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## ESSAYS

### UNCONSCIOUS RACISM

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My first encounter with what we now call unconscious racism came in a courtroom in 1968. We didn't use that phrase back then. There was a lot of focus on racism and consciousness in the 1960s, and the idea would have made sense. But for reasons I'll explain, it wouldn't have seemed very important.

I was a rookie public defender assigned to the bail-setting court in the Police Administration Building at 8th and Race Streets in Philadelphia.<sup>2</sup> The bail hearings went on all day and all night; I was on the graveyard shift because I was new. Two cases came up over the course of a week that upset me. The defendants in both cases were employed, middle class men in their mid-thirties with stable residences, marriages, and children.

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\* Professor of Law, Temple University Beasley School of Law. This is an edited transcript, with minimal footnoting added, of my introductory remarks at *Temple Law Review's* Symposium "The Evolution of Civil Rights Litigation: Using Social Science and Statistics to Prove Employment Discrimination and Predatory Lending" on November 19, 2010. I appreciate the many ways Murray Shusterman, who attended this symposium in the Law School building named for him, has contributed to Temple Law School. Research assistance was provided by Eric Motylinski. Copyright © 2010 by David Kairys.

1. The content for this Essay was partially drawn from my works in the area, including: PHILADELPHIA FREEDOM, MEMOIR OF A CIVIL RIGHTS LAWYER (2008); WITH LIBERTY AND JUSTICE FOR SOME: A CRITIQUE OF THE CONSERVATIVE SUPREME COURT (1993); *Civil Rights*, in International Encyclopedia of the Social and Behavioral Sciences 1878 (Neil J. Smelser & Paul B. Baltes eds., 2001); *A Brief History of Race and the Supreme Court*, 79 TEMP. L. REV. 751 (2006); *More or Less Equal*, 13 TEMP. POL. & CIV. RTS. L. REV. 675 (2004); *Searching for the Rule of Law*, 36 SUFFOLK L. REV. 307 (2003); *Unexplainable on Grounds Other than Race*, 45 AM. U. L. REV. 729 (1996); *Race Trilogy*, 67 TEMP. L. REV. 1 (1994); see also *Freedom of Speech*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 140-71 (David Kairys ed., 1st ed. 1982), available at <http://ssrn.com/abstract=727903>; *Introduction to THE POLITICS OF LAW* (David Kairys ed., 3d ed. 1998), available at <http://ssrn.com/abstract=841469>.

2. I wrote about this in my memoir, PHILADELPHIA FREEDOM, *supra* note 1, at 47-62.

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Richard Davis was a white car salesman from Cherry Hill, New Jersey who sold Studebakers, a funky, odd car back in the day. He was formally dressed with a jacket and tie, but he had drunk way too much and puked on his jacket and pants. He was charged with drunk driving, and he had a prior drunk driving charge on his record. At that time, drunk driving was not taken as seriously as it is now. The judge set bail at \$300 and allowed Davis to sign his own bail bond, which meant he could walk out the door by signing a written promise to pay the bail himself if he didn't show up for trial.

About a week later, Alex Horne, also in disheveled business attire, faced the same charge and, like Davis, had a prior drunk driving charge. He was a black insurance salesman for Prudential who lived in West Philadelphia. The prosecutor asked for \$500 bail. The judge granted my request to set bail at \$300 dollars, maybe to do the new kid a favor, but he wouldn't allow Horne to sign his own bond. This meant Horne would have to post \$300 himself, pay a bondsman to do so, or go to jail. I asked the judge to inquire whether Horne or his family could post the bond or pay a bondsman so late at night.

"I can't do anything about that," the judge said. "They give 'em each one phone call. If he gets through, fine. Next case."

I wanted to yell at the judge, bring a federal test suit, go to the media, watch a zillion bail hearings so I could get data and present a systemic challenge. But I decided I should just talk to the judge privately and not call him, or what he had done, racist, which could end the conversation. After that batch of cases was done, I asked the judge if I could talk to him in the little room behind the bench.

The judge didn't care whether Horne spent the night in jail or at home. He said Horne "could be dangerous, driving drunk like that, and it wasn't his first time." I brought up the bail hearing for Davis, whom he remembered as the guy who sold Studebakers. Davis "had a few too many," the judge said. "He wouldn't hurt anybody." I reminded the judge that Davis also had a prior drunk driving charge, and I said, "it might hurt just as bad to be run over by a drunk car salesman from Cherry Hill as a drunk insurance salesman from West Philadelphia." He smiled. Race was not specifically mentioned, although we both knew at that point that the only difference between the cases was the race of the defendants.

The judge relented, allowing Horne to sign his own bail bond. Horne slept at home rather than in jail that night, and I learned something important about the difference between causes and clients, and about race. This judge was not an overt or self-perceived racist, or a bad person. He would have been insulted and angry if told that what he had done was racial discrimination. But within all of us, in varying ways and degrees, race deeply influences perceptions, feelings, and judgment. This white judge, who had lived most of his life in predominantly Italian-ancestry neighborhoods in South Philadelphia, much of it during segregation, reached such different results although he knew nothing about Davis or Horne except they both drove while drunk, both had done it at least once before, and one was white and the other black.

The judge responded to the white man with an immediate effort to understand his actions, an openness to excuse, and a presumption of essential goodness. Davis drank too much and shouldn't have driven, but he was presumed by the judge to be a good person who had just made an understandable mistake. He wouldn't harm anybody. The

best term for this is empathy—basically, identification with him and a strong presumption of his essential goodness, as if he is a friend or a member of one's family.

The judge's response to the black man was dominated by fear. There was a presumption of danger and an absence of empathy, with no attempt or openness to understand or excuse Horne's actions.

Back then, this was racism, and it was a common internalized norm not limited to evil people. It was not and is not the same as the racist epithets of the Ku Klux Klan or the segregation laws that prohibited blacks from drinking in the same water fountains, gassing up at the same pumps, or going to the same schools as whites. But it was racial discrimination, and as such, morally and constitutionally wrong.

There was no reason for an inquiry into the judge's deepest, subterranean motivation or purpose in doing this. That wasn't particularly interesting or legally important. He had imprisoned the black guy and let the white guy go free in circumstances that called for the same treatment, based on presumptions and stereotypes unsupported by the facts before him. That was more than enough; the judge's mental state didn't really matter.

Nor could I have imagined that at a later date—starting in the mid-1970s—our courts might be excusing such differences in treatment unless there is also proof that it was done purposefully, with racial animus or motivation.<sup>3</sup> That wouldn't have occurred to me back then. Why would it matter? The disparity in treatment should be enough, and is unacceptable.<sup>4</sup>

The judge's rulings and explanations in that bail court in 1968 demonstrate the operation and consequences of what we now call unconscious racism, or more often these days, unconscious bias.<sup>5</sup> But to understand the meaning and relevance of unconscious bias in the 1960s and today, it is essential to pay attention to history and

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3. Since the mid-1970s, equal protection claims brought by African Americans and other minorities were rejected for lack of proof of purposeful discrimination on issues that significantly defined the not-very-distant segregated past: job discrimination, voting discrimination, housing discrimination, segregated schools, and the death penalty. *See McCleskey v. Kemp*, 481 U.S. 279, 313 (1987) (holding no violation of equal protection where petitioner failed to show decision-makers acted with discriminatory intent in death penalty sentencing); *City of Memphis v. Greene*, 451 U.S. 100 (1981) (upholding closure of a street connecting black and white neighborhoods, initiated at behest of an all-white neighborhood built with racial covenants, despite procedural and substantive irregularities); *City of Mobile v. Bolden*, 446 U.S. 55, 73 (1980) (upholding city's at-large electoral system that enabled a consistently all-white city commission despite significant black population); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 (1977) (finding no proof that rezoning was racially motivated); *Washington v. Davis*, 426 U.S. 229, 248–50 (1976) (finding facially nondiscriminatory test administered to job applicants allowable despite discriminatory effect and lack of correlation to job performance); *Milliken v. Bradley*, 418 U.S. 717, 752 (1974) (refusing to implement multidistrict remedy for schools in absence of proof that boundaries were purposefully established to racially segregate). *See generally A Brief History of Race and the Supreme Court*, *supra* note 1, at 761–64. This shift and the range of race issues have been significantly addressed by works embracing critical race theory. *See id.* at 751 n.2.

4. This approach, which I have called the "purpose doctrine," now dominates the Court's analyses not only of discrimination issues but the full range of civil rights and civil liberties issues as well. *See WITH LIBERTY AND JUSTICE FOR SOME*, *supra* note 1, at 183–88, and the other works collected *supra* note 1.

5. *See generally* Jerry Kang, *The Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

context.<sup>6</sup> For present purposes, the most important development is that at a certain point not that far in the past, about 50 or 60 years ago, we came to the conviction that racism is wrong.<sup>7</sup> Racism on the part of government, private institutions, or individuals became socially, morally, and culturally wrong.<sup>8</sup> Before that, slavery had long been abolished but we went through long periods of Jim Crow and segregation, and racism in words and deeds was acceptable and not unusual, if not something like the norm.<sup>9</sup>

I'm old enough to have listened as a child growing up in Baltimore to educated people with good jobs and high positions in society spew out racial epithets as easily as, for example, analyses of the latest Colts football game.<sup>10</sup> Racial, ethnic, and religious stereotypes and putdowns were part of our everyday language and life. I don't mean that everybody acted this way, or that use of epithets is the only or main issue of relevance or concern. But racial epithets provide a window to understanding when and how important this change was, and they reflected actual discrimination that was common.

Over the course of many years, with fits and starts, progress and setbacks, we changed not only our law and our constitutional interpretation of equal protection,<sup>11</sup> but perhaps more importantly, our deeply held social, moral and cultural norms. We didn't agree on what racism is, and still don't, but a consensus developed that racism is wrong. It became so thoroughly wrong that, after this change I'm talking about, leading Ku Klux Klan official David Duke headed a splinter group of the Klan that insisted they were not racist.<sup>12</sup> They had to give up their catchiest racist slogans, given the moral, ethical, and cultural loathing of racism as akin to evil.

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6. See generally *A Brief History of Race and the Supreme Court*, *supra* note, 1.

7. *Id.* at 756.

8. *Id.* at 760.

9. See generally A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996) (documenting connections between law and racial oppression in Jim Crow/segregation era).

10. Sports analyses were themselves often laced with explicit racial references for the African American players. For example, Buddy Young, a black halfback who was a miraculously effective runner for the Colts despite his small size, was frequently referred to as the "Bronze Bullet." Neil Hayes, *Good and Quick—23 Buddy Young: From Phillips High to Illini to NFL, Hall of Fame Back Was Even Better as a Person*, *CHI. SUN. TIMES*, July 20, 2008, at A46.

11. *E.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. (2006)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973gg-10); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See generally MARTHA MINOW, *IN BROWN'S WAKE, LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* (2010).

12. Duke characterized his splinter group of the Klan—Knights of the Ku Klux Klan—as a "white civil rights" organization. *Knights of the Ku Klux Klan*, S. POVERTY LAW CTR., <http://www.splcenter.org/get-informed/intelligence-files/groups/knights-of-the-ku-klux-klan> (last visited Oct. 8, 2011). Racism is still apparent in the organization, however, as evident by its statement that: "Non-whites who reside in America should be expected to conduct themselves according to Christian principles and must recognize that race mixing is definitely wrong and out of the question. It will be a privilege to live under the authority of a compassionate White Christian government." *Id.* Duke has even insisted that the Klan itself was not racist. *David Duke: 2012 Presidential Profile*, *CDNEWS*, <http://conservativedailynews.com/2011/07/david-duke-2012-presidential-profile/> (last visited Oct. 8, 2011) (noting that Duke has "repeatedly insisted that Klan was 'not anti-black,' but rather 'pro-white' and 'pro-Christian'").

Though this change was deep and in some respects thorough, it had serious limits and problems arose pretty quickly. The shift to perceiving racism as a moral deficiency or as evil was relatively quick, and there wasn't much time or effort given to education and promotion of a new understanding. Deep-seated notions about race dating back to slavery, Jim Crow, and segregation persisted and remain very much alive today— notions of inferiority and superiority, as well as racially attributed, stereotyped characteristics, like intelligence, perseverance, morality, tendencies to violence, and sexual promiscuity.<sup>13</sup>

None of this is surprising in the sense that a change of this magnitude cannot be expected to be absorbed quickly. The problem is that we quickly cut off the learning process and—in the legal realm and in society generally—we wound up focusing our attention almost exclusively on overt, explicit, and formal inequality. Once these were banished, we declared a premature victory in the struggle for racial equality.

While explicitly racist and overtly segregationist measures were banned, and racial epithets became taboo, we left in place the legacy of slavery, Jim Crow, and segregation that, I have to say, still literally surrounds us today in places like North Philadelphia. It's still got the worst of the schools, the worst of the healthcare, housing, jobs, nutrition, and so on.<sup>14</sup> A black middle class has developed, which has been quite an accomplishment, but for the mass of African Americans, particularly in communities like North Philadelphia where a racially concentrated population lives in extreme poverty, not much is different from the 1950s.<sup>15</sup> This concrete legacy of the past dominates the reality of lives in the present.

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13. See, e.g., I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 54 n.75 (2008) ("Ratings based on the 1990 General Social Survey reveal that, at least as of 1990, 54% of whites believed blacks are less intelligent than whites, 62% of whites believed blacks are less industrious, and 54% of whites believed blacks are more prone to violence."); Alex M. Johnson, Jr., *The Re-Emergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race*, 94 IOWA L. REV. 1547, 1571–72 & n.88 (2009) (discussing continuing influence of stereotypes historically associated with "blackness," including reduced intelligence, greater athleticism, laziness, and sexual promiscuity); Kang, *supra* note 5, at 1525–28 (discussing research on perceptions of blacks being more prone to violence).

14. See, e.g., Lynn M. Paltrow, *The War on Drugs and the War on Abortion: Some Initial Thoughts on the Connections, Intersections and the Effects*, 28 S.U. L. REV. 201, 208 n.19 (2001) (citing research showing that "poverty and its many concomitants—poorer nutrition, inadequate housing, health care and stimulation once the child is born" can cause greater physical and mental impairments than early childhood crack exposure); Terry Jean Seligmann, *An Idea Schools Can Use: Lessons from Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 772 n.79 (2001) (noting "correlation between, race, poverty, inadequate health and nutrition, and resulting [learning] disabilities"); Marc Tucker, *Industrial Policy and National Success: The Human Element*, 5 STAN. L. & POL'Y REV. 53, 55 (1993) ("A substantial fraction of our inner-city children live in conditions no better than those found in the poorest third world countries. The consequences—poor health, inadequate nutrition, drug addiction, inadequate neural development, severe emotional problems—are incalculable."). On the persistence of racial discrimination in employment, see DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007).

15. See, e.g., WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 7–8 (1987) (describing inner cities in 1980s as being "populated almost exclusively by the most disadvantaged segments of the black urban community, that heterogeneous grouping of families and individuals who are outside the mainstream of the American occupational system"); R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1539–40 (2011) (discussing persistence of hypersegregation among African American community and its implications for education, employment, and health).

There's also the remaining racism—the deep-seated parts that we're focusing on today—that doesn't just go away because the courts, the media, and mainstream culture declare explicit racism wrong. And it all becomes harder to deal with because—there's an irony here—the racist label became so loathsome that the deeper layers of racism have become harder to reach.<sup>16</sup> The labels, understanding, and explanation of something as complex as racism got reduced to only two acceptable categories—racist or nonracist—so conduct or circumstances became either maliciously racist and evilly wrong or nonracist and completely free of any racial taint or significance. Perhaps this distorted labeling and description of racism gained easy acceptance because it exempts almost all white people from involvement in or responsibility for racial oppression, or the privileges derived from it. In any event, it undermined efforts to build a deeper and more widely held understanding of race relations and limited our ability to deal with and correct the remaining problem.

Progress was hindered further by a multi-faceted retrenchment by the courts starting in the mid-1970s.<sup>17</sup> The adoption of the purposeful discrimination rule, which requires proof of a racial purpose or motive to establish a discrimination case, made it near impossible for minorities to win, even in circumstances resembling the worst forms of pre-civil rights discrimination, segregation and disenfranchisement.<sup>18</sup> In the same period, a hypersensitive version of the purposeful discrimination rule was applied to invalidate good-faith affirmative and remedial action, by taking any consideration of race—even if done in good faith to open opportunities and eliminate discrimination—as sufficient proof of purposeful discrimination.<sup>19</sup>

Taken together, the Court's race decisions over the past few decades make it quite easy for white plaintiffs to establish a claim of reverse discrimination to invalidate good faith legislative and executive efforts aimed at achieving meaningful equality, but near impossible for minority plaintiffs to establish a claim of discrimination, even under circumstances closely resembling traditional discrimination against minorities or pre-*Brown* segregation.<sup>20</sup> The Court has essentially established two distinct sets of rules, assumptions, and approaches—one characterized by insensitivity to race and the other by hypersensitivity to race. Which applies in particular circumstances depends on

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16. See Adjoa Artis Aiyetoro, *Can We Talk Now? How Triggers for Unconscious Racism Strengthen the Importance of Dialogue*, 22 NAT'L BLACK L.J. 1, 54 (2009) (discussing “taboo on speaking about race” due to fear of being perceived as racist, and how the resulting dearth of discussion has helped “maintain[] the myths of white supremacy”).

17. See *A Brief History of Race and the Supreme Court*, *supra* note 1, at 753–54 (describing shift in 1970s towards purpose doctrine, whereby rights can be vindicated only if bad purpose is proved).

18. See *supra* note 3 and accompanying text for examples of cases denying relief under the purposeful discrimination doctrine.

19. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (holding, for the first time, that affirmative action explicitly considering race is subject to strict scrutiny); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that, contrary to an earlier decision, federal affirmative action explicitly considering race is also subject to strict scrutiny).

20. See *A Brief History of Race and the Supreme Court*, *supra* note 1, at 764 and other works collected, *supra* note 1. The differing analyses of white and minority discrimination claims has been accomplished by selective differences in what I have called “pre-scrutiny scrutiny,” which includes an often detailed scrutiny only in the cases considering discrimination claims by whites to determine whether there should be strict (or detailed) scrutiny. *Id.* at 765 n.49.

whether whites or minorities are claiming discrimination.<sup>21</sup> The result of this retrenchment is that over the last few decades almost all of the winning plaintiffs in equal protection race cases before the Supreme Court have been white.<sup>22</sup>

In the courts and in American society and culture generally, the stigma of racial impropriety has moved from discriminating against minorities to discriminating against white people. Challenging discrimination against minorities is now regularly referred to disparagingly as “playing the race card.” Meanwhile, we are still living with the unfulfilled promise of the civil rights years, and with the lost opportunity. Many of our current woes, including the range of racial and urban problems, are traceable in large part to the failure in this period to deal with contemporary discrimination and the effects of past discrimination and segregation.<sup>23</sup>

The judicial retrenchment was led by a Supreme Court justice who opposed equality for African Americans and other minorities right from the beginning. At the helm of the Supreme Court when it decided, with all its moral as well as legal authority, how far and how deeply we would deal with our terrible history and daily reality of racial oppression, was a Justice who actively opposed even the earliest moves toward equality and away from segregation: Chief Justice William Rehnquist.<sup>24</sup> As a law clerk to Justice Robert Jackson in the 1950s, Rehnquist wrote a memo to Jackson urging that he not go along with what became *Brown v. Board of Education*.<sup>25</sup> Rehnquist said in the memo that the “separate but equal” principle of *Plessy v.*

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21. *Id.* at 764–65 & n.49. In an analysis developed in a series of writings, see *supra* note 1, I have characterized this as a “dual system,” accomplished through the selective use of “pre-scrutiny scrutiny,” rather than the uniform system that the Court purports to apply to all discrimination claims. *Id.* Since *Brown v. Board of Education*, 347 U.S. 483 (1954), there has been an easy and irrepressible, but seldom documented, tendency to see the courts as ardent supporters of civil rights and civil liberties. There are only two periods in our history, however, that have been characterized by sustained, systematic protection: from about 1937 to 1944 and from about 1961 (or 1954) to 1973. *Id.* at 766–67.

22. *Id.* at 764. There are some exceptional areas where there have been some successes by blacks and other minorities, most prominently jury representativeness, which concerns the rights of litigants to a fair trial and the legitimacy and integrity of the courts in addition to underrepresentation of particular groups. See *Taylor v. Louisiana*, 419 U.S. 522, 530–31 (1975) (recognizing necessity and benefits of inclusion in jury pools); see also *Duren v. Missouri*, 439 U.S. 357 (1979) (holding as unconstitutional a law that allowed women to request exemption from jury service); *Berghuis v. Smith*, 130 S. Ct. 1382, 1392–94 (2010) (maintaining application of *Duren*’s impact-based rule in underrepresentation challenge wherein racial purpose is not a requisite factor). See generally David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CALIF. L. REV. 776, 784–88 (1977).

23. See *A Brief History of Race and the Supreme Court*, *supra* note 1, at 756.

24. See DAVID SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* 51–133 (1992); see also *A Brief History of Race and the Supreme Court*, *supra* note 1, at 760–61 n. 33 (“As a young attorney in Phoenix, Rehnquist opposed a public accommodations law proposed in response to the city’s embarrassment when at a national meeting of lawyers a top hotel refused to admit Jewish guests; he was active in ‘poll watching teams’ accused of obstructing voters in African American and Hispanic neighborhoods; and he opposed a school integration proposal with the argument that ‘[w]e are no more dedicated to an “integrated” society than we are to a “segregated” society.’ In the Reagan justice department, he vehemently opposed the proposed equal rights constitutional amendment guaranteeing equality for women. In the 1950s and 1960s, opposition to integration and to the civil rights acts defined conservatism. For example, the Civil Rights Act of 1964, which prohibited discrimination in public accommodations, was opposed in the House by a moderate conservative from Texas, George H.W. Bush.” (alteration in original) (citations omitted)).

25. 347 U.S. 483 (1954).

*Ferguson*<sup>26</sup> is “right and should be reaffirmed.”<sup>27</sup> He urged in another memo that Jackson approve of all-white primaries: “It’s about time the Court faced the fact that the white people of the South don’t like the colored people.”<sup>28</sup>

The period in which the Court struck down, on constitutional grounds, measures disadvantaging blacks or other minorities was very short, a couple of decades, and essentially limited to explicit measures.<sup>29</sup> It was followed by a few decades in which the impossible burdens to prove a constitutional violation were erected while affirmative and remedial actions were invalidated or undermined.<sup>30</sup> The conservative Supreme Court refused to invalidate ongoing discrimination or to require meaningful equality, and then struck down legislative and executive efforts by federal and local governments to do so.

Alongside and not unrelated to these legal developments, non-explicit forms of discrimination against African Americans and other minorities grew in number, significance, and subtlety. It became easier to discriminate without explicit reference to race, whether purposefully,<sup>31</sup> routinely, out of a bad habit, unconsciously, or whatever. Whites—with racially distributed federal government subsidies in hand, including the notorious practice of “redlining” that deprived blacks of the same housing subsidies<sup>32</sup>—left cities for white suburbs. Whites and minorities were increasingly separated geographically; advantage and disadvantage could be described as a matter of where one lived rather than one’s race. Differences in funding per pupil in public schools, for example, could be characterized as geographic. Since funding of school systems is based on the local tax base, the rationale went (and goes), that, too bad, we can’t do much for schools in poor areas that happen to be black and happen to look a lot like pre-*Brown* segregated black schools.<sup>33</sup>

Whites in the new white suburbs got discriminatory, preferential treatment on housing, schools, healthcare, work, financing, insurance, veteran’s and other benefits, and the costs of just about everything—much of it implemented, subsidized, or facilitated by governmental policies and practices.<sup>34</sup> For example, school funding

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26. 163 U.S. 537 (1896).

27. SAVAGE, *supra* note 24, at 36

28. *Id.* at 37.

29. See *A Brief History of Race and the Supreme Court*, *supra* note 1, at 762 n.42–43 (collecting cases from this period).

30. *Id.* at 763–65

31. The new purposeful discrimination rule, perversely, facilitates purposeful discrimination. A purposeful discriminator can avoid any legal responsibility by purposefully framing actions nonracially and refraining from expressing any racial motivation. See *id.* at 754–55.

32. See *Race—The Power of an Illusion: The House We Live In* (PBS broadcast 2003) (transcript available at <http://newsreel.org/transcripts/race3.htm>).

33. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that reliance on separate tax bases is acceptable way to fund state schools even if it results in inter-district funding inequalities).

34. See, e.g., IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 25–79, 113–41 (2005) (discussing preferential treatment whites received in welfare, employment, and veteran benefits); see also DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 9 (2004) (arguing that policy makers only act to remedy racial discrimination when it does not significantly diminish “whites’ sense of entitlement”). Katznelson frames the advantages to whites as a form of affirmative action.



formulas and mortgage and zoning policies that had previously favored whites explicitly were framed in terms of geography and characteristics or circumstances other than race.<sup>35</sup>

These policies and practices were sometimes racially conscious and deliberate, but more often they needed no overt racism or racists. Identification and empathy with one's own, unspoken feelings of entitlement, the traditional habit of ignoring the interests and suffering of blacks and other minorities, denial, or simply passing it off were sufficient—although the racially disparate effects and consequences were obvious.

The use of social science and statistics to prove unlawful discrimination presents a possibility of dealing with at least some of these problems in the current context, and that's why we are here.<sup>36</sup> While such evidence may not be generally sufficient to provide proof of purposeful discrimination under the constitutional standard, there are statutory standards that are different and not quite as difficult to prove.<sup>37</sup> Justice Ginsburg, writing for four Justices, recently confirmed this possibility, and the ongoing persistence and significance of unconscious racism, in *Ricci v. DeStefano*.<sup>38</sup>

We have a great cast here today to deal with this problem, including a panelist who will discuss the current scientific research underlying the unconscious bias debate and panelists who will be debating whether and to what extent this science can be introduced in court to prove unlawful discrimination.<sup>39</sup> Additionally, the broader

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See KATZNELSON, *supra*. There is another regularly overlooked form of affirmative action that was earlier extended to whites: preferences in hiring and employment by our major cities to certain ethnic groups who had suffered prior discrimination, for example, people of Irish and Italian descent. See *A Brief History of Race and the Supreme Court*, *supra* note 1, at 755–56 & n.17.

35. See, e.g., Charles Lewis Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact Upon African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131, 174–85 (2008) (discussing discriminatory lending practices expressly sanctioned by U.S. government from 1930 to 1960 and how these policies exacerbated poverty and residential isolation of African American population); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 1–2* (1993) (discussing residential racial segregation and its impact on American society); see also *Race—The Power of an Illusion: The House We Live In*, *supra* note 32 (contending that playing field is still not level and that “colorblind” policies perpetuate inequality).

36. For differing views on the use of social science research to prove discrimination in the courtroom, see Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37 (2009); John Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of “Social Frameworks,”* 94 VA. L. REV. 1705 (2008).

37. See Michael Connett, Comment, *Employer Discrimination Against Individuals with a Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007 (2011) (discussing availability of disparate impact claims under both federal and state law, and assessing viability of challenges to employer criminal-record policies).

38. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2695–96 (2009) (Ginsburg, J., dissenting) (noting that, after Title VII took effect, “[m]ore subtle—and sometimes unconscious—forms of discrimination replaced once undisguised restrictions,” and affirming role of disparate impact litigation as way of challenging facially-neutral policies that, in addition to disproportionately harming minorities, fail to measure attributes necessary to performance of job).

39. Two of the presentations from the Symposium that dealt with these issues are published herein. See Susan T. Fiske & Eugene Borgida, Commentary, *Standards for Using Social Psychological Evidence in Employment Discrimination Cases*, 83 TEMP. L. REV. 867 (2011); Amy L. Wax, *Supply Side or Discrimination? Assessing the Role of Unconscious Bias*, 83 TEMP. L. REV. 877 (2011).

question of using social science and statistics to prove discrimination will be specifically explored in both the employment and predatory lending contexts.<sup>40</sup>

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40. One of the presentations from the Symposium dealing with these issues is published herein. See Charles L. Nier III & Maureen R. St Cyr, *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act*, 83 TEMP. L. REV. 941 (2011).