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Whatever Happened to Racism?

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WHATEVER HAPPENED TO RACISM?

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INTRODUCTION

In the 1950s, 1960s, and early 1970s, most Americans thought they knew what racism meant. Racism was a belief that non-Whites were inferior and that Whites should avoid social contact with them. During the heyday of the civil rights movement, racial segregation became the target for historic judicial intervention, unprecedented congressional action, and dramatic deployment of federal executive power. In *Brown v. Board of Education*,[1] the United States Supreme Court unanimously condemned state-mandated segregation in public schools that damaged the "hearts and minds" of Black children "in a way unlikely ever to be undone."[2] Despite the Court's delay in implementing remedies, the Justices spoke with one voice in pronouncing that "in the field of public education the doctrine of 'separate but equal' has no place."[3] Congress invigorated this vision of racial equality by enacting the Civil Rights Act of 1964 along with other important civil rights legislation.[4] Even before that, when some school desegregation orders were implemented in the South, President Dwight D. Eisenhower forced recalcitrant state and local officials to comply out of respect for the Court's

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1 347 U.S. 483 (1954).

2 *Id.* at 494.

3 *Id.* at 495.

4 *See* Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000 (2005)). *See generally* GARY ORFIELD & JOHN T.YUN, THE CIVIL RIGHTS PROJECT HARVARD UNIV., RESEGREGATION IN AMERICAN SCHOOLS 29 fig.1 (1999), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Resegregation_American_Schools99.pdf (showing that substantial desegregation of public schools began only after passage of the Civil Rights Act in 1964).

authority.[5] Norman Rockwell's image of Black children entering school under the watchful eyes of federal marshals became a graphic statement of the nation's commitment to undo the legacy of Jim Crow segregation.[6]

In the decades following the implementation of *Brown*, public opinion polls suggested that laws could change the hearts and minds of Americans. People reported declining levels of racism and increasing interracial contact at school and in the workplace.[7] Rates of interracial marriage also climbed steadily.[8] In many ways, the model of racial animus that animated *Brown* seemed to be growing obsolete. Incidents of virulent racism were seen as aberrations, vestiges of an earlier era that were universally condemned.[9] Yet, even with these reported gains in racial tolerance and understanding, residential segregation has remained a commonplace feature of American life, and significant gaps in educational attainment, earnings, and wealth persist between White and non-White Americans.[10] As a result, many activists argue that civil rights remedies remain as vital and relevant today as they were when *Brown* was decided.[11]

For legal scholars, the decades after *Brown* have posed a dilemma. Race-conscious remedies have been used for decades, and the evil of racism that they addressed seems to be in decline. Yet, racial inequality remains a robust feature of American life by nearly any commonly accepted measure of well-being. How

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[5] *See* J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE* 90–91 (1979) (describing President Eisenhower's deployment of the National Guard to enforce a school desegregation order in Little Rock).

[6] *See* Wilhelmina M. Wright, Brown's *Legacy: Looking Back, Moving Forward*, 31 WM. MITCHELL L. REV. 375, 378 (2004); *see also* ORFIELD & YUN, *supra* note 4.

[7] *See, e.g.*, THE GALLUP ORG. FOR AARP, CIVIL RIGHTS AND RACE RELATIONS 5–8, 70–78 (2004), *available at* http://assets.aarp.org/rgcenter/general/civil_rights.pdf.

[8] *See* RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 103–09 (2001).

[9] *See* MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 36–37 (2003). *But cf.* Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 395–96 (2002) (describing explicitly racist corporate culture at Texaco in the mid-1990s).

[10] *See* BROWN ET AL., *supra* note 9, at 13.

[11] *See, e.g.*, ERICA FRANKENBERG ET AL., THE CIVIL RIGHTS PROJECT HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 12–14 (2003), *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (demonstrating the various improvements for students today in integrated classrooms).

can this paradoxical situation be understood, and what are its implications for the future of civil rights remedies? Here, I would like to look at two responses to this problem, one by law and economics scholars and the other by critical race theorists. These two schools of thought are often characterized as polar opposites with little to say to one another. Yet, in the area of discrimination, each has suggested that *Brown's* definition of the wrong, that is, distaste for interracial contact, needs to be revisited, and both wrestle with the implications for antidiscrimination law and affirmative action. In the end, neither scholarly approach is wholly compatible with a colorblind jurisprudence, and the concessions to color-consciousness offer some interesting lessons for the future of race in America.

I. LAW AND ECONOMICS: THE PARADOX OF PERSISTENT DISCRIMINATION

For economists, rational choice lies at the heart of any account of human behavior. As Kenneth Arrow explains, "Rational choice theory means that the individual actors act rationally (that is, by maximizing according to a complete ordering) within the constraints imposed by preferences, technology, and beliefs, and by the institutions which determine how individual actions interact to determine outcomes."[12] Rationality is a normative ideal, but it also serves as the basis for descriptive and predictive accounts of human behavior.[13]

During the 1950s, economists had to reconcile the realities of racial segregation and stratification with rational choice theory. To do so, Gary Becker posited that Whites have a taste for discrimination, that is, an aversion to interaction with non-Whites. As a result, Whites gain utility from avoiding interracial contact even after discriminatory behavior has been formally labeled antisocial.[14] So long as the taste for discrimination remains widespread, discrimination can persist in a competitive market.[15] Even when Becker first proposed his theory, it

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[12] Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, 12 J. ECON. PERSP. 91, 93–94 (1998).

[13] *See* Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1558–61, 1575 (1998) (contending that rationality is a desirable trait with strong predictive value and considerable descriptive accuracy).

[14] *See* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 19 (2d ed. 1971).

[15] *See id.* at 14–15, 39–45.

presented problems. The concept of a taste for discrimination seemed to be tailor-made to save rational choice theory. Economists did not posit other widespread, antisocial preferences that so powerfully trumped the quest for personal profit. As Arrow notes, "introducing new variables easily risks turning the 'explanation' into a tautology,"[16] and a taste for discrimination could operate much as phlogiston did to rescue scientific theories already emptied of their explanatory value.

Becker's theory posed additional difficulties because the taste for discrimination operates even when little interracial contact is required. Employment and housing can bring the parties to a contract into close proximity, but this is not always the case. Moreover, discriminatory behavior occurs in consumer transactions like the sale of a car, even though these markets are relatively impersonal.[17] Finally, despite a decline in racial animus since the 1950s, discrimination in the marketplace persists.[18] The intransigence of discrimination is a puzzle for theorists like Becker because once people lose their taste for discrimination, markets should become colorblind.

Economists have offered several explanations for racial inequalities in the marketplace. In his study of retail car sales in Chicago in 1991, Ian Ayres used testers to determine whether dealerships engaged in discriminatory pricing practices.[19] To avoid confounding race and gender with other traits like appearance, financial standing, and knowledge about car prices, Ayres controlled for the testers' dress, background, and behavior in dealing with the sellers.[20] He discovered that salespeople

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[16] Arrow, *supra* note 12, at 95.

[17] *See* IAN AYRES, PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 127–33 (2001) [hereinafter AYRES, PERVASIVE PREJUDICE] (discussing plaintiff's burden in proving that an automobile seller took race into account in the bargaining process); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 827–30 (1991) [hereinafter Ayres, *Fair Driving*]. In a subsequent study, Ayres confirmed that White males receive the best offers on a car, but he did not find that Black females receive the worst deals. Instead, Black males were quoted the highest prices for a car. *See* Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 115–16 (1995).

[18] *See* AYRES, PERVASIVE PREJUDICE, *supra* note 17, at 4–6.

[19] *See* Ayres, *Fair Driving*, *supra* note 17, at 822–24.

[20] *See id.* at 825. As I have argued elsewhere, these controls may be imperfect if retail car sellers interpret statements or behavior differently when they come from White men, Blacks, and women. *See* Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2372–75, 2383 (2003). Still, Ayres has made

offered better deals to White males than they did to Blacks and women. Black males were quoted the highest prices, but White women and Black women also were asked to pay significantly more than White men.[21]

To explain these discriminatory pricing practices, Ayres had to refine the definition of animus. In Ayres' view, animus can be divided into two types: associational and consequential. Associational animus is a desire to avoid interracial contact, and it resembles the taste for discrimination that Becker described. Consequential animus is a desire to place members of a different race in a worse position than members of one's own race. This version of animus relates more to subordination than segregation.[22] According to Ayres, associational animus played no role in discriminatory pricing practices in Chicago. As he explains, salespeople were willing to spend considerable time with Black customers, including Black males, to negotiate a deal. If sellers had simply wanted to avoid interracial contact, they would not have prolonged the bartering over price. Instead, in Ayres' view, consequential animus accounted for the substantially higher prices offered to Black males. That is, salespeople wanted Black men to be in a worse position than Whites at the end of the bargaining process.[23]

Ayres offered a different explanation for the higher prices quoted to women, whether Black or White. In the retail car market, dealers make most of their profit by charging inflated prices to customers with limited knowledge or weak bargaining skills. To maximize returns, sellers "search for the sucker," the unwitting or timid buyer who will pay too much. When a potential customer walks into the showroom, a retailer knows almost nothing about that person's skills and knowledge. So, sellers rely on other traits to make quick and admittedly imperfect judgments about whether a prospective buyer is likely to be a sucker. Race and gender are easy to identify, and salespeople believe these characteristics roughly correlate with

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every effort to link differential pricing to race and gender, rather than other personal characteristics.

[21] *See* AYRES, PERVASIVE PREJUDICE, *supra* note 17, at 28–33.

[22] *See id.* at 59–60.

[23] *See id.* at 68–69. Again, I take issue with this claim. Although associational animus may not play the exclusive role in explaining differential pricing, it is possible that it continues to play some role by discouraging Blacks, particularly Black males, from returning to the dealership. *See* Moran, *supra* note 20, at 2370.

sophistication and bargaining acumen. Dealers expect White men to know more and bargain harder than other people who are in the market for a new car. As a result, the higher prices offered to women, whether Black or White, reflect statistical discrimination, a belief that they are easy marks for generating extra profit.[24] By contrast, the notably higher price demanded from Black men is based on both statistical discrimination (the belief that this is a sucker) and consequential animus (a desire to keep the sucker in his place).

Unlike consequential animus, statistical discrimination is a rational strategy for dealing with limited information. This strategy has ramifications that go well beyond retail car sales. Employers can use race as a convenient proxy in evaluating job candidates. Information about race is typically inexpensive to obtain, and there may be group differences in skills and preparation. For instance, the average level of education and experience differs for racial groups, and the variability in performance may differ as well.[25] Race thus becomes a powerful tool for sorting candidates, leading employers to prefer Whites over non-Whites when granting interviews and offering jobs. Once on the job, non-Whites realize that in a world of limited information, they labor in the shadow of race-based judgments about their promise. As a result, non-White employees choose between a high-risk strategy to establish themselves as superstars or a low-risk approach to minimize the chance of failure. Each course of action can backfire if the risk-taker appears foolhardy or the risk-avoider passive.[26] As a result, statistical discrimination limits the opportunities that non-Whites have to develop their human capital. The predicted racial

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[24] *See* AYRES, PERVASIVE PREJUDICE, *supra* note 17, at 29, 68–69, 77–80, 84.

[25] *See* GEORGE A. AKERLOF, AN ECONOMIC THEORIST'S BOOK OF TALES: ESSAYS THAT ENTERTAIN THE CONSEQUENCES OF NEW ASSUMPTIONS IN ECONOMIC THEORY 14–15 (1984); *see also* Bradford Cornell & Ivo Welch, *Culture, Information, and Screening Discrimination*, 104 J. POL. ECON. 542, 543–44 (1996) (arguing that discrimination in screening job applicants can occur even when employers "have no innate preference for similar people and even when they (correctly) believe that the distribution of quality among people of their own background is no different from the distribution of quality among people of other backgrounds" so long as employers "can distinguish between high- and low-character individuals more accurately when the people being sorted are of a similar cultural type").

[26] *See* David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 574–80 (1996).

gap becomes a self-fulfilling prophecy.

In addition to explaining persistent discrimination by unpacking animus and recognizing the use of race as a statistical proxy, economists have explored the role of informal social networks in perpetuating racial inequality. In their view, racial inequality can be understood in part by looking beyond the marketplace to personal connections that offer important economic advantages. This theory reflects the commonplace belief that people get ahead because of who they know as well as what they know.[27] Some fortunate individuals can turn to family, friends, and acquaintances for help in finding a job.[28] Because racial divides in income and wealth persist, non-Whites are less apt than Whites to have the kind of contacts that open professional and corporate doors. To the extent that social networks remain racially homogeneous, differential access to the well-connected perpetuates segregation in the workplace and replicates racial inequality.[29]

In sum, then, economists give relatively little weight to animus in explaining the persistence of racially disparate outcomes in the marketplace. These scholars focus on mechanisms that derive from rational self-interest rather than irrational antipathy to others. Statistical discrimination is a low-cost strategy for processing information that is designed to optimize the bottom line. Social networks are reliable ways of sharing information and coordinating action based on relationships of trust. Investments in these ties have already been made, so job referrals become a relatively inexpensive additional feature of the connections. The racial disparities that result are considered unintended rather than malicious, a byproduct of the predominance of same-race families, friendships, and neighborhoods.

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[27] *See* Janny Scott & David Leonhardt, *Class in America: Shadowy Lines That Still Divide*, N.Y. TIMES, May 15, 2005, at 11 (noting that a substantial proportion of Americans believe that it is essential to come from a wealthy family or to know the right people to get ahead, although a larger proportion believe that natural ability, a good education, and hard work are key to success).

[28] *See* Arrow, *supra* note 12, at 97–98; Glenn C. Loury, *Discrimination in the Post-Civil Rights Era: Beyond Market Interactions*, 12 J. ECON. PERSP. 117, 119–20 (1998).

[29] Arrow, *supra* note 12, at 97–98.

II. CRITICAL RACE THEORY: THE PERVASIVENESS OF RACIAL SUBORDINATION

The field of critical race theory is a younger and more unruly discipline than law and economics. Because critical race theorists want to offer a "big tent"[30] to those who do scholarship on race, common assumptions are sometimes difficult to identify. Several key points of agreement do emerge, however, and they stand in marked contrast to those of the law and economics scholar. Critical race theorists presume that racism remains commonplace. As a result, critical race theorists reject claims that racial disparities are an accidental byproduct of otherwise neutral practices. After centuries of oppression, race is deeply entrenched in everyday life, and racism continues to subordinate non-Whites. In reaching this conclusion, these scholars rely heavily on the victims' perspective, a truth captured through personal narrative. Unlike Ayres, race scholars reject the need to gather extensive aggregate, statistical evidence to demonstrate that racism is real.

Critical race theorists also question traditional civil rights models that make individual animus a hallmark of defining the wrong. Like some modern-day economists, race scholars want to revisit the concept of animus, but they are unwilling to accept any neat divide between irrational animus, whether associational or consequential, on the one hand, and rational, statistical discrimination on the other. Instead, race scholars focus on the distinction between conscious and unconscious bias, presuming that racial distinctions in whatever form represent tainted thinking. This approach grew out of Charles Lawrence's seminal work on *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*,[31] which argues that in the wake of the civil rights movement, old-fashioned animus is no longer the main obstacle to racial equality. Instead, racism persists through assumptions and attitudes that are often hidden from individual awareness:

> [M]ost of us are unaware of our racism. We do not recognize the

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[30] Kimberle Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 UCLA L. REV. 1343, 1362–63 (2002).

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

> ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.[32]

Although Lawrence's emphasis on Freudian psychology has largely faded away, his fundamental insight that racism can be unconscious remains a vital component of critical race theory.

In elaborating on this claim, race scholars have turned to cognitive psychology and the general ways in which human beings process information. Cognitive theorists make clear that "Because implicit prejudice arises from the ordinary and unconscious tendency to make associations, it is distinct from conscious forms of prejudice, such as overt racism or sexism."[33] For instance, psychologists have used an Implicit Association Test ("IAT") to demonstrate that implicit racial biases are strong and pervasive even as self-reported racism declines.[34] Racial biases, like other group biases, stem from an illusion of objectivity, a belief that individuals are capable of being fair and rational. In fact, unconscious biases can operate in a way that contradicts explicit beliefs.[35] These implicit biases can be costly precisely because, at times, they contravene expressly held commitments. Moreover, these costs can arise in "situations that involve economically and socially important decisions, such as hiring, educational admissions, and personnel evaluations."[36]

Proponents of cognitive bias theory offer a different explanation of research like Ayres' work with testers in the Chicago retail car market. For instance, the Discrimination Research Center sent pairs of specially trained testers to temporary employment agencies. The testers were matched with respect to personal characteristics, qualifications, and interviewing behavior. Despite efforts to make the two job applicants interchangeable, temporary employment agencies preferred White applicants over Black applicants by a wide

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[32] *Id.* at 322.

[33] Mahzarin R. Banaji et al., *How (Un)ethical Are You?*, HARV. BUS. REV., Dec. 2003, at 56, 58.

[34] *Id.* at 58–59.

[35] *Id.* at 56.

[36] Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 6 (1995).

margin.[37] These preferences manifested themselves in several ways. Compared to Black applicants, White applicants were more likely to be offered an interview, to get a job offer, to obtain a placement with superior pay, benefits, and hours, and to receive support and encouragement during the screening process.[38] Like Ayres, the Discrimination Research Center did not rely on conscious racism (that is, animus) to explain the results. However, the Center also declined to invoke statistical discrimination and instead concluded that "[b]latant discrimination is rarely seen in testing; most discrimination is subtle and covert, and perhaps not even conscious on the part of the employer."[39]

Statistical discrimination and implicit bias share some similarities. Both can operate even among individuals who do not think of themselves as racists.[40] Moreover, statistical discrimination is a shortcut used when information is expensive,[41] and implicit bias is most acute when individuals are distracted and pressed for time.[42] Like statistical discrimination, implicit bias can be difficult to eradicate by fiat. Many organizations attempt to fight discrimination with programs that urge managers to just try harder. Yet, leading cognitive theorists "doubt that a well-intentioned, just-try-harder approach will fundamentally improve the quality of executives' decision making."[43] After all, implicit bias is not the product of a character flaw, but an ingrained way of processing information.

For proponents of both statistical discrimination and

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[37] JENNY BUSSEY & JOHN TRASVINA, DISCRIMINATION RESEARCH CTR., RACIAL PREFERENCES: THE TREATMENT OF WHITE AND AFRICAN AMERICAN JOB APPLICANTS BY TEMPORARY EMPLOYMENT AGENCIES IN CALIFORNIA 8 (2003).

[38] *Id.* at 5, 11–12.

[39] *Id.* at 4. The Discrimination Research Center reached similar conclusions when it studied how temporary employment agencies process resumes in Los Angeles and San Francisco. Once again, there were differences in the success rate of applicants based on race and ethnicity, even when their qualifications were similar. For Black applicants, class differences also had a significant effect. The researchers attributed the disparities to stereotyped views of the candidates. *See generally* DISCRIMINATION RESEARCH CTR., NAMES MAKE A DIFFERENCE: THE SCREENING OF RESUMES BY TEMPORARY EMPLOYMENT AGENCIES IN CALIFORNIA (2004), *available at* http://drcenter.org/staticdata/pdfs/name_resume_study.pdf.

[40] Greenwald & Banaji, *supra* note 36, at 15.

[41] *See* Thomas A. Cunniff, *The Price of Equal Opportunity: The Efficiency of Title VII After* Hicks, 45 CASE W. RES. L. REV. 507, 516 (1995).

[42] *See* Greenwald & Banaji, *supra* note 36, at 18.

[43] Banaji et al., *supra* note 33, at 61.

cognitive bias, antidiscrimination laws that emphasize animus largely miss the point. However, those who rely on theories of statistical discrimination focus on the rationality of the judgments, which are a response to the problem of limited information. Racial heuristics work precisely because race is correlated with other relevant traits. In particular, race continues to mark significant gaps in skills and training. By contrast, cognitive theorists insist that implicit bias is a damaging vestige of racial animus. This bias reflects a tension "between feelings and beliefs associated with a sincerely egalitarian value system and unacknowledged negative feelings and beliefs about blacks."[44] The question for cognitive theorists is how civil rights remedies can combat this habitual and distorted racial stereotyping.

Cognitive bias theorists expand the concept of discrimination by reconceptualizing race-based individual thought and behavior. Other race scholars, however, urge a focus on institutional racism, the collective patterns and practices that entrench inequality. According to this view, race is a social construction highly relevant to our lives, not a personal trait that should be ignored in a colorblind society. As Ian Haney Lopez explains:

> [H]uman interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization . . . . [R]ace is not a determinant or a residue of some other social phenomenon, but rather stands on its own as an amalgamation of competing societal forces. Racial formation includes both the rise of racial groups and their constant reification in social thought.[45]

Haney Lopez argues that "ideas about race form part of the whole social fabric into which other relations, among them gender and class, are also woven."[46] The very pervasiveness of racial assumptions and practices means that individuals can engage in highly discriminatory conduct, even as they think of themselves as colorblind. The explanation resides not in unconscious bias but in a set of institutional scripts and paths

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[44] Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 61, 62 (1986).

[45] Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27–28 (1994).

[46] *Id.* at 30.

that perpetuate racial subordination.[47]

As an example, Haney Lopez draws on grand jury selection practices in Los Angeles in the late 1960s. Statistical evidence conclusively demonstrated that Mexican Americans were severely underrepresented in the jury pool, yet the judges who nominated jurors insisted that they did not discriminate.[48] Haney Lopez explains this seeming paradox by arguing that the judges were trapped in patterns of institutional racism.[49] Judges picked members of the pool from among their friends and associates, assuming that these individuals would be best qualified for service. None of the jurists worried that the social circles they frequented were highly exclusionary. Without any trace of malice, the judges used a selection process that largely prevented Mexican Americans from participating in grand jury proceedings.[50] The force of institutional habit proved so powerful that even when judges were warned about the dangers of underrepresentation, they persisted in choosing jurors in the same way. The longstanding practice of identifying grand jurors from among friends and acquaintances continued to seem legitimate despite the evident difficulties it created.[51]

To a certain extent, Haney Lopez's account resembles the discussion of social networks that proponents of law and economics sometimes invoke. Yet, for Haney Lopez, the key concern is how institutions embody racist practices by establishing scripts and paths that guide individual behavior, not the descriptive reality of segregated friendships. The key script here is one of "pick your friends," which is race-neutral on its face, yet has highly disparate consequences for Mexican Americans. The racial homogeneity of friendships is the mechanism by which this script becomes exclusionary, but Haney Lopez would argue that the script enjoys its normative legitimacy precisely because it rests on notions of merit and inclusion that are highly racialized. So, it is not merely the existence of segregated social networks, but their deployment to legitimate institutionalized practices that interests Haney Lopez.

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[47] *See* Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1781–83 (2000).

[48] *See id.* at 1743–44, 1757–61.

[49] *See id.* at 1812.

[50] *See id.* at 1819–22.

[51] *See id.* at 1820.

In short, then, critical race theorists, like economists, have increasingly turned away from conscious animus as the primary explanation for ongoing racial disparities. Unlike economists, however, race scholars reject accounts that treat persistent inequality as a byproduct of otherwise rational shortcuts and innocent personal relationships. According to critical race theory, both individual cognition and social structures remain tainted by the legacy of racism. Race is readily available as a mark of inferiority because of this history, and institutional patterns and practices seem familiar and appropriate because they reflect and replicate racial difference.

III. REMAKING LAW AND POLICY: THE LESSONS OF LAW AND ECONOMICS AND CRITICAL RACE THEORY

Clearly, the fields of law and economics and critical race theory have adopted different approaches to understanding contemporary racial inequality. Yet, both schools of thought concur that old-style animus, standing alone, cannot explain the persistence of discrimination and subordination. As a result, scholars from each discipline have revisited traditional civil rights remedies, which largely equate discrimination with racial antipathy. Even if antidiscrimination laws should continue to target animus, economists and critical race theorists have asked whether more should be done to reach statistical discrimination, segregated social networks, unconscious bias, and institutional practices that perpetuate racial differences. Not surprisingly, the answers have been complex and at times contradictory, revealing the profound uncertainty that surrounds the future of racial justice in America.

A. Retooling Antidiscrimination Law and Affirmative Action: A Law and Economics Perspective

For proponents of law and economics, there is no doubt that the irrational taste for prejudice should be eradicated. Disparate treatment laws, which prohibit discrimination motivated by an invidious racial purpose, are largely uncontroversial. The real question is whether, with the decline in animus, these laws have largely served their purpose and are now obsolete.[52] As George

[52] *See* John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1421–30 (1986); Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21

Rutherglen has remarked, "[t]he descriptive, let alone the progressive, force of the concept [of discrimination] has been exhausted."[53] As a result, for proponents of law and economics, disparate treatment law is justified but rarely necessary today. In general, once freed from the distortions of irrational prejudice, markets can be trusted to operate efficiently.

For economists, the decline in animus casts doubt on the legitimacy of two other civil rights remedies: disparate impact laws and affirmative action. Disparate impact claims reach facially neutral conduct that has the effect of generating racial disparities.[54] For instance, a screening test with differential pass rates for Whites and non-Whites generates a disparate impact in hiring.[55] If non-White applicants who fail the test challenge its use, the employer must demonstrate that the test is in fact job-related and a business necessity.[56] In a world in which animus remains a significant problem, disparate impact analysis can ferret out invidious racial subterfuge that is otherwise hard to prove. If animus has largely disappeared, however, this approach imposes a tax on employers who rationally choose a test but bear special costs of justification because it has racially disparate effects.

The decline in animus also calls into question the rationale for affirmative action programs. Such programs may be appropriate in the short run to remedy past discrimination by a particular institution or perhaps even to correct widespread societal discrimination. However, once racial antipathy has declined, economists doubt whether the government should second-guess market decisions about hiring and productivity. As

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BERKELEY J. EMP. & LAB. L. 476, 493–94 (2000). However, a few economists challenge disparate treatment laws altogether, on efficiency grounds. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 181, 265–66 (1992) (rejecting the efficiency of protections against disparate treatment as well as disparate impact); Richard A. Epstein, *Standing Firm, on Forbidden Grounds*, 31 SAN DIEGO L. REV. 1, 54–56 (1994) (defending his position that employment discrimination protections should be largely eliminated).

[53] George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 146 (1995).

[54] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

[55] *See, e.g.*, County of Los Angeles v. Davis, 440 U.S. 625, 627 (1979); Elaine W. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793, 793–94 (1978).

[56] *See Griggs*, 401 U.S. at 431.

a result, economists would oppose compulsory affirmative action programs as inefficient.[57] Voluntary affirmative action programs, by contrast, presumably reflect an employer's judgment that racial inclusion advances business objectives. Therefore, economists would not be averse to such initiatives, as long as they are not coerced by government in any way.[58] To preserve room for official support of affirmative action, some economic analysts have relied on the need to build social capital across racial lines. These arguments rest on a belief that government must counter the ongoing effects of segregation of family ties and friendships, even if these patterns are not a product of racial hatred.

1. Statistical Discrimination, Disparate Impact, and Accommodation

To explain why racial disparities persist in the absence of animus, economists have relied on the concept of statistical discrimination. That is, people use race as a convenient proxy for other traits, such as training and skills, and this strategy is a rational response to the high cost of individualized evaluation. For the economist who prizes market rationality, there is some real doubt as to whether this conduct is antisocial or unethical, even if it inflicts group-based disadvantage.[59] Nevertheless, disparate impact law imposes special burdens on employers whose practices generate racial disparities, even in the absence of evidence of discriminatory intent.

Christine Jolls questions whether disparate impact law is justified.[60] In her view, this legal safeguard can not be explained

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[57] *See* George Rutherglen, *After Affirmative Action: Conditions and Consequences of Ending Preferences in Employment*, 1992 U. ILL. L. REV. 339, 346–52; Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 95 (2002).

[58] *See* Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 144–50 (1994) (arguing that either mandating or forbidding affirmative action constitutes bureaucratized, command-and-control legislation that interferes with free market solutions); Janine S. Hiller & Stephen P. Ferris, *Separating Myth from Reality: An Economic Analysis of Voluntary Affirmative Action Programs*, 23 MEMPHIS ST. U. L. REV. 773, 781 (1993) (highlighting the success of voluntary affirmative action programs); Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1296–308 (1995) (arguing that employers may adopt voluntary affirmative action for efficiency reasons).

[59] Stephen Maitzen, *The Ethics of Statistical Discrimination*, 17 SOC. THEORY & PRAC. 23, 39–40 (1991).

[60] *See generally* Christine Jolls, *Antidiscrimination and Accommodation*, 115

as a way to ferret out hidden cases of invidious intent.[61] On the contrary, Jolls asserts that disparate impact laws are tantamount to an accommodation or affirmative action requirement because employers must

> incur special costs in response to the distinctive needs (as measured against existing market structures) of particular, identifiable demographic groups of employees, such as individuals with (observable) disabilities, and [the law] imposes this requirement in circumstances in which the employer has no intention of treating the group in question differently on the basis of group membership (or "discriminating against" the group in the canonical sense).[62]

Jolls believes that disparate impact, accommodation, and affirmative action force employers to depart from acting rationally by ignoring traits that are relevant to profitability.[63] Although Jolls refrains from condemning disparate impact law outright, she insists that it must be supported on grounds other than the eradication of irrational animus. She also points out that critical race theorists committed to anti-subordination—or group equality—would be unperturbed by her observations.[64]

To the extent that statistical discrimination generates racial disparities in today's marketplace, economists will question the propriety of disparate impact law unless some strong alternative grounds can be offered to justify the tax on a firm's efficiency. To address these concerns, Mark Kelman weighs the collective interest of previously excluded racial groups in integration against the employer's goal of profit-maximization.[65] Kelman agrees that "claims for reasonable accommodations . . . are very difficult to distinguish, as distributive claims, from the claims of those who are viewed as 'justly' disadvantaged in a market economy."[66] In either case, accommodation means some loss of efficiency and profit-maximization. For Kelman, this tax on

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HARV. L. REV. 642 (2001).

[61] *Id.* at 652–54.

[62] *Id.* at 648.

[63] *See id.* at 687.

[64] *See id.* at 686–87.

[65] *See generally* Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833 (2001) (exploring the idea that an employee's demand to a right of "accommodation" is subject to claims that such a demand is unreasonable because the resources necessary to satisfy such a right could be spent in a better, more efficient fashion).

[66] *Id.* at 881.

profit-maximizing behavior is appropriate only when accommodation is necessary to avoid the creation of "an outsider caste."[67] Under these circumstances, accommodation becomes a legitimate means of addressing segregation and its harms—collective injuries unlikely to be fully accounted for in any individual calculation of profit-maximization. Kelman believes that, over the long run, accommodation yields valuable societal gains for all concerned.[68] Members of the dominant group enjoy access to diverse perspectives, a benefit which shatters the illusion that their own experience is universal, while members of the subordinate group are granted the opportunity to develop diverse contacts and escape the stigma of isolation.[69] These long-term gains are apt to be overlooked in business assessments of short-term profitability.

For economists, then, once the eradication of animus is unavailable as a normative justification for civil rights laws, some other societal values must be produced to account for the interference with the efficient operation of market forces. Both group equality and group inclusion have been proffered as justifications for preserving civil rights protections that go beyond disparate treatment. What remains to be seen, however, is whether any of these rationales will generate the kind of societal consensus that the crusade against irrational racial prejudice commanded.

2. Affirmative Action and Social Capital

Just as economic theorists doubt the propriety of disparate impact requirements, they worry that affirmative action compels employers to engage in inefficient behavior by subsidizing previously disadvantaged groups. Economists may agree that affirmative action is a legitimate short-term remedy for an institution's own past invidious misconduct, or even for widespread, contemporary prejudice. Once such harms have been rectified, though, economists would generally prefer to leave firms free to make their own decisions about hiring, promotions, and layoffs. Each business would have to decide whether affirmative action advances its particular business objectives. A firm could voluntarily adopt such programs, but the government

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[67] *Id.* at 891.

[68] *See id.* at 885.

[69] *See id.*

would not mandate or encourage them.[70]

Not all scholars agree that as animus declines, affirmative action becomes a matter for business judgment. In their view, there is a societal interest in using affirmative action to counteract the exclusionary effects of segregated social networks. For example, Clark Cunningham, Glenn Loury, and John David Skrentny argue that affirmative action dispels the lingering effects of discrimination—particularly the unequal access to social capital.[71] As a result, the federal government should map access to social capital so that affirmative action programs can be narrowly tailored to address racial disparities.[72] Although the prospects for such mapping appear remote, this proposal is significant because it moves beyond the behavior of individuals and firms to consider how social structures affect market opportunities.

In a related vein, Cynthia Estlund has addressed the role of the workplace in generating social capital.[73] In her view, "the workplace is the single most important site of cooperative interaction and sociability among adult citizens outside the family."[74] The job is an especially significant place for interracial contact, given the pervasive residential segregation that characterizes much of the United States.[75] Moreover, the employment setting offers a safe and structured environment in which to interact with members of other races because it is diverse, and governed by a principle of non-discrimination. As Estlund explains, "[i]n the workplace, and often only there, citizens must find ways of cooperating on an ongoing basis, over weeks or years, outside of and often counter to traditional racial, ethnic, or sexual hierarchies."[76]

Because Estlund sees the job as a critical place for the development of social capital, she justifies affirmative action in

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[70] *See* Selmi, *supra* note 58, at 1308–12.

[71] *See* Clark D. Cunningham, Glenn C. Loury & John David Skrentny, *Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs*, 90 GEO. L.J. 835, 841–43 (2002).

[72] *See id.* at 878–82.

[73] *See generally* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 4 (2000) (discussing the workplace and its relationship to the development of social capital).

[74] *Id.* at 3.

[75] *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 60–82 (1998).

[76] Estlund, *supra* note 73, at 4.

employment as a means by which to undo racially exclusionary networks.[77] In her view, programs are appropriate only to the extent that they build positive interracial contacts, and initiatives leading to interracial resentment, hostility, and stereotyping should be abandoned.[78] Estlund favors racial preferences in hiring that are modest and flexible because they will be "relatively invisible and nonthreatening" to White employees, and worries about the divisive effect of racial preferences during layoffs.[79] Estlund concedes that her approach allows "integration efforts [to be held] hostage to racial resentment" and that the "diffuse societal benefits [will be] hard to demonstrate in particular cases."[80] Estlund's analysis demonstrates the normative uncertainty that can arise once affirmative action is used as a forward-looking strategy, rather than a backward-looking remedy for an actor's past discrimination. Building social capital is an uncertain enterprise that turns on the goodwill of all parties concerned. The dominant group must relinquish some of its privileges, while the subordinate group must transcend distrust and distance. Artful organizational practices are crucial to the success of these efforts, yet they are difficult to mandate precisely because of the wide range of institutional histories, cultures, and practices at different workplaces.[81]

B. Disparate Treatment and Institutional Racism: Lessons from Critical Race Theory

Race scholars face distinct challenges in addressing the future of civil rights remedies. Critical race theorists are convinced that racism remains a deeply entrenched part of American life. At an individual level, this pervasive racism manifests itself not so much in conscious animus but in unconscious bias. For that reason, disparate treatment law, which targets discriminatory intent, is far from obsolete. However, the definition of illicit purpose must be changed to

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[77] *See id.* at 79–88.

[78] *See id.* at 88–89.

[79] *Id.* at 89–90.

[80] *Id.* at 92–93.

[81] *See, e.g.*, Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229, 229–70 (2001) (identifying three different views of workforce diversity and evaluating their implications for realizing the benefits of diversity).

include unconscious racism. Moreover, affirmative action can counter implicit bias by affording individuals an opportunity to work cooperatively in an interracial setting.

Some critical race theorists contend that civil rights law should target institutional as opposed to individual racism. Here, the aim is to move beyond sanctions for race-conscious practices and to reach seemingly race-neutral organizational paths and scripts that perpetuate subordination. Because this approach departs radically from the traditional emphasis on not only animus but also individual action, the challenges of implementation are formidable. Any effort to dismantle institutional racism requires a clear vision of how to link the restructuring of organizational practice to distributive justice, and redistributive goals would have to trump interests in institutional autonomy. So far, critical race theorists have explored institutional racism mainly through descriptive case studies, but their work has yet to confront decisively the daunting normative dilemmas of remediation. The area of corporate law could be ripe for an exploration of institutional racism. The corporate form has already been thoroughly theorized, and extensive empirical research has been done on business practices. Yet, the polarization of critical race theory from law and economics has left the racial implications of this work largely unexamined.

1. Unconscious Bias, Disparate Treatment, and Affirmative Action

Because critical race theorists emphasize the pervasiveness of implicit bias, they question the efficacy of discrimination laws that target conscious animus. Rather than abandon disparate treatment law as obsolete, race scholars believe that its protection must be expanded to prohibit conduct rooted in implicit bias. According to Linda Hamilton Krieger, antidiscrimination law should recognize "mixed-motives" that stem from a combination of express beliefs and implicit stereotypes.[82] Courts have been receptive to a mixed-motive

[82] *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1223 (1995); *see also* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1243 (2002); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased*

approach in addressing claims based on gender and age because judges do not treat these forms of discrimination as the product of deep-seated animosity. Instead, false stereotypes about women and the elderly interfere with objective individualized evaluations. The law must root out these mistaken notions about gender or age, whether they operate consciously or unconsciously.[83] In the field of race, by contrast, the goal has been to implement corrective justice for past wrongs, transgressions that grew out of profound hostility and distrust. Precisely because disparate treatment connotes deeply antisocial conduct, labeling unconscious stereotypes as a form of racism seems harsh and excessive. To invoke the moral outrage that corrective justice requires, courts must find animus rather than a mere cognitive mistake.[84]

On occasion, courts have found that implicit racial bias can serve as the basis for a disparate treatment claim. In *Thomas v. Eastman Kodak Co.*,[85] the plaintiff was the only Black customer service representative in one of Eastman Kodak's offices. When she was laid off, she challenged her employer's decision as discriminatory because it used a ranking method that incorporated racially biased performance appraisals done in the three years preceding her termination.[86] In finding that the plaintiff had a triable claim of disparate treatment, the Court of Appeals noted that "[t]he Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus."[87] After discussing age and gender discrimination decisions, the court noted that "[s]tereotypes or cognitive biases based on race are as incompatible with Title VII's [antidiscrimination] mandate as stereotypes based on age or sex; here too, 'the entire spectrum of disparate treatment' is prohibited."[88]

Redefining the meaning of disparate treatment is not the only way to fight unconscious bias. Structural changes can avoid the unfairness of blaming individuals for conduct that is

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Prototypes, 74 S. CAL. L. REV. 747, 782 (2001).

[83] *See* Krieger, *supra* note 82, at 1168–71.

[84] *See* Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1220 (1999).

[85] 183 F.3d 38 (1st Cir. 1999).

[86] *See id.* at 45–46.

[87] *Id.* at 59.

[88] *Id.*

automatic, unconscious, and widespread. Moreover, these changes may be more efficacious than exhorting individuals to behave better when they have little control over their cognitive habits.[89] The goal of dispelling unconscious bias provides a distinct justification for affirmative action, which should be understood "not only as compensation to a stigmatized group for past explicit discrimination by others who intended to discriminate against them, but also as compensation for past, present, and likely future *implicit* discrimination by persons who have no intent to discriminate."[90] According to this view, affirmative action can reshape workplace environments in ways that reduce implicit bias. Placing members of underrepresented groups in positions that demonstrate their competence and authority counters negative associations and stereotypes.[91] By reconfiguring the workplace, affirmative action reconstructs the way that people think about race, both consciously and unconsciously.

Some scholars have used implicit bias not only to justify existing civil rights remedies but to argue for new reforms. For example, Cheryl L. Wade has proposed that the Securities and Exchange Commission mandate disclosure of information regarding a company's hiring and promotion of non-White employees.[92] She argues that "mandatory disclosure of employment-related facts would help corporate managers deter discriminatory behavior in their firms because it would provide an important opportunity for self-examination."[93] Wade believes that when managers conduct due diligence investigations to comply with the disclosure requirement, subtle discriminatory conduct could be revealed. In making this claim, she relies heavily on the prevalence of unconscious bias:

> While racism may be carefully veiled by subtle, discrete, or disguised discriminatory behavior, many discriminatory practices result from unconscious bias. The self-examination that would be required in order to accurately disclose employment-related matters may help managers recognize and

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[89] *See* Wax, *supra* note 84, at 1158–69. Indeed, Wax indicates that any effort to treat implicit bias as a form of disparate treatment is desirable largely as a means to encourage firms to adopt diversity programs. *See id.* at 1226–31.

[90] Greenwald & Banaji, *supra* note 36, at 19.

[91] *See* Banaji et al., *supra* note 33, at 63.

[92] *See* Wade, *supra* note 9, at 410–16.

[93] *Id.* at 416.

> expose the unconscious racial bias that often impedes the progress of minority employees and the retainment of minority suppliers. The fact remains, however, that self-examination will not enable corporate managers to uncover unconscious racism unless they have sufficient reason to believe that unconscious discriminatory conduct is likely to occur, even in their firm.[94]

In Wade's view, mandatory disclosure of statistics on the racial composition of the workforce is uniquely justified because unconscious racism is an especially intractable problem.[95]

Some of the research on implicit bias casts doubt on the efficacy of Wade's proposal. Cognitive theorists have suggested that data collection can reduce unconscious prejudice by revealing its presence. However, aggregate statistics on the composition of the workforce may not be enough. To combat implicit bias, the data should be surprising to many people, so that the results counter "the 'statistics' our intuition provides."[96] It is not clear that a report on the underrepresentation of people of color in the corporate workplace would be counterintuitive. As an alternative, cognitive theorists suggest audits of individual and group decision-making. For example, individual employees might take the Implicit Association Test to determine whether they are subject to implicit bias, and in group settings, employees might be asked to acknowledge the contributions of others before claiming too much credit for themselves.[97] Nor is it clear that data collection should be limited in the way that Wade proposes. Far from being unique to race, implicit bias appears to operate for a number of other categories, including gender and age.[98] As a result, arguments for confining mandatory disclosure to racial statistics would have to rest on a justification other than the exceptional nature of unconscious bias. Still, Wade's pioneering efforts are important because they test whether the work on implicit bias has significant policy implications outside of the

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94 *Id.* at 417 (footnote omitted).

95 *See id.* at 426.

96 Banaji et al., *supra* note 33, at 62.

97 *See id.*

98 *See* Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC. PSYCHOL. 272, 278–79 (1993) (showing implicit gender bias under various experimental conditions); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES. & PRAC. 101, 105–09 (2002) (documenting implicit biases for race, age, and gender).

traditional civil rights paradigm.

2. Institutional Racism and a Radical Critique of Corporate Personhood

Proponents of implicit bias primarily seek to expand the existing civil rights model by insisting that not all prejudice is conscious. Scholars who focus on institutional racism contemplate a radical and far-ranging critique of traditional remedies for racial injustice. By moving beyond the blameworthy individual, these critical race theorists hope to unmask the everyday structures and practices that perpetuate subordination. The form and operation of corporations might seem to be an area ripe for examination based on theories of institutional racism. Yet, little of this work has been done, in part because law and economics has been seen as wholly distinct and even polarized from critical race theory.[99] As a result, most of the discussions of race in the corporate setting have focused on employment discrimination without addressing other features of the corporation that entrench racial inequality.[100]

There is much work to be done on this front. First, race scholars could fruitfully explore the complex history of personhood in American law. The Constitution readily acquiesced in the institution of slavery, which denied Blacks full personhood.[101] It took a bloody Civil War to emancipate slaves, and even then, the rise of Jim Crow diminished Black personhood well into the twentieth century.[102] Meanwhile, corporations gained recognition as persons relatively easily. Anglo-American law began to use personhood as a tool for defining non-human entities, particularly townships and free cities, as early as the fourteenth century.[103] Moreover, when the

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[99] *See* Wade, *supra* note 9, at 394 ("Until now, the discourse on race, and considerations of corporate responsibility and lawfulness have occurred in disaffiliated contexts.").

[100] *See generally* Thomas W. Joo, *Corporate Hierarchy and Racial Justice*, 79 ST. JOHN'S L. REV. 955 (2005).

[101] *See* U.S. CONST. art. I, § 2, *amended by* U.S. CONST. amend. XIV, § 2, amend. XVI (stating that all persons not deemed free persons were counted only as three-fifths of a person for purposes of determining taxes and apportioning representatives for the House of Representatives).

[102] *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974) (chronicling the legal abolition of slavery and its inability to completely emancipate Blacks from the handicaps of segregation).

[103] Mark M. Hager, *Bodies Politic: The Progressive History of Organizational*

United States embarked on substantial industrialization in the late 1800s and early 1900s, courts readily adapted to these developments by according the status of persons to burgeoning corporations. Indeed, the Fourteenth Amendment, a post-Civil War amendment designed to accord rights and protections to former slaves, was mostly used to reinforce the entitlements of corporations as persons. As Justice Hugo Black noted in 1938:

> This Amendment sought to prevent discrimination by the states against classes or races .... Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of 1 per cent. invoked it in protection of the negro race, and more than 50 per cent. asked that its benefits be extended to corporations.[104]

Interestingly, beginning in 1960, the Supreme Court's references to corporate personhood waned, just at the moment that the Amendment was reinvigorated as an instrument of racial justice. It seems likely that the rise of the civil rights movement revealed how legal personhood had devolved into an abstraction that masked the dehumanization of non-Whites. Once the Fourteenth Amendment was again enlisted in the service of its intended beneficiaries, the status of corporations as persons arguably grew increasingly anomalous.[105] Sharp contrasts in the role of personhood to promote racial equality on the one hand and to expand capital markets on the other could make for a fascinating critical race history.[106]

This history could lay the foundation for exploring how the

"Real Entity" Theory, 50 U. PITT. L. REV. 575, 616–17 (1989).

[104] Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 89–90 (1938) (Black, J., dissenting) (questioning whether corporations should be treated as persons); *see also* David Graver, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. CHI. L. SCH. ROUNDTABLE 235, 235–36 (1999) ("Near the turn of the century, the Court granted corporations the equal protection and due process rights accorded persons under the Fourteenth and Fifth Amendments.").

[105] *See* Graver, *supra* note 104, at 240 (arguing that after 1960, the Supreme Court ceased to theorize about whether corporations were persons and instead focused pragmatically on the impact that constitutional protections for corporations would have on natural persons); *see generally* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 26–27 (1976) (describing how legal abstractions become masks that conceal the identity and impact on individuals who make, enforce, and obey the law).

[106] For a preliminary effort to compare these applications of personhood, see Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1749–52 (2001).

corporate form in turn influences practices that entrench racial subordination. Ironically, the very term "institutional racism" may acquiesce in an anthropomorphic image of the corporation. After all, the notion that an institution can be racist seems to suggest a capacity for malice. In this sense, institutional racism harkens back to earlier efforts to reform corporations by drawing on their status as persons. In the early nineteenth century, when the destructive force of large enterprises became clear, legal scholars argued that corporations were not merely fictive creatures of the state but real entities that should be subject to civil and criminal liability.[107] Similarly, some race scholars suggest that businesses are organic collectivities that can be morally responsible in their own right, as distinct from their constituent individual members. The reparations movement arguably has adopted this approach insofar as it targets corporations for liability in conjunction with past practices related to slavery, even though the individuals who made the decisions are long dead.[108]

Corporate law scholars have themselves questioned images of personhood, but the dominant response has been to characterize corporations as nothing more than a nexus of efficient contracts dedicated to the maximization of shareholder

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[107] *See* Hager, *supra* note 103, at 579–82, 585–87.

[108] *See* Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 308–11 (2003). Kent Greenfield's call to revive the ultra vires doctrine in the service of racial justice harkens back to an earlier conception of corporate personhood. Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1302–04 (2001) [hereinafter Greenfield, *Ultra Vires Lives!*]; *see generally* Adam J. Sulkowski & Kent Greenfield, *A Bridle, a Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior*, 79 ST. JOHN'S L. REV. 929 (2005). Because corporations were creatures of the state, acts that fell outside of a government-authorized charter were ultra vires. As a result, the corporation could not be held liable because it lacked the agency to perform these acts. *See* Hager, *supra* note 103, at 593. At the turn of the century, the ravages of rapid industrialization convinced leading legal scholars that this model of personhood offered little in the way of meaningful protection from business abuses. *See id.* at 585–87. Yet, Greenfield contends that this approach still has some meaning insofar as corporate action must be lawful. Greenfield, *Ultra Vires Lives!*, *supra*, at 1314–15. Because Greenfield's reform proposal turns on a vision of the corporation that has been dismissed as outmoded, his claim that "ultra vires lives" has received far less attention than demands for reparations, which impose corporate accountability as though businesses have a moral life of their own.

wealth. This approach is surely congenial to law and economics theorists, but it raises serious questions for critical race theorists. Building on demands for progressive corporate law, race scholars can show how the abstract notion of a nexus of contracts obscures significant effects that firms have on the general social welfare.[109] For example, Thomas W. Joo tackles the implications of shareholder primacy for racial justice.[110] He points out that scholars have debated whether shareholders can and should play a highly influential role in corporate governance or whether key policy decisions are best left to corporate managers.[111] Joo notes that some observers have too quickly assumed that expanding the governance role for shareholders would promote social justice in general and racial equality in particular. In fact, he makes a persuasive case that small shareholders would be stymied by collective action problems and that large institutional investors would not sacrifice profit to advance a racial agenda.[112] Moreover, so long as shareholders are seen as arm's-length stakeholders who defer to management, they may not take responsibility for business practices with racially exclusionary effects, even as these practices are justified by a norm of shareholder primacy.[113]

If, in fact, existing characterizations of the corporation mask practices that perpetuate racial inequity, then other ways of framing the debate can be considered.[114] For example, in other countries, corporations have important public obligations. In Japan, large business enterprises once relied more heavily on bank financing than on equity to support their development. As a result, shareholder primacy is not an unquestioned norm

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109 *See, e.g.*, Kellye Y. Testy, *Capitalism and Freedom—For Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87, 92 (2004).

110 *See generally* Joo, *supra* note 100.

111 *Id.*

112 *Id.*

113 *Id.*; *see also* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

114 In evaluating these alternative frameworks, critical race theorists can build on and contribute to the efforts of those who call for progressive corporate law. Progressive corporate scholars have largely devoted themselves to critiquing the dominant model of the corporation, and they now must develop a set of normative prescriptions. To do so, some theorists hope to draw inspiration from other progressive legal discourses. *See, e.g.*, Testy, *supra* note 109, at 89 (drawing on feminist legal theory as a source of normative prescriptions for progressive corporate law).

there.[115] Corporate governance is responsive to multiple stakeholders, so that business decisions "maximize shareholder profits while maintaining employment for the corporation's employees and maintaining a level of corporate responsibility for social affairs."[116] Germany's system of co-determination also forces corporate managers to be accountable to employees as well as shareholders. Unlike businesses in the United States, German firms have downsized primarily through attrition and early retirement rather than layoffs, an approach that minimizes economic disruptions for workers.[117] Claire Moore Dickerson uses her comparative analysis of women entrepreneurs in West Africa and the United States to reflect on the responsibilities that corporations have as a part of communities and not merely a nexus of contracts.[118] As she explains,

> [C]omparative analysis offers us the clear opportunity to ask foundational questions: why does society allow managers, through the public corporations, to use citizens' wealth? Should society demand a quid pro quo for that tremendous advantage, in addition to shareholders' right to participate in the vicissitudes of the corporation's business, and if so, what should the quid pro quo be?[119]

Along with critical race histories and inquiries into corporate structure and practice, a global perspective promises important insights for scholars who hope to unmask the culture-bound assumptions that make racial inequality seem both natural and inevitable in the business world.

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[115] *See* Janis Sarra & Masafumi Nakahigashi, *Balancing Social and Corporate Culture in the Global Economy: The Evolution of Japanese Corporate Structure and Norms*, 24 LAW & POL'Y 299, 306, 336–40 (2002); Cheryl L. Wade, Commentary, *Corporate Governance in Japan, Germany, and Canada: What Can the U.S. Learn From Other Countries?*, 24 LAW & POL'Y 441, 442 (2002) [hereinafter Wade, Commentary]; Cheryl L. Wade, *The Impact of U.S. Corporate Policy on Women and People of Color*, 7 J. GENDER, RACE & JUST. 213, 235 (2003) [hereinafter Wade, *The Impact of U.S. Corporate Policy*].

[116] Wade, *The Impact of U.S. Corporate Policy*, *supra* note 115, at 235.

[117] *See* John W. Cioffi, *Restructuring "Germany, Inc.": The Politics of Company Takeover Law Reform in Germany and the European Union*, 24 LAW & POL'Y 355, 362–63 (2002); Wade, Commentary, *supra* note 115, at 442–43; Wade, *The Impact of U.S. Corporate Policy*, *supra* note 115, at 235.

[118] Claire Moore Dickerson, *Sex and Capital: What They Tell Us About Ourselves*, 79 ST. JOHN'S L. REV. 1161 (2005).

[119] *Id.* at 1184.

CONCLUSION

Today, there seems to be a consensus that old-fashioned racism is on the decline. The very success of civil rights remedies has been the undoing of their traditional justification as a way to eradicate animus. For many, the racial divide looms large and unbridgeable, however pure the motives of those on the privileged side of the color line. Segregation and inequality remain a pervasive feature of everyday life, and the perplexing question is whether law can reach this social problem without a bigot to blame. Civil rights law is at a crossroads in its search for alternative explanations and strategies. Though the answers are distinct, both economists and critical race theorists have been willing to move beyond animus to account for racial disparities and to tailor remedies accordingly. Only time will tell whether our constitutional law and culture are similarly prepared to embrace these ideas as a way to reinvigorate the quest for racial justice.