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A Paradigm for Equality: The Honorable Damon J. Keith

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A PARADIGM FOR EQUALITY: THE HONORABLE DAMON J. KEITH

BLANCHE BONG COOK†

Table of Contents

I. INTRODUCTION ....................................... 1163
II. HEGEMONY: THE CREATION OF THE OTHER ............ 1167
III. HEGEMONY AND THE LIFE TRIUMPH OF JUDGE KEITH ... 1173
IV. RESISTANCE: JUDGE KEITH'S LEGAL IDEOLOGY AND THE EXPANSIVE VIEW OF ANTI-DISCRIMINATION LAW ...... 1179
V. JUDGE KEITH'S EXPANSIONIST VISION AND RACE ...... 1184
   A. Affirmative Action: Baker v. City of Detroit .......... 1186
      1. Facts ........................................ 1187
      2. Holding ................................ 1188
         a. Racism as Societal Policy ................. 1189
         b. Inequality as Direct Product of Racism ... 1189
         c. Rejection of White "Innocence" ............ 1190
         d. Historical Wrongdoing Outweighs White Innocence .... 1192


First, I must give thanks to God, the head of my life and the peace that surpasseth all understanding. Second, I must also thank Reverend Louis K. Johnson, a living saint without whom I would have never made it this far. I am greatly indebted to my co-clerks N. Jeremi Duru, Charles Hamilton Houston III, Daniel Abebe, Cynthia L. Evans, and Marchelle Falconer. Jeremi, Daniel, Cynthia, and Marchelle provided several edits, suggestions, and encouragement. I am equally grateful to Charles for his editing ability and for keeping the tradition of his grandfather, Charles Hamilton Houston, alive and well in our chambers. I would also thank Dr. Moses Nkondo, Justice Gregory K. Scott, Len Givens, Joan J. Hollier, Laureen Robinson, Marie Horton Godush, Roland T. Baumann III, and my much adored parents Albert and Bong Son Cook. Finally, I wish to thank the Honorable Damon J. Keith for inspiring all of his law clerks through both his life and legal opinions.
B. Employment Discrimination: Stamps v. Detroit Edison Co. .... 1193
   1. Facts ........................................ 1193
   2. Holding ...................................... 1194
C. Education Discrimination: Davis v. School District of Pontiac .... 1195
   1. Facts ........................................ 1195
   2. Holding ...................................... 1196
D. Housing Discrimination: Garrett v. City of Hamtramck .... 1198
   1. Facts ........................................ 1199
   2. Holding ...................................... 1199
   1. Facts ........................................ 1201
   2. Analysis .................................... 1202
VI. RESISTANCE: THE EXPANSIVE VIEW APPLIED TO GENDER ............. 1203
   A. Judge Keith's Development and Contextualization of the Facts within the Material Reality of Female Subordination .... 1204
   B. Rejection of Societal Norms that Perpetuate the Status Quo .... 1206
   C. Reasonable Woman Standard .................................. 1207
   D. Assumption of Risk ................................... 1210
   E. Summoning the Power of the Court to Effect Equality ........... 1210
VII. EQUALITY AND THE RIGHTS OF CITIZENS .............................. 1211
   A. The Keith Case: United States v. Sinclair ................. 1212
   B. Prosecutorial Misconduct ................................ 1215
VIII AND JUSTICE FOR ALL: DIRECT EVIDENCE FOR DIVERSITY ON THE BENCH ........................................ 1217
   A. Impartiality Through Diversity ................................ 1219
   B. A Role Model for the Bench ................................ 1222
IX. CONCLUSION ........................................ 1230

The question is no longer whether the first move must be made in order to accomplish equality within our society; the question has become and, possibly has always been, who has the power and duty to make those moves so as to advance the accomplishments of that equality.

- The Honorable Damon J. Keith\(^1\)

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I. INTRODUCTION

As the twentieth century yields to the twenty-first, Damon J. Keith, United States Court of Appeals Judge for the Sixth Circuit, paradigmatically exemplifies, in both his life and jurisprudence, a single individual's effective contribution to the struggle for equality. Despite hegemony's\(^2\) seemingly overwhelming power to both create and maintain material subordination for people of color, Judge Keith has effected socioeconomic change. Despite building political pressures that continue to repeal the gains of the Civil Rights Movement, Judge Keith has upheld and cogently justified programs that distribute power more fairly. His legal opinions reflect a transformative legal ideology that has not only impacted the material conditions of people of color, women and citizens generally, but has also withstood both political attack and reversal on appeal.

Judge Keith has set an example for those who will continue the struggle for equality. As analyzed in this Article, Judge Keith has gone

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\(^2\) Hegemonic theories appear throughout this Article. In examining domination as a combination of both physical coercion and ideological control, "Antonio Gramsci, an Italian neo-Marxist theorist," developed the concept of hegemony. See Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1350 (1988) [hereinafter *Race, Reform, and Retrenchment*]. "Hegemony is a system of attitudes and beliefs which permeate both popular consciousness and ruling class ideology." *Id.* It "reinforces [the] existing social arrangements and convinces the dominated classes that the existing order is inevitable," unchangeable, and natural. *Id.* Critical Legal Studies (CLS) scholars have used the concept of hegemony to track the continued legitimacy of American social arrangements. See *id.* According to these theorists, the unequal distribution of wealth and resources within American social arrangements has historically sustained its legitimacy by inducing the poor to consent and accept their own oppression as natural and obvious. See *id.* For example, Robert Gordon, legal historian, argues that the legal system is at its best when it appears uncontroroversial, neutral, and acceptable. See *id.* (citing Robert Gordon, *New Developments in Legal Theory, in the Politics of Law Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987)). This is the most potent form of hegemony because "both the dominant and dominated classes believe that the existing order" is inescapable. See *Race, Reform, and Retrenchment*, supra, at 1349-51 (citing Gordon, *supra*, at 286); see also James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985). In addition to hegemonic theories and other CLS theories, Professor Kimberle Williams Crenshaw's article *Race, Reform, and Retrenchment* provides the ideological underpinning for this article. The theories Professor Crenshaw explores in her article are applied to both the life and legal opinions of Judge Keith in this Article.
beyond the abolition of the substantive conditions of Black subordination. He has devoted his legal tenure to the eradication of inequality for all people of color, women, and citizens generally.

Judge Keith has demonstrated that in order for future leaders to resist and overcome the co-opting force of legal reform and the empty rhetoric of equal opportunity, they must develop and maintain a distinct political consciousness grounded in the material subordination of Black people. History has demonstrated that the Black community's most valuable political assets have been its ability to assert a collective identity and to name its collective political reality. Judge Keith is an example of such an asset. Judge Keith's legal philosophy is grounded in the reality of the oppressed. He has consistently resisted the temptation to separate himself from the greater collective of Black people and assert himself as an "individual," in the American tradition, in order to curry favor with majority society and to make himself more palatable to them. Instead, he has consistently identified himself with the collective struggle of Black people. Unlike some Black leaders, Judge Keith has transcended the "I" and embraced the "we." He has and will continue to speak to, for, and about people of color, women, and justice in general.

This Article analyzes Judge Keith's contributions to equality in both his life and jurisprudence. In Part I, I discuss the centrality of racist hegemony in our world in order to place in sharp relief Judge Keith's personal triumph and the effectiveness of his legal opinions. The full hegemonic force of race not only informs Judge Keith as a person, but also the historical context of his cases, and the political climate in which he adjudicates. The same fortitude that has empowered Judge Keith to triumph over hegemony inspires his adherence to the struggle for both justice and equality for everyone.

In Part II, I discuss how the hegemonic force of race has structured Judge Keith's lived reality. Additionally, I demonstrate how Judge Keith's own experiences with racist hegemony have produced in him a

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3. I acknowledge that many scholars have argued that "Black," as opposed to African-American, references a pan-African inclusiveness. See Black is Back, THE NEW YORKER, Oct. 30, 1995, at 33. However, in this Article, I use "Black" and "African American" interchangeably and both are meant to reference a pan-African inclusiveness.

4. Kimberle Williams Crenshaw examines and discusses the formulation of this political consciousness in Race, Reform, and Retrenchment, supra note 2.
keen awareness of power imbalance, whether it is between Whites and persons of color, men and women, or citizen and government. Moreover, Judge Keith’s personal struggle paradigmatically exemplifies Black Americans’ power and ability to resist the brunt of hegemony successfully.5

In Part III, I analyze how anti-discrimination law has produced two conflicting visions and goals: the restrictive view of equality as process and the expansive view of equality as a result.6 I also argue that the world view of the interpreter informs his/her adherence to the restrictive or expansive view, as opposed to some self-evident, neutral principle.7 I further argue that Judge Keith has consistently and willingly embraced the challenge of the expansionist vision by developing a legal ideology grounded in the material and historical reality of the oppressed.

In Part IV, I analyze Baker v. City of Detroit,8 Stamps v. Detroit Edison,9 Davis v. School District of the City of Pontiac,10 and Garrett v. City of Hamtramck,11 as examples of Judge Keith successfully using a historical approach emblematic of the expansionist vision. By fully elaborating the facts of these cases within their greater historical context, Judge Keith has exposed racism as societal policy, not the product of individual bad actors. Furthermore, Judge Keith’s use of a historical approach has negated the possibility of drawing a false symmetry of despair between Whites harmed by remedial efforts and Blacks harmed by America’s racist past. Additionally, each of these cases demonstrates Judge Keith’s willingness to summon the institutional power of the courts to effect equality.

In Part V, I demonstrate that in addition to a legal sensibility keenly sensitive to injustice generally, and sensitive to race specifically, Judge

5. Rev. Dr. Martin Luther King, Jr. described the kind of strength and power Judge Keith has exhibited when he told a group of white segregationist “[w]e will wear you down with our capacity for suffering.” HOUSTON A. BAKER JR., CRITICAL MEMORY AND THE BLACK PUBLIC SPHERE, IN PUBLIC CULTURE 25 (1994).
6. Professor Crenshaw develops the idea of the restrictive and expansive views in Race, Reform, and Retrenchment, supra note 2, at 1336. I have used Crenshaw’s restrictive and expansive theories to analyze the effectiveness of Judge Keith’s legal jurisprudence in the struggle for equality.
7. See id. at 1344.
Keith has also embraced the expansionist view in the struggle for gender equality and summoned the full power of the court to ameliorate the substantive power imbalance between men and women. In his dissent in *Rabidue v. Osceola Refining Co.*, Judge Keith employed his signature method of adjudicating: exhausting the facts within the historical context of gender inequality. In addition to exposing the majority opinion by exhausting the record, Judge Keith (1) established that societal norms cannot set the standard for permissible sexual harassment in the workplace; (2) introduced the reasonable woman standard in assessing the severity of sexually offensive conduct in order to avoid drawing a false symmetry of power between women and men and to avoid masking the power imbalance between the two; (3) rejected the notion that women in "blue collar" environments voluntarily assume the risk of such exposure; and (4) summoned the institutional power of the courts to effect the vision of Title VII, workplace equality.

In Part VI, I demonstrate how Judge Keith has reached beyond the subjectivity of his own life to create a more equitable world, particularly in situations involving governmental abuse of power against its citizens and his adherence to "equal justice under the law." Even in the face of peril and political pressure from the office of the presidency, Judge Keith used the same fortitude that enabled him to triumph over hegemony to protect the rights of every citizen from the government's uninvited ear. In addition, in Part VI, I provide two examples of Judge Keith's adherence to fairness and the rights of every citizen to a fair trial.

Finally, in part VII, I argue that Judge Keith exemplifies the most compelling reasons for diversity on the bench. His presence on the bench manifests that racial diversity among judges promotes, rather than undermines, impartiality. As an African-American, Judge Keith promotes impartiality because his presence on the bench negates the possibility of any viewpoint, perspective, or set of values that is not

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12. 805 F.2d 611 (6th Cir. 1986).
13. *See id.* at 626.
14. *See id.*
15. *See id.*
16. *See id.* at 627.
informed by the brunt of hegemony from persistently dominating legal decision making. Furthermore, Judge Keith has demonstrated that minority judges whose reality has been informed by racist hegemony not only decrease both racial and gender bias in the courts, but also increase the level of sensitivity to injustice generally. Judge Keith’s judicial legacy exemplifies a greater sensitivity to all injustices because he has experienced and survived first-hand struggles with American hegemony.

II. HEGEMONY: THE CREATION OF THE OTHER

[A] page of history is worth a volume of logic.

- Oliver W. Holmes, Jr.18

The centrality of hegemony in our world and Judge Keith’s life inspires his keen sensitivity to power imbalance.19 It also provides the historical and political backdrop for his life and the cases discussed in Parts IV and V of this Article. Moreover, the seemingly overwhelming power of hegemony brings the effectiveness of Judge Keith’s methods

19. As an example of racism’s enormously destructive power and the uniqueness of the African American experience consider: No other ethnic group is (1) unable to identify with its particular country of origin and (2) forced therefore to identify with a continent. So, for example, the Irish may identify as Irish American, whereas African Americans identify with a continent in lieu of a particular country on the African continent. African Americans’ forced entry into this country has erased their history. In articulating the uniqueness of the African American experience, Justice Marshall stated:

[The racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured.


As further evidence of hegemony’s ability to create a power imbalance between Whites and Blacks, the percentage of Blacks in poverty is twice that of Whites, as is the unemployment rate. And the median income for African-American households is $15,000 less than that for White households. Deirdre Shesgreen, This Family Exemplifies the Fight for Equality Series, ST. LOUIS POST-DISPATCH, Sept. 5, 1999, at A9.
of adjudicating and contributions to the struggle for equality into sharp relief. An analysis of the man and his contributions necessitates a historical examination of race.

According to hegemonic theory, the ruling class legitimizes the current distribution of power by peddling a ruling class world view that attracts and entices subordinated Whites. Historically, ruling class White elites have successfully solidified their interests with subordinated Whites through the institution of racism. Racism builds a consensus among Whites about both Whiteness and Blackness by defining and privileging membership in the White community. Racism designates Blacks as the ultimate “other,” whose interests are diametrically opposed to those who identify—by virtue of color and/or culture—with the dominant class. Racism creates an illusion of White solidarity because many Whites, regardless of their class or gender, will align their interests with those of the dominant class and dissociate themselves from the “other” as much and as quickly as possible.

20. See supra note 2.

21. In examining the ability of race to unite diverse White interests, Lillian Smith states:

When taxicab drivers, and store owners, bankers, farmers, Christian ministers, doctors, politicians, patients in mental hospitals and their attendants, writers, university presidents, union members and mill owners, garbage collectors and Rotarians, rich and poor, men and women, unite in common worship and common fear of one idea we know it has come to hold deep and secret meanings for each of them, as different as are the people themselves. We know it has woven itself around fantasies at levels difficult for the mind to touch, until it is a part of each man’s internal defense system, embedded like steel in his psychic fortifications. And, like the little dirty rag doll that an unhappy child sleeps with, it has acquired inflated values that extend far beyond the rational concerns of economics and government, or the obvious profits and losses accruing from the white-supremacy system, into childhood memories long repressed.


22. The urge to dissociate oneself from the powerless—namely Black people—and to associate oneself with the powerful—namely White people—is not restricted to classes of White people. On the contrary, the same phenomenon lies at the heart of the immigrant experience and the assimilation process. In describing this magnetic gravitational pull toward power, and simultaneous disassociation with the powerless, comedian Richard Pryor stated that immigrants became American “by learning to how to say nigger.” Richard Pryor, “That Nigger’s Crazy” (Reprise MS 2241, 1974); see also Edward A. Delgado-Romero, The Face of Racism, J. OF COUNSELING
The hegemonic force of race defines White as virtuous, "good, hard-working and human," and Black as virtueless, "lazy, unemployed, criminal and less-than-human." Through this definitional process, Black subjugation appears natural, deserved, and "just the way things are." Furthermore, the seemingly natural state of Black subjugation is further supported because many Whites willingly embrace a shared consensus that Black oppression is legitimate, if not natural, and that Blacks are worthy objects of antipathy and coercion. This is where consensus and coercion come together: ideology convinces one group that the coercive domination of another is legitimate. As Michel Foucault comments "power is tolerable only on condition, that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanism."

White consensus in Black subordination is a political operative in American history. American history is rife with examples where Black interests in the redistribution of power have been sacrificed so that different groups of Whites could settle disputes and establish or reestablish White solidarity.


24. See *Race, Reform, and Retrenchment*, supra note 2, at 1358.


26. Derrick Bell has referred to this historical hegemonic pattern as the "Principal of Involuntary Sacrifice." DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 2 (1990). Bell provides several examples of how slave holders from the seventeenth
In sum, the ability of race to unite White interests across class and party lines brought about the demise of the First Radical Reconstruction. Although Whites had clearly identifiable class differences, those conflicts were resolved in order to maintain the material subordination of Blacks. It is ironic that the same Principle of Involuntary Sacrifice that brought about the end of the First Reconstruction is the same principle that brought about the end of the Second Reconstruction as demonstrated below. The GOP’s creation of a populist hegemony provides a contemporary example and also sets the political climate for the cases discussed in this Article.

Despite shameless posturing as the all-inclusive political party in the century onward used race to maintain non-slaveholding White support. For example, slavery, and its consequent cheap labor damaged non-slave holding Whites. However, non slave holding Whites restrained their challenge to slavery because they willingly embraced a common interest with the slave holders in Black subordination. Thus, the hegemonic power of race had convinced even poor Whites to support a system that disadvantaged them economically. As Bell put it, “racial privilege could and did serve as a compensation for class disadvantage.” Id. at 31; see also J. OAKES, THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS 141 (1982) (quoting the Richmond Enquirer a decade before the Civil War stating “[i]n this country alone does perfect equality of civil and social privilege exist among the white population, and it exists solely because we have black slaves.” And “[f]reedom is not possible without slavery.”).

As another example, the Tilden Hayes Compromise of 1877 demonstrates the ability of racism to transcend and resolve class and political antagonism between opposing groups of Whites through a compromise that victimizes and vilifies Blacks. BELL, supra, at 32-34. By 1876, the federal government had not stopped Whites from regaining political control over the South and much of the North; thereby, sounding the demolition of Radical Reconstruction. Scandal and differing views on economic issues had fragmented Republicans; however, their resolve to end their involvement in Southern affairs united them as long as those terms would insure continued development of business interests in the South.

Samuel Tilden, a Republican, had won a plurality of votes and seemed to have won the electoral count by one vote. But the returns from three southern states, South Carolina, Florida, and Louisiana were challenged. After a recount failed to resolve the challenge, a special electoral commission was formed. Eight of the fifteen members were Republicans and each disputed issue was resolved in favor of the Republicans by a strict party vote of eight to seven. The Democrats did not dispute these resolutions because both Democrats and Republicans agreed that “if the Republican Hayes was elected, the national administration would withdraw the remaining federal troops from the South and would do nothing to prevent popularly elected Democratic governors from taking office in the three states (South Carolina, Florida, and Louisiana) which were still controlled by Republicans. Id. at 2.
2000 presidential election,\(^2^7\) the GOP’s formulation of a populist hegemony, otherwise known as “playing the race card,”\(^2^8\) exemplifies ruling class deflection of class antagonism through the further victimization and vilification of Blacks. During the Second Reconstruction, the gains of the civil rights era such as busing, nominal residential integration and affirmative action have placed the core of the New Deal coalition, namely Blacks and working and middle class Whites, in bitter competition over jobs, schools, neighborhoods\(^2^9\) and in a broader sense over intangibles such as prestige, authority and social space.\(^3^0\) Moreover, racial tensions in the New Deal coalition are further exacerbated by (1) race conscious remedial measures that clash with White working class-interests; and (2) the growth of suburbia, which has established a jurisdictional and geographic boundary between White counties and dark cities.

The GOP’s once opportunistic rush to the rescue of “victimized” and “innocent” White males has provided the party with a greatly needed cosmetic facelift.\(^3^1\) Once viewed as the party of the wealthy and corporate America, the GOP has used race and taxes to capitalize on the racial tensions within the New Deal coalition.\(^3^2\) By appropriating the

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28. The following are two widely publicized examples of the GOP play of the “race card”: (1) Ronald Reagan’s condemnation of the “Chicago welfare queen;” and (2) George Bush’s use of Willie Horton to represent the depraved criminal. See KENNETH O’REILLY, NIXON’S PIANO: PRESIDENTS AND RACIAL POLITICS FROM WASHINGTON TO CLINTON 360, 381-88 (1995). “It is not coincidence that the images evoked are simultaneously abhorrent and Black.” Powell, supra note 23, at 110.
29. Neoconservative scholar Thomas Sowell, Senior Fellow at Stanford University’s Hoover Institution, suggests civil rights policies, like affirmative action, have prompted the growing popularity of White hate groups. See THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 90 (1984). Sowell observes that “[e]armarked benefits for Blacks provide some of these hate groups’ strongest appeals to Whites.” Race, Reform, and Retrenchment, supra note 2, at 1331 n.34 (citing Thomas Sowell).
31. Race politics and the successful manipulation of wedge-issues have enabled the GOP to win five of the seven past presidential elections and, most importantly, to enact upwardly redistributive economic polices for its most influential constituency, the affluent. See THOMAS EDSALL, THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 172, 220-22 (1992).
32. In summarizing a Federalist Society Meeting, Stanley Fish articulated the neoconservative credo as follows:
language and posture of political oppression, the GOP became the advocate and defender of a new conservative egalitarianism, namely those Whites who feel "victimized" by remedial efforts to more fairly distribute power. Under the GOP schematic, Blacks, as opposed to the ruling classes, are the reason for the perceived decline in White working and middle class material conditions.

This new conservative egalitarianism singles out race conscious remedial measures as a primary threat to a democratic political system.

A]n emphasis on group rights (I am entitled to special treatment because I am black or Hispanic or female or gay) leads to the de-emphasis of individual achievement (my fate is the result of my sex, race, or ethnic affiliation and not of my abilities or lack of ability) and to a society in which one competes not for prizes but for the status of most victimized (my disadvantages are greater than yours and therefore my rewards, or spoils, should be greater too). It is because we now glorify victims rather than heroes and prize sensitivity over character that we live in a world of affirmative action (where you believe you deserve something before you have done anything); or multiculturalism (where universal and objective norms are replaced by the local norms of insular groups and anything you do is all right so long as everyone you hang out with does it too); of feminism (where, in a new form of paternalism, your gender gives you a leg up rather than an equal chance); of criminal rights (where the judiciary is more solicitous of the repeat offender than of the men and women he has robbed and killed); of welfare (where, by removing incentives for effort, the state destroys the spirit of self-improvement and produces an ethic of dependency); of political correctness (where you are penalized for calling a spade a spade and pressured to adopt a vocabulary that offends no one and says nothing); of runaway damage awards (where entrepreneurship is discouraged by a tort system that turns your every action into a potential lawsuit).


Thomas Edsall argues that in 1983, when the Republicans realized they needed 70% of the White male vote to offset the Black majorities of the Democrats, Lee Atwater, who perfected the parade of Black horribles (i.e. quotas, taxes, special interests, welfare, Willie Horton, and the death penalty), outlined a plan for the Reagan-Bush reelection committee. According to Edsall, Atwater realized that although populists were liberal on economics, they were staunchly conservative on social issues. See EDSALL, supra note 31, at 220-22.

See Ann Devroy, Clinton Orders Affirmative Action Review, At Stake: Principles and Political Base, THE WASH. POST, Feb. 24, 1995, at A1. Devroy wrote "that the GOP will try to use the issues of racial preferences to slice into the multiracial coalition that traditionally has supported Democrats. White males in the last election generally favored the GOP, and Republicans want to keep them with arguments that the GOP is 'colorblind' while Democrats give minorities unfair advantages." Id.
By embracing the need for “equal opportunity” and strictly color-blind policies, this ideology vehemently opposes race conscious remedial measures in job selection, government contracting, and university admissions. Most importantly, this ideology casts the use of taxes as the essence of a coercive federal bureaucracy mandating, regulating, and legislating social, cultural, and racial change.

By making racially laden social issues the centerpiece of the political agenda under the guise of a new conservative egalitarianism, the GOP has seized the populist vote. Key White voters have abandoned their former allegiance to a coalition of the dominated and joined a coalition of the ruling in part because the GOP has successfully persuaded them that (1) federal taxation was used as a means to redistribute hard earned wages to the lazy in general, and Black welfare recipients specifically; (2) the thrust of federal regulation was diminishing their collective ability to exclude Black people from their schools, neighborhoods, jobs, and other formerly White enclaves; and (3) federal expenditures were subsidizing enormously wasteful programs that encouraged dependency, sloth, and a fundamental breakdown of American family values. The transformation of former Democrats agonized over race-freighted issues into “Reagan Democrats” or presidential Republicans has enabled the GOP to rally a political consensus for conservative retrenchment and to enact upward economic distribution.  

III. HEGEMONY AND THE LIFE TRIUMPH OF JUDGE KEITH

“The life of the law has not been logic; it has been experience.”

“Sometimes the reasons people give for taking a position are just window dressing, good for public display but only incidental to the heart of the matter, which is the state of their hearts.”

35. In a tragic note of irony, the gains made in both the First and Second Reconstruction have been systemically sacrificed in order to maintain ruling class interests through White solidarity. See Bell, supra note 26, at 31.


37. Fish, supra note 32, at 735.
The scientist never completely succeeds in making himself into a pure spectator of the world, for he cannot cease to live in the world as a human among other humans . . . and his scientific concepts and theories necessarily borrow aspects of their character and texture from his untheorized, spontaneously lived experience.38

The hegemonic force of race has structured Judge Keith's lived reality. For him, racial domination is reality, not a hypothetical and not something that can be taken for granted. The full hegemonic force of race informs Judge Keith as a person, the historical context of his cases, and the political climate in which he adjudicates. More importantly, Judge Keith's own experiences with the hegemonic force of racism have produced in him a keen awareness of power imbalance, whether it is between Whites and persons of color, men and women, or citizen and government.

In witnessing how Judge Keith's experiences as an African-American have produced his sensitivity and unyielding commitment to equality, Justice Stephen Breyer stated:

I cannot tell you just where, in his background, he learned to combine so effectively "head" and "heart." Perhaps that ability reflects, in part, his own early experiences as the son of a Ford foundry worker, where he learned, as he put it, about an auto worker's need "to drag his sore bones out of bed on a freezing January day to go off and feed his family." Perhaps, too, it reflects his experience of the evils of segregation.39

For Judge Keith, discrimination has not been an isolated incident, but rather societal policy over which he has triumphed. In 1943, having graduated from West Virginia State,40 a predominantly Black college, Judge Keith was drafted into the segregated U.S. Army.41 He served for two years in an "all-colored" unit, eventually becoming a staff sergeant.

41. See id.
Although he possessed a college degree, Judge Keith was inducted as a private, the military's lowest rank, and was assigned to the quartermaster corps.\textsuperscript{42} In reflecting on the American military's racist policies, Judge Keith stated "[w]e drove trucks and took care of the other soldiers' supplies. . . . Every single officer in our 'all-colored' outfit was white—captains, the lieutenants—we had no black officers."\textsuperscript{43}

Judge Keith's experiences with American hegemony in its military motivated his legal career. After witnessing German POWs being treated better than African American servicemen in the segregated U.S. Army during World War II, Judge Keith decided to pursue the law.\textsuperscript{44}

Upon returning home, Judge Keith noted the irony of risking his life for a country that simultaneously denied him equality:

\begin{quote}
I served my country, but when I returned, I still had to ride on the back of the bus, drink from separate water fountains and use separate bathrooms. I thought, is this what I've been fighting for? Have I been laying down my life to come back to this world of Jim Crows and racists?\textsuperscript{45}
\end{quote}

In 1949, Judge Keith received his legal education at Howard University School of Law,\textsuperscript{46} where he was groomed by and among legal scholars who possessed both intellectual fervor and an unyielding commitment to an expansive vision of anti-discrimination law. These legends included James N. Nabrit, Jr., who later became Dean of Howard Law School and then President of Howard; George E. C. Hayes; William H. Hastie, who later became Chief Judge of the Third

\footnotesize
\begin{enumerate}
\item See id.
\item Id. at 324.
\item See LINN WASHINGTON, BLACK JUDGES ON JUSTICE 113 (1994). One of Judge Keith's mentors, Charles Hamilton Houston, chief architect and engineer of the NAACP's legal strategy to dismantle Jim Crow, remarked on his similar experience of having served his country in war to return only to his country's segregated reality. Damon J. Keith, New African-American Trailblazers Needed, DET. LEGAL NEWS, Sept. 15, 1993, at 1. Upon his return to civilian life, "Houston reflected upon the hostility expressed by a White patron who was forced to sit near him in a dinner car on a passenger train. See id. Houston stated: "I felt damned glad I had not lost my life fighting for this country." Id.
\item Littlejohn, supra note 40, at 324-25.
\end{enumerate}
Circuit Court of Appeals; Charles Hamilton Houston; Thurgood Marshall, who later became a United States Supreme Court Justice; and Spottswood Robinson, who later became Chief Judge of the D.C. Circuit Court of Appeals. Judge Keith credits his judicial vision to his student days at Howard. There, in the company of Justice Marshall, Dean Houston, and many others, Judge Keith came to accept the Constitution as a living document, which he believes offers insight, and even prescription, for correcting societal wrongs even if Congress is too weak or malevolent to act.

In discussing the genesis of his understanding of his role as a judge, Judge Keith stated “I was taught the law should be an instrument of social change,” and that “the Constitution was our best hope; that equality would come through the law.” “If I would not have met Thurgood Marshall, it would have drastically changed my life. He told me that through the law and the Constitution, we could challenge the theory of racism. He was the pivotal legal giant who changed my life.”

Although Judge Keith has triumphed over the hegemonic force of race, racism greatly burdened his early legal career. As of September 1949, the 160th anniversary of our nation’s founding, no African-American had ever been appointed to the federal courts as an Article III judge. “Before 1950, there were no black judges in Michigan, and few black lawyers were hired in key government posts.” In conveying his treatment from the all White bench, Judge Keith stated:

Many of the white judges simply were not nice to us—they didn’t treat us as they did other lawyers, with dignity and respect. Some were actually outright mean, if not nasty, and belittling in their dealings with black attorneys... We [black lawyers] had to struggle to get case assignments from the bench. In addition, clients saw or knew how poorly black lawyers were treated.

47. See id. at 325-26.
48. See id.
49. See Trevor W. Coleman, Judge Keith Takes the Law’s Insight and Lets It Live Fairly for All, DET. FREE PRESS, June 2, 1998, at 8A.
50. WASHINGTON, supra note 44, at 113.
51. Littlejohn, supra note 40, at 327.
53. Littlejohn, supra note 40, at 327.
treated in court. Many of the black citizens in Detroit came from the South and they knew, first-hand, about racism in the legal system and how it could determine the outcome of their case. Judges, as much as any aspect of the legal system, caused many black clients to shun black lawyers.

Despite these obstacles, Judge Keith, in 1964, founded the highly successful law firm of Keith, Conyers, Anderson, Brown & Wahls. In 1967, when President Lyndon B. Johnson appointed Judge Keith to the federal bench, he had already immersed himself in the struggle for equality as a member of the Wayne County Board of Commissioners, the Detroit Housing Commission, and the Michigan Civil Rights Commission. His commitment to equality earned him his nickname "the Jackie Robinson of modern day judges."

In describing the political climate for African-American federal judges in the 1980s, Harvard law professor and former law clerk to Judge Keith, Lani Guinier, noted that African American judges were an endangered species on the federal appeals circuit during the Reagan-

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54. In describing the atmosphere in which Black lawyers practiced in the South, particularly Florida, Joseph Hatchett, former Florida Supreme Court Justice and Chief Judge of the United States Court of Appeals for the Eleventh Circuit, stated "[b]ack then black lawyers practiced in segregated courthouses. There were separate drinking fountains and separate bathrooms. . . . I remember going into the DeLand courthouse for the first time and looking around for my client's family. It was the first time that it dawned on me that black people—at that time, in that area—sat in a special mezzanine over the main courthouse." Gary Blankenship, Diversity in the Florida Bar, 74 FLA. B.J. 64 (Apr. 2000).

55. See Littlejohn, supra note 40, at 329.

56. The original members were Nathan G. Conyers, President of Riverside Ford, Inc.; Herman J. Anderson, Senior Partner with the firm of Anderson & Associates, P.C.; Joseph N. Brown, Partner in the firm of Bodman, Longley & Dahling; and the late Judge Myron H. Wahls, Judge of the Michigan Court of Appeals. Judge Joseph N. Baltimore, Chief Judge, 36th District Court, Detroit, Michigan, and Administrative Law Judge Theodore Stephens, thereafter became partners in the law firm. Detroit Recorders' Court Judge Prentis Edwards and Wayne County Circuit Judge Claudia H. Morcom were associates in the firm for several years. Detroit Mayor Dennis W. Archer interned with the firm while a student at Detroit College of Law. The firm of Keith, Conyers, Anderson, Brown & Wahls produced more judges than any other law firm in Michigan.

57. See Bonnie De Simone and Oralandar Brand-Williams, African-American Archive Gives Legal Giants a Place in History, DET. NEWS & FREE PRESS, at 1A.

58. Id.
Bush administrations, when that Court became “a symbol of White power.” Guinier quoted an African writer who said that “a poet who is not in trouble with the king is in trouble with his work.” Judge Keith, she continued, may have been in trouble with the king during the Reagan-Bush years, but he was not in trouble with his work.

Even after several decades of success on the federal bench, Judge Keith found no insulation from the effects of race. Although he had achieved the pinnacle of successful contribution to equality, racism continued to mar his own life. For example, the Honorable Frank X. Altimari, United States Court of Appeals Judge for the Second Circuit, relates this story, which occurred in 1991 while Judge Keith was serving as the National Chairman of the Judicial Conference Committee on the Bicentennial of the Constitution.

I will never forget the day when we were together at a conference in Virginia. Judge Keith and I were standing outside the entrance of our hotel when a car pulled up. The driver jumped out of the car, apparently in a rush, and attempted to give the keys to Damon with the command, “Boy! Park this car in the parking lot.” Damon quietly turned his back and walked in the opposite direction. As, I, furious, rushed toward the offending driver, Damon stopped me, again intoning the words, “Whom the devil would destroy, he first makes angry.”

60. Id.
61. See id.
62. The members of the Judicial Conference of the United States Committee on the Bicentennial of the Constitution, of which Judge Keith was chair, included: the late Justice Harry A. Blackmun; Chief Justice Warren E. Burger; Judge Arthur L. Alarcon; Judge Frank X. Altimari; Judge Adrian G. DuPlantier; Judge William Brevard Hand; Justice Edward F. Hennessey; Judge Patrick F. Kelly; Judge James H. Meredith; Judge Robert C. Murphy; Judge Helen W. Nies; Judge James E. Noland; Judge Jaime Perares, Jr.; Judge Dolores Korman Sloviter; Judge Kenneth W. Starr; and Judge J. Harvie Wilkinson, III. The Committee was responsible for the placement of 300 Bill of Rights Plaques in federal courthouses around the country.
63. Letter from Frank X. Altimari, United States Circuit Judge for the Second Circuit, 42 WAYNE L. REV. iv (1996). Rodney A. Smolla also recounts this incident, stating “Judge Keith turned this incident into a powerful homily later that afternoon at one of the conference’s public presentations. ‘A day does not go by,’ he thundered, ‘in which I am not reminded that I am an African American, and that this nation is still
The systemic denial of his own civil rights has made Judge Keith keenly aware of the rights of others. He has used his positioning in the margins to develop an acute sensitivity to fairness and commitment to equality. His own experiences with material subjugation as a governmental policy have created in him an unyielding commitment to a more equitable distribution of power. "With enthusiasm and warmth that is irresistible, he works in countless ways, formal and informal, in tireless pursuit of a society that is more tolerant and just."64

IV. RESISTANCE: JUDGE KEITH'S LEGAL IDEOLOGY AND THE EXPANSIVE VIEW OF ANTI-DISCRIMINATION LAW

"The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."65

The war between those committed to a more equitable distribution of power and those who feel victimized by the remedial gains of the Civil Rights Movement has produced two ideological trends in anti-discrimination law. Professor Kimberly Crenshaw has coined these two conflicting ideologies, the expansive view and the restrictive view.66 Adherents to the restrictive vision (1) see equality as a process, downplaying actual outcomes; (2) seek to prevent future wrongdoing, rather than redress present manifestations of past injustice; (3) accept oppression as isolated actions against individuals, not a societal policy against an entire group;67 (4) reject the idea that courts should redress plagued by prejudice." Letter from Rodney A. Smolla, Professor of Law and Director, Institute of Bill of Rights Law, 42 WAYNE L. REV. viii (1996).

64. Id.
66. See Race, Reform, and Retrenchment, supra note 2, at 1341.
67. In explaining the individualized notion of discrimination and its allure, Stanley Fish draws an interesting analogy between the Rodney King defense and the majority opinion in Adarand v. Pena, 515 U.S. 200 (1995). See Stanley Fish, How the Right Hijacked the Magic Words, N.Y. TIMES, Aug. 13, 1995. In answering how the Rodney King jurors could have acquitted the police, Fish states that part of the answer lies within the two part defense strategy: (1) the film depicting the beating was slowed down "so that each frame was isolated and stood by itself"; (2) "the defense asked the questions that treated each frozen frame as if everything in the case hung on it and it alone. Is this blow an instance of excessive force? Is this blow intended to kill or maim?" Id.

In describing the effectiveness of this strategy Fish states:
harms from America’s racist and sexist past, as opposed to policing society to eliminate a narrow set of proscribed discriminatory practices; and (5) adopt an ahistorical approach to adjudicating, which deemphasizes America’s discriminatory past. Moreover, adherents to

Under the pressure of such questions, the event as a whole disappeared from view and was replaced by a series of discontinuous moments. Looking only at individual moments cut off from the context that gave them meaning, the jury could not say of any of them that this did grievous harm to Rodney King. This strategy—of first segmenting reality and then placing all the weight on individual bits of it—is useful whenever you want to deflect attention away from the big picture, and that is why it has proved so attractive to those conservative Republicans who want to roll back the regulatory state. On every front, from environmental protection to affirmative action, large questions of ecology and justice are pushed into the background by the same segmenting techniques that made it easy for the jurors in Simi Valley to forget it was a beating they were seeing.

Linking the individualized connection to *Adarand*, Fish states:

In *Adarand v. Pena*, the question was whether the policy of giving financial incentives to prime contractors who hire minority subcontractors is constitutional. Those in favor of the incentives justify them by invoking constitutional history and the history of discrimination in the contracting industry. They remind us, in Justice John Paul Stevens words, that the “primary purpose of the Equal Protection Clause to end discrimination of the former slaves,” and they report that even today certain groups remain entrenched in the building trades while others are virtually shut out.

Those opposed to the incentives reject arguments from history and specifically reject the argument that historical patterns of discrimination have impaired the life chances of African-Americans as a group. They say it is individuals, not groups, that are protected by the Constitution, and they would allow remedies for discrimination only in cases where there has been “an individualized showing” of harm, a harm inflicted discreetly on a specific person by a specific agent at a specific time. *See id.*

68. Crenshaw notes that the “Supreme Court stated this viewpoint with stark clarity in *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977): ‘A discriminatory act . . . which occurred before the [Civil Rights Act of 1964] was passed . . . may constitute relevant background evidence [regarding past conduct] . . . but separately considered . . . is merely an unfortunate event in history which has no present legal consequences.’” *Race, Retrenchment, and Reform*, supra note 2, at 1342. This view was also endorsed by Judge Merritt in *Young v. Kluczniak*, 652 F.2d 617 (5th Cir. 1981), “Obviously there are many unjust conditions and occurrences, natural and man-made, which federal courts do not have the strength, wisdom or power to remedy in a timely manner.” Id. at 625 n.8.

69. *See Race, Reform, and Retrenchment*, supra note 2, at 1342.
the restrictive view argue that even where injustice exists, remediation must be balanced against, and limited by, the interests of Whites—even when Black subordination created those interests. Accordingly, the alleged innocence of Whites and the benefits that they have derived from racism, are more important than the harm racism inflicts on Black people. In sum, the restrictive view seeks to proscribe only certain kinds of subordinating acts, and even then only if White interests are not overly burdened.

By contrast, adherents to the expansive view (1) accept equality as a result, (2) strive to prevent future wrongdoing and redress present manifestations of past injustice, (3) understand discrimination as a societal policy against an entire group, (4) use the institutional power of the courts to ameliorate the effects of oppression, (5) attempt to eradicate the substantive conditions of subordination, (6) avoid drawing a false symmetry of racial victimization between Whites adversely affected by remedial programs and Blacks historically subjected to discrimination, and (7) adopt a historical approach to adjudication, which fully outlines both current and past American hegemony.

Adherence to the expansionist or restrictive view of anti-discrimination law results from the world view of the interpreter, as opposed to an apolitical, self-evident interpretation or neutral principle. Critical Legal Studies (CLS) scholars have argued that judges

70. Although the Supreme Court has acknowledged the effects of past and present societal discrimination, see Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 613 (1990) (O'Connor, J. dissenting) (stating “[i]n Croson, we held that an interest in remedying societal discrimination cannot be considered compelling”), the personal rights of Whites burdened by a particular remedial plan are more important than the state interest in eliminating the effects of racism. See Alexander Aleinikoff, A Case for Race-Consciousness, 91 COLUM. L. REV. 1060 (1991). Justice Powell summarized this view in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986):

No one doubts that there has been serious racial discrimination in this country. But as the basis of imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

Id. at 276.

71. See Race, Reform, and Retrenchment, supra note 2, at 1342. Professor Sylvia R. Lazos Vargas suggests that the difference in understanding racism between Whites and Blacks emanates from the experience of the viewer, such that Whites view discrimination as “conscious, casuistic, individualist, and culpable,” whereas Blacks
are “socially constructed”; thus, culture, social background, and context direct their decision making. Although judges interpret the law in good faith, they do so according to their social experiences, which are positioned according to gender, race, class, and culture. As a necessary corollary, no legal rule is truly “neutral” because it incorporates political, ideological, economic, and philosophical assumptions. Moreover, legal rules reflect political or cultural sensibilities and judges incorporate these sensibilities when applying legal rules to individual cases.

For example, in both the expansionist and the restrictive approach, all arguments about what the law is are premised upon what the law should be, given a particular world view. The conflict is not between the true meaning of the law and a bastardized version, but between two different interpretations of society. Thus, although adherents to the restrictive vision claim an apolitical advantage and accuse civil rights visionaries of bastardizing the law through politics, neoconservatives themselves rely on their own political interpretations to give meaning to their concepts of rights and oppression. The critical point is that law itself does not dictate which vision will be adopted as an interpretive base, but rather, the viewer’s life experiences.

As another example, advocates of color-blind policies, a by-product of the restrictive view, implicitly assume that racial equality already exists. These advocates posit that inconveniencing Whites with remedial programs is “just as bad” as the history of discrimination against people of color. Thus, the “proper” role for judges is to assure equality of process. Once equality of process is obtained, real differences between groups would explain a difference in outcome, not past discrimination. Furthermore, when the free market is liberated from burdensome

interpret “discrimination as a broad systemic practice, a social text concordant with how racial minorities experience discrimination, as unconscious, diffuse, systemic, and negligent.” See Sylvia R. Lazos Vargas, Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity, 58 MD. L. REV. 150, 169 (1999).

72. Vargas, supra note 71, at 197 (citing JEROME FRANK, LAW AND THE MODERN MIND 100-18, 137-38 (1935)) (“arguing that judges come to cases with biases, and that the process of judging is a manifestation of the judge’s individual personality and values, concealed by the language of ‘compelling mechanical logic’”).


74. See Vargas, supra note 71, at 198.

75. See Race, Reform, and Retrenchment, supra note 2, at 1345-46.
government regulation, such as affirmative action, and irrational prejudices, employers' decisions to hire the best workers at the least cost would explain any stratification between groups.76

By contrast, adherents to the expansionist vision recognize the importance of historical contextuality and understand that historical fact negates color-blindness as a viable option. According to expansionists, color-blindness and equal process would be obsolete if, in fact, people of color had been treated differently historically and if the effects of this disparate treatment had not created the current material subordination.77 Furthermore, expansionists understand that racial domination, not cultural inferiority, explains differences in economic status. In fact, expansionists recognize that historical discrimination itself creates cultural disadvantage.

Because equal opportunity rhetoric ambiguously incorporates both the expansionist view and the restrictive view,78 such that University X can claim to be an equal opportunity educator, and yet maintain a disproportionately White student body, the civil rights community runs the risk of allowing an ambiguous, ahistorical antidiscrimination discourse to pollute its political consciousness. To give equal opportunity meaning, the civil rights community must maintain a contextualized world view that reflects Black reality.79 Despite the need for creativity, ingenuity, and the acceptance of multiple methods for engaging the struggle, an effective political consciousness for the civil rights community necessitates an ideology grounded in the material and historical reality of Black people.80 The expansionist view represents this ideology.

Judge Keith has consistently and willingly embraced the challenge

76. See id. at 1344-45.
77. As Alfred Blumrosen observes, "it [is] clear that a 'color-blind' society built upon the subordination of persons of one color [is] a society which [cannot] correct that subordination because it [can] never recognize it." Race, Reform, and Retrenchment, supra note 2, at n.60 (citing A. Blumrosen, Twenty Years of Title VII Law: An Overview 26 (Apr. 18, 1995)) (unpublished manuscript on file in the Harvard Law Library); see also Stanley Fish, When Principles Get In the Way, N.Y. TIMES, Dec. 26, 1996, at A27 (arguing that under an ahistorical approach, when a politically divisive issue like affirmative action is stripped of its historical conditions, "there no longer seems to be any moral difference between the two [conflicting] sides" of the argument).
78. See Race, Reform, and Retrenchment, supra note 2, at 1342.
79. See id. at 1353.
80. See id. at 1387.
of the expansionist vision. Through his opinions, Judge Keith has demonstrated an effective ideology grounded in the material and historical reality of the oppressed. In articulating his vision of the law as an instrument of equality, Judge Keith stated:

We must continue to pave the way for progressive discourse in the way of race and economic relations in this country. In the face of great adversity, our heads may be bloodied but remain unbowed. We must live the vision of equality in its many facets.

America’s problem can no longer be regarded as a problem solely of civil rights. It has now become an issue of human rights with social and economic justice.

The principle difference lies in the fact that civil rights sought changes in the law and the gaining of equal protection of those laws. Social and economic justice seek to bring about a total restructuring of our society and our institutions. We must seek to achieve not simply the integration of the races, but the liberation, equality, and economic independence of all peoples.

Do not mistake this assertion as a call for social engineering. For justice has as its goal achieving equity and parity in the access to all of the opportunities, all of the benefits, all of the rewards and all of the powers of the total American society.  

V. JUDGE KEITH’S EXPANSIONIST VISION AND RACE

Baker v. City of Detroit, 82 Stamps v. Detroit Edison, 83 Davis v. School District of the City of Pontiac, 84 Garrett v. City of Hamtramck, 85 United States v. Harvey, 86 and United States v. Taylor, 87 exemplify Judge Keith’s successful use of a historical approach emblematic of the expansionist vision. In these cases, Judge Keith has given the facts meaning by fully elaborating them within their greater historical context. By contextualizing the facts, Judge Keith has debunked the notion of racism as the product of

81. Keith, supra note 44, at 1.
86. 16 F.3d 109 (6th Cir. 1994).
87. 956 F.2d 572 (6th Cir. 1992).
individual bad actors and exposed it for the societal policy that it is and has always been. Baker, Stamps, Davis, Garrett, Harvey, and Taylor reflect the material reality of Black people in areas of employment, education, and housing. As a matter of legal history, Judge Keith has documented that Black people do not create their own material inequality; but rather, the hegemonic force of racism unequally distributes power leaving Blacks subordinated.

In addition, both Taylor and Harvey involve racial profiling, a practice by which law enforcement subjects blacks and other people of color to discriminatory searches because they are not white.

Judge Keith’s use of the historical approach provides a sharp contrast to the ahistorical approach and highlights its shortcomings. The ahistorical approach creates a false equality between Whites and Blacks and draws a false symmetry of despair between Whites burdened by remedial measures and Blacks historically subjugated. This false symmetry enables courts to privilege harm imposed on Whites from remedial action over the harms imposed on Blacks by a history of discrimination. In Baker, Stamps, Davis, and Garrett, Judge Keith has demonstrated that allegedly “innocent Whites” have made gains, not only from individual merit, but also from institutional policies that deliberately exclude Blacks and include Whites. Having established the historical institutionalization of racist hegemony in the facts of the cases, Judge Keith summoned the full power of the court to ameliorate

88. In City of Richmond v. J.A. Croson Co., 488 U.S. 469, 502 (1989), the Supreme Court invalidated a Richmond set-aside program for minority businesses. The Court held that color-blind principles would be used to evaluate state action. See id. Justice O'Connor’s plurality opinion in Croson announced a prohibition on racial classifications:

The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their “personal rights” to be treated with equal dignity and respect are infringed by a rigid rule erecting race as the sole criterion in an aspect of public decision making. Id. at 493. Justice Thomas has also echoed this sentiment stating “it is irrelevant whether . . . racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.” Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in judgment). In order for racial classifications in remedial programs to be “just as bad” as the history of discrimination against Blacks, one must assume, among other things, an equality of despair. See id.
the substantive and material conditions of inequality that are present in these cases.

A. Affirmative Action: Baker v. City of Detroit

In Baker, the defendant Detroit Police Department (police department or defendant) adopted an affirmative action plan (the plan) in which equal numbers of Black and White police sergeants were promoted to the rank of lieutenant. In response, plaintiffs, White candidates who the police department would have promoted if it had followed customary rank order, claimed that the defendant "passed over them" solely because they were white, in violation of Title VII of the Civil Rights Act of 1964. Judge Keith justified the affirmative action program and withstood reversal on appeal by (1) utilizing a historical approach; (2) fully developing the factual record; (3) giving meaning to the facts before the court by placing them within their relevant historical context; (4) documenting the police department’s long-standing racist policies of excluding Black police officers and violence toward Black citizens; and (5) avoiding a false symmetry of despair between Whites harmed by the plan and Blacks against whom the defendant had institutionally and violently discriminated.

Baker is phenomenal in both the breadth of the facts and the historical context included in the court’s opinion. Having ruled that plaintiffs were not entitled to a jury, the following facts were before Judge Keith and he included them in his opinion.

89. In Baker, the defendants further included the City of Detroit; Coleman A. Young, then Mayor of the City of Detroit; the Detroit Board of Police Commissioners and its individual members; and Philip G. Tannian, Chief of Police. Baker v. City of Detroit, 483 F. Supp. 930, 937 (E.D. Mich. 1979).
90. See id. at 936.
91. Id. at 964.
93. See Baker, 483 F. Supp. at 930.
1. Facts

In 1943, at the time of the first Detroit race riots, the police department had only forty-three Black officers out of more than three thousand. Walter White and Thurgood Marshall, who at the time worked for the National Association for the Advancement of Colored People (NAACP) and later became a justice on the Supreme Court, prepared an analysis of the riot. Justice Marshall described the police department's role in the riot as follows:

In the June riots of this year, the Detroit police ran true to form. The trouble reached riot proportions because the police of Detroit once again enforced the law under an unequal hand. They used "persuasion" rather than firm action with [W]hite rioters while against [N]egroes they used the ultimate force; night sticks, revolvers, riot guns, submachine guns, and deer guns. As a result, 25 of the 34 persons killed were Negroes. Of the 25 Negroes killed, 17 were killed by police.94

Of the White people who were killed, none were killed by police officers.95

In the same report, Mr. White complained of the "inadequate number" of Black officers and specifically recommended "that the number of Negro officers be increased from 43 to 350 [and] that there be immediate promotions of Negro officers in uniform to positions of responsibility."96

The City of Detroit (the "City"), however, refused to follow this recommendation.97 According to the 1950 census, non-white people comprised 84% of Detroit's population. However, between 1944 and 1953, annual Black hires ranged from four to twenty-eight whereas annual White hires ranged from 135 to 560.98 White officers were occasionally assigned to ride with Black officers as a form of

94. Id. at 940-41 (citing Thurgood Marshall, Activities of Police During the Riots June 21 and 22, 1943, in WHITE & MARSHALL, WHAT CAUSED THE DETROIT RIOT? AN ANALYSIS 29-30 (NAACP 1943)).
95. See id.
96. Id. at 941 (citing WHITE & MARSHALL, supra note 94, at 17).
97. See id.
98. See id.
punishment.99 Furthermore, "there were only a handful of Black Sergeants and Lieutenants. However, they were not deemed good enough to supervise Whites."100

The "New Bethel Church Incident" of 1969 provides another illustration of the relationship the police shared with Black residents:

Following reports that a [W]hite policeman had been shot near the New Bethel Church, twenty or thirty policemen converged on the building. The people inside the church were [B]lack and included women and children. The police went on an unprovoked rampage and began shooting and looting. The people in the church ducked for cover as best they could. The shooting was stopped by two [B]lack officers who physically removed the guns from the hands of the White officers.101

In 1967, the police department was no more than 6% Black although the City of Detroit was almost 40% Black.102 At the same time, Blacks represented a paltry 2.1% of the police department's supervisors. Nine of 348 Sergeants and two of 158 Lieutenants were Black.103 In June 1974, the department was 17.2% Black, but only 5.15% of the sergeants and 4.78% of the lieutenants were Black.104

2. Holding

Judge Keith upheld the plan, and stated "no reasonable person could fail to conclude that given the history of antagonism between the police department and the Black community, the affirmative action plan was a necessary response to what had been an ongoing city crisis."105 Furthermore, by fully contextualizing the facts within their greater historical dimensions, Judge Keith established the following premises in his written opinion: (1) racism is a societal policy perpetrated by some

99. See id. 100. Id. at 942. 101. Id. at 996-97. 102. See id. at 946. 103. See id. at 952. 104. See id. 105. Id. at 1000.
Whites against Blacks;\textsuperscript{106} (2) racism has directly caused the subordination of Blacks;\textsuperscript{107} (3) some Whites, as individuals and Whites generally, have benefitted from Black subordination;\textsuperscript{108} (4) the historical willingness of Whites to engage in racist conduct and to benefit directly from such conduct undermines their claim to alleged "innocence";\textsuperscript{109} and (5) the need to redress this historical wrongdoing outweighs competing White interests.\textsuperscript{110}

\textit{a. Racism as Societal Policy}

The facts of \textit{Baker} exemplify the coercive power of race, specifically the police department's institutional commitment to not only exclude Blacks, but to direct violence at them.\textsuperscript{111} The police department had implemented several employment policies deliberately designed to exclude Blacks.\textsuperscript{112} As Judge Keith noted, "the evidence in the record of blatantly discriminatory treatment of Black citizens winked at by the department as well as blatant discrimination against Black officers in the department provides additional compelling evidence that the department was deliberately keeping Blacks out."\textsuperscript{113} Having thus established the record, it was impossible for the plaintiffs to argue that only a few White officers had discriminated against a few individual Blacks in a few isolated circumstances.

\textit{b. Inequality as Direct Product of Racism}

The police department's exclusionary and discriminatory conduct directly caused the the paltry numbers of Blacks within the police department. Judge Keith demonstrated that if the police department had hired Blacks in proportion to their representation in the relevant labor market, 1,366 more Blacks would have been hired.\textsuperscript{114} As a

\textsuperscript{106} See id. at 1000-03.
\textsuperscript{107} See id.
\textsuperscript{108} See id.
\textsuperscript{109} See id.
\textsuperscript{110} See id.
\textsuperscript{111} See id. at 940-79.
\textsuperscript{112} See id.
\textsuperscript{113} Id. at 992.
\textsuperscript{114} See id. at 960.
necessary corollary, 1,366 Whites had jobs that they would not have had "but for" the deliberate exclusion of Blacks.

c. Rejection of White "Innocence"

In claiming that they were "innocent," plaintiffs attempted to deflect the reality that Whites had benefitted from Black oppression in an abundance of conspicuous and less conspicuous ways. By failing to examine critically the opportunities that racism created for Whites, namely 1,366 jobs, the plaintiffs failed to comprehend that the denial of opportunity for minorities led to increased opportunities for Whites. The exclusion of minorities, contemporarily and historically, from access to opportunities necessarily implies the over-inclusion of Whites. Until this basic truism is addressed, racial hierarchy will persist. Thus, in presenting themselves as "innocent," plaintiffs obscured the following questions: (1) What White person is "innocent," if innocence is defined as the absence of advantage at the expense of others?; and (2) Since discrimination against people of color has been historical, pervasive, and legally enshrined, what Black person is not an "actual" victim? Moreover, in constructing the defense of White "innocence," plaintiffs demonstrated two hegemonic reactions to remedial measures: Remediation hurts innocent White people, and it advantages undeserving Black people. In other words, the plan did not merely do

117. Justice Powell applied the rhetoric of White innocence in rejecting the affirmative action plan in University of California v. Bakke, 438 U.S. 265 (1978). Powell complained of the patent unfairness of "innocent persons . . . asked to endure [deprivation as] the price of membership in the dominant majority." Id. at 294 n.34. He wrote of "forcing innocent persons . . . to bear the burdens of redressing grievances not of their making." Id. at 298.

By contrast, Justice Marshall's and Justice Brennan's dissenting opinions each challenged the premise of White innocence. See id. at 324, 387. Justice Brennan rejected the requirement of proof of individual and specific discrimination as a prerequisite to affirmative action. He wrote "[s]uch relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been
bad things to good ("innocent") people nor merely do good things for bad ("undeserving") people; the plan did both at once and in harmony. Given the hegemonic appeal of this construction, its persistence in politics and legal opinions is not surprising.

When judges establish a symmetry of racial victimization between Whites adversely affected by remedial programs and Blacks historically subjected to discrimination, they must deny the difference race has made in the historical treatment of the two groups and the disparity in power between the two groups.118 When courts decide to subject race conscious remedial action to the same level of scrutiny as White racist conduct, they are equalizing power between Blacks and Whites. This equalization of power only exists in a hypothetical world that ignores the structural reality race has created. This fallacious equality of despair demonstrates the ability of decontextualization and an ahistorical approach to erase reality, create fiction, and repeal attempts to ameliorate Black subordination.119

By contrast, Judge Keith's historical approach negated the White officers' ability to claim innocence. Although plaintiffs claimed that they were "wholly innocent" and that the City, as opposed to them as individuals, was guilty of the original discrimination, Judge Keith

118. In articulating the dangers of the ahistorical approach, which permits drawing a false symmetry, Stanley Fish states "[i]t is just like saying (what no one would say) that killing in self-defense is morally the same as killing for money because in either case it is killing you're doing. When the law distinguishes between these scenarios, it recognizes that the judgment one passes on an action will vary with the motives informing it. It was the express purpose of some powerful, White Americans to disenfranchise, enslave, and later exploit Black Americans. It was what they set out to do, whereas the proponents of affirmative action did not set out to deprive your friend's cousin's son of a place at Harvard." Fish, supra note 77, at 733.

119. In Shaw v. Reno, 509 U.S. 630 (1993), Justice O'Connor uses the false symmetry between the victimization of Whites through remedial redistricting efforts and the institutionally sanctioned disenfranchisement of Blacks. She wrote "appellants' claim that the state engaged in unconstitutional racial gerrymandering . . . strikes a powerful historical chord: It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past." Id. at 525.
squarely confronted the White officers and their innocence stating:

It was the White officers who were guilty of mistreating Black citizens. It was White officers who went on a ticket strike in 1959 when the City proposed integrating squad cars. It was White officers who fiercely resisted efforts to integrate the department throughout the 1960s.

The City did not ask what the plaintiffs and the Lieutenants and Sergeants Association were doing during the many years that White officers abused Black officers in the department and Black citizens on the street. This Court will not ask either.

Instead, the Court will uphold the City's affirmative action plan as proper under federal and state law.

d. Historical Wrongdoing Outweighs White Innocence

The facts of Baker brought the conflicting interests of Whites in the benefits made possible by a discriminatory past and the interests of Blacks in justice into sharp relief. Judge Keith squarely confronted this conflict and held that "[t]he City did not act to favor Blacks out of malice toward Whites, or even capriciousness; but rather, it acted to favor Blacks because as a class, they had been subject to debilitating discrimination for years on end." Furthermore, according to Judge Keith "[a]ll affirmative action programs have an adverse effect on Whites and to one extent or another upset their settled expectations. Where past discrimination against Blacks has been shown, courts have reasoned that making up for past discrimination justifies upsetting the

120. Baker, 483 F. Supp. at 1002-03. Judge Keith has similarly denounced the construction of "White innocence" in other cases. See, e.g., Aiken v. City of Memphis, 37 F.3d 1155, 1181 (6th Cir. 1994). In the dissenting opinion, Judge Keith stated "In 1994, equality is far from won. In fact, today we are faced with a new oxymoron—the notion of reverse racial discrimination. This outrageous notion is nothing but inflammatory fodder designed to discourage taking race into account even where such accounting promotes fundamental fairness, equality and justice."

expectations of White workers." In other words, "[a]ll affirmative action programs have some adverse effect on Whites who must step aside so that Blacks may be hired or promoted."


In holding that defendant Detroit Edison (Edison), a utility, had discriminated against minority employees, in violation of the Civil Rights Act, Judge Keith fully historicized Edison's discriminatory practices in both hiring and assigning its minority employees. The following facts were before Judge Keith and were included in his opinion.

1. Facts

Until July 2, 1965, Edison only used White hiring interviewers. In 1966, when Detroit was approximately 40% Black, Edison employed 304 Blacks out of 9,475 employees and only four of Edison's 1,722 officials and managers were Black. In 1972, Edison employed approximately 860 Blacks out of approximately 11,500 employees although Detroit was approximately 44% Black.

In addition to hiring few Blacks, Edison had a reputation of limiting its Black employees to menial jobs such as janitor, porter, shoe shine boy, elevator operator, wall washer, lamp changer, coal ash handler, and utility serviceman. Rather than promote its Black employees, Edison would sometimes hire skilled tradesmen from Canada who, in some cases, did not speak English. Additionally, Edison deliberately recruited Blacks with poor employment records, when Blacks on its

122. Id. at 985 (citing Franks v. Bowman Trans. Co., 424 U.S. 747, 772-78 (1976); EEOC v. AT&T Co., 556 F.2d 167 (3d Cir. 1977)).
123. Id. at 919.
126. See id. at 102-03.
127. See Baker, 483 F. Supp. at 946.
129. See id.
130. See id. at 102.
131. See id. at 108.
own payroll had good employment records, and yet Edison refused to promote or transfer them. Moreover, Edison used a non-job-related examination to "freeze the status quo of past discrimination." In dealings with its unions, only Whites represented Edison, and with the exception of the named plaintiff, only Whites represented the unions. One of Edison's unions, Local 223, refused to process Blacks' grievances, negotiated discriminatory seniority provisions, failed to accord Black meter readers the rights that Whites had, gerrymandered seniority districts, and excluded Blacks from political office, by among other things, requesting reelections where Blacks had been elected.

2. Holding

Despite overwhelming evidence to the contrary, Edison continued to claim recalcitrantly that it "ha[d] and d[id] recruit, hire, transfer, and promote qualified persons according to their availability and their ability without regard to race or color." In response to Edison's defense and based on a fully developed factual record, Judge Keith replied that, in regard to hiring and promoting Blacks, Edison "ha[d] done nothing at all which has produced fruitful results." Furthermore, "because of discrimination, Black employees and rejected applicants ha[d] lost employment opportunities which would have allowed them to earn more than they ha[d] earned." Therefore, Judge Keith held that it was "appropriate to award them amounts of back pay sufficient to restore them to the economic position in which they would have been but for this discrimination." Accordingly, Judge Keith ordered Edison to pay four million dollars and Local 223 to pay two hundred fifty thousand dollars.

In addition to providing new job opportunities for Black workers, at the time Judge Keith's ruling represented the largest damage award

132. See id.
133. Id. at 115.
134. See id. at 112.
135. See id. at 115.
136. Id. at 94.
137. Id. at 109.
138. Id. at 119.
139. Id.
140. See id. at 124.
in employment discrimination history against a single company. In remarking on the impact of Judge Keith’s ruling, Carl T. Rowan wrote in Just Between Us Blacks: 141

Judge Keith lowered the judicial boom on Detroit Edison in the belief that only this unprecedented kind of decree could jar American industry out of the grip of entrenched, institutionalized racism. . . . [T]he message is clear that half-hearted attempts at corporate fairness in hiring and promotion will no longer satisfy the courts. . . . With a stroke of his pen on a monumental decree he has done more for Black equality than a thousand loud speeches cursing Whitey. 142

C. Education Discrimination: Davis v. School District of Pontiac 143

In Davis, Judge Keith demonstrated his ability and willingness to pierce the veil of empty equal opportunity rhetoric and unmask a practice of deliberate discrimination even in the face of death threats. 144

1. Facts

In Davis, a case decided seventeen years after Brown v. Board of Education, 145 Black children, through their parents and guardians, brought a class action against defendant School District of the City of Pontiac, its Superintendent and Assistant Superintendents, and the seven members of the Pontiac Board of Education (collectively Pontiac). 146 Plaintiffs claimed that Pontiac denied them an education under the same terms as White children and discriminated in their hiring and assigning of teachers. 147

In its defense, Pontiac presented several board resolutions and policies that had incorporated the empty rhetoric of equal opportunity.

142. Id. at 55.
144. See Allan Lengel, Judge Keith Will Cut Back to Part-Time, DET. NEWS, Nov. 8, 1994.
146. See Davis, 309 F. Supp. at 735.
147. See id.
For example, in 1954, Pontiac resolved to build new schools without regard to race, color, or creed. However, Pontiac had, on at least two occasions, built new Black schools to accommodate overcrowding in predominately Black schools rather than accommodate the overflow of Black students in nearby predominately White schools that had "an overwhelmingly large capacity." As another example of Pontiac's equal opportunity rhetoric masking deliberate segregation, in 1955, Pontiac resolved to employ and assign teachers and administrators "without regard to race, color, marital status, nationality, or religion." Despite these written commitments to integrate faculties and administrations, Pontiac deliberately created the following conditions:

Alcott School had a total enrollment of 608 students, 605 of which are white; Alcott had no Black teachers. Emerson School had an enrollment of 656 students all of whom are White; Emerson had one Black teacher. Weaver School, Whitfield School, Wisner School, Malcolm School and Willis School all had a White student body; each had one Black teacher. Other all-White schools had, at most, two Black teachers. Whitter School, an all Black school, had two White teachers.

2. Holding

In announcing his decision in Davis, Judge Keith started his analysis by identifying the impact of discrimination on the actual material realities of Black children stating: "The Court begins its decision in this matter confronted with the undisputed fact that Negro children are being deprived of quality education in the Pontiac School System and that early deprivation of innocent young children culminates in permanent, devastating, irreparable harm — harm incapable of subsequent correction."
Next, Judge Keith pierced Pontiac's smoke-screen defense. Although Pontiac "had established a very long record of making policy statements to the effect that they were committed to integrating the Pontiac School System, [it] did nothing to implement that policy." Moreover, according to Judge Keith "[p]ronouncements of good intentions with nothing more amounts to monumental hypocrisy."

Pontiac claimed that a school district had "no affirmative obligation to achieve a balance of the races in the schools when the existing imbalance [was] not attributable to school policies or practices and [was] the result of housing patterns and other forces over which the school administration had no control." According to Pontiac, segregated housing patterns, and not Pontiac's discriminatory policies and conduct, caused the racial imbalance in its schools. Despite Pontiac's claim of innocence, Judge Keith focused his attention on Pontiac's policy of shifting boundary lines and locating new schools in order to minimize the prospect of achieving racial integration. Having identified this practice, Judge Keith held that Pontiac "intentionally us[ed] the power at [its] disposal to perpetuate a pattern of segregation that had the effect of irreparably harming innocent young Negro children by depriving them of a quality education."

In further emphasizing Pontiac's "wrongdoing," Judge Keith stated:

[O]fficials of the Pontiac School System admitted that the black children in their system were being given an inferior education which was psychologically damaging to their self-image and economically damaging to their ability to perform in an adult world; and that in 1967, after approximately twenty years of doing nothing more than issuing resolutions and policy statements regarding its intent to strive for and achieve racial balance... made one more statement of policy without any act of implementation.

156. See Davis, 309 F. Supp. at 741-42.
158. Id. at 145 (citations omitted). On appeal, the Sixth Circuit upheld Judge Keith's holding and further suggested that the United States Supreme Court followed
In addition to piercing empty promises of equal opportunity, Judge Keith fashioned a legal remedy commensurate with the harm done. For the first time in a United States school district above the Mason-Dixon line, Judge Keith ruled that Pontiac was to be integrated by cross-district busing at the beginning of the next school year. Moreover, his order applied with equal force to Pontiac’s teachers and administrators.

Shortly after his ruling, on August 30, 1971, eight days before fall classes were to begin, ten Pontiac school buses were dynamited. The investigation of the bombing led to the arrest and conviction of Robert Miles, the Grand Dragon of Michigan’s Ku Klux Klan.

In the face of FBI warnings that the Klan had targeted him for an assassination plot, Judge Keith called for his order to be implemented as scheduled. In remarking on his ability to withstand both political pressure and even death threats, Judge Keith quotes the late Dr. Martin Luther King Jr.: “Cowardice asks the question, is it safe? Expedience asks the question, is it politic? Vanity asks the question, is it popular? But conscience asks the question, is it right?”

D. Housing Discrimination: Garrett v. City of Hamtramck

The Garrett v. City of Hamtramck trilogy further exemplifies Judge Keith’s willingness to pierce alleged White innocence and unmask a history and pattern of deliberate discrimination. Furthermore, Garrett

Judge Keith in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971). See Davis, 443 F.2d at 577 n.1 (stating “[o]nce a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”).


161. See Hollowell, supra note 159.

162. See id.

163. See id.

164. Id.

typifies the vehemence and endurance of racist practices as well as Judge Keith's equally potent ability to remediate proportionately with the racist harm. In *Garrett*, Judge Keith found that defendants City of Hamtramck, its Mayor, its City Planning Commission, and its coordinator of urban renewal (collectively Hamtramck) deliberately engaged in a program of "Negro Removal" designed to get rid of its Black population.\textsuperscript{166}

1. Facts

In order to remove its Blacks, Hamtramck had, among other things, turned residential areas into industrial sites and placed an expressway through Black dwellings.\textsuperscript{167} These activities coupled with racially discriminatory private housing practices caused a decrease in Hamtramck's Black population from 14.5% in 1960 to approximately 8.5% in 1966.\textsuperscript{168}

As another example of invidious Hamtramck practices, eighteen Black families lived in one portion of an area slated for "urban renewal" in a row of consecutive multi-family flats while Whites occupied the remainder of the homes in the same area.\textsuperscript{169} Hamtramck could not establish that the condition of the Black-owned residences differed from those of their White counterparts.\textsuperscript{170} Nevertheless, Hamtramck destroyed the Black-owned houses before it touched the White-owned houses.\textsuperscript{171}

2. Holding

Summarizing Hamtramck's "wrongdoing," Judge Keith stated "[t]he defendants simply cannot surreptitiously permit and encourage displacement of [B]lack residents from their homes . . . without taking reasonable steps to assure that housing for rental or purchase will be made available to those displaced."\textsuperscript{172} Moreover, Judge Keith went on

\textsuperscript{166} *Garrett*, 335 F. Supp. at 17.
\textsuperscript{167} See id. at 21.
\textsuperscript{168} See id. at 21-22.
\textsuperscript{169} See id. at 21.
\textsuperscript{170} See id.
\textsuperscript{171} See id.
\textsuperscript{172} Id. at 25.
to allocate responsibility for the "Negro Removal" at its source:

If what has occurred in Hamtramck is ever to be stopped, responsibility must be placed at the source, that is, the Department of Housing and Urban Development which funds and administers the programs. It must be clearly understood that in order for the City of Hamtramck to bring about the "Negro removal" and ancillary discriminatory results of which plaintiffs are complaining in this action, federal financial assistance and involvement was essential.173

Garrett came before Judge Keith on November 20, 1968.174 As an example of racism's endurance, Hamtramck had "through dilatory tactics . . . delayed, attempted to delay, and frustrated the implementation of any program to redress the grievous injustices for which they ha[d] been responsible" well past May 21, 1975.175 Despite Hamtramck's insolence and delay, Judge Keith was evenly matched for the hold-out and continued to order defendants to build 515 to 604 replacement units176 and to contact the displaced Black residents, via Black radio stations and newspapers, in order to determine if they desired replacement housing in Hamtramck.177 As further evidence of Judge Keith's tenacity, he retained jurisdiction of the case even after he had been promoted to the Sixth Circuit Court of Appeals, receiving special permission to retain the case every year. In 2001, Judge Keith ordered the homes be rebuilt.178

In sum, Garrett v. City of Hamtramck,179 like Baker v. City of Detroit,180 Stamps v. Detroit Edison,181 and Davis v. School District of the City of Pontiac,182 reflects Judge Keith's ability to ground both his adjudication and

173. Id. at 25.
175. Id. at 1154.
176. See id.
177. See id. at 1156.
opinions in the reality of material subordination by fully historicizing an exhaustive factual record. The breadth of the factual record and its historical context provides a thorough record of racist policies and practice. Yet, these opinions are refreshingly bold, particularly where courts have polluted the landscape of anti-discrimination law with legal opinions that obfuscate racism by deemphasizing historical reality. Each of these cases is a veritable recipe for effective remediation.


Both *Taylor* and *Harvey* involve the phenomenon of “driving or walking while black,” where law enforcement equates color with criminality and, through the vehicle of racial profiling, subjects people of color to discriminatory searches and seizures. In both of these cases, Judge Keith dissented to the majority’s finding of probable cause and exposed the racially discriminatory practice.

1. Facts

In *Taylor*, the defendant was the only black person to deplane from a Miami flight by the time he was stopped. In addition, the defendant “walked away from the gate nervously, hurriedly and moved faster than the other passengers; constantly looked backwards as he walked; carried a tote bag that he held tightly to his body; and left the terminal walking very fast.” According to the arresting officer’s testimony, the officer stopped the defendant because he was both dressed in dingy clothing and nervous.

In *Harvey*, law enforcement stopped the defendant because he was driving “three miles over the speed limit in a car which was missing a bumper and a headlight.” In addition, when asked “[w]hat was it about the appearance of the occupants that got [his] attention,” the arresting officer replied “[a]lmost every time that we have arrested drug

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183. 956 F.2d 572 (6th Cir. 1992) (Keith, J. dissenting).
184. 16 F.3d 109 (6th Cir. 1994) (Keith, J. dissenting).
185. See *Taylor*, 956 F.2d at 582.
186. Id. at 586 (enumeration omitted).
187. Id. at 587.
188. *Harvey*, 16 F.3d at 113.
189. Id.
traffickers from Detroit, they’re usually young black males driving old cars.”\textsuperscript{190}

2. Analysis

In \textit{Taylor}, Judge Keith began his dissent by cutting through to the heart of the matter stating “[l]aying aside the legality of the seizure and the subsequent search of Taylor under established fourth amendment principles for the moment, the Drug Enforcement Agency (DEA) personnel stopped [defendant] . . . solely because he was an African-American.”\textsuperscript{191} Furthermore, Judge Keith exposed the racial component of the profiling methods employed:

The disproportionate number of African-Americans who are stopped indicates that a racial imbalance against African-Americans does exist and is implicitly sanctioned by the law enforcement agency. The assumption that seventy-five percent of those persons transporting drugs and other contraband through public modes of transportation are African-American is impermissible. It flies in the face of reason and legitimates a negative stereotype of African-Americans. Surely, this practice must “be subjected to the strictest scrutiny and [can be] justified only by the weightiest of considerations.” If our “right of locomotion,” “right to be let alone,” or simply our right to be free from capricious and arbitrary government interference in public places is to mean anything, then this race-based practice must stop.

We cannot allow law enforcement officers to cloak what may fairly be characterized as a racist practice in a generic drug courier profile that openly targets African-Americans.\textsuperscript{192}

\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Taylor}, 956 F.2d at 572.
\textsuperscript{192} \textit{Id.} at 581-82. In joining Judge Keith’s dissent, Judge Martin, now Chief Judge of the Sixth Circuit, stated

When I travel, I am typically attired in a suit and tie and behave in a conventional manner. I doubt that I attract much attention from the airport police, even though I may exhibit signs of nervousness or agitation due to turbulence during a flight or a difficult connection. I face little, if any, possibility of being stopped. Perhaps it is my dress and manner, I believe that
In challenging the majority's opinion in *Harvey*, Judge Keith related the reality of racial profiling for Black people:

Unfortunately, the present case is not unique; rather, it eloquently illustrates the plight of many African-Americans. News reports detail unreasonable stops of African Americans [sic] by police motivated solely by irrational and illogical racial stereotypes. For example, a national newspaper reported "the same percentages of whites and blacks use drugs." Arguably, for every 100 people arrested for drug use or trafficking, 50 should be black. Blacks, however, are four times as likely to be arrested for drugs in central cities, six times as likely in suburbs, and three times as likely in rural areas . . . African-Americans are more likely to be arrested because drug courier profiles reflect the erroneous assumption that one's race has a direct correlation to drug activity.\(^1\)

VI. RESISTANCE: THE EXPANSIVE VIEW APPLIED TO GENDER

In addition to maintaining a legal sensibility keenly sensitive to all forms of injustice, Judge Keith has also reached beyond the subjectivity of his own male experience, embraced the expansionist view in the struggle for gender equality, and summoned the power of the court to ameliorate the substantive power imbalance between men and women. In *Rabidue v. Osceola Refining Co.*,\(^2\) the Sixth Circuit majority held that plaintiff failed to sustain her Title VII sexual harassment claim.\(^3\) However, in his dissent, Judge Keith characteristically (1) developed the full factual record and (2) elaborated those facts within their historical context.

\(^1\) *Harvey*, 16 F.3d at 114-15 (citing Sam Meddis, *Suburbs 'Have Gotten Off Easy,' Whites' Drug Activity Often Better Hidden*, USA TODAY, July 26, 1993, at 6A.)

\(^2\) 805 F.2d 611 (6th Cir. 1986).

\(^3\) See id. at 622.
and material reality. Having exhausted the facts within the context of
gender inequality, Judge Keith established that the majority erred in
finding that "defendant’s treatment of plaintiff evinced no anti-female
animus and that gender-based discrimination played no role in her
discharge." 196

In addition to undermining the majority’s opinion by exposing the
record, Judge Keith’s dissent in Rabidue evinces a keen receptiveness to
pervasive issues in sexual harassment law that directly affect gender
equality. First, Judge Keith established that societal norms cannot set
the standard for the level of inequality women must tolerate in the
workplace as the majority suggested. Second, just as he understands the
disparate historical treatment of persons of color, Judge Keith, unlike
the majority, rejected gender neutral standards for assessing sexually
offensive conduct because gender-blind standards create a false
symmetry of power between men and women and mask the power
imbalance between the two. 197 Third, Judge Keith took issue with the
majority’s suggestion that women who work in environments infected
with misogyny voluntarily assume the risk of exposure. Finally, as in
cases involving race, particularly under the restrictive view of anti-
discrimination law, the majority opinion expressed an unwillingness to
use the courts to eradicate or correct the anti-female environment at
issue in Rabidue. Judge Keith, however, used the institution of the courts
to fulfill the vision of Title VII—workplace equality.

A. Judge Keith’s Development and Contextualization of the Facts within the
Material Reality of Female Subordination

The majority analysis in Rabidue violated “the most basic tenet of a
hostile work environment cause of action, the necessity of examining
the totality of the circumstances.” 198 Instead of applying the “totality of
the circumstances” test, the majority evaluated each of plaintiff’s
allegations separately and rejected each one as having a “de minimus”

196. Id. at 623.
197. See Deborah Zalense, The Intersection of Socioeconomic Class and Gender in Hostile
Housing Environment Claims under Title VIII: Who is the Reasonable Person?, 38 B.C. L. REV.
A PARADIGM FOR EQUALITY

The majority’s opinion is particularly startling in light of Osceola Refining Company’s (defendant’s) egregious conduct. However, as is characteristic of Judge Keith, he (1) fully developed the facts of the case and then (2) gave those facts meaning by contextualizing them within the material reality of female subordination and the power imbalance between men and women.

Although the majority failed to focus critically on the defendant’s behavior or elicit the following facts in its opinion, Judge Keith characteristically developed the full factual record and presented the following in support of his dissent:

One poster, which remained on a wall for eight years in plaintiff’s work environment, showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling “Fore.” A desk plaque declared “[e]ven male chauvinist pigs need love.” A supervisor “routinely referred to women as ‘whores,’ ‘cunt,’ ‘pussy,’ and ‘tits.’” The same supervisor, remarked of plaintiff that “[a]ll that bitch needs is a good lay” and called her “fat ass.” When plaintiff complained about such treatment, she was told to “calm down.”

In addition to tolerating this anti-female behavior, defendant excluded plaintiff, the sole female in management, from activities she needed to perform her duties and progress in her career. For example, unlike male salaried employees, plaintiff did not receive free lunches, free gasoline, a telephone credit card or entertainment privileges. Nor was she invited to the

199. See id.

200. The majority opinion in Rabidue has been severely criticized by commentators, courts, and the EEOC. See, e.g., Elliston v. Brady, 924 F.2d 872, 877 (9th Cir. 1991) (“We do not agree with the standards set forth in ... Rabidue.”); Lipsett v. University of P.R., 864 F.2d 881, 905 (1st Cir. 1988) (quoting the dissent in Rabidue with approval); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1426, 1525 (M.D. Fla. 1991) (concluding “that the reasoning of these cases (including Rabidue) is not consistent with the Eleventh Circuit precedent and is otherwise unsound”); Policy Guidance on Current Issues of Sexual Harassment, EEOC Compl. Man. (BNA) No. 137, at N:4048 (Mar. 19, 1990) (hereinafter EEOC Policy Guidance) (rejecting the Rabidue rationale regarding obscene materials in the workplace).

201. Rabidue, 805 F.2d at 624.
Defendant prevented plaintiff from visiting or taking customers to lunch because it would be improper for a woman to take male customers to lunch and because she "might have car trouble on the road." In a "Catch 22," plaintiff's supervisor stated that "we really need a man on [plaintiff's] job" and added that plaintiff "can't take customers out to lunch."

Presenting another "Catch-22," the majority found plaintiff "to be an abrasive, rude, antagonistic, extremely willful, uncooperative, and irascible personality." Plaintiff's supervisor, however, stated that "plaintiff was not forceful enough to collect slow-paying jobs." Judge Keith, noting the irony, stated "[h]ow plaintiff can be so abrasive and aggressive as to require firing but too timid to collect delinquent accounts is, in my view, an enigma."

B. Rejection of Societal Norms that Perpetuate the Status Quo

The majority opinion went out of its way to emphasize the plaintiff's aggressive and cantankerous personality while simultaneously excusing defendant's offensive conduct. Unlike the majority, however, Judge Keith's dissent recognizes that the pivotal issue under Title VII is the defendant's conduct, not the victim's,

202. See id. "The district court below dismissed these perks and business activities as fringe benefits." Id.
203. Id.
204. Id. at 615.
205. Id. at 624.
206. Id.
207. See id. at 615 (critically describing the plaintiff as "a capable, independent, ambitious, aggressive, intractable, and opinionated individual.") Id. "It is arguable that these characteristics would not have been so offensive to the court if they had been attributed to a male officer manager." Deanna Weisse Turner, Civil Rights—Employer's Beware: The Supreme Court's Rejection of the Psychological Injury Requirement in Harris v. Forklift Systems, Inc., 114 S.Ct. 376 (1993), Makes It Easier for Employees to Establish a Claim for Sexual Harassment Based on a Hostile Working Environment, 17 U. ARK. LITTLE ROCK L.J. 839, 857 n.153 (1995).
208. See Rabidue, 805 F.2d at 615.
particularly not the victim's reaction to sexually offensive conduct in light of societal norms that may actually reinforce gender discrimination. In *Rabidue*, Judge Keith refused to let societal norms dictate the measure of inequality women must tolerate in the workplace. According to Judge Keith, societal norms are no excuse for the debilitating effects of pornography in the workplace.

**C. Reasonable Woman Standard**

Just as he has recognized the difference race has made, Judge Keith, unlike the majority, rejected gender neutral standards of assessing sexually offensive conduct in *Rabidue* because he recognized that gender-blind standards create a false symmetry of power between men and women and mask the power imbalance between the two. Instead, Judge Keith introduced the reasonable woman standard to account for not only the differences of perception between the sexes, but also the difference in power. While other courts have adopted the reasonable woman standard, Judge Keith has been credited with introducing the

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210. Several commentators have argued that the "reasonable person" standard is a male defined norm masquerading as objectivity. See, e.g., Cynthia A. Dill, *The Reasonable Woman's Standard in Sexual Harassment Litigation*, 12 ME. B.J. 154, 155 (1997) (stating "this so called 'reasonable person' standard, when used in hostile environment cases, has the effect of imposing a male bias and therefore prejudices the rights of female plaintiffs. The argument, in sum, is that we live in a patriarchal society where men are the measure of all things and women are evaluated according to their correspondence with men. When the factfinder is asked to determine whether or not a reasonable person would consider the environment sufficiently severe or abusive to be actionable under Title VII, the reasonable person is, in fact, the reasonable man.").

211. See Zalesne, *supra* note 197, at 871 (stating "[s]tudies show that because women have not historically held power positions, men and women often have different perspectives regarding what conduct constitutes sexual harassment. According to a joint survey by Redbook magazine and the Harvard Business Review on sexual harassment in the workplace, '[m]ost people agree on what harassment is. But men and women disagree strongly on how frequently it occurs.' The study showed that actions deemed harassment by women were often perceived as harmless by men. The report concluded that '[f]rom the comments in the returns, a visitor from another planet might conclude that men and women work in separate organizations."") (citations and footnotes omitted).

212. Inspired by Judge Keith's dissent in *Rabidue*, the Ninth Circuit adopted the reasonable woman standard in *Ellison v. Brady*, 924 F.2d 872, 878-90 (9th Cir. 1991). Writing for the majority, Judge Breezer explained "because women are disproportionately victims of rape and sexual assault, women have a stronger incentive
reasonable woman standard in case law.\textsuperscript{213}

Just as colorblindness is used to erect the status quo and mask a vision that is white, Judge Keith understood that genderless standards of assessing offensive conduct would only assume the current distribution of power, namely male. In justifying the reasonable woman standard, Judge Keith stated:

Nor can I agree with the majority's notion that the effect of pin-up posters and misogynous language in the workplace can have only a minimal effect on female employees and should not be deemed hostile or offensive "when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at newsstands, on prime-time television, at the cinema and in other public places." "Society" in this scenario must primarily refer to the unenlightened; I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture. In fact, pervasive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without full appreciation of the social setting or the underlying threat of violence that a woman may perceive." Id. at 879. In addition, the court concluded that the reasonable woman standard was an essential tool for defeating ingrained sexist stereotypes and prejudices. See id. at 881. The Sixth Circuit itself, in \textit{Hixson v. Norfolk Southern Railway Co.}, held that a constructive discharge due to sexual harassment occurs if "working conditions [are] so difficult or unpleasant that a reasonable [woman] in the employee's shoes would [feel] compelled to resign." No. 94-5832, 1996 U.S. App. LEXIS 15421, *15 (6th Cir. June 10, 1996) (unpublished) (citing \textit{Yates v. Aeco Corp.}, 819 F.2d 630, 636-37 (6th Cir. 1987)).

As another advantage of the "reasonable woman" standard, "[i]n cases involving violence against women, the reasonable woman standard serves to change the woman's subordination by increasing the potential for effective enforcement of laws against subordinating behavior. Specifically, the reasonable woman standard includes women's experiences in a system with asymmetrical power relations that has historically excluded women's participation." Zalesne, \textit{supra} note 197, at 871 (internal citations and footnotes omitted).

societal approval thereof and of other stereotypes stifles female potential and instills the debased sense of self worth which accompanies stigmatization. The presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy. That some men would condone and wish to perpetuate such behavior is not surprising. However, the relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point also condoned slavery. I conclude that sexual posters and anti-female language can seriously affect the psychological well being of the reasonable woman and interfere with her ability to perform her job.\(^{214}\)

Having contextualized the facts of *Rabidue* within their historical context, Judge Keith demonstrated that women disproportionately suffer the brunt of sexual harassment and gender bias.\(^{215}\) Unlike the adherents to the restrictive view of anti-discrimination law, Judge Keith established that the legal system must account for the woman’s perspective regarding appropriate behavior. According to Judge Keith, the reasonable person standard failed because it did not reflect women’s perceptions of what constitutes sexual harassment. The reasonable woman standard, on the other hand, evaluates the conduct from the woman’s perspective and thus minimizes the risk of reinforcing the prevailing level of sexual harassment in society.\(^{216}\)

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214. *Rabidue*, 805 F.2d at 627 (internal citations omitted).
216. As another example of how genderless standards implicitly assume the male-oriented distribution of power and paradigm, Jeanne L. Schroeder uses the example of women and self-defense. Initially, “women who killed men in self-defense often had to plead insanity... because their actions did not meet the prevailing legal elements of self-defense. These elements were based on the male perspective and the paradigm of the bar room brawl between two men of relatively equal strength.... Male judges and legislatures initially could not accept the theory proposed by women—that it is self-defense for a small woman to use a gun against a large, drunken, but unarmed man—because it is not the theory that would initially occur to men who are differently situated. Consequently, to defend themselves, women had to adopt the dominant characterization of their thought as irrational in the literal, pejorative sense and had to characterize their behavior as insane.” Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 Tex. L. Rev. 109, 119 n.29 (1991)
D. Assumption of Risk

The majority excused the work atmosphere in *Rabidue* stating that courts must consider the "prevailing work environment," "the lexicon of obscenity that pervaded the environment both before and after plaintiff's introduction into its environs," and plaintiff's reasonable expectations upon "voluntarily" entering that environment. The majority further suggested that it is "through these factors that a woman assumes the risk of working in an abusive anti-female environment." In other words, the majority implicitly supported the notion that female employees assume the risk of sexual harassment when they enter male-dominated, traditionally vulgar, and misogynistic work environments.

By contrast, Judge Keith rejected the majority's voluntary assumption of risk suggestion and stated "I conclude the misogynous language and decorative displays tolerated at the refinery (which even the district court found constituted a 'fairly significant' part of the job environment), the primitive views of working women expressed by Osceola supervisors, and defendant's treatment of plaintiff as the only female salaried employee clearly evince anti-female animus."

E. Summoning the Power of the Court to Effect Equality

As in cases involving race under the restrictive view of anti-discrimination law, the majority opinion expressed an unwillingness to use the courts to eradicate or correct the anti-female environment in *Rabidue*. Beyond the mere tolerance of such environments, the majority suggested that such work environments have an innate right to perpetuation and are not to be addressed under Title VII:

Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar.

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(citing Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 606-10 (1986)). When feminist legal activists exposed the assumptions behind the dominant theory and gave voice to the female perspective, "male as well as female lawyers began to see the rationality not only of the new theory, but of women as well." *Id.*

218. *Id.* at 626.
219. *Id.* at 625 (Keith, J., dissenting).
Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or cannot—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female worker of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.  

In response to the majority’s judicially restraining Title VII in the sexual harassment field, Judge Keith stated that the majority had undermined the very purpose of Title VII, which was the promotion of social change and equality in the workplace by perpetuating working environments hostile to women:

In my view, Title VII’s precise purpose is to prevent such behavior and attitudes from poisoning the work environment . . . . To condone the majority’s notion of the “prevailing workplace” I would also have to agree that if an employer maintains an anti-Semitic workforce and tolerates a workplace in which “kike” jokes, displays of Nazi literature and anti-Jewish conversation “may abound,” a Jewish employee assumes the risk of working there, and a court must consider such a work environment as “prevailing.” I cannot . . . as I believe no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative, I dissent.

VII. EQUAlITY AND THE RIGHTS OF CITIZENS

Judge Keith has reached beyond the subjectivity of his own life to create a more equitable world for everyone. His keen sensitivity to an abuse of power is not isolated to cases involving race and gender discrimination; rather, the same level of sensitivity and effective adjudication that Judge Keith applies to cases involving race and gender equally applies to cases involving governmental abuse of power against

220. Id. at 621.
221. Id. at 626-27 (Keith, J., dissenting).
its citizens. One famous example marks Judge Keith's adherence to principle even in the face of peril: *United States v. Sinclair.* There, despite overwhelming political pressures, particularly from the Office of the President, Judge Keith protected every citizen from the uninvited ear of the government. The same fortitude and courage that enabled Judge Keith to triumph over the forces of hegemony in his own life enabled him to resist political pressure and ensure the privacy rights of every citizen. In another set of examples, Judge Keith protected the rights of every citizen, even a corrupt governor, to a fair trial. In sum, each of the following cases further exemplifies Judge Keith's commitment to equality in all of its many dimensions.

*A. The Keith Case: United States v. Sinclair*

Judge Keith's keen sensitivity to equality and his own experiences of exclusion coupled with his unyielding sense of fortitude and bold courage directed him in *United States v. Sinclair,* perhaps his most legendary case. In *Sinclair,* notwithstanding the office of the presidency and President Nixon's enormous popularity at the time, Judge Keith held that the Constitution prohibited President Richard Nixon, Attorney General John Mitchell, and the federal government from wiretapping the residence of the White Panthers, a Michigan-based political dissident group, whom the government had accused of conspiring to bomb a CIA building, unless a warrant had been issued consistent with the Fourth Amendment. The Supreme Court unanimously upheld Judge Keith's decision, which became known as "the Keith case." Beyond the specific facts or particular parties before the court, the

223. See id.
224. As a result of his ruling in *Sinclair,* Judge Keith is one of the few sitting jurists ever to be sued by a United States president. See WASHINGTON, supra note 44, at 113.
228. See Hollowell, supra note 225, at 1201.
229. As the Sixth Circuit recognized on appeal, "[t]he issue in this case is the power
decision in *Sinclair* shielded the privacy rights of every United States citizen from the government's "uninvited ear." Apprehending the need to protect every citizen's rights against governmental abuse, Judge Keith squarely confronted the executive branch of the government and stated:

The great umbrella of personal rights protected by the Fourth Amendment has unfolded slowly, but very deliberately, throughout our legal history.\(^\text{230}\)

\[\ldots\]

The final buttress to this canopy of Fourth Amendment protection is derived from the [Supreme] Court's declaration that the Fourth Amendment protects a defendant from the evil of the uninvited ear.\(^\text{231}\)

\[\ldots\]

It is to be remembered that the protective sword which is sheathed in the scabbard of Fourth Amendment rights, and which insures that these fundamental rights will remain inviolate, is the well-defined rule of exclusion. And, in turn, the cutting edge of the exclusionary rule is the requirement that the Government obtain a search warrant before it can conduct a lawful search and seizure. It is this procedure of obtaining a warrant that inserts the impartial judgment of the Court between the citizen and the Government.\(^\text{232}\)

In articulating the impact of Judge Keith's ruling, the *Puzzle Palace*, a widely celebrated book on the National Security Agency ("NSA") and the pervasive influence of America's intelligence community, reported that Judge Keith's "[o]rder rocked the NSA,"\(^\text{233}\) because it exposed that organization's questionable practices of electronic surveillance. Historian Jeff A. Hale has stated that "Keith has become one of the

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of the Attorney General of the United States as agent of the President to authorize wiretapping in internal security matters without judicial sanction. This case has importance far beyond its facts or the litigants concerned." *United States* v. *United States District Court*, 444 F.2d 651, 653 (6th Cir. 1971).

231. *Id.* (citations omitted).
232. *Id.* at 1078.
foundations of our modern conception of privacy rights."234

Ironically, the individual who has devoted his life to equality, particularly for those who have been denied it, is the same individual who has championed the rights of everyone, including the privileged. This touch of irony is illustrated in the following excerpt from a conversation between Henry Ford and Judge Keith, in Judge Keith’s own words:

I remember my good friend Henry Ford said to me after the wiretap case, “Damon, what is this wiretapping case all about that everybody is talking about.”

... .

I said, “Well, Henry, if you and your wife were having a private conversation, the government would say that Henry Ford and his wife are having a conversation that may be a threat to the national security. Once they declared the conversation a threat to the national security, they could wiretap your telephone without going before a neutral magistrate and showing probable cause that what you are saying was actually a threat to this country. The government could do it alone. If Nixon and John Mitchell wanted to intercept telephone calls they could do it just by invoking national security. National security would be their defense.” I told Henry that the Supreme Court decision in that lawsuit against me prohibited the Nixon administration, the government, from wiretapping without judicial approval. Henry said, “My goodness, I would never have believed it.”235

In addition to securing privacy rights, Sinclair exemplifies the importance of an independent judiciary. Author Joseph C. Goulden reflected on Judge Keith’s contribution to the independence of the judiciary in the following excerpt from his book, The Benchwarmers:

Keith’s action . . . is a prime example of an independent Federal Judge interposing his authority between an executive action and the general citizenry. As the public knows through

235. WASHINGTON, supra note 44, at 115.
the various Watergate-released disclosures, the Nixon administration had grandiose schemes for surveillance of domestic "enemies," political and otherwise; warrantless wiretapping of the sort used against [one of the plaintiffs in *Sinclair*] was a key weapon. But Judge Damon Keith, a jurist not answerable to a presidency which likened itself to a "sovereign" had the courage to say "no"... 

The strength of the judiciary is rooted in just such independence as that displayed by Keith.236

In remarking on the case, Judge Keith stated "I feel honored as a federal district judge to have made a ruling that protects the rights of all Americans. This is a country of laws and not of men. No one is above the law. That's what makes this country so great."237

B. Prosecutorial Misconduct

In *United States v. Blanton*, Judge Keith's sense of justice remained vigilant even in the face of a governor whose administration reeked of corruption.238 There, former Governor Leonard R. Blanton was charged and convicted of various violations after he arranged for friends to receive liquor licenses from the state of Tennessee.239 True to form, Judge Keith expressed his concerns for justice stating "[t]his case, however, concerns something that is more important and fundamental—a man's liberty and his right to a fair trial. Under our system of justice, everyone, including an allegedly corrupt ex-governor, is entitled to a fair trial before a fair and impartial jury of his peers—no more and no less."240

In another example of Judge Keith's sensitivity to prosecutorial misconduct, and also in light of recent accusations of mishandled

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238. 719 F.2d 815 (6th Cir. 1983) (Keith, J. dissenting).
239. *See id.* at 817.
240. *Id.* at 846 (Keith, J. dissenting).
investigations involving President Clinton, United States v. Bess, further exemplifies Judge Keith's sensitivity toward justice and impartiality, specifically the rights of every citizen to a fair trial. In Bess, the United States Attorney's office had prosecuted plaintiff for concealing and retaining scrap metal from a military reservation. During the trial, the United States Attorney, engaged in prosecutorial vouching stating that "[i]f the United States did not believe the defendant was guilty of committing these charges in the indictment, based on the evidence that has been presented to you, this case, of course, would have never been presented to you in the first place."

In admonishing the United States Attorney, Judge Keith wrote "[t]he function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial."

241. See Donna Abu-Nasr, Clinton Allies Call for Investigation to Cease, Starr to Go, ASSOC. PRESS POLITICAL SERV., Mar. 2, 1998 (quoting Sen. Patrick Leahy, D-Vt, "Starr has gotten totally out of control. He has this fixation of trying to topple the president of the United States. He's doing everything possible to do it.").
242. 593 F.2d 749 (6th Cir. 1979).
243. Id. at 749.
244. Id. at 753.
245. Id. at 754 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 648-49 (1974) (Douglas, J. dissenting)). As yet another example of Judge Keith's compassion for the wrongly abused, regardless of race, gender, religion, or class, Judge Keith wrote the following dissent in response to a police barricade that left a man, O'Brien, paralyzed:

Describing the unacceptable and outrageous actions taken by officers in this case as "reasonable" offends the competency and professionalism practiced by the overwhelming majority of officers across the nation. Recognizing O'Brien presented "no overt, hostile threat" and there was no probable cause to believe he committed any crime, only unreasonable and overzealous officers would harass and persecute O'Brien by surrounding his home and breaking its windows. In this case, the officers' refusal to obtain a warrant from a neutral and detached magistrate, despite the passing of several hours, resembles the self-righteous arrogance of a lynch mob. Unfortunately, the officers' overactive imaginations, irrational paranoia and aggressive conduct incited a scenario which left O'Brien paralyzed.

O'Brien v. City of Grand Rapids, 23 F.3d 990, 1006 (6th Cir. 1994).
VIII. AND JUSTICE FOR ALL: DIRECT EVIDENCE FOR DIVERSITY ON THE BENCH

President Jimmy Carter was the first Chief Executive to pledge expressly to increase the number of “women and minorities on the federal bench.”\(^{246}\) Despite this laudable goal, many view African American judges with suspicion and see them as a salve for narrow, parochial interests rather than a benefit to the judicial system as a whole.\(^{247}\) At the core of this suspicion lies the belief that only Whites are capable of impartiality. For example, in *Baker v. City of Detroit*,\(^{248}\) White police officers challenging the Detroit Police Department’s affirmative action plan sought to recuse Judge Keith allegedly because he was an acquaintance of one of the nominal defendants, African American Mayor Coleman Young. In rejecting the recusal motion, Judge Keith candidly remarked:

The reality of life is that only a small number of Black persons have been elevated to positions of responsibility in our national life. It therefore is highly likely, especially in a predominantly Black city like Detroit, that a Black Federal Judge would know, on a friendship basis, a Black Mayor.\(^{249}\)

Furthermore, Judge Keith identified the true basis of the recusal motion as premised not on his acquaintance with Mayor Young, but rather on his race:

The conclusion is inescapable that the likely grounds upon which plaintiffs’ motion is based is the fact that I am Black, that Mayor Young is Black, that this action was brought by White policemen seeking to challenge the affirmative action program in the Detroit Police Department. . . . \(^{250}\)

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\(^{247}\) See Ifill, *supra* note 17, at 118.

\(^{248}\) 458 F. Supp. 374 (E.D. Mich. 1978); see *supra* Part V.A.

\(^{249}\) *Baker*, 458 F. Supp. at 377.

\(^{250}\) Id.
Although the White police officers attempted to mask a critique of Judge Keith’s impartiality, Judge Keith was able to respond with an impeccable record of service on the federal bench. Judge Keith countered that the White police officers “can point to no instance in which this Court has conducted proceedings in this matter in anything but a fair and impartial manner.” 251 Furthermore, in another case in which Judge Keith presided, Judge Keith noted that in Bars & Stripes, the official publication of the Detroit Police Lieutenants and Sergeants Association, which was one of the plaintiffs in Baker, noted the following:

The (Lieutenants and Sergeants) Association owes much to Judge Damon Keith. Judge Keith displayed compassion, concern and fairness in acting as an arbitrator in this matter. 252

The allegory of the recusal motion in Baker and Judge Keith’s response exemplify evidence for diversity on the bench. In the face of racist critiques of impartiality, Judge Keith has countered with an impeccable record of sensitivity to both race and gender bias, and also justice. Judge Keith exemplifies the value of a diversified bench informed by a diversity of life experiences. Furthermore, the same power Judge Keith uses to resist hegemony has enabled him to fortify the rights of every citizen against extreme political pressure and death threats. The strength that enables him to be a Black man in the United States inspires his ability to protect the rights of all citizens. Rather than exhibiting partiality, Judge Keith has been an engine for equality for all citizens. Judge Keith’s personal experiences with hegemony have created in him a greater allegiance to the protection of rights. 253

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251. Id.
252. Id. at 378 (quoting 10 BARS & STRIPES July 1975, at 1-2).
253. In articulating the “feminist standpoint” theory, Nancy Hartsock suggests that because men and women occupy different material existences, the female standpoint is more adequate than that of males and better situates women to anticipate the consciousness of the next stage in the development of material society. See Nancy L. M. Hartsock, The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism, in FEMINISM & METHODOLOGY (Sandra Harding ed., 1987). Hartsock’s analysis is based on the Hegelian-Marxian analysis of classical Greek slave-holding society. The material existence of the master and slave enabled the slave to acquire a consciousness more adequate than the consciousness of the master. Slave-consciousness made the contradictions of the slave-holding society apparent. Slave-
Moreover, Judge Keith's hegemonically-informed consciousness is not isolated to race; rather, Judge Keith's keen awareness of injustice has also benefitted every citizen, including white privileged citizens. Despite racist critiques concerning the inability of Blacks to be impartial, Judge Keith is an example of a Black man using his sensitivity toward justice to benefit the rights of all. Moreover, the diversity that Judge Keith's presence brings to the bench has provided an example for our entire justice system. A presence which both practitioners and other judges have not only recognized, but applauded.

A. Impartiality Through Diversity

Because majority and minority groups occupy different social spaces and because knowledge is "socially positioned," majority and minority groups adhere to different epistemologies. This is not to say that all Blacks think exactly alike or all women think alike; however, race, gender, and class determine life experiences and inform perspectives. For example, competition for resources, acceptance of the status quo, and rejection of hegemony have all produced many perspectives that are sometimes sharply at odds with each other. The current attack on affirmative action programs reveals a deep racial divide. Most Whites

consciousness (stoicism) eventually became the universal consciousness of the next stage in the development of society, Roman Imperialism. See Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEXAS L. REV. 109, 210 n.296 (1991) (citing G.W.F. Hegel, *The Phenomenology of the Mind* 234-40 (J.B. Baille trans. 2d ed. Harper & Row 1967) (1807)) (stating "In the master, the bondsman feels self-existence to be something external, an objective fact; in fear self-existence is present within himself; in fashioning the thing, self-existence comes to be felt explicitly as his own proper being, and he attains the consciousness that he himself exists in its own right and on its own account . . . ").

Hartsock's material reality assumes the material reality of privileged white men, not underprivileged men of color. In Hartsock's analysis "power" is mislabeled "male" when what is meant is white male. However, with that critique aside, arguably the experience of material subordination at the hands of dominance, whether male, white, or both, creates a greater awareness of injustice. It is this awareness, informed by hegemony, that Judge Keith brings to the bench.


255. See Vargas, supra note 71, at 197-98.

256. See id.
oppose affirmative action as a policy of group quotas or preferences. Most racial minorities support affirmative action as a way to combat the hegemonic force of race. On the gender front, the media has helped to popularize the notion that men and women communicate and perceive differently, and that men and women have distinct values and different orientations toward problem solving.

Because different life experiences inform different ways of knowing, the bench should reflect this diversity. Moreover, pluralist communicative democracy embraces the value of including all members of the polity and treating them as equal, coparticipants in constructing the fundamental values of the polity. James Madison, in Federalist No. 39, emphasized inclusion of all the polity's members as fundamental to the constitution of democracy. Exclusion of significant sectors of a polity "degrade[s] . . . the republican character" of the government, because

257. See id. at 155 (citing Affirmative Action: Republicans Praising Supreme Court's Ruling, ATLANTA J. CONST., June 13, 1995, available at 1995 WL 6529562 (reporting that close to 80% of [W]hites expressed the view that "qualified minorities should not receive preference over equally qualified [W]hites"); see also DINESH D'SOUZA, THE END OF RACISM PRINCIPLES FOR A MULTIRACIAL SOCIETY 215 (1995) (arguing that affirmative action is equivalent to group quotas); DANIEL YANKELovich, HOW CHANGES IN THE ECONOMY ARE RESHAPING AMERICAN VALUES, IN VALUES AND PUBLIC POLICY 16, 29-33 (Henry J. Aaron et al. eds., 1994) (advocating that because Americans value individualism and meritocracy highly, policy makers should reconsider affirmative action policies)).


259. See Vargas, supra note 71, at 155-56 (1999) (citing JOHN GRAY, MEN ARE FROM MARS, WOMEN ARE FROM VENUS at 59-91 (1992)) (teaching couples how to communicate better in light of gender differences); Malcolm Gladwell, Listening to Khakis; What America's Most Popular Pants Tell Us About the Way Guys Think, THE NEW YORKER, July 28, 1997, at 54 (discussing how Levi Strauss & Co. marketed its Dockers collection by focusing on the way men talk to each other); Deborah Tannen, How to Give Orders Like a Man, N.Y. TIMES, Aug. 28, 1994 (Magazine), at 46 (challenging the assumption that talking in an indirect way, which is characteristic of women's mode of communication, reveals character flaws); CAROL GILIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (analyzing through psychological research and literary texts the different modes in which men and women describe the relationship between self and other)).

260. See Vargas, supra note 71, at 197-98.
“[i]t is essential to a [republican] government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it.”261

Judicial decision-making is most effective, conscious, and representative when it is informed by the variety of perspectives and qualities that race, gender, and class generate. To that degree, structural impartiality is realized through the interaction of diverse viewpoints on the bench and the resulting decreased opportunity for one perspective to dominate consistently judicial decision-making.

Judge Keith’s presence on the bench demonstrates the most compelling reasons for diversity among judges. He paradigmatically exemplifies racial diversity in the courts promoting, rather than undermining, impartiality.262 The hegemonic force of race not only informs his life, but also the opinions he expresses on the bench. Thus, he promotes impartiality because his presence negates the possibility of any viewpoint, perspective, or set of values that is not informed by life experiences shaped by the brunt of hegemony from persistently dominating legal decision making. In fact, his presence functions as a check on bias.263 Judge Keith’s jurisprudence demonstrates that increased diversity enhances the judiciary’s understanding of complex public policy issues, such as securing and retaining employment, education, and housing.

Furthermore, Judge Keith has demonstrated that minority judges not only decrease both racial and gender bias in the courts, but also increase the level of sensitivity to injustice generally. His opinions establish that racial minorities bring a legal acumen to the bench that is enhanced by marginalization, but not limited to issues solely involving race. Judge Keith’s presence on the bench demonstrates that, given the subordinated role of minorities in the social, economic, and political life of our country, increasing racial diversity on the bench results in the inclusion of alternative perspectives reflective of other kinds of subordination—such as gender and class.264 Moreover, Judge Keith’s sensitivity toward justice has protected every citizen, rich and poor,

262. See generally Ifill, supra note 17, at 119.
263. See generally id. at 120.
264. See generally id. at 121-22.
from the dangers of unrestrained power in the hands of government.

B. A Role Model for the Bench

Judge Keith has not only educated his colleagues through the example he sets, but also by informal as well as formal exchanges. Aside from the manifestation of his character and sensibility in his judicial opinions, other practitioners have gone on record to attest to Judge Keith's gentlemanly-like quality. An ongoing theme in the many accolades paid to Judge Keith is his sensitivity and commitment to treating everyone under all conditions with basic human courtesy and respect. As an example, in his autobiography, MY LIFE AS A RADICAL LAWYER (1994), William M. Kunstler described his appearance before Judge Keith in the White Panther case, United States v. Sinclair, as follows:

In Chicago, where Judge Hoffman turned off and didn't want to deal with anything and the marshals in the courtroom were often confrontational, the defendants reacted accordingly. But the White Panther case was very different. I am often asked how judges can stop disruptive trials. One answer is to have more judges like Damon Keith. On the first day of trial, he called the prosecutors and defense lawyers into his chambers for a conference; he served, as I recall, very delicious buns and coffee. He broadly hinted to Len and me that he did not expect this trial to be similar to Chicago. We assured him that unless we had the same type of provocations that permeated the Chicago trial, we didn't expect any difficulties.

In a similar vein, of the many accolades that Judge Keith holds dear, one of the most telling came from a juror. The unnamed juror sat through an eight-month trial and twenty-seven hours of deliberations regarding the notorious "Tony Jack" Giacalone, an alleged mafia kin pin. In remarking on the deliberations, the juror said, "[i]t was painful, really hard, but we tried to be as fair and honest as we believed the

266. Littlejohn, supra note 40, at 329.
judge was during the trial."\textsuperscript{267}

In remarking on Judge Keith's innate sense of fairness to everyone, including an alleged mafia boss, Giacalone's own defense attorneys' echoed such praise when "they said repeatedly on the record that their client was getting a fair trial."\textsuperscript{268} Judge Keith himself has remarked:

I am constantly alert to treat the lawyers who appear before me with the dignity and respect they deserve as officers of the court—something that Black lawyers often didn't get when I practiced. In my [thirty-two] years on the bench, I have never held nor threatened to hold a lawyer or anyone else in contempt of court.\textsuperscript{269}

In addition to his diplomatic and gentlemanly character on the bench, Judge Keith has set an example for diversity in his own hiring selections. He has employed and mentored more than twenty-five female law clerks\textsuperscript{270} and more than fifty law clerks of color, more than

\textsuperscript{267}. Robert Ankeny, \textit{Judge Keith Praises Giacalone the Trial Juror}, DET. NEWS, May 7, 1976, at 4A. As another example of Judge Keith's demeanor on the bench, Cynthia Grant, a juror, wrote the following to Judge Keith:

As a recent federal court juror, I found the experience both stimulating and enlightening... Although I learned a great deal about our federal court system, the highlight of my service was the opportunity to serve as a juror in your court... Your sense of fairness, respect and consideration for all concerned was evident throughout the proceedings. Having seen you in action it is not difficult to understand why you are Chief Judge of the Federal District Court. Yours is an example all can learn from.

Letter from Cynthia J. Grant (July 8, 1976).

\textsuperscript{268}. Ankeny, \textit{supra} note 267, at 4A.

\textsuperscript{269}. Littlejohn, \textit{supra} note 40, at 329.

\textsuperscript{270}. As another example of Judge Keith's commitment to equality, one of his prized letters is from Ginger Kent. On June 18, 1997, Ms. Kent wrote to thank Judge Keith for his ruling in a case, which the Sixth Circuit later affirmed, \textit{Morris v. Michigan State Bd. of Educ.}, 472 F.2d 1207 (6th Cir. 1973). In \textit{Morris}, two high school girls challenged a Michigan regulation, which prohibited them from playing in interscholastic athletic contests with boys. \textit{Id.} at 1207. In response, Judge Keith enjoined the state agency promulgating the regulation from: "Preventing or obstructing in any way the individual plaintiffs or any other girls in the State of Michigan from participating fully in varsity interscholastic athletics and athletic contests because of their sex." \textit{Id.} at 1208. The Sixth Circuit modified Judge Keith's order to exclude contact sports. \textit{Id.} at 1209.

In response to Judge Keith's ruling, Ms. Kent wrote the following:
any other federal judge in the history of our nation. Where some judges have argued that they cannot find qualified law clerks of color, Judge Keith has employed law clerks spanning the entire globe, including Caucasian, Jewish, Chaldean, Ethiopian, Nigerian, Korean, Indian, and African American. As a direct result of his tutelage, all of his law clerks, regardless of race, ethnicity or gender, have inherited a legacy of penetrating and sophisticated legal analysis, coupled with principled commitment to justice and equality.

As an example of Judge Keith's legacy and lived commitment to equality, in her book *Lift Every Voice*, Harvard law professor Lani Guinier recalls how one day in court, Judge Keith instructed a panel of jurors to begin deliberations by choosing a foreman and a spokesman. Later, when Judge Keith returned to his chambers, there was a note on his desk from one of his law clerks (Guinier) discreetly suggesting that this esteemed, veteran jurist modify his language and use "foreperson" or "spokesperson" next time because that might help jurors think about

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I am writing this letter to invite you to lunch to thank you for a judgment you made 25 years ago in Detroit. You may not remember it, but you enforced Title IX with respect to two of my friends in Ann Arbor whose high school did not have a girls' varsity tennis team. They sued, under Title IX, to be allowed to play on the boys varsity team and won in your court. You later approved making it a class action judgment. I attended the class action hearing in downtown Detroit which was my first experience in a courtroom.

To make a long story short, after much pressure, my high school, Grosse Pointe South, allowed me to play on the boys varsity team where I earned my varsity letter. I later went to Wellesley College, University of Michigan for business school and today am President of Global Marketing and Product Development of Hasbro Corporation, a toy company.

Letter from Ginger Kent, President of Global Marketing and Product Development, to Honorable Damon J. Keith (June 18, 1997).


272. See id.


274. See Trevor W. Coleman, *Judge Keith Takes the Law's Insight and Lets It Live Fairly for All*, DET. FREE PRESS, June 2, 1998, at 8A.
selecting a woman. Some judges might have been indignant at such a suggestion from a lowly clerk. Others might have dismissed it as an ambitious young lawyer being hypersensitive or too politically correct. Not Judge Keith. He took the advice and complimented Guinier on her assertiveness. In reflecting on the incident, Guinier wrote "Judge Keith tried to teach all his law clerks to respect the rule of law, 'but to realize it is a changing thing.' That's why he liked my note: It showed 'sensitivity' and awareness of the need for change, even in our most basic speaking."

Judge Keith's colleagues on the bench have also recognized his lived commitment to equality. In presenting Judge Keith with the Edward J. Devitt Award for Distinguished Service to Justice, which honors a federal judge who has achieved an exemplary career and has made significant contributions to the administration of justice, United States Circuit Court of Appeals Judge Peter Fay noted:

One cannot be around Damon for very long without sensing his commitment to all that is good about our country. But, unlike many, he does not limit his commitments to words—his actions speak volumes. He gets involved. He spends time. He does work. Yes, he gets his hands "dirty" because there is nothing he will not do if he is convinced it will help others and strengthen our way of life.

In addition to countless accolades from colleagues and practitioners,

275. See id.
276. See id.
277. See id.
278. Daily Briefing, DET. LEGAL NEWS, Mar. 25, 1998. In yet another accolade, civil rights leader and recipient of the Presidential Medal of Freedom, Oliver W. Hill, Sr., writes the following of Judge Keith in his autobiography THE BIG BANG THEORY:

I have enjoyed a close and longstanding friendship with Judge Damon Keith of the United States Court of Appeals for the Sixth Circuit. For example, one of his early judicial opinions which was affirmed by the court of appeals and the U.S. Supreme Court contributed to Nixon's exit from the Presidency. In 1998, Damon won the prestigious Edward J. Devitt award conferred by federal judges upon their colleagues. His forceful, thoughtful and direct approach to legal issues confronting him as a jurist has made him one of the greatest judges of this century.

Judge Keith's most enduring legacy may be the "Damon J. Keith Law Collection of African-American Legal History, Wayne State University," founded by Judge Keith. The collection, a central depository for the nation's African-American legal history, documents the contributions of Black lawyers and judges to the struggle for equality. It contains the substantial historical accomplishments of African-American lawyers and judges with more than a century of records, documents, photographs, personal papers, memorabilia, and interviews. In remarking on the purpose and importance of the collection, Judge Keith stated:

I can think of no other place in the world where researchers, students, and others will be able to take advantage of a central repository with more than a century of records, documents, photographs, and personal papers that may have in many ways impacted American lifestyles.

I am finding it more and more significant that young African-Americans are not familiar with the struggles that went on years ago. They don't seem aware that they are now standing on the shoulders of giants who sacrificed and went to jail for their rights. We should have a depository where people can come in and ask questions and have them answered.

As further evidence of his triumph over hegemony, Judge Keith has received numerous award and recognitions, including, but not limited to:

2. President of the Detroit Housing Commission 1958-1967
3. In 1967, President Lyndon B. Johnson appointed Judge Keith to the United States District Court for the Eastern District of Michigan, where he was Chief Judge from 1975 to 1977.
4. From 1971 to 1990, Ebony Magazine selected Judge Keith as

279. The collection, which has raised well in excess of $2 million and has its own archivists and director, is the only one of its kind in the country.
281. De Simone and Brand-Williams, note 57, at 14A.
one of the "One Hundred Most Influential Black Americans."

5. In 1974, the Detroit Board of Education dedicated one of its primary schools in Judge Keith's honor, naming it "The Damon J. Keith Elementary School."


7. In 1976, Judge Keith traveled to the former Soviet Union to show support for the Soviet Jewish Refusniks. 282

8. "In 1985, Chief Justice Warren Burger appointed Judge Keith as the Chair of the Committee on the Bicentennial of the Constitution of the Sixth Circuit. Two years later, Chief Justice William Rehnquist appointed him the National Chair of the Judicial Conference Committee on the Bicentennial of the Constitution. In 1990, President George Bush, in recognition of Judge Keith's contributions to the development of constitutional law, appointed him to the Commission on the Bicentennial of the Constitution." 283

9. "Under Judge Keith's leadership, over three hundred Bill of Rights plaques have been placed in courthouses and law schools throughout the United States and Guam. In October 1991, the Commission on the Bicentennial of the Constitution in celebration of the Bill of Rights held a three-day conference that included over 350 federal judges, the largest gathering of the federal judiciary in American history. For his work as Chair of the Judicial Conference Committee, Judge Keith received a special resolution of commendation from the Judicial Conference. He was also the Chair of the Fortieth Anniversary Conference of Brown v. The Board of Education, held May 17-18, 1994 at the College of William Mary, Marshall-Wythe School of Law." 284

10. "Judge Keith's peers within the nation's leading civil rights and service organizations have also recognized his devotion to the Constitution and equality under law. In 1974, he was a

282. In reflecting on Judge Keith's support of the Soviet Jewish Refusniks, Natan Sharansky, a Refusnik leader and organizer, wrote "[y]our help and support ever since we first met in Moscow all those years ago has been a vital part of the campaign which has now succeeded in bringing me home." Letter from Natan Sharansky, July 16, 1986.

283. Littlejohn, supra note 40, at 335.

284. Id.
recipient of the NAACP’s prestigious Spingarn Medal. Other Spingarn winners include: Justice Thurgood Marshall; Dr. Martin Luther King, Jr.; and the ‘Mother of the Civil Rights Movement,’ Mrs. Rosa Parks. The Spingarn Award notes particularly Judge Keith’s decisions in the ‘Keith Case’ and the ‘Detroit Edison Case,’ which in addition to providing new job opportunities for Black workers, was, at the time, the largest damage settlement in an employment discrimination case against a single company.

11. In 1988, he was the co-recipient with General Colin Powell of the One Nation Award from the Patriots Foundation in Washington, D.C. Also in 1988, Judge Keith received the Distinguished Public Service Award of the Anti-Defamation League of B’nai B’rith for his humanitarianism and commitment to equality.

12. In 1992, the National Bar Association honored Judge Keith with the C. Francis Stratford Award.

13. In 1997, Judge Keith received the American Bar Association’s Thurgood Marshall Award. The award, named in honor of the late Supreme Court justice goes annually to a nominee with a history of substantial and long-term contributions to the advancement of civil rights, civil liberties, and human rights in the United States. Judge Keith the recipient, the ABA said:

14. Judge Keith represents the best in the legal profession. His work reflects incisive analysis of issues, principled application of laws and the Constitution, passionate belief in the courts’ role in protecting civil rights, a commitment to community service and, most significantly, an independence of mind to do what’s right that is at the core of his view of professional responsibility. There is no better role model today for lawyers and law students seeking to work for equal justice.

15. In 1998, Judge Keith received the Detroit Urban League’s Distinguished Warrior Award. He also received the Edward J. Devitt Award for Distinguished Service to Justice. The Devitt

285. Id. at 336.
286. Judge Collects Legal Honors For Everyone To See, Service, DET. FREE PRESS, May 11, 1997, at 5E.
Award annually honors a federal judge who has achieved an exemplary career and has made significant contributions to the administration of justice, the advancement of the rule of law, and the improvement of society as a whole. In addition, the Damon J. Keith Law Collection of African-American Legal History founded the Marching Toward Justice exhibit, a tribute to Justice Thurgood Marshall. The exhibit informs the public about the fundamental importance of the Fourteenth Amendment and the ongoing quest to realize equality.²⁸⁷ The exhibit chronicles the United States history of promoting justice and equality for some, while condoning the enslavement of others. As the exhibit demonstrates, although the philosophy of “justice and equality for all” is the founding principle of the nation, in practice, the nation long denied due process and equal protection to African Americans under the law.

16. In 2000, Judge Keith received the Turner Broadcasting Systems Trumpet Award, for those African Americans whose achievements in their fields, coupled with their humanitarian and community-oriented efforts, have helped create a better society.

17. As of the publishing of this Article, Judge Keith has received 38 honorary degrees from colleges and universities across the country.

In sum, Judge Keith’s experiences of marginalization have informed a jurisprudence that not only acts as a check on race and gender equality, but also on the abuse of power by a government toward all of its citizens. Rather than catering to only a narrow set of interests, Judge Keith has participated in securing the rights of all citizens. His sensitivity toward justice has set a shining example for both colleagues and practitioners alike. Judge Keith’s example has not gone unnoticed.

²⁸⁷ On February 3, 1999, the exhibit opened at the Thurgood Marshall Federal Judiciary Building in Washington D.C. President Bill Clinton, Mrs. Thurgood Marshall, and Rosa Parks were all in attendance. It then traveled to New York City, New York; Philadelphia, Pennsylvania, and Newark, New Jersey. In 2000, it traveled to Harvard University in Cambridge, Massachusetts and Cleveland, Ohio. Also in 2000, it toured both Los Angeles and San Francisco, California. In 2001, the exhibit toured Chicago, Illinois at the Museum of Science and Industry; Topeka, Kansas; Dallas, Texas; Kansas City, Missouri; Milwaukee, Wisconsin; and St. Croix, Virgin Islands. On May 17, 2002, the exhibit opened at Vanderbilt University.
Unlike judges who deny as judges that which they know as men, Judge Keith has resisted the fallacy of distorting social reality when fashioning legal formula. Instead, he has developed a method of legal adjudication that gives facts meaning by contextualizing them within their historical context, and specifically in the relevant history of power imbalance. At a time when just about all civil rights groups, poor people and people of color absolutely fear going into the federal courts for relief from injustice and bias, Judge Keith’s legacy reminds us of his tireless and effective struggle for equality. In describing his unyielding commitment to equality, Judge Keith often quotes Edwin Hall:

I am only one, but still I am one.
I cannot do everything, but I can do something, and because I cannot do everything,
I will not refuse to do what I can.

Judge Keith’s legacy offers insight into the heart and mind of an individual whose lived experiences of racist hegemony have informed an acute sensitivity toward power and justice. He has remained steadfast in his belief that the United States belongs to all its citizens—regardless of race, gender, class, religion, or background. Throughout his career, Judge Keith has held high this light of basic, simple justice for all. He has brought honor on the system he serves. Both his life and legal legacy breathes life into the immortal words etched in marble on the United States Supreme Courthouse—“equal justice under law.” Judge Keith’s tenure as a federal judge has been devoted to making those words a reality for everyone.