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Through the Looking Glass: Recent Developments in Affirmative Action

Kathleen Morris†

Alice could never quite make out, in thinking it over afterwards, how it was that they began: all she remembers is, that they were running hand in hand, and the Queen went so fast that it was all she could do to keep up with her: and still the Queen kept crying 'Faster! Faster!' . . . The most curious part of the thing was, that the trees and the other things round them never changed their places at all: however fast they went, that never seemed to pass anything . . . suddenly, just as Alice was getting quite exhausted, they stopped . . . Alice looked around her in great surprise. 'Why, I do believe we've been under this tree the whole time! Everything's just as it was!' 'Of course it is,' said the Queen. . . . 'Now *here*, you see, it takes all the running *you* can do, to keep in the same place. If you want to get somewhere else, you must run twice as fast as that!'¹

I. INTRODUCTION

The year 1995 saw three major developments that threaten the future of voluntary affirmative action programs in California and nationwide. On June 12, the U.S. Supreme Court in *Adarand Constructors, Inc. v. Peña*,² held that voluntary federal affirmative action programs should be subject to the same "strict scrutiny" reserved for all other racial classifications.³ The following month, the Regents of the University of California voted to abolish the use of race and gender as factors in admissions and hiring in the

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¹ LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* 180-82 (1987).

² 115 S. Ct. 2097 (1995).

³ The Supreme Court has read the Equal Protection Clause to require different levels of scrutiny for different classifications. "Strict scrutiny," which is applied to suspect classifications (based upon race or national origin), requires that the classification be necessary to achieve a compelling state objective. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). "Intermediate scrutiny," which is applied to quasi-suspect classifications (based upon gender), requires only that the classification be substantially related to the achievement of an important governmental objective. *Craig v. Boren*, 429 U.S. 190, 197 (1976). The rational basis test is applied to classifications which are neither suspect nor quasi-suspect, and requires only that the classification be rationally related to a legitimate governmental objective. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

University of California system. Finally, last year the so-called "California Civil Rights Initiative" ("CCRI") was presented to the citizens of California as a possible ballot measure for the November 1996 statewide elections. The CCRI would outlaw the use of racial "preferences" in any organization receiving state funds. This piece will briefly discuss these developments, highlighting the oddly distorted mix of fact and fantasy that has surrounded the affirmative action debates.

II. THE COURT

The United States Supreme Court's holding in *Adarand* came as no shock to those who have followed recent Supreme Court decisions. The Court had laid the groundwork for *Adarand* six years earlier in *City of Richmond v. Croson*,⁴ in which it held that state voluntary affirmative action programs would be subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

In *Croson*, the court struck down a Richmond, Virginia law that required prime contractors hired by the city to subcontract at least 30% of the dollar amount of the contract to minority business enterprises, unless they could show that such a requirement could not realistically be met. The City of Richmond (which is 50% African-American) provided the Court with a study showing that only 0.67% of the city's prime construction contracts had been awarded to minority businesses between 1978 and 1983. Moreover, Richmond showed that the contractor's associations (which provided the most vehement opposition to the plan) had virtually no minority membership.

Nevertheless, the Court decided to apply strict scrutiny on the grounds that, "absent searching judicial inquiry into the justifications for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."⁵ A classification will only survive strict scrutiny if the governmental objective is shown to be "compelling," and the classification is "narrowly tailored" to that objective. Historically, almost all classifications have failed this stringent test,⁶ and *Croson* was no exception.

Justice Marshall, in a scathing dissent, denounced the decision to apply strict scrutiny to voluntary affirmative action programs. In so doing, he alluded ruefully to Virginia's long history of racial violence:

⁴ 488 U.S. 469 (1989).

⁵ *Id.* at 493.

⁶ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1451-52 (2d ed. 1988). Ironically, exceptions include two cases that justified internment of Japanese Americans during World War II on national security grounds: *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. . . . The essence of the majority's position is that Richmond has failed to catalog adequate findings to prove that past discrimination has impeded minorities from joining or participating fully in Richmond's construction contracting industry. I find deep irony in second-guessing Richmond's judgment on this point.⁷

The theoretical underpinnings of *Croson*, which essentially equated voluntary attempts to remedy discrimination with invidious discrimination itself, led almost inevitably to *Adarand*. In *Adarand*, the Court struck down a plan crafted by the Federal Small Business Administration, in which prime contractors were given financial incentives to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals. Justice O'Connor's lead opinion in *Adarand* simply extended the *Croson* rule—that state affirmative action programs must be subject to strict scrutiny—to federal affirmative action programs. The Court then restated the bedrock principle underlying its analysis, that racial classifications should be consistently reviewed under strict scrutiny regardless of context or governmental intent: “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”⁸ In a dissenting opinion, Justice Stevens argued that “[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. . . . The consistency that the Court espouses would disregard the difference between a ‘No Trespassing’ sign and a welcome mat.”⁹

For women of color, *Croson* and *Adarand* highlight, indeed exacerbate, the dilemma posed by discrimination laws structured around either race or gender. While these cases circumscribe voluntary affirmative action programs based upon racial classifications, they say nothing about gender classifications. A question arises, then, around whether African-American women, Asian women, Latinas/Chicanas, Native American women, and others are “people of color” or “women” for the purposes of equal protection (and therefore affirmative action). In “A Black Feminist Critique of Antidiscrimination Law and Politics,”¹⁰ Professor Kimberlé Crenshaw explains how antidiscrimination law is structurally hostile to claims by women of color, because it is constructed from the perspective of White males:

⁷ *Croson*, 488 U.S. at 528-29.

⁸ *Adarand*, 115 S. Ct. at 2111.

⁹ *Id.* at 2120-21.

¹⁰ Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 195 (David Kairys ed., 1991).

[G]ender discrimination, imagined from the perspective of White men, is what happens to White women; race discrimination is what happens to Black men . . . Black women are protected only to the extent that their experiences coincide with either of the two groups. Where their experiences are distinct, Black women will encounter difficulty articulating their claims as long as approaches prevail which completely obscure problems of intersectionality.¹¹

Despite the power of arguments for developing intersectional theories of discrimination, made not only by Crenshaw, but also by professors Regina Austin,¹² Paulette Caldwell,¹³ and others, American courts have explicitly rejected intersectionality analysis,¹⁴ maintaining that discrimination can only be legally recognized on the basis of race *or* gender. Thus, the lived experience of women of color continues to go unrecognized in the courts.

Ironically, the Court's narrow view of invidious classifications may allow some women of color to take advantage of gender-based affirmative action programs, since gender-based affirmative action programs will continue to be reviewed under a lesser standard, "intermediate scrutiny."¹⁵ This raises the question of whether the pursuit of intersectional classifications continues to make sense from a purely pragmatic point of view, given that the level of scrutiny applied to these classifications could be strict scrutiny. However, the long-term political goals of women of color will probably be best served by explicit recognition of their life experiences in the courts, regardless of short-term sacrifices.

While the Court's failure to recognize intersectional identity and discrimination presents particular obstacles for women of color, the more deeply pervasive injustice in antidiscrimination law lies in its baseline assumptions. Crenshaw argues that the real danger for women and people of color lies in the fact that:

Underlying dominant conceptions of discrimination . . . is a view that the wrong which antidiscrimination law addresses is the use of race or gender factors to interfere with decisions that would otherwise be fair or neutral. This process-based definition is not grounded in a bottom-up commitment to improve the substantive conditions for those who are victimized by the interplay of numerous factors.¹⁶

¹¹ *Id.* at 197 (footnote omitted).

¹² See Regina Austin, *Sapphire Bound!*, 1989 Wis. L. REV. 539 (1989).

¹³ See Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991).

¹⁴ See *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981) (upholding the right of employers to prohibit categorically the wearing of braided hairstyles in the workplace); *Chambers v. Omaha Girls Club*, 629 F. Supp. 925 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987), *reh'g denied*, 840 F.2d 583 (1988) (allowing a rule, in which employer could fire unmarried counsellors for becoming pregnant, to stand as a business necessity and bona fide occupational qualification defense to a Title VII suit).

¹⁵ "Intermediate scrutiny," which was first introduced by the Court in *Craig v. Boren*, 429 U.S. 190 (1976), requires only that the classification serve an "important" governmental objective, and that it be "substantially related" to the achievement of that objective.

¹⁶ Crenshaw, *supra* note 10, at 201.

This presumption, that the underlying system is fundamentally fair, clearly underlies the Supreme Court's reasoning in *Adarand*. The majority opinion takes as a given that a fair system is an unfettered system; thus, attempts to remedy racism are included as among the evils which interfere with neutral decisions made by employers. In fact, Justice Thomas, in his concurrence, explicitly declares "racial paternalism and its unintended consequences" (i.e., affirmative action) to be "as poisonous and pernicious as any other form of discrimination."¹⁷

This odd, ahistorical portrayal of affirmative action—in which the Supreme Court has essentially placed racism and remedies for race discrimination into the same moral category—reveals the way in which debates around affirmative action have taken on a kind of dark, grotesque, "Alice in Wonderland" quality.¹⁸ Similarly distorted rhetoric has pervaded the fight over affirmative action at the University of California.

III. THE UNIVERSITY

Following close on the heels of *Adarand*—but quite a bit more extreme—was a decision of the University of California Regents to prohibit the use of "race, religion, sex, color, ethnicity, or national origin as criteria" for admissions, contracting or employment on the nine public University of California campuses.

I use the word "extreme" because while *Croson* and *Adarand* merely limit the use of race-conscious programs to particular circumstances,¹⁹ the Regents voted to ban affirmative action altogether. By contrast, in 1978, the Supreme Court held in *Regents of University of California v. Bakke*²⁰ that a university has a compelling interest in taking the race of applicants into account in its admissions process in order to foster greater diversity in a student body.²¹ In his plurality opinion, Justice Powell conceded that the maintenance of diversity in a university leads to an atmosphere "conducive to speculation, experiment and creation."²² Under *Bakke*, only admissions processes that use fixed numerical quotas, or use race as the sole or primary factor in admissions, would be too rigid to pass constitutional scrutiny under the Fourteenth Amendment's Equal Protection Clause.²³

¹⁷ *Adarand*, 115 S. Ct. at 2119.

¹⁸ I first heard this "Alice in Wonderland" metaphor in a lecture on affirmative action by Professor Robert Post, Boalt Hall School of Law, November 1995.

¹⁹ The circumstances are those in which the employer has made a showing that a program is "necessary," and where the program is "narrowly tailored" to remedy the problem.

²⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

²¹ *Id.* at 312.

²² *Id.* at 312 (quoting Justice Frankfurter's concurring opinion in *Sweezy v. N.H.*, 354 U.S. 234, 263 (1917)).

²³ Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice to General Counsels 24 (June 28, 1995) (on file with author).

I also use the word “extreme” because, contrary to a long tradition of “shared governance” between governing bodies of the campuses, under intense political pressure from California Governor and then-presidential candidate Pete Wilson, the Regents acted unilaterally and in the face of the “united opposition” of the University’s president, all nine chancellors, faculty, and students.²⁴ Thus, the war in the University of California over its affirmative action programs has developed along two fronts. On one front, advocates argue about the need for and wisdom of affirmative action as a means of promoting excellence in the public universities, as well as creating a public culture dedicated to healing racial rifts. University of California President J.W. Peltason, in a speech at the March 16, 1995 Regents’ meeting, argued that:

as the public university of our nation’s most racially and ethnically diverse mainland state, the University has an obligation to encompass that diversity in its student body, its faculty, and its staff. What happens in our university campuses will have much to do with our ability to forge an emerging new culture, a culture that is inclusive, varied, and respectful of difference, but which also unites us into a community that can live, work, prosper, and flourish in our constitutional democracy. It may well threaten California’s social and economic future if we make it harder for minority and disadvantaged people to learn or work in the University of California and other institutions of higher education in this state.²⁵

The battle’s second front is not on the substance of affirmative action policies, but on the process of decision making. On Tuesday, October 17, 1995, the Academic Senate of the University of California at Berkeley—in a show of unprecedented solidarity—passed a resolution by 124-2, calling on the Regents to rescind their votes.²⁶ The faculty has taken the position that, regardless of the merits of affirmative action programs, the Regents should not have made such a monumental policy decision in the face of such strong unilateral opposition from all other corners of the University of California.²⁷

The faculty has also taken pains to point out that under the California Constitution, the Regents are bound to administer the University’s affairs “entirely independent of all political or sectarian influence.”²⁸ Governor Wilson defends his position by asserting that in his opinion, “we are happily in a time when a number of the compensations that were earlier advanced to make up for earlier discrimination are no longer needed.”²⁹ In reality, however, education and employment statistics in Wilson’s own home state provide glaring evidence that the opposite is true—that affirmative action is

²⁴ Edward Epstein, *Faculty Opposes Gutting Affirmative Action at UC*, S.F. CHRON., Oct. 21, 1995, at A13.

²⁵ Statement of J.W. Peltason, President, 2-3 (March 16, 1995).

²⁶ Epstein, *supra* note 24, at A13.

²⁷ *Id.*

²⁸ CAL. CONST. art. IX, § 9.

²⁹ Cathleen Decker, *Affirmative Action: Why Battle Erupted*, L.A. TIMES, Feb. 19, 1995, at A2.

needed now more than ever in order to achieve even a minimal level of racial justice. For example, the 1995 University of California at Berkeley undergraduate admissions program, which applied the U.C. affirmative action program, resulted in a class that is 31% White, 6.6% Black, 1.7% Native American, 15% Chicano/Latino, and 36% Asian.³⁰ The U.C. Berkeley admissions office estimates that the percentage of African-American and Latino students at the University will drop from 22% to less than 8% if the Regents' vote goes into effect.³¹

Moreover, public employee salary and employment data, gathered by the U.S. Equal Employment Opportunity Commission (EEOC), show that although minorities in California have made some gains in public jobs since affirmative action programs were implemented, people of color employed by the state still make considerably less than Whites, and women earn significantly less than men.³² In addition, minorities and women tend to be "ghettoized" into lower-paying, lower-skilled jobs. In 1993, for example, 76% of the new hires in the highest category of public jobs—"officials and administrators"—were White, and 62.7% were male. By contrast, Blacks were hired for 8.9% of those jobs, Hispanics for 8.4%, Asians for 6.3%, women for 37.3%.³³ Overall, then, although affirmative action in government hiring is slowly moving minorities and women towards something approximating parity, Whites are still over-represented at the top of the career ladder, while Blacks and Hispanics are over-represented at the bottom.³⁴

Analysis of California's private sector reveals a similar pattern of employment along racial lines. Census figures from 1980 show that Whites, who make up 57% of California's population, held 82.3% of managerial and professional jobs in the state. Ten years later, not much had changed; in 1990, the figure was 75.3%. Blacks in 1990 held only 5.1% of management jobs, Latinos 9.56%, and Asians only 9%.³⁵ Moreover, the net worth of African Americans in California averages \$9,359 compared with \$44,980 for Whites.³⁶ About 31% of African-American families in California make less than \$15,000 a year, compared with 25% of Latino families,

³⁰ The statistic on "Asians" is somewhat misleading however, since "Asian" includes not only persons of Chinese and Korean descent, who make up 23% of the 36%, but also East Indians, Pakistanis (3%), Filipinos (2%), Japanese (2%), and Pacific Islanders (.3%), as well as an ambiguous category termed "other Asian" (5%). University of California, Berkeley Office of Student Research, *New Undergraduates by Gender and Ethnicity* (Fall 1995) (on file with author).

³¹ Memorandum from Equal Rights Advocates to Affirmative Action Advocates 5 (Jan. 12, 1995) (on file with author).

³² In 1993, the median income for Whites in public employment in California was \$40,313, and for men, \$42,556, while Blacks averaged \$33,774, Hispanics \$32,978, Asians \$37,925, Native Americans \$33,889, and women \$31,897. CALIFORNIA SENATE OFFICE OF RESEARCH, *TAKING A LOOK AT AFFIRMATIVE ACTION 5* (1995).

³³ *Id.* at 6.

³⁴ *Id.*

³⁵ Decker, *supra* note 29, at A1.

³⁶ Memorandum from Equal Rights Advocates to Affirmative Rights Advocates, *supra* note 31, at 3 (citing a Jan. 1992 report by the CAL. SENATE OFFICE OF RESEARCH).

and just 16% of White families. Finally, in 1992 Latinos/Latinas made up 37.5% of equipment operators, 55.5% of laborers, and 33.6% of service workers, as contrasted with just 5.6% of professional jobs.³⁷

Wilson and other opponents of affirmative action often have tried to blame these statistics on disparities in “merit”—a kind of intellectual Darwinism. In an attempt to quash this “myth of meritocracy,” sociologists such as University of California at Berkeley Professor Jerome Karabel have begun to examine and expose the tenuous links between so-called “merit” and admissions to institutions of higher learning. Karabel has done extensive studies of an ordinarily hidden type of affirmative action: children of alumni, or so-called “legacies.” One study of Harvard’s 1988 admissions discovered that if Harvard’s legacies had gone through the normal admissions process, instead of being given a “plus” factor, “the number of alumni offspring [admitted] would have fallen by nearly 200, a figure that exceeded the total of Blacks, Mexican Americans, Puerto Ricans and Native Americans admitted as freshmen that year.”³⁸ A 1991 report by Berkeley’s Institute for the Study of Social Change noted that overall, “far more Whites have entered the gates of the 10 most elite institutions through ‘alumni preference’ than the combined number of all the Blacks and Chicanos entering through affirmative action.”³⁹

Nevertheless, Governor Wilson and the U.C. Regents maintain that affirmative action must be abolished statewide in order to make admissions and hiring criteria “fair and equal,” a position which suggests they may have joined Justice Thomas and stepped through the looking glass. For, as has been noted by advocates of affirmative action, “the notion of ‘fair and equal’ is a cruel joke if you have been denied and systematically excluded from the institutions and experiences that provide you with the mastery of the requirements for entry into the playing field.”⁴⁰ Nevertheless, attacks on affirmative action have spread statewide with the proposed California Civil Rights Initiative.

IV. THE INITIATIVE

With the California Civil Rights Initiative (“CCRI”) possibly looming over the November 1996 elections, the news media has conducted a series of polls to gauge the public mood around affirmative action programs.⁴¹ According to researchers at the U.C. Berkeley Project on Equal Opportu-

³⁷ *Id.* at 2.

³⁸ Elaine Woo, *Belief in Meritocracy an Equal-Opportunity Myth*, L.A. TIMES, Apr. 30, 1995, at A1.

³⁹ *Id.*

⁴⁰ Memorandum from Equal Rights Advocates to Affirmative Action Advocates, *supra* note 31, at 2.

⁴¹ Memorandum from Lisa Stulberg to Project on Equal Opportunity, Synthesis of Affirmative Action Data (Nov. 30, 1995) (on file with author).

nity, support for affirmative action depends largely on two factors: (1) how the poll is worded, and (2) demographics.

Where the term "affirmative action" is used, between 52% and 61% of Californians generally express support for affirmative action programs. However, if the poll replaces the term "affirmative action" with "preferences" or "quotas," support falls drastically, among all racial and gender groups.⁴² Finally, the California Civil Rights Initiative, which would prohibit the use of "race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the state's system of public employment, public education, or public contracting,"⁴³ receives much less support after its effects—the unilateral abolition of all affirmative action programs—are fully explained.⁴⁴ Nevertheless, currently a slim majority of Californians appear to support the CCRI.⁴⁵

In summarizing her findings, Stulberg points out that:

while no specific remedy . . . gathers much public support, there is a general dislike and intolerance of "discrimination" and a desire for "equal opportunities" for all. Intolerance of *discrimination* and *prejudice* is widespread, with support for stronger laws against and punishment for discrimination ranging from 64 to 78% (Feldman Poll, May 1995). Support for the concept of *equal opportunities* is also very strong, ranging from 64 to 79% support for programs designed to facilitate equal opportunities for women and people of color (Harris and Feldman Polls).⁴⁶

The tension highlighted in this last point—strong support for equal opportunities yet hesitant or weak support for affirmative action programs—underlies the entire affirmative action debate. Seemingly, very few people would want to deny a remedy to a person who could prove they had personally experienced tangible prejudice. However, it remains difficult to form a consensus on the pervasive nature of systemic societal discrimination and the need for a legal remedy, even in the face of powerful statistics. Thus, discrimination seems to some as either non-existent or invisible, even though—like the Cheshire Cat—it is at all times everywhere. The conclusion of this piece will discuss pervasive biases that seem most often to distort reality, and allow opponents of affirmative action to deny that discrimination still mandates a legal remedy.

⁴² *Id.* at 5.

⁴³ CAL. SENATE OFFICE OF RESEARCH, TAKING A LOOK AT AFFIRMATIVE ACTION 3 (1995).

⁴⁴ When one pollster explained to his respondents that CCRI would end affirmative action for women and minorities, support for the initiative dropped from 81% to 29%. Ellen Debenport, *Affirmative Action is Hardly Detested by Public, Poll Finds*, ST. PETERSBURG TIMES, Apr. 26, 1995, at 3A.

⁴⁵ Memorandum from Lisa Stolberg to Project on Equal Opportunity, Synthesis of CCRI Public Opinion Data 2 (Nov. 30, 1995).

⁴⁶ Memorandum from Lisa Stolberg to Project on Equal Opportunity, *supra* note 41, at 9.

V. CONCLUSION

Three pervasive themes throughout discussions on affirmative action suggest the biases which stand in the way of affirmative action opponents' recognition of discrimination and the need for a remedy. They are the myth of meritocracy, the politics of denial, and unconscious racism. These biases pervade modern discussions of affirmative action, and often form the basis for the distinction people insist upon making between remediable and nonremediable prejudice.

First, the myth of meritocracy suggests that in modern day America, we have a "level playing field" which is unfairly tilted by affirmative action programs. Professor Harley Shaiken, a U.C. Berkeley education professor, argues that "[t]he notion that we at one point had a system based on merit and then gratuitously introduced affirmative action (is an argument that) [sic] rewrites history. It is a powerful and confining myth."⁴⁷ In reality, as the work of Karabel and others have shown, our society is loaded with preferences—for Whites and men.

Second, the phrase "politics of denial" refers to the tendency of those in power to sweep evidence of racism and discrimination under the rug and declare affirmative action either no longer necessary, unfair because based upon past "sins" for which they bear no current responsibility, or mis-targeted at women and people of color (as opposed to groups who are disadvantaged in other ways). For example, Presidential candidate Robert Dole argued recently that "[t]he people of America now are paying a price for things that were done before they were born We did discriminate. We did suppress people. It was wrong. . . . But should future generations have to pay for that?"⁴⁸ And Speaker of the House Newt Gingrich has remarked that discrimination has been experienced by "virtually every American," noting, for example, that the Irish were discriminated against by the English.⁴⁹

History professor Roger Wilkins has noted that the "politics of denial" can appear not only in the form of overt racism, but that it can also skew the perspectives of White Americans "who are not racists but who more or less passively accept the powerful suggestions coming at them from all points in the culture that Whites are entitled to privilege and to freedom from competition with Blacks."⁵⁰ Wilkins concludes that, though racism in society is powerful, violent, and deadly, "millions of Americans who are deemed sane—some of whom are powerful and some even thought wise—deny, wholly or in part, that racism exists."⁵¹

⁴⁷ Woo, *supra* note 38, at A1.

⁴⁸ Decker, *supra* note 29, at A1.

⁴⁹ Roger Wilkins, *Racism has its Privileges*, THE NATION, Mar. 27, 1995, at 409, 412.

⁵⁰ *Id.*

⁵¹ *Id.*

Finally, there is the omnipresent problem of unconscious racism, a problem that has led law professors and psychologists alike to fear aloud that racism ultimately is intractable. In "The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism,"⁵² Professor Charles Lawrence argues that racism is not only a "crime," but a "disease," infecting almost everyone. To Lawrence:

[a]cknowledging and understanding the malignancy are prerequisites to the discovery of an appropriate cure. . . . Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about non-Whites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.⁵³

Psychological studies of racism support Lawrence's analysis of discrimination as part outright racism, part unconscious "racial nepotism." These studies suggest that some discrimination is caused by cognitive "weak points" that cause people to see what they expect to see, and to reject any information—any "unusual objects"—that would challenge their already established point of view.⁵⁴ Discrimination results when the "unusual objects" are women and minorities filling out applications for White and/or male bosses. Due to these cognitive weak points, it may be virtually impossible for Whites and/or males to see these applicants as qualified for certain jobs.⁵⁵

Of course, the acknowledgment of unconscious racism was what spurred the enactment of affirmative action programs in the first place. Affirmative action programs require institutions and individuals to break with "business as usual" and make an effort to search for qualified candidates from previously untapped sources.⁵⁶ According to one Los Angeles Times pollster, "[t]he real challenge for the proponents of affirmative action is not to make the argument that there's still prejudice They have to make an argument that the tools they want to use are fair. That's tough."⁵⁷

The question remains, however, whether the controlled bias we call affirmative action is less "fair" than the many invisible, uncontrolled, and unmonitored biases in our educational, economic, and social systems. The

⁵² 39 STAN. L. REV. 317 (1987).

⁵³ *Id.* at 321-23.

⁵⁴ K.C. Cole, *Brain's Use of Shortcuts Can be a Route to Bias*, L.A. TIMES, May 1, 1995, at A1.

⁵⁵ *Id.*

⁵⁶ Wilkins, *supra* note 50, at 409, 409.

⁵⁷ Cathleen Decker, *Most Back Anti-Bias Policy but Spurn Racial Preferences*, L.A. TIMES, Mar. 30, 1995, at A1.

battle over affirmative action ultimately asks whether we are willing to pay the moral, political, and social costs of dismantling thirty years of hard-won civil rights gains in the name of what is at best a false “consistency,” and at worst a cynical exchange of the facts for an absurd, distorted fantasy.