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Unconscious Racism

By David Kairys[1]

My first encounter with what we now call unconscious racism came in a courtroom in 1968.[2] We didn't use that phrase back then. There was a lot of focus on racism and on consciousness in the 1960s, and the idea would have made sense. But for reasons I'll explain, it wouldn't have seemed very important.

I was a rookie public defender assigned to the bail-setting court in the Police Administration Building at 8th and Race Streets in Philadelphia. The bail hearings went on all day and all night; I was on the graveyard shift because I was new. Two cases came up over the course of a week that upset me. The defendants in both cases were employed, middle class men in their mid-30s with stable residences, marriages and children.

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[1] Professor of Law, Temple University. This is an edited transcript, with minimal footnoting added, of Professor Kairys' introductory remarks at the Temple Law Review Symposium *The Evolution of Civil Rights Litigation: Using Social Science and Statistics to Prove Employment Discrimination and Predatory Lending* on November 19, 2010. Professor Kairys preceded these remarks with the following tribute: "It's very nice to see Murray Shusterman here, our esteemed alumnus, for whom this building is named." The content was partially drawn from Professor Kairys' works in the area: *A Brief History of Race and the Supreme Court*, 79 TEMP. L. REV. 751 (2006), *available at* http://ssrn.com/abstract=920737; PHILADELPHIA FREEDOM, MEMOIR OF A CIVIL RIGHTS LAWYER (2008); *More or Less Equal*, 13 TEMP. POL. & CIV. RTS. L. REV. 675 (2004), *available at* http://ssrn.com/abstract=715181; WITH LIBERTY AND JUSTICE FOR SOME, A CRITIQUE OF THE CONSERVATIVE SUPREME COURT (1993); *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307 (2003), *available at* http://ssrn.com/abstract=724341; *Civil Rights*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 1878 (Neil J. Smelser & Paul B. Baltes eds., 2001); *Unexplainable on Grounds Other Than Race*, 45 AM. U. L. REV. 729 (1996); *Race Trilogy*, 67 TEMP. L. REV. 1 (1994); *see also Freedom of Speech*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 140-71 (David Kairys ed., 1st ed. 1982), *available at* http://ssrn.com/abstract=727903; *Introduction* to THE POLITICS OF LAW (David Kairys ed., 3d ed. 1998), *available at* http://ssrn.com/abstract=841469. Research assistance was provided by Eric Motylinski. Copyright © 2010 by David Kairys.

[2] I wrote about this in my memoir, PHILADELPHIA FREEDOM, at 47-62.

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

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

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

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

The judge didn't care whether Horne spent the night in jail or at home. He said Horne "could be dangerous, driving drunk like that, and it wasn't his first time." I brought up the bail

hearing for Davis, whom he remembered as the guy who sold Studebakers. "He had a few too many," the judge said. "He wouldn't hurt anybody." I reminded the judge that Davis also had a prior drunk driving charge, and I said, "it might hurt just as bad to be run over by a drunk car salesman from Cherry Hill as a drunk insurance salesman from West Philadelphia." He smiled. Race was not specifically mentioned, although we both knew at that point that the only difference between the cases was the races of the defendants.

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

The judge responded to the white man with an immediate effort to understand his actions, an openness to excuse, and a presumption of essential goodness. Davis drank too much and shouldn't have driven, but he was presumed by the judge to be a good person who had just made an understandable mistake. He wouldn't harm anybody. The best term for this is empathy – basically, identification with him and a strong presumption of his essential goodness, as if he's a friend or a member of one's family.

The judge's response to the black man was dominated by fear – he presented danger, and represented the danger posed by all drunk drivers. There was no empathy, no attempt or openness to understand or excuse, a presumption of danger.

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

There was no reason for an inquiry into the judge's deepest, subterranean motivation or purpose in doing this. That wasn't particularly interesting or legally important. He had treated the black guy and the white guy differently in circumstances that called for the same treatment, and he had come up with some presumptions and stereotypes beyond the facts before him and wound up imprisoning one and letting one free. That was more than enough; the judge's mental state didn't really matter.

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

[3] Since the mid-1970s, equal protection claims brought by African Americans and other minorities were rejected for lack of proof of purposeful discrimination on, for example, the issues that significantly defined the not-very-distant segregated past: job discrimination, voting discrimination, housing discrimination, segregated schools, and the death penalty. *See* Milliken v. Bradley, 418 U.S. 717, 752 (1974) (refusing to implement multidistrict remedy for schools where there is no proof that boundaries were purposefully established to racially segregate); Washington v. Davis, 426 U.S. 229, 248-50 (1976) (finding facially nondiscriminatory test administered to job applicants allowable despite discriminatory effect and lack of correlation to job performance); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270-71 (1977) (finding no proof that rezoning was racially motivated); Memphis v. Greene, 451 U.S. 100 (1981) (upholding the closure of a street between black and white neighborhoods at the behest of an all-white neighborhood built with racial covenants despite procedural and substantive irregularities); Mobile v. Bolden, 446 U.S. 55, 73 (1980) (upholding city's at-large electoral system that enabled a consistently all-white city

The judge's rulings and explanations in that bail court in 1968 demonstrate the operation and consequences of what we now call unconscious racism,[5] but to understand the meaning and relevance of unconscious racism in the 1960s and today, it is essential to pay attention to history and context.[6] For present purposes, the most important development is that at a certain point not all that long ago, about 50 or 60 years ago, we came to the conviction that racism is wrong.[7] Racism on the part of government, private institutions or individuals became socially, morally and culturally wrong.[8] Before that, slavery had long been abolished but we went through long

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commission despite a significant black population); McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (holding no violation of equal protection where petitioner failed to show that decision-makers acted with discriminatory intent in his death penalty sentencing). *See generally A Brief History of Race and the Supreme Court*, at 761-64. This shift in the law and the range of race issues have been most significantly addressed by works embracing critical race theory. *See* DERRICK BELL, SILENT COVENANTS, BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004) (discussing deficiencies of *Brown* decision); KIMBERLÉ CRENSHAW ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995) (containing a collection of essays from leading critical race theory scholars); CRITICAL RACE THEORY: AN INTRODUCTION (Richard Delgado & Jean Stefancic eds., 2001) (providing introduction to critical race theory); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: THE CUTTING EDGE (2d ed. 2000) (including writings of next generation civil rights scholars on critical race theory); IAN F. HANEY LOPEZ, WHITE BY LAW, THE LEGAL CONSTRUCTION OF RACE (1996) (discussing cases that provided legal construction of whiteness as racial identity); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (arguing that color-blind interpretation of the Constitution legitimates and maintains white racial domination); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (examining evolution of whiteness from a color, to status, to property). *See also* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES, FROM THE 1960S TO THE 1990S (1994) (exploring how race shapes both state and civil society by constructing identities and institutions); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004) (tracing the law and effects of restrictions on immigration, including creation of new categories of racial difference); MICHAEL BROWN ET AL., WHITEWASHING RACE, THE MYTH OF A COLOR-BLIND SOCIETY (2003) (challenging notions that racial discrimination is a thing of the past and that racial inequalities are attributable to failing in blacks and black culture and highlighting the persistence of racism and racial disadvantage).

[4] This approach, which I have called the "purpose doctrine," now dominates the Court's analyses not only of discrimination issues but also of the range of civil rights and civil liberties issues. *See supra* note 1.

[5] *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Christine Jolls and Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L REV. 969 (2006); [citations to be provided – legal and social sci. literature on unconscious bias].

[6] *See generally A Brief History of Race and the Supreme Court* and authorities collected in note 1, supra.

[7] *A Brief History of Race and the Supreme Court*, *supra* note 1, at 756.

[8] *Id.* at 760.

periods of Jim Crow and segregation, and racism in words and deeds was acceptable and not unusual, if not something like the norm.[9]

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

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

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[9] *See, e.g.*, A. Leon Higginbotham, Jr., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996) (documenting the connections between the law and racial oppression in the Jim Crow/segregation era).

[10] Sports analyses were themselves often laced with explicit racial references for the African American players. For example, Buddy Young, a black halfback who was a miraculously effective runner for the Colts despite his small size, was frequently referred to as the "Bronze Bullet." See http://en.wikipedia.org/wiki/Buddy_Young.

[11] For example, The Civil Rights Act of 1964 (Pub.L. 88-352); The Voting Rights Act of 1965 (Pub.L. 89-110); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

[12] See http://en.wikipedia.org/wiki/David_Duke#NAAWP (Duke insisted that the Klan was "pro-white" and not "anti-black"); Southern Poverty Law Center, Knights of the Ku Klux Klan, http://www.splcenter.org/get-informed/intelligence-files/groups/knights-of-the-ku-klux-klan (racism was still apparent in their statements and positions; for example, "Non-whites who reside in America should be expected to conduct themselves according to Christian principles and must recognize that race mixing is definitely wrong and out of the question. It will be a privilege to live under the authority of a compassionate White Christian government.").

They said they just happen to like their own, white people and don't care that much for black people or other minorities, but they're not racist.

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

None of this is surprising in the sense that a change of this magnitude cannot be expected to be absorbed quickly. But what happened is we quickly cut off that process and – in the legal realm and in society generally – we wound up focusing our attention almost exclusively on overt, explicit and formal inequality. Once they were banished, we declared a pre-mature victory in the struggle for racial equality.

Explicitly racist and overtly segregationist measures were banned, and racial epithets became taboo. But we left in place the legacy of slavery and Jim Crow and segregation that, I have to say, still literally surrounds us today in a place like North Philadelphia. It's still got the worst of the schools, the worst of the healthcare, housing, jobs, nutrition, and so on.[14] A black middle class developed, which has been quite an accomplishment, but for the mass of people living in communities like North Philadelphia, where a racially concentrated population lives in

[13] [citations to be provided from the unconscious bias literature on historic perceptions of differences between races persisting to the present-day.]

[14] *See, e.g.*, Mary Carmichael, "The Great Divide: Why Racial Disparities in Health Care Persist," http://www.newsweek.com/2010/02/14/the-great-divide.html (explaining problems of race and health).

extreme poverty, not much is different from the 1950s.[15] Then there's the remaining racism, the deep-seated parts that we're focusing on today that don't just go away because a court declares explicit racism wrong.[16] There are the concrete remnants of the past, and the reality of life in the present surrounded by poverty and prejudice.

And it becomes harder to deal with because – there's an irony here – the racist label became so loathsome that the deeper layers of racism became harder to reach.[17] The labels, understanding and explanation of something as complex as racism got reduced to only two acceptable categories – racist or nonracist – so conduct or circumstances were either maliciously racist or completely free of any racial significance. The labeling and description of racism as evilly wrong limited our ability to deal with and correct the remaining problem.

Progress was hindered further by a multi-faceted retrenchment by the courts.[18] The adoption of the purposeful discrimination rule, just discussed, which requires proof of a racial purpose or motive to establish a discrimination case, made it near impossible for minorities to win, even in circumstances that resemble the worst forms of the discrimination, segregation and disenfranchisement of African Americans that characterized the pre-civil rights past.[19] Then a hypersensitive version of the purposeful discrimination rule was applied to invalidate good-faith affirmative and remedial action, by taking any consideration of race – even if done in good faith

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[15] *See, e.g.*, Bruce Katz, "Concentrated Poverty in New Orleans and Other American Cities," http://www.brookings.edu/opinions/2006/0804cities_katz.aspx (commenting on continuing racial economic disparities in American cities).

[16] [citations to be provided from unconscious bias articles]. On the persistence of racial discrimination in employment, *see* Devah Pager, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007).

[17] [citations to be provided from unconscious bias articles].

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

[19] *See supra*, note 3.

to open opportunities and eliminate discrimination – as sufficient proof of purposeful discrimination.[20]

Taken together, the Court's race decisions over the past few decades make it quite easy for white plaintiffs to make out a claim of reverse discrimination to invalidate good faith legislative and executive efforts to achieve meaningful equality; but near impossible for minority plaintiffs to make out a claim of discrimination, even if the circumstances closely resemble traditional discrimination against minorities or pre-*Brown* segregation.[21] The Court has essentially established two distinct sets of rules, assumptions, and approaches – one characterized by insensitivity to race and the other by hypersensitivity to race. Which applies in particular circumstances depends on whether whites or minorities are claiming discrimination.[22] The result of this retrenchment is that over the last few decades almost all of the winning plaintiffs in equal protection race cases before the Supreme Court have been white.[23]

In the courts and in American society and culture generally, the stigma of racial impropriety has moved from discriminating against minorities to discriminating against white people. Challenging discrimination against minorities is now regularly referred to disparagingly as "playing the race card," although we are still living with the unfulfilled promise of the civil

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

[21] *A Brief History of Race and the Supreme Court*, *supra* note 1, at 764.

[22] *A Brief History of Race and the Supreme Court*, *supra* note 1, at 764-65 and n. 49. I have characterized this as a "dual system" rather than the uniform system the Court purports to apply to all discrimination claims, an analysis developed in a series of writings. *See* supra, note 1. Since *Brown*, there has been an easy and irrepressible, but seldom documented, tendency to see the courts as ardent supporters of civil rights and civil liberties; but there are only two periods in our history characterized by sustained, systematic protection: from about 1937 to 1944 and from about 1961 (or 1954) to 1973. *A Brief History of Race and the Supreme Court*, *supra* note 1, at 766-67.

[23] *A Brief History of Race and the Supreme Court*, *supra* note 1, at 764. There are some exceptional areas where there have been some successes by blacks and other minorities, most prominently jury representativeness, which raises the rights of litigants to a fair trial and the legitimacy and integrity of the courts in addition to underrepresentations of particular groups. *See* Taylor v. La., 419 U.S. 522, 530-31 (1975); *see also* Duren v. Missouri, 439 U.S. 357 (1979); Berghuis v. Smith, 130 S. Ct. 1382 (2010). *See generally*, Kairys, Kadane and Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Calif. L. Rev. 776, 784-88 (1977).

rights years, and with the lost opportunity. Many of our current woes, including the range of racial and urban problems, are traceable in large part to the failure in this period to deal with contemporary or future discrimination and the effects of past discrimination and segregation.[24]

The judicial retrenchment was led by a Supreme Court justice who opposed equality for African Americans and other minorities right from the beginning.[25] At the helm as the Supreme Court decided, with all its moral as well as legal authority, how far and how deeply we would deal with our terrible history and daily reality of racial oppression was a justice who actively opposed even the earliest moves toward equality and away from segregation – Chief Justice William Rehnquist.[26] As a law clerk to Justice Robert Jackson in the 1950s, Rehnquist wrote a memo to Jackson urging that he not go along with what became *Brown v. Board of Education*.[27] He said in the memo that the "separate but equal" principle of *Plessy v. Ferguson*[28] is "right and should be reaffirmed." Rehnquist urged in another memo that Jackson approve of all-white electoral party primaries: "It's about time the Court faced the fact that the white people of the South don't like the colored people."

The period of invalidation of measures that disadvantage blacks or other minorities as constitutional violations of equality was very short, a couple of decades, and essentially limited

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[24] *See A Brief History of Race and the Supreme Court*, at 756.
[25] In politics and popular culture, the leading figure was President Ronald Reagan. [citations and analysis to be provided].
[26] *See* David Savage, TURNING RIGHT, THE MAKING OF THE REHNQUIST SUPREME COURT ch. 2 (John Wiley & Sons 1992). As a young attorney in Phoenix, Rehnquist opposed a public accommodations law proposed in response to the city's embarrassment when at a national meeting of lawyers a top hotel refused to admit Jewish guests; he was active in "poll watching teams" accused of obstructing voters in African American and Hispanic neighborhoods; and he opposed a school integration proposal with the argument that "[w]e are no more dedicated to an 'integrated' society than we are to a 'segregated' society." In the Reagan justice department, he vehemently opposed the proposed equal rights constitutional amendment guaranteeing equality for women. In the 1950s and 1960s, opposition to integration and to the civil rights acts defined conservatism. For example, the Civil Rights Act of 1964, which prohibited discrimination in public accommodations, was opposed in the House by a moderate conservative from Texas, George H.W. Bush. http://www.pbs.org/newshour/character/essays/bush.html.
[27] 347 U.S. 483 (1954).
[28] 163 U.S. 537 (1896).

to explicit measures,[29] followed by a few decades in which the impossible burdens to prove a constitutional violation were erected and affirmative and remedial action were invalidated or undermined.[30]

Alongside and not unrelated to these legal developments, non-explicit forms of discrimination against African Americans and other minorities grew in number and significance, and became more easily non-explicit. It became easier to discriminate, whether one does it purposefully,[31] routinely, out of a bad habit, unconsciously, or whatever. Whites – with racially distributed federal government subsidies in hand, including the notorious practice of "redlining" that deprived blacks of the same housing subsidies and source of family wealth[32] – left cities for white suburbs. Whites and minorities were increasingly separated geographically; advantage and disadvantage could be described as a matter of where one lived rather than one's race.

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[29] *See* Smith v. Allwright, 321 U.S. 649, 663-66 (1944) (holding that poll taxes inflicted on voters by Texas law is state action of discrimination implicating Fifteenth Amendment); Mitchell v. United States, 313 U.S. 80, 92-94 (1941) (holding that denial of equal accommodations to black man on interstate railroad was violation of Fourteenth Amendment); United States v. Classic, 313 U.S. 299, 320 (1941) (holding that primary election "is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it");Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 352 (1938) (holding that denying a black man admission to law school within the state was violation of Equal Protection Clause of Fourteenth Amendment); Brown v. Mississippi, 297 U.S. 278, 286-87 (1936) (holding convictions based solely on confessions obtained using brutality and violence violate due process); Grovey v. Townsend, 295 U.S. 45, 55 (1935) (holding that respondent did not violate constitutional rights of petitioner when he obeyed Texas law denying petitioner a ballot in primary election); Norris v. Alabama, 294 U.S. 587, 591 (1935) (holding that petitioner was denied equal protection under Fourteenth Amendment when black people were excluded from serving on jury during his rape trial); Powell v. Alabama, 287 U.S. 45, 71-72 (1932) (holding that failure of the court in assigning counsel where defendants were unable to employ counsel violated due process); Moore v. Dempsey, 261 U.S. 86, 90-91 (1923) (holding that defendants were denied due process where recent race riots influenced their trial); United States v. Thind, 261 U.S. 204, 208-09 (1923) (interpreting "white persons" in an immigration statute with the "common usage" of white people); Newberry v. United States, 256 U.S. 232, 258 (1921) (holding that Congress's power over holding elections does not extend to control over party primaries and selection of candidates and reversing conviction of candidate for senator for violating a Congressional act regarding campaign contributions); Buchanan v. Warley, 245 U.S. 60, 81-82 (1917) (holding that ordinance that prevented a white man from selling property to a black man because of race violated due process under Fourteenth Amendment). *See generally A Brief History of Race and the Supreme Court*, *supra* note 1.

[30] *See supra*, note 17.

[31] The new purposeful discrimination rule, perversely, facilitates purposeful discrimination. A purposeful discriminator can avoid any legal responsibility by purposefully framing actions nonracially and refraining from expressing any racial motivation. *See A Brief History of Race and the Supreme Court*, at 754-55.

[32] *See The House We Live In*, episode 3 of *Race: The Power of an Illusion* (California Newsreel 2003) (discriminatory housing subsidies and policies made it easy for working class and middle class whites to buy homes in white suburbs and provided their main source of family wealth).

Differences in funding per pupil in public schools, for example, could be characterized as geographic. Funding of school systems is based on the local tax base, so, the rationale went (and goes), too bad, but we can't do much for schools in poor areas that happen to be black.[33]

Whites in the new white suburbs got discriminatory, preferential treatment on housing, schools, healthcare, work, financing, insurance, veteran's and other benefits, and the costs of just about everything – much of it implemented or facilitated by governmental policies and practices. For example, school funding formulas and mortgage and zoning policies that had previously favored whites explicitly still favored whites but were framed in terms of geography and characteristics or circumstances other than race.[34]

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

The use of social science and statistics to prove what we're now calling unconscious racism presents a possibility of dealing with at least some of these problems in the current

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[33] [citations to be provided on the state of inner city schools]. *See also* Big Urban Schools Grapple with Multiple Problems, http://www.npr.org/templates/story/story.php?storyId=4678683; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that reliance on separate tax bases is an acceptable way to fund state schools even if it results in inter-district funding inequalities).

[34] *See, e.g.*, IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE, AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 25-79, 113-41 (2005) (discussing preferential treatment whites received in welfare, employment, and veteran benefits); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID, SEGREGATION AND THE MAKING OF THE UNDERCLASS 1-2 (1993) (examining residential racial segregation and its impact on American society); RACE – THE POWER OF AN ILLUSION: EPISODE 3: THE HOUSE WE LIVE IN (California Newsreel 2003) (transcript available at www.newsreel.org/guides/race/ Transcript%20Show%203.htm) (contending that playing field is still not level and "colorblind" policies perpetuate inequality); *see also* DERRICK BELL, SILENT COVENANTS 9 (arguing that policy makers only act to remedy racial discrimination when it does not significantly diminish "whites' sense of entitlement"). Katznelson frames the advantages to whites as a form of affirmative action. There is another, regularly overlooked form of affirmative action extended earlier to whites who had suffered discrimination: preferences in hiring and employment by our major cities. *See A Brief History of Race and the Supreme Court*, at 755-56 & n. 17.

context, and that's why we're here.[35] It may not be generally sufficient to provide proof of purposeful discrimination under the constitutional standard, particularly if that is taken, most restrictively, to require proof of conscious purposefulness; but that is a possibility, and there are statutory standards that are different and not quite as difficult to prove.[36] Justice Ginsburg recently confirmed this potential, and the ongoing persistence and significance of unconscious racism.[37]

We have a great symposium cast to deal with this problem. First there's a panel on unconscious bias in social science and law, where we take on the basic issues, and then panels on two specific applications: employment discrimination and predatory lending.[38]

[35] [citations to be provided].
[36] *See* Michael Connett, *Employment Discrimination Against Ex-Offenders: Reviving the Disparate Impact Remedy Through Engagement of State Fair Employment Practice Agencies (FEPAs)*, 83 TEMP. L. REV. ____ (2011).
[37] Ricci v. DeStefano, 129 S. Ct. 2658 (2010) (observing that City officials had cautioned that "even if individual exam questions had no intrinsic bias, the selection process as a whole may nevertheless have been deficient," at 2693; and that "[e]ven if the exams were 'facially neutral,' significant doubts had been raised about whether they properly assessed the key attributes of a successful fire officer," at 2695; and that, in general, after Title VII took effect, "[m]ore subtle—and sometimes unconscious—forms of discrimination replaced once undisguised restrictions," at 2696 (Ginsburg, J., dissenting)). *See also* Gratz v. Bollinger, 539 U.S. 244, 300-01 (2004) (Ginsburg, J., dissenting).
[38] The other symposium papers published here are: Susan T. Fiske & Eugene Borgida, *Standards for Using Social Psychological Evidence in Employment Discrimination Cases*, 83 TEMP. L. REV. ____ (2011): Amy Wax, [title forthcoming], 83 TEMP. L. REV. ____ (2011); Charles L. Nier, III & Maureen R. St. Cyr, *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act*, 83 TEMP. L. REV. ____ (2011); see also *Employment Discrimination*, supra note 36.