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## Racial Classification and Ascriptive Injury

Paul Gowder

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## RACIAL CLASSIFICATION AND ASCRPTIVE INJURY

PAUL GOWDER\*

*Slow in my blindness, with my hand I feel  
the contours of my face. A flash of light  
gets through to me. I have made out your  
hair,  
color of ash and at the same time, gold.  
I say again that I have lost no more  
than the inconsequential skin of things.  
These wise words come from Milton, and  
are noble,  
but then I think of letters and of roses.  
I think, too, that if I could see my features,  
I would know who I am, this precious  
afternoon.*

—Borges<sup>1</sup>

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\* Associate Professor of Law, Adjunct Associate Professor of Political Science (by courtesy), University of Iowa. Member, 2014–2015, Institute for Advanced Study, School of Social Science. For thoughts, comments, and assistance, I thank participants in the Iowa Legal Studies Workshop, the 2014 Midwest People of Color Legal Scholarship Conference, the 2014 symposium “Outside the Box: A Day of Legal Philosophy at Iowa,” the Fifth Annual John Mercer Langston Writing Workshop, the 2014 Mid-Atlantic Law and Society Association Meeting, a faculty workshop at Loyola University Chicago, a talk at U.C. Irvine School of Law, and far more individuals than can be singled out, both separately and as a part of the above-noted workshops, but including particularly Christina Bohannon, Kevin Brown, Bill Buss, Paul Butler, Ruth Colker, Frank Rudy Cooper, Marcella David, Jovana Davidovic, Tom Gallanis, Jonathan Glater, Tanya Hernandez, Herb Hovenkamp, Darren Hutchinson, Kimberly Jade Norwood, Osagie Obasogie, Mark Osiel, Todd Pettys, Cedric Powell, Song Richardson, Caroline Sheerin, SpearIt, and my excellent research assistants, Brett Holubeck and Eric Schmitt, as well as highly skilled yet unusually tolerant editors at the Washington University Law Review.

1. JORGE LUIS BORGES, *A Blind Man*, in *SELECTED POEMS JORGE LUIS BORGES* 357 (Alexander Coleman ed., Alastair Reid trans., 1999).

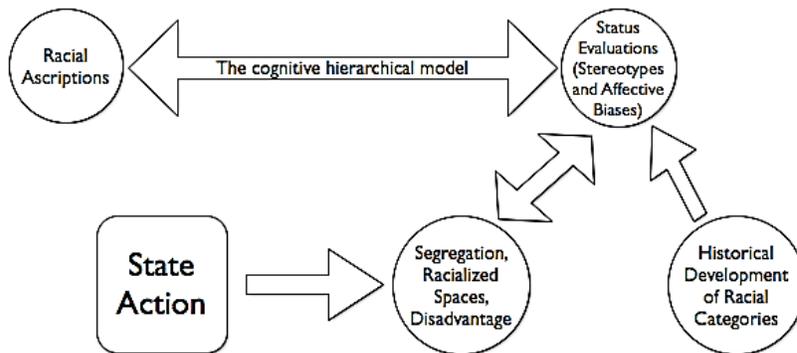
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## INTRODUCTION

This Article describes a new model of the relationship between racial ascriptions on an individual level, private racial bias, social disadvantage, and state action, called the *cognitive hierarchical model*. It argues that racial hierarchy in the wider culture affects our individual cognitions, and vice versa. Status evaluations turn out to be built deep into our racial perceptions. Because the state exercises a continuing influence on our culture and the cognitions it generates, this Article defends new grounds for constitutional challenge to state complicity in racial hierarchy. To be ascribed a stigmatized racial identity is to be subject to continuing harm, which this Article calls *ascriptive injury*. The state, by participating in the continual creation and reinscription of stigmatized racial identities, contributes to such ascriptive injuries, which for that reason must be subject to a constitutional remedy.

The following diagram summarizes the entire cognitive hierarchical model, including the key dynamic, the bidirectional relationship between racial identities and hierarchical status evaluations. Arrows indicate causal relationships.



Conventional American presumptions about our individual, day-to-day references to race are incorrect.<sup>2</sup> In the legal system as in ordinary life, we talk as if racial categories track mostly clear biological and hereditary divisions, and using such categories merely means observing and referring to these divisions. This Article will call that presumption the “naive concept of race.” Even sophisticated observers view racial categories as socially constructed, but do not always identify those categories as normative.<sup>3</sup> But the evidence from history, demography, sociology, and psychology shows otherwise. In fact, our everyday acts of racial classification—assigning racial categories to the persons we observe—are acts of hierarchical social stratification. The latest research reveals that we even assign racial identities in part based on nonracial status information and that those assignments change as status information changes.<sup>4</sup>

2. In the language of philosopher Sally Haslanger, our “manifest concept” of race and our “operative concept” have come apart. See SALLY HASLANGER, RESISTING REALITY: SOCIAL CONSTRUCTION AND SOCIAL CRITIQUE 387–90 (2012) (explaining that manifest concept is how we think we use a concept and operative concept is how the concept actually functions in our social world).

3. There are exceptions, including HASLANGER, *supra* note 2, who has recognized that these categories inherently are hierarchical; this Article helps support her claims with concrete evidence. In future work, I will more directly consider the role of philosophical conceptual analyses like Haslanger’s in helping the legal system as well as social science sort through the problems of racial hierarchy.

4. This Article refers primarily to third-party racial assignments, or “racial ascriptions”: when one person decides that someone else is a member of some race.

Moreover, those status evaluations are built into our low-level perceptual processes: neuroscientific evidence reveals that hierarchical status evaluations occur even at the level of visual processing, as we observe and place persons into racial categories.<sup>5</sup>

Consequently, persons ascribed racial categories in the contemporary United States<sup>6</sup> are subjected to hierarchical social identities. Those at the bottom of the hierarchy are subjected to a tainted (or stigmatized) identity. In the United States, the stigma particularly falls on those ascribed the identity “black.” This Article primarily focuses on this racial category for two reasons. First, it describes the victims of the starkest hierarchy in our history and contemporary politics. Second, it has been the subject of the most extensive investigation in social science and history (although where evidence is available with respect to other categories I have drawn on it).<sup>7</sup>

Our racial categories acquire legal implications because the state supports them. The stigmatized racial ascriptions we suffer under today are constructed in substantial part out of implicit and explicit stereotypes and implicit affective biases, which are in turn facilitated by physical isolation and by social disadvantage visibly associated with racial divisions. The state, with its laws, props up both of these phenomena.

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5. See *infra* Part II.B.

6. In view of the cultural contingency of racial cognition (about which see *infra* III.A), we should not expect other countries to “do race” the same way. However, see HASLANGER, *supra* note 2, at 237 (describing similar dynamics in Brazil, in which social class and education feed into racial ascriptions).

7. See, e.g., Michael S. North & Susan T. Fiske, *Social Categories Create and Reflect Inequality: Psychological and Sociological Insights*, in *THE PSYCHOLOGY OF SOCIAL STATUS* 249 (Joey T. Cheng, Jessica L. Tracy & Cameron Anderson eds., 2014) (“Primarily, psychological social psychology has focused on Black and White categories of inequality.”). However, it is important to note that this focus on blackness is not meant to exclude the application of the theory to other nonwhite groups in American society. Rather, it reflects only constraints of space and of the existing scientific literature. Mindful of the critique of race scholarship’s excessive focus on the black/white binary, see, e.g., Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 *DENV. U. L. REV.* 329, 350–51 (2006) (describing critique of early critical race theory’s focus on blackness and whiteness), further scholarship is needed to investigate the application of the cognitive hierarchical model to other racial ascriptions.

This Article uses “black” rather than “African-American” to capture the *visual*, not geographic, nature of the racial cleavage in our society. We apply racial categories upon looking at someone, and on the naive concept we usually do so on the basis of skin color. Also, geographic labels for races are particularly misleading: it’s possible for someone to have physical characteristics that are usually classified as “black” even though his or her ancestors are mostly from continents other than Africa, and in day-to-day practice we do not inquire into the ancestral origins of someone beyond a generation or two. Finally, there is substantial evidence that practices of discrimination and hierarchy revolve around skin hue even apart from categorical ascriptions of geographic heritage. See *generally* COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POSTRACIAL AMERICA (Kimberly Jade Norwood ed., 2013); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 *DUKE L.J.* 1487 (2000).

In particular, laws establishing municipal boundaries and other arbitrary geographic divisions in access to public goods, which are de facto allocated along racial lines, support both the physical isolation of those with stigmatized racial identities and the continuing visible disadvantage of those groups. While this is certainly not the only way that the state supports racial hierarchy, such laws provide important support to racial stigma. Physical isolation limits the exposure of whites to nonwhites, leading to “illusory correlation”: a phenomenon in which negative attributes are more readily attributed to nonwhites.<sup>8</sup> Disadvantage also supports stereotypes and affective bias. For example, black poverty supports the stereotype that blacks are lazy, and disparate policing in black communities supports the stereotype that blacks are prone to crime.

Because the state is complicit in creating racial stigma and its consequences, Equal Protection doctrine should expand to encompass a remedy for ascriptive injury.<sup>9</sup> In the words of Louis Brandeis, “Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”<sup>10</sup> Today, our government teaches racial hierarchy by offering the support of its laws to the practices that make it up, and by neglecting to intervene on the continuing conditions created by its laws of the past. It must be made to stop doing so.

This dynamic leads to (at least) two concrete doctrinal consequences. First, because segregation supports stigmatized racial identities, legal regimes that create or support racialized spaces—physical spaces socially identified with subordinated or superordinated racial groups, along which benefits and burdens are allocated—should be subject to Equal Protection challenge regardless of whether those spaces are the product of conscious racial discrimination. This requires a modification (though not a complete abandonment) of the rule in *Washington v. Davis* requiring state racial discrimination to be “intentional” before triggering strict scrutiny.<sup>11</sup> It also requires a modification of the rule, most clearly expressed in *Parents Involved in Community Schools v. Seattle School District No. 1*, that state remedial action against racialized spaces, such as de facto segregated schools, is only permissible to the extent the racialized spaces are the product of intentional state discrimination.<sup>12</sup>

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8. See discussion *infra* notes 62–64 and accompanying text.

9. I thank Jonathan Glater for pressing me to make this inferential step explicit.

10. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

11. 426 U.S. 229, 239 (1976).

12. 551 U.S. 701, 721 (2007).

Second, legal injuries both supporting and stemming from stigmatized racial identities should be understood as continuing, not isolated, injuries to every member of the class potentially subjected to those injuries. Thus, cases such as *City of Los Angeles v. Lyons*, which denied standing for injunctive relief to the victim of a seemingly racially discriminatory chokehold, should be overruled.<sup>13</sup>

Ultimately, this Article aims to reclaim the concept of colorblindness from the opponents of affirmative action. Stripping state support from hierarchical and ascriptive racial categories will promote, or at least stop standing in the way of, a genuine colorblindness—one in which individuals as well as society are blind to the status classifications built into our practice of drawing racial categories. But the road to true colorblindness must go through public as well as private efforts at integration, and those efforts cannot be effective without paying attention to race.<sup>14</sup>

The colorblindness of this Article is not what conventional discussions of the idea take colorblindness to be. Typically by “colorblindness” it is meant that government actions should not take race into account. Critical race scholars have rightly argued that such colorblindness is no solution to the problem of American racial hierarchy.<sup>15</sup> The reason that these scholars are right, this Article argues, is because such colorblindness—in the unlikely event the American governments ever managed to achieve it—would be embedded in a self-reinforcing system of racial hierarchy where the consequences of past and present intentional racial discrimination persist and require conscious remediation.

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13. 461 U.S. 95 (1983).

14. A word of caution. This Article does not argue that racial identity, though stigmatized, cannot be the appropriate subject of solidarity or pride. Racial solidarity and racial stigma operate from different points of view. Racial solidarity and pride are first-person phenomena, relating to roles one accepts and identities one endorses, respectively. By contrast, racial stigma is primarily a third-person phenomenon. That being said, phenomena such as stereotype threat suggest that racial stigma can be experienced from the first-person standpoint as well. See *infra* note 68 and accompanying text. In general victims of racial stigma are involuntarily assigned identities and the negative social consequences that flow from those identities. One of the many injuries of racial stigma is that it makes it harder to achieve racial (or other) pride: to be ascribed a stigmatized race is to lack the social support for a positive self-identification. See BELL HOOKS, *WE REAL COOL: BLACK MEN AND MASCULINITY*, at x (2003) (describing constraints stigmatic stereotypes impose on black men’s self-identification).

However, the notion of racial pride must be taken with some caution. Kwame Anthony Appiah has expressed the worry that racial ascriptions may be so powerful that insisting on racial identities (where “identities” bears a first-person, chosen meaning, as opposed to third-person “ascriptions”) swamps other features of the individual, and in doing so makes the bearers of salient (i.e., non-normative, nonwhite) racial identities worse off and less free to be individuals. See K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 97–99 (1996).

15. See Mutua, *supra* note 7, at 334–37.

By contrast, this Article argues for a different kind of colorblindness, at the end of a very long road. True colorblindness cannot be directly achieved just by willing the suppression of our racial cognitions. Rather, it can only be achieved indirectly, by the color-conscious abolition of the social circumstances that build racial hierarchy into our very perceptions. Directly pursuing colorblindness by pretending that race is not relevant to contemporary decisions is likely to reinforce those social circumstances, and in doing so defeat the goal of true colorblindness. For that reason, colorblindness should be understood as an instance of what Jon Elster has called “states that are essentially by-products”: goals that cannot be achieved directly.<sup>16</sup>

The cognitive hierarchical model also has the potential to help provide what might be called microfoundations for the project of critical race theory. In 2003, Devon Carbado and Mitu Gulati pointed out that critical race theory ordinarily operated “at the macro level, focusing primarily on legal and sociopolitical processes,” and they suggested more attention be paid to “the interpersonal ways in which race is produced.”<sup>17</sup> At the time, critical race scholars had not yet pursued the psychological path to those microfoundations very far.<sup>18</sup> This has changed, and there is now an active psychological wing of the critical race theory research program.<sup>19</sup> To that literature this Article contributes the explicit recognition of what has heretofore largely been implicit: the psychology of race interacts with the social formation of race—another topic of great interest within critical race theory.<sup>20</sup> That is, the social phenomena that construct our racial categories directly influence and are influenced by psychological phenomena on the individual level.<sup>21</sup>

The cognitive hierarchical model also contributes to the account of a long-recognized phenomenon in critical race theory: the interaction between expressive and more concrete forms of racial subordination.

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16. JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 43 (1983). Elster is skeptical of even indirect pursuit of such states, but we need not go so far to understand the difficulty of directly pursuing colorblindness. *See id.* at 43–44, 86–100.

17. Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 *YALE L.J.* 1757, 1760–61 (2003) (reviewing *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002)).

18. *Id.* at 1764–65.

19. *See, e.g.*, works cited *infra* Part II.

20. *See generally* Carbado & Gulati, *supra* note 17, at 1769–71 (discussing racial formation theory).

21. It thus aims to help answer the “critical call” raised by Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 *CONN. L. REV.* 1253, 1349 (2011), “to help contribute to a counter-narrative of how prevailing ideas about race have come to be.”

Expressive, or “symbolic,” progress can substitute for, and thus impair, material progress.<sup>22</sup> However, the absence of expressive progress can also impair material progress. This Article contributes to the account of the latter phenomenon by tracing the connections between the symbolic construction of race and concrete racial disadvantage through the psychological research on racial cognition and conceptualization.

This Article is divided into four Parts. Part I identifies the doctrinal difficulties created by the U.S. Supreme Court’s failure to recognize the insidious effect of state action on racial cognition. It focuses on two lines of caselaw, each represented by two central cases. First is the line of cases requiring intent to create a remedy for state racial discrimination, either in the form of a suit under the Equal Protection Clause (*Washington v. Davis*) or in the form of a compelling interest sufficient to permit race-conscious integration (*Parents Involved*).<sup>23</sup> Second is the line of cases denying standing to seek injunctive relief based on supposedly isolated race-based injuries (*Lyons*), or state support for racial stigmas (*Allen v. Wright*).<sup>24</sup>

Part II discusses the social practice of making racial classifications. It argues, on the basis of sociological and psychological evidence, that our practice of identifying individuals with races is tainted by hierarchical social statuses: identifying someone as a member of a racial group involves making a judgment about that person’s place in a social hierarchy. With racially subordinated identities (the evidence is mostly about blackness), these judgments are typically negative and harmful. This is true even at the perceptual level. Neuroscientists and psychologists have shown that attitudes toward subordinated races leak out even as faces are first perceived, and influence the racial content of those perceptions.<sup>25</sup> Moreover, the relationship is bidirectional. Racial ascriptions influence the

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22. See *id.* at 1313 n.192 (“[R]acial oppression is constituted by symbolic [as] well as material dimensions, however symbolic change is often taken as indicative of substantive transformation.”).

23. To be more precise, the objection in this Article is to what Ian Haney-López calls “malicious intent” doctrine. Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1785 (2012). For Haney-López, “contextual intent” is the intent doctrine used at the time of the civil rights movement and referred, not to any specific state of mind on behalf of some government agent, but to behavior that was “generally understood” to be discriminatory—in the nature of the behavior itself. *Id.* at 1785, 1790. By contrast, “malicious intent” refers to a state of mind: the state actor intentionally pursues injury or benefit to some targeted racial group(s). *Id.* at 1833. Haney-López criticizes scholars who blame *Washington v. Davis* for the Court’s move from contextual intent to malicious intent. *Id.* at 1785, 1814–15. This Article need not take a position on that debate—*Washington v. Davis* is used here to stand in for the entire line of cases decided under its authority, including those that have relied on malicious intent. When this Article uses “intent,” it is meant to refer to the contemporary (“malicious”) understanding of intent doctrine.

24. 468 U.S. 737 (1984).

25. See *infra* Part II.B.

stereotypes and attitudes we apply to people, and those stereotypes and attitudes in turn influence racial ascriptions.<sup>26</sup>

Part III traces out the causes of these individual judgments in group hierarchy. It argues that Americans' individual acts of ascriptive racial classification are rooted in social practices of racial oppression. It then traces the historical roots of these practices from seventeenth-century Virginia to the present and describes the intertwined actions of the state and private individuals in supporting them, both in generating the original racial classifications and in reinforcing their association with status categories.

Part IV argues that many of our municipal and other boundaries are subject to Equal Protection challenge, contra the intent requirement described in Part I, because they support the stigma described in Part II by propping up the inequalities described in Part III. This part is based on my previous research on the relationship between the normative ideal of the rule of law and Equal Protection.<sup>27</sup> Part IV also argues that the standing rules described in Part I must be modified to provide access to injunctive relief challenging state perpetuation of hierarchical racial categories.

## I. HOW CURRENT DOCTRINE MISSES RACIAL HIERARCHY

### A. *The Intent Requirement*

In 1976, the Supreme Court settled a persistent question under Equal Protection Clause doctrine: would a plaintiff be able to challenge racially disparate state action for its disparate impact, absent a showing that some state agent intended to create such an impact?<sup>28</sup> The Court squarely answered: no.<sup>29</sup> The plaintiffs in *Washington v. Davis* had challenged a pre-employment test used to hire police officers, on the theory that the test in question disproportionately excluded black officer candidates and had not been shown to be relevant to the job.<sup>30</sup> However, this standard applies in broader contexts, including when de facto racial segregation is subject to constitutional challenge. Plaintiffs must show either by direct evidence

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26. See *infra* Parts II, III.A.

27. See Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021 (2014) (explaining relationship between public reason conception of the rule of law principle of generality and Equal Protection); see also Paul Gowder, *The Rule of Law and Equality*, 32 L. & PHIL. 565 (2013) (giving theory of the rule of law).

28. Contrast the constitutional rule with Title VII, which explicitly provides for a disparate impact cause of action in employment discrimination cases. 42 U.S.C. § 2000e-2(k) (2010).

29. *Washington v. Davis*, 426 U.S. 229, 238–48 (1976).

30. *Id.* at 233–36.

or by inference that the state intended to bring about segregation—a state policy that merely causes segregation, without such intent, is not subject to challenge.<sup>31</sup>

This rule applies not just to private causes of action that challenge state racial discrimination, but also to preemptive state action aiming to abolish the state's own racial discrimination. Under current doctrine, the state ordinarily cannot act preemptively unless the racial discrimination to be remedied is intentional. Thus, in *Parents Involved*, the Court held that school desegregation cannot be carried out, even if a school is de facto segregated (what the Court called “racial imbalance in the schools, without more”),<sup>32</sup> in the absence of intentional state discrimination.<sup>33</sup> The Court did so over a dissent from Justice Breyer, who pointed out that the state has a compelling interest “in overcoming the adverse educational effects produced by and associated with highly segregated schools”<sup>34</sup>—an interest that, on its terms, is indifferent to whether the segregation is de jure or de facto, intentional or inadvertent—as well as the presence of “persisting injustices” traceable to historical discrimination<sup>35</sup> and its impact on “housing patterns, employment practices, economic conditions, and social attitudes.”<sup>36</sup>

### B. Ignoring Racial Harm

The Court has also persistently held that blacks lack standing to seek injunctive relief for continued state injury to their equal standing, even in cases that would otherwise be subject to Equal Protection challenge. The leading case along these lines is *Lyons*. Adolph Lyons was a black man, subjected to a highly dangerous chokehold after being pulled over for a burned-out taillight.<sup>37</sup> In view of the general racial patterns of the exercise of police discretion,<sup>38</sup> it seems likely that Mr. Lyons was subjected to this

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31. See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (rejecting claim with respect to de facto segregation caused by zoning policy, in absence of intent showing); *City of Memphis v. Greene*, 451 U.S. 100 (1981) (rejecting challenge to street closure separating black neighborhood from white neighborhood on basis that discriminatory intent had not been shown); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (plaintiff had offered sufficient evidence to permit inference of intentional school segregation).

32. 551 U.S. 701, 721 (2007) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977)).

33. *Id.* at 720–21.

34. *Id.* at 839 (Breyer, J., dissenting). He also cites evidence of resegregation since the end of the court-ordered desegregation era. *Id.* at 869–72.

35. *Id.* at 844–45.

36. *Id.* at 838.

37. 461 U.S. 95, 114–15 (1983) (Marshall, J., dissenting).

38. See discussion *infra* Part III.C.

chokehold because of his race, but the police did not include such discrimination in their official policy. The Court had previously held, in another standing case—*Rizzo v. Goode*—that plaintiffs lack standing to sue for injunctive relief against racially-disparate police abuse unless that abuse was carried out as a matter of policy.<sup>39</sup> Accordingly, while in the background, the issue of race discrimination was not explicitly presented in *Lyons*. *Lyons* instead brought a claim alleging that the department, as a matter of policy/practice, applied chokeholds arbitrarily. However, because he could not show that he personally was likely to be subjected to chokeholds in the future, he was denied standing.<sup>40</sup> The combination of *Lyons* and *Rizzo* suggests that even in actions against egregiously racist state conduct, a plaintiff in an injunctive relief case must show (a) that the conduct was a matter of policy, and (b) that the policy essentially commands the plaintiff be subject to that conduct in the future. This is an impossibly high standing bar.<sup>41</sup>

Similarly, in *Allen v. Wright*, the Court denied standing to plaintiffs seeking to challenge the IRS's failure to enforce its policy of denying tax exemptions to racially discriminatory private schools.<sup>42</sup> The plaintiffs had attempted to bring a class action, alleging that black parents and students in general were harmed by state support for segregated schools and assistance to private efforts to avoid desegregation.<sup>43</sup> The court entertained the notion that plaintiffs had “a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race.”<sup>44</sup> However, even as the Court acknowledged that “this sort of noneconomic injury is one of the most serious consequences of discriminatory government action,” it nonetheless held that the plaintiffs had not “personally been denied equal treatment,” and accordingly rejected their claim to standing.<sup>45</sup>

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39. 423 U.S. 362 (1976).

40. *Lyons*, 461 U.S. at 105–07; see also *O’Shea v. Littleton*, 414 U.S. 488 (1974) (rejecting injunctive race discrimination claims against state court for failure to show personal injury).

41. Despite this, the Court sometimes finds that whites have standing to challenge affirmative action programs without similar evidence of a redressable injury. See generally Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1455–65 (1995) (describing pattern of granting standing to white challengers to programs that benefit minorities, while denying standing to minority challengers to programs that disadvantage them); Adam D. Chandler, *How (Not) to Bring an Affirmative-Action Challenge*, 122 YALE L.J. ONLINE 85 (2012), [http://www.yalelawjournal.org/pdf/1102\\_o64bg8c4.pdf](http://www.yalelawjournal.org/pdf/1102_o64bg8c4.pdf) (raising similar points with respect to *Fisher v. Texas* affirmative action litigation), archived at <http://perma.cc/9ZU6-Q963>.

42. 468 U.S. 737, 743–45 (1984).

43. *Id.*

44. *Id.* at 754.

45. *Id.* at 755 (citation omitted).

In Part IV, this Article will argue that both of these lines of cases should be partially overruled. The intent cases should be overruled (1) to the extent they permit the state to unintentionally support the existence of racialized spaces, and thereby, support existing racial hierarchies and stigmatized racial identities, and (2) more broadly to permit challenges to all state support for racial hierarchy, intentional or otherwise. The standing cases should be overruled to the extent they fail to recognize the continuing injury suffered by each individual in a subordinated racial group from hierarchical racial ascriptions as well as their concrete consequences, and refuse a remedy to those plaintiffs that bring suit against the state for reinforcing those ascriptions.

## II. HOW IS RACIAL CLASSIFICATION HIERARCHICAL?

This Part presents the core of the cognitive hierarchical model: the claims that when we see race, we also see status, and that status judgments affect our racial judgments, and vice versa. The model rejects the naive concept of race, according to which race is first observed as a biological category, and then status hierarchies are applied after the fact and only by “racists.” It suggests instead that ordinary people who would not ordinarily be described as racists assign high status to whiteness and low status to blackness.<sup>46</sup>

Part II.A describes the evidence for this phenomenon as it operates among social groups, via stereotypes and attitudinal biases. It relies on the well-known psychological evidence for implicit attitudes and stereotypes, and demonstrates that when people assign membership in a subordinated racial group to someone, they place that person in a group social hierarchy. Part II.A further details the consequences of those psychological assignments.<sup>47</sup>

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46. This is a familiar claim of critical race theory, which usually goes under the name “white supremacy,” and which this Article locates in a novel theoretical framework. *See generally* RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 7–10 (2012) (summarizing the research program).

47. Some (though not all) of the results in parts II.A and II.B are subject to a risk of racial bias themselves, due to either underrepresentation of nonwhite groups in experimental subject populations or failure to account for different effects among subjects in different racial groups. It is well known that blacks and whites perceive racial discrimination differently, *see generally* Russell K. Robinson, *Perceptual Segregation*, 108 *COLUM. L. REV.* 1093 (2008) (describing differing perceptions of racial hierarchy between whites and blacks), and more deeply rooted psychological processes around race likely operate differently across racial lines as well (not least because the informational differences across racial groups that Robinson describes could influence things like the content of stereotypes and affective biases). *See, e.g.*, Margaret Shih et al., *The Social Construction of Race: Biracial Identity and Vulnerability to Stereotypes*, 13 *CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH.* 125 (2007)

Part II.B describes the evidence for the hierarchical nature of racial ascription as it operates in individual acts of racial perception and classification. Individual judgments, at least in some instances, precede group judgments: we conclude someone is of low status and, for that reason, ascribe a stigmatized racial group to that person.

Finally, Part II.C gives a novel theoretical framework—the heart of the cognitive hierarchical model—for understanding our social practice of racial perception in light of the evidence.

By way of caveat, I am a consumer, not a producer, of psychological and sociological research. The theory given in this Article is best understood as a non-comprehensive reading of a body of scientific work for the theoretical traction it might offer on social phenomena critical to constitutional law. For that reason, it is necessarily tentative and subject to revision or rejection from psychologists and sociologists. Such is the risk of interdisciplinarity; the reward for undertaking that risk is the opportunity to draw an expansive, cross-disciplinary picture of incredibly complex social phenomena, like race. Like a map, the further out we zoom, the more we can see the shape of the land, but only with some corresponding loss of detail. However, maps are necessary for a full understanding of our world, racial as well as physical, and someone has to sketch them out, with necessarily incomplete knowledge, before the interrelationships between these different areas of study can be seen. The mapmaker must write with an appropriate degree of humility.<sup>48</sup>

### A. *Racial Hierarchy*

Our racial classification practices are hierarchical at two levels. This subpart develops the claim that racial classification is hierarchical at the group level. Individuals within our culture (both members of hierarchically superordinate groups and of subordinate groups, e.g., who have internalized racial stigma) attribute negative, low-status

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(giving example). However, as the socially dominant racial group, the perceptions and behaviors of those identified as white are most likely to influence overall social, cultural, and legal practices in the United States; accordingly, it is appropriate to build a theory concerning such practices from studies that primarily focus on their cognitions.

48. This approach follows a substantial tradition of transdisciplinary scholarship on race. *See* IMANI PERRY, *MORE BEAUTIFUL AND MORE TERRIBLE: THE EMBRACE AND TRANSCENDENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 4 (2011) (listing other scholars who have taken the “bricolage” track). For a more comprehensive overview of the psychological research on the process of racial and other group classification, see Galen V. Bodenhausen, Sonia K. Kang & Destiny Peery, *Social Categorization and the Perception of Social Groups*, in *THE SAGE HANDBOOK OF SOCIAL COGNITION* 311–29 (Susan T. Fiske & C. Neil Macrae eds., 2012).

characteristics to subordinated racial groups and have negative affective responses to them. This social practice indirectly affects individuals ascribed subordinated identities by subjecting them to a higher probability of social disadvantage. While this claim is fairly conventional, this subpart clarifies its meaning. The next two subparts develop the more novel claim that racial classification is hierarchical on the individual level.

First, the claim made more precise is this: to describe someone as a member of a race is to describe that person as a member of a group, where the groups in question are ordered in a status hierarchy. On the group-level version of the claim, to say race is hierarchical is not to say that identifying an individual's race is to identify his or her place in a social hierarchy. The hierarchy in a racial category applies directly to groups, not individuals—black people as a group are socially subordinated, not black people as individuals.<sup>49</sup> Individual members of a socially subordinated group can themselves lack social subordination, because numerous variables can affect one's place in an overall social hierarchy, only one of which is race.

The best way to understand the individual impact of group hierarchy is probabilistic. Racial hierarchy entails that the probability of a person experiencing social disadvantage increases conditional on holding a subordinated racial ascription; the probability of a person experiencing social advantage increases conditional on holding a superordinated racial ascription. Importantly, this probabilistic claim is causally neutral: it is consistent both with the inflicting of disadvantage on those with subordinate racial ascriptions and with the inflicting of subordinate racial ascriptions on those who have suffered disadvantage. To say that racial hierarchy is a function of racial classification, as this Article does, is to say that the act of identifying a person as a member of one of those groups increases the probability that social subordination is inflicted on that person.

We must add one more condition to the definition of racial hierarchy. It should be distinctively racial. For, in principle, racial groups could be probabilistically associated with social disadvantage due to nonracial mediating factors.<sup>50</sup> For example, a group of immigrants of color could be disadvantaged not in virtue of their racial ascriptions, but in virtue of their recent migration. To exclude such cases, we should limit the notion of racial hierarchy to those cases where an individual experiences a higher

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49. This is a weaker claim than that advanced by HASLANGER, *supra* note 2, at 326–37.

50. *Cf.* HASLANGER, *supra* note 2, at 331–32 (elucidating distinction between primary and secondary oppression).

probability of being disadvantaged (advantaged) *due to* his or her being ascribed a subordinate (superordinate) racial identity; or, to reverse the causal direction again, an individual experiences a higher probability of being ascribed a subordinate (superordinate) racial identity *due to* his or her experience of social disadvantage (advantage).

Evidence for the claim that the United States currently is a racial hierarchy comes primarily from the psychological literature on stereotyping and implicit affective bias. Together, this literature suggests that a substantial proportion of the population experiences negative affect from, and draws negative inferences about, stigmatized racial groups, and acts on it. And it suggests that stereotypes and affective biases are activated by the salience of racial categories: to attend to race is to have these negative cognitions. A description of this evidence follows.

Today, scholars in psychology and sociology typically focus on implicit or unconscious racism, reflecting the social sanctions attached to acting out conscious racism. However, it is important to note that the latter still exists and can manifest in settings where acting out racist preferences cannot be punished. For example, a substantial number of whites voting in the 2008 Democratic primary were willing to admit to pollsters (if not to their friends and neighbors) that they voted against Barack Obama due to his race.<sup>51</sup> Media also replicate stereotypes of blacks in a way that is hard to describe as “unconscious” or “implicit.”<sup>52</sup> Even our major social institutions occasionally get caught in egregious explicit racial bias. For example, in 2009, Wells Fargo was sued for targeting black communities with disadvantageous subprime loans. According to one employee’s affidavit, “[t]hey referred to subprime loans made in minority communities as ghetto loans and minority customers as ‘those people have

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51. Galen V. Bodenhausen & Jennifer A. Richeson, *Prejudice, Stereotyping, and Discrimination*, in *ADVANCED SOCIAL PSYCHOLOGY: THE STATE OF THE SCIENCE* 347 (Roy F. Baumeister & Eli J. Finkel eds., 2010).

52. See generally Tia Tyree, *African American Stereotypes in Reality Television*, 22 *HOW. J. COMM.* 394 (2011) (reviewing literature on stereotyped representations of blacks on television, and reporting on replication of these stereotypes in contemporary reality TV). Television representations of black stereotypes do influence attitudes toward blacks. See, e.g., Travis L. Dixon & Keith B. Maddox, *Skin Tone, Crime News, and Social Reality Judgments: Priming the Stereotype of the Dark and Dangerous Black Criminal*, 35 *J. APPLIED SOC. PSYCHOL.* 1555 (2005) (reviewing literature on disparate news association of blacks with crime, and showing, via experimental evidence, that crime news stories involving darker-skinned blacks elicited greater emotional response). See also Travis L. Dixon & Daniel Linz, *Race and the Misrepresentation of Victimization on Local Television News*, 27 *COMM. RES.* 547 (2000) (providing evidence for overrepresentation in television news of whites as crime victims and blacks as perpetrators).

bad credit', 'those people don't pay their bills' and 'mud people.'<sup>53</sup> In December 2013, Ally Financial settled a Department of Justice suit alleging it charged higher interest rates to racial minorities, independent of their objective creditworthiness.<sup>54</sup> In general, the social unacceptability and yet persistence of some explicitly racist views is vividly illustrated in Eduardo Bonilla-Silva's account of interviewees who descend into total incoherence as they utter things like their opposition to interracial marriage, thrown by the dissonance between their stated egalitarian ideologies and the racist views they were affirming.<sup>55</sup>

However, as noted, the chief focus of contemporary research is in implicit racism.<sup>56</sup> On the "Implicit Association Test," over sixty percent of every racial group except blacks displayed an affective bias for whites over blacks.<sup>57</sup>

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53. Michael Powell, *Bank Accused of Pushing Mortgage Deals on Blacks*, N.Y. TIMES, June 6, 2009, [http://www.nytimes.com/2009/06/07/us/07baltimore.html?%2359;gwt=regi&%2359=&\\_r=2&%2359;=&pagewanted=all](http://www.nytimes.com/2009/06/07/us/07baltimore.html?%2359;gwt=regi&%2359=&_r=2&%2359;=&pagewanted=all). The suit and several others were ultimately settled for \$175 million. Charlie Savage, *Wells Fargo Will Settle Mortgage Bias Charges*, N.Y. TIMES, July 12, 2012, <http://www.nytimes.com/2012/07/13/business/wells-fargo-to-settle-mortgage-discrimination-charges.html>.

54. Chris Isidore, *Ally to Pay \$98 Million for Car Loan Bias*, CNNMONEY, Dec. 20, 2013, <http://money.cnn.com/2013/12/20/news/companies/ally-car-loan-discrimination/>, archived at <http://perma.cc/B6Y5-VJRU>. As of this writing, the City of Los Angeles has just filed yet another lawsuit, alleging mortgage lending discrimination against J.P. Morgan Chase. Complaint, *City of Los Angeles v. JPMorgan Chase & Co.*, No. 14-04168 (C.D. Cal. May 30, 2013), available at [https://consumer.mediallc.files.wordpress.com/2014/05/lacityp\\_028287.pdf](https://consumer.mediallc.files.wordpress.com/2014/05/lacityp_028287.pdf), archived at <http://perma.cc/Q9MD-SSYQ>. According to that lawsuit, "a regression analysis that controls for credit history and other factors demonstrates that an African-American JPMorgan borrower was 1.795 times more likely to receive a predatory loan than a white borrower, and a Latino borrower 1.576 times more likely." Complaint at 6, *City of Los Angeles v. JPMorgan Chase & Co.* (Midway through the editorial process for this Article, this complaint was dismissed on procedural grounds with leave to refile. See Order Granting Defendants Motion to Dismiss With Leave to Amend, *City of Los Angeles v. JPMorgan Chase & Co.*, No. 14-04168 (C.D. Cal. Aug. 5, 2014), available at <http://www.clearinghouse.net/chDocs/public/FH-CA-0015-0002.pdf>.

55. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 115–18 (4th ed. 2014).

56. See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

57. Greenwald & Krieger, *supra* note 56, at 958. Strikingly, the test in question was carried out on a self-selected internet sample. *Id.* Ordinarily, we might expect such subjects to be less racist than the general population, since they were sufficiently self-aware to choose to take a test about their racial attitudes. It is important to note that the Implicit Association Test, and the notion of measuring implicit bias in general, has been subject to some criticism. See, e.g., Etienne P. LeBel & Sampo V. Paunonen, *Sexy But Often Unreliable: The Impact of Unreliability on the Replicability of Experimental Findings with Implicit Measures*, 37 PERSONALITY AND SOC. PSYCHOL. BULL. 570 (2011), and literature cited therein; Anthony G. Greenwald et al., *Consequential Validity of the Implicit Association Test*, 61 AM. PSYCHOLOGIST 56, 60 (2006) (citing and answering IAT critics). However, there is evidence that implicit attitude measures display substantially better predictive validity than self-report measures of black-white racial bias. See Anthony G. Greenwald et al., *Understanding and Using the Implicit*

Researchers have distinguished implicit stereotypes and implicit prejudice, proposing that the former are evaluative (i.e., hold descriptive content, like “blacks are lazy” or “blacks are good at sports”) and the latter are affective (e.g., having an aversion to blacks).<sup>58</sup> The two can be experimentally distinguished (e.g., testing association of particular concepts like athleticism with blacks, versus testing association of pleasant or unpleasant words), and produce different effects on behavior, although both appear in study populations.<sup>59</sup> Stereotype content appears to be largely consistent between those who admit to believing the stereotypes and those who do not, although the extent to which subjects admit to believing the stereotypes appears to have decreased.<sup>60</sup> Stereotype traits of blacks include “lazy,” “athletic,” “rhythmic,” “low in intelligence,” “poor,” “criminal,” “hostile,” and “loud.”<sup>61</sup>

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*Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 29–30 (2009). For that reason it may be that implicit measures, however imperfect, are our most reliable scientific tool. As I am no psychologist, I do not purport to judge these debates—we must use the best science we have until something better comes along. Similar points apply to worries about the current “replication crisis” in psychology, particularly with respect to priming studies. See generally Wolfgang Stroebe & Fritz Strack, *The Alleged Crisis and the Illusion of Exact Replication*, 9 PERSPECTIVES ON PSYCHOL. SCI. 59 (2014) (describing debates over failure to replicate a number of priming studies). As non-psychologists who have to make sense of the world in order to make policy, the best we can do is recognize that all scientific research is imperfect and subject to upset by new evidence, and to move forward under conditions of necessarily incomplete knowledge using the best evidence we have available. The IAT is discussed further *infra* notes 79–81 and accompanying text.

58. David M. Amodio & Patricia G. Devine, *Stereotyping and Evaluation in Implicit Race Bias: Evidence for Independent Constructs and Unique Effects on Behavior*, 91 J. PERSONALITY & SOC. PSYCHOL. 652, 657 (2006).

59. *Id.* See also Srividya Ramasubramanian, *Testing the Cognitive-Affective Consistency Model of Intercultural Attitudes: Do Stereotypical Perceptions Influence Prejudicial Feelings?*, 39 J. INTERCULTURAL COMM. RES. 105, 116 (2010) (developing further the notion that affective and cognitive evaluations of blacks do not simply track one another).

60. Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading?: The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139, 1146–48 (1995).

61. *Id.* at 1144. See also Ramasubramanian, *supra* note 59, at 108–09 (reviewing literature giving similar lists of stereotyped traits); John F. Dovidio et al., *Racial Stereotypes: The Contents of Their Cognitive Representations*, 22 J. EXPERIMENTAL SOC. PSYCHOL. 22, 27 (1986) (associating “ambitious” and “practical” with whites, along with “conventional” and “stubborn”; “lazy” and “imitative” associated with blacks along with “musical” and “sensitive”). Perhaps the most shocking result is the lingering association of blacks with apes. See Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 304 (2008) (finding that there is an implicit association between black faces and images of apes in study populations, independent of implicit attitudinal bias against blacks; priming with pictures of apes led respondents to more readily excuse police violence against blacks; and blacks are more likely than whites to be described in apelike fashion in media crime reports); see also Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014) (reporting numerous results on the relative dehumanization of blacks, overestimation of the age of black suspects, and effect of those biases on policing).

Let us first consider stereotypes. Psychologists have proposed various mechanisms to explain stereotype formation, but one of the most important for present purposes relies on familiar mechanisms from the cognitive bias literature: nonminorities have greater cognitive access to negative behaviors associated with minorities because of the increased salience of negative behaviors, as well as the increased salience of minority groups.<sup>62</sup> This is known to social psychologists as “illusory correlation.”<sup>63</sup> Stripping off the jargon, whites remember black people more readily than white people, simply because they are exposed to fewer black people, and we all remember crime more readily than non-crime. Consequently, whites are more likely to remember black criminals and thereby to stereotype blacks *as* criminals.<sup>64</sup>

Note that the foregoing mechanism depends on the preexisting social history and construction of racial categories. Even though redheads are rarer than non-redheads, we don’t remember redhead crime and implicitly associate redheads with criminality. The most obvious reason to suppose that this is the case is that race is salient, and hair color is not, due to our social practice of organizing the population along racial lines. Put

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62. Bodenhausen & Richeson, *supra* note 51, at 349–50; David L. Hamilton & Robert K. Gifford, *Illusory Correlation in Interpersonal Perception: A Cognitive Basis of Stereotypic Judgments*, 12 J. EXPERIMENTAL SOC. PSYCHOL. 392 (1976); Brian Mullen & Craig Johnson, *Distinctiveness-Based Illusory Correlations and Stereotyping: A Meta-Analytic Integration*, 29 BRIT. J. SOC. PSYCHOL. 11 (1990). Bodenhausen and Richeson note that this line of research “has been the subject of controversy.” Bodenhausen & Richeson, *supra* note 51, at 351. Further details are discussed, and more of the literature is reviewed, in James L. Hilton & William von Hippel, *Stereotypes*, 47 ANN. REV. PSYCHOL. 237, 245–47 (1996). Consistent with the salience of blackness underlying the idea of illusory correlation, in at least one study black primes were noticeably better at inducing stereotyping responses than white primes. Kerry Kawakami & John F. Dovidio, *The Reliability of Implicit Stereotyping*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 212, 222–23 (2001).

63. Hilton & von Hippel, *supra* note 62, at 245–47.

64. Generally, illusory correlation effects are stronger when the observed behavior is negative, plausibly because negative behavior is more salient. Mullen & Johnson, *supra* note 62, at 13, 21, 24. Moreover, representations of black crime in the news seem to generate an unusually strong effect, particularly among those who subscribe to the stereotype of black crime—such citizens seem to become particularly concerned about crime, and they appear particularly likely to give character-based explanations for crime when exposed to information about black criminals. Franklin D. Gilliam, Jr. et al., *Crime in Black and White: The Violent, Scary World of Local News*, INT’L J. PRESS/POL., June 1996, at 6, 18–19.

Let us not be ahistorical: scholars described similar ideas before the Great Depression. For example, one early sociologist pointed out the unusual salience of black criminals in the following terms: “The press is almost certain to brand him . . . [i]n setting the hall-mark of his color upon him, his individuality is in a sense submerged, and instead of a mere thief, robber, or murderer, he becomes a representative of his race . . . .” Thorsten Sellin, *The Negro Criminal: A Statistical Note*, 140 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 52 (1928), *quoted in* KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME AND THE MAKING OF MODERN URBAN AMERICA* 2 (2011).

differently, the socially constructed concept of race with the strong social salience that it carries leads people to remember crimes and other disapproved behaviors by members of minority races. This reinforces the hierarchical subordination of those races.<sup>65</sup> Moreover, once a stereotype is established, those holding it are more likely to believe information consistent with it, rather than inconsistent with it—racial stereotyping makes hierarchical race a self-perpetuating category.<sup>66</sup>

Let us examine the details. Stereotypes can alter the evaluation of evidence in a courtroom.<sup>67</sup> Stereotypes can impair the performance of stereotyped groups due to anxiety associated with fear of confirming the stereotype. This is the famous “stereotype threat” that leads blacks to perform worse on tests “described as diagnostic of intelligence.”<sup>68</sup> (Some psychologists suggest that blacks internalize negative stigmas to the extent of exhibiting “outgroup favoritism,” rather than the more usual “ingroup favoritism.”)<sup>69</sup>

In one study, experimental subjects were exposed to rude behavior from a black person, triggering the stereotype of blacks as hostile. Not only did they avoid future interactions with blacks, the association between hostile behavior and blackness was so strong that experimental subjects exposed to hostile behavior from *whites* showed a subsequent greater propensity to avoid blacks, although this latter result was insignificant.<sup>70</sup> In an even more striking result, nonblack subjects who were merely asked to think about people with stereotypically black names performed worse on academic tests.<sup>71</sup>

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65. More on this phenomenon in Part III.A.

66. Hilton & von Hippel, *supra* note 62, at 252. See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998) (describing general tendency of humans to attend more to information confirming prior beliefs).

67. Bodenhausen & Richeson, *supra* note 51, at 351.

68. *Id.* at 358–59. See also Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995) (giving experimental evidence for stereotype threat); Thierry Devos & Mahzarin R. Banaji, *Implicit Self and Identity*, 1001 ANNALS N.Y. ACAD. SCI. 177 (2003) (summarizing research on the influence of social categories on self-perception).

69. Bodenhausen & Richeson, *supra* note 51, at 360.

70. Eaaroon I. Henderson-King & Richard E. Nisbett, *Anti-Black Prejudice as a Function of Exposure to the Negative Behavior of a Single Black Person*, 71 J. PERSONALITY & SOC. PSYCHOL. 654, 655–58 (1996). In another study, experimental subjects subliminally exposed to a black face even showed greater anger in response to a computer crash—and this was true regardless of the subject’s explicit prejudice. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238–39 (1996).

71. S. Christian Wheeler et al., *Think unto Others: The Self-Destructive Impact of Negative Racial Stereotypes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 173, 179 (2001).

Economist Glenn Loury has developed fundamental insights into the nature of self-reinforcing stereotypes.<sup>72</sup> Often treating someone (consciously or unconsciously) as if they have a characteristic generates its own evidence. Thus, lending discrimination against blacks based on the belief that they are more likely to default becomes self-fulfilling, because it makes loans more costly for the victims of discrimination, and people, regardless of their race, are more likely to find themselves unable to pay more costly loans.<sup>73</sup> This will provide confirmatory information for stereotype-holders and reinforce the stereotype. Loury has aptly described the system of self-reinforcing stereotypes and attitudes attached to race as “racial stigma,” and notes a startling consequence: substantial percentages of all other races, when surveyed, “envisioned their ideal neighborhood, in which they would feel most comfortable, as one containing no blacks.”<sup>74</sup>

As that last remark suggests, stereotyping exacerbates the residential segregation discussed at length in the next Part.<sup>75</sup> Black neighborhoods are perceived as having more crime, independent of their actual crime rate, and whites have more inflated estimates of crime in black neighborhoods than do blacks.<sup>76</sup> This gives whites “rational” (from their distorted epistemic standpoints) reason to avoid or flee from black communities. Racial stigma can be applied at the neighborhood level as well as at the individual level.<sup>77</sup>

Now let us consider implicit attitudinal bias. Negative attitudes about blacks and positive attitudes about whites surface in response-time word-association tests of implicit attitudes. These results have reappeared many times, with increasingly sophisticated experimental methods.<sup>78</sup> The most modern method, the Implicit Association Test (“IAT”), has yielded consistent results in which subjects associate not only white and black names, but also white and black faces, with, respectively, positive and

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72. GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 17–54 (2002).

73. *Id.* at 25, 29–33 (giving this and similar examples).

74. Glenn C. Loury, *Racial Stigma and Its Consequences*, FOCUS, Fall 2005, at 1, 2 (40% of Asians, 32% of Latinos, and 19% of whites). See also Glenn C. Loury, *The Anatomy of Racial Inequality: The Author's Account*, REV. BLACK POL. ECON., Fall 2004, at 75, 79 (explaining concept of stigma).

75. See generally Elizabeth Brondolo et al., *Racism and Social Capital: The Implications for Social and Physical Well-Being*, 68 J. SOC. ISSUES 358 (2012) (explaining role of racial attitudes in social isolation of stigmatized racial groups).

76. Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime?: The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOC. 717, 718–19 (2001).

77. Robert J. Sampson & Stephen W. Raudenbush, *Neighborhood Stigma and the Perception of Disorder*, FOCUS, Fall 2005, at 7, 7–8.

78. See the literature reviewed by Jack Glaser & Christopher Finn, *How and Why Implicit Attitudes Should Affect Voting*, 46 PS: POL. SCI. & POL. 537, 538–39 (2013).

negative words.<sup>79</sup> Moreover, measured implicit racism leaks out in observable behavior: it is associated with perceived friendliness or unfriendliness of nonverbal interactions.<sup>80</sup> These implicit attitudes are also associated with hasty judgments of blacks. In one study, subjects took less time to evaluate black than white people, and this difference was associated not only with measured implicit prejudice, but also with explicit prejudice and with the tendency to see blacks as homogeneous and interchangeable.<sup>81</sup>

A prominent model for understanding implicit attitudinal bias is “aversive racism,” according to which a person’s conscious or surface beliefs support racial equality, but, when the implications of this belief system are not salient, “automatic activation” of lingering racist beliefs leads to discriminatory behavior.<sup>82</sup> Paradoxically, even conscious attempts to avoid such behavior can make matters worse: the cognitive effort to overcome racial attitudes can cause whites to avoid interactions with blacks or exhibit less friendly behavior toward them.<sup>83</sup> Aversive racists have, as the name suggests, aversive attitudes (often unconsciously), such as fear and discomfort, toward black people, while at the same time having aversive attitudes toward being characterized as racist.<sup>84</sup> Aversive racist attitudes emerge in individuals’ behavior primarily when the racial implications of their behavior are not obvious, even to themselves.<sup>85</sup> Thus, such racial attitudes can be manifested, inter alia, in employment decisions in the “grey area” of ambiguous qualifications evaluations,<sup>86</sup> and where subjects had previously affirmed egalitarian views and thus could more easily preserve their self-image as non-racist.<sup>87</sup>

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79. Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 321–22 (2000).

80. John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002).

81. Jorge Vala et al., *Intergroup Time Bias and Racialized Social Relations*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 491, 493 (2012). As the authors point out, swift evaluation is exactly what “prejudice” means. It is plausible to suppose that these hasty judgments facilitate the application of stereotypes: many psychologists accept the “dual process” model of cognition according to which hasty judgments are characterized by lazy cognitive shortcuts and heuristics. See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

82. Bodenhausen & Richeson, *supra* note 51, at 348.

83. *Id.* at 363–64. See also Jennifer A. Richeson & Sophie Trawalter, *The Threat of Appearing Prejudiced and Race-Based Attentional Biases*, 19 PSYCHOL. SCI. 98 (2008) (offering neuroscientific evidence in support of the aversive model).

84. Adam R. Pearson et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 316–17 (2009).

85. *Id.* at 318.

86. *Id.* at 319–20.

87. *Id.* at 326.

Implicitly racist attitudes may also be activated by coded racial appeals, which may or may not be intended by the speaker. For example, Tali Mendelberg's research on coded racial messages in political campaigns suggested that referring to social practices stereotypically associated with race, like welfare receipt, in conjunction with pictures of blacks, led subjects to prefer policies reflecting previously measured "racial resentment," even though subjects did not consciously recognize the racial implications of the conjunction of pictures and stereotype.<sup>88</sup>

There is substantial evidence that implicit racially biased attitudes are associated with real-world discriminatory behavior.<sup>89</sup> Perhaps their most severe manifestation (and that of stereotypes as well) is in the criminal justice system.<sup>90</sup> When data have been collected, police overwhelmingly have been shown to target blacks.<sup>91</sup> This targeting is ineffective: the "hit" rate—the rate at which investigating someone yields evidence of a crime—is higher for whites, indicating that blacks are being targeted with less reason to suspect their involvement in crime than are whites.<sup>92</sup>

Highlighting the criminal justice effect of implicit bias, psychologists have shown that subjects are more likely to identify held objects as guns rather than tools when the holder is black.<sup>93</sup> The mere fact of attention to

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88. TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* 193–203 (2001). See also Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233 (2014) (analyzing how these racial appeals arise from historical stereotypes and become "conceptual metaphors" that influence individual perceptions as well as social policy).

89. See Justine E. Tinkler, *Controversies in Implicit Race Bias Research*, 6 SOC. COMPASS 987, 992–93 (2012) (citing evidence for voting, employment discrimination, generosity, medical treatment, and other social interactions).

90. See Michael R. Smith & Geoffrey P. Alpert, *Explaining Police Bias: A Theory of Social Conditioning and Illusory Correlation*, 34 CRIM. JUST. & BEHAV. 1262 (2007) (giving an account of biased policing rooted in the theory of illusory correlation). See generally L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 296–97 (2012) (reviewing implicit bias literature and its implications for racially disparate criminal justice, in the context of "self-defense" claims such as those at issue in the Trayvon Martin shooting); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2037–41 (2011) (describing implications for police decisions to stop, search, and seize).

91. David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, LAW & CONTEMP. PROBS., Summer 2003, at 71, 77–78 ("In Maryland, for example, where the driving population on the relevant highway was seventeen percent black, blacks made up over seventy percent of all of those stopped and searched."); *id.* at 96 (In New Jersey, "[b]lacks made up fifty-three percent of all those drivers subjected to consent searches; Latinos were twenty-five percent, while whites were only nineteen percent."). See also PERRY, *supra* note 48, at 104 (recounting further evidence of racial profiling).

92. Harris, *supra* note 91 at 82, 96 (rates for stops and searches).

93. See literature reviewed in Christopher R. Jones & Russell H. Fazio, *Person Categorization and Automatic Racial Stereotyping Effects on Weapon Identification*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 1073, 1075 (2010). See also Joshua Correll et al., *The Influence of Stereotypes on*

race yields this outcome, and diverting attention to dimensions of categorization other than race ameliorates it.<sup>94</sup> Indeed, even asking subjects to think about race in order to consciously *ignore* its effects increased this weapon bias.<sup>95</sup>

Nor are judges free from implicit bias, although the ideal of judicial impartiality may lead them to attempt to compensate for it.<sup>96</sup> These biases also distort the criminal justice policies endorsed by the democratic process. In one recent study, whites who were led to believe that the prison population was more predominantly black showed both a greater fear of crime and a higher level of support for aggressive policing and harshly punitive sentencing.<sup>97</sup>

There is also some psychological evidence on implicit attitudinal bias that directly implicates the hierarchical nature of racial categories. Whites have been shown to express stronger negative attitudes toward “strongly identified” nonwhites than to “weakly identified” nonwhites, and, strikingly, the intensity of negative attitudes was positively associated with endorsing social hierarchies in general.<sup>98</sup> The authors of this study interpret their evidence as suggesting that members of subordinated racial groups who more greatly emphasize their association with those groups are perceived to pose a threat to existing status hierarchies, thus leading

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*Decisions to Shoot*, 37 EUR. J. SOC. PSYCHOL. 1102, 1104–07 (2007) (finding exposure to news stories about black criminals increased propensity to shoot blacks rather than whites in shooter judgment simulation). *But see* Lois James et al., *Results from Experimental Trials Testing Participant Responses to White, Hispanic and Black Suspects in High-Fidelity Deadly Force Judgment and Decision-Making Simulations*, 9 J. EXPERIMENTAL CRIMINOLOGY 189, 189 (2013) (finding contrary result suggesting lesser police readiness to shoot blacks than other suspects). Evidently, the research in this area is not totally conclusive. Additional insight may be gleaned from another finding, suggesting that police took longer to decide whether to shoot black suspects, and did not display shooter bias, though civilians did more readily shoot blacks. Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006 (2007). Perhaps these results can be reconciled by hypothesizing that police officers and civilians are subject to the same implicit racial bias in weapon perception, but that police training allows them to pause and reconsider before reflexively shooting—at least in low stakes environments like the lab. (Judging by the recent spate of police shootings of unarmed black men in the news, it is hard to believe that any such police training effect applies on the streets, but, of course, such an intuition does not constitute evidence.)

94. Jones & Fazio, *supra* note 93, at 1083.

95. B. Keith Payne et al., *Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions of Weapons*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 384, 394–95 (2002).

96. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009).

97. Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949, 1950–51 (2014).

98. Cheryl R. Kaiser & Jennifer S. Pratt-Hyatt, *Distributing Prejudice Unequally: Do Whites Direct Their Prejudice Toward Strongly Identified Minorities?*, 96 J. PERSONALITY & SOC. PSYCHOL. 432, 432–34 (2009).

whites invested in those hierarchies to defend them by adopting negative attitudes toward the subordinated groups.<sup>99</sup> The threat that confident nonwhite racial identity poses to the comfortable enjoyment by whites of status hierarchy is strong evidence that the normative behavior of nonwhites is to be ashamed of their racial ascription. That is, the social meaning of race is closely tied to status. That interpretive idea is the subject of the next two subparts.

### *B. Race on the Perceptual Level*

The group-level version of the claim that third-person racial classifications are infected with status hierarchies is not the complete picture of racial hierarchy. For some surprising sociological and psychological research suggests that even on the individual level, perceptions of race depend on social status, and perceiving nonracial social-status information changes perceived race information.

First, the groundbreaking research of Aliya Saperstein, Andrew Penner, and their co-authors shows that both self-identification and racial identities ascribed by others vary with social status over a wide array of life settings and over a period of time ranging at least from the Jim Crow era to the present. People who are poor, unemployed, dead from violence, or incarcerated are more likely to identify as black and be identified by others as black. And this is not only a group-level phenomenon: a single individual can switch races after a status change.<sup>100</sup>

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99. *Id.* at 442. See also Jennifer A. Richeson & Nalini Ambady, *Effects of Situational Power on Automatic Racial Prejudice*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 177, 181–83 (2003) (whites who had been placed in a situationally superior role to a black person showed more racist attitudes on IAT); Maureen A. Craig & Jennifer A. Richeson, *On the Precipice of a “Majority-Minority” America: Perceived Status Threat from the Racial Demographic Shift Affects White Americans’ Political Ideology*, 25 PSYCHOL. SCI. 1189, 1190–91 (2014) (reporting experimental results suggesting that demographic shifts toward greater proportion of nonwhites caused white subjects to endorse more conservative policy positions); Edward A. Ho et al., *The Effects of Comparative Status on Social Stereotypes: How the Perceived Success of Some Persons Affects the Stereotypes of Others*, 20 SOC. COGNITION 36, 41–45 (2002) (when experimental subjects were exposed to “Horatio Alger” individual success stories, they adopted more negative stereotypical views of blacks). This last result can be interpreted as motivated cognition in defense of a system that provides high status to whites, since it allowed subjects to blame black disadvantage on individual rather than social factors.

100. Aliya Saperstein & Andrew M. Penner, *Racial Fluidity and Inequality in the United States*, 118 AM. J. SOC. 676, 698–700 (2012) (finding, inter alia, that Americans who lose their jobs, are incarcerated, or are on welfare are more likely thereafter to be classified by survey interviewers as black even if they were previously classified as white); Aliya Saperstein & Aaron Gullickson, *A “Mulatto Escape Hatch” in the United States? Examining Evidence of Racial and Social Mobility During the Jim Crow Era*, 50 DEMOGRAPHY 1921, 1921–22 (2013) (finding that nineteenth century census takers were more likely to classify an individual as mulatto who had previously been classified as black when that individual had an improved occupational status, and vice versa); Jonathan B.

This sociological evidence is matched by psychological evidence. In the lab, observers' own biases were shown to influence categorization attempts. Subjects who exhibited implicit affective bias were more likely to categorize hostile-appearing faces as black.<sup>101</sup> In another study, participants more accurately remembered black faces when those faces were presented as angry.<sup>102</sup> In still another study, white subjects had more difficulty—i.e., they took more time—identifying famous people whom they admired as black.<sup>103</sup> Reading these studies together, subjects seem to have a much easier time ascribing blackness to individuals with negative and low-status qualities than to individuals with positive and high-status qualities.

It is also matched by neurological evidence. In one study, subjects who exhibited more evidence of negative implicit attitudes toward blacks also exhibited greater differences in some neurological activation patterns when beginning operations associated with face recognition.<sup>104</sup> That study's authors interpret this result to “suggest that implicit race

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Freeman et al., *Looking the Part: Social Status Cues Shape Race Perception*, 6 PLOS ONE e25107 (2011) (finding that experimental subjects were more likely to identify a picture of the same individual as black when janitorial clothes were worn, and as white when business clothes were worn); Andrew Noymer et al., *Cause of Death Affects Racial Classification on Death Certificates*, 6 PLOS ONE e15812 (2011) (finding that stereotypical black and Native American causes of death make those racial identifications more likely); Aliya Saperstein & Andrew M. Penner, *The Race of a Criminal Record: How Incarceration Colors Racial Perceptions*, 57 SOC. PROBS. 92, 103–10 (2010) (finding that black self-identification as well as other-identification is more likely after incarceration); Andrew M. Penner & Aliya Saperstein, *How Social Status Shapes Race*, 105 PROC. NAT'L ACAD. SCI. 19628, 19628 (2008) (similar results for incarceration, unemployment, and poverty).

101. Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCHOL. SCI. 342, 342 (2004). See also Paul B. Hutchings & Geoffrey Haddock, *Look Black in Anger: The Role of Implicit Prejudice in the Categorization and Perceived Emotional Intensity of Racially Ambiguous Faces*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1418, 1418 (2008) (extending Hugenberg & Bodenhausen's result to show that subjects with more implicit bias were more likely to interpret hostile faces as black, and more likely to interpret angry black-categorized faces as more angry than angry white-categorized faces).

102. Joshua M. Ackerman et al., *They All Look the Same to Me (Unless They're Angry): From Out-Group Homogeneity to Out-Group Heterogeneity*, 17 PSYCHOL. SCI. 836, 836 (2006). In describing all of this research, the statement that subjects, saw, remembered, etc. a face of a given race should be understood to mean that they saw, remembered, etc. a face that had been identified with that race by either themselves or the researcher.

103. Jennifer A. Richeson & Sophie Trawalter, *On the Categorization of Admired and Disliked Exemplars of Admired and Disliked Racial Groups*, 89 J. PERSONALITY & SOC. PSYCHOL. 517, 527 (2005).

104. Yi He et al., *The Relation Between Race-Related Implicit Associations and Scalp-Recorded Neural Activity Evoked by Faces from Different Races*, 4 SOC. NEUROSCI. 426, 437–40 (2009). See also Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 881–88 (2004) (reporting results of studies in which subjects focused attention more readily on black faces after being primed with both negative and positive stereotyped black traits).

associations influence the neural processing of faces almost immediately after identification.”<sup>105</sup>

Another neuroscientific study revealed that subjects categorized faces as black or white faster when presented with those faces in conjunction with words reflecting stereotypes associated with those racial classifications.<sup>106</sup> The words for whites were “smart, rich, success, scholar, educate, wealth, honest, bright, safe, truth, loyal, [and] kind”; for blacks, “stupid, poor, messy, violent, lazy, danger, threat, rude, loud, harm, deceive, [and] crime.”<sup>107</sup> This study suggests that the use of racial stereotypes and status classifications is built into our ability to classify faces as white or black in the first place. Interpreting that study with an awareness of the contingency of racial classifications to status, as in the Saperstein/Penner research, suggests that participants classified the faces as white or black in part *because* of their association with stereotyped content with high or low status valence, respectively.

In another recent study, attentional patterns of white subjects to faces designed to be racially ambiguous were affected by such racial stereotypes. Without stereotypic primes, the subjects paid more attention (as measured by EEG data) to black faces than to white or (researcher-classified) racially ambiguous faces; when stereotypic primes were given, the subjects paid more attention to the racially ambiguous faces as well.<sup>108</sup> In the context of the previously noted results, this suggests that the

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105. He et al., *supra* note 104, at 438. See also William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCI. 806, 806 (2004) (more negative attitudes toward blacks correlated with amygdala response, associated with emotional arousal, to black faces after only 30 milliseconds of exposure); Renana H. Ofan et al., *Seeing Race: N170 Responses to Race and Their Relation to Automatic Racial Attitudes and Controlled Processing*, 23 J. COGNITIVE NEUROSCI. 3153, 3158–60 (2011) (subjects with more implicit bias showed stronger electrical responses in systems associated with facial encoding when exposed to black faces, which the authors interpret as suggesting that processing non-normative faces imposes greater cognitive demands).

106. Bruce D. Bartholow & Cheryl L. Dickter, *A Response Conflict Account of the Effects of Stereotypes on Racial Categorization*, 26 SOC. COGNITION 314, 314 (2008).

107. *Id.* at 318 (italicized in the original).

108. Cheryl L. Dickter & Julie A. Kittel, *The Effect of Stereotypical Primes on the Neural Processing of Racially Ambiguous Faces*, 7 SOC. NEUROSCI. 622, 622 (2012). The priming treatment in this study was carried out first by surveying a separate pool of subjects to determine the words they associated with blackness and whiteness, and then those were briefly displayed to the main experiment subjects before the pictures to which their response was measured. *Id.* at 624–25. See also Virginia A. Newton et al., *The Effects of Stereotypical Cues on the Social Categorization and Judgment of Ambiguous-Race Targets*, 4 J. INTERPERSONAL REL. INTERGROUP REL. & IDENTITY 31, 39–42 (2011) (similarly constructed ambiguous-race faces tended to be identified as black when presented with stereotypically black names and personal traits, white otherwise).

stereotype primes led the subjects to entertain the possibility that the ambiguous faces were black.

In another study, subjects were shown videos of subjects accused of crimes stereotypically associated with either blacks or whites and then asked to identify the perpetrator from a photograph.<sup>109</sup> When the crime was stereotypically black, the subjects identified mugshots with more stereotypically black physical features, regardless of the actual video; when the crime was stereotypically white, they identified mugshots with more stereotypically white features.<sup>110</sup> In other words, subjects misremembered the putatively objective racial characteristics of the faces they saw once they had been exposed to behavior consistent with racial stereotypes.

In the most recent study, subjects were subliminally primed with either “educated” or “ignorant,” then asked to remember the faces they had seen.<sup>111</sup> Those who were primed with “educated” remembered lighter faces.<sup>112</sup>

What are we to make of these results? The cognitive hierarchical model suggests that individual observers apply hierarchical status evaluations in order to ascribe racial identities to other individuals. To identify someone as “black” or “white” is to assign that person a status, a place in a social hierarchy. This theoretical innovation is described in the next subpart.

Before turning to that material, however, let us note that status hierarchies are not the only social factors that feed into our racial ascriptions. Observers’ general attitudes toward race affect the way they carry out the cognitive task in the first place. For example, in one study, those subjects who scored higher on a scale of explicit racism took more time, and gave more indications of effort, when asked to categorize

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109. Danny Osborne & Paul G. Davies, *Eyewitness Identifications Are Affected by Stereotypes About a Suspect’s Level of Perceived Stereotypicality*, 16 GROUP PROCESSES & INTERGROUP REL. 488, 488 (2013). Again, stereotypes were elicited by a preliminary survey. *Id.* at 491. For blacks, they were “drive-by shooting, gang-related beating, pimp, carjacking, cop killer, and street gambling,” for whites, “internet hacker, insider trading, hate crime, identity theft, embezzlement, and serial killer.” *Id.* at 502.

110. *Id.* at 493–97. The authors also found similar results using slightly different experimental methods.

111. Avi Ben-Zeev et al., *When an “Educated” Black Man Becomes Lighter in the Mind’s Eye: Evidence for a Skin Tone Memory Bias*, SAGE OPEN, Jan.–Mar. 2014, at 1, 3–5, available at <http://sgo.sagepub.com/content/4/1/2158244013516770.full-text.pdf+html>. I thank Vero Smith for bringing this result to my attention. Even within racial groups, there is reason to believe that lighter skin tone means higher status. See generally COLOR MATTERS, *supra* note 7.

112. Ben-Zeev et al., *supra* note 111, at 7.

racially ambiguous faces.<sup>113</sup> In another study, short-term resource constraints appeared to affect how subjects saw race and what they did with it: when confronted with scarcity-related primes observers were more likely to perceive faces they encountered as black, and when confronted with actual economic scarcity they were more likely to assign blackness to more stereotypically black and darker-skinned faces.<sup>114</sup> Subjects allocated fewer resources to the faces with the more stereotypically black traits, and subjects who endorsed the belief that blacks and whites were in direct economic competition were more likely than those who did not endorse that belief to categorize ambiguous faces as black.<sup>115</sup>

Moreover, once a racial category is assigned, that assignment guides further perceptions. For example, even perceived physical characteristics can vary depending on ascribed racial categories. One study showed that otherwise identical faces, once given stereotypically black hairstyles, were perceived to have other stereotypically black physical traits, such as a “darker complexion.”<sup>116</sup>

Some of the science itself may be problematic on its own terms. Many of the studies described in this Part seem to have been based on the assumption that researchers could themselves categorize faces by race based on visual observation alone—to identify, for example, which faces were “actually” white, or black, or racially ambiguous—and some even removed experimental subjects’ classifications which they viewed as erroneous.<sup>117</sup> That they could even do this in the course of experimentally demonstrating the malleability of visual racial classification is a

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113. Jim Blascovich et al., *Racism and Racial Categorization*, 72 J. PERSONALITY & SOC. PSYCHOL. 1364, 1364 (1997).

114. Amy R. Krosch & David M. Amodio, *Economic Scarcity Alters the Perception of Race*, 111 PROC. NAT’L ACAD. SCI. 9079, 9082 (2014).

115. *Id.* That last finding is consistent with the “opportunity hoarding” explanation for racial discrimination discussed by ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 7–8 (2010), according to which in-groups prefer their own members for social and economic resources. Another excellent account of opportunity hoarding, in more explicitly economic terms, is Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45 (2010). Overall, the Krosch & Amodio research suggests that people are more likely to categorize others into racial out-groups when doing so facilitates in-group control of scarce resources.

116. Otto H. MacLin & Roy S. Malpass, *The Ambiguous-Race Face Illusion*, 32 PERCEPTION 249, 250 (2003).

117. For example, Bartholow & Dickter, *supra* note 106, at 319, 322, removed “incorrect” results. One paper reviewed many of the results noted in Part II.B, and then said the following: “Of course, many individuals appear to be ambiguous with respect to traditional racial or ethnic groups because they are in fact multiracial.” Galen V. Bodenhausen & Destiny Peery, *Social Categorization and Stereotyping In Vivo: The VUCA Challenge*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 133, 144 (2009). To the contrary, the research described here suggests that there is no objective “in fact” multiraciality.

paradigmatic case of the theory-ladenness of observation: the theoretical implication of their own work indicates that their own pre-experimental acts of racial classification may be socially contingent as well as unstable.<sup>118</sup> However, the demonstrated behavior by experimental subjects nonetheless reveals the status contingency of racial categorization even on less than ideal experimental designs.

The upshot of all of this research is that racial ascriptions are influenced by many factors other than visual and cultural references like skin color and hairstyle. While doubtless those factors also feed into racial ascriptions, those ascriptions can vary with a variety of facts, most importantly including the hierarchical social status of the observed, but also including the observer's racial attitudes and short-term influences on the observer.

### C. *The Cognitive Hierarchical Model*

The research reviewed in the last Subpart suggests the possibility of an advance on previous social constructionist accounts of race, which we may call the *cognitive hierarchical model of race*. Its main distinction is that it specifies the way that hierarchy functions on an individual as well as a group level in our operation of racial concepts.

The cognitive hierarchical model adds to the group-level claim the idea that Americans apply social hierarchy to race at the level of perception. To perceive someone as of a given race is to perceive his or her place in a social hierarchy. Put differently, judgments of hierarchical status are inextricable from racial ascriptions: to carry out the second cognitive operation is always to do the first.<sup>119</sup> Status judgments cause racial ascriptions, as racial ascriptions cause status judgments, on an individual-by-individual basis. In Obasogie's terms, this contributes to a "constitutive" account of race, one that moves beyond social

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118. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 126–30 (3d ed. 1996) (describing contingency of our observational categories on preexisting theoretical paradigms). See generally Jim Bogen, *Theory and Observation in Science*, STAN. ENCYCLOPEDIA PHIL. (last updated Jan. 11, 2013), <http://plato.stanford.edu/archives/spr2013/entries/science-theory-observation/> (explaining concept of theory-ladenness).

119. This is a step beyond the previous state-of-the-art incorporation of the mind sciences research into the legal literature, that of Kang, *supra* note 56. Kang borrows from the racial schema framework to suggest that attitudes about race are activated when races are recognized, even unconsciously. *Id.* at 1499–1504. The cognitive hierarchical model concludes that, contrary to what Kang appears to have been assuming, the schema works both ways. Racial classification doesn't just influence attitudes; status-linked attitudes also influence racial classification.

constructionism to reveal how our social categories seep directly down into individual behavior and cognition.<sup>120</sup>

The cognitive hierarchical model makes bolder claims than the group-level account. The group account is compatible with the notion that some individuals can be assigned to a subordinate or superordinate race without being assigned to subordinate or superordinate status. For that reason, the group account is arguably consistent with the implicit presupposition, built into the standing cases discussed in Parts I.B and IV.C, that individual members of a subordinated race might not suffer personal injury from their racial subordination.<sup>121</sup> The cognitive hierarchical model calls that notion into question. It suggests that each person with a stigmatized racial identity suffers a direct and individual blow to his or her social status. This is the heart of ascriptive injury.

Here, I propose to complete the model by drawing a connection between the way American language-users use a term like “black” and what we mean by it. Stated that way, it sounds as if I am about to utter a trivial banality: of course linguistic meaning has something to do with the way words are used. But actually, the philosophical claim that use constitutes linguistic meaning is debatable.<sup>122</sup>

Rather than take on controversial positions in philosophy of language, for purposes of understanding the Equal Protection implications of racial hierarchy, we can rely on a more prosaic observation. Regardless of whether linguistic meaning is constituted by use or not, the way people use words certainly counts as evidence of what they mean by them and what they understand them to entail. And the evidence suggests that many people in America seem to equate blackness to a cluster of low-status traits such as poverty and criminality. This is what I mean by ascriptive injury: the notion that blackness is worth less than whiteness seems to be built into the American psyche.

On the expressive conception of Equal Protection, to be discussed in Part IV, the state is forbidden to reinforce such ascriptive injuries with the law—the state may not enact laws that express or reinforce the

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120. OSAGIE K. OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* 18 (2014).

121. See HASLANGER, *supra* note 2, at 237 n.17 (“[M]embers of racial groups may be scattered across social contexts and may not all actually be (immediately) affected by local structures of privilege and subordination.”).

122. For a use-based theory of linguistic meaning, see Paul Horwich, *Implicit Definition, Analytic Truth, and Apriori Knowledge*, 31 *NOÛS* 423, 424 (1997). For a picture of the debate, see Jeff Speaks, *Theories of Meaning*, *STAN. ENCYCLOPEDIA PHIL.* (last updated Apr. 23, 2014), <http://plato.stanford.edu/entries/meaning/>.

psychological and sociological association of blackness with badness, for to do so cannot be justified by any principle that takes blacks and whites to be equals. Most of the remainder of this Article is devoted to arguing that the American governments violate this conception of Equal Protection.

If we do take on stronger philosophical claims about use-based linguistic meaning, an even stronger claim about ascriptive injury is available (though no such claim is necessary for the constitutional argument in this Article). Consider Barack Obama. On the evidence presented in Part II.A alone, to say he is identified as black is to signify that if we knew nothing else about him, he would be more likely than someone who was identified as white to be poor, to be suspected of crimes, to be viewed as lazy or violent. But we do know other things about him—we know that he is a graduate of Columbia and Harvard, and, of course, that he is President of the United States, and such individual information is likely to swamp the probabilistic information about the consequences of his race, such as the stereotypes that would otherwise be likely to be attributed to him. It seems highly unlikely that many people think Barack Obama is on welfare or liable to commit a carjacking.<sup>123</sup>

However, the evidence presented in Part II.B suggests that President Obama is nonetheless harmed by the ascription “black.” The causal direction from perceived status to ascription matters for meaning: since people in American society (or, at least, those at the top of the American racial hierarchy, i.e. whites) ascribe blackness to people of subordinate status (that is, they use “black” to mean “subordinate”), and because of that subordinate status, there is a sense in which “X is black” in part means “X is of subordinate status.”

Of course, such a claim is subject to caveats associated with the distinction between using a term and mentioning it. It is possible to employ the status content of a racial ascription either with or without implying the truth of that content. To say “X is black” might mean “X is in fact of low status,” or it might mean “X is attributed low status by others.” When President Obama identifies himself as black, as he did on the 2010 census,<sup>124</sup> his act of doing so is obviously not an insult to himself (except to the extent he has internalized racial stigma), but is in part an affirmation

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123. That being said, even if Obama is free from racial stereotypes, he is not completely free from the consequences of attitudinal biases. Political scientists have found evidence that his approval ratings, as well as who endorses policy positions that become associated with the President, are influenced by citizens’ racial attitudes. See MICHAEL TESLER & DAVID O. SEARS, *OBAMA’S RACE: THE 2008 ELECTION AND THE DREAM OF A POST-RACIAL AMERICA* 142–59 (2010).

124. SpearIt, *Why Obama is Black: Language, Law and Structures of Power*, 1 COLUM. J. RACE & L. 468, 468 (2012).

of the fact that others have assigned him to low status relative even to an equivalent (counterfactual) white President.

In contrast to the likely meaning of the President's self-attribution, based on the evidence given in Part II.B, at least some language users in fact implicitly use blackness to mean actual low status. For those people, to say "President Obama is black" is to assign him to a social position of less esteem than he otherwise would hold—using a label to describe him that they otherwise tend to use to describe people who are, for example, in jail or on welfare. Accordingly, even the President suffers ascriptive injury on an individual basis from the association of blackness with badness, and he too would benefit from measures designed to ameliorate the social stigma of blackness, so that "black" no longer means "of low status" to anyone. To be clear, the solution is not to stop calling him black. The solution is to abolish the social basis for the stigmatic association of blackness with lowliness. For, on the individual-level account, every individual who is subject to a subordinated racial ascription experiences ascriptive injury.

To further clarify, the group-level claim and the cognitive hierarchical model (individual-level claim) are both true. The cognitive hierarchical model is an addition to the group-level claim, and—the next Part argues—causally depends on it. We draw on status hierarchies in classifying individuals within races because over hundreds of years our (American) racial categories have been constructed in hierarchical ways and have been used to reinforce those hierarchies in our broader culture. Our social hierarchies promote racial stereotypes and attitudinal biases, and those stereotypes and biases then leak into our basic perceptual processes to the point where we apply them on an individual level. Culture creates cognition. That phenomenon, and the joint responsibility of the state and private individuals for bringing it about, is the subject of the next Part.

### III. THE CAUSES OF HIERARCHICAL CLASSIFICATION

This Part gives an account of the cultural, political, and legal causes of the social cognitions described in Part II. It sets the stage for Part IV, which argues that the state is continuing to support the causes of hierarchical racial classification with its laws, and then suggests the Equal Protection Clause be pressed into service to stop it. Part III.A gives the basic argument for the proposition that culture causes the cognitions described in the previous Part. Part III.B describes the historical construction of racial categories in the United States. Part III.C describes the continuing phenomenon of racial segregation and segregation-related

disadvantage as well as the joint responsibility of public and private actors for it.

### A. *Perception and Culture*

Sociologists, historians, and other social scientists typically agree that race is a social construct, and have produced a vast literature demonstrating that racial categories change over time and location, depending on political, economic, and social forces.<sup>125</sup> Philosophers and biologists generally agree (with a handful of exceptions) that races are not natural, and typically debate whether it is better to say that they are “social kinds” (a position roughly equivalent to the social constructionist view in social science) or to simply deny that they exist altogether.<sup>126</sup>

Here, there is no need to enter into the conceptual debate. We can suppose, with Haslanger, that there is a biological category (“color”) upon which social facts (“race”) are overlaid or we can suppose that the social facts are all there are.<sup>127</sup> For present purposes, however, we must maintain a sharp distinction between social and biological facts about race, and we must recognize that even visual perceptions are social. The evidence in Part II.B suggests that when we observe a face, our perception of the person’s race—which we commonly understand and describe as a perception of its skin hue, a physical fact—depends on social information. It depends on both social status information and on other visual information, such as hair type, which, on the American folk theory of race, is clustered with skin hue in a set of allegedly ancestral categories.

The question thus arises: where did it come from? The status ascriptions we attach to racial categories cannot be natural because those racial categories vary across times and cultures. As Part III.B will describe, even our chief existing racial cleavage in the United States did not obviously exist until the start of the eighteenth century. Moreover, since then, American racial classifications have changed, as have the criteria for inclusion in those classifications.<sup>128</sup> Worldwide, racial

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125. See, e.g., MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 53–61 (2d ed. 1994) (giving social constructionist account of race).

126. See generally HASLANGER, *supra* note 2, at 299–300 (describing the extant positions).

127. See HASLANGER, *supra* note 2, at 307–08 (giving color/race distinction).

128. See, e.g., OMI & WINANT, *supra* note 125, at 82 (recounting initial classification of Chinese people in the U.S. as “Indian,” development of Latino classification in mid-twentieth century); Peter Kolchin, *Whiteness Studies: The New History of Race in America*, 89 *J. AM. HIST.* 154, 158 (2002) (quoting Benjamin Franklin’s strange-to-contemporary-ears classification of Saxons and English as white, Germans, Swedes, French, and Russians as nonwhite). See generally Jerry Kang, *Implicit Bias*

classifications have also changed in the face of cross-cultural interaction; perhaps the most egregious example is the warping of the categories “Hutu” and “Tutsi” by colonial powers to facilitate their rule in Rwanda.<sup>129</sup>

The most plausible supposition is that the cognitive hierarchical model is a consequence of our social and cultural treatment of race. Psychologists have long known that culture shapes basic perceptual processes.<sup>130</sup> Many of our cognitive functions are strongly culturally contingent.<sup>131</sup> These include basic visual processing elements like the perception of line length.<sup>132</sup> They also include natural kind groupings, such as the identification of which dimensions make up the stuff of basic categorization.<sup>133</sup> These perceptual processes are obviously relevant to seeing race and describing it. Similarly, psychologists have observed that preexisting conceptual categories shape perceptual processes, even to the point of allowing people to be outright misled about what they report seeing. For example, people presented with an abnormal playing card (like a red spade) can erroneously report seeing a card that their preexisting conceptual categories suggest they ought to have seen (i.e. a black spade).<sup>134</sup>

In view of the cultural and conceptual plasticity of the mind, this Article will operate with the working hypothesis (which cannot be validated except by focused scientific study) that we apply social hierarchy in our individual acts of racial perception and classification because

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*and the Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139, 1144 (2010) (explaining how “racial categories,” “racial mapping rules,” and “racial meanings” are all contingent and change over time).

129. Alison Des Forges, *The Ideology of Genocide*, 23 ISSUE: J. OPINION, no. 2, 1995 at 44, 44 (describing European identification of Tutsi as superior racial category in view of alleged physical similarities to whites); Catharine Newbury, *Ethnicity and the Politics of History in Rwanda*, AFRICA TODAY, Jan. 1998, at 7 (describing contested terrain of Rwandan racial identity); Ulrike Kistner, *Lineages of Racism in Genocidal Contexts—Lessons from Hannah Arendt in Contemporary African Genocide Scholarship*, DEV. DIALOGUE, Dec. 2008, at 155, 159–61 (providing further detail on the classification system imported by Europeans into Rwanda).

130. See generally Paul DiMaggio, *Culture and Cognition*, 23 ANN. REV. SOC. 263, 269–70 (1997) (summarizing research suggesting that people are better at perceiving and remembering information consistent with their “schemata”—culturally influenced “knowledge structures that represent objects or events and provide default assumptions about their characteristics, relationships, and entailments”).

131. See generally Joseph Henrich et al., *The Weirdest People in the World*, BEHAV. & BRAIN SCI., Mar. 2009, at 61, 64–78 (reviewing literature on cultural differences in basic cognitive processes).

132. *Id.* at 64 (discussing Muller-Lyer optical illusion about line length, to which Americans are more susceptible than people in other countries).

133. *Id.* at 67–68.

134. KUHN, *supra* note 118, at 62–64 (describing experiments reported in Jerome S. Bruner, & Leo Postman, *On the Perception of Incongruity: A Paradigm*, 18 J. PERSONALITY 206 (1949)).

cultural practices of racial stratification and subordination have seeped into our individual psychologies.<sup>135</sup> Any other explanation for this evidence seems impossible: those things that we do, even at the neurological level, with categories that are unquestionably dependent on cultural facts—such as which features about people we find salient and how we draw the lines between groups at our current place in history—must be in some sense causally influenced by the properties attributed to those groups in the culture. Perhaps evolution has wired a need to attend to social status directly into our brains, or perhaps that, too, is a product of our culture. This Article need not, and does not, take a position on the question. What we do know is that our culture has assigned statuses to races, and these statuses appear in our behavior and in our brains.

Recent qualitative research by Osagie Obasogie further supports this hypothesis. Obasogie reveals that even the blind make inferences about visual physical traits like skin color from non-visual information, up to and including odors, in order to carry out racial classification.<sup>136</sup> When asked to describe how they came to structure racial perceptions in visual categories (despite not having any visual data to work with), blind study participants explained that others communicated status information to them as children and, with it, the attachment of those status arrangements to visual information.<sup>137</sup> Moreover, these visually-arranged status hierarchies lead to concrete bias even in the blind—Obasogie strikingly recounts how one blind person refused to be rescued from a pond by someone whom she perceived as black.<sup>138</sup> That even the blind encode racial hierarchy visually, when they cannot possibly have observed visual data directly, suggests that racial hierarchy is a product of cultural training. Accordingly, Obasogie summarizes his findings as follows:

Not only do blind people have the same visual understanding of race as their sighted peers, but this visual understanding of race also shapes their daily interactions as it does for sighted individuals. Visual understandings of race do not stem from their obviousness as

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135. Note that our racial hierarchy appears to be embedded in, or at least symbolized by, our linguistic conventions as well. See Spearit, *Enslaved by Words: Legalities & Limitations of "Post-Racial" Language*, 2011 MICH. ST. L. REV. 705, 732–35 (describing linguistic association of whiteness qua color with purity and blackness qua color with contamination and the way this association tracks our social practices with respect to racial categories).

136. OBASOGIE, *supra* note 120, at 66–67.

137. *Id.* at 82–93.

138. *Id.* at 86. See also *id.* at 87 (recounting story of blind white person who learned that a romantic partner was black and ended the relationship).

much as they do from the social practices that shape the way we think about race.<sup>139</sup>

This supposition is also supported by our history of legal racial classifications. When racial identity was litigated in the American courts, high-status “white behavior” was used not just as the social expectation of whiteness, but also as direct evidence of whiteness.<sup>140</sup> That evidentiary assumption is exactly the social notion that manifests cognitively in the research described in Part II: if high-status, then white; if low status, then nonwhite.

The remainder of this Part will further describe how our culture has assigned these statuses.<sup>141</sup>

### *B. The Historical Construction of Racial Categories*

There is substantial historical evidence that at the beginning of the eighteenth century, the socioeconomic elite in colonial Virginia created the category “white” in order to split a nascent political alliance between poor and bonded laborers of European descent and poor and bonded laborers of African descent. They did so by dividing the laborers into a hierarchically ordered pair of races. The goal was to “enlist [poor whites] actively, or at least passively, in keeping down the Negro bond-laborer with whom they had made common cause.”<sup>142</sup>

In the seventeenth century, European and African-descended bonded laborers in the Virginia colony were often allied—fleeing their masters together, marrying against their masters’ wishes, and even rebelling together.<sup>143</sup> During that period, the social status of free colonists of African descent was substantially greater than that of later years: they owned land, litigated against free colonists of European descent as equals, and even

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139. *Id.* at 127.

140. See Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 641–43 (2005) (recounting behavioral race cases).

141. Lawrence worries that the turn in contemporary race scholarship from cultural and structural explanations of racial inequality to explanations rooted in individual cognitive bias may undermine the project of remedying societal inequality. Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of ‘The Id, the Ego, and Equal Protection’*, 40 CONN. L. REV. 931, 956–66 (2008). This subpart has suggested that Lawrence’s worries can be relieved, for the cognitive cannot be healed without healing the culture.

142. THEODORE W. ALLEN, *THE INVENTION OF THE WHITE RACE, VOLUME II: THE ORIGIN OF RACIAL OPPRESSION IN ANGLO-AMERICA* 249 (2d ed. 2012).

143. *Id.* at 153–61 (flight and marriage), 213–5 (rebellion). See also EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* 308, 327 (2d ed. 2005) (further explaining relationship between inception of racialized slavery and inhibition of nascent cross-“racial” lower-class collective action).

owned bonded laborers, including bonded laborers of European descent.<sup>144</sup> The very term “white” does not appear in the first sixty years of Virginia colonial records.<sup>145</sup>

After Bacon’s Rebellion at the end of the seventeenth century, planter elites feared continued unrest from the alliance of European and African bonded laborers.<sup>146</sup> Accordingly, in the early eighteenth century, they worked to build an alliance with poorer colonists of European descent by creating a social hierarchy according to which the privileges of citizenship were granted to all “whites” and denied to all “negroes.”<sup>147</sup> In pursuit of this strategy, the Virginia Assembly disenfranchised all “free negro, mulatto, or Indian” members of the community, and Governor William Gooch openly admitted that the purpose of this enactment was to lower the social status of members of these racial groups.<sup>148</sup> During the same period, numerous other laws were enacted to carve out an inferior social status for blacks.<sup>149</sup> Particularly, anti-miscegenation laws appeared first in Virginia in 1691, and then spread across the colonies.<sup>150</sup>

At the same time, the planter elite enacted measures to increase the status of European-descended laborers. In particular, they wrote economic subsidies into law for the newly created category of “whites,” including laws mandating that white laborers be employed in a specified proportion to the number of enslaved blacks on any given plantation.<sup>151</sup> The strategy worked: European servant rebellions stopped, and the elites no longer felt the need to fear lower-class, cross-“racial” alliance.<sup>152</sup>

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144. ALLEN, *supra* note 142, at 180–87. See also Paul Finkelman, *The Origins of Colorism in Early American Law*, in COLOR MATTERS, *supra* note 7, at 29–33 (describing introduction of racial categories into Virginia law). Finkelman also explains why this focus on Virginia’s racial history is significant for America as a whole: “most of the southern colonies adopted the rules and laws coming out of Virginia in this period.” *Id.* at 29. For more references, see STEVE MARTINOT, *THE RULE OF RACIALIZATION: CLASS, IDENTITY, GOVERNANCE* 36–72 (2003). See also *id.* at 75–81 (another interpretation in terms of class conflict).

145. ALLEN, *supra* note 142, at x (introduction of Jeffery B. Perry).

146. *Id.* at 218–19.

147. *Id.* at 240.

148. *Id.* at 241–42.

149. *Id.* at 251–52.

150. MORGAN, *supra* note 143, at 334–35; ARIELA J. GROSS, *WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* 18 (2008). See also Finkelman, *supra* note 144, at 32–33 (explaining background of anti-miscegenation laws in laws prohibiting concerted action between blacks and whites and “discourage[ing] interracial challenges to the planter class”).

151. ALLEN, *supra* note 142, at 252–53. See also MORGAN, *supra* note 143, at 331–37, 344–45 (special legal privileges and economic subsidies for “Christian white servants”).

152. ALLEN, *supra* note 142, at 251–52.

Thus, from the very beginning, race in the U.S. was created by the state for the purpose of imposing hierarchical subordination on nonwhites.<sup>153</sup> And this quickly became entrenched into our culture to the point that we became unable to remember a time when it had been otherwise. In 1806, Judge Tucker of the Supreme Court of Appeals of Virginia could declare, in *Hudgins v. Wrights*, that “[f]rom the first settlement of the colony of Virginia to the year 1778, (Oct. Sess.) all negroes, Moors, and mulattoes, except Turks and Moors in amity with Great Britain, brought into this country by sea, or by land, were slaves,”<sup>154</sup> and, by contrast, that “[a]ll white persons are and ever have been free in this country.”<sup>155</sup> Barely a century after the crude legislative divide-and-conquer strategy of the elite brought it into being, the black-white racial and status distinction had become an eternal fact.

Should the reader doubt the continuing relevance of our historical construction of race categories for current practices, current research in political science should help. According to recent work by Avidit Acharya, Matthew Blackwell, and Maya Sen, the geographical concentration of slavery exerts a continuing effect on racial attitudes even today: the concentration of slave ownership in 1860 predicts party identification, opposition to affirmative action, and resentment of blacks in a survey of white respondents in the South.<sup>156</sup> After excluding a number of potential mechanisms, the authors suggest, that this can be explained by the influence of parents on their children’s racial attitudes.<sup>157</sup> To the extent

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153. See Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation* 62 AM. SOC. REV. 465, 471–72 (1996) (giving references for the “invention” of racial categories “to justify the conquest and exploitation of various peoples”). See also Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 TEMP. L. REV. 129, 143–86 (2003) (providing broad and deep history of interrelated public and private construction of stigmatized black identity in the form of the n-word).

154. 11 Va. 134, 137 (1806). I thank Herb Hovenkamp for suggesting I discuss this case.

155. *Id.* at 139.

156. Avidit Acharya et al., *The Political Legacy of American Slavery* 7–13 (Nov. 21, 2014) (unpublished) (available at <http://scholar.harvard.edu/files/msen/files/slavery.pdf>). There is also evidence that the construction of racial hierarchy in the nineteenth century contributes directly to contemporary disadvantage. See Heather A. O’Connell, *The Impact of Slavery on Racial Inequality in Poverty in the Contemporary U.S. South*, 90 SOC. FORCES 713, 727 (2012) (finding that counties in which there were more slaves in 1860 show higher black poverty rates today); Graziella Bertocchi & Arcangelo Dimico, *Slavery, Education and Inequality*, 70 EUR. ECON. REV. 197 (2014) (showing that counties with higher proportion of slaves in 1860 suffer from greater contemporary racial income inequality as well as greater contemporary racial educational attainment inequality and lower per capita spending on education).

157. Acharya et al., *supra* 156, at 32; Avidit Acharya et al., *Attitudes Shaped by Violence* 2–4 (Nov. 5, 2013) (unpublished) (available at <http://www.mattblackwell.org/files/papers/slaverytheory.pdf>) (giving theory of southern racism according to which racism was initially motivated by economic incentives to secure continuing black labor after emancipation and later persisted through “inter-generational socialization”).

this is correct, there is compelling evidence for the notion that the political effect of racial politics, and the state action that drove it, can linger for hundreds of years and affect contemporary individual behavior. Accordingly, because it created these conditions in the first place, the state must bear some of the blame for the persistence of the psychological facts described in Part II.

### C. Segregation and Racialized Spaces

This subpart describes the origin and persistence of residential segregation and the consequent creation of *racialized spaces*—spaces that are associated with racial groups (e.g., the black neighborhood or the white school). It also describes the consequences of the racialization of space. This includes both perceptual isolation that supports the stereotype formation described in the previous Part<sup>158</sup> and physical/social isolation that permits numerous types of concrete racial disadvantage.<sup>159</sup>

At the start of the twentieth century, there was surprisingly little residential racial segregation.<sup>160</sup> However, in the early part of the century, segregated neighborhoods were created in the north as a response to industrialization and black migration to the northern cities.<sup>161</sup> Strategies used to create residential segregation included racially motivated violence by whites, coordinated economic action by whites to keep blacks out of their neighborhoods, zoning restrictions and other local government actions taken against black residents, racially restrictive covenants, “blockbusting”—real estate agents consciously taking advantage of white fear of black neighbors to concentrate blacks in ghettos—and, in the South, enforcement of de jure segregation laws.<sup>162</sup> After the World Wars, government investments in suburban transportation and homeownership programs for veterans facilitated white flight.<sup>163</sup> There was also copious

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158. This is the case particularly with reference to the phenomenon of illusory correlation, which is facilitated by limited cross-racial exposure.

159. Early life residential segregation predicts a preference for segregated neighborhoods as well as observed workplace segregation. Brondolo et al., *supra* note 75, at 364 (discussing studies).

160. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 20 (1993).

161. *Id.* at 26–30.

162. *Id.* at 26–41.

163. *Id.* at 44. These programs were conceived of and administered in a discriminatory fashion. See Juan F. Perea, *Doctrines of Delusion: Bakke, Fisher and the Case for a New Affirmative Action*, INST. FOR HIGHER EDUC. LAW & GOVERNANCE 1, 4 (2013), <http://www.law.uh.edu/ihe/g/monograph/13-02.pdf> (describing veterans programs). See also Brondolo et al., *supra* note 75, at 364 (further references on racially motivated postwar housing programs).

private discrimination in the real estate industry in that period.<sup>164</sup> Government complicity in the discrimination included “redlining”—or endorsing lending discrimination—a practice that sometimes excluded entire cities from federal loan benefits.<sup>165</sup> It also included “slum redevelopment” that further displaced blacks and concentrated blacks in public housing projects.<sup>166</sup>

After the civil rights legislation of the 1960s, existing patterns of racial segregation were maintained by private discrimination. Such discrimination included continuing systematic real estate industry discrimination, such as “steering” customers to racialized neighborhoods or failing to advertise mixed-race neighborhoods,<sup>167</sup> as well as the unwillingness of individual whites to move to mixed-race neighborhoods.<sup>168</sup> Lenders also discriminated against mixed-race neighborhoods.<sup>169</sup> “White flight” further contributes to continuing segregation: simply put, whites tend to leave neighborhoods with a substantial number of black people.<sup>170</sup> Moreover, the state remains complicit today in racial residential segregation by directing disparate police attention and intimidation against blacks and other people of color when they leave minority neighborhoods.<sup>171</sup>

While residential segregation has declined over the last few decades, it remains significant.<sup>172</sup> Importantly, even though we intuitively would expect economic segregation, driven by factors like housing prices in the most desirable areas, to be more important than racial segregation, the most recent analyses show this to not be true: blacks and Latinos are both more segregated from whites than are the poor from the wealthy.<sup>173</sup> This residential racial segregation has had dramatic effects on black disadvantage. Massey and Denton have shown that racial segregation

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164. MASSEY & DENTON, *supra* note 160, at 50–51.

165. *Id.* at 51–55.

166. *Id.* at 55–56.

167. *Id.* at 98–105.

168. *Id.* at 92–96.

169. *Id.* at 106–07.

170. See Lincoln Quillian, *Why Is Black–White Residential Segregation So Persistent?: Evidence on Three Theories from Migration Data*, 31 SOC. SCI. RES. 197, 198–200 (2002) (discussing empirical evidence for white flight).

171. DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 102–04 (2002) (recounting stories of police suspicion and harassment of minorities living in white neighborhoods).

172. While there is some evidence that residential segregation has been on the decline since Massey and Denton wrote, blacks are still highly segregated. Bonilla-Silva, *supra* note 153, at 32.

173. Leah Platt Boustan, *Racial Residential Segregation in American Cities* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 19045, 2013), available at <http://www.nber.org/papers/w19045>.

leads to concentrated poverty, which in turn worsens the condition even of non-poor blacks—because they are subjected to the social consequences of poverty despite their relative wealth—and improves the condition of whites.<sup>174</sup> The concentration of poverty leads to a tipping-point phenomenon whereby property owners have a reduced incentive to invest in their land, driving property values into a death spiral, leading to commercial flight, worsening crime, higher rates of reliance on public benefits, inferior schools, and all the familiar misfortunes of the black inner city.<sup>175</sup> This effect, we can conclude, is likely to be recursive: since concentrated poverty in black neighborhoods drives the economic condition of all people in the neighborhood down, this will lead to still more poverty in those neighborhoods and will cause whites to avoid them all the more assiduously.<sup>176</sup>

The housing market continues to be racialized today. In recent years, two groups of researchers studied landlord responses to Internet housing inquiries. Both studies varied their e-mails only by signing some of them with stereotypically black names (“Tyrell Jackson,” “Tyrone Johnson”). In both experiments, the e-mails with black names received significantly fewer responses than the e-mails with white names.<sup>177</sup>

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174. MASSEY & DENTON, *supra* note 160, at 118–28.

175. *Id.* at 130–42.

176. See Lincoln Quillian, *Segregation and Poverty Concentration: The Role of Three Segregations*, 77 AM. SOC. REV. 354, 354–57 (2012) (finding empirical support for Massey and Denton’s theory of the economic consequences of segregation, adding insight into role of proximity only to lower-income members of other races). On the self-reinforcing nature of segregation and other kinds of opportunity hoarding/racial cartel behavior, see generally Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C. L. REV. 373 (2008) (giving general theory of “feedback loops” in perpetuation of racial inequality).

177. Michelle E. Feldman & Allyson J. Weseley, *Which Name Unlocks the Door?: The Effect of Tenant Race/Ethnicity on Landlord Response*, 43 J. APPLIED SOC. PSYCHOL. E416 (2013); Adrian G. Carpusor & William E. Loges, *Rental Discrimination and Ethnicity in Names*, 36 J. APPLIED SOC. PSYCHOL. 934 (2006). In another version of that experiment, landlords discriminated against blacks, but when e-mails were accompanied with social status information favorable to a black sender, the discrimination disappeared. Andrew Hanson & Zackary Hawley, *Do Landlords Discriminate in the Rental Housing Market?: Evidence from an Internet Field Experiment in US Cities*, 70 J. URB. ECON. 99, 113–14 (2011). This is consistent with the supposition of the cognitive hierarchical model that racial attributions are inextricably linked to status. However, it is unclear from this study whether those subjects who received high-status information attached to black names failed to attribute blackness to the senders for that very reason or the subjects simply applied specific counter-stereotypic information to falsify their previous assumption that black applicants would be less desirable.

This phenomenon also exists in the purchase market. See Bo Zhao et al., *Why do Real Estate Brokers Continue To Discriminate?: Evidence from the 2000 Housing Discrimination Study*, 59 J. URB. ECON. 394, 395 (2006) (documenting discrimination in housing sales); Stephen L. Ross & Margery Austin Turner, *Housing Discrimination in Metropolitan America: Explaining Changes between 1989 and 2000*, 52 SOC. PROBS. 152, 165–74 (2005) (finding persistent discrimination in the

Racialized spaces, of course, directly reinforce hierarchical statuses. The impact of racial segregation on the phenomenon of illusory correlation is perhaps most obvious: to the extent whites are not exposed to blacks in their daily lives, such that many whites are only exposed to blacks in the form of crime-ridden TV news reports, they are likely to generate the stereotype that blacks are criminals.<sup>178</sup> And segregation, by subjecting blacks to more and concentrated disadvantage, reinforces the stereotype that blacks are associated with the social consequences of that disadvantage, such as welfare receipt and, again, crime. Perhaps most strikingly, spatial separation can serve as a proxy for visual data. Obasogie has found that parents of the blind used segregated spaces as a way of constructing racial identity for their children, reinforcing the message that white spaces were preferable in the absence of a visual reference for race.<sup>179</sup>

Empirical data have supported the segregation/poverty death spiral postulated by Massey and Denton, indicating that segregation impairs long term movement toward equality by depressing home appreciation, and thus wealth accumulation, by black families.<sup>180</sup> Actually, the median black homeowner (unlike both whites and Latinos) turns out to be, on the whole, subject to depreciation rather than appreciation.<sup>181</sup> And, consistent with Massey and Denton's theory, this appreciation disparity is exacerbated by concentrated poverty.<sup>182</sup> This relationship has earned a name: "the segregation tax."<sup>183</sup>

Moreover, residential racial segregation has pernicious political effects. Because only blacks benefit from public goods created in black

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purchase market, although overall decline over 11 years, and noting a sustained level of steering discrimination against blacks as well).

178. See discussion *supra* Part II.A.

179. OBASOGIE, *supra* note 120, at 90–92.

180. Chenoa Flippen, *Unequal Returns to Housing Investments?: A Study of Real Housing Appreciation Among Black, White, and Hispanic Households*, 82 SOC. FORCES 1523, 1523–25 (2004).

181. *Id.* at 1535.

182. *Id.* at 1541.

183. DAVID RUSK, BROOKINGS INST. CTR. ON URBAN & METRO. POL., THE "SEGREGATION TAX": THE COST OF RACIAL SEGREGATION TO BLACK HOMEOWNERS (2001), available at <http://www.brookings.edu/~media/research/files/reports/2001/10/metropolitanpolicy%20rusk/rusk.pdf> (finding that 18% lower values for black than white homes, controlling for income, is attributable to segregation). See generally Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53 (2006) (explaining the importance of homes, and the role of segregation, in racial wealth disparities); THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY (2004) (book-length treatment of racial wealth disparity as factor in persistence of racial inequality).

neighborhoods, blacks, unlike other groups, are unable to form cross-group political alliances to get those public goods created.<sup>184</sup>

Unsurprisingly, growing up in a poor black neighborhood suppresses a citizen's expected earnings by 18–27%.<sup>185</sup> In general, residential racial segregation has profound effects on practically every aspect of black life.<sup>186</sup> Blacks have substantially less income and wealth, a substantially higher unemployment rate, substantially lower educational attainment, and substantially higher crime victimization rates than do whites.<sup>187</sup> This is not a coincidence: the consequences of “past” residential segregation persist from generation to generation.<sup>188</sup> Black children who grow up in poor neighborhoods remain in poor neighborhoods.<sup>189</sup> Moreover, even increases in parental income lead to higher income for children less often for blacks than for whites; that is, parental upward mobility is not passed on to black children, at least in part because income increases in black families are often not sufficient to allow them to escape their poor and segregated neighborhoods.<sup>190</sup> Seventy percent of black families start out in neighborhoods in the bottom quartile of the income distribution in the first generation; 65% end up there in the next generation.<sup>191</sup> Part of this is due to geographic isolation from available jobs: lower-wage blacks are concentrated in central cities, while many of the jobs they might seek are spread out in the suburbs.<sup>192</sup> In the home lending market, racial minorities,

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184. MASSEY & DENTON, *supra* note 160, at 155.

185. *Id.* at 178.

186. This Part is greatly indebted to the analysis of the relationship between segregation and disadvantage in ANDERSON, *supra* note 115.

187. *See* sources cited *id.* at 23–25.

188. *See generally* Patrick Sharkey, *The Intergenerational Transmission of Context*, 113 AM. J. SOC. 931 (2008) (describing persistence of effects of residential segregation over generations).

189. *Id.* at 933 (“[M]ore than 70% of black children who are raised in the poorest quarter of American neighborhoods will continue to live in the poorest quarter of neighborhoods as adults. Since the 1970s, more than half of black families have lived in the poorest quarter of neighborhoods in consecutive generations, compared to just 7% of white families.”).

190. *Id.* at 951–53. Moreover, only 35% of blacks whose parents were in the top quartile of the income distribution remain there themselves, compared to 63% of whites. *Id.* at 953.

191. *Id.* at 953 tbl.3, 954 tbl.4.

192. Margery Austin Turner, *Residential Segregation and Employment Inequality*, in SEGREGATION: THE RISING COSTS FOR AMERICA 151, 164 (James H. Carr & Nandinee K. Kutty eds., 2008). This distance raises not just transportation problems but also information ones: blacks have a harder time learning about jobs that are advertised in distant suburbs or jobs advertised by referrals in the social networks of the current (white) workers. *Id.* at 170–71. *See also* Rachel Garshick Kleit, *Neighborhood Segregation, Personal Networks, and Access to Social Resources*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 192, at 237, 237–60 (providing more detail about effects of segregation in impoverishing black social networks and reducing their economic opportunities). As of this writing, a recent poll has confirmed the continuing segregation of the social world. White-identified respondents reported that 91% of the top seven people with whom they identified as having important conversations were white, and only 1% black. Black-identified respondents reported that

holding their creditworthiness constant, pay more for credit because their segregated neighborhoods are particularly attractive to subprime predatory lenders and particularly unattractive to traditional lenders.<sup>193</sup> Accordingly, in 2008 the black unemployment and poverty rates were more than double those of whites, and an average black family had a tenth the net worth of a white family.<sup>194</sup>

Schools, too, are subject to substantial de facto segregation thanks to residential segregation. Even in districts that are declared “unitary,” school segregation increases after their desegregation orders are lifted.<sup>195</sup> Moreover, the schools in racially segregated neighborhoods provide a worse education due to the effect of concentrated poverty on their tax bases, on the desirability of the locations for high-quality teachers, and on the social problems associated with poverty (e.g., illness, malnutrition), which interfere with education.<sup>196</sup>

A single example will highlight the continuing problem of residential and school segregation. As of this writing, the City of Huntsville, Alabama is still under a desegregation order in a lawsuit that was first filed in 1963. On June 30, 2014, the U.S. District Court found that “although black students make up 41% of the district’s total enrollment, almost all of the 40 public schools in the Huntsville City School district are racially identifiable.”<sup>197</sup> The Court further noted that there is a “strong correlation between race and the relative strength of educational programs throughout the district.”<sup>198</sup> Consistent with the noted pattern, the school district

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83% of their conversation partners were black and 8% were white. PUB. RELIGION RESEARCH INST., ANALYSIS: RACE AND AMERICANS’ SOCIAL NETWORKS (Aug. 28, 2014), <http://publicreligion.org/research/2014/08/analysis-social-network/>.

193. Kathleen C. Engel & Patricia A. McCoy, *From Credit Denial to Predatory Lending: The Challenge of Sustaining Minority Homeownership*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 192, at 81, 89–96.

194. BONILLA-SILVA, *supra* note 55, at 257.

195. Sean F. Reardon et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL. ANALYSIS & MGMT. 876, 899–900 (2012). See also Erica Frankenberg, *The Role of Residential Segregation in Contemporary School Segregation*, 45 EDUC. & URB. SOC’Y 548, 548 (2013) (finding strong empirical relationship between residential and school segregation); Gary Orfield et al., *Deepening Segregation in American Public Schools: A Special Report from the Harvard Project on School Desegregation*, EQUITY & EXCELLENCE EDUC., Sept. 1997, at 5, 5 (similar). For a number of case studies, see GARY ORFIELD ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* (1996).

196. See generally Deborah L. McKoy & Jeffrey M. Vincent, *Housing and Education: The Inextricable Link*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 192, at 125, 125–50.

197. *Wellington v. Huntsville Bd. of Educ.*, No. 5:63-cv-00109-MHH, slip op. at 66 (N.D. Ala. June 30, 2014), available at [http://media.al.com/news\\_impact/other/ruling.pdf](http://media.al.com/news_impact/other/ruling.pdf).

198. *Id.* at 78.

blames this school segregation on residential segregation, which it attributes to “private choice.”<sup>199</sup> The black students in Huntsville are relatively lucky: because their school district has been under a segregation order for five decades, they have the advantage of a legal status quo designed to protect their interests. Black students in schools that have never been under segregation orders, or that have been declared unitary in the last fifty years, are not so fortunate. In those schools, the “private choice” argument works to bar any judicial remedy, as it did in *Milliken v. Bradley*.<sup>200</sup>

Statistically, being black is correlated with numerous other kinds of disadvantage. At the most basic level, blackness kills: being black is associated with a shorter life expectancy than being white.<sup>201</sup> The health disparity between blacks and whites has increased over time.<sup>202</sup> Racial segregation is instrumental in this disadvantage, thanks to the concentration of health risks in minority neighborhoods as well as the absence of health-facilitating services such as grocery stores selling healthy food.<sup>203</sup>

In addition, blacks are subject to disproportionately harsh treatment at every stage of the criminal process, from investigation through sentencing.<sup>204</sup> In 1995, a third of black men between ages 20–29 were locked up or under probation or parole supervision.<sup>205</sup> Of course, the

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199. *Id.* at 67.

200. 418 U.S. 717 (1974). There, Justice Stewart declared, in concurrence, that residential segregation arose from “unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears,” thus relieving the state of all responsibility for the situation in which black students found themselves. *Id.* at 756 n.2 (Stewart, J., concurring).

201. ELIZABETH ARIAS, U.S. DEP’T OF HEALTH & HUMAN SERVS., UNITED STATES LIFE TABLES, 2008, 3 (2012), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61\\_03.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_03.pdf).

202. Robert S. Levine et al., *Black-White Inequalities in Mortality and Life Expectancy, 1933–1999: Implications for Healthy People 2010*, 116 PUB. HEALTH REP. 474, 479–80 (2001) (showing increase in health inequality from 1979 to 1998). See also PERRY, *supra* note 48, at 42 (discussing literature on health discrimination against blacks). There is some evidence for a direct (i.e. unmediated by social circumstances) effect of racial bias on the health of blacks. Researchers found that blacks who had stronger internalized anti-black racial bias (as measured by the IAT) and also reported experiencing more racism had more genetic markers of aging, even after controlling for things like poverty. David H. Chae et al., *Discrimination, Racial Bias, and Telomere Length in African-American Men*, 46 AM. J. PREVENTIVE MED. 103, 106–08 (2014).

203. See generally Renee E. Walker et al., *Disparities and Access to Healthy Food in the United States: A Review of Food Deserts Literature*, 16 HEALTH & PLACE 876, 876–77 (2010) (reviewing literature).

204. The most complete discussion of the racial disparities in the criminal process is MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS* (2d ed. 2012). See also ANDERSON, *supra* note 115, at 128–29; DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 16–62, 101–57 (1999).

205. Harris, *supra* note 91, at 71.

concentration of crime as well as aggressive policing in black neighborhoods means that residential segregation is inextricably intertwined with the social construction of blacks (and Latinos) as criminals—the physical and social environment in segregated communities marks residents as criminals even from childhood. For example, Victor Rios describes how ongoing criminalization begins in the schools of black and Latino neighborhoods in Oakland, where police use the criminal justice system as a disciplinary measure; schools themselves are often turned into heavily-policed environments and school personnel are in cahoots with police on the lookout for opportunities to bring students into the system.<sup>206</sup> In segregated neighborhoods, even the victims of crime can themselves be criminalized. Rios describes one youth who, after becoming the target of random gang violence, was falsely entered into a police database of known gang members on the assumption that he must have been a member of a competing gang.<sup>207</sup> On the streets of segregated communities, police sometimes leave the vulnerable to their own devices and even encourage them to use self-help violence to defend themselves from crimes the police do not bother to try to prevent.<sup>208</sup> Thus, racially disparate law enforcement is enabled by the creation of minority spaces and white spaces, in which police behave differently.

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206. VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 28, 57–63, 79–82 (2011).

207. *Id.* at 28, 76–78.

208. *Id.* at 28, 52–57, 72–73. See generally RANDALL KENNEDY, RACE, CRIME AND THE LAW 69–75 (1997) (arguing that racial disparity in criminal justice includes both underprotection as well as overcriminalization of blacks). This neglect has been empirically observed. Stephanie L. Kent & David Jacobs, *Minority Threat and Police Strength from 1980 to 2000: A Fixed-Effects Analysis of Nonlinear and Interactive Effects in Large U.S. Cities*, 43 CRIMINOLOGY 731, 752–53 (2005) found that cities with large black populations have larger police departments, except where the black populations are highly segregated, in which case they have smaller police departments—precisely what we would expect to see if politically powerful whites take advantage of the isolation of blacks to neglect crime control in black neighborhoods, but attend to crime control when it reaches their own neighborhoods. However, this result must be taken with some hesitation: Brian J. Stults & Eric P. Baumer, *Racial Context and Police Force Size: Evaluating the Empirical Validity of the Minority Threat Perspective*, 113 AM. J. SOC. 507, 526 (2007) find by contrast that more segregated communities have larger police departments. Some additional evidence for the neglect of crime control in black communities can be found in Lisa Stolzenberg et al., *A Multilevel Test of Racial Threat Theory*, 42 CRIMINOLOGY 673, 687–90 (2004), which found that in segregated cities reports of crime committed by blacks are less likely to result in an arrest than reports of crime committed by whites, but that it is the other way around in integrated cities. However, segregated cities are more likely than integrated cities to make an arrest when a white victim reports a crime committed by a black perpetrator. The implication is that “black-on-black crime” is neglected in segregated cities, but “black-on-white-crime” is not: these cities are inadequately motivated or equipped to protect blacks from violence. Some of the responsibility for this must be attributed to the municipal boundaries that deprive poorer black communities of public goods, including adequate police services, about which see *infra* Part IV.B.

The workplace is also a racialized space. Blacks and Latinos are subject to persistent discrimination in the employment market. This both exacerbates residential segregation by impoverishing workers and reducing their mobility, and is exacerbated by it—e.g., by the role of segregation in the criminalization of people of color and consequent job market disadvantage. One recent study found that otherwise equivalent black and Latino job applicants generated less interest from employers than whites who had recently been released from prison.<sup>209</sup> That study revealed both blatantly intentional discrimination, such as an employer who saw equivalent white, black, and Latino candidates at the same time, and, without discussion, sent only the black candidate away;<sup>210</sup> or the employer who told black and Latino candidates that the job was filled and invited the white candidate to start on the spot;<sup>211</sup> as well as slightly more subtle channeling of blacks away from customer-facing positions and less charitable evaluations of blacks' work histories.<sup>212</sup> Similarly, audit tests involving stereotypically white or black names also show a substantial amount of racial discrimination: “[w]hite names receive 50 percent more callbacks for interviews,” and this “racial gap is uniform across occupation, industry, and employer size.”<sup>213</sup> This latter study measured the qualitative impact of race: “[a] [w]hite name yields as many more callbacks as an additional eight years of experience on a resume.”<sup>214</sup>

As this Part has shown, the state has been complicit in the creation and maintenance of racialized spaces, both with its direct complicity in twentieth century segregation, as well as its role in supporting the stigmatized racial ascriptions with which we continue to live. Accordingly, it is complicit in the continuing cognitions that today drive private racial

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209. Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 785–86 (2009). On the whole, blacks generated half as much interest as whites. *Id.* at 784. See also DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 146–49 (2007) (describing further audit study results and the cumulative economic effect of racial employment discrimination and disparate racial exposure to criminal justice system, as well as arguing that long-term employment credentials of black workers are impaired by early-on labor market discrimination); PERRY, *supra* note 48, at 235 n.20 (citing further evidence); Donald Tomaskovic-Devey et al., *Race and the Accumulation of Human Capital Across the Career: A Theoretical Model and Fixed-Effects Application*, 111 AM. J. SOC. 58, 58 (2005) (providing evidence for long-term human capital cost to blacks of racial employment discrimination).

210. Pager, *supra* note 209, at 787.

211. *Id.* at 788.

212. *Id.* at 789–91.

213. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991 (2004).

214. *Id.* at 992.

bias. The next Part will argue that this complicity requires a constitutional remedy.

#### IV. THE CONSTITUTIONAL CONSEQUENCES OF RACIAL HIERARCHY

This Part argues, based on the legal ideal of the rule of law as incorporated into the Equal Protection Clause, that the state must cease propping up racial hierarchy. After briefly describing the relationship between the rule of law and Equal Protection, it offers two doctrinal implications of the cognitive hierarchical model, of many that are possible. First, the United States must eliminate the legal structures that support racialized spaces by distributing public goods along racial lines, and abandon the doctrinal vestiges that forbid it from doing so, including (in part) the requirement that state discrimination be intentional to be subject to challenge under the Equal Protection Clause. Second, citizens who complain of the individual impact of state support of racial hierarchy should be granted standing to seek injunctive relief, even in the face of supposedly isolated injuries that are not likely to recur.

##### A. *The Rule of Law Case Against Racial Hierarchy*

In prior work, I showed that the normative principle, which is within the ideal of the rule of law, that the law must be general—captured in American law in the Equal Protection Clause—forbids the state from reinforcing existing unjust social hierarchies with its legal system by making those hierarchies the basis of legal rights and responsibilities.<sup>215</sup> To recap the analysis: a conjunction of legal and social arrangements violates the rule of law if it is inconsistent with public reasons for the legal enactments that establish it—that is, if, in the law’s social context, the reasons justifying the law cannot be understood consistent with the equal standing of all within the community.<sup>216</sup> And this will happen when the law cannot be understood as justifiable by such reasons from each of three standpoints: from the first-person standpoint of those who enact the law, who are to be seen as enacting the law to promote the general public good; from the second-person standpoint of those who are to obey the law, who are to be seen as obeying the law because it helps them comply with reasons that already apply to them; and from the third-person standpoint of the community at large, who are to be seen as having reasons to take the

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215. Gowder, *Equal Law in an Unequal World*, *supra* note 27.

216. *Id.* at 1033–37, 1045–47.

law as expressing their overall goals for the social relationships they have with one another.<sup>217</sup>

This is an expressive inquiry that does not depend on intentions: if the state with its legal system expresses, however unintentionally, the notion that the objects of social inequalities are not entitled to equal treatment—are not equal members of the political community—then the laws in question cannot be understood to be general.<sup>218</sup> In turn, the requirement that the laws be general is at the very heart of our constitutional order. A law that expresses the inferiority or subordination of some member of the community directly denies that person the equal protection of the laws.

This is not an argument cognizable under current Equal Protection Clause doctrine. Rather, it is a Dworkinian interpretation of that doctrine, in terms of the principles that justify it.<sup>219</sup> The suspect classes and levels of scrutiny in equal protection doctrine are best understood as expressions of the public-reason conception of the rule of law principle of generality, which commands greater care to avoid legal distinctions that harm those subject to a social history of subordination.<sup>220</sup> But the broader normative principle of generality also has implications beyond the system of suspect classifications, including those given below.

### *B. Municipal Boundaries as Racialized Spaces*

Consider the laws establishing local government boundaries in the United States. Many public goods are divided along local government lines, including vital public goods like schools and policing. To establish a municipal boundary is for that reason to declare, by a law, a division of the world into those citizens who have access to the public goods provided by that municipality and those who do not.

Due to residential segregation, many of these municipal boundaries are racialized.<sup>221</sup> Sometimes, this racialization was intentional. Gregory Weiher has argued, based on the post-*Brown* era legal attacks on intrajurisdictional discrimination (i.e., desegregation within municipalities),

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217. *Id.* at 1040–45.

218. *Id.* at 1038.

219. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 116–17 (1978) (explaining theory of interpretation as finding values that “fit” and “justify” existing legal material).

220. Gowder, *Equal Law in an Unequal World*, *supra* note 27, at 1032, 1049, 1079 (explaining how public reason conception of generality helps us understand—that is, fits and justifies—Equal Protection doctrine).

221. To repeat and clarify: this Article says that a space is “racialized” when either it is identified by the community as predominately occupied by the members of a given race or in fact operates to isolate members of different races from one another.

along with the refusal to entertain challenges to jurisdictional boundaries represented by cases like *San Antonio Independent School District v. Rodriguez*,<sup>222</sup> that racial discrimination has shifted to the development of municipal boundaries, and its intentional face has primarily shifted into segregation by socioeconomic class in order to avoid Equal Protection challenges.<sup>223</sup> Supporting this hypothesis empirically, he demonstrated that the amount of variance in minority population accounted for by municipal boundaries increased in both Cook County and Los Angeles County between 1960 and 1980.<sup>224</sup>

Some of this racialization may not be intentional. Thousands of new municipalities and tens of thousands of special districts (water districts, school districts, housing authorities, etc.) were created in the 20th century.<sup>225</sup> Sometimes these acts of municipal creation were motivated by desires as simple as excluding profitable commercial property from taxation by separating it from the local residents in need of tax-supported public goods.<sup>226</sup> Regardless of the motives underlying the acts, however, they served to give a legal face to residential segregation. In the words of Nancy Burns:

[Those who formed new local governments] used the form of the city to keep themselves from being annexed to older cities that had populations with higher service needs, smaller tax bases, and thus higher taxes. These citizens and businesses were able to define unwanted others out of their politics, creating—in fact—political boundaries that signified class and racial divisions.<sup>227</sup>

*Signified* is the most important word in that passage: the boundaries signify racialized spaces, regardless of intent. Moreover, class segregation is also race segregation, in view of the extreme economic disparities between black and white families. And, due to continuing housing and

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222. 411 U.S. 1 (1973).

223. Gregory R. Weiher, *Public Policy and Patterns of Residential Segregation*, 42 W. POL. Q. 651, 655–56 (1989).

224. *Id.* at 660–62. See also NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS 36–37 (1994) (citing egregious cases of intentional discrimination in the creation of municipalities to exclude racial minorities, particularly blacks); *id.* at 83–92 (giving additional empirical support); Jonathan T. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. & ECON. REV. 290, 347–48 (2011) (finding that local government low-density zoning rules are responsible for a substantial proportion of existing residential segregation).

225. See BURNS, *supra* note 224, at 4–6.

226. *Id.* at 38–39, 80–81.

227. *Id.* at 76.

lending discrimination against blacks, a black family is less likely to be able to access a wealthy neighborhood than a white family, even if it shares the same level of wealth. The black family can expect to have a harder time finding a willing seller or landlord and to be forced to pay higher interest rates.

As evidence that these racial and economic boundaries are genuinely enforced by law, consider that American parents are routinely arrested for lying about their residences to enroll their children in better-resourced public school districts in neighborhoods they cannot afford.<sup>228</sup> A citizen is subject to criminal punishment if she makes use of the public goods of a wealthier neighbor without having the financial or social (that is, racial) resources to move there.<sup>229</sup>

Moreover, municipalities create not only physical racialized spaces, but also bureaucratic and institutional as well as social racialized spaces. The public institutions of poorer and darker municipalities are likely to evolve in order to adapt to their environment in a different direction than those of richer and lighter municipalities. For example, by structuring space such that there is a police department for the white community and a different police department for the black community, the state makes it possible for those departments to evolve different cultures as well as formal policies around things like the use of force and consent searches.<sup>230</sup>

What are the results? Consider a single example. The city of Palo Alto, California, one of the hubs of Silicon Valley, is a largely white center of incredible wealth and privilege. Right next door, just across the 101 freeway (a physical boundary that expresses both legal and racial boundaries), is East Palo Alto. In 1992, East Palo Alto earned the dubious

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228. See, e.g., *Where School Boundary-Hopping Can Mean Time in Jail*, AL JAZEERA AM. (Jan 21, 2014), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2014/1/21/where-school-boundaryhoppingcanmeantimeinjail.html> (listing cases), archived at <http://perma.cc/ZZ2E-Y6JJ>.

229. On conceiving of racial identities as commercial resources, see Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2158–61 (2013).

230. Recent empirical research is consistent with this supposition. See Brad W. Smith & Malcom D. Holmes, *Police Use of Excessive Force in Minority Communities: A Test of the Minority Threat, Place, and Community Accountability Hypotheses*, 61 SOCIAL PROBLEMS 83, 97 (2014) (finding that cities with higher proportion of black and Latino residents, as well as more segregated black residents, had more founded complaints of excessive police force). See generally Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156, 163 (2001) (explaining that residential segregation facilitates the delivery of “qualitatively different” policing in black and white communities).

distinction of “the murder capital of America.”<sup>231</sup> The disparity between the two is striking: Palo Alto is largely white and has a wealthy tax base; East Palo Alto, a mere footstep across the border, is largely Latino and black and much poorer. Compare the two cities’ public revenue to their reported racial demographics:

	<u>Per capita revenue</u>	<u>White pop.</u>	<u>Black/Latino pop.</u>
Palo Alto <sup>232</sup>	\$6,651	60.6%	8.0%
East Palo Alto <sup>233</sup>	\$1,119	6.2%	80.3%

The disparity in public revenue arises, unsurprisingly, from greatly disparate income and wealth in the two communities:

	<u>Median income</u>	<u>Median home value</u>	<u>Poverty rate</u>
Palo Alto	\$120,670	>1,000,000	5.7%
East Palo Alto	\$48,734	\$525,000	16.6%

The mostly minority residents of East Palo Alto, in short, are legally excluded from the immensely better funded public services of mostly white and wealthy Palo Alto.<sup>234</sup>

231. Jenifer Warren, *E. Palo Alto Murder Rate Worst in U.S.; Drug Wars Blamed*, L.A. TIMES, Jan. 5, 1993, [http://articles.latimes.com/1993-01-05/local/me-833\\_1\\_east-palo-alto](http://articles.latimes.com/1993-01-05/local/me-833_1_east-palo-alto), archived at <http://perma.cc/DVA-97QC>.

232. Population and wealth figures in this table and the next for Palo Alto are based on the 2010 Census and American Community Survey. See *City of Palo Alto*, BAYAREACENSUS.CA.GOV, <http://www.bayareacensus.ca.gov/cities/PaloAlto.htm>, archived at <http://perma.cc/EJD3-BNS6>. According to those data, the city is 60.6% white non-Hispanic, 1.8% black non-Hispanic, 6.2% Hispanic, and 27.0% Asian non-Hispanic. We are not told how much above one million dollars the average owner-occupied home is worth. Public revenue figures are based on the city’s FY 2014 published budget, reporting total revenue of \$435,971,723 for a population of 65,544. CITY OF PALO ALTO, ADOPTED OPERATING BUDGET FISCAL YEAR 2014 4, 19 (2013), available at <http://www.cityofpaloalto.org/civicaX/filebank/documents/35339>.

233. Population and wealth figures in this table and the next for East Palo Alto are based on the 2010 Census and American Community Survey. See *City of East Palo Alto*, BAYAREACENSUS.CA.GOV, <http://www.bayareacensus.ca.gov/cities/EastPaloAlto.htm>, archived at <http://perma.cc/NU5S-BU9X?type=source>. According to those data, the city is 6.2% white non-Hispanic, 15.8% black non-Hispanic, 64.5% Hispanic, and 3.6% Asian non-Hispanic. Public revenue figures are based on the city’s 2013–14 published budget, reporting total revenue of \$32,089,904 (2012–13) for a population of 28,675 (2013). CITY OF EAST PALO ALTO, FISCAL YEAR 2013–2014 ADOPTED OPERATING BUDGET OS-6, FS-2 (2013), available at <http://www.ci.east-palo-alto.ca.us/ArchiveCenter/ViewFile/Item/135>.

234. The attentive reader will notice that this example appears, statistically, to be about segregation between whites and Latinos, not whites and blacks. This is not a problem for my argument. First, the share of blacks in East Palo Alto is over eight times that in Palo Alto. Second, those racial categories are highly malleable, not least because the African diaspora and “blackness” are

The data will tell us how much better those public services are. The East Palo Alto school district “regularly struggles to provide such basics as textbooks, classroom supplies, and building maintenance.”<sup>235</sup> Half of the schools in the district have “the lowest rating” on the California Department of Education’s Academic Performance Index (API).<sup>236</sup> Consider the following statistics:

	<u>Mean API</u>	<u>Max API</u>	<u>Min API</u>
Palo Alto	942	995	877
East Palo Alto	710.33	826	590

For context, the statewide mean API in 2012 was 787, with a standard deviation of 106. In Palo Alto, all but one school scored over 900, and the worst school in Palo Alto scored better than the best school in East Palo Alto.<sup>237</sup>

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part of the mix of the areas and peoples identified as “Latino.” See generally Frank F. Montalvo & G. Edward Codina, *Skin Color and Latinos in the United States*, 1 ETHNICITIES 321, 323 (2001) (describing history of African slavery and subsequent attempts at racial assimilation in Latin America); *id.* at 333–35 (describing ambiguous position of Puerto Ricans in American racial category system); Lourdes Martinez-Echazabal, *Mestizaje and the Discourse of National/Cultural Identity in Latin America, 1845–1959*, LATIN AM. PERSP., May 1998, at 21, 21 (describing development of racial hybridization as a component of Latino identity), Imani Perry, *Of Desi, J. Lo, and Color Matters: Law, Critical Race Theory the Architecture of Race*, 52 CLEV. ST. L. REV. 139, 146–48 (2005) (highlighting discrimination directed at black Latinos and failure to acknowledge black Latinos in contemporary American discourse). Third, Latinos doubtless also occupy a subordinate position in America’s racial hierarchy relative to whites, and there is no obvious reason to think that the cognitive hierarchical model would not apply on similar terms. This Article focuses on the black/white cleavage because of the important history and salience of that cleavage to American society, because of the ready availability of social scientific evidence, and because my own racial background means I know more about and have a personal investment in that cleavage—not in order to suggest that the fundamental mechanism of racial hierarchy is any different with respect to other subordinate categories.

The situation of Asian-Americans, the fourth racial group represented in these statistics, is of course more complicated because of the “model minority” stereotype imposed on them. But while that discussion is beyond the scope of this Article, it seems clear that Asian-Americans also suffer ascriptive injury. See generally Monica H. Lin et al., *Stereotype Content Model Explains Prejudice for an Envied Outgroup: Scale of Anti-Asian American Stereotypes*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 34 (2005) (describing Asian-American stereotypes and their harmful effects). The analytic difficulties of extending the model to racially liminal categories, like multiracial Americans and contemporary African immigrants, will have to await future work.

235. Rob Reich, *A Failure of Philanthropy: American Charity Shortchanges the Poor, and Public Policy Is Partly to Blame*, VOICES URB. EDUC., Winter 2012, at 42, 43, available at <http://vue.annenberginstitute.org/sites/default/files/issuePDF/VUE32.pdf>.

236. *Id.*

237. Palo Alto data from CALIF. DEP’T OF EDUC., 2012–13 ACCOUNTABILITY PROGRESS REPORTING (APR): PALO ALTO UNIFIED (2013), available at [http://api.cde.ca.gov/Acnt2013/2012Base\\_Dst.aspx?cYear=&allcds=4369641&cChoice=2012BDst](http://api.cde.ca.gov/Acnt2013/2012Base_Dst.aspx?cYear=&allcds=4369641&cChoice=2012BDst). East Palo Alto data from CALIF. DEP’T OF EDUC., 2012–13 ACCOUNTABILITY PROGRESS REPORTING (APR): RAVENSWOOD CITY ELEMENTARY (2013), available at [http://api.cde.ca.gov/Acnt2013/2012Base\\_Dst.aspx?cYear=&allcds](http://api.cde.ca.gov/Acnt2013/2012Base_Dst.aspx?cYear=&allcds)

Nor are the schools the only public service that suffers in East Palo Alto. According to a 2010 report by the Berkeley Center for Criminal Justice, East Palo Alto “ranks in the top ten among California cities in . . . aggravated assault, homicide, and rape,” yet its police department is “significantly lower in officers per capita compared to other cities in California with similar violent crime rates and other similarly sized cities in California.”<sup>238</sup> By contrast, Palo Alto suffered exactly one homicide from 2009–2013.<sup>239</sup> The city of Palo Alto provides a chart comparing the total number of FBI Uniform Crime Report Part I crimes with its neighboring communities. Based on those figures plus population data noted above, I calculate that the 2013 per capita crime rate in East Palo Alto was almost double that of Palo Alto.<sup>240</sup>

When the people of East Palo Alto look across the freeway at the public goods from which the law excludes them, we must ask what sort of public reasons might justify such laws. Within a political community, such as the State of California, which has duties toward all of its citizens, the most obvious justification for such internal fragmentation will be that California apportions responsibilities for providing public goods to subgovernmental units in order to provide them with local control and the benefits of local knowledge.<sup>241</sup> However, this public reason is sensitive to social circumstances.<sup>242</sup> If some municipalities are deprived of the

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=4168999&cChoice=2012BDst (Ravenswood is the name for the East Palo Alto school district; there does not appear to be a high school under the Ravenswood district’s control). Citywide means are my calculation based on those data; statewide mean and standard deviation are my calculation based on data made available at <http://www.cde.ca.gov/ta/ac/ap/apidatafiles.asp>. Only one of the Ravenswood schools was above the statewide mean, and four out of nine were more than one standard deviation below it; all of Palo Alto’s were above the mean, and sixteen out of seventeen were more than one standard deviation above.

238. SARAH LAWRENCE & GREGORY SHAPIRO, BERKELEY CTR. FOR CRIMINAL JUSTICE, CRIME TRENDS IN THE CITY OF EAST PALO ALTO 3–4 (2010), available at [https://www.law.berkeley.edu/files/EPA\\_Main\\_Report\\_Final.pdf](https://www.law.berkeley.edu/files/EPA_Main_Report_Final.pdf). According to Lawrence & Shapiro, these figures actually represent a dramatic improvement from previous decades.

239. *Crime Statistics*, CITY OF PALO ALTO, <http://www.cityofpaloalto.org/gov/depts/pol/info/stats.asp> (visited Sept. 23, 2014).

240. Palo Alto: 1554 crimes; one per 42.2 residents; East Palo Alto: 1175 crimes; one per 24.4 residents. *A 10 Year Comparison of Part I Crime by City*, CITY OF PALO ALTO, <http://www.cityofpaloalto.org/civicax/filebank/documents/8350> (visited Sept. 23, 2014).

241. See generally Robert E. Goodin, *What is so Special About our Fellow Countrymen?*, 98 ETHICS 663 (1988) (explaining assigned responsibility theory of governmental divisions for the case of international borders); EVAN FOX-DECENT, *SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY* (2011) (giving account of the state as a fiduciary of its people). Read together, these make a plausible case for local governments as instrumentalities for the effective fulfillment of the state’s fiduciary obligations.

242. Cf. Goodin, *supra* note 241, at 685 (arguing that if a state has insufficient resources for fulfilling its duties to its people, either the borders or the resource allocations must change).

resources necessary to provide public goods for their citizens, then those citizens have neither the benefit of local autonomy nor of local knowledge in determining how their nonexistent public goods are allocated.

Another possible justification for municipal boundaries adds to these “liberal” reasons broader “communitarian” ones: “freedom from domination under, and inefficiencies resulting from, indifferent, ill-informed, or corrupted distant authorities; but also recognition of the social conditions necessary for the meaningful exercise of such freedom.”<sup>243</sup> This latter idea is meant to suggest “associative richness,” that is, the protection of the communities in which our close ties and “our broader conceptions of justice and the good life are formulated and affirmed.”<sup>244</sup> However, while such public reasons may be sufficient to justify giving dignity and respect to existing local boundaries and some control over local decisions (particularly, for example, with respect to culturally significant lawmaking), it hardly works as a justification for legally excluding the residents of some localities from the resources—such as decent schools—necessary to achieve public goods needed for all “conceptions of justice and the good life.”

These most obvious public reasons not being available, we should turn our attention to the expressive content of such municipal boundaries, in light of the ideas about the hierarchical nature of race developed in this Article.<sup>245</sup> As the boundaries track a hierarchical category, creating racialized spaces—spaces identified with unjust social hierarchy—and then allocating greatly unequal public burdens and benefits along those lines, the only possible ostensible justifications for these boundaries are manifestly nonpublic reasons that incorporate the existing racial hierarchy. That is, such spaces suggest that racial minorities who have been pushed into these burdened communities are simply entitled to less out of their local governments than whites.<sup>246</sup> Because our racialized internal borders

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243. Loren King, *Federalism, Subsidiarity, and Cities*, in *FEDERALISM AND SUBSIDIARITY* 291, 302 (James E. Fleming & Jacob T. Levy eds., 2014).

244. *Id.*

245. See Gowder, *Equal Law in an Unequal World*, *supra* note 27, at 1036–37 (explaining that task is to find expressive meaning of the laws).

246. For a compelling version of this argument in the context of school segregation, see Kevin Brown, *Termination of Public School Segregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 *GEO. WASH. L. REV.* 1105, 1124–25 (1990) (explaining that school segregation, in its social context, communicated the inferiority of black people and reinforced the value judgment embedded in that social meaning). The cognitive hierarchical model warrants applying Brown’s argument to the universe of racial injustice generally. See also PERRY, *supra* note 48, at 178 (“It is not the case that segregation itself creates inequality; it is the meaning and value that are attributed to the segregated spaces and the unequal distributions that go along with the racialization of spaces that produce and reproduce the existing inequality.”).

express the social hierarchy embedded into our racial categories, they are inconsistent with the rule of law.

The foregoing conclusion can most directly be reached from the second-person point of view. We cannot attribute to black and Latino citizens of East Palo Alto any public reasons why they should comply with the laws excluding them from the public services of Palo Alto. For example, why not lie about their addresses and commit the crime of “theft of services,” if it means enrolling their children in the better schools next door? What public reasons can the state offer to explain why they ought to accept the laws barring them from educating their children as well as their neighbors’ children, in the face of racial segregation and concentrated poverty for which the state is, in part, responsible?

The expressive impact of this kind of racial line-drawing—intentional or unintentional—has been recognized in our jurisprudence, but only in dissent. Most notably, Justice Thurgood Marshall, dissenting in *Memphis v. Greene*, notes that the lower court aptly described the case as one in which “an all white neighborhood is seeking to stop the traffic from an overwhelmingly black neighborhood from coming through their street,”<sup>247</sup> and expressed the constitutional interest at stake in the following terms:

This analysis ignores the plain and powerful symbolic message of the “inconvenience.” Many places to which residents of the area north of Hein Park would logically drive lie to the south of the subdivision. Until the closing of West Drive, the most direct route for those who lived on or near Springdale St. was straight down West Drive. Now the Negro drivers are being told in essence: “You must take the long way around because you don’t live in this ‘protected’ white neighborhood.” Negro residents of the area north of Hein Park testified at trial that this is what they thought the city was telling them by closing West Drive. Even the District Court, which granted judgment for petitioners, conceded that “[o]bviously, the black people north of [Hein Park] . . . are being told to stay out of the subdivision.” In my judgment, this message constitutes a far greater adverse impact on respondents than the majority would prefer to believe.

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247. 451 U.S. 100, 137 (1981) (Marshall, J., dissenting).

The psychological effect of this barrier is likely to be significant. In his unchallenged expert testimony in the trial court, Dr. Marvin Feit, a professor of psychiatry at the University of Tennessee, predicted that the barrier between West Drive and Springdale St. will reinforce feelings about the city's "favoritism" toward whites and will "serve as a monument to racial hostility." The testimony of Negro residents and of a real estate agent familiar with the area provides powerful support for this prediction. As the District Court put it: "[Y]ou are not going to be able to convince those black people out there that they didn't do it because they were black. They are helping a white neighborhood. Now, that is a problem that somebody is going to have to live with . . . ." I cannot subscribe to the majority's apparent view that the city's erection of this "monument to racial hostility" amounts to nothing more than a "slight inconvenience." Thus, unlike the majority, I do not minimize the significance of the barrier itself in determining the harm respondents will suffer from its erection.<sup>248</sup>

Justice Marshall's analysis in the foregoing was directed at satisfying the *Washington v. Davis* intent requirement, but is just as compelling as a rejection of it: regardless of whether the state intended to write hostile racial attitudes into law, the harm caused by the state's even inadvertent expression of those preexisting attitudes should be constitutionally cognizable.<sup>249</sup>

The Equal Protection Clause is the constitutional location for the rule of law principle of generality.<sup>250</sup> The foregoing analysis leads to the conclusion that local government boundaries that divide our urban areas into racialized spaces violate the Equal Protection Clause, and that the state is obliged to abolish either these boundaries or the economic and social inequalities that lead to their unjustifiability.<sup>251</sup>

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248. *Id.* at 138–40 (internal notes and references omitted) (brackets and first and third sets of ellipses in the original).

249. See Gowder, *Equal Law in an Unequal World*, *supra* note 27, at 1038–39, 1044 (explaining that expressive content of a law is not the same as the subjective intentions of those who enacted it).

250. *Id.* at 1024, 1049, 1079–81.

251. See *id.* at 1058 (explaining that the rule of law requires states to either abolish unjustifiable laws or abolish the unjust social conditions that lead to their rule of law violations). One dramatic failure of the law to respond to this reality is in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 259 (1977), in which the Court applied the *Washington v. Davis* standard to refuse to entertain a race discrimination challenge to exclusionary zoning rules because the plaintiffs could not show that they were intentionally discriminatory rather than simply an effort to "protect property values." The Court was confused. White aversion to blacks is instrumental in causing such property value declines. See David R. Harris, "Property Values Drop When Blacks

Returning to the example given above, it should be clear that nothing in this analysis requires the claim that the boundary between Palo Alto and East Palo Alto was created with the intention of reinforcing racial hierarchy, or even that the boundaries were originally caused by race in some fashion. All that matters is that they currently reinforce racial hierarchy with the laws, and that this reinforcement has the expressive effect of suggesting the inferiority of nonwhite racial groups, because of the lack of any other public justification for those boundaries in their social context.<sup>252</sup> Even the fact that the state's past intentional discrimination bears some of the responsibility for these conditions is not necessary to reach the conclusion that the state must refrain from reinforcing them today, although it intensifies the moral demand underneath that conclusion.

By enforcing a legal boundary between Palo Alto and East Palo Alto, the state of California provides markedly inferior services to blacks and Latinos. In doing so, the state further impoverishes its citizens of color and makes it harder for them to move somewhere with better public goods. It makes them less well educated and thus deprives them of the human capital to earn more so they can buy their way out of segregation. It also supports the perception that black and Latino areas are high-crime areas (as would be any neighborhood with a concentrated lack of financial resources and inferior schools and police) and thereby perpetuates stereotypes of criminality associated with blacks and Latinos. The boundary supports continuing "voluntary" segregation by creating dangerous neighborhoods starved for public goods to which whites and the wealthy are unwilling to move. And it does all of this with borders that are

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*Move in, Because . . .*: *Racial and Socioeconomic Determinants of Neighborhood Desirability*, 64 AM. SOC. REV. 461, 461 (1999); see also Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 34–36 (Justin D. Levinson & Robert J. Smith eds., 2012) (giving references on relationship between implicit bias and perception of property quality). The Court also missed the broader point, which is that those zoning laws support racial hierarchy whether intentionally or not.

252. Indeed, the exclusion of blacks and Latinos from Palo Alto runs much deeper than any conscious intent. For example, early educational disadvantage excludes blacks and Latinos from Palo Alto's technology industry. In 2013, there were eleven states in which no black high school student took the AP computer science exam and eight states in which no Latino student did so. Barbara Ericson, *Detailed Data on Pass Rates, Race, and Gender for 2013*, CC.GATECH.EDU, <http://home.cc.gatech.edu/ice-gt/556> (last visited Mar. 29, 2014) (see the Excel document on this site for additional data). In none of ten states in which the most black students took the exam were black students represented among exam-takers at the population rate. *Id.* In only five U.S. states did the percentage of takers who were black reach or exceed the percentage of blacks in the population—Arizona, New Hampshire, Rhode Island, Vermont, and South Dakota. *Id.* (from full data set, distributed via a spreadsheet).

understood by all to create racialized spaces—the white/Asian side of the freeway and the black/Latino side of the freeway—and, by predicating these patterns of superior and inferior services along racial lines, it sends the message that blacks and Latinos are not entitled to the public goods that those on the other side of the freeway claim by right of residence. The municipal border between Palo Alto and East Palo Alto is unconstitutional.

This analysis is particularly important in the case of schools, where the Court has shown an unusual level of deference to local boundaries that facilitate de facto racial segregation. The Supreme Court’s unwillingness to do anything about the school context is typified by *Milliken v. Bradley*,<sup>253</sup> which ruled that courts may not order a desegregation remedy for racially disparate school district lines unless plaintiffs can show that “the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race.”<sup>254</sup>

The extreme deference that the Court gave to local boundaries in *Milliken* is at odds with other case law indicating that states may not permit disparities in important constitutional interests to track arbitrary municipal boundaries. In *Reynolds v. Sims*,<sup>255</sup> the Court struck down voting districts of unequal size as violating a principle of equal voting power for each citizen. Turning a deaf ear to the defense that the districts tracked local government borders, the Court pointed out that:

Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh*, these governmental units are “created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,” and the “number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the state.”<sup>256</sup>

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253. 418 U.S. 717 (1974).

254. *Id.* at 745.

255. 377 U.S. 533 (1964).

256. *Id.* at 575 (internal citations omitted) (alteration in original).

Yet in *Milliken*, the Court—when racial equality in education, a constitutional interest on a par with equal representation in the electorate, was at issue—said exactly the opposite:

The [district] court’s analytical starting point was its conclusion that school district lines are no more than arbitrary lines on a map drawn “for political convenience.” Boundary lines may be bridged where there has been a constitutional violation calling for inter-district relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. Thus, in *San Antonio School District v. Rodriguez*, we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages “experimentation, innovation, and a healthy competition for educational excellence.”<sup>257</sup>

The “tradition” of local control of education on which the Court rests this implicit distinction is a thin reed indeed, since there has been an equally long tradition of local self-government in general, one that goes not only back to the colonies, but even back to Magna Carta.<sup>258</sup> Yet such a tradition availed the state not a whit in *Reynolds*, and it ought not to have availed the state in *Milliken*.

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257. *Milliken*, 418 U.S. at 741–42 (internal citations omitted). For the consequences of *Milliken*, see CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 40–99 (2004) (suggesting that *Milliken* led to increasing segregation across district lines). See also Brondolo et al., *supra* note 75, at 364 (explaining role of school district “fragmentation” in conjunction with white flight in educational segregation); Genevieve Siegel-Hawley, *Educational Gerrymandering?: Race and Attendance Boundaries in a Demographically Changing Suburb*, 83 HARV. EDUC. REV. 580 (2013) (in-depth case study of school redistricting process in a suburban Virginia county that neglected the interests of nonwhite students and worsened segregation).

258. See generally Abby Williamson & Archon Fung, *Public Deliberation: Where We Are and Where Can We Go?*, NAT’L CIVIC REV., Winter 2004, at 3, 6–8 (describing colonial history and current persistence of New England town meeting as site of self-governance); Magna Carta, 1297, 25 Edw. 1 c. 9 § 9 (“THE City of London shall have all the old Liberties and Customs [which it hath been used to have]. Moreover We will and grant, that all other Cities, Boroughs, Towns, and the Barons of the Five Ports, and all other Ports, shall have all their Liberties and free Customs.”). The quoted text is from the “traditional translation” as given by Her Majesty’s Government, available at <http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/section/IX>.

Moreover, our recent practice of creating increasingly more fragmented local government boundaries has not been with us forever. It is an artifact of political choice rather than structural necessity or long-held tradition.<sup>259</sup> To be sure, the considerations noted at the end of the *Milliken* excerpt above justify local control of schools. However, they do not require that the localities in question maintain their pre-litigation segregated borders—those borders can be modified while retaining local control. As such, the Court ought to extend the principles it stated in *Reynolds* to permit challenges to racialized spaces, including school districts, that depend on local boundaries for their maintenance.

### *1. Is This Just Disparate Impact Analysis?*

The careful reader may worry that the equal protection implications of this argument are entirely those which the Court rejected in *Washington v. Davis*: the proposition that the state is not permitted to take acts that have a disparate impact along racial lines.<sup>260</sup> The argument of this Article is not so demanding. While *Davis* must partially go, it need not go altogether.

Consider the facts of *Davis*. A police department used a pre-employment test that had a disproportionate impact on black candidates.<sup>261</sup> If the test at issue in *Davis* created a racialized space in the form of the police department, or otherwise used the laws to support racial hierarchy, then the test would be subject to challenge on the theory articulated in this Article. However, whether the test supported racial hierarchy is a distinct inquiry from whether it had a disparate impact—the two can easily come apart. Suppose, for example, the test had a very large disparate impact: it excluded, say, ninety percent of all black police officer candidates and only ten percent of white candidates. Under such circumstances, it would likely have created a police department that essentially excluded blacks and would have risked sending the message to the community at large that law enforcement is entrusted distinctively to whites. The police department would have become a white institution. In addition, the nearly all-white police department would likely exacerbate other components of racial hierarchy, such as discriminatory policing and lack of access to economic opportunities for blacks. In short, it would create a situation

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259. See generally GREGORY R. WEIHER, *THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION* 176–95 (1991) (describing historical and political forces leading up to contemporary levels of urban fragmentation).

260. I thank Bill Buss for pressing me to address this worry.

261. *Washington v. Davis*, 426 U.S. 229 (1976).

much like what led to the recent protests and tear-gassings over the police killing of an unarmed black teenager in Ferguson, Missouri, a majority-black community whose police department had only three black officers out of fifty-three.<sup>262</sup> Under those circumstances, the *Davis* pre-employment test would manifestly be subject to challenge under the theory articulated in this Article.

By contrast, suppose that the test had a very small disparate impact: black candidates were two percent more likely to be excluded. Such a disparity would still be subject to challenge under an ordinary disparate impact test. However, it might not have been subject to challenge under the theory of this Article because it would not so obviously have been a component of racial hierarchy. In terms of the rule of law principle of generality that gives life to the Equal Protection Clause, the establishment of a police department with a 2% racial disparity would probably not express the inequality of blacks—blacks and whites alike would still have had public reasons to accept the legal authority of the officers of such a department. The *Washington v. Davis* rule must be compromised, not eliminated: the state cannot be allowed to prop up genuine racial hierarchy with its laws, but nothing in this Article requires the policing of incidental disparate racial impact.

To summarize, the constitutional problem with racial disparity—accessed through the expressive ideas underlying the rule of law and, with it, the Equal Protection Clause—is not the mere fact of disparity. Rather, the problem is that the state, by participating in the self-reinforcing system of interrelated racial disparities which I have called “racial hierarchy,” expresses and perpetuates—whether it means to or not—the inferior status of those who are subjected to subordinate racial ascriptions.<sup>263</sup>

## 2. Requirement as Permission

Since the state’s obligation to end its support for racialized spaces does not depend on their intentional creation, neither does its license to do so. Consider again *Parents Involved*,<sup>264</sup> in which the Supreme Court struck down the attempts of several school districts to remedy de facto racial

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262. Paulina Firozi, *5 Things to Know About Ferguson Police Department*, USA TODAY (Aug. 19, 2014), <http://www.usatoday.com/story/news/nation-now/2014/08/14/ferguson-police-department-details/14064451/>.

263. See Gowder, *Equal Law in an Unequal World*, *supra* note 27, at 1072–73 (explaining difference between “equality as identity,” which demands formal identical treatment or outcomes between different people, and “equal status,” which demands that people be treated as equals).

264. 551 U.S. 701 (2007).

segregation in their school systems, on the grounds that the schools were not responding to intentional state segregation.<sup>265</sup>

As a first pass, the evidence in Parts II and III suggests that the notion of sorting out what counts as intentional state segregation is simply absurd. Consider the following loose sketch of the incredibly tangled causes of contemporary black-white educational inequality, which is based on the research discussed above.

To start, some who are in the workforce today suffered under intentionally segregated schools. Their long-term earning prospects, and hence multigenerational wealth, will have suffered from that segregation. And, in turn, their children (and grandchildren, and so on) will have lacked the educational benefits that wealth can bring, including, e.g., access to wealthier school districts with better schools, access to preschools, tutors, test prep, and the like, as well as resources to pay college tuition. That intergenerational wealth disparity, as well as geographic isolation, will also be exacerbated by the consequences of past intentional residential segregation.

Past residential segregation—which contributes to continuing segregation today due not only to reduced geographic mobility due to wealth disparities, but also to, *inter alia*, inheritance of homes, the return of children to their neighborhoods of origin, family caretaking responsibilities, and the like—leads to the present concentration of low-income black families in discrete neighborhoods, which in turn leads to underfunded schools in those neighborhoods. The poverty in those neighborhoods contributes to crime; law enforcement responses to that crime as well as to racial stereotypes about criminality exacerbate that poverty, and hence that crime; this in turn further reduces local wealth. At the same time, residents of those neighborhoods may be more likely to be victimized by crime, again impairing their overall wealth—and ability to escape poverty and segregation—as well as educational performance.

Teachers in predominantly black schools, affected by unconscious racial biases relative to intelligence and educational aptitude, will expect less of their students and work less hard to cause each student to succeed. Students, victims of stereotype threat, will achieve less and in turn will confirm the racial stereotypes held by their teachers. The parents of students in those schools are subject to conscious or unconscious employment discrimination, forcing them to work more for less pay; this will in turn undermine their ability to raise their children to succeed

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265. *Id.* at 720–21.

educationally—depriving them of the time, for example, to read to their children.

Living in segregated neighborhoods in which there are few role models for achievement (thanks to the above factors), many black high schoolers will lack knowledge of the available college options, external evidence (such as role models) to believe that they can achieve access to the best schools, and knowledge of strategies to do so (such as, for example, how to write a strong admissions essay). Their families, of course, will also lack longstanding ties with the highest-status institutions and other forms of social capital facilitating access to them.

In these environments, parents will—rationally, recognizing that the deck is stacked against them from the start—have lower expectations for their children’s achievement; this in turn, however, will suppress that achievement, becoming a self-fulfilling prophecy, both because of the lowered incentive to support educational goals and because of stereotype threat. Stereotypes about parental involvement, in turn, will affect teachers’ willingness to try to recruit parental support for student achievement.

The outcomes of all these disparities further reinforce conscious and unconscious biases, as whites see blackness associated with lower educational and occupational achievement and higher crime. The result: “de facto” racial segregation in schools and racial educational disparity, which, via its effects on poverty, crime, residence, the beliefs held by others, and the educational condition of the next generation, further reinforces racial hierarchy and the conditions that created it in the first place.

Now suppose Seattle School District No. 1 decides to intervene on this sorry situation by driving a few school buses around to de-racialize the schools. Are they “remedying the effects of intentional state discrimination?” Who can say?<sup>266</sup> And why, in the face of such a mess, should we even ask that question? Instead, recognizing that the municipal boundaries that demarcate school districts amount to racialized spaces—and that in enforcing those boundaries, the state of Washington is supporting racial hierarchy with its laws—the Court should have held that the school district was not forbidden, but rather required, to remedy its de facto educational segregation.

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266. In reality, we can. As discussed in Parts II and III, past intentional state action has been at the root of the cultural significance of race—and has thereby been the catalyst for continuing private discrimination—since the end of the seventeenth century. But the constitutional point goes through even if we assume that long-term causal influence is too attenuated to support a contemporary remedy.

This point extends far beyond the schools. Once we recognize that all racialized spaces, racialized opportunities, and racialized practices are built out of the same recursive mix of intentional and unintentional public and private action, we see that the state must act to eliminate those racializations without having to try to trace out the causal links between any given racialization and intentional state discrimination.<sup>267</sup>

Thus, recognizing the general public responsibility for the hierarchy built into racial classification allows the state to stop supporting what Loury has identified as the core mechanism of racial inequality. In his words:

[D]urable racial inequality can best be understood as the outgrowth of a series of what Myrdal (1944) called “vicious circles of cumulative causation.” Tacit association of “blackness” with “unworthiness” in the American public’s imagination affects cognitive processes and promotes essentialist causal misattributions. When confronted by the facts of racially disparate achievement, the racially disproportionate transgression of legal strictures, and racially unequal development of productive potential, observers will have difficulty identifying with the plight of a group of people whom they (mistakenly) think are simply “reaping what they have sown.” In such a case, there will be little public support for egalitarian policies benefiting a stigmatized racial group. This, in turn, encourages the reproduction through time of racial inequality because, absent some policies of this sort, the low social conditions of many blacks persist, the negative social meanings ascribed to blackness are then reinforced, and so the racially biased social-cognitive processes are reproduced, completing the circle.<sup>268</sup>

Had the Court recognized these processes in *Parents Involved*, the Seattle School District’s attempts at remedial integration could have been upheld.

Note further that nothing in this Part requires that the state, by taking these measures, be able to solve the problem of racial hierarchy. It will probably take more than a few (or even many) school buses to solve racial inequality. This Article does not attempt to perform a standard strict scrutiny analysis, wherein there must exist a compelling interest in abolishing racial hierarchy (which surely there is) and the state must show

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267. By contrast, under current law, the state must meet a high evidentiary bar to prove that its remedial use of race responds to a situation caused by prior state intentional discrimination. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986).

268. Loury, *The Author’s Account*, *supra* note 74, at 82.

that its measures are narrowly tailored to achieve that end. Rather, the claim here is much simpler and more direct: even if the state cannot end racial hierarchy, it is required to stop participating in its continuance.

I submit that such a remedy should not face strict scrutiny even under current doctrine, as the argument is not that the state is remedying the effects of past discrimination but rather that its laws are continuing to discriminate, albeit not in an unproblematically “intentional” way. Thus, stopping that discrimination, such as by abolishing racialized municipal boundaries, ought not to count as a racial classification for Equal Protection purposes.

However, recall that the requirement that the state stop participating with its laws in the maintenance of racialized spaces leaves the state two options: it may either abolish the laws (i.e., the municipal boundaries) or it may act to change the social conditions that make the laws disparate (i.e., carry out a program of integration).<sup>269</sup> The latter choice would be subject to strict scrutiny under current doctrine.<sup>270</sup> However, such state action would be narrowly tailored to satisfy a compelling interest in stopping the state’s support for racial hierarchy.

Moreover, while there is not currently enough evidence to be sure, such efforts might affirmatively promote racial justice, and thus potentially be narrowly tailored even with respect to that more demanding end. A well-supported psychological mechanism known as the *contact hypothesis* suggests that state-sponsored integration might help heal the warped cognitions underlying racial hierarchy.<sup>271</sup> According to the contact hypothesis, intergroup contact can reduce intergroup bias.<sup>272</sup> Yet, despite its strong scientific support, not a single federal case within the Lexis

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269. See Gowder, *Equal Law in an Unequal World*, *supra* note 27, at 1058 (explaining disjunctive character of rule of law judgments).

270. Nothing said in this Article is meant to be an endorsement of that doctrinal choice. Actually, the Supreme Court ought to adopt an “anti-subordination” approach to Equal Protection rather than an “anti-classification” approach. See generally Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059 (2011) (offering a cogent argument along these lines). But the text here is meant to acknowledge how the argument of this Article functions in the doctrine we have now.

271. See generally Thomas F. Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. PSYCHOL. 65 (1998) (reviewing evidence on intergroup contact theory). It is important to note that the contact hypothesis has come under some sustained attack in recent years, particularly from Putnam’s oft-cited critique. Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137, 141–49 (2007). However, psychologists have refined their research in response, and the contact hypothesis remains a well-supported psychological regularity. See generally Ananthi Al Ramiah & Miles Hewstone, *Intergroup Contact as a Tool for Reducing, Resolving, and Preventing Intergroup Conflict: Evidence, Limitations, and Potential*, 68 AM. PSYCHOLOGIST 527, 534 (2013) (addressing Putnam’s critique).

272. See generally Pettigrew, *supra* note 271.

database includes the phrase “contact hypothesis,” and “intergroup contact” appears only three times, never in a case that remains good law to support a ruling that the state may carry out integrative efforts.<sup>273</sup> This suggests that the legal system is missing scientific knowledge that can explain the state’s interest in integration.

As implicit bias is a major component in the hierarchical nature of race, it too must be ameliorated. Although social scientists have not gotten very far yet in figuring out what eliminates implicit bias, early evidence seems to suggest that promoting interracial contact and recognition of the innate similarity between the “races” is a promising direction.<sup>274</sup> At least one psychological study aiming to explain why the contact hypothesis shows up so reliably in empirical results found that “blurring intergroup boundaries”—by identifying similarities between group members—can reduce implicit bias.<sup>275</sup> Other studies have suggested that, at least in the short term, placing people in counter-stereotypic social contexts (such as when the experimenter, qua high-status authority figure, is black) can reduce implicit bias—further support for a program of social integration that reduces the extent to which whites only see blacks in stereotyped roles.<sup>276</sup>

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273. Search for “contact hypothesis” conducted on March 10, 2014. By contrast, a Google Scholar search for the same phrase on the same date yielded 11,200 results, indicating the importance of the concept in the research literature.

In all American case law available on Lexis, the phrase “contact hypothesis” appears to have shown up only twice, both in state court cases where defendants attempted to challenge eyewitness identifications based on the psychological evidence for the difficulty of cross-racial identification. *People v. Abney*, No. 3314/05 (N.Y. Sup. Ct. May 5, 2011); *Smith v. State*, 857 A.2d 1198 (Md. App. 2004), *rev’d*, 880 A.2d 288 (Md. 2005).

Search for “intergroup contact” (and “inter group contact,” “inter-group contact”) conducted on December 23, 2014. It showed up in dissent in the 9th Circuit opinion in *Parents Involved*, 377 F.3d 949, 993 n.12, 1011 n.39 (9th Cir. 2004) (Graber, J., dissenting), in the vacated district court opinion in *Fisher v. Texas*, 645 F. Supp. 2d 587, 605 (W.D. Tex 2009), and at some length in *Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005) (and prior procedural history), a case which came to the right result, but, unfortunately, upheld an assignment program similar to that rejected by the Supreme Court two years later in *Parents Involved*—and which thus must be understood as overruled. See *Comfort v. Lynn School Committee*, 560 F. 3d 22, 25 (1st Cir. 2009) (upholding, on procedural grounds, denial of motion for relief from judgment in view of *Parents Involved*; noting “distinct resemblance” between *Parents Involved* policy and *Lynn* policy). Intergroup contact also shows up in one early state case, *Newberg v. Board of Pub. Educ.*, 1983 Phila. Ct. Com. Pl. LEXIS 1, 26 Pa. D. & C.3d 682 (1983), concerning gender-segregated high schools.

274. See generally Calvin K. Lai et al., *Reducing Implicit Prejudice*, 7 SOC. & PERSONALITY PSYCHOL. COMPASS 315 (2013) (reviewing current state of research).

275. Natalie R. Hall et al., *Reducing Implicit Prejudice by Blurring Intergroup Boundaries*, 31 BASIC & APPLIED SOC. PSYCHOL. 244, 244 (2009).

276. See Jan De Houwer et al., *Implicit Measures: A Normative Analysis and Review*, 135 PSYCHOL. BULL. 347, 351–52 (2009) (citing examples).

### C. *Standing and Racial Injury*

Plaintiffs seeking injunctive relief in race discrimination cases against the government often face a high hurdle to demonstrate standing because they must prove that they are likely to be subject to the same injury in the future.<sup>277</sup> But if hierarchical race *itself* is an injury, then all persons ascribed subordinated racial status are subject to a continuing injury. Therefore, any standing concerns are eliminated. The plaintiff in *City of Los Angeles v. Lyons*, for example, need not have shown that he would be personally subject to racially discriminatory police chokeholds in the future to seek injunctive relief.<sup>278</sup> Rather, he could simply have shown that he suffered a continuing injury from being a member of a class seen as fair game for police violence—the injury of degraded status as well as its real-world consequences, such as living in fear of the police and the social and economic consequences of disparate criminal attention. And he could have shown that the challenged practice supported that continuing injury—that a practice of applying dangerous chokeholds to black citizens gives every black citizen reason to fear and avoid encounters with the police (we recently relearned this in the tragic death of Eric Garner). This fear furthers the general social subordination of every black citizen.

Drawing out the chain of influence still further, the general fear in which black citizens rationally hold the police likely deters those in segregated black communities from seeking police assistance against crime, exacerbating both the problem of crime in black communities and the stereotype of blacks as criminals. Those consequences, in turn, lead in yet another vicious cycle to still more police violence against blacks. To this day, Lyons likely suffers continuing economic and social injury as well as physical danger from these facts, including a higher likelihood of being harmed either by criminals or by the police in the future. Each of these consequences is caused in part by the fact that officers of the LAPD viewed themselves as licensed to arbitrarily inflict extraordinary violence on blacks with whom they came into contact.

Likewise, the plaintiffs in *Allen v. Wright* could have shown that by permitting a tax exemption to racially discriminatory private schools, the IRS financially and expressively supported the existence of racialized

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277. See Raj Shah, Note, *An Article III Divided Against Itself Cannot Stand: A Critical Race Perspective on the U.S. Supreme Court's Standing Jurisprudence*, 61 UCLA L. REV. 198, 204–08 (2013) (detailing cases in which racial discrimination plaintiffs were denied injunctive relief for lack of standing in view of their inability to show a likely future injury).

278. 461 U.S. 95 (1983).

spaces. In doing so, it exacerbated a general social racial hierarchy that placed those classified as black into a subordinate position. The plaintiffs are harmed by that hierarchy—ascriptive injury—just like everyone else subject to that classification.<sup>279</sup> The plaintiffs should have been permitted to prevail on such a showing instead of being required, as in the actual case, to show that they would have individually had better educational opportunities in the absence of the tax exemption. Not having the benefit of an analysis of how we actually use racial classifications, the Supreme Court outright held the opposite in *Allen*, ruling that “abstract stigmatic injury” is insufficient to confer standing on a plaintiff.<sup>280</sup> *Allen* must be overruled.

This reform is a direct implication of the cognitive hierarchical model, which licenses the conclusion that racial hierarchy disadvantages those with stigmatized racial identities in an individual and definite—rather than group and probabilistic—sense. The remediable injury for standing purposes is not just that Lyons had some positive probability of being subjected to future police violence, economic disadvantage, crime, and the like by virtue of his membership in the group of black people and the network of public and private components of racial hierarchy, including LAPD chokeholds. It is also that he suffered a definite continuing and personal injury from holding an ascriptive classification that subjected him personally to status degradation in the minds of others, and because the state, by supporting racial inequality through practices like the chokehold policy, promoted the continuing association of his identity with that status classification.

#### CONCLUSION: A NEW COLORBLINDNESS

Racial ascriptions can be harmful. That fact was vividly brought into the legal system most recently in the mid-1980s, when a group of plaintiffs brought suit in Louisiana to challenge the ascription “colored” on their parents’ birth certificates.<sup>281</sup> The court rejected their claims, but it is helpful to ask why they felt the need to bring the case in the first place. For, by 1985, when the Louisiana Court of Appeals ruled on the case, the principle of strict scrutiny for government racial classifications<sup>282</sup> and the

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279. 468 U.S. 737 (1984)

280. *Id.* at 755–56.

281. *Doe v. State*, 479 So.2d 369, 371 (La. Ct. App. 1985).

282. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (commanding strict scrutiny for racial classifications).

major statutory frameworks that prohibited private discrimination in areas such as housing<sup>283</sup> and employment<sup>284</sup> had commanded the legal irrelevance of race for decades. Nonetheless, the plaintiffs doubtless richly recognized the social relevance of race and of the racial ascriptions that the state creates and supports. So they—rationally—wanted no part of it.<sup>285</sup>

Earlier scholars have aptly argued that unintentionally discriminatory state action should be subject to challenge when it arises from unconscious racism or the unconscious negative cultural meaning of stigmatized race.<sup>286</sup> This Article offers a broader point: state action, intentional or unintentional, ought to be subject to challenge when it contributes to the pernicious social and psychological meaning of race, which the Louisiana plaintiffs knew so well. And the reason is not merely because that social meaning leads to concrete harms, though it doubtless does so.<sup>287</sup> Rather, it is because of the special nature of those harms in a liberal democracy.

Ascriptive injuries are not just ordinary injuries, or even unfair injuries that fall disparately on a disadvantaged sector of the population. The expressive theory of Equal Protection shows that because ascriptive injuries are distinctively not susceptible to public justification, a state cannot inflict them and still claim to be acting in the name of its citizens understood as a general community of shared interest. For that reason, ascriptive injuries are inconsistent with the notion of a democracy of equal citizens under the rule of law that animates the Equal Protection Clause.

Public justifiability is a universalizing ideal at the heart of democratic political philosophy. It finds its highest classical expression in Jean-Jacques Rousseau's conception of the general will of a political community, which cannot enact laws with a "particular object."<sup>288</sup> Race

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283. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (1968).

284. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 241, 253 (1964).

285. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713 (1993) (suggesting that white identity has been treated as a valuable property interest). See also PERRY, *supra* note 48, at 162 (citing other work on capitalized whiteness).

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

287. Lenhardt has previously argued that the state perpetuation of racial stigma ought to be subject to constitutional challenge. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004). Lenhardt's account, while brilliant and hugely important, infers a constitutional remedy directly from the concrete harms of racial stigma on the lives of people of color, such as stereotype threat and a feeling of exclusion. But we need a theory to indicate which harms are subject to constitutional remedy; this Article supplies one in the expressive account of Equal Protection, according to which not all harmful state acts are to be challenged, just those not amenable to public (expressive) justification.

288. JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE* (G.D.H. Cole, trans. 1782 [1762]), bk. II, ch. 6, available at [http://www.constitution.org/jjr/socon\\_02.htm#006](http://www.constitution.org/jjr/socon_02.htm#006).

conservatives implicitly appeal to such a universalizing ideal when they insist that the government must be “colorblind,” meaning free of attention to race. Understanding the constraints and demands public justifiability imposes on governmental action with respect to race can help us understand where race conservatives have gone wrong, and how colorblindness can be reclaimed for a progressive legal project.

The rhetoric of colorblindness has changed political hands over the years. It began as a possession of the left, of Martin Luther King and the civil rights movement, expressed in the hope that one might be judged “on the basis of the content of his character rather than the color of his skin.”<sup>289</sup> It currently seems to be a property of the right: colorblindness has become a slogan of, for example, those opposed to affirmative action.<sup>290</sup>

But a reclaimed colorblindness that demands that state action be publicly justifiable to the community taken as a whole has the potential to mean nothing less than the abolition of race, at least in its current, hierarchical form. And this abolition moves through colorblindness in the strictest sense of the term: since hierarchy is built into our very perceptual structure for race, it calls for us to genuinely, on an individual as well as a societal level, become blind to race. When racial categories cease to be salient to us, when we cease to rely on socially constructed perceptions in which we ascribe racial classifications based on information about social standing, then true colorblindness will have been achieved.<sup>291</sup>

Colorblindness, in its true form, should be distinguished from what Sumi Cho has called “post-racialism.”<sup>292</sup> As Cho has pointed out, the post-racialist project, which denies the importance or legitimacy of race-conscious action to remedy racial hierarchy, depends on a “racial progress/transcendence narrative,” which claims that American society has progressed beyond its past racial hierarchies.<sup>293</sup> The psychological literature may help to explain why post-racialism is appealing to so

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289. WOLFGANG MEIDER, “MAKING A WAY OUT OF NO WAY: MARTIN LUTHER KING’S SERMONIC PROVERBIAL RHETORIC 205 (2010). See generally Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 997–98 (2010) (describing movement of colorblindness from left to right).

290. See generally OBASOGIE, *supra* note 120, at 109–37 (describing contemporary politics of “colorblindness”).

291. The first step may be to promote the public recognition of how arbitrary and malleable our racial categories are, for psychologists have shown that such understanding, and the rejection of the “essentialist theory of race,” are associated with lower levels of racial bias (although the causal direction is not obvious to me). Jennifer L. Rosner & Ying-yi Hong, *Lay Theories of Racial Difference Make a Difference*, 21 PSYCH. INQUIRY 160 (2010).

292. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).

293. *Id.* at 1645.

many—perhaps because it accommodates aversive racism, by allowing those with implicit biases to deny the social impact of those biases and avoid confronting the need for collective change—while at the same time grounding a rejection of the “progress/transcendence narrative” on which it rests.

Should race progressives and critical race theorists take on the hierarchical construction of our racial classifications in universalistic terms, and reclaim the ideal of colorblindness to advocate the elimination of the status-loaded classificatory practices built into our current operation of racial categories themselves, the left and right might find common ground. The moral principles underlying the political programs of both left and right can endorse the elimination of government-supported racial hierarchy in the pursuit of the universalizing ideal of the liberal democratic state.

The catch is that the path to such genuine colorblindness does not go through blindness to the current reality of race. A passive state and a passive society cannot change our deeply rooted biases or the social structures that reinforce and are reinforced by them. Only by coordinated action from the state—to uproot the structural causes of racial bias in segregation, residential and otherwise—and from civil society—to promote genuine social, cultural and economic integration—can the ideal of colorblindness be achieved. Now is the time for the Supreme Court to stop standing in the way, and for policymakers, using the insights of sociology and psychology, to determine how best to put an end to racial hierarchy.