Local Kine Implicit Bias: Unconscious Racism Revisited (Yet Again)

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Featuring a poem by Kathy Jetnil-Kijiner

I. INTRODUCTION

In 1987, I introduced the idea that anti-discrimination law should take cognizance of unconscious bias in an article titled *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism.*[1] I argued that the purposeful intent requirement found in Supreme Court equal protection doctrine and in the Court's interpretation of anti-discrimination laws disserved the value of equal citizenship and suggested that rather than looking for discriminatory motive, the Court should examine the cultural meaning of laws to determine the presence of collective unconscious bias.

The Supreme Court paid little heed to my call for the law to recognize the continuing effects of unconscious bias.[2] Nonetheless, in the almost thirty years since my article's publication, behavioral scientists have made significant advances in the study of unconscious bias providing us with important evidence and understanding of the ubiquity of biases that reside outside of our awareness.[3]

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

[2] I have written elsewhere of how the Supreme Court's conservative majority has marched relentlessly and radically, not to mention intentionally, in the opposite direction of my call to give attention to unconscious bias and the racial meaning of legal and social texts. Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 951-55 (2008) [hereinafter *Unconscious Racism Revisited*].

[3] *See, e.g.*, Justin D. Levinson, *Race, Death, and the Complicitous Mind,* 58 DEPAUL L. REV. 599 (2009); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering,* 57 DUKE L.J. 345 (2007); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence,* 112 W. VA. L. REV. 307 (2010).

Legal scholars have done the vital work of applying the science of implicit bias to legal problems.[4] They have focused primarily on the usefulness of implicit bias evidence in proving that bias may influence an individual decision-maker's actions, thereby rendering those actions discriminatory and potentially unlawful. Although this valuable work has built on my early work, it differs from that work in an important way. Anti-discrimination law prohibits actions by an employer, police officer, or prosecutor that have been tainted by impermissible considerations of race or gender. Lawyers have employed the work of cognitive psychologists to demonstrate that these impermissible biases are at work even when the decision-maker is unaware of their presence. The law understands the statutory, constitutional, or normative harm of race discrimination as the biased, and therefore wrongful, actions of one individual against another.

When I called attention to unconscious bias my project was greater than getting the Court to recognize that each of our decisions was motivated or influenced by unconscious as well as conscious bias. I argued that racism's harm encompassed more than the biased actions of individuals and I sought to challenge the idea that racism's harm derives only from the actions of identified racist individuals against individual victims of racism. I pointed to the ubiquity of conscious and unconscious racism as evidence of the continued vitality of racist ideology and argued that so long as this ideology lived and flourished the Constitution, and normative justice, required that we act affirmatively to remedy its effects and disestablish its institutional embodiments.[5] Racism was a societal illness, and we needed to respond to racism as epidemiologists rather than as moralists or crime fighters.

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[4] Linda Krieger and Justin Levinson, both contributors to this symposium, have made significant groundbreaking contributions to this scholarship. *See, e.g.*, Robert J. Smith, Justin D. Levinson, & Zoe Robinson, *Bias in the Shadows of Criminal Law: The Problem of Implicit White Favoritism,* 66 ALA. L. REV. (forthcoming 2015); Justin D. Levinson, Huajian Cai, & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV.945 (2006).

[5] The "cultural meaning" test does not ask whether bias infects the decisions of the individual actors. Rather, it demonstrates the continuing presence of racist belief in the larger society by discerning the racial (or racist) meaning or interpretation that the relevant community would give an act or decision that is not articulated or justified in explicitly racial terms. These are two very different projects. One accepts the central premise of the *Davis* intent requirement—that the harm of race discrimination lies in individual acts infected by bias. *See* Washington v. Davis, 426 U.S. 229, 240-42 (1976). The other rejects that premise and finds the harm of racism in the pervasive effects of shared racist ideology. *See The Id, the Ego, and Equal Protection, supra* note 1, at 362-76.

This article returns to this project once again.[6] I consider and interrogate three texts[7] to model an approach that employs implicit bias to ask how we might understand racism as a disease that infects us as a community, rather than as a collection of acts by individuals who can choose to be racists or not. All three of the texts or stories take place in Hawai'i and within our immediate community. By using local texts I choose this community as my primary audience, trusting that we will recognize the cultural meanings evident in a text that includes us as characters. I also trust that the meanings of these local texts will not be lost on readers who do not live close by, as all of these texts can also be read as stories inhabited by the American family if not the human family.

In telling each story I reprise my original challenge to the law's story that the primary harm of racism, sexism and homophobia is the harm that one individual does to another, rather than the harm that is done when a nation constituted in racism, sexism and homophobia has failed to heal those societal sicknesses. My critique does more than claim descriptive error in the law's understanding of harm. I argue that the "bad guy hurts victim" story of fault and causation keeps us from seeing and recognizing our collective, shared biases, from talking with one another about them, from seeing how they harm us all and from working together to heal ourselves.

II. LOCAL KINE BLACK FOLKS: WHY WE UNDERSTAND WHAT THE PROSECUTOR MEANT

My first text comes from a *Honolulu Star Advertiser* article titled *Remark About Ethnicity Wins Convict Resentencing Hearing*.[8]

> A state appeals court has overturned the manslaughter sentence of a Waipahu man found guilty of fatally stabbing his cousin because the prosecutor urged

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[6] Although almost all of my work considers and is influenced by some aspect of this project, I have made unconscious bias the central theme of my work on three previous occasions. *See The Id, the Ego, and Equal Protection, supra* note 1; *Unconscious Racism Revisited, supra* note 2; Charles R. Lawrence III, *Unconscious Racism and the Conversation About the Racial Achievement Gap*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012) [hereinafter *Unconscious Racism*].

[7] All three texts are social or cultural rather than legal texts, although one is a newspaper article that reports a legal text. Although I only occasionally refer to a legal text in the body of my argument, I cite and discuss legal texts throughout the footnotes. I trust that I have made clear my belief that legal texts play a central, if not dominant, role in determining the way we understand and misunderstand the texts that are the subjects of this article.

[8] Nelson Daranciang, *Remark About Ethnicity Wins Convict Resentencing Hearing*, HONOLULU STAR ADVERTISER, Dec. 17, 2014, at B2, *available at* http://www.staradvertiser.com/s?action=login&f=y&id=286061841 (login required).

the judge to impose a harsh penalty "to send a message to the Micronesian community."

A state jury found Peter David guilty of manslaughter in the January 2010 stabbing death of his 27-year-old cousin Santhony Albert.

Both men came to Hawaii from Chuuk, the most populous of the four Federated States of Micronesia.

David was facing a murder charge, which carries a mandatory life prison term with the possibility of release on parole.

Manslaughter carries a sentence of either 20 years in prison or 10 years of probation.

At sentencing in 2012, Deputy City Prosecutor Darrell Wong urged Circuit Judge Randal K.O. Lee to impose the 20-year prison term to send a message to the Micronesian community, "mainly the males, who take it upon themselves the idea that they can just drink all they want and not be responsible for what happens after that."

According to trial testimony, both men had been drinking alcohol to celebrate the new year prior to the stabbing.

Albert's blood-alcohol content was 0.25, more than three times the legal threshold for drunken driving.

Authorities were not able to measure David's blood-alcohol content because he left the scene before police arrived. He turned himself in the next day.

The Hawaii Intermediate Court of Appeals said Monday that a defendant's race, ethnicity or national origin cannot be used as justification for the imposition of a harsher penalty.

The court said that it does not believe that Lee based his sentence on Wong's improper argument. However, the court said that to satisfy the appearance of justice, Lee should have made clear on the record that he rejected Wong's argument. The court therefore vacated the sentence and sent the case back for resentencing.[9]

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[9] *Id.* (emphases added).

Peter David[10]

Initially, I should note that deputy Prosecutor Wong's words hardly seem correctly classified as implicit or unconscious.[11] He urges the judge to send a message to the Micronesian community—and is quite explicit in his characterization of what he thinks of that community—"mainly the males."[12] *They* are the *kind of people* who drink and kill. Furthermore they are the kind of people who feel no responsibility for that behavior and who will be deterred from that behavior not by virtue of their own sense of right and wrong and self-control, but only in response to the threat of severe punishment. We hear in this brief recommendation by one officer of the court to another all of the tropes of racist narrative. The entire Micronesian community is lumped together and labeled. This is not the crime of one individual deserving of punishment, but an entire community that is prone to criminal behavior. The prosecutor calls Micronesians "they" and "them." He employs these pronouns to designate Micronesians as "other,"[13] a people who are different from and less than the rest of us. His

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[10] *Id.*, image available at http://khnl.images.worldnow.com/images/13777379_BG1.jpg.

[11] *See* Linda Hamilton Krieger, Keynote Address at the University of Hawai'i Law Review Symposium: Exploring Implicit Bias in Hawai'i (Jan. 16, 2015).

[12] Daranciang, *supra* note 8.

[13] This is a term often used by scholars in critical theory to describe the social, psychological and ideological process of creating, reinforcing and reproducing positions of domination and subordination. Scholars have employed this word as a verb "to other." The term "othering" was originally coined by Gayatri Chakravorty Spivak in 1985. *See* Gayatri

words invoke all of the images of violence, brutality, savagery, immorality, irrationality, lack of intelligence, sexuality employed to justify slavery and segregation. They echo the words used today to justify the killing of Trayvon Martin, Michael Brown, and Eric Garner,[14] and, dare I mention Kollin Elderts.[15]

If this text represents old-fashioned explicit bias rather than implicit bias, if no Implicit Association Test ("IAT") is needed to reveal the racism here, why do I choose to interrogate it? First, I think that Mr. Wong would say, "I am not a racist. I have not asked the court to lengthen Mr. David's sentence because he is Micronesian." He might even say he has Micronesian friends and argue that he was not using a race-based stereotype. Rather, he was doing nothing more than pointing out a cultural pathology in a particular ethnic community.[16] A court might well agree

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Chakravorty Spivak, *The Rani of Sirmur: An Essay in Reading the Archives*, 24 HISTORY & THEORY 247 (1985); s*ee also* BILL ASHCROFT, GARETH GRIFFITHS, & HELEN GRIFFIN, POSTCOLONIAL STUDIES: THE KEY CONCEPTS 190 (3d ed. 2013) (The authors explain "othering" as "a process by which the Empire can define itself against those it colonizes, excludes and marginalizes. It locates 'others' by this process in the pursuit of that power within which its own subjectivity is established.").

[14] Trayvon Martin, Michael Brown, and Eric Garner are black men who were killed during police encounters within the past three years. In each of these cases, juries failed to indict the offending police officers, and the victims had been accused of thug behavior by the media, thereby justifying police action as self-defense. *See, e.g.*, Patricia J. Williams, *The Monsterization of Trayvon Martin,* THE NATION (July 31, 2013), http://www.thenation.com/article/175547/monsterization-trayvon-martin ("And so, by the end of the trial, the 200-pound Zimmerman, despite martial arts training and a history of assaulting others, was transformed into a 'soft,' retiring marshmallow of a weakling. The 158-pound Martin had been reimagined as an immense, athletically endowed, drug-addled 'thug.'"); *see also* Alexandra Jaffe, *Huckabee: Michael Brown Acted Like a "Thug,"* CNN, (Dec. 3, 2014), http://www.cnn.com/2014/12/03/politics/ferguson-mike-huckabee-michael-brown-shooting-thug/.

[15] *See* Hawaii v. Deedy, 532 F. App'x 751 (9th Cir. 2013). Christopher Deedy, a U.S. State Department officer, shot and killed Kollin Elderts in a Waikiki McDonald's in 2011. During the trial, the Deedy defense argued that Deedy's actions were in self-defense as Elderts was intoxicated, aggressive, and used racial slurs. Jim Dooley, *Shooting Victim Was Grabbing Federal Agent's Gun, Defense Argues,* HAWAII REPORTER, (July 27, 2012), http://www.hawaiireporter.com/shooting-victim-was-grabbing-federal-agents-gun-defense-argues.

[16] The argument that an attribution to and characterization of behaviors of persons from a particular racial or ethnic community is not racist because it refers to culture rather than race has its origins in a report on the black family authored in 1965 by Daniel Patrick Moynihan, Secretary of Labor under President Lyndon Johnson. The report argued that the problems of crime, drugs, out-of-wedlock babies and increasing welfare rolls in poor black communities could be traced to a community culture of poverty that legitimized immoral behavior and encouraged economic dependence. OFFICE OF POLICY PLANNING AND RESEARCH, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION

with him.[17] After all, the trial court heard his argument without objection and imposed the maximum sentence he recommended . Even the appellate court that overturned the sentence did so not because the harsher penalty was based on the defendant's race or upon a racial stereotype of the defendant's ethnic group, but because the remarks did not satisfy the *appearance* of justice. The appellate court's concern with the appearance of fairness asks a question about the individual adjudicator's bias. Was the trial judge's sentence influenced by the prosecutor's or judge's bias against the individual defendant? Or will it appear that he was influenced by such racial bias?

Often when we ask how research on implicit bias can help make our judicial system more just we ask the same kind of question—how do we reveal, recognize and correct the individual bias of various legal decision-makers. We conduct implicit bias training seminars for police officers, judges, prosecutors, probation officers, teachers and social workers.[18] We give them the IAT and demonstrate to them that they are more likely to find the brown face guilty, untrustworthy, unfit for parental responsibility, more likely to pull the trigger when that brown face is holding a cell phone and not a gun. Such training is designed to make decision-makers aware of their own unintentional bias.[19]

(1965), *available at* http://www.dol.gov/oasam/programs/history/webid-meynihan.htm; s*ee also The Moynihan Report Revisited: Lessons and Reflections after Four Decades*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (2009); JAMES T. PATTERSON, FREEDOM IS NOT ENOUGH: THE MOYNIHAN REPORT AND AMERICA'S STRUGGLE OVER BLACK FAMILY LIFE—FROM LBJ TO OBAMA (2010); *cf.* WILLIAM RYAN, BLAMING THE VICTIM (1976). There is also recent resurgence of research and scholarship on culture and poverty. Patricia Cohen, '*Culture of Poverty' Makes a Comeback*, N.Y. TIMES (Oct. 17, 2010), *available at* http://www.nytimes.com/2010/10/18/us/18poverty.html?pagewanted=all&_r=0.

[17] *See* Hernandez v. New York, 500 U.S. 352 (1991) (upholding the use of peremptory challenge to exclude Latino jurors who would understand defendants' testimony rather than relying on interpreter).

[18] *See, e,g.*, Cheryl Staats, *State of the Science: Implicit Bias Review 2014,* THE KIRWAN INSTITUTE (2014), http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf; Implicit Bias Training, National Consortium on Racial and Ethnic Fairness in the Courts, http://www.national-consortium.org/Implicit-Bias/Implicit-Bias-training.aspx (last visited Feb. 27, 2015); NATIONAL CENTER FOR STATE COURTS, STRATEGIES TO REDUCE IMPLICIT BIAS, http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx (last visited Feb. 27, 2015).

[19] The Implicit Association Test ("IAT") was developed by Dr. Mahzarin Banaji, now at Harvard University, and Dr. Anthony Greenwald of the University of Washington and their colleagues. *See* Shankar Vedantam, *See No Bias*, WASH. POST (Jan. 23, 2005), http://www.washingtonpost.com/wp-dyn/articles/A27067-2005Jan21.html. *See generally* Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgputa, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom,* 59 UCLA L. REV. 1124 (2012); Levinson, Cai & Young,

We should look at the text of prosecutor Wong's recommendation to ask a different question. Why is it that all of us understand the meaning of the text? What makes his words intelligible not just to the judge but to all of us? What makes him assume, with considerable confidence, that we will hear truth in his assertion that Micronesian people, especially males, will think and behave as he describes and that it is a good idea to send them a message to get their act together? I think the answer to this question reveals our collective bias. It reveals the racism we have all internalized and share.

In overturning the sentence the appellate court focuses on the intrusion of bias in the individual judge's sentencing decision, and one might argue that this is only appropriate, as the possibility or appearance of improper judicial bias was the only question before the court. The law tells us this is the only question we can ask. The law determines that the only question properly before the court is whether the individual prosecutor's or judge's bias has interfered with the individual defendant's right to due process.[20]

What might we learn if we asked about bias writ large? How did racial bias play a role in this young man's life story? What trauma, what injury brought him to a place where he would stab his cousin to death? What if we asked where he went to school? What if we looked at how his teachers spoke to him, or whether they listened to him, or really believed that he was smart, or good, or might amount to something other than a kid who would one day kill a relative in a drunken fight? What if we asked why we understand the prosecutor's words and how the way we understand those words effects the way we read the story of this young man's life?

These kinds of questions look not only at the way the content of our biases influences each of our discretionary decisions.[21] Instead these questions ask how the stories we have been told all of our lives inhibit our ability to see the structural inequalities that rig the game in favor of individuals and groups privileged by racism, patriarchy, heterosexism, or classism. These are the questions that precede even the first moment of discretion in the criminal justice system that Professor Levinson speaks of when he describes how the police officer must decide how to characterize an ambiguous behavior or potential suspect as worthy of further observation or the discretion by the system in choosing where to deploy police officers.[22] These questions ask how the biases that all of us share (explicit

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supra note 4; Greenwald & Krieger, *supra* note 4.

[20] *See* McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting an equal protection challenge to the administration of Georgia's death penalty statute).

[21] Krieger, *supra* note 11.

[22] Justin D. Levinson, Koichi Hioki & Syugo Hotta, *Implicit Bias in Hawaii: An Empirical Study*, 37 U. HAW. L. REV. 429 (2015).

and implicit) keep us from recognizing our own responsibility for changing those structural conditions.[23]

When I look at the text of the *Advertiser* article I am immediately drawn to the photographic image of Peter David. In Washington DC, New York, Cleveland, Oakland or Ferguson, Missouri, he could well be taken for a black man. He would be treated by the police,[24] by his teachers,[25] by realtors,[26] by banks,[27] by doctors in the emergency room[28] and by white folks he passed on the street just as we black folk have become accustomed to being treated.

Here in Hawai'i we claim it is different. We recognize and celebrate our ethnic diversity and multiracial genealogies.[29] We sing songs and tell jokes

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[23] *See infra* notes 65–67 and accompanying text. In *Unconscious Racism Revisited,* I noted that my goal in *The Id, The Ego and Equal Protection* was to challenge doctrine established in *Washington v. Davis* that if there were no evidence of intentional racists no constitutional violation had occurred. My goal was to do more than call attention to the inevitable implicit bias harbored by every individual. Rather, my purpose was to expose the way that the court had declared the reconstructive work of the Thirteenth, Fourteenth, and Fifteenth amendments accomplished by conflating the issue of bad motive with that of the constitutional and moral injury occasioned by the historical and structural inequalities produced by slavery and segregation. "I asked my readers to think of America's racism as a public health problem, as a disease that required anti-racists to adopt the mindset and methodology of epidemiologists rather than that of policemen." *Id.* at 948.

[24] *See, e.g.*, E. Ashby Plant & Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects,* 16 PSYCHOL. SCI. 180 (2005); Patricia Warren, Donald Tomaskovic-Devey, William Smith, Matthew Zingraff & Marcinda Mason, *Driving While Black: Bias Processes and Racial Disparity in Police Stops,* 44 CRIMINOLOGY 709 (2006).

[25] *See* Ronald F. Ferguson, *Teachers' Perceptions and Expectations and the Black-White Test Score Gap, in* THE BLACK-WHITE TEST SCORE GAP 273–317 (Christopher Jenks & Meredith Phillips eds. 1998); THERESA PERRY ET AL., YOUNG GIFTED AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN AMERICAN STUDENTS 85 (2005); Tom Rudd, *Racial Disproportionality in School Discipline: Implicit Bias is Heavily Implicated,* THE KIRWAN INSTITUTE (Feb. 2014), *available at* http://kirwaninstitute.osu.edu/wp-content/uploads/2014/02/racial-disproportionality-schools-02.pdf.

[26] *See generally* Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets,* 34 ANNU. REV. SOC. 181 (2008).

[27] *See id.*

[28] *See, e.g.*, Alexander R. Green, Dana R. Carney, Daniel J. Pallin, Long H. Ngo, Kristal L. Raymond, Lisa I. Iezzoni & Mahzarin R. Banaji, *Implicit Bias Among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients,* 22 J. GEN. INTERNAL MED. 1231 (2007) (finding that white doctors with implicit biases favoring white patients are more likely to treat white patients than black patients suffering from thrombolysis).

[29] *See* John P. Rosa, *Race/Ethnicity, in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE 53 (Craig Howes & John Osorio eds., 2010). Hawai'i is often referred to by residents and in the media as a "melting pot." *See, e.g.*, Carla Herreria & Chloe Fox,

about our cultural practices, food preferences and accents.[30] Even when we tell stories about the segregation and hierarchy of the plantation it is a nostalgic story of a distant past.[31]

Nonetheless, we understand the meaning of Prosecutor Wong's words. Although we might seek to distance ourselves from the racist meaning of those words by designating him the perpetrator,[32] the culpable[33] and causal actor,[34] our understanding of his text implicates all of us. We understand

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Why You Can't Understand Obama Until You Understand Hawaii, THE HUFFINGTON POST, http://www.huffingtonpost.com/2014/12/31/what-hawaii-teaches-us-about-obama_n_6358330.html (last updated Dec. 31, 2014) (quoting Barack Obama) ("The opportunity that Hawaii offered—to experience a variety of cultures in a climate of mutual respect—became an integral part of my world view, and a basis for the values that I hold most dear."); *cf.* Gene Park, *The Debate Over Race, History and Racism in Hawaii,* CIVIL BEAT (Feb. 21, 2014), http://www.civilbeat.com/2014/02/21257-gene-park-the-debate-over-race-history-and-racism-in-hawaii/ (discussing conflicts between native Hawaiians and haoles).

[30] *See Local Kine Jokes From Hawai'i*, E-HAWAII.COM, http://www.e-hawaii.com/jokes (last visited Feb. 4, 2015); *see also* FRANK DE LIMA, http://www.frankdelima.com/ (last visited Mar. 12, 2015). Frank De Lima is perhaps Hawai'i's most popular local comedian. His routines, that poke fun at Hawai'i's diverse ethnicities and cultures, rely on local stereotypes about each of Hawai'i's racial and ethnic groups as well the local community's view that these stereotypes are harmless because they no longer manifest or represent the ideologies and structures of racism and colonialism that once gave them meaning. The De Lima web site includes the following introduction: "His ethnic background, which is self-described as 'veritable Portuguese Soup' and 'Chop Suey Nation,' consists of Portuguese, Hawaiian, Irish, Chinese, English, Spanish, and Scottish. He celebrates, not disregards, ethnic differences and integrates them into his comedic routines".

[31] *See, e.g.*, HAWAII'S PLANTATION VILLAGE, http://www.hawaiiplantationvillage.org/ (last visited Feb. 9, 2015). Hawai'i Plantation Village is a museum focusing on the sugar plantations that proliferated during the late nineteenth and early twentieth centuries. The Village features the multiple cultures represented by plantation workers.

[32] Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine.* 62 MINN. L. REV. 1049 (1978).

> The perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class.

Id. at 1053.

[33] *See The Id, The Ego, and Equal Protection, supra* note 1 (critiquing the discriminatory intent requirement established in *Washington v. Davis*, and positing that intent in itself is a false notion).

> Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.

Id. at 322.

[34] *See* Mari J. Matsuda, *On Causation*, 100 COLUM. L. REV. 2195 (2000) (arguing for a

his words because they gesture toward and signify a shared understanding about Micronesians,[35] about their blackness, their foreignness, their dirtiness, their scariness, their bestiality, their less-human-than-the-rest-of-us-ness. I use these hard-to-hear words to describe our shared beliefs quite intentionally. They come from a lexicon that Americans have used to imagine and construct my own people.[36] They are words that inhabit and shape the narrative of white supremacy, words and images that at different moments in history meant and signified Chinese or Japanese,[37] that still often mean Filipino, or Samoan or Native Hawaiian,[38] but in this moment in

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collective sense of obligation based in social responsibility).

[35] *See Unconscious Racism Revisited*, *supra* note 2, at 358 (quoting PAUL RICOEUR & JOHN B. THOMPSON, HERMENEUTICS AND THE HUMAN SCIENCES: ESSAYS ON LANGUAGE, ACTION AND INTERPRETATION, 200-02 (1981)) ("In spoken discourse, the subjective intention of the speaker and the objective meaning of the discourse overlap, while with written discourse the meaning of the text is disassociated from the mental intention of the author and the two no longer coincide. Likewise, spoken discourse ultimately refers to the contextual situation common to the speaker and the listener. Texts, on the other hand, speak about the world. The text frees itself from the reference of the particular situation in which its author speaks and creates its own universe of references.").

[36] *See* FRANZ FANON, BLACK SKIN, WHITE MASKS (Grove Press rev. ed. 2008); DVD: 1987 Ethnic Notions (Marlon Riggs 1987) (on file with California Newsreel); TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION (1993); ROBERT GOODING WILLIAMS, LOOK, A NEGRO!: PHILOSOPHICAL ESSAYS ON RACE, CULTURE, AND POLITICS (2005); s*ee also* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 860 (2004); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 56 (1994).

[37] *See, e.g.*, Keith Aoki, *Is Chan Still Missing? An Essay About the Film Snow Falling on Cedars and Representations of Asian Americans in U.S. Films*, 7 ASIAN PAC. AM. L.J. 30, 36 (2001) (describing racial stereotypes of Japanese and Chinese women as either "exotic" or "dragon lad[ies]"); *see also* Keith Aoki, *The Yellow Pacific: Transnational Identities, Diasporic Racialization, and Myth(s) of the "Asian Century,"* 44 U.C. DAVIS L. REV. 897 (2011); Gary Y. Okihiro & Julie Sly, *The Press, Japanese Americans, and the Concentration Camps*, 44 PHYLON 66 (1983) (discussing "Yellow Peril").

[38] Shelley Sang-Hee Lee & Rick Baldoz, *"A Fascinating Interracial Experiment Station": Remapping the Orient-Occident Divide in Hawaii*, 49 AM. STUD. 87, 92 (2008). Contemporary racist images and stereotypes of Filipinos and Hawaiians go back to the plantation era. These groups were described as "improvident and shiftless" and "stuck at an adolescent stage of development." *Id.* (quoting STANLEY PORTEUS, TEMPERAMENT AND RACE (1926)) (internal quotation marks omitted); *see also* Darlene Rodrigues, *Imagining Ourselves: Reflections on the Controversy Over Lois-Ann Yamanaka's Blu's Hanging*, 26 AMERASIA J. 195 (2000) (discussing the ways that Yamanaka's writing of Filipino characters confirm and reinscribe racist stereotypes and erase the diversity of Filipino communities in Hawai'i). Samoans, a relatively new group to the islands, are characterized in similar terms, known as lazy, poor, and violent in the community. *See* Lee Cataluna, *Changing Stereotypes of Samoans*, HONOLULU ADVERTISER (Apr. 20, 2004), *available at* http://the.honoluluadvertiser.com/article/2004/Apr/20/ln/ln48alee.html; Levinson, Hioki, &

Hawai'i's history we have designated our brothers and sisters from the Micronesian islands to assume the role of blackness. I will not use the "N" word, but you get my meaning.

Listen to this young Chuukese poet speak truth to the lie we tell ourselves when we say we are different in Hawai'i. When we say, "We have no bias. We are not racists."

Lessons from Hawai'i
by
Kathy Jetnil-Kijiner[39]

"Fucking Micronesians!"
That's my seventh grade friend
cussin at those boys across the street
rockin swap meet blue t-shirts
baggy jeans
spittin a steady beetlenut stream
yea that one's related to me

"You know. You're actually kinda smart
for a Micronesian."

And that's my classmate
who I tutored through the civil war
through the first immigrants
through history that always
seems to repeat itself

Micronesians
MICRO(nesians)
as in small
tiny crumbs of islands scattered
across the pacific ocean;
too many countries / cultures no one has heard about / cares about
too small to notice.

Hotta, *supra* note 22.

[39] The text of this poem was transcribed from a recorded performance by Kathy Jetnil-Kijiner later uploaded to YouTube. Kathy Jetnil-Kijiner, *Lessons from Hawai'i by Kathy Jetnil-Kijiner*, YOUTUBE (Jan. 19, 2013), https://www.youtube.com/watch?v=3sbtpazYra0.

small like how
i feel
when woman at the salon
delicately tracing white across my nail
stops and says
you know you don't look
Micronesian.
You're much prettier!
Prettier as in not
ugly like those
other Micronesian girls
who are always walking by the street
smiling rows of gold teeth like they got
no shame

with hair greased and braided
cascading down dirt roads of brown skin,
down shimmering dresses called guams
and neon colored Chuukese skirts
and i can hear
the disgust
in my cousin's voice

Look at those girls! They wear their guams
to school and to the store like they're
at home don't they
know?
This isn't their country this is America see that's
why everyone here hates
us Micronesians

I'll tell you why everyone here hates us Micronesians
It's cuz we're neon colored skirts screaming DIFFERENT!
Different like that ESL kid
whose name you can't pronounce
whose accent you can't miss

Different like 7-Eleven/WalMart/Mickey D's
parking lot kick its and fights

those long hours
those blue collar nights

Different like parties
with hundreds of swarming aunties, uncles, cousins
sticky breadfruit drenched in creamy coconut
coolers of our favorite fish
wheeled from the airport
barbequed on a spit
my uncle waving me over
Dede a itok! Kejro mona!
Dede come! Let's eat!

Headline: No aloha for Micronesians in Hawai'i.
Headline: Micronesians fill homeless shelters.
Headline: Micronesians run hefty healthcare tab.
Quote: "You know they're better off living homeless in Hawai'i than they are living in their own islands.

Quote: "We should've just nuked their islands when we got the chance."
Joke: "Eh, eh. Why did the Micronesian man marry a monkey?"
"Because all Micronesian women are monkeys!"
What? Can't you take a joke?

It's actually
NOT Micronesians
It's Marshallese/Yapese/Chuukese/Palauan
Kosraean/Pohnpeian/Chomorro/Kiribati/
but when Hawai'i insists
on lumping us all together

when they belittle us and tell us we're small,
when they tell us our people are small
when they give us a blank face
when they give us a closed door
when so many in Hawai'i hates
Micronesians, when so many in Hawai'i hates us

That's how I learned
That's how I learned
That's how I learned

to hate ME

I suspect that the first injury done to Peter David by our collective racism was the injury the poet speaks of in her last line. White supremacy teaches black and brown folk to hate ourselves. This was the lesson of Dr. Kenneth Clark's doll test cited by the U. S. Supreme Court in footnote eleven of *Brown v. Board of Education*.[40] The Court reasoned that segregation denoted "the inferiority of the Negro group," and that message of inferiority "affects the motivation of a child to learn."[41] There is ample evidence that Black children, and brown children, whom we designate as black, continue to experience the devastating effects of segregation's defamatory message.[42] Our schools and our neighborhoods are no longer segregated by law, but they are segregated nonetheless.[43] However, the Supreme Court has held that if the segregation of our schools and our neighborhoods is not mandated by law, if it is *de facto* rather than *de jure*, there is no

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[40] 347 U.S. 483, 494 (1954).

[41] *Id.* ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn.").

[42] *See, e.g.*, Kiri Davis, *A Girl Like Me*, YOUTUBE (May 4, 2007), https://www.youtube.com/watch?v=YWyI77Yh1Gg. In the video, Davis replicated Doctors Kenneth and Mamie Clark's doll test, which involved providing each black child with two dolls of different skin colors, asking them to respond to a set of questions including: Which doll would you like to play with? Which doll looks like you? Which is the pretty doll? The study was cited by the Court in *Brown v. Board of Education* to support its holding that segregation induces a sense of inferiority that affects the motivation of a child to learn. *Brown*, 347 U.S. at 494 n.11. Davis's film illustrates how young Black children's self-images continue to be affected by racism over fifty years after *Brown*, as the children she interviews identify the dark-skinned doll as less pretty than the white doll, while also reluctantly recognizing that they themselves look like the dark-skinned doll.

[43] *See* Gary Orfield, Erica Frankenberg, Johnyeon Ee & John Kuscera, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, UCLA CIVIL RIGHTS PROJECT, http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf ("[E]nrollment trends in the nation's schools (between 1968 and 2011) show a 28% decline in white enrollment, a 19% increase in the black enrollment, and an almost unbelievable 495% percent increase in the number of Latino students. . . . White enrollment was almost four times the combined black and Latino enrollment in 1968, but only about a fifth bigger in 2011. The Asian enrollments, insignificant in 1968, reached 2.5 million by 2011, more than the number of Latinos in 1968. The country underwent an incredible transformation. In 2011 it was, in important ways, a different society than that which existed when *Brown* was decided. *Brown* and the Civil Rights Act were fundamentally aimed at a transformation of a black-white South, and the impact was most dramatic there."). Although segregation looks different in our multiracial state of Hawai'i than it does in Mississippi or Washington D.C., when we ask, "Where you live?" or "Where you grow up?" or "Where you go school?" we know the question and the answer are racially coded.

constitutional violation.[44] If we who are privileged by race and class continue to segregate ourselves by the neighborhoods we live in and the schools we choose to send our children to, the law tells us we are not responsible. It does not matter if that segregation still sends a defamatory message, still designates some children as inferior, still teaches black and brown children to hate themselves and still denies privileged children lessons of democracy, critical thinking, and humanity that are only possible in truly integrated communities. The law says we played no part in those injuries and need not concern ourselves with righting the wrong.[45]

III. LOCAL KINE WHITE FLIGHT: IMPLICIT BIAS AND SCHOOL SEGREGATION

This brings me to my second text. Three of the contributors to this symposium have written on the effects and implications of implicit bias on issues of educational equity in Hawai'i.[46] Tawnee Sakima and Scott Schmidtke's article reports on the results of a study on how implicit bias effects our beliefs about the relative quality of education provided by public and private schools and our views about the intelligence, skills, trustworthiness and overall professional competence of graduates of those schools.

On its face this study does not make racial bias its subject. Nor were the evaluative instruments the authors used designed to inquire into or reveal implicit racial bias.[47] Instead, the authors' research sought to determine

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[44] This doctrine holds that equal protection is violated only when a law requires racial segregation on the face of the statute or where evidence shows that school officials acted intentionally to segregate children by race. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 1 (1970); Keyes v. School Dist. No. 1, 413. U.S. 189 (1973). These cases are early examples of how the law's focus on the motivation of an individual or government perpetrator. The court in *Davis* cites the desegregation cases as precedent to show that the *Davis* intent requirement is not a departure from but is consistent with prior doctrine. *See* Washington v. Davis, 426 U.S. 229, 240-41 (1976) ("The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause.").

[45] Milliken v. Bradley, 418 U.S. 717 (1974) (refusing to include suburban school districts in the desegregation remedy using the equitable principle that the remedy may not exceed the scope of the injury).

[46] Breann Nu'uhiwa, *"Language is Never About Language": Eliminating Language Bias in Federal Education Law in Futherance of Indigenous Rights*, 37 U. HAW. L. REV. 381 (2015); Tawnee Sakima & Scott Schmidtke, *Implicit Biases and Hawai'i's Educational Landscape: An Empirical Investigation*, 37 U. HAW. L. REV. 501 (2015).

[47] In the study, participants took an online survey assessing implicit biases towards

whether their subjects harbored an implicit bias that favored private schools over public schools. They tested their hypothesis, that residents of Hawai'i held an implicit bias that favored private schools, by measuring responses to questions about the perceived professional competence of individuals when respondents were told lawyers or doctors were graduates of public schools compared to when respondents were told the same professionals had graduated from private schools.[48]

Despite the apparent racial neutrality of this study, I want to suggest that in the context of Hawai'i we should read the study as a racial text. We should ask ourselves whether one can think about public and private schools in Hawai'i without thinking about the race of the children who attend those schools.[49] In Hawai'i we have experienced significant flight from the public to the private schools.[50] Studies of school segregation in the continental United States have named this phenomenon "white flight."[51] In Hawai'i the racial demographics of the fleeing parents is more diverse than on the continent. Here we think of the flight from public schools as primarily socioeconomic,[52] but the resulting segregation also has evident racial markings and meaning.[53]

In this context, it is impossible to ask about public schools, private schools and competence, without implicating (triggering, seeing through the

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Hawaii public and private schools.

[48] Sakima & Schmidtke, *supra* note 46.

[49] I use the words "coming to mind" to include not only those images and associations of which we are aware but also those about which we are not fully aware. *See* Krieger, *supra* note 11, at 6-7.

[50] During the 2012-2013 school year, 183,251 (84.5%) students attended public schools while 33,702 (15.5%) students attended private schools. STATE OF HAW. DEPT. OF EDUC., SUPERINTENDENT'S 24TH ANNUAL REPORT 5 (June 2014), *available at* http://arch.k12.hi.us/PDFs/state/superintendent_report/2013/2013SuptRptFinal20140806.pdf.

[51] *See* Mingliang Li, *Is There "White Flight" Into Private Schools? New Evidence from High School and Beyond,* 28 ECON. EDUC. REV. 382 (2009); Robert W. Fairlie & Alexandra M. Resch, *Is there "White Flight" into Private Schools? Evidence from the National Educational Longitudinal Survey,* 84 REV. ECON. & STAT. 21 (2002); Milliken v. Bradley, 418 U.S. 717, 806 (1974); *see also* Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy*), 114 YALE L.J. 1353 (2005) [hereinafter *Forbidden Conversations*].

[52] In Hawai'i, 14% of public school students are white, while white students make up 25% of the population. In contrast, Hawaiian students compose 26% of public school students, while only 6.6% of the general population identifies as Hawaiian. JONATHAN Y. OKAMURA, ETHNICITY AND INEQUALITY IN HAWAII 65 (2008).

[53] Middle class Chinese and Japanese parents, who attended Hawai'i's once well regarded public schools now send their children to private schools along with white children. Hawai'i's brown children, Native Hawaiian, Filipino, Samoan, Tongan, Micronesian are left behind to populate a public school system that has deteriorated, as those with the social and political capital to demand its excellence have departed. This is what segregation looks like.

distorting lenses of) race. The racial segregation in Hawai'i's schools was never mandated by law.[54] No school board or legislature has acted intentionally to segregate our schools. Instead, when parents decide to send their children to a private school or move to a neighborhood where the public school is mostly white or Asian, they are looking for the schools that will make their children most competent, where the teachers will recognize their children's gifts, where their children will have access to the skills and social networks that will give them an edge in this all too competitive world.[55] The explicit biases influencing school choice decisions favor excellence and competence over poor performance and incompetence. However, those decisions also reflect our racial bias.

We flee schools that become too black or brown because of our racism. We flee because we have internalized a set of beliefs about black and brown people that has its origins in racist ideology. We flee because we know that structural racism has made these schools less good and that often it has made them terrible. In the latter case, we are not so much fearful of black and brown children as of having our own children treated as if they were black. We flee because we are fearful of giving up our race and class privilege.[56]

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[54] Hawai'i did achieve what amounted to *de jure* racial segregation with the establishment of the English Standard School. Children could gain admission to public schools designated as English Schools only by passing a test requiring them to speak Standard English rather than pidgin or Hawaiian Creole English. As almost all children of immigrant contract laborers from China, Japan, Portugal and the Philippines as well as native Hawaiian children spoke pidgin, the English Standard schools were almost exclusively white. *See* Eileen H. Tamura, *Power, Status, and Hawai'i Creole English: An Example of Linguistic Intolerance and History.* 65 PAC. HIST. REV. 431, 436-37 (1996) ("Arthur L. Dean, former president of the University of Hawai'i and then vice-president of the sugar company Alexander and Baldwin and chairman of the Territorial Board of Education, admitted in 1936 that the establishment of Standard schools was a way to separate children of different cultural and economic groups[and] . . . the Department of Public Instruction created these schools in response to pressure from Caucasians. . . .").

[55] *Forbidden Conversations*, *supra* note 51, at 1374 ("In a world where knowledge, teaching, and learning are increasingly commodified and stratified, where only those children whose parents can pay will touch a cello, read James Joyce, or a see a cell divide beneath a microscope . . . we fear our child will be left out, that the promise of her gifts will go unrealized and that it will be our fault. We may disagree in principle with an education system that preserves class hierarchy, but if it's the only game in town and our children are at stake, it's just too scary to opt out.").

[56] Elsewhere I have written more extensively about the kinds of fear that engender white flight. I argue that while most of these fears do not have their origin in explicit racist beliefs they all result from embedded ideological and structural racism. *See Forbidden Conversations, supra* note 51, at 1370-75 (arguing that it is a fear of blackness—conscious or unconscious—that makes us send our children to certain schools, a fear that our children will be treated as black children in run-down buildings with less-than top-notch teachers).

I do not believe that these fears operate at an entirely unconscious level. I think that if we are honest with ourselves most of us who are privileged will admit we are afraid to send our children to the worst of the schools that are populated by poor brown people. Some of us would confess to fearing that these brown children will beat-up our children, or take their lunch-money, or sell them drugs. Certainly a skillfully constructed IAT would quickly reveal that our fears that our children will not be safe in these schools are caused in part by implicit racial biases.

I am not arguing here that we all should take a public/private school IAT. I am not asking for a *mea culpa* from each and every parent who sends his children to private schools. To the contrary, I am asking that we reconsider the law's paradigm of individual fault, culpability and causation, or that we consider how that paradigm has created a different kind of distortion in our cognitive processes and more importantly in our ethical and moral perceptions and responses.

In the context of separate and unequal *de facto* segregation perhaps the implicit bias resides in our assumptions about the morality or justice of our privilege rather than in our individual unconscious beliefs about racial others.[57] When the law tells us that only intentional state sponsored *de jure* segregation violates the Fourteenth Amendment's Equal Protection Clause, it announces that we have done no injury to the poor black and brown children we leave behind in racially isolated failing schools. The *de facto/de jure* distinction does more than declare that our flight from these schools was not motivated by racism. It also asserts no racism exists, and that we should therefore feel no sense of moral responsibility for the conditions of racially isolated and failing schools. The subtext, the hidden assumption in the law's story of no injury and no racism tells us if no wrong has caused the conditions that result in our relative privilege, that privilege must be natural and just.[58] The law tells us we have privilege

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[57] Cheryl I. Harris, *Whiteness as Property,* 106 HARV. L. REV. 1709, 1753 (1993). Cheryl Harris has noted that *Brown v. Board of Education* created these expectations of continuing white privilege. She argues that although *Brown* overturns *Plessy*'s validation of officially-sanctioned segregation and status inequality, it represents a "transition from old to new forms of whiteness as property." *Id.* at 1714. *Brown* declined to dismantle white privilege or "even to direct that the continued existence of institutionalized white privilege violated the equal protection rights of Blacks." *Id.* at 1751. White status privilege accorded as a legal right by law was rejected, but substantive inequality produced by white domination and race segregation remained unaddressed. Thus *Brown* protected white Americans continued expectations of race-based privilege.

[58] As Alan Freeman notes, the perpetrator perspective imagines a world where, but for the conduct of a few identified misguided racist perpetrators, "the system of equality of opportunity would work to provide a distribution of the good things in life without racial disparities and where deprivations that did correlate with race would be 'deserved' by those

because we are indeed better, that our children deserve to be in the best schools, that our achievements, our success, our advantages in life manifest our talent and hard work, and have nothing to do with the racist structures, practices, and accepted beliefs that distort our politics, our policies and our collective decisions. We hear the law's story and we internalize it. It fits neatly into the schematics and content of our cognitive categories. When we see poor black and brown children performing less well than our children, when we are told no injury or wrong has caused the achievement gap, it fits the content of white supremacy's story: these children are less intelligent, less motivated, and less disciplined. Their parents care less and their people's culture is somehow different and deficient.[59] The *de facto/de jure* distinction does more than declare us innocents. It joins with other racial narratives to distort the lens through which we see school segregation.[60]

Ten years ago in a *Yale Law Journal* article titled *Forbidden Conversations*, I wrote:

> Schools must be integrated because segregated schools build a wall between poor black and brown children and those of us with privilege, influence, and power. The wall denies them access to the resources we command: social, political, and economic. Although the wall is not a physical structure or a prohibition mandated by law, it is nonetheless a division that permits and encourages us to hoard our wealth on one side of the wall while children on the other side are left with little.[61] The genius of segregation as tool of

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deprived on grounds of insufficient 'merit.'" *Freeman, supra* note 32, at 1054.

[59] *See Unconscious Racism, supra* note 6 (discussing how implicit bias shapes the way that racial disparities in education are understood and explained, resulting to powerful harms to black and brown children).

[60] *See* Freeman, *supra* note 32, at 1055 (1978) ("The fault concept gives rise to a complacency about one's own moral status; it creates a class of 'innocents,' who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations. This resentment accounts for much of the ferocity surrounding the debate about so-called 'reverse' discrimination, for being called on to bear burdens ordinarily imposed only upon the guilty involves an apparently unjustified stigmatization of those led by the fault notion to believe in their own innocence.").

[61] *See* ERICA FRANKENBERG ET AL., THE CIVIL RIGHTS PROJECT, HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 35 (2003), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-multiracial-society-with-segregated-schools-are-we-losing-the-dream/frankenberg-multiracial-society-losing-the-dream.pdf (noting that "[a]lmost half of the students in schools attended by the average black or Latino student are poor or near poor" and that "[h]igh poverty schools have been shown to increase educational inequality for students in these schools because of problems such as a lack of resources, a dearth of experienced and credentialed teachers, lower parental involvement, and high teacher

> oppression is in the signal it sends to the oppressor—that their monopoly of resources is legitimate, that there is no need for sharing, no moral requirement of empathy and care. The children on the other side of the wall are not our own. They are not kin to us. They may not even belong to the same species. They are different from us in essential, unchangeable ways. They do not belong to our community. This is the meaning of Brown's observation that segregation is inherently unequal. [62]

The distortion of racism lets us accept a *de facto* segregated system that leaves most black and brown children in the United States in underfunded and underperforming schools. Our racism leads us to believe this allocation of resources is ethical, moral and just. In other words, our unconscious racism manifests itself not just by turning black and brown children into scary bullies from whom we must flee. Our racial bias also distorts our ability to care, to know these children are no different than our own. Our racial bias, our unconscious belief that these children are less intelligent, less hard working, less deserving of the best education, alters our perceptions and deforms our empathy. We believe the arguments that black and brown children are in the worst schools because that is where they belong, that the achievement gap is evidence of their intellectual inferiority or a culture of poverty and "oppositional behavior."[63] Our collective infection with unconscious racism leads us to accept the Supreme Court's holding that there is no constitutional injury in *de facto* segregation. It keeps us from recognizing our ethical responsibility for engaging in collective political action to demand that our politicians desegregate our schools. Our implicit bias distorts our vision, so we do not see that separate and unequal schools injure all of us.

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turnover"); JONATHAN KOZOL, SAVAGE INEQUALITIES (1991) (graphically describing who gets what and who does not get much in American public education); Linda Darling Hammond & Laura Post, *Inequality in Teaching and Schooling: Supporting High-Quality Teaching and Leadership, in Low-Income Schools, in* A NATION AT RISK 129 (Richard D. Kahlenberg ed. 2000) ("African-American students are nearly twice as likely to be assigned to the most ineffective teachers and about half as likely to be assigned to the most effective teachers.").

[62] *Brown*, 347 U.S. at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

[63] *See Unconscious Racism, supra* note 6, at 118-25.

> I first heard the culture story when Daniel Patrick Moynihan . . . argued that the problems of crime, drugs, out-of-wedlock babies, and increasing welfare rolls in poor black communities could be traced to a community culture of poverty that legitimized immoral behavior and encouraged economic dependence. . . . The culture story, filled with the familiar tropes of indolence, ignorance, and immorality, sounded suspiciously like the nature story with a new title.

Id. at 120.

IV. LOCAL KINE TRADITION: THE ETE BOWL HALF-TIME SHOW

My final text comes from the autobiography of our own law school. I begin with the story of a halftime performance at our annual Ete bowl.[64] Throughout my discussion I consider the texts that surround that performance and give it meaning.[65] Again, as in the first two sections of this article, I suggest that our shared understanding of cultural texts and the meaning we give those texts reveals our collective biases—our conscious and unconscious racism, sexism, and homophobia. These shared biases make up the content of our categories. They are the epidemic diseases that we are called to cure, and because we are all infected, our remedy, our cure, our justice seeking must be collective.

I include this text with some trepidation. Richardson Law School is a small and tight-knit community. It is impossible to read a story about this community and not know, or think we know, the characters, without seeing our friends and ourselves. My reluctance to speak of this text arises from the fear that the reader will hear the story and imagine she sees individuals she knows playing particular roles. I fear that merely by writing about this text, speaking it out loud as it were, I will perpetuate the very way of thinking this article hopes to criticize. I worry the story will cause the reader to look for perpetrators and victims, for someone to blame, as a way to make the rest of us blameless.

I have decided to tell the story despite my fears. For this article also calls on us to break the silence imposed by what I have called "forbidden conversations."[66] We do not wish to call our friends racist. We know that

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[64] *See Ete Bowls: Genesis of the Ete Bowl,* WILLIAM S. RICHARDSON SCHOOL OF LAW, https://www.law.hawaii.edu/ete-bowls (last visited Feb. 25, 2015). The Ete bowl, brainchild of Diane Ho, originated in 1978 as a female flag football challenge between University of Hawai'i law students. From there, it grew into an annual event where one team composed of female law students (the Etes) played a team of female law practitioners (the Bruzers). The game has become an expression of strong women lawyers as well as feminism, poking fun at the patriarchal idea that only men play football and only women do half-time cheerleading shows; male members of the 1L class are responsible for putting together the Ete Bowl half-time show. *See also* Mari Matsuda, *A Richardson Lawyer,* 33 U. HAW. L. REV. 61, 64 n.10 (2010) ("The Ete bowl began as a way to generate and perpetuate bonds of friendship. It has evolved into something more. It is a catalyst for connecting people far, far beyond the three years they spend in law school.").

[65] Note that there are texts that surround this temporally—that come before and after the performance—as well as texts that surround it cartographically—texts in the world outside of the law school.

[66] I have considered this theme at some length elsewhere. *See, e.g.*, *Forbidden Conversations, supra* note 51; Charles R. Lawrence III, *The Epidemiology of Color Blindness: Learning to Think and Talk About Race, Again,* 15 B.C. THIRD WORLD L.J. 1 (1995).

if we call something racist, if we name racism when we see it, we are heard as casting aspersions, as finger-pointing, as blaming bad guys, so we do not speak of racism at all. We have made the subject taboo.[67] This taboo, our reluctance to speak out loud about our shared racism, reinforces the "post-racial" narrative of formal equality that claims we have conquered racism and our work is done.[68] I include this story because I do not wish to participate in that conspiracy.

All of us here at Richardson are characters in this story. We are good people. We celebrate our multiple heritages. We teach and learn from one another across our differences. We care about and for one another. We are committed to tolerance of difference, but more than that, we value our differences. We know that our diversity makes our community special, creative and strong. We know that the work of seeking justice is joyous work,[69] and that it is hard, giving work as well.[70] I use this text, this story, because it is a story about good people doing the hard work of seeking justice.

The Story

On Sunday November 16, 2014, during half-time of the Law School's annual Ete Bowl game, a group of male students donned shiny green wigs and stuffed balloons inside the backside of their basketball shorts to replicate the appearance of extremely large buttocks. They danced to the soundtrack of *Anaconda,*[71] a song performed by Nicki Minaj, a popular African American hip-hop artist renown for performances that accentuate her voluptuous body and sexuality. I first learned of the performance when a small group of students who were present came to speak with me. As I listened to them I quickly realized that, although they had come to ask for

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[67] The U.S. Supreme Court cases *Bakke*, *Grutter*, *Gratz*, *Parents Involved in Community Schools*, and *Fisher* have altered the perception of race in higher education by moving towards a "colorblind" approach to racial categories, supporting the belief that by recognizing race we only support racism. However, by turning a colorblind eye to issues of race, we also fail to engage in those conversations.

[68] *See, e.g.*, Freeman, *supra* note 32.

[69] Mari Matsuda, Commencement Speech at the University of Hawai'i Law School (2008) (on file with author) ("[T]here is nothing, nothing, nothing, that feels better than working with your fellow citizens to make ours a better community."); *see also* Mari Matsuda, *A Richardson Lawyer,* 33 U. HAW. L. REV. 61 (2010).

[70] Charles R. Lawrence III, Incoming Student Speech at The University of Hawai'i Law School (2009) (on file with author) ("Dean Soifer knows his descriptive truth of a community norm of kindness is always a work in progress.").

[71] Nicki Minaj, *Anaconda,* YOUTUBE (Aug. 19, 2014), https://www.youtube.com/watch?v=LDZX4ooRsWs.

my advice about how they should respond to the incident, the first thing they needed was for someone to listen and hear what had happened to them. They had been hurt and needed someone to validate what they had experienced, to tell them that the hurt they felt was real.[72]

The students described the performance and told me how their classmates and friends had responded with laughter and applause. When I asked if they had said or done anything when this happened, they said, "No." They had not responded. They seemed ashamed of their failure to speak up. They explained that they were caught unawares, had not anticipated the shock, the strength of their feelings and sense of isolation. One of them said she wondered if she were the only one who thought something was wrong. They did not know what to do and had done nothing. As I listened I wondered if I would have had the presence of mind and courage to speak up, to interfere and disrupt the fun and festive spirit among friends and colleagues when I knew that all of them meant well and no one had intended any harm. I knew that I had too often failed myself by remaining silent in similar circumstances.

Some of the students did speak with their friends after the game and voiced their objections to the performance. Some of the people they spoke with said that they too felt uncomfortable, but many others did not understand why anyone would be offended. "It was all intended in fun," they said. "It was a spoof, a joke, a bunch of guys acting stupid." "Getting the guys to put on these crazy halftime shows is part of the Ete Bowl tradition." "You know these guys. They aren't sexist or racist." "Why do you have to be so sensitive? Why can't you lighten up?"

That evening and the next day students on both sides of the debate placed posts on Facebook. As might be expected, the Facebook postings only further divided the students and drove them apart. Unmediated by gestures of relationship, care, respect, humor and goodwill they might have conveyed had they spoken to one another in person, the students experienced each other's posting as accusatory and defensive. This no doubt heightened feelings of injury, misunderstanding and mistrust, on both

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[72] Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 39 DUKE L.J. 431, 462 (1990) [hereinafter *If He Hollers*] ("There is a great difference between the offensiveness of words that you would rather not hear—because they are labeled dirty, impolite, or personally demeaning—and the *injury* inflicted by words that remind the world that you are fair game for physical attack, evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see.") (emphasis added); *see Unconscious Racism Revisited*, *supra* note 54, at 942 ("I write so I know I am not crazy. . . . I hope that my writing will help other people know that they are not crazy.") (internal quotation marks omitted).

sides. I saw none of the postings, and no one shared their content with me. However, the students who spoke with me told me that they were injured as much by the on-line comments as by the performance itself. It was apparent that the on-line exchange was fueled in part by mutual feelings of betrayal among friends who were now situated as accuser and accused.

On the Monday following the Ete Bowl some of the students who objected to the half-time performance met with Dean Soifer.[73] He listened to their account of the performance and the on-line exchange that followed.[74] He acknowledged the complaining students' experience of injury and made clear his own belief that the performance was not in keeping with the law school's commitment to creating an inclusive, respectful culture and community. He noted that this was not the first time that the half-time show had used material that demeaned some members of our community[75] and said that he had even suggested that we eliminate the

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[73] I accompanied the students and participated in the conversation. I had already talked with the students about the central thesis of this article and I knew that Dean Soifer had heard me make this argument before and supported it entirely.

[74] Although Dean Soifer had attended the Ete Bowl game he said that he had not watched the half-time performance and had not been made aware of its troublesome content. The first complaint about the half-time show occurred after the 2012 Ete Bowl, when 1L male students dressed in drag and performed to songs that included Beyonce's "Single Ladies." Several students in the law student community raised concerns that the show was hurtful to transgender and transsexual communities, and set up meetings with the Dean in protest.

[75] In the fall of 2013, Dean Soifer received an email from a student in the 2L class.

> As the only openly gay individual in the Class of 2015, I feel that I have a special duty to speak up when I encounter homophobia at our school. I sincerely believe that the Ete Bowl's half time drag show is homophobic. Heterosexual male students dressed in drag, imitating women prancing about the football field, is a mockery to women and gay individuals. It might have been acceptable in the past to do so but in today's fight for equality I believe it is in very poor taste.
>
> The legitimacy of the Ete drag half time show should seriously be questioned for the following reasons:
>
> 1) The Ete Bowl is about female empowerment. However, having intoxicated heterosexual men distastefully dressed with gobs of make-up on their face, sashaying and shaking their rears in heels and nylons, is female degradation. Ete women are strong as they enter the traditional male sphere of football. The drag show is shallow and is blatantly sexist. It is antagonistic toward women, taking away power and subverting it for showman purposes. Nothing in the half time performance embodies the femininity or womanhood a female would desire. Instead, these men are promoting stereotypes and objectifying women.
>
> 2) The drag show is offensive and insensitive to the transgendered and drag queen

half-time show altogether. He asked the students how they thought the law school could best respond and what they wanted him to do.

> communities. These communities take pride in their identity. Dressing in drag is an opportunity for them to express their gender identity, unafraid. A true drag performer may temporarily escape social pressures and display to some degree her/his true self. The Ete Bowl's men performing are not serving this purpose. They trivialize true drag performers for a few laughs. Our male student performers have no understanding of the marginalization and brutal realities a transgendered individual may face. Instead they mock and ridicule.
>
> 3) The drag show is offensive to the gay and lesbian communities. This year's game will take place around the same time as the special legislative session's vote on the Marriage Equality Bill. As you may know, last year, a photo spread of our scantily clad male students appeared in the Star Advertiser. It would be shameful if photos from this year's show appeared in the same issue of our local paper reporting on the legislative vote. This is a very important month—year—for LGBT rights in Hawaii and the United States. Perhaps 35 years ago when the Ete Bowl was first established this kind of drag show was deemed acceptable. But a lot has happened in this country since then. I never imagined that I may soon have the opportunity to marry my boyfriend in Hawai'i, who I've been engaged to for the past 6 years.
>
> Last Monday, October 7, Lambda met with Ete members. The outcome was disappointing. In spite of Lambda's heartfelt objections, Ete members were insistent that the show would go on.
>
> The Ete Bowl's drag show is a tradition, but not all traditions are worth preserving. The Ete Bowl's drag show is homophobic as white people black-facing is racist, and the name "Redskin" is derogatory toward American Indians.
>
> There are countless other kinds of shows my fellow students could present, a Glee-like song and dance number, a Super Bowl type musical performance, a rousing cheerleading routine, but they seem to be insisting that the tradition of the Ete Bowl calls for a silly drag show.
> I am writing this letter to you as a class of one gay man fighting for my self worth. My fellow colleagues will not marginalize me and degrade me as I have been in the past.
>
> I welcome the opportunity to meet with you to discuss this matter. I thank you for listening.

The Dean's office negotiated a compromise that called for a moratorium on half-time drag shows, and there was no performance at the 2013 Ete Bowl. Different explanations have been offered for the reappearance of the half-time show in 2014. Did the Ete Bowl organizers interpret the moratorium to be in effect for only one year? Did the performers believe that the *Anaconda* performance did not constitute a drag show? In any case it was apparent that the Gay student's letter had not occasioned the kind of community discussion that might have helped the larger community hear and understand the injury he had so carefully articulated in his letter.

After some conversation the students agreed that the Dean should write a letter to the law school community communicating the law school's position that this performance and others like it violated the law school's commitment to and responsibility for ensuring all students a non-discriminatory education. They also asked the Dean to convene an educational forum early in the following semester that would give the entire law school community an opportunity to talk about these events and the larger question of how best to work towards living up to our commitment to nondiscrimination and honoring our diversity.[76]

Early on Tuesday an anonymous pamphleteer left a flyer on all of the desks in Classroom Two where a first year class was scheduled to meet. The title, *Why The ETE Half Time Show Was Racist, Sexist & Transphobic*, appeared in bold print at the top of the first page. Below the title photographs taken at the 2014 half-time "Anaconda" performance were displayed along with photographs of a 2013 half-time performance, where male performers had dressed in drag and done a burlesque performance. Seven additional pages contained several additional photographs of the two performances juxtaposed with pictures and drawings of an African woman,

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[76] Dean Soifer sent the following email to the law school community.

Dear Members of the WSRSL Community:

We take pride in the fact that Richardson is a unique Law School in part because we celebrate difference and care for one another much more than is the norm in legal education. To many, the half-time performance during the Ete bowl reinforced stereotypes and thus caused harm to our community. Further, I am told that it has been followed with hurtful communications among our students.

The half-time show has a long tradition and has often been appreciated by many spectators. In recent years, however, some members of our community have found the show to be demeaning or even worse. Even if such harm is unintentional, it is not something that befits our Law School and it undercuts our celebration of diversity, tolerance, and civility. In fact, we should consider no longer having any half-time Ete Bowl performance.

In addition, some students and leaders of our Lambda, FLSA, and Aha Hui O Hawai'i organizations, as well as several faculty members suggested that we hold an educational event early in the next semester to examine issues of stereotyping, oppression, and collegial communication, and we will do so. I trust that both before and after that event takes place, we will all work toward mutual understanding and respect for all members of our community.

Please let me know if you have any questions.

I hope you all will join me in being particularly thankful to be part of the William S. Richardson School of Law.

Mahalo and aloha,
Avi

Saartjie (Sara) Baartman, who was enslaved and exhibited in Europe as a freak and sexual curiosity because of her pronounced hips and backside.[77]

While the flyer's language referred to the show as racist rather than charging those who performed with racism, the men in the photographs were easily identifiable. They experienced the flyer as a personal attack by its author and the other students who objected to the performance. They felt their friends and classmates were calling them racist, sexist and homophobic and they were none of these. They knew that even if the language of the flyer did not single them out, it would be read and understood to accuse them. The flyer cast them as bad guys, as outsiders who did not share the Richardson community's ethic and culture of tolerance and commitment to equal justice for all. The flyer injured them, much as their half-time performance had injured black, women, gay and transgendered students, by placing them outside of the circle of belonging. A student whose photograph appeared in the flyer told me, "This was clearly intended as a shaming device."

How is this story related to our understanding of unconscious or implicit bias? What does it teach us about how the law re-inscribes and reinforces bias even as it claims to seek its eradication? How does it inform the work of lawyers, social scientists and citizens who seek to use our understanding of implicit bias to seek justice?

I begin my response to these questions as I have in the two previous sections of this article by interrogating the text. I ask about the meaning we give to the text of the performance, about the way we read or interpret it. Do we read the text to have the same or similar meaning, and does that meaning derive from historical and contemporary narratives and tropes about race, gender or sexuality?

Secondly, I ask about injury. How does the text of the performance injure us? I ask this question about the individuals and groups who are the subjects, objects or targets of the text, the people whom the performance

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[77] The leaflet also included a brief text explaining why its author believed the Ete Bowl performances and contemporary hip-hop videos like *Anaconda* were replicating and re-inscribing this racist and sexist narrative. The author closed her/his essay with these words:

> I have seen countless videos that go viral on social media of women "twerking." Their butts are the only thing in the shot. And turns out the women are usually black, and if they are not black one is sure to find numerous comments on the video saying something along the lines of "wow she can move like a black girl." That is a clear example of racism and how black women are sexualized in our everyday life. In Baartman's day, there were no cameras to take videos but people would travel to see the same thing people see every day on popular media. As far as I'm concerned we as a whole have not gotten any better. Black women or any women should not be sexualized for their looks.

represents or constructs,[78] but I also ask how the text's meaning injures all of us, how it impedes the transformational project of achieving a just society.[79] The latter question is particularly important for my analysis, as I am arguing for an approach that treats racism, sexism and heterosexism as diseases with collective consequences.

The third part of my response explores how the law's approach to questions of equality hinders, rather than helps, our efforts to recognize, redress and heal the injury the diseases of racism, sexism and heterosexism inflict upon us all. I use the story of the Ete Bowl half-time performance to show that the law's requirement of intentionality, blame and causation, what Alan Freeman has named the "perpetrator perspective,"[80] impedes our ability to recognize and acknowledge the injuries of racism, sexism and heterosexism, to know that we are all injured and to understand our responsibility for fighting them together.

The Text

We cannot understand the Ete Bowl half-time performance, cannot discern its textual meaning,[81] outside of the context of Nicki Minaj's *Anaconda* video. At the time of the Ete Bowl performance the Minaj video had "gone viral" and become a cultural phenomenon. Only those of us whose advanced age or cultural isolation separates us completely from

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[78] *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (1984); John A. Powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. J. 99 (1997); Charles R. Lawrence III, *"Acting Our Color": Racial Re-Construction and Identity as Acts of Resistance*, 18 ASIAN PAC. AM. L.J. 21 (2013).

[79] Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995); Albie Sachs, *Towards a Bill of Rights for a Democratic South Africa*, 35 J. AFRICAN L. 21 (1991); Charles R. Lawrence III, *Forbidden Conversations*, *supra* note 51, at 1382 (describing the substantive value of the Equal Protection Clause as requiring an affirmative duty to move from slavery to freedom).

[80] Freeman, *supra* note 32, at 1053.

[81] In *The Id, The Ego and Equal Protection*, I argued that in determining whether facially neutral laws should be treated as suspect (infected by racism or white supremacy) we should ask whether the law or government action had a racist cultural meaning. What does the text of the performance mean? How do we read it? *See supra* note 1, at 324 ("This test would thus evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance. A finding that the culture thinks of an allegedly discriminatory governmental action in racial terms would also constitute a finding regarding the beliefs and motivations of the governmental actors: The actors are themselves part of the culture and presumably could not have acted without being influenced by racial considerations, even if they are unaware of their racist beliefs. Therefore, the court would apply strict scrutiny.").

popular culture could watch the young men dancing to the video's music without also seeing the video.[82] Perhaps more importantly, we cannot understand Minaj's performance in the video, cannot know its meaning, without understanding a larger cultural narrative whose meaning lies at the intersection gender, race, and sexuality.[83]

The *Anaconda* video is a remake or re-mix of an original song by Sir Mix-a-Lot, titled "Baby Got Back."[84] In the video Minaj and a back-up troupe of young Black women perform a sexually suggestive dance called the "twerk."[85] The women are clad in a variety of costumes all featuring skimpy halter-tops and G-string bottoms designed to reveal and call attention to their buttocks. I will not attempt to describe the video here.[86] Nor will I engage the considerable cultural commentary and critique surrounding the video and hip-hop music in general.[87] I think it sufficient

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[82] Of course this is the point of a spoof. A satire only works if we know what is being satirized.

[83] Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,* 43 STAN. L. REV. 1241, 1282-95 (1991) (on representational intersectionality).

[84] SIR MIX-A-LOT, *Baby Got Back*, *on* MACK DADDY (Def American Recordings 1992).

[85] *See Teddy Wayne*, Op-Ed., *Explaining Twerking to Your Parents*, N.Y. TIMES, Aug. 31, 2013, (Sunday Review), http://www.nytimes.com/2013/09/01/opinion/sunday/explaining-twerking-to-your-parents.html?_r=0.

[86] A recurring refrain in the lyrics is representative.

My anaconda don't, my anaconda don't
My anaconda don't want none unless you got buns, hun
Oh my gosh, look at her butt
Oh my gosh, look at her butt
Oh my gosh, look at her butt
(Look at her butt)
Look at, look at, look at
Look, at her butt

NICKI MINAJ, *Anaconda*, *on* THE PINKPRINT (Republic Records 2014).

[87] A considerable body of academic scholarship and popular literature has considered the subject of how racial, gendered, gay and lesbian and transgendered bodies, subjects and subjectivities are viewed, constructed, constituted, performed and appropriated. *See, e.g.*, BLACK PERFORMANCE THEORY (Thomas F. DeFrantz & Anita Gonzales, eds. 2014); E. PATRICK JOHNSON, APPROPRIATING BLACKNESS: PERFORMANCE AND THE POLITICS OF AUTHENTICITY (2003); JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (1993); LET'S GET IT ON: THE POLITICS OF BLACK PERFORMANCE (Catharine Ugwu ed. 1995); REPRESENTATIONS OF BLACKNESS AND THE PERFORMANCE OF IDENTITIES (Jean Muteba Rahier ed. 1999). This literature has been particularly vital in its interrogation and theorization of black influenced hip-hop music and culture. Among other things the literature considers hip-hop performance as a site where the narratives, constructions, tropes and disciplinary histories of white supremacy, patriarchy and heterosexism enforce and reiterate oppression. The literature also asks how hip-hop performance can be read as transgressive, and oppositional, contesting oppressive narratives and constructions,

to note that the words and the imagery employed in the video are replete with references to sexual acts and bodies as well as racial sexual stereotypes. The song "went platinum," selling over a million digital copies within the two weeks of its release. During the twenty-four hour period after its release, the video was viewed 19.6 million times.[88] The Internet quickly made *Anaconda* a cultural phenomenon.[89]

In the first part of this article I suggested that we consider our shared understanding of the prosecutor's words describing Micronesian men as evidence of a derogatory racial meaning we all understand that text to convey.[90] Likewise, we need no translation to understand that the balloon stuffed basketball shorts and gyrating pelvises that constitute the text of this performance gesture toward and signify a derogatory, demeaning, dehumanizing narrative about race, gender and sexuality.[91] We understand the Ete Bowl performance because the intersecting narratives of white supremacy, patriarchy and heterosexism persist.[92] Despite our noble

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sometimes by re-appropriation. *See, e.g.*, Luciana Villalba, *TYF Column: Nicki Minaj, Feminism, and the Message Behind 'Anaconda,'* THE YOUNG FOLKS (Aug. 30, 2014), http://theyoungfolks.com/review/nicki-minaj-feminism-and-the-message-behind-anaconda/38651. Minaj herself situates her video as part of this transgressive discourse of reappropriation. Zayda Rivera, *Nicki Minaj talks 'Anaconda' Music Video Controversy: 'It's Just Cheeky, Like A Funny Story,'* N.Y. DAILY NEWS (Oct. 20, 2014), http://www.nydailynews.com/entertainment/gossip/nicki-minaj-talks-anaconda-video-cheeky-article-1.1980608. For purposes of my argument here I need not consider whether one might read Manaj's *Anaconda* as a performance that disrupts or contests dominant narratives of oppression. I believe it is evident that the Ete Bowl performance reinforces rather than contests those narratives.

[88] Marisa Meltzer, *For Posterior's Sake*, N.Y. TIMES, Sept. 17, 2014, http://www.nytimes.com/2014/09/18/fashion/more-women-seeking-curvaceous-posteriors.html.

[89] *See, e.g.*, Booty Rap, *Saturday Night Live*, NBC.COM, http://www.nbc.com/saturday-night-live/video/booty-rap/2815279 (last visited Feb. 25, 2015); *How Kids React to Nicki Minaj New Anaconda Video*, YOUTUBE (Aug. 22, 2014), https://www.youtube.com/watch?v=CU_tq_CTPA4; Adriana Williams, *8yr. Old Singing Anaconda by Nicki Minaj*, YOUTUBE (Sept. 28, 2014), https://www.youtube.com/watch?v=y2y2YrNu14o.

[90] *The Id, the Ego, and Equal Protection*, *supra* note 1.

[91] DVD: 1987 Ethnic Notions (Marlon Riggs, 1987) (on file with California Newsreel); DONALD BOGLE, TOMS, COONS, MULATTOES, MAMMIES, AND BUCKS: AN INTERPRETIVE HISTORY OF BLACK AMERICAN FILMS, 4th ed. (2001); JAN NEDERVEEN PIETERSE, WHITE ON BLACK: IMAGES OF AFRICA AND BLACKS IN WESTERN POPULAR CULTURE (1992); K.SUE JEWELL, FROM MAMMY TO MISS AMERICA AND BEYOND: CULTURAL IMAGES AND THE SHAPING OF U.S. SOCIAL POLICY (1993); Stuart Hall, *Racist Ideologies and the Media*, in MEDIA STUDIES: A READER (Paul Marris, Caroline Bassett, & Sue Thornham eds., 2d ed. 2000); TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION (1993).

[92] *See* Kimberle Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE

aspirations to put them to rest, despite the Supreme Court's claims that we have already done so, we hear them and we know what they mean. These stories constitute the content of our categories.

The Injury

We can identify several different injuries in the story of the half-time performance and the events that followed. All of these injuries are interdependent and no one of them occurs without the others. First is the injury that the students who first came to speak to me experienced, which I will call "assault."[93] I use the word assault because it best describes the feeling I get when I hear words or see images that makes me feel as if I am under attack. This includes feelings of fear and shame that momentarily constrict my breathing as if I have been hit in the gut.[94] Mari Matsuda has written of the psychological and physical symptoms experienced by victims of hate speech,[95] and although I do not believe we should think of this performance as hate speech, the injuries these students experienced were similar.[96]

The second injury I will call the injury of exclusion.[97] The students told me that the performance's portrayal of women, of black women in

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FIRST AMENDMENT (Mari Matsuda & Charles R. Lawrence III et al. eds., 1993).

[93] *See* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Mari Matsuda & Charles R. Lawrence III et al. eds., 1993). The students who came to speak with me used the word "offended" to name their experience at watching the performance but offence does not capture the nature of the injury.

> There is a great difference between the offensiveness of words that you would rather not hear—because they are labeled dirty, impolite, or personally demeaning—and the *injury* inflicted by words that remind the world that you are fair game for physical attack, evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see.

If He Hollers, supra note 72, at 461.

[94] I describe my own experience with this feeling as I first read reports of the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1. See Unconscious Racism Revisited, supra* note 2, at 934-35. One student said, "I found it deeply troubling and disrespectful for straight men from the law school to put on a drag show making a caricature of LGBTQ people and perpetuating the stereotypes of women, particularly black women. I feel that, as a black man and person of color I have been attacked. The half-time show perpetuated negative and harmful stereotypes about black women, black people, people of color, women and LGBTQ members."

[95] Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 24 (Mari Matsuda & Charles R. Lawrence III et al. eds., 1993).

[96] *See infra* notes 98-102 and accompanying text.

[97] I have argued elsewhere that signs and symbols that signify exclusion and non-

particular, and of gay men and transsexuals made them feel as if they were being made fun of. The performers and the audience who laughed at and applauded them were not laughing at themselves. The big-butted women portrayed in the skit were outsiders. They were ugly, exotic, oversexed, unintelligent, not like and somehow inferior to people in our community, to us. However, the students who came to speak to me also knew, and just as importantly felt, that the big-butted women were related to them, that these big-butted people were their kin, were them, and this made them outsiders too.[98] They knew that if they laughed along with the rest of the audience they would be making fun of themselves, demeaning and defaming their own people.[99]

The third injury is the injury of silence. Although several students and faculty who were in the audience told me they were offended, upset or at least troubled by the performance no one spoke up at the time.[100] How does this happen? Several elements of this story may have contributed to the silence of those who in one way or another were troubled by the performance and the audience's response.[101] The students who first came to speak to me reported that they were surprised and stunned by the content of

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membership in the constitutive community are central to the injury that violates the Equal Protection Clause of the Fourteenth Amendment. The symbolism of segregation, not just the act of exclusion, makes segregation inherently unequal. *See If He Hollers*, *supra* note 72, at 439 ("The key to this understanding of *Brown* is that the practice of segregation, the practice the Court held inherently unconstitutional, was speech. *Brown* held that segregation is unconstitutional not simply because the physical separation of black and white children is bad or because resources were distributed unequally among black and white schools. *Brown* held that segregated schools were unconstitutional primarily because of the message segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children.") (internal citations omitted).

[98] *The Id, the Ego, and Equal Protection, supra* note 1, at 317 ("I wish I could laugh along with my friends. I wish I could disappear."); *see also* Charles R. Lawrence III, *Passing and Trespassing in the Academy: On Whiteness as Property and Racial Performance as Political Speech*, 31 HARV. J. RACIAL & ETHNIC JUST. (forthcoming 2015).

[99] *The Id, the Ego, and Equal Protection*, *supra* note 1, at 317 ("It is circle time in the five-year old group, and the teacher is reading us a book. . . . The book's title is *Little Black Sambo.* Looking back, I remember only one part of the story, one illustration: Little Black Sambo is running around a stack of pancakes with a tiger chasing him. . . . I have heard the teacher read the 'comical' text describing Sambo's plight and have heard the laughter of my classmates. There is a knot in the pit of my stomach. I feel panic and shame. . . . I am slowly realizing that, as the only black child in the circle, I have some kinship with the tragic and ugly hero of this story—that my classmates are laughing at me as well as at him.").

[100] I understand that sometime soon after the performance one or two students posted to Facebook responses and critical analysis of the halftime show. This elicited further postings from other members of the law school community, and it was primarily through social media that word of the controversy spread.

[101] *If He Hollers, supra* note 72, at 452-56.

the performance—surprised at what they saw, that their friends would participate in this performance, and stunned by the force of their own emotional reaction. In the context of discussions surrounding hate speech and the First Amendment, critical race theorists have noted that face-to-face racial insults have an immediate injurious impact that often disables speech.[102] Although the half-time performers were not intentionally hurling racial invective, the impact of unintentional insult can be just as immediate and the surprise that it comes from an unexpected source may increase the shock that disables responsive speech.

The students who objected to the performance may have worried that by speaking out against the performance, by calling attention to its racism and interrupting the fun, they would only fuel the feeling among other students that they were outsiders. If most of us think this is just harmless fun, what's wrong with you guys? Why can't you share in the joke? Why do you always have to play the race card? Here anti-racist speech is silenced by a colorblind post racial ideology and rhetoric that makes the person who calls attention to racism the racist.[103] I believe that what most often silences us from speaking up when we see racism is our fear that to name racism will be heard as calling our friends racist. When we can only think of racism within the paradigm of individual fault and causation then any naming of racism must refer to a racist. If the student sees her friend dancing in a green wig with balloons stuffed down his gym shorts, and she says, "What I see injures me because it is racist and sexist," her friend will hear her calling him a sexist and racist. The perpetrator perspective leaves only two choices. Either he is a racist or there is no racism here.

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[102] *Id.* at 452 ("The experience of being called 'nigger,' 'spic,' 'Jap,' or 'kike' is like receiving slap in the face. The injury is instantaneous. There is neither an opportunity for intermediary reflection on the idea conveyed nor an opportunity for responsive speech."). Furthermore, speech is usually an inadequate response when one is assaulted with words that denote one's subhuman status and untouchability. There is little (if anything) that one can say that responds to one's experience of emotional or reputational injury. This is particularly true when the message and meaning of the assaultive message resonates with beliefs widely held in society. Segregation and other forms of racist speech injure victims because of their dehumanizing and excluding message. But each individual message gains its power because of the cumulative and reinforcing effect of countless similar messages that are conveyed in a society where racism is ubiquitous.

[103] Ian Haney-Lopez, *Freedom, Mass Incarceration, and Racism in the Age of Obama,* 62 ALA. L. REV. 1005, 1010 (2010) ("[C]olorblindness at the level of public discourse tells us that the first person to mention race is the racist, an indictment frequently made through the claim that someone is 'playing the race card.'").

The Perpetrator Perspective and the Ete Bowl Story: Critical Race Cliff Notes

I close my discussion of the story of the Ete Bowl performance by examining how the perpetrator perspective[104] and post racial discourse shape the way we read the text of the performance and the events that followed. I have already touched upon several parts of this analysis as I have told the story and described the injuries inflicted by its constituent texts. In this section I summarize those arguments and ask the reader to recall the earlier moments in my narrative of the story that provide context, feeling and nuance. I present this brief reprise of my argument to demonstrate how at each moment the story, the law's paradigm of individual blame, causation, and culpability captures our perception and understanding of the events and of our relationship to one another. The perpetrator perspective keeps us from seeing that we have all internalized racism's story. It keeps us from naming our shared racism when we see it, from speaking to each other about it and joining forces to fight it together.

The story begins when students who were present at the half-time performance feel assaulted and demeaned. The perpetrator perspective identifies the performers and the audience members who respond with laughter and applause as the source of their injury. The performers and

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[104] Freeman, *supra* note 32, at 1053-55. Alan Freeman has described the perpetrator perspective as follows:

> The perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator.
>
> . . . .
>
> Its central tenet, the "antidiscrimination principle," is the prohibition of race-dependent decisions that disadvantage members of minority groups, and its principal task has been to select from the maze of human behaviors those particular practices that violate the principle [and] outlaw[] the identified practices.
>
> The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors. . . .
>
> Central to the perpetrator perspective are the twin notions of "fault" and "causation." Under the fault idea, the task of antidiscrimination law is to separate from the masses of society those blameworthy individuals who are violating the otherwise shared norm. . . .
>
> The fault concept gives rise to a complacency about one's own moral status; it creates a class of "innocents," who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations.

audience have engaged in racist, sexist, homophobic and transphobic speech and these intentional speech acts have caused injury.[105]

The students who performed in the half-time show and those who participated as an appreciative audience hear the charge that the performance is racist, sexist and homophobic as a charge that they are bad people. They hear what the injured students say as a personal accusation. The law's story requires a perpetrator, and thus they hear the injured students calling them the bad guys. Naturally, they deny. They say "We are not racist, sexist, or transphobic. We have done nothing to injure you." If they were to admit their racism they would be cast as pariahs in a community where the law has declared that the rest of us are color-blind.[106]

The injured students hear their classmates' disavowal as a refusal to see or recognize that they have been injured at all. They hear in their friends' response, "I am not a racist. I did nothing to hurt you," a denial of their experience of injury. The Court's intent requirement tells us that there is no injury unless some intentionally racist person has caused the injury. If the performers and their audience are not racist then the students who experienced injury have not been injured at all.[107]

Thus the injured students' initial experience of assault by the performance is compounded by the denial of that injury.[108] Moreover, they

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[105] Implicit bias research might demonstrate that the performers were not aware of their bias.

[106] Within the perpetrator perspective, the performing students and those who support them are not only identified as the racists, but the rest of us are excused—told that we are not racist. Some of us get to point the finger of blame and remain innocent and not responsible while those at whom we point our fingers become racist—culpable of wrongdoing. *See also* Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality,* 52 WM. & MARY L. REV. 197 (2010).

[107] This aspect of the perpetrator perspective is reflected in the *Washington v. Davis* intent requirement itself. If no discriminatory intent can be established in the case and controversy before the court then no racism exists. The perpetrator perspective's assertion that no racism exists in this case in turn becomes an argument that there is no racism in the community/society/nation except in those individual cases that racism has been proven. The affirmative action cases that hold remedial racial classifications suspect unless they are narrowly drafted to remedy identified intentional racism incorporate this doctrinal sleight of hand that transforms the injuries of past and contemporary discrimination into no injury at all. *See* Regents v. Bakke, 438 U.S. 265 (1978) (Justice Powell holding that societal discrimination is "too amorphous" to remedy); s*ee also* Adarand Constructors v. Pena, 515 U.S. 200 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning,* 31 U.S.F. L. REV. 757, 766-70; Lawrence & Matsuda, WE WON'T GO BACK 67-87; *cf.* Plessey v. Ferguson, 163 U.S. 537 (1896).

[108] This injury is further compounded by the court's colorblind doctrine and the post racial claim that society has overcome its racism—so that this denial of the experience of injury happens to these students many times every day.

hear this denial not just from their classmates in this instance. Rather, they hear the larger post racial discourse denying society's racism.[109] The post-racial discourse tells them, "Nothing happened to you." In other words, they are hurt not just by the performance itself but by the performers and the rest of the community's participation in the discourse that says they were not hurt. This community denial of the injury they experienced from the performance becomes a denial of the racism they experience many times every day and therefore feels like a denial of entirety of their lived experiences with racism as well.[110]

The injured students respond by distributing a flyer that affirms and explicates their experience of injury. Although they articulate this injury by referring to the injury done by the original text of the performance, the pamphlet also expresses the injury they feel as the result of their classmates', friends' and the larger community's denial of their racism. The flyer's words say "Why the Ete Half Time Show Was Racist, Sexist, & Transphobic," and could be read as meaning, "Why the show evidences the continued existence of racism, sexism and transphobia in our society." However, the photographs in the pamphlet from the most recent and past shows place this text squarely within the perpetrator perspective. The individuals in the photographs are easily identifiable. We read and interpret the flyer as a personal accusation leveled against the individuals pictured in the photographs. The individuals who appear in the photographs read the flyer as intended to shame them, and single them out as individual racist, sexist and transphobic perpetrators.

The historical examples of racism and sexism that appear in the pamphlet, examples that might in another context be read as arguments about the continuing presence of societal racism, (Sarah Baartman and other historical pictures stereotyping big-butted black and native women), only serve to reinforce the performing students' post-racial defense. Within the perpetrator perspective, the examples of racism in the pamphlet point to

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[109] *See* Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2-3 (1991); Ian F. Haney-Lopez, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012); John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889 (1995).

[110] *See* Peggy C. Davis, *Law as Microaggression,* 98 YALE L.J. 1559, 1568 (1989); Daniel Solórzano et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students*, 69 J. NEGRO EDUC. 60, 62 (2000); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Claudia Rankine, *"You are in the dark, in the car . . ."*, *in* CITIZEN: AN AMERICAN LYRIC (2014).

a racist past—a past that we have moved beyond, for which we should not be held responsible.[111] Within the post-racial narrative even the contemporary images of black women in the flyer (Nicki Minaj in her *Anaconda* costume and pose) are read as no longer having demeaning racial and sexual meaning.[112] If we live in a post-racial colorblind society, even those things that we may have recognized as racist at an earlier time cannot be racist now. The same costumes or performances that were used to portray blacks in minstrel shows or circus exhibits before we declared ourselves colorblind no longer convey the same meaning that they did before we overcame our racism. The leaflet is read within this colorblind post racial discourse. The students pictured in the pamphlet experience it as a shaming device, an unfair accusation intended to defame them. The Court's perpetrator perspective has done its work and we will find it even more difficult to have the forbidden conversation about our shared racism, sexism and heterosexism.

Unconscious Racism Revisited, Again (We haven't finished our work yet)

In *The Id, the Ego, and Equal Protection*, I suggested that the court should consider the "cultural meaning" of an allegedly racially discriminatory act as the "best available analogue for and evidence of the collective unconscious that we cannot observe directly."[113] My reference to the "collective unconscious" rather than the individual actor's unconscious was meant to convey my belief that the harm of racism resided in the continued existence of a widely shared belief in white supremacy and not in the motivation of the individual actor or actors charged with discrimination. I argued that so long as this shared ideology remained we must assume that

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[111] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 721 (2006) (quoting Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977)) ("We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that 'the Constitution is not violated by racial imbalance in the schools, without more.' Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.") (internal citations omitted).

[112] Minaj and other hip hop artists have embraced an argument made by some postmodern black feminist that their performances should be read as a feminist reclaiming of women's power to control their own bodies, to represent them in their own chosen way, to contest the narrative by disrupting it and to be independent actors in the market. *See, e.g.*, Villalba, supra *note* 87; Zayda Rivera, *Nicki Minaj talks 'Anaconda' Music Video Controversy: 'It's Just Cheeky, Like A Funny Story,'* N.Y. DAILY NEWS (Oct. 20, 2014), http://www.nydailynews.com/entertainment/gossip/nicki-minaj-talks-anaconda-video-cheeky-article-1.1980608.

[113] *The Id, the Ego, and Equal Protection*, *supra* note 1, at 324.

the affirmative command of the Constitution's Equal Protection Clause to abolish white supremacy has not been accomplished.

In applying a cultural meaning test I sought to reveal the continued vitality of the ideology of white supremacy in determining the content of conscious and unconscious bias. I also meant to show how our collective biases serve to rationalize and justify chronic conditions of structural and institutional racism. My final purpose was to expose the Supreme Court's doctrine of discriminatory intent as a mechanism designed to deny the continuing legacy of slavery and segregation in our nation and show how the perpetrator perspective has kept us from acknowledging our disease and working together towards a cure.

Several weeks ago, as I wrote the final drafts of this article, I was asked to comment on a documentary about Albie Sachs, a freedom fighter during the anti-apartheid movement in South Africa, one of the principal drafters of that country's Constitution and one of the first justices to serve on its Constitutional Court. The film takes its titled "Soft Vengeance"[114] from Sach's own words. In the film's opening scene we watch news footage taken immediately after an assassination attempt on Albie Sachs. Sachs, in exile in Mozambique, has been targeted by the apartheid regime's secret police because of his leadership role in the resistance struggle and the African National Congress (ANC). Miraculously, he survives the bomb they have planted in his car but he loses his right arm in the explosion. In the film he recalls lying in his hospital bed and receiving a note from his comrades in the ANC. "Don't worry comrade," they said, "We will avenge you." "Avenge me? We going to chop off their arms? We going to blind people? Where's that going to get us? But if we get democracy in South Africa and freedom, that will be my soft vengeance."

Albie Sachs's soft vengeance was realized in 1994 when the Republic of South Africa elected its first democratically elected government and in 1996 when it adopted its Constitution. At the end of the film we watch Justice Sachs as he takes the oath of his judicial office along with eight other members of South Africa's first Constitutional Court. He raises the stump of his right arm as he promises to faithfully uphold a Constitution whose preamble opens by recognizing "the injustices of *our* past."[115]

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[114] SOFT VENGEANCE: ALBIE SACHS & THE NEW SOUTH AFRICA (The Rord Foundation & Ginzburg Productions 2013).

[115] S. AFR. CONST., 1996, pmbl., *available at* http://www.constitutionalcourt.org.za/site/constitution/english-web/preamble.html.

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Justice Sachs, a white man who fought side by side with his brothers and sisters in a multiracial struggle, who twice endured prison and solitary confinement, who experienced exile and survived an attack on his life, was instrumental in the drafting of this new Constitution.[116] He knew that they could not create a new and just South Africa without confronting apartheid's injuries, without understanding that those past injuries, the psychic injuries of racist ideologies and the material injuries of racist structures, lived with them still. He knew that their Constitution must commit them to the affirmative disestablishment of these twin injustices.

As his country contemplated and debated its Constitution, Sachs wrote that the new bill of rights must not enact a "constitutional freezing of the present unjust and racially enforced distribution of land."[117]

> [T]he starting point of constitutional affirmation in a post-apartheid democratic South Africa is that the country belongs to all who live in it, not just to a small racial minority. If the development of human rights is criterion, there must be a constitutional requirement that the land be redistributed in a fair and just way, not a requirement that says there can be no redistribution.
>
> . . . .

Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
May God protect our people.
Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
God seën Suid-Afrika. God bless South Africa.
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

[116] Albie Sachs was born in Johannesburg, South Africa in 1935. From a young age he engaged in activism and civil disobedience, and after receiving his law degree at twenty-one, he represented a number of black clients. Sachs endured two stints in prison as a political prisoner. Following his release, Sachs lived in England and then Mozambique before returning to South Africa where he was appointed to the Constitutional Committee and played a major role in creating South Africa's Bill of Rights. *See Albie Sachs,* ACADEMY OF ACHIEVEMENT, http://www.achievement.org/autodoc/page/sac0bio-1 (last visited Mar. 7, 2015).

[117] Albie Sachs, *Towards a Bill of Rights in a Democratic South Africa,* 35 S. AFR. J. ON HUM. RTS. 21, 28 (1991).

> Without a constitutionally structured programme of deep and extensive affirmative action, a Bill of Rights in South Africa is meaningless. Affirmative action by its nature involves the disturbance of inherited rights. It is redistributory rather than conservative in character.[118]

Sachs understands equal protection as a transformative project that requires a constitutional and collective community commitment to the eradication of racism and the disestablishment of ideologies and systems of racial subordination. This transformative project defines the injury of racism very differently than our own Supreme Court's doctrine and theory of individual fault and causation. The latter theory is designed to help us turn away from, repress and deny the past and continuing injuries of racism so that we can tell ourselves there is no longer need for redistribution. Our laws define the injury of racism as acts perpetrated by individuals against other individuals. The theory that seeks societal transformation sees the injury as done to the collective, as participated in and suffered by us all.[119]

In this Article I have considered three local texts. I have asked the reader to consider the cultural meaning of those texts and to think about how our knowledge of unconscious bias might help us understand them. Like Justice Sachs and the South African Constitution, I call on all of us to recognize the injuries and injustice of racism, sexism, and heterosexism as injustices of our past that live with us still. The way we read and understand the texts of the prosecutor's words about Micronesians, of our flight from Hawai'i's public schools, and of our own Ete Bowl show, are evidence of biases, conscious and unconscious, that none of us has escaped. Perhaps more importantly it is evidence that our transformative project is not complete.

In his book *War Crimes, Atrocity and Justice*,[120] Mike Shapiro explores the notion of juridicial cartographies or the mapping of spaces of justice. The state is constructed and built through various practices and justice is activated through such practices. States are made and remade as they are both legitimated and attenuated, as justice is created and implemented.[121] The state is constituted by crime, violence and atrocity—the genocide of

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[118] *Id.* at 28-29.

[119] I have argued elsewhere that our own Constitution should be read to command a transformative approach to equal protection. *See, e.g.*, Lawrence, *supra* note 6; Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001); *Forbidden Conversations, supra* note 51.

[120] MICHAEL J. SHAPIRO, WAR CRIMES, ATROCITY, AND JUSTICE 41(2015) (quoting SHOSHANA FELMAN, THE JUDICIAL UNCONSCIOUS: TRIALS AND TRAUMAS OF THE TWENTIETH CENTURY 8 (2002)).

[121] *Id.*

indigenous Americans,[122] and our Constitution's creation of property in human beings.[123] The state is constituted by grand juries in Ferguson and Staten Island, declaring black lives "unworthy of life."[124] The state is constituted by the savage inequality of segregated and unequal schools,[125] by prisons filled with black and brown faces,[126] by homeless families and hungry children, by corporations deemed persons,[127] their global theft protected while human beings are named "illegals."[128]

Our country, our laws, our communities are constituted by these practices, histories and mappings of justice, by the meaning we give them and by our internalization of the content of that meaning. In a democracy our Constitution and laws gain their authority by the consent of the people. We constitute ourselves.[129] We choose our values. We are responsible for asking ourselves who we are and who we should be, for engaging in a conversation about public morality and the values we hold as a

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[122] *See generally* DAVID STANNARD, AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD (1992); ROBERT A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990); Johnson v. McIntosh, 21 U.S. 543 (1823). Indian possession of desirable lands, according to Justice Story, "was not treated as a right of dominion, but as a mere right of occupancy. As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations." Joseph Story, *Commentaries § 152*, *reprinted in* MARK LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKGROUND TERRITORY IN INTERNATIONAL LAW 29 (1926).

[123] U.S. CONST. art. I, § 2 ("three-fifths" clause); art. I, § 9 (prohibition on ending the slave trade); art. IV, § 2 (fugitive slave provision).

[124] *See* Amy Davidson, *What the Eric Garner Grand Jury Didn't See*, THE NEW YORKER (Dec. 4, 2014), http://www.newyorker.com/news/amy-davidson/eric-garner-grand-jury-didnt-see; Lawrence, *supra* note 98; SHAPIRO, *supra* note 120, at 65-66. Shapiro notes that the Nazis, in their death sentences for Jews, Gypsies and the physically impaired, "eradicate[ed] their victim's citizenship to cancel their juridical subjectivity, and then implemented a biopower (in Foucault's sense), not the traditional sovereign's right over life and death, but a state-implemented racism . . . so that 'inferior species' and 'abnormal individuals' are identified and eliminated. . . . The National socialist eugenic program . . . drew form anthropological (turned into biopolitical) discourses on human life, the most notorious and sinister of which was Alfred Hoche's treatise, 'Life Unworthy of Life.'"

[125] JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (2012); JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2005).

[126] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010).

[127] Citizens United v. FEC, 558 U.S. 310 (2010).

[128] *See, e.g.*, DAVID BACON, ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS (2008).

[129] *See* Charles R. Lawrence III, *Promises to Keep: We Are the Constitution's Framers*, 30 HOW. L.J. 937, 939 (1987).

community.[130] We cannot do this if we look away from who we are, if we deny and repress our collective racism, sexism and homophobia. We will never accomplish the transformation from a nation constituted in slavery and patriarchy if we use the law's perpetrator perspective to pretend that we are healed from racism's ravages.

Critical race theorists and their sisters and brothers in outsider communities have told stories from the bottom, the margins and the borders to challenge the universality of stories told by the law.[131] Again, I borrow from Mike Shapiro who designates as "literary cartography" the efforts from story-tellers in exile who seek to constitute a "literary justice" that contests the violence of legal constitutions. Shapiro notes:

> In contrast to the "legal justice" dispensed at trials ("physical theaters of justice"), literature is a dimension of concrete embodiment and language of infinitude that in contrast to the language of the law, encapsulates not closure but precisely what in a given legal case refuses to be closed and cannot be closed. It is to this refusal of the trauma to be closed that literature does justice.[132]

The Hawai'i Court of Appeals does "legal justice" declaring the trial court in error—pointing the finger at prosecutor and judge as if only their words did injustice, as if only their racism and this sentencing were at stake. Kathy Jetnil-Kijiner's poetic "Lessons" from our own neighborhood do "literary justice" exposing our wounds for examination and conversation. The Court's holding that our segregation is "*de facto*" not "*de jure*" attempts to hide the wounds caused by our fear of black and brown children, as we flee from their schools leaving them behind to live with a savage inequality that blames them for their failure. When we engage in the forbidden conversation about our flight we begin the work of literary justice. The law's claim that we are "color blind," its post racial tale of "no intent, no fault, no injury," covers up and hides the wounds that racist, sexist, homophobic images still inflict. It says the content of what we once knew was a minstrel show does no injury, that it no longer bears its old racist meaning. The conversation about the Ete Bowl show will be difficult for all of us. It may seem unbearable to see and feel the open wounds of

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[130] *See Forbidden Conversations, supra* note 51, at 1398.

[131] *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); *Unconscious Racism*, *supra* note 6; Margaret E. Montoya, *Máscaras Y Trenzas: Reflexiones Un Proyecto De Identidad Y Análisis A Tráves De Veinte Años,* 36 HARV. J. L. & GENDER 469 (2013); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983). Charles R. Lawrence III, *Listening for Stories in All the Right Places: Narrative and Racial Formation Theory,* 46 LAW & SOC. REV. 247 (2012).

[132] SHAPIRO, *supra* note 120.

our racism, sexism, and homophobia, but if we can listen to each other's stories we can begin to heal.

At the end of the film *Soft Vengeance* we watch the officer who planned and orchestrated the bomb attack on Justice Sachs as he appeared before South Africa's Truth and Reconciliation Commission.[133] We watch him as he tells the commission the horrible details of the apartheid regime's assassinations of ANC leaders. The new nation, determined to remember and move forward from its bloody past, established the Commission because it knew that true transformation requires confronting the past. They knew they must hear the survivors' stories of torture and imprisonment, of murdered children, parents, husbands and wives. The murderers and torturers must also stand before the people and tell the truth of atrocities they carried out in the nation's name. They must name and confess their crimes. The nation would not declare them guilty perpetrators singled out from those in whose name they acted. Nor would they be forgiven or absolved of guilt. They confessed collective crimes, the crimes of a nation. The Truth Commission began the work of literary justice, confronting the communal trauma that refuses to heal, knowing that this collective confrontation with past and still living evils was necessary to the nation's healing.

We cannot heal our wounds by covering them and pretending they do not exist, by refusing to listen to the hard-to-hear meaning of the content of our categories. We must not be afraid to speak with one another about our wounds. We must name racism, sexism, and heterosexism when we see and feel them without accusation or claim of innocence. We must know "every wound upon a human heart or body as both caused by us and happening to us."[134] Only then will we know justice.

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[133] The South African Truth and Reconciliation Commission ("TRC") was set up by the Government of National Unity to help deal with what happened under apartheid. The conflict during this period resulted in violence and human rights abuses from all sides. No section of society escaped these abuses. The TRC was based on the Promotion of National Unity and Reconciliation Act, No. 34 of 1995. *"[A] commission is a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation."* TRUTH & RECONCILATION COMMISSION, http://www.justice.gov.za/trc/ (last visited Mar. 18, 2015); *see* Martha Minnow, *Between Vengeance and Forgiveness: South Africa's Truth and Reconciliation Commission,* 14 NEGOTIATION J. 319 (1998).

[134] Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2220 (2000).