ARTICLE: **POST-INTENT** RACISM: A NEW FRAMEWORK FOR AN OLD PROBLEM

NAME: Imani Perry *

BIO: * Imani Perry is an Associate Professor of Law at Rutgers School of Law in Camden. She received her Ph.D. and J.D. from Harvard University. Professor Perry is currently working on a book under contract with New York University Press on race in the contemporary United States. She wishes to thank several people for feedback on this article, or on presentations related to this article: Matthew Adler, Anita Allen-Castellito, Regina Austin, Michael Eric Dyson and Tukufu Zuberi.

 SUMMARY:
 ... The first says that racism has been largely ameliorated in our society, but the gaps persist because of moral and cultural deficits among particularly low achieving populations, especially poor blacks, as well as misguided remedial efforts which encourage dependence and victim complexes rather than striving and achievement. ... Are we seeing evidence that race merely acts as a proxy for entrenched poverty and its culture? Is the disparate impact that we note simply a reflection of an economic or cultural state, not race? John Rex's definitions from a sociology of race relations provide a guide for understanding the structure of racism, and how deeply connected it is to the social definitions of race. ... While the current theory supporting racial inequality as a practice is not biologically based, there are still popular theories, mostly based on cultural and moral deficiency, which result in the practice of discrimination. ... Thus, evidence of disparate impact upon races caused by state action alone cannot constitute unconstitutional racial discrimination. ... Racial coding and linguistic proxies for race like "inner city," "fatherlessness," and "crack baby," extended the racial narrative by alluding to race without any requirement for specific reference. ... The problem with ascribing old-fashioned racism to current racial inequality is both a practical and ethical one. ... If, as suggested earlier, we look to these proxies for group membership, and not just race, as a source of inequality, then we may address much more racial discrimination. ...

 TEXT:
 [*113]

 [*114]

I. Introduction

 From our various points on the political spectrum, we all look to the current state of black and brown people in the United States - the persistent gaps in income, education, health, crime and more - with frustration. Two principle explanatory frameworks describe why the gaps persist despite our nation's transformation under the moral authority of the civil rights movement. The first says that racism has been largely ameliorated in our society, but the gaps persist because of moral and cultural deficits among particularly low achieving populations, especially poor blacks, as well as misguided remedial efforts which encourage dependence and victim complexes rather than striving and achievement.

Proponents of such arguments are the self-described "racial realists." [n1] The other framework maintains that the civil rights revolution failed to resolve the structural inequalities that are responsible for ongoing poor outcomes for people of color. America is still experiencing the effects of a historic, as well as contemporary, racially discriminatory society with inadequate policy and judicial responses to racism. These are the well-described "structural racism" advocates.

The dominant distinguishing features of these explanatory frameworks are where they locate blame and resolutions for these problems. Two other features of these arguments are particularly relevant: whether they promote solutions driven by actors internal or external to the communities at issue, and whether they focus on individuals - including their intentions, values and responsibilities - or institutions like the community, the state and the government. This article constitutes an intervention into the scholarly debates between racial realists and their structural-racism counterparts. [n2] I reject the conventional party lines of these two groups, and instead promote both a distinct paradigm for understanding the practice of racial inequality in the post-civil rights era and community-oriented and capacity-building responses based on this paradigm.

It is immediately clear that my work shares something with the structural racism group because of its interest in addressing racial inequality as a practice. That is, it does not accept the belief that racism is dead or dying. On the other hand, this work takes seriously evidence showing that most Americans of all races believe racism is bad, [n3] and self-report that they do [*115] not hold racial animus. [n4] Therefore, the first question in my analysis is: how do we reconcile the American value of equality and egalitarianism with evidence of persistent inequality in everything from criminal justice to medical testing and child welfare? [n5]

I reconcile this dichotomy with a descriptor: Post-Intent Racism or - as an era designation - Post-Intent Times. This moment can be described with three separate elements. First, Americans generally no longer believe in deterministic accounts of race, nor do they engage in intentionally racist acts as racism is defined in our popular culture. Instead, bias occurs because of unconscious aversions. Second, group position theory reveals a fundamental tension between our sense of group membership and our belief in racial equality, a tension that impedes the goal of equality. Finally, members of all groups, including racially disfavored groups, are strongly influenced by racial narratives that affect the ability of decision-makers to make race neutral evaluations of parties over whom they exercise power. In fact, these narratives encourage people to discriminate against members of racially disfavored groups. The cumulative effects of decisions that disadvantage people of color because of the impact of racial narratives are dramatic and structurally relevant. Ultimately, institutions and communities working towards solutions for inequality must destabilize racial narratives, even the current narratives about how to solve racial problems, insofar as they reflect and produce disadvantaging and exclusionary practices.

This description of "Post-Intent Racism" does not emphasize racism as an individual act, but rather as cultural and social practice. However, it also recognizes that individual agents who are influenced by culture and society exercise much power over the practice of racial inequality. Solutions for inequality in these times must not rely solely on a construct of racism as that which is intentional and deterministic, but must also impact the process of individual decision-making.

[*116]

II. Post-Intent Times, Post-Intent Racism

A. Defining Post-Intentionality

In 1965, Daniel Patrick Moynihan released his famous, or infamous, report decrying the pathological domestic behaviors of the black poor. [n6] The following year, Dr. Martin Luther King Jr. moved into a Chicago slum to draw attention to the deplorable living conditions for citizens there. [n7] This period of the mid-1960s marks the political beginning of the scholarly conflict now occurring between the "realists" and "structuralists."

Communications scholars Jimmie Reeves and Richard Campbell describe the late twentieth century belief in "cultural Moynihanism" as the idea that moral values, discipline and a work ethic could break the cycle of dependency that debilitates the poor and especially the black poor. [n8] While Dr. King was one of the few black public figures who did not loudly protest Moynihan's report, he spoke against Moynihanism with his actions. He wanted to call upon the nation to respond to the suffering created by poverty, and generate political movement among citizens - both inside and outside of those impoverished communities - to respond to poverty in the United States. His vision was based neither exclusively on policy nor "bootstraps." It was one of participatory democratic transformation.

Today, most Americans have adopted Dr. King's belief that racism is immoral, and that valuing racial classification over individual character is wrong. [n9] But a problem remains: When King said "let us be judged not by the color of our skin, but by the content of our character," perhaps he was not prepared for the widespread impugning of black character in the twenty-first century, not on a deterministic basis, but through what appears to be race-neutral evaluations regarding behaviors, culture and morality. [n10]

There is a question of whether what has been outlined is adequately described as racism. Are we seeing evidence that race merely acts as a proxy for entrenched poverty and its culture? Is the disparate impact that we note simply a reflection of an economic or cultural state, not race? John Rex's definitions from a sociology of race relations provide a guide for understanding the structure of racism, and how deeply connected it is to the social definitions of race. Rex describes the construction of races as:

 [*117]

 1. A situation of differentiation, inequality and pluralism as between groups.

2. The possibility of clearly distinguishing between groups by their physical appearance, their culture, or occasionally merely by their ancestry.

3. The justification and explanation of this discrimination in terms of some kind of implicit or explicit theory, frequently but not always of a biological kind. [n11]

 Rex's definitions do not require a particular brand of racial animus, but do require a practice of discrimination that can be theorized. While the current theory supporting racial inequality as a practice is not biologically based, there are still popular theories, mostly based on cultural and moral deficiency, which result in the practice of discrimination.

Nevertheless, the description of racism in popular culture continues to involve: (1) deterministic conceptions of people according to race, i.e., you are black and therefore you will have X inferior characteristic; and (2) deliberate efforts to disadvantage someone because of race, i.e., no blacks or Mexicans need apply. [n12] This is evident from our colloquialisms: Judging someone by the color of his skin, color-blindness, "I do not see you as black" and "we are all the same under our skin," for example. It is also evident from the state of our law. [n13] However, these intentionalist and deterministic definitions of racism describe the biases of a quite small number of Americans. Our legal definitions are outdated.

This work understands law itself as a cultural institution. [n14] The law and court decisions have enormous influence over racial realities and perceptions. This may be because the law has been used to define race and racial borders since the nation's formation. [n15] Moreover, the law has always been a critical agent for change in moments of racial transformation in the United States. [n16]

The cultural studies method interprets social practices, but has failed in many ways to use the abundant social science literature on the attitudes, practices, and social realities regarding race. Examining the law while ignoring the social science literature produces an incomplete set of information for cultural analyses. It also risks over-representing

the particular intellectual biases of the author, rather than being a social practice oriented development of cultural theory. [n17]

This work uses case law as a lens through which to understand the limitations of our current conceptions of race, and to encourage new ways of thinking about race. It is not about measuring whether a given judicial **[*118]** result is correct or not, but rather understanding the law as part of the fabric of cultural practice and formation and as a tool for democracy.

B. Intent at Law

In the context of race, the culture of law is in many ways the law of culture. The intent based standard for measuring discrimination in law and culture reflects the political choice Owen Fiss identified years ago: the choice of anti-classification responses to racial inequality rather than anti-subordination ones. [n18] While the civil rights movement brought the moral imperative, the courts and legislators fashioned the remedies. In the early post civil rights era, federal civil rights legislation was a primary means by which the rights of people of color were protected. [n19] As Jack Balkin and Reva Siegel have noted, even in the contemporary era in which all racial classification is subject to strict scrutiny, and yet racial discrimination is extremely hard to establish, there remains a concern with racial subordination in our law - even if the concern is insufficient. [n20] There is a tension between goals and means at the heart of our deep ambivalence about the failure of anti-racist ideology to respond to racism's ongoing prevalence.

The United States Constitution provides a baseline of protections against racial discrimination under the Fourteenth Amendment. These protections are extended by federal and state legislation. Currently, the constitutional standard for establishing invidious racial discrimination under the Fourteenth Amendment of the United States Constitution requires the complaining party to prove intentional or purposeful discrimination. [n21] Thus, evidence of disparate impact upon races caused by state action alone cannot constitute unconstitutional racial discrimination.

The legislative standard under Title VII of the Civil Rights Act provides another basis for establishing racial discrimination. Under that act, employers are prohibited from racially discriminating against employees and evidence of invidious discrimination may be established by showing that there is a disparate impact upon members of a racial group, if that disparate impact cannot be explained by a rational and race neutral measure. [n22] The quandary is that although disparate impact does not require evidence that an employer acted intentionally, it is quite expensive to garner compelling evidence that shows disparate impact.

In contrast to the Title VII context, the Supreme Court's recent series of decisions have limited Congress's power to substantively interpret the scope of rights under Section 5 of the Fourteenth Amendment. [n23] Moreover, **[*119]** the Court has held that private discrimination is beyond the reach of Section 5 altogether. [n24] As a result, Congress is significantly limited in extending anti-discrimination protections beyond the Fourteenth Amendment. Although none of these cases are race discrimination cases, all are relevant to the legal efforts to respond to racial discrimination because they are Fourteenth Amendment cases.

In these recent decisions, the Court has also abandoned a rational basis standard of review for Section 5 legislation. Instead, it has adopted a standard of "congruence and proportionality" which imposes stringent standards for legislative evidence that has yet to be satisfied. The Court thereby limits the power of Congress and lower courts and also dictates a particular ideology of what will constitute discrimination for the public at large. In Alexander v. Sandoval, 532 US 275 (2001), the Court held that no private cause of action can be premised on Title VI regulations containing a disparate impact standard because Title VI reaches only instances of intentional discrimination. [n25] Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in federally funded programs.

The Court's anti-classification measures mean that while it is increasingly difficult to establish discrimination claims, it is also extremely difficult to fashion remedies to racial discrimination because of the strict scrutiny applied to all racial classifications. [n26] Reva Siegel, critiquing the state of antidiscrimination law, points out that it "exposes

serious inconsistencies in the Court's reasoning about race." When it strikes down race-conscious remedial plans, the Court employs what she calls a "thin" conception of race - race as a "morphological accident" and race as "analogous to blood type." "Using this thin understanding of race, the Court rejects the arguments advanced by advocates of diversity and affirmative action who employ racial classification as a proxy for differences in history, culture, and experience. It sees those arguments as impermissibly stereotyping racial groups. But when minority plaintiffs challenge state policies that create or support racially disparate outcomes in housing, employment, criminal justice, and schools, this same Court uses a 'thick' conception of race to justify leaving those outcomes undisturbed." [n27]

At least two more observations are clear about the state of the law: First, it is inconsistent. There are different standards for establishing discrimination under different bodies of law. Yet, at the same time, the law is **[*120]** moving towards a uniform position that discrimination is a conscious act. During the period in which intent has become increasingly important for establishing illegal racial discrimination, citizens' self-reporting of racial discrimination has diminished. Additionally, over this period there has been a growing body of evidence, particularly in the field of cognitive science, showing that much racial discrimination is unconscious or unintentional.

C. Cognition Research and Race

In a 1987 article, Georgetown law professor and critical race theorist Charles Lawrence argued that requiring a showing of discriminatory purpose before invalidating legislation as unconstitutional under the Fourteenth Amendment ignores the fact that racial discrimination is often the result of unconscious racial motivation. [n28] Eighteen years later, Jerry Kang, a law professor at UCLA, published an article with the same underlying theme that used the substantial body of cognitive research on race which had grown in the intervening years. Kang used the data to show the amount of unconscious racial bias, and applied that information to challenge recent FCC rulings permitting media ownership consolidation and failing to enforce diversity. [n29]

Kang cited data from a wide swath of researchers, ranging from word associations based upon pictures of individuals belonging to particular racial groups, [n30] to the interpretation of behaviors - such as one's likelihood of carrying a gun - according to racial membership. [n31] He found that most people in the United States appear to have racial biases that operate on an unconscious level. Interestingly, while Kang does not focus much attention on it, one of the studies he cites also demonstrated that members of a racial minority group might have biases against their own group members too. This study suggests that many minorities internalize the biases of society at large. [n32]

While this information does provide a legitimate basis for questioning the intent standard, it does not go far in giving information about how the effects of racial bias come to pass. Even if we acknowledge the existence of unconscious bias, are we prepared to say that it is so powerful that it destroys **[*121]** our ability to reason and deliberate? If it were that powerful, how could we have any hope of overcoming it? Unconscious bias research alone says little about how people's unconscious biases affect their behavior. This absence is particularly felt in the context of actions that do not take place as a result of split second decision-making. For instance, in Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care, the authors conclude that "when differences in treatment attributable to insurance, access to care, health status, and other factors are eliminated ... racial and ethnic healthcare disparities still remain." [n33] However, we do not know enough about the explanation of "unconscious bias" to understand how race changes a doctor's deliberation process in responding to a situation.

Dorothy Roberts' research on child welfare similarly demonstrates the deficiencies of unconscious bias research. [n34] Knowing about the existence of unconscious bias alone cannot explain why a social worker is more likely to remove a child from her home when she is black as opposed to white, [n35] with otherwise comparable factors at play, because social workers do not make split second decisions. They follow rules and protocol. Much of the practice of discrimination is conducted by actors who deliberate and make decisions, some in professional capacities as teachers, doctors, lawyers, policemen, social service agents, judges, and employers and others in their private lives as home owners and civic group members. It is too simplistic to conclude that unconscious bias explains why these professionals' deliberations so often disadvantage blacks and Latinos. Are individuals so subject to reflexive reactions that their

deliberative capabilities cannot overcome racial aversions? These actors, particularly when operating in a professional capacity, use specific criteria to make evaluations. They make decisions by using precedent, as well as by judging individuals on the basis of several factors dictated by a combination of professional training and experience. In many if not most of these professions black people, and in many cases Latinos, are judged more harshly. [n36] This may not be intentional per se or rooted in racial animus. It may be better explained by looking beyond racial bias and investigating how these actors interpret the lives of individuals they encounter.

Historically, the discriminatory exercise of discretion has always been a means by which racism has manifested itself, intentionally or otherwise. [n37] It is a popular misconception that pre-civil rights era racism was exclusively **[*122]** that which was superficially evident. Facially race neutral discriminatory policies appeared immediately after the passage of the Civil War Amendments. [n38] There was clearly, however, deliberate deception in previous eras with respect to the idea of race neutrality, where intentional racism was masked as race neutral evaluation. [n39] Critical race theorists have argued in recent years against any claims to race neutrality by stipulating that our normative conceptions entail advantages for whites that masquerade as meritorious but really only serve to support the racial status quo. [n40] Instead of claiming that the standards deceptively obscure intentional racism, critical race theorists call into question the objective standards themselves because they replicate racial disadvantage. But, even before tackling the more difficult question of standards, we can show that the application of standards is quite unfair. Moreover we should distinguish between standards that are rational and those that merely reflect cultural biases and yet in their application have material consequences. [n41]

This "disparate judgment" phenomenon occurs in the conscience of the individual who is inquiring and in whom discretion lies - not because he or she believes the party they are judging will necessarily be a certain way because he or she is black, but because of the belief that African Americans have a particular set of behaviors, demographics, and pathologies against which each individual is expected to prove him or herself. In every segment of the African American population there is a hypervigilant awareness of this belief. In previous generations it manifested in the bourgeois disapprobation "don't show your color." In contemporary colloquialisms, it is the pejorative "that's so ghetto."

D. The Dispersal of Racism

In one of Chris Rock's comedic routines, he distinguishes between "black folks" and "niggas," saying to the audience that black people do not like niggas either. [n42] To niggas he ascribes all the negative characteristics generally associated with the black poor: lazy, criminal and excessive. Perhaps a dramatic scholarly corollary to this is the evidence presented by the racial response research done at Harvard and Yale, which shows that a high percentage of African Americans have a negative association with black images. While not as high as for white Americans, it is higher than one might expect. [n43]

Individuals on the right and left [n44] have criticized the use of Kenneth Clark's doll studies in justifying the decision in Brown v. Board of Education. [n45] **[*123]** Interestingly, legal scholars have rarely interpreted the studies as evidence of the quandary of intra-racial discrimination. Measures of self-esteem for African American children are high, especially African American girls. [n46] There is often, however, a marked difference between self-esteem and group esteem. One can have poor group esteem and high self-esteem. [n47] The choice of the white doll as the "pretty doll" did not necessarily suggest that the individual child had poor self-esteem, but suggested the child may have understood that the black doll belonged to the group marked as inferior.

When applying the issues raised by this observation to the contemporary era, one realizes that not only are we post-intent and post-deterministic regarding how racism manifests, but also perhaps from whom it manifests. It is not necessarily the case that one must have a white bad actor to have discrimination against racial minorities. Courts have acknowledged this. But as Tanya Hernandez has noted, acknowledging it and parties actually prevailing in cases of intra-racial discrimination are two totally different matters. [n48] This is of particular concern because within racial groups there are growing numbers of sub-groups who have inter-group conflict intra-racially which may be based on ethnicity, color, class, or some other variable tied to notions of race, even if it is not simplistic racial animus against X group.

Discrimination among groups of racially marginalized people complicates the challenge of responding to unconscious bias, and particularly the usefulness of the "role model" as a formula for responding to racial bias, since the proposed role model may be subject to similar kinds of biases against people of color as whites. [n49]

E. Group Position Theory

Although cognition research shows unconscious bias both intra-and inter-racially, we still have the difficulty of showing how this fits within the puzzle of deliberation that leads to racial inequality as a social practice. Two other bodies of information help us answer this deliberative question. The first is the work of sociologists who use group position theory to provide explanations of contemporary racism. One such scholar, Lawrence Bobo, terms contemporary group position oriented discrimination "laissez **[*124]** faire racism." He and his colleagues have described the shift from "Jim Crow racism" to "laissez faire racism":

We have seen the virtual disappearance of overt bigotry [at least in polite society], of demands for state imposed segregation, of advocacy of anti-Black exclusion and discrimination in the labor market, and of adherence to the belief that Blacks are the categorical intellectual and temperamental inferiors of Whites... . Laissez faire racism involves a persistent negative stereotyping of Black Americans, a tendency to blame Blacks themselves for the Black-White gap in socioeconomic standing, and resistance to meaningful policy efforts to ameliorate America's racist social conditions and practices, with the latter views substantially rooted in perceptions of threat and the protection of collective group privileges. [n50]

Bobo argues for a group position theory of prejudice, which links in a useful way the decision making of individual actors to the larger social structure in which they participate. Importantly, Bobo identifies competition as well as symbolic racism as the source of racism under the group position theory. He uses Blumer's group position theory of prejudice to make his argument with the intent of "theorising how social structure comes to shape individual psychology and socially consequential behavior. It is neither a sociological approach interested only in the macro-level, structural dynamics of race, nor one that defines individual psychological dynamics as relatively unimportant." This normative belief brings an agency to the construct of laissez faire racism: it is not simply a structural or instrumental phenomenon; it is acted upon. [n51] Bobo applies this argument by conducting research on competitive threat from the perspectives of multiple groups and examining the impact of competitive threat on policy attitudes and preferences. Finally, he uses the group position framework to theorize changes in whites' racial attitudes in the United States. [n52]

In studying the Chippewa Indians' treaty rights controversy between 1983 and 1992, Bobo and his colleague Mia Tuan demonstrate that whites opposed the treaty because of the perceived threat of economic gains by Indians. [n53] They argue that many white people see themselves as losing ground compared to members of minority groups. [n54] In his 1992 study of ethnic antagonism in Los Angeles, [n55] Bobo revealed that competitive threat impacted all groups, although with respect to different variables. The sense of threat was not necessarily correlated to the size of the group. [n56] Other factors involved were the relative economic resources of the groups, the specific social domain in question, and the overtness and intensity of prior or current conflict between the groups. Hence, the manifestation of group position based prejudice depends upon the relative position of the groups-economically, geographically, and politically.

[*125] Cognitive researchers have considered group preferences as a basis for the practice of racial bias as well. Gaertner and Dovidio have demonstrated that people will avoid acting in ways that are generally acknowledged to be racist, especially if they are liberals. [n57] However, when there is a space for discretion, in which there is no public statement that such bias is evidence of racism, they will act with preferences for whites or members of what Gaertner and Dovidio have termed "in groups" for the evaluating parties. [n58] Two things are notable with this evidence: First, people interpret the racial implications of their actions according to narratives that are popularly held about what racism

is or is not. Second, parties may disadvantage people of color, even while vociferously stating that they are not "racist" and without evidence of any form of deliberate racial animus.

Moreover, Gaertner and Dovidio show that it is especially true that the bias presents itself when it is possible to ascribe it to some other factor. Therefore, a legal standard which demands a race-neutral factor for justifications of discriminatory impact [n59] actually serves the form of racial discrimination that is common among white liberals. It is often only when one can find a "race neutral" measure, regardless of whether it is rationally related to the form of discrimination, that one feels comfortable acting in a discriminatory fashion. [n60] In particular, according to the findings in these cognitive and sociological studies, the creation of norms that are proxies for races - rather than rational ideals - serves a purpose. [n61] In order for a court to begin to be able to account for this, it would have to do a multivariable analysis not only of race neutrality and rational basis, but also of the relationship between the neutral factor and the presence of members of the suspect class, and whether the neutral factor actually allowed a justification for discrimination in the specific case and perhaps even in a larger social context. [n62]

The work of Bobo and his co-authors, along with Gaertner and Dovidio, indicates a conflict between the way members act in the interest [*126] of their group and their proclamations of egalitarianism. In particular, it may demonstrate why white Americans when surveyed may acknowledge the existence of racial inequality and yet be resistant to remedial measures to racial "unfairness." It reflects, as Bobo says, a laissez faire attitude towards inequality, that may be motivated by feelings of group competition that trump national ethos compounded by an easy reliance upon "neutral principles" in making evaluations of what should happen to groups of people. [n63]

This does not explain, however, the discriminatory behavior of actors whose behavior is not tied to group interests. What group interest does a physician have in providing inferior care to black patients? [n64] In particular, professional contexts would seem to cut against the bias created by sense of self, a proxy for group interest, as well as the "gut" unconscious bias reaction. In areas that may have economic consequences but do not reflect economic competition, there is not enough information to explain the intervention of race into the deliberative process with such dire consequences. And this is where I believe we must return to narrative. In particular, we must confront the disadvantaging racial narratives that intervene in our deliberative processes and shape our interpretations.

F. Racial Narratives

In "Trojan Horses of Race," Kang argues that the turn to cognition research is perhaps a particularly fertile area for those who are working in the field of race, and particular for critical race theorists. He posits that cognition research is not as vulnerable to critique as narrative jurisprudence such as storytelling and personal reflection. Furthermore, Kang argues that because of the rise of science in law, cognition research might be capable of stronger persuasion than narrative jurisprudence. [n65] While I sympathize with his strategic concerns, there is a two-fold danger to his argument. The first is that cognitive science remains a young field. It is subject to interpretive biases and cultural influences like all sciences and particularly the social sciences. [n66] So, it cannot be relied on as definitive evidence, even if it is good evidence. Second, by bifurcating narrative and cognitive science, he discounts a highly important area of cognitive research: narrative epistemology, or the manner in which narrative plays into cognition. In The Literary Mind, Mark Turner explains that "narrative imagining - story - is the fundamental instrument of thought. Rational capacities depend upon it. It is our chief means of looking into the future, of predicting, of planning, and of explaining. It is a literary capacity indispensable to human cognition." [n67] Narrative is fundamental to the way we structure and operate within the world as individuals and members of [*127] communities. The use of parable, metonym and metaphor allow us to project a given story into new contexts. Nowhere is this more salient than in the precedent-based structure of Anglo American Law. Other cognitive and literary researchers have shared Turner's thoughts about the role of narrative in how we acquire knowledge.

Narratives shape the way people deliberate, interpret and evaluate race in society. This is not to say that narratives are akin to the use of science to justify racism in a deterministic fashion. I argue that narratives, the stories that are told about members of racial groups, are a fundamental piece of how we acquire knowledge about those groups. They are

part of how we make decisions about how to treat individual members of those groups. There is nothing unusual about this. Story making is fundamentally human. While the racial stories may be subjective, cultural, and contingent, the impact of story making is not.

In an article titled "Culture and Cognition," sociologist Paul DiMaggio argues that research at the intersection of the sociology of culture and cognitive science shows that cultural schemata provide cognitively efficient means of interpretation that are contingent, mediated, often fragmented, and certainly not deterministic. [68] Hence, our cultural schemata about race may be reflected in cognitive research without our having to resort to deterministic accounts about the ways in which race operates. Moreover, literary cognitivist Ellen Spolsky has argued that the genetically inherited epistemological equipment we share actually provides a means of avoiding cultural determinism because we can re-shape norms and interpretations through our access to narratives and schemata. [69] Spolsky sees within the cognitive dimensions of narrative the possibility for transforming its cultural manifestations. In other words, racial narratives have the potential to be changed.

Literary theory suggests that the well-worn descriptor 'stereotype' is not adequate for understanding the connection between racial imagery and inequality, and that we should look instead to narratives. Roland Barthes, in his description of the relationship between metaphor and metonymy, illuminates the relationship between stereotype and racial narrative and explains why the latter is preferable for this discussion. "Metaphor sustains any discourse which asks: 'What is it? What does it mean?' - the real question of any essay. Metonymy, on the contrary, asks another question: 'What can follow from what I say? What can be engendered by the episode I am telling?" [70]

Metonymy has a narrative component. While stereotype, like metaphor, tells you what something means, it does not tell you what will follow from that meaning in the way metonymy does. Take for example, Russian formalist, Roman Jakobson, who cites a classroom experiment where schoolchildren were asked to react to the word "hut." [71] Some of the children **[*128]** said that a hut was like a cabin (metaphor), others that it had burned down (metonymy). Racial narratives not only create a particular image, they tell you something consequential that will follow in the lives of people or characters in ways that are presumably reflective of their membership in a particular racial group. Racial narratives say: Black families move into the neighborhood and run down the quality of the homes, increase crime and therefore lead to depreciation of home values. In contrast, stereotypes say: "Black neighborhoods are poor and dangerous." It is clear then that racial narratives are more "useful" or interventionist, for example, in examining a realtor's deliberations about whether to show homes to a black family, or why white families moves out when three black families move onto the block.

Not all racial narratives are bad. Some are positive, particularly those that emerged from the history of African American political movements. Kang demonstrates, moreover, that positive racial images may be cued by messaging, and therefore argues for positive racial imaging through public service announcements. [72] Non-black people of color often have several positive racial narratives such as: "Asian Americans come to this country with little, work hard, and excel above all others." These narratives may be employed in different ways depending on the context. In one, Asian success may be seen as a counter-narrative to racism, in another it may be a means of reflecting white American anxieties about under-achievement. And for exceptionalized blacks, the Barack Obamas and Oprah Winfreys, the rhetorical shape of their successes are often "success against odds" stories that operate as positive yet exceptionalizing racial narratives.

The realms of media and politics are useful for identifying racial narratives and analyzing their influence on deliberation and evaluation. Media is often a convenient straw horse for racial images, yet is not necessarily a causal factor in racial narratives. It probably reflects far more racial ideology than it guides. However, racial narratives in mass media can be measured in much easier fashion than in many other contexts and can arguably reflect a greater social world than specific examples. For example, as Herman Gray has argued, "television is a dense site of struggle over the symbolic meanings of blackness in the production of the nation." [73] The backlash against the civil rights movement may have begun as early as 1965, but it became widespread in the early 1980s, and its most powerful symbols were stories told through media representations. As Gray writes, "The conservative claim on American national identity

depended on the production and circulation of specific representations of blackness that could function as the centerpiece of manufactured resentments, moral panics and fears." [n74] Significantly, political conservatives did not invent the discursive force of many of these images of blackness. These images had a long history even in liberal civil rights ideology. As historian Daryl Scott has argued, the idea of black Americans as culturally or psychologically damaged provided the foundation for arguments ranging from the plaintiffs' **[*129]** claims in Brown v. Board of Education to culture of poverty theses and tough on crime measures. [n75] The behavioral manifestation of this damaged state and the appropriate response to it identified the politics behind the particular argument, but few questioned whether the state was an accurate description at all. During the past twenty-five years of presidential elections, racial narratives have influenced outcomes for both Republicans and Democrats. The Ronald Reagan campaign stump speech about "welfare queens" tapped into an emotional reaction to the civil rights movement's remedial measures among recession-wounded whites. And Reagan's policies reflected that orientation. He moved the nation from remedy to punishment of Americans on the margins of the United States economy. During Reagan's presidency, the U.S. prison population nearly doubled and by 1990 the country had the highest incarceration rate in the world. African Americans in that year made up nearly half of the U.S. prison population. [n76] As Jimmie Reeves argues, "The war on drugs ... succeeded in defining social problems that grew from global transformations in late capitalism [like deindustrialization, job migration, the vanishing 'family wage' of a vanishing manufacturing economy, the flexible exploitation of fragmented labor markets in a burgeoning service economy, and the rise of transnational corporations] as individual moral problems that could be resolved by voluntary therapeutic treatment, compulsory drug testing, mandatory prison sentences, and even the penalty of death." [n77] According to this narrative, damaged and morally deficient blacks failed despite remedial efforts, which ultimately debilitated and encouraged them to be lazy or criminal. The reasonable response proposed was to no longer reward behavioral and moral failure.

The basic image of the welfare queen, like many of the most powerful racial narratives, was not new. Nor were the images of the bad black mother, the black thug, the rapist, etc. These images could be traced to the antebellum era as justifications for the control of African Americans in the form of enslavement, and to the post emancipation era as explanations for the inappropriateness of radical reconstruction. [n78] I am not making a reductive argument likening current conditions to slavery or even Jim Crow, but suggesting that we should not look for immediate past events to understand the generation and power of racial narratives. Just as, arguably, the civil rights movement could shift and create new racial narratives, the Moynihan report could bring back old ones. The nostalgic return to objective social values in the 80s, which has continued currency today, also provided a means of avoiding any self-consciousness about the appearance of deterministic or intentional racism and yet facilitated the continuation of disadvantaging **[*130]** racial narratives. Hence, colloquial formations such as "blacks need to stop whining" could coexist with the thought, "I'm not a racist."

Thomas and Mary Edsall argue that both competitive threat as well as a racially shaped moral narrative played a decisive role in elections beginning in the 1980s. [n79] As a specific racial narrative, the Willie Horton imagery of the Bush election did not simply suggest that citizens should beware of democrats and the black criminals they protect. It said something about how to expect Dukakis to act; i.e., he will advocate furlough programs that will lead to rapists and murderers coming to communities like yours to commit violent crimes. It intimated that individuals who are concerned about crime coming to their community probably should not vote for someone who will advocate policies that allow this to occur. Racial coding and linguistic proxies for race like "inner city," "fatherlessness," and "crack baby," extended the racial narrative by alluding to race without any requirement for specific reference. [n80] This allowed for a further protection against claims of racism based in determinism or intentionality.

Malcolm Cross argues, "The increased use of 'coding' was itself a reactionary response to the upsurge of minority movements of the 1960s, which discredited the use of overly racist appeals without obviating their effectiveness. The 1988 Bush presidential campaign's intensive focus on the theme of law and order and its scurrilous use of the image of a black rapist to mobilize white voters exemplifies the ongoing efficacy of racial coding in the mainstream political process." [n81] Cross' point is well-taken but in it coding can be read as a simplistic intentionally racist act when in fact the power of coding is that it need not require intentional or deterministic racism. The thing itself may

disproportionately reflect black people without being seen as equivalent to, or in absolute union with, the entire black population. [n82] At any rate, the issue of prison furlough programs raised by the Willie Horton story was a significant factor in moving Bush Sr. from a seventeen point deficit in the summer of 1988 to an eight point lead, and victory in November. [n83]

Despite the dominant discourses in which race is broken down along political party lines, the use of racial narratives in deciding elections has not simply advantaged Republicans. Clinton also saw the benefits of using racial narratives - often in the form of picture-stories, but also in speeches - to increasing his constituency. The coding began in his speech accepting the Democratic Party nomination in which he stressed "individual responsibility," **[*131]** using the term over twenty times. [n84] The party platform that year was "tough on crime" and promoted workfare instead of welfare. Clinton even left the campaign trail to witness an Arkansas execution of a lobotomized black defendant. In the Southern primaries, the Clinton team circulated a flyer showing Clinton shaking hands with a white prison warden in front of a group of huddled black prisoners. [n85] This image told the story, "Despite Clinton's Democratic Party membership, he will affiliate with the white working man, and will also control black criminals."

To return to a previous example, which provides a less deliberately manipulative context than politics, consider the role racial narratives play in physicians' responses to black patients. With some sensationalism, reporters in 2004 provided readers with a truncated version of research suggesting that physicians respond to black patients distinctly from whites. The authors of the Board on Health Sciences Policy Report, "Unequal Treatment," understood that part of the phenomenon of racial inequality in medical care had to do with the shorthand work necessary for deliberation in medical contexts. They write:

The assembly and use of ... data are affected by many influences, including various heuristics that introduce significant problems for recall and weighting. In conditions such as these, it may be assumed that cognitive shortcuts have significant value to any decision maker. Physicians, in fact, are commonly trained to rely on gestalts that functionally resemble the application of 'prototypic' or stereotypic constellations. That is, physicians use clusters of information in making diagnostic and other complex judgments that must be arrived at without the luxury of time and other resources to collect all the information that might be relevant. These conditions of time pressure and resource constraints are common to many clinical encounters and map closely onto those identified as producing negative outcomes due to lack of information, to stereotypes, and to prejudice. [n86]

In addition to reporting studies of physicians showing features of unconscious bias and aversion, these authors also argue that physicians' responses to patients vary along racial lines. The interpretation of patient symptoms and behavior is shaped by their senses of what members of those groups will do, and the responses of members of those groups are shaped by previous encounters with the medical profession. [n87] The research shows that part of the decision-making process of physicians involves assumptions they make about the likelihood of patients to comply with their directions. [n88] This is not a negative narrative per se, but if the evaluation is being made along lines of race, rather than other signifiers or behaviors, it may have the effect of being systematically disadvantaging regardless of the physician's intent. It is also a quite normal human response to the process of categorization, which tends to minimize distinctions within groups but **[*132]** maximize distinctions between groups, and shapes how information is recalled about members of groups. [n89]

The impact of these "narratives" as they present themselves in the individual patient context raises an important issue. There has been some public debate over the use of racial categorization in medicine and epidemiology, highlighting the potentially stigmatizing effect of such categorization. And yet, there are very real demographic distinctions that make collecting data on race extremely important in order to provide adequate care of communities of color. It is important to know, for example, that African Americans have higher rates of death from breast cancer. This

must be distinguished, however, from the operation of negative narrative upon treatment decisions. As literary theory demonstrates, narratives are multivalent. Derrida describes such texts as being tissues of signs. We cannot say that a racial narrative means X. This is why the same narrative has different political and social interpretations for different parties. Our social practices guide our responses to particular narratives - social goals intersect with narratives. The statement, "Black people do not take their medicine," could mean black people reasonably do not trust doctors, or black people do not care about their health, or something else altogether. But if one acts to deny the medicine, the unequal effect is the same for the individual. The punitive interpretation of narratives, i.e., "the more prisons, less resources, no medical intervention" response to the ails of poor communities, is ethically suspect. It forces us also to reconsider the roles of bias and group position as well as political discourse in the process of policy decision-making. There is a cyclical relationship between bias, group position, narrative, and inequality that must be confronted.

III. But What About Bad Behavior?:
Anticipated Critiques of the Argument

It would be disingenuous to discuss racial narratives without examining the extent to which they correlate with empirical truths about certain racial groups. Such a failure might be analogous to the fatal mistake of the Dukakis campaign in response to the Willie Horton ads. The Democratic response was to have Jesse Jackson and vice presidential candidate Lloyd Bentsen denounce the ads as racist. But the description did not take because citizens 'believed" the threat described by the advertisements to be accurate. [90]

One critique then of the racial narratives observation is that the narratives are merely reflections of empirical truths in the same way that higher rates of incarceration or child removal are. Moreover, critics may say that bad black behavior is influencing the deliberative process and that the racial narrative only serves to echo the bad behavior to which people are responding. There are several useful elements in this observation as well as several problems. In the political arena, Drew Westen shows that individuals' interpretations are dictated less by evidence and more by party affiliation [*133] and interest group membership. [91] Additionally, many cultural anthropologists argue that decision-making has more to do with social norms than "evidence." The problem these arguments pose to my analysis is that they appear to undermine the significance of deliberation and its intersection with racial narratives as part of the practice of racial inequality. Instead, they imply that people merely go along with a kind of blind group-think.

It is important to maintain a belief in the deliberative process, if one believes in either democracy or social equality. It is also true that people are decision makers, even if those decisions are often truncated. We should not discount the role of decision making even if at times it is less thoughtful than one would hope, because if we could get individuals to make different sorts of decisions we might be able to ameliorate a good deal of racial inequality.

Behavioral psychology and economics provides another way to think about this. Under the theory of bounded rationality, certain kinds of evidence presented for decision-making are not weighed completely but according to shorthand heuristics or an "adaptive toolbox." [92] But how much does the racial narrative and generalized demographic information actually lead to systemic disadvantaging through a racial heuristic? For example, knowing that black teenagers commit more crimes might be correlated to a shorthand assumption of criminality upon an encounter with a black teenager, despite its inefficiency and likely inaccuracy. That would certainly explain instances of over-policing of young black men.

The vulnerability of these arguments, particularly with respect to social ills like crime, is that they appear to readers to operate as an apologia. Acknowledging the problems of over-policing and over-enforcement are not, however, a justification for illegal behavior. Instead, they pose an equity question. Is it fair or constitutional to innocent African Americans and Latinos to have unequally or inappropriately distributed penalties? Consider the following New Jersey racial profiling case. In 1995, a New Jersey state judge dismissed charges against fifteen black drivers who, the judge decided, had been pulled over without cause. [93] During the trial, it emerged that on this particular stretch of the southern part of the New Jersey Turnpike blacks and Latinos accounted for 46 percent of the drivers stopped for speeding, even though they were only 15 percent of the speeders. [94] This evidence did not show that there was not a

higher proportion of black drug couriers along this route - the purported suspicion leading to these stops - but rather that the rate of stop was disproportionate and resulted in a discriminatory over-policing. Moreover, the effect of over-enforcement or under protection as a result of racial biases may be to de-legitimize particular kinds of authority in harmful ways. Over-enforcement may be more than inconvenient. It may be socially destructive. Thus, it is **[*134]** not the case that if there were no inequality suddenly all gaps would be gone, but rather that the gaps are exacerbated and extended by practices of inequality that are inconsistent with our stated values. In cases in which evaluations are not based on generally agreed upon good social norms, we have to evaluate whether norms are merely operating as proxies for race. [n95] Addressing crime rates is altogether a different question from confronting the disproportionate punishment of people of color.

The critiques are not only from the right, but also from the political left. Unlike some structural racism advocates, I argue that the individual decision-maker role in inequality is extremely important. In an article a recent article, Richard Delgado revisits Alan Freeman's distinction between victim-centered and perpetrator-centered responses to inequality. [n96] He argues that the question of intent, and the focus on unconscious racism, is a problematic lens through which to understand inequality. Intent and unconscious racism only consider the internal experiences of whites but not the impact upon people of color. In most cases, and particularly in the construct of law, the emotional sympathy of the law or court lies with the accused rather than the accuser. Indeed, the fact that "no one wants to be called or considered a racist" animates our sense of racial justice much more than the idea that "no one wants racism to exist." The emotional stakes in being "unintentional" with racial discrimination make the intent standard not only inappropriate but also aggressively misdirected. Hence, Delgado argues that rather than talking about unconscious racism, in which we are oriented towards the subjective emotional states of white bad actors, we should look to the material consequences of racism upon its victims.

As Delgado warns, focusing exclusively on social cognition research may lead to a perpetrator-focused account. But if we consider instead the role unconscious bias plays in the process of deliberative decisions, social practices, and their cumulative effect, it may give us information about the material conditions he argues should be at the center of analysis. Cognition may be an individual process, but it has social dimensions. Cognition is both physiological and socio-cultural. Our conceptualizations of things emerge from both socio-cultural factors and neural processes. Moreover, as studies of developmental impairment and trauma demonstrate, the brain is altered by social environment. [n97] Cognition is even political, including **[*135]** both "victims" and "perpetrators" and all the valences of the signs and symbols they use to organize the world.

Looking at structures rather than individual will, as Delgado proposes, is rooted in Marxist analysis. However, even Marx understood the importance of individual consciousness in producing or sustaining these structures. [n98] We should be wary of avoiding examinations of individual actors and their decisions. David Theo Goldberg critiques Jennifer Hochschild for locating responsibility for responding to the "plights and problems of the racialized poor primarily with those closest to the problems: the individuals directly in touch with those whose values are seen to need transforming. These include parents, schoolteachers, social workers, police, potential employers and local politicians." [n99] He negatively contrasts Hochschild's work with that of Elijah Anderson who is interested in structures of inequality. Goldberg identifies this line of thinking with the "individual responsibility account."

I am sympathetic to Goldberg's concern with the punitive dimension of the individual responsibility account and agree that Elijah Anderson's observations of structural forces are essential especially for understanding urban America. But if we do not consider the actions of social workers, police, and parents, how do we believe in the capacity of citizens to effect change? Relying completely on state action to effect change risks delimiting agency or locating it only with elites. There must be a balance between structural considerations, individual action, and capacity believing and building. The accumulation of actions of inequality, internal and external, must be confronted. We are not forced to disregard material consequences if we attend to individual action, we must be attentive to both. And our solutions must neither be completely structural nor completely individuated. Solutions must take place within the political process and within our communities to have any social impact either on perception or on people's lives.

If intent and determinism are not the basis for discrimination any longer, then they should not be the standard for evaluating federal discrimination claims. But this conclusion is insufficient without offering an alternative standard. And we cannot approach an alternative without a richer explanation of the structural consequences of racial inequality and a social agenda that would support new constitutional standards - the way the civil rights movement supported civil rights legislation and litigation. While antidiscrimination law should return to a disparate impact standard across the board, it is even more important that new racial narratives be used to shift the very conceptions leading to disparate impact.

Inequality as a practice occurs at the intersection of unconscious biases, group interest, and the use of narratives about groups - which may be accurate or inaccurate - to effectively penalize or interpret situations to the **[*136]** disadvantage of members of racial minority groups. At the same time, exceptionalism is operationalized, creating an escape hatch, [n100] either for people within groups or between groups. For example, Obama is an exception to blacks and East Asian immigrants are an exception to minorities. As well, racial narratives are neither all negative nor all positive, but contingent and fluctuating, even sometimes ideologically neutral. The solutions to post intent racism must respond to this reality.

IV. Why Isn't This Just Old-Fashioned Racism?

One of the critiques of previous bodies of scholarship arguing that it is useful to find a new explanatory framework for racial inequality is that the new frameworks do not necessarily look different from old-fashioned racism. But, after every significant social transformation in U.S. history, there has been a shift in the way race works in our society as a result of the social impact of racial ideology combined with the particularities of that moment in time, factors that are separate from values or rules. This period is no different.

Old-fashioned racism can be defined by the combination of a biologically based theory of racial inferiority and the support for formal discrimination. Other terms for old-fashioned racism have included: redneck racism, [n101] blatant racism, [n102] and classical racism. [n103] While there is a clear distinction between biological justifications for racism and others, the distinction fades when behaviors are attributed to groups without accounting for whether the root is found in biology or culture. The stereotypes of black people as lazy, stupid, amoral, loud, violent, and out of control have been in circulation for many years. [n104]

These have not depended upon advocacy of formal discrimination or biological argument for their maintenance, and yet they have been used as justifications for biological arguments as well as culture of poverty arguments about the underclass. Although there have been many theories developed about "new racism" including: symbolic racism, [n105] modern racism, [n106] subtle racism, [n107] racial resentments, [n108] ambivalent racism, [n109] laissez **[*137]** faire racism, [n110] and aversive racism, [n111] critical responses to these categorizations have often said that these new racisms are nothing more than underlying old racism with the veneer of conservative morality based politics. Others have argued that one should not differentiate between new and old racism because prejudice and stereotypes have the same result - strong evaluative reactions to a particular group - regardless of differences in terms of cognitive content. This approach is philosophically consistent with Freeman and Delgado's victim-centered approach. It suggests that the immediate causal explanation is less relevant than the impact of racial inequality and the structure of racial hegemony, which may take different forms at different moments, but ultimately supports one particular ideological norm, i.e., the superiority of whites.

The problem with ascribing old-fashioned racism to current racial inequality is both a practical and ethical one. First, it implies that little has changed since social transformations of the civil rights movement. Whether one is satisfied or not, it is undeniable that significant changes have taken place with respect to racial inequality. Moreover, because no one wants to be called a racist, or few will admit to it, why would we remain committed to a definition of racism that is difficult to establish or find a practical response to? Do we force people to admit they hold racial animus, even if it is unconscious? Should we encourage people of color to always assume that inequality has conscious malice associated with it?

Implying that inequality is completely a manifestation of thinly veneered, old-fashioned racism risks accusing the entire nation of deliberate hypocrisy. On the other hand, if we see inequality as beyond our control, if we say none of it is deliberate and all of it is unconscious and therefore irremediable, we limit our belief in the capacity for change. To advance democratic principles, one must maintain some belief in will and deliberation, regardless of whether the consequences of non-deliberate inequality mirror those of deliberate inequality. The motivations of the actor, the political unit, the civic unit, and social processes matter. For that reason, post-intent racism should be treated differently even if the consequences are largely the same. The terms of engagement are distinct. It is clear that civil rights activists saw that different rules mattered. After Brown, having the rule of law on their side invigorated the civil rights movement. Civil rights activists saw possibility within the context of formal rules for the first time in over sixty years and took advantage of it.

Particular examples of documented inequality help clarify post-intent racism's usefulness among a group of "new racism" theories. There are two areas that many people immediately interpret as evidence of old-fashioned racism, but these areas and their surrounding discourses are excellent **[*138]** examples for the descriptor "post-intent racism." These are racial name bias and racial voice identification bias, two proxies for racial group membership that are highly connected to economic, legal, and cultural inequality.

A. Case Study: Racial Name Bias

"...with names like Shaniqua, Taliqua and Mohammed and all of that crap, and all of them are in jail." Bill Cosby quoted at the NAACP gala event honoring the 50th anniversary of Brown v. Board of Education, May 17, 2004

In a recent article, Marianne Bertrand and Sendhil Mullainathan conducted a study of response rates to resumes sent to potential employers in Chicago and Boston. [n112] The fictional resumes were assigned either very African American or very white sounding names. [n113] The results showed that white names received 50 percent more callbacks for interviews. For whites, a higher quality resume elicited 30 percent more callbacks, whereas for African Americans it elicited a far smaller increase. The authors created addresses for the resumes as well and showed that living in a wealthier - or more educated, or whiter - neighborhood increased callback rates significantly for whites but not for blacks. [n114] Moreover, they found that federal contractors did not discriminate less than other employers [n115] despite more rigorous requirements under equal protection laws.

They also examined whether race specific names were a proxy for social class based upon the education of birth parents. The higher socio-economic class black names, generally African names, did not render less discrimination than those names associated with lower class blacks such as Latonya or Leroy. [n116] On the other hand, the "white names" were above average in class in general: on average the whiter the name, the richer the people. [n117]

They did find some differences among occupations. The highest discrimination ratio was for administrative supervisors, where whites were 64 percent more likely to receive a callback. Executive positions showed the lowest discriminatory response, with whites having only a 33 percent higher chance, and the second lowers gap was for clerical work, 38 percent. [n118] With respect to industry, the callback rate gap was greatest in finance, insurance and real estate, and smallest in health, education and social services. [n119] Interestingly, business related professions and mid-level professional jobs showed the greatest discriminatory response. However, there was discrimination across the board.

[*139] How you interpret the social practices explaining this research depends in part on your theory of how racial inequality operates. One who believes that new racism is merely old racism with a veneer would probably interpret this as evidence of blatant efforts by employers to keep blacks out of the interview pool - either absolutely or simply to minimize the number of black candidates that have to be considered. Proving this interpretation, however, requires

information about what happens in interviews. Are the blacks who get interviews and come into the office, the ones without racially identifiable names, rejected from the hiring pool or subject to some other weeding mechanism? Recent research by David Figlio in Florida public schools suggests that children with distinctively African American names, although more likely to be promoted to the next grade level at the appropriate time, are less likely to be recommended for gifted programs. [n120] He theorizes that teachers associate the black names with low parental involvement or socioeconomic status, and therefore do not recommend the children to gifted programs. Conversely, the students with distinctively black names are more likely to be promoted because of some positive racial identity associated with the distinctively black names that increases school success. [n121] Figlio finds, in contrast, that Asian children with racially distinctive names are more likely to be recommended to gifted programs, [n122] indicating that the name's "Asianness" is connected to positive assumptions about intelligence or school success. Moreover, he found that even within families, a child possessing a distinctively black name was less likely to be recommended for a gifted program than a sibling with a more mainstream name. [n123] This further indicates that there is a negative association with the blackness of names, rather than some familial feature or all black people. Figlio's research establishes that the aversion is not a thinly veiled form of old-fashioned racism, but rather a negative association with something that is distinctively black. One might call this the "Bill Cosby effect." The names may be a sign of undesirability because they are associated with black people. This association may well have a significant disparate impact on black students or employees without being intentional, absolute or even eliminating all black people. Still, the individual party with the "black" name may be unfairly influenced by a name that, while not an immutable characteristic, may be a powerful racial proxy.

An article by Roland Fryer and Steven Levitt considers, however, why their research does not confirm that having a distinctively black name creates economic disadvantage. [n124] The outcomes are virtually the same, regardless of how "black" a person's name. They theorize that names reflect, rather than cause, socioeconomic status, skills, and marketability. To illustrate this point, they cite the concentration of distinctively black names in **[*140]** the most segregated and impoverished communities. [n125] How then do we account for David Figlio's research, which suggests that even within families names may operate as an educational disadvantage? Perhaps it is useful to conceptualize name-based discrimination as just one of many proxies for race that operate in a person's life - along with language, dress, address, and many others. While a child named Michael, an extremely popular name for African American boys of all social classes, may not be disadvantaged by his name, there may be some other distinctively black feature that he carries which operates to disadvantage him according to a racial narrative. [n126]

The post-intent paradigm understands how name-based discrimination can disadvantage black people, but does not require looking to the internal motivations of the people involved to answer. It also shows how an irrational association, such as the correlation between mainstream names and desirability, status, and competence, is related to disparate impact.

Can the law resolve the problem of name-based discrimination? Should there be potential claims using name-discrimination as a proxy for race? How does one collect evidence or distinguish between names? Is Monique, a very popular African American name, to be treated the same way as LaKeisha? Should Arabic names, also common among African Americans, be given the same treatment as those that are of African American vintage? If those with Arabic names are being discriminated against, do we assume that discrimination is based upon national origin or race? How should the disadvantage of a white person with a black sounding name be treated? It becomes clear quickly that a legal resolution would not protect everyone. And it would be quite difficult to identify a Title VII violation, in addition to the challenge of establishing a class, case or controversy. Because of the correlation between race and culture, one can find many different iterations of this kind of problem. For example, researchers have discovered that employers use neighborhoods, addresses, and city or suburban school attendance as screening devices for employees, all of which also have operated as proxies for race and class. [n127] While it is useful to maintain standards of review in order to enforce social norms, it is unclear how we would create a coherent framework in law to address such inequalities. In fact, name discrimination shows that affirmative action is one of the few clear ways to address disadvantaging, race-neutral effects because it employs a transparent process to redress irrational norms.

[*141]

B. Case Study: Racial Voice Identification

Although racial voice identification is similar to name discrimination, it is more easily litigated. For example, in Clifford v. Chandler, the U.S. Court of Appeals for the Sixth Circuit recently ruled as permissible a lay witness's testimony that a black defendant could be identified by voice alone. [128] In reaching its conclusion, the court cited a study in which "421 students at Stanford University were asked to identify the racial identity of twenty different speakers, and students correctly identified the African American males 88% of the time." It further supported its holding by citing cases from other jurisdictions that held in favor of similar racial voice identification testimony. [129] Critics of the opinion referred to it as a ratification of linguistic profiling - negative identifications according to language patterns that operate as a proxy for race or national origin. Linguist John Baugh is the primary author of the idea of linguistic profiling and was, ironically, also cited in the Clifford opinion because of his research showing that racial group membership could often be identified by voice.

There is a problem with identifying someone as "sounding black": It seems deterministic and therefore makes us uncomfortable. However, Black English is a language [130] and therefore acknowledging its existence is not deterministic. Because it is a language without formal definition, it tends not to be translated or spoken outside of the group. One does not learn Black English in a formal sense, and even informally it is uncommon to hear it spoken by non-black Americans. Accordingly, there is a high correlation between speaking the language and being black, even though all black people do not speak the language.

In another context, when a realtor fails to show people houses because of racial voice identification, over the telephone for example, it may be an absolute racial proxy or it may reflect a non-deterministic racial proxy such as not wanting "that" type of black as a client or in a particular neighborhood. The story attendant to the voice, about what will happen when the person appears, may be attached to larger narratives of neighborhood declension which have nothing to do with that individual but everything to do with the kind of balance that is comfortable for whites. The realtor may be protecting the interests of other clients based on the class and cultural significance of Black English or she may be truly attempting to keep all black people out. But then again, even the realtor who sees a black face and refuses to show homes to that individual may not refuse to show homes to all black clients. The client's style, dress, or presentation may fit into particular racial narratives that allow the realtor to engage in what she believes to be a race-neutral evaluation.

 [*142] In light of fair housing laws, denying a client access to homes based on either language or blackness constitutes invidious discrimination. However, "there is little case law documenting the use of linguistic profiling to circumvent the fair housing laws. While the practice is well-known within the fair housing industry, most cases brought under this theory settle leaving a void in the case law and an inability to track the frequency and success of these cases." [131] There remains a central challenge in approaching this problem: Namely, how should we conceive of the practice of racial voice identification itself, in addition to its consequences?

The articles that decry racism in racial voice identification cases have a remarkable incoherence that does not appear to derive simply from the intent of the articles, or from a lack of authorial rigor. In fact, this incoherence evinces the limitations of defining racism only in intentional or deterministic terms. According to Dawn Smalls' article, "Linguistic Profiling and the Law," the Clifford opinion provides no legitimate basis for allowing testimony that voices can be discerned as distinctively "black." When discussing housing discrimination cases, she argues that linguistic profiling is invidious discrimination. Bafflingly, she justifies her argument by propounding evidence that dialect-based discrimination occurs because whites can identify the voices of black people. [132] In other words, Smalls and others, Benjamin Kohler and John Kon for example, argue against the Clifford ruling for its deterministic possibilities by showing that all blacks do not sound a certain way at the same time as making another argument based upon evidence that blacks do sound that way. Smalls writes, "Clifford v. Chandler affirms the legality of racial identification based on speech by a lay witness. Inherent in this decision is the notion that race is something that can be easily perceived using some objective standard that fosters certainty." [133]

While it is true that deterministic accounts of voice and race are dangerous, it also would be bizarre in this media

saturated culture for anyone to think that all black people necessarily speak Black English. Surely, people know that language is not deterministic. The problem is not, as these authors suggest, determinism in the Clifford case or intent in the housing cases. Instead, the issue is the negative associations rendered with black language in both examples. In the housing cases, Black English is a signifier for undesirability - a direct or likely indicator of race, or socioeconomic or cultural status. In the criminal law context, the Clifford decision elicits the fear that "sounding black" will mean that the perpetrator was necessarily black. The association between black language and social ills may unfairly prejudice juries, thus becoming a question of social narrative rather than courtroom evidence. Kohler says, citing Jody David Armour:

A large part of Armour's analysis of unconscious racial fears deals with the widely held misperception that most blacks have a higher propensity to engage in violent acts. Allowing lay witnesses to conjecture about an individual's race in trials dealing with drug-trafficking, such as Clifford, or **[*143]** in rape trials, such as Kinard, [n134] without directly addressing the hidden prejudices and stereotypes that individuals hold about people of color, encourages jurors to respond based upon suppressed [or not so suppressed] reliance on a negative black stereotype. [n135]

This is why Smalls stresses that there is a white co-defendant who claimed that he committed the crime for which Clifford is being prosecuted, and that the "sounding black" testimony of the police officer trumped this evidence. The facts of the case and the white co-defendant's admission indicate some prejudice - perhaps the jurors made a negative association with the "black voice." The dilemma the authors have is that neither disparate impact analysis nor intent standards provide the language to describe this problem. However, post-intent racism, understanding the aversive and narrative response to features of blackness, does.

Another problem might be the role that coding and signifiers play in misperceptions of language. Benjamin Kohler writes, "Lanita Jacobs-Huey found that a white male subject who assumed 'the style and speech associated with African Americans was misidentified over the telephone as black ninety-two percent of the time, whereas two African American participants were identified as black only ninety-two and eighty-five percent of the time." [n136] However, this evidence does not mean that Black English is not legitimately identifiable; it just means that the heuristics we use to determine certain features may lead to incorrect identification. For instance, if someone says the word "be" five times in a sentence, they probably aren't speaking Black English, but may be mocking it in a way that convinces others. Smalls persuasively argues that the defense erred by failing to analyze the defendant's voice in Clifford, but that seems to be an issue for rebuttal testimony. We can guess why the defense did not provide it: The defendant may very well have been a Black English speaker.

There is a high degree of correlation between Black English and black people. Its "blackness" makes people resistant to recognizing it as formal language despite linguists' agreement that it is. Therefore, when realtors engage in linguistic profiling, their actions should be treated as invidious racial discrimination. Courts should admit evidence of "sounding black," but the observer's veracity should be tested and established. As Tanya Hernandez warns, delimiting racial references in the interest of seeking racial equality does not bring us closer to justice. In fact, it may mask the multi-layered proxies for race that are part of the practice of inequality. [n137] On the other hand, the use of Black English must be dissociated from an absolute direct correlation between blackness and any particular behavior. An oft-recognized idea on the left is that thick conceptions of race, as described by Reva Siegel, may be either subordinating or liberating, but the same distinction is not as commonly recognized among thin conceptions of **[*144]** race. One can thinly conceptualize some racial features, like language, as a mutable characteristic rather than absolute proxy for racial group membership. However, this conceptualization may or may not be legitimate as a basis for distinguishing or discriminating among people. Therefore, in disparate impact claims, some rational relation test should be applied, as a defense, to avoid encouraging the low evaluation of things that are black and value neutral.

V. Strategies: New Standards, New Stories, Building Capacity

 Although this article describes "post-intent" racism, it does not reject all anti-classification principles or the intent standard as a minimum. We should maintain a special place for intentional racism as particularly bad and contrary to our national ethos. And we should use a wide swath of evidence about the deliberate use of racial proxies to substantiate intentional discrimination claims. Moreover, given the evidence of unconscious bias, group position, and racial narratives, disparate impact should be an alternative basis for raising antidiscrimination claims under equal protection and Title VII. The defense should bear the burden of establishing a rational relationship, especially considering Gaertner and Dovidio's research on the flawed race-neutral approach. In this case too, there should be admissible evidence of the use of racial proxies to sharpen the requirements of rational relationship. I argue, as well, that anti-subordination principles should not be treated as unusual in equal protection doctrine, but as a constant delimitation upon anti-classification. In other words, racial classification is inappropriate unless the classification serves the goals of anti-subordination, addresses disparities rooted in historic injustice, or promotes some common good like the equitable provision of resources.

   It would be unwise to simply reject the intent standard and romanticize disparate impact. Disparate impact doctrine also can be used to support damaging racial narratives. For example, disparate impact analysis has played a dangerous role in the culture of describing test bias. [138] Often, instead of saying educational inequality is bad, it seems to say that testing is bad because black children cannot do well. This is both an unequal stance, and also one that does not attempt to address underlying problems of educational inequality. Disparate impact may be more likely to address a broader range of inequality than the intent standard, but it is not enough. We should, therefore, look beyond simply restoring the disparate impact standard and develop more appropriate standards for responding to racial discrimination.

   At the same time, even if we acknowledge that anti-classification principles have supplanted the goal of anti-subordination, they may still be useful. An anti-classification model may provide a political framework which [*145] reveals new strategies for addressing inequality [139] outside of racial group membership. For example, we may confront inequality via key racial proxies like language, class, or neighborhood, or at least add those to racial categories to demonstrate invidious discrimination. If, as suggested earlier, we look to these proxies for group membership, and not just race, as a source of inequality, then we may address much more racial discrimination.

   One useful goal is to encourage creativity within our existing frameworks for evaluating discrimination. Our legal language and concepts move slowly, and therefore paradigm shifts in the law often arise through the art of argument rather than the mere illumination of some new reality. The law, as a cultural institution, frequently follows broader cultural patterns. While today resistance to responding to racial inequality is shaped by the prevalent narratives about the failures and costs of those who are poor, of color, and undocumented, there are other narratives that we can draw upon to weaken that resistance.

   To respond to the power of our current racial narrative, we must return to understanding what promoted the civil rights revolution: a shift in racial narratives. [140] This argument does not adhere to what has been described as the empathic fallacy, [141] the idea that if you just create an empathetic response you can get citizens to respond to racism. Rather, the rhetorical and ethical power of the civil rights movement shifted the national discourse. Shifting narratives does not mean simply changing images on television or in books. It involves the deliberate efforts of groups of citizens to change the practice and discourse around race and trigger a cultural paradigm shift. It requires civic participation and engagement, and a distinctive set of ideas about what participation and engagement mean given the cultural and political frameworks of marginalized people.

   We also must shift the narrative of how to appropriately respond to the ills of the poor, colored, and marginal in our society. A charity based, care-taking model replicates images of damage and incapacity among those communities. Instead, these communities must be agents of their own transformations, and must choose the new narratives that describe their communities. This is both an internal and external process - one that changes perceptions as well as practices. But to begin this process of transformation, we must institutionalize John McKnight and John Kretzmann's work on creating capacity building communities or "asset based community [*146] development." [142] McKnight and

Kretzmann argue that we must depart from a needs-driven and deficiency-oriented model of responding to poor, urban communities and instead embrace capacity oriented models which begin with an inventory of the skills, associations, and networks of community members. They argue that this orientation does not eliminate the need for external support, but rather that communities must be organized and mobilized to capitalize upon that support. Moreover, this model has the possibility of shifting how citizens view themselves and their communities.

Capacity building is not only found in community activism, but also in research initiatives in which individuals work collaboratively to solve social problems and to consider the ideas and experiences of the citizens living within the community. It should even appear as an ethos for how we develop funding equations for social policy measures. Our minimal policy efforts at creating "capacity" have failed to be inclusive of the parties being capacitated, and appear to be more punitive than assisting.

The capacity building model does not reject the ideas underlying structural racism analyses, but it recognizes that democratic society and principles require citizens to participate. The economic marginalization of communities of color correlates disturbingly with degrees of participation in larger civic cultures with respect to everything from election platforms to school board policies. [143] It is quite common to hear anecdotal references about black students in urban schools rejecting school success as "acting white." The scholarly origins of this idea, found in the work of sociologist John Ogbu, were based upon a study of eight African American high school students. However, the majority of subsequent researchers studying the phenomenon have shown that the "acting white" argument is not substantiated. Darity and Tyson write, "Social scientists have produced little empirical evidence to substantiate the claim that an 'oppositional peer culture' or 'a burden of acting white' is pervasive in the black community or that either explains the underachievement of black students." [144]

Unfortunately, the anecdotal evidence lives, even making its way into Barack Obama's 2004 speech at the Democratic National Convention. "Go into any inner city neighborhood, and folks will tell you that government alone can't teach kids to learn. They know that parents have to parent, **[*147]** that children can't achieve unless we raise their expectations and turn off the television sets and eradicate the slander that says a black youth with a book is acting white." [145] Indeed, the narrative is a very convincing one in the eyes of many Americans. But consider, for a moment, the example of the Baltimore students who, on their own volition, began to protest the inadequate education they were are receiving in Baltimore City Schools, including the lack of advanced placement courses, expert teachers, or equal funding. [146] These students, a multiracial but largely African American group, tell a story that is supported by the social science data. They do want to achieve academically. However, the manner in which they tell the story likely has greater narrative shifting potential. The narrative shifting is both internal and external. They adopt a group membership defined not by academic failure, but rather by aspiration and engagement. And the students identify themselves to others as individuals who long for achievement. It provides a way of being and acting that resonates within. Hopefully, it also resonates with viewers or listeners who decry black children for not studying hard with little thought to what studying hard in a terrible school gets you: a terrible education.

In response, society should shift resources towards capacity building institutions and communities. Legal academics should work collaboratively with these young people, for example, to imagine ways to approach educational equity and access. In addition, successful school finance equalization cases [147] show that there are more possibilities in litigation that move toward educational equalization than many have imagined. Action outside the context of litigation is also crucial. We must craft policy measures that build capacity directed by the interests of communities of color and that support "voluntary group membership" [148] organized around goals, values and ideas. Identity, in the goal of addressing racial equality, need not be totally defined by negative characteristics applied to an "ascriptive" identity, but it may be a combination of values developed through voluntary membership, and shared cultural, or social identities. Finally, it is of paramount importance to not resign all resolution to the political winds. In this regard, I agree with Senator Obama's statement, "Government alone can't teach kids to learn." [149] Capacity building is internally directed. It asks: What will we do to change our outcomes, possibilities, and lives?

This conclusion may seem to suggest that we only look to communities of color rather than government, courts, or

white members of our community for solutions. But that is not what is intended. Instead, it acknowledges **[*148]** that the current outcomes are too dire to wait for sufficient policy responses, or to assume that those not immediately impacted by the practice of inequality will rush to partner in these goals. Naturally, policy responses are never enough, even though they are incredibly important. Moreover, the policy responses that would adequately address the problem of racial inequality and disparity can only be sustained if citizens view them as legitimate. To the extent that participatory and collaborative narrative shifting responses have social impact, they also facilitate the development of appropriate social policy, and affect the perceptions and orientations of the wider witnessing and listening public. To respond to post-intent racism, not only do we need post-intent legal standards, we need post-intent activism.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrivate DiscriminationLabor & Employment LawDiscriminationNational Origin DiscriminationEnforcementLabor & Employment LawDiscriminationRacial DiscriminationCoverage & Definitions

FOOTNOTES:

n1. This group of "racial realists" should not be confused with the racial realist subcategory of critical race theory, that group of scholars who believe in a materialist approach to questions of inequality that are raised in Critical Race Theory.

n2. For the dominant racial realists and their works, see Stephen Thernstrom & Abigail Thernstrom, America in Black and White: One Nation, Indivisible Race in Modern America (1997), Dinesh D'Souza, The End of Racism: Principles for a Multiracial Society (1995), John McWhorter, Authentically Black: Essays for the Black Silent Majority (2004), and Thomas Sowell, Civil Rights: Rhetoric or Reality (1985). See generally Michael K. Brown et al., Whitewashing Race: The Myth of a Color Blind Society (2003), Eduardo Bonilla-Silva, Racism Without Racists: Color Blind Racism and The Persistence of Racial Inequality in the United States (2003), Derrick Bell, Faces of the Bottom of the Well: The Permanence of Racism (1993) and David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (1999).

n3. Howard Schuman, Charlotte Steeh & Lawrence D. Bobo, Racial Attitudes in America: Trends and Interpretations (1997). See also David O. Sears & Donald R. Kinder, Racial Tensions and Voting in Los Angeles, in Los Angeles: Viability and Prospects for Metropolitan Leadership (W.Z. Hirsch ed., 1971).

n4. Howard Schuman, Charlotte Steeh & Lawrence D. Bobo, Racial Attitudes in America: Trends and Interpretations (1997).

n5. See generally Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care (Brian Smedley, Adrienne Stith & Alan R. Nelson eds., 2003) (discussing evidence of racial discrimination in health care), Dorothy Roberts, Shattered Bonds: The Color of Child Welfare (2002) (discussing evidence of discrimination in child welfare). For a discussion of unequal schooling, see Theresa Perry et al., Young Gifted and Black: Promoting High Achievement Among African American Students (2003), and Pedro Noguera, City Schools and

the American Dream: Reclaiming the Promise of Public Education (2003). See generally National Fair Housing Alliance: 2005 Fair Housing Trends Report, and Douglass Massey & Nancy Denton, American Apartheid: Segregation and the Making of the Underclass (1993) (discussing evidence of discrimination in housing). For many kinds of encounters with public institutions or larger and diverse community networks and resources, there is substantial evidence not simply of inequality but inequality as a practice of professionals in those institutions.

n6. See generally U.S. Dep't of Labor Office of Research and Planning, The Negro Family: The Case for National Action (1981).

n7. On January 22, 1966, Martin Luther King, Jr. moved into a Chicago tenement and on July 10 he initiated a campaign to end discrimination in housing, employment, and schools in the city. For a detailed treatment of this campaign, see Taylor Branch, At Canaan's Edge: America In the King Years 1965-1968 (2006).

n8. Jimmie Reeves & Richard Campbell, Cracked Coverage: Television News, the Anti-Cocaine Crusade, and the Reagan Legacy (1994).

n9. See generally Paul M. Sniderman & Edward G. Carmines, Reaching Beyond Race, PS: Pol. Sci. & Pol., Sept. 1997, at 466, and John B. McConahay et al., Has Racism Declined in America? It Depends on Who Is Asking and What Is Asked, 25 Cardozo J. Conflict Resol. 563, 563-579 (1981) (analyzing the decline in reported prejudice in the face of continued discrimination).

n10. Donald R. Kinder & Lynn M. Sanders, Divided By Color: Racial Politics and Democratic Ideals 105-06 (1996) ("A new form of prejudice has come to prominence, one that is preoccupied with matters of moral character, informed by the virtues associated with traditions of individualism.").

n11. John Rex, Race Relations in Sociological Research, in Theories of Race and Racism: A Reader 124 (Les Back & John Solomos eds., 2000).

n12. See Philip Q. Yang, Ethnic Studies: Issues and Approaches 145 (2000) (comprehensively defining racism and the preference for ideological understandings of racism).

n13. See generally Washington v. Davis, 426 U.S. 229 (1976) (establishing intent doctrine).

n14. For a background in the study of law as a cultural institution, see generally Law in Culture and Society (Laura Nader ed., 1997).

n15. See generally A. Leon Higginbotham, In the Matter of Color: Race and the American Legal Process The Colonial Period (1980).

n16. See Imani Perry, Doctoral Dissertation, Dusky Justice: Race in U.S. Law and Literature 1878-1914 (Harvard University 2000).

n17. See Imani Perry, Cultural Studies, Critical Race Theory and Some Reflections on Methods, 50 Vill. L. Rev. 915, 915-32 (2005).

n18. Owen Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107 (1976).

n19. See generally Legacies of the 1964 Civil Rights Act (Bernard Grofman ed., 2000) and Theodore Eisenberg, Civil Rights Legislation: Cases and Materials (2000).

n20. Jack Balkin & Reva Siegel, The American Civil Rights Tradition: Anticlassification or Antisubordination?, 58 U. Miami L. Rev. 9 (2004).

n21. Davis, 426 U.S. at 229.

n22. Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971), Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 266 (1977).

n23. See generally Bd. of Trustees v. Garrett, 531 U.S. 356 (2001) (holding that the Americans with Disabilities Act exceeds Congress' authority to abrogate the States' Eleventh Amendment immunity, an authority Congress has pursuant to Section 5 of the Fourteenth Amendment which allows for appropriate legislation to enforce Section 1), Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that although the Age Discrimination in Employment Act does contain a clear statement of Congress' intent to abrogate the States' immunity, that abrogation exceeded Congress' authority under Section 5 of the Fourteenth Amendment), City of Boerne v. Flores, 521 U.S. 507 (1997) (holding the Religious Freedom Restoration Act of 1993 exceeded the scope of congressional enforcement power under Section 5 of the Fourteenth Amendment).

n24. See generally U.S. v. Morrison, 529 U.S. 598, 599 (2000).

n25. Title VI of the Civil Rights Act of 1964, 42 U.S.C §2000. ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.")

n26. See generally Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), Adarand Constructors v. Pena, 515 U.S. 200 (1995), and McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

n27. Brown et al., supra note 2, at 57 (citing Reva B. Siegel, The Racial Rhetorics of Colorblind Constitutionalism: The Case of Hopwood v. Texas, in Race and Representation: Affirmative Action 44-45 (Robert Post & Mociael Rogin eds., 1998)).

n28. Charles R. Lawrence III, The ID, The Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 330 (1987).

n29. Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489, 1495 (2005).

n30. See, e.g., John F. Dovidio et al., On the Nature of Prejudice: Automatic and Controlled Processes, 33 J. Experimental Soc. Psychol. 510, 516-17 (1997) (demonstrating time differentials in subjects' ability to classify positive or negative words after receiving subliminal flashes of black and white faces).

n31. Kang, supra note 29, at 1493. See generally B. Keith Payne, Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon, 81 J. Personality & Soc. Psychol. 181 (2001), Joshua Correll et al., The Police Officer's Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals, 83 J. Personality & Soc. Psychol. 1314, 1315-17 (2002).

n32. Project Implicit is a project conducted at Harvard University, which collects and allows for online evaluation of Implicit Association Tests revealing racial biases. Research they have conducted has shown that a significant percentage of African Americans show bias towards African American visual images. Project Implicit, https://implicit.harvard.edu/implicit/ (last visited Jan. 11, 2007). See also A.G. Greenwald & M.R, Banaji, Implicit Social Cognition: Attitudes, Self-esteem, and Stereotypes, 102 Psychol. Rev. 4 (1995).

n33. See Unequal Treatment, supra note 5.

n34. See Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 8 (2003). To explain why 42 percent of all children in foster care are black, Dorothy Roberts examines racial bias in child welfare practices, even though black children constitute only 17 percent of the country's youth. She argues that child protection policy has mirrored broader social policies, which have called for punitive responses to the problems of poverty, including increased rates of child removal, less interest in preserving families, and the termination of parental rights.

n35. Id. at 9. Roberts argues that the high rates of child removal can be devastating for communities, citing one neighborhood in Harlem in which 10 percent of children had been removed from their homes. Often the criteria for such removals are simply features of poverty, rather than neglect.

n36. See Cole, supra note 2, at 8-9 (arguing that racial double standards exist at every point in the criminal justice system). See also Brown et al., supra note 2, at 34-65 (discussing harsher social standards for African Americans invisible racial privilege).

n37. See generally Perry, supra note 16.

n38. See Perry, supra note 16 (discussing facially neutral enticement statutes, surety systems and systems of criminalizing breach of contract).

n39. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

n40. See Gary Peller, Race Consciousness, 1990 Duke L.J. 758.

n41. See Ellen Pader, Housing Occupancy Standards: Inscribing Ethnicity and Family Relations on the Land, 19 J. Architecture & Plan. Res. 300, 300 (2002) (arguing that housing occupancy standards requiring particular distribution of people among rooms have no correlation to health or human welfare outcomes and disadvantage members of racial minority groups).

n42. Chris Rock, Roll With The New (DreamWorks 1997).

n43. Project Implicit, supra note 32.

n44. See generally A. Wade Boykin & James M. Jones, The Psychological Evolution of Black Children's Education Since Brown, in The Unfinished Agenda of Brown v. Board of Education (Black Issues in Higher Education et al. eds., 2004).

n45. Brown v. Board of Education, 347 U.S. 483, 495 n.11 (1954).

n46. Jean M. Twenge & Jennifer Crocker, Race and Self-esteem: Meta-analyses Comparing Whites, Blacks, Hispanics, Asians, and American Indians and Comment on Gray-Little and Hafdah (2000), 128 Psychological Bulletin 371, 383 (2002).

n47. See generally Rosenberg & Simmons, Global Self-esteem and Specific Self-esteem: Different Concepts, Different Outcomes, 60 Am Soc. Rev. 141, 141 (1995), C. Steele, Race and the Schooling of Black Americans, Atlantic Monthly, April 1, 1992, at 269, J. Crocker & B. Major, Social Stigma and Self-esteem: The Stage They Become Particularly Vulnerable to Stigmatization, Self-protective Properties of Stigma, 96 Psychol. Rev. 608 (1989), G. Kao, Group Images and Possible Selves Among Adolescents: Linking Stereotypes to Expectations

by Race and Ethnicity, 15 Sociological Forum 407 (2000).

n48. Tanya Kateri Hernandez, Multiracial Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 Md. L. Rev. 97 (1998).

n49. See Pamela Babcock, Detecting Hidden Bias, HR Magazine, Feb. 2006. Babcock discusses IAT research showing that while people of color show less bias against their own groups in cognitive research than whites, they still show internalized bias. This should be a cause for concern, as well their biases against members of other racial minority groups.

n50. Lawrence D. Bobo, Prejudice as Group Position: Microfoundations of a Sociological Approach to Racism and Race Relations, 55 J. Soc. Issues 445 (1999).

n51. Id. at 446, 449, 454 and 456.

N52. Id. at 457.

n53. Id. at 458.

n54. See Lawrence Bobo & Mia Tuan, Prejudice in Politics: Group Position, Public Opinion and the Wisconsin Treaty Rights Dispute (2006).

n55. Bobo, supra note 50, at 460.

n56. Bobo, supra note 50, at 462.

n57. See S.L. Gaertner & J.F. Dovidio, Helping Behavior and Racial Discrimination Among Liberals and Conservatives, 25 J. Personality & Soc. Psych. 335, 335-341 (1973), S.L. Gaertner & J.F. Dovidio, The Subtlety of White Racism, Arousal and Helping Behavior, 35 J. Personality & Soc. Psych. 691, 691-707 (1977).

n58. See generally S.L. Gaertner & J.F. Dovidio, Reducing Intergroup Bias: The Common In-group Identity Model (2000).

n59. Davis, 426 U.S. at 242 and Arlington Heights, 429 U.S. at 366 (both holding open the possibility that discriminatory intent could be inferred from the totality of circumstances, including disparate impact although not defined by it).

n60. Although Title VII currently has a rational relationship test as a justification of disparate impact, one can imagine that this will not always be the case, therefore drawing the possibility of merely requiring race neutrality for justifications is useful.

n61. See, e.g., D. Kinder & D. Sears, Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life, 40 J. Personality & Soc. Psychol. 414 (1981). Sears and Kinder's symbolic racism theory reflects whites' moral codes about how to organize society rather than beliefs satisfying personal interests. It focuses on blacks as group rather than on individual blacks.

n62. See Gaertner & Dovidio, supra note 58. Gaertner and Dovidio argue that social conservatives racial bias is cruder, that it proclaims egalitarian standards and yet rigidly demands a particular kind of bootstraps activity on the part of the most resource poor segments of society. But this model also supports a constitutional interpretation that fails to address racial discrimination. The shift to an intent standard is a kind of bootstraps model itself, "If you want us to acknowledge mistreatment, you must do the hard work to show it."

n63. This also might help explain the difficulty of coalition politics among groups of different people of color. There is an interest in fueling racist practices against others if there is a competitive sense of group position that motivates race based decision-making.

n64. See generally Unequal Treatment, supra note 5.

n65. It is important to note that Kang makes merely a strategic, rather than an objective, claim about the greater value of cognition research.

n66. Kang acknowledges this, but does not use this observation to call into question the sole use of this research in his work.

n67. Mark Turner, The Literary Mind 4-5 (1996).

n68. Paul Dimaggio, Culture and Cognition, 23 Annual Rev. Soc. 263 (1997).

n69. Ellen Spolsky, Gaps in Nature: Literary Interpretation and the Modular Mind 192 (1993).

n70. Roland Barthes, Rustle of Language 278 (Richard Howard trans., 1986).

n71. Roman Jakobson, Two Aspects of Language and Two Types of Aphasic Disturbances, in Fundamentals of Language (R. Jakobson & M. Halle eds., 1956).

n72. Kang, supra note 29, at 1580.

n73. Herman Gray, Watching Race: Television and the Struggle for Blackness, xiv (2004).

n74. Id. at xvii.

n75. Daryl Michael Scott, Contempt and Pity: Social Policy and the Image of the Damaged Black Psyche 1880-1996 (1997).

n76. Jimmie L. Reeves & Richard Campbell, Cracked Coverage: Television News, the Anti-Cocaine Crusade, and the Reagan Legacy 100 (1994).

n77. Id.

n78. See Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment (2000), William W. Fisher III, Ideology and Imagery in the Law of Slavery, 68 Chi.-Kent L. Rev. 1051 (1993) (revised and expanded version published in Slavery and the Law 43-85 (Paul Finkleman ed., Madison House 1997)). For a reference to these representations in film, see Donald Bogle, Toms, Coons, Mulattoes, Mammies & Bucks: An Interpretive History of Blacks in American Films (2001).

n79. Thomas Byrne Edsall & Mary Edsall, Chain Reaction: The Impact of Race, Rights and Taxes on American Politics 213 (1992).

n80. See, e.g., Jon Hurwitz & Mark Peffley, Playing the Race Card in the Post-Willie Horton Era: The Impact of Racialized Code Words on Support for Punitive Crime Policy, 69 Pub. Opinion Q. 99 (2005).

n81. Malcolm Cross, Racism: The City and the State 114 (1993).

n82. Eduardo Bonilla-Silva, The Linguistics of Color-Blind Racism or How to Talk Nasty About Blacks Without Sounding Racist, 28 Critical Soc. 41 (2002) (analyzing thinly veiled racial coding among Midwestern college students and residents of the Detroit metropolitan area).

n83. Alan I. Abramowitz & Jeffrey A. Segal, Beyond Willie Horton and the Pledge of Allegiance: National Issues in the 1988 Elections, 15 Legis. Stud. Q. 565, 566 (1990).

n84. The word "responsibility" is both racially coded and race neutral. It allowed "upstanding" black citizens, who also decry inner city responsibility, to identify with the Clinton message even if they were implicitly associated with its negative imagery.

n85. Kevin Alexander Gray, Clinton and Black Americans, in Dime's Worth of Difference: Beyond the Lesser of Two Evils 99 (Alexander Cockburn & Jeffrey St. Clair eds., 2004).

n86. Unequal Treatment, supra note 5, at 162.

n87. Id. at 163, 164.

n88. Id. at 173.

n89. Id. at 170.

n90. See, e.g., Reeves, supra note 76. See generally Dan T. Carter, From George Wallace to Newt Gingrich: Race in the Conservative Counter-revolution 1964-1994 (1996).

n91. See Shankar Vedantam, Study Ties Political Leanings to Hidden Biases, Washington Post, Jan. 30, 2006, at A5 (citing Westen and describing his research findings).

n92. See Reinhard Selten, What is Bounded Rationality?, in Bounded Rationality: The Adaptive Toolbox 13 (Gerd Gigerenzer and Reinhard Selten eds., 2002).

n93. See David Cole, No Equal Justice: Race and Class in the American Justice System 38 (2000).

n94. Id.

n95. See Letter from Laura W. Murphy & Gregory T. Nojeim to Rep. John Lewis (June 8, 2000), http://www.aclu.org/privacy/gen/15445leg20000628.html. A study by the General Accounting Office in March of 2000 found that "an astounding 97% of patdown searches, 77% of strip-searches, 69% of x-ray searches, and 44% of body cavity searches turned up no contraband.Black and Hispanic individuals were approximately four to nine times more likely than White individuals to be x-rayed after being frisked or patted down. Black women have the highest likelihood of being strip-searched of all U.S. citizens. GAO reported that in some cases, people of color who were more likely to be invasively searched by Customs officials were significantly less likely to be found carrying illegal substances."

n96. Richard Delgado, Two Ways to Think About Race: Reflections on the Id, The Ego and Other Reformist Theories of Equal Protection, 89 Geo. L. J. 2279 (2001).

n97. See, e.g., J. D Bremmer & M Narayan, The Invisible Epidemic: Post-Traumatic Stress Disorder, Memory and the Brain, 10 Dev. Psych. 871, 871-886 (1998), Daniel J Siegel, The Developing Mind, How Relationships and the Brain Interact to Shape Who We Are (1999), Lane Strathearn et al., Childhood Neglect and Cognitive Development in Extremely Low Birthweight Infants, 108 Pediatrics 121-151(2001).

n98. See Karl Marx, The German Ideology (Prometheus Books, 1998) (1846) (arguing that consciousness, like language, was created by the conditions in which we live). Later Marxist theorists like Antonio Gramsci revised the absolute determinism of this idea, and considered the possibility of consciousness resistant to the social order created by capitalist societies.

n99. David Theo Goldberg, Racial Knowledge, in Theories of Race and Racism: A Reader 154, 168 (Les Back & John Solomos eds., 2000).

n100. See generally Carl N. Degler, Neither Black nor White: Slavery and Race Relations in Brazil and the United States (1971) (discussing the concept of a mulatto "escape hatch" as a way to transcend race-based exclusions).

n101. See generally John B. McConahay & Joseph C. Hough, Jr., Symbolic Racism, 32 J. Soc. Iss. 23 (1976), John B. McConahay, Modern

Racism, Ambivalence, and the Modern Racism Scale, in Prejudice, Discrimination, and Racism 91-125 (J. F. Dovidio & S. L. Gaertner, eds., 1986).

n102. See generally T. F. Pettigrew & R. W. Meertens, Subtle and Blatant Prejudice in Western Europe, 25 Euro. J. Soc. Psych. 57 (1995).

n103. See generally J. Pratto Sidanius & L. Bobo, Racism, Conservatism, Affirmative Action and Intellectual Sophistication: A Matter of Principled Conservatism or Group Dominance?, 70 J. Personality & Soc. Psych. 476 (1996).

n104. See Daniel Katz & Kenneth Braly, Racial Stereotypes of One Hundred College Students, 28 J. Abnormal & Soc. Psych. 280 (1933), for an example of an older study.

n105. See generally David O. Sears & Donald R. Kinder, Racial Tensions and Voting in Los Angeles, in Los Angeles: Viability and Prospects for Metropolitan Leadership (W. Z. Hirsch ed., 1971), D. Kinder & D. Sears, Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life, 40 J. Personality & Soc. Psych. 414 (1981).

n106. See generally J.B. McConahay, Modern Racism, Ambivalence and the Modern Racism Scale, in Prejudice, Discrimination and Racism 91 (S.L. Gaertner & J.F. Dovidio eds., 1986).

n107. See generally Pettigrew, supra note 102.

n108. See generally D. Kinder & L. Sanders, Divided by Color: Racial Politics and Democratic Ideals (1996).

n109. See generally I. J. Katz & R. G. Wackenhut, Racial Ambivalence, Value Duality, and Behavior, in Prejudice, Discrimination and Racism, supra note 101, at 35.

n110. See generally Lawrence Bobo, James Kluegel & Ryan Smith, Laissez faire Racism: The Crystallization of a Kinder, Gentler, Antiblack Ideology, in Racial Attitudes in the 1990s: Continuity and Change 15 (Steven A. Tuch & Jack K. Martin, eds., 1997).

n111. S. L. Gaertner & J. F. Dovidio, The Aversive Form of Racism, in Prejudice, Discrimination and Racism, supra note 101.

n112. See generally Marianne Betrand & Sendhil Mullainathan, Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination (Mass. Institute of Technology Dept. of Econ., Working Paper No. 03-22).

n113. Id. at 7.

n114. Id. at 3.

n115. Id.

n116. Id. at 21.

n117. Id.

n118. Id. at 16.

n119. Id. at 18.

n120. See generally David N. Figlio, Names, Expectations and the Black-White Test Score Gap (Nat'l Bureau of Econ. Research, Working Paper No. 11195).

n121. Id. at 18.

n122. Id. at 19.

n123. Id. at 21.

n124. Roland G. Fryer & Steven D. Levitt, The Causes and Consequences of Distinctively Black Names, 119 Q. J. of Econ. 767 (2004).

n125. They do not, however, control for class in order to distinguish between distinctively black names.

n126. It is important to remember that the majority of names given to African American children are names that are also common among white and Asian American children.

n127. See generally Katherine Neckerman & Joleen Kirschenmann, Hiring Srategies, Racial Bias and Inner City Workers, 30 Soc. Probs. 801 (1991), Philip Moss & Chris Tilly, Why Black Men Are Doing Worse in the Labor Market: A Review of Supply Side and Demand Side Explanations (Soc. Sci. Research Council Committee on the Urban Underclass, Working Paper), Philip Kasinitz & Jan Rosenberg, Missing the Connection: Social Isolation and Employment on the Brooklyn Waterfront (Michael Harrington Center for Democratic Values and Social Change, Queens College, Working Paper, 1994).

n128. Clifford v. Chandler, 333 F.3d 724, 730 (6th Cir. 2003)

n129. John K. Son, Note & Comment, In Court Racial Voice Identifications: They Don't All Sound the Same, 37 Loy. L.A. L. Rev. 1317, 1321.

n130. See generally Morgan, Marcyliena, The African-American Speech Community: Reality and Sociolinguists, in Language and the Social Construction of Identity in Creole Situations 121 (Marcyliena Morgan & Center for Afro-American Studies eds., 1994), Geneva Smitherman, Talkin' and Testifyin': The Language of Black America (1977), David Sutliffe, System in Black Language (1992), Charles DeBose, Codeswitching: Black English and Standard English in the African-American Linguistic Repertoire, in Codeswitching 152 (Carol Eastman ed. 1992).

n131. Dawn L. Smalls, Linguistic Profiling and the Law, 15 Stan. L. & Pol'y Rev. 579, 582 (2004).

n132. Id.

n133. Id.

n134. State v. Kinard, 696 P.2d 603 (Wash. Ct. App. 1985) (ruling permitting the testimony of a woman who claimed her burglar's voice sounded "black").

n135. Benjamin Kohler, Racial Voice Identification: Judicially Condoning the Bogus Science of Hearing Color, 77 Temple L. Rev. 757, 777 (2004).

n136. Id. at 767.

n137. Tanya K. Hernandez, Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison, 87 Cornell L. Rev. 1093, 1133-44 (2002).

n138. The group most well known for supporting test abolition is FairTest. FairTest: The National Center for Fair & Open Testing, http://www.fairtest.org (last visited Jan 11, 2007). While the organization has done important work showing bias and social class reproduction through tests, they have made little comparable effort to show how all children can succeed despite these inequalities.

n139. See, e.g., Bruce Ackerman & Anne Alstott, The Stakeholder Society (1999). Scholars have noted that Americans dislike social policy aimed at benefiting black citizens or the poor. As a result, some have begun to think about measures that create different notions of "we" that locate the poor and people of color among majorities.

n140. See Derrick A. Bell, Jr., Brown v. Board of Education and the Interest Convergence Dilemma, in Critical Race Theory: The Key Writings That Formed the Movement 20, 22 (Kimberle Crenshaw et al. eds., 1995), Mary Dudziak Cold War Civil Rights: Race and the Image of American Democracy (2000) (both arguing that the racial narrative transformation had a great deal to do with interest convergence). Bell and Dudziak's arguments are correct at the level of courts and legislation, but the nation ultimately ratified the narrative shift because of the argumentative impact of African American activism in the civil rights movement.

n141. Richard Delgato & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 Cornell L. Rev. 1258, 1261 (1992).

n142. See generally John P. Kretzmann & John L. McKnight, Building Communities from the Inside Out: A Path Toward Finding and Mobilizing a Community's Assets (1993).

n143. See generally Lawrence Bobo & Franklin D. Gilliam, Jr., Race, Sociopolitical Participation, and Black Empowerment, 84 Am. Pol. Sci. Rev. 377 (1990).

n144. See Karolyn Tyson & William Darity, Jr., It's Not 'a Black Thing': Understanding the Burden of Acting White and Other Dilemmas of High Achievement, 70 Am. Soc. Rev. 582, 582 (2005). See also Roland Fryer & Paul Torelli, An Empirical Analysis of Acting White 5-6 (Nat'l Bureau of Econ. Research, Working Paper No.11334). Fryer and Torelli found that the "acting white" accusation correlates with behaviors rather than grades. "Acting white is more salient in public schools and schools in which the percentage of black students is less than twenty, but non-existent among blacks in predominantly black schools or those who attend private schools. Schools with more interracial contact have an acting white coefficient twice as large as more segregated schools (seven times as large for black males). Other models we consider, such as self-sabotage among black youth or the presence of an oppositional culture identity, all contradict the data in important way." Hence, the issue may be that multiracial and racially stratified schools create an association between whiteness and high achievement that students are detecting rather than creating.

n145. Barack Obama, The Audacity of Hope, 2004 Democratic National Convention Keynote Address, July 27, 2004.

n146. See Liz Bowie, Students Voice Concern on Funding, Baltimore Sun, Apr. 6, 2004 (recounting student protesters' claims that the Mayor of Baltimore and Superintendent of Schools failed to comply with a court order requiring Baltimore schools to provide $ 2,000 more per pupil annually). See also Laura Loh, City Students Lie Down in Protest Over State's Lack of School Funding, Baltimore Sun, Dec. 8, 2004.

n147. See Imani Perry, Reading, Writing and Rights: Ruminations on Getting the Law in Line with Educational Justice, in Quality Education as a Civil Right: Creating a Grassroots Movement to Transform America's Public Schools (Robert Moses, Theresa Perry, Ernesto Cortes & Lisa Delpit, eds., 2007).

n148. See generally Amy Gutmann, Identity in Democracy (2003).

n149. See Obama, supra note 145.