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COMMENT

UNCONSCIOUS RACISM AND THE CRIMINAL LAW

Sheri Lynn Johnson†

At most, [defendant's proof of racial discrimination] indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.¹

The Court today sanctions the execution of a man despite his presentation of evidence that establishes a constitutionally intolerable level of racially based discrimination leading to the imposition of his death sentence.²

*McCleskey v. Kemp*³ is shocking, but not surprising. Much has been written about *McCleskey*. Most commentators agree that it is wrong, and they painstakingly map out all the points at which Justice Powell's opinion goes wrong.⁴ I agree that it is very wrong, but what I want to focus on is how *McCleskey* fits into the larger picture of race and criminal procedure. I think *McCleskey* is the consequence of a large blindspot, a blindspot that mars the reasoning of all of the recent cases involving both race and criminal procedure, a blindspot that also distorts the Court's gestalt in more traditional equal pro-

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¹ *McCleskey v. Kemp*, 107 S. Ct. 1756, 1777-78 (1987).

² *Id.* at 1794 (Blackman, J., dissenting).

³ 107 S. Ct. 1756 (1987).

⁴ See, e.g., S. GROSS & R. MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1988); Kennedy, *McCleskey v. Kemp: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 155-59 (1987); Note, *Social Science Statistics in the Courtroom: The Debate Resurfaces in McCleskey v. Kemp*, 62 NOTRE DAME L. REV. 688 (1987); Bedau, *Someday McCleskey Will Be Death Penalty's Dred Scott*, L.A. Times, May 1, 1987, § 2, at 5, col. 1. As Kennedy, notes, the bitter criticism of the Supreme Court's decision was foreshadowed by the overwhelmingly negative response to the lower courts' decisions in the case. Kennedy, *supra*, at 1389; see also Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 440-47 (1988) (criticizing majority opinion for its callousness to black victims, but accepting outcome for *McCleskey* as inevitable).

tection cases. In that blindspot is the empirical reality of unconscious racism.

This Comment begins by discussing the flaws in other recent decisions involving both race and criminal procedure, then speculates about the sources of the blindspot that I think is responsible for those flaws, and, finally, tries to link this blindspot to the ongoing debate concerning discriminatory purpose and disparate effect in the equal protection literature.

I

THE BLINDSPOT IN RECENT RACE AND CRIMINAL PROCEDURE DECISIONS

At first glance, *McCleskey* stands alone. The Court has decided three major race and criminal procedure cases in the last two years, and in the other two, *Turner v. Murray*⁵ and *Batson v. Kentucky*,⁶ the Court mandated additional protections against racial discrimination. It would be wrong to say that the victories in *Turner* and *Batson* do not matter, but it is equally wrong to ignore how sharply limited those victories are; the remedies in *Turner* and *Batson* are inadequate for the same reason that *McCleskey* got no remedy at all.

A. *McCleskey v. Kemp*

I need not detail what is wrong with *McCleskey*. Others have done so far more exhaustively and persuasively than I could;⁷ the opinion is defensive and unpersuasive, and the outcome threatens our communal sense of justice. What is important for my purpose is to point out how attention to the phenomenon of unconscious racism would have altered Justice Powell's analysis under both the equal protection clause of the fourteenth amendment and under the cruel and unusual punishment clause of the eighth amendment.

McCleskey grounded his eighth and his fourteenth amendment claims on racial discrimination. By far the most important evidence *McCleskey* proffered to demonstrate that Georgia's capital sentencing system is administered in a racially discriminatory manner was the Baldus study.⁸ Justice Powell accepted, at least *arguendo*, the validity of the Baldus study.⁹ The study, described by Justice Powell

⁵ 476 U.S. 28 (1986).

⁶ 476 U.S. 79 (1986).

⁷ See *supra* note 4.

⁸ It was not, however, the only evidence he proffered to show intentional discrimination. As Justice Brennan's dissent noted, "Georgia's legacy of a race-conscious criminal justice system" is extraordinary. *McCleskey*, 107 S. Ct. at 1786 (Brennan, J., dissenting).

⁹ *Id.* at 1766 n.7 (majority opinion).

as "sophisticated,"¹⁰ examined over 2000 murder cases that occurred in Georgia during the 1970s.¹¹ The raw data showed substantial disparities in the imposition of the death penalty depending on the victim's race, and smaller disparities associated with the defendant's race.¹² Because of the possibility, indeed likelihood, of spurious correlations,¹³ Baldus subjected his data to extensive analysis, considering 230 variables that could have explained the disparities on nonracial grounds.¹⁴ One of his models controlled for the effects of all 230 variables; another model incorporated thirty-nine nonracial variables.¹⁵ Justice Powell's opinion appears to accept, at least for purposes of discussion, the latter.¹⁶

When he controlled for thirty-nine nonracial variables, Baldus found that, in Georgia, defendants charged with killing white victims were 4.3 times more likely to be condemned to death than defendants charged with killing black victims, and that black defendants were 1.1 times more likely to receive the death penalty than white defendants.¹⁷ Justice Powell deemed these statistics insufficient proof of the purposeful discrimination necessary to demonstrate a violation of the equal protection clause, and also insufficient to demonstrate the "constitutionally significant risk of racial bias affecting the . . . capital-sentencing process"¹⁸ impermissible under the cruel and unusual punishment clause.

Regarding the equal protection claim, Powell noted that statistical disparities ordinarily must be "stark" to be accepted as the sole proof of discriminatory intent;¹⁹ apparently a 300 or 400 percent overrepresentation in the ranks of the condemned is not stark enough *even when that overrepresentation cannot be explained in a noninvidious way*. He then refused to broaden the category of cases in which not-so-extreme statistical patterns are accepted as sufficient proof of the prohibited intent, a category currently composed of Ti-

¹⁰ *Id.* at 1763.

¹¹ *Id.*

¹² *Id.*

¹³ A spurious correlation is a statistical association between two variables that appears to reflect a causal relationship between those variables, but actually results from the association of both variables with a third variable.

¹⁴ *Id.* at 1764.

¹⁵ *Id.* A model that incorporates more variables is not necessarily superior to one that uses fewer variables.

¹⁶ *Id.*

¹⁷ *Id.* As Justice Blackmun's dissent pointed out, Baldus found the race of the victim to be as powerful an explanation for the imposition of the death sentence as is a prior murder conviction or acting as the principal planner of a homicide. *Id.* at 1800 (Blackmun, J., dissenting).

¹⁸ *Id.* at 1778 (majority opinion).

¹⁹ *Id.* at 1767.

tle VII and jury selection cases.²⁰ He distinguished those cases primarily on the basis that the decisions involved were less complicated.²¹

Powell disposed of the cruel and unusual punishment claim with closely analogous reasoning. Stressing the need for discretion in capital sentencing, he reasoned that apparent discrepancies are the inevitable result of such discretion. He interpreted the Baldus study as “[a]t most . . . indicat[ing] a discrepancy that appears to correlate with race,”²² insisting that “[w]e decline to assume that that which is unexplained is invidious.”²³

The phenomenon of unconscious racism challenges both Powell’s fourteenth and his eighth amendment analyses. The concept of purposeful discrimination, or at least its terminology, does not mesh well with unconscious race discrimination. I consider this problem more fully below,²⁴ but note here that the nature and prevalence of unconscious racism threatens both steps of Powell’s equal protection argument. First, cognizance of the frequency with which racial stereotypes alter judgment should influence how “stark” a statistical disparity must be to raise a presumption of a race-based decision, particularly where, as here, noninvidious explanations have been exhausted.

Second, awareness of the way in which unconscious racism functions should militate in favor of a decision to expand the category of cases in which stark disparities are not required. The multiplicity of factors that enter sentencing decisions and the consequent need for discretion may make the inference of race-based decision-making riskier in the sentencing context than where only a few permissible considerations enter into a decision, as Powell argued.²⁵ However, it also increases the likelihood that race will play a role in the decision: the greater number of factors allows the conscious but covert racist to conceal his or her motives, and the difficulty of weighing all the factors allows the well-intentioned unconscious racist to be influenced—at the margin—by race.²⁶

²⁰ *Id.*

²¹ *Id.* at 1767-68.

²² *Id.* at 1777.

²³ *Id.* at 1779.

²⁴ See *infra* notes 107-12 and accompanying text.

²⁵ 107 S. Ct. at 1767-68. Professor Kennedy reviews each of the distinctions cited by the majority opinion, and argues that they are weak even on their own terms. Kennedy, *supra* note 4, at 1427-29.

²⁶ McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, in PREJUDICE, DISCRIMINATION, AND RACISM 116-20 (J. Dovidio & S. Gaertner eds. 1986); see also *infra* notes 66-74 & 89-90 and accompanying text.

This is probably why the race of the victim has its greatest effect in the “middle-range” cases. See 107 S. Ct. at 1764 n.5 (Baldus divided cases into ranges according to

On the eighth amendment front, the phenomenon of unconscious racism provides a compelling "explanation" of the data Powell claimed to find unexplained and, therefore, presumptively noninvidious. In one sense, race itself is the explanation: the race of the victim and, to a lesser extent, the race of the defendant, explain some of the variation in the imposition of death sentences. Accepting the validity of the Baldus study, which Powell claimed to do, means accepting this explanation. If what Powell meant is that Baldus has not explained *why* race influences capital sentencing decisions, then unconscious racism provides that explanation. What is known about unconscious racism—its prevalence, its sources, and the ways in which it is manifested—can explain not only the strength of the race-of-victim effect, but also the counterintuitive finding that the *defendant's* race does not affect capital sentencing decisions as much as does the *victim's* race.²⁷

Of course, the reason that race influences a decisionmaker, or even the way in which it influences that decisionmaker, would not seem relevant if one accepts that race has affected the decision. Perhaps Powell really did not mean to accept the validity of the Baldus study, but only the reliability of its data collection and the correctness of its statistical analysis. If so, Powell meant that race may not *cause* the discrepancies observed. If this is what he meant, then he needed to explain why he rejected the study's conclusions even though he accepted its methodology. There are two obvious possibilities: first, that the correlation between race of the victim and sentence is spurious, and the apparent effect of race is really caused

aggravation level of offense). Because middle-range decisions are the most complicated, race may play a decisive, yet unobtrusive role in the decisionmaking process. *See id.* at 1806 (Stevens, J., dissenting) (if Georgia were to narrow class of death-eligible defendants to categories of extremely serious crimes, danger of discriminatory application of death penalty would be significantly decreased).

²⁷ The typical unconscious racist does not feel particularly punitive toward minorities. Instead, he or she wishes to maintain distance and is less likely to feel empathy for minorities due to this distance. *See, e.g.,* J. JONES, PREJUDICE AND RACISM 121-24 (1972); Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 687-90 (1985); *see also* Rogers & Prentice-Dunn, *Deindividuation and Anger-Mediated Interracial Aggression: Unmasking Regressive Racism*, 41 J. PERSONALITY & SOC. PSYCHOLOGY 63 (1981). Rogers and Prentice-Dunn discuss one facet of modern racism, which they label "regressive racism." The regressive racist claims to accept egalitarian norms and behaves consistently with those norms in most situations. *Id.* However, in situations in which anger is aroused, the regressive racist reverts to traditional patterns of racial discrimination. *Id.* White-victim cases would seem to be a situation in which anger would be aroused.

Although race of the defendant is not an important predictor in capital-sentencing decisions, we should not assume that discrimination based on the race of the defendant has disappeared; such discrimination persists at the guilt attribution stage and is probably caused by the unconscious influence of stereotypes. *See infra* note 35 and accompanying text.

by some other, unexamined variable; or second, that the explanation of race as a cause is so implausible that we should conclude that an event of minuscule probability has occurred—the correlation reflects only chance.²⁸ With no competing explanations—and Justice Powell offered none because he could not, given the 39 variables Baldus controlled for and the nearly 200 more he investigated—and with the phenomenon of unconscious racism rendering race-based decisionmaking entirely plausible—it becomes virtually impossible to reject the invidious and unconstitutional explanation: racial discrimination.

B. *Turner v. Murray*

Turner v. Murray,²⁹ decided in 1986, is only marginally better than *McCleskey* in result, is similarly flawed in its empirical premises, and is, doctrinally speaking, a mess. Turner, a black defendant convicted and sentenced to death for murdering a white victim, had his request to voir dire potential jurors concerning racial bias denied. The Court held that this denial invalidated his capital sentence, but not his conviction. Justice White explained that three factors—the interracial violent crime, the broad discretion given the jury at the death penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case—rendered the risk of racial prejudice unacceptable for the capital sentencing proceeding.³⁰ With respect to the guilt phase of Turner's trial, however, White concluded that the risks of prejudice infecting the decision were no greater than with other noncapital interracial offenses, and hence insufficient to compel inquiry into racial bias.³¹ To say the least, this reasoning is troubling. As Justice Brennan, dissenting in part, pointed out:

Implicit in the Court's judgment is the acknowledgment that there was a likelihood that the jury that pronounced the death sentence acted, in part, on the basis of racial prejudice. But the exact same jury convicted Turner. Does the Court really mean to suggest that the constitutional entitlement to an impartial jury attaches only at the sentencing phase? Does the Court really believe that racial biases are turned on and off in the course of one criminal prosecution?³²

Justices Powell and Rehnquist, also dissenting in part, noted the

²⁸ Of course, even with statistically significant correlations, there is a possibility, albeit very small, that chance is responsible for the association.

²⁹ 476 U.S. 28 (1986).

³⁰ *Id.* at 37.

³¹ *Id.* at 37-38. As Justice White noted, this is consistent with the Court's earlier decision in *Ristaino v. Ross*, 424 U.S. 589 (1976), a black defendant, white victim non-capital case in which the Court upheld a refusal to grant voir dire on racial prejudice.

³² *Turner*, at 43 (Brennan, J., dissenting).

same inconsistency, but drew the opposite conclusion: there was no reason to "presume racial bias" at the sentencing stage for the same reason there was no reason to presume such bias at the guilt determination phase.³³

We could view this decision as simply another split-the-difference compromise, and on a polarized court, such compromises are not infrequent.³⁴ In *Turner*, however, I think we see more than just a pragmatic balancing of values and views. This compromise *can* be justified; its justification, however, rests upon a false empirical premise. *If* racial bias were an exceptional occurrence and *if* it were largely composed of conscious hostility towards persons of other races, then we would expect that in an "ordinary" decision determining the "facts" of guilt, prejudice would be much less likely to operate than in a decision regarding how to *punish* a person. But these assumptions are both empirically wrong: race affects the thinking of virtually everyone in this society, and for more and more people, this influence is neither conscious nor motivated by hostility. Ironically, the empirical evidence says that Justice White got it exactly backward. If we look at mock jury studies examining the effects of the defendant's race on jurors' decisions, it appears that the defendant's race affects guilt determinations *more* often than it affects sentences; it is the subtle, unconscious alteration of judgment, not the conscious desire to injure, that most threatens the fair administration of the criminal justice system.³⁵

C. *Batson v. Kentucky*

The first of the three major race and criminal procedure decisions in the last two years, *Batson v. Kentucky*,³⁶ held that a prosecutor's racially motivated exercise of the peremptory challenge violates the equal protection clause of the fourteenth amendment. Without diminishing *Batson's* significance—I think the symbolic importance of overturning *Swain v. Alabama*³⁷ is enough reason to applaud, even if there are *no* practical consequences—I would argue that it is flawed by the same premises that determine *McCleskey* and mar *Turner*.

At the very least, *Batson* is flawed by the assumption that merely

³³ *Id.* at 52 (Powell, J., dissenting).

³⁴ Justice Brennan so characterizes the decision. *Id.* at 44 (Brennan, J., dissenting).

³⁵ See Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1625-38 (1985) (reviewing literature); see also *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1603, 1625 (1988) [hereinafter *Developments*].

³⁶ 476 U.S. 79 (1986).

³⁷ 380 U.S. 202 (1965). *Swain* held that a black defendant was not denied equal protection by the State's exercise of peremptory challenges to exclude blacks from the petit jury, absent proof of systematic exclusion of black jurors in case after case.

allowing defendants to challenge the racially discriminatory use of peremptory challenges in individual cases will end the illegitimate use of the peremptory challenge. Justice Marshall, concurring, rejected the Court's limited remedy because of the huge practical obstacles the majority would require the defendant to surmount to gain relief. First, he noted that only flagrant abuses of the peremptory challenge will establish a prima facie case, so that in those jurisdictions where only one or two black jurors survive challenges for cause, the prosecutor is free to strike them from the jury because of their race.³⁸ Second, he observed that even when the defendant can establish a prima facie case, the trial court will face a difficult burden in assessing the prosecutor's motives; other explanations will be easy to generate.³⁹ The majority responded to these concerns in a footnote:

We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination.⁴⁰

This response would be satisfactory if racial bias were an exceptional occurrence easily detected by any well-intentioned observer. As Justice Marshall pointed out, however, the danger is not limited to outright prevarication. An attorney might lie to himself or herself to justify his or her actions; conscious or unconscious racism may lead him or her to conclude that a prospective black juror is "sullen" or "distant" on the basis of behavior that would not have prompted the same conclusion had the juror been white.⁴¹ Moreover, a judge's own conscious or unconscious racism might prompt acceptance of such an explanation.⁴²

The majority did not—because it could not—respond to Marshall's assertions about the prevalence of racism, particularly unconscious racism. Social scientists would tell us that Marshall is right, and his prediction is borne out by *Batson's* early progeny. Prosecutors are already asserting flimsy justifications for exercising their challenges against black jurors,⁴³ and judges sometimes uphold these excuses. For example, one court held that the following ex-

³⁸ 476 U.S. at 105 (Marshall, J., concurring).

³⁹ *Id.* at 105-06.

⁴⁰ *Id.* at 99 n.22 (majority opinion).

⁴¹ *Id.* at 106 (Marshall, J., concurring).

⁴² *Id.*

⁴³ *See, e.g.*, *State v. Butler*, 731 S.W.2d 265 (Mo. Ct. App. 1987); *Wallace v. State*, 41 Crim. L. Rep. (BNA) 2019 (Ala. Crim. App. Mar. 10, 1987); *Branch v. State*, 526 So.2d 605 (Ala. Crim. App. 1986).

planations rebutted the defendant's prima facie case of discrimination:

[A] young black female was struck because she was a homemaker and 'may have trouble making the necessary judgments that have to be made and that is the knowledge of what life is like out on the street'; a young black female who is a student made no indication that she was working and 'would have not have the necessary experience to be able to draw on to make a judgment in this case'; an older black female who was retired and 'maybe overly sympathetic based on the fact that she appeared to be a grandmotherly type'; a young black male who had a beard and 'I [the prosecutor] tend to think that people that have beards are somehow those that try to go against the grain,' and also, 'both of the defense attorneys have beards and I felt like that he would somehow identify with the defense attorneys and would therefore lean in their direction'; a middle-aged, black male who was not working and 'may be somewhat irresponsible'; and a middle-aged black female who was some type of supervisor and appeared to be in the same age group as the defendants' parents or mothers.⁴⁴

I would expect that, sometimes consciously and sometimes unconsciously, prosecutors will develop more sophisticated excuses for striking black jurors.

Ultimately, how much progress will *Batson* make in eliminating the racially motivated exercise of the peremptory challenge? I would guess not a great deal. And eliminating the racially motivated use of the peremptory challenge was a very modest goal. As I have argued at length elsewhere, I think that awareness of the data on race and guilt attribution, coupled with an understanding of unconscious racism, compels the conclusion that what black defendants need is not purification of voir dire procedures, but black jurors.⁴⁵

In my view, *McCleskey*, *Turner*, and *Batson* are only the most obvious and most recent examples of the failure to attend to the impact of unconscious racism on the criminal justice system. Slightly older decisions involving the intersection of race and criminal procedure reveal the same blindspot. In the fourth amendment area, *United States v. Brignoni-Ponce*⁴⁶ purports to sanction a limited use of race in suspected immigration violation detentions, apparently oblivious to the likelihood of heavy and irrational reliance on Hispanic ethnicity as a source of suspicion;⁴⁷ in *Kolender v. Lawson*,⁴⁸ the Court ignored

⁴⁴ *Wallace*, 41 Crim. L. Rep. (BNA) at 2019-20.

⁴⁵ *Johnson*, *supra* note 35.

⁴⁶ 422 U.S. 873 (1975).

⁴⁷ See also *United States v. Martinez-Fuerte*, 428 U.S. 543, 563-64 (1976) (no constitutional violation where further questioning at border is based largely on apparent Mexican ancestry due to minimal nature of intrusion involved and need for broad discretion). For an account of Hispanic citizens' frustrating attempts to restrict Immi-

the extraordinary racial discrimination faced by the plaintiff who challenged California's stop-and-identify statute, apparently deeming it coincidence rather than an additional objection to such statutes. In the voir dire area, the cases preceding *Turner*, *Ristaino v. Ross*⁴⁹ and *Rosales-Lopez v. United States*⁵⁰ exhibit the same naive reasoning concerning the dynamics of prejudice that underlies the decision in *Turner*, and in *Press-Enterprise Co. v. Superior Court*⁵¹ the Court gratuitously criticized the length of the voir dire in a case imbued with extraordinary potential for inflaming racial prejudice.⁵² In cases touching on cross-racial identification, the Court has also sent the wrong signals. In *Manson v. Brathwaite*,⁵³ it implied that black-on-black identifications are particularly trustworthy,⁵⁴ and in *Stovall v. Denno*⁵⁵ it ignored the increased likelihood of error generated by a white-on-black identification.⁵⁶ Arguably, some civil cases concerning the criminal process, such as *Los Angeles v. Lyons*,⁵⁷ are also flawed by the failure to consider the effects of unconscious racism.⁵⁸

gration and Naturalization Service (INS) use of ethnicity to cases where there are other indicators of suspicion, see *Marquez v. Kiley*, 436 F. Supp. 100 (S.D.N.Y. 1977); for a review of cases in which INS reliance on race has been extreme, see Johnson, *Race and the Decision To Detain a Suspect*, 93 YALE L.J. 214, 232-33 (1983).

⁴⁸ 461 U.S. 352 (1983).

⁴⁹ 424 U.S. 589 (1976) (no constitutional violation to refuse to permit voir dire on racial bias absent "special circumstances;" violent interracial crime does not constitute special circumstances).

⁵⁰ 451 U.S. 182 (1981) (neither constitution nor supervisory power over federal courts mandates per se rule requiring voir dire on racial prejudice in all cases with minority-race defendant).

⁵¹ 464 U.S. 501 (1984).

⁵² *Id.* at 510 n.9. Justice Marshall's concurrence criticizes the majority for its insensitivity to the potential for prejudice posed by a rape-strangulation murder of a 15 year-old white girl by a 26 year-old black man with a prior conviction for rape of an adolescent white girl. *Id.* at 521-22 (Marshall, J., concurring).

⁵³ 432 U.S. 98 (1977).

⁵⁴ Of course, black-on-black identifications are no more reliable than the most common identification pattern, white on white.

⁵⁵ 388 U.S. 293 (1967) (upholding extremely suggestive hospital room show-up without mentioning additional unreliability caused by cross-racial nature of identification).

⁵⁶ For a review of the psychological data showing substantially higher rates of error in cross-racial identifications, see Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 938-51 (1984).

⁵⁷ 461 U.S. 95 (1983).

⁵⁸ The Court held that the plaintiff, a black male who had been subjected to a chokehold, had no standing to challenge the city's policy of using life-threatening chokeholds to subdue its citizens. As Justice Marshall's dissent noted, although only nine percent of the residents of Los Angeles are black males, they have accounted for 75 percent of the deaths resulting from chokeholds. *Id.* at 116 n.3 (Marshall, J., dissenting). The majority did not deem this disparity worthy of notice, or relevant to the question of whether the plaintiff had a reasonable fear that he would again be injured by the practice of using chokeholds. See also *Rizzo v. Goode*, 423 U.S. 362 (1976) (no case or contro-

II

THE SOURCES OF THE BLINDSPOT

The obvious question is—why? Let me reject a few possible explanations first. Is there something particularly uncomfortable about closely examining racism in the context of the criminal justice system? I think not; looking back several decades, there was no hesitance to take note of the dynamics of race relations in the police station or even the courtroom. In both the right to counsel cases⁵⁹ and the involuntary confession cases,⁶⁰ the Supreme Court implicitly recognized that the defendant's race might subtly affect his ability to defend himself against governmental abuses of power.

Is it a reluctance to rely upon social science data in either equal protection questions or in criminal procedure matters? Again, I think the answer is "no." Precedent for using purely statistical data is available in another area where equal protection doctrine and criminal procedure questions intersect: the jury venire selection cases.⁶¹ Moreover, the Court has used softer, more "general" social science findings to ground decisions in both areas. The obvious example in equal protection analysis is the school desegregation cases,⁶² and in the criminal procedure realm, the jury-size cases.⁶³

Finally, is it a recently developed reluctance, perhaps caused by changes in Court membership, to probe race questions too deeply? I think the Court's treatment of affirmative action cases—its unwillingness to simply set out the general contours of permissible pro-

versy where plaintiffs alleged widespread illegal and unconstitutional police conduct aimed at minority citizens).

⁵⁹ See *Powell v. Alabama*, 287 U.S. 45 (1932); see also *Betts v. Brady*, 316 U.S. 455, 463 (1942) (noting that *Powell* involved "ignorant and friendless negro youths").

⁶⁰ *Brown v. Mississippi*, 297 U.S. 278 (1936), and the six confession cases that directly followed it all involved black defendants. See *Ward v. Texas*, 316 U.S. 547 (1942); *Lomax v. Texas*, 313 U.S. 544 (1941); *Vernon v. Alabama*, 313 U.S. 547 (1941); *White v. Texas*, 309 U.S. 631 (1940); *Canty v. Alabama*, 309 U.S. 629 (1940); *Chambers v. Florida*, 309 U.S. 227 (1940).

⁶¹ *Castaneda v. Partida*, 430 U.S. 482, 495-96 (1977) (showing that population was 79.1 percent Mexican-American, but that over eleven-year period only 39 percent of persons summoned for grand jury service were Mexican-American established prima facie case of discrimination); see also *Turner v. Fouche*, 396 U.S. 346 (1970) (prima facie case of discrimination may be made out by showing that substantial disparity between minority group members in population and on jury list originated, at least in part, at point in selection process where jury commissioners invoked subjective judgment).

⁶² *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁶³ *Ballew v. Georgia*, 435 U.S. 223 (1978); *Williams v. Florida*, 399 U.S. 78 (1970). Of course *Brown*, *Williams*, and *Ballew* have all been criticized and debated, at least in part for their reliance on social science data. But at this juncture I only mean to point out that such reliance is not so novel as to explain the Court's behavior, not to establish that the reliance on such data is correct. My view, however, is that reliance on social science data concerning race and criminal justice is less problematic than these prior disputed uses. See *Johnson*, *supra* note 35, at 1704-05.

grams, its obsession with resolving various factual variations—says that this is not a sufficient explanation.⁶⁴ Certainly the blindspot is not caused by a general judicial reluctance to discuss racial issues lest hostilities be inflamed.⁶⁵

This leaves us, I think, with the special properties of unconscious racism itself. Put differently, it is not the *location* of the blindspot, but its *content*. I am convinced that unconscious racism is ignored in the reasoning of race and criminal procedure decisions for three reasons, all linked to the nature of phenomenon itself: ignorance, fear, and denial.

A. Ignorance

Ignorance is the first obstacle to taking account of unconscious racism. To most judges, in fact to most of our society, "racial discrimination," "racism," "racial bias," and "racial prejudice" are the property of the hate-filled, stereotype-spouting, put-them-in-their-place white supremacist—what social scientists call the "dominative racist."⁶⁶ Although the 1980's have brought something of a revival of racially motivated violence against minority groups and an increase in the number of overtly racist organizations,⁶⁷ the general perception that the ranks of these "traditional" racists are dwindling is accurate.⁶⁸ As a society, we have largely rejected gross stereotypes and blatant discrimination, but this has not rid us of racism. A burgeoning literature documents the rise of the "aversive" racist,⁶⁹ a person whose ambivalent racial attitudes leads him or her to deny his or her prejudice and express it indirectly,⁷⁰ covertly,⁷¹ and often

⁶⁴ If one looks at the Supreme Court's docket in the last five years, one might easily get the impression that the Court sees affirmative action as the most significant race discrimination issue facing our society. This selection *among* race discrimination cases clearly does reflect something about the Court's membership and the Justice's priorities, *see infra* notes 85-88 and accompanying text, but the fact that the Court is hearing *any* kind of race discrimination cases in relatively large numbers indicates that queasiness about the societal consequences of highlighting such disputes is not the cause of the Court's refusal to examine the consequences of unconscious racism.

⁶⁵ Indeed, one would imagine that highlighting affirmative action cases engenders more divisiveness than would highlighting almost any other subset of race discrimination cases.

⁶⁶ J. JONES, *supra* note 27, at 121-24; J. KOVEL, *WHITE RACISM* 54-55 (1970); Pettigrew, *supra* note 27, at 687.

⁶⁷ JONES, *An Argument For Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, 21 HARV. C.R.-C.L. L. REV. 689, 697-700 (1986).

⁶⁸ *See, e.g.*, J. JONES, *supra* note 27, at 121-22; McConahay & Hough, *Symbolic Racism*, 32(2) J. SOC. ISSUES 23, 39 (1976); Pettigrew, *supra* note 27, at 687-88 (reviewing poll data).

⁶⁹ J. JONES, *supra* note 27, at 121-24; J. KOVEL, *supra* note 66, at 54-55; Pettigrew, *supra* note 27, at 687; McConahay & Hough, *supra* note 68, at 23-24 (using term "symbolic racism").

⁷⁰ Crosby, Bromley & Saxe, *Recent Unobtrusive Studies of Black and White Discrimination*

unconsciously.⁷² That literature, which does not come from one narrow subfield of zealots but spans the chasms between Freudians, cognitive psychologists, and sociologists,⁷³ also documents how pervasively and subtly race influences the thinking of us all.⁷⁴

Certainly current public awareness of the concept and dynamics of unconscious racism is low. But public ignorance is not a sufficient barrier to incorporating new insights about race into judicial thinking; the courts have been educated—and subsequently, educators—before.⁷⁵ At least two members of the Court are aware of uncon-

and Prejudice: A Literature Review, 87 *PSYCHOLOGICAL BULL.* 546, 554 (1980) (reviewing aggression studies); McConahay & Hough, *supra* note 68, at 43; Pettigrew, *supra* note 27, at 690, 694-700. Many whites agree with the goal of racial equality in principle, but strongly object to and obstruct specific reforms aimed at implementing that principle. I. KATZ, *STIGMA: A SOCIAL PSYCHOLOGICAL ANALYSIS* 14-16 (1981) (reviewing a variety of studies); H. SCHUMAN, C. STEEH & L. BOBO, *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 211-12 (1985); Pettigrew, *supra* note 27, at 689-91 (also reviewing a variety of studies).

⁷¹ Strong public norms against racial prejudice compete with private norms that endorse it. See H. SCHUMAN, C. STEEH & L. BOBO, *supra* note 70, at 202; Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 *HARV. C.R.-C.L. L. REV.* 301, 317-18 (1987). Discrimination is therefore most prevalent in private settings and public settings where it may be practiced without disclosure of prejudiced attitudes. G. ALLPORT, *THE NATURE OF PREJUDICE* 56-57 (1954); H. SCHUMAN, C. STEEH & L. BOBO, *supra* note 70, at 65 (discussing race-of-interviewer effects on reported racial attitudes); Crosby, Bromley & Saxe, *supra* note 70, at 549, 554, 559 (reviewing helping-behavior studies and studies examining effect on subjects' reported racial attitudes when telling subjects that truthfulness of their statements is being monitored by sensitive lie detector); Gaertner & Dovidio, *The Aversive Form of Racism*, in *PREJUDICE, DISCRIMINATION, AND RACISM*, *supra* note 26, at 80-84 (reviewing experiments on positive and negative rating scale studies and reaction time/rating scale studies); Sigall & Page, *Current Stereotypes: A Little Fudging, A Little Faking*, 18 *J. PERSONALITY & SOC. PSYCHOLOGY* 247 (1971).

⁷² Crosby, Bromley & Saxe, *supra* note 70, at 555-56 (reviewing nonverbal behavior studies); Gaertner & Dovidio, *supra* note 71, at 85 (reviewing a variety of studies and concluding that aversive racists rationalize negative responses to minorities in ambiguous situations and thus maintain perception of themselves as egalitarian, unprejudiced, and nondiscriminating); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 *STAN. L. REV.* 317, 329-32, 343 (reviewing the literature); McConahay & Hough, *supra* note 68, at 43-44.

⁷³ The terminology differs among the various disciplines, as does the explanation of the origin of unconscious racism, but all document the existence and prevalence of the same phenomenon. For an excellent, brief description of the different causal theories of psychoanalytic theory and cognitive psychology, see Lawrence, *supra* note 72, at 331-39; for a comprehensive treatment of various motivational and cognitive approaches to the newer forms of racism, as well as a briefer treatment of institutional and socio-cultural perspectives, see Gaertner & Dovidio, *supra* note 71. See also Pettigrew, *supra* note 27.

⁷⁴ J. KOVEL, *supra* note 66, at 94; Gaertner & Dovidio, *supra* note 71, at 317-18; Lawrence, *supra* note 72, at 330-31.

⁷⁵ *Brown v. Board of Educ.*, 347 U.S. 483 (1954), is the most obvious example of the Court leading and educating the public, and I think *Gideon v. Wainwright*, 372 U.S. 335 (1963), has served the same function regarding the right to counsel. Arguably, *Miranda v. Arizona*, 384 U.S. 436 (1966), has also altered the public perception of proper

scious racism: Justice Marshall's concurrence in *Batson v. Kentucky*⁷⁶ and Justice Brennan's dissent in *Turner v. Murray*⁷⁷ allude to unconscious racism. Thus, ignorance alone does not explain the blindspot.

B. Fear

Justice Powell listed two "additional concerns" about McCleskey's claim as reasons for refusing to grant him relief,⁷⁸ and one of those reasons translates into the second source of the blindspot: fear. Surmounting ignorance may feel dangerous here. After listing a variety of challenges that might follow a grant of relief in *McCleskey*, Powell concluded "there is no limiting principle to the type of challenge brought by McCleskey."⁷⁹ As Justice Brennan noted, that argument "seems to suggest a fear of too much justice."⁸⁰ He also noted that the fear was not rational: at least in the short run, the practical consequences of respecting McCleskey's claim would be very limited.⁸¹ Students of unconscious racism, however, would predict irrational fear, or at least fear disproportionate to the threat.⁸²

C. Denial

A cautious person might respond that in the long run, we cannot predict what further data *might* be amassed and what other cherished institutions threatened.⁸³ Still, I think this long term practical

police interrogation methods despite the continuing controversy over the decision's correctness.

⁷⁶ 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

⁷⁷ 476 U.S. 28, 42 (Brennan, J., dissenting). Even the majority opinion comes close to a recognition of unconscious racism when it alludes to "less consciously held racial attitudes." *Id.* at 35 (majority opinion).

⁷⁸ *McCleskey v. Kemp*, 107 S. Ct. 1756, 1779 (1987).

⁷⁹ *Id.* at 1780.

⁸⁰ *Id.* at 1791 (Brennan, J., dissenting).

⁸¹ *Id.* at 1792-93 (Brennan, J., dissenting). Justice Brennan pointed out that many of Justice Powell's hypotheticals did not involve race, which would render them subject to a lesser degree of scrutiny, *id.* at 1792-93, and he noted that with regard to other hypothesized race effects, the Baldus study provided documentation unavailable for most any other kind of race discrimination claim. *Id.* at 1793.

⁸² A wide variety of measures and samples have found that the objective threat posed by racial change is a poor predictor of white racial attitudes and behavior. Subjective threat, the dangers perceived from alterations in the racial status quo, is what motivates white opposition to racial change. Pettigrew, *supra* note 27, at 691 (reviewing literature).

⁸³ Although many commentators, I among them, would be glad to see the death penalty abolished, the majority of public opinion favors retention. Views on the retention/abolition question are undifferentiated and emotional. These views probably do not stem from a set of reasoned beliefs, but rather reflect the adherent's ideological self-image. Ellsworth & Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 1983 *CRIME & DELINQ.* 116, 167-69.

risk is probably less inhibiting than the psychological risk: really, do we want to acknowledge that racism infects us all? So we see the third and probably most powerful reason for the blindspot: denial. Denial, too, is a property of unconscious racism.⁸⁴

It is one thing to identify and castigate dominative racists: one⁸⁵ feels morally superior. It is a different thing to ponder affirmative action at length (what shall we do for them? haven't we done enough already?): one feels generous and yet, prudent. But both kinds of reflection are similar in one respect: they enhance the decisionmaker's self-image. In contrast, recognizing the ubiquity of unconscious racism cannot but detract from one's self-image. This is particularly true for a person accustomed to thinking of racism as immoral, even criminal (which in its conscious forms, it certainly is)⁸⁶—rather than as sick. Even if one makes the distinction between conscious, unconscionable racism, and unconscious racism, it is hardly ego-enhancing to think of oneself as the passive recipient of a culturally pervasive illness. Here we may have a psychological variation of Professor Derrick Bell's observation about interest convergence:⁸⁷ just as the legal establishment has rejected civil rights claims that threaten the *position* of upper middle class whites, so it is now rejecting claims that threaten their *psyches*.⁸⁸

This seems like a rather drastic reaction when incarceration and death are at stake, but then, that is the whole point of denial. And, as the studies of modern racism would predict, one then justifies one's opposition to racial change—both to oneself and to the world—by citing nonracial reasons.⁸⁹ In the context of criminal procedure decisions, finding a nonracial reason is particularly easy

⁸⁴ J. KOVEL, *supra* note 66, at 54-55, 60-61; Crosby, Bromley & Saxe, *supra* note 70 (reviewing the literature); Gaertner & Dovidio, *supra* note 71, at 84-86 (reviewing results of number of experiments); Lawrence, *supra* note 72, at 335; McConahay & Hough, *supra* note 68, at 43-44; Pettigrew, *supra* note 27, at 690.

⁸⁵ I am self-consciously switching to an indefinite pronoun at this point because the first person plural would exclude and ignore minority readers, while the second person plural might imply that I think I have transcended this kind of thinking, which I certainly cannot claim to have done.

⁸⁶ See Lawrence, *supra* note 72, at 321 (describing racism as "both a crime and a disease"); see also Kennedy, *supra* note 4, at 1442 n.242 (noting risk that moral condemnation of racism will be eroded as we come to conceptualize racist conduct as culturally induced rather than consequence of individual choice).

⁸⁷ Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523-24 (1980).

⁸⁸ Cf. Lawrence, *supra* note 72, at 387 (intent requirement in equal protection doctrine is example of Bell's observation that legal establishment does not respond to civil rights claims that threaten status of privileged whites).

⁸⁹ Gaertner & Dovidio, *supra* note 71, at 84-86 (drawing conclusions from results of number of experiments); Pettigrew, *supra* note 27, at 690 (citing survey data from variety of contexts that reflect this phenomenon).

to do: one cites the guilt of the suspect.⁹⁰

III

THE BLINDSPOT AND EQUAL PROTECTION DOCTRINE

If I am right about the blindspot of unconscious racism, it would be surprising if it only affected race and criminal procedure cases. I think it is largely responsible for the Court's blurred vision of the heart of traditional equal protection doctrine: the discriminatory purpose/disparate effects distinction.⁹¹ As Professor Randall Kennedy has argued, conventional equal protection precedents neither compelled nor precluded the outcome in *McCleskey*.⁹² Was there discriminatory purpose, or more precisely, was discriminatory purpose proved in *McCleskey*?

The dissatisfaction with the discriminatory purpose doctrine has several facets, but a recurring theme in the literature is the difficulty of proving discriminatory purpose.⁹³ Early commentary focused on the ease with which the sophisticated discriminator could conceal his purposes.⁹⁴ This complaint was occasionally buttressed by the additional observation that the discriminator might not even be aware of his racial bias.⁹⁵ More recently, the likelihood of unconscious discrimination has been given greater attention.⁹⁶

The best example of this new focus is a provocative article by Professor Charles Lawrence entitled *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*.⁹⁷ Lawrence argues that the Court should expand equal protection doctrine to include a prohibition against unconscious racial discrimination.⁹⁸ He then proposes

⁹⁰ Justice Powell makes this move openly in his *McCleskey* opinion. 107 S. Ct. at 1769 ("Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: *McCleskey* committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.").

⁹¹ See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

⁹² Kennedy, *supra* note 4, at 1402-08.

⁹³ See, e.g., Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L.F. 961; Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978).

⁹⁴ Eisenberg, *supra* note 93, at 47-48; Perry, *supra* note 93, at 551; Schwemm, *supra* note 93, at 1031.

⁹⁵ Binion, "Intent" and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397, 442; Karst, *supra* note 93, at 1165.

⁹⁶ See Johnson, *supra* note 35; Kennedy, *supra* note 84; Lawrence, *supra* note 72.

⁹⁷ Lawrence, *supra* note 72.

⁹⁸ *Id.* at 324-27, 344-55.

that unconscious motivation be assessed by the "cultural meaning" of the action.⁹⁹ He reasons that if the culture assigns racial meaning to an action with racially disparate impact, then the action probably was subconsciously motivated by racial considerations—and should therefore be subjected to strict scrutiny.¹⁰⁰ Lawrence, like most mainstream equal protection theorists, does not consider examples from the criminal justice system.¹⁰¹

I think Lawrence's work, and that of other equal protection theorists struggling with the purpose/effects dilemma, would be enriched by examining the criminal justice sphere. One potentially significant contribution of the race and criminal procedure cases is *documentation* of the phenomenon of unconscious racism. The nature of any unconscious process makes absolute proof impossible. But in this area, there are a variety of data for which no other plausible explanation exists: higher conviction rates of other-race defendants;¹⁰² the race-of-victim effect in capital sentencing;¹⁰³ the overwhelming propensity of prosecutors to strike black jurors from cases with black defendants;¹⁰⁴ the increased rates of mistaken identification in interracial crimes;¹⁰⁵ and so on.

These data present an opportunity: recognizing the operation of unconscious racism in the criminal procedure context would pave the way toward incorporating it into the Court's vision in other equal protection contexts. The five to four split in *McCleskey* provides some hope that this kind of data is insistent enough to demand some acknowledgment, at least if repeatedly proffered. Moreover, even the public may be somewhat receptive to the concept of unconscious racism if introduced in this realm; although most white Amer-

⁹⁹ *Id.* at 355-62.

¹⁰⁰ *Id.* at 355-58. Lawrence justifies this inference by referring to psychoanalytic and cognitivist theory about racial imagery. *Id.* at 356-57.

¹⁰¹ The jury panel selection cases are occasionally alluded to in discussions of the role of statistical proof, but even the related question of individual juror selection, so prominent in the criminal procedure area during the reign of *Swain v. Alabama*, 408 U.S. 936 (1972) is largely ignored. For an exception, see Wasserstom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977).

¹⁰² Johnson, *supra* note 35, at 1620-22 (reviewing literature); *see also id.* at 1625-43 (reviewing mock jury studies on race and guilt attribution); *Developments, supra* note 35, at 1559-60.

¹⁰³ *See McCleskey*, 107 S. Ct. at 1763-64 (reviewing the Baldus study); *see also* Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980) (studying capital sentences in Georgia, Texas, Florida, and Ohio); Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984) (comparing FBI homicide data with death sentences in eight states from 1976 to 1980); Miller & Hewitt, *Conviction of a Defendant as a Function of Juror-Victim Racial Similarity*, 105 J. SOC. PSYCHOLOGY 159 (1978).

¹⁰⁴ *Batson v. Kentucky*, 476 U.S. 79, 103-04 (1986) (Marshall, J., concurring) (reviewing data from four jurisdictions).

¹⁰⁵ Johnson, *supra* note 55, at 937-51 (reviewing the literature).

icans believe that blacks do not need more help from the federal government or from affirmative action programs, they do acknowledge that discrimination persists in the criminal justice system.¹⁰⁶

The second contribution that attention to criminal justice race cases can make to general equal protection doctrine lies in the insight it can provide into the nature of remedies for unconscious racism, both doctrinal and practical. Doctrinally, I think these cases argue against Lawrence's "cultural meaning" test for discriminatory purpose: the salient cultural meaning of criminal justice decisions is rarely racial even when race has influenced these decisions. This is partly because criminal justice decisions have so many strong competing meanings that their racial significance can get lost, and it is partly because the taboo against recognizing racial discrimination in *individual* decisions of imprisonment and death is so strong that the decisionmakers and the public would probably repress the racial significance of these decisions as well as their underlying racial motivation.

From the vantage point of the race and criminal procedure cases, it would seem that illuminating equal protection doctrine with the knowledge of unconscious racism ultimately will not yield a single new test, as Lawrence initially envisioned.¹⁰⁷ Instead, I would foresee escalating doctrinal modifications, beginning with the modest step of abandoning the phrases "discriminatory purpose" and "purposeful (or intentional) discrimination." As existing decisions have made clear, these terms of art do not really concern conscious intent, as the word "purpose" implies,¹⁰⁸ but were created to stress the requirement of race-dependent decisions,¹⁰⁹ thus distinguishing

¹⁰⁶ *Black and White: A Newsweek Poll*, NEWSWEEK, Mar. 7, 1988, at 23.

¹⁰⁷ Lawrence does not purport to offer a perfected and unalterable proposal. "Rather, it is [his] hope that . . . [his article] will stimulate others to think about racism in a new way and will provoke a discussion of how equal protection doctrine can best incorporate this understanding of racism." Lawrence, *supra* note 72, at 387. I see this Comment as a response to that invitation, and I hope that it furthers the discussion he envisions.

¹⁰⁸ Here I would quibble with Lawrence that current doctrine needs to be expanded to include unconscious discrimination. By prevailing usage, discriminatory purpose encompasses race-dependent decisions, whether or not the actor is aware that race has influenced the decisionmaking process. See *infra* notes 110-11 and accompanying text. And, as Lawrence convincingly argues, the justifications for applying heightened scrutiny to racial classifications would not differentiate conscious from unconscious motivation. Lawrence, *supra* note 72, at 344-55; see also Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 972-84 (1983) (arguing that interpreting the purposeful discrimination standard to mean "objective purpose" explains cases better than does an interpretation relying on decisionmaker's subjective awareness of invidious motives); Johnson, *supra* note 35, at 1688-89 (arguing that Supreme Court's discriminatory purpose standard does not and should not require proof of conscious motive to discriminate).

¹⁰⁹ See *Washington v. Davis*, 426 U.S. 229, 239-41 (1976).

decisions made *because of* anticipated racial effects rather than *in spite of* such effects.¹¹⁰ Because these phrases are particularly inept and misleading in the context of unconscious race-based decisionmaking, they should be jettisoned.¹¹¹

A second and more significant modification would be the expansion of the *Arlington Heights* list of the kinds of evidence that tend to prove invidious discrimination.¹¹² The current list, perhaps unsuited to uncovering racism in any form,¹¹³ is wholly useless in revealing unconscious, invidious discrimination. A revised list would include empirically verified indicia of unconscious racism, such as slips of the tongue,¹¹⁴ microaggressions against the minority race litigant,¹¹⁵ avoidance of face-to-face interactions with minorities,¹¹⁶ and the adoption of defensive rationalizations.¹¹⁷ It would probably also include indicators logically deduced from the concept of unconscious racism, just as the current list includes indicators deduced from the concept of conscious discrimination;¹¹⁸ a prime candidate would be Lawrence's "cultural meaning" of the action.¹¹⁹

Eventually, we might see some lessening of the total burden of proof of invidious discrimination to reflect the ubiquity (and hence, quite likely influence) of unconscious racism. Perhaps this would be accomplished simply by giving greater weight to disparate effects, particularly where there are no truly plausible, nonracial explanations for those effects. Alternatively, some of the post-*Arlington Heights* proposals for steering a middle course between a purpose and effects test might be reevaluated in light of what we learn about the difficulties of proving unconscious discrimination.¹²⁰

On the practical side, the race and criminal procedure cases

¹¹⁰ *McCleskey*, 107 S. Ct. at 1769 (quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979)).

¹¹¹ These terms may have other problems, as some of the literature critical of the discriminatory purpose doctrine has argued. See, e.g., Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L. L. REV. 31 (1982).

¹¹² The *Arlington Heights* list includes: the impact of the official action, the historical background of the decisions, the specific sequence of events leading up to the challenged decision, departures from the normal procedural sequence, substantive departures from routine decisions, and contemporary statements made by the decisionmakers. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). Justice Powell's opinion states explicitly that the list is not exhaustive. *Id.* at 268.

¹¹³ See *supra* note 94 and accompanying text.

¹¹⁴ See Lawrence, *supra* note 72, at 339-41.

¹¹⁵ See Pettigrew, *supra* note 27, at 690.

¹¹⁶ *Id.*

¹¹⁷ See *supra* note 89 and accompanying text.

¹¹⁸ The Court offered no empirical evidence for the factors listed in *Arlington Heights*, but apparently relied upon logical supposition.

¹¹⁹ Lawrence, *supra* note 72, at 355-62; see *supra* note 98 and accompanying text.

¹²⁰ See, e.g., Binion, *supra* note 95; Eisenberg, *supra* note 94.

clearly show that the shape of the "remedies" for unconscious discrimination will not "match" the violation in the same way possible with conscious discrimination. Justice Stevens struggled in his *McCleskey* dissent with how to save the death penalty after recognizing its racially discriminatory character (assuming of course that we want to save it).¹²¹ Justice Marshall argued that we must eliminate *all* preemptory challenges to eliminate their racially selective exercise.¹²² The *voir dire* cases, even wrongly decided, suggest that we should be ready to look outside of equal protection jurisprudence, perhaps consulting due process cases, for more effective remedies.¹²³ Certainly these problems contain lessons about the necessary breadth of remedies that could be transferred to contexts like housing discrimination. Solving such problems also may facilitate the adoption of a radically different view of when and why affirmative action is justified.¹²⁴

This is not the first time that courts have had to consider unconventional "remedies" for equal protection violations. School desegregation is the obvious predecessor.¹²⁵ Then and now, the

¹²¹ *McCleskey v. Kemp*, 107 S. Ct. 1756, 1806 (1987) (Stevens, J., dissenting).

¹²² *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring).

¹²³ Some criminal justice system injuries caused by unconscious racism, such as erroneous convictions stemming from the increased rates of error in cross-racial identifications, may be approachable only through the due process clause, or through legislative solution, because the racist action is not state action.

¹²⁴ At the least, it argues for rejection of the premise that affirmative action must be preceded by identifiable prior discrimination against minorities. I think it also suggests that other strategies, such as reparations, must be considered if we hope to make progress against white racism. In its current forms, affirmative action allows the majority to see itself as wronged, rather than as the wrongdoer; moving to remedies that explicitly declare a compensation rationale might be helpful in altering such perceptions, even at the margins of consciousness. Obviously, there are other arguments for reparations, and I do not mean to denigrate them, but only to point out that recognition of the concept of unconscious racism may serve to breathe new life into those arguments. See Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.L.-C.L. L. REV. 323 (1987); see also B. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973); Bell, *Dissection of a Dream*, 9 HARV. C.R.-C. L. L. REV. 156, 157 (1974) ("[S]hort of a revolution, the likelihood that blacks today will obtain direct payments in compensation for their subjugation as slaves before the Emancipation Proclamation, and their exploitation as quasi-citizens since, is no better than it was in 1866. . .").

¹²⁵ The Court called a halt to further remedies in *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976), when it reversed a district judge's order to require annual readjustment of attendance zones to achieve racially balanced schools. The justification for this stopping point was that "having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Id.* at 437. One problem with this reasoning is that one can hardly believe that the prior discrimination by the school board had no *psychological* impact on white parents in terms of their expectations of and desire for racially segregated schools. Certainly that psychological impact would not have been remedied by mandating a neutral attendance pattern for a single year.

need for innovative remedies stems from the intransigence of discriminatory conduct. One difference is that with unconscious discrimination, unlike with segregated schools, the intransigence of the problem can be foreseen at the outset. A second difference is the knowledge that *judicial* eradication of this kind of problem is impossible. The judiciary can only ameliorate effects.

CONCLUSION

Several years ago, Justice Powell gave a speech in which he said:

It is of course true that we have witnessed racial injustice in the past, as has every other country with significant racial diversity. But no one can fairly question the present national commitment to full equality and justice. Racial discrimination, by state action, is now proscribed by laws and court decisions which protect civil liberties more broadly than in any other country. But laws alone are not enough. Racial prejudice in the hearts of men cannot be legislated out of existence; it will pass only in time, and as human beings of all races learn in humility to respect each other—a process not furthered by recrimination or undue self-accusation.¹²⁶

This is true, but misleading by virtue of what is missing. Powell is right that we have made progress; he is right that recrimination is not helpful. To the extent, however, that these remarks imply that our history of racial discrimination is now irrelevant, he is wrong. It is also wrong to call our efforts to eradicate this discrimination “unceasing,” as he does in *McCleskey*.¹²⁷ They *should* be unceasing, and at least in the criminal justice sphere, this involves a shift in focus from individual guilt to collective responsibility. The next stage requires recognition that racism is always wrong even when it is not morally blameworthy. In this next stage, we will attempt to control racial discrimination without first looking to whether we should condemn the discriminator.¹²⁸

I say “next stage” with some optimism, perhaps unfounded

Although the school desegregation cases expanded our earlier notions of remedies, the ultimate line drawing in those cases can hardly be described as enlightened. *See id.* at 442-43 (Marshall, J., dissenting) (unitary system had not been established).

¹²⁶ N.Y. Times, Aug. 31, 1972, § 1, at 33, col. 3.

¹²⁷ 107 S. Ct. at 1775.

¹²⁸ The recognition that it is possible to separate the behavior from the actor long ago transformed the substantive criminal law. Excuses such as insanity were recognized and the harmdoer was distinguished from the wrongdoer. The net of criminal responsibility was thus narrowed. We need to make that distinction with regard to racial discrimination, thus broadening the net of social responsibility. It is worth noting that insanity acquittees, while not subject to the moral opprobrium implied by a criminal conviction, are nevertheless subject to civil restraint because of the necessity of protecting the community.

given my hypothesized explanation of the blindspot. Still, I think progress is possible. In self-esteem terms, it requires that the Court—and the rest of us—shift from pride in what we have done and who we are now, to pride in what we are trying to do and the kind of people we are yearning to be.