

NEGOTIATING THE NEW POLITICAL AND RACIAL ENVIRONMENT

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I. Introduction

With the election of Barack Obama, our nation's first African American President, we have entered into a historic period. There is political and cultural significance and meaning attached to the election of Obama, but the meaning and significance will likely be contested for years. To many, the election was the last nail in the coffin of a racist America. It was a sign of incredible racial healing after centuries of struggles for equality. To these people, President Obama's cracking of the racial glass ceiling was the end of American racism and segregation. It did not matter that in many parts of the South, Obama received only 10% of the white vote and did only marginally better than Kerry in getting a total of 43% of the white vote. Furthermore, it is not just that Obama did not do especially well with white voters; there was little focus on the fact that many southern whites shifted to the Republican Party, a fact which is easily traced back to the civil rights movement. As suggested by a number of commentators, these Reagan Democrats are at least partially motivated by racial resentment. But these insights would be considered a bad test for those who were all too eager to claim that America had achieved a post racial Mecca . . . or should we have said Heaven? Sure there were a few folks stuck back in the old days, but they were older and would soon be removed by time. This is a dangerous assumption, and one that stands in the way of deep reflection on the continued possibility of racial transformation. While this perspective seems to garner support immediately following the election, there has been a growing disquiet that maybe we are not as done with race and racism as we had hoped.

In this paper, we will first detail the ways in which the structures in this country have created and fostered racial divisions. Next, we will show how the same structures fostered racial resentment and diminished community. We will explain how advances in mind sciences have refuted the idea that we are individual, rational agents, and explain the way that mind sciences can open us up to insights on the ways we do race. Then, we will talk about the ways that systems and structures operate to keep this system of racial division in place, despite the absence of intentional racism. Finally, we will suggest a targeted universalist approach to creating equality and breaking down the structures that our biases built up.

II. The Process of Race

Much of what we call race is non-phenotypical. All of what we call race is non-biological.¹ Race is the result of a fluid set of concepts and practices that are constantly shifting. If one looks at our historical census data, one will notice that racial categories change from decade to decade, even if we fail to notice in our daily lives. It should not be surprising, then, that race can shift and change substantially in a short period of time. But change does not mean an end or even an improvement to racial practices and meaning. Allen writes, "However one may choose to define the term 'racial'-- it concerns the historian only as it relates to a pattern of oppression (subordination, subjugation, exploitation) of one group of human beings by another."² Similarly, Calmore wrote, "[R]ace' is a fluctuating, decentered complex of social meanings that are formed and transformed under constant pressures of political struggle."³ While the use of race as a social construction has been given much attention, the process that constructs and creates it has been largely ignored.

Race is a process. We constructed race to suit particular purposes at particular times and we have shifted and changed our definitions of race, redrawing boundaries of whiteness and the wages associated with the same.⁴ We give race meaning when we replicate

1. See Human Genome Project Information, Minorities, Race, and Genomics, http://www.ornl.gov/sci/tech_resources/HumanGenome/elsi/minorities.html. (stating that "no consistent patterns of genes across the human genome exist to distinguish one race from another.").

2. THEODORE ALLEN, *THE INVENTION OF THE WHITE RACE* 27 (1994).

3. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992).

4. Indeed, George Lipsitz, when describing the eras of racial oppression in America, from slavery to Indigenous war to immigration bans, states, "all of the new racial hierarchies that emerged in each of these eras revolved around applying racial labels to 'nonwhite' groups in order to stigmatize and exploit them, while at the same time

racialized behaviors and fuel the racialized systems. Our constructions of race are sometimes signifying religious beliefs, sometimes phenotype, sometimes origin or language. It is well documented, for example, that the Italian and Irish immigrants of the late 19th and early 20th century were treated as nonwhites – an idea that strikes most whites today as bizarre.

Even though race initially reflected the needs of the elite, it is contested and redefined by all segments of society including those who are meant to be otherized by race.⁵ Race is not static or inevitable. And, as it comes into being, it quickly becomes a means for conflict and contestation. Generally, the idea of race is more an idea of whiteness – as a system of privilege and exclusion related to non-whites. The idea of white privilege to the detriment of others strongly indicates that race is not meant as a biological fact in this country, but instead as a structure within a system of shifting and changing white supremacy. Whiteness – and therefore what is meant by race – is constantly changing, and we are changing it. This section traces the evolution of the meaning of race from the country's founding to the present day. As we will see, whiteness is not at all biological and sometimes not even human. But, race can also be a site of resistance as racial others have used race to challenge the very assumption imposed by white dominants.

A. Moving Toward Whiteness

Race did not exist in colonial America as we currently understand it.⁶ Intermarriage was not unheard of, nor was it illegal.⁷

reserving extra value for whiteness” GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS* 2-3 (2006).

5. MICHAEL OMI AND HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1990s* (2nd ed. 1994).

6. *See, e.g.*, GUNNER MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 84 (Wilbur H. Watson, ed., Transaction Publishers 1996) (1944) (stating “Among the educated classes, race prejudice was low in the generation around the Revolution. This is easily seen even by a superficial survey of the American political literature of the age . . . When the Negro was first enslaved, his subjugation was not justified in terms of his biological inferiority.”)

African slaves and captured Native Americans were treated in the same way as Euro-American⁸ indentured servants.⁹ America was raceless until the time of Bacon's Rebellion, when justification for keeping Africans in chattel slavery demanded at least superficial explanation.¹⁰ The ways that "race" existed before this period, if at all, was only proto-typical of what was to come.

Bacon's Rebellion in 1676 was a watershed moment in pre-United States history. In the Virginia colony, poor Euro-Americans and slaves attempted a revolt against the propertied planter classes. The precarious unity of disadvantaged groups was assembled under the leadership of Nathaniel Bacon, a disgruntled property owner. Before the revolt, planter classes had attempted to extend terms of bond labor, effectively reducing indentured servants to slave status. In response to this lower class rebellion, the planting classes "decided to greatly increase the importing of slaves, to reduce the number of indentured servants, and to be much more selective in choosing them."¹¹ Whiteness – as opposed to slave status – was given privilege over money in order to drive a wedge between the indentured and slave populations and to curtail any further economic rebellions. Euro-Americans, regardless of class or condition, were allowed to join militias and to bargain for better working conditions.¹² Manumission was impeded.¹³ Children of slaves were not only illegitimate, but also

7. ANDREW L. BARLOW, *BETWEEN FEAR & HOPE: GLOBALIZATION AND RACE IN THE UNITED STATES* 84 (2003).

8. We use the term "Euro-American" as opposed to "white" here because race as a white-non-white binary was not in existence until further into the American "experiment," and therefore is not applicable in certain parts of our history.

9. EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975).

10. MYRDAL, *supra* note 8, at 85.

11. LESLIE G. CARR, "COLOR-BLIND" RACISM 15 (1997).

12. *Id.*

13. *Id.* at 17.

property of the owner, ensuring perpetual slave populations.¹⁴ This change in the power of all people called white helped to create and define the first racial classes. As the American Revolution brewed, a new White American Nation was being created. This nation stood in opposition to the English Nation, was self deterministic, and was, for the first time, racialized. Interestingly, those racial lines were not drawn to define African, Asian, and White, but instead to create white to the exclusion of all else. This evolved into the concept of white purity that did not exist for other groups. As race has evolved in the United States, it has never been just about black and white. It has largely been about boundaries of whiteness and the policing of meaning and privilege associated with that boundary.

Importantly, this history suggests that racial prejudices and racial divisions – and the idea of race itself – was less of a natural order phenomenon, and much more of a conscious manipulation of society by the elite ruling classes. Individual prejudice is not the cause of race, but the result of our social racialization process. During emancipation debates, the elites continued to stir racialized fears and resentments. Carr writes, “Northern, antislavery politicians argued that the extension of slavery into new territories was a threat to the wage labor workers of the North. Conversely, slavery supporters like Henry Clay appealed to the Northern White workers to oppose abolition because the North would be flooded with African American competitors if slavery ended.”¹⁵

14. *Id.* See also, Edward E. Baptist, “Cuffy,” “Fancy Maids,” and “One-Eyed Men”: Rape, Commodification, and the Domestic Slave Trade in the United States, 105-5 AMERICAN HISTORICAL REV., 1619, 1636-7 (2001) (describing the mental process of slave traders, “First, they pretended that slaves were not alive – at least not in the sense of being living creatures with rights, social claims, and the ability to resist. Second, they reanimated the socially dead, but in a new fetish form that allegedly responded to market forces instead of to human ones. . . . [t]hose who could view and use human beings as mere objects of commerce could also exert immense power while displacing either burdens of guilt or the obligations enacted by social ties. The existence of a commercial market in human beings meant that some people could, at will, destroy the familial and social relationships that had raised an infant to a full grown enslaved human being.”)

15. CARR, *supra* note 13, at 17.

In this way, control by the elite, or at least its drive for keeping a supply of cheap or free labor, was a driving force of the emerging racialized divisions. After Bacon's Rebellion, the elite "found that revolutionary impulses toward 'leveling' could be stopped by splitting the labor force along racial lines and giving tangible privileges to the White worker."¹⁶ It should be noted that this concept of capitalism's influence on racial divisions stands in opposition to the economic determinism reading of Marx. Indeed, Gunnar Myrdal, in his seminal work *An American Dilemma*, notes that "while the Marxian scheme assumes that there is an actual solidarity between the several lower class groups against the higher classes," his hypothesis is that "the lower class groups will, to a great extent, take care of keeping each other subdued, thus relieving, to that extent, the higher classes of this otherwise painful task necessary to the monopolization of the power and the advantages."¹⁷ Prior to the Bacon rebellion, there was little evidence that there was anything which would be all class consciousness.

Looking at a later period, Barlow explains that the "very existence" of Jim Crow segregation "resulted from the potential for racial integration that lay within industrial capitalism. Without the use of state power to keep the races apart and unequal, the system of free labor and capital . . . had the potential to create a non-racial working class in urban America."¹⁸ Jim Crowism bestowed upon whites the privilege to walk anywhere, work anywhere, live anywhere and exclude anyone. The excluded persons were simply non-white.

As Jim Crow evolved, a new place-based form of racial exclusion emerged. Private discrimination in the form of the exclusion of non-whites from neighborhoods remained key in housing. While suburban communities before the mass-suburbanization movement after World War II had been largely – if not entirely – European American, they were also wealthy. The post-war Levittown and its

16. *Id.* at 39.

17. MYRDAL, *supra* note 8, at 68.

18. BARLOW, *supra* note 9, at 85.

progeny were also European American, but created to be affordable to the market of working class European Americans using government sponsored mortgage loans.¹⁹ As “white-flight” drained inner cities and populated first and second ring suburbs, ethnic enclaves of recent and second generation immigrants experienced a diaspora of sorts and Euro-ethnic ties of Irish, German, and Polish dissipated into white.²⁰ Suburbanized European immigrants thus made the move into whiteness.

B. Defining Whiteness as Private and Individual

The modern form of whiteness as a salient feature of identity was not well established before World War II. Instead, most Euro-Americans continued to identify along ethnic lines. The creation and expansion of modern suburbs changed that. Euro-Americans traded in their ethnic identity in exchange for a more generic white identity. And while there was a softening of identity between ethnic European Americans, there was a hardening of lines between the newly emerging white and blacks.²¹

Not only was there a physical move from the cities to the suburbs to preserve white space, but there was also a conceptual move. As marginalized groups fought to get into the public sphere to vote, to be educated alongside whites, and to work under the same conditions and the same terms, the public sphere shifted to include those groups, but the white space became private and exclusionary in different ways. After *Brown*²² there was *Allen v. Wright*.²³ After *Shelley*²⁴ there was

19. See below for the legal and extra-legal operation of the white suburb.

20. See BARLOW, *supra* note 9, at 38-39.

21. Martha Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659 (1995).

22. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

23. 468 U.S. 737 (1984) (dismissing the claims of Black students against a tax exempt whites only school because of a lack of standing).

Arlington Heights.²⁵ After *Bakke*²⁶ there was *Parents Involved*.²⁷ White space was private and discriminatory, while non-white space was public. Hand in hand with this physical and conceptual move was the move of (white) Americans to an individual, rather than a collective identity.

Robert Putnam speaks about how we are a nation of solitary, mistrustful citizens.²⁸ In each General Social Survey taken since 1974, the proportion of Americans who socialized with their neighbors more than once a year has steadily declined.²⁹ Our tendency to be individual, disconnected, and disengaged has been growing steadily since the 1950s.³⁰ This tendency is not only unnatural, but detrimental to our democracy. While Putnam may be characterized as one who yearns for the simpler times that might not have existed, when one

24. *Shelley v Kraemer*, 334 U.S. 1 (1948) (proclaiming racial restrictive covenants unconstitutional)

25. *Arlington Heights v Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (declaring constitutional a zoning ordinance that effectively barred neighboring poor and largely African American communities from living in the village.).

26. *Regents of Univ. of Cal. v Bakke*, 438 U.S. 265 (1978) (holding that race may be used as a factor in deciding admissions to higher education).

27. *Parents Involved in Cmty. Sch. v Seattle Sch. Dist.*, 551 U.S. 701 (2007) (banning a district's assigning of students to public schools solely for the purpose of achieving racial integration and declining to recognize racial balancing as a compelling state interest.).

28. Robert Putnam, *Bowling Alone*, 6 J. DEMOCRACY 65, 73 (1995).

29. *Id.*

30. Although, as discussed below, engagement through communities may well have shifted from the physical spatial communities to the virtual communities made available by the internet. The power of this engagement, as made clear by first the 2004 Dean campaign and then – to a greater extent – by the 2008 Obama campaign, cannot be ignored. But, like the Gore revolution, it moves meaningful participation into the realm of the individual and the campaign, not the community and the campaign. There are multiple vertical ties with only the most superficial horizontal ties. While we may be participating in democracy along side a large multi-racial, multi-ethnic, multi-income group, we are participating alone.

looks at the way Whiteness has morphed, there may be salience to his claims. White is now the inward, private, and isolated individual. Whiteness, after *Allen*, *Arlington Heights*, and *Parents Involved*, is increasingly shifting to the insular, exclusive, and private zones of life.

Over the last 50 years, and especially in the last 20, the way we interact with government (and the ways government interacts with us) has increasingly become individualistic. Of course, the mistrust in the federal government has part of its roots in the desire to protect states' rights to maintain white racial dominancy going back to the very founding of the country.³¹ From the 1990s on, the movement toward "e-government" has changed what were once citizens, to what are now customers. The 1993 National Performance Review suggested a fundamental change in the way the government and citizens interact, suggesting that "when they vote, citizens seldom have much chance to influence the behavior of public institutions" and that influence over government was most effective when citizens acted as customers.

Former Vice President Al Gore said, "A lot of people don't realize that the federal government has customers. We have customers. The American people."³² The government as a business model only increased and further developed under the Bush administration.³³ While this move to "e-government" has on one hand increased access to government services for those who have internet access, it has – as envisioned by Gore – decreased the role of citizens to that of a customer. This move to consumerism in government can be overstated and has been criticized from its inception. While it may be that democratic processes have been shifted to the electronic realm, there is still isolation and exclusion: isolation because we are vertically connected to our government without being horizontally tied to each other and exclusion because while many communities are wired, many

31. *See, e.g.*, CARR, *supra* note 13.

32. Al Gore, Vice President of the United States, Town Meeting at the Dept. of Hous. & Urban Dev. (Mar. 26, 1993).

33. ANDREW CHADWICK, INTERNET POLITICS: STATES, CITIZENS, AND NEW COMMUNICATIONS TECHNOLOGIES 180 (2006).

others are not, with rural and urban communities being the most likely not to have broadband internet access.

Matthew Crenson writes about the detrimental effect of the decline in citizenship roles. He posits that for “ordinary” Americans, “the proliferation of opportunities for individual access to government has substantially reduced the incentives for collective mobilization.”³⁴ Elites, according to Crenson, “find that they can use the market, courts, administrative procedures, and other political channels to achieve their ends without organizing political constituencies to support them and their aims.” Interestingly, Crenson notes that post World War II responses to New Deal legislation dealt the most crushing blow to collective democracy, specifically the passage of the Administrative Procedures Act and the Taft-Hartley Act,³⁵ which were instrumental in making all agency activity subject to personal assault by individual citizens rather than collective assault by democratic process and dismantling a once strong, union-building piece of legislation, respectively.

C. Whiteness as Exclusion

The idea of whiteness as property, exclusion, and domination is not new. The story of how whiteness is property is complicated and well documented.³⁶ This section articulates the move from isolation to corporatization of whiteness, and how whiteness has shifted and morphed from simply privileged and monied classes, into what appears to be the corporate person.

It should not be surprising that the decline in civil participation goes hand in hand with donations to political and advocacy organizations.³⁷ It used to be that elites required popular support from

34. Matthew A. Crenson, *From Popular to Personal Democracy*, 92 NAT. CIVIC REV. 173, 174 (2003).

35. *Id.* at 183.

36. *See*, Cheryl L. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

37. Crenson, *supra* note 45, at 174.

citizens and had to do much to garner such support.³⁸ Political elites used to “offer concessions and inducements . . . representation and participation . . . [and later] more concrete benefits.”³⁹ In response to this “working” for citizen votes, voter turnout was customarily near 80%.⁴⁰ This move from a government that responds to citizens to a government that responds to customers is not just semantic. With the decline in civil participation and rise in political and advocacy contribution, this country is now one that *de facto* responds to money.

Our obsession with individuality and self-reliance dates back to our early history and is deeply racialized. As Roediger shows, as the working class evolved in the U.S., it was in opposition to the dependant black slave class.⁴¹ Our modern reclaim of individualism builds on this cultural history but was also supported by the move to suburbs, and this *de facto* segregation has shifted us into a corporate democracy. As non-whites started to successfully make claims to participating in the public space, there was a move to both private space and an effort to destroy the public. The current attack on public schools continues to this day. We are not just in a private space but a private, corporate space. Consider how our voting power has translated into speech via money, and our votes are now expressed pro rata, not per capita. Indeed, in *Buckley v. Valeo*, the Court, in deciding that monetary expenditure limitations are political speech, said that any expenditure limit “necessarily reduces the quantity of expression . . . because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”⁴² Speech without money is simply not useful political speech, to the Court. This is both because you can’t reach people, but also because your vote or small donation to a candidate is merely a “symbolic expression of

38. *Id.* at 175.

39. *Id.* at 176.

40. *Id.*

41. DAVID R. ROEDIGER THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS page number (1999).

42. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

support.”⁴³ The Court in *Buckley* shifted the nature of speech and thus the role of citizenship from one of pure communication of ideas, to one of amplification of those ideas through monetary expenditures. While one could certainly still speak without money, the court protected the speaker with money over the speaker without by recognizing and valuing the role of money in a democracy.

In addition, as voting diminishes and expenditures increase, it is interesting to note that expenditures – now a primary way of being heard – are not just coming from citizen-customers. The *Belotti* decision recognized the right not only of citizens to spend money to influence an election or vote, but the right of corporations.⁴⁴ From there, the Court in *Citizens United* recognized and protected the ability of corporations to spend unlimited funds on issue commercials based on, among other things, the fact that a corporate expenditure limit would treat non-favored corporations differently than the favored group citizens.⁴⁵ The Corporate person has been recognized and given rights by the Supreme Court.⁴⁶ A corporation, for example, may be granted the right to exclusively control industry in a state.⁴⁷ This right can be granted even though it would be detrimental to citizens of that state.⁴⁸ Corporations, in addition, wield this power exclusive to all other claims, and in particular, to the exclusion of African Americans.⁴⁹ Indeed, of all the 14th Amendment cases between 1890 and 1910, 19 were filed by individuals seeking protection and 288

43. *Id.* at 21.

44. *First Nat'l Bank of Boston v Bellotti*, 435 U.S. 765 (1978).

45. *Citizens United v. Fed. Election Comm'n.* 558 U.S. ____ (2010).

46. An entity recognized without argument in *Santa Clara v. Se. Pac. R. R.*, 118 U.S. 394 (1886).

47. *Slaughterhouse Cases*, 83 U.S. 36 (1873).

48. *Id.*

49. Jeffrey Kaplan, *The Birth of the White Corporation*, 5 BY WHAT AUTHORITY *1 (2003) available at http://www.poclad.org/?pg=By_What_Authority&show=200303.txt

were filed by businesses. As *Citizens United* demonstrates, this era of corporate dominance is returning to the forefront. As we listen to how race is discussed in the media, a zero sum game where whites are pitted against nonwhites, we should think about the power structures in America today.

It is equally important to note here that the elite did not use race to separate white from the race *other*. Whiteness was created as an exclusionary space. The Supreme Court noted in *Loving v. Virginia* that anti-miscegenation laws were not about keeping the race separate by maintaining white supremacy.⁵⁰ There has always been, and continues to be, a deep relational, asymmetrical relationship between white and the *other*. President Jackson is remembered for extending the vote to the non-elite whites, but in doing so, he shut the door to blacks and created a trail of tears for Native Americans. Few notice, however, that for whiteness to have meaning, it had to be worth something that non-whites did not have. Again, what tells us who is white is not skin color necessarily, but who belongs, who can be excluded, and who should be given proper regard in relationship to the other. One can only understand whiteness and otherness by understanding the relationship, situatedness and cultural meaning. If we are to undo this or make some transformation, we must undo this exclusionary and dominating practice. This would require not just a new set of arrangements and practices, but a new identity for those who are not whites or whites-in-training. Yancy believes that we are moving from a white, nonwhite society where benefit is at the boundary of whiteness to a black, non-black society where all those who are non-black can belong.⁵¹ However, if whiteness is about benefits and the right to exclude with support of law and policy makers, then the new whites in America may be the corporate person.⁵²

50. *Loving v. Va.*, 388 U.S. 1, 11 (1967) (stating “The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”).

51. See generally, GEORGE A. YANCY, WHO IS WHITE: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE page number (2003).

We are suggesting two things as we go deeper into the 21st Century. One is that we look seriously at the social, political and cultural conditions associated with the production and the rearticulation of race and the work that race is doing. One of this paper's authors once made an assertion about race, and his detractor insisted that if one accounts for neighborhood, wealth, education, family history, the job the person had, and a few other factors, race would drop out. The author's response was, what do you think race is? If we understand the multiple factors that are involved in creating race, we could begin to seriously think about transforming. In our society race has been about exclusion, power and belonging. It might be more accurate to say that is what *white* has meant in our society. Whiteness has been functionally defined as the right to exclude and dominate others. While it might be true that *other* will also exclude the rich, an array of law and policy has largely been eroded to protect and define whiteness. It is no surprise that our first immigration policy in 1790 stated that only whites could be naturalized as Americans. When we think of race in the country, we often think about the racial other. But race has been largely a system of exclusion and control with the central concern. There had to be meaning and benefit to racial, white boundaries. This benefit was material to both citizenship and an ontological sense of self. Race then is not about skin color, but about the production of group identity with the power to exclude, control, and benefit.⁵³ It is the authors' suggestion that when viewing race as a system of powers to exclude and control, corporations are clearly the new Whites.

III. The Process of Creating and Recreating Race: How Race is Constructed

That race is a social construct is now generally accepted. The way people colloquially talk about race belies its socially constructed nature. For example, it is not unusual – though usually it is offensive

52. Kaplan *supra* note 55.

53. See generally, MARTINOT, *supra* note 18; powell, *supra* note 18; ROEDIGER *supra* note 45.

– to hear that a certain child is “acting white” or “being ghetto.” More recently, Chris Matthews, after listening to President Obama’s first state of the union address, complimented the endeavor by saying that he “forgot he was black.” The comment was read to mean that what we call black does not necessarily include the ability to make a good speech. We also demonstrate through structures how race is, in part, shaped by geography. It is impossible not to notice the demographic distribution of people in suburbs and within city lines. In this way, our laws that created ghettos also created part of what we mean by blackness, that is, poverty and location in the inner cities.

Part of race is undeniably place based. Part is undeniably social. This is in the presence of the Fair Housing Act, the Civil Rights Act, and many other social protections as well as this country’s vehement stance that it is post racial. Proponents of rational actor economic theories have written extensively explaining why the market should be able to reduce discrimination without intervention.⁵⁴ Nonetheless, they are faced with the plain fact that disparities still exist. There must then, be something else driving these disparities. And, indeed there is. On the micro level, recent science has demonstrated that there are implicit mental processes that are driving discrimination. On the macro level, structures and systems are recreating and preserving artifacts of intentional discrimination.

This section of our article will detail first the advances in mind sciences in the area of schemas and implicit biases. Next, it will explain structural racialization -- the process that creates disparities in the absence of intent. Finally, it will discuss systems thinking, a method of envisioning the relationships upon which structural racialization depends and a method for envisioning a way to break those relationships.

A. Mental Processes Construct Race

We have entered into a complicated and fast changing terrain. And, we are trying to make sense of it using language, tools and

54. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 20-58 (1992).

understanding that were designed for another era and circumstance. Race is complicated and impacts our lives in ways few of us understand. Yet, it is an area that most people have strong opinions on and poignant experiences. We are likely to make sweeping assumptions and generalizations with little more than a personal experience mediated by our culture and racial position and our longing for how we would like the world to be.

Much of that experience is strongly influenced by what we wish to be true, instead of by the things we refuse to know about the world and ourselves. It has been suggested in some of powell's writings that we discuss many of the issues that we confront related to race with the concept of racialization. Part of the intent in using this concept is to suggest that the binary of what is or is not racist is problematic. Racialization is meant to suggest some of the complexities related to racialized practices. While racism suggests an individual, conscious, bad actor, racialization is concerned with structures, systems, and processes that can reproduce racial outcomes without being dependant on the racist action. In matters of race, the entire question all but turns on two sets of related questions. First, is he or isn't he a racist, and second, an inquiry into the moral worth of racial *other* and the blameworthiness or innocence of whites. One may notice a deep binary in most of this. Again, the concept of racialization is to interactions of processes that are both dynamic and unstable. That makes it much harder to talk rigid categories.

So, the old language and tools of race invite the wrong questions and give us unsatisfactory answers. Below, we will assert that we should be looking at the work that systems and structures are doing in their inter- and intra-actions in the productions of meaning and life chance; not whether or not he is a racist. This is not to ignore the individual, but to understand the individual differently. In considering the work the mind science, we look at the unconscious processes that impact individual feeling and judgment in the world. These processes are not static or neat stable categories. A person can, and is likely to hold conflicting feeling related to race and other matters. The person in most cases may not have direct access to these processes. Many of these processes are unconscious. Some researches estimate that 98% of our emotional and cognitive processes are

unconscious.⁵⁵ Our unconscious processes affect what we see, how we make meaning, and how we feel. In short, they affect our judgment and behavior.

If they are unconscious, how do we know anything about them? Through tests and experiences, we can and do know a great deal. We are not simply in the position of Freud making speculations that are very difficult to prove. But in the matter of race, the problem is even more confounding. There are some things we are not aware of because they simply are not in our consciousness; how words are formed, the complex process of making memories, the texture of the last book we read. But if someone were to point this out to us, we would likely accept it. When there is something in our unconscious that we actively want to avoid being conscious of, we repress it. During the time that most white Americans accepted the doctrine of white supremacy, there was little reason to resist the consciousness of racial resentment.⁵⁶

So, a person who is making deeply racialized assumptions may be completely unaware of it. In addition, the same person in a different situation may be unconsciously organized about racial inclusion and fairness. If a person can be both racially fair and racially biased, what is he? Human. But all of this profound insight coming from the mind science and systems thinking is not just about a new way of describing the world and people in it. It is also a new way of interacting with the world. This shift does not eviscerate the individual or agent, but merely gives it a different valence. Race has, and is, changing the United States, but it would be a gross mistake to assume that the salience of race is going away. Despite our young children who can apparently play with boys and girls from different races with ease, we

55. ANDREA ROCK, *THE MIND AT NIGHT: THE NEW SCIENCE OF HOW AND WHY WE DREAM* page number (2005).

56. Consider how glibly Harlan asserted that superiority of the white race in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., *dissenting*). (stating, “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 to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty.”).

cannot imagine the meaning of this to be the ‘declining significance of race’. This should be approached with deeper insight about how racialization is, and likely is, to be reproduced in the 21st century.

If we reject the binary and rigid categories, we might find that new categories are emerging that allow for both racial progress and racial retrenchment at the same time. We may find that America can support a black man for President, love Oprah, and dig deep in the bowels of American antebellum period to unconsciously claim the flag of early white supremacy like Calhoun in the fight for states’ rights. We may find that the move to a more diverse society that is not descriptive of black and white might fail to notice that while much of Latin American does not do race like we do, they nonetheless do race. A conscious move to embrace racial fairness, while continuing to harbor racial resentment and stereotype, sets up a tension that is resolved by repressing or being actively unaware of our negative attitudes and feelings. The Harvard Implicit Associate Test, which has been taken by millions, shows that most Americans have negative racial attitudes that may impact their judgment. There is also strong evidence that many of these negative stereotypes exist in very young children. We cannot assume that the extension of the boomers will take care of this problem. What we celebrate when we talk about improved racial attitudes is largely what is happening in the 2% of conscious thought. We are not addressing what is happening in the 98%, nor are we being attentive to the work that systems and structures are doing. If we are to make meaningful and lasting positive racial transformation, we must do just that.

Before turning to the systems and structure, let us briefly examine what is going on in the 98%. First of all, we cannot make the most of what is unconscious directly available to us consciously.⁵⁷ As suggested, what we actively resist may function differently than those things in our unconscious that would not make us uncomfortable if we became aware of them. Our unconscious is not unitary. At an unconscious level, we are likely to have conflicting feelings and processes. We might hold both aspects of racial fairness and racial

57. ISRAEL OR-BACH, *THE HIDDEN MIND: PSYCHOLOGY, PSYCHOTHERAPY AND UNCONSCIOUS PROCESSES* page number (1995).

stereotypes or resentment. What becomes dominant or salient in every situation depends on cues or triggers. This triggering process is called priming. We are generally not aware that we are being primed or that we have these conflicting attitudes and feelings. When the conscious mind gets this information from the unconscious, that may impact our judgment and we are likely to make up a rational reason that has nothing to do with race. We will explain why we did not like a black candidate's platform for some other acceptable reason. He is a Muslim. He was not born in America. I don't believe he has my values. When blacks were strained in New Orleans we collectively sought a non-racial explanation.⁵⁸ Maybe it was class, maybe it was the failure of individual responsibility. Maybe. This process of avoidance is not lying. Nor is it something only whites engage in. It is important to note that the conflict with the conscious values of racial fairness may indeed indicate progress but it is widely execrated and misunderstood. If left unaddressed, we may be in a long period of racialization where racial stereotypes are reproduced, acted on, and denied.

Writing in the wake of *Washington v. Davis*,⁵⁹ which endorsed an intent-based test for proving racial discrimination under the Fourteenth Amendment, Professor Charles Lawrence argued in his seminal article, "The Id, the Ego, and Equal Protection," that the intent-based test is wrongheaded.⁶⁰ Instead, he proposed an alternative effects-based inquiry. More important in this context than Professor Lawrence's proposed alternative is his introduction of "unconscious racism" into legal discourse. Lawrence's primary complaint against the intent-based inquiry is that the intentional/unintentional binary fails to capture the complexity of racism. He writes:

58. See Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 44 HARV. C.R.-C.L. L. REV. 413 (2006).

59. 426 U.S. 229 (1976).

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

Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought — nor unintentional — in the sense that the outcomes are random, fortuitous, and uninfluenced by the decision maker’s beliefs, desires, and wishes.⁶¹

To marshal support for his claim, Lawrence turned to two social-scientific resources: Freudian psychoanalytic theory and cognitive psychology. Psychoanalytic theory teaches that because there is a conflict between deep-seated racist ideas and a society that increasingly condemns blatant racism, the mind excludes racism from conscious thought and, through the mechanism of repression, pushes it into the unconscious.⁶² By contrast, cognitive psychology understands racism primarily as an aspect of culture that is transmitted as a “tacit understanding.” In short, children are socialized from an early age to understand race and its meanings in particular ways. These understandings are so deeply ingrained that they are unlikely to be consciously experienced.⁶³ According to Professor Lawrence: “Whatever our preferred theoretical analysis, there is considerable commonsense evidence from our everyday experience to confirm that we all harbor prejudiced attitudes that are kept from our consciousness.”⁶⁴

The idea of schemas – organized mental representations or cognitive shortcuts that help us quickly assess and understand new information in the context of old information – was first represented

61. *Id.* at 322.

62. See Lawrence *supra* note 76, at 331-36. There are different types of ignorance and they serve different purposes. See Linda Martín Alcoff, *Epistemologies of Ignorance: Three Types in RACE AND EPISTEMOLOGIES OF IGNORANCE* 39 (Shannon Sullivan & Nancy Tuana ed., 2007).

63. See *Id.* at 336-39.

64. *Id.* at 339.

by Bartlett in the early part of the 20th century.⁶⁵ Bartlett conducted a series of experiments where he would tell subjects stories and then have those people retell the stories from foreign cultures that were unfamiliar in structure and form to the listener. He found that the listeners retold stories in accordance with their own cultural knowledge of what they believed the structure and form should be, often leaving out culturally relevant information. He found that the story schemas of the subjects dictated what information was retrieved and remembered from the original stories. Schemas are at the heart of stereotyping – a process of using prior knowledge as a tool to arrive at a judgment with as little cognitive process as possible. A schema might tell us how to behave in a religious house, how to approach a shopkeeper, what a police officer is doing, or how to categorize the presence of two adults and a child walking down the street holding hands.

More specifically, schemas also organize and structure our knowledge of societal roles, or “the set of norms and behaviors attached to a social position.”⁶⁶ When we encounter another in the world, we immediately categorize that person by race, gender, and a host of social factors. As Jerry Kang writes, “once an individual is mapped into that category, specific meanings associated with that category are immediately activated and influence our interaction with that individual.”⁶⁷ These social schemas operate to selectively remember attitudes, behaviors and characteristics that confirm that schema, and to misremember or not remember those that do not confirm the schema. In one experiment, subjects were instructed to watch a video of a woman engaged in a variety of behaviors and then were tested on their memory of the woman’s characteristics.⁶⁸ The

65. SIR FREDERIC BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY page number (1932).

66. SUSAN FISKE & SHELLEY TAYLOR, SOCIAL COGNITION 159 (1984).

67. Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CALIF. L. REV. 1063-1118 (2006).

groups were either told that the woman was a librarian or a waitress.⁶⁹ Memory of the woman differed in each group. The librarian group was more likely to remember that the woman was a fan of classical music and wore glasses, for example, while the waitress group remembered that the woman drank beer and ate hamburgers.⁷⁰

A schema that operates to define how we are to behave in a given situation is called a script. Schank and Abelson define a script as “a predetermined, stereotyped sequence of actions that defines a well known situation.”⁷¹ Scripts “specify procedure (how to act), as well as semantic knowledge that defines the situation and the elements within it. Thus they contain information that specifies more than just expectations about what events will occur, but the order of the events as well (and thus implicate procedural memory).”⁷² Scripted behavior is described as “mindless” because in a triggering situation, the triggered person “surrender[s] the decisions about what to do and when to do it” to the script procedures.⁷³

The potential damage of these schemas is that they skew our perceptions in a way that reinforces the schema, against even the most certain of odds. For example, in a study where subjects were informed that a “special test reveals that you are a socially sensitive person, much more so than the average person,” those subjects went on to develop a schema on this belief.⁷⁴ When the test was revealed later to

68. See, Claudia E. Cohen, *Person Categories and Social Perception: Testing Some Boundaries of the Processing Effects of Prior Knowledge*, 40 J. PERSONALITY & SOC. PSYCHOL. 441 (1961).

69. *Id.* at 444.

70. *Id.*

71. R. C. SCHANK & R. P. ABELSON, *SCRIPTS, PLANS, GOALS, AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES* 45 (1977).

72. GORDON B. MOSKOWITZ, *SOCIAL COGNITION: UNDERSTANDING SELF AND OTHERS* 162 (2005).

73. *Id.* at 163.

the subjects to be bogus, the subjects continued to believe the test was true. Furthermore, when people are given information about a person or a group, they are more ready to believe actions that conform to the information given than to actions that do not.⁷⁵ We have a bias against non-schema conforming behavior. When this is coupled with our racialized society, it becomes infinitely more complicated to refute and correct racist or racialized stereotypes.

Writing in 2006, Professors Anthony Greenwald and Linda Hamilton Krieger confirm that “the science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”⁷⁶ The authors define “implicit bias” as “discriminatory biases based on implicit attitudes or stereotypes,” which are evaluative dispositions or mental associations reflecting a connection between a category and a trait that the actor does not view as reflecting any particular disposition or association.⁷⁷ Recent surveys of implicit bias research establish four major claims of the field. First, implicit bias is pervasive across the population. Second, the beliefs revealed in implicit bias diverge from the conscious beliefs of the same individual. Third, implicit biases predict the occurrence of biased behavior. Finally, implicit biases can be altered.⁷⁸

74. Ross, Lepper & Hubbard, Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm, 32 J. PERSONALITY & SOC. PSYCHOL. 880 (1975).

75. Darley & Gross, A Hypothesis-Confirming Bias in Labeling Effects, 44 J. PERSONALITY & SOC. PSYCHOL. 20 (1983).

76. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006).

77. *Id.* at 951. “Put more technically, an implicit stereotype . . . can be defined as the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category.” *Id.* at 950 (internal quotation marks and footnote omitted).

78. See Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 19.1, 19.3 (2007).

Research in neighboring fields has yielded similar results. Behavioral law and economics, for example, has dethroned the rational actor model (*homo economicus*) that underpins neoclassical economic theory. Rational actors are utility-maximizers with stable preference who operate in conditions of maximum information.⁷⁹ In contrast to this idealized assumption, real humans are boundedly rational persons, subject to pervasive cognitive biases, with shifting preferences, who may or may not act in self-interest—all while operating in an environment of imperfect information!⁸⁰ The picture of the human subject that emerges from these implicit bias and related research efforts differs markedly from the subject assumed by methodological individualism and releases us from the assumption that discrimination is individual or fault-based.

Not to understand or see the formation of thoughts or memories can be attributed largely to things in our unconscious that we simply do not have direct access too. But, we could have greater, if not complete, access to many of our unconscious racial or ascriptive biases. We stated above that when most whites believed in white supremacy, they had little trouble believing, and stated what we today would call racial stereotypes and bias. Then, they were seen as just facts.⁸¹ A refusal to support a person of color for a high position or a job would have been done, even in explicit terms. So these implicit biases and stereotypes are the function of social assumption and associations on one hand, and social disapproval or repression on the other. The point is that this is not primarily an individual issue or problem, but a social or societal problem. While an individual can appropriate and use this social phenomenon, they can only do that if

79. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (adopting Gary Becker's description of "rational actor").

80. See generally *Id.* See also Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman et al. eds., 1982) (discussing cognitive biases); Wikipedia, *List of Cognitive Biases*, available at http://en.wikipedia.org/wiki/List_of_cognitive_biases (last viewed 14 Apr 2010.)

81. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 116 (1996).

they are already present in society.⁸² This is an important qualification as we are too often willing to assume that racial stereotype is a natural phenomenon. Some people try to explain the preference for one's race by in and out-group theory which basically holds that people tend to prefer their group.⁸³ But even if one accepts this, it says less about race than it seems. First of all, races are not natural groups. Secondly, in a society such as ours, the racial *other* is likely to have greater affinity for white out-group members than her own group. This is inconsistent with in-group out-group theory. My point is that racial grouping and racial meaning is a social practice before it is an individual practice.

There are some who are willing to embrace this claim but then misuse it. They have likely been influenced by the position that race is not scientifically or biologically grounded. There is an increasing apparent acceptance that race is socially constructed. The false syllogism is that if race is not biologically or scientifically grounded it is not real, and therefore we should not use it. There are a number of problems with this move and those problems have been addressed in earlier articles.⁸⁴ The point is that race can be a scientific fiction *and* a social fact. The proponents of simply not doing race pay no attention to how the mind creates association through schemas. The content or value of these schemas is largely social. These associations act at an unconscious level and faster than the conscious mind. We do not decide to make associations that happen to us, if by *us* we mean the conscious mind.⁸⁵ So an individual cannot decide to not make certain associations such as associating black men with dangerous. If we are to take the insight of social construction seriously, we need to ask how is race constructed and what are the social structures.

82. MARTINOT, *supra* note 18.

83. Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004).

84. john a. powell, *The Colorblind Multiracial Dilemma Racial Categories Reconsidered in RACE, IDENTITY, AND CITIZENSHIP: A READER* (Rodolfo D. Torres, Louis F. Mirón, & Jonathan Xavier Inda, eds.) (1999).

85. DREW WESTEN *THE POLITICAL BRAIN* page number (2007).

A partial answer to this question is that our situatedness in society and societies structures and systems construct race, and that there are cultural meanings associated with those structures. So, structure then doesn't just distribute opportunity and burden which they do, they also help to constitute our identities. Modern whiteness is about exclusion and domination. Those excluded and dominated are non-whites. Martha Mahoney has written that the modern suburbs were critical in creating the modern white identity over European ethnic identity and against black identity.⁸⁶ When we talk about race in terms of its situatedness and the social determinates of race, it invites us into a very different discussion. We are not then obsessed with ones biology or even phenotype. There may be an association but it is not required. When Brazilians say that money "whitens," they are saying there is a racial hierarchy, not just determined by color or biology, but also by ones social position to wealth.

B. Race is in Our Structure

Race is built into our structure. If one were to look at the United States as an outsider, racial differences would be immediately apparent. Huge disparities exist between whites and non-whites in the United States with respect to education, housing, and wealth, and these disparities are not tied to intentional discrimination or to individual failings of minorities. This is a product of structural racialization.

Structural racialization describes the ways in which interactions between and among institutions shape life outcomes along the lines of race and class. Structural racialization "emphasizes the powerful impact of inter-institutional dynamics, institutional resource inequities, and historical legacies on racial inequalities today."⁸⁷

86. Mahoney, *supra* note 32.

87. Andrew Grant-Thomas and John A. Powell, Structural Racism and Color Lines in the United States, in *21ST CENTURY COLOR LINES: EXPLORING THE FRONTIERS OF AMERICAS MULTICULTURAL PRESENT AND FUTURE* (Andrew Grant-Thomas and Gary Orfield, eds. 2008).

A clear example of how structural racialization operates in the absence of present intentional racism is the continuing segregation of neighborhoods. Our neighborhoods today are as segregated as they were when FHA's underwriting manuals contained language that labeled African American families as "adverse influences" on property values. Under this system, the FHA would not lend to African American families in white areas.⁸⁸ Racially homogenous neighborhoods were the ideal under the guidelines.⁸⁹ For this reason, white families were not given loans if they chose to move into African American neighborhoods.⁹⁰ Private lenders refused to lend to integrating families under these rules long after the FHA ended their redlining practice, leaving a distinctly racial imprint on neighborhoods across the United States.⁹¹ The effects of redlining and housing discrimination placed many low income minorities in impoverished and highly segregated inner-city communities. The advent of the highway system further segregated the inner cities from the suburbs since affluent families could afford car transportation. Furthermore, the highway system and the rise of automobile transportation reduced the need for bus transportation from suburbs to the city, and then from different parts within the city. The wealthier one was, the easier it was to live outside of the city lines. The flight of wealthy – mostly white – individuals from the cities sapped money from city school districts to suburban schools. K-12 education is funded largely through property taxes of the areas where the schools are. Impoverished neighborhoods then will have impoverished schools, while wealthy neighborhoods have wealthy schools. Through no small fault of housing segregation, it is far more likely for a poor minority student to attend a high-poverty school than it is for a poor white student to attend a high-poverty school.⁹² High poverty schools have higher drop out rates and

88. john a powell, *Race Place and Opportunity*, *The American Prospect*, Sept. 22, 2008, http://www.prospect.org/cs/articles?article=race_place_and_opportunity.

89. *Id.*

90. *Id.*

91. *Id.*

lower numbers of advanced placement classes, which are vitally necessary for admission into top colleges. Without a college education, young people in the United States are far less likely to have a high paying job that will allow them to move “up” in the world and out of impoverished neighborhoods. Those people, mostly families of color, within the city were left with little access to local jobs, transportation, and adequate education. Our structures of school, highway, and public services funding are all tied to place and because place was historically racialized, the structure replicates racial disparities in the absence of intent.

Fueling the vicious cycle that keeps African American families in poverty is the educational system. These interconnected factors are all part of the structural racialization framework that demonstrates how structures operate to produce racialized results. In the example above, there is direct government interference with these structures that produced what Justice Thomas would call racial imbalance and what activists would call resegregation. In order to remedy this governmental effect, the courts need to expand or eliminate their intent requirement to accommodate intentional acts farther away in time and space.

Racial disparities are not just embedded in the tangible structures in our world, but also in the intangible ones. In the next section, we describe “schemas” and other social cognition sciences that create and recreate racialized thought processes and thus replicate racialized behavior and patterns.

C. Systems

It is not enough to know that we are situated in these structures. We must also be concerned with the whole system in which those structures are situated and how that whole affects our situatedness and our structures that replicated and reproduce our situatedness. It is helpful here to employ systems theory to

92. Gary Orfield, et. al., *Statement of American Social Scientists of Research on School Desegregation to the U.S. Supreme Court in Parents v. Seattle School District and Meredith v. Jefferson County*, 40 URBAN REV. 96, 106-7 (2008).

conceptualize this. Systems thinking is a method of conceptualization that focuses largely on the relationships between parts of a complex system, the way that those relationships create, compound, or delay causation, and the way a system will adjust to and resist changes.

i. Relationships

A system can be large or small. Here, we can imagine that the political structure of a city, a state, or a country is a system. We can also imagine that the global political structure is a system and the political structures of the countries are some of the parts. If one seeks to develop an understanding of the latter example, understanding the relationships between China and the United States would be much more useful than understanding the political structure of each of the countries in isolation. This focus on relationships is critical to an understanding of the complicated nature of the political and racialized structures in the United States.

ii. Causation

Beyond and building upon the idea of relationships, systems thinking brings to our attention the existence of mutual, multiple, and cumulative causation. Mutual causation is the idea that when one thing alone cannot cause an event, the addition of another thing which is also not satisfactory alone can aid the first and cause the event. Multiple causation simply acknowledges that many events may contribute or cause the same thing, and it is not always so easy to separate out which event is primary or even if there is a primary cause. Rebecca Blank explicates cumulative discrimination in her work, *Tracing the Economic Impact of Cumulative Discrimination*. She suggests that instead of looking for causes of discrimination at one point in time, we view the “cumulative effects of single or multiple incidents of discrimination across time and across societal settings.”⁹³ She names three ways one may find cumulative discrimination, “first, one may observe the cumulative impacts of discrimination that arise from multiple interactions within a single social domain over time . . .

93. Rebecca M. Blank, *Tracing the Economic Impact of Cumulative Discrimination*, 95 AM. ECON. REV. 99 (2005).

Second, discrimination in one social domain may over time affect outcomes in another social domain . . . Third, discrimination may have cross generational effects.”⁹⁴ Blank suggests that traditional methods of understanding the causes of discriminatory effects “seriously understate their impact.”⁹⁵

Generally, the way we are taught to think is through causation that is close in time and in space. For example, in *Bakke*, Justice Powell rejected the idea that affirmative action could remedy what he saw as societal discrimination because that type of discrimination (as opposed to direct discrimination by the school in the past) was too amorphous and remote.⁹⁶ However, this so-called societal discrimination was exactly the type of discrimination that caused the disparities in admissions that necessitated affirmative action in the first place. It was just that Powell was not looking at causation in a cumulative, multiple, or mutual way. If he had been, it would be clear that not only are there disparities in predominately white and predominately minority schools that make it more difficult for minorities to get in to colleges, much less the top colleges that feed medical schools at issue in *Bakke*, but also that this relationship of race and high school is intimately connected to a history of intentional segregation. In the system of school admissions, there is no simple causation leading to discriminatory results remedied by affirmative action, but rather a web of decisions and feedback whereby decisions by one actor modify other decisions and create disparities.

iii. Feedback loops

These modifications are mechanized by feedback loops. In a system, there are two forms of feedback: positive and negative. A negative feedback loop is self-correcting. Negative feedback is a system response to external inputs to maintain the status quo in the same way that a thermostat pumps cool air in response to outdoor heat

94. *Id.* at 2.

95. *Id.*

96. *Regents of Univ. of Cal. v Bakke*, 438 U.S. 265, 309 (1978).

to maintain room temperature. On the other hand, a positive feedback loop is self-reinforcing; the more it works, the more it will continue to work. A savings account is an example of such feedback; the more money one has in the account, the more interest one will earn, and the more interest one earns will increase the amount of money (and interest) in the account. Unchecked by negative feedback, a positive loop will grow to the point of becoming unstable.

iv. Emergence

Systems theory also brings our attention to the idea of emergence. Emergence is the idea that the whole is greater than the sum of its parts. You cannot begin to understand why there are less minority students in colleges without understanding that most colleges base admissions on AP test scores; that higher resourced schools provide more AP classes than lower resourced schools (which may not provide AP classes at all); that a system of property taxes funnels lower resources into schools with more minority children; that schools are still segregated; and without understanding the early history of housing discrimination. Any one of these things would not explain the lack of a substantial minority presence in higher education, but when taken all together, the fabric of discrimination and privilege reveals itself.

v. What to do with all of this complexity?

Viewing the world from a systems perspective can be a daunting task indeed. Systems thinking demands that one see the world holistically. Cause and effect, in a linear sense, are abandoned in favor of events as a product of indirect and delayed effects, as well as the nature and structures of systems. In this sense, creating solutions to problems like racial injustice or economic inequality is to confront a staggering task of not only looking for the multiple, cumulative, and possibly hidden factors on which injustice and inequality depend, but also confronting and imagining the possible consequences any one solution will have. For obvious reasons, the systems approach can leave a person paralyzed by the sheer vastness of social complexity or

running for the fabled “simpler times.”

But, complexity does not mean intractability. Interconnectedness, while certainly fostering complexity, also has simple beauty within it. Because we are all connected – whether by place, status, or simply by the way one action far from us can affect all of us – we are all part of the system. And, our simple actions can have far reaching consequences. Small changes can produce large results. A drop in the pond becomes a ripple that pushes water down a hill and into a stream that, with time, can become a river that creates a canyon. The foreclosed home a few blocks away reduces the property value of our home, which affects property taxes, school funds, and ultimately, the educational futures of neighborhood children. We are not islands; we are all connected. As the system changes and adapts, so do we.

As we live and make choices, we need to be aware of this interconnectedness. We cannot afford to pretend that we are solely responsible for our position in life, and others are responsible for theirs. Our positions, made possible by the positions of others before us and contemporary to us, are given importance and meaning because of others. Law professor Robert A. Williams, Jr. tells a story from his youth when Lumbee elders asked him, “what have you done for your people today”⁹⁷ He explains that this question is meant to convey that all he does, achieves, and learns should be for the purpose of helping the community. He is essentially asked to use his interconnectedness to create a societal evolution, where his gain is the gain of his people and the gain of his people is the gain of all people. As interconnected beings in this large and complex system we call a city, a country, or a world, we too need to ask how we can move and change to affect the system and not just ourselves.

IV. Conclusion: Building a Just Society - Structurally, Implicitly, Explicitly

It is crucially important to connect the individual to the structural, and vice-versa. Just as we cannot separate out the individual

97. Robert A. Williams, *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997).

from the collective, the system from the part, and the part from the whole, we cannot separate out our implicit biases and cognitive structures from the way we relate within the world. One way to do this is to say that we are all situated. Whites and non-whites receive meaning and privileges from the ways in which they are situated in relation to structures, opportunities, and others in the system. Our laws that strive for equality do not recognize this situatedness and thus perpetuate inequality. Targeted universalism is one answer to that inequality. In this section, we will present the problem of flawed universalism and explain how a targeted approach addresses this problem.

Previous works⁹⁸ have discussed the idea of targeted universalism, and in this piece we continue to call for a targeted approach. Targeted universalism accounts for our situatedness in the pursuit of universal goals such as health care for all or economic recovery. A flawed universal approach does not account for structural differences, and instead treats all members or groups in a society as fundamentally alike in their access or eligibility for goods and services.

It is helpful to think of procedural universal approaches and targeted universal (or universal goals) approaches in terms of arithmetic and superficial equality. Maureen B. Cavanaugh describes these equalities in her article *A New Equal Protection: Two Kinds of Equality*.⁹⁹ Arithmetic equality is equality without context. It is “superficial equality,”¹⁰⁰ or equality of “measure weight and number.”¹⁰¹ Arithmetic equality in practice is encapsulated in Anatole France’s farcical statement, “The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.” Geometric equality “gives in proportion to the

98. John A. Powell, *Post-Racialism or Targeted Universalism*, 86 DENVER U. L. REV. 1 (2009).

99. 13 LAW & INEQ. 381, 417-24 (1994).

100. *Id.* at 419.

101. *Id.* at 420 (quoting PLATO LAWS 756e-757e (B. Jowett trans. 1953)).

nature of each,”¹⁰² taking contextual factors into account. Geometric equality recognizes that the harm of separate but equal schools makes those schools inherently unequal.

When asked why he would not target aid to the African American community, President Obama said “I’m the president of the entire United States. What I can do is make sure that I am passing laws that help all people, particularly those who are most vulnerable and most in need. That, in turn, is going to help lift up the African-American community.” As Cornell West noted, when the President deals with the Jewish community, the gay community, and certainly the corporate community, their situatedness helps define their interest and does not get lost in America. While the President may be appearing to take the high road, he is rhetorically erasing African Americans from public concern. He is making a number of serious errors. He is suggesting a kind of universalism where all Americans deny the situatedness of African Americans. Instead of having universal goals, getting all Americans back to work, or having no community with double digit poverty, the President is adopting a universal process that is not likely to adequately respond to the situatedness of African Americans. Myrdal noted more than 60 years ago, the condition of poor Negroes was very different from the condition of poor whites. What Myrdal calls condition, we call situatedness. Because of this, the logic of focusing on a single factor like poverty even when African Americans are overrepresented is not likely to yield the results one might expect in the African American community. To recognize the situatedness of African Americans, Latinos or any other group does not make the effort race-based or a special pleader. It maintains the need for universal goals that most Americans share while acknowledging that we are situated differently for reasons that cannot be explained in terms of moral worth. It has all the need to be universal in goal and recognizing our situatedness; targeted universal. We need to target resources to make sure that all groups have a fair chance of achieving the universal goals that we share. In a perverse way, many of the stimulus plans have been targeted, but not to the communities of color. Consider the focus on

102. *Id.* at 420.

resource to construction. Because of who is in the construction industry, this target is likely to have a greater benefit for white men than others. When former Secretary Reich pointed this out, some called him racist.

When President Obama focuses on the flawed universal, he is denying the situatedness of the black and other marginalized communities. In doing so, he is tacitly or deliberately trying to construct a solution, bending to existing white resentment. It might appear that President Obama and other policy leaders are in a Catch-22. If they address the interest of non-whites, they lose. If they lean toward implicit racial resentment, they sacrifice much of the interest of non-whites.

We must seek a targeted approach to achieving equality.

What the Right has been relatively successful in doing with a pass from many of the more powerfully placed folks on the Left is to label anyone who notices race - including racial disparity in public spending - a racist. However, the stimulus package has so far been ineffective in addressing the conditions of communities of color. Looking at unemployment numbers, while the national unemployment rate declined from 10% to 9.7% (indicating a decrease of 430,000 unemployed workers),¹⁰³ unemployment increased for some racial groups, notably African Americans, whose unemployment numbers increased from 15.5% to 16.5% during the same time period.¹⁰⁴ Similarly, based on the projected jobs created, 69.6% of new jobs will be going to whites with only 10.1%, 15.9, and 4.4% of jobs going to African Americans, Hispanic/Latino, and Asians, respectively.¹⁰⁵

103. U.S. Bureau of Labor Statistics.
<http://www.bls.gov/news.release/empsit.t01.htm>

104. U.S. Bureau of Labor Statistics.
<http://www.bls.gov/news.release/empsit.t02.htm>

105. 2007 Bureau of Labor Statistics Household Data Annual Averages: Table 18. Employed persons by detailed industry, sex, race, and Hispanic or Latino ethnicity, employment share percentages were applied to the amount of jobs projected to be created by 4th quarter 2010 as a result of the Stimulus Plan.

African American males are at 25.7% unemployment compared to 11.7% for their white counterparts.¹⁰⁶ African American women and white women are at 20.5% and 11%, respectively.¹⁰⁷

Not only is the President's "rising tide" assessment incorrect, but it also ignores the way race is created and preserved in the United States, and, is part of the process of preservation. Today, we think of race as something inevitable, something even biological and also social. This wasn't always the case. Race was created to achieve various ends over the course of centuries. It has changed and shifted to keep those ends in place and at times taken on a life of its own. It is hard to think about a time when race as we experience today was not already in place. Marinot notes that most people who attempt to discuss the genealogy of race start by assuming it already exists. In *The Rule of Racialization*, Marinot carefully tried to develop the formation of race without assuming it already exists.¹⁰⁸ More than that, these artificial racial divisions have decreased democracy and increased a sense of false individualism. The role of capitalism and corporatism in these changes is indisputable. We have become a reclusive, distrustful nation. Now, the same capitalism that brought us down earlier this century is continuing to divide us, to make race visible and invisible, and to threaten our democracy.

When we choose to ignore our history, we preserve the structures and biases that keep race and racial hierarchies and divisions in place. President Obama suggests a universal (race-blind) means to achieve equal distribution of social goods. However, these universal goals with universal processes have proven ineffective at remedying any racial disparities. The African American unemployment rate increases while the average unemployment rate decreases. Our structures are discriminating. In addition to that, we discriminate ourselves when we fail to see those structures and fail to account for them in assessing the behavior of the other. In order for us to move

106. Center for Social Inclusion, *Race, the Job Market, and Economic Recovery: A Census Snapshot* (September 2009).

107. *Id.*

108. See also ALLEN, *supra* note 25.

forward toward justice, we need to recognize and correct these structures on the one hand, and our behaviors on the other.

Much of the effort of centrist Democrats for the last decade has been to try to assuage the anxiety of middle and working class whites. However, this effort is fraught with dangers. As George Liptz has noted that the efforts of the racial others to belong, to refute Taney in *Dred Scott*, has consistently been stalled by middle class prerogative. Blacks, Latinos and Asians can be members only on terms that are acceptable to racially anxious whites, which according to Liptz, means they cannot be full members.¹⁰⁹ We have asserted that the most important benefit a society distributes to its members is not health care, or even education, but membership. This membership cannot exist only on terms that will satisfy white racial anxiety. This bleak picture may seem like just being pragmatic or realist. If white racial anxiety is not addressed, then chances of moving forward are very seriously constrained. This approach adopted by centrist Democrats is very close to Bell's idea of interest convergence. He asserts that racial progress is never made because of concern for blacks and other non-whites but only when there is a convergence of interest with what elite whites want and what is being demanded by non-whites. But once this short term interest diverges, many of the apparent gains can be lost.¹¹⁰ This frame has lead Bell at one point to suggest we will never achieve racial equality.

The approach of allowing white anxiety to trump is a mistake for several reasons. The assumption is that the number of whites who have this anxiety is large enough that it demands attention. And while the mind science would agree that there is a great deal of anxiety in whites and we would assert it might increase, the anxiety is not stable. Earlier, we talked about the internal conflict within the unconscious. The same white that is anxious may be susceptible to a shift to racial equality and inclusion which is not just on his terms. In some ways, the above approach is much more cynical about not just the possibility

109. LIPSITZ, *supra* note 13.

110. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470 (1976)

of change, but also about the current condition of whites. We should be looking for the conditions that would support either a shift from the anxiety or a different way of resolving the anxiety. It was suggested in an earlier article that much of this anxiety is ontological and cannot be addressed by pandering to it.¹¹¹ The space created for whiteness is a fearful, isolated space that many might abandon if there is an alternative.¹¹² Unfortunately, that alternative is largely ignored as a possibility.

Targeted universalism offers an alternative. By focusing on some of the shared universal goals, it allows the conversation to be about *we*. Everyone has an interest in the game. But it also takes situatedness seriously. This not only addresses different interests, including African Americans', but it starts to call attention to whiteness in a way that both connects them with other, i.e., not exclusive, and addresses their immediate needs as well. It is both material and heuristic. It allows a shift in white anxiety and interest. There can be an ongoing test to see what is working and why. This approach combines the apparent idealism of the mind science with the apparent materialism of structure and systems. It brings them together in a dialectic that is closer to how they in fact work.

111. See John A. Powell, *supra* note 17.

112. *Id.*