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SEEING THE OLD LADY: A NEW PERSPECTIVE ON THE AGE OLD PROBLEMS OF DISCRIMINATION, INEQUALITY, AND SUBORDINATION

JACQUELYN L. BRIDGEMAN*

Abstract: In recent years, legal scholars have used insights from cognitive and social psychology to explain that, despite significant gains, discrimination persists in America. Specifically, such scholars argue that our current antidiscrimination legal system, aimed at overt, conscious, and intentional conduct is not an effective tool for combating current forms of discrimination that are often subtle, unconscious, and unintentional. This article builds on that work by illustrating that, while insightful, the perspective from which these scholars approach the problem of discrimination is really no different from that which informs the current antidiscrimination system they seek to change. Accordingly, this article will explain how the perspective of these scholars is the same as that informing the current system. Second, this article will put forth an alternative perspective and then demonstrate how the new point of view advocated for opens up new possibilities with respect to how we might eradicate discrimination from American society.

INTRODUCTION

There are some who would say that everything they needed to know they learned in kindergarten,¹ but for me, some of the most valuable lessons I have learned came courtesy of my English teacher during my first year in high school. This teacher was a rather eccentric older

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¹ See generally ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN: UNCOMMON THOUGHTS ON COMMON THINGS (Villard Books 1988) (1986).

man who wore wooden ties to class, used to sit in a chair with no back but with support for his knees, and who taught us to spell by having us jump in the air and touch each letter. He taught us word roots and the rules of grammar through clever rhymes and sayings, most of which I remember to this day. He required us to complete every task “eighty-two” times—his metaphor for the importance of revision—and a yawn in class earned the offender a set of ten push-ups or a lap around the school, depending on how frequent the offense. However, with all of his unconventional methods and creative ways, the things I remember most were the logic games and brain teasers, for they were the activities through which I learned the most. Operating under the belief that “just as one uses calisthenics to exercise one’s body, one must also work to exercise one’s mind in order to keep it in shape,” our teacher had a closet full of logic games that he had collected over his long career. Through the use of those games we learned how to think critically and “outside of the box.” We learned to reason through problems the likes of which we had never seen and through those games we learned the paramount importance of perceiving a problem correctly in order to reach an appropriate solution. This latter point was best illustrated on one particular day about half-way through my freshman year.

On this day our teacher started class with a brain teaser. However, this time it was not one of the games from his closet but a picture he had us look at that he had hung on the chalkboard. He asked us to look at the picture and write down what we saw. I looked and saw a black and white drawing of a young woman, dressed in Victorian style clothing with a beautiful, elaborate cap on her head. I wrote down my answer and waited for the rest of the class to do the same. After a few minutes passed, our teacher asked the girl in front of me what she saw; like me, she saw a young woman. The teacher then proceeded to ask another kid and then another and another, and each, like me, saw a young woman. Finally he came to a student towards the back of the class, a smaller child, a bit of a misfit. With some hesitation, the child shakily admitted that he did not see a young woman; he saw instead an old lady. As soon as he gave his answer the majority of the class proceeded to roll their eyes and snicker behind their palms. How could he see an old lady when obviously there was not one?

Our teacher did not roll his eyes, nor did he snicker. Instead he looked the ostracized kid right in the eye and with a smile told him he was exactly right, there was an old lady and how great it was that he had been able to see it. The rest of us stopped mid-giggle and stared at the picture again. There must have been some mistake as there was obviously no old lady in that picture. Perhaps our rather eccentric teacher

had finally lost his mind. The teacher asked the strange student if he would come to the front of the class and trace for us the picture of the old lady. Still rather tentative, although gaining some confidence now, the student walked to the front of the room and identified for us the old lady in the picture. Sure enough she was there, occupying the same space as the young woman. What appeared to be the ear of the young woman was at the same time the eye of the old woman. What appeared to be the neck and a necklace of the young woman was actually the chin and the mouth of the older woman. What appeared to be the hat of the young woman was the hair of the old.² Once the old lady was pointed out, she was obvious. In fact, I could not believe that I had so easily missed her. But missed her I had, as had most of the rest of the class.

The obvious point of this brain teaser was to demonstrate to us how the mind can adopt a particular point of view, and, once it has done so, how difficult that point of view can be to change. Often, when this happens, one literally cannot see the world in a different way, even if that different way is in fact present, valuable, legitimate, and helpful. The lesson also illustrated how changing an entrenched view is even more difficult when a large group of people subscribe to that view. I have no doubt that had our teacher not been so supportive, the timid child at the back of the class never would have spoken up or challenged the rest of us. As a consequence, his views would have gone unheard and we would have persisted in ours none the wiser, having never considered a different perspective because we had no idea there was another one to consider. The lesson I learned that day is one that may be helpful to us in trying to use the law as an effective tool for combating the persistent problems of subordination and discrimination in this country.

Before America became America, it had a discrimination and subordination problem.³ America's problem with discrimination produced one of the bloodiest wars in American history, brought about the restructuring of our Constitution, sparked social movements, engendered the passage of several laws, and prompted the creation of a variety of task forces and commissions.⁴ This problem has been the subject of countless articles, books, movies, poems, songs, television shows, conferences, and other discussions, and through all of these efforts we have

² A version of this picture is available at <http://www.mathworld.wolfram.com/YoungGirl-OldWomanIllusion.html>.

³ See discussion *infra* Part III.A.

⁴ See discussion *infra* Part III.A.

made significant progress in addressing and eradicating this societal problem. Yet, it persists and persists. Like the mythical Hydra,⁵ it would seem that as soon as we think we have addressed subordination and discrimination, they rear their ugly heads again. This has occurred so frequently that some believe it is an intractable and unsolvable problem, that the extremely complex and difficult problem of eradicating discrimination and subordination will never be solved.⁶ While I certainly agree with many of the sentiments and valuable insights that have caused some to reach this conclusion, I am not willing to subscribe to that outcome yet. For I believe that, much like my classmates and I who were only able to see the young woman and not the old lady, part of why we have had such a difficult time eradicating subordination in this country is that we have not actually addressed the core problem in all of its complexities. We have not done so because, to a large extent, we have only seen a portion of the problem, not the whole. Much like a doctor who misdiagnoses a disease, we have addressed certain symptoms and manifestations based on what we see and are willing to acknowledge, but have not been able to cure the disease as a whole because we have not addressed the root of the problem.

This article is an attempt to begin to do that. The first in a series of four articles, this article asserts that part of why our antidiscrimination laws have not been as effective as we might hope in eradicating all forms of discrimination and subordination is because they are based on a view of subordination and discrimination that is at best incomplete and at worst inaccurate. Thus, our approach and the laws we have developed are also incomplete. Specifically, I argue that our approach to addressing discrimination through our antidiscrimination laws is based on the view that discrimination is the anomaly in this country: a break from the norm, perpetrated by a few bad actors at specific points in time.⁷ Thus, our laws are geared toward identifying those bad actors and providing redress to the victims of those specific instances. Consequently, our antidiscrimination laws have done fairly well addressing and helping to eradicate blatant forms of discrimination but unfortu-

⁵ See generally G. S. KIRK, *THE NATURE OF GREEK MYTHS* 184–85 (1975) (describing the mythical Hydra as a multi-headed monster whose heads grew back twice as fast when cut off).

⁶ See, e.g., Derrick Bell, *The Permanence of Racism*, 22 SW. U. L. REV. 1103, 1104 (1993) (discussing the continued elusiveness of equality for African Americans and even stating the thesis that “[b]lack people will never gain full equality in this country”) (quoting DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 12 (1992)).

⁷ See discussion *infra* Part I.B.

nately have done little to adequately address discrimination in its many other forms.⁸

The goal of this article is to try to add to the conversation in which several scholars have engaged in recent years regarding how we can make the law a more useful tool in combating all forms of discrimination.⁹ Building on the valuable insights of the last few decades by critical scholars across disciplines including the groundbreaking work of several critical race theorists, psychologists, and sociologists, this article asserts that one of the necessary components to making the legal approach to discrimination more effective is to change the conception of discrimination that underlies that approach. In other words, if we can reconceptualize the problem, perhaps we can also develop better solutions, solutions that are viable though possibly not readily apparent from our current point of view.

Towards that end, I argue that discrimination and subordination are not the anomaly but the norm in American culture. As American as apple pie, they are part and parcel of the way we perceive the world. They are embedded in the way we have structured our country and permeate our institutions, important societal systems, and cultural constructs.¹⁰ Thus, the perception of discrimination as an anomaly perpetrated by bad actors at specific points in time in an equal and nondiscriminatory world has allowed us to alleviate the symptoms of blatant discrimination, yet it has not allowed us to address the problem as a whole. Accordingly, in this article I argue for us to take the first steps in changing that perspective. Part I reviews the development of antidiscrimination law in the United States with an emphasis on articulating the current, dominant perception of discrimination and subordination such law embodies. Specifically, this view rests upon the assumption that discrimination and subordination are anomalies perpetrated by a few bad actors in isolated pockets of society. Part II reviews recent innovative proposals to use or change the law to make it more responsive to the persistent problem of discrimination and subordination. This part explains how these new proposals tweak the dominant perspective in some significant ways but still leave some of its fundamental underlying premises intact. Part III explains what both the dominant perspective and these innovative scholars are still missing, specifically, that discrimination and subordination are the norm in, are embedded in, and

⁸ See discussion *infra* Part I.B.

⁹ See discussion *infra* Part II.A.

¹⁰ See discussion *infra* Part III.A.

permeate every aspect of American life. This part begins by looking critically at the history of the United States and then explaining what new perspective may be derived from that history. It then provides examples to illustrate how the proposed change in point of view would affect our approach to the problems of discrimination and subordination.¹¹

I. THE CRISIS IN AMERICAN ANTIDISCRIMINATION LAW: THE UNFULFILLED PROMISE

A. *A Little Bit of History*

The inherent difficulty of solving complex social problems through the legal system is a rather obvious and important issue, for even if one is able to correctly define the particular problem, there are still variables, competing interests, and other factors that make fashioning and implementing an effective solution a Herculean task at best and an impossible one at worst. The problem of eradicating subordination and inequality in American society is no different.

The first major societal attempt to address this problem on a national scale came after the Civil War in the form of the First Reconstruction.¹² The passage of a series of laws¹³ and three constitutional amendments,¹⁴ led to the end of slavery and the first steps towards forming a more equal nation. The passage of these laws and constitutional amendments appeared to have brought sweeping change to the

¹¹ As mentioned, this is the first of what I intend to be a series of four articles. Thus, my goal in this article is only to present the proposed change in perspective as a viable alternative in our quest to effectively eradicate discrimination and subordination. The second article will propose a new definition of equality that better articulates the goal of a truly equal society than do the definitions we currently employ. The third article will take the new concepts proposed in the first two and suggest how we might begin to work those ideas into a practical and cost-effective scheme that starts from the perspective proposed in this article and develops structures and rules under the law that might allow us to reach the equal society as defined in the second article. However, the radical changes proposed in the first three articles would not be without their consequences. Thus, the fourth article in the series looks at the potential consequences, both good and bad, of implementing the proposals put forth in this body of work.

¹² MANNING MARABLE, *RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945–1990*, at 1–12 (2d ed. 1991) (identifying 1865–1877 as the first period of reunion, reconstruction, and racial readjustment); WILLIAM A. SINCLAIR, *THE AFTERMATH OF SLAVERY* 37 (1969) (referring to the period right after the Civil War as the era of Reconstruction).

¹³ See Civil Rights Act of 1875, ch. 114, 18 Stat. 335; Enforcement Act of 1870, ch. 114, 16 Stat. 140; Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

¹⁴ U.S. CONST. amends. XIII–XV.

country. Apart from no longer being slaves, blacks voted in record numbers,¹⁵ held public office,¹⁶ sat on juries,¹⁷ and meaningfully participated in American society in many other ways.¹⁸ However, these gains were met with massive resistance including the rise of the Ku Klux Klan and similar groups, and the widespread violence such groups perpetrated that worked to intimidate and prevent the newly freed slaves and their allies from exercising their rights.¹⁹ In the face of this resistance, those in power proved they would only protect the rights of the newly freed slaves so long as it was politically expedient.²⁰ Consequently, within less than twenty years after emancipation, the newly gained freedoms began to disappear.²¹

By 1867, every state in the South had passed laws whose sole purpose was to relegate the freed men and women to as close a condition of slavery as possible without technically reinstating the peculiar institution.²² These laws, popularly known as Black Codes, provided sanctions, usually in the form of servitude or even whipping, for offenses such as vagrancy and disorderly assembly.²³ These laws also sought to return blacks to a condition of servitude by forcing them to sign yearly labor contracts (through which they were punished if they left the plantation before the contract expired), apprenticing black children who were

¹⁵ DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 46 (5th ed. 2004); MICHAEL L. LEVINE, *AFRICAN AMERICANS AND CIVIL RIGHTS: FROM 1619 TO THE PRESENT* 100 (1996). For example, in Louisiana in 1896 there were 130,334 registered black voters making them a majority of registrants in twenty-six parishes. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 85 (3d rev. ed. 1974).

¹⁶ BELL, *supra* note 15, at 46; RICHARD WORMSER, *THE RISE AND FALL OF JIM CROW* 27 (2003). See generally BLACK CONGRESSMEN DURING RECONSTRUCTION: A DOCUMENTARY SOURCEBOOK (Stephen Middleton ed., 2002).

¹⁷ LEVINE, *supra* note 15, at 102.

¹⁸ *Id.* at 99; see WORMSER, *supra* note 16, at 19–20 (describing the many ways in which blacks participated in civic life during Reconstruction, primarily through Union Clubs).

¹⁹ LEVINE, *supra* note 15, at 116–18; WOODWARD, *supra* note 15, at 82–93; WORMSER, *supra* note 16, at 22, 24–26, 29. See generally SINCLAIR, *supra* note 12 (describing the many forms opposition and violence took after the Civil War and the end of slavery).

²⁰ See LEVINE, *supra* note 15, at 104–06 (describing waning white support for Reconstruction from 1870 on, which eventually resulted in the Hayes-Tilden compromise of 1877 whereby the Democrats conceded the presidency to the Republicans in return for the end of Reconstruction); WORMSER, *supra* note 16, at 30–33.

²¹ If one marks the beginning of the end with the 1877 Hayes-Tilden compromise, the newly found freedoms of the ex-slaves lasted scarcely fourteen years after Lincoln signed the Emancipation Proclamation in 1863.

²² LEVINE, *supra* note 15, at 289 (defining “black codes” as “[l]aws passed by the former Confederate states between 1865 and 1867 intended to return blacks to virtual slavery”); SINCLAIR, *supra* note 12, at 37–73.

²³ SINCLAIR, *supra* note 12, at 62–65.

taken from parents deemed unfit, and by leasing out the labor of convicts.²⁴ At the same time, while slavery may not have gained a foothold in the North and many in the North may have pushed for abolition, white supremacy and the inequality it engendered were still the order of the day throughout the country.²⁵ The belief in white supremacy and the desire for reconciliation and imperialistic adventures throughout the world combined to shift the attitudes of many in the North to those of their southern brothers by the end of the nineteenth century.²⁶

Additionally, the U.S. Supreme Court dealt the final blow to the aspirations of Reconstruction in a series of cases that either struck down the laws intended to protect the newly freed slaves and give some content to their freedom,²⁷ or read the new amendments so narrowly as to make them largely ineffective.²⁸ The recalcitrance of the South, the increasing lack of support in the North, an ineffective executive, and an unsupportive Supreme Court ultimately combined to bring the progress which had followed the Civil War to a virtual standstill. In fact, it would be another half century before the nation would see a similar step toward equality.

Beginning roughly with the *Brown v. Board of Education* decision in 1954,²⁹ the United States once again turned a corner on the road to true equality.³⁰ Often referred to as the Second Reconstruction, this

²⁴ LEVINE, *supra* note 15, at 95–96.

²⁵ WOODWARD, *supra* note 15, at 17–20.

²⁶ *Id.* at 69–74.

²⁷ *See, e.g.*, United States v. Cruikshank, 92 U.S. 542 (1875) (striking down the provisions of the 1870 Enforcement Act meant to protect against terrorism by the Ku Klux Klan and similar groups); United States v. Reese, 92 U.S. 214 (1875) (invalidating sections of the Enforcement Act of 1870 meant to secure the right to vote under the Fifteenth Amendment).

²⁸ Using an extremely narrow definition of national citizenship, the Court held in the *Slaughter House Cases* that the Privileges and Immunities Clause of the Fourteenth Amendment did not allow the federal government to protect privileges and immunities that lay within state power. 83 U.S. (16 Wall.) 36 (1873). The Court then went on to define state power as that “for the establishment and protection of which organized government is instituted.” *Id.* at 76. In that way the Court effectively read the Privileges and Immunities Clause out of the Fourteenth Amendment. *See id.* at 76–78; *see also* The Civil Rights Cases, 109 U.S. 3 (1883) (determining that (1) the Fourteenth Amendment only applied to state action, and therefore Congress could not pass laws targeting the behavior of individuals, and that (2) while the Thirteenth Amendment may apply to individual actions, its provisions did not extend so far as to offer protection against wrongs such as a refusal of accommodation at an inn or on a public conveyance).

²⁹ 347 U.S. 483 (1954).

³⁰ While many mark the beginning of the Second Reconstruction at the time of the *Brown* decision or slightly before, *see* MARABLE, *supra* note 12, at 18, 40–41, it was not as though the fight for civil rights remained dormant during the period between the First

period resembled the First Reconstruction in terms of the kind of change brought about in a relatively small amount of time.³¹ However, these eras do differ in significant ways. Unlike the First Reconstruction, the second was backed by a vibrant protest movement that gained international notoriety and support, the groundwork for which had been laid in the intervening fifty to sixty years.³² The Second Reconstruction took place in an America where the attitudes of the majority of Americans had changed; where the hazards of prejudice and discrimination were brought home through World War II and the Nazi campaign, which put in stark relief the potential consequences of severe prejudice and discriminatory action; and where white supremacy and America's racist attitudes were hurting her image and credibility abroad.³³ Apart from this, these two eras also differed because the Second Reconstruction proved more successful than the first.

As with the First Reconstruction, Congress passed national laws meant to address the problem of discrimination and to help guarantee basic civil rights.³⁴ However, unlike the First Reconstruction the Supreme Court was not so quick to strike down these laws,³⁵ and the ex-

and Second Reconstructions. In fact, it was the work of many during this period that laid the groundwork for the Second Reconstruction and helped pave the way for the changes it brought to be more longstanding than those of the First Reconstruction. *See generally, e.g.,* Leland B. Ware, *Setting the Stage for Brown: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930-1950*, 52 *MERCER L. REV.* 631 (2001) (describing the work of the NAACP and, in particular, Charles Hamilton Houston during the time between the two periods of Reconstruction).

³¹ MARABLE, *supra* note 12, at 3-4.

³² *See generally* LEVINE, *supra* note 15, at 109-65; HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY 1954-1992* (rev. ed. 1993); MARABLE, *supra* note 12; ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* (1984).

³³ SITKOFF, *supra* note 32, at 14-17.

³⁴ Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81-89; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

³⁵ *See, e.g.,* *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (finding that Congress did not exceed the power granted to it in section two of the Fifteenth Amendment in holding certain challenged provisions of the Voting Rights Act constitutional); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding Title II of the Civil Rights Act of 1964 as a constitutional exercise of Congress's commerce power). Not only did the Court uphold the constitutionality of these laws, many would argue that the Court led the charge with respect to securing civil rights during this era. *See, e.g.,* David J. Garrow, *The Supreme Court's Pursuit of Equality and Liberty and the Burdens of History*, in *REDEFINING EQUALITY* 205, 205 (Neal Devins & Davison M. Douglas eds., 1998) (noting the Court's *Brown* decision "is commonly regarded as the signal event in the modern quest for racial equality"). *But cf.* Gerald N. Rosenberg, *The Irrelevant Court: The Supreme Court's Inability to Influence Popular Beliefs About Equality (or Anything Else)*, in *REDEFINING EQUALITY*, *supra*, at

ecutive was more effective in enforcing them.³⁶ Thus, although there was still widespread resistance to the changes wrought during the Second Reconstruction, the response was more effective in the face of that resistance. Also, the general public appeared more willing to accept such changes than during the time of the First Reconstruction. While during both periods there was staunch resistance to the move to make the country more equal, during the Second Reconstruction that resistance did not result in the complete reinstatement of racist and discriminatory ideals. Further, after the Second Reconstruction, the sentiments of a majority of Americans began to change, at least on the surface.³⁷ Consequently, the change engendered the second time around was much more permanent, widespread and meaningful.

De jure laws relegating blacks, women, and other minorities to legalized second class citizenship are largely a thing of the past as are many other forms of blatant discrimination.³⁸ This change has been

172, 187 (questioning whether the Court has any real influence with respect to Americans' views on equality, and concluding that "there is no evidence supporting the power of the Court to increase support for racial or gender equality").

³⁶ For example, President Eisenhower reluctantly sent federal troops into Arkansas in response to Governor Faubus's blatant defiance of a federal court order to integrate the schools and the militant defiance of many of the state's citizens. MARABLE, *supra* note 12, at 42-43; WORMSER, *supra* note 16, at 183. However, the willingness of the federal executive to help in the struggle for equality should not be overstated. In fact while the executive branch was helpful in some ways, it actively worked to thwart equality movements in other ways. *The FBI's Efforts to Disrupt and Neutralize the Black Panther Party*, in *THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE* 529 (Clayborne Carson et al. eds., 1991) (describing and documenting the way the FBI worked to disrupt and neutralize the Black Panther Party during the 1960s and early 1970s).

³⁷ For example, a 1942 survey showed that 51% of Americans surveyed favored segregated streetcars and buses, but by 1970, 88% favored integrated streetcars and buses. PAUL M. KELLSTEDT, *THE MASS MEDIA AND THE DYNAMICS OF AMERICAN RACIAL ATTITUDES* 2, 4 (2003). Similarly, the same survey found that prior to the 1970s, 68% favored segregated schools and 55% favored active job discrimination. *Id.* at 2. By 1972, 97% favored equal employment opportunity for blacks and by 1995, 96% favored integrated schools. *Id.* at 4. *But see* John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, in *CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE* 3 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (describing how despite the apparent sea change in attitudes, many Americans are still biased).

³⁸ David O. Sears, *Racism and Politics in the United States*, in *CONFRONTING RACISM*, *supra* note 37, at 76, 80 (stating the general consensus is that "old fashioned racism" and "opposition to general principles of equality" have largely disappeared); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 91 & n.1 (2003) (describing how discrimination in today's workplace operates "less as a blanket policy or discrete, identifiable decision" and citing several scholars who "have documented this shift in the nature of discrimination"); Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Obser-*

significant enough that a good portion of white America no longer believes discrimination is still a problem in American society.³⁹ Once the blatant forms of discrimination began to recede and more and more segments of society began to engage in formal practices of equality, it became apparent that the Second Reconstruction did have something in common with the first; in the wake of the Second Reconstruction, as with the first, subordination and discrimination remained.

While the law said all people were now equal and many professed that they believed it to be so, many of the accoutrements of true equality were missing. Those allowed into jobs they had previously been denied found it hard to move up once they gained entry, or found themselves the subjects of differential treatment and harassment.⁴⁰ While things on the whole did improve for previously subordinated groups, members of those groups were certainly not equal. Minorities and women still found themselves overrepresented in the lower rungs of society—disproportionately holding the worst jobs if they held jobs at all,⁴¹ living in poorer conditions,⁴² and receiving an inferior education.⁴³ At the same time, they were underrepresented in the best jobs,⁴⁴ best neighborhoods,⁴⁵ and best educational institutions.⁴⁶ Not only that, demands to continue to move forward were increasingly met with

vations, 1 U. PA. J. LAB. & EMP. L. 639, 641 (1998) (explaining that while deliberate exclusion may not be obsolete, modern patterns of exclusion are more subtle).

³⁹ Sears, *supra* note 38, at 81 (“Most whites believe that discrimination has been greatly reduced and that equal opportunity does in fact exist.”).

⁴⁰ See, e.g., FED. GLASS CEILING COMM’N, U.S. DEP’T OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION’S HUMAN CAPITAL 7–8 (1995), available at <http://www.dol.gov/oasam/programs/history/reich/reports/ceiling.pdf>.

⁴¹ U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, CENSUS 2000 EEO DATA TOOL, <http://www.census.gov/eo2000/index.html> (select “Employment by Census Occupation Codes and Earnings” and click “Next” button; select “US Total” and click “Next” button; select “Total Employed at Work” from list of occupation categories, select “Show Detailed Race/Ethnicity Categories” from list of race categories, select “Show Total of Selected Geographies and Occupations” from list of output options, and click “Display table” button) (indicating that minorities and women are disproportionately represented in the lowest level of jobs as indicated by median earnings for particular occupations); see DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 47 (1987).

⁴² U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, SER. P23-205, CURRENT POPULATION REPORTS: POPULATION PROFILE OF THE UNITED STATES: 1999, at 30–31 & 31 fig.7-3 (2001) [hereinafter U.S. POPULATION PROFILE: 1999], available at <http://www.census.gov/prod/2001pubs/p23-205.pdf>.

⁴³ *Id.* at 39 & fig.9-2. However, it should be noted that, while a numerical minority, Asians and Pacific Islanders have the highest educational attainments of all groups in the census report. *Id.* at 39.

⁴⁴ See *supra* note 41.

⁴⁵ U.S. POPULATION PROFILE: 1999, *supra* note 42, at 28–32.

⁴⁶ *Id.* at 36–39.

resistance as challenges to affirmative action grew and support for civil rights waned.⁴⁷ Thus, while the outcome of the Second Reconstruction was certainly better than the first, the promises of that era have still gone largely unfulfilled. The persistence of inequality and subordination in this country can be linked to a variety of factors. Be this as it may, at least one significant factor is the inherent shortcoming of the legal system meant to help address and eradicate this problem. Specifically, our legal system as currently constructed is inadequate for the task of eradicating persistent inequality and subordination, at least in part because it is derived from a faulty perspective with respect to the persistent nature of subordination and inequality in this country.

B. *The Current Perspective*

There are many situations in which a person can suffer discrimination that are actionable under current law.⁴⁸ However, for purposes of making this discussion manageable, my primary focus will be on discrimination in employment and how it is addressed under both statutory and constitutional law.⁴⁹ There are essentially five potential avenues open to an employee or potential employee who feels that he or she has been discriminated against. A brief review of these avenues and how they have been applied recently provides insight into the concept of discrimination that underlies them.

⁴⁷ Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 103–04 (Kimberlé Crenshaw et al. eds., 1995).

⁴⁸ For example, possible claims are available for discrimination with respect to housing, 42 U.S.C. § 3604 (2000); voting, *id.* § 1973; and employment and education, *id.* § 245.

⁴⁹ The purpose of this portion of the discussion is to illustrate the perspective that underlies antidiscrimination jurisprudence. While the nature of how one brings a claim may differ somewhat depending on the type of discrimination at issue, the underlying perspective behind all antidiscrimination laws is essentially the same regardless of the type of claim. Because the laws and constitutional provisions addressing employment discrimination are fairly comprehensive and lend themselves well to illustrating the point I intend to make here, I have chosen to focus on those to make this portion of the discussion more manageable. See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 285 (1997) (stating that there is no substantial difference in how the Supreme Court approaches discrimination issues whether they are statutory or constitutional).

1. Title VII claims⁵⁰

Title VII of the 1964 Civil Rights Act⁵¹ is the primary federal law addressing employment discrimination. While other laws such as the Age Discrimination in Employment Act (ADEA)⁵² and the Americans with Disabilities Act (ADA)⁵³ address discrimination with respect to categories not covered under Title VII, the theories under which a person might bring a claim under those acts largely mirror those of Title VII.⁵⁴ Under Title VII and its state law counterparts, when an action is not discriminatory on its face, there are three theories of discrimination available to a potential plaintiff: disparate treatment,⁵⁵ disparate impact,⁵⁶ and harassment.⁵⁷ However, for any of these theories to offer redress, a person must first demonstrate that he or she fits into a protected category covered by the Act.⁵⁸ Even if a plaintiff can demonstrate blatant and even horrible discrimination on the basis of a particular characteristic or trait, for example obesity or sexual orientation, he or

⁵⁰ To the extent that a state also has its own antidiscrimination laws that mirror and are interpreted similarly to Title VII, much of what I say here will be applicable to state law claims as well.

⁵¹ 42 U.S.C. §§ 2000e to 2000e-17.

⁵² 29 U.S.C. §§ 621–634.

⁵³ 42 U.S.C. §§ 12101–12213.

⁵⁴ However, the theories available are not necessarily identical. For example, while disparate impact claims may be available under the ADEA, the Supreme Court has indicated that such claims are narrower in scope than under Title VII. *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (“[D]ifferences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII.”). Additionally, the ADA allows for an employee to recover for failure to accommodate a disability. 42 U.S.C. § 12112(b)(5)(A). Title VII only has a similar provision for discrimination on the basis of religion. *Id.* § 2000e(j).

⁵⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973) (stating the elements of a prima facie case and allocation of proof for disparate treatment cases). Although the *McDonnell Douglas* Court did not specifically refer to the type of discrimination in that case as “disparate treatment,” that is the name such claims have been given over time. See BELL, *supra* note 15, at 643–45; MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW* 282–85 (5th ed. 2003).

⁵⁶ 42 U.S.C. § 2000e-2(k)(1)(A)–(C); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 645–46 (1989); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

⁵⁷ *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751–54 (1998); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63–67 (1986).

⁵⁸ Title VII states specifically that it only prohibits discrimination on the bases of race, sex, religion, color, and national origin. 42 U.S.C. § 2000e-2(a)–(d); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510–11 (2002) (indicating that the first element in a prima facie case of disparate treatment based on circumstantial evidence is that the plaintiff show that he or she is a member of a protected group).

she will not be able to obtain redress under current law unless that person can make the characteristic in question fit into a protected category.⁵⁹ Thus, Title VII is not a general civility code and it does not protect a person from all forms of discrimination.

Once a person has met the threshold requirement of fitting into a protected category, the next task is to establish discrimination on the basis of that particular characteristic. In situations where a person has been treated differently and detrimentally from similarly situated others, she may have a disparate treatment claim.⁶⁰ When a person has not been specifically treated differently but has suffered a differential effect due to an employer's policy or practice, the proper avenue is a disparate impact claim.⁶¹ Lastly, one who is subjected to a differential working environment because of a particular protected characteristic, such as when a woman is the object of lewd gestures or subjected to jokes or other conduct that alters her terms and conditions of employment, may have a claim for harassment.⁶²

Obviously, this is a cursory and simplified rendition of the way a person may prove a discrimination claim under Title VII,⁶³ but, as stated, what is currently required to prove a discrimination claim is only important to this discussion to the extent that it provides insight into the underlying concept of discrimination. Under each of the above described theories, a plaintiff must not only show that he or she fits into a protected category, but that the basis for the alleged discrimination was

⁵⁹ For example, the plaintiff in *Whaley v. Southwest Student Transportation*, clearly lost her job because of her obesity, but lost her case on a motion for summary judgment because the court found that her obesity did not qualify as a disability under the ADA. See No. 7:01-CV-034, 2002 WL 999382, at *2, *3 (N.D. Tex. May 9, 2002). In contrast, the plaintiff in *Butterfield v. New York*, was able to survive summary judgment on his ADA claim over the disputed fact of whether his morbid obesity constituted a disability, but was unable to bring a Title VII claim for harassment due to his weight as he did not fit into a protected category. See No. 7:96-CV-05144, 1998 WL 401533, at *13, *19 (S.D.N.Y. July 15, 1998). Similarly, in *Rene v. MGM Grand Hotel, Inc.*, the plaintiff was ultimately able to survive a grant of summary judgment to the defendant on his sexual harassment claim despite the fact that the harassment he endured was largely because of his sexual orientation because the court found that "[t]he physical attacks to which Rene was subjected, which targeted body parts clearly linked to his sexuality, were 'because of . . . sex.'" 305 F.3d 1061, 1066 (9th Cir. 2002).

⁶⁰ *McDonnell Douglas*, 411 U.S. at 802; see BELL, *supra* note 15, at 643-45; ROTHSTEIN & LIEBMAN, *supra* note 55, at 282-85.

⁶¹ 42 U.S.C. § 2000e-2(k)(1)(A)-(C); *Wards Cove*, 490 U.S. at 645-46; *Griggs*, 401 U.S. at 431.

⁶² *Faragher*, 524 U.S. at 786; *Burlington*, 524 U.S. at 751-54; *Meritor*, 477 U.S. at 63-67.

⁶³ For a more detailed discussion, see Green, *supra* note 38, at 112-26.

that protected category.⁶⁴ In other words, one must show that the particular act in question was motivated, at least in part, by animus toward a protected characteristic.⁶⁵ Additionally, one can usually only recover when he or she has suffered some kind of identifiable tangible harm.⁶⁶ Thus, the law only applies after the act of discrimination has occurred.

2. Equal Protection and Due Process Claims

For those employees working in the public sector, equal protection and due process claims under the Fourteenth Amendment may also be available to address claims of discrimination.⁶⁷ Arguably, such claims, when available, are broader in scope in that one need not fit into a specific protected category in order to bring such a claim. For example, a homosexual person, similarly situated with respect to her coworkers but treated differently from them, may have a cognizable equal protection claim.⁶⁸ Because homosexuality is not currently a protected category

⁶⁴ See sources cited *supra* notes 58–62.

⁶⁵ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240–41 (1989); see also 42 U.S.C. § 2000e-2(m) (“[An] unlawful employment practice is established when the complaining party demonstrates that race, religion, sex, or national origin was a motivating factor for any employment practice . . .”).

⁶⁶ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002) (noting that the third element of a *prima facie* case for disparate impact is “an adverse employment action”); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988) (stating that a violation of Title VII can be found when a “facially neutral employment practice[] . . . [has] significant adverse effects on protected groups”) (emphasis omitted); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999) (noting that an adverse employment action must be shown whether the defendant is a private employer or a government agency).

⁶⁷ U.S. CONST. amend. XIV, § 1. Due to early interpretations of the Fourteenth Amendment restricting its application only to situations involving state action, such claims are generally only available to employees working in the public sector. See *The Civil Rights Cases*, 109 U.S. 3, 11–12 (1883); *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1875). While claims under the federal Constitution are restricted to state action, that is not necessarily the case for all state constitutions. See, e.g., *Luck v. S. Pac. Transp. Co.*, 267 Cal. Rptr. 618, 628 (Cal. Ct. App. 1990) (stating that California state constitutional provisions protecting privacy applied to private employers). However, while these state provisions may reach more broadly, as with Title VII, the underlying concept of discrimination that guides their application does not differ from that underlying application of the federal constitutional provisions.

⁶⁸ *Quinn v. Nassau County Police Dep’t*, 53 F. Supp. 2d 347, 350, 356–58 (E.D.N.Y. 1999) (upholding a \$380,000 verdict for the plaintiff on a sexual harassment claim based on the plaintiff’s sexual orientation brought under the Equal Protection Clause of the Fourteenth Amendment after applying the rational basis test). *But see High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 568, 571, 578 (9th Cir. 1990) (finding cognizable an equal protection claim under the Due Process Clause of the Fifth Amendment regarding the Department of Defense’s policies of requiring expanded investigations and mandatory adjudications as well as refusing to grant security clearances to known or

under Title VII, no such claim would be available under that law. Similarly, one may have a due process claim for violation of a right regardless of the nature of the motivation underlying deprivation of that right.⁶⁹ In other words, the underlying motivations that will sustain a constitutional due process claim are much broader than those that would sustain a Title VII claim. Yet, regardless of these differences, equal protection and due process claims are still similar to Title VII claims in that to prevail, a person must show causation and specific harm, both of which are addressed after the fact.

3. The Perspective Underlying Our Current Antidiscrimination Regime

This somewhat quick review of the statutory and constitutional schemes for combating discrimination provides the basis from which we can infer the concept of discrimination or equality that underlies these laws. First and foremost, as several commentators have already clearly demonstrated, the law envisions discrimination largely as something purposely, intentionally, and consciously done.⁷⁰ This underlying

suspected gay applicants, but upholding the policies and practices under a rational basis test).

⁶⁹ See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 595, 598 (1972) (reversing grant of summary judgment to defendant school on plaintiff's claim that the school's refusal to rehire him infringed his right to free speech, and noting that "a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment").

⁷⁰ See, e.g., Green, *supra* note 38, at 112 ("[The d]isparate treatment doctrine has long been understood to require a showing of intentional discrimination, often defined in terms of conscious motivation to discriminate."); Justin D. Cummins, *Refashioning the Disparate Treatment and Disparate Impact Doctrines in Theory and in Practice*, 41 *How. L.J.* 455, 459 (1998) ("Antidiscrimination law . . . in accordance with the disparate treatment doctrine . . . only recognizes conscious acts of discrimination . . ."); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1177 (1995) ("[C]ourts have construed section 703 of Title VII, like 42 U.S.C. sections 1981 and 1983, to require proof of intent to discriminate in disparate treatment cases."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317, 318 (1987) (explaining how the Supreme Court decision of *Washington v. Davis*, 426 U.S. 229 (1976), established the discriminatory purpose doctrine which "requires plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose on the part of those responsible for the law's enactment or administration"); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *MINN. L. REV.* 1049, 1054-55 (1978) ("[O]nly 'intentional' discrimination violates the antidiscrimination principle."). But see Selmi, *supra* note 49, at 286-89 (agreeing that the Supreme Court requires a showing of intent, but that the focus of the Court's inquiry when addressing the issue of intent centers on "whether race [or another protected cate-

premise is further evident in the jurisprudence regarding mixed motive cases under Title VII, particularly with respect to the fact that a defendant's liability is less if part of the motive is permissible, even if discriminatory motive has clearly been shown.⁷¹ Second, not only is discrimination something that is purposely, intentionally, and consciously done, such action often will only result in liability if it can be shown that one's intentional and conscious action was motivated by the victim's membership in a designated protected category.⁷² As stated, a person who is the victim of blatant and even awful discrimination or inequality on the basis of something other than a specific category identified under the law generally will have no redress for that harm.⁷³

Third, this perspective is informed by the idea that equality exists when everyone is treated the same in a given situation, or put differently, when race or other protected categories are not taken into account.⁷⁴ Thus, if in fact a particular person has a differential experience because of a unique personal quality or characteristic, but technically the standards applied to that person are "the same," there is no cognizable claim for discrimination, a point which Professor Barbara Flagg illustrates well in her article *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*.⁷⁵ In that piece, Professor Flagg presents a hypothetical situation detailing the differential treatment two black sisters received at their respective places of work. One, Yvonne, was an accountant at a major nationwide accounting firm.⁷⁶ In

gory] made a difference in the decisionmaking process," an inquiry targeting causation rather than the actor's subjective mental state).

⁷¹ 42 U.S.C. § 2000e-5(g) (2) (B) (2000); see also *Desert Palace Inc., v. Costa*, 539 U.S. 90, 94–95 (2003) (explaining that in a mixed motive case, an employer has an affirmative defense that, while not absolving it of liability, restricts the remedies available to the plaintiff).

⁷² However, as mentioned previously, while one has to fit into a protected category for Title VII purposes and under similar statutory provisions such as the ADA and ADEA, in some instances the scope of constitutional provisions is somewhat broader. See *supra* notes 67–69 and accompanying text.

⁷³ See *supra* note 68 and accompanying text.

⁷⁴ Often presented by critics as the "race-neutral" or "colorblind" view, this view asserts that equality has been achieved when the law makes no differentiation or acknowledgment of race, or other protected category. See Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* in CRITICAL RACE THEORY, *supra* note 47, at 257, 268–72 (explaining that a color-blind approach has been put forth as the "proper" attitude toward race, but also explaining the limits and problems in that approach). See generally MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003).

⁷⁵ See generally Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995).

⁷⁶ *Id.* at 2009.

this scenario, Yvonne was a well-qualified individual who largely conformed to existing norms in her profession and within the corporate culture of her workplace, including the norm of estimating time spent on client accounts and erring on the side of overbilling.⁷⁷ When it came time for Yvonne to be promoted to regional manager, she was passed over for promotion due to the imprecise manner in which she had billed certain clients.⁷⁸ Yvonne was passed over despite the fact that she engaged in practices similar—if not identical—to other members of the firm, who were not held accountable for their equally shoddy recordkeeping.⁷⁹ As Flagg points out, although she may not win, Yvonne would have a cognizable claim under existing antidiscrimination doctrine because she is being treated differently from similarly situated others.⁸⁰

In contrast, Yvonne's sister, Keisha Akbar, did not assimilate to prevailing norms to the extent that Yvonne did. Apart from legally changing her name from Deborah Taylor, Keisha also adopted speech and grooming patterns consistent with her African heritage.⁸¹ Working as the only black scientist in a small research firm, Keisha did well at the technical aspects of her job, but was ultimately not promoted when the small firm began to expand because she was thought to lack the personal qualities needed to be an effective manager; namely, she was seen as being too different from the researchers she would supervise.⁸² While Keisha suffered differential treatment like Yvonne, Flagg explains that Keisha is much less likely to have a cognizable discrimination claim because, unlike Yvonne, Keisha is treated the same as her coworkers; the same norms are being applied to her as to everyone else, and she is arguably being treated the same as anyone who fails to conform to those norms.⁸³ Despite the fact that Keisha's unwillingness to conform to those norms is directly linked to her identity as a black woman, and thus arguably results in a difference in treatment based on her race, the discrimination Keisha experienced is not the type for which current antidiscrimination law provides redress.⁸⁴

⁷⁷ *Id.* at 2009–10.

⁷⁸ *Id.* at 2010.

⁷⁹ *Id.*

⁸⁰ Flagg, *supra* note 75, at 2012, 2013, 2014.

⁸¹ *Id.* at 2010–11.

⁸² *Id.* at 2011.

⁸³ *Id.* at 2012.

⁸⁴ *Id.* at 2013–15; see also Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2407–08 (1994) (explaining how victims of cultural domination, such as victims of English-only rules, have not

Fourth, this perspective is informed by the idea that discrimination is an abnormality or rarity, rather than the norm.⁸⁵ Put simply, the underlying assumption is that the employer has acted for permissible motives and the workplace is not discriminatory. Several of the major Supreme Court antidiscrimination cases evidence this point. For example, *Wards Cove Packing Co. v. Atonio* involved a disparate impact case in which employees challenged the composition of the employer's workforce in which nonwhites predominated in the less-skilled, lower-paying jobs.⁸⁶ Specifically, the plaintiffs alleged that hiring and promotion practices of the employer were responsible for the racial stratification of the workforce.⁸⁷ In finding against the plaintiffs, the Supreme Court first explained that the proper comparison for analysis was not the discrepancy between the cannery and noncannery workforce within the particular employer, but rather the pool of qualified applicants versus those holding a particular position.⁸⁸ Thus, the plaintiffs could not establish a prima facie case of disparate impact on the basis of comparing segments of the employer's own workforce.⁸⁹ Furthermore, although not necessary to the decision, the Court went on to clarify a few other points, the most important for this discussion being the issue of causation. Specifically, the Court made clear that even if properly determined, it would not be enough to demonstrate an imbalanced workforce to prevail on a disparate impact claim.⁹⁰ Rather, in addition to

been successful in seeking redress from the courts since their harm is regarded as due to their own choices, rather than them being victims of an exclusionary workplace culture).

⁸⁵ See Krieger, *supra* note 70, at 1167 (“[D]isparate treatment analysis assumes that, unless they harbor discriminatory intent or motive, decisionmakers will act objectively and judge rationally.”); Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 590 (2000) (describing what she terms the “meritocracy myth” which reflects dominant cultural assumptions, the first of which being “that employment discrimination is an anomaly”); Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1314 (1991) (“[E]qual protection jurisprudence reflects a society that merely rebukes accidental manifestations of prejudice, condemning them as social blunders rather than recognizing them as symptoms of a deeper societal pathology.”); Sturm, *supra* note 38, at 672 (“The law appears to assume that, absent racist or sexist motivation, race and gender identity does not enter into workplace decision making”); see also Freeman, *supra* note 70, at 1103 (explaining that jurisprudence views discriminatory acts as “the occasional aberrational practice”).

⁸⁶ 490 U.S. 642, 647 (1989). Jobs at the canneries at issue were divided into two primary types, cannery and noncannery jobs. *Id.* The cannery jobs were unskilled, paid less than the skilled noncannery jobs, and were predominantly filled by nonwhites. *Id.* In contrast, the noncannery jobs were skilled positions filled predominantly by whites. *Id.*

⁸⁷ *Id.* at 647–48.

⁸⁸ *Id.* at 651–52.

⁸⁹ *Id.* at 654–55.

⁹⁰ *Id.* at 656–57.

establishing an imbalance, the plaintiff would also have to show that the particular disparate impact was created by a specific or particular employment practice.⁹¹ To the extent an employee is unable to make this causal link, the employee's claim will fail. Hence, unless an employee can show that an employer has created a racial imbalance through some specific and identifiable practice, the employee will not be able to establish a claim of disparate impact discrimination under the law. In other words, there is no disparate impact discrimination. Thus, the assumption is that, unless specifically shown otherwise, the workplace is free from discrimination such that an employer enjoys a presumption of legitimacy.

Furthermore, discrimination is only actionable when the victim has experienced some tangible effect.⁹² Thus, there are no proactive claims available under the current system. An employer who is engaging in discriminatory practices is free to do so under this presumption of legitimacy. The law applies only after a specific instance of discrimination occurs to which an employee or potential employee can refer.⁹³ Even at that juncture, the presumption of legitimacy remains unless the plaintiff can show by a preponderance of the evidence that there was a specific act or instance of discrimination based on an impermissible motive that caused an identifiable harm to that particular individual or group of individuals.⁹⁴ Accordingly, pursuant to this view, equality and fairness are the embedded norms and discrimination is the anomaly.

The above perspective on equality and the legal system it has engendered has done fairly well combating blatant forms of discrimination, so much so that some believe discrimination and subordination are largely a thing of the past.⁹⁵ However, subtle, unconscious, and un-

⁹¹ *Wards Cove*, 490 U.S. at 656–57. Although amendments to Title VII, in the form of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat 1071, 1074–75, overturned this portion of the decision to the extent that the Court in *Wards Cove* required an employee to disaggregate the particular offending employment practice, those amendments did not relieve the employee of the requirement of providing a direct causal link from the employment practice at issue and the disparate impact. See 42 U.S.C. § 2000e-2(k)(1)(A)–(B) (2000).

⁹² Freeman, *supra* note 70, at 1056.

⁹³ See *supra* text accompanying note 66.

⁹⁴ See *supra* text accompanying notes 70–73.

⁹⁵ BROWN ET AL., *supra* note 74, at 1–9; Crenshaw, *supra* note 47, at 103 (“The position of the New Right . . . is that the goal of the civil rights movement—the extension of formal equality to all Americans regardless of color—has already been achieved, hence the vision of a continuing struggle under the banner of civil rights is inappropriate.”); Freeman, *supra* note 70, at 1103 (noting that many believe the “future society,” where discrimination is the anomaly, is already here); Lawton, *supra* note 85, at 594 (“A majority of white Americans do not believe that race discrimination affects employment opportunities for black

intentional discrimination still persists. For this reason, several scholars have put forth proposals for how to address these other forms of discrimination under the law.⁹⁶ These proposals demonstrate a few key shifts in the traditional underlying perspective.

II. RECENT INNOVATIVE ATTEMPTS TO USE THE LAW TO COMBAT THE PROBLEM OF PERSISTENT INEQUALITY AND SUBORDINATION

For the last several decades, psychologists have explored the social and psychological processes that lead to prejudice, discrimination, and inequality.⁹⁷ As a result, researchers have gained valuable and sometimes startling insights that help explain why discrimination and inequality persist despite the demise of more blatant forms of discrimination and the large number of people claiming to be in support of equality.⁹⁸ Essentially, they described the preference for one's own group versus those of an outside group and how categorization and stereotyping, though part of efficient cognitive functioning, can result in unconscious bias that affects one's judgment of, perception of, and interaction with others as well as the ability to remember events.⁹⁹

Recognizing the persistence of discrimination in the wake of the Second Reconstruction and realizing that our laws and current antidiscrimination system were ineffective in sufficiently addressing the problem, legal scholars seized on the work of psychologists and began to theorize about unconscious and structural discrimination and how the law might be used to address it.¹⁰⁰ A review of these theories is to where this article now turns.

Americans in today's market."); Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather Than Intent*, 34 COLUM. HUM. RTS. L. REV. 657, 662–63 (2003).

⁹⁶ See discussion *infra* Part II.A.

⁹⁷ See generally THE HANDBOOK OF SOCIAL PSYCHOLOGY (Daniel T. Gilbert et al. eds., 4th ed. 1998) [hereinafter Gilbert et al., HANDBOOK]; ON THE NATURE OF PREJUDICE (John F. Dovidio, et al. eds., 2005); STEREOTYPES AND PREJUDICE (Charles Stangor ed., 2000); THE HANDBOOK OF SOCIAL PSYCHOLOGY (Daniel T. Gilbert et al. eds., 4th ed. 1998); PREJUDICE, DISCRIMINATION, AND RACISM (John F. Dovidio & Samuel L. Gaertner eds., 1986).

⁹⁸ See, e.g., Dovidio & Gaertner, *supra* note 37, at 4–8 (describing how racism persists in our society despite a change in overt measures of racial attitudes that show an increase in the belief in equality due to a more subtle form of modern racial bias known as aversive racism).

⁹⁹ See *id.* at 5–6. A comprehensive review of the wealth of this scholarship is beyond the scope of this paper, but for detailed overviews, see HANDBOOK OF SOCIAL PSYCHOLOGY (John Delamater ed., 2003) [hereinafter Delamater, HANDBOOK]; Gilbert et al., HANDBOOK, *supra* note 97, at 371–372; PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 97, at 128–133; STEREOTYPES AND PREJUDICE, *supra* note 97.

¹⁰⁰ See discussion *infra* Part II.A.

A. *New Proposals*

In his seminal article *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, Professor Charles Lawrence brought the problem of unconscious discrimination and inherent bias to the attention of the legal world.¹⁰¹ Relying on psychological theory, in particular Freudian and cognitive theories, he explained that all of us are influenced by a racist cultural heritage and, because of this influence, we are all racists to a certain extent.¹⁰² However, at the same time, most of us are unaware of our racism and, as a result, engage in behavior that produces racial discrimination influenced by unconscious, racial motivation.¹⁰³ Accordingly, Lawrence sought in his article to challenge the doctrine of discriminatory purpose established by the Supreme Court's decision in *Washington v. Davis*.¹⁰⁴ He explained:

[A doctrine] requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious.¹⁰⁵

Given this, he proposed a "cultural meaning" test to address unconscious bias.¹⁰⁶ Under this test, a particular government action would be evaluated to see if it "conveys a symbolic message to which the culture attaches racial significance."¹⁰⁷ If the court were to find by a preponderance of the evidence that a significant portion of the population would think of the action in racial terms, then a presumption would arise that unconscious racial attitudes had influenced the decisionmakers and the court would therefore apply heightened scrutiny.¹⁰⁸ In this way, equal protection law would be more responsive to pervasive and unconscious discrimination.¹⁰⁹

¹⁰¹ See generally Lawrence, *supra* note 70.

¹⁰² *Id.* at 322, 331-39.

¹⁰³ *Id.* at 322, 339-44.

¹⁰⁴ 426 U.S. 229, 247 (1976); Lawrence, *supra* note 70, at 318-19.

¹⁰⁵ Lawrence, *supra* note 70, at 323.

¹⁰⁶ *Id.* at 324.

¹⁰⁷ *Id.* at 324, 355-56.

¹⁰⁸ *Id.* at 356.

¹⁰⁹ *Id.* at 362-81 (containing illustrations for how the cultural meaning test would apply).

Since Lawrence's article, several scholars have also put forth proposals to make antidiscrimination law more responsive to the ways in which modern discrimination manifests itself. For example, Professor Oppenheimer proposed the adoption of a negligence theory of liability under Title VII.¹¹⁰ In so doing, he likened the disparate treatment and impact theories of Title VII liability to intentional and strict liability theories in tort.¹¹¹ He explained, however, that the work of social psychologists and sociologists lends considerable support to the idea that racial discrimination is frequently the result of negligent behavior.¹¹² Accordingly, he proposed a negligence theory of Title VII liability whereby employers would be liable if they failed to act to prevent discrimination that they knew, should have known, expected, or should have expected to occur, or when they breached a statutorily established standard of care by "making employment decisions which have a discriminatory effect, without first scrutinizing their processes, searching for less discriminatory alternatives, and examining their own motives for evidence of stereotyping."¹¹³ Apart from arguing that a negligence theory of liability would be more in line with the scientific data on discrimination,¹¹⁴ Oppenheimer also justified the proposal to impose negligence liability on the grounds that antidiscrimination doctrine already incorporated many aspects of negligence theory with respect to doctrines governing claims of harassment and those requiring accommodation of religious practices, pregnancy, and disabilities.¹¹⁵ Thus, it was but a small step to impose negligence liability, a better system for addressing unconscious bias.¹¹⁶

Linda Hamilton Krieger also focused on the work of psychologists in her groundbreaking work *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*.¹¹⁷ However, unlike Lawrence and Oppenheimer, Krieger used psychological theory to do more than argue the existence of unconscious bias

¹¹⁰ David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993).

¹¹¹ *Id.* at 899, 920–21, 924–25.

¹¹² *Id.* at 902–17.

¹¹³ *Id.* at 969–70.

¹¹⁴ *Id.* at 967.

¹¹⁵ Oppenheimer, *supra* note 110, at 939 (religious practices); 942–43 (pregnancy); 944 (disabilities); 948, 950 (racial harassment); 959, 962, 966–67 (sexual harassment).

¹¹⁶ *Id.* at 969–72. *But see generally* Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999) (arguing that unconscious bias should be addressed through an expansion of Title VII).

¹¹⁷ Krieger, *supra* note 70, at 1165.

as something the law should address. Instead of just speaking generally about the existence of unconscious bias, Krieger articulated the specific ways in which normal cognitive functioning can lead to biased perception and decisionmaking.¹¹⁸ She then illustrated what that meant with respect to Title VII's ability to adequately address workplace discrimination.¹¹⁹

First, Krieger pointed out that under disparate treatment theory and, in particular, the pretext model, a defendant is assumed to have acted rationally and without discriminatory animus.¹²⁰ However, as Krieger makes clear, psychologists have shown that "implicit knowledge structures and judgmental heuristics systematically bias perception and judgment at all points along the perceptual/judgment continuum."¹²¹ Thus, decisions by those with even the best of intentions are often the result of intergroup bias.¹²² Accordingly, the insistence on only addressing discrimination where motive or intent are shown allows many instances of discrimination to go unaddressed.

Second, Krieger explained that disparate treatment theory also rests on the assumption that discrimination occurs at the moment a decision is made.¹²³ However, psychological study has also demonstrated that this is not the case. Rather, interpersonal decisionmaking is an integrated process of several components that happens over time.¹²⁴ Thus, while Title VII only addresses discrimination if intent or motive is found at the time of decision, in reality, cognitive functioning can taint the process long before the actual decision is made.¹²⁵ Lastly, Title VII rests on the assumption that decisionmakers are aware of the basis for their decisions.¹²⁶ However, as with the previous two assumptions, psychological research shows that this is not likely the case; in fact, the opposite may more often be true.¹²⁷

After showing that much of Title VII disparate treatment jurisprudence rested on faulty assumptions about human cognitive functioning and the causes of discrimination, Krieger proposed that "[t]he pretext model of individual disparate treatment [theory should] be eliminated

¹¹⁸ *Id.* at 1187–88.

¹¹⁹ *Id.* at 1211.

¹²⁰ *Id.* at 1181.

¹²¹ *Id.* at 1212.

¹²² Krieger, *supra* note 70, at 1212–13.

¹²³ *Id.* at 1167, 1213.

¹²⁴ *Id.* at 1213.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Krieger, *supra* note 70, at 1213–15.

entirely and replaced with a unitary ‘motivating factor’ analysis.”¹²⁸ Under a “motivating factor” analysis, a plaintiff could prevail on a disparate treatment claim by simply showing that her group status played a role—in other words, “made a difference”—in the employer’s action or decision.¹²⁹ If the defendant were then able to show that it would have made the same decision absent the biasing effect of the plaintiff’s group status, the plaintiff would be limited to the remedies available for disparate impact cases.¹³⁰ However, if the plaintiff could show proof of the defendant’s conscious use of group status, she would be entitled to compensatory and punitive damages as well.¹³¹ Thus, under this approach, the law would take account of the fact that discrimination can arise absent discriminatory intent or purposeful causation.¹³²

Like Lawrence, Oppenheimer, and Krieger, other commentators have focused on the unconscious nature of discrimination and the law’s inability to adequately address discrimination of this type. However, in so doing, these scholars have focused more on inherent structural problems that facilitate or perpetuate discrimination rather than individual cognitive or psychological processes. For example, Professor Susan Sturm has illustrated that the nature of the current workplace has changed.¹³³ In most situations, gone are the days of traditional, top-down, hierarchical structures.¹³⁴ Instead, more and more workplaces are characterized by a flatter form of decisionmaking where coworkers function as teams in increasingly mobile environments and where the lines between customers, clients, and suppliers are blurring.¹³⁵ Because of the changes in the modern workplace, Sturm argues that the current legal system, largely based on the eroding traditional hierarchical structure, no longer allows us to adequately address the real ways that exclusion, bias, and the exercise of power effect the modern workplace.¹³⁶ Accordingly, she proposes that we take a structural approach to antidiscrimination law. This approach would call for “a dynamic and reciprocal relationship between judicially elaborated general legal norms and

¹²⁸ *Id.* at 1241.

¹²⁹ *Id.* at 1242.

¹³⁰ *Id.* at 1243.

¹³¹ *Id.*

¹³² Krieger, *supra* note 70, at 1242.

¹³³ Sturm, *supra* note 38, at 639–41; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001).

¹³⁴ Sturm, *supra* note 38, at 640.

¹³⁵ *Id.* at 640–41.

¹³⁶ *Id.* at 659–61, 673.

workplace-generated problem-solving approaches¹³⁷ and would embody the underlying assumption that a problem-solving process rather than a rule-enforcement approach would better address current problems in the dynamic workplace.¹³⁸ In a similar vein, Professor Tristin K. Green has also argued that the modern workplace has changed and that we accordingly need a new conceptualization of discrimination that will allow us to combat these modern forms.¹³⁹ Lastly, Professor Ian F. Haney López, in his insightful article *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, examines how inherently biased patterns and structures of decisionmaking and selection can create and perpetuate discrimination and subordination.¹⁴⁰

The work of the scholars discussed in this section and others like them demonstrates a shift in the understanding of discrimination, inequality, and subordination underlying our current antidiscrimination system. The following section explicates this shift as well as the difference from the traditional perspective it evidences.

B. *The Tweaking of the Traditional Perspective*

As identified earlier, the perspective underlying our current anti-discrimination system can be characterized as envisioning discrimination as something purposely or consciously done at a specific point in time on the basis of certain protected characteristics.¹⁴¹ It is a perspective that views equality as sameness in treatment and which largely does not countenance a proactive approach to eradicating the problem.¹⁴² It is a perspective that sees discrimination, subordination, and inequality as anomalies in an otherwise fair and rational system and as problems which can only be eradicated in the face of an identifiable tangible effect.¹⁴³ The proposals for change discussed in the previous section¹⁴⁴ evidence key shifts in this perspective, but they also show a continued

¹³⁷ Sturm, *supra* note 133, at 522.

¹³⁸ *Id.* at 475–78.

¹³⁹ See generally Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2005); Green, *supra* note 38; Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659 (2003).

¹⁴⁰ See generally Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000). For a more detailed account of his article, see discussion *infra* Part III.C.2.

¹⁴¹ See discussion *supra* Part I.B.3.

¹⁴² See discussion *supra* Part I.B.3.

¹⁴³ See discussion *supra* Part I.B.3.

¹⁴⁴ See discussion *supra* Part II.A.

belief in aspects of this perspective that are important as well. The following subsections highlight these differences and similarities.

1. Differences in Perspective

The first major difference between the traditional perspective and the view of scholars like those discussed above is the belief on the part of the former that while discrimination can and does occur in the form of blatant and purposeful discrimination it can, and often does, occur in subtle and unconscious or unintended ways.¹⁴⁵ In fact, it was precisely the recognition that not all discrimination and inequality is purposeful that prompted many of these scholars to seek alternatives to our current system, alternatives that would address these unconscious forms of discrimination and bias.¹⁴⁶

Second, the perspective evident in these scholars' work also differs significantly from the traditional perspective in that several of them recognize that discrimination can and does occur at points other than at the moment of action.¹⁴⁷ While discrimination may be present at the moment of action or with respect to a particular action, as they highlight, bias can infect all parts of a particular situation or process.¹⁴⁸

Third, although not necessarily articulated explicitly in each of their works, several of these scholars appear to hold a view of equality that goes beyond the formal equality and colorblindness that informs the current system.¹⁴⁹ A strong argument can be made, which some of these scholars have asserted, that formal equality has largely been achieved.¹⁵⁰ Thus, if that were sufficient, there would be no need to put forth the kinds of proposals they have because equality would already have been achieved.

Lastly, proposals such as those put forth by Sturm and Green, which would specifically and proactively address workplace discrimination through structural change, show a willingness to address inequality and discrimination absent a clearly identifiable tangible effect.¹⁵¹ Thus, the views informing their work evidence a significant shift in the traditional perspective underlying our antidiscrimination laws.

¹⁴⁵ See discussion *supra* Part II.A.

¹⁴⁶ See discussion *supra* Part II.A.

¹⁴⁷ See *supra* text accompanying notes 117–140.

¹⁴⁸ See *supra* text accompanying notes 117–140.

¹⁴⁹ See discussion *supra* Part II.A.

¹⁵⁰ See discussion *supra* Part II.A.

¹⁵¹ See *supra* notes 133–140 and accompanying text.

2. Similarities in Perspective

While the difference in perspective between these progressive scholars and the traditional view is significant, there are some important similarities as well. First, while the underlying view of equality these scholars seem to adopt appears to be more expansive than that held under the traditional perspective, it is not clear how much more expansive or different that view actually is. While it is pretty clear that formal equality, or simply equal access, without meaningful equality of result would not be enough for these scholars, they do not articulate a clear vision of what an equal and nondiscriminatory society would look like. Without that clear vision and an explanation of how their proposals do a better job of getting us to that ideal, these proposals lose some of their normative force.¹⁵²

Second, while some of these scholars question the importance of and continued reliance on the protected categories we have in place,¹⁵³ few really question whether those categories should be primary constructs regarding the way we understand and address discrimination and inequality. Lastly, and most importantly, while perhaps not wholeheartedly holding to the belief of discrimination as anomaly,¹⁵⁴ none really challenge that belief or explore the implication for our entire antidiscrimination system if that underlying presumption is a faulty one. As a result, even with a shift in perspective and the resulting proposals for reform, key components of the perspective underlying our current system remain intact and largely go unchallenged.

The scholars discussed and cited here and others like them, through their innovative and insightful ideas and desire to address a persistent and very difficult problem, have done much to advance our understanding of inequality and subordination within our society and the law's role in both helping to perpetuate and to eradicate the persistent problems of discrimination, subordination, and inequality. However, lack of a clearly articulated vision for what constitutes equality, or, in the converse, what constitutes inequality, as well as the absence of

¹⁵² Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 34–40 (2006).

¹⁵³ See generally, e.g., Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (arguing that race is primarily a social, rather than a biological, construct, and therefore is to some degree a product of choice).

¹⁵⁴ See, e.g., Haney López, *supra* note 140 *passim* (noting how racism can permeate whole systems and structures); Lawrence, *supra* note 70, at 330 (describing racism as “normal” and ubiquitous).

significant challenge to the anomaly assumption and the continued use of categories, points to aspects of the problem that these scholars have overlooked. Failure to recognize these aspects of the problem necessarily leads to a failure to address them and the attendant possibilities for meaningful change that addressing these aspects might present.¹⁵⁵

III. WHAT IS MISSING?

The proposals discussed above are informed by a more comprehensive and complex understanding of the problem of discrimination and subordination than the current norm, but there is a key aspect of this problem which even they are missing. This important, absent component and the attendant change in perspective it engenders are addressed below.

A. *The Truth About Inequality and Discrimination in America*

It is easier for the world to accept a simple lie, than a complex truth.

—attributed to Alexis de Tocqueville

On July 4, 1776, Thomas Jefferson, writing for a unanimous United States of America, declared:

We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.¹⁵⁶

¹⁵⁵ While I do intend to offer a perspective I believe to be different from those discussed here, with the hope that a different perspective will allow us to address aspects of the discrimination and subordination problem I feel we have not sufficiently theorized, it is not at all my intent to diminish or disparage the work of the scholars presented here. Further, I do not mean to imply, nor would I assume, that there are not other aspects to this exceedingly complex and difficult problem that I may be missing as well. It is simply my hope to add to and hopefully expand or alter the direction of the conversation.

¹⁵⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

With this declaration we took the first steps toward forming our own country in which equality and inalienable rights were to be the bedrock of the more perfect union we sought to form. Unfortunately, the more perfect union was from the beginning built on shaky ground, at least to the extent it might guarantee and deliver on the promise of equality to all men (not to mention women).

1. Inequality Predates America

Over 100 years before the drafting of the Declaration of Independence, the seeds for our longstanding inequality, subordination, and discrimination problem were sown. Beginning as early as 1565, the first Europeans began to colonize what would eventually become the United States of America.¹⁵⁷ Over the next several years the number of colonists grew and the need for land increased.¹⁵⁸ At the same time, the fertility of the American soil became more apparent and the profitability of cultivating cash crops grew.¹⁵⁹ However, the land the colonizers wanted was already occupied and the cheap labor they desired was not readily available.¹⁶⁰ It was primarily this need for land and labor that catalyzed the subordinating regime that eventually became woven into nearly all aspects of the American fabric.

Historians have debated for decades the origins of chattel slavery in what eventually became the United States and the concomitant ideological regime of white supremacy, racism, and subordination.¹⁶¹ Some have argued that chattel slavery and the ideology of white supremacy

¹⁵⁷ See Press Release, City of St. Augustine, Fla., St. Augustine Celebrates 441 Years (July 27, 2006), http://www.ci.st-augustine.fl.us/pressreleases/7_06/441-yrs-celebrate.html (noting one of the first colonies on the part of the North American continent that would become the United States was St. Augustine, Florida, founded by Spaniard Don Pedro Menendez de Avilés); see also American Discovery and Colonization Timeline, <http://usa-history.info/timeline/> (last visited Mar. 29, 2007).

¹⁵⁸ See STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 12 (2005).

¹⁵⁹ ROBIN BLACKBURN, *THE MAKING OF NEW WORLD SLAVERY: FROM THE BAROQUE TO THE MODERN 1492–1800*, at 223–35 (1997) (describing the rise of tobacco, cotton, sugar and indigo crops in the Americas).

¹⁶⁰ See BANNER, *supra* note 158, at 10–20 (describing the complexity of the problem the colonists faced regarding their ability to take land from the Native Americans); PATRICIA SEED, *AMERICAN PENTIMENTO: THE INVENTION OF INDIANS AND THE PURSUIT OF RICHES* 29–37 (2001) (describing the English view of the Americas as “idle,” unoccupied “waste” land in need of cultivation).

¹⁶¹ See, e.g., Alden T. Vaughan, *The Origins Debate: Slavery and Racism in Seventeenth-Century Virginia*, 97 VA. MAG. HIST. & BIOGRAPHY 311 (1989), reprinted in *THE WORLDS OF UNFREE LABOUR* 25 (Colin A. Palmer ed., 1998) (all subsequent citation to reprinted work).

and nonwhite inferiority were present as early as the first record of blacks in the United States in 1619 Virginia.¹⁶² Others argue that the move to an ideology of racism and chattel slavery was more gradual over a longer period.¹⁶³ Relying on records of freed blacks,¹⁶⁴ the use of significant numbers of white servants,¹⁶⁵ and the aversion to enslaving Christians regardless of color,¹⁶⁶ these scholars argue that slavery and white supremacist ideology developed over time.¹⁶⁷ Scholars in the latter camp also point to laws of that time, which present the intransigence of the slave system as something that occurred gradually.¹⁶⁸ Regardless of which view one adopts, the important point is that chattel slavery and its accompanying ideology of white supremacy were firmly in place in certain areas of America as early as the 1660s and 1670s and became more firmly entrenched by the 1680s,¹⁶⁹ thus predating the formation of the Union by roughly 100 years.

Similarly, the eventual belief in the right of whites to take Native American lands and to subjugate Native American people also appears to be something that developed over time without clear-cut origins.¹⁷⁰ Early records appear to present a mixed view among the Europeans regarding whether the land in North America was simply theirs for the taking.¹⁷¹ Some early settlers assumed property and sovereignty rights on the basis of “discovery” of “New World” lands as though the Native Americans were not there simply because they could be conquered.¹⁷² Others justified the taking of land by claiming that Christians had the right, if not the duty, to take land from non-Christians.¹⁷³ Still others justified their actions by asserting that Native Americans were a “savage” people who were not able to claim any property rights.¹⁷⁴

¹⁶² *Id.* at 26.

¹⁶³ *See id.* at 26–32.

¹⁶⁴ *Id.* at 27–28, 44.

¹⁶⁵ BLACKBURN, *supra* note 159, at 219 (stating that there was a period of twenty to eighty years in which “English servants filled the plantation colonies and comprised the principal workforce”).

¹⁶⁶ Vaughan, *supra* note 161, at 43.

¹⁶⁷ *See generally id.*

¹⁶⁸ *See* A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 19–36* (1978).

¹⁶⁹ *See id.* at 32–40.

¹⁷⁰ *See* BANNER, *supra* note 158, at 10–20.

¹⁷¹ *E.g., id.* at 12–14.

¹⁷² *Id.* at 14–15, 17–18.

¹⁷³ *Id.* at 16.

¹⁷⁴ *Id.* at 18–19.

Be that as it may, there were many others, although by no means a unanimous group, who believed that the Native Americans did in fact own the land they occupied and that, at the very least, such land had to be acquired by purchase; it could not be taken without consent under English law.¹⁷⁵ However, a belief in Native American land ownership was not necessarily accompanied by a belief in the equality of Native Americans.¹⁷⁶ Nor was it void of a self-serving purpose on the part of the colonists for, ironically, the same laws that would have recognized land possession by the Native Americans were also the same laws that protected property rights in the claims made by the colonizers.¹⁷⁷ Thus, while some North American colonizers may have recognized Native American property rights, they did so while at the same time viewing Native Americans as barbaric and uncivilized and rarely questioning their right to take Native American land.¹⁷⁸ Further, as the number of colonizers increased and the need for land grew, more and more land was taken without even the fiction of purchase.¹⁷⁹

In sum, the initial foundation for the United States grew out of the acquisition of land by European colonizers on the North American continent and the ability to make that land commercially productive through the use of cheap labor.¹⁸⁰ Acquiring that land for next to nothing and forcing people to work it for free required the development of an ideology that allowed for and justified the subordination and subjugation of groups of "others." Thus, the seeds of inequality and subordination were sown into the American foundation long before 1776 and have only grown and matured since that time.

2. The Framers' View of Equality

Despite the fact that at its inception the United States was declared a nation of equals, the reality was that the ideology of white male supe-

¹⁷⁵ BANNER, *supra* note 158, at 16–17, 23. Indeed, there is evidence of many purchases made in colonial times under this latter theory. *Id.* at 24–29.

¹⁷⁶ *Id.* at 42.

¹⁷⁷ *Id.* at 41 ("To suggest that the Indians were not property owners would have been to upset the settled expectations of a large number of *English* property owners, who would suddenly have found their land titles open to question.")

¹⁷⁸ Nicholas P. Canny, *The Ideology of English Colonization: From Ireland to America*, 30 WM. & MARY Q. 575 (1973), reprinted in THEORIES OF EMPIRE, 1450–1800, at 179, 200–01 (David Armitage ed., 1998) (describing how the English used the same pretexts for colonization of Native Americans as they used for the Irish).

¹⁷⁹ BANNER, *supra* note 158, at 35.

¹⁸⁰ BLACKBURN, *supra* note 159, at 235 (explaining how the "voracious demand for plantation products" eventually forced the use of slave labor).

riority was alive and well before the nation's founding, and permeated all aspects of American life despite declarations to the contrary. As Chief Justice Taney explained (more honestly than most):

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument. . . .

. . . .

[Paragraph two of the Declaration of Independence] would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration

. . . .

. . . .

[The Framers] perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race¹⁸¹

Chief Justice Taney's interpretation is supported by other historical documents and commentary of the time.¹⁸² For while some of the founders may have been ambivalent, opposed to slavery, or even accepting of blacks as men, they certainly did not see blacks as equal to whites.¹⁸³

Thus, despite the principles upon which this country was founded, equality as viewed by the founders only included white men, and even then only white men with property and status. Poor people of all kinds, women generally, and anyone not considered white in particular were thought to be unequal and relegated to a subordinate status.¹⁸⁴ Any doubts as to whether the founding fathers subscribed to these beliefs

¹⁸¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407, 410 (1857).

¹⁸² See DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770–1823*, at 174–77, 194–95 (1975).

¹⁸³ *E.g., id.* (describing the views of Thomas Jefferson).

¹⁸⁴ See JERRY FRESIA, *TOWARD AN AMERICAN REVOLUTION: EXPOSING THE CONSTITUTION AND OTHER ILLUSIONS 1–23* (1988).

are belied by many of their actions, for who can own another man or woman and hold that person in bondage or servitude and at the same time see that person as equal? There are some scholars and historians who are quick to point out that, despite these shortcomings, the founders were not nearly as bad or as hypocritical as they are depicted in modern scholarship.¹⁸⁵ However, even if the founders on some level did believe in the equality of all human beings, the need to make a profit on the backs of free labor superseded that belief.¹⁸⁶ Further, the continuation of slavery and the belief in white superiority in the face of a bold declaration to the contrary meant the country would be founded on the basis of an inherent contradiction, and the subordination and inequality would continue, endure, and become part of the fundamental social fabric of America.

3. Inequality and Subordination Are Embedded in the American Government Structure

In the same way that subordination and inequality were part and parcel of the foundation of this country and the views of the founders, they were also embedded into our structure of government and system of laws. The preeminent legal document in this country, the U.S. Constitution, did not affirmatively allow women to vote until 1920, thus al-

¹⁸⁵ *E.g.*, THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA, at xi–xv (1997).

¹⁸⁶ *See* DAVIS, *supra* note 182, at 196.

Would any one believe that I am Master of Slaves of my own purchase! I am drawn along by ye general Inconvenience of living without them; I will not, I cannot justify it. However culpable my conduct, I will so far pay my devoir to Virtue, as to own the excellence & rectitude of her Precepts & to lament my want of conformity to them.

Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), in GEORGE S. BROOKES, FRIEND ANTHONY BENEZET 443 (1937), *quoted in* DAVIS, *supra* note 182, at 196.

Jefferson's record on slavery can only be judged by the values of his contemporaries and by the consistency between his own professed beliefs and actions. . . . One can understand and sympathize with his occasional feelings of despair, as when he wrote in 1820 that "we have a wolf by the ears, and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other." But for Jefferson the scale tipped heavily toward self-preservation, which meant the preservation of a social order based on slavery.

DAVIS, *supra* note 182, at 183. *See generally* Tania Tetlow, *The Founders and Slavery: A Crises of Conscience*, 3 LOY. J. PUB. INT. L. 1 (2001) (examining the role of self-interest in shaping ideology).

lowing for the disenfranchisement of over half of the population from the beginning.¹⁸⁷ Similarly, the Constitution provided for the protection of slavery, be it directly or indirectly, in at least twelve places,¹⁸⁸ and several other constitutional clauses ultimately served to protect the institution when they were interpreted by the courts or implemented by the executive.¹⁸⁹

Accordingly, the “more perfect Union” the document was meant to form excluded or subordinated the majority of the individuals in that Union.¹⁹⁰ Significant changes made nearly a century later in the form of the Thirteenth, Fourteenth, and Fifteenth Amendments helped lessen the problems of inequality and subordination, but those amendments have not been able to eradicate the inequality and subordination embedded at formation. This is due in no small part to the restrictive way in which the U.S. Supreme Court interpreted those sections shortly after their passage.

First, while the Thirteenth Amendment effectively abolished slavery, the Supreme Court interpreted that amendment in such a way that it did little more than remove the shackles. When interpreting the amendment in the *Civil Rights Cases*,¹⁹¹ the Supreme Court made it clear that the incidents of slavery and servitude that the Thirteenth Amendment was meant to eradicate extended only to instances of “[c]ompulsory service . . . for the benefit of the master, restraint of . . . movement[] except by the master’s will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities.”¹⁹² Consequently, the Court refused to accept the plaintiffs’ argument that denial of equal accommodations and privileges constituted subjection to a species of servitude as contemplated by the Amendment.¹⁹³ Stating clearly that “[m]ere discriminations on account of race or color were not regarded as badges of slavery,”¹⁹⁴ the Court struck down the Civil Rights Act of 1875 and greatly narrowed the scope of the Thirteenth Amendment,¹⁹⁵ pointing out that:

¹⁸⁷ U.S. CONST. amend. XIX.

¹⁸⁸ Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 427–33 (1999).

¹⁸⁹ *Id.* at 426.

¹⁹⁰ U.S. CONST. pmbl.

¹⁹¹ 109 U.S. 3 (1883).

¹⁹² *Id.* at 22.

¹⁹³ *Id.* at 23–25.

¹⁹⁴ *Id.* at 25.

¹⁹⁵ *Id.*

[t]here were thousands of free colored people in this country before the abolition of slavery . . . yet no one . . . thought that [slavery] was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement¹⁹⁶

Thus, while technically free, the recently freed slaves remained in a subordinated status as many of the “badges” of slavery remained intact.

The Fourteenth and Fifteenth Amendments fared little better. In the *Slaughter-House Cases*, the Court applied an extremely strict view of state versus national citizenship in asserting that citizenship of the United States was distinctly different from citizenship of the several states, and therefore section one of the Fourteenth Amendment referred only to citizens of the United States.¹⁹⁷ Accordingly, the Fourteenth Amendment did not protect the privileges and immunities found to fall within the purview of state power. The Court then defined state power as encompassing “nearly every civil right for the establishment and protection of which organized government is instituted.”¹⁹⁸ In so doing, it effectively read the Privileges and Immunities Clause out of the Fourteenth Amendment and made it a nullity for all time.¹⁹⁹ Given that at least some of the framers of the Fourteenth Amendment intended the Privileges and Immunities Clause to “protect basic rights from state interference,”²⁰⁰ the Supreme Court’s refusal to give it any meaningful content was no insignificant act in keeping subordination and inequality embedded in the Constitution. In a similar vein, the reach of the Equal Protection and Due Process clauses were similarly limited from the outset by the Court’s ruling that they too only applied to state action,²⁰¹ and by the Court’s determination that equality meant simple, formal equality before the law rather than equality in fact.²⁰² Additionally, the backlash to the Court’s strict adherence to freedom of contract doctrine, which served to protect certain classes to the detri-

¹⁹⁶ *Id.* See *The Civil Rights Cases*, 109 U.S. at 25.

¹⁹⁷ 83 U.S. (16 Wall.) 36, 74 (1873).

¹⁹⁸ *Id.* at 76.

¹⁹⁹ Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 *Loy. L.A. L. Rev.* 1143, 1144 (1992) (“Through judicial interpretation, the Court has rendered the Privileges or Immunities Clause a nullity.”).

²⁰⁰ *Id.* at 1145.

²⁰¹ See *The Civil Rights Cases*, 109 U.S. at 13–14, 17–18.

²⁰² See *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896).

ment of others, ultimately led to a reluctance to use substantive due process to address the deprivation of many rights.²⁰³

For similar reasons the Fifteenth Amendment was no more helpful than its counterparts. In construing the reach of the Fifteenth Amendment, the Supreme Court once again took an extremely restrictive approach that essentially made the Fifteenth Amendment ineffectual in securing for African Americans and other people of color the right to vote for several decades. In *United States v. Reese*, the Court stated that the Fifteenth Amendment did not actually confer the right of suffrage, but only created the right of an “exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous conditions of servitude.”²⁰⁴ It confirmed that view in *United States v. Cruikshank*.²⁰⁵ Thus, the Supreme Court opened the door for the many methods of disenfranchisement that would follow; it effectively condoned the behavior at issue in both of those cases, such as refusing to accept William Gartner’s payment of the tax necessary to vote in *Reese*,²⁰⁶ and permitting the banding together with the intent to injure, threaten, and intimidate Levi Nelson and Alexander Tillman in *Cruikshank*.²⁰⁷

Ironically, even if the Supreme Court had read the Fifteenth Amendment in such a way as to make it effective, the Court still would have only allowed men to vote.²⁰⁸ Thus, all women (regardless of color or social status) would still have been disenfranchised, and the accompanying subordination would have still been embodied in our national Constitution. As a result, even with these attempts to rectify its shortcomings, subordination and inequality still remain embodied in the U.S. Constitution and have continued to be embedded in the very foundations of our country.

4. Inequality and Subordination Are Embedded in Our Major Institutions

Whether or not one can say for certain that inequality was embedded in our major social institutions prior to the end of the Civil War, one can certainly argue that such was the case after the Civil War and the end of Reconstruction. Examining closely the time following the

²⁰³ Chemerinsky, *supra* note 199, at 1150–51.

²⁰⁴ 92 U.S. 214, 218 (1875).

²⁰⁵ 92 U.S. 542 (1875).

²⁰⁶ 92 U.S. at 223–25 (Clifford, J., dissenting).

²⁰⁷ 92 U.S. at 548–49.

²⁰⁸ See generally JEFF HILL, *DEFINING MOMENTS: WOMEN’S SUFFRAGE* (2006).

end of Reconstruction up until the passage of the 1964 Civil Rights Act, one can see how the decision in *Plessy v. Ferguson*²⁰⁹ and the cementing of de facto and de jure segregation across the United States caused inequality to become entrenched in almost all major social, political, and governmental institutions in the United States. While a complete accounting of how this happened in various parts of society is beyond the scope of this article, what follows are a few highlights that demonstrate the degree to which inequality and subordination became embedded in nearly every aspect of American life.

a. *Politics and Voting*

As early as 1790, through the Naturalization Act, the founding fathers limited eligibility for naturalized citizenship to free white people, who more often than not were men.²¹⁰ Thus, nonwhite immigrants, slaves, and Native Americans were excluded from the beginning.²¹¹ Yet during the time of Reconstruction, there was a rise in black enfranchisement, voting, and political participation, though these trends did not last long.²¹² The rise of the Ku Klux Klan and other similar groups that used violence to intimidate blacks and sympathetic whites helped keep their victims from the polls and out of political activity.²¹³ Furthermore, several states used a variety of legal means to limit black's participation in the political process; poll taxes, white primaries, and other mechanisms such as literacy tests and grandfather clauses resulted in the widespread disenfranchisement of blacks.²¹⁴ While many of these provisions and tactics were not race specific, their purpose was clear and they resulted in a system rife with intentionally built-in inequity meant to subordinate whole groups of people.²¹⁵ While the civil rights movement, the passage of the 1964 Civil Rights Act²¹⁶ and 1965

²⁰⁹ 163 U.S. 537 (1896). In this case, the U.S. Supreme Court found a Louisiana law providing for the segregation of railway trains constitutional under both the Thirteenth and Fourteenth Amendments, and thus sanctioned such laws across the South, opening the door for widespread legally sanctioned segregation. *See id.*

²¹⁰ JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A MULTIRACIAL AMERICA* 583 (2000).

²¹¹ *Id.* at 583–84.

²¹² *See supra* notes 15–18 and accompanying text.

²¹³ *See* MICHAEL J. CASSITY, *LEGACY OF FEAR: AMERICAN RACE RELATIONS TO 1900*, at 151–55 (1985) (excerpting testimony before a Congressional Joint Select Committee of a Klan victim during Reconstruction); *see also supra* notes 19–21 and accompanying text.

²¹⁴ BELL, *supra* note 15, at 478–82; WOODWARD, *supra* note 15, at 83–85.

²¹⁵ *See* BELL, *supra* note 15, at 481.

²¹⁶ Pub. L. No. 88-352, 78 Stat. 241.

Voting Rights Act²¹⁷ helped alleviate many of these past problems, the widespread disenfranchisement, lack of political participation, and political inequity affecting blacks are still persistent problems today.²¹⁸

b. *Employment, Housing, Education, Healthcare, and the Criminal Justice System*

Inequity in employment has long and deep roots in the United States.²¹⁹ Beginning with the system of slavery, inequity in employment has been a continuous problem.²²⁰ Traditionally, the best jobs were reserved for white males while lower-paying, unskilled positions were left for women and people of color.²²¹ This was accomplished through several measures including blatant refusals to hire;²²² the barring of women and people of color from certain types of jobs within the workforce;²²³ refusals to train so that minorities could not acquire the skills necessary for the job; and by prohibiting the joining of a union, membership of which was sometimes required to enter a particular profession or trade.²²⁴ As a result of these measures, the means by which one might earn a living and accumulate wealth were largely foreclosed either explicitly by law or implicitly by custom.²²⁵

²¹⁷ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 to 1973aa-6 (2000)).

²¹⁸ LUCIUS J. BARKER & MACK H. JONES, *AFRICAN AMERICANS AND THE AMERICAN POLITICAL SYSTEM* 69–73, 84–85 (3d ed. 1994) (noting that, while voter registration has improved since the Voting Rights Act (VRA) became law, blacks have had little effect on policy and there are still relatively few black elected officials and political groups); LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 7–12 (1994) (describing post-VRA attempts in some states to dilute black political power through redistricting schemes and manipulation of legislative voting procedures).

²¹⁹ See BELL, *supra* note 15, at 618–619.

²²⁰ *Id.*

²²¹ *Id.*

²²² See *Griggs v. Duke Power Co.*, 401 U.S. 424, 42627 (1971) (describing a workforce where, until the passage of the Civil Rights Act of 1964, the company openly discriminated on the basis of race in hiring and assigning employees such that the highest paying jobs were reserved for whites only).

²²³ *Albermale Paper Co. v. Moody*, 422 U.S. 405, 409 (1975); *Griggs*, 401 U.S. at 426–27.

²²⁴ William A. Sundstrom, *Strikebreaking and Racial Exclusion by American Labor Unions: A Bargaining Approach* (Dec. 28, 1990) (paper presented at Cliometric Society Sessions of the Allied Social Sciences Associations Annual Meetings), available at http://eh.net/Clio/Conferences/ASSA/Dec_90/Sundstrom.shtml.

²²⁵ Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 734 (2000) (arguing that “white dominance in legal education and employment” can be understood as “the product of a locked-in, culturally specific network standard that favors whites” that grew out of “anticompetitive conduct by whites during the segregation era”).

Housing was no different. Redlining, discriminatory lending policies,²²⁶ restrictive covenants,²²⁷ and even realtors' refusal to show certain people houses or rent-available units in a given location²²⁸ meant that even those who had the economic means to live anywhere still were often not able to do so. Such inequality and subordination were also embedded in the education system. As *Brown v. Board of Education*,²²⁹ its predecessor cases,²³⁰ and its progeny²³¹ made clear, unequal education was the purposeful norm in the United States. While perhaps improving in recent years, segregated and unequal schools continue to be the norm in many parts of the country.²³²

This widespread inequality and embedded subordination continues to permeate other major social institutions as well. For example, until the important decision in *Simkins v. Moses H. Cone Memorial Hospital*²³³ and the passage of Title VI of the 1964 Civil Rights Act,²³⁴ segregated healthcare on all levels was the norm throughout America.²³⁵ While segregated medical facilities are largely a thing of the past, the

²²⁶ Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595, 1611–14 (1995).

²²⁷ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

²²⁸ ROY L. BROOKS ET AL., *CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES* 299–301 (2d ed. 2000) (describing (1) “smiling discrimination” where, for example, an African American person may be told there is no unit available for rent while a white person will be given the vacancy or be informed that the unit will be available the following day, and (2) “steering,” a process whereby “real estate agents deliberately direct[] African Americans to minority or mixed neighborhoods and whites to predominantly white neighborhoods”); Johnson, *supra* note 226, at 1612 (speaking of discriminatory action “on the part of realtors and other private actors in the real estate industry [as] a major causative factor” in creating and maintaining ghettos).

²²⁹ 347 U.S. 483 (1954).

²³⁰ *E.g.*, *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

²³¹ *E.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Alexander v. Homes County Bd. of Educ.*, 396 U.S. 19 (1969); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

²³² Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for Brown?*, 103 MICH. L. REV. 1507, 1512–15 (2005) (reviewing DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004)).

²³³ 323 F.2d 959 (1963).

²³⁴ Pub. L. No. 88-352, tit. VI, 78 Stat. 241, 252–53 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (2000)) (prohibiting discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance).

²³⁵ Sidney D. Watson, *Race, Ethnicity and Quality of Care: Inequalities and Incentives*, 27 AM. J.L. & MED. 203, 210–13 (2001). *See generally* THOMAS J. WARD JR., *BLACK PHYSICIANS IN THE JIM CROW SOUTH* (2003) (describing the segregated nature of healthcare and health education).

inability to access quality healthcare on the part of the poor and minorities remains.²³⁶

Furthermore, the inequality inherent in the criminal justice system is legendary, and has been addressed at length in several articles and books by a range of scholars.²³⁷ The system has been repeatedly used to criminalize certain kinds of behavior that differentially impact minorities primarily as a tool to subdue them.²³⁸ For example, during the time of slavery, criminal statutes barred slaves from the following:

[L]earning to read, leaving their masters' property without a proper pass, engaging in "unbecoming" conduct in the presence of a white female, assembling to worship outside the supervisory presence of a white person, neglecting to step out of the way when a white person approached on a walkway, smoking in public, walking with a cane, making loud noises, or defending themselves from assaults.²³⁹

These same laws allowed for more severe punishments for crimes committed by slaves as opposed to those committed by whites.²⁴⁰ Similarly, after the Civil War, the Black Codes that spread throughout the South criminalized several forms of innocent conduct.²⁴¹ Although presumably neutral on their face, these Codes were enforced only against blacks with the intent that whites would be able to dominate blacks and return them to a position reminiscent of slavery.²⁴² Thus, even when laws were stated to appear as if they applied equally to everyone, they

²³⁶ AGENCY FOR HEALTHCARE RES. & QUALITY, DEP'T OF HEALTH & HUM. SERVS., NATIONAL HEALTHCARE DISPARITIES REPORT 5–8 (2003), available at <http://www.ahrq.gov/qual/nhdr03/nhdr2003.pdf>; Timothy Stoltzfus Jost, *Racial and Ethnic Disparities in Medicare: What the Department of Health and Human Services and the Centers for Medicare and Medicaid Services Can, and Should, Do*, 9 DEPAUL J. HEALTH CARE L. 667, 667–68 (2005); Watson, *supra* note 235, at 205–10.

²³⁷ To understand the voluminous nature of this work one need only run a search on an articles database, or in a library catalogue using keywords such as "race," "crime," and "inequality."

²³⁸ RANDALL KENNEDY, RACE, CRIME, AND THE LAW 76 (1997).

²³⁹ *Id.*

²⁴⁰ *Id.* at 76–77.

²⁴¹ *Id.* at 84–85; SINCLAIR, *supra* note 12, at 61–62.

²⁴² KENNEDY, *supra* note 238, at 86 ("Although this and other vagrancy statutes were silent as to race, their authors intended and assumed that they would be applied principally, if not exclusively, against Negroes."); SINCLAIR, *supra* note 12, at 59. Kennedy also notes that many such laws were invalidated, repealed, or ignored during Reconstruction. KENNEDY, *supra* note 238, at 86.

have been enforced differentially.²⁴³ The racially biased criminalization of certain behaviors, differential enforcement of crimes, and the failure to guarantee fair and unbiased trials are all problems that persist today.²⁴⁴ Accordingly, from housing to education, employment to the criminal justice system, and nearly every institution in between, inequality, and subordination have been embedded into the structures and systems at nearly every level of American society for hundreds of years, and they persist to the present day.

5. Inequality and White Supremacy Are Entrenched in American Culture

If one defines culture as consisting of the customary beliefs and social forms of a social group,²⁴⁵ then subordination and inequality are embedded in American culture, attitudes, and beliefs as well. As previously discussed, this country was founded on the ideology of white supremacy.²⁴⁶ Inherent in the ideology of white supremacy is the concomitant ideology of the inferiority of everyone else. The degree to which this ideology permeated and continues to permeate the thoughts and beliefs of the vast majority of Americans is formidable, but a few stark examples are sufficient for the present discussion. Chief Justice Taney's opinion in *Dred Scott* is once again helpful, since he stated clearly:

[Negroes] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every

²⁴³ *E.g.*, *McClesky v. Kemp*, 481 U.S. 279 (1987); MARC MAUER, *RACE TO INCARCERATE* 142–46 (rev. ed. 2006) (discussing racial bias in prosecuting and sentencing).

²⁴⁴ MAUER, *supra* note 243, at 130–56.

²⁴⁵ WEBSTER'S COLLEGIATE DICTIONARY 304 (11th ed. 2004); *see also* SERENA NANDA, *CULTURAL ANTHROPOLOGY* 467 (5th ed. 1994).

²⁴⁶ *See* discussion *supra* Part III.A.1–2.

grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people.²⁴⁷

Lest we believe that such beliefs are only held by hardcore racists, a couple of other examples are also informative. For example, President Lincoln, often revered and remembered for having freed the slaves,²⁴⁸ certainly did not imagine that they would become full and equal members of society when he stated:

I will say then that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races—that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people, and I will say in addition to this that there is a physical difference between the black and white races which I believe will for ever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race.²⁴⁹

In a similar vein, Justice Harlan in his famous dissent in *Plessy v. Ferguson*, where he forthrightly declared that “[o]ur Constitution is color-blind,” took great pains to point out in the next breath that this colorblindness did not mean in reality that the races were equal when he stated:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue

²⁴⁷ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407–08 (1857).

²⁴⁸ Although often credited as the document that freed the slaves, a close reading of the Emancipation Proclamation indicates that it only freed those slaves held in states “in rebellion against the United States.” Abraham Lincoln, A Proclamation (Jan. 1, 1863), *reprinted in* 12 Stat. app. at 1268, 1268.

²⁴⁹ WOODWARD, *supra* note 15, at 21.

to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.²⁵⁰

And if one questioned his view that nonwhite races were different and likely inferior, Justice Harlan's comments regarding those of Chinese descent are also illustrative: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."²⁵¹

While such blatant statements of white supremacist beliefs made in mixed company may be largely a thing of the past, it is not clear that such sentiments have entirely faded. Recent psychological studies show that while the vast majority of white Americans outwardly express attitudes evidencing a belief in equality, when put to the test, those same people may not actually embrace those beliefs to the extent they profess.²⁵²

A recent study in sociology lends further support to these findings.²⁵³ In this study, college students on a predominantly white campus in the Mountain West were asked to keep journals as part of a larger national study that sought to document the national atmosphere of racism on college campuses.²⁵⁴ Specifically, these students were asked to document racist events in classes, on the university campus, and in the communities in which they found themselves.²⁵⁵ The researchers envisioned racism as living along two dimensions: traditional racism, which embodies acts of blatant racism, such as burning a cross or killing a person because of skin color, that nearly everyone would agree are racist, and liberal racism, which can be considered discrimination in its more subtle and unconscious forms.²⁵⁶ The researchers then classified the 951 entries that became part of the study into four categories, two falling under the rubric of traditional racism and two falling under the

²⁵⁰ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

²⁵¹ *Id.* at 561.

²⁵² See, e.g., Dovidio & Gaertner, *supra* note 37, at 4 ("[M]any of the people who are part of the 85%-90% of the white population who say and probably believe that they are not prejudiced may nonetheless be practicing a modern, subtle form of bias."); see also discussion *supra* Part II.A (discussing the modern, subtle, and unconscious forms of bias).

²⁵³ See generally Margaret M. Zamudio & Francisco Rios, *From Traditional to Liberal Racism: Living Racism in the Everyday*, 49 Soc. PERSP. 483 (2006).

²⁵⁴ *Id.* at 488.

²⁵⁵ *Id.* The study, which lasted a year, collected eighty-seven journals with 1263 entries, though only sixty of the journals met the study protocols. *Id.* These sixty journals contained the 951 entries used in the study. *Id.*

²⁵⁶ *Id.* at 486-87.

rubric of liberal racism.²⁵⁷ They labeled the first of the traditional racism categories “no doubt” racism.²⁵⁸ This category consisted of incidents evidencing behavior over which there would be little disagreement on the fact that it was racist.²⁵⁹ They labeled the second traditional category “segregationist racism,” and in that category they put instances of “marked attempts to distance people of color from whites.”²⁶⁰ The other two categories, which they labeled “Revisionist Racist Narratives” and “Equal Opportunity Racism” fell under the liberal racism rubric.²⁶¹ What was most striking about the results of this study was the fact that the incidents recorded in the student journals evidenced “no doubt” racism three times more often than its liberal counterparts, thus directly calling into question the prevailing notion that blatant forms of racism are an infrequent thing of the past.²⁶² Apart from these more formal studies, it is easy to find personal anecdotes reflecting these same residual subordinating beliefs.²⁶³

The categories by which we classify people in this country and place them in inferior and subordinated status groups are so entrenched and so much a part of the culture that they have become more than the norm; rather, the nature of embedded inequality and the way we perpetuate it is virtually invisible to most of us.²⁶⁴ Attendant to the unconscious and invisible bias in our culture is an unawareness towards the privileges experienced by those who sit on the top of the American hierarchy, a set of privileges weighed in favor of particular groups and established in such a way as to keep the hierarchy in

²⁵⁷ *Id.* at 490.

²⁵⁸ Zamudio & Rios, *supra* note 253, at 490.

²⁵⁹ *Id.* at 490–93.

²⁶⁰ *Id.* at 493. For example, in one instance of reported segregationist racism, a nineteen-year-old female related that her father made clear that he only wanted her dating white men. *Id.*

²⁶¹ *Id.* at 490, 495–98.

²⁶² Zamudio & Rios, *supra* note 253, at 490.

²⁶³ For example, a manager of a roofing company in Cheyenne, Wyoming has had potential customers on more than one occasion state that they did not want “Mexicans” installing their roofs. Interview with Richard Birdsley, Manager, Swede’s Roofing, in Cheyenne, Wyo. (July 5, 2006).

²⁶⁴ See discussion *supra* Part II.A. For reports on psychological experiments that further demonstrate the unconscious nature of our biases and the embedded nature by which we classify people, see PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 97; STEREOTYPES AND PREJUDICE, *supra* note 97; Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in Gilbert et al., HANDBOOK, *supra* note 97, at 357; Judith A. Howard & Daniel G. Renfrow, *Social Cognition*, in Delamater, HANDBOOK, *supra* note 99, at 259.

place.²⁶⁵ Thus, inequality and subordination are woven throughout all facets of our culture whether we realize and acknowledge them or not.²⁶⁶ Equality is not the norm in America; it is the anomaly.

B. *The Perspective Derived from the Truth*

By acknowledging America's discriminatory past and recognizing that such historical inequality and subordination remains embedded in American society, the shift in perspective becomes obvious. If inequality permeates all aspects of our lives and we all participate in American culture, society, and institutions in ways that help perpetuate that problem, then to eradicate inequality, the focus should not be finding individual bad actors who have deviated from a hopefully clear-cut norm or better holding accountable those individuals who discriminate intentionally. Instead, we need to ask ourselves: how do we recognize or identify the thought processes and social institutions that create and perpetuate inequality and, once identified, how do we change them to eradicate the problem.

As an example of how this perspective differs, let us look more closely at *Wards Cove Packing Co. v. Atonio*.²⁶⁷ The case involved two companies that operated salmon canneries in remote areas of Alaska.²⁶⁸ Jobs at the canneries were of two types, "cannery jobs" and "noncannery jobs."²⁶⁹ Most noncannery jobs were classified as skilled positions and were filled with predominantly white workers hired during the winter months in the cannery offices in Washington and Oregon.²⁷⁰ The cannery jobs were largely unskilled and filled predominantly with non-whites hired locally either in villages near the cannery locations or through Local 37 of the International Longshoremen Workers Union.²⁷¹ Nearly all of the noncannery jobs paid more than the cannery positions and, further, the noncannery and cannery workers were housed in separate dormitories and ate in separate mess halls.²⁷² The

²⁶⁵ See generally CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR, 291–335 (Richard Delgado & Jean Stefancic eds., 1997); BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW (1998); STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996); Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245 (2005).

²⁶⁶ See generally JUDITH C. BLACKWELL ET AL., CULTURE OF PREJUDICE (2003).

²⁶⁷ 490 U.S. 642 (1989).

²⁶⁸ *Id.* at 646.

²⁶⁹ *Id.* at 647.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Wards Cove*, 490 U.S. at 647.

racial disparity between these two positions was enough to cause the Ninth Circuit Court of Appeals to rule that the plaintiffs had established a prima facie case of disparate impact.²⁷³ However, a majority of the U.S. Supreme Court disagreed. In holding that the plaintiffs failed to establish a prima facie case of disparate impact, the Supreme Court explained that the Ninth Circuit improperly focused its inquiry.²⁷⁴ Rather than comparing sectors within a workforce for disparity as did the Ninth Circuit, the Supreme Court majority stated that the proper inquiry was between “the racial composition of the [at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market.”²⁷⁵ The Court went on to say that “[i]f the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners’ fault), petitioners’ selection methods or employment practices cannot be said to have had a ‘disparate impact’ on nonwhites.”²⁷⁶ The Court then concluded that if one allowed a within-workforce comparison to form the basis for liability, the inevitable result would be the use of racial quotas, a result the Court determined was far from the intent of Title VII.²⁷⁷ The Court stated further that

[a]s long as there are no barriers or practices deterring qualified nonwhites from applying for noncannery positions, if the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer’s selection mechanism probably does not operate with a disparate impact on minorities.²⁷⁸

The majority’s adherence to the traditional perspective is evident in this decision, as are the limits of that perspective in identifying and rooting out disparity and inequality. As previously identified in this article, the traditional perspective has five important components: (1) purposeful, intentional, or consciously committed act; (2) motivation based on a protected category; (3) the assumption that equality exists if

²⁷³ *Id.* at 648–49. The plaintiffs also brought disparate treatment claims but lost with respect to those claims in both lower courts; they were not pursued at the Supreme Court level. *Id.* at 645–46, 649 n.4.

²⁷⁴ *Id.* at 650–51.

²⁷⁵ *Id.* (alteration in original) (internal quotation omitted).

²⁷⁶ *Id.* at 651–52 (footnote omitted).

²⁷⁷ *Wards Cove*, 490 U.S. at 652.

²⁷⁸ *Id.* at 653 (citation omitted).

everyone is treated the same; (4) the presumption of inequality as an abnormality; and (5) the need for a tangible effect.²⁷⁹ That the plaintiffs in *Wards Cove* fit into the protected category of race was obvious and not contested, as was the idea of tangible effect, for if plaintiffs were denied certain jobs on the basis of their race the tangible effect of the canneries' actions would also be obvious. The Court's reliance on notions of "same treatment equals equality" is evidenced by the majority's indication that as long as there were no barriers or practices serving as a deterrent, there was likely no liability.²⁸⁰

While the Court did not focus on intent, since it characterized the case from the beginning as a disparate impact case, the ideas of intent—purposeful and conscious action that brings about a result—still informed its decision.²⁸¹ Even though the majority did not look for an intentional actor *per se*, the Court still relied on notions of "intent equals culpability" in reaching its decision.²⁸² The above quote illustrates this as the Court explicitly states that if there is a dearth of qualified applicants for reasons that are not petitioner's fault, then there is no disparate impact.²⁸³ The majority's reliance on notions of intent is also illustrated by the canneries' use of Local 37, a predominantly non-white local union, in hiring nonwhite cannery workers. In that section of the opinion, the majority explained that the problem was not that nonwhites were underrepresented in noncannery positions due to the hiring practices of the employers, but rather that nonwhites were overrepresented in the cannery positions because of the use of Local 37 to fill those positions.²⁸⁴ Thus, the problem lay not with the employer but with the fact that minorities were overrepresented in the union.²⁸⁵ In other words, the majority concluded that there was no problem with the selection of noncannery workers, despite the fact that very few minorities held those positions; it just might appear so because too many cannery workers were minorities as a result of the composition of the union, not because of any purposeful or intentional action on the part of the employer.²⁸⁶ One can clearly see the majority's belief that inequality was the abnormality rather than the norm and, unless clearly

²⁷⁹ See *supra* text accompanying notes 70–96.

²⁸⁰ See *supra* note 278 and accompanying text.

²⁸¹ *Wards Cove*, 490 U.S. at 651 n.7, 652.

²⁸² *Id.*

²⁸³ See *supra* note 276 and accompanying text.

²⁸⁴ *Wards Cove*, 490 U.S. at 654–55.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

proven otherwise, the employer benefited from the presumption of legitimacy and equality.²⁸⁷ Thus, because of its adherence to the traditional view and its focus on the basis for comparison, the majority was unwilling to sustain a prima facie disparate impact claim for the plaintiffs.

This case would be addressed much differently under the new perspective proposed in this article. Under this new perspective, the fact that the canneries in *Wards Cove* exhibited such disparities would be enough to justify an inquiry into the situation. The aim would be to try to identify what mechanisms or structures were causing the discriminatory effect. In this case, it would appear, as the plaintiffs alleged, that it was possibly a combination of practices such as “nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, [and] a practice of not promoting from within” the canneries that caused the discrepancy.²⁸⁸ Under this new perspective, the task would then be to examine each of those practices to see if they contributed to a stratified workforce. Put another way, one might inquire as to whether less disparity could be achieved if some or all of the mechanisms and structures used in hiring were changed. Once the nature of the problem is identified in that way, the next step is to discern how it can be addressed in a cost effective manner. Perhaps the canneries could simply seek applicants for all positions both locally and out of state to eliminate the separate hiring channels, enact a policy outlawing nepotism, or seek to employ objective hiring criteria when selecting applicants for a position.²⁸⁹

This example illustrates the advantages of approaching discrimination problems from this new perspective. First, it allows us to address unconscious or structural bias without the difficulty of having to specifically prove it under the existing Title VII rubrics. Second, and more importantly, it allows us not only to address that one instance of dis-

²⁸⁷ The fact that the majority viewed inequality as an abnormality is highlighted by Justice Blackmun’s dissenting opinion in which he questioned “whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was.” *Id.* at 662 (Blackmun, J., dissenting).

²⁸⁸ *Id.* at 647–48 (majority opinion).

²⁸⁹ It may seem obvious that addressing the problem as proposed here may not be best accomplished through use of an adversarial court proceeding. That is why I intend to argue in the third article in this series for an alternative mechanism of dispute resolution in this area that will allow the type of back and forth collaboration necessary to identify these types of problems and seek meaningful solutions to them. For a similar approach, see *supra* notes 133–138 and accompanying text.

crimination, but it allows us to change beneficially the underlying structure even absent the need for a difficult finding of fault.

C. *How This New Perspective Would Change Our Approach to Antidiscrimination Law*

Approaching inequality, subordination, and discrimination from the perspective proposed here would hopefully allow us to address certain aspects of these problems in ways never before attempted. The following subsections illustrate what those different approaches could be.

1. The Ability to Theorize Around Whole Structures

Because our current system only examines specific actors in specific instances of time and assigns liability based on poor motives, the only aspect of the large inequality problem it can address is what happens in that one point in time.²⁹⁰ For example, in the recent affirmative action cases of *Gratz v. Bollinger*²⁹¹ and *Grutter v. Bollinger*,²⁹² the Supreme Court reviewed the affirmative action admissions policies of the University of Michigan's undergraduate and law school programs. In both cases there was really no question that both the undergraduate and law school programs resorted to various affirmative action measures as a way to address underrepresentation of minorities in their schools.²⁹³ In evaluating the constitutionality of both programs, the Supreme Court applied strict scrutiny, stating, "We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'"²⁹⁴ In *Gratz*, the Supreme Court struck down the undergraduate admissions program based on the fact that it did not find the admissions programs to be narrowly tailored to the school's interest in creating a diverse student body;²⁹⁵ it did not reach the question of whether diversity is a compelling state interest. However, the Court in *Grutter* did reach that question by determining first that diversity is a compelling state interest,²⁹⁶ and then finding the

²⁹⁰ See *supra* notes 92–94 and accompanying text.

²⁹¹ 539 U.S. 244 (2003).

²⁹² 539 U.S. 306 (2003).

²⁹³ *Gratz*, 539 U.S. at 253–54; *Grutter*, 539 U.S. at 315–16.

²⁹⁴ *Grutter*, 539 U.S. at 326 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)); see *Gratz*, 539 U.S. at 270.

²⁹⁵ *Gratz*, 539 U.S. at 270–76.

²⁹⁶ *Grutter*, 539 U.S. at 327–33.

Michigan Law School admissions program sufficiently narrowly tailored to that interest.²⁹⁷

What is important for purposes of the present discussion is the fact that, in both instances, the Court focused solely on the actions of the University of Michigan and the question of whether the school had impermissibly considered race in conducting the admissions programs.²⁹⁸ At no point did the Court address the underlying structural reasons why minorities might be underrepresented, staying true to the current system of examining individual discriminatory offenses. However, even if the Supreme Court allows affirmative action programs as it did in the case of Michigan's law school, the continuation of such programs does not necessarily address the underlying disparities causing the problem in the first place.

In contrast, an approach that starts from the perspective advocated in this article would allow us to do more than look narrowly at the specific actions of the University of Michigan. Starting from the premise that the underrepresentation of minorities in admission to higher education is likely due to the vestiges of our historical perpetuation of embedded discrimination and subordination instead of asking the question of whether race was impermissibly used as a criteria for admission, the new perspective would approach the problem by asking whether there is a better way to select and prepare students for higher education that would lessen such disparities. While this approach might find that affirmative action measures are helpful, it might also be able to address other problems in our education system that are affecting minority admission rates. This is an issue that, as the Michigan cases demonstrate, is not addressable under the current system.

2. Provides a Justification that Allows Us to Remedy Long-Standing Harms

Apart from potentially allowing us to theorize and address whole structures, the new perspective may also provide another and perhaps better justification for taking steps to remedy persistent discrimination. If inequality has always been embedded in our systems and structures,

²⁹⁷ *Id.* at 333–40.

²⁹⁸ *Gratz*, 539 U.S. at 249–50 (“We granted certiorari in this case to decide whether ‘the University of Michigan’s use of racial preferences in undergraduate admissions violate[s] the *Equal Protection Clause of the Fourteenth Amendment*’”) (alteration in original) (emphasis added); *Grutter*, 539 U.S. at 311 (“This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School . . . is unlawful.”).

then changing them or taking measures to address the problems they create makes good sense and is easily justifiable. The selection of grand jurors for service in Los Angeles County, which Ian F. Haney López describes in his article *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, provides a good example of the potential beneficial effects of this new perspective and approach.²⁹⁹

In that article, Haney López describes how people of color, in particular Mexican-Americans, were almost never selected to serve on grand juries despite the fact that they made up a significant portion of the Los Angeles County population.³⁰⁰ This fact was challenged in the cases of *East LA 13* and *Biltmore 6*.³⁰¹ In both instances, the plaintiffs were left without redress because they were unable to prove purposeful, deliberate, or conscious discrimination, and the court refused to recognize as discriminatory a selection system that consistently resulted in the exclusion of Mexican-Americans.³⁰² Yet it was precisely the system of selection in which the judges participated that resulted in persistent discrimination without purposeful intent.

Haney López explains how the informal, ad hoc process used by the judges in selecting grand jurors likely led to this lack of representation. Specifically, the standard practice for selecting jurors was for the judges to select nominees from among social acquaintances.³⁰³ In fact, as many as 83% of the nominations (211 out of 255) for the relevant time period (1959–1968) were social acquaintances of the judges, most often friends; neighbors; spouses of acquaintances; or comembers of a church, civic organization or club.³⁰⁴ Of the remaining 17% (or 44 jurors), at least 17 were recommended by a “friend, family relation, fellow

²⁹⁹ See generally Haney López, *supra* note 140.

³⁰⁰ *Id.* at 1728 (noting that, “while Mexican Americans accounted for one of every seven persons in Los Angeles County during the 1960s,” (the period when the two cases were decided), they were only one of every fifty-eight grand jurors).

³⁰¹ According to Haney López, the names *East LA 13* and *Biltmore 6* are the names given these cases within the Mexican-American community. *Id.* at 1722. *East LA 13* involved an indictment by grand jury of thirteen activists on a variety of charges. *Id.* at 1721. *Biltmore 6* involved three of the original thirteen defendants plus three others indicted on arson and burglary charges arising out of a staged protest. *Id.* at 1721. In both cases, the defendants brought a Fourteenth Amendment challenge resting on the claim that the selectors of Los Angeles grand jurors had excluded Mexican-Americans. *Id.* at 1722. The jurors were nominated by Los Angeles superior court judges, so, as part of the strategy for proving the discrimination the defendants examined more than 100 judges on the witness stand. *Id.* The transcripts of those interrogations are the basis for Haney López’s article. *Id.*

³⁰² *Id.* at 1758–61.

³⁰³ *Id.* at 1731.

³⁰⁴ Haney López, *supra* note 140, at 1735–36.

club member, or another judge.”³⁰⁵ The fact that all of the judges picked nearly exclusively from their social acquaintances was not surprising because all of the judges selected jurors in the same way, namely by selecting “persons casually from among their personal acquaintances.”³⁰⁶ While at first glance this selection process would not appear to be discriminatory, a problem arises because the people with whom the judges were acquainted were a very limited group. The judges knew few, if any, Mexican-Americans, and most of the ones they knew were gardeners or servants, not the people they would consider for jury selection.³⁰⁷ Moreover, Mexican-Americans were not the only ones excluded from their social circles.³⁰⁸ Accordingly, although the judges may not have purposely intended to discriminate in the selection of jurors, the process they used still resulted in discrimination as “the judges’ selection practices favored a narrow group of people, and excluded many, many more. Though the favored group supposedly represented the population as a whole, it instead reflected one version of the elite, a group of people on the higher rungs of a host of social hierarchies.”³⁰⁹

Even though the discriminatory effect was clear and the reasons for that effect were readily identifiable, the defendants in these cases were still unable to sustain an equal protection claim because they could not prove motive.³¹⁰ Given that the current system defines discrimination as something done by bad actors at specific points under the current system, if there is no identifiable act of discrimination or if one cannot prove bad motive, there is no discrimination under the law even if in reality that discrimination is as clear as it was in *East LA 13* and *Biltmore 6*.³¹¹

However, if the new perspective is utilized such that the presumption is that discrimination is the embedded norm, then the potential exists for addressing the discrimination in cases such as *East LA 13* and *Biltmore 6*. Essentially, the question is no longer whether one can show proof of bad actions on the part of the judges; instead, the question is whether we can identify what is producing the discriminatory result and if so, what can we change to rectify it. As Haney López astutely

³⁰⁵ *Id.* at 1736.

³⁰⁶ *Id.* at 1736–37.

³⁰⁷ *Id.* at 1737–39.

³⁰⁸ *Id.* at 1740–41.

³⁰⁹ Haney López, *supra* note 140, at 1741.

³¹⁰ *Id.* at 1758–60.

³¹¹ See *supra* notes 70–71, 92–94 and accompanying text.

noted, the problem in the Los Angeles County grand juror selection cases was that judges selected jurors by looking almost exclusively towards social acquaintances, which produced discriminatory results because the social circles from which the judges drew were narrow and exclusionary. Once this problem is identified, the solution (or the approach to the solution) becomes fairly straightforward: the networks by which grand jurors are identified, or the pool from which they are drawn, could simply be changed. The judges could be prohibited from selecting grand jurors from their narrow pool of acquaintances, or a different process designed to attract a broader range of participants could be implemented. The purpose here is not to determine the best specific solution for that problem, but to simply demonstrate that there might be a fairly simple solution, one readily identifiable under the proposed perspective but currently foreclosed under the present system.

Additionally, this new approach has the added benefit of getting us beyond the issue of blame and the questions of fairness that blame raises. When looked at from the perspective of blameworthy bad actors, it is hard to hold the judges blameworthy for simply acting within a system he or she did not create, had not consciously evaluated, or within which he or she was trying to be fair and nondiscriminatory.³¹² In contrast, when looked at from the point of view of a presumption of discrimination, the blameworthiness of the defendant is not an issue because the focus is on recognizing and addressing structures, processes, and similar societal and cultural mechanisms that result in inequality and discrimination. Accordingly, we can address an obvious problem or instance of discrimination regardless of how “innocent” the defendant might actually be.

3. Moves Beyond the Restriction of Categories

As discussed earlier in this article, a person typically must fit his or her discrimination claim into a particular category in order for that claim to be actionable under the current system.³¹³ However, there are many instances of discrimination or unequal treatment where the victim does not fit neatly into a protected category or suspect class.³¹⁴

³¹² Haney López, *supra* note 140, at 1759–61. The prosecutor asked each judge on cross-examination whether he intended to discriminate. *Id.* at 1757. Each responded that they did not intend to discriminate or exclude any particular member of a racial or ethnic group; rather, they felt they were nominating the best qualified to serve. *Id.* at 1758.

³¹³ See *supra* notes 72–73 and accompanying text.

³¹⁴ See *supra* note 59 and accompanying text.

Scholars have shown that breaking people into groups as the current system requires actually helps create situations of inequality because of in-group and out-group favoritism.³¹⁵ Furthermore, scientists have shown that some of the categories, such as race, with which we invest so much meaning are social constructs deriving their salience through repeated use and context.³¹⁶

If our goal is in fact to achieve true equality, then we should be looking to root out subordination and discrimination whenever we know it to exist, not just for the people for whom we happen to be a bit more sympathetic or for those who we feel are worthy of equality. Being a human being should be enough. A perspective that starts from the presumption of inequality may allow us to get beyond the restrictions of categories and hopefully allow us to do a better job of remedying inequality. With its focus on identifying unequal situations rather than individual bad actors that are targeting specific individuals, the proposed perspective may help us eradicate at least some forms of discrimination and inequality that have largely been untouchable under the current system.

To illustrate this point, let us return to *Rene v. MGM Grand Hotel, Inc.*³¹⁷ under this new perspective. In that case, Rene worked as a butler on the twenty-ninth floor of the MGM Grand,³¹⁸ a position which was entirely staffed by males.³¹⁹ During the course of time he worked in that position, his coworkers began subjecting him to horrific treatment including “whistling and blowing kisses at [him], calling him ‘sweet-heart’ and ‘muñeca’ . . . telling crude jokes and giving sexually oriented ‘joke’ gifts, and forcing Rene to look at pictures of naked men having sex.”³²⁰ The coworkers also resorted to physical conduct of a sexual nature on numerous occasions, touching him like they would a woman, grabbing his crotch and poking their fingers into his anus through his clothing.³²¹ There was little question that Rene was subjected to differential treatment and that the coworkers’ actions were discriminatory

³¹⁵ Howard & Renfrow, *supra* note 264, at 272–73.

³¹⁶ Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice: A Social Psychological Equation for Racial Oppression*, in *CONFRONTING RACISM*, *supra* note 37, at 33; Haney López, *supra* note 153.

³¹⁷ 305 F.3d 1061 (9th Cir. 2002).

³¹⁸ *Id.* at 1064.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

and intentional.³²² Despite this reality, the question in Rene's case was whether he was treated that way because of his sex or his sexual orientation,³²³ for if treatment were due to his sexual orientation, Rene would have no claim under Title VII regardless of how horrific the conduct because sexual orientation is not a protected category.³²⁴

Despite the fact that Rene specifically stated in his deposition that, based on the names his coworkers called him, he thought he received such treatment because of his sexual orientation, a plurality of the Ninth Circuit still determined the harassment was because of sex, not sexual orientation.³²⁵ However, as pointed out in Judge Hug's dissent, reaching this conclusion took some doing.³²⁶ Seizing on the fact that, in harassing Rene, his coworkers touched his sexual organs, the plurality determined that because of the places his coworkers chose to touch him, the harassment that Rene endured was because of sex.³²⁷ Thus the Ninth Circuit set an odd precedent whereby, as long as the conduct involves touching of a sexual nature as it did in *Rene* and arguably *Oncale*, the conduct is actionable even if the harasser makes it clear that he or she is motivated by the victim's sexual orientation. Yet if the harasser engages in similar conduct but happens to touch the victim in a non-sexual way (such as beating the victim severely), then presumably the conduct would not be actionable because without the touching in a sexual nature, it would not be considered "because of sex." Therefore, one can be subjected to almost identical discriminatory conduct, yet a slight difference in the way the perpetrator chooses to carry out that conduct will be the difference between redress for the victim or not.

³²² *Id.* at 1065 ("It is clear that Rene has alleged physical conduct [that was so severe and pervasive as to constitute an objectively abusive working environment].").

³²³ The plurality opinion stated, "[i]t is equally clear that the conduct was 'of a sexual nature.'" *Rene*, 305 F.3d at 1065. When asked what he believed was the motivation behind the harassment, Rene responded that it was because he was gay. *Id.* at 1064. Additionally, while the plurality was willing to construe the specific acts of touching Rene's crotch and anus as enough to meet the "because of sex" requirement for sexual harassment under Title VII, several of the concurring and dissenting opinions did not agree. *Id.* at 1068 (Pregerson, J., concurring) (characterizing the case as one of gender stereotyping); *id.* at 1069-70 (Graber, J., concurring) (agreeing that Rene's case was indistinguishable from *Oncale v. Sundowner Offshore Servs., Inc.* 523 U.S. 75 (1998), and therefore actionable, but making a point to note that Title VII does not protect against discrimination based on sexual orientation, and that Rene did not assert a sex stereotyping theory); *id.* at 1070 (Hug, J., dissenting).

³²⁴ See *supra* notes 58-59 and accompanying text.

³²⁵ *Rene*, 305 F.3d at 1067-68.

³²⁶ *Id.* at 1070-78 (Hug, J., dissenting).

³²⁷ *Id.* at 1067-68 (plurality opinion).

Rene becomes an easier case when reviewed under the new perspective. The first step under this analysis is to identify whether there are indications that an unequal or subordinating situation is present, with the presumption once again being that there likely is.³²⁸ Because of the manner in which *Rene* was treated and the facts demonstrating that the jobsite was policed by heterosexual, male-dominated norms,³²⁹ it can be easily argued that subordination was present. As a result, the question again becomes: what can be done to remedy the situation? In other words, is there a way to restructure the selection process to prevent this position from being all male? Are there changes that can be made to the management of butlers or the work environment on the MGM Grand twenty-ninth floor that may prevent this kind of treatment, regardless of the motivation behind it? Once again, specific solutions are beyond the scope of this article, but the new perspective opens up a range of possibilities that the current practice and its focus on providing relief for only one ill-treated victim (who may or may not fit into the appropriate rubric for legal remedy) cannot contemplate.

When approached from the new perspective, our need for categories becomes less important because the focus is not on addressing individual instances of inequality, discrimination, and subordination. Rather, the goal is to eliminate those instances in whatever form they might take. Thus, situations like *Rene's* can be addressed not because we are willing to address specific instances of intentional discrimination based on sexual orientation, but because we are willing to address any situation in which discrimination and inequality has an impact. Not only would this serve to allow redress of a broader range of claims, but there are added benefits that would not be present under the current system. First, apart from allowing redress where a person does not neatly fit into arbitrary categories but has a viable claim, taking the focus away from the categories helps make them less salient, which in turn helps lessen the law's role in fostering inequality based on categorization and the notion of in-group and out-group favoritism.³³⁰

Second, allowing *Rene* to recover under the current system by squeezing him into a category does not truly address the underlying

³²⁸ See *supra* text accompanying notes 288–289.

³²⁹ See Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J. 1, 35–41 (2005).

³³⁰ See R. Richard Banks & Jennifer L. Eberhardt, *Social Psychological Processes and the Legal Bases of Racial Categorization*, in CONFRONTING RACISM, *supra* note 37, at 54, 60–72 (describing the way legal norms and decisionmaking help perpetuate racial categorization and the social construction of race).

workplace problems that led to his harassment. If Rene recovered and MGM paid him money damages, while the victim may have gotten redress, nothing much within MGM's structure has changed. The workplace remains all male and the policing of heterosexual, male-dominated norms likely continues.³³¹ However, MGM would probably be careful now to make sure that when those norms are policed, it is done in a way that makes it less likely that MGM will be sued or lose if sued.³³² Thus, the underlying unequal and subordinating structure remains intact.

In contrast, a view that focuses on changing the workplace rather than just addressing the discriminatory harm to an individual would allow us to address the underlying workplace problem by focusing on how to change the structure to make it less unequal and discriminatory. This more expansive approach not only allows us to scrutinize the discrimination experienced by Rene, it also requires us to look at institutionalized discrimination existing at the workplace: the apparent inability for women to obtain butler positions at the MGM Grand. Although mentioned briefly in Judge Pregerson's concurring opinion primarily as a way to explain why the policing of male norms may have been so strong in that context,³³³ the major issue of why there are no women holding butler positions goes essentially ignored under the current system due to the focus on individuals. An approach from the new perspective, however, would conceivably allow us to address all aspects of the discrimination problems at MGM, including those not raised by the victim.

4. Provides a Better Set of Tools to Combat Subordination and Inequality in Ways They Are Currently Manifested

One of the reasons for a need to change our antidiscrimination laws is the fact that they do a poor job of addressing discrimination in its current forms.³³⁴ The change in perspective advocated for in this article could help to address this problem in several ways. First, part of why people act in unconsciously biased ways is that these are cognitive

³³¹ *Rene*, 305 F.3d at 1069 n.3 (Pregerson, J. concurring) (noting that "[a]ll-male workplaces are common sites for the policing of gender norms and the harassment of men who transgress such norms").

³³² Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 961-62 (1999).

³³³ See generally *Rene*, 305 F.3d at 1069 n.3 (Pregerson, J., concurring).

³³⁴ See *supra* Parts I, III.A.

tools that helps us think more efficiently.³³⁵ Be that as it may, the content of our categories and the nature of our biases are largely culturally and socially determined.³³⁶ At the same time, the norms embodied in the law help provide and make salient the nature of our social world.³³⁷ Accordingly, changing the perspective and attendant norms within the law should help address and change the norms in society generally.

Second, an approach from this new perspective should better help address persistent discrimination to the extent that it is largely manifested in the form of unconscious bias.³³⁸ Not only does this approach point to mechanisms by which we might accomplish this, but it also provides justification for doing so.³³⁹ At the same time, to the extent unconscious bias operates largely in part because of the discriminatory structures that are in place, this approach allows us the means to more effectively address those structures.³⁴⁰ Lastly, this approach should also allow us to address unconscious bias to the extent that it exists and persists because of cultural norms embedded in the society.³⁴¹

There is one other aspect of redressing unconscious bias that this approach should allow us to address: the problem of being proactive. While it can be helpful to redress wrongs when they occur, it is better to prevent those wrongs in the first place. A focus on recognizing unequal or subordinating situations and then trying to address them should allow us the ability to be more proactive in our approach to this problem. For example, studies have shown that bias can effect hiring.³⁴² One study conducted by Carl O. Word and his colleagues found that interviewers interacted differently with candidates depending on the candidate's race.³⁴³ Specifically, interviewers placed themselves farther away from nonwhite candidates, interviewed them for shorter time periods, and made more speech errors in their presence.³⁴⁴ In a subsequent experiment, they found that interviewees treated in this fashion exhibited

³³⁵ See generally SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (2d ed., McGraw Hill 1991) (1984); Howard & Renfrow, *supra* note 264.

³³⁶ See sources cited *supra* note 264.

³³⁷ See Banks & Eberhardt, *supra* note 330 and accompanying text.

³³⁸ See *supra* text accompanying notes 288–289.

³³⁹ See *supra* text accompanying notes 299–312.

³⁴⁰ See *supra* text accompanying notes 331–333.

³⁴¹ See *supra* text accompanying notes 336–337.

³⁴² E.g., Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000); Lu-in Wang, *Race As Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1061–64 (2004); Kendra Hamilton, *What's in a Name?*, BLACK ISSUES IN HIGHER EDUC., June 19, 2003, at 28.

³⁴³ Wang, *supra* note 342, at 1061–64.

³⁴⁴ *Id.*

less positive behaviors and were judged more harshly than other applicants, thus causing them to be evaluated less favorably in interview situations.³⁴⁵

In a similar real world situation, an investment company found that it had a problem hiring women.³⁴⁶ In a move to address the problem, the profiled company reviewed its thirty-minute interviewing process and changed its approach to interviewing by lengthening the time of interview so as to lessen the reliance on first impressions often forced by a shorter interview.³⁴⁷ It also revised its interviewing protocol so as to not ask questions that tended to favor men.³⁴⁸ These seemingly minor changes significantly changed the tone and substance of the interviews the firm conducted and, as a result, allowed the interviewers to interact better and gain more insightful information from nontraditional candidates, both men and women.³⁴⁹ Though a system that merely addresses individual harms based on discriminatory intent and victim categorization does not provide it, a more progressive approach that seeks to identify entrenched inequality and change structures to address disparate treatment would give employers the incentive to engage in this same kind of proactive reform.

CONCLUSION

Sometimes the solution to a seemingly difficult problem is easier to see when the problem is viewed from a different perspective, one that at first glance may not be obvious. Consequently, I believe that the current approach to eradicating discrimination and subordination in American society can be enhanced by viewing those persistent problems from a new perspective. This new perspective accepts the reality that bias, discrimination, and subordination are embedded in and permeate all aspects of American society. Until we are willing to address and change the many structures, habits, beliefs, and other aspects of American culture in which discrimination and subordination reside, the seemingly intractable problem of discrimination and subordination will remain.

My goal with this article is simply to begin the conversation surrounding the possibility of viewing this problem from a different point

³⁴⁵ *Id.* at 1063.

³⁴⁶ Debra E. Meyerson & Joyce K. Fletcher, *A Modest Manifesto for Shattering the Glass Ceiling*, HARV. BUS. REV. Jan.-Feb. 2000, at 127, 133.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

of view. In so doing, I am not advocating that we throw out our current system, for I feel it serves a legitimate, proven, and important function that in many cases has rendered positive results. Instead, I am simply advocating that we be willing to go beyond that approach and seek solutions that the current system does not provide. At the same time, I do not seek to diminish, discount, or criticize the work of those I cite in this article and others like them. Rather, I am hoping to simply build on the work they have already done.

The problem of discrimination and subordination in America is an extremely difficult and complex one, so much so that perhaps it is a problem that cannot be solved. Yet I do not believe that we should cease seeking solutions to this problem or pretend it is solved when it is not simply because a remedy appears unattainable. While our current system may not have solved the problem in its entirety, we have made significant progress under that system nonetheless. Though we still have a ways to go, the progress we have made thus far gives me hope for the future.

