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## Article

### Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection”

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*Twenty years ago, Professor Charles Lawrence wrote “The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism.” This article is considered a foundational document of Critical Race Theory and is one of the most influential and widely cited law review articles. The article argued that the purposeful intent requirement found in Supreme Court equal protection doctrine and in the Court’s interpretation of antidiscrimination laws disserved the value of equal citizenship expressed in those laws because many forms of racial bias are unconscious. Professor Lawrence suggested that rather than look for discriminatory motive, the Court should examine the cultural meaning of laws to determine the presence of collective, unconscious racism. In this Article, Professor Lawrence discusses the origins and impact of his groundbreaking article. He notes that while an increasingly conservative Supreme Court majority has ignored his call to recognize the presence of unconscious racism and to consider the meaning of cultural text, an important body of research and scholarship has emerged to substantiate his assertion concerning the ubiquity of unconscious racial bias. He applauds the work that has advanced our understanding of unconscious bias, but he expresses concern that this scholarship’s focus on the mechanisms of cognitive categorization rather than on the history and culture of racial subordination embedded in our unconscious may have undermined the central lesson of his article: to advance the understanding of racism as a societal disease and to argue that the Constitution commands our collective responsibility for its cure.*

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# Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection”

CHARLES LAWRENCE III\*

## PROLOGUE

The Headline reads, “Justices Limit the Use of Race in School Plans for Integration.”

*WASHINGTON, June 28—With competing blocs of justices claiming the mantle of Brown v. Board of Education, a bitterly divided Supreme Court declared Thursday that public school systems cannot seek to achieve or maintain integration through measures that take explicit account of a student’s race.*

*Voting 5 to 4, the Court, in an opinion by Chief Justice John G. Roberts, Jr., invalidated programs in Seattle and metropolitan Louisville, Ky., that sought to maintain school-by-school diversity by limiting transfers on the basis of race or using race as a “tiebreaker” for admission to particular schools.*

*Both programs had been upheld by lower federal courts and were similar to plans in place in hundreds of school districts around the country. Chief Justice Roberts said such programs were “directed only to racial balance, pure and simple,” a goal he said was forbidden by the Constitution’s guarantee of equal protection.*

*“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” he said. His side of the debate, the chief justice said, was “more faithful to the heritage of Brown,” the landmark 1954 decision that*

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*declared school segregation unconstitutional.*<sup>1</sup>

I am in Hawaii, six time zones away from the scene of the crime. Our *New York Times* will not arrive until evening, and I'm reading this news on my web browser. I sit staring at the screen, trying to figure out what I'm feeling. I'm stunned and disappointed, but it's much more than that. I feel assaulted, as if someone has caught me by surprise and hit me in the gut. I'm trying to catch my breath, to gather my wits, to pull myself together before this guy hits me again. I'm angry at myself, thinking, "What's wrong with you, Lawrence? Why are you letting this thing get to you?" It's not like it was a sneak attack. I'd seen it coming from the moment I'd heard the Court had taken cert.<sup>2</sup> Back in December I'd sat in my office and listened to the oral argument. I could hear the Court majority's commitment to white supremacy, as much in their voices as in the content of their questions.<sup>3</sup> I could have written Chief Justice Roberts's opinion that very day—the rape of *Brown v. Board of Education* and the claim that she had consented,<sup>4</sup> the assault on her already badly beaten body,<sup>5</sup> and the

<sup>1</sup> Linda Greenhouse, *Justices, Voting 5-4, Limit the Use of Race in Integration Plans*, N.Y. TIMES, June 28, 2007, at A1, available at LEXIS, News Library, NYT File.

<sup>2</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005), cert. granted, 75 U.S.L.W. 3018 (U.S. June 5, 2006) (No. 05-908), *Meredith v. Jefferson County Bd. of Educ.*, 416 F.3d 513 (6th Cir. 2005), cert. granted, 75 U.S.L.W. 3018 (U.S. June 5, 2006) (No. 05-915).

<sup>3</sup> See Charles R. Lawrence III, *Anatomy of an Oral Argument: The Racial Meaning of Things Said and Unsaid*, 69 OHIO ST. L.J. (forthcoming 2008) (exploring the cultural meaning of the texts—and silences—of the oral arguments in *Parents Involved in Community Schools* and *Meredith* to ask how the Court conveys its belief in white supremacy even as it requires that we not speak “out loud” about race and racism) (on file with author and Connecticut Law Review).

<sup>4</sup> Writing for the majority, Chief Justice Roberts claimed the mantle of *Brown* to strike down the school integration programs. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2765 (2007) (“Again, this approach to racial classifications is fundamentally at odds with our precedent, which makes clear that the Equal Protection Clause ‘protect[s] persons, not groups’ . . . . This fundamental principle goes back, in this context, to *Brown* itself.”) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)) [hereinafter *PICS*]. Not content with misrepresenting the court's own precedent, the Chief Justice claimed that Thurgood Marshall and the team of lawyers who argued *Brown* embraced his reading of the of the Equal Protection Clause. See *id.* at 2767 (“The parties and their amici debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: ‘[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.’”).

<sup>5</sup> The Supreme Court had already retreated from its commitment to integration. See generally Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461 (2003) (noting the Supreme Court's role in hindering desegregation efforts); GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996). For example, in *Milliken v. Bradley*, the Court held that Detroit could not remedy its *de jure* segregation through a school integration plan that included surrounding white suburbs unless the suburbs had also perpetrated *de jure* segregation. *Milliken v. Bradley*, 418 U.S. 717, 721–22, 744–45 (1974); see generally Charles R. Lawrence III, *Segregation “Misunderstood”: The Milliken Decision Revisited*, 12 U.S.F. L. REV. 15 (1977). The Court further demonstrated its disregard for integration in a series of cases lifting desegregation orders even when the effect of lifting the order

defamation of her principles and of those who had labored for her birth.<sup>6</sup> I could see it coming like a tidal wave, like the torches of the Klan riding in the night. Why, then, was I caught with my guard down, so poorly defended? Why, even now, was I trying to figure out what hit me? Why was I feeling as if I too had been beaten and violated?

## I. INTRODUCTION

The editors of the Connecticut Law Review have done me a great honor. They have assembled an esteemed group of judges, litigators, activists, and scholars and asked that they consider whether an article that I wrote twenty years ago may have asked a question, begun a conversation, or offered an insight that has influenced their own good work or had an impact on the way we think about law, science, the human mind, race, and power. They have asked me to open this retrospective by reflecting upon and evaluating my own work. I find this task more than a little daunting. I understand that if I have gained some status as an elder among constitutional scholars and Critical Race Theorists,<sup>7</sup> I may have done so primarily through my efforts and good fortune to just stay alive. But staying alive is no mean task for a black man in America,<sup>8</sup> so I'll gladly

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would cause resegregation. See *Missouri v. Jenkins*, 515 U.S. 70, 100–02 (1995); *Freeman v. Pitts*, 503 U.S. 467, 495–96 (1992); *Board of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248 (1991). The result has meant the resegregation of American schools. See Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1622 (2003) (“Tragically today, America has schools that are increasingly separate and unequal.”).

<sup>6</sup> See *PICS*, 127 S.Ct. at 2782 (“[M]y view was the rallying cry for the lawyers who litigated *Brown*.”).

<sup>7</sup> My life's work is writing and teaching about constitutional law and critical race theory. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 327–28 (1987) [hereinafter Lawrence, *The Id, the Ego, and Equal Protection*]; Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 437–38 [hereinafter Lawrence, *If He Hollers Let Him Go*]; CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 5–7 (1997). This work is heavily cited in judicial opinions and scholarly writing. See Ian Ayres & Fredrick E. Vars, *Interpreting Legal Citations: Determinants of Citations to Articles in Elite Law Reviews*, 29 J. LEGAL STUD. 427, 432–33, 434 (2000) (listing *The Id, the Ego, and Equal Protection* as the first or second most-cited law review article of all-time); Fred R. Shapiro, *The Most-Cited Legal Articles Revisited*, 71 CHI.-KENT L. REV. 751, 769, 777 (1996) (listing *The Id, the Ego, and Equal Protection* as the sixty-first most cited law review article of all-time and *If He Hollers Let Him Go* as one of the most-cited articles published in 1990); see, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 332–33 (1987) (Brennan, J., dissenting) (quoting *The Id, the Ego, and Equal Protection*); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1496 (2005); Frank I. Michelman, *Brown at Fifty: Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378, 1383 n.30 (2004); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1351, 1355 (1991).

<sup>8</sup> Blacks bear a disproportionate risk of disease, injury, death, and disability in the United States. CDC, HEALTH DISPARITIES EXPERIENCED BY BLACK OR AFRICAN AMERICANS: UNITED STATES, 54

take credit, if only for that.

This essay seeks to understand and articulate the injury that racism or white supremacy and its reiteration in the law does to African Americans, to other people of color, and ultimately to us all. I have tried to make this work my vocation.<sup>9</sup> As teacher, activist, and scholar I have aspired to the tradition of radical teaching that historian Vincent Harding has named “The Word.”<sup>10</sup> “The Word” articulates and validates our common experience. It seeks the reasons for oppression. It is the practice of struggle against dehumanization. This is the tradition that inspired my work in 1987, and it guides my effort in this essay. I cannot reflect on *The Id, the Ego, and Equal Protection* outside of the context of this larger vocational aspiration.

I begin this piece, as I did *The Id, the Ego, and Equal Protection*, with narrative.<sup>11</sup> In both narratives I am considering a text, and in each narrative I tell of my response to the text, of the thoughts and feelings the text evokes. Both texts are filled with racial images. The exaggerated broad noses, thick lips, and unkempt hair on the visages of Little Black Sambo and his parents, Mumbo and Jumbo, reveal the consciously embraced white supremacist ideology of the late 19th century, when the

MORBIDITY AND MORTALITY WEEKLY REPORT 1 (2005), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5401.pdf>; CDC, HEALTH, UNITED STATES, 2004, at 147 tbl.29 (2004), available at [http://www.cdc.gov/nchs/data/04trend.pdf#03](http://www.cdc.gov/nchs/data/hus/04trend.pdf#03). In 2004, the life expectancy for black males in the United States was 69.5 years, compared to 75.7 years for white males. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 76 tbl.101 (2008), available at <http://www.census.gov/prod/2007pubs/08abstract/vitstat.pdf>. Blacks also experience significantly higher infant mortality rates. *Id.* at 82 tbl.109; CDC FACT SHEET, RACIAL/ETHNIC HEALTH DISPARITIES (Apr. 2, 2004), available at <http://www.cdc.gov/od/oc/media/pressrel/fs040402.htm>.

<sup>9</sup> I explore this vocational aspiration in Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2236–37 (1992).

<sup>10</sup> See VINCENT HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA*, at xviii–xxi, 82 (1981) (recounting the history of black radicalism in America).

<sup>11</sup> The prologue to *The Id, the Ego, and Equal Protection* begins with the following description of my experience as a kindergartener at a predominately white private school in New York:

It is circle time in the five-year old group, and the teacher is reading us a book. As she reads, she passes the book around the circle so that each of us can see the illustrations. The book’s title is *Little Black Sambo*. Looking back, I remember only one part of the story, one illustration: Little Black Sambo is running around a stack of pancakes with a tiger chasing him. He is very black and has a minstrel’s white mouth. His hair is tied up in many pigtails, each pigtail tied with a different color ribbon. I have seen the picture before the book reaches my place in the circle. I have heard the teacher read the “comical” text describing Sambo’s plight and have heard the laughter of my classmates. There is a knot in the pit of my stomach. I feel panic and shame. I do not have the words to articulate my feelings—words like “stereotype” and “stigma” that might help cathart the shame and place it outside of me where it began. But I am slowly realizing that, as the only black child in the circle, I have some kinship with the tragic and ugly hero of this story—that my classmates are laughing at me as well as at him. I wish I could laugh along with my friends. I wish I could disappear.

Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 7, at 317.

book first was published.<sup>12</sup> The story in the Court's opinion in *Parents Involved in Community Schools* (hereinafter "*PICS*") is also filled with the faces of Black children and their parents.<sup>13</sup> This contemporary text paints the black faces with the abstract language of constitutional doctrine. Words like "suspect classification," "compelling state interests," and "narrow tailoring" describe no noses or lips. Chief Justice Roberts says he sees no color (blackness) in these families' faces, except that which the school districts' plans have painted and the Constitution compels him to erase.<sup>14</sup> But I see the faces of the children who trigger racial tie-breakers and from whom white families flee.<sup>15</sup> I see the faces of the parents who

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<sup>12</sup> HELEN BANNERMAN, *THE STORY OF LITTLE BLACK SAMBO* (Grant Richards 1st ed. 1899).

<sup>13</sup> Of course, the heroine in Chief Justice Roberts's story is white—the white mother denied the chance to send her daughter to the school of her choice, the best school, the white school. The white victim of discrimination stands at center stage in Justice Roberts's story, but the black faces that stand offstage give the story meaning.

<sup>14</sup> Consider the following quotes from Chief Justice Roberts's opinion:

This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. We have many times over reaffirmed that "[r]acial balance is not to be achieved for its own sake."

*PICS*, 127 S.Ct. at 2757 (quoting *Freeman v. Pitts*, 513 U.S. 467, 494 (1992)).

"Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation's history of using race in public schools, and requires more than such an amorphous end to justify it." *Id.* at 2760.

"Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny." *Id.* at 2765.

"For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way 'to achieve a system of determining admission to the public schools on a nonracial basis' . . . is to stop assigning students on a racial basis." *Id.* at 2768 (quoting *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300–01 (1955)).

Roberts never mentions the race of the children he says have been "segregated," "classified," "assigned," "balanced," and "discriminated" against. In this way he separates each word from the context that gives them meaning.

<sup>15</sup> Segregation in public schools has been exacerbated by "white flight" from the urban housing market. In *PICS*, Justice Breyer noted in dissent that the school district integration plans were in part aimed to discourage "white flight." *PICS*, 127 S.Ct. at 2828 ("Nor could the school districts have accomplished their desired aims (e.g., avoiding forced busing, countering white flight, maintaining racial diversity) by other means."). Justice Breyer also cited a report describing the importance of the link between housing and education policy. Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, in *PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY* 121 (John A. Powell et al. eds. 2001). An amicus brief submitted by Housing Scholars and Research & Advocacy Organizations explained that "[w]ithout question, the federal government and individual housing authorities played an active and deliberate role in concentrating poverty in the racially segregated public housing they created" which has resulted in, among other things, segregated public schools. Brief for Housing Scholars and Research & Advocacy Organizations as Amici Curiae Supporting Respondents at 15, *PICS*, 127 S.Ct. 2738 (2007) (Nos. 05-908, 05-915); see also SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 103 (2004); Raymond A. Mohl, *Planned Destruction: The Interstates and Central City Housing*, in *FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA* 226, 226–45 (John F. Bauman et al. eds.,

know that no one will fix the leaking roof at their children's school or repair the toilets or teach advanced placement Calculus and Chemistry, unless there are also white children there.<sup>16</sup> I see the faces that Justice Roberts would render colorless, and they are black like my face. They, and I, look nothing like the characters in *Little Black Sambo*, but neither did our great grandparents in 1890.<sup>17</sup>

As I read each of these texts, I know I am not reading alone. The other children in my kindergarten class have seen how Sambo is portrayed and noticed his kinship to me.<sup>18</sup> Although few Americans will read the full text of the Chief Justice's opinion, most will hear some version of his story. The feelings of humiliation, anger, powerlessness, and disappointment I experience as I read the new desegregation decision are caused not so much by the text itself as by my knowledge that this text is read by a larger community and by the meaning that community will give it.

I first used the term "cultural meaning" in *The Id, the Ego, and Equal Protection*.<sup>19</sup> Although scholars most often read and cite the article for its introduction of the theories and science of unconscious motivation to the discussion of equal protection doctrine,<sup>20</sup> the cultural meaning of racial

2000) (describing how the Interstate Highway system destroyed low-income housing and helped further "residential segregation agendas"). Unfortunately, the Supreme Court has given short shrift to the importance of this link. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 748 (1974) (striking down a city's public school integration program because it involved surrounding white suburbs).

<sup>16</sup> See Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community* (A Continuing conversation with John Ely on Racism and Democracy) 114 YALE L.J. 1353, 1395 (2005) (discussing the ways that poor minority children who attend integrated schools benefit by the social and political capital that middle class and white parents bring to those schools); see also RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 47 (2001).

<sup>17</sup> Racial imagery and iconography has long been associated with racial ideology in the United States. See JANETTE LAKE DATES & WILLIAM BARLOW, SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA 3 (1990) (discussing the struggle to control images of African Americans in mass media in order to maintain the ideological hegemony of white supremacy); CATHERINE SILK & JOHN SILK, RACISM AND ANTI-RACISM IN AMERICAN POPULAR CULTURE (1990) (discussing the treatment of African American characters and themes in literature and film from the Civil War era to the mid 1980s); STERLING A. BROWN, THE NEGRO IN AMERICAN FICTION 1-4 (1969) (identifying racial stereotypes of African Americans in American fiction and noting the difference in treatment of African American fictional characters by white and black authors).

<sup>18</sup> See Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 7, at 317 ("[I] am slowly realizing that, as the only black child in the circle, I have some kinship with the tragic and ugly hero of this story—that my classmates are laughing at me as well as him.").

<sup>19</sup> See *id.* at 355-56 ("I propose a test that would look to the 'cultural meaning' of an allegedly racially discriminatory act as the best available analogue for and evidence of the collective unconscious that we cannot observe directly.").

<sup>20</sup> See, e.g., Charles F. Abernathy, *Legal Realism and the Failure of the "Effects" Test for Discrimination*, 94 GEO. L.J. 267, 268 n.4 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 n.11 (1995); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 22 (1991).



texts remains, for me, the central and most important idea in the article.<sup>21</sup> Perhaps I am at fault for giving the article a title that so provocatively evokes the outsized personage and controversial theory of Sigmund Freud, but my primary project in that article was not to explain or promote any particular theory of the unconscious.<sup>22</sup> Rather, I was most concerned with exploring how white supremacy is maintained not only through the intentional deployment of coercive power,<sup>23</sup> but also through the creation, interpretation, and assimilation of racial text.<sup>24</sup>

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<sup>21</sup> See Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 7, at 358 (“Indeed, construction of text is the most basic of judicial tasks. And while most judicial interpretation involves determining the meaning of written text, legal theorists have recognized that meaningful human behavior can be treated as a “text-analogue.”); see also *id.* at nn.188–89 (“In spoken discourse, the subjective intention of the speaker and the objective meaning of the discourse overlap, while with written discourse the meaning of the text is disassociated from the mental intention of the author and the two no longer coincide. Likewise, spoken discourse ultimately refers to the contextual situation common to the speaker and the listener. Texts, on the other hand, speak about the world. The text frees itself from the reference of the particular situation in which its author speaks and creates its own universe of references.”) (quoting PAUL RICOEUR & JOHN B. THOMPSON, *HERMENEUTICS AND THE HUMAN SCIENCES: ESSAYS ON LANGUAGE, ACTION AND INTERPRETATION* 200–02 (1981)).

<sup>22</sup> See Kang, *supra* note 7, at 1496 n.28 (“Lawrence’s work is consistent with the claims of this Article, broadly stated. Moreover, its exploration of unconscious racism, based on psychology, is a crucial intellectual precursor. However, social cognition is a very different psychology from that of Freud and psychoanalysis.”); Krieger, *supra* note 20, at 1164 n.11 (“Drawing on psychoanalytic theory, Professor Lawrence argues that much of what is classified as disparate treatment discrimination results from subconscious instincts and motivations.”).

<sup>23</sup> At the time, critical legal studies scholars were focusing on how legal ideology and consciousness induces consent to racial oppression. See Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1350–55 (1988) (“The concept of hegemony allows Critical scholars to explain the continued legitimacy of American society by revealing how legal consciousness induces people to accept or consent to their own oppression.”). This line of thinking ignored important aspects of racial domination through coercion. See *id.* at 1357 (“The Critics’ principal error is that their version of domination by consent does not present a realistic picture of racial domination. Coercion explains much more about racial domination than does ideologically induced consent. Black people do not create their oppressive worlds moment to moment but rather are coerced into living in worlds created and maintained by others.”).

<sup>24</sup> See generally R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 860 (2004) (“Minstrelsy—an entertainment form that showed white performers in blackface mocking the stereotypical black characters—produced additional stereotypes, to include the lazy, wise-cracking Sapphire woman and the elderly [sic], crippled, and shuffling Jim Crow. The Harlem Renaissance produced vastly improved (if still imperfect) depictions of African-American life, as did the Civil Rights movement and more recent efforts by African Americans and others in music, literature, and cinema. But the negative stereotypes and images far outnumber those that are positive and have proved far more enduring. One can see modern analogues of the Sambo, black beast, Jezebel, and Sapphire tropes in ads and television shows from the 1970s, 1980s, and even the 1990s.”); see also Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 56 (1994) (“Racial ideology, for example as embodied in segregation, powerfully sculpts communities in U.S. society.”); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S*, at 78 (1986) (noting the role of the state in racial formation and ideology); CLIFFORD GEERTZ, *Ideology As a Cultural System*, in *THE INTERPRETATION OF CULTURES* 193, 231 (Basic Books, Inc. 1973) (exploring

This Article revisits that exploration with the benefit of twenty years of hindsight. I begin with the origins of the article. My comrade in Critical Race theory, Professor Kimberlé Crenshaw, once asked, “What was it you hoped to do in writing this piece?” Part II answers that question. I explore personal, political, professional, and analytic motivations and goals, without drawing sharp lines of demarcation between these interrelated inspirations and purposes. In Part III I ask, “What have they done with my song?” What has this article wrought? How has it been received, understood, misunderstood, embraced, rejected and employed? What has been its influence, or lack thereof, on the Supreme Court, on dominant constitutional discourse and on the law’s response to the “American Dilemma”?<sup>25</sup> How have the ideas I introduced in this article been applied by social scientists, litigators, judges and other scholars?

Part III contains two subparts. In Part A, I offer an account and critique of how an increasingly conservative Supreme Court majority has not only ignored my scholarly intervention but has marched relentlessly and radically, not to mention intentionally, in the opposite direction of my call to give attention to the meaning of racial text.<sup>26</sup> This doctrinal march to re-segregation in the name of “colorblindness” culminates in the recent Seattle and Kentucky desegregation decisions.<sup>27</sup> In *The Id, the Ego, and Equal Protection*, I challenged the Court’s refusal in *Washington v. Davis* to ask whether there was constitutional injury in the cultural meaning of racially discriminatory impact. In *PICS*, the Court’s majority strikes down two voluntary school desegregation plans, asserting that *all* facially racial classifications must receive strict scrutiny. Chief Justice Roberts’s opinion for the majority offers no coherent explanation for this rule. Instead, he proclaims it settled doctrine. This rule gains authority through the Court’s power to proclaim its truth. It achieves the pretense of reason only by taking the question of racial meaning off the table. Desegregation can only inflict the same injury as segregation if we ignore the question of what each signifies. Only in this *Alice in Wonderland* world, where racial

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the nature of ideology in societies and defining ideology as “that part of culture which is actively concerned with the establishment and defense of patterns of belief and value”) (quotation marks omitted).

<sup>25</sup> See GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY lxxi (1962) (“The ‘American Dilemma,’ referred to in the title of this book, is the ever-raging conflict between, on the one hand, the valuations preserved on the general plane which we shall call the ‘American Creed,’ where the American thinks, talks, and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where personal and local interests; economic, social, and sexual jealousies; considerations of community prestige and conformity; group prejudice against particular persons or types of people; and all sorts of miscellaneous wants, impulses, and habits dominate his outlook.”).

<sup>26</sup> See *infra* notes 56–75 and accompanying text.

<sup>27</sup> See *PICS*, 127 S.Ct. 2738, 2767–68 (2007) (“What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?”).

classifications are devoid of meaning, can a remedy to the injury identified in *Brown v. Board of Education*<sup>28</sup> become the injury itself.<sup>29</sup>

Part B discusses some of the considerable and important body of research and literature that has emerged since the advent of my article. Cognitive psychologists have employed carefully constructed research and sound scientific methodology to substantiate my article's assertion that we are all influenced by racial bias, much of which we are unaware. Legal scholars, including Linda Krieger, Jerry Kang, Devon Carbado, and others<sup>30</sup> have drawn on this social science and made the work accessible to lawyers and civil rights activists who have, in turn, used it well to do the important political work of educating the courts and the public about the

<sup>28</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>29</sup> The incoherence and absurdity of the Court plurality's reasoning is made apparent by a line of questioning at oral argument in *Meredith v. Jefferson County Board of Education*. Justice Ginsburg asks plaintiffs counsel, Mr. Gordon, how the school district's desegregation system that he is challenging "compares with the system that was in effect from . . . 1975 until 2000." (A federal district court had ordered this plan as a remedy having found that the School District had unconstitutionally segregated its schools.)

Mr. Gordon: I'm sorry. It's the same remedial program that—this court has found . . . that when the remedial program has achieved its result we should no longer carve out that exemption under the Equal Protection Clause.

Justice Ginsburg: Do you think there's something of an anomaly there, that you have a system that is forced on the school that it doesn't want it, works for 25 years, and then the school board doesn't have to keep it any more, but it decides it's worked rather well, so we'll keep it. What's constitutionally required one day gets constitutionally prohibited the next day.

Transcript of Oral Argument at 4, *Meredith v. Jefferson County Bd. of Educ.*, 127 S. Ct. 2738 (2007) (No. 05-915). After Mr. Gordon fumbles through several unsuccessful attempts to answer Justice Ginsburg's question, Justice Scalia comes to his rescue.

Justice Scalia: Mr. Gordon, isn't it the case that once you've achieved unitary status, which means that the effects of past intentional discrimination have been eliminated, the only way you can lose unitary status is to discriminate intentionally? Isn't that right?

*Id.* Justice Souter then takes up the questioning asking if there is not an important difference between a court's finding of "unitary status" (a legal construction) and a "unitary condition" (a descriptive term). Justice Souter asks, "is the preservation of a unitary condition a legitimate or indeed a compelling governmental objective?" *Id.* at 5. Justice Breyer makes a final attempt to reveal the illogic of the legal fiction upon which the plaintiff's, and ultimately Justice Robert's plurality opinion rests.

Justice Breyer: Now, the question from a constitutional point of view that you're being asked is how could that Constitution which says that this is intolerable, that segregated school, and insists that the school boards in Swann and elsewhere take black children and white children and integrate them? How could the Constitution that day that that decree is removed tell the school board it cannot make that effort any more, it can't do what it's been doing and we'll send the children back to their black schools and their white schools.

*Id.*

<sup>30</sup> See, e.g., Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063, 1064–66 (2006); Kang, *supra* note 7, at 1493–95; Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1003–08 (2006); Krieger, *supra* note 20, at 1164–65.

role of the unconscious in discrimination. I express my gratitude for this good work. However, I argue that, while this scholarship's focus on the mechanisms of cognitive categorization has taught us much about how implicit bias works, it may have also undermined my project by turning our attention away from the unique place that the ideology of white supremacy holds in our conscious and unconscious beliefs. I find this outcome unfortunate, if unintended, as the ubiquity and invidiousness of racism was the central lesson of my article. I further express my fear that cognitive psychology's focus on the workings of the individual mind may cause us to think of racism as a private concern, as if our private implicit biases do not implicate collective responsibility for racial subordination and the continued vitality of the ideology and material structures of white supremacy. In its most extreme manifestation, this view of implicit bias, as evidence only of private, individual beliefs, is expressed as a right to be racist.<sup>31</sup> Part III closes by noting a paradox. The Court's use of legal formalism to repress our consciousness of racism has converged with psychologists' efforts to explain the origins of unconscious bias, and this convergence has served to undermine my article's chief purpose: to advance the understanding of racism as a societal disease and to argue that the Constitution commands our collective responsibility for its cure.

## II. THE ARTICLE'S ORIGINS: WHAT DID I HOPE TO DO?

I first met Professor Mari Matsuda<sup>32</sup> in 1981 at a small gathering of legal scholars of color at the University of Pennsylvania. I was presenting a work in progress that contained the seeds of the argument that became *The Id, the Ego, and Equal Protection*.<sup>33</sup> Professor Matsuda recalls that, in introducing that piece and explaining the process of its conception, I said, "I write so I know I'm not crazy." I do not remember saying this, but it is surely true. I may have also said, "I hope that my writing will help other people know that they are not crazy," for that has also been a primary motivation in my scholarship. I trace this motivation, and thus the origins

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<sup>31</sup> This seems to be the position taken by my colleague in this Symposium, Amy Wax, in her article and in an op-ed published in the Wall Street Journal. Amy Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979 (2008); Amy Wax & Philip E. Tetlock, *We Are All Racists At Heart*, WALL ST. J., Dec. 1, 2005, at A16, available at LEXIS, News Library, WSJNL File.

<sup>32</sup> Professor Matsuda and I have enjoyed a close professional and personal collaboration, having co-authored two books, LAWRENCE & MATSUDA, *supra* note 7, MARI J. MATSUDA, CHARLES LAWRENCE III, RICHARD DELGADO & KIMBERELE WILLIAMS CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993), and shared the joys and challenges of a loving marriage and two beautiful children.

<sup>33</sup> I first explored the ideas which eventually found voice in *The Id, the Ego, and Equal Protection*, when writing a review of David Kirp's book, *JUST SCHOOLS: THE IDEA OF RACIAL EQUALITY IN AMERICAN EDUCATION* (1982). Charles R. Lawrence III, "Justice" or "Just Us": *Racism and the Role of Ideology*, 35 STAN. L. REV. 831, 841-43 (1983).

of this article, to my experience in law school. I was one of only three black students in my first year class, and I recall expending considerable intellectual and emotional energy in an effort to maintain my sanity as I struggled to make sense of a discursive world that rarely reflected my lived experience. I did not have the work of Critical Race Theorists like Derrick Bell, Kim Crenshaw, Patricia Williams, Jerry Lopez, and Mari Matsuda to provide me with an analysis that explained the dissonance between that lived experience and the way the dominant legal discourse described the world.<sup>34</sup> So I wrote to keep from going crazy, to explain to myself and others why the legal analysis of race that my professors, and later my colleagues, presented as wise and just often struck me as foolish or evil. And, I wrote with the hope that in my own struggle to understand what was making me crazy I might help all of us understand the insanity of white supremacy.

*The Id, the Ego, and Equal Protection* was conceived in this struggle for sanity. I knew from my own intuition and experience that racism achieved its injury through the production and reproduction of hierarchy, power, and material conditions of subordination determined by race. I knew that this production of material and structural subordination is achieved not only through coercion<sup>35</sup> but also by the creation and transmission of an ideology that justifies those coercive practices and conditions. As Kendall Thomas has said, "We are raced."<sup>36</sup>

*The Id, the Ego, and Equal Protection* began as a critique of *Washington v. Davis*<sup>37</sup> and of the doctrine of discriminatory purpose

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<sup>34</sup> Although I did not have the benefit of the work of critical race scholars in the legal academy, I was taught and inspired by a host of critical race scholars including Herbert Aptheker, James Baldwin, Gwendolyn Brooks, Harold Cruz, Martin Delany, Fredrick Douglas, W.E.B. Dubois, St. Clair Drake, Frantz Fanon, John Hope Franklin, Lorraine Hansberry, Langston Hughes, Zora Niel Hurston, Staughton Lynd, Martin King, Ira Ried, Paul Robeson, Walter Rodney, Carter G. Woodson, and Malcolm X.

<sup>35</sup> See Crenshaw, *supra* note 23, at 1369–87 (noting, in a section entitled "The Context Defined: Racist Ideology and Hegemony," that white supremacy is achieved not just through the internalization of hegemonic ideology but also through coercive violence and economic subjugation); Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1053 (2007) ("Racism and sexism gain social meaning and destructive power from the ubiquitous deployment of force, violence, degradation, coercion, and dominance, not merely through the tendency to make distinctions on the basis of criteria outside individual control.").

<sup>36</sup> Professor Kendall Thomas describes how racism acts as both speech and conduct. It is speech in that it refers to a socially constructed idea or meaning derived from a history of oppression. It is conduct in that it is perpetuated and reinforced through an ongoing process of contemporaneous speech and acts. In this respect, racism is less a noun and more a verb. Thus, he says: "We are raced." Kendall Thomas, Nash Professor of Law and Co-Director of the Center for the Study of Law & Culture at Columbia Law School, Comments at Panel on Critical Race Theory, Conference on Frontiers of Legal Thought, Duke Law School (Jan. 26, 1990).

<sup>37</sup> *Washington v. Davis*, 426 U.S. 229, 238–39 (1976).

established in that decision.<sup>38</sup> I joined many other critics of that decision who condemned *Davis* for placing a heavy and often impossible burden on plaintiffs seeking constitutional protection from racially discriminatory practices and conditions.<sup>39</sup> However, I wanted to make the more fundamental argument that *Davis* was wrong because the injury of racial inequality exists irrespective of the motives of the defendants in a particular case. I believe that the 13th, 14th, and 15th Amendments embody a moral and constitutional duty to act affirmatively to disestablish the practices, institutional structures, and ideology of slavery and white supremacy.<sup>40</sup> I wanted to demonstrate that *Davis*'s motive-centered inquiry, its requirement that we identify a perpetrator, a bad guy wearing a white sheet and hood, made no sense if equality was our goal.

I also wanted to formulate a response to a question that I was asked by white liberal friends whenever we talked about race. "Why should 'innocent' whites pay the costs for remedying racial discrimination for which they were not responsible?" The question appeared in the euphemisms of sophisticated anti-affirmative action arguments, in stories

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<sup>38</sup> The legal doctrine first established in *Davis* requires plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose or intent on the part of those responsible for the law's enactment or administration. *Davis*, 426 U.S. at 240–41.

<sup>39</sup> See, e.g., Derrick A. Bell, Jr., *Foreword: Equal Employment Law and the Continuing Need for Self-Help*, 8 LOY. U. CHI. L.J. 681, 682–83 (1977) (discussing the *Davis* test as "eroded to an irreparable degree"); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 39–40 (1977) (arguing that the Supreme Court's ruling in *Davis* "unwisely confine[d] heightened scrutiny"); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050, 1115–16 (1978) (commenting on the lack of validation of the test in *Davis*); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 49–50 (1977) (discussing the "purpose doctrine" in the context of race); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1111 (1989) (discussing the discriminatory purpose requirement in *Davis*); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 541, 543 (1977) (discussing the impact of the Supreme Court's ruling in *Davis*); Michael A. Reiter, *Compensating for Race or National Origin in Employment Testing*, 8 LOY. U. CHI. L.J. 687 (1977).

<sup>40</sup> I have elsewhere described my view of this constitutional imperative:

My own theoretical framework and the discussion in this article presume that the Reconstruction Amendments and the Equal Protection Clause embody a constitutional norm or value of antistatutory subordination. The meaning of this value can be understood only in the context of a culture, nation, and Constitution that for more than a century affirmatively embraced the values of slavery and white supremacy. Thus, I believe the Equal Protection Clause does more than require that every individual have equal access to the democratic process and does more than grant blacks the right to treatment free of invidious racial motives. Rather, it creates a new substantive value of "non-slavery" and antistatutory subordination to replace the old values of slavery and white supremacy.

Lawrence, *supra* note 16, at 1382; see also Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 824–25 (1995) (proposing racial equality as a "substantive social condition rather than an individual right").

about a son who didn't get into Harvard,<sup>41</sup> of immigrant ancestors who had never owned slaves,<sup>42</sup> and in less refined outbursts like, "Some of my best friends are black," but I always heard the question's meaning loud and clear. My friends were saying, "Why me? I'm not a racist."

In the late 1960s and early 1970s, I had participated in a newly militant civil rights movement that called for structural and institutional changes that went beyond formal equality and addressed the social and economic conditions of poor people of color. We used words like white supremacy, institutional racism, and colonialism to name these conditions.<sup>43</sup> By the time I was writing *The Id, the Ego, and Equal Protection*, the backlash

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<sup>41</sup> These arguments have found their way into legal doctrine as well. For example, in *Regents of Univ. of California v. Bakke*, the Supreme Court said that the harm of "societal discrimination" is too "amorphous" for there to be a remedy. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) ("That goal was far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past."); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989) ("Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."). The Court also rejected the notion that the "innocent," or those not found to have perpetrated racial discrimination, should be disadvantaged because of past discrimination perpetrated by others. See *Bakke*, 438 U.S. at 307 ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."); *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) ("Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.").

<sup>42</sup> These arguments reflected an emerging narrative which transformed the discussion from a civil rights story linked to slavery to a story about competing racial and ethnic groups. See Haney López, *supra* note 34, at 990 ("This competing narrative suggested that racial subordination was largely past and that social inequalities, if any, reflected the cultural failings of minorities themselves, while further postulating that there existed no dominant white race as such, but instead only a welter of competing cultural groups defined in national origin terms, for instance, Irish- or Italian-Americans."); *Bakke*, 438 U.S. at 292 ("[T]he United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups."). The story about a "nation of minorities" became an attractive historical revision to a majority looking to assuage its guilt and avoid penance. See JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 157, 209–10 (1979); see also *Bakke*, 438 U.S. at 402 ("[I]t is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible.") (Marshall, J., dissenting).

<sup>43</sup> For a history of this movement and examples of this discourse, see generally VOICES OF FREEDOM, AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT 349–586 (Henry Hampton and Steve Fayer eds. 1990); HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 433–459 (1980); ROBERT L. ALLEN, BLACK AWAKENING IN CAPITALIST AMERICA: AN ANALYTIC HISTORY 1–3 (1969); STOKELY CARMICHAEL & CHARLES HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION (1967); MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945–2006 (3d ed. 2007); JULIUS LESTER, LOOK OUT, WHITEY! BLACK POWER'S GON' GET YOUR MAMA! xi–xii (1968); THE BLACK POWER REVOLT 10 (Floyd B. Barbour ed. 1968); MALCOLM X, MALCOLM X SPEAKS (1965).

against Black power and Black Nationalism was in full sway.<sup>44</sup> My white liberal friends were saying, in effect, "I'm tired of being called a 'white honky.' I just don't like being called a racist." I understood the intent of this request that I not defame them with the same pejorative label I would use to describe a Nazi or KKK member, and that I reaffirm our friendship by acknowledging that we both stood against racism. I always felt conflicted at this point in the conversation. I wanted to respond positively to their good faith commitment to racial equality, but I had also heard in their plea for a "good white folks" pass a demand that I do something more than not call them a bad person. They were asking me to delete the words "white supremacy" from our conversation, to take the question of our collective racism off the table, to refrain from asking whether their white privilege implicated them in the structures and conditions of racial inequality, to exempt them from responsibility for America's racism. This I could not do.

My answer to this dilemma was to refuse to issue "good white folks" passes, to say, "Sorry, my friend. You are a racist and so am I." The chief insight of *The Id, the Ego, and Equal Protection* was gained from my realization that I could not respond to my friends' first request (that I refrain from calling them racist) without also giving them a pass on the second request—to remove from the agenda the issue of our implication in America's racism. I understood that the second request was necessarily contained within the first. They wanted a pass on their own racism and on their participation in America's racism as well. When my friends said they didn't want to be called racist, they were also saying they didn't want to be held responsible for society's institutional and structural racism.

The defendant in *Washington v. Davis* had asked the Supreme Court for the same free pass on racism as my friends had asked of me. And, of course, the Court gave the defendants that free "good guy" pass on both questions. Only intentional racists were deemed to violate the constitutional value of racial equality. But the Court, in *Davis*, did much more than give the named defendants a free pass. It held that, because the defendants were not intentional racists, *no* constitutional violation had occurred, even though the facts showed dramatic racial inequality.<sup>45</sup> The rest of us were held guiltless as well, all of us exculpated from any responsibility for society's institutional and structural racism, because no

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<sup>44</sup> For a discussion of the backlash against black militancy of this period, see DREYFUSS & LAWRENCE, *supra* note 42, at 141–61, and STEPHEN STEINBERG, *TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICA* 97–175 (1995).

<sup>45</sup> See *Washington v. Davis*, 426 U.S. 229, 245 (1976) ("[W]e have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.").



intentional racist planned the unequal result. While blacks continued to suffer from conditions of inequality, none of us were to blame.<sup>46</sup>

My goal in *The Id, the Ego, and Equal Protection* was to expose and challenge the way that the Court had, with this single opinion, declared the reconstructive work of the 13th, 14th, and 15th amendments accomplished. The Supreme Court, by conflating the issue of bad motive with that of constitutional and moral injury, had given my friends and colleagues the exoneration they were seeking from me. I wrote *The Id, the Ego, and Equal Protection* to say to my friends, “Just because the Court gave you the answer you wanted to hear doesn’t mean it’s a good answer. Just because the Court’s answer has let you off the hook, do not think that you can claim allegiance to the struggle against racism.”

My method was to decouple the question of whether my friends were good or bad people from the question of our responsibility for our own racism. I argued that if the Equal Protection Clause prohibited government decisions determined or influenced by our continued adherence to an ideology of white supremacy, then *Davis* had created a false dichotomy between the “evil” acts of avowed racial bigots and the “innocent” acts of good people. If the constitutional value at stake is anti-slavery or anti-white supremacy, then that value is violated whenever a decision is determined by our belief in white supremacy. And if the decisions of the avowed racial bigot and my good white friends were all influenced by our belief in white supremacy, the presence or absence of bad intent was irrelevant to the question of whether those decisions violated the Equal Protection Clause.<sup>47</sup>

The final piece of my argument, that bad intent and constitutional injury must be decoupled, asserted the ubiquity of racist belief and the fact that often we are not even conscious of the fact that we hold those beliefs. In the most often quoted passage of the article I said, “[A]mericans share a historical experience that has resulted in individuals within the culture

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<sup>46</sup> This places the Court’s jurisprudence firmly within what Alan Freeman calls the “perpetrator perspective,” which holds that the goal of antidiscrimination law is to root out individual instances of discrimination in a world otherwise free from discrimination. This perspective “denies historical reality—in particular, the fact that we would not have had antidiscrimination law had it not been for the historical oppression of particular races.” Alan Freeman, *Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, in *THE POLITICS OF LAW* 288 (David Kairys ed. 3d ed. 1998). In contrast, the “victim perspective” focuses on the social and economic conditions associated with our specific history of discrimination and measures the success of antidiscrimination law against the actual equality it produces. *Id.* at 285–311; Freeman, *supra* note 39, at 1050–52.

<sup>47</sup> I recognize, as I did then, that my choice to center my argument on the influence of the unconscious on an individual’s decision-making meant that I was accepting the Court’s motive-centered inquiry, albeit for the limited purposes of engaging my friends and colleagues within the dominant legal paradigm and proving *Davis*’s intent doctrine incoherent on its own terms. For a discussion of my motivations for and ambivalence about this choice, see *infra* notes 52–55 and accompanying text.

ubiquitously attaching a significance to race that is irrational and often outside their awareness.<sup>48</sup>

In support of this assertion, I turned to the considerable body of theory and research in psychology and social science that hypothesized and offered evidence for the presence of perceptions, beliefs, and ideas of which we are unaware but, nonetheless, influence our actions and decisions. I devoted a significant part of the article to introduce these disciplines to an audience that had paid scant attention to their implications for constitutional theory,<sup>49</sup> and it is for this part of my argument that the article is most often cited.<sup>50</sup>

I asked my readers to think of America's racism as a public health problem, as a disease that required anti-racists to adopt the mindset and methodology of epidemiologists rather than that of policemen.<sup>51</sup> I hoped that by pointing out that we were all infected with racism I would at least remove the very stigma that caused my friends to deny their racism, and at the same time help them recognize that the injury of racism was found in symptomatic material conditions, including inequalities of wealth, employment, schooling, health, incarceration, etc., and in the ideology that produced and justified those symptomatic material conditions.

I had another purpose that shaped the content and form of the article. I was determined to challenge the Supreme Court and proponents of the discriminatory purpose requirement on their own terms. I wanted to prove that my argument against the discriminatory intent requirement did not require agreement with my more radical position that the Fourteenth Amendment embodies a constitutional norm or value of anti-subordination, to demonstrate that, even if we judged the *Davis* doctrine by the measure of mainstream liberal theories of equal protection, the doctrine did not serve the Fourteenth Amendment's purpose. I devoted a significant segment of the article to this task, examining two leading constitutional theories that justified the application of heightened scrutiny to

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<sup>48</sup> Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 7, at 327. Justice Brennan quotes this passage in full in the body of his dissent in *McCleskey v. Kemp*. *McCleskey v. Kemp*, 481 U.S. 279, 332 (Brennan, J., dissenting); *see also id.* at 360 n.13 (Blackman, J., dissenting) (citing generally to Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 7). I think that I can safely say Justice Brennan's quote brought attention to my Article that it might not have otherwise received.

<sup>49</sup> Part I of *The Id, the Ego, and Equal Protection* was subtitled, "A Primer on the Unconscious and Race." Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 7, at 328.

<sup>50</sup> *See, e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5 (2006) ("In an influential article published in 1987, Professor Charles Lawrence urged the legal system to 'reckon[] with unconscious racism.' His article relied on both Freudian psychoanalytic theory and the findings of cognitive psychologists to argue that unconscious bias is a pervasive aspect of everyday life.").

<sup>51</sup> *See* Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 7, at 331 ("We must understand that our entire culture is afflicted, and we must take cognizance of psychological theory in order to frame a legal theory that can address that affliction.").

governmental decisions based on race, (the “process defect theory” and the “stigma theory”), and arguing that the distinct harm that each theory posits is more completely revealed and addressed if the theory incorporates a recognition of unconscious as well as conscious motives for racist acts.<sup>52</sup> Because each of these theories assumed that the harm of race discrimination derived from intentional motive, I challenged the theories by asking that they not ignore what science had taught us about the influence of the *unconscious* on human motivation.<sup>53</sup> My proposal here was quite modest: rather than arguing that the harm of racism existed irrespective of motivation, I chose to speak within the motivational paradigm of the dominant liberal constitutional theory. As a law professor writing for a law review, it seemed the most effective way to be heard. However, my choice to engage liberal legal theory on its own terms is often incorrectly read to infer my acceptance of the normative principle and interpretation of the Constitution’s Equal Protection Clause upon which that theory is premised.<sup>54</sup> Both Ely’s process defect theory and

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<sup>52</sup> Briefly stated, process defect theory takes the position that judicial review of legislative action is legitimate insofar as it seeks to reinforce democratic values by correcting defects in the political process. See *id.* at 345–49 (giving an overview of the theory); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 76 (1980) (“[I]t is an appropriate function of the Court to keep the machinery of the democratic government running as it should, to make sure the channels of political participation are kept open.”). John Hart Ely, a chief proponent of this theory, notes that racial discrimination is one manner in which the political process gets distorted. Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 7, at 346. The courts, however, only look for a process defect and apply strict scrutiny when a legislature makes a facial racial classification or when overt racism has been proved under the *Davis* test. *Id.* at 347. This completely ignores the destructive effect of unconscious racism on the political process. Thus, in *The Id, the Ego, and Equal Protection*, I argue that Ely’s process defect theory “stops an important step short of locating and eliminating the defect it has identified.” *Id.* at 349. Stigma theory likewise attaches undue significance to the distinction between conscious and unconscious racism. Stigma theory posits that racial classifications should be strictly scrutinized when they serve to shame and degrade a class of persons as inferior. *Id.* at 349–50. This was at the heart of the Court’s unanimous decision in *Brown* holding that segregated schools are inherently unequal. *Id.* at 350. The injury inflicted by stigmatization flows from the meaning society attaches to an action or classification. Thus, the evil racist intent of individual actors, although perhaps sufficient, is certainly not necessary to inflict the harm of stigma. Nonetheless, as I note in *The Id, the Ego, and Equal Protection*, many advocates and scholars who embrace stigma theory have been extremely hesitant to suggest expanding equal protection analysis much beyond laws which are apparently race-dependent. *Id.* at 353–54.

<sup>53</sup> See Krieger, *supra* note 19, at 1164 n.11 (“Drawing on psychoanalytic theory, Professor Lawrence argues that much of what is classified as disparate treatment results from subconscious instincts and motivations.”).

<sup>54</sup> See Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 91–92 (“[Charles Lawrence] attempted to cast his argument in the shadow of the arguments by traditional liberals, such as John Hart Ely and Paul Brest, and to respond to the more radical arguments of Alan Freeman. However, his efforts to tie his worldview into the liberals’ critiques of current court and legal dogma fail precisely because these critiques ultimately take for granted the perspective of the white world.”). Legal scholars such as Linda Krieger and Jerry Kang have described their work as building on my own and distinguished my work from their own primarily by my emphasis on psychoanalytic rather than cognitive theory. To the extent that their work adopts

Brest's anti-stigmatization thesis ascribe to the Equal Protection Clause a principle that disfavors race-dependant conduct. The argument for interpreting the Fourteenth Amendment to embrace this principle requires that one identify a substantive value that explains why race-dependent political choices violate the principle and race-neutral choices do not. Ely, Brest, and the justices in *Washington v. Davis* find that substantive value in the antidiscrimination principle which they read as a value against conduct infected by prejudice or bias. Simply put, this principle finds a normative wrong in conduct motivated by prejudice toward a racial group.

I challenged the *Davis* intent requirement and the internal coherency of these theories by arguing that they only accounted for conscious prejudice, and that unconscious motives were also a source of this wrong. I believe I succeeded in this challenge. But my desire to prove *Davis* incoherent on its own terms and to frame my argument so that my colleagues would find it more accessible and acceptable undermined my initial and primary purpose.

My own view of equal protection's central principle and command is very different from that which finds the harm to equality in the mind and motivation of individuals. I believe the Equal Protection Clause embodies a constitutional norm or value of anti-subordination.<sup>55</sup> In recent years I have stated this belief more forthrightly and with more clarity than I did in 1987. For example, in *Forbidden Conversations* I write:

My own theoretical framework and the discussion in this article presume that the Reconstruction Amendments and the Equal Protection Clause embody a constitutional norm or value of anti-subordination. The meaning of this value can be understood only in the context of a culture, nation, and Constitution that for more than a century affirmatively embraced the values of slavery and white supremacy. Thus, I believe the Equal Protection Clause does more than require that every individual have equal access to the democratic process and does more than grant blacks the right to treatment free of invidious racial motives. Rather, it creates a new substantive value of "non-slavery" and anti-

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the liberal paradigm, they have also read me to implicitly accept the dominant white worldview. See Kang, *supra* note 7; Krieger, *supra* note 22. For an expanded discussion of how legal scholars employing cognitive theory remain within the dominant liberal legal paradigm see *infra* notes 83–111 and accompanying text.

<sup>55</sup> See, e.g., Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 775–78 (1997) (explaining the necessity of interracial collaboration in achieving anti-subordination); Lawrence, *If He Hollers Let Him Go*, *supra* note 7; Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 950–51, 962 (2001) (defining and defending anti-subordination theory as indispensable to individual equality and dignity).

subordination to replace the old values of slavery and white supremacy. Given the historical and cultural context of the Amendments' adoption, I believe the Constitution cannot be understood to establish these new values but not implement them. Such a reading renders the Amendments without substance. If the Reconstruction Amendments replace the constitutional value of slavery with the value of non-slavery, the Equal Protection Clause requires the disestablishment of the ideology, laws, practices, and structures that were put in place in service of slavery and white supremacy. It requires a reconstruction of the substantive societal conditions that slavery created.<sup>56</sup>

In *The Id, the Ego, and Equal Protection*, I spoke of the "cultural meaning" of an allegedly racially discriminatory act as the "best available analogue for and evidence of the collective unconscious that we cannot observe directly."<sup>57</sup> My reference to the "collective unconscious" rather than the individual actor's unconscious was meant to convey my belief that the harm resided in the continued existence of a widely shared belief in white supremacy and not in the motivation of the individual actor or actors charged with discrimination. So long as this shared ideology remains we must assume that the affirmative command of the Constitution's Equal Protection Clause to abolish white supremacy has not been accomplished.

In retrospect, I believe that while my effort to demonstrate the limitations of *Davis* on its own terms may have advanced the utility of the article for litigators and teachers of traditional constitutional theory, it also may have undermined the central goal of my project.<sup>58</sup>

### III. WHAT HAVE THEY DONE WITH MY SONG?: TWO RESPONSES TO THE ARTICLE

#### A. *Racism Repressed: The Supreme Court as Societal Super Ego*

When I wrote *The Id, the Ego, and Equal Protection*, I was not so naïve that I expected I would persuade the Court to recognize the error of its ways and reject the *Davis* intent requirement in a subsequent case. It was apparent to me, even then, that the Court was declaring its intention to

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<sup>56</sup> Lawrence, *supra* note 16, at 1382–83.

<sup>57</sup> Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 7, at 324.

<sup>58</sup> In my own defense, I must point out that even in 1987, I recognized this tension between the liberal frame I adopted in this Part of the Article and my own view and spoke of it in the last Part of the Article. Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 7, at 381–87; see Culp, *supra* note 54, at 47–48 ("Black scholars knew, in exactly the way the black domestic did, that certain claims were outside the bounds of discourse. . . . Black legal scholars have faced a history of not being heard, or of being heard selectively.").

retreat as quickly as possible from the radical reasoning of *Green v. County School Board of New Kent County*<sup>59</sup> and *Griggs v. Duke Power Co.*,<sup>60</sup> cases that acknowledged the still vital legacy of slavery and Jim Crow and recognized that justice required the affirmative disestablishment of the institutions and structures of white supremacy.<sup>61</sup> For the Court to heed my call for attention to the cultural meaning of racially discriminatory acts would require its adherence to the substantive vision of racial justice set out in *Green* and *Griggs*. The Court had made an about face in *Davis*. It would stage a rapid and relentless retreat from the fight against white supremacy,<sup>62</sup> and that retreat required the Justices to blind themselves and us to the racial meaning of our acts.

The progress of this march away from racial meaning is most evident in the affirmative action cases, but it begins in *Washington v. Davis* itself. Justice White's opinion for the majority in *Davis* argues that the Court must require proof of intentional racism before applying strict scrutiny because an impact test would prove unworkable. He argues that an impact test would be "far reaching"<sup>63</sup> and might require the court to "invalidate a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than the more affluent white."<sup>64</sup> In other words, we cannot subject every governmental action with disproportionate impact to strict scrutiny, because many of these actions are not the product of racism.

But why not require strict scrutiny of just those cases where the harm can be traced to white supremacy's continuing presence? Justice White offers no explicit answer to this question, but the answer his argument implies is clear: "Because we cannot tell when racism is at work and when it is not." What follows from Justice White's assertion that we cannot know racism when we see it is *Davis*'s doctrinal rule that we may only treat racially discriminatory conditions and outcomes with suspicion when

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<sup>59</sup> See *Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430, 437-38 (1968) ("School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the *affirmative duty* to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.") (emphasis added); see also Lawrence, *supra* note 5, at 34-40 (discussing the importance of the Supreme Court's decision in *Green*).

<sup>60</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.").

<sup>61</sup> See Freeman, *supra* note 39, at 1093 (noting that "*Griggs v. Duke Power Co.*, the Court's first substantive decision under Title VII of the Civil Rights Act of 1964, is as close as the Court has ever come to formally adopting the victim perspective").

<sup>62</sup> See generally *id.* at 1114-17; see also Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1987-89 (1990).

<sup>63</sup> *Davis*, 426 U.S. at 248.

<sup>64</sup> *Id.*

government actors employ racial classifications on the face of a statute or when plaintiffs prove those actors intended to achieve a racial result. Accordingly, it is the use of racial classification, or attention to race, not its connection to white supremacy, that the court finds suspicious. Justice White explains his decision to not strictly scrutinize actions with racially discriminatory impact by claiming he cannot tell whether they are racist or not, and then holds that the Court must strictly scrutinize all facially racial classifications without asking whether we have any reason to believe they are racist in intent. In both cases, the Court declines to ask the question, "Does the government action reinforce the structures and ideology of white supremacy?" In *The Id, the Ego, and Equal Protection*, I condemned *Washington v. Davis* for the Court's refusal to consider the racial meaning of discriminatory impact, but *Davis* also marks the beginning of a series of cases that assert and establish as doctrine the incoherent, unprincipled, Orwellian notion that the Fourteenth Amendment mandates equality but prohibits consideration of the presence or absence of white supremacy.

Although I argue in *The Id, the Ego, and Equal Protection* that we are often unaware of the racism that motivates our actions, the Supreme Court majority's refusal to see society's racism is quite intentional. In *McCleskey v. Kemp*, a case decided within months of the publication of my article, the Court rejected an equal protection challenge to the administration of Georgia's death penalty statute.<sup>65</sup> Plaintiff had proffered a statistical analysis of the sentences in more than two thousand murder cases that demonstrated that defendants charged with killing whites were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks.<sup>66</sup> Although Justice Powell, writing for the majority, acknowledged the validity of plaintiff's regression analysis demonstrating the statistical disparity could be explained by no other factor than racial bias,<sup>67</sup> the Court nonetheless said it could not see race at work. "[W]e decline to assume that what is unexplained is invidious," said Justice Powell.<sup>68</sup> In *Davis*, Justice White argues that the Court must require intent because it *cannot* tell when discriminatory impact is caused by racial bias. In *McCleskey* the Court simply "*declines*" to do so. "There is some risk of racial prejudice influencing a jury's decision in a criminal case," says the Court, "the question is at what point that risk becomes constitutionally unacceptable."<sup>69</sup> A friend of mine who represents defendants in death

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<sup>65</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>66</sup> *See id.* at 286–87 ("McCleskey proffered a statistical study performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth (the Baldus study) . . . . One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks.").

<sup>67</sup> *Id.* at 291 n.7.

<sup>68</sup> *Id.* at 313.

<sup>69</sup> *Id.* at 308–09.

penalty cases calls McCleskey the “so what” case. The Court says, “OK, so you’ve shown that more likely than not this defendant’s death sentence was influenced by racial prejudice. So what?”

*Regents v. Bakke* marks the first case where Justice White’s argument for intent in *Davis* (that we must require proof of intent because we cannot tell when discriminatory impact implicates racism) appears together with its doctrinal fraternal twin (that we must strictly scrutinize even remedial racial classifications because how else will we know that they are not invidious).

In *Bakke*, Justice Powell rejects the remedial purpose of ameliorating “societal discrimination.”<sup>70</sup> “It’s too ‘amorphous,’”<sup>71</sup> he says. What is it that makes amorphous discrimination inappropriate for remedy? Powell cannot mean that we should not seek to remedy societal discrimination because there is too much racism or because it is too widespread. No, Justice Powell declares “societal discrimination” is off limits for race-conscious remedy for the same reason that Justice White refuses to recognize racism in racially discriminatory impact.<sup>72</sup> His claim is that he can’t be sure it’s racism.<sup>73</sup> Moreover, the Court holds in *Bakke* that all laws that employ racial classifications on their face must be strictly scrutinized. Why? The Court’s answer in *Bakke*, *Croson*, *Adarand*, *Gruter* and *PICS* is the same: because we cannot tell if this racial classification is invidious or benign. We do not know whether it is employed for good or bad reasons.<sup>74</sup>

Note that in *Davis* uncertainty about the cause of racially subordinating impact leads to the default position of no suspicion of racism. In the affirmative action and recent desegregation cases, uncertainty about the motives of those attempting to remedy racial subordination leads to the default position of suspicion of racism. I think I have already made it clear that I do not buy the Court majority’s claim to myopia. To paraphrase

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<sup>70</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 (1978).

<sup>71</sup> *Id.* at 307.

<sup>72</sup> *Id.* at 310.

<sup>73</sup> *Id.* at 307–10.

<sup>74</sup> *See id.* at 298 (“[I]t may not always be clear that a so-called preference is in fact benign.”); *see also PICS*, 127 S.Ct. at 2764 (“Our cases clearly reject the argument that motives affect the strict scrutiny analysis.”); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“‘Absent searching judicial inquiry into the justification for such race-based measures,’ we have no way to determine what ‘classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’”) (quoting *City of Richmonds v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)); *Adarand Constructors v. Pena*, 515 U.S. 200, 226 (1995) (“We adhere to that view today, despite the surface appeal of holding ‘benign’ racial classifications to a lower standard, because ‘it may not always be clear that a so-called preference is in fact benign.’”) (quoting *Bakke*, 438 U.S. at 298); *Croson*, 488 U.S. at 493 (“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”).



Justice Stevens's words in *Adarand*,<sup>75</sup> I think Justice O'Connor and her colleagues really *do* know the difference between a "keep out sign" and a "welcome mat."<sup>76</sup>

But I want to point out something even more disturbing about the move the Court has made in these cases. By claiming not to be able to know when racism or white supremacy is at work, they have removed the question of white supremacy's presence from the doctrine that applies the Equal Protection Clause to questions of race. The Court presumes a law that produces discriminatory impacts is benign without ever asking whether that discriminatory impact furthers white supremacy. Facially racial classifications are presumed invidious, again without asking whether the classification perpetuates white supremacy or operates to disestablish American Apartheid. We have the 14th Amendment only because we had slavery and a war that ended slavery. The origin is anti-racist, the Court's interpretation is not.

The recent decision striking down school desegregation plans in Seattle and Kentucky<sup>77</sup> represents the culmination and nadir of this ruthless march away from my call to recognize the cultural meaning of government action as a way of discovering whether that action represents the continuing influence of white supremacy. Only in a world where racial discrimination is devoid of any meaning can Justice Roberts equate the segregation in *Brown*<sup>78</sup> with the integration in *PICS*.<sup>79</sup> When Justice Roberts says, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"<sup>80</sup> he asks us to deny our knowledge of the real meaning of race and racism in America. He asks us to repress our knowledge of 380 years of slavery and segregation. He asks us to believe that race consciousness is what violates the Constitution, not racism.

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<sup>75</sup> *Adarand*, 515 U.S. at 242 (Stevens, J., dissenting).

<sup>76</sup> Justice Stevens found "untenable" Justice O'Connor's assumption that there is no consistent way to distinguish between racial classifications which place a burden on a minority race and those which seek to bestow a benefit or those which are invidious and those which are benign. *See id.* at 243. Indeed, as Justice Stevens explains, Justice O'Connor's position runs contrary to common sense. *See id.* at 245 ("It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers."). Consequently, Justice Stevens quips that "[t]he consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat." *Id.*

<sup>77</sup> *PICS*, 127 S.Ct. at 2738.

<sup>78</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>79</sup> *PICS*, 127 S.Ct. at 2738.

<sup>80</sup> *Id.* at 2768.

## B. *A Two-Edged Sword: The Emerging Science of Implicit Bias*

During the twenty years since *The Id, the Ego, and Equal Protection* was published, behavioral scientists have made significant advances in the study of unconscious racism. Recent social cognition research has provided stunning evidence to support my assertion that we are all infected with racial bias and that often that bias resides outside of our awareness.<sup>81</sup>

In 1994, researchers at Yale University and the University of Washington devised the Implicit Association Test.<sup>82</sup> The Implicit Association Test measures unconscious racial bias by linking together words and images to reveal what associations come most easily to mind. When you visit the IAT web site, you are asked to classify a series of faces into two categories, African American and European American. You must then mentally associate the white and black faces with words such as “joy” and “failure.”<sup>83</sup> You must take the test under considerable time pressure

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<sup>81</sup> For an overview of this body of scientific research and theory, see generally Anthony Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006). See also Anthony Greenwald et al., *A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem, and Self-Concept*, 109 PSYCHOL. REV. 3 (2002); Anthony Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

<sup>82</sup> The IAT was developed by Dr. Mahzarin Banaji, now at Harvard University, and Dr. Anthony Greenwald of the University of Washington and their colleagues. See Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12, available at LEXIS, News Library, WPOST File; Erica Goode, *A Computer Diagnosis of Prejudice*, N.Y. TIMES, Oct. 13, 1998, at F7, available at LEXIS, News Library, NYT File; Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998).

<sup>83</sup> Greenwald and Krieger describe the mechanics of the test:

The most widely used IAT measure assesses implicit attitudes toward African Americans (AA) relative to European Americans (EA). In this “Race IAT,” respondents first practice distinguishing AA from EA faces by responding to faces from one of these two categories with the press of a computer key on the left side of the keyboard and to those of the other category with a key on the right side of the keyboard. Respondents next practice distinguishing pleasant-meaning from unpleasant-meaning words in a similar manner. The next two tasks, given in a randomly determined order, use all four categories (AA faces, EA faces, pleasant-meaning words, and unpleasant-meaning words). In one of these two tasks, the IAT calls for one response (say, pressing a left-side key) when the respondent sees AA faces or pleasant words, whereas EA faces and unpleasant words call for the other response (right-side key). In the remaining task, EA faces share a response with pleasant words and AA faces with unpleasant words.

The implicit-attitude measure produced by this IAT is based on relative speeds of responding in the two four-category tasks. This measure allows an inference about attitudes (category-valence associations) because it is easier to give the same response to items from two categories when those two categories are cognitively associated with each other. For American respondents taking the Race IAT, response speeds are often faster when EA, rather than AA, is paired with pleasant words. This frequently observed pattern supports the interpretation that EA-pleasant is a stronger association than AA-pleasant. Researchers have described this result as showing implicit attitudinal preference for EA relative to AA.

Greenwald & Krieger, *supra* note 81, at 952–53.

using your computer keys to respond to the pairings. If you take the test too slowly the web site indicates that you have defaulted and must begin the test again. These tests have been taken by more than two million people. An analysis of tens of thousands of these tests taken anonymously on the Harvard web site found that eighty-eight percent of white people had a pro-white or anti-black implicit bias; nearly eighty-three percent of heterosexuals showed implicit bias for straight people over gays and lesbians; and more than two-thirds of non-Arab, non-Muslim testers displayed implicit biases against Arab Muslims.<sup>84</sup>

Implicit bias research also supports my observation that the victims of white supremacy often internalize racial bias directed against them. Forty-eight percent of blacks showed a pro-white or anti-black bias. Claude Steele's groundbreaking research on stereotype threat provides more evidence of the debilitating effects of internalized racism on even high achieving black students.<sup>85</sup> In a striking adaptation of Steele's experiments, researchers at Harvard found that Asian women math majors performed better on math tests when they were prompted to think of themselves as Asian and worse when they thought of themselves as women.<sup>86</sup>

This cognitive research has also shown that implicit bias against African Americans and Arabs predicts policy preferences on affirmative action and racial profiling.<sup>87</sup> This suggests that implicit attitudes affect

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<sup>84</sup> Vedantam, *supra* note 82.

<sup>85</sup> Psychologist Claude Steel describes the "stereotype threat" as a fear that by performing poorly on exams minority students risk reinforcing negative racial stereotypes associated with race and intelligence. The deployment of these racial stereotypes creates self-doubt and results in lower test scores. Thus, the stereotypes become a self-fulfilling prophecy. Claude Steel, *Thin Ice: "Stereotype Threat" and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 44; Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 613-18, 620-22 (1997); Claude Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797-98, 800-01, 805-06, 808 (1995); see also Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 456-57 (2007) (summarizing one of Steel's studies demonstrating this phenomenon with black students).

<sup>86</sup> Social psychologist Margaret Shih had three groups of Asian American women at Harvard University fill out different questionnaires designed to be subtly suggestive of different social identities (i.e., female or Asian). The subjects were then asked to take a math test. Those given the questionnaire triggering an Asian identity performed best; the control group came in second; and the group given the female identity questionnaire last. In other words, having the Asian identity triggered boosted performance whereas cuing the female identity lowered scores. Kang, *supra* note 7, at 1492-93, 1521-22; Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 80-83 (1999).

<sup>87</sup> See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063, 1065-66 (2006) (stating that the presence of implicit bias creates discrimination by causing merit to be mismeasured); see also Vedantam, *supra* note 82 (explaining that "bias against blacks and Arabs predicts policy preferences on affirmative action and racial profiling").

more than personal preference or snap judgments. They also play a role in positions arrived at after careful consideration such as the policy choices of legislators, policemen, and employers.<sup>88</sup>

Legal scholars, including Linda Krieger, Jerry Kang, Richard Banks, Devon Carbado, Mitu Gulati, and Cass Sunstein, have explored the implications of this new science for the adjudication of allegations of discrimination, for shaping public policy and for understanding broader patterns of disadvantage in our society.<sup>89</sup> Linda Hamilton Krieger's groundbreaking article, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment*, introduced the science of cognitive bias to employment discrimination lawyers, demonstrating that a large number of biased employment decisions result not from discriminatory motivation (either conscious or unconscious) but from unintentional categorization-related judgment errors.<sup>90</sup> This scholarly work has in turn been employed by lawyers who have educated judges about unconscious bias even as they have argued anti-discrimination cases within the limited doctrinal regimes that focus on motive rather than impact,<sup>91</sup> and by advocates who have sought directly to educate employers, educators, health care workers, and political constituencies about the importance of recognizing unconscious racism in the fight for equal justice.<sup>92</sup>

I welcome and celebrate this important work. When I first assigned

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<sup>88</sup> Krieger, *supra* note 20, at 1169–70, 1173, 1177, 1181–82, 1200–01, 1210.

<sup>89</sup> R. Richard Banks, *Discrimination and Implicit Bias In A Racially Unequal Society*, 94 CAL. L. REV. 1169, 1170–71 (2006); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 701–04 (2001); Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1260–62, 1267–70 (2000); Kang, *supra* note 7, at 1491–95; Krieger, *supra* note 20, at 1165.

<sup>90</sup> Krieger, *supra* note 20, at 1165.

<sup>91</sup> To date *The Id, the Ego, and Equal Protection* has been cited in sixteen judicial decisions, including one United States Supreme Court case, five decisions of the federal Courts of Appeals, eight federal district court cases, and by the state supreme courts of Alaska and Minnesota. These citations have covered a broad range of cases and legal issues, including: criminal law, *see McCleskey v. Kemp*, 481 U.S. 279, 332–33 (1987), *U.S. v. Bishop*, 959 F.2d 820, 827–28 (9th Cir. 1992); *Chin v. Runnels*, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004); *U.S. v. Burroughs*, 897 F. Supp. 205, 208 (E.D. Pa. 1995); *United States v. Clary*, 846 F. Supp. 768, 779 n.25 (E.D. Mo. 1994); *Knop v. Johnson*, 667 F. Supp. 467, 503 (W.D. Mich. 1987); *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 963 n.62 (Alaska 2005); *Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 575 n.1 (Minn. 1994); education, *see Brown v. Bd. of Educ.*, 892 F.2d 851, 863 n.28 (10th Cir. 1989); employment discrimination, *see Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999); *Thomas v. Troy City Bd. of Educ.*, 302 F. Supp. 2d 1303, 1309 (M. D. Ala. 2004); *Dobbs-Weinstein v. Vanderbilt Univ.*, 1 F. Supp. 2d 783, 801 (M.D. Tenn. 1998); *Harris v. Int'l Paper Co.*, 765 F. Supp. 1509, 1515–16 (D. Me. 1991); and immigration, *see Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1450 (9th Cir. 1994).

<sup>92</sup> *See, e.g.*, Equal Justice Society, EJS and California Teachers Association Collaboration on Unconscious Bias Project, <http://www.equaljusticesociety.org/newsletter5/story5.html> (last visited Apr. 1, 2008) (discussing the pilot Project in Davis, California that will review “current research of unconscious bias in education and . . . any current research on [the] impact of bias within the classroom” and conduct “‘collaborative inquiry project’ within the Davis School Community”).

*The Id, the Ego, and Equal Protection* to my constitutional law classes, many students found my claim that we all harbored unconscious bias difficult to accept. They found the theoretical work and anecdotal examples I cited unconvincing and argued that if my own experience differed from theirs this was indicative of the considerable difference in our ages. They were careful not to call me old, but they said that they had grown up in a post-civil rights world where race no longer mattered. I was disappointed but not surprised by this reaction. After all, for these young people the “colored” and “white” signs on drinking fountains I saw as a child were ancient history. This post-*Bakke* generation was raised on a steady diet of the carefully selected excerpts from Dr. King’s “I have a dream” speech. When I kidded them by referring to them as “white folks,” expressions of surprise and betrayal crossed their faces because I’d noticed their race and said it out loud. Now when I teach *Washington v. Davis*<sup>93</sup> I include a link to the IAT site<sup>94</sup> alongside the link to my article. Although my students may claim the test is unfair or poorly constructed, the scholarly literature proves the methodology unimpeachable and they must directly confront the proof of their own unacknowledged bias. Part I of *The Id, the Ego, and Equal Protection*, subtitled “A Primer on the Unconscious and Race,” would look very different were it written today. If the court victories relying on the cognitive research have been limited and sometimes overruled, the beneficial influence of this important work on policy and political discourse is far from trivial. If my article in some small way inspired this work or paved the way for its application to anti-discrimination law, I can count myself as having contributed to something good.

But there is also something that troubles me about the way the research and scholarship of behavioral scientists describes and explains unconscious racism. Even as this science has done much to establish, prove, and quantify the presence of individual unconscious bias, it has also served to undermine the central purpose of my article. Recall that my first goal for this project was to put the subject of racism as white supremacy back on the table and to argue that our collective belief in white supremacy and the continuing influence of that belief on government policy and decisions violated the Fourteenth Amendment’s mandate of equal protection of the law. I called attention to unconscious racism not so much to make the case that each of us as *individuals* harbored unconscious racist thoughts as to make the case for the continued ubiquity of racism in our culture, and to argue that if the constitutional value expressed in the Equal Protection

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<sup>93</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>94</sup> Project Implicit, <https://implicit.harvard.edu/implicit/> (last visited Apr. 1, 2008).

Clause required the eradication of behavior motivated (or caused)<sup>95</sup> by racist beliefs, we needed to treat racism as a societal disorder or sickness. We needed to respond to racism as epidemiologists rather than as moralists or crime fighters.

The cognitive behavioral research begins with the goal of understanding and demonstrating the source of bias in individuals. The theory that informs this research posits an implicit system or “primitive” part of the brain designed for reaction rather than reason. This system specializes in mental shortcuts. Bias or stereotype occurs because the brain works by placing information into categories. We make stereotyped assumptions about others—good or bad—because categories that correspond to those stereotypes are created in this primitive part of our brain and those categories are available as a place to sort our perceptions. People revert to the shortcuts of the implicit system of categorization because this is the way our brain processes information. The theoretical claim made by cognitive social psychologists is that stereotypes should be understood as no different from other categorization constructs.<sup>96</sup> Our biases and prejudices result from the same process of categorization, assimilation, and search for coherence that underlies all human cognition.<sup>97</sup>

The point of this research was to understand the process of categorization. What cognition theory and the implicit bias experiments have taught us about the content of those categories is an important by-product of this enterprise, but incidental to the project’s thesis and purpose. Cognitive behavior theory describes categorization as a consequence of the natural way that each of us processes information. Implicit bias is biological, normal, automatic, an inevitable product of the workings of an individual’s brain. Cognitive theory sees stereotyping as “simply a form of categorization, similar in structure and function to the categorization of natural objects. . . . [S]tereotypes, like other categorical structures, are cognitive mechanisms that *all* people, not just ‘prejudiced’ ones, use to simplify the task of perceiving . . . .”<sup>98</sup>

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<sup>95</sup> Both anti-discrimination law and cognitive psychologists have used the word “motivation” to mean that discriminatory conduct is intentional—that it originates in the individual’s or group’s desire to harm another individual or group. Cognitive psychologists view Freudian psychology as motivational because Freud theorized an unconscious that has its origins in repressed conscious thoughts. Linda Krieger contrasts her own perspective with my own noting that: “While Professor Lawrence does mention cognitive bias as a potential source of discriminatory decision-making, he focuses primarily on discussing *motivational* rather than cognitive antecedents.” Krieger, *supra* note 20, at 1164 n.11 (emphasis added).

<sup>96</sup> Krieger, *supra* note 20, at 1186–88 (citing the work of W. Edgar Vinacke, *Stereotypes As Social Concepts*, 45 J. SOC. PSYCHOL. 229, 229–30 (1957) and Joshua A. Fishman, *An Examination of the Process and Function of Social Stereotyping*, 43 J. SOC. PSYCHOL. 27, 45–52 (1956)).

<sup>97</sup> Krieger, *supra* note 20 at 1186–87 (paraphrasing Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79, 80–82 (1969)).

<sup>98</sup> *Id.* at 1188.

By focusing on the process of categorization, we normalize bias and make the content of white supremacy and the origins of that content irrelevant to the analysis. When the process of categorization, rather than the content of the categories, is our central concern, we turn our attention away from questions like, “Why is racism so ubiquitous in these categories?” “Why do we form categories that violate the value of human equality?” and “Why we should assume collective responsibility for correcting the consequences?” The bias in favor of whites is a prejudice like any other preference, the natural product of categorization. This description of the origin of bias suggests an inevitability—“We can’t help it, we always categorize,” devolves easily back to, “It’s not our fault.”

Linda Krieger notes that “[t]he emergence of social cognition theory represented a profound shift in psychologists’ thinking about intergroup bias.”<sup>99</sup> From the late 1940s and into the 1980s, social psychologists believed that prejudice consisted of negative beliefs and feelings towards a group that in turn caused negative behavior. Stereotypes of “outgroups” were seen as caused by prejudice and serving to rationalize it. They viewed prejudice as irrational, unjustifiable, pathological and abnormal, as discontinuous from “normal” cognitive process. Social cognition theory not only saw bias as part of the normal cognitive process, it argued that the processes of categorization “might in and of themselves produce and perpetuate intergroup bias.”<sup>100</sup>

This view that bias or stereotype grows out of the “normal” cognitive process of categorization rather than out of learned prejudice suggests that none of us is responsible for our bias or for the discriminatory behavior that results from that bias. How can we judge someone blameworthy for the normal functioning of the human brain? But, of course, the process of categorization has content. This content is what defines the categories and gives them meaning. Cognitive theory’s view of unconscious racism and the perspective that inspires my cultural meaning test share two important insights. Both speak of racial bias as often operating beyond our self-awareness and both describe racial bias as normal. But the theories differ in an important way. When cognitive theorists call racial bias normal, they refer to the normalcy of categorization—the fact that we all categorize as a way of making sense of the world. When I say that racism is normal, I refer to the ubiquity of racism—to the fact that our categories are filled with a specific content: the ideology of white supremacy.

Mahzarin Banaji, one of the researchers who developed the Implicit Association Test, was quoted in a Washington Post article as saying, “The Implicit Association Test measures the thumbprint of culture on our minds

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<sup>99</sup> *Id.* at 1187.

<sup>100</sup> *Id.* (emphasis omitted).

. . . . If Europeans had been carted to Africa as slaves, blacks would have the same beliefs about whites that whites now have about blacks."<sup>101</sup> Of course, Europeans were not carted to Africa as slaves, and Banaji's hypothetical revision of history achieves the same result as Justice Roberts's equating the segregation condemned in *Brown* with the race-conscious policies designed to integrate the schools in Seattle. Cognitive research's focus on the process of categorization, like the Court's focus on the process of classification, skips the question of our responsibility for what our history has wrought. Both turn our attention away from the content of the categories and the meaning of that content. Both take white supremacy (and anti-subordination) off the table as the central concern of our justice project.

Cognitive behavior research focuses on individual bias. We take the Implicit Association Test as individuals and it proves that each of us harbors racial bias. Although the researchers count tens of thousands of our responses and offer this as evidence that this racial bias is widespread, many of my students and as many of my colleagues in the bar and legal academy do not think this proves that what we do collectively through the state has been infected by bias. For that, they say, we must prove conscious intent. I have heard no logic to support the argument that eighty-eight percent of white people and almost half of blacks may be proved to harbor unconscious anti-black bias,<sup>102</sup> but that this racism does not infect those elected to represent us. Of course, the state action requirement is the doctrinal rule that gives this argument authority,<sup>103</sup> but that doctrine, like the intent requirement, must have a logic of its own that gives it some authority other than that it gains from white power.<sup>104</sup>

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<sup>101</sup> Vedantam, *supra* note 82.

<sup>102</sup> *Id.*; Jay Dixit, *Screen Test*, SLATE, Jan. 26, 2006, <http://www.slate.com/id/2134921>. See also Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GROUP DYNAMICS 101, 102, 105 (2002) (reporting results from 600,000 IATs on the popular online website, including significant Black-White IAT results); Greenwald et al., *supra* note 82, at 1474, 1478.

<sup>103</sup> By restricting the application of the Fourteenth Amendment to discrimination implicating the government, the state action rule immunizes private discriminators from constitutional scrutiny. See *The Civil Rights Cases*, *United States v. Stanley*, 109 U.S. 3, 11–12, 24–25 (1883) (“[The Fourteenth Amendment] does not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of state laws . . .”); see also Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 536–37 (1985) (“Limiting the Constitution’s protections to state action preserves state sovereignty by giving the states almost complete authority to regulate private behavior.”).

<sup>104</sup> The doctrine embodies the notion in American life and law that racial discrimination can be accurately and properly divided into two spheres: “public” and “private.” I have critiqued this view elsewhere. See Lawrence, *supra* note 32, at 847; Lawrence, *If He Hollers Let Him Go*, *supra* note 7, at 444–452 & nn.60–87; Lawrence, *supra* note 16, at 1389–90 & nn.79–86; see also Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 306 (1989); DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW*



I imagine that there is another unspoken argument or belief embedded in my students' resistance to reading proof of their own racism as sufficient to hold us collectively responsible for that racism's impact. This argument asserts a right to be racist. If my implicit bias is only the product of my mind's categorization of lived experience, how can you pass moral judgment on my prejudice?<sup>105</sup>

Legal scholars who have applied cognitive theory to legal problems have focused primarily on its usefulness in proving that unconscious bias influences an individual decision-maker's actions and thereby renders those actions discriminatory and unlawful. Anti-discrimination law prohibits actions by an employer, police officer, or prosecutor that have been tainted by impermissible considerations of race, and the research done by cognitive psychologists can demonstrate that these impermissible biases are at work even when the decision-maker is unaware of their presence. For example, Linda Krieger's groundbreaking article, *The Content of Our Categories*, begins with a narrative about a Title VII disparate treatment case on which she was working as a lawyer and her realization that "something about the way the law was defining or seeking to remedy disparate treatment discrimination was fundamentally flawed."<sup>106</sup> She locates this flaw in Title VII jurisprudence's construction of discrimination—a construction that "while sufficient to address deliberate discrimination . . . is inadequate to address the subtle, often unconscious forms of bias that Title VII was also intended to remedy."<sup>107</sup> Her article's thesis is that the failure of this construction "stems from the assumption that disparate treatment discrimination, whether conscious or unconscious, is primarily motivational, rather than cognitive, in origin."<sup>108</sup>

Krieger identifies the law's failure as a misunderstanding of the psychological process that produces bias: The law thinks that

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104–10 (2d ed. 1980). See generally Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982) (arguing that the distinction between public and private is a fundamental weakness in applying state action to labor law).

<sup>105</sup> For an example of this argument, see Wax & Tetlock, *supra* note 31; see also DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 24 (1995); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 17–18, 77 (1992); Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 25; Richard Cohen, *Closing the Door on Crime*, WASH. POST, Sept. 7, 1986, at W13, available at LEXIS, News Library, WPOST File. I have critiqued this view elsewhere. See generally Lawrence, *supra* note 16; Lawrence, *If He Hollers Let Him Go*, *supra* note 7; Lawrence, *supra* note 32; see also Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1761–69 (2000). Of course, the state action doctrine formalizes this right by holding that only government must abide by the Constitution's commands.

<sup>106</sup> Krieger, *supra* note 20, at 1161–64.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

discriminatory treatment is caused by biased motivation when, in fact, the origin of discriminatory bias is primarily cognitive—the product of the process of categorization.<sup>109</sup> While her analysis shifts the psychological paradigm from motivation to the structure and process of cognition, the legal question remains within the paradigm of individual fault and causation. Unconscious bias is demonstrated to prove an individual's action has been caused at least in part by bias. Krieger employs cognitive theory to challenge and expand Title VII law's limited understanding of the causal relationship between the human mind and human action. She argues that the process of categorization within an individual's brain distorts her perception and that this distortion, rather than invidious motive, results in biased and discriminatory decisions that violate the law. This descriptive model tells a more accurate story about the origins of racial bias, but the normative and legal injury that Krieger addresses is the one identified as doctrinally relevant by the court in *Davis* and by Title VII's disparate treatment test. This model understands the statutory, constitutional, or normative harm of race discrimination as the biased, and therefore wrongful, actions of one individual against another. Krieger's insight and analysis is a laudable and important intervention for litigators who are called upon to tell this true and persuasive story within the confines of existing antidiscrimination law, but it should not be confused with my own.

I did not set out to invent a better tool for Title VII litigators. I sought to challenge the disparate treatment paradigm itself. I argued that racism's harm was greater than the biased actions of individuals. I pointed to the ubiquity of conscious and unconscious racism as evidence of the continued vitality of racist ideology and argued that so long as this ideology lived and flourished, the Constitution, and normative justice, required that we act affirmatively to remedy its effects and disestablish its institutional embodiments. The "cultural meaning" test does not ask whether bias infects the decisions of the individual actors. Rather, it demonstrates the continuing presence of racist belief in the larger society by discerning the racial (or racist) meaning or interpretation that the relevant community would give an act or decision that is not articulated or justified in explicitly racial terms. These are two very different projects. One accepts the central premise of the *Davis* intent requirement—that the harm of race discrimination lies in individual acts infected by bias. The other rejects that premise and finds the harm of racism in the pervasive effects of shared racist ideology. I do not want to diminish the importance of the former project, but to the extent that *The Id, the Ego, and Equal Protection* is

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<sup>109</sup> *Id.* at 1165.

linked to this limited critique, my more radical purpose is undermined.<sup>110</sup>

I am not accusing the authors of this research and scholarship of being unconcerned with racism and other forms of group subordination. The research is directed primarily at demonstrating the prevalence of forms of bias that motivate and justify behavior that creates and perpetuates racial hierarchy and other conditions of dominance and subordination, and it is clear that these empiricists seek to advance the cause of antidiscrimination.<sup>111</sup> What I caution against here is the direct, if unintended, consequence of a particular method of describing prejudice. I have described the way this research is read and received by those who find it easier to avoid their own implication in and responsibility for righting America's racism. I think this work is interpreted to suggest the most limited and least provocative conclusions for the same reason that Americans are so ready to accept Justice Roberts's unsupported assertion

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<sup>110</sup> Professor Amy Wax's article in this Symposium provides an example of how my argument is misunderstood or misrepresented by conflating and confusing it with the excellent but very different work of those who have been inspired by and built upon my observation that antidiscrimination law should take the role of the unconscious into account. Professor Wax says that she is writing a response to "the work of Charles Lawrence and his acolytes," but, regardless of how one views the merits of her argument, its central thesis is the claim that the causal relationship between demonstrated unconscious bias and the alleged discriminatory behavior of employers, law enforcement officers, and other individuals has not been proved. Wax, *supra* note 31, at 981. For Wax, "discrimination occurs when an individual is victimized by ill treatment that is *causally* linked to or based on a protected characteristic." *Id.* at 985 (emphasis added). She uses some forty pages to argue that, while the cognitive research may have demonstrated pervasive racial bias, these studies have not demonstrated that "mental states generate discrimination." *Id.* Disparate impacts may be attributable to a decision-maker's reliance on neutral criteria, such as "'supply side' differences" in "groups' overall ability" or "average qualifications" rather than on their biases. *Id.* at 1022.

It may be objected that any group deficiencies in supply side determinants of success are themselves traceable to unlawful discrimination and racism—past, present, or both. Nothing here is to the contrary. But the observation . . . must be sharply distinguished from the assertion that a particular company, organization, or employer violates anti-discrimination laws by selecting, evaluating, or rewarding its employees on the basis of group identity. . . . Employers and economic actors take employees as they find them. That racism has contributed to making some employees less qualified does not change the fact that they are less qualified.

*Id.* at 1005. She continues:

The question of what to do about the legacy of racial discrimination is highly charged and controversial. But the fact that private actors respond to existing disparities does not justify treating them as if they are responsible for those disparities in the first place. . . . Rectifying past or present injustice by addressing "root causes" is a fundamentally different exercise from claiming that a particular social actor is discriminating.

*Id.* at 1005–06. Of course, the "objections" and "highly controversial" questions that Wax distinguishes as not the subject of her article are objections and debates that I make central. I argue that addressing the "root causes" of racism ought to be the project of antidiscrimination law. The "cultural meaning" test directly asks whether any "group deficiencies in supply side determinants of success" and our interpretation and reliance upon those "deficiencies" are indeed traceable to racism.

<sup>111</sup> As social scientists they may deliberately understate their commitment to equality in order not to appear "biased." That scientists feel they must take care to be seen as "neutral" on the normative question of racial equality in order to maintain their credibility as scientists is itself a commentary on the continued salience and legitimacy of the ideology of white supremacy. One might ask why "neutral" equals "no position on racism" while an avowed anti-racist stance is seen as partisan?

that there is no racism to worry about except the racism of the integrationist who would dare to notice race.

#### IV. HURRICANE KATRINA AND THE “FLOOD BEFORE THE FLOOD”

The white people got out, most of them, anyway. If television and newspaper images can be deemed a statistical sample, it was mostly black people who were left behind. Poor black people, growing more hungry, sick and frightened by the hour as faraway officials counseled patience and warned that rescues take time. What a shocked world saw exposed in New Orleans two years ago wasn't just a broken levee. It was a cleavage of race and class, at once familiar and startlingly new, laid bare in a setting where they suddenly amounted to matters of life and death.<sup>112</sup>

I watched the news in stunned silence that first night after the storm. Men, women, children, elderly people, too infirm to walk, newborn babies were stranded on a freeway bridge above the water, within sight of the Superdome, but unable to get there. They cried out to television cameras and reporters, pleading for water and food. An old woman sat on the curb beside her dead husband's body and told of how he had died while she begged passing police cars to stop and help them. Every face on that freeway bridge was black, and I felt sick to my stomach with the knowledge that this human suffering was not just the random horror of natural disaster.<sup>113</sup>

In the aftermath of Hurricane Katrina and the flood in New Orleans, we witnessed just how deeply race divides our nation. And our response, as evidenced by our action, our inaction, our explanations and justifications, is evidence of “cultural meaning”—of how we think about racism, equal protection, and the meaning and relevance of intent.

A Gallup poll taken in the wake of Katrina found that six in ten African Americans believed that the fact that most hurricane victims were poor and black was one factor behind the failure of the federal government to come to their rescue quickly. Nearly nine in ten non-Hispanic whites

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<sup>112</sup> Jason DeParle, *Broken Levees, Unbroken Barriers*, N.Y. TIMES, Sept. 4, 2005, at 1, available at LEXIS, News Library, NYT File.

<sup>113</sup> For critical essays on the social implications of the disaster and the deeper forces of structural racism and social inequality that caused the poor and people of color to suffer disproportionately, see generally *THERE IS NO SUCH THING AS A NATURAL DISASTER: RACE, CLASS, AND HURRICANE KATRINA* (Chester Hartman & Gregory D. Squires eds. 2006); *WHAT LIES BENEATH: KATRINA, RACE, AND THE STATE OF THE NATION* (South End Press Collective ed. 2007); *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* (David Dante Trout ed. 2007).

believed those were not factors.<sup>114</sup>

President Bush on his first visit to New Orleans after the hurricane denied that race played a role. “[M]y attitude is this,” he said, “The storm didn’t discriminate and neither will the recovery effort. When those Coast Guard choppers . . . were pulling people off roofs, they didn’t check the color of a person’s skin.”<sup>115</sup> But, for example, Rae Clifton, who is black and was among those surveyed, displayed a widely held belief about the impact of race on the administration’s handling of the disaster. “If it had been a 17-year-old white cheerleader who was caught in the water, somebody would have tried to get there faster,” she said.<sup>116</sup>

I was teaching a class in Constitutional Law during the week following Katrina. The readings I had assigned for the day included the landmark case of *Washington v. Davis* and *The Id, the Ego, and Equal Protection*. At the beginning of the class, I read the reactions from President Bush and Ms. Clifton quoted above.

“I want you to keep this exchange in mind as we consider *Washington v. Davis*, *Arlington Heights* and *McCleskey v. Kemp*,” I said. “I want you to keep in mind the images we’ve seen from New Orleans and ask what implication they have for how we should think about race and equal protection.”

I asked my students to consider if the disagreement between President Bush and Ms. Clifton, about whether the guys pulling people off roofs were racist, was asking the wrong question. I asked, “Of what relevance to equal protection analysis is the fact that when the Gallup Poll asked about the people shown taking goods from stores in the aftermath of the storm, whites by a margin of 50% to 44% said most of those involved were criminals taking advantage of a situation, but blacks by a margin of 77% to 16% said they were mostly desperate people trying to find a way to survive?”<sup>117</sup>

Of what relevance is New Orleans’s complex racial history? What about the extreme levels of poverty, the highly segregated neighborhoods, the failing schools, the deteriorated infrastructure and housing, the undernourished children, the thousands of residents with no access to health care and basic public services,<sup>118</sup> that awaited Katrina before she

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<sup>114</sup> Susan Page & Maria Puente, *Views of Whites, Blacks Differ Starkly on Disaster*, USA TODAY, Sept. 13, 2005, at 1A, available at LEXIS, News Library, USATDY File.

<sup>115</sup> Transcript, President Bush in New Orleans, N.Y. TIMES, Sept. 12, 2005, available at LEXIS, News Library, NYT File.

<sup>116</sup> Page & Puente, *supra* note 114.

<sup>117</sup> *Id.* For an analysis of how racial images “framed” the stories and “facts” reported about Hurricane Katrina and gave them meaning, see Cheryl Harris & Devon Carbado, *Loot or Find: Fact or Frame*, in AFTER THE STORM, *supra* note 110, at 87, 87–88.

<sup>118</sup> See Evangeline Franklin, *A New Kind of Medical Disaster in the United States*, in THERE IS NO SUCH THING AS A NATURAL DISASTER, *supra* note 110, at 1, 3.

came ashore—what Mari Matsuda has called “the flood before the flood”?<sup>119</sup> How is this storm related to our collective racism, conscious and unconscious?

What was “the flood before the flood” in Seattle, Washington and Louisville, Kentucky? How and why were the schools segregated in the first place? What messages are conveyed to the world about the children who attend those schools? When we picture the children in the segregated all black schools, do they look like Little Black Sambo? Is this the picture that causes white families to flee with their children to white suburbs and private schools?<sup>120</sup> Does this picture tell us that these children are less intelligent, more violent, less precious, vulnerable and worthy of our care? Is this why we allow their school buildings to deteriorate and crumble around them? Is this why we believe they can only learn when we dumb-down the curriculum and teach them to chant scripted answers and ask no questions?<sup>121</sup> Do the black and brown children who hear and see these messages all around them understand that they are Little Black Sambo? Does it “affect their hearts and minds in a way unlikely to ever be undone”?<sup>122</sup> When this message, that black and brown children are inferior, is no longer written into the laws, when no school board acts with conscious intent to send the message, when a federal district court issues an order holding that a school district has achieved “unitary status,”<sup>123</sup> is

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<sup>119</sup> Mari J. Matsuda, *The Flood: Political Economy and Disaster*, 36 HOFSTRA L. REV. 1, 2 (2007).

<sup>120</sup> See Lawrence, *supra* note 16, at 1368–75 (discussing the often unacknowledged fears that cause white and middle class black parents to flee predominantly black urban schools); see also *supra* note 15.

<sup>121</sup> See generally Charles R. Lawrence III, *Who is the Child Left Behind?: The Racial Meaning of the New School Reform*, 39 SUFFOLK U. L. REV. 699 (2006) (discussing the ways in which the No Child Left Behind Act perpetuates and reinforces social class hierarchies and racist beliefs and practices).

I want to make a larger point about the continuing segregation in American education. Not only do we teach children in different schools, separated by race, class, and how much money we spend; we also *teach* them differently. . . . We have different expectations, aspirations, and goals. We are educating them for different futures. We send them different messages about their value to us, to the world, and to themselves.

*Id.* at 712–13.

<sup>122</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1953).

<sup>123</sup> Building upon the principles articulated in *Brown*, the Supreme Court issued a series of decisions in the 1960s forcing school districts to integrate public schools and create unitary school systems. See, e.g., *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968). Decades later, the Rehnquist Court betrayed this commitment to the Court’s decision in *Brown* through a radical reinterpretation of when schools are said to have achieved “unitary status.” See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991). Recent decisions relieve school districts of the burden of proving that segregated schools are not the result of past discrimination and require only good faith compliance with a court’s desegregation order and the elimination of the harm of past discrimination “to the extent practicable.” *Dowell*, 498 U.S. at 250; see also The Honorable David S. Tatel, *Judicial Methodology, Southern*

the meaning of the message any less clear? Do these messages and their meaning provide evidence of the continued vitality of white supremacy and substantiate our legal and moral duty to continue to affirmatively act to disestablish slavery's legacy?

These are the questions I want my students to ask. They are the questions that I hoped my article would provoke and that the best critical scholars in law and science have asked and continue to ask. This is the conversation we must have if we are to save our nation and our souls. If my effort of twenty years ago to save my own sanity has advanced this conversation even one small step, I am deeply gratified and thankful.

### EPILOGUE

In the weeks before this Symposium went to press, a political controversy placed the issue of race at the middle of the presidential primary campaign and threatened to derail the candidacy of Senator Barack Obama, a man whom many believe may well become our nation's first African American president. The texts and context of the controversy tell a story that captures, in its full complexity, the essential lesson of *The Id, the Ego, and Equal Protection*. I close this retrospective with a brief reflection on those events.

The Reverend Jeremiah Wright is angry about racism. He is angry about American violence, about the thousands of precious lives lost in Afghanistan, Iraq, and in the Chicago neighborhood where he lives and serves as Pastor of the 10,000 member Trinity United Church of Christ. Jeremiah Wright speaks forthrightly about his anger with injustice. For thirty-six years he has spoken from his pulpit, following the prophetic tradition of his Old Testament namesake, giving voice to the injury and anger of his flock and calling all of us to account for our sins against God and our neighbors.<sup>124</sup> In the black church vernacular, he "makes it plain."

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*School Segregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071 (2004). Moreover, they hold that once a school system has reached "unitary status" the desegregation order should be dissolved. See *Dowell*, 498 U.S. at 248 ("Such decrees . . . are not intended to operate in perpetuity."). The Court in *PICS* adopted this radical view of "unitary status" and went one step further. The Court held that once a school district has achieved "unitary status" it is actually unconstitutional for the district to continue the integration plan it designed to comply with the prior desegregation order. See *PICS*, 127 S.Ct. at 2752 ("Once Jefferson County achieved unitary status it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis."). Justice Breyer's dissent points out how the majority's newfangled reading of "unitary status" runs contrary to nearly half a century of Supreme Court precedent growing out of its decision in *Brown*. See *PICS*, 127 S.Ct. at 2831 (Breyer, J., dissenting) ("How could the plurality adopt a constitutional standard that would hold unconstitutional large numbers of race-conscious integration plans adopted by numerous school boards over the past 50 years while remaining true to this Court's desegregation precedent?").

<sup>124</sup> Martin E. Marty who was Wright's professor at the University of Chicago Divinity School writes:

Now he has been pushed into the glare of public scrutiny because Barack Obama is a member of his flock. Opponents of Senator Obama's candidacy have excerpted the most provocative and intemperate of Reverend Wright's angry, plainly spoken words, circulated them widely on the internet, and used them to brand him "separatist," "anti-American," "anti-white," to portray him in the stock image of an angry black man, rightly hated and feared.<sup>125</sup>

Of course, Senator Obama is the primary target of these attacks on Reverend Wright. Obama is called upon to denounce his pastor's words

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While Wright's sermons were pastoral—my wife and I have always been awed to hear the Christian Gospel parsed for our personal lives—they were also prophetic. At the university, we used to remark, half lightheartedly, that this Jeremiah was trying to live up to his namesake, the seventh-century B.C. prophet. Though Jeremiah of old did not "curse" his people of Israel, Wright, as a biblical scholar, could point out that the prophets Hosea and Micah did. But the Book of Jeremiah, written by numbers of authors, is so full of blasts and quasi curses—what biblical scholars call "imprecatory topoi"—that New England preachers invented a sermonic form called "the jeremiad," a style revived in some Wrightian shouts.

In the end, however, Jeremiah was the prophet of hope, and that note of hope is what attracts the multi-class membership at Trinity and significant television audiences. Both Jeremiahs gave the people work to do: to advance the missions of social justice and mercy that improve the lot of the suffering. For a sample, read Jeremiah 29, where the prophet's letter to the exiles in Babylon exhorts them to settle down and "seek the peace and prosperity of the city to which I have carried you into exile." Or listen to many a Jeremiah Wright sermon.

Martin E. Marty, *Prophet and Pastor*, CHRONICLE OF HIGHER EDUC., Apr. 11, 2008, at B1, available at LEXIS, News Library, CHEDUC File..

<sup>125</sup> See, e.g., Richard Cohen, *On Wright, What Took Obama So Long?*, REAL CLEAR POLITICS, Mar. 18, 2008, [http://www.realclearpolitics.com/articles/2008/03/on\\_wright\\_what\\_obama\\_so\\_l.html](http://www.realclearpolitics.com/articles/2008/03/on_wright_what_obama_so_l.html) ("Why did Barack Obama take so long to 'reject outright' the harshly critical statements about America made by his minister, Jeremiah Wright, not to mention the praise the same minister lavished on Louis Farrakhan just last November?"); Jodi Kantor, *Pastor's Words Still Draw Fire*, N.Y. TIMES, Mar. 13, 2008, at A18, available at LEXIS, News Library, NYT File ("[D]espite Mr. Obama's past attempts to distance himself from the harshest language, critics continued to question whether Mr. Wright's statements reflect Mr. Obama's beliefs."); William M. Welch, *Obama's Ties To Minister May Be A 'Big Problem,' Some Say Senator Has Rejected Racial Comments*, USA TODAY, Mar. 17, 2008, at 4A, available at LEXIS, News Library, USATDY File ("Critics say Obama may not have ended the controversy because he has had a relationship with Wright for nearly two decades."). One might well ask why Rev. Wright was so easily cast in this role. Wright volunteered for the Marine Corps during the Vietnam War and received several White House commendations. He holds a degree from one of the country's most prestigious universities, has received several honorary doctorates, and served as a faculty member at several seminaries. His church is known in Chicago for its hospitality, for its devotion to physical and spiritual healing, and for education and active involvement in the civic life of Chicago. White guests to Trinity report that they are welcomed and embraced when they worship there. Why do his calls for America to confront its violence and history of oppression translate into "He hates us"? Obama reminds his audience that segregation may be one explanation for why white people found Wright's words so shocking while most black people did not:

The fact that so many people are surprised to hear that anger in some of reverend Wright's sermons simply reminds us of the old truism that the most segregated hour in American life occurs on Sunday morning.

Senator Barack Obama, Remarks in Philadelphia, Penn.: A More Perfect Union (Mar. 18, 2008), available at [http://www.barackobama.com/2008/03/18/remarks\\_of\\_senator\\_barack\\_obam\\_53.php](http://www.barackobama.com/2008/03/18/remarks_of_senator_barack_obam_53.php).



and disown the man.<sup>126</sup> If he won't, he is anti-American and anti-white. He becomes the angry black man. Faced with this racist image-making, with the demand that he publicly denounce black anger and implicitly accept the demand's premise that black anger is unwarranted, Obama delivers a speech on the subject of race.<sup>127</sup>

Obama's speech is wonderful. I listen as each sentence unfolds, admiring his intelligence, his eloquence, his presence, worrying about how he will frame the next difficult issue and smiling to myself with admiration and pride as he chooses just the right word, metaphor, or story to capture the full complexity and spirit of the truth he must tell. I am watching Obama stand before the nation, breaking the taboo against speaking out loud about our racism. This is the speech I've wanted him to give since the beginning of the campaign. He asks us to confront our racism, to acknowledge its roots in our nation's history,<sup>128</sup> to remember and

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<sup>126</sup> See, e.g., Tom Baldwin, *Obama Is Urged To Disown Pastor Who Denounced America As Racist*, THE TIMES (LONDON), Mar. 15, 2008, at 55, available at LEXIS, News Library, TTIMES File; Cohen, *supra* note 125; Welch, *supra* note 125. This was not the only attempt to portray Obama as the dangerous black man by associating him with another black man whose words and images strike fear into the hearts of most whites. Obama was also criticized for not rejecting the support of Louis Farrakhan with enough force. See, e.g., Richard Cohen, *Obama's Farrakhan Test*, WASH. POST, Jan. 15, 2008, at A13, available at LEXIS, News Library, WPOST File. Attempting to make this point, Senator Clinton said in a televised debate: "[T]here's a difference between denouncing and rejecting . . . I just think, we've got to be even stronger. We cannot let anyone in any way say these things, because of the implications they have, which can be so far reaching." Responding, Obama memorably quipped: "I have to say, I don't see a difference between denouncing and rejecting . . . But if the word 'reject' Senator Clinton thinks is stronger than the word 'denounce,' then I'm happy to concede the point, and I would reject and denounce." *The Democratic Debate In Cleveland*, in N.Y. TIMES (Feb. 26, 2008) (transcript available at <http://www.nytimes.com/2008/02/26/us/politics/26text-debate.html?pagewanted=all>).

<sup>127</sup> Obama's speech is delivered in Philadelphia across the street from the hall where the Constitution's framers gathered to write the nation's foundational document. His title, "A More Perfect Union," echoes the Constitution's preamble, and his opening paragraph reminds his audience that the perfection of our union is unfinished business for which we are responsible. This theme echoes my own position on bottom-up Constitutional construction. See Lawrence, *Forbidden Conversations*, *supra* note 16, at 1398 (arguing that constitutional interpretation involves our "engaging in a conversation about public morality and the values we hold collectively as a community, about the way we choose to constitute ourselves as a people"); Charles R. Lawrence III, *Promises to Keep: We are the Constitution's Framers*, 1987 HOW. L.J. 645 (arguing that the Constitution "includes us—all of us—that it calls upon each of us to be active participants in making the Constitution; in deciding which constitutional values will be given primacy").

<sup>128</sup> Speaking of the Framers of the Constitution who had gathered in there in Philadelphia in 1787, Obama said:

The document they produced was eventually signed but ultimately unfinished. It was stained by this nation's original sin of slavery, a question that divided the colonies and brought the convention to a stalemate until the founders chose to allow the slave trade to continue for at least twenty more years, and to leave any final resolution to future generations.

Of course, the answer to the slavery question was already embedded within our Constitution—a Constitution that had at its very core the ideal of equal citizenship under the law; a Constitution that promised its people liberty, and justice, and a

appreciate the sacrifice and bravery of parents and grandparents who struggled to narrow the gap between our nation's ideals and our legacy of slavery and Jim Crow,<sup>129</sup> to know that this legacy lives with us still. He wants us to understand that we share this history and the illness it has wrought,<sup>130</sup> to use our knowledge and understanding to heal ourselves of the disease of racism. It hardly seems possible.<sup>131</sup> Barack Obama has made the subject of my life's work the subject of his speech.

Once again, I am aware that I do not watch this speech alone, that millions of other Americans are hearing this text and giving it meaning.<sup>132</sup> Like the text in *Little Black Sambo* and the text of the of the Supreme Court's opinion in *Parents Involved in Community Schools*, Senator Obama's speech is filled with racial images and I watch the speech

union that could be and should be perfected over time.

Obama, *supra* note 125.

<sup>129</sup> Speaking of the great, long struggle and those who sacrificed to work towards the promise of our Constitution, Obama says:

And yet words on a parchment would not be enough to deliver slaves from bondage, or provide men and women of every color and creed their full rights and obligations as citizens of the United States. What would be needed were Americans in successive generations who were willing to do their part—through protests and struggle, on the streets and in the courts, through a civil war and civil disobedience and always at great risk—to narrow that gap between the promise of our ideals and the reality of their time.

*Id.*

<sup>130</sup> Obama does not say that “we are all racists,” as I have said, Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 7, at 322, or that structural racism remains and is justified by racist ideology, *see supra* notes 17, 23–24, 35–36 and accompanying text, but that is his clear meaning. Consider when he says:

Understanding this reality requires a reminder of how we arrived at this point. As William Faulkner once wrote, “The past isn't dead and buried. In fact, it isn't even past.” We do not need to recite here the history of racial injustice in this country. But we do need to remind ourselves that so many of the disparities that exist in the African-American community today can be directly traced to inequalities passed on from an earlier generation that suffered under the brutal legacy of slavery and Jim Crow.

Obama, *supra* note 125.

<sup>131</sup> My predisposition to disbelief does not come from an earlier conviction that Obama did not previously believe what he now speaks. Rather, I could not imagine that Obama could say these things as a serious contender for the presidency. Until this time, he had seldom spoken directly about issues of race or racism. Of course, his blackness spoke always of race but it was others who made his blackness an issue.

<sup>132</sup> Obama's speech instantly became one of the most popular videos on YouTube and has, as of April 4, 2008, been viewed more than four million times on that site. *See* YouTube, [http://www.youtube.com/results?search\\_query=obama+philadelphia+race&search\\_type=](http://www.youtube.com/results?search_query=obama+philadelphia+race&search_type=) (last visited Apr. 8, 2008) (noting that Obama's speech entitled “A More Perfect Union” has been viewed over four million times); *see also* *Speech on Race Tops YouTube*, NPR, Mar. 20, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=88650809> (reporting that as of March 20, 2008, Obama's speech had been clicked more than 1.6 million times and had been commented on more than four thousand times). This, coupled with the sound bites played on the television and radio news networks, brought his words to an unprecedented audience, especially for a primary season campaign speech.

knowing that our collective history and experience will give those images meaning. I know that the images we will see and the meanings we will take from this text are determined not only by the text itself, but by the face of the speaker.

One cannot mistake Barack Obama for anything other than a black man. The Media has dubbed him a “post-racial” candidate.<sup>133</sup> When a euphoric multiracial crowd of Obama campaign workers and supporters gathered to celebrate his historic victory in the South Carolina primary they chanted: “Race doesn’t matter!”<sup>134</sup> But race *does* matter in America, Supreme Court pronouncements of our colorblindness notwithstanding. Obama’s candidacy compels us to ask, “Are we capable of electing a Black president? Are we capable of overcoming and moving beyond our racism?” We cannot answer those questions in the affirmative while we deny our racism.

Even as I rejoice in the truth and eloquence of Obama’s words, I experience uneasiness and apprehension. I am fearful that he has spoken too much truth, too forthrightly; that even this carefully crafted speech will produce the backlash that always comes when one speaks truth to power.<sup>135</sup> Within hours of the speech, a host of pundits and commentators descend on his words, eager to dissect, analyze, reinterpret, assault and condemn. Many of these commentators lift passages from Obama’s speech and reframe them to distort his meaning and silence his truth.<sup>136</sup> They seek to

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<sup>133</sup> See *The Cook Spoils Obama’s Broth: Race and the Democrats*, ECONOMIST, Jan. 24, 2008, available at LEXIS, News Library, ECON File (“Mr. Obama’s candidacy at first seemed a post-racial triumph.”); Peter J. Boyer, *The Political Scene: The Color of Politics*, NEW YORKER, Feb. 4, 2008, at 38, available at LEXIS, News Library, NEWYRK File (discussing Obama and Newark Mayor Gary Booker as two African American politicians who transcend race); Tim Rutten, *The Good Generation Gap*, L.A. TIMES, Feb. 6, 2008, at 31, available at LEXIS, News Library, LAT File (reporting that “he personifies and articulates the post-racial America in which most of our young people now live”). See *contra* Gary Younge, *Some Things Even Obama Can’t Transcend*, THE NATION, Feb. 11, 2008, available at <http://www.thenation.com/doc/20080211/younge> (“[B]efore we can talk sensibly about transcending difference, we must first transform the conditions that give these differences meaning.”).

<sup>134</sup> See Alec MacGillis, *A Margin That Will Be Hard to Marginalize*, WASH. POST, Jan. 27, 2008, at A01, available at LEXIS, News Library, WPOST File.

<sup>135</sup> See Mari Matsuda, *Love Change*, 17 J.L. & FEMINISM 185, 187 n.10 (2005) (pointing out that some commentators attributed Senator Kerry’s loss in the 2004 presidential election to a backlash against Democrats for their modest support of civil unions, and making the case for persisting in the fight for the marriage rights of all people—the risk of political backlash notwithstanding); Cynthia Tucker, *King’s Courage Should Not Be Reduced To Caricature*, Yahoo! News, Mar. 29, 2008, [http://news.yahoo.com/s/ucas/20080329/cm\\_ucas/kingscourageshouldnotbereducedtocaricature](http://news.yahoo.com/s/ucas/20080329/cm_ucas/kingscourageshouldnotbereducedtocaricature) (quoting Martin Luther King, Jr. as saying, “The most popular explanation for the backlash is that it is a response to Negro ‘aggressiveness’ and ‘excessive demands.’ It is further attributed to an overzealous government which is charged with so favoring Negro demands that it has stimulated them beyond reason. These are largely half-truths and, as such, whole lies.”).

<sup>136</sup> See, e.g., William Kristol, *Let’s Not, And Say We Did*, N.Y. TIMES, Mar. 24, 2008, at A23, available at LEXIS, News Library, NYTIMES File (“Nor was I shocked when Obama compared Reverend Wright, who was using his pulpit to propagate racial resentment, with his grandmother, who

break the bridge of shared humanity that Obama has labored so mightily to build in his campaign and in this speech. They signal to white people, "This man Obama is not you. Remember he is black and black folks are not us." They do this in the coded language of colorblindness, a language that invokes racism's images even as it denies racism's existence or attributes racism only to those who dare remove white supremacy's colorblind disguise. They never *say* Obama is scary because he is black. Instead, they use Jeremiah Wright, with his afro-centric robes and unguarded angry words, to re-cast Obama as scarily black. Obama's answer was to confront the image, to say our history has made blackness scary. The image of blackness as violent, angry, hateful, is not true. Now the truth-silencers strike back by telling the lie again and again, calling Wright, now Obama's surrogate, white-hating and separatist. The commentators position themselves as colorblind and Wright (now Obama) becomes the separatist who is racist. Like Justice Roberts in *PICS*, they turn reality upside-down, denying the existence of white supremacy's structure and meaning in order to silence those who exhort us to be conscious of our racism so that we can heal ourselves.

The day after Obama gives his speech I present and discuss this Article with my colleagues at a works-in-progress seminar. The racism at the core

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may have said privately a few things that made Obama cringe, or with Geraldine Ferraro, whom 'some have dismissed . . . as harboring some deep-seated bias.'"); *see also* The Daily Show, *The Dialogue Begins*, Mar. 19, 2008, available at <http://www.thedailyshow.com/video/index.jhtml?videoId=164521&title=the-dialogue-begins> (lamprooning the cable network news' coverage of Obama's speech and their penchant to, in Obama's words, "tackle race only as spectacle"). Obama anticipated this backlash and warned of it in his speech, calling on Americans to resist this old brand of politics by division:

For we have a choice in this country. We can accept a politics that breeds division, and conflict, and cynicism. We can tackle race only as spectacle—as we did in the OJ trial—or in the wake of tragedy, as we did in the aftermath of Katrina—or as fodder for the nightly news. We can play Reverend Wright's sermons on every channel, every day and talk about them from now until the election, and make the only question in this campaign whether or not the American people think that I somehow believe or sympathize with his most offensive words. We can pounce on some gaffe by a Hillary supporter as evidence that she's playing the race card, or we can speculate on whether white men will all flock to John McCain in the general election regardless of his policies.

We can do that.

But if we do, I can tell you that in the next election, we'll be talking about some other distraction. And then another one. And then another one. And nothing will change.

That is one option. Or, at this moment, in this election, we can come together and say, "Not this time." This time we want to talk about the crumbling schools that are stealing the future of black children and white children and Asian children and Hispanic children and Native American children. This time we want to reject the cynicism that tells us that these kids can't learn; that those kids who don't look like us are somebody else's problem. The children of America are not those kids, they are our kids, and we will not let them fall behind in a 21st century economy. Not this time.

Obama, *supra* note 125.

of the attack on Obama is the new shared text I ask my colleagues to confront. I ask them to consider the challenge that Obama faces when he makes this speech, when he asks us to confront and heal our racism, even as we suffer from the disease, even while there are those who seek to feed the cancer, even as he stands surrounded by the images that racism has created.

I begin my presentation by showing several visual images. The first is a drawing of Little Black Sambo. The image comes from the cover of the 1899 London edition of the book. In the slides that follow there are several other iconic images of Black people as America has imagined us: a white minstrel in blackface; a cartoon caricature of a black uniformed waiter with huge distorted red lips in a wide smile, the restaurant's name printed on his white teeth—"Coon-chicken Inn;" advertisements for *Aunt Jemima Pancakes* and *Rastus Cream of Wheat*; a photograph of Flavor Flav—a contemporary minstrel in clownish garb. Interspersed among these images I have placed a photograph of myself from the Georgetown web site, a photograph of the Reverend Jeremiah Wright wearing afro-centric vestments, and a photograph of Barack Obama taken as he delivered his speech in Philadelphia. I want my colleagues to see that these images stand beside Barack Obama nearly blocking our ability to see him as he is, in his intelligence, and empathetic generosity toward his audience, asking Americans to hear our history and know the truth of our racism. The picture of my face among the others signals that these images also stand with me as I speak.

Obama's foes have used Jeremiah Wright to remind us that all of these images represent Obama's kin. They deploy these images so that we will feel their presence without knowing they are there, without asking why their presence makes Obama less human, less one of us. I want to expose the images, to make my colleagues conscious of the cultural meaning found in the demand that Obama denounce his pastor, a meaning that we have pushed into our unconscious. I want them to hear how Obama responds to his foes, knowing he must speak directly to the images if he is to prove them false.

I read the following passage from Obama's speech.

Like other predominantly black churches across the country, Trinity embodies the black community in its entirety—the doctor and the welfare mom, the model student and the former gang-banger. Like other black churches, Trinity's services are full of raucous laughter and sometimes bawdy humor. They are full of dancing, clapping, screaming and shouting that may seem jarring to the untrained ear. The church contains in full the kindness and cruelty, the fierce intelligence and the shocking ignorance, the struggles and successes, the love and yes, the bitterness and bias that make

up the black experience in America.

And this helps explain, perhaps, my relationship with Reverend Wright. As imperfect as he may be, he has been like family to me. He strengthened my faith, officiated my wedding, and baptized my children. Not once in my conversations with him have I heard him talk about any ethnic group in derogatory terms, or treat whites with whom he interacted with anything but courtesy and respect. He contains within him the contradictions—the good and the bad—of the community that he has served diligently for so many years.

I can no more disown him than I can disown the black community. I can no more disown him than I can my white grandmother—a woman who helped raise me, a woman who sacrificed again and again for me, a woman who loves me as much as she loves anything in this world, but a woman who once confessed her fear of black men who passed by her on the street, and who on more than one occasion has uttered racial or ethnic stereotypes that made me cringe.

These people are a part of me. And they are a part of America, this country that I love.<sup>137</sup>

Obama understands the racial message and meaning in the demand that he disassociate himself from Reverend Wright. He knows that this demand is about more than his pastor's intemperate words. Obama refuses to disown Jeremiah Wright or the community of black people.<sup>138</sup> He says I

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<sup>137</sup> *Id.*

<sup>138</sup> Although Obama did not disown Reverend Wright or his anger at injustice, he did distance himself from Wright's comments calling them "wrong" and "divisive" and characterizing them as expressing "a profoundly distorted view of this country—a view that sees white racism as endemic . . ." I found this troubling. For in distancing himself from Wright's words, Obama appeared to deny the substance of Wright's meaning as well as the words that Wright had chosen. Obama's detractors were demanding that he disown his kinship with his pastor and Obama refused, but they were also demanding that he distance himself from the more radical content of Wright's words and Obama seemed to accede to this demand. These two different responses represent the tightrope that Obama, the presidential candidate, is forced to walk. He cannot use the words "white supremacy" as I have in this Article. He must speak of our shared racism in a way that his audience can hear him. He can embrace his pastor, but he must be careful about embracing his pastor's radicalism.

Obama's opponents have employed another image in seeking to render him silent in the face of racism. They have used his Muslim heritage to evoke a racialized image of adherents of Islam. See Maureen Dowd, *What's in a Name, Barry?*, N.Y. TIMES, Dec. 2, 2006, at A15, available at LEXIS, News Library, NYT File; Adam Freedman, *The Object of His Rejection*, N.Y. TIMES, Mar. 2, 2008, at 11, available at LEXIS, News Library, NYT File (discussing Clinton's call for Obama to "reject" as well as "denounce" Farrakhan); Joe Garafoli, *Right Wing Plays Muslim Card Against Obama*, SAN. FRAN. CHRON., Feb. 28, 2008, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/02/28/MNKGVABG8.DTL&hw=right+wing&sn=007&sc=637>; Jim Kuhnhen, *Obama Fights*

am one of these people, too. We are not as white supremacy imagines us and neither are you. We cannot ignore the continuing legacy of a nation born in slavery. We cannot deny the existence of our segregated schools, neighborhoods, and churches. We cannot ignore the images that stand beside me as I speak. These images stand here with me, and we must see them clearly before we can understand the injury they do. This work of coming face to face with our racism and reconstructing our images of each other and ourselves is the unfinished business of forming a more perfect union.

I began this reflection on *The Id, the Ego, and Equal Protection* with a text that felt like a nightmare and made me despair. The Supreme Court majority in *Parents Involved in Community Schools v. Seattle School District* had turned *Brown v. Board of Education* on its head, declaring it unconstitutional for us to see our racism, to speak of it out loud, to make it visible so that we can fight it together. I close with a text both hopeful and difficult. A text from a black presidential candidate who challenges us to see the cultural meaning that white supremacy has constructed, to see it so that we can begin the work of reconstructing those meanings and our shared humanity. We must choose the latter text, with our eyes and hearts open, and do this difficult work that will make our wounded world whole.

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*Rumors About Islam, Senator Rejects Farrakhan; Says Repeatedly He Is a Christian*, CHARLESTON GAZETTE, Feb. 28, 2008, at A1, available at LEXIS, News Library, CHRGAZ File. The silencing power of this image is apparent in Obama's exclusion of Muslims from his truth speaking and inclusive lesson on American racism. In the same paragraph that he distances himself from Wright's words, he makes his only reference to Islam saying that Wright's remarks expressed a view "that sees the conflicts in the Middle East as rooted primarily in the actions of stalwart allies like Israel, instead of emanating from the perverse and hateful ideologies of Islam." Obama, *supra* note 125. Here, Obama might have taught the same lesson he taught in countering the racialized images of blackness by invoking Reverend Wright's full humanity and explaining his anger within the context of the black experience with oppressive racism. Instead, Obama participates in the post 9/11 racialized imagery that equates Islam with terrorism and renders all Muslims terrorists in our eyes. As my colleague Professor Lama Abu Odeh has noted, "While Obama explains black rage to white Americans, he completely fails to explain Muslim rage to Americans. In a post-9/11 world, we Muslims are way too hot to touch and he drops us as surely as he has dropped his middle name Hussein." Lama Abu-Odeh, Remarks at a Georgetown University Law Center Panel Discussion Titled "Perfecting the Union: Obama, Race, and Religion" (Apr. 7, 2008) (on file with author).