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The University of Kentucky College of Law sponsored a conference titled "Structural Racism: Inequality in America Today" on February 25, 2011,[1] funded from a bequest by the late James M. Lassiter. Judge Lassiter was a 1949 graduate of the College of Law, and served as a Commonwealth Attorney and a Circuit Court judge for much of his distinguished career.[2] The bequest is being used in part to support the Lassiter Distinguished Visiting Professorship, which, as the name implies, is meant to bring a prominent legal scholar from elsewhere to the College for a semester.[3] I had the honor of serving as the inaugural Lassiter Professor in the spring 2011 semester.[4] Dean David A. Brennan, the faculty of the College of Law, and the Lassiter family expect that the holder of the professorship will contribute to the intellectual richness of the College of Law's scholarly activity and teaching; encourage interdisciplinary outreach to scholarly fields outside the law school; and enhance the reputation of the College of Law in the wider community of the city, region, and Commonwealth. With these goals in mind, we planned the 2011 conference on structural racism that produced the papers presented here.

I am collaborating with a sociologist, Dr. Judy L. Hamilton, on a study that is meant to introduce the subject to lawyers and judges. We hope that the marriage of her work as a sociologist and mine as a constitutional historian[5] will sensitize the legal community to the existence and impact of a social reality that most lawyers ignore. We thought that a conference that

1 For details about the conference, including a brief introduction to the problem of structural racism, a schedule of panels at the conference, a list of resources and organizations working to combat racism, and a bibliography of references on the topic, see *Structural Racism*, UNIV. KY. COLL. L., http://www.law.uky.edu/structural-racism (last visited Sept. 27, 2011). Videos of some of the presentations are available online. *See Video Archive*, UNIV. KY. COLL. L., http://www.law.uky.edu/videos (last visited Sept. 29, 2011).

2 For information about the James and Mary Lassiter Professorship, and about Lassiter himself, see *James and Mary Lassiter Professorship*, UNIV. KY. COLL. L., http://www.law.uky.edu/index.php?pid=333 (last visited Aug. 26, 2011).

3 *Id.*

4 To see the announcement of this appointment on the University of Kentucky College of Law web site, see *News: Welcome Professor Wiecek*, UNIV. KY. COLL. L., http://www.law.uky.edu/index.php?nid=80 (last visited Aug. 26, 2011).

5 This is not just metaphorical: in actuality, we are a husband-and-wife team, which greatly helped in the organization of the conference.

brought together persons from multiple fields outside the law could increase awareness of structural racism among lawyers and showcase work on the subject already being done at the University of Kentucky and other universities in the region. We also hoped that such a confluence of scholars would enable us working together across disciplines to develop a common language that describes the problem and would make it easier for us to share our work.

I. An Introduction to Structural Racism for Lawyers

The concept of "racism" – like the word itself – is surprisingly modern,[6] being introduced to social-science scholarship by the anthropologist Ruth Benedict in her path-breaking 1940 study *Race: Science and Politics*.[7] It soon made its way, though abortively, into the discourse of the Justices of the United States Supreme Court. The word "racism" itself first appeared in the United States Reports in a concurring opinion by Justice Frank Murphy in *Steele v. Louisville & Nashville Railroad Company*,[8] which was decided in 1944, and then again on the same day in his dissent in *Korematsu v. United States*.[9] Yet it is both astonishing and symptomatic of the Justices' collective refusal to confront issues of structural racism that, after 1944, the word "racism" appears only infrequently in isolated dissents or concurrences, mostly of Justices William O. Douglas, William J. Brennan, and Thurgood Marshall. Not until 1992 was the word used substantively in a majority opinion of the Court.[10] This half-century cultural lag is remarkable, even by the standards of the Supreme Court.

Racial oppression and the mindsets that sustain racially-based hegemony and subordination are far older, of course, not just coeval with the European conquest of North and South America and the Caribbean, but antedating them by centuries.[11] Scientific racism, pioneered in Thomas Jefferson's anthropological speculations,[12] became dogma among America's

6 The earliest appearance of the word "racism" noted by the Oxford English Dictionary was in a 1926 article in the *Manchester Guardian*. Oxford English Dictionary (3d ed. 2008), *available at* http://www.oed.com/view/Entry/157097.

7 [7] *See* Ruth Benedict, Race: Science and Politics (1940).

8 Steele v. Louisville & N.R. Co., 323 U.S. 192, 209 (1944) (challenging racial discrimination by a labor union, Justice Murphy denounced "[t]he cloak of racism surrounding the actions of the Brotherhood [of Locomotive Firemen and Enginemen] in refusing membership to Negroes and in entering into and enforcing agreements discriminating against them").

9 Korematsu v. United States, 323 U.S. 214, 233 (1944) (determining that Japanese wartime exclusion from the West Coast "falls into the ugly abyss of racism").

10 Georgia v. McCollum, 505 U.S. 42, 58 (1992) (banning racially-discriminatory use of peremptory challenges by defense counsel in a criminal prosecution).

11 Winthrop D. Jordan, White Over Black: American Attitudes Toward the Negro 1550 - 1812, at 3-43 (1968).

12 *See* Thomas Jefferson, Notes on the State of Virginia 138-39 (William Peden ed.,

educated elite by the early twentieth century, expounded by Madison Grant, Henry Fairfield Osborn, and the circle around them at the American Museum of Natural History.[13] The intellectual project of naming and describing this outlook occurred in mid–century critiques by the anthropologists Franz Boas[14] and Ashley Montagu.[15] (Ruth Benedict was a student of Boas at Columbia.)

This late conceptualization of what "racism" is has imprinted on public understanding – including that of lawyers – the idea that racism is fundamentally a matter of attitude: of conscious belief and a will to act on that belief. That understanding has had incalculable consequences for American law, and for the larger society. It is that (mis–)understanding that this conference addressed.

Since Benedict's day, sociologists have distinguished between two manifestations of racism:

- Traditional racism, of the Jim Crow, Ku Klux Klan variety; and
- Structural racism, also known as institutional racism.

I will briefly describe the two.

A. Traditional racism

This is the phenomenon that Benedict originally identified. The principal cultural and legal manifestation of traditional racism since Emancipation has been the complex of social practices and legal constraints known as Jim Crow.[16] It is these that modern equal protection doctrine has condemned. A consensus prevails among white Americans today that traditional racism has declined, and is no longer a severe problem. This has been accompanied by a decline in traditional racist attitudes and assumptions on the part of whites.[17] Traditional racism is marginalized today, though it

1781); *see also* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 152–53 (1996).

13 *See, e.g.*, MADISON GRANT, THE PASSING OF THE GREAT RACE OR THE RACIAL BASIS OF EUROPEAN HISTORY (1916). On scientific racism and the influence of Grant, see generally STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981).

14 *See generally* FRANZ BOAS, RACE, LANGUAGE AND CULTURE (1940); FRANZ BOAS, THE MIND OF PRIMITIVE MAN (1938).

15 *See generally* M. F. ASHLEY MONTAGU, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE (1942); Ashley Montagu, *The Race Question*, in UNESCO AND ITS PROGRAMME (1950).

16 Our work focuses on the circumstances of African Americans, past and present. We do not slight the experiences of other people of color, but they are grounded in different histories of encounter between them and Euro–Americans. Slavery and its successors have provided the mold for all forms of racism affecting African Americans, both traditional and structural, and that in turn established the paradigm for legal attempts to eradicate racism and its effects.

17 *See generally* HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS (1997).

is far from negligible. The legal structures that sustained state-mandated overt discrimination have been dismantled, though sometimes tardily and reluctantly.[18] For the past half-century, American society has been formally committed to a general goal of racial equality.

A lawyer's sense of what offends the Fourteenth Amendment's guarantee of equal protection is confined by this prevalent understanding of what racism is: traditional racism. Racism in this view is a result of belief, both in imputed inferiority of the object person or group and in the assumed superiority of the racist. It is deliberate, in the sense that the racist is self-aware of his attitudes, does not censure them, and intends them to have consequences. It is individualistic rather than collective, both in the mind of the racist and in its impact on the victim. In constitutional debate, racism is often decontextualized and isolated. Judges treat racial discrimination as a discrete event, like an intentional tort, even if it is repeated, cumulative, or persistent over time and across space. This approach cuts off the legal wrong of discrimination from the gestalt of its social environment, including the intersection of class, gender, and history.

The legal model of traditional racism focuses on an individual with a bad attitude. It assumes that the racist is aware of his beliefs and by acting on them, intends to bring about discriminatory results for the victim. He cooperates with others similarly ill-disposed to people of another race to act deliberately in a private or public capacity to adopt policies that discriminate against disfavored individuals. The racist's actions are presumed to be conscious and deliberate, and to most people today, morally reprehensible. Absent such self-aware motivation, the perpetrator's action cannot be properly considered racist in any actionable legal sense. The most important consequence of these assumptions is that the United States Supreme Court has shrink-wrapped equal protection doctrine to fit traditional racism and little else. The Justices have displayed unease verging on hostility to legislative attempts, such as affirmative action programs, Title VII, or pupil assignment programs, that go beyond traditional understandings of racism to grapple with non-intent-based structural racism.

A major problem we encounter in discussing forms of racism other than the traditional volitional sort described here is the assumption that anything labeled "racism" must include all the components of traditional racism: prejudice, intent, and discrimination. Where these ingredients are missing, the social phenomenon under discussion, such as residential segregation and consequent inferior schooling, cannot be culpable, and is not remediable within the confines of the United States Supreme Court's inadequate understanding of racism. Responsibility evaporates, and the law

18 To illustrate, Kentucky formally rejected ratification of the Thirteenth Amendment on February 24, 1865, and did not get around to ratifying it until March 18, 1976. *See* U.S. CONST. amend. XIII.

is helpless, short of legislative intervention, which is itself often suspect in the eyes of the Justices.

B. Structural racism.

Structural racism is a complex, dynamic system of conferring social benefits on some groups and imposing burdens on others that results in segregation, poverty, and denial of opportunity for millions of people of color. It comprises cultural beliefs, historical legacies, and institutional policies within and among public and private organizations that interweave to create drastic racial disparities in life outcomes.

Because structural racism operates invisibly, and is difficult to define succinctly except in abstract academic prose (like the preceding paragraph), the best way to convey a sense of what it is and how it functions is by concrete examples. Take the original exclusion of agricultural and domestic workers from eligibility for Social Security benefits in 1935. Because they could not collect old–age or unemployment benefits, field hands, sharecroppers, maids, and nannies – constituting the bulk of the black labor force in the New Deal South – were shut out from even the most modest opportunity that whites enjoyed for wealth accumulation and survival assistance in economic downturns.[19] In this example, blacks were not explicitly excluded, but the proxy phrase 'agricultural and domestic workers' did the job effectively. Nor was this anomalous: African Americans were excluded implicitly or through administrative fiat from all major New Deal welfare programs, including the National Labor Relations Act, the Fair Labor Standards Act, the National Industrial Recovery Act, and the Agricultural Adjustment Act.[20] This exclusion of African Americans from the opportunities offered by New Deal programs originated in traditional racism: the determination of powerful southern Democrats in the Senate to preserve the racial order of the Jim Crow South. But once set in motion, the *structure* of exclusion and discrimination operated automatically. Coupled with other examples of mid–century discrimination, such as overtly racist Federal Housing Administration mandates for segregation, New Deal policies stunted black wealth accumulation at the same time that they created a cornucopia of opportunity for whites. Though the nation moved slowly away from Jim Crow, the structure endured, as powerful as ever, even if

19 *See* ALICE KESSLER–HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH–CENTURY AMERICA 130–56 (2001). They were later included by amendments to the Social Security Act in 1950 (domestic workers) and 1954 (agricultural workers). *See* Social Security Amendments of 1950, Pub. L. No. 81–734, 64 Stat. 809 (1950); Social Security Amendments of 1954, Pub. L. No. 83–761, 68 Stat. 1206 (1954); *see also* Kessler–Harris, *supra*, at 155–56.

20 *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 104–26 (2011).

no longer deliberately racist. The most effective agent perpetuating that structure has been the Supreme Court's refusal to recognize it.

Structural racism may be familiar to some lawyers by its other name, institutional racism, thanks largely to Ian Haney López's path breaking exploration of the problem in 2000.[21] Haney–Lopez described the "unexamined social practices or patterns [that] at once structure and give meaning to human interaction," analyzing the practices of California Superior Court judges in selecting grand jurors, which resulted in a near–total exclusion of Chicanos.[22] He found that the "unconsidered repetition of cognitively familiar routines," the "routinized sequences of behavior," structured social institutions (here, grand jury proceedings).[23] Haney–Lopez examined "racial institutions," those "understanding of race . . . within a community" that enable individuals to understand and explain reality.[24] These beliefs in turn reinforce a racial hierarchy of status resulting in "social domination" by a superordinate group (Anglos) over a subordinated group (Chicanos).[25]

Eight characteristics distinguish structural racism from its traditional Jim Crow predecessor:

- Structural racism is to be found in racially–disparate outcomes, not invidious intent.
- Structural racism ascribes race as a basis of social organization to groups through a process of "racialization."
- White advantage is just as important an outcome as black subordination, if not more so.
- Structural racism is invisible and operates behind the illusion of colorblindness and neutrality.
- Structural racism is sustained by a model of society that recognizes only the individual, not the social group, as a victim of racial injus-

21 Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

22 *Id.* at 1723.

23 *Id.*

24 *Id.* at 1809.

25 *Id.* at 1810.

tice. This individualist outlook refuses to acknowledge collective harm, group responsibility, or a right to collective redress.

- The effects of structural racism are interconnected across multiple social domains (housing, education, medical care, nutrition, etc.).
- Structural racism is dynamic and cumulative. It replicates itself over time and adapts seamlessly to changing social conditions.
- Structural racism operates automatically and thus is perpetuated simply by doing nothing about it.

Let us briefly examine each of these in turn.

1. *Outcome vs. Intent.*—Structural racism is manifested in disparate outcomes between racial groups, not the intent of an alleged discriminator. Because intent is central in traditional racism, both laypeople's and lawyers' recognition of racism requires proof of deliberate malevolence before some policy can be considered racist and legally actionable. Sociologists have described the processes of structural racism since 1967,[26] but the Supreme Court clings to the long–outdated notion that racism can be defined only in traditional terms. The Justices shrug their shoulders indifferently and refuse to acknowledge the collective harm, understand the cause, or provide a remedy for structural racism.

The case of *Washington v. Davis*[27] affirmed the requirement of intent for a violation of the equal protection clause. It remains the single most important decision of the United States Supreme Court for understanding the failure (or refusal) of the Justices to recognize structural racism. There Justice Byron White held that "the basic equal protection principle [demands] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[28] "Disproportionate impact" alone is insufficient to prove a constitutional violation.[29]

One of the great failings of this judicial posture is that it refuses to recognize unconscious racism. Researchers in social psychology have demonstrated that unconscious prejudice (also known as aversive racism) plays a significant role in thought processes and behavior,[30] and have buttressed

26 For the first use of the term "institutional racism," see STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 4 (1967) ("Racism is both overt and covert. It takes two, closely related forms: individual whites acting against individual blacks, and acts by the total white community against the black community. We call these individual racism and institutional racism.").

27 Washington v. Davis, 426 U.S. 229 (1976).

28 *Id.* at 240.

29 *Id.* at 240–41. It may, however, suffice for demonstrating a statutory violation under Title VII of the 1964 Civil Rights Act, as amended. *See* Griggs v. Duke Power Co., 401 U.S. 424, 426–34 (1971).

30 *See* Susan T. Fiske, *What We Now Know About Bias and Intergroup Conflict, the Problem of*

the sociological argument that intent is not a component of racism in its structural or institutional manifestations. Unconscious racism thereby becomes an important element of structural racism. The explanatory model of aversive racism proposed by social cognition theory[31] works this way: individuals harbor unrecognized, submerged mental associations that link people of color with crime, poverty, drugs, violence, and other negative racial stereotypes. This is sometimes described as "implicit bias."[32] These unconscious biases exist in all of us, even those who consciously disavow racist attitudes and sincerely support the abstract goal of racial equality. Conscious ideals and unrecognized imagery coexist in unacknowledged tension. These unacknowledged negative attitudes affect their holder's behavior, and this produces disparate outcomes, such as when individuals make hiring decisions.

By 1970, cognitive psychologists began to distinguish traditional racism, which they aptly referred to as "dominative racism,"[33] from aversive racism. Drawing on this work, in 1987 the legal scholar Charles Lawrence published what has become the classical legal analysis of the problem: *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism.*[34] As his title suggests, Lawrence relied on both Freudian theory and cognitive psychology to elaborate a doctrinal approach to the problem of intent in discrimination law. He recommended that judges take unconscious racism into account in mandating strict scrutiny for all public actions that convey symbolic messages having racial significance. His seminal article estab-

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the Century, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 123 (2002); Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 61, 61–66 (John F. Dovidio & Samuel L. Gaertner eds., 1986); Marianne Bertrand et al., *New Approaches to Discrimination: Implicit Discrimination*, 95 AM. ECON. REV. 94, 94–95 (2005); John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 512 (1997); Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 ANN. REV. PSYCHOL. 297 (2003); John T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 40–42 (2009); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 428–32 (2007); Lincoln Quillian, *New Approaches to Understanding Racial Prejudice and Discrimination*, 32 ANN. REV. SOC. 299, 299–300 (2006); Troy Duster, *Introduction to Unconscious Racism Debate*, 71 SOC. PSYCHOL. Q. 6, 6 (2008).

31 For a discussion of social cognition theory, see generally SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION: FROM BRAINS TO CULTURE (2008).

32 *See, e.g.*, Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 970–71 (2006); Jerry Kang & Kristin Lane, *Seeing through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473 (2010).

33 The phrase originated in the work of the psychiatrist Joel Kovel. *See* JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY 32 (1970).

34 Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

lished the reality of unconscious racism for legal academics, if not for the Justices of the Supreme Court.[35]

Recognizing the ubiquity and force of implicit bias, lawyers as well as social psychologists have relied on cognitive science to critique intentionality–grounded antidiscrimination law. The foremost scholar in this area, Linda Hamilton Krieger, has argued that categorizing and stereotyping people are part of "normal human cognitive functioning."[36] That this produces biased decisions is normal, and beyond self–awareness and thus self–control. Because discrimination is cognitive and not "motivational," Krieger contends that much of antidiscrimination law[37] is misguided and counterproductive. Instead, she urges, law should move from imposing a "proscriptive" duty not to discriminate to a "prescriptive" duty to control for such cognitive biases, recognizing their inevitability. [38]

This work has not, however, had any apparent impact on the Supreme Court. Instead, Justice Antonin Scalia's indifference to social–scientific demonstrations of racial bias reminds us that the concept of implicit bias can be perverted to *sanction* racial discrimination. In a 1987 memorandum on the problem of racial prejudice in death penalty litigation, he wrote:

> I do not share the view, implicit in [Justice Lewis Powell's 1987 draft opinion in *McCleskey v. Kemp*], that an effect of racial factors upon sentencing, if it could be shown by sufficiently strong statistical evidence, would require reversal. Since it is my view . . . that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial [decisions], is real, acknowledged [in the decisions] of this court and ineradicable, I cannot honestly say that all I need is more proof.[39]

The proven reality of structural racism and of implicit bias places legal doctrine in a posture that ignores over forty years of findings in sociology and psychology. The Court's stubborn refusal to acknowledge the work in social science, as well as its outmoded assumptions, "have been compellingly, verifiably, and reliably contradicted by recent findings" in cognitive science.[40] An individual may be motivated by impulses and attitudes that are not apparent to him; thus by definition, he may not have the intent

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35 *See id.*

36 Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1161 (1995).

37 She was referring specifically to the disparate–treatment tests derived from *McDonnell Douglas Aircraft Corp. v. Green*, 411 U.S. 792 (1973), that are used to interpret and apply Title VII of the 1964 Civil Rights Act as amended.

38 Krieger, *supra* note 36, at 1166.

39 Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 MERCER L. REV. 1035, 1038 (1994).

40 Margaret Richardson & Todd L. Pittinsky, *The Mistaken Assumption of Intentionality in Equal Protection Law: Psychological Science and the Interpretation of the Fourteenth Amendment*, *in* FAC. RES. WORKING PAPER SERIES 2 (John F. Kennedy Sch. of Gov't, Harvard Univ., 2005).

– which implies conscious volition – to act in a way that results in illegal discrimination. Just as requiring a showing of intent to cause global warming is pointless for collective action in responding to climate change, so is it useless for reforming the structural bases of racial inequities.[41] By mandating a showing of intent, the Court has potentially foreclosed relief for the actions of all but the most overtly bigoted, those stupid enough to provide evidence of their malevolence.

This has been obvious to sociologists for decades. The president of the American Sociological Association, Barbara Reskin, noted in her 2002 inaugural address that "[r]edirecting our attention from motives to mechanisms is essential for understanding inequality and – equally important – for contributing meaningfully to social policies that will promote social equality."[42] But while this is a commonplace in social science, it has yet to penetrate the thinking of the Justices.

2. *Race is socially constructed through racialization.*—The revolution in our thinking about race that was begun by Boas, Benedict, and others in the 1930s and 1940s triumphed by the close of the twentieth century. We now see that race is a social construct rather than an essentialist, biological characteristic of human beings. At the macro level, students of social systems came to see that race in not an inherent and immutable characteristic of groups any more than it is of individuals. Instead, societies are "racialized," both historically and currently.[43] Dominant groups identify "races" on the basis of simple phenotypes based on physical appearance, and then color–code them reductively: white, black, red, brown, and yellow. In this process, race as a basis of social organization is ascribed to groups of people as well as individuals. Hugely important effects follow from such racial ascription as racial hierarchies that control the distribution of benefits and burdens in society.

Racialization is an on–going, dynamic process of "racial formation," in which "racial categories themselves are formed, transformed, destroyed, and re–formed."[44] The superordinate group attributes meaning to racial

41 *See* john a. powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 797–98 (2008).

42 Barbara F. Reskin, *Including Mechanisms in Our Models of Ascriptive Inequality*, 68 AM. SOC. REV. 1, 1 (2003).

43 For a sociological analysis of racialization, see generally EDUARDO BONILLA–SILVA, RACISM WITHOUT RACISTS: COLOR–BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (2003); Eduardo Bonilla–Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465 (1996). For historical explanations of racialization, see JORDAN, *supra* note 11, at 316. *See generally* EDMUND S. MORGAN, AMERICAN SLAVERY AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975).

44 PAULA S. ROTHENBERG, RACE, CLASS AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 15 (1998).

identity as the fundamental organizing principle of social relationships.[45] Law plays a crucial role in forming, defining, assigning, and imposing social classifications on individuals and groups alike along racial lines.[46] When a society becomes racialized, with groups of people consigned to racial categories and those categories then become the basis of distributing benefits and imposing burdens, structural racism provides the dynamic process that polices and renews that race–based social structure. Because this process is fluid, new groups may be promoted to the dominant racial group, as happened successively to Irish, Italian, Greek, and Jewish immigrants before World War II.[47] This process results in a "racialized social system" in which socially–defined racial groups receive radically different shares of the society's benefits and burdens. Whites enjoy both material benefits (wealth, economic opportunity) and what W.E.B. Du Bois identified as the "psychological wage" of assumed racial superiority.[48]

3. *White advantage.*—For over half a century, lawyers have approached the problem of racism as a matter of discrimination, whereby a majority oppresses a racially–defined minority. The focus has exclusively been on detriment to the minority. But black subordination is only one side of the coin of racism. The other side is what is frequently termed "white privilege."[49] When legal analysis ignores this issue, it reinforces what sociologists call "white normativity." Whites unthinkingly assume that their privileged situation is the norm,[50] and that all others could experience it too, were it not for those others' deficiencies (originally taken to be racial/biological,

45 MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 61–69 (2d ed., 1994).

46 *See* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 7–14 (rev. and updated ed. 2006).

47 *See* DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE: THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS 124 (2005).

48 W. E. B. DU BOIS, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA: 1860–1880 700 (1935); *see also* DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS xix–xx (rev'd ed., 1999).

49 The literature on this topic is extensive. *See generally* Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack, in* RE–VISIONING FAMILY THERAPY: RACE, CULTURE, AND GENDER IN CLINICAL PRACTICE 147, 147 (Monica McGoldrick ed., 1998); STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996); LINDA FAYE WILLIAMS, THE CONSTRAINT OF RACE: LEGACIES OF WHITE SKIN PRIVILEGE IN AMERICA 2 (2003); WHITE PRIVILEGE: ESSENTIAL READINGS ON THE OTHER SIDE OF RACISM 1 (Paula S. Rothenberg ed., 2005); Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245 (2005).

50 *See* Robert Westley, *White Normativity and the Racial Rhetoric of Equal Protection, in* EXISTENCE IN BLACK: AN ANTHOLOGY OF BLACK EXISTENTIAL PHILOSOPHY 91, 91 (Lewis R. Gordon ed., 1997); Kari L. Karsjens & JoAnna M. Johnson, *White Normativity and Subsequent Critical Race Deconstruction of Bioethics*, 3 AM. J. BIOETHICS 22 (2003).

now assumed to be cultural and social). A bizarre yet instructive example of white normativity occurred in the events that produced the Supreme Court's decision in *Los Angeles v. Lyons*, the notorious Los Angeles Police Department ("LAPD") chokehold case.[51] Explaining why most of the people who had died because LAPD officers used a chokehold on them were black, Police Chief Daryl Gates explained that "in some blacks when [the hold] is applied, the veins or arteries do not open up as fast as they do in normal people."[52] The point here is not Gates's unique understanding of human physiology; rather, it is the whites' unthinking assumption that they are "normal people," while African–Americans are something else, not "normal." White advantage offers the bonus of enabling its beneficiaries to assume that benefits accruing to them are normal as well, and thus are natural entitlements. For whites, their race is invisible, and their superordinate status is normal. Whites do not see their relatively privileged position as a built–in advantage.

A corollary of white normativity and advantage is white innocence, which, since 1978, has been a recurrent theme in opinions of the United States Supreme Court. In *Regents v. Bakke*, decided that year, Justice Lewis Powell cautioned that "there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making."[53] Various Justices have repeated the meme since then.[54]

From innocence, it is only a short step to victimization, so perhaps we should not be surprised to find that some whites today consider *themselves* to be the victims of a new form of societal racism. Following on their assumption that the problems of traditional racism have been largely overcome in the "post–racial" era that American society has supposedly entered with the election of President Barack Obama, their resentments about affirmative action take the form of believing that whites are now excluded from opportunities available on a preferential basis to blacks.[55]

4. *Invisibility, colorblindness, and facial neutrality.*—Because structural racism operates invisibly, it is difficult to see or even define. Traditional racism is easy to spot; a "Colored Only" sign or a lunch counter where whites sit and

51 City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

52 James J. Fyfe, *Enforcement Workshop: The Los Angeles Chokehold Controversy*, 19 CRIM. L. BULL. 61, 61 (1983) (quoting a statement made by Police Chief Gates in a *Los Angeles Times* interview).

53 Regents of the Univ. of Ca. v. Bakke, 438 U.S. 265, 298 (1978).

54 *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 575 (1984); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 357–62 (1977); *see also* Antonin Scalia, Commentary, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"*, 58 WASH. U. L. Q. 147, 152–53 (1979).

55 Michael I. Norton & Samuel R. Sommers, *Whites See Racism As a Zero–Sum Game that They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215, 216–17 (2011).

blacks stand – those are obvious. But though the racism–based impoverishment of some African American, Latino, and Native American communities is apparent, its causes are not, nor are the structural processes that created and maintain it. Because of its invisibility, structural racism does its work in the Potemkin village of "race–neutral" policies.

The cover of neutrality excuses or rationalizes policies that have differential real–world impacts on the lives of people of color. Because of extreme residential segregation, whites are generally unaware of the realities of daily life in black and Latino neighborhoods. Public or private policy decisions impact groups of people differently, and often in negative ways. For example, a municipality facing budget pressures may decide to reduce its support for public transportation. Though this may appear to be a reasonable and race–neutral financial decision, its impact on people of color will be far greater than on whites because of their greater dependence on public transportation. Yet whites often fail to perceive the resulting inabilities to get to work, to doctors' appointments, to school, and so on, because segregation assures that they need not personally confront such realities. White normativity enhances the veneer of neutrality, because whites believe that their life trajectories and their access to opportunity are the norm and therefore are actually shared equally by everyone in society.

Sociologists have extensively documented both the structural forces that perpetuate racial disparities and how the illusion of neutrality contributes to the persistence of those structural forces.[56] Social psychologists have demonstrated how unconscious biases affect our conscious attempts to be objective or neutral. Legal doctrines that spurn social science findings reinforce the silent, invisible operation of structural racism. Foremost among these is colorblindness, which pretends to an Olympian impartiality: just as race may not be taken into account to oppress, so may it not be taken into account to remedy past oppression.[57] Justice John Marshall Harlan's dictum in *Plessy v. Ferguson*[58] is applied to situations he never intended

56 *See* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 86–92 (2007); Fred L. Pincus, *From Individual to Structural Discrimination*, *in* RACE AND ETHNIC CONFLICT: CONTENDING VIEWS ON PREJUDICE, DISCRIMINATION, AND ETHNOVIOLENCE 82, 82–87 (Fred L. Pincus & Howard J. Ehrlich eds., 1994); George Wilson, *Racialized Life–Chance Opportunities Across the Class Structure: The Case of African Americans*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 215 (2007).

57 Justice Thomas is the most avid proponent of this kind of colorblindness. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 772 (2007) (Thomas, J., concurring) (claiming to follow the views of Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and of the lawyers, including his predecessor on the Court, Justice Thurgood Marshall who argued *Brown v. Board of Education*, 347 U.S. 483 (1954)); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) ("I believe that there is a 'moral [and] constitutional equivalence,' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality." (alteration in original) (citation omitted)).

58 *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

it to cover.[59] In the hands of the current Court's majority, his colorblindness ideal itself is first ripped out of context and historical setting; then flash–frozen in a rarified, abstract, and formal form, where it becomes timeless and acontextual; and later thawed to serve operationally as a rationale for invalidating race–conscious remedies.[60] The Court's majority is seemingly unaware of – or indifferent to – the legal and sociological scholarship that has debunked the pretensions of current colorblindness.[61]

The illusion of facial neutrality provides a cover for both colorblindness and its parent impulse, structural racism. This has two pernicious effects: 1) it rationalizes a refusal to go behind the outwardly–neutral terms of a statute or policy to explore actual discriminatory motives or effects, and 2) it effectively bans race–conscious remedial policymaking. Therein lies a paradox. *Washington v. Davis* mandates a showing of discriminatory racial intent for constitutional claims under the equal protection clause. Yet the Court generally eschews inquiry into motive in equal protection cases. If there is an articulable difference between *intent* and *motive* in this context, it is too diaphanous to sustain such different outcomes.[62] In the area of affirmative action, for example, a racially explicit (i.e., not facially neutral) remedial statute or ordinance confronts a scrutiny level so daunting that few major federal or state initiatives are able to meet it.[63] By contrast, facially neutral statutes are usually validated by the flaccid standard of *Washington v. Davis*: "we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the

59 Harlan's "racialist" views informing the dictum are analyzed. *See* LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 97–100 (1999).

60 *See generally* MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLORBLIND SOCIETY (2003).

61 For legal critiques, see generally Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99 (1986). For sociological and historical critiques, see generally BONILLA–SILVA, *supra* note 43; J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (1999).

62 *E.g.*, Palmer v. Thompson, 403 U.S. 217, 227–28 (1971); Evans v. Abney, 396 U.S. 435, 445–48 (1970).

63 *E.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 743–45 (2007); Gratz v. Bollinger, 539 U.S. 244, 275–76 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226–27 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 471–72 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S 267, 283–84 (1986); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 319–20 (1978). The majority opinion in the one major precedent sustaining an affirmative action program, *Grutter v. Bollinger*, 539 U.S. 306 (2003), was written by Justice Sandra Day O'Connor, and the dissenters in the 5–4 division were adamant in rejecting her position and reasoning. *Id.* at 346, 349, 378, 387. She has been succeeded by a judge of a radically different outlook on this issue.

Equal Protection Clause simply because it may affect a greater proportion of one race than of another."[64]

5. *Individualism.*—For a persistent majority of the Justices, underlying all doctrine in race-related cases is the meta-doctrinal assumption that American society is organized on an individualistic basis, with the values of community and group severely discounted. In *Miller v. Johnson*, an electoral districting case, the majority asserted that "the Government must treat citizens 'as individuals, not as simply components of a racial, religious, sexual or national class.'"[65] Justice Lewis Powell, writing for the majority in an affirmative-action case, insisted that "the petitioners before us today are not 'the white teachers as a group.' They are Wendy Wygant and other individuals who claim that they were fired from their jobs because of their race."[66] Justice Antonin Scalia has carried the idea to its *ne plus ultra*: "[t]he relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, 'created equal,' who were discriminated against."[67] Justice Clarence Thomas would elevate that to an overarching and exclusive principle: "[a]t the heart of . . . the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups."[68] In a 1998 speech to the National Bar Association, he defended that outlook: "the individual approach, not the group approach, is the better, more acceptable, more supportable and less dangerous one. This approach is also consistent with the underlying principles of our country."[69]

Such hyperindividualism is innately antagonistic to group-based remedies, which usually provide the only effective remedy for structural problems. It proved impossible, for example, for parents of African-American children to challenge a Reagan administration failure to deny tax-exempt status to segregation academies.[70] Though Justice O'Connor conceded that "stigmatizing injury . . . is one of the most serious consequences . . . to support standing," she denied the parents in that case standing because "such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct."[71]

64 Washington v. Davis, 426 U.S. 229, 242 (1976).

65 Miller v. Johnson, 515 U.S. 900, 911 (1995) (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

66 *Wygant*, 476 U.S. at 281 n.8.

67 *City of Richmond*, 488 U.S. at 528 (Scalia, J., concurring).

68 Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring).

69 JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 128 (2007).

70 *See* Allen v. Wright, 468 U.S. 737, 755 (1984).

71 *Id.*

The plaintiff–injury requirement of standing has often proved fatal in cases challenging the effects of structural racism.[72]

6. *Interconnection across social domains.*—Causation in matters of race is often non–linear. The effects of structural racism do not occur in isolation from each other. Rather, they are connected spatially, across all social domains. This is often described as a "matrix of domination" or a "web of oppression."[73] In their now–classic 1993 study entitled *American Apartheid*, sociologists Douglas Massey and Nancy Denton demonstrated how residential segregation is at the heart of all other forms of invidious racial disparity.[74] In the "hypersegregated" inner cities of America, "poverty and joblessness are the norm . . . social and physical deterioration abound."[75] Segregation concentrates poverty, and concentrated poverty leads to poor health outcomes cradle–to–grave (actually, pre–cradle: lack of access to family planning; infrequent or no prenatal care for pregnant woman; low birth weights; and lack of access to pediatric care for neonates, infants, and children); exposure to toxic substances (lead in paint and auto exhaust; and environmental pollution because of the higher concentration in minority neighborhoods of chemical plants, incinerators, toxic waste facilities, sewage treatment plants, coal ash disposal sites, and oil refineries); correlation between segregated, impoverished neighborhoods and poor schools; high drop–out rates; exposure to street drugs and related violence in challenged neighborhoods, producing high mortality rates from gunshot wounds, mostly in young black males; poor nutrition in what have come to be known as "food deserts," caused by lack of access to markets selling fresh fruits and vegetables and resulting forced reliance on processed and fast foods high in fats and chemicals; dearth of job opportunities, largely because of disinvestment in challenged neighborhoods, poor educational outcomes, and lack of transportation to work sites; exploitative financial services like payday loan lenders; high crime rates, producing among other things constant exposure to trauma through gang violence and drive–by shootings; poor and inappropriate policing, exacerbated by lack of trust between police and the people they attempt to serve; and high rates of incarceration, which takes young black males out of society and away from gainful employment, in turn contributing to the corrosive rates of unwed and teen pregnancies and the prevalence of single–parent (usually mother) households. The depressing catalogue goes on and on, but the point should be obvious: each of

72 *E.g.*, Warth v. Seldin, 422 U.S. 490, 502–07 (1975).

73 PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 227–28 (2000); *see also* BOB MULLALY, CHALLENGING OPPRESSION AND CONFRONTING PRIVILEGE, ch. 7 (2d ed. 2010).

74 *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

75 *Id.* at 2.

these indicia of structurally racialized outcomes causes, contributes to, and exacerbates the others. They cannot be understood or treated in isolation. Cumulatively, they are overwhelming.

Related to this interconnection is what feminist critical theory calls "intersectionality": the linkage between race, class, and gender.[76] This produces multiple and mutually–enforcing forms of domination/subordination, resulting in systemic inequality across lines of color, ethnicity, religious affiliation, sex, and wealth.[77]

7. *Dynamic and cumulative.*—Corresponding to the spatial character of interconnection is its temporal counterpart: cumulative results over time. Here the best illustrative example is wealth accumulation. The systematic exclusion perpetrated by both public agencies and private actors that denied African Americans the opportunities of home ownership before and after World War II deprived most blacks of what has been the single most important source of wealth in American households, the family home. As home values appreciated over time, blacks were left behind, finding themselves renters in public housing and segregated ghettos. Even before the current foreclosure crisis (which has impacted African Americans hardest), average black family wealth was only one–tenth the average of white family wealth.[78] Since the crisis, "the median net worth for white households had fallen 24 percent to $97,860."[79] In striking contrast, black household net worth had fallen 83% to $2,170,[80] or, as an economist for the Economic Policy Institute put it, "for every dollar of wealth the average white household had, black households only had two cents."[81]

Continuity over time, crushing in itself, is exacerbated by the dynamic, ever–adaptive character of structural racism. Housing again provides an illustration. Once whites determined to isolate blacks into segregated neighborhoods, policies to achieve this fluidly adapted to legal challenges. At the turn of the twentieth century, some hundreds of places throughout the United States became "sundown towns" with ordinances, signs, audible

76 Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244–45 (1993); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

77 Jerome Mccristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 169 (1994).

78 MEIZHU LUI ET AL., THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE 16–17 (2006); Meizhu Lui, *The Wealth Gap Gets Wider*, WASH. POST, Mar. 23, 2009, at A15.

79 Christopher Chantrill, *Obama and the Coming Democalypse*, AM. THINKER (July 19, 2011), http://www.americanthinker.com/2011/07/obama_and_the_coming_democalypse.html.

80 *Id.*

81 Jesse Washington, *The Disappearing Black Middle Class*, CHI. SUN–TIMES, July 10, 2011, at News 2.

signals, and social custom warning African Americans to depart by sunset.[82] After the United States Supreme Court declared residential segregation ordinances unconstitutional in 1917,[83] the legal profession responded by resorting to the racial covenants, at first upheld by the Court in 1926.[84] These were later declared judicially unenforceable in *Shelley v. Kraemer* in 1948.[85] The racial covenant by no means disappeared from deeds simply because *Shelley* held that its enforcement by state courts constituted impermissible state action under the doctrine of the *Civil Rights Cases*.[86] But those who wanted to maintain residential segregation found that their goals could be achieved just as effectively by less overt methods, of which the most pervasive is exclusionary zoning. Though the New Jersey Supreme Court doggedly fought to stamp out the practice in the Mount Laurel struggles of the 1970s and 1980s,[87] the United States Supreme Court has erected daunting procedural barriers to those who would challenge exclusionary zoning in federal courts.[88] The Court's indirect facilitation of exclusionary zoning has the advantage of being a perfect stealth technique of structural racism: opaque, uninteresting and incomprehensible to lay people, yet supremely effective in perpetuating racial disparities.

8. *Automaticity.*—A metaphor drawn from human physiology is strikingly apt here: automaticity is the quality of some cardiac muscles to self–activate, without an external stimulus (such as a command from the brain or a pacemaker to depolarize.) Structural racism has a comparable character. It automatically self–perpetuates, insinuating itself like a virus imperceptibly into new social environments, without needing a stimulus from overt racism. To illustrate by example: a grocery chain might decide not to locate a new store in an inner city neighborhood for defensible non–racist reasons: unpromising prospects for profitability, high operating and insurance costs, or lack of transportation nexus. But the effect of this decision is to deprive residents of access to fresh fruits and vegetables, leaving them to the sorts of processed, fatty, and chemically–saturated junk foods available from convenience stores and fast–food chains. Poor nutrition leads to obesity, which turn leads to health problems like heart disease and diabetes later in life (both of which afflict African Americans at disproportionate rates), to

82 JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 3–4 (2005).

83 Buchanan v. Warley, 245 U.S. 60, 82 (1917).

84 Corrigan v. Buckley, 271 U.S. 323, 330 (1926).

85 Shelley v. Kraemer, 334 U.S. 1, 21–22 (1948).

86 The Civil Rights Cases, 109 U.S. 3, 18 (1883).

87 S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 456 A.2d 390, 415 (N.J. 1983); S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 730–32 (N.J. 1975).

88 *E.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977); Warth v. Seldin, 422 U.S. 490, 502 (1975).

social stigma, to lack of exercise opportunities, to impaired mobility, and so on. No one has to intend such dire health and social outcomes: they occur automatically and invisibly. Structural racism actuates and reproduces itself. The problem will replicate itself endlessly unless society determines to recognize its reality and to attack it pro–actively and aggressively. Passivity only insures structural racism's continuance.

II. Conference Papers

The interdisciplinary outreach mentioned at the beginning of this introduction was gratifyingly successful. Of the sixteen panel presentations, only three dealt explicitly and principally with legal subjects. Otherwise, panelists spoke from a wide range of scholarly disciplines, including criminal justice, English literature, humanities, sociology, social work, history, psychology, and education. The authors of two of the legal papers graciously consented to having their work published here.[89]

Professor Darrell Miller of the University of Cincinnati College of Law draws on work that he[90] and Daria Roithmayr[91] have published on the concept of "racial cartels" to suggest a valuable addendum to Congress' power to suppress what in the nineteenth century were known as the "badges" or "incidents," of slavery, specifically, both publically–sanctioned and private racial discrimination, including disparate outcomes. A racial cartel, by analogy from economic theory and the postulates of law–and–economics, is an agreement among discriminators (including the non–explicit behavior known as "conscious parallelism" or "tacit collusion"[92], as well as now–unconscious norms of behavior) that has the effect of curtailing opportunities for people of color. The merit of Professor Miller's suggestion is that it would enable Congress to reach not only positive laws that sustain the badges and incidents of slavery, and the extra–legal violence that provided sanctions, but also the implicit social norms that are constitutive of a racialized cartel and, by extension, a racialized society. This would provide a means, if Congress could be persuaded to use it, to deal with the problem of disparate impact that is the object of structural racism analysis. Congress's power here rests on Section 2 of the Thirteenth Amendment, the Enforcement Clause. This has the additional virtue of providing a backstop against the resistance of some members of the Court, most notably Justice Antonin Scalia, to the power of Congress to reach racially–disparate

89 The third, my own, titled, *Structural Racism and the United States Supreme Court, 1970–2010*, was a preview of the book that Dr. Hamilton and I are writing and as such is not ready for publication at this time.

90 Darrell A. H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of* Jones v. Alfred H. Mayer Co., 77 Fordham L. Rev. 999, 1023–25 (2008).

91 Daria Roithmayr, *Racial Cartels*, 16 Mich. J. Race & L. 45, 50 (2010).

92 Reza Dibadj, *Conscious Parallelism Revisited*, 47 San Diego L. Rev. 589, 590 (2010).

impacts under its commerce power or its Fourteenth Amendment enforcement powers.[93]

Professor Robert Schwemm, the Ashland–Spears Distinguished Research Professor of Law at the University of Kentucky College of Law, reviews a more recent historical era, the period since Congress enacted the Fair Housing Act (FHA) in 1968.[94] Given the stubborn persistence of residential segregation in America's cities, with the attendant structural damage to the prospects of people of color, he identifies a provision of the FHA, section 3608, as a means not only of reducing segregation but also of affirmatively promoting a fully integrated society. [95]

Since the 1960s, Congress has progressively expanded the mandate of federal agencies (most notably, the Department of Housing and Urban Development) from the minimal negative goal of not promoting segregation, though remaining neutral with respect to segregation, to preventing discrimination, and finally to the current stage of affirmatively promoting integration. Section 3608 requires that federal funds be spent "affirmatively to further [FHA] policies,"[96] which the United States Supreme Court defined as promoting racial integration for the benefit of the entire community.[97] This policy is often referred to by the acronym AFFH: "affirmatively furthering fair housing." The Second Circuit has read the AFFH remit as "[a]ction [that] must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat."[98] Professor Schwemm sees section 3608 as a major but underutilized opportunity for federal agencies to promote these broad integrationist goals of the FHA. He analyzes the recent Westchester

93 U.S. CONST. amend. XIV, § 5; Ricci v. DeStefano, 129 S.Ct. 2658, 2681–83 (2009) (Scalia, J., concurring); Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

94 Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back–to–the–Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125 (2011). This statute is now codified as the Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2006). At the time of its enactment, the FHA was more commonly known as the Civil Rights Act of 1968, correctly situating it in the succession of historic legislation of the Civil Rights era, including the Civil Rights Act of 1964 and the Civil Rights Act of 1965. Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 B. U. PUB. INT. L.J. 35, 37 (2001).

95 *See generally* Schwemm, *supra* note 94.

96 § 3608.

97 Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (construing the purpose of FHA as "replac[ing] the ghettos 'by truly integrated and balanced living patterns'"). This construction was confirmed in *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) ("recognizing the FHA's 'broad and inclusive' compass, and therefore according a 'generous construction' to the Act[] . . . .").

98 Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973).

County, New York litigation[99] as a promising means of implementing the potential of section 3608.[100]

These valuable papers hint at the rich potential that awaits lawyers and civil rights activists who will find in law numerous ways of attacking structural racism.

99 United States *ex rel.* Anti–Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 495 F. Supp. 2d 375 (S.D.N.Y. 2007).

100 *See* Schwemm, *supra* note 94, at 164–65.