ARTICLES

UNDERSTANDING THE MARK: RACE, STIGMA, AND EQUALITY IN CONTEXT

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In its Fourteenth Amendment jurisprudence, the Supreme Court regards intentional discrimination as the principal source of racial injury in the United States. In this Article, R.A. Lenhardt argues that racial stigma, not intentional discrimination, constitutes the main source of racial harm and that courts must take the social science insight that most racialized conduct or thought is unconscious, rather than intentional, into account in their constitutional analyses of acts or policies challenged on the grounds of race. Drawing on the social science work of Erving Goffman and the ground-breaking work of Charles H. Lawrence, Professor Lenhardt argues that courts should reframe the constitutional inquiry to account for the risk or evidence of stigmatic harm to racial minorities. Professor Lenhardt explains that stigmatic harm occurs when a given act or policy sends the message that racial difference renders a person or a group inferior to Whites, the category constructed as the racial norm. This stigma imposes what Professor Lenhardt calls citizenship harms, which prevent members of racial minorities from participating fully in society in a variety of contexts. Professor Lenhardt proposes a four-part test to determine whether an act or policy—whether it is intentionally race based or carries a disparate racial impact—imposes a significant risk of stigmatic harm such that it should be subject to strict scrutiny. First, courts should examine the specific historical origins of the constitutional provision they are being asked to interpret. Second, they should consider the socio-historical context of the challenged act or policy. Third, they should evaluate the current context of the act or policy,

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including consideration of a possible disparate impact on members of racial minorities. Finally, courts should consider the probable future effects of the act or policy in terms of its likely citizenship effects on members of racial minorities. Professor Lenhardt argues that, while the use of this test will not eliminate racial harms altogether, it will enable courts and policymakers to engage in a disciplined and systematic analysis of racial harm which will ultimately provide the basis for more effective means of addressing racial stigma and persistent racial inequalities in the United States.

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INTRODUCTION

In 1903, W.E.B. DuBois asserted in *The Souls of Black Folk*, his deeply insightful and profound study of race and inequality in the United States, that the problem of the twentieth century was that of the "color line"—the American caste system whose brutality and forced separation of the races effectuated the economic, political, and social exploitation and subordination of generations of African Americans and other racial minorities.[1] Over one hundred years later, in 2004, there is unfortunately reason to believe that DuBois's statement might well apply to the twenty-first century as well. To be sure, the precise contours of the color line have shifted in many important and perhaps even unexpected respects in the last century. As a nation, we

[1] *See* W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 3 (Vintage Books 1990) (1903).

have gone from a period in which the division of the races was set by law and characterized in turns by the enslavement, mistreatment, and subjugation of African Americans to one in which our judicial precedents, legislative enactments, and social norms permit no efforts to draw formal distinctions between the races. Race no longer provides an adequate legal basis for efforts to exclude racial minorities from schools, housing, or employment.[2]

There is no question that real progress has been made in the area of race, as we see African Americans and other racial minorities assume positions of prominence in business, medicine, law, and government. And, yet, it also seems clear that the promise of equality for African Americans and other racial minorities—made first through the adoption of the Reconstruction Era amendments and then again through the legislative enactments and judicial decisions of the Civil Rights Era—has not been fully realized.[3] Studies show that the vast majority of African Americans and other racial minorities lead lives that are qualitatively different from those enjoyed by Whites. On average, they have lives that are shorter and full of greater social and economic disadvantage than those of their white counterparts.[4] They are more likely to live below the poverty line,[5] to reside in poor, racially isolated neighborhoods,[6] and to be unemployed.[7] African

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[2] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (school segregation); Shelley v. Kraemer, 334 U.S. 1 (1948) (housing); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employment).

[3] *See* U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000(a)-(h)(6) (2000)).

[4] *See, e.g.*, COUNCIL OF ECON. ADVISERS FOR THE PRESIDENT'S INITIATIVE ON RACE, CHANGING AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING BY RACE AND HISPANIC ORIGIN 33-34 (1998), http://w3.access.gpo.gov/eop/ca/pdfs/ca.pdf (reporting that Blacks and Latinos fare worse than Whites with respect to income, poverty, and asset holdings); ORLANDO PATTERSON, RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES 13 (1998) (comparing life expectancy rates for African Americans and Whites); Garry L. Rolison & Verna M. Keith, *Drugs, Crime, Murder, and the Underclass: An Analysis of Aggregate Data from the Largest Metropolitan Areas*, *in* RACE AND ETHNICITY IN AMERICA: MEETING THE CHALLENGE IN THE 21ST CENTURY 129, 130 (Gail E. Thomas ed., 1995) [hereinafter RACE AND ETHNICITY IN AMERICA] (indicating that African Americans equal approximately 12% of population but 44% of murder victims).

[5] *See* Gail E. Thomas, *Introduction: The Status and Well-Being of Underrepresented Citizens as a Gauge of a Nation's Welfare and Prosperity*, *in* RACE AND ETHNICITY IN AMERICA, *supra* note 4, at 1, 2 (indicating that in 1992 "32% of Native American, 31% of African American, 26% of Latino American, 14% of Asian American, and 9% of White American families lived in poverty"); *see also* A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS, at xxix (1996) (noting greater poverty rates for black children than for white children).

[6] JOHN R. LOGAN, UNIV. OF ALBANY, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS AND HISPANICS IN METROPOLITAN AMERICA 2, 5 (2002), http://

Americans and Latinos drop out of high school more often than white students[8] and attend college less frequently, although college attendance rates have improved since the 1970s.[9] In fact, we are approaching a state in which many minority youths arguably stand a greater chance of being incarcerated than of obtaining a college degree and entering the economic mainstream.[10] According to a recent study, of the approximately two million people in adult correctional facilities in the United States, an astounding 1.2 million, or 63%, are African-American or Latino, even though these groups together comprise only 25% of the total population.[11]

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mumford1.dydns.org/cen2000/SepUneq/SUReport/Separate_and_Unequal.pdf ("[o]n average blacks lived in neighborhoods with median incomes only about 70% as high as whites[,]" and these neighborhoods were often highly segregated).

[7] *See* Avner Ahituv et al., *Transition from School to Work: Black, Hispanic, and White Men in the 1980s*, *in* BACK TO SHARED PROSPERITY: THE GROWING INEQUALITY OF WEALTH AND INCOME IN AMERICA 250, 253 (Ray Marshall ed., 2000) [hereinafter SHARED PROSPERITY] ("Nearly 75 percent of young white males, but only 65 percent of Hispanics and 61 percent of blacks, are employed full time or are in the military at age 25."); Jeremiah Cotton, *Causes and Consequences of the Persistent and Growing Black-White Unemployment Gap*, *in* RACE AND ETHNICITY IN AMERICA, *supra* note 4, at 269, 271 ("Blacks have been experiencing a growing unemployment disadvantage vis-à-vis their White counterparts."); William J. Wilson, *Jobless Ghettoes: The Social Implications of the Disappearance of Work in Segregated Neighborhoods*, *in* SHARED PROSPERITY, *supra*, at 85, 85 ("[I]n many inner-city ghetto neighborhoods in 1990, most adults were not working in a typical week.").

[8] *See* PHILLIP KAUFMAN ET AL., DROP OUT RATES IN THE U.S. 1999, at 7, 13 (Nat'l Ctr. for Educ. Statistics, NCES 2002-114, 2001), http://nces.ed.gov/pubs2001/2001022.pdf ("Hispanics and blacks are at greater risk of dropping out [of high school] than whites."). Sources indicate that for African Americans and Whites, however, the gap in drop out rates has declined. *Id.* at 13.

[9] *See* Sandra E. Black & Amir Sufi, Who Goes to College? Differential Enrollment by Race and Family Background 8–11 (Nat'l Bureau of Econ. Research, Working Paper No. W9310, 2002), http://www.econ.ucsd.edu/seminars/black.pdf (indicating that, on average, Whites are more likely than Blacks to go to college, but noting that rates for black college attendance have improved since 1970s); *see also* Mary Leonard, *Race, Gender Gaps Found in Colleges*, BOSTON GLOBE, Sept. 23, 2002, at A3 (noting "wide and continuing disparities between whites and minorities in enrollment, graduation, degrees attained, and employment in higher education"); Genaro C. Armas, *Census: Hispanic Dropouts on Rise*, AP ONLINE, *at* 2002 WL 101560816 (Oct. 11, 2002) (noting greater dropout rates for Hispanics aged sixteen to nineteen than for African Americans and Whites in same age group).

[10] Becky Pettit & Bruce Western, Inequality in Lifetime Risks of Imprisonment 11 (Mar. 2003) (unpublished paper) (on file with the *New York University Law Review*), http://www.princeton.edu/~western/life7.pdf ("[B]y the end of the 1990s, the experience of imprisonment [for Blacks and Latinos] rivalled in frequency more familiar life stages such as military service and college completion.").

[11] *See* HUMAN RIGHTS WATCH, BRIEFING: RACE AND INCARCERATION IN THE UNITED STATES, http://hrw.org/backgrounder/usa/race/pdf/race-bck.pdf (Feb. 27, 2002) (documenting state-by-state incarceration rates of African-Americans and Latinos); *see also* MARC MAUER, AMERICANS BEHIND BARS: U.S. AND INTERNATIONAL USE OF INCARCER-

These statistics paint a devastating picture of increasing racial separation and inequality along several fundamental life axes and demonstrate how far away we actually are from remedying the problem of racial disadvantage. The truth is that, in many ways, we are as racially divided a society today as we were before the Supreme Court's landmark decision in *Brown v. Board of Education*[12] and the enactment of the Civil Rights Act of 1964.[13] Where we live,[14] go to school,[15] and work[16] are all still greatly determined by race. The question we must ask is: Why? What accounts for the stubborn persistence of the color line DuBois identified so many years ago? Why do racial disparities still exist?

For some time, the only legal framework available for understanding questions of racial inequity and disadvantage, reflected in cases such as *Washington v. Davis*,[17] was that of intentional discrimination. Then, more than fifteen years ago, Professor Charles Lawrence revolutionized legal scholarship by arguing that the source of racial harm lay principally in unconsciously racist acts. Drawing on psychoanalytic theory and cognitive psychology, Lawrence's article, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, challenged the view that only intentionally discriminatory conduct ran the risk of imposing racial harm.[18] Because of the cognitive processes and meanings associated with race in this country,

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ATION, 1995, at 15 (1997) ("[A]n African American boy born today has almost a three in ten (28.5%) chance of going to state or federal prison at some point in his life.").

12 347 U.S. 483 (1954).

13 Pub. L. No. 88–352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000(a)–(h)6 (2000)).

14 LOGAN, *supra* note 6, at 2, 5.

15 JOHN R. LOGAN, UNIV. OF ALBANY, CHOOSING SEGREGATION: RACIAL IMBALANCE IN AMERICAN PUBLIC SCHOOLS, 1990–2000, at 3 (2002), http://www.albany.edu/cpr/LoganChoosingSegregation2002.pdf (indicating that, on average, most elementary school children "attend schools where their group is a majority"); *see also* ERICA FRANKENBERG ET AL., Harvard Univ., A Multiracial Society with Segregated Schools: Are We Losing the Dream? 6 (2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (documenting that, during 1990s, proportion of black students in majority white schools fell to lowest level since 1968).

16 Eric Grodsky & Devah Pager, *The Structure of Disadvantage: Individual and Occupational Determinants of the Black-White Wage Gap*, 66 AM. SOC. REV. 542, 563 (2001) (finding that African-American men are more likely than White men to be in low-paying, low status occupations). Grodsky and Pager also find that "as black men gain entry to the most highly compensated occupational positions, they simultaneously become subject to more extreme racial disadvantage." *Id.* at 564.

17 426 U.S. 229, 239 (1976) (rejecting "proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact").

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

Lawrence argued, racial motive was most often reflected in unconscious conduct bearing a disparate racial impact.[19] He maintained that the messages communicated by facially neutral governmental actions were the best indicator of racist motive, and he therefore advocated greater judicial attention to the cultural or racial meaning of policy choices and initiatives.[20]

This Article seeks to advance the conversation about the nature and contours of racial harm by asserting that we should be concerned, not with the meanings associated with conduct, but rather with the meanings associated with race itself. My argument is that racial stigma, not intentional discrimination or unconscious racism, is the true source of racial injury in the United States. This theory accounts for the persistence of racial disparities that mark the color line, as well as the incidence of intentionally discriminatory or racialized behavior. It conceives of these problems as a function of racial stigma, not vice versa. In this respect, it is perhaps the most comprehensive theory of racial harm advanced thus far.

To be clear, by "racial stigma," I do not mean racial slurs or insults, stereotypes, or even the denial of a particular opportunity on the basis of one's race. Looking to the work of social scientists such as Erving Goffman[21] and economist Glenn Loury,[22] I define racial stigma as a problem of negative social meaning, of "dishonorable meanings socially inscribed on arbitrary bodily marks [such as skin color], of 'spoiled collective identities.'"[23] To be racially stigmatized, under this view, implies more than merely being referred to by a racial epithet or even the denial of a particular opportunity on the basis of one's race. It involves becoming a disfavored or dishonored individual in the eyes of society, a kind of social outcast whose stigmatized attribute stands as a barrier to full acceptance into the wider community. As Loury recently explained, racial stigmatization "entails doubting the person's worthiness and consigning him or her to a social netherworld. Indeed, although the language is somewhat hyperbolic, it means being skeptical about whether the person can be assumed to share a common humanity with the observer."[24]

New social science research focuses on the cognitive processes linked to racial stigma and the negative meanings it conveys, rather

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[19] *Id.* at 330, 332.

[20] *Id.* at 355–56.

[21] *See, e.g.*, ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963).

[22] *See, e.g.*, GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY (2002).

[23] *Id.* at 59.

[24] *Id.* at 61.

than on unconscious racism per se.[25] It suggests that these cognitive processes distort social relationships, obscure the salience of racial disparities, and lead to conscious and unconscious behavior on the part of nonstigmatized individuals that intensifies racial disadvantage. In the end, they operate to reify existing racial hierarchies and lock African Americans and other racial minorities into a permanent "outsider" status. Socially, politically, and economically, racial minorities exist on the margins of society and, as a result, are prevented—even where laws and policies require formal equality among the races—from participating as full members of society.

Ultimately, the stigma theory I advance has implications for policy as well as the law. In this Article, however, I focus principally on legal issues raised by racial stigma. What I propose is the adoption of a structured judicial analysis for identifying racially stigmatic meaning and harm. Earlier legal theories of racial injury have advocated a focus on certain types of cases. Lawrence, for example, focused principally on those cases involving facially neutral policies with a disparate racial impact, suggesting—contrary to the Supreme Court's discriminatory intent doctrine—that proof of unconscious discriminatory motive could be found there.[26] Paul Brest, who argued that the intentional discrimination model could be justified under the Fourteenth Amendment by the need to eliminate racial stigma, looked only at cases involving intentional discrimination.[27] Indeed, he argued that "a presumption prohibiting all decisions that stigmatize or cumulatively disadvantage particular individuals" was unwise because it "would affect an enormously wide range of practices important to the efficient operation of a complex industrial society."[28]

Because social science research suggests that racial stigma can be perpetuated by intentional and unintentional policies and actions,[29] however, the structured analysis I propose would apply in cases involving disparate racial impact as well as in those involving intentional discrimination. My analysis shares certain characteristics of the

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[25] *See infra* Part I.A.

[26] *See* Lawrence, *supra* note 18, at 355–81 (discussing how courts would apply new analysis); *infra* Part IV.A.2. Lawrence, to be clear, did not argue that courts should be unconcerned with cases clearly involving discriminatory intent. *See* Lawrence, *supra* note 18, at 324. Because he was largely responding to the Supreme Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976)—which declined to apply strict scrutiny in cases where there was evidence of disproportionate racial impact, but not discriminatory intent—Lawrence spends relatively little time discussing cases involving bad or discriminatory motive.

[27] *See* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976); *see also infra* Part IV.A.1.

[28] Brest, *supra* note 27, at 11.

[29] *See infra* notes 96–104 and accompanying text.

test for cultural meaning that Lawrence proposed in his work.[30] It differs from that test, however, in the following ways: First, it rests on specific insights into the problem of racial stigma; second, it is designed to detect the presence of actual harm rather than motive, whether conscious or unconscious; and third, it envisions a specific *process* of detecting harmful meanings that is more attuned to the dynamics of context than current legal approaches to the problem of racial stigma. While the current meaning of a law or policy of course would be a primary concern, it would not be enough, under my analysis, for a court to look solely at this aspect of the harm alleged. Courts would be obligated to apply a multi-part analysis that would consider the constitutional, social and historical, current, and future contexts relating to a challenged law or policy in determining whether it imposes racially stigmatic harm.

The approach to racial stigma I propose in this Article would have several advantages over the existing alternatives for understanding racial injury and disadvantage. To begin, the conception of racial injury put forth under my theory is more in line with what we now know about how race functions in this society and is thus more likely to produce real solutions for racial harms. Further, it dispenses with the concern for the motivations and behavior of perpetrators that marks both the intentional discrimination model and Lawrence's unconscious racism theory. Under my theory, the obsession with perpetrators would be replaced with a sensitivity to the potential for a law or policy to impose racially stigmatic harm or to generate or perpetuate negative meanings about race. This approach restores the focus on the experience of those most burdened by racial stigma.

Finally, adopting racial stigma rather than intentional discrimination as a primary focus opens new, more productive avenues for talking about race and racial stigma in our society more generally. The current legal framework's focus on intent makes it very difficult even to know how to think about the large-scale inequalities described earlier. Similarly, such focus fosters a defensiveness about racial issues that impedes opportunities to understand the operation of race and racial stigma in a given context. Formulating the problem in terms of good or bad motives means that people, quite naturally, become preoccupied with demonstrating that they are not inherently racist instead of trying to understand how their behavior might have contributed to racial stigma. The harm-based approach I advocate in this Article avoids these pitfalls.

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[30] *See infra* notes 409–413 and accompanying text.

This Article looks at the problem of racial stigma in four parts. Part I concentrates on developing a complete picture of racial stigma and its attendant harms through, inter alia, a reliance on social science and narrative.[31] Using a multidisciplinary approach, Part I begins by providing a working definition of racial stigma, something courts—including the United States Supreme Court—have failed to do even though they regularly rely on the notion of racial stigma to resolve claims of discrimination brought under the Equal Protection Clause. Part I draws heavily on the important work of Erving Goffman but also looks to more recent work on the topic of stigma, including Glenn Loury's book on racial inequality.[32]

Part I then enumerates the central harms caused by racial stigmatization, suggesting that they include individual *and* group-based harms, as well as a set of injuries that I call citizenship harms. It explores the social and psychological harms typically associated with racially stigmatizing actions or policies but also considers the impact that racial stigma has on the manner in which racial identity is experienced in the United States. It attempts to identify the full range of barriers to acceptance in, or belonging to, society that racial stigma constructs for racial minorities.[33]

Part II takes up the claim made by social scientists that the problem of racial stigma cannot be fully understood without an appreciation of social and historical context. Critical race scholars have made similar claims about racism more generally. But neither social scientists nor critical race theorists have explained in any detail how one actually might go about contextualizing questions of race and stigma. Drawing on narrative, Part II thus explores what it might mean, as a practical matter, to look at an issue or policy in context. From there, Part II attempts to put the problem of racial stigma itself in context. Focusing primarily on the experience of African Ameri-

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[31] Although fictionalized, the narratives, which I use to illustrate key aspects of the stigma phenomenon, should not be dismissed as mere stories. Each narrative related in this Article is based in part on a real-life event or situation of which I am personally aware or with which I am familiar. The narratives appear in fictionalized form to permit the reader to evaluate the idea being communicated in a more universal and, therefore, more objective way than a "true" or more factual account might permit. For a discussion of the use of narrative in critical race theory, see Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1783–87 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002)).

[32] *See* GOFFMAN, *supra* note 21; LOURY, *supra* note 22.

[33] *See* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 320–21 (1986) (discussing stigma of separation and describing Jim Crow laws as "thoroughgoing program designed to maintain blacks as a group in the position of a subordinate racial caste by means of a systematic denial of belonging").

cans, it briefly looks at specific historical events and practices that helped to make race a discrediting mark in this society.[34]

The second half of this Article focuses on how courts have approached and should approach the problem of racially stigmatic harm and meaning as a constitutional matter. Part III begins this effort by putting the U.S. Supreme Court's cases involving racial stigma into context. The concept of racial stigma has been treated as a problem of constitutional dimension in the Court's cases for many years. However, the Court's specific approach to racial stigma in individual cases has gone largely unexamined.[35] I take up this analysis by mapping decisions and analytical strategies employed by the Court in a representative sample of cases.[36] This analysis highlights the extent to which the Court's cases rest on a faulty understanding of racial stigma and the social and cognitive processes that lead to it.

Part IV then articulates the new, multi-part analysis for racially stigmatic meaning and harm that I propose. It starts by reviewing the theoretical predecessors for this analysis in legal scholarship: the intentional harm-based theory of stigma advanced by Paul Brest and Charles Lawrence's theory of unconscious racism, including the test for cultural meaning that Lawrence proposed. Next, Part IV sets out the components of my proposed stigma analysis and explains how courts would apply it. Part IV ends by applying the analysis to several scenarios. It first explores whether the analysis would change the result in two cases previously decided by the Supreme Court—*Allen v. Wright*[37] and *Milliken v. Bradley*.[38] Next, it explores how the analysis

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[34] In concentrating on African Americans in this Article, I do not mean to suggest that other minority groups—namely Asian Americans, Latinos, and Native Americans—have somehow been shielded from the damaging effects of racial stigma and caste. Clearly they have not. At both an individual and group level, Asian Americans, Latinos, and Native Americans have suffered and still do suffer from the effects of racial stigma. As a result, I refer to their experiences wherever possible in this Article. However, because the U.S. Supreme Court cases analyzed herein focus principally on the racially stigmatic harms arising out of American slavery and its aftermath, I use that period and African Americans, the minority group most directly affected by it, as my primary analytical compass.

[35] *But see* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 57–76 (1996) (examining arguments underlying stigma-based approach); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 (1997) (arguing that principle of equal citizenship forbids imposition of stigma); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 941–43 (1989) (examining conceptions of discrimination based on subordination and stigma).

[36] The sample includes cases in which racial stigma was discussed in great detail by one or more of the Justices, or was otherwise pivotal in the disposition of the case.

[37] 468 U.S. 737 (1984) (denying standing on part of parents of African-American children to challenge tax-exempt status of racially discriminatory private schools).

[38] 418 U.S. 717 (1974) (rejecting multi-district remedy for segregated schools when de jure equal protection violations occurred in only one district).

would play out in two contexts in which claims of stigma and racial discrimination recently have surfaced. The first context relates to the use of affirmative action in higher education and the assertion made by Justice Clarence Thomas in his dissent in *Grutter v. Bollinger*[39] that affirmative action stigmatizes African Americans and other minorities as inferior. The second context examined involves felon disenfranchisement statutes and the disparate impact such laws have on racial minorities.

I
WHAT IS RACIAL STIGMA?

> "Ran away, negro woman and two children. A few days before she went off, I burnt her with a hot iron, on the left side of her face. I tried to make the letter M."[40]
>
> "Ran away, a negro girl called Mary. Has a small scar over her eye, a good many teeth missing, the letter A is branded on her cheek and forehead."[41]
>
> "Was committed to jail, a negro man. Says his name is Josiah. His back very much scarred by the whip; and branded on the thigh and hips in three or four places, thus (J M). The rim of his right ear has been bit or cut off."[42]

Racial stigma. Ancient Greeks originated the term stigma to refer to a system of markings typically burned or cut onto the bodies of criminals, traitors, and prostitutes as a way of identifying them as people "to be discredited, scorned, and avoided."[43] As the ads

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[39] 123 S. Ct. 2325, 2362 (2003) (Thomas, J., concurring in part and dissenting in part). I worked as a member of the litigation team on both *Grutter* and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

[40] CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 274 (John S. Whitley & Arnold Goldman eds., Penguin Books 1972) (1842) (reproducing advertisements for runaway slaves); *see also* GOFFMAN, *supra* note 21 , at 46 n.9 (discussing newspaper ads used to locate and secure return of fugitive slaves recorded by Dickens in *American Notes*); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 77 (2000) (noting that slaves could also face "maiming, branding, ear cropping, whipping, [and] castration"); KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 188–89 (1989) (discussing slaveholder efforts to punish through methods of physical torture and mutilations, such as branding).

[41] DICKENS, *supra* note 40, at 275.

[42] *Id.*

[43] Steven L. Neuberg et al., *Why People Stigmatize: Toward a Biocultural Framework*, *in* THE SOCIAL PSYCHOLOGY OF STIGMA 31, 31 (Todd F. Heatherton et al. eds., 2000); *see also* GOFFMAN, *supra* note 21 , at 1 (citing same origin of term); *cf.* ROBERT M. PAGE, STIGMA CONCEPTS IN SOCIAL POLICY 2 (1984) (noting that stigma marks were also used to identify people devoted to temple services). The dictionary defines stigma as, among other things, "a scar left by a hot iron," a "brand," or "a mark of shame or discredit." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1155 (10th ed. 1996).

reprinted above suggest, American slaveholders used a similar set of markings in the process of first cultivating and then perpetuating the practice of enslaving Africans.[44] Brands were used as a way of identifying African slaves as human property up until the latter part of the eighteenth century and as a method of punishment well into the nineteenth century.[45] When we talk about racial stigma today, however, we are almost never referring directly to the brands and cuts that were used to demarcate slave or outsider status. We plainly mean something different, something less physical and perhaps more cognitive in nature. The question is: *What*?

Even as the term racial stigma has become part of common parlance, it has escaped clear definition. An informal survey of individuals on the street likely would generate as many definitions as people interviewed. For some, it refers to demeaning racial insults or stereotypes. For others, it is synonymous with the concept of racial inferiority. Still others see it principally as a by-product of discriminatory treatment that excludes or denies a benefit on the basis of race. The connotation given the term seems to vary by individual and even by context.

Significantly, this holds true even among courts and legal scholars, who ordinarily might be expected to have a more uniform understanding of a concept that has been embraced as a key constitutional principle in the race context.[46] The legal approach to racial

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[44] *See* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 59 (1982). Imposition of such marks helped to effectuate what Professor Patterson describes as "social death." *Id.* at 38. In slave societies, a captive's "social death" generally involved three components in addition to the imposition of physical marks: first, "the symbolic rejection by the slave of his past"; second, "a change of name"; and third, "the assumption of a new status in the household or economic organization of the master." *Id.* at 52.

[45] *Id.* at 59; *see also* JOHN HOPE FRANKLIN & LOREN SCHWEININGER, RUNAWAY SLAVES: REBELS ON THE PLANTATION 216–17 (1999); STAMPP, *supra* note 40, at 188. According to historians, "[a] significant segment of the runaway population was identifiable by marks, scars, and disfigurements." *See id.* at 216.

[46] Legal scholars have adopted varying definitions of stigma. *See, e.g.*, KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 25 (1989) (describing stigma as "breakdown of empathy," which "dissolves the human ties we call acceptance" and "excludes the [racially] stigmatized from belonging to a community"); Brest, *supra* note 27, at 5 (referring to racial stigma as question of "empathy"); Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 98 (1999) (linking racial stigma to "an aversion to being associated with African-Americans and their interests"); Lawrence, *supra* note 18, at 350 (defining racial stigmatization as "the process by which the dominant group in society differentiates itself from others by setting them apart, treating them as less than fully human, denying them acceptance by the organized community, and excluding them from participating in that community as equals"); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2430–31 (1994) (referring to racial stigma as injury to "self-respect"). Courts at the federal and state levels have been

stigma, for the most part, has mirrored the strategy that former Justice Potter Stewart infamously adopted in obscenity cases: "I know it when I see it."[47] By contrast, with only a few refinements, social scientists seem to have employed the same basic understanding of stigma for some time. In this Section, I thus look principally outside the legal arena to social science for direction in defining *what* racial stigma is and *how* it functions.

A. *The Components of Racial Stigma*

1. *Dehumanization and the Imposition of Virtual Identity*

Most lawyers are probably familiar with the social research on racial stigma that Dr. Kenneth Clark completed nearly fifty years ago as an expert in the litigation surrounding *Brown v. Board of Education*.[48] In the social science world, however, the work of another social scientist—Erving Goffman—is most often cited in connection with questions surrounding the problem of racial stigma. Nearly forty years after it was first published, Goffman's book, *Stigma: Notes on the Management of Spoiled Identity*, continues to be regarded as one of the definitive texts in this area.[49]

In *Stigma*, Goffman concerned himself with a single purpose: defining the problem of stigma. Looking to a variety of psychological, sociological, and historical studies and texts, he explored a range of stigma-inducing conditions and situations, including the so-called "tribal" or group-based stigmas such as "race, nation, and religion."[50] Although Goffman also studied the etiology and function of stigmas relating to physical deformities and character "blemishes" attributed

similarly imprecise in their definition of stigma. *See infra* Part III; *see also* Jones v. Ryan, 987 F.2d 960, 968 (3d Cir. 1993) (describing stigma as function of being excluded on ground that people of particular race are thought to lack objectivity and ability to be impartial); Pride v. Cmty. Sch. Bd. of Bklyn, N.Y. Sch. Dist. No. 18, 488 F.2d 321, 325 (2d Cir. 1973) (discussing racial stigma as problem of inferiority); Deronde v. Regents of Cal., 625 P.2d 220, 229 (Cal. 1981) (Mosk, J., dissenting) (discussing stigma of being assumed as disloyal to one's country on the basis of race); *In re* R.M.G., 454 A.2d 776, 800 (D.C. 1982) (describing stigma as problem of inferiority and endorsement of racial bigotry); Taylor v. Metzger, 706 A.2d 685, 696 (N.J. 1988) (discussing stigma as psychic injury).

[47] Jacobellis v. State, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[48] 347 U.S. 483 (1954). Clark's research into the psychological effects of racial stigma figured in the Supreme Court's holding in *Brown* that racially segregated schools violated the Equal Protection Clause. *See id.* at 494 n.11.

[49] *See, e.g.*, Stephen C. Ainlay et al., *Stigma Reconsidered*, *in* THE DILEMMA OF DIFFERENCE: A MULTIDISCIPLINARY VIEW OF STIGMA 1, 2 (Stephen C. Ainlay et al. eds., 1986) [hereinafter DILEMMA OF DIFFERENCE] ("Few books have more eloquently addressed the topic of stigma than did Erving Goffman's classic *Stigma*."); *see also* GOFFMAN, *supra* note 21.

[50] GOFFMAN, *supra* note 21, at 4.

to a variety of conditions,[51] the many insights he garnered through his research are extremely relevant to the race-focused inquiry that I take up here. Even today, virtually all social scientists accept the broad definition of stigma developed through his work, namely that "stigmatized persons possess an attribute that is deeply discrediting and that they are viewed as less than fully human because of it."[52]

Let us begin, then, by considering this definition with race specifically in mind. The first part of the definition—"an attribute that is deeply discrediting"—is, I think, fairly straightforward. The attribute at issue when we talk about racial stigma is, of course, dark skin color or, perhaps more accurately, a heritage that includes people of African-American, Latino, Native American, or Asian descent.[53] And there is no question that this particular attribute has often been regarded as a disfavored feature. Even today it continues to stand out as an unfortunate basis on which individuals or groups are discriminated against or otherwise differentiated from others in society.[54]

It is the second part of the definition—the idea that an individual or group could be "viewed as less than fully human" because of a disfavored attribute—that requires some additional thought. The notion that skin color or racial heritage might be discrediting already is encompassed in the first part of the definition. So this second com-

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[51] *See id.*

[52] Ainlay et al., *supra* note 49, at 3 (adopting Goffman's definition); *cf.* GOFFMAN, *supra* note 21, at 3 (describing stigma as deeply discrediting attribute that "constitutes a special discrepancy between virtual and actual social identity"). For a listing of similar definitions of stigma, see also Mark C. Stafford & Richard R. Scott, *Stigma, Deviance, and Social Control: Some Conceptual Issues*, *in* DILEMMA OF DIFFERENCE, *supra* note 49, at 77, 78–80. Goffman's work has been employed to explore race as well as stigmatizing attributes such as gender, disability, and sexual orientation. *See, e.g.*, EDWIN M. SCHUR, LABELING WOMEN DEVIANT: GENDER, STIGMA AND SOCIAL CONTROL 5, 39 (1984) (referring to Goffman in discussing gender-based stigma); Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 437–38 (2000) (referring to Goffman in discussing disability-based stigma); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 287–88 (1995) (referring to Goffman in discussing development of social identities).

[53] I include this qualification to make clear that, under Goffman's definition, a fair-skinned or multiracial person may experience racial stigma even if their skin is not dark per se. Mere membership or suspected membership in a stigmatized group can subject an individual to social scorn or degradation. *See* Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1495–97 (2000). That said, dark skin color has, of course, been one of the primary determinants of social status in American history. *But see* PATTERSON, *supra* note 44, at 61 (arguing that "it was not so much color differences as differences in hair type that become critical as a mark of servility in the Americas" as increases in interracial births made skin color an inexact tool for determining racial heritage).

[54] This holds true for other countries in addition to the United States. *See, e.g.*, Catherine Powell & Jennifer H. Lee, Comment, *Recognizing the Interdependence of Rights in the Andiscrimination Context Through the World Conference Against Racism*, 34 COLUM. HUM. RTS. L. REV. 235, 242–45 (2002).

ponent cannot be read as merely redundant with respect to that clause. While it may include the idea that nonminorities may be socialized to have feelings of dislike or even a strong aversion to racial minorities, it plainly refers to something much deeper and more pernicious, namely, the idea that racial minorities are somehow inferior to Whites because of their skin color or heritage. With the second part of his definition, then, Goffman essentially highlights the extent to which racial stigma "convey[s] a negative social identity" for individuals who bear the discredited mark of race.[55] The person bearing the racialized attribute is not only disliked but socially dehumanized, a devalued individual whose ability to participate as a full citizen in society is fundamentally compromised by the negative meanings associated with his or her racial status.[56] In essence, a racially stigmatized person becomes socially spoiled,[57] dishonored,[58] and "reduced in our minds from a whole and usual person to a tainted, discounted one."[59]

Goffman likened the experience of being socially spoiled and excluded in this way to being forced to assume a new identity, a "virtual social identity."[60] This identity is purely social in nature and has nothing to do with the stigmatized person's actual identity. Indeed, a large discrepancy generally exists between a racially stigmatized person's actual and virtual identities.[61] The actual identity consists of the "attributes . . . [a stigmatized person] could in fact be proved to

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[55] Jennifer Crocker et al., *Social Stigma*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 504, 505 (Gilbert et al. eds., 4th ed. 1998); *see also* GOFFMAN, *supra* note 21, at 5, 19 (describing feelings of disconnectedness and uneasiness that nonstigmatized "normals" experience in encounters with stigmatized individuals).

[56] *See* GOFFMAN, *supra* note 21, at 19 ("[Stigma] has the effect of cutting . . . [the stigmatized person] off from society and from himself so that he stands a discredited person facing an unaccepting world."); *see also* John F. Dovidio et al., *Stigma: Introduction and Overview*, *in* THE SOCIAL PSYCHOLOGY OF STIGMA, *supra* note 43, at 1, 1 ("Stigmatization, in its essence, is a challenge to one's humanity.").

[57] GOFFMAN, *supra* note 21, at 19.

[58] Professor Orlando Patterson talks about dishonor in connection with his social death theory of slavery. He argues that dishonor or degradation was a central part of all major slave societies, not simply because slaves were deprived of empathy—which they invariably were—but because it was necessary to keep them in a subjugated, socially dead position from which they could not easily emerge. For Patterson, the principal problem for American slaves was not the denial of acceptance or even the discriminatory treatment to which they were subjected. Rather, it was that they were consigned to a position wholly "outside the social order." PATTERSON, *supra* note 44, at 79.

[59] GOFFMAN, *supra* note 21, at 3; *see also* Jennifer Crocker & Diane M. Quinn, *Social Stigma and the Self: Meanings, Situations, and Self-Esteem*, *in* THE SOCIAL PSYCHOLOGY OF STIGMA, *supra* note 43, at 153, 153 ("One [who is stigmatized] is devalued, spoiled, or flawed in the eyes of others." (citation omitted)).

[60] *See* GOFFMAN, *supra* note 21, at 2.

[61] *See id.* at 19 (discussing effects of discrepancy between actual and virtual identity). W.E.B. DuBois eloquently described the consequences for African Americans of this false or virtual identity in *The Souls of Black Folk* :

possess," whereas the virtual identity is based not on known facts, but rather on our "assumptions as to what [we believe an] individual before us ought to be," including the capabilities, belief systems, and morality that "we impute to the individual."[62] In this sense, it is fabricated, not real. Nevertheless, it invariably takes on what some have described as a "master status" in the minds of the nonstigmatized and sometimes even the stigmatized.[63] In the case of racial stigma, this means that the individual's race—and all the negative connotations generally imputed to it—eventually overshadows or "eclipses all other aspects" of his or her self, essentially becoming all that anyone sees.[64] Race becomes a sort of mask, a barrier that both makes it impossible for the stigmatized person's true self to be seen and fixes the range of responses that others will have to that person.[65]

The following narrative helps to show how this mask—or, to use the term Goffman rather presciently selected, virtual social identity—works:

> *A young African-American male, dressed in jeans, a red pullover, and sneakers, walks down an affluent, predominantly white neighborhood street on a summer night. A third-year student at the area's most prestigious law school and a member of the law review, he is returning home after having dinner with a law professor from his school who recognized his talent early on and has been grooming him to assume a prestigious job as a law clerk or possibly even a legal academic upon his graduation. In the law school context, the stu-*

> [T]he Negro is kind of a seventh son, born with a veil, and gifted with second-sight in this American world—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

DUBOIS, *supra* note 1, at 59.

62 GOFFMAN, *supra* note 21, at 2.

63 Ainlay et al., *supra* note 49, at 6 (defining "master status" as occurring when "the defining attribute eclipses all other aspects of stigmatized persons, their talents and abilities" (citations omitted)).

64 *Id.*

65 *See* Paul Laurence Dunbar, *We Wear the Masks*, *in* THE COLLECTED POETRY OF PAUL LAURENCE DUNBAR 71 (Joanne M. Braxton ed., 1993) (discussing race as kind of mask). Social spoiling of this sort is evident in a myriad of social interactions. *See, e.g.*, Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 953–64 (2002) (describing various racialized encounters with police); Carbado & Gulati, *supra* note 31, at 1762 (discussing role of race in employment decisions); *see also, e.g.*, Christian v. Wal-Mart Stores, Inc., 252 F.3d 862 (6th Cir. 2001) (involving complaint brought by black woman claiming that she and friend were wrongly suspected of shoplifting and removed from store because of race).

dent's unique abilities, as well as his easy-going manner and overall affability, are legendary among students and faculty members alike. Individuals in that environment generally approach him with a mixture of admiration and affection. On the street, however, things are quite different.

As the student makes his way home on this particular evening, he encounters three individuals, each of whom reacts to his presence with either suspicion or fear. The first person, a young white woman, walks toward him for about a block, but then she abruptly crosses the street as she gets close. The second person, a middle-aged white male, does not cross the street, but he refuses to meet the student's gaze as he approaches. As the man looks away, he reflexively clutches the bag of department store purchases he carries close to his chest. The third, a seasoned police officer who is also white, sees the student and begins to follow him as he makes his way down the street. Suspecting possible criminal or gang activity, the police officer decides to stop the student. He detains the young man for quite some time, demanding identification and a detailed explanation for the student's presence in the neighborhood. Upon seeing the young man's student identification card, however, the police officer seems to recognize that he has made a mistake. Eventually, he permits the student to continue his journey home.[66]

In each of the encounters described, the *actual* identity of the young student becomes essentially invisible as soon as he enters a social situation with a nonstigmatized individual.[67] Instead of a successful young law student, the three people in the narrative see only danger, an African-American man who has invaded their neighborhood with the intention of robbing them or, worse, subjecting them to physical harm. Especially here, where no prior relationship between the nonstigmatized and stigmatized individuals exists, the virtual social identity trumps everything. With nothing to counteract the assumptions that they have been socialized to make about African Americans, the first and second individuals respond to whom they think the student ought to be, given what they think they know about his race, rather than to whom he is.[68] The police officer follows suit.

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[66] I am indebted to Professor Audrey McFarlane for giving me the inspiration for part of this narrative.

[67] For a more comprehensive exploration of the issue of invisibility in the race context, see generally RALPH ELLISON, INVISIBLE MAN (Vintage Books 1995) (1952).

[68] Loury suggests that the imputation of a virtual identity in any given situation correlates directly with the level of familiarity between the nonstigmatized and stigmatized persons. *See* LOURY, *supra* note 22, at 65 ("Race becomes an important aspect of a subject's virtual social identity just when his actual identity is unknown to the observer. Yet given the convention of attending to race and the evident value of doing so, and given that the social meanings carried by the race-markers support the deleterious, homogeneous view, an observer may see no reason to track the personal life history that defines a subject's

He breaks the pattern of negative assumptions only when confronted with concrete evidence suggesting that the student has an *actual* identity that differs in substantial ways from the *virtual* identity imputed to him.[69]

In Part II, we will explore in detail the consequences for the racially stigmatized of having to bear a virtual social identity. For now, it will suffice to reiterate two of the points illustrated by the above narrative. First, the extent to which the virtual identity imposed by those who encounter a racially stigmatized individual and the actual identity felt by that individual are generally discrepant—in our narrative it was the difference between being a promising law student and being mistaken for a possible criminal—must be kept firmly in mind. Second, it should be understood that while virtual social identities obviously exist in the minds of the nonstigmatized—recall the people on the street who sensed danger upon encountering the law student in the narrative—they are subjective, not grounded in reality.

Both of these points are important because they help to underscore an issue essential to any understanding of racial stigma: Racial stigma—like race itself—is ultimately a social construct.[70] This means that the norms and rules about which categories of individuals will be valued or devalued are "defined by society, even by the government,

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actual identity."). While lack of familiarity between two individuals might lead to increased reliance on virtual identities, it does not follow that such identities do not also emerge when the nonstigmatized and stigmatized individuals at issue know one another. Problems related to the concept of master status arise even where the parties at issue are not strangers, as they were the above scenario. *See* Lawrence, *supra* note 18, at 341 n.100 (noting problem of African Americans and Asians being mistaken by their white colleagues "for another black or Asian who looks nothing like" them); Radha Natarajan, Note, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821 (2003) (noting that people are better at recognizing members of their own race than they are at recognizing members of another race, and that this own-race bias causes mistaken identifications).

[69] It bears noting that, although I have used narrative to make my point, the dynamic just described is played out in scores of real-life encounters between the racially stigmatized and nonstigmatized. *See, e.g.*, Carbado, *supra* note 65, at 953–64 (describing experiences of black men with police). The problem of racial minorities, particularly men, being unable to hail cabs because drivers often assume that they are dangerous criminals or lack the resources to pay the fare provides one well-known example. *See* Salvatore Arena, *Glover Says Cabs Don't Pick Him Up*, DAILY NEWS (New York), Nov. 4, 1999, at 5 (detailing difficulties Danny Glover, successful African-American actor, faced upon trying to hail cab in New York City, leading to filing of racial bias complaint).

[70] *See* Ainlay et al., *supra* note 49, at 3; *see also* Crocker et al., *supra* note 55, at 505 ("[R]ace is a socially constructed identity that has little to do with genetic differences among groups of individuals.").

but not by nature."[71] There is, after all, nothing inherently wrong with having dark skin or being a racial minority in society. Such a status does not itself lead to mistreatment or discrimination.[72] As Goffman recognized, "An attribute that stigmatizes one type of possessor can confirm the usualness of another, and therefore is neither creditable nor discreditable as a thing in itself."[73] An attribute becomes disfavored only because of the social information it carries.[74] In this sense, the problem of racial stigma is best understood as a problem of social or cultural meanings.[75]

Early research in this area suggested that the social meanings conveyed by racial stigma are relatively fixed.[76] More recent work on racial stigma, however, suggests that stigmatic meaning is quite often situational or contextual.[77] A racially stigmatized person may, for example, feel stigma in an all-white work environment but may receive positive messages about his or her identity upon returning home to a community that is largely minority. Similarly, the same individual may find that his or her race generates few negative reactions in one situation but may elicit anger or even fear in situations that seem to tap into shared assumptions of how individuals of that race behave.[78] Thus, we have our young African-American law student's experience of being admired by peers and professors at his law school and feared by the people he encountered in a predominantly

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[71] Crocker et al., *supra* note 55, at 505; *see also* Stephen C. Ainlay & Faye Crosby, *Stigma, Justice, and the Dilemma of Difference*, *in* DILEMMA OF DIFFERENCE, *supra* note 49, at 17, 18.

[72] *See* Crocker et al., *supra* note 55, at 505.

[73] GOFFMAN, *supra* note 21, at 3. At the same time that racial stigma imposes a negative identity on racial minorities, it should be understood that it also operates to construct a superior, defect-free identity for nonstigmatized individuals. *See* Lerita M. Coleman, *Stigma: An Enigma Demystified*, *in* DILEMMA OF DIFFERENCE, *supra* note 49, at 214, 214. The construction of whiteness is a direct consequence of the imposition of racial stigma. *See generally* Thomas Ross, *Being White*, 46 BUFF. L. REV. 257 (1998) (reviewing IAN F. HANEY LOPEZ, WHITE BY LAW—THE LEGAL CONSTRUCTION OF RACE (1996)). For more on the construction of whiteness, see CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado and Jean Stefancic eds., 1997).

[74] *See* GOFFMAN, *supra* note 21, at 45–48 (discussing signs carrying social information).

[75] *See, e.g.*, Gaylene Becker & Regina Arnold, *Stigma as a Social and Cultural Construct*, *in* DILEMMA OF DIFFERENCE, *supra* note 49, at 39, 39. Professor Charles Lawrence insightfully discussed the notion of cultural meaning in his article on unconscious racism and the problems raised by the application of the Supreme Court's intent requirement in equal protection cases. *See* Lawrence, *supra* note 18, at 347–49.

[76] *See, e.g.*, Crocker & Quinn, *supra* note 59, at 155–56 (discussing studies assuming that effect of stigma is uniform in all contexts).

[77] *Id.* at 157–59; Ainlay et al., *supra* note 49, at 4–5; Crocker et al., *supra* note 55, at 506.

[78] Similarly, an attribute that society normally values may be regarded as negative in a particular context. *See, e.g.*, Crocker et al., *supra* note 55, at 506 (discussing situations in which men may be devalued).

white neighborhood. The upshot is that racial stigma turns in large part upon the context in which the stigmatized individual finds her- or himself. It cannot fully be understood without an inquiry into the social, cultural, and historical context from which it originated and in which it now exists.

2. *Shared Negative Meanings about the Racially Stigmatized*

The narrative communicated earlier illustrates the way in which the negative meanings associated with race operate to obscure actual identity. The fact that our law student was so readily mistaken for a potential criminal demonstrates how powerful the messages that race carries in our society can be. Just as important as the fact that such messages exist, however, is the fact that they are so widely shared. Although each of the characters in the narrative reacted somewhat differently, they had the same basic vision of the law student. The uniformity of their responses goes to the heart of the racial stigma problem and to the systemic nature of the social problems that so often correlate with race.

Racial stigma, at bottom, concerns the relationship between a group of individuals perceived as essentially similar[79] and shared community beliefs about that group and the attributes they possess.[80] While racist attitudes are held at an individual level as well, the group-level responses to racial difference are most important here. Part of the strength of the "societal devaluations" associated with race in this country is that "they cannot be dismissed as the ravings of some idiosyncratic bigot."[81] They are shared and consensual, which means that they cannot easily be ignored.[82] This, perhaps even more than the precise character of the messages conveyed about race, is what makes

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[79] The idea that the similarities in the group are merely perceived is key. Groups with so-called tribal stigmas are regarded as very similar even though by virtue of size, geography, and ethnicity, there may be significant variations among their members. *See* Monica Biernat & John F. Dovidio, *Stigma and Stereotypes*, *in* THE SOCIAL PSYCHOLOGY OF STIGMA, *supra* note 43, at 88, 92–93 (suggesting that size of tribally stigmatized groups such as "Black Americans" may alone "prohibit a clear sense of group organization and interaction"). Latinos provide a clear example of such a group. *See, e.g.*, Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 963–64 (1995) (noting racial differences among Latinos).

[80] Charles Stangor & Christian S. Crandall, *Threat and the Social Construction of Stigma*, *in* THE SOCIAL PSYCHOLOGY OF STIGMA, *supra* note 43, at 62, 63–64 ("For a characteristic to be a stigma, it must be shared among the members of a given group."); *see also* GOFFMAN, *supra* note 21, at 4 (describing stigma as "a special kind of relationship between attribute and stereotype").

[81] Ainlay & Crosby, *supra* note 71, at 31.

[82] *See id.*; *see also* Stangor & Crandall, *supra* note 80, at 63–64.

racial stigma such a powerful social force.[83] The meanings ascribed to an attribute—i.e., that dark skin or an accent provide meaningful evidence of intellectual or moral inferiority—begin to form what constitutes "a socially shared sense of 'reality.'"[84]

This shared sense of reality means that, in many respects, racial disparities in social indicators, such as education or employment, simply do not register as problems with which the nonstigmatized must be concerned.[85] At some level, they merely confirm basic assumptions about the character and abilities of racially stigmatized minorities.[86] And, as we have seen on many occasions, these assumptions are very difficult to refute. Take the very dramatic example of the spate of racial hoaxes perpetrated in the last decade or so. Many of the more than sixty hoaxes identified between 1987 to 1996 involved a crime committed by a white person who successfully impeded the police investigation into their misdeeds by identifying a person of African-American descent as the perpetrator of the crime at issue.[87] In most cases, it took several days before anyone uncovered the deceit. Some hoaxes—such as that involving South Carolinian Susan Smith, who claimed that a black man had taken her car and two children before confessing nine days later that she had actually drowned them by pushing her car into a lake while they were still strapped in their car seats—took even longer to expose.[88]

The lack of skepticism exhibited about these incidents relates very directly to public responses to racial disparities. It helps to underscore *why* it is that, for example, the high drop-out rate among African-American youths or perhaps even the appalling rate of heart disease in the African-American community are viewed as largely

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[83] Ainlay & Crosby, *supra* note 71, at 31.

[84] *Id.* Thus far, I have emphasized the extent to which the negative meanings about race become shared among nonstigmatized individuals. In doing so, I have not meant to suggest that membership in a stigmatized group somehow shields an individual from internalizing demeaning messages about minority status and perpetuating negative racial norms. *See infra* Part I.B.2.b. For example, one of the individuals depicted in the law student narrative could very well have been African American. In certain contexts, stigma-based myths, such as the myth of black dangerousness, will have salience for stigmatized and nonstigmatized individuals alike. *See* LOURY, *supra* note 22, at 53.

[85] *See* Loury, *supra* note 22, at 71, 86.

[86] *See id.* at 52–53, 81.

[87] *See* KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS app. at 157–73 (1998) (summarizing racial hoaxes perpetrated between 1987 and 1996).

[88] *See* Katheryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 593, 596 (1996); *Grand Jury Indicts Smith in Her Children's Deaths*, WASH. POST, Dec. 13, 1994, at A24. Smith was later sentenced to life in prison. *See* Tamara Jones, *Susan Smith is Spared by South Carolina Jury; Drowning Sons Brings Life Sentence*, WASH. POST, July 29, 1995, at A01.

symptomatic of problems within that community rather than as a result of, say, the racial bias in our educational programs or health care system.[89] The frame we have for viewing racial difference distorts our perception of reality, making it easier both to see and ignore certain conditions.

This is so even when the flaws in the common perspective are made evident. Revelations about the fallacy of the shared "reality" of race may occasion some adjustments in thinking, but they are unlikely to be more than temporary ones. Racial stigma, after all, is comprised of very "complex interactional process[es]" and meanings.[90] Even as racial myths get disproved, they are reinforced by institutional structures that operate to further compound racial stigma.[91] The high incidence of incarceration among African-American and Latino youths, for example, perpetuates the stereotype that certain racial minorities have an uncanny propensity for criminality even where, as in the recent Tulia, Texas case, there is strong evidence that discrimination on the part of some police officials may account for part of the problem.[92] The existence of high-crime urban ghettos—comprised largely of poor African Americans and Latinos—also perpetuates this stereotype.[93]

3. *The Automatic Nature of Responses to the Racially Stigmatized*

The next stigma factor that contributes to broad-scale racial inequality relates to the automatic or unconscious nature of the responses the nonstigmatized—and sometimes even minorities themselves—have to the racially stigmatized. The prevailing constitutional paradigm in the race context is, of course, the discrimination model discussed earlier. Under that model, embodied in cases such as

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[89] *See* Robert Davis, *Racial Differences in Mortality: Current Trends and Perspectives*, *in* RACE AND ETHNICITY IN AMERICA, *supra* note 4, at 115, 123–25 (discussing rate of heart disease among African Americans); KAUFMAN, *supra* note 8 (discussing high dropout rates). In recent years, a number of studies have documented differences in the treatment that physicians give to minorities and nonminorities with identical symptoms. *See* Avram Goldstein, *GU Study Finds Disparity in Heart Care*, WASH. POST, Feb. 25, 1999, at A01 (discussing results of study in New England Journal of Medicine on how race and gender affect provision of cardiac care).

[90] PATTERSON, *supra* note 44, at 13.

[91] Becker & Arnold, *supra* note 75, at 47 (using example of welfare mothers to explore "the institutionalization of stigma").

[92] *See* Lee Hockstader, *For Tulia 12, 'It Feels So Good,'* WASH. POST, June 17, 2003, at A1 (reporting release of Texas inmates after investigation revealed sheriff deputy intentionally falsified reports and investigation methods in numerous drug cases involving Blacks).

[93] *Cf.* Biernat & Dovidio, *supra* note 79, at 93 (discussing possibility that high incidence of African Americans and Latinos in low-wage jobs may reinforce stereotypes about the intelligence levels of individuals in those groups).

Washington v. Davis,[94] only conduct and policies that reflect discriminatory intent or motive can be actionable.[95] No remedies exist for racialized, unconsciously committed behavior or policies that have merely a discriminatory impact.

Social scientists, for reasons that are related to those Lawrence identifies in his work, tell us, however, that questions of intent and motive have little to do with racial stigma.[96] While there is no doubt that intentional discrimination and stereotyping figure into the stigmatization process at some point—particularly at the beginning, as the negative attitudes about the group or attribute become shared at a societal level—social science research does not support the view, reflected in current Supreme Court jurisprudence, that all stigmatization and discrimination is a function of conscious racial classification or bad motive.[97] Indeed, quite the opposite is true. Much of this stigmatization occurs at an unconscious level.

Social science research suggests that "[t]he practice of grouping people together on the basis of their common possession of visible bodily marks is a universal aspect of the human condition."[98] As human beings, we are constantly and unconsciously trying to "fit experience into some interpretive scheme."[99] We label people and things according to appearance (Black versus White), function (lawyer versus doctor), uses (bed versus couch), role (mother versus teacher), and even actions (criminal versus law-abider).[100] At some level, this labeling helps us to navigate the often difficult terrain of our physical and social environment.[101] It is a form of what has been described as "cognitive economy"[102]—an effort to "achieve some meaningful ordering" of the world.[103]

In achieving this ordering, we are, of course, not exactly neutral with respect to our assessments. Our "[i]nterpretive schemes [clearly] include both 'cognitive' (what is) and 'normative' (what ought to be) constructs."[104] We notice differences everywhere, but some differences form part of what some researchers term "our perceptual fore-

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94 426 U.S. 229 (1976).

95 *See id.* at 238–48; Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (requiring proof of discriminatory intent for equal protection claim).

96 *See, e.g.*, Coleman, *supra* note 73, at 214, 218.

97 *See id.*

98 LOURY, *supra* note 22, at 17.

99 Ainlay & Crosby, *supra* note 71, at 20.

100 *Cf. id.* at 21 (describing how "we distinguish [a] chair from a telephone").

101 *Id.* at 18–19.

102 Stangor & Crandall, *supra* note 80, at 63–64.

103 Ainlay & Crosby, *supra* note 71, at 18.

104 *Id.* at 34.

ground and are what we might term 'salient,' whereas [others] . . . become part of our perceptual background."[105] These background differences do not necessarily become part of our conscious thought. We may, for example, immediately register that someone is male or female, or perhaps that someone is African-American or Latino without focusing on any other identifying features, such as clothing, height, or speech. Similarly, we accord positive value to some things and negative value to others.[106] Someone becomes classified as dangerous or safe on the basis of what many times turns out to be only a glance. Witness our young law student from earlier in our discussion. These types of reactions are all linked to stigmatization. Stigmatization "represents one end of the continuum of the process of assigning positive or negative labels to those we come across, and then valuing or devaluing them as their labels warrant."[107]

As common as the tendency to label or categorize is, however, how we come to value or devalue things—in this case racial difference—is generally not a "natural" or internally driven phenomenon. The meaning we attach to particular categories largely comes from external sources.[108] That is, the social and historical context in which we find ourselves largely accounts for the value systems we employ at an individual level in categorizing difference.[109] Community norms—e.g., rules about what is normal and abnormal—about identity, behavior, and other sorts of difference help to shape what we notice or overlook, what we regard positively, and what we regard negatively.[110] They, in turn, are part of a larger, societal effort to order social relations and achieve some degree of control. "Each society creates hierarchies of desirable and undesirable attributes and sets rules for the management of [certain individuals and] attributes . . . ."[111]

The way that we learn how to value these things relates to a phenomenon social scientists refer to as "social learning." In the case of race and racial stigma, social learning refers to the process by which we learn and are conditioned to expect racial minorities to conform to

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105 *Id.* at 21.

106 *See* Neuberg et al., *supra* note 43, at 31.

107 *Id.*

108 Ainlay et al., *supra* note 49, at 3–6 (describing stigma as social construct).

109 Ainlay & Crosby, *supra* note 71, at 25–26.

110 *Id.* at 34 (arguing that stigma is prescriptive).

111 Ainlay et al., *supra* note 49, at 4. The ancient Greeks' mandate that individuals bearing certain physical markings or scars be avoided or exiled provides one example of such a management scheme. *See id.* at 3.

certain stereotypes about behavior, intellect, and morality.[112] While we may not be formally introduced to certain beliefs about racial minorities until fairly late in life, research suggests that we actually learn the attitudes we hold about race and racial minorities much earlier. By age three, many children have already learned to regard racial minorities as inferior to Whites.[113] And studies suggest that we internalize negative attitudes and responses to racial minorities at an even earlier developmental stage.[114]

For the most part, the impetus for ascribing negative meaning to racial categories is not internal.[115] Rather, adults, particularly those who play a caregiver role to the young infant or child, provide it.[116] They pass the "predisposition to stigmatize . . . [to their children] through social learning."[117] With facial expressions and behavior, parents teach their children which categories should be disfavored and the kinds of responses—e.g., fear, hatred, anxiety, ambivalence, avoidance—that those categories should engender.[118] As a child reaches school age, teachers also may have an impact on their responses to stigmatized children, through their expressions, as well as through their behavior—e.g., how they interact with stigmatized individuals, whether they call on them in class, and how they receive answers or information provided by stigmatized children.[119] In short, adult affective responses to stigmatized individuals can shape the way in which children develop cognitively.[120] Eventually, children, without knowing why or even being conscious of what they are doing, will begin to associate specific categories with certain attitudes and emotions.[121] Responses to these categories become automatic and remain so into adulthood.[122]

The range of affective responses nonstigmatized adults may have to stigmatized individuals is relatively broad, spanning from ambiva-

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112 *See* Larry G. Martin, *Stigma: A Social Learning Perspective*, *in* DILEMMA OF DIFFERENCE, *supra* note 49, at 145, 150–53 (discussing social learning of stigma).

113 Crocker et al., *supra* note 55, at 511.

114 *See* Coleman, *supra* note 73, at 218.

115 *See* EDWARD E. JONES ET AL., Social Stigma: The Psychology of Marked Relationships 160–61 (1984) (noting sociocultural perspective that "beliefs about minorities and other markable groups are transmitted by parents, the media, and other socialization agents").

116 *See* Coleman, *supra* note 73, at 218.

117 *Id.*

118 *See id.*; *see also* Crocker et al., *supra* note 55, at 511–16 (discussing some responses nonstigmatized individuals can have to stigmatized individuals).

119 *See* Martin, *supra* note 112, at 151–52.

120 *See* Coleman, *supra* note 73, at 218.

121 *See id.*

122 *See id.*

lence to feelings of tension and anxiety,[123] though current attitudes about acceptable behavior toward racial minorities may impede the expression of such feelings in many instances.[124] Feelings of fear, in particular, may be due to a desire "to avoid 'courtesy stigmas' or stigmatization by association";[125] a belief that stigmatized individuals will compete with them for already scarce resources, such as jobs or college admission;[126] or concern for physical well-being, particularly in contexts which already may generate certain levels of discomfort.[127] Our earlier narrative provides one illustration of the latter variety of fear. The famed case of Bernhard Goetz, a white New York City subway rider who shot and wounded four unarmed African-American youths as they approached him for money on a crowded subway car, arguably provides another example.[128]

That reactions to the stigmatized can be automatic or uncontrolled has troubling implications for the racially stigmatized as well as for efforts to eradicate racial inequality. If our reactions are uncontrolled, they are largely uncontrollable to the extent that they operate outside of our consciousness. This means, for example, that antidiscrimination statutes designed to curb intentional action, as a practical matter, can have no real impact on automatic responses to racial difference that we know can compound racial stigma and the negative meanings associated with race. More than this, it means that even those racial egalitarians who consciously purport to embrace race-neutral norms may inadvertently contribute to conditions that

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123 Crocker et al., *supra* note 55, at 511–13.

124 *See id.* at 514. But see the recent violent murder of James Byrd, an African-American man, at the hands of three white men in Jasper, Texas. John Freeman, *Undercurrent of Hate Swells to the Surface: Racial Killing's Seed Festered in Small Town*, DENVER POST, Feb. 3, 2002, at EE01, *available at* 2002 WL 6559668. Encounters with individuals from other stigmatized groups may also generate similar responses in individuals. *See, e.g.*, Allan Lengel, *Thousands Mourn Student's Death*, WASH. POST, Oct. 15, 1998, at A7 (reporting on response to violent bias killing of gay Wyoming man).

125 Coleman, *supra* note 73, at 225–26; *see also* GOFFMAN, *supra* note 21, at 30–31; Michelle R. Hebl et al., *Awkward Moments in Interactions Between Nonstigmatized and Stigmatized Individuals*, *in* THE SOCIAL PSYCHOLOGY OF STIGMA, *supra* note 43, at 273, 282.

126 *See* Stangor & Crandall, *supra* note 80, at 74–75. Stangor and Crandall note, for example, that some research suggests that the number of lynchings of African Americans rose and fell with the price of cotton. *Id.* at 74.

127 *See* Hebl, *supra* note 125, at 282.

128 Goetz, who was later charged with attempted murder, maintained that he felt threatened by the youths. *See* Margaret Hornblower, *'Subway Vigilante' Goetz Goes on Trial in N.Y.*, WASH. POST, Apr. 28, 1987, at A3. A jury acquitted Goetz of attempted murder, finding him guilty only of carrying an illegal firearm. *See* Margaret Hornblower, *Jury Exonerates Goetz In 4 Subway Shootings*, WASH. POST, June 17, 1987, at A01, *available at* 1987 WL 2041477.

increase racial inequalities.[129] The impact of unintentional responses to race matters as much, if not more, than intentional responses to race.

4. *The Reinforcing Nature of Racial Stigma and Stereotypes*

As previously noted, when asked to define racial stigma, people often confuse it with the problem of racial stereotypes, which have historically been defined as inaccurate or overbroad generalizations, but have more recently come to be understood as "cognitive categories" employed in processing information.[130] Most "profoundly stigmatized social identities" have a myriad of well-accepted stereotypes associated with them:[131] "Blacks are dumb"; "Latinos are lazy"; "Asians are smart, but conniving." The terms racial stigma and racial stereotype are, however, two analytically distinct concepts.[132] Whereas racial stigma provides the negative meanings associated with race and accounts for the initial affective reactions individuals often have toward racial minorities, racial stereotypes help to explain the persistence of certain attitudes about and responses toward race and the racially stigmatized. In this way, they also are directly related not just to discrimination but to the broader problem of racial inequality.

Racial stigma and stereotypes, in some sense, play mutually reinforcing roles in the dehumanization and marginalization—social, as well as economic and political—of minority groups. On the one hand, racial stigma contributes to the development of negative racial stereo-

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129 Crocker et al., *supra* note 55, at 517.

130 Biernat & Dovidio, *supra* note 79, at 95 (citation omitted).

131 Crocker et al., *supra* note 55, at 511. These stereotypes can be conveyed through a variety of mechanisms, including books, television, movies, or newspapers. *Id.* (discussing role of books and mass media in perpetuating stereotypes).

132 The two categories are, however, closely related. *See* Biernat & Dovidio, *supra* note 79, at 89 ("Because of the common mechanism of group-based inferences, stereotyping and tribal stigmas are closely related."). In trying to distinguish them, it may be helpful to think in terms of the following continuum: generalizations, stereotypes, and stigma. Generalizations, in this context, refer to those assumptions about a group that have some degree of accuracy associated with them. For example, a person might say that people who identify themselves as African-American often have skin tones that are darker than those who identify as white. As a generalization, this statement will often be true, but not in every case. In contrast, a stereotype is generally not based in fact. The idea that African Americans, as a group, have a propensity toward criminality is one example of a racial stereotype. Such a stereotype can play a role in creating or perpetuating stigma, but it differs from stigma. Unlike the concept of stigma, a stereotype does not necessarily convey the message that the group or individual that it concerns is subhuman or less than a part of society. Indeed, stereotypes can sometimes even be positive in nature. *Id.* at 108 (using example of stereotypes regarding physically attractive people). Stigma, in contrast, is never positive.

types about stigmatized groups.[133] It is thought that the social meanings conveyed by racial stigma actually influence the cognitive processes that lead to stereotype formation.[134] As Glenn Loury notes, "The 'social meaning of race'—that is, the tacit understanding associated with 'blackness' [or dark skin] in the public's imagination, especially the negative connotations—biases the social cognitions and distorts the specifications of observing agents, inducing them to make causal misattributions [or categorizations] detrimental to" racial minorities.[135]

The fact that racial stigma involves categories that appear to be "natural" and often concerns "attribute[s] [that are] confounded with 'role division,' or segregation at the societal level" leads to the type of categorization discussed in the previous Section.[136] Race serves as a signal for classification or grouping in the first instance.[137] But it also leads perceivers to draw certain "inferences" about all individuals who bear the racial attribute that inspired that cognitive grouping.[138] Encounters with one or two people who, at a very general level, look the same or who seem to hold the same social position lead to certain

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133 *See* Biernat & Dovidio, *supra* note 79, at 92–94 (describing factors inherent to stigma that facilitate generation of stereotypes).

134 Coleman, *supra* note 73, at 219–20.

135 LOURY, *supra* note 22, at 52.

136 Biernat & Dovidio, *supra* note 79, at 93; *see supra* Part I.A.3.

137 *See id.* at 91; *see generally* Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 55, at 357 (reviewing psychological research on nature and causes of stereotyping).

138 *See* Biernat & Dovidio, *supra* note 79, at 92 ("[C]ategorization generates expectations about individual group members."). "Mistaken" identity cases of this sort suggest a useful way to further tease out the distinction between racial stigma and racial stereotypes. Consider this example:

> *A low-income, African-American woman goes to her local, inner-city bank branch in search of a loan to expand her small cake-making business into a catering service. She has prepared a business plan and wants now to procure the funds necessary to put her dream of owning her own business into action. She has a high school diploma and a perfect work and credit history. At the bank, however, the tellers and account managers seem unwilling to take her request for a loan seriously. When she is finally able to meet with a loan manager, he tells her, without listening to her plan or looking at the plan that she prepared, that the bank considers people with her particular profile too risky.*

Although the bank would no doubt point to statistics regarding lending rates in its defense, the statement made by the loan manager is based on an overbroad generalization, a stereotpype. The stereotype is that low-income, African-American women cannot be expected to honor their debts or have the intellectual wherewithal necessary to be successful businesspeople. It allows for no individual inquiry into this woman's actual potential and creditworthiness. As a result, it feeds into the negative meanings conveyed by the woman's discredited attributes, her race and her gender. This stereotype, however, is not the same as the discredited attribute itself. Further, it does not, in and of itself, convey the notion, so important to stigma, that the bearer of the attribute is somehow socially disgraced or less than human.

assumptions about the whole group. For example, experiences with minorities who work in the service industry might lead some perceivers to conclude, if only at an unconscious level, that *all* minorities can be expected to work in such roles. The many stories of minority executives who, despite their business attire, are mistaken for department store clerks, maids, or bellhops bear this out.[139]

Likewise, racial stereotypes play a major role in the "development, justification, maintenance, and perpetuation of stigmatization."[140] Cognitively, stereotypes affect how we acquire and process information about the racially stigmatized. They operate as what has been described as "person prototypes" or "social schemas,"[141] "informal, private, unarticulated theor[ies] about the nature of events, objects or situations which we face."[142] Once "activated," schemas automatically encode, store, and retrieve social data and information "in a manner that reflects the structure of the schema."[143]

Experiments conducted by social scientists in recent years demonstrate how such proxies or schemas function. Studies show that "both White children and adults tend to interpret ambiguously aggressive behaviors as more threatening and violent when they are performed by a Black person than by a White person."[144] Professor Linda Krieger describes a 1980 experiment by H. Andrew Sagar and Janet Schofield in which elementary school children were given a

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139 *Cf.* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 741 (1995) (relaying example of three-year-old child who reacts to seeing black child by saying, "Look mom, a baby maid").

140 Biernat & Dovidio, *supra* note 79, at 107.

141 Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995).

142 *Id.* at 1190 (quoting David E. Rumelhart, *Schemata and the Cognitive System*, *in* 1 HANDBOOK OF SOCIAL COGNITION 161, 166 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 1984)) (internal quotation marks ommitted).

143 *Id.* at 1200; *see also* Steven J. Spencer et al., *Automatic Activation of Stereotypes: The Role of Self-Image Threat*, 24 PERS. & SOC. PSYCHOL. BULL. 1139, 1150 (1998) ("[W]hen stereotypes are activated, they often become the lens through which targets of stereotypes are perceived and the catalyst by which targets are discriminated against."). Some argue that such stereotypes are economically rational proxies:

> Observable traits are important because, when individuals encounter a stranger, they have no other basis for making an esteem judgment. . . . Given the scarcity of information, it is rational to use cheaper information—proxies—to infer the existence of more expensive, individualized information. The economics literature describes the use of proxies for making decisions of material consequence (such as employment), but proxies can also be used for the allocation of status. Shared-trait group membership is a proxy people use for granting or withholding esteem to individuals they do not know personally.

Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1021 (1995) (citations omitted).

144 Biernat & Dovidio, *supra* note 79, at 101 (citations omitted).

drawing depicting two students in a classroom, one sitting in front of the other.[145] The picture carried a written description: "Mark was sitting at his desk, working on his social studies assignment, when David started poking him in the back with the eraser end of his pencil. Mark just kept on working. David kept poking him for a while, and then he finally stopped."[146] When David was shown as an African-American child, the subjects consistently rated his behavior as being more aggressive than they did when he was depicted as white.[147] Such results strongly suggest the presence of a cognitive schema fixing the meaning of blackness as dangerous.

At some level, then, stereotypes perform a self-reinforcing role with respect to racial stigma.[148] They give "an information-processing advantage for stereotypical traits[,]" ensuring that they always fall in our perceptual foreground rather than background.[149] This means, of course, that, in the absence of significant outside intervention, our experiences of individuals and various situations will always work to confirm our baseline beliefs and assumptions about racially stigmatized individuals—i.e., that they are dangerous, untrustworthy, lascivious, etc.[150] Stigmatizing behavior becomes cast not as racialized or stereotype-based, but as wholly rational, even empirically based. Consider the following narrative:

> *An African-American teenager transfers to a new, predominantly white, high school. Despite her grades, scores, and earlier school placements, school administrators assign her to the lowest-track sophomore English class, where virtually all the students of color in her grade have been assigned. However, the girl's parents*

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145 Krieger, *supra* note 141, at 1202–03; *see also* H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590 (1980).

146 Krieger, *supra* note 141, at 1202 (quoting Sagar & Schofield, *supra* note 145, at 593) (internal quotation marks omitted).

147 *Id.* at 1203; *see also, e.g.*, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1248–49 (2002) (describing experiment in which subjects identified image of tool as gun more often when first primed with image of black man). Obviously, experiments such as this one have real-world implications. If we know the nonstigmatized will adopt biased attitudes about the behavior of stigmatized individuals, we can expect decisions relating to everything from policing to the adoption of policy reforms to be similarly affected by bias. *See id.* at 1249 (citing example of Amadou Diallo case, in which New York City police officers mistook wallet held by black immigrant for gun prior to fatally shooting him).

148 LOURY, *supra* note 22, at 52–53; *see also supra* note 84 and accompanying text.

149 Biernat & Dovidio, *supra* note 79, at 95 (citations omitted).

150 This is not to say that the way in which we experience racially stigmatized individuals remains the same across contexts or that the effects of racial stigma can never be modified. *See infra* note 211 (discussing research indicating that meaning of racial stigma can change across contexts and can be mitigated by performative choices made by racially stigmatized).

intervene, and she is eventually moved to the accelerated English class. This class, which is classified as "gifted and talented," consists of children who have been grouped together academically since the fourth grade. It is all white.

On her first day, the girl shows up for class eager to learn but noticeably stands out from her classmates. Her corn-rowed hairstyle contrasts sharply with those worn by other girls in the class. And her clothes, which placed her in the top ranks of fashion in the urban school district from which she transferred, seem out of place amidst the khakis and top-siders worn by the other students. The teacher, who is also white, was expecting the girl but was unprepared for how "different" she would look. Almost immediately, the teacher, who has a reputation as a kind and talented educator, finds herself thinking that it might have been a mistake to permit the girl—the first African American ever assigned to her—to join the close-knit class. She wonders immediately whether the girl can "fit in." And, although the students have not yet been asked to produce any work for grading, she begins to have serious doubts about the young girl's ability to perform well.

As the week wears on, the teacher scrutinizes the girl's class participation and interaction with other students. She becomes convinced that, although there have been no major problems, the girl simply does not "belong." This is, she tells herself, a judgment based on years of experience spotting and working with children with unique academic gifts. It is, she reasons, linked to a kind of intuition one forms over time.

On Friday, the teacher thus pulls the girl aside and asks her to stay after class. When everyone has departed, the teacher says that, in her opinion as an educator, the girl would be more comfortable in another class and should make a change before the semester gets too far under way. Bewildered, hurt, and ashamed, the student does not contradict her.

Stereotypes about the intellectual inferiority of African Americans plainly influenced the behavior of both the school officials and the teacher in this narrative.[151] But the teacher, in particular, did not experience her conduct as racialized in any way. In fact, she may even have believed that she was doing the young girl assigned to her class a favor, shielding her from ultimate disappointment. The decision to

[151] For a discussion of stereotypical messages involved in similar encounters, see BEVERLY DANIEL TATUM, "WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?" AND OTHER CONVERSATIONS ABOUT RACE 58–59 (1997) (discussing teachers' often low expectations regarding minority educational achievement). *See generally* HENRY LOUIS GATES, JR., THE TRIALS OF PHILLIS WHEATLEY: AMERICA'S FIRST BLACK POET AND HER ENCOUNTERS WITH THE FOUNDING FATHERS (2003) (describing trial designed to determine whether Wheatley, early African-American poet and slave, possessed sufficient level of intelligence to have written poems attributed to her).

exclude the student struck her as considered and rational, based on years of experience. In truth, however, it was very much—if not wholly—shaped by unconsciously held beliefs about the ability of minorities, particularly those who stand out in a racially homogenous environment, to succeed.[152] When the young girl entered the room with clothing and a hairstyle that conflicted with the accepted appearance norms for that setting, the prototypes or social schemas discussed earlier[153] were activated for the teacher (if not the students). These schemas likely shaped every encounter the teacher had from that moment on, ultimately convincing her that a strong, experience-based intuition, rather than racial stigma and bias, dictated the child's removal from her class.[154]

The stereotypes at work in the narrative clearly disadvantaged the excluded child in terms of her education, self-esteem, and the prestige she might have enjoyed had she been permitted to finish out the year or perhaps even to proceed to the next grade level with her "gifted" classmates.[155] In the long run, however, stigma-based stereotypes have a broader impact than the experiences of any one individual. These stereotypes are so commonly held that they are perceived not as gross overgeneralizations about a group and its members, but as cultural truths, or actual facts.[156] Eventually, they form an essential component of the stigma story that a society develops to justify the status quo.[157] Where, for example, the function that racial stigma serves in a given society is to elevate or enhance the status of the "in-group" over that of the "out-group," one will likely find stereotypes about the intellectual or moral inferiority of the stigmatized group.[158] In situations in which the stigma plays what might be described as a "terror management"[159] or perhaps a more general system justification role,[160] stereotypes about the dangerousness or

[152] For a discussion of the issue of racial homogeneity in the workplace, see Carbado & Gulati, *supra* note 31, at 1788–1814.

[153] *See supra* notes 141–143 and accompaning text.

[154] Activation of such schema also provide an explanation for the behavior of the individuals in the earlier narrative involving the African-American law student. *See supra* text accompanying note 66.

[155] In a college admissions context in which selective schools give special weight to course loads that include AP courses, the decision may also have a negative impact on the girl's future educational choices. Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 943–45 & n.58 (2001).

[156] Crocker et al., *supra* note 55, at 511.

[157] *See id.* at 509–10 (discussing function of stigma in justifying status quo).

[158] *See id.* at 508–09 (explaining that stigma functions to enhance status of nonstigmatized and justify discrimination against stigmatized); *see also infra* Part II.B.3.

[159] Crocker et al., *supra* note 55, at 510.

[160] *Id.* at 509–10.

laziness and criminality of such individuals typically become prevalent.[161]

B. The Dimensions of Racially Stigmatic Harm

For some time, those interested in the nature of racial injury have had to pick sides in the debate that has been waged in legal circles around this issue. Either one stands with those who believe that racial injury is a personal injury,[162] specific to the individual, or with those who see it as a problem that affects racial groups as a whole.[163] There has been little, if any, middle ground. The insights into racial stigma provided by the preceding Section, however, suggest that the debate about racial injury has been much too artificial. Racial stigma is far more dynamic and, for that reason, pernicious than this long-standing argument among legal scholars suggests. It falls into both the individual- and group-harm categories and supercedes them, ultimately imposing something I refer to as citizenship harm, an injury that prevents the stigmatized individual and the group with which they are identified from fully belonging to, and participating in, our society. In the Sections that follow, I explore this unique harm along with the specific group- and individual-based harms that racial stigma imposes.

1. Group Stigmatic Harms: Racial Disparities, Discrimination, and Microaggressions

We begin with harms that may be categorized as *group* harms. Admittedly, the types of racial injuries discussed in this Section also affect people at an individual level. However, because they affect many racial minorities—male or female, rich or poor—at one point or another in their lives,[164] I think it is best to classify them as group harms. Here, I am concerned with harms that, at a general level, can be said to be emblematic or representative of the experience of a large number of a racial group's members. These are group harms.

Racial disparities of the sort discussed at the outset of this Article plainly fall into this category. It is true enough that, for example, not all African Americans live below the poverty line or are underemployed. We can point to exceptions—a Michael Jordan, a

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[161] *See infra* Part II.B.4.

[162] *See* Brest, *supra* note 27, at 12 (arguing that Equal Protection Clause addresses "harm that may befall *individuals*") (emphasis added).

[163] *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 154–55 (1976) (arguing that Equal Protection Clause is principally concerned with group-based injury).

[164] *See* Crocker et al., *supra* note 55, at 516 ("[S]tigmatized are never entirely free of the possibility of encountering prejudice in others.").

Condoleezza Rice, or a Vernon Jordan. But no one can dispute that African Americans, as a group, are more likely than not to experience the racial disparities—in education, health care, economics, involvement with the criminal justice system—that characterize the color line.[165] One can have the same certainty about racial discrimination and microaggressions, the term used to refer to the slights, racialized comments and insults, and non-verbal "put-downs" that racially stigmatized individuals endure on a daily basis.[166]

It might seem somewhat anomalous to talk, in particular, of racial discrimination in such terms in an article in which I advocate a shift away from the current obsession with intentional discrimination in American law. But the notion that racial stigma is the proper focus of inquiries into racial injury should not be read as an assertion that racial stigma and discrimination somehow are unrelated.[167] Obviously, these phenomena are very closely linked. How we treat people relates very directly to "who, at the deepest cognitive level, they are understood to be."[168] Racial discrimination constitutes one of the behavioral consequences of racial stigma.[169] Just as the negative meanings associated with race may elicit various affective responses from nonstigmatized individuals,[170] they may result in conduct that operates both to further stigmatize and deprive minorities of certain rights and opportunities. At their most extreme, these discriminatory behaviors may result in serious physical harm to the stigmatized individual, as the fiftieth anniversary of Emmett Till's murder reminds us.[171] More often, the consequences of discriminatory conduct involve the deprivation of concrete benefits (e.g., a job or access to certain facilities)[172] or official mistreatment on the basis of race (e.g.,

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165 *See, e.g.*, *supra* notes 4–11 and accompanying text.

166 *See* Peggy C. Davis, *Law as Microagression*, 98 YALE L.J. 1559, 1565–66 (1989) (explaining term "microagression"); *see also* Crocker et al., *supra* note 55, at 516–17.

167 *See* LOURY, *supra* note 22, at 10 ("'[R]acial stigma' should now be given pride of place over 'racial discrimination' as the concept which best reflects the causes of African-American disadvantage.").

168 *Id.* at 167 (emphasis omitted).

169 Crocker et al., *supra* note 55, at 516–17.

170 *See supra* notes 123–128 and accompanying text.

171 Emmett Till was brutally murdered after allegedly committing the "offense" of whistling at a white woman. His murder, which horrified the nation and energized the fight for civil rights, remains unavenged. *See* Bob Longino, *Hundreds Say Farewell to "Heroine,"* ATL. J. & CONST., Jan. 12, 2003, at A7 (recounting story of Emmett Till's murder on occasion of his mother's death).

172 *See, e.g.*, Peter Scott & Bill Torpy, *Disunion at Union Point*, ATL. J. & CONST., Feb. 18, 1995, at C2 (discussing efforts to stop rash of shoplifting incidents in Union Point, Georgia, by excluding from retail shops people on list consisting only of African Americans).

being racially profiled).[173]

Racial microaggressions—which are usually committed during small, interpersonal encounters—differ from the discriminatory conduct just discussed because they generally do not involve the deprivation of a significant right or opportunity and are almost always carried out on an unconscious level. Nevertheless, they, too, have real consequences for racially stigmatized individuals, even those who have transcended problems of poverty.[174] They might, for example, involve the indignity of a racial slur or, more seriously, require stigmatized individuals to endure the inconvenience and insult that comes, for example, from being unable to hail a cab because of the widely held belief that all people of their racial group are dangerous or without sufficient funds to pay.[175] Likewise, they might lead to a stigmatized individual's being excluded from an event or place of work on grounds of race. A 1999 incident involving U.S. Congressman Luis Gutierrez of Illinois provides a dramatic illustration. Congressman Gutierrez was returning to his D.C. office after attending an event honoring Puerto Rican veterans when he was stopped by a Capitol police officer who refused to believe Gutierrez could be a member of Congress.[176] The officer first questioned the authenticity of the Congressman's official credentials. Eventually, he openly doubted whether Gutierrez, who is Puerto Rican, was even a citizen of the United States, asking at one point, "Why don't you and your people just go back to the country you came from?"[177]

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[173] *See, e.g.*, David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 267–88 (1990) (discussing studies that found racial profiling to be acute problem in several cities and states). Consider the case of *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000): The case involved the town of Oneonta, New York, a small, predominantly white, upstate town, which responded to an elderly woman's 1999 claim of assault by an African-American man by hauling every young African-American male within the town's boundaries into the police station for questioning provides another example of such mistreatment. It seems clear that no similar action would have been taken had the alleged assailant in the Oneonta case been white. *See* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1113 (2001). The federal court that reviewed the case, however, held that no constitutional violation had occurred. *City of Oneonta*, 221 F.3d at 333.

[174] *See, e.g.*, Crocker et al., *supra* note 55, at 517.

[175] *See supra* note 69; *see also* LOURY, *supra* note 22, at 74 (arguing that elites are not exempt from effects of racial stigma).

[176] *See* Ediberto Román, *Who Exactly Is Living* La Vida Loca*?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER RACE & JUST. 37, 62 (2000).

[177] *Id.* (quoting David Jackson & Paul de la Garza, *Rep. Gutierrez Uncommon Target of a Too Common Slur*, CHI. TRIB., Apr. 18, 1996, at 1 (quoting Capitol police officer's remark)) (internal quotation marks omitted). For more on how race and questions of "foreignness" interact, see Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface,*

Microagressions of this sort, which occur quite frequently, provide racially stigmatized individuals with almost daily reminders of their devalued social status and the extent to which they exist on the outside of whole sectors of American society.[178] They make it impossible to forget, even momentarily, about one's compromised social position.[179] And, like racial disparities and discriminatory conduct, microagressions have the effect—even when they are committed unconsciously—of further amplifying the negative messages conveyed not just about individuals, but about entire groups of racial minorities.

2. *Individual Stigmatic Harms: Uncertainty, Internalization of Dehumanizing Norms, and Anxiety*

The stress of being a dishonored person in society and having constantly to guard against the kinds of group-level harms just discussed can have certain social and psychological effects on the racially stigmatized. Such harms typically also have an impact on a large number of racial minorities, but are classified here as individual, rather than group, level harms. Problems such as uncertain social identity, internalization of dehumanizing identity norms, and stereotype threat and anxiety are very much mediated by context. Because such problems are more dependent on the special circumstances in which an individual finds him or herself than the types of group harms just discussed, I classify them as individual level harms.

a. Uncertain Social Identity and Ambiguity

The notion that *all* racially stigmatized individuals may be the target of group-based racially discriminatory actions at some point in their lives brings us to the first set of *individual* harms associated with

World War II Propaganda and Bifurcated Racial Stereotypes, 4 UCLA ASIAN PAC. AM. L.J. 1, 44–50 (1996) (discussing immigrant-bashing and Orientalist stereotypes essentializing Asian-Americans as "model minority"); Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347 (1997) (arguing that Asian Americans and Latinos have been treated as permanent foreigners in United States and advocating use of political, rather than legal, means for remedying racial subordination); Natsu Taylor Saito, *Aliens and Non-Aliens Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 262 (1997) (examining "presumption of 'foreignness' attaching to those of Asian descent in the United States").

[178] *See, e.g.*, Crocker et al., *supra* note 55, at 516–18 (relaying other incidents, including one involving black senior partner in law firm who was denied entry to his office building by white junior associate because associate thought he looked suspicious).

[179] *Id.* at 516 ("[T]he stigmatized are never entirely free of the possibility of encountering prejudice in others."); *see also* Carol T. Miller & Brenda Major, *Coping with Stigma and Prejudice*, *in* THE SOCIAL PSYCHOLOGY OF STIGMA, *supra* note 43, at 243, 244 (discussing "ever-present possibility that the [stigmatized] person will be a target of prejudice or discrimination.").

racial stigma. For the most part, racially stigmatized individuals have relatively few places where they can go and be assured of not being exposed to racist or racialized conduct or remarks.[180] As the previous narrative involving the teacher suggests, "even individuals who genuinely endorse egalitarian values . . . may act in prejudiced ways."[181] Such individuals pose a threat to racially stigmatized individuals that, in some ways, rivals that presented by the overtly discriminatory.

This reality may leave stigmatized individuals feeling that they must be constantly "on" and vigilant against racialized conduct.[182] It may also have psychological consequences, leaving them feeling somewhat insecure or uncertain in their social interactions with others.[183] As Goffman explained, "The awareness of inferiority means that one is unable to keep out of consciousness the formulation of some chronic feeling of the worst sort of insecurity, and this means that one suffers anxiety and perhaps even something worse."[184] In other words, racial stigma deprives individuals of the confidence that they are being dealt with in good faith, leaving them (quite understandably) somewhat mistrustful of even those individuals who expressly claim and perhaps even believe that they are nonracist. The idea that an individual may be disadvantaged because of an attribute over which he or she has no control "means that he is always insecure in his contact with other people."[185]

In addition, the uncertainty surrounding their social identity may make it difficult for racially stigmatized individuals accurately to interpret the actions and words of the individuals with whom they come in contact, a problem social scientists refer to as attributional ambiguity.[186] Despite their intimate understanding of the pervasiveness of racism, racially stigmatized individuals may sometimes find it difficult to determine whether, in a given context, a comment or behavior is reflective of racial bias or prejudice.[187] You might, for example, find an Asian American who is asked to show his or her I.D. upon entering a building wondering whether he or she was singled out for this treatment on the basis of race or whether, in the interest of safety, security

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180 Crocker et al., *supra* note 55, at 516–17.

181 *Id.*

182 GOFFMAN, *supra* note 21, at 14 (noting self-consciousness experienced by stigmatized individuals during contact with nonstigmatized); *see also* Crocker et al., *supra* note 55, at 517, 541 (same).

183 *See* Crocker et al., *supra* note 55, at 517.

184 GOFFMAN, *supra* note 21, at 13 (quoting HARRY STACK SULLIVAN, M.D., CLINICAL STUDIES IN PSYCHIATRY 145 (Helen Swick Perry et al. eds., 1956)).

185 *Id.*

186 Crocker et al., *supra* note 55, at 519.

187 *Id.* at 519–20.

was actually checking the I.D.s for *all* entrants, regardless of race. Because racial stigma often functions in subtle ways, the answers to such questions are not always obvious. Racial stigma fundamentally alters the "usual scheme of interpretation for everyday events."[188]

b. Internalization of Dehumanizing Identity Norms

Next, we come to the kind of psychological harms that result from the internalization of dehumanizing identity norms, the harms at issue in *Brown*.[189] Just as stigmatizers begin to learn negative attitudes about and certain affective responses to racially stigmatized individuals in infancy,[190] the stigmatized begin to internalize normative judgments about their race very early in their lives, learning such judgments, in some cases, from their own parents as well as from others.[191] Almost from the beginning, they are in a constant battle to reconcile their actual selves with the virtual identities imposed by the steady barrage of negative images coming from the media and other sources.[192] Even where negative stereotypes about race are expressly rejected, mere awareness of them may leave racially stigmatized individuals feeling at a very deep—perhaps even unconscious—level that their attribute may warrant some of the adverse treatment their racial group incurs.[193] The results of Dr. Kenneth Clark's infamous doll test, in which African-American children, who were given a choice between white and black dolls, consistently rejected the black dolls in

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188 GOFFMAN, *supra* note 21, at 14.

189 *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954). Significantly, the part of *Brown* that addresses these harms is what is most often criticized about the opinion. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring). Almost from the moment the Court issued its decision, the social science research the Court relied on in rendering its opinions was attacked as unreliable. *See id.* at 120 n.2 (citing articles critiquing social science on psychological harm).

190 *See supra* notes 116–122 and accompanying text.

191 Becker & Arnold, *supra* note 75, at 48.

192 *See infra* notes 292–293 and accompanying text (discussing, inter alia, use of stereotypes in media).

193 GOFFMAN, *supra* note 21, at 8–9 (stating that stigmatized individual may respond to denial of respect "by finding that some of his own attributes warrant it"). Needless to say, this does *not* mean that racially stigmatized individuals somehow *become* inferior because of their dishonored social status. *But see Jenkins*, 515 U.S. at 114 (Thomas, J., concurring) (criticizing willingness of courts "to assume that anything that is predominantly black must be inferior"); Ronald S. Sullivan, *Multiple Ironies:* Brown *at 50*, 47 How. L.J. 29, 31 (2003) (criticizing *Brown* decision for employing vocabulary of African-American inferiority). Nor, as I explain later, does it mean that once a stigmatized individual has internalized one dehumanizing or discriminatory norm—e.g., that black students cannot excel academically—that he or she accepts all such norms for all time. *See infra* Part IV. It means only that, in some circumstances, racially stigmatized individuals may "become socialized to their disadvantageous [social] situation even while they are learning and incorporating the standards against which they fall short." GOFFMAN, *supra* note 21, at 32.

favor of the white dolls, provide a fairly dramatic example of this possibility.[194]

At some level, the internalization of dehumanizing norms threatens to impair "both personal and collective self-esteem."[195] The idea that one's racial group "is, in fact, less worthwhile, deserving, or valuable than other social groups or collective identities," leads to the inexorable conclusion that one's personal identity may be similarly flawed.[196] Because questions of identity are so closely tied to conceptions of the self, a stigmatized individual may develop intense feelings of inferiority.[197] Self-hate and shame also "become[ ] a central possibility," stemming principally from the stigmatized individual's own belief that his or her "flaw" is indeed undesirable.[198] Finally, feelings of ambivalence may also materialize.[199] Even as they realize that they cannot measure up to the prevailing identity norms, racially stigmatized individuals may attempt to comply with them in the hopes of gaining acceptance by the broader society, as the proliferation of skin whiteners and products used to straighten naturally kinky hair attests.[200]

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194 To the extent that modern researchers agree with earlier critiques about the Clark research, they seem to do so primarily with respect to the notion, reflected in *Brown*, that the damage that flows from the internalization of racially discriminatory norms is permanent and irreversible. *See Brown*, 347 U.S. at 494. Current thinking says that the nature and duration of such harms depends largely on the context in which the affected individual finds him- or herself. Crocker et al., *supra* note 55, at 518–19.

195 Crocker et al., *supra* note 55, at 517.

196 *Id.* at 518.

197 *See* GOFFMAN, *supra* note 21, at 7 ("Shame becomes a central possibility, arising from the individual's perception of one of his own attributes as being a defiling thing to possess, and one he can readily see himself as not possessing.").

198 *Id.*

199 Crocker et al., *supra* note 55, at 520 (observing that internalization of negative stereotypes and uncertainty of effect of prejudice lead to potential for both positive and negative outcomes to contribute to loss of self-esteem in stigmatized individuals).

200 *See generally* TONI MORRISON, THE BLUEST EYE (1970) (detailing, inter alia, African-American girl's attempts to satisfy dominant norms of beauty). Racially stigmatized individuals may even replicate the social stratification to which they fall victim by privileging, in their own communities, those features most consistent with prevailing identity norms—e.g., straight hair, fair skin, or the absence of an accent—over those typically possessed by members of their stigmatized group. In the African-American community, for example, color hierarchies analogous to those constructed by whites during slavery have long been in effect. *See* Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow Than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131, 140–43 (1997). A rhyme commonly known by African-American community members helps to illustrate the structure of these hierarchies: "If you're white you're right, if you're yellow you're mellow, if you're brown stick around, but if you're black get back." *See, e.g.*, Claude M. Steele, *Race and the Schooling of Black Americans*, ATLANTIC MONTHLY, Apr. 1992, at 68, 72 (quoting rhyme author learned in childhood) (internal quotation marks omitted).

c. Anxiety and "Stereotype Threat"

Finally, the condition of being stigmatized may also cause anxiety and debilitating threats to individual self-esteem. Significantly, threats of this sort may occur even without the stimulus that direct contact with a prejudiced individual might provide.[201] The negative meanings attached to race in this country are so strong and pervasive that a threat to self may (not necessarily inaccurately) be perceived in any number of circumstances. Consider the example of a member of a racial minority who enjoys a fair amount of financial and career success. Although one would expect such success to cut against the exclusionary effects of racial stigma, minorities who have "made it" commonly feel a great deal of pressure to represent or otherwise take responsibility for their racial group.[202] During mixed contacts with nonstigmatized individuals, they may be unusually anxious about the impression that they are making, feeling an obligation to avoid confirming negative racial stereotypes about their group.[203]

Anxiety levels regarding stereotype confirmation likely will vary by situational context and the extent to which someone has internalized the negative stigmatic messages.[204] For some, anxiety levels will be relatively low. For others, they will be so high that cognitive impairment, such as memory loss, results.[205] Research by Claude Steele and Joshua Aronson suggests that such impairment, referred to as "stereotype threat," may be particularly high when a stigmatized person is aware of negative racial stereotypes and "those stereotypes . . . provide a framework for interpreting . . . behavior."[206] Black experiment participants performed as well as Whites on skills tests described as nondiagnostic of intellectual ability, but worse than Whites when they were led to believe that the tests were diagnostic in nature—e.g., tests for which a poor score might be interpreted to con-

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201 *See* Crocker et al., *supra* note 55, at 518–19.

202 *Id.* at 541–42; *see also* GOFFMAN, *supra* note 21, at 14–16.

203 Racially stigmatized individuals, for example, may be particularly concerned when highly publicized crimes are attributed to members of their group. *See* Darryl Fears & Avis Thomas-Lester, *Blacks Express Shock at Suspects' Identity*, WASH. POST, Oct. 26, 2002, at A17 (discussing African-American reactions to revelation that Washington-area snipers were African American, including one woman's feeling of betrayal "that such an act could be carried out by a black man").

204 *See* Crocker et al., *supra* note 55, at 532. *But see* Jacques-Philippe Leyens et al., *Stereotype Threat: Are Lower Status and History of Stigmatization Preconditions of Stereotype Threat?*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1189, 1195–96 (2000) (arguing that stereotype threat is largely situational, but not dependent on internalization of stereotype).

205 Crocker et al., *supra* note 55, at 519.

206 *Id.* at 518. For more on the research conducted by Steele and Aronson, see also Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African-Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995).

firm negative stereotypes about the intellectual ability of Blacks.[207] The closer the possible correlation between negative stereotypes and the stigmatized individual's performance, the greater the threat to self became.[208]

3. *Race-Based Citizenship Harms*

The final harm imposed by racial stigma relates to a category of injuries I call citizenship harms. Citizenship here generally means participation in one's community and government processes.[209] Focused more on the deprivation of intangibles such as "empathy, virtue, and feelings of community" than on the denial of concrete political benefits like the right to vote or serve on a jury, citizenship harms ultimately go to what it means to be in community with others.[210] They refer to stigma-related injuries that do not fit neatly within the group and individual harm categories just covered, but nevertheless have a negative impact on a racially stigmatized individual's ability to belong—to be accepted as a full participant in the relationships, conversations, and processes that are so important to community life.[211]

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[207] Crocker et al., *supra* note 55, at 518–19. Crocker reports that Spencer, Steele, and Quinn conducted similar experiments with and received similar results for women compared to men. *See id.* at 519 (summarizing findings of Spencer, Steele, and Quinn's unpublished manuscript); *see also* Blasi, *supra* note 147, at 1249 (describing similar set of experiments involving Asian-American women in which students primed with Asian stereotype scored higher than those primed with woman stereotype).

[208] Crocker et al., *supra* note 55, at 518–19.

[209] *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541–42, 1555–57 (1988) (emphasizing importance of citizenship and participation in liberal republican tradition).

[210] *Id.* at 1556.

[211] It must be understood that racial minorities are not passive participants in any of the dynamics described in this Section on stigmatic harms. The meanings and harms associated with racial stigma can be changed to some extent through the choices made by racial minorities in coping with its effects. *See* GOFFMAN, *supra* note 21, at 44 (discussing use of "disidentifiers" to cast doubt on one's virtual identity); Miller & Major, *supra* note 179, at 249–60 (describing means of coping with stigma); *see also* John F. Dovidio et al., *Racial, Ethnic, and Cultural Difference in Responding to Distinctiveness and Discrimination on Campus: Stigma and Common Group Identity*, 57 J. SOC. ISSUES 167, 170 (2001) (arguing that "racial bias is *not* inevitable or immutable" and that it can be reduced through "cooperative relationships between groups"). For example, racial minorities can change the nature of the social information conveyed by the virtual identity ascribed to them by "performing" or "representing" their racial identity in different ways. *See* LOURY, *supra* note 22, at 50, 209 n.18 (discussing journalist Brent Staples's efforts to change misperceptions about his identity as African-American by whistling Vivaldi as he walked down street at night); *see also, e.g.*, Carbado & Gulati, *supra* note 31, at 1811–12 (discussing minority efforts to fit into homogeneous workplace environment by signaling acceptance of dominant cultural norms). *See generally* JAMES WELDON JOHNSON, THE AUTOBIOGRAPHY OF AN EX-COLOURED MAN (1961) (discussing African-American efforts to misrepresent racial identity by attempting to "pass" or live as white); NELLA LARSEN, QUICKSAND AND PASSING (Deborah E. McDowell ed., 1986) (depicting efforts to pass as white). No one set

Nothing illustrates the devastating nature of this impact more dramatically than the majority opinion in *Dred Scott v. Sandford.*[212] Justice Taney emphasized the thoroughly "degraded condition" Blacks held in the United States at that time and the astoundingly large number of state enactments explicitly designed to stigmatize them as inferior beings "subordinate" in every respect to Whites.[213] Statutes enacted during the early Republic prohibited interracial marriage, limited militia service—which Taney described as "one of the highest duties of the citizen"[214]—to Whites, prohibited Blacks from traveling freely, and made it unlawful to establish schools for Blacks.[215] Even the Constitution, Taney noted, treated "the negro race as a separate class of persons."[216] In light of "such an [*sic*] uniform course of legislation," he concluded, "it would seem that to call persons thus marked and stigmatized, 'citizens' of the United States, 'fellow-citizens,' a constituent part of the sovereignty, would be an abuse of terms."[217]

Although the position he took remains both morally and legally indefensible, Taney's opinion gets to the core of what I have termed citizenship harm. If one has been stigmatized, he or she exists outside the polity, on the margins, in some way. This is what it means to be stigmatized. That is to say, racial stigma deprives stigmatized individuals of the acceptance and the other tools they need to participate as whole, functioning members of society. Because of their social degradation, African Americans, for example, have comparatively few opportunities to develop social capital, the "goodwill, fellowship,

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of choices could completely eliminate racial stigma, but they could reduce the severity of the threats to self and well-being it generates. *See* JONES ET AL., *supra* note 115, at 305–08 (discussing social activism as destigmatization agent); *see also* Angela C. Brega & Lerita M. Coleman, *Effects of Religiosity and Racial Socialization and Subjective Stigmatization in African-American Adolescents*, 22 J. ADOLESCENCE 223, 225 (1999) (suggesting that religiosity may help to decrease feelings of stigmatization among African-American adolescents).

212 60 U.S. 393 (1857) (holding that Dred Scott, black slave, could not be considered U.S. citizen such that he had right to sue for his own freedom). For a more complete treatment of *Dred Scott* and the circumstances that led to its consideration by the Supreme Court, see, for example, ANNETTE GORDON-REED, Race on Trial: Law and Justice in American History 26–47 (2002).

213 *Dred Scott*, 60 U.S. at 404–21 (detailing state statutes subjugating African Americans).

214 *Id.* at 415.

215 *See id.* at 406–26.

216 *Id.* at 411.

217 *Id.* at 421.

mutual sympathy and social intercourse"[218] so necessary for being involved in one's community, whether it be the local neighborhood or national government. Their ability to influence decisions and to develop sustained, interest-enhancing relationships with others has been impaired, leading to the persistence of the disparities discussed at the beginning of this Article.

This is not, of course, to say that African Americans cannot or do not participate in their communities or government. After all, there are whole cities represented by African-American officials.[219] The point is simply that the stigma of race—because it means that African Americans often are alternately feared, mistrusted, or presumed incompetent—interferes with community processes.

Where the Fourteenth Amendment is concerned, citizenship harms may be the greatest injury imposed by racial stigma. Participation and citizenship are constituent elements of effective government and democracy. But much of what we have discussed thus far suggests that, even where African Americans and other minorities have not been deprived of an actual right or intentionally discriminated against, they may be excluded from such participation. There comes a point—an admittedly different point than existed, say, one hundred or even thirty years ago—at which acceptance will either be denied or withheld in some measure.

One sees evidence of this problem in a myriad of places in our public life. The narratives related earlier illustrate its operation on a small or more private scale. A more public example comes from the voting context. In the last few decades, African Americans and other minorities, who previously had been denied opportunities for involvement in electoral politics, have won election to local offices, such as mayor, and even to the U.S. House of Representatives.[220] But they have not had as much success with positions elected on a statewide basis.[221] Since Reconstruction, only two African Americans have been elected to the U.S. Senate.[222] And only one African American

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218 L.J. Hanifan, *The Rural School Community Center*, 67 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 130 (1916); *see also* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 19 (2000) (quoting Hanifan, *supra*).

219 *See* Kathy Kiely, *These Are America's Governors. No Blacks. No Hispanics.*, USA TODAY, Jan. 21, 2002, at A1 (indicating that some of "nation's best and brightest black politicians are mayors").

220 *See id.* (noting that sixty members of House of Representatives are minorities).

221 *Id.* ("[O]f the nation's 473 statewide elected executives . . . eight are black and seven are Hispanic.").

222 *See Face Off: Obama v. Ryan*, CHI. TRIB., Mar. 17, 2004, at 6, *available at* 2004 WL 72755020 (noting that, if elected, U.S. Senate candidate Barack Obama would be only "the third African-American elected to the Senate since Reconstruction, after former Illinois Senator Carol Moseley Braun and ex-Senator Edward Brooke" of Massachusetts).

has ever held the position of governor.[223] For the most part, commentators have not attributed this problem—at least in modern times—to any organized discrimination. Indeed, polls taken in advance of some of these races have suggested that the candidate of color would fare quite well in the race at hand.[224] More often than not, though, the failure of a seemingly viable candidate—e.g., Ron Kirk, who recently ran for Senate in Texas, or Harvey Gantt, who sought Jesse Helms's seat in North Carolina—gets attributed, at least in part, to race.[225] Despite any preferences they might voice publicly, white voters have not been willing, as a collective matter, to elect African-American candidates to positions of great prestige and power.[226] This, in my view, is racial stigma at work. The negative meanings communicated about race have not formally deprived anyone of a concrete right, but they have exacted a citizenship harm by, among other things, undermining a candidate's ability to represent and be in community with voters inside and outside of that candidate's stigmatized group.

C. *Summary*

In summary, what I mean to suggest with the previous overview is that racial stigma constitutes the principal source of racial injury in the United States. Racial stigma, more than intentional discrimination or theories of unconscious racism, provides a frame for understanding the stubborn persistence of racism and racial inequality in this country. Social science tells us that the shared, dehumanizing meanings associated with race operate at a largely pre-conscious level to distort perception and spoil social interactions between racially stigmatized and nonstigmatized individuals.[227] These meanings, rather than the existence of bad motive or intent, explain the active instances of discrimination committed against racial minorities, as well as the

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223 *See* Kiely, *supra* note 219 (noting that former Governor Douglas Wilder "remains the only black ever elected governor in any state").

224 *See, e.g., id.* (noting that former Charlotte, North Carolina mayor Harvey Gantt was ahead in the polls prior to losing to Senator Jesse Helms); Richard Benedetto, *Pollsters Claim Voters "Lied" to Them*, USA TODAY, Nov. 9, 1989, at A1 (giving voter lies as reason exit polls suggested that 1989 victories of African-American mayoral candidate David Dinkins and gubernatorial candidate Douglas Wilder would win by greater margins); *see also* T. Alexander Alienikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 348 and n.91 (noting that, where African Americans win elections, they often do so by smaller margins than past elections or party registration information would suggest).

225 *See* Patrick Reddy, *For Black Candidates, a Ceiling of Their Own*, WASH. POST, Jan. 19, 2003, at B4.

226 *See* Crocker et al., *supra* note 55, at 509 (noting "[t]he reluctance to vote for Black candidates").

227 *See* GOFFMAN, *supra* note 21, at 18–19; Crocker et al., *supra* note 55, at 538–42.

racial disparities in income, education, access, and other critical areas of life discussed at the outset of this Article. Perhaps more than previously thought, racial stigma imposes real, concrete harms on African Americans and other racial minorities that negatively affect them in their personal lives and also operate at a group level to deny them certain tangible and intangible benefits. Finally, racial stigma functions as an impediment to full citizenship for stigmatized individuals. This injury accrues to the individual, the group, and society as a whole because it interferes with the social interactions that are necessary for civic involvement.

II
PUTTING RACIAL STIGMA IN CONTEXT

To be comprehensive, our study of what racial stigma is and how it operates must address one final issue: the notion of context. Social scientists, as previously noted, emphasize the important role that context plays in generating the meanings associated with race and in mediating the harms associated with racially stigmatized status. Neither social science research, nor the work on context introduced by critical race and feminist scholars, however, provides a great deal of insight into what it means, as a practical matter, to view or interpret racial stigma "in context."[228] This Section begins an exploration of that question by considering a short narrative involving an interracial conversation about college admissions and race. It suggests that, more than the talismanic response it has become in certain arenas, context actually refers to a *process* of interpreting meaning.[229] The second part of this Section continues the study by looking at some of the historical events that have given race its current meaning in American society.

A. Story Telling and Retelling

A young woman and man talk together over lunch in a school cafeteria. The young woman is black; her colleague is white. Both

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228 *See* John O. Calmore, *Critical Race Theory, Archie Shepp and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2146 (1992) (discussing critical race theory and focus on "experiential grounding" of individuals); Carbado & Gulati, *supra* note 31, at 1786 (outlining focus on "situatedness" of truth in critical race theory); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1705–11 (1990) (describing standpoint of feminist theory as "embodied contextuality"); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 528 (1992) (emphasizing need to link examination of particular to general when considering context).

229 *See* Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1600 (1990).

are seniors at an upper middle-class, predominantly white, suburban high school. Throughout the year, they have met occasionally at this place to discuss the college admissions process. The young woman has found these sessions particularly useful. While she stands in the top ten percent of her class academically and has performed well on the SAT, she feels that she lacks an adequate understanding of what it takes to gain admission to a "top" school. The school guidance counselor has not been helpful, telling the young woman on their first meeting that, given her academic record, she would be an ideal candidate for a two-year college. Nor have her parents been able to help. Though the income they earn from a lucrative family business enables them to afford a home in a wealthy neighborhood, her parents were too poor to attend college and thus have few insights of their own into how to succeed in the admissions process.

On this day, the young woman is elated. The night before she received her first admissions letter, an acceptance to her "number one" school, Harvard University. Unbeknownst to her, however, her colleague—whose top choice was also Harvard—also received his first admissions letter of the season. Throughout the year, the young man, whose grades and test scores are comparable to the young woman's, had boasted that his grandfather's position as one of Harvard's most distinguished alumni would easily secure him a seat in the entering class. In the end, though, his legacy status had not been enough to get him admitted.

Before the young woman can report on her good news, the young man tells of his rejection. Genuinely sorry for her friend, the young woman attempts to console him, deciding to withhold the news of her own admission until later. The curious young man, however, directly asks whether the young woman has heard anything yet. When she finally reveals her acceptance, the young man's demeanor changes. Instead of offering congratulations, the young man accusingly says, "You know that you only got in because you are black!"

At first, the young woman is angry. She could understand some disappointment on her colleague's part, but feels that this reaction is unfair. "After all," she says to herself, "haven't I worked just as hard, maybe even harder than he?" "Why is the presumption that only he could deserve this honor?" In the midst of her internal dialogue, though, the young woman begins to experience other emotions. "What if race did play a role in my admission," she begins to wonder. "If it did, should it matter to me?" "Is it really any different than being a legacy admit?" Hurt and confused, she does not respond.

This narrative obviously raises issues of attributional ambiguity ("How should I interpret this situation? Am I overreacting or wrong about what I have heard?"), automatic response, and stereotyping. Apart from this, however, it conveys a fair amount of information about its two main characters and the nature of their past interactions.

Clearly, the basic outline of the story could have been told without any of the information it now includes. One could, for example, try to limit the narrative to a few specific, isolated facts.[230] It could be reduced to a story about a discussion between two high school seniors. Likewise, it could be told as discussion between a young woman and man. Each description would be accurate, but necessarily incomplete.

Retelling the narrative without some of the relevant details tells why these incomplete stories would be problematic. Imagine the same conversation between classmates, the male is white and the female is African-American, but instead of saying "You only got in because you're black," the male says something different, something completely unrelated to race. Under such a scenario, he might say, "You only got in because you are tall" or "You only got in because of the geographic region in which you live." Both statements question the legitimacy of the admissions decision at issue, but neither has an impact comparable to that which attends the accusation involving race. The reason for this difference lies, of course, in the history of race in this country. Race now has a special significance. For reasons explored in more detail in the Section that follows, color, or, more specifically, "blackness," has become synonymous with inferiority in many sectors, especially intellectual inferiority.[231] In the scenario I described, the term "black" was essentially code. Without ever having to say the word "inferior," the young man was able to make the girl's intellect and academic ability a topic of debate.

Next, imagine a scenario in which the young woman is denied admission, but the young man gets in. In this version of the narrative, the young woman is overcome with disappointment and she exclaims, "You only got in because you are a legacy" or "You only got in because you are white." Once again, these responses do not have the same impact as the statement made in the original narrative. The young man might be offended, but he is unlikely to experience the same attack on his academic abilities or self-worth. The reason for this, of course, is that, typically, no presumption of inferiority attaches to whiteness in our culture (in fact, just the opposite is true). And, although legacy admissions programs arguably have the effect of perpetuating social and economic inequality—because they give a preference to individuals who, because of racial discrimination and the economic exploitation of certain groups, already enjoy a privileged

230 *Id.*

231 *See supra* Part II.B.

status—they have not been subjected to the same scrutiny as programs in which the consideration of race and ethnicity is explicit.[232]

Finally, imagine now that the narrative instead involved two African Americans. Once again, the story's meaning would be different. The statement could have been made in jest. Alternatively, it might carry an inference—particularly at a time when black conservatives have begun to challenge affirmative action as stigmatizing[233]—that the admittee was being underestimated or perhaps sold short by the school administration. In any event, given the racial identity of both actors in this scenario, it is unlikely that the statement would involve the *same* inference of *inherent* inferiority.

Now, what does all of this story telling and retelling have to do with context? The point is simple. In the same way that our narrative would be virtually incomprehensible without some of the facts in place, understanding the meaning of racial stigma will require knowing more than the basic outline of a particular case or set of interactions.[234] To understand racial stigma, one must understand the cultural norms and meanings surrounding race. That is, there must be a focus on the present situation, as well as on the cultural and historical events that help to give it meaning. As Martha Minow and Elizabeth Spelman have explained the term, "context"—at least in the context of racial stigma—refers to a process, "a readiness . . . to recognize patterns of differences that have been used historically to distinguish among people," as well as events and issues.[235]

B. How Racial Stigma Got Its Meaning

Where race is concerned, Americans have found the task of looking at events in their full context extremely difficult.[236] This Part seeks to provide a more "critical memory" of racial stigma in the United States, some explanation of how African Americans, in partic-

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232 *See infra* Part IV.D.1; *see also* John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491, 516–17 (1993) (arguing that legacy preferences favor traditionally privileged segments of society but have not been criticized).

233 *See, e.g.*, SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 116–18 (1991) (criticizing affirmative action as perpetuating notions of black inferiority); *see also infra* Part IV.D.2.

234 *Cf.* Minow & Spelman, *supra* note 229, at 1600.

235 *Id.*

236 Emma Coleman Jordan, *Crossing the River Between Us: Lynching, Violence, Beauty, and the Paradox of Feminist History*, 3 J. GENDER RACE & JUST. 545, 558 (2000) (describing Americans as suffering from "racial aphasia," an inability to acknowledge aspects of this country's racial past).

ular, came to be stigmatized.[237] Thus far, we have talked primarily about racial stigma as it exists in our current context. Here, we look back and briefly examine four of the many factors that have helped to establish race as a discrediting mark: 1. constraints on traditional citizenship activities and racial isolation; 2. limitations on family and intimate relationships; 3. the proliferation of negative racial stereotypes and images; and 4. racial terrorism and the criminalization of race. This examination is necessarily incomplete. Its purpose is less to advance a comprehensive history of race in this country than to provide us with context for later discussions.

1. Constraints on Traditional Citizenship Activities and Racial Isolation

Limitations on activities associated with citizenship have historically played a central role in racial stigmatization because they perpetuate the perception that African Americans and other minorities do not "belong," as a formal matter, to American society. During slavery, the exclusion of Blacks from traditional citizenship activities such as voting and jury service was, of course, total, as was their exclusion from other activities relating to full participation in American society.[238] In the years following the Civil War, it seemed that African Americans—with Reconstruction and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments—might ultimately be successful in surpassing such constraints. But white opposition to African Americans sharing in the social, economic, or political advantages of full citizenship ultimately proved too great. As W.E.B. DuBois noted, "The slave went free; stood a brief moment in the sun; then moved back again toward slavery."[239]

White Southerners who saw the efforts of African Americans to involve themselves in public life—and thereby shape the meaning of their newfound freedom—as a threat to white control set out immediately to prohibit African Americans from serving on juries and participating in the political process, duties thought essential to citizenship.[240] Blacks audacious enough to seek and obtain public

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[237] *See generally* HOUSTON A. BAKER JR., CRITICAL MEMORY: PUBLIC SPHERES, AFRICAN-AMERICAN WRITING, AND BLACK FATHERS AND SONS IN AMERICA (2001).

[238] *See, e.g.*, KENNEDY, *supra* note 40, at 37–38 (discussing complete exclusion of slaves from service as witnesses against Whites on grounds that they were too "mendacious").

[239] W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 30 (Touchstone Books 1995) (1935).

[240] In a move reminiscent of more modern debates on social issues, *see, e.g.*, Stanley Kurtz, *Beyond Gay Marriage: The Road to Polyamory*, WEEKLY STANDARD, Aug. 4–Aug. 11 2003, at 26, *available at* 2003 WL 6818991, threatened Whites described African Americans as "'a semi-barbarous race of blacks who are worshippers of fetishes and polygamists

office during the Reconstruction period were, for example, frequently terrorized by white mobs.[241] State legislators, convinced that Blacks were too unreliable and dishonest to decide issues concerning white citizens, passed legislation barring them from jury service.[242]

Similarly, many states adopted voting requirements that, though usually facially neutral, were explicitly designed to disenfranchise African Americans. Some imposed literacy requirements they knew the largely illiterate former slave population could not meet,[243] while others adopted hefty poll taxes and grandfather clauses,[244] permanently disenfranchised individuals convicted of crimes with which Blacks were frequently charged,[245] or employed other means to dilute black voting power.[246] Such measures—which, in many cases, remained in place well into the twentieth century—worked to further stigmatize Blacks already degraded by their experience in slavery. Over time, the inability of African Americans to engage in activities such as voting and jury service was seen less as a function of white obstruction than as confirmation of Blacks' innate inferiority and inability to perform the duties of citizenship.

[*sic*],'" and argued that enfranchising African Americans "would 'roll back the tide of civilization two centuries at least.'" ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 340, 294 (1988).

241 *See* FONER, *supra* note 240, at 425–44 (detailing incidents of KKK violence against black officials during Reconstruction); KENNEDY, *supra* note 40, at 39 ("At least one-tenth of the black members of state constitutional conventions in the South were victimized by racially motivated violence . . . ."). Blacks who sought to be otherwise politically active also met with violence. *See* FONER, *supra* note 240, at 442–43; *see also id.* at 353 (listing African Americans who held positions in state and federal government during Reconstruction, including positions in Congress). For more on the stigmatizing effects of racial terrorism and violence, see *infra* Part II.B.4.

242 The U.S. Supreme Court eventually invalidated such legislation as stigmatizing and unconstitutional in *Strauder v. West Virginia*, 100 U.S. 303 (1879). *See infra* notes 315–319 and accompanying text. Efforts to obstruct African-American jury service unfortunately persisted. Just last year, the Supreme Court decided a case involving allegations of race discrimination in the use of peremptory strikes in which a local prosecutor's office had been shown to have employed a handbook that, among other things, explicitly directed district attorneys to remove African Americans from voir dire. *See* Miller-El v. Cockrell, 537 U.S. 322 (2003).

243 *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 83–84 (3d rev. ed. 1974).

244 *See id.* at 84.

245 *See infra* Part II.B.4 (discussing efforts to stigmatize Blacks by criminalizing previously lawful conduct in which Blacks, because of where they resided or worked, could be expected to engage); *see also* John O. Calmore, *Race-Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C. L. REV. 1253, 1274–76 (2001) (discussing disparate racial impact of current statutes disenfranchising felons).

246 *See* FONER, *supra* note 239, at 422–23 (describing practices that diluted black voting power, including imposing "property qualification[s]," gerrymandering, and "reduc[ing] the number of polling places in black precincts").

A similar phenomenon occurred in areas not connected to formal notions of citizenship, but nonetheless related to an individual's ability to be fully involved in the life of his or her community. The area of labor relationships provides one example. Following the Civil War, freed Blacks, who viewed "economic independence as a corollary of freedom," sought to exercise greater control over their labor arrangements by starting their own businesses or refusing generally to work under overseers as they had during slavery.[247]

Whites retaliated by adopting legal and extralegal measures calculated to recreate the economic subordination of the slave system. In the initial aftermath of the Civil War, Southern localities adopted curfews regulating black movement and placed restrictions on black real estate ownership and skilled labor.[248] Eventually, states began to enact statutes called Black Codes that placed further constraints on black economic freedom.[249] The Codes, inter alia, ensured that former slaves had no viable alternatives to working on white plantations by outlawing or heavily taxing trades—e.g., fishing and hunting—in which Blacks could easily engage.[250] Further, they created rules that reduced competition for black labor; imposed wage forfeiture as punishment for pre-term contract termination; sanctioned long work hours and corporal punishment of laborers; and, in some cases, established "apprenticeship" arrangements that capitalized on the destruction of African-American families wrought by slavery by requiring that black orphans be loaned out indefinitely as laborers to white planters.[251]

By denying black economic freedom, the Codes thus helped to further stigmatize African Americans as degraded individuals and to keep them in the caste position they held during slavery. The Codes' effect was only compounded by subsequently enacted Jim Crow laws and customs that required racial separation not only in the workplace, but also in schools, residential areas, hospitals, recreational areas, public conveyances, taxis, and even cemeteries.[252] Such rules sent a message that Blacks and Whites were not part of the same commu-

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247 *Id.* at 198; *see also id.* at 103–04. Frustration about the sexual exploitation women endured in slavery also led to black efforts to shield women and children from working in close contact with white men. *Id.* at 86.

248 *See id.* at 198.

249 *See id.* at 199.

250 *See id.* at 200, 203, 206.

251 *See id.* at 199–203. One Louisiana statute even provided that labor contracts for African Americans "shall embrace the labor of all the members of the family able to work," recreating in one provision the involuntary servitude that marked the slavery era. *Id.* at 200.

252 WOODWARD, *supra* note 243, at 97–102, 116–18.

nity. Even today, doubts about the extent to which African Americans and Whites form a "common constituency" persist,[253] as does the perception that African Americans lack the initiative and ability to compete with Whites.

2. *Limitations on Family and Intimate Relationships*

In the private arena, the stigmatization and social disgrace of African Americans occurred with the denial of rights along two important life axes. The first relates to relationships with family. As discussed at the outset of this Article, part of the dishonor slaves in any society must endure relates to their "natal alienation," the sense that they have no familial relations and thus "belong" to no one but their masters.[254] American slaves were no exception to this general rule. Indeed, alienation from family is perhaps what most helped to commodify slaves stolen from Africa.[255] Once cut off from an African past, it became much more possible for American slaves to be regarded by their masters as interchangeable pieces of property.[256] This was true even where slaves had clearly formed new familial units in the United States.[257] The original stigma of separation was such that, at least in the minds of slaveholders, it attached to slaves for all time, leaving them without any control whatsoever in an area we regard today as truly fundamental to the human experience.[258] Slaves could be separated at any moment from their parents, siblings, children, or spouses.[259]

The second area of private life in which deprivations facilitated the stigmatization of African Americans relates to intimate relations. As a corollary to the destruction of family units, the slave system also withheld from black slaves the ability to make certain choices about their intimate relationships. Slave women provide what is perhaps the best example of the denial of choice in intimate relations during the antebellum period because they were so frequently the victims of rape by white slaveholders.[260] White men "considered it an inviolable priv-

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253 FONER, *supra* note 239, at 207 (describing "the lengths to which the leaders of Presidential Reconstruction were prepared to go to avoid recognizing blacks as part of their common constituency").

254 PATTERSON, *supra* note 44, at 5–6.

255 *Id.* at 7.

256 *Id.*

257 *Id.* at 6.

258 *Id.* at 9 (noting that important corollary of natal alienation was that slave status was perpetual and inheritable).

259 *See id.* at 6; Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1329–30 (1998).

260 *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 162–77 (2003) (recounting numerous stories of white slaveholders raping

ilege" to rape black women "because no moral suasion or legal authority restrained them."[261] But the constraints on choice in this area were by no means limited to black women. As a general rule, slaves in most states were not permitted to marry and, even outside the context of rape, often had little control over the selection of their sexual partners.[262] Such decisions were often dictated more by the slaveholder's interests in generating additional profits than by the personal preferences of the slaves themselves.[263]

The absence of choice in the area of intimacy during slavery contributed significantly to the denigration of African Americans. With emancipation, many of the formal barriers to black family stability and intimate relationships that existed during slavery were lifted. State Black Codes permitted African-American couples to marry and generally did not seek to interfere with their decisions regarding childrearing.[264] This minimal level of increased autonomy did little, however, to reduce or guard against stigma. Where intimate relations between African Americans and other racial groups were concerned, the rules regulating intimacy were perhaps even stricter than they had been during slavery. Concerned that the innate licentiousness and sexual deviance of Blacks would become apparent once the shackles of slavery were removed, Whites acted to place strong constraints on interracial marriages and sexual relationships through extralegal

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black slaves). Kennedy notes, however, that the precise incidence of these types of rapes is difficult to ascertain. *Id.* at 175.

261 Adele Logan Alexander, *"She's No Lady, She's a Nigger": Abuses, Stereotypes, and Realities from the Middle Passage to Capitol (and Anita) Hill*, *in* RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS 3, 9 (Anita Faye Hill & Emma Coleman Jordan eds., 1995); *see also* KENNEDY, *supra* note 40, at 34–36 (discussing rape of female slaves and free black women). Scholars have noted the contradiction between the prevalence of rape against black women during slavery and white male preoccupation with the potential rape of white women by black men in the 1800s and 1900s. *See* Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 33 n.9 (1996) (pointing out contrast between excessive preoccupation over white women's vulnerability to rape and absence of any efforts to protect black women against rape). The myth of the black male brute-rapist "reinforced a societal code in which white men alone possessed the 'privilege' of interracial sex." *Id.* at 47–48. Others see the myth as a projection of white males' own propensity for violence. *See* PATTERSON, *supra* note 4, at 242 ("Seeing the victim as the aggressor is a classic instance of projection: at once a denial of one's own moral perversity and violence and a perfect excuse for them."). Still others see it as an expression of anxieties about white male sexuality and interracial sex more generally. *See* Holden-Smith, *supra*, at 48.

262 *See* Patterson, *supra* note 4, at 25–44.

263 *See, e.g.*, Alexander, *supra* note 261, at 3, 10 (describing slaveholders' view of black women as means to "perpetuate the South's cadre of black workers").

264 *See, e.g.*, GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 67–75 (AMS Press 1969) (1910) (discussing post–Civil War statutes permitting marriages between emancipated slaves or legalizing existing marriages between former slaves).

means such as violence, discussed later in this Part, and statutory measures.[265] States across the country adopted or toughened existing antimiscegenation statutes in an effort to preserve white racial purity.[266] And some states, like Alabama, added antimiscegenation provisions to their state constitutions to ensure that "[t]he legislature shall never pass any law to authorize or legalize any marriage between any white person and a Negro or descendant of a Negro."[267]

By the early twentieth century, a number of states had adopted antimiscegenation statutes. While the Supreme Court eventually held such statutes unconstitutional in its 1967 decision in *Loving v. Virginia*,[268] they had a deeply stigmatizing effect on African Americans that persists today. The incidence of interracial marriage and dating has increased significantly since *Loving*, but African Americans are less likely than members of other racial groups to be selected by Whites as partners in interracial unions.[269] Statistics show that increasing numbers of Asian Americans, Latinos, and Native Americans become involved in interracial relationships with Whites.[270] In contrast, comparatively few African-American men and women are involved in such relationships.[271] These numbers arguably suggest that, in some sectors, racial stigma still prevents African Americans from being regarded as viable intimate partners.[272]

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265 *See id.* at 78–88.

266 *Id.* at 78–90 (discussing prohibitions on intermarriage and punishment imposed for violation of such prohibitions).

267 *Id.* at 80 (quoting Alabama constitution of 1901) (internal quotation marks omitted). African Americans, however, were not the only group to whom antimiscegenation statues applied. States also sought to bar intermarriage between Whites and Asian Americans, Latinos, and Native Americans. *See, e.g.*, *id.* at 81–83; *see also* Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795 (2000). In general, no prohibitions applied to the intermarriage or cohabitation of two racial minorities. STEPHENSON, *supra* note 264, at 90–91.

268 388 U.S. 1 (1967).

269 *See* Randall Kennedy, *Interracial Intimacy*, ATLANTIC MONTHLY, Dec. 2002, at 103, 104.

270 *See id.* (reporting that in 1990, approximately 45% of Asian-American wives and 36% of Asian-American husbands between the ages of 25 and 34 had white spouses; approximately 54% of Native-American wives and 53% of Native-American husbands in the same age bracket had white spouses at this time).

271 In 1990, only 4% of African-American wives and 8% of African-American husbands between the ages of 25 to 34 had white spouses. *Id.*

272 *See generally* KENNEDY, *supra* note 260 (discussing history of interracial relationships in United States). Professor Randall Kennedy's Atlantic Monthly article discussing interracial marriage emphasizes the extent to which these numbers might reflect an unwillingness on the part of African Americans to enter interracial relationships. *See generally* Kennedy, *supra* note 269. While this may partially explain the statistics on black interracial relationships, it seems unlikely, in light of the strong stigma attached to blackness in our society, that it would explain them completely. Kennedy's discussion in the article does not adequately explore the extent to which racial stigma operates to prevent Whites

3. *The Proliferation of Negative Racial Stereotypes and Images*

Denigrating stereotypes and images of African Americans have also played an essential role in providing race with the negative meaning that it carries today. Over the years, African-American stereotypes, which have taken on several distinct forms, have played, among other things, an important legitimating function within white society.[273] Images of African Americans prevalent in the eighteenth and nineteenth centuries, for example, provided white slaveholders with a justification for the abuses of the slave system[274] and eased white anxieties by providing reassurance that black slaves posed no economic or sexual threat. Consider the stereotype of the "docile and contented slave"[275] and the black Sambo, a character alternatively portrayed as a shuffling buffoon and a slave whose "maniacal desires" could only be curbed by a strong master.[276] Each image emphasized black inferiority and sought to convey how utterly impossible it would be for slaves to compete on equal footing with Whites.[277]

After the Civil War and into the early twentieth century, the images of African Americans shifted, as Southern Whites tried to make sense of a world in which the social, economic, and political hegemony they had enjoyed during the antebellum period no longer seemed assured. In the case of African-American men, two divergent images appeared in the art, literature, and scholarship of this time. The first was exemplified by characters like Uncle Remus, a gentle

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and certain racial minorities from viewing African Americans as romantically desirable or eligible. Racial stigma distorts reality and the perception of one's choices in the romantic arena just as much as it does in other areas of life.

273 *See* Crocker et al., *supra* note 55, at 509–10 ("[A] function of stigmatizing may be legitimation of unequal group status in society."). Author Ralph Ellison once suggested that such stereotypes and images also have served a psychological purpose for Whites: "[T]he Negro stereotype is really an image of the unorganized, irrational forces of American life, forces through which, by projecting them in forms or images of an easily dominated minority, the white individual seeks to be at home in the vast unknown world of America." Ralph Ellison, *Twentieth–Century Fiction and the Black Mask of Humanity*, CONFLUENCE, Dec. 1953, at 19.

274 *See* PATTERSON, *supra* note 4, at 240–41 (describing Sambo and brute figures as classic examples of projection, which, by requiring white discipline, both allowed Whites to deny their "moral perversity and violence" and gave them "a perfect excuse for them").

275 *See* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1262 (1992).

276 PATTERSON, *supra* note 4, at 241–42. Significantly, characters similar to this Sambo figure have been used to legitimate many of the slave systems that have operated throughout history, including those of the Greeks and British-Caribbeans. *Id.* at 241.

277 *See* Delgado & Stefancic, *supra* note 275, at 1263 (noting that even abolitionist Harriet Beecher Stowe deviated only slightly from such depictions in crafting characters for her anti-slavery novel, *Uncle Tom's Cabin* (1852)).

former slave often depicted with a "little white boy in his lap."[278] Such characters served the objectives of former slaveholders who believed that the social gentility and economic benefits of the Old South could be preserved, even though the most essential component of that system, free black labor, was no longer available.[279] The second type of character, which became more dominant toward the turn of the century, was that of the black beast, a violent brute with an unusually powerful sexual appetite for white women who was completely devoid of humanity.[280] More than anything else, this stereotype arguably functioned as a barometer of the fears of Whites who were alarmed by the idea that black men might prove able to compete with them economically, politically, and sexually;[281] by the prospect of miscegenation with races increasingly reported in the religious and scientific journals of the day as inferior to Whites;[282] and by reports of increased crime in black areas.[283] The brute stereotype confirmed the belief that African-American men were immoral, disgraced beings, "incapable of self-government, unworthy of the franchise, and impossible to educate beyond the rudiments."[284]

Parallel images of black women emerged during this time.[285] On one hand, there was Aunt Jemima, the "'mammy' figure—cook, washerwoman, nanny, and all-round domestic" who lived only to maintain the comforts of antebellum life for Whites.[286] On the other hand, there was Jezebel, a seductive character who had no physical strength to speak of, but who, like the brute, exuded a sexuality that could be overpowering.[287] Jezebel, who was typically depicted as trying to

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278 WOODWARD, *supra* note 243, at 93.

279 *See* Delgado & Stefancic, *supra* note 275, at 1263–64.

280 *Id.*

281 *See* Holden-Smith, *supra* note 261, at 48 (discussing view that myth of black rapist reflects white anxieties); *see also* WOODWARD, *supra* note 243, at 81 (suggesting that white aggression against Blacks at close of nineteen century was reflection of white "economic, political, and social frustrations" and related efforts to scapegoat Blacks).

282 Delgado & Stefancic, *supra* note 275, at 1264.

283 WOODWARD, *supra* note 243, at 94 (describing early twentieth-century fears concerning perceived criminality among African Americans relocating to urban centers).

284 *Id.* at 95. Woodward notes that the brute image was developed in a series of publications of the late nineteenth and early twentieth centuries, including titles such as Charles Carroll's *The Negro a Beast; or, 'in the Image of God'* (1900) and Robert W. Shufeldt's *The Negro, A Menace to American Civilization* (1907). *See* WOODWARD, *supra* note 243, at 94.

285 Delgado & Stefancic, *supra* note 275, at 1264. Significantly, stereotypes similar to those developed about African-American men and women were also developed for Asian Americans, Mexican Americans, and Native Americans. *See id.* at 1267–75.

286 *Id.* at 1263–64.

287 *See* Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 636–38 (2000).

exact some favor or benefit from men, helped to explain, in the white mind at least, the rapes of slave women and mulatto births that occurred during slavery.[288] She also served the additional purpose of contrasting black women with the stereotypical image of the Southern white woman, who was regarded as pure and lady-like.[289]

Minstrelsy—an entertainment form that showed white performers in blackface mocking the stereotypical black characters—produced additional stereotypes, to include the lazy, wise-cracking Sapphire woman and the elederly, crippled, and shuffling Jim Crow.[290] The Harlem Renaissance produced vastly improved (if still imperfect) depictions of African-American life, as did the Civil Rights movement and more recent efforts by African Americans and others in music, literature, and cinema.[291] But the negative stereotypes and images far outnumber those that are positive and have proved far more enduring. One can see modern analogues of the Sambo, black beast, Jezebel, and Sapphire tropes in ads and televisions shows from the 1970s, 1980s, and even the 1990s.[292] The Willie Horton ad shown during President George W. H. Bush's 1988 presidential campaign to enhance perceptions of Bush's stance on crime, for example, was nothing if not an effort to inflame white fear of black criminality and sexual deviance through the use of the black brute stereotype.[293]

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288 *See id.* at 637–38.

289 *See id.* at 633–34; *see also* Alexander, *supra* note 261, at 6 (discussing views of Thomas Jefferson and others on black womanhood).

290 *See* Delgado & Stefancic, *supra* note 275, at 1262–63.

291 For example, some literature from the Harlem Rennaisance includes ZORA NEALE HURSTON, THEIR EYES WERE WATCHING GOD (1937) and Langston Hughes, *The Negro Speaks of Rivers* (1921) *in* THE COLLECTED POEMS OF LANGSTON HUGHES 23 (Arnold Rampersad & David Roessel eds. 1994). For an important work of the Civil Rights Era, see ELLISON, INVISIBLE MAN, *supra* note 67. More recent literature includes TONI MORRISON, BELOVED (1998), Alice Walker, THE COLOR PURPLE (1985), ERNEST J. GAINES, A LESSON BEFORE DYING (1997), and CLIFTON L. TAULBERT, ONCE UPON A TIME WHEN WE WERE COLORED (1989). Significant depictions of African-American life have also appeared in film and on television, including EYES ON THE PRIZE (1995), MALCOLM X (1992), and THE TUSKEGEE AIRMEN (HBO Pictures 2000). In addition, some African-American playwrights have begun to receive national attention. *See, e.g.*, AUGUST WILSON, THE PIANO LESSON (1984).

292 *See* Sherri Burr, *Television and Societal Effects: An Analysis of Media Images of African-Americans in Historical Context*, 4 J. GENDER RACE & JUST. 159–74 (2001) (discussing history of negative stereotypes generally and listing stereotypical images of Blacks shown in televisions shows such as *The Jeffersons*, *Good Times*, *Different Strokes*, *Benson*, and *Sanford and Son*).

293 *See* PATTERSON, *supra* note 4, at 242 (noting that Willie Horton ad demonstrates continuing force of "dishonorable brute" stereotype); Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 626–28 (2000) (discussing Willie Horton ad).

4. *Racial Terrorism and the Criminalization of Race*

The stereotype of the black beast, the criminally inclined brute with insatiable sexual desires and superhuman strength discussed above, was greatly bolstered by white efforts to effectively criminalize and punish the very condition of being black. During the antebellum period, slaveholders solidified their near total control over the lives of black slaves by systematically criminalizing conduct—e.g., reading, traveling without a pass, failing to move out of a white person's path, "engaging in 'unbecoming' conduct in the presence of a white female," and defending themselves against assaults by white persons—that would have been perfectly lawful had it been committed by Whites.[294] Similar strategies were employed in the wake of the Civil War.

During Reconstruction, Black Codes designed to reinstitute antebellum social structures criminalized everything from disobedience to an employer to leading idle or disorderly lives.[295] Those former slaves who traveled about in search of work, new housing, or family members from whom they had been separated during slavery were labeled vagrants and often subjected to punishment far more severe and prolonged than any White would have received.[296] Whipping was a common punishment, as was condemning Blacks to indeterminate periods of labor on public works projects or white plantations.[297] The prevailing sentiment, reflected in the words of a state court of the period, was that "the degraded caste should be continually reminded of their inferior position, to keep them in a proper degree of subjection to the authority of the free white citizens."[298]

Because of the wide number of minor offenses for which Blacks might receive a jail sentence, black offenders during the Reconstruction period comprised a disproportionate number of offenders confined in state penitentiaries and leased out to work on plantations or farms.[299] These disparities only served to reinforce the stigma of

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294 KENNEDY, *supra* note 40, at 76.

295 FONER, *supra* note 240, at 200.

296 *See id.* at 198, 200, 205. A number of states also sought to enhance the punishment for crimes Blacks were thought to commit more often than Whites. Many states effectively elevated the crime of petty larceny to that of larceny through sentencing enhancements on the theory that poor Blacks had a greater propensity to steal than Whites. *Id.* at 202; *see also* Dvorak, *supra* note 293, at 629–30, 647–48 (describing racial motivations behind strict laws criminalizing cocaine use).

297 *See* FONER, *supra* note 240, at 200, 205.

298 Luke v. State, 5 Fla. 185, 195 (Fla. 1853).

299 FONER, *supra* note 239, at 204–05. As noted earlier, a similar disproportionality exists in our current prison system. *See supra* notes 10–11 and accompanying text.

black inferiority so important to the former slave system.[300] In time, they also worked to inflame racial animosities and violence. White Southerners convinced of the black male's proclivities toward rape began to employ extralegal "justice" systems to address what they perceived as the growing threat of black aggression and criminality.[301] Race riots and attacks by terrorist groups such as the Ku Klux Klan spread like a rash throughout Southern cities and towns in the late 1800s and early 1900s.[302] By 1968, there had been nearly 5000 lynchings of African Americans.[303]

Through these extralegal mechanisms, white Southerners simultaneously forged a connection between blackness and criminality in the

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300 The failure to protect Blacks from criminal conduct by Whites and even other Blacks also contributed to notions of black inferiority and devaluation. Slave Codes, as a rule, provided that slaves could be subjected to a range of physical abuses that would clearly have been regarded as crimes had they been committed against Whites. *See* KENNEDY, *supra* note 40, at 30–33. Slaveholders (and other slaves) could, for example, rape slave women with impunity, because only the rape of white women was regarded as a crime. *See* Alexander, *supra* note 261, at 7–8 (discussing case of male slave whose conviction for raping young black girl was overturned because law did not prohibit rape of black women). Slaveholders were also free physically to abuse or, in some circumstances, kill slaves without fear of repercussion because states generally only prosecuted such cases when they were especially egregious. KENNEDY, *supra* note 40, at 31 (describing case of Virginia slaveholder who was punished for murder only once it was revealed that, after first subjecting male slave to severe whipping, he had then imposed a myriad of tortures on him, including burning, being tied to log, and being washed with hot water in which red peppers had been soaked).

301 *See* Holden-Smith, *supra* note 261, at 37–39 (noting that threat of rape served as primary justification for lynching in late nineteenth and early twentieth centuries); *see also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 357, 367 (Kimberlé Crenshaw et al. eds., 1995) (observing that conceptualization of rape as crime committed by Blacks against Whites "has left black men subject to legal and extralegal violence"). Statistics show, however, that only 28.4% of the lynchings that occurred between 1889 and 1918 actually involved allegations of rape or attempted assault on a white woman. *See* Holden-Smith, *supra* note 261, at 37–38 (citing lynching statistics provided to Congress); *see also* PATTERSON, *supra* note 4, at 175 (providing chart indicating that rape or attempted rape was alleged in only 1200 of the 4723 lynchings chronicled in records maintained at Tuskegee Institute).

302 Between 1866 and the early part of the twentieth century, anti-Black race riots occurred in scores of cities in both the South and the North, including Memphis, Tennessee (1866); New Orleans, Louisiana (1866), Wilmington, North Carolina (1898); Atlanta, Georgia (1906); Chicago, Illinois (1919); and Tulsa, Oklahoma (1919). *See* STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS 1882–1930, at 5–6 (1995) (describing riots of 1866); WOODWARD, *supra* note 243, at 86–87, 114–15 (referring to riots of 1898, 1906, and 1919).

303 PATTERSON, *supra* note 4, at 179. Between 1882 and 1968, 80% of all lynchings occurred in the South, and approximately 72% of all lynching victims were African Americans. *Id.* at 176. Other racial minorities, however, did not escape the lynch mobs. Chinese laborers, Mexicans, and Native Americans were also victims of lynching. *See* Holden-Smith, *supra* note 261, at 36.

white mind that has yet to be undone,[304] perfected terror as a mechanism for black control, and reinforced notions of black inferiority. The lynchings, possibly more than anything else, had the effect of reinforcing the denigrated status Blacks had held prior to emancipation.[305] Highly ritualistic—often including the severing of genitalia—and communal in nature,[306] these lynchings, which became a form of entertainment for white communities and sometimes involved law enforcement officials as participants, communicated the view that Blacks were "object[s] devoid of worth."[307] Indeed, they reflected the dissociation of blackness from human status: "[A]s 'black beast[s],' [African Americans] could be horribly sacrificed, without any sense of guilt . . . ."[308]

C. *Summary*

In the subsections outlining some of the early sources of racially stigmatic meaning, the historical analogues of certain modern-day events should be evident. I earlier mentioned the relationship between the first President Bush's infamous Willie Horton ad and the stereotype of the black brute. Consider, too, the connection between the racial terrorism described in the last subsection and recent racially motivated killings of victims such as James Byrd, an African-Amer-

304 For example, racial profiling policies that single out African Americans and other minorities for car stops are premised on the theory that such individuals are more likely than Whites to commit drug-related crimes and certain other offenses. *See* Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002) (defining racial profiling as incidents in which "a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating"); Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 LAW & CONTEMP. PROBS. 99, 136 (2003) (including instances in which "a police officer stops someone in part because she believes that members of that person's race are more likely to commit the crime under investigation" as examples of profiling).

305 *See* TOLNAY & BECK, *supra* note 302, at 23 ("[Y]ears of [lynchings] had . . . lessened blacks to simplistic and often animalistic stereotypes."); *see also* PATTERSON, *supra* note 4, at 188–92.

306 *See* Jordan, *supra* note 236, at 559–61.

307 TOLNAY & BECK, *supra* note 302, at 23; *see also* Holden-Smith, *supra* note 261, at 34 (describing lynching as "cultivat[ing] the myth of black men as 'beast-rapists'").

308 PATTERSON, *supra* note 4, at 212. Orlando Patterson maintains that this propensity to disassociate blackness from qualities generally associated with human beings first arose during slavery: "'The cruelties of slavery inevitably produced a sense of disassociation. To the horrified witness of a scene of torture, the victim becomes a "poor devil," a "mangled creature." He is no longer a man. He can no longer be human because to credit him with one's own human attributes would be too horrible.'" *Id.* at 211 (quoting WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812, at 233 (1968)).

ican man who died in 1998 after being beaten and dragged from the back of a pickup truck by his white attackers.[309] Such connections not only help to explain the negative meanings associated with racial difference, but they also shed light on the meaning carried by modern events. Without our past history of racial violence, the murder of James Byrd would certainly have been regarded as horrible on its own terms, but likely would not have had the same expressive message.[310] Where that incident is concerned, the past is crucial to understanding the present, to appreciating the extent to which some of the conditions that facilitated the earlier violence—notions of African Americans as inferior, less than human, and appropriate targets of white rage—are still in place today.

The point to take away from this is not so much that the Byrd killing, or any similar event, was necessarily fated to occur, though it is probably true that, as long as racial stigma persists, we will continue see incidents of this sort. The more important point, for our purposes, is that in the connections drawn in this Section, we see the necessary elements of the *process* of interpretation required to put racial stigma and meaning in context. Understanding racial stigma and racial stigmatization requires an appreciation of all the contexts—past, present, and future—in which an event occurs.

III
MAPPING U.S. SUPREME COURT CASES ON RACIAL STIGMA

The first Part of this Article articulated the case for understanding racial stigma and the negative meanings and effects associated with it as the principal source of racial injury and disadvantage in

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309 *See* John Freeman, *Undercurrent of Hate Swells to the Surface: Racial Killing's Seed Festered in Small Town*, DENVER POST, Feb. 3, 2002, at EE01, *available at* 2002 WL 6559668. Although highly publicized, the Byrd case is unfortunately not the only recent example of a murder movitated by racial hostility. *See also, e.g.*, J. Clay Smith, Jr., *Lynching at Bensonhurst: A Bibliographic Essay*, 4 HOW. SCROLL 97 (2001) (discusing murder of Yusuf Hawkins, young African-American male, by white mob in Bensonhurst section of Brooklyn, New York); Daina C. Chui, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 S. CAL. L. REV. 1053, 1093 (1994) (discussing murder of Vincent Chin, a Chinese American, by two white males who attributed their unemployment to "Japs").

310 *See* Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809, 822 (2000) ("'[B]y tying African-American James Byrd to the bumper of their car and dragging his body for miles, his white supremacist killers traded on the evocative connotations of lynching.'" (quoting Dan Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 464 (1999))); *see also* Mark Babineck, *Byrd Killing Spurs Changes in Jasper*, HOUS. CHRON. June 1, 2003, at 41, *available at* 2003 WL 57421181 (noting that killing "spawn[ed] fear in the black community").

the United States. We know now what social scientists say about how it operates and the nature of the harms it imposes, especially those related to citizenship and the exclusion of African Americans and other minorities from the conversations, interactions, and relationships necessary for meaningful democratic engagement. This Part tries to develop an understanding of how courts have historically addressed the issue of racial stigma. More specifically, it looks at the U.S. Supreme Court and its treatment of the problem of racial stigma over time.

For many people, the Supreme Court's history with issues of racial stigma starts in 1954 with its celebrated decision in *Brown* or, perhaps, with its affirmative action cases, which have debated the stigmatic effects of race-conscious programs designed to remedy past discrimination or enhance diversity for decades.[311] But, as Justice Taney's discussion in *Dred Scott* and his stigma-based conclusion that Blacks "are not included, and were not intended to be included, under the word 'citizens' in the Constitution" suggests, the Supreme Court was forced to contemplate the legal consequences of racial stigmatization long before *Brown* and the affirmative action cases arose.[312] Indeed, a close look at Supreme Court cases in this area makes clear that a concern about the effects of racial stigma runs throughout the Court's modern cases.[313] In the years since the Fourteenth Amendment was enacted, the Court has plainly concluded that the harms imposed by racial stigma lie at the core of the problems of inequality the Fourteenth Amendment was designed to address.[314]

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311 Affirmative action cases in which the issue of stigma was raised or discussed include *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

312 Dred Scott v. Sandford, 60 U.S. 393, 404 (1857).

313 In the last fifty years, the Court has discussed issues relating to racial stigma in a variety of cases and contexts. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 485 (1992) (school desegregation); Powers v. Ohio, 499 U.S. 400, 410 (1991) (preemptory challenges); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (affirmative action); United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165 (1977) (voting); Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (school desegregation).

314 *See, e.g.*, *Powers*, 499 U.S. at 410 (acknowledging centrality of stigma to equal protection analysis); *Croson*, 488 U.S. at 493 (suggesting that "classifications . . . motivated by illegitimate notions of racial inferiority" are a focus of strict scrutiny analysis applied under the Fourteenth Amendment); Allen v. Wright, 468 U.S. 737, 755 (1984) ("There can be no dobut that . . . noneconomic [stigmatic] injury is one of the most serious consequences of discriminatory government action . . . ."; Rose v. Mitchell, 443 U.S. 545, 554–56 (1979) (recognizing assertion of racial inferiority as one of "larger concerns with racial discrimination" that are "at the core of the Fourteenth Amendment"); *see also* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 155 (1994) (suggesting that Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), invalidating use of race-based preemptory challenges, "is best understood as a recognition that race lies at the core of the commands of the Fourteenth Amend-

This understanding about the significance of racial stigma in the constitutional scheme did not, of course, emerge immediately. In the decades just after the Fourteenth Amendment's enactment, the Court's position on the seriousness of the threat that racial stigma posed to equality varied significantly. *Strauder v. West Virginia*[315] provides an example of an instance in which the Court recognized the citizenship harms associated with racial stigma. In that case, the Court was asked to assess the constitutionality of a West Virginia statute excluding Blacks from jury service.[316] Taking the view that the Fourteenth Amendment encompassed an affirmative right to be free from racial stigma and "unfriendly legislation . . . implying inferiority in civil society,"[317] the Court held that the statute, among other things, impermissibly stigmatized those excluded from jury service on the grounds of race:[318]

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority, and . . . an impediment to securing [equal protection] to individuals of the race.[319]

Plessy v. Ferguson,[320] in contrast, found the Court unsympathetic to claims of racial stigmatization. Indeed, the Court seemed to say that racial stigmatization, to some extent, was a "just and necessary"[321] aspect of black life.[322] Perhaps because social, rather than

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ment"); Columbus Bd. of Educ. v. Penic, 443 U.S. 449, 509 (1979) (Rehnquist, J., dissenting) (identifying "stigma and other harm inflicted by racially motivated governmental action" as "conditions that offend the Constitution"). *But see Bakke*, 438 U.S. at 294 n.34 (opinion of Powell, J.) ("The Equal Protection Clause is not framed in terms of 'stigma.' Certainly the word has no clearly defined constitutional meaning."). The Court has also discussed the problem of stigma in the gender context. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 265 (1989); Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984).

315 100 U.S. 303 (1879).

316 The statute provided, in relevant part, that "[a]ll white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." *Id.* at 305 (internal quotation marks omitted).

317 *Id.* at 307–08. For more on this view of the Fourteenth Amendment, see Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 247 (1983); *see also Powers*, 499 U.S. at 408 (discussing *Strauder*).

318 *Strauder*, 100 U.S. at 308–09. In other contexts, the Court has recognized that excluding jurors on grounds of race also imposes a harm on the community at large because it calls the legitimacy and fairness of the entire justice system into question. *See Batson*, 476 U.S. at 87.

319 *Strauder*, 100 U.S. at 308.

320 163 U.S. 537 (1896) (holding that statutes requiring separation of Blacks and Whites on railroad cars raised no equal protection problem).

321 Dred Scott v. Sandford, 60 U.S. 393, 416 (1857).

political, rights—such as voting or jury service—were at issue, the Court's view was that "a statute which implies merely a legal distinction between the white and colored races" raised no real citizenship concerns.[323] For Justice Brown, who authored the Court's opinion, citizenship referred to formal or political citizenship alone, not the broader notions of citizenship discussed in Part I.[324] If African Americans experienced exclusion from railway cars as a "badge . . . of inferiority" prohibiting them from full citizenship, he asserted, "it is not by reason of anything found in the act,"[325] but because "the colored race . . . put[s] that construction" on it.[326]

It would take more than fifty years for the Court to clarify its position on racial stigma's significance as a constitutional concept or principle.[327] The Court accomplished this with its 1954 decision in *Brown*,[328] which overturned *Plessy*. By invalidating segregated public schools as unconstitutional, the Court seemed to embrace fully the notion that racial stigma—whether it impairs social or political rights—constitutes one of the harms the Fourteenth Amendment was

322 In making its decision, the *Plessy* Court underscored the prevalence of stigmatizing legislation. *See Plessy*, 163 U.S. at 544 (citing school segregation laws and other similar enactments in reasoning that "separate-but-equal" statutes fell "within the competency of the state legislatures in the exercise of their police power"). *See also Dred Scott*, 60 U.S. at 413–16 (discussing legislation that stigmatized Blacks).

323 *Plessy*, 163 U.S. at 543. For Justice Brown, legal enactments could put individuals on equal footing with respect to formal political rights, but could not do so with respect to social rights extending to matters such as railway ridership. "If one race be inferior to the other socially," he opined, "the Constitution of the United States cannot put them upon the same plane." *Id.* at 552.

324 Significantly, this view conflicts with that of Justice Taney in *Dred Scott*, whose recitation of laws "repudiati[ng] . . . the African race," *Dred Scott*, 60 U.S. at 415, suggests that he, like the ancient Greeks, understood racial stigma to operate on a social as well as political level.

325 *Plessy*, 163 U.S. at 551. Justice Harlan, in dissent, unfortunately shared Justice Brown's sentiments about the superiority of the white race, *see id.* at 559 (Harlan, J., dissenting), but disputed the contention that segregation posed no threat to black citizenship. He maintained that forced racial separation "is a badge of servitude wholly inconsistent" with equal protection. *Id.* at 562. In his view, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559.

326 *Id.* at 551.

327 This is not to suggest that the Court decided no other cases during this early, pre-*Brown* period in which the rights of African Americans who had been discriminated against were vindicated. For the most part, however, the Court chose not to discuss the reasons for its invalidation of a program or practice in stigma-based terms. *See, e.g.*, Bush v. Kentucky, 107 U.S. 110 (1882) (setting aside murder indictment on grounds that Kentucky statute unconstitutionally excluded persons of African American descent from service on juries); Neal v. Delaware, 103 U.S. 370 (1880) (holding unconstitutional discrimination on basis of race in jury selection).

328 347 U.S. 483 (1954).

intended to address.[329] Taking a page from *Strauder*, the Court recognized racial stigma as a problem linked directly to citizenship and the guarantee of equal protection, arguing that education provides "the very foundation of good citizenship"[330] and that its denial on racial grounds would marginalize African-American children in the larger society. "In these days," the Court asserted, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[331]

In addition to focusing on issues of citizenship, the *Brown* Court concerned itself with the psychological aspect of the harms imposed by racial stigma. The National Association for the Advancement of Colored People (NAACP) legal team that brought the consolidated cases in *Brown* introduced extensive social science evidence at trial and in their briefs before the Court on the racially stigmatizing and psychological effects of forced segregation,[332] including submissiveness, diminished personal drive, and overall "feelings of inferiority."[333] Professor Kenneth Clark's doll test, which sought to measure the psychological impact of racial stigma by recording childrens' responses to black and white dolls, was the centerpiece of this evidence. Clark reported that the African-American children tested expressed preferences for white dolls; moreover, they most often ascribed negative attributes to the black dolls, leading Clark to conclude that the children had internalized, to their detriment, the negative identity norms so important to maintaining Jim Crow segregation.[334]

On the strength of this and other research,[335] the Court held that the stigmatizing effects of segregation also had an impermissible psychological impact. This portion of the Court's opinion was drafted in particularly strong terms. "To separate [black children] from others of similar age and qualifications solely because of their race," Chief Justice Warren wrote for the Court, "generates a feeling of inferiority as to their status in the community that may affect their hearts and

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329 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1477 (2d ed. 1988) (arguing that stigma rationale offers "most obvious" and "most persuasive" grounds for the decision in *Brown*).

330 *Brown*, 347 U.S. at 493.

331 *Id.*

332 *See* Brief for Appellants app. at 10, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1) (citing Max Deutscher & Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 259 (1948)).

333 *Id.* at 4–5.

334 *See* REMOVING A BADGE OF SLAVERY: THE RECORD OF *Brown v. Board of Education* 48–52 (Mark Whitman ed., 1993).

335 *See Brown*, 347 U.S. at 494–95 n.11.

minds in a way unlikely ever to be undone."[336] The Court's view was that the injuries flowing from racial stigma were permanent, largely because the segregation was state-sanctioned.[337]

The *Brown* Court's focus on issues relating to racial stigma arguably helped put an end to the kind of uncertainty about the constitutional significance of racial stigma that existed in the wake of *Strauder* and *Plessy*. Today, the Court's equal protection cases are replete with cautionary references to the racially stigmatizing effects of discriminatory policies.[338] And the idea that the Constitution reflects anti-stigma notions has been widely accepted.[339] Ironically, though, a precise understanding of racial stigma and the harms it imposes has remained elusive. The Court—despite its reliance on social science evidence in *Brown*—has yet to bring its understanding of racial stigma in sync with what social science research currently says about how racial stigma operates. In fact, it has yet to define racial stigma with any specificity at all.

The definition of racial stigma employed at any given time seems to change by case and individual justice.[340] In education cases following *Brown*, we see racial stigma being defined as a citizenship-like

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336 *Id.* at 494.

337 Quoting a lower court opinion in the case, the Court explained:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racia(ly) integrated school system."

Id. (no citation provided in original).

338 *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 643 (1993) (stating that racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) ("Classifications based on race carry a danger of stigmatic harm."); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971) (discussing "the stigma of segregation"); *see also* Fullilove v. Klutznick, 448 U.S. 448, 521 (1980) (Marshall, J., concurring) (describing acceptable remedy for past discrimination as one that "is carefully tailored to remedy racial discrimination while at the same time avoiding stigmatization and penalizing those least able to protect themselves in the political process").

339 *See supra* note 314.

340 The variation in the definitions employed by the Court and its individual members cannot be attributed to particularities of context alone. An emphasis on context might, in some case, explain the non-recognition of stigma in a given case—assuming a consistent approach to addressing the issue of stigma, which the Court now lacks—but it would not explain the fact that the Justices employ very different definitions of racial stigma in the same case. That reflects a problem of definition.

harm, a matter of psychological harm, or both.[341] But the definition employed often shifts when the Court considers cases in other areas. Consider, for example, the Court's decision in *City of Richmond v. J.A. Croson Co.*,[342] which addressed the constitutionality of a 1983 Richmond program designed to increase the number of racial minorities in the construction industry by requiring prime contractors awarded municipal contracts to subcontract at least 30 percent of the dollar amount of any contract to one or more minority business enterprises (MBEs).[343]

Justice O'Connor, writing for the plurality, concluded that the strict scrutiny standard Justice Powell had applied eleven years earlier in articulating the judgment in *Regents of the University of California v. Bakke*[344] should apply, rather than the more lenient intermediate standard that had been applied to a federal MBE program in *Fullilove v. Klutznick*.[345] In explaining the need for such an exacting standard, Justice O'Connor invoked racial stigma: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[346]

The use to which Justice O'Connor put the term "stigmatic harm," however, differs from what we have seen in the other cases discussed thus far. The utilization of the term "racial inferiority" in conjunction with a statement Justice Powell made in the admissions context—where implementation of affirmative action has, as the narrative in Part II suggests, raised old questions about the intellectual capabilities of minorities—suggests that it refers here to some intellectual infirmity or lack of overall ability, not the citizenship-based notion of stigma so prominent in *Strauder* or the psychological harm featured in *Brown*. At the same time, the notion that stigmatic harm could be imposed by a mere classification, as opposed to, say, one expressly designed to disadvantage, suggests that yet another concep-

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341 *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 485 (1992) (emphasizing inferiority-based view of racial stigma and identifying it as "principal wrong of the *de jure* system"); Wright v. Council of Emporia, 407 U.S. 451, 461, 466 (1972) (noting that discriminatory purpose of school officials operates to increase "stigma of implied racial inferiority" and negative psychological impact on students); *Swann*, 402 U.S. at 26 (1971) (discussing "stigma of segregation" as question of inequality).

342 488 U.S. 469 (1989).

343 *Id.* at 477–78. Justices Marshall, Blackmun, and Brennan dissented.

344 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290–91 (1978) (opinion of Powell, J.).

345 448 U.S. 448, 495–99 (1980) (Powell, J., concurring) (applying *Bakke* standard to federal MBE provision of Public Works Employment Act); *see Croson*, 488 U.S. at 493–94 (plurality opinion).

346 *Croson*, 488 U.S. at 493–94 (citing *Bakke*, 438 U.S. at 298).

tion of stigma was in play: the notion of racial otherness, the idea that being recognized as racially different by government—whether or not one belongs to a racial group with a history of discriminatory treatment—is its own type of stigma.[347]

Shaw v. Reno[348] conceptualized racial stigma in yet another way. That case involved a North Carolina redistricting plan drawn to include two majority-minority voting districts. Marking a dramatic turn from its earlier voting rights precedents, the Court held that white voters could assert an equal protection claim challenging the two oddly misshapen districts as unconstitutional and impermissibly drawn for the sole purpose of electing African Americans to Congress, even though they asserted no claim of vote dilution or interference with their ability to vote.[349] To reach this conclusion, the Court drew on the concept of racial stigma, in terms similar to those employed in *Croson*: "Classifications of citizens solely on the basis of

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[347] Justice Stevens, who wrote a separate concurrence, also discussed the concept of racial stigma. For Justice Stevens, Richmond's program risked stigmatizing its potential beneficiaries as intellectually inferior. *Croson*, 488 U.S. at 516–17 (Stevens, J., concurring). "'[E]ven though it is not the actual predicate for this legislation,'" he noted, quoting his earlier dissenting opinion in *Fullilove*, 448 U.S. at 545, such statutes are viewed "'as resting on an assumption that those who are granted this special preference are less qualified in some respect'" relating to race. *Croson*, 488 U.S. at 517; *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) (suggesting that affirmative action plans stamp beneficiaries with "badge of inferiority"). Additionally, Justice Stevens expressed concern about the risk of stigmatizing Whites with the "unproven charge of past discrimination." *Croson*, 488 U.S. at 516 (Stevens, J., concurring). Similar concerns seem to have influenced Justices in other affirmative action cases. *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547, 635–36 (1990) (Kennedy, J., dissenting) (expressing concern that FCC affirmative action program harmed white non-beneficiaries and implicitly labled them racists).

[348] 509 U.S. 630 (1993).

[349] The Court described the claim as the right to be free from redistricting so "irregular on its face that it rationally can be viewed only as an effort to segregate the races." *Id.* at 642. The recognition of such a claim, which is evaluated under strict scrutiny, marked a significant departure from the Court's earlier precedents. Prior to *Shaw v. Reno*, the mere consideration of race in redistricting had not occasioned the application of heightened scrutiny. It was taken for granted that, as a practical matter, the business of redistricting could not be conducted without lawmakers being aware of the impact district lines might have on particular racial groups. *See id.* at 646 (referring to earlier cases' treatment of difficulty of proving gerrymander based on race). Moreover, the thinking at that time was that no violation occurred as a result of a voter's placement in one district rather than another, as such placement denied no voting rights. *Id.* at 681–82 (Souter, J., dissenting) ("[T]he mere placement of an individual in one district instead of another denies no one a right or benefit provided to others."); *id.* at 661 (White, J., dissenting) (arguing that because eliminating race from redistricting would have been "unrealistic," pre-*Shaw v. Reno* Court looked not to whether race was considered in assigning voters to districts but at impact assignment had on voting strength); *see also* Shaw v. Hunt, 517 U.S. 899, 928 (1996) (Stevens, J., dissenting) (referring to "so-called 'stigmatic' harms" of race-based districting).

race . . . 'threaten to *stigmatize* individuals by reason of their membership in a racial group and to incite racial hostility.'"[350]

When it lamented that North Carolina's two districts—because they were drawn to enhance minority voting strength—sent the message that "members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates[,]" the Court seemed poised to draw on a citizenship, psychological, or inferiority-based notion of stigmatic harm.[351] But the danger of what it called "political apartheid" was only a piece of what motivated the Court.[352] In the end, it was not the concern that white voters would be stigmatized as racially similar to Blacks, but the idea that they might suffer stigma as a result of not being recognized as racially *distinct* from them—a kind of courtesy stigma[353]—that seemed most to concern the majority.[354] Essentially, the Court cast racial stigma as a "reputational" type of harm,[355] which helps explain Justice O'Connor's assertion that the redistricting plan risked telling "elected officials that they represent a particular racial group rather than their constituency as a whole."[356]

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350 Shaw v. Reno, 509 U.S. at 643 (emphasis added).

351 *Id.* at 647.

352 *Id.*

353 GOFFMAN, *supra* note 21, at 30 (explaining notion of courtesy stigma as fear that stigma might "spread from the stigmatized individual to his . . . connections").

354 *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 508 (1993) (noting *Shaw v. Reno*'s preoccupation with messages conveyed by North Carolina's districting scheme).

355 Justice Stevens described the *Shaw v. Reno* claim as a harm to reputation in his dissent in *Shaw v. Hunt*, 517 U.S. 899, 928 (1996) (Stevens, J., dissenting) ("I do not understand why any voter's reputation or dignity should be *presumed* to have been harmed simply because he resides in a highly integrated, majority-minority district that the legislature has deliberately created."). The harm identified by the *Shaw v. Reno* Court has also been described as a representational harm—one that threatens to interfere with political representation. *See* U.S. v. Hays, 515 U.S. 737, 744 (1995) (referring to representational harms); Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote*, 4 MICH. J. RACE & L. 389, 412 (1999) (same).

356 Shaw v. Reno, 509 U.S. at 650. Four Justices filed vigorous dissents, but only Justices White and Souter directly challenged the Court's conclusions with respect to racial stigma. Justice White raised the issue of racial stigma somewhat indirectly, *see* Shaw v. Reno, 509 U.S. at 658–75 (White, J., dissenting), by asserting that the majority's position was precluded by *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977), which, in reviewing a similar claim brought by white voters in New York, held that absent some denial or abridgment of the right to vote, voting districts drawn to enhance minority voting strength imposed "no racial slur or stigma" upon white voters. *See id.* at 165. Justice Souter attacked the majority's approach toward racial stigma head on. In particular, he disputed that the *Shaw v. Reno* voters had been stigmatized in any way. The kind of racial stigma recognized by the *Shaw v. Reno* Court, he argued, provided no justification for departing from the accepted practice of treating race-conscious redistricting

For all the definitions of racial stigma—inferiority or citizenship, psychological, or reputational-based—that it has employed, the Court often fails to recognize racially stigmatic harm when it is present. *Board of Education v. Dowell*,[357] a case involving a challenge to the dissolution of an Oklahoma desegregation decree, provides one illustration of this problem. *Palmer v. Thompson*,[358] which involved Jackson, Mississippi's decision to close its swimming pools rather than

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plans intended to enhance minority voting power differently from those designed to dilute it or otherwise deprive African Americans and other minorities of the right to vote. *See* Shaw v. Reno, 509 U.S. at 681–82 (Souter, J., dissenting). The *Shaw v. Reno* plaintiffs, in his view, had suffered no injury. It seemed implausible, Justice Souter argued, that North Carolina's strangely shaped district generated "'a feeling of inferiority as to [one's] status in the community'" comparable to that created by a segregated school system. *Id.* at 686–87 n.9 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)); *see also* Shaw v. Hunt, 517 U.S. 899, 928 (1995) (Stevens, J., dissenting) (embracing *Brown* notion of stigmatic harm).

357 498 U.S. 237 (1991). *Dowell* asked the Court to determine the appropriate standard for dissolving a desegregation decree dating back to the 1960s. The Court paid little attention to claims that the stigmatic effects of Oklahoma's past *de jure* segregation system persisted and that one of the school assignment plans at issue in the case seemed likely to result in resegregation. *Id.* at 250 & n.2 (directing lower court to determine whether "vestiges of past discrimination had been eliminated to the extent practicable," as well as whether current segregation was "too attenuated to be a vestige of former school segregation"). It seemed to say that no stigma could be recognized where the intentional discrimination that gave rise to the stigma occurred in the somewhat distant past, rather than the present. *Id.* at 250 n.2 (accepting possibility that current residential segregation was "result of private decisionmaking and economics," and therefore unrelated to history of *de jure* segregation). Justice Marshall—who frequently discussed the problem of racial stigma in his opinions and seemed to have a cohesive theory of stigma that he employed in race cases—took issue with the disposition of the issues in *Dowell*. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (recognizing that "race has often been used to stigmatize politically powerless segments of society," but arguing that intermediate standard of review was appropriate for racial classifications designed to remedy past discrimination, such that only those programs that "'stigmatize[ ] any group or that single[ ] out those least well represented in the political process'" because they lack important governmental purpose or are not "substantially related to achievement of those objectives" should be invalidated (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 359, 361 (1978) (opinion of Powell, J.))). Justice Marshall took the majority to task, inter alia, for its failure to take account of context and the district's past discrimination. *Dowell*, 498 U.S. at 265 (Marshall, J., dissenting) (asserting that district court ignored School Board's "role . . . in creating 'all-Negro' schools clouded by the stigma of segregation—schools to which white parents would not opt to send their children"). He argued that a decree should remain in place "so long as conditions likely to inflict the stigmatic injury . . . persist," *id.* at 252, and chastised the Court for ignoring the fact that "the stigmatic harm identified in *Brown I* can persist even after the State ceases actively to enforce segregation," *id.* at 261. In addition, he disputed the *Dowell* Court's suggestion that the Oklahoma City School District could not reasonably be held accountable for the residential segregation contributing to the risk of resegregation for its schools, noting that the Court seriously underestimated the extent to which any personal choices regarding housing or schools were a function of the stigma imposed by the Board's original discrimination. *See id.* at 265.

358 *Palmer*, 403 U.S. 217 (1971).

integrate and open them to Blacks, as it had done with other public facilities, offers another.[359] In *Palmer*, the majority declined even to consider seriously the possibility that the closings might send a negative expressive message about Jackson's African-American residents.[360] It rejected out of hand claims that the closings stigmatized African-American residents as unfit for membership in the larger community[361] and concluded that Jackson's actions did not deny equal protection.[362]

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[359] *See id.* at 218–19 (outlining issue of pool closings). By this time, the *Brown* precedent had resulted in judicial decisions finding violations of equal protection in both the public and private sectors. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1966) (declaring prohibition on interracial marriage unconstitutional); McLaughlin v. Florida, 379 U.S. 184 (1964) (finding prohibition on interracial cohabitation unconstitutional); Watson v. City of Memphis, 373 U.S. 526 (1963) (refusing to permit delay in desegregation of public parks and other recreational areas); Florida *ex rel.* Hawkins v. Bd. of Control, 350 U.S. 413 (1956) (per curiam) (requiring prompt admission of African-American student to graduate school); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (remanding for order to desegregate public golf courses).

[360] 403 U.S. at 218–21. The majority opinion does not attempt to draw a distinction between social and political rights. But the majority does seem to say that, to the extent any stigma was imposed by the pool closings, it was simply not as troubling as that imposed by segregated schools. *Id.*

[361] *Id.* at 224–26 (rejecting argument that pool closings were "motivated by a desire to avoid integration of the races" and thus sent message that African Americans were inferior). The Court also dismissed out of hand the notion that the pool closings constituted a "badge and incident[ ]" of slavery under the Thirteenth Amendment. *Id.* I save for another article an exploration of the question of whether the racial stigma recognized by the Court under the Fourteenth Amendment should be considered the same as a "badge and incident of slavery" under the Thirteenth Amendment. I note, however, that many of the issues of stigmatic meaning and citizenship addressed in this Article have also surfaced in cases brought under the Thirteenth Amendment. A frequently cited example is *Memphis v. Greene*, 451 U.S. 100 (1981), involving a challenge by African-American residents to the closing of a street that served as a thruway between their neighborhood and an affluent white area. *See* Lawrence, *supra* note 18, at 363–64 (discussing *Greene* and arguing that, given historical context, street closing would signify inferiority of African Americans).

[362] *Palmer*, 403 U.S. at 226. Justice Black, who wrote for the majority, found that the closings could be explained on financial grounds and concluded that there was no constitutional problem so long as Jackson closed the pools to everyone, a formulation of the issues that made it easier to distinguish *Palmer* from prior cases involving efforts to avoid court-mandated desegregation. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967) (invalidating California constitutional amendment establishing private right to discriminate in real estate); Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (invalidating county effort to circumvent desegregation by closing public schools and then financing private, all-white schools). Justice White, who filed one of three dissents, stated unequivocally that the city was "expressing its official view that Negroes are so inferior that they are unfit to share with whites this particular type of public facility." *Palmer*, 403 U.S. at 266 (White, J., dissenting). Claiming that the case was indistinguishable from *Brown*, Justice White argued that the city's long-term stance against desegregation, its decision to integrate only when ordered to do so, and the defiant statements made by city officials during the course of the litigation, were clear evidence of the city's motives and efforts to thwart the desegregation of its recreational facilities. *Id.* at 249–50. He maintained that the message sent by the

A number of factors account for this failure to recognize racial stigma and for the definitional variations discussed earlier. To begin, the Court has a very narrow understanding of both the sources of racial stigma and the harms it imposes. Part I of this Article primarily located racial stigma as a problem of social meaning and norms, one that affects our unconscious, cognitive processes and responses to race and imposes harms ranging from racial microaggressions to persistent racial disadvantage in areas such as employment, education, and health care, among other things.[363] In contrast, the Court repeatedly casts racial stigma as a problem of intentional discrimination alone.[364] Along with the deprivation of concrete benefits such as employment opportunities or access to schools, racial stigma is seen by the Court as one of the harms of intentional discrimination, not one of its causes.[365] By intentional discrimination, however, the Court does not necessarily mean overtly discriminatory acts of the sort discussed in Part II.[366]

Under the Court's cases, the mere consideration of race as a factor in government decisionmaking can, in certain circumstances, result in racial stigma. *Shaw v. Reno*, a case in which the plaintiffs alleged no deprivation of any right whatsoever, is perhaps the strongest evidence of this.[367] Racial stigma, for the Court, has become a sort of reputational harm, one that can arise by the mere acknowledgement (or failure to acknowledge) of racial difference.[368] This superficial understanding comports with the very narrow, formalistic interpretation of the Equal Protection Clause and the notion of equality the Court has adopted in its race cases in the last two or three

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closings could never reasonably be found to affect black and white Jacksonians equally. "Whites feel nothing but disappointment and perhaps anger" in the face of the closings, he explained, but Blacks were affirmatively stigmatized by them. *Id.* at 268. For them, "the closed pools stand as mute reminders to the community of the official view of Negro inferiority." *Id.*

363 *See supra* notes 2–11, 174–178 and accompanying text.

364 *See* City of Mobile v. Bolden, 446 U.S. 55, 133–35 (1980) (Marshall, J., dissenting) (criticizing Court for suggesting that racially discriminatory impact, unlike intentional discrimination, imposed no racial stigma); *see also* United States v. Fordice, 505 U.S. 717, 749 (1992) (suggesting that no stigma will be found to exist in formerly segregated school system where acts giving rise to stigma occurred in distant past).

365 *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 643 (1993) (describing stigma as possible result of intentional race-based classification); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (same).

366 As *Dowell* makes clear, however, evidence of such acts may be required for the continuation of a decree initially designed to remedy the effects of racial stigma. *See supra* notes 357–362 and accompanying text.

367 In *Shaw v. Reno*, the white plaintiffs objected to race-based districting, claiming it was a form of segregation, but alleged no stigmatic harm to themselves. *See* 509 U.S. at 636 (outlining complaint and relief sought); *see also supra* notes 348–356 and accompanying text.

368 *See supra* note 355 and accompanying text.

decades, but it is, as we have seen, very much out of sync with current sociological views on the problem of racial stigma and the very substantive citizenship effects—social, economic, and political—that it can have on stigmatized individuals.[369]

Additionally, the Court has no consistent, structured mechanism for analyzing cases involving a risk of racial stigmatization. Indeed, although the Court has often regarded racial stigma as a problem of constitutional dimensions, it is difficult to predict when or how the Court will deem it necessary even to mention the potentially stigmatizing effects of a challenged policy or action.[370] This, admittedly, is not so much a direct conflict with social science as it is a consequence of ignoring some of its core teachings about how racial stigma operates. As I indicated earlier, the social science insight that racial stigma is very much mediated by context and the historical realities of race in the United States provides a clue as to how to approach the task of assessing the risk of racially stigmatic harm. One must, at a minimum, be focused on the historical context out of which an allegedly stigmatizing program or policy stems, if racial stigma is ever to be effectively addressed.

The Court, however, has not demonstrated that it can reliably be expected to engage in such contextualizations. We can, of course, point to some instances in which the Court has tried to place its decisions within a broader context that would allow for interpretation of stigmatic meaning. In *Brown,* for example, the Court's conclusions were based, in part, on its broad interpretations of the Fourteenth Amendment's purposes and an understanding of the important role that education had come to play in the development of future citizens.[371] An expansive view of context also made it possible to interpret stigmatic meaning in *Strauder.*

There, the Court looked to examples of discriminatory laws in effect at the time, as Justice Taney did in *Plessy,* but also endeavored to understand the overall context in which the Fourteenth Amendment was adopted. "The true spirit and meaning of the [civil rights] amendments," Justice Strong, the author of the majority opinion in *Strauder*, admonished, "cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish."[372]

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369 *See supra* Parts I & II.

370 *Compare, e.g.*, *Croson*, 488 U.S. at 493 (discussing "danger of stigmatic harm" posed by racial classification), *with* Palmer v. Thompson, 403 U.S. 217 (1971) (declining to recognize presence of stigmatic harm).

371 Brown v. Bd. of Educ., 347 U.S. 483, 489–90, 493 (1954).

372 Strauder v. West Virginia, 100 U.S. 303, 306 (1879).

But the deliberate consideration of context seems to have been jettisoned in later cases. Consider *Shaw v. Reno*, where, in recognizing a voting rights claim for the white plaintiffs, the Court imputed a history of discrimination and deprivation to Whites without any hesitation, much less evidence of actual harm, despite the fact that evidence of harm in the voting rights context pertained primarily to African Americans.[373] One can also look to cases such as *Palmer* or *Dowell,* where decisions about the actuality or risk of stigmatization were essentially made in a vacuum, without any inquiry into past and future contexts.[374]

In far too many cases, the analysis employed by the Court has been ahistorical and willfully ignorant of relevant contexts, and, thus, necessarily incomplete.[375] Essentially, the Court has no principled way for evaluating a potentially stigmatizing program or, for that matter, for deciding between two options that each run a risk of stigma.[376] Were it not for the seriousness of the harms that racial stigma imposes, the Court's narrow approach and refusal to take into account social science in this area arguably would not be cause for concern, much less the subject of an Article. But we know from Part II that refusing to attend to the problem of racial stigma has real consequences—individual and collective—for the people it affects.

In failing to adopt a consistent approach to racial stigma, the Court, in a very real sense, becomes complicit in its perpetuation. If the Court is to fulfill its mandate in Fourteenth Amendment cases, it must develop a strategy to address the full range of racially stigmatic

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373 *See supra* notes 348–356 and accompanying text.

374 *See supra* notes 357–362 and accompanying text.

375 The Court's analysis in equal protection cases involving race has often been criticized as acontextual and ahistorical. *See, e.g.*, Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 1014 (1993) (describing the Court's "colorblindness principle" as "acontextual" and "ahistorical"); Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1763–65 (2001) (criticizing Court's approach to colorblindness); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 195 (1997) (criticizing as "acontextual" Supreme Court's "principle of colorblindness").

376 *See* David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 669–70 (comparing alleged stigma from affirmative action with "stigma of exclusion from opportunities"). The conclusion drawn about the risk of racial stigma in *Croson*, for example, was more a function of judicial fiat than the result of a balanced consideration of the potentially stigmatizing effects of both an affirmative action program that, under the Court's cases, relies too much on race as a factor in awarding benefits and a municipal program that makes no effort whatsoever to include historically-excluded minorities in its construction initiatives. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989).

harms—those that arise from intentionally discriminatory acts as well as those that are imposed unconsciously or as a result of cognitive processes of which individuals are not necessarily aware. What is required, in sum, is a more comprehensive approach to identifying and remedying racial stigma than has heretofore been suggested in the Court's cases or in legal scholarship.

IV
DEVELOPING A JUDICIAL ANALYSIS FOR RACIALLY STIGMATIC MEANING AND HARM

In light of the limitations inherent in the Supreme Court's current approach to racial stigma, this Section sets forth an alternative, structured constitutional analysis for identifying racially stigmatic harm that can be employed by courts in race cases. Courts have an important role to play in advancing the move toward eliminating racial stigma, inequality, and disadvantage in the United States. It should be noted at the outset, however, that the notion that racial stigma, rather than intentional discrimination or even racism (whether conscious or unconscious), constitutes the principal source of racial injury has implications that go far beyond the extent of what courts might be able to do in this area. Legislators and policymakers—at the local, state, and federal levels—may very well have to bear the yeoman's share of the burden in any concerted effort to fully address racially stigmatic harm.

Eliminating the American color line will require serious attention to the institutional structures and systems that feed the complex dynamics of racial stigma—the preconscious cognitive processes that, because they tap into deep, negative meanings of race, spoil social interactions, and distort perceptions of reality, account for individuals experiencing racialized conduct as rational or objective, and seeing racial disparities as natural or at least not abnormal.[377] Legislators and policymakers, unfettered by the prudential constraints placed on judges, are arguably in the best position to develop broad, creative solutions that interrupt these processes and focus public attention on the stigmatizing effects of various policy choices. One can, for example, imagine a scenario under which policymakers would assess

[377] *See* LOURY, *supra* note 22, at 121. Social scientists have begun to look closely at the strategies that might be employed in eliminating or at least reducing the effects of racial stigma. *See, e.g.*, John F. Dovidio et al., *Racial, Ethnic, and Cultural Differences in Responding to Distinctiveness and Discrimination on Campus: Stigma and Common Group Identity*, 57 J. SOC. ISSUES 167, 170, 178–84 (2001) (discussing "Common Ingroup Identity Model" as option for changing manner in which individuals categorize and classify ingroup and outgroup members).

the potential stigma and citizenship effects of a proposed construction project or building use prior to granting any permit. A chemical dumping project slated for an already struggling inner city community might be moved or scrapped completely on the grounds that it risks further devaluing an already socially marginalized community, not only in terms of health hazards and actual property values in the area, but also in terms of the expressive message that such a project would send about the relative value of the individuals who reside in that community.[378]

Similarly, policymakers might evaluate the effectiveness of ongoing government programs or policies by attempting to assess their potential for perpetuating racially stigmatic meanings and effects. Greater awareness of racial stigma could, for instance, lead a child welfare agency to think hard about whether the removal of a preference for African-American parents in the adoption placement of African-American children impermissibly exacerbates negative messages about black motherhood or families.[379] In the law enforcement area, policymakers might decide to discontinue the use of racial profiles by law enforcement after reconsidering the extent to which they reinforce citizenship-impairing beliefs about the criminality and potential dangerousness of groups such as African Americans and Latinos. Likewise, one could imagine law enforcement officials making changes in the training programs that seek to instruct police recruits on the reasonableness of stops and searches on the basis of the social science research pertaining to racial stigma. The idea that

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[378] *Cf.* E. Bibb-Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning and Zoning Comm'n, 888 F.2d 1576 (11th Cir. 1989) (upholding administrative process leading to siting of private landfill that African-American plaintiffs claimed had been motivated by discriminatory purpose).

[379] A number of commentators have argued that the movement toward transracial adoption reinforces negative myths about African-American families and parenting. *See, e.g.*, Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 94–97 (1993–94) (outlining negative effect of discourse in foster care and adoption cases). *But see* Karst, *supra* note 52, at 349 (rejecting argument that transracial adoption necessarily stigmatizes African-American families as unfit). In a stigma-conscious agency, policymakers would be encouraged at least to consider such arguments before making an adoption policy. This said, it is not at all clear to me that the structured analysis I offer in this Part, *see infra* Part IV.B.2, would result in a conclusion that policies that promote transracial adoption necessarily stigmatize African Americans, especially where the effect of such policies is to promote overall acceptance. For more on the transracial adoption debate, see generally R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998) (proposing eliminating consideration of race preferences of adoptive parents in placing children); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Transracial Adoption*, 139 U. PA. L. REV. 1163 (1991) (outlining policies and empirical data on race-matching in adoption placements).

racial stigma affects our cognitive processes in a way that makes racialized decisionmaking seem objective or rational arguably calls much of the prevailing wisdom about the potential dangerousness of certain individuals and who should reasonably be considered a law enforcement threat into doubt.[380]

Finally, policymakers, unlike judges, are in a position to adopt aggressive strategies to reverse the dynamics that lead to and perpetuate racial stigmatization. They could, for example, attempt to reduce the incidence of both public and private discrimination through a direct campaign to educate the citizenry about the connection between stigmatic meaning and the subordination of racial minorities. This might take the form of programs designed to inform people about the social and historical context from which racial stigma gets its meaning, or the form of research detailing how racial stigma operates. It could also entail drawing greater public attention to the huge disparities that exist among racial minorities and nonminorities,[381] as racial stigma often prevents those it affects from recognizing such inequities as abnormal or out of the ordinary. The truth of the matter is that policymakers would have a range of possible solutions available to them in this area.

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[380] *But see* R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003) (arguing that racial profiling may be rational and that policymakers should allow it to continue in context of illicit drugs). Here, I mean to address individual choices as well as those made at a policy level. The presumption is that so-called rational discrimination—e.g., use of race as a proxy in areas such as law enforcement on the basis of statistical evidence or support—is permissible because it relies on objective, non-biased factors. *See* Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2387 (2003) (discussing statistical approach to decisions that use race as proxy). But the information on racial stigma presented in this Article arguably calls this into question, along with the situation in which an individual crosses the street because of assumptions about the dangerousness of a passerby. Take the example of law enforcement policies. To the extent that there are statistics indicating the dangerousness of particular communities, it would be fair to say that on some level they reflect historical biases. *See supra* Part II.B.4. It also seems true that continued reliance on such statistics would also lead to certain predetermined results, not to mention reliance on faulty information and bad decisionmaking—such as the failure to adequately police white crime—on the part of law enforcement officials. *See* Moran, *supra*, at 2887–88 (discussing danger of "statistical discrimination" reinforcing social exclusion). This strikes me as decidedly "irrational." Moreover, I must confess that the "rational" discrimination response to the kinds of scenarios described in this Article seem to be ultimately beside the point. It simply reconstructs the intentional discrimination debate I reject here in a different way. Where a "rational" policy imposes a stigmatic or citizenship harm, it must be regarded as necessarily suspect, rather than presumptively valid. *See generally* Samuel R. Bagenstos, *"Rational Discrimination," Accomodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003) (arguing that otherwise "rational" decisionmaking is open to challenge when resulting in discriminatory effects).

[381] *See supra* notes 4–11 and accompanying text.

That said, I think it is imperative that attention be focused on the role that courts can play in addressing some of the harms imposed by racial stigma.[382] First, unlike policymakers, courts already have a great deal of experience in thinking about matters of racial stigma.[383] Although the strategies employed by courts in this area thus far have largely fallen far short of the mark,[384] the fact that judges have an obligation to consider the effects of racial stigma makes them a logical, if not the best, place to focus preliminary efforts to eliminate or at least minimize the incidence of racial stigma.

Second, there is good reason to think that judicial action in this area could lay the foundation for policy efforts down the line. The social changes which occurred subsequent to the Supreme Court's decision in *Brown* are good evidence of the way in which the law can

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382 I focus on federal courts in this Article, but state courts could also apply my analysis under their respective state constitutions. In fact, to the extent that a state constitution contains or has been interpreted to encompass more expansive protections than the U.S. Constitution, it might even be easier for state courts to address stigma problems in their cases. *Compare, e.g.*, State v. Russell, 477 N.W.2d 886 (Minn. 1991) (holding that punishment differentials for drug violations involving crack and powder cocaine violated state constitutional equal protection guarantees because of disparate impact on minorities), *with* United States v. Clary, 34 F.3d 709 (8th Cir. 1994) (holding that punishment differential for cocaine possession did not constitute equal protection violation under Fourteenth Amendment).

383 *See supra* Part III. For examples of lower federal court decisions addressing issues of racial stigma, see, for example, Anderson v. Kane, No. 97-35386, 1998 WL 416499 (9th Cir. June 15, 1998) (unpublished opinion) (considering employment claim that woman denied tenure was unfairly stigmatized as racist); Contractors Ass'n of E. Pa., Inc. v. City of Phila., 91 F.3d 586, 597 (3d Cir. 1996) (noting that race-based classifications carry risk of stigmatic harm in evaluating constitutionality of city ordinance creating set-aside for black subcontractors); Smith v. City of Cleveland Heights, 760 F.2d 720, 721–25 (6th Cir. 1985) (holding that alleged racially stigmatic effects gave plaintiff standing to challenge housing policy designed to limit percentage of African Americans in community); Kromnick v. Sch. Dist. Of Phila., 739 F.2d 894 (3d Cir. 1984) (concluding, inter alia, that school district reassignment program did not impose risk of racial stigma); Vasquez v. Salomon Smith Barney, Inc., No. 01 CV 2895, 2002 WL 10493 (S.D.N.Y. Jan. 4, 2002) (unreported decision) (considering plaintiff's claim that she suffered stigmatic injury because of discrimination in employment); Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 375–77 (W.D. Ky. 2000) (discussing arguments about reemergence of racial stigma in granting dissolution of desegregation decree); Wash. Park Lead Comm., Inc. v. United States EPA, No. 2:98 CV 421, 1998 WL 1053712, at *2, *11 (E.D. Va. Dec. 1, 1998) (unreported) (concluding that residents of predominantly African-American housing project had stated sufficient claim under Thirteenth Amendment for racially stigmatic harm). For state cases involving claims of racial stigma, see, for example, Hill v. State, 827 S.W.2d 860, 873 (Tex. Ct. App. 1992) (rejecting view that no stigma results from prosecutorial use of race as proxy for juror objectivity in jury selection process); Taylor v. Metzger, 706 A.2d 685 (N.J. 1988) (holding that racial slurs intensify effects of racial stigmatization and may satisfy emotional harm requirement under doctrine of intentional infliction of emotional distress).

384 *See supra* Part III.

influence community norms and attitudes, particularly in the area of race.[385]

Finally, we now have resources that can be employed in thinking about the role that judges should have in this area. Legal scholarship produced in the race area, while it does not speak directly to all of the issues laid out in this Article, offers helpful insights into what an approach to judging in this context might look like. I examine this scholarship in the Section that follows.

A. Differing Accounts of Racial Injury and Meaning

When discussing issues of race and equality, legal scholars have often employed the concept of racial stigma.[386] But relatively few theories purport to address racial stigma as anything more than a side note or offer ideas that bear specifically on our project here. Two articles, however, present notable exceptions.

1. Paul Brest's Stigma Theory

Professor Paul Brest's 1976 article, *In Defense of the Antidiscrimination Principle*,[387] represents one of the earliest and perhaps still best-regarded treatments of the problem of racial stigma.

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[385] *See* Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 173, 174–77 (1994) (discussing role of *Brown* in affecting change in society and law); John Charles Boger, Mount Laurel *at 21 Years: Reflections on the Power of Courts and Legislatures to Shape Social Change*, 27 SETON HALL L. REV. 1450, 1469 (1997) (defending *Brown* as inspiration for civil rights activists, even though it did not result in "the immediate transformation of the racial composition of Southern schoolrooms"); Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the* Brown *Case*, 36 WM. & MARY L. REV. 665, 668 (1995) (suggesting *Brown* "changed how we think about the society we live in," even though it did not achieve its full promise). *But see* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 157–69 (1991) (suggesting that decision in *Brown* may simply have reflected positive changes in society rather than causing them). The Court's decision in *Plessy* provides a less celebrated illustration of the same point. Although the decision in *Plessy* by no means started the wave of Jim Crow legislation in the South, it certainly permitted such laws to thrive by sending a message to state and local governments that the unequal treatment of African Americans was permissible in public facilities and accommodations, education, transportation, etc. *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (expressing view that legislation was powerless to change racist attitudes because such attitudes were instinctive and thus natural).

[386] *See, e.g.*, CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 121–41 (1997) (discussing claims of racial stigma in affirmative action debate); Caldwell, *supra* note 46, at 95–98 (referring to black stigma in discussing barriers to multiracial civil rights movements); Sunstein, *supra* note 46, at 2439–41 (discussing racial stigma in connection with problem of caste); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996) (using stigma to discuss race in legal workplace).

[387] Brest, *supra* note 27.

Writing in the wake of *Washington v. Davis*,[388] Brest explained and defended the Supreme Court's adoption in that case and in others of a judicial rule disfavoring only those classifications designed to discriminate on racial stigma grounds. For Brest, the Court's antidiscrimination principle served a dual purpose: preventing race-dependent defects in government processes and "prohibit[ing] . . . race-dependent decisions that disadvantage the members of minority groups."[389] But, for him, the stigma-based purpose was most important. Cases such as *Strauder* and *Brown*, in Brest's view, demonstrated—as I argue in Part III—that the prevention and elimination of the racial stigmatization of African Americans and other minorities lay at the heart of the purposes that the Fourteenth Amendment was enacted to achieve.[390]

The definition of racial stigma employed under Brest's theory of antidiscrimination law was similar to the psychological harm-based definition employed by the Court in *Brown*.[391] Racial stigma was constitutionally problematic because it imposed psychological harm on African Americans and other minorities by communicating the degrading message that they were inferior to Whites.[392] Brest recognized that racial classifications often also resulted in the deprivation of concrete benefits, but he maintained that the imposition of stigmatic harm, because of its cumulative effects, raised the greatest concern under the Constitution:

> Often, the most obvious harm is the denial of the opportunity to secure a desired benefit—a job, a night's lodging at a motel, a vote. But this does not completely describe the consequences of race-dependent decisionmaking. Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior. Moreover, because acts of discrimination tend to occur in pervasive patterns, their victims suffer especially frustrating, cumulative and debilitating injuries.[393]

Although he did not have the benefit of the social science research discussed in Part I, Brest appreciated the extent to which racial stigmatization results in increased racial disparities and disadvantage. Whereas discrimination on grounds unrelated to race resulted in individual incidences of harm, discrimination on the basis of race almost always "combine[d] into a systematic and grossly ineq-

388 426 U.S. 229 (1976).

389 Brest, *supra* note 27, at 2.

390 *See id.* at 8–11.

391 Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

392 Brest, *supra* note 27, at 8–9.

393 *Id.* at 8.

uitable frustration of opportunity" for minorities.[394] Because he could envision few bases on which race-dependent policies carrying the risk of such harm could be justified, Brest argued that the Court was right to apply strict scrutiny in cases involving explicit racial classifications and otherwise discriminatory policies—i.e., race-based generalizations that were unlikely to serve legitimate, race-neutral purposes. Treating racial classifications as presumptively invalid was the best way to "guard[ ] against the stigmatic and cumulative harms of race-dependent decisions."[395]

However, policies that were "colorblind" but nevertheless had a disparate or potentially stigmatizing racial impact were not subjected to review under Brest's stigma theory. Brest argued that using a disparate impact test posed too great a risk of invalidating policies and programs that actually served a valid purpose.[396] In this respect, his theory was consistent with Justice White's approach in *Davis*, where the Justice declined to import the disparate impact test applied in the Title VII context to constitutional cases and held instead that some evidence of discriminatory intent or motive had to be presented before strict scrutiny could be applied.[397] In contrast to the antidiscrimination principle, Brest argued that "a presumption prohibiting all decisions that stigmatize or cumulatively disadvantage particular individuals would affect an enormously wide range of practices important to the efficient operation of a complex industrial society" and, moreover, would be difficult for courts to apply.[398] The implication of his view is that in a case in which discriminatory motive is not immediately apparent, the balance is best struck against the minorities who stand to be stigmatized. Without concrete evidence of the bad intent of the government actor involved in developing the policy bearing a disparate impact, the possibility of psychological harm was simply not enough to recommend a more aggressive judicial approach in all cases or, put differently, to assign moral culpability for discriminatory behavior to a government actor under the intent standard adopted in *Davis*.

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394 *Id.*

395 *Id.* at 15.

396 *Id.* at 11.

397 *See* Washington v. Davis, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would . . . perhaps, invalidate, a whole range of . . . statutes that may be more burdensome to the poor and to the average black than to the more affluent white."); *see also* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (invalidating employment policies with disproportionate racial impact that cannot be justified by job-related purpose under Title VII).

398 Brest, *supra* note 27, at 11.

2. *Charles Lawrence's Theory of Unconscious Racism and Cultural Meaning*

Professor Charles Lawrence's pathbreaking article, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*,[399] is easily one of the most influential articles looking at questions of race in the law in the last few decades. It responded to the notion, reflected in *Davis* and Brest's article, that only cases involving discrimination that is plainly intentional—i.e., facially discriminatory—warrant heightened scrutiny. Although Lawrence discussed Brest's theory and racial stigmatization more generally at various points in his article, he was principally concerned about "unconscious racism," suggesting that it often accounted for racial injury in the United States.[400] Lawrence's work, nevertheless, is directly relevant to this discussion of racial stigma.

In contrast to Brest, who used a stigma theory to explain and justify the need for strict scrutiny in a limited category of cases, Lawrence focused on an earlier moment in constitutional analysis: the identification of a racial classification. His project was to demonstrate, contrary to prevailing thought, that policies disproportionately affecting racial minorities might carry evidence of the consideration of race in official decisionmaking such that strict scrutiny should apply.[401] He referred to this as a process defect.[402] Lawrence accomplished this through the then-unorthodox approach of turning to the psychoanalytic theory of Sigmund Freud and the work of cognitive psychologists regarding the nature of human motivation and personality.[403]

Based on this work, Lawrence explained that racism was not, as the Court's jurisprudence suggests, a matter of conscious thought or motive. Rather, to a large extent, it was a "product of the unconscious."[404] He observed that "[w]e attach significance to race even when we are not aware that we are doing so."[405] Unconsciously or tacitly held racist beliefs, Lawrence argued, could thus explain a policy with a racially disparate impact. Such a policy, he argued, could be discriminatory such that it operated to disadvantage African Ameri-

399 Lawrence, *supra* note 18.

400 *Id.* at 321–23.

401 *Id.* at 354–58.

402 *Id.*

403 *See id.* at 328–39.

404 *Id.* at 330.

405 *Id.*

cans and other minorities, even though it was not explicitly race-based or intentionally discriminatory.[406]

For Lawrence, the social science literature documenting the prevalence of unconscious racism in human interactions called into serious doubt the utility of the search for discriminatory intent under cases such as *Davis*.[407] By definition, a narrow focus on intentional wrongdoers omitted a large category of likely perpetrators—those whose unconscious behavior operated to harm minorities. Thus, Lawrence urged a concentration on both unconscious and conscious racism in equal protection cases, and suggested that such an emphasis could be justified by the twin notions of process defect and stigmatic harm, concepts that resemble the underpinnings of Brest's antidiscrimination principle.[408] Unconscious racism constituted a process defect because it had the potential to distort the policy choices made by government officials.[409] Similarly, Lawrence maintained, it also imposed stigmatic harm—principally defined here as the imposition of psychological harm and degradation—by forcing a member of a minority group to "wear a badge or symbol that degrades him in the eyes of society."[410] In contrast to Brest, Lawrence maintained that the fact that such degradation might have been imposed unknowingly did not obviate the need for strict scrutiny, or, for that matter, excuse the perpetrator of moral culpability. He took the view that strict scrutiny was required whenever there was evidence that unconscious racism had influenced decisionmaking.[411]

Lawrence proposed the application of what he called the "cultural meaning" test to assist courts in identifying when strict scrutiny was warranted by the presence of unconscious racism even though the policies at issue were ostensibly race-neutral.[412] Under that test, courts would regard "an allegedly racially discriminatory act as the best available analogue for and evidence of the collective unconscious that we cannot observe directly."[413] Their task would be to assess government decisionmaking "to see if it conveys a symbolic message to which the culture attaches racial significance."[414] A court would first complete a review that involved considering the social and historical context surrounding the case. If a court determined that a signifi-

406 *Id.* at 358.
407 *Id.* at 343–44.
408 *Id.* at 354–55.
409 *Id.* at 347–49.
410 *Id.* at 351.
411 *Id.* at 356.
412 *Id.* at 355–56.
413 *Id.*
414 *Id.* at 356.

cant part of the community would see the challenged action or policy as racially motivated, it would "presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers."[415] It would then subject the challenged government policy or action to strict scrutiny, just as if the consideration of race had been evident on its face.[416]

B. (Re)Considering Racially Stigmatic Harm and Meaning

1. Taking a New Look at Old Accounts

As the previous Section underscores, this Article joins a long-standing conversation about the nature of racial injury and harm. Brest and Lawrence—each in their own way and time—concerned themselves with the project of bringing legal rules into accord with prevailing understandings about the operation of race in society. This is my project as well. In this Section, I advance a structured legal analysis that courts can apply in trying to identify racially stigmatic meaning, a problem I identified in earlier Sections as the source of racial injury. This analysis, along with the theory of racially stigmatic injury and harms developed in previous Sections, draws on aspects of work by both Brest and Lawrence, but particularly that of Lawrence. As the earlier discussion and narratives reveal, the focus on unconscious cognitive processes in his work has been central to mine as well.

Despite this and other points of synergy, the work of trying to elucidate further the nature of racial injury means that there are also significant differences between my project and those of Lawrence and Brest. I briefly note these points of divergence before moving on to a discussion of the analysis that I advocate for courts. They bear on the choices I make in that connection and help to explain why neither Brest nor Lawrence's theory, in my view, offers a viable lens through which to view issues of race and racial stigma in the long-term.

a. Stigma as the Source of Racial Injury

The notion, articulated in earlier Sections, that racial stigma constitutes the principal source of racial injury in the United States marks an important difference between my theory and that advanced by Lawrence. I agree with Lawrence that the Court's current focus on intentional discrimination cannot adequately address the way that race and racial injury operate in this society. My view diverges from his as to what constitutes the principal source of racial injury. Whereas Lawrence argues that unconscious racism and the negative

415 *Id.*
416 *Id.*

meanings it generates explain racialized behavior, I maintain that the dehumanizing meanings associated with race itself, and not just racialized behavior per se, are the source of the harm. This formulation, in my view, better explains how the cognitive processes so central to both Lawrence's and my theories get triggered and, more importantly, the cumulative disadvantage that perpetuates the color line. In recognizing the "pervasive patterns" and "cumulative and debilitating injuries" associated with racial stigma, Brest came close to understanding this point.[417] But his focus on the stigmatic harms that flow from intentionally discriminatory conduct, to the exclusion of those that attend merely unconscious behavior or policies carrying a disparate impact, ultimately makes his theory of harm problematic.[418] Only an approach to racial stigma that acknowledges both individual and group harms, in addition to the citizenship harms discussed in Part I, can provide the foundation for a coherent judicial analysis of stigmatic meaning and harm.

b. Rejecting a Focus on Perpetrators

Another point of divergence relates to the singular focus, under my theory, on those most directly affected by racially stigmatic harm rather than on those who perpetrate it.[419] Both Lawrence and Brest adopt a focus on the perpetrators of racialized behavior that I believe is misguided. Underlying the intentional discrimination model of harm, (or, as Alan Freeman has called it, "the perpetrator perspective"[420]) is the assumption that the "world [is] composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity."[421] Because of this assumption, Freeman argues, "the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular

417 Brest, *supra* note 27, at 8.

418 This, by the way, is a limitation of Lawrence's approach as well. Because he sought principally to respond to *Davis*, Lawrence gives little indication of how his theory might enhance judicial decisionmaking in the context of cases expressly involving discriminatory motive. *See* Lawrence, *supra* note 18.

419 *See* Fiss, *supra* note 163, at 153–55 (proposing focus on group disdvantage or subordination in equal protection cases). Group-based harm or disadvantage approaches, admittedly, have never been fully embraced by courts. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1473 n.10 (2004) (citing sources recognizing failure of equal protection law to embrace antisubordination or group-based focus).

420 Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978).

421 *Id.* at 1054.

actors."[422] Lawrence arguably attempted to respond to the limits of this approach by focusing on the social dynamics and cognitive processes that lead to unconscious racism.[423] But his theory never fully moves to a focus on those victimized by the perpetuation of negative racial meaning, a focus that I think is required by the Fourteenth Amendment. Under the approach I advocate, this preoccupation with perpetrator conduct or behavior is replaced with a focus on those burdened by it.[424]

c. Shifting from Motive to Harm

In conjunction with the move away from a perpetrator-based perspective, my theory would adopt a focus on stigmatic harm instead of on the discriminatory motive emphasized by Brest and Lawrence.[425] My approach has several advantages over current theories emphasizing motive. First, it would ensure that, to the extent that courts engage in discussions about the morality of adopting particular rules, those conversations would focus first and foremost on the burden borne by the racially stigmatized, not on the impact that a rule would have on institutions that may themselves work to perpetuate racial stigma. Second, by eliminating the need to decide whether someone can be held at fault for a policy that conveys a stigmatizing meaning, such a rule would help change the way that people talk and think about race in the United States. Rather than attempting to escape blame, nonminority individuals would be free to explore the ways in which their behavior and/or thought processes exacerbate complex stigma dynamics.[426] Third, the approach would facilitate long-term societal change. As individuals became attuned to the historical connections between stigmatic meaning and enduring racial disparities,

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422 *Id.*

423 *See supra* Part IV.A.2.

424 *See* Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. MICH. J.L. REFORM 247, 284–88 (2003) (advocating focus on community members actually affected by expressive harms); *see also* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–26 (1987) (proposing that critical legal scholarship should be informed by experiences and perspectives of people of color).

425 It is true that Lawrence's project, with its recognition of the harms endured by racial minorities, arguably endeavors to move courts' focus away from the perpetrators, *see supra* notes 410–416 and accompanying text, but it is ultimately unsuccessful. His cultural meaning test remains fixed on the project of demonstrating to courts that a process defect has occurred—i.e., that a government decisionmaker has, whether consciously or unconsciously, considered race in some way. *See id.*

426 Such an approach would have benefits for the racially stigmatized as well. A recognition of the serious harms imposed by racial stigma would arguably not only affirm the experiences of racially stigmatized individuals but make serious efforts to eliminate the social and economic disadvantage that established the contours of the color line possible.

increased opportunities to change institutions and structures that operate to further subordinate minorities would emerge.

d. Concentrating on the Full Range of Racially Stigmatizing Acts and Policies

Finally, the theory of stigmatic meaning I advance in this Article is much broader in scope than the theories advocated by Brest and Lawrence. Both Brest and Lawrence concentrated on only one type of potentially racially stigmatizing policy. Lawrence, because of his concern with the rule in *Davis,* looked principally at policies having a disparate impact. Brest, in contrast, concerned himself principally with policies involving intentional discrimination. In my view, neither approach alone makes sense. Improvements in the way that courts address the problem of racial stigma only can be made through the application of a uniform theory and approach to stigmatic harm. My theory therefore addresses the stigmatic harm flowing from cases involving both intentionally discriminatory policies and programs that have a disproportionate racial impact. It attempts to fill a gap in current race jurisprudence by providing courts with a model for the systematic and principled analysis of the effects of racial stigma.

2. A Structured Analysis of Racially Stigmatic Harm and Meaning

Following the analysis in Part III, I argued that a more comprehensive judicial approach to racial stigma is needed if courts were to provide an adequate response to racially stigmatic injury.[427] Toward that end, I propose a structured analysis for detecting acts and policies that have racially stigmatic meaning and effect—as defined in Part I—that courts would be obligated to apply in constitutional cases involving so-called intentional discrimination, as well as those concerning so-called disparate impact. While not unconcerned with the type of psychological harm at issue in cases such as *Brown*, the analysis focuses on identifying stigmatic harm that operates at a group level to prevent opportunities for full participation and involvement by racial minorities. It draws on important insights provided by those concerned with expressive harms[428] and by Lawrence's cultural meaning test. For reasons mentioned above, however, the analysis I advance differs from Lawrence's work in particular. Its principal focus would be on averting racially stigmatic harm that interferes with

427 *See supra* Part III and introduction to Part IV.

428 *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1527–45 (2000); Godsil, *supra* note 424, at 284–88 (arguing strict scrutiny should apply whenever governmental action sends discriminatory message as determined from perspective of affected community member).

meaningful citizenship, not on the motives or unconscious behavior of so-called perpetrators.[429]

Moreover, I think my proposed analysis is better suited to the particular competencies of judges than other approaches. Courts employing my approach still would function, to use Lawrence's phrase, as "cultural anthropologist[s]" in the sense that they would be responsible for interpreting the meanings associated with race at a given time and place.[430] But courts would be obligated to follow a fairly specific protocol for assessing racially stigmatic meaning, based on the insights we gained into the connection between context and stigmatic meaning[431] and the use of selective contextualization by the Justices.[432] The purpose of this analysis would not be to define racial stigma generally. As I have indicated, social science research has already done that.[433] The application of my analysis would, instead, focus on identifying the negative citizenship effects of racial stigma. To this end, it is designed to provide a much-needed evidentiary basis for drawing conclusions about the meaning or effect of a challenged policy or program and would result in more consistent decisionmaking.[434]

So how would this work as a practical matter? In essence, judges would be required to gather information that would provide insight into the likelihood of racial stigmatization in a given case. The first step in the process of preparing what would effectively be a racial impact statement[435] would be to undertake, as judges already typically do, an inquiry into the context surrounding the constitutional provision they are interpreting—most likely the Fourteenth Amend-

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[429] My focus in this Article, as indicated above, is on constitutional cases. An analysis of the sort I propose, however, could be applied with good effect in the statutory context. *See, e.g.*, Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003) (suggesting structured analysis for Title VII cases).

[430] Lawrence, *supra* note 18, at 356.

[431] *See supra* Part II.

[432] *See supra* Part III.

[433] *See supra* Part I.A.

[434] As we saw in Part III, an evidentiary foundation for decisionmaking regarding racial stigma has been lacking in the Court's cases. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217 (1971) (concluding that swimming pool closings imposed no stigma on African Americans without considering any evidence of policy's actual impact).

[435] I have in mind something roughly analogous to the environmental impact statement required before a construction project or an initiative likely to have a negative impact on the environment can go forward. I am not, of course, suggesting that courts take on the sort of tasks performed by administrative agencies. I mean only to say that the complete analysis should be one that ultimately gives the court a sense of whether a challenged policy imposes a race-based citizenship harm in violation of the Constitution. The analyses currently employed by courts rarely, if ever, produce information of this sort.

ment.[436] It would not be enough under this prong of the analysis, however, merely to make a cursory reference to the origins of the relevant provision. Courts applying the analysis would, for example, be expected to review the ratification debates pertaining to the constitutional provision at issue and to pay special attention to those portions of the legislative history that might reasonably be thought to bear on the matter they have been asked to resolve. A court considering the stigmatic effect of racial profiling by law enforcement agencies, for example, might look at the extent to which lawmakers debating the Fourteenth Amendment were concerned with eliminating the differential punishment or prosecution of Blacks at the time of ratification. Further, a court might look to see whether the laws in effect prior to the enactment of the constitutional provision before them shed any light on the meaning of the provision or on the meaning that should ultimately be imputed to the challenged policy. The notion here is not that a court will emerge from this portion of the inquiry with a definitive understanding of all the issues and concerns that led to the adoption of that provision. In fact, it is quite unlikely that a reading of legislative history here would be dispositive in any way. The goal is simply to ensure that courts begin their review in a manner that is grounded in the origins, however muddled, of the constitutional provision they are being asked to interpret.

Following consideration of the legislative context, a court would then look at the social and historical context implicated by the challenged policy or action. At this stage, the objective would be to identify historical analogues for the policy or program being challenged, past statutes or practices that might lead us to think that the policy or program might convey a stigmatic meaning in the present. Take the example of statutes that punish offenses involving crack cocaine more severely than those involving powder cocaine.[437] A court considering a lawsuit contesting the constitutionality of such statutes would look

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436 *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 306–07 (1879) (discussing context of adoption of Fourteenth Amendment).

437 The disparate impact of such statutes has been challenged as a violation of equal protection. *See, e.g.*, United States v. Clary, 34 F.3d 709 (8th Cir. 1994) (considering equal protection challenge to crack cocaine statute based on disparate impact on African Americans); Dvorak, *supra* note 293, at 617–21 (citing cases). The constitutional significance of this disparity has been a source of academic debate. *Compare* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1273 (1994) (arguing that disparity evidences no equal protection violation because "[a]lthough blacks subject to relatively heavy punishment for crack possession are burdened by it, their black law-abiding neighbors are presumably helped by it"), *with* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1298–1301 (1995) (arguing crack cocaine disparity should raise equal protection concerns as virtually all of burden is imposed on Blacks).

to some of the history regarding differential punishment and prosecutions of African Americans discussed in Part II. The history of criminal statutes that punished Blacks for behavior for which Whites were never sanctioned or that were designed to disenfranchise Blacks from formal citizenship activities such as voting or jury service through incarceration would be particularly relevant here. A court exploring social and historical context might also find it important to invite or permit testimony from historians, criminologists, or sociologists on the stigma and citizenship effects of these earlier statutes.[438]

Next, a court would focus its attention on the current context of the policy or program being reviewed. To ensure that considerations bearing on the matter, but perhaps not directly related to stigmatic meaning, could be contemplated by courts, the range of issues that could be introduced under this prong would be fairly broad. Evidence of discriminatory treatment under a policy or even its disparate impact would, of course, be relevant here. A court considering the constitutionality of a crack cocaine statute might, for example, look at statistics providing insight into the application of the statute in the surrounding area or perhaps at the national level.[439] But it would not be limited to such an analysis.[440] Indeed, a focus only on such statistics at this stage would necessarily be incomplete. The objective here is for the court to obtain a full understanding of the impact, particularly at a citizenship level, of the allegedly stigmatizing policy. In this connection, it might seek anecdotal or expert testimony on the nature of racial stigma in our society or, more directly, on the policy's effect on racial minorities and the communities in which they live.[441] A court reviewing the constitutionality of a city referendum on a development project that would build low-income housing units in middle- and upper-income neighborhoods, for example, might try to assess the risk of racially stigmatic meaning imposed by the referendum—which is thought by some to be an effort to exclude African Americans from

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[438] For an example of a court that took a similar approach in reviewing one of these crack cocaine statutes, see the Eighth Circuit's discussion of the district court's opinion in *Clary*, 34 F.3d at 711–13.

[439] *See, e.g.*, United States v. Clary, 846 F. Supp. 768, 786 (E.D. Mo. 1994) (examining statistical evidence that impact of crack cocaine statute primarily borne by African Americans).

[440] In fact, a showing of disproportionate impact would not be a necessary precursor to the application of my proposed analysis. There will be some facially neutral policies, for example recent welfare reform statutes, that may carry some risk of stigmatic effect, despite the fact that, in terms of actual numbers, they have no racially disproportionate impact.

[441] *See, e.g.*, *Clary*, 34 F.3d at 710–11 (discussing district court's decision to listen to testimony about profound impact of crack statute—and its ten-year mandatory sentence—on African Americans).

white neighborhoods—by talking to those city residents whom the referendum might exclude or by inviting testimony from minorities excluded from other neighborhoods by measures of that sort.[442] In hearing such testimony, the court would be concerned with the nature of the message the referendum sent to residents about the excluded minorities' fitness for membership in the community.

Finally, courts would be required to consider the likely effect—at a citizenship level—of the policy in the future. Here, too, statistical or comparative analysis demonstrating a similar policy's long-term impact might be useful. The court might, through expert reports or testimony, also try to get a sense of the policy's chances of increasing racial disadvantage in the long-run. In a suit challenging the placement of an industrial park, for example, the projected long-term environmental effects of the park might be relevant to the extent they could contribute to negative externalities and meanings associated with the predominantly Latino community in which it was to be placed. In a case like *Shaw v. Reno*,[443] which might be said to involve competing claims of racial stigma—those of the white voters on one hand and those of the black voters whose voting strength the majority-minority districts were designed to enhance on the other—the court would try to assess the effects of the policy on Whites as well as on minority voters. In so doing, however, it would necessarily take into account the different histories and contexts affecting these different groups of voters. Questions relating to reductions in minority voting strength or political influence, for example, are ones the court would try to explore.[444]

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[442] Referendums of this sort have, unfortunately, become increasingly common. *See generally* Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 421–62 (1999) (describing implications of ballot box initiatives on minorities' civil rights and citizenship status). In a case decided just last year, the Court upheld the constitutionality of such a measure. *See* City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003). In concluding that the referendum was not racially discriminatory, the Court emphasized the race-neutral nature of the procedures followed by the city in allowing for a city-wide vote on the proposed housing project and the lack of hard evidence of discriminatory intent on the part of city officials. *Id.* at 195. While such considerations would not be irrelevant under the stigma analysis I propose, they would certainly not be dispositive of the case. A court would, among other things, be required to consider the impact of the referendum and delayed development project on minority residents, whether through conducting an inquiry into the impact other such initiatives have had on minorities or by listening to actual testimony from affected individuals, as I suggest above.

[443] Shaw v. Reno, 509 U.S. 630 (1992).

[444] At this phase of the analysis, the *Shaw v. Reno* Court also would have been required to test its conclusion that the use of majority-minority districts would lead politicians to ignore the interests of those in the minority or to treat all residents of the district as if they had the same interests by procuring testimony on this point or perhaps by looking at the

In a case where the challenged policy had only a disparate impact, a court applying this four-part analysis would determine whether, in light of all the circumstances, the policy conveyed or carried a risk of conveying negative stigmatic meaning. If a policy carried such meaning, the court would apply strict scrutiny. Where the act or policy at issue involved a racial classification such that the application of strict scrutiny was already mandated, a court would consider evidence of racially stigmatic meaning in determining whether a policy was narrowly tailored. A policy that, for example, expressly encouraged police officers to increase *Terry* stops only in African-American neighborhoods on a theory that African Americans are more likely to engage in crime would likely not be narrowly tailored because of the negative meaning it communicates about members of that community and the fact that the police could arguably achieve their goals through other means.[445] Similarly, a policy imposing an arbitrary quota on the number of Whites who could be hired for a construction project might raise concerns under the analysis.[446]

Under Lawrence's cultural meaning test, a court could not apply strict scrutiny unless it concluded that a broad consensus existed in the community about the meaning of the policy. Such a requirement, however, would not apply under my proposed analysis. Where the focus is on the stigmatic harm to those burdened by a policy, rather than evidence of unconscious racism or intent, the need for such showings is minimal, though obviously not irrelevant. And in any event, the fact that a community lacked consensus on the meaning communicated by a policy could not be dispositive.[447] Greater weight

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voting records of elected officials. *Cf. id.* at 648 ("When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.").

[445] Because courts will be applying strict scrutiny, there may be instances in which a policy which carries some stigmatic effect might be permitted to stand because it serves a compelling governmental interest. I expect such circumstances to be rare, however. Policies with even moderate stigmatic effect would be hard to justify.

[446] I make this point to emphasize that the application of my proposed analysis would by no means be limited to cases involving claims of the stigmatization of racial minorities. Courts could apply it to address claims of stigmatization made by Whites as well. Courts, however, would not be permitted simply to assert the stigmatization of nonminority plaintiffs in the absence of a history of such stigmatization, as the Supreme Court did in *Shaw v. Reno*, 509 U.S. at 643 (stating that race-based classifications stigmatize individuals of any race). An inquiry into the relevant social and historical contexts would also have to be carried out in such cases.

[447] On this score, the analysis I propose would arguably be much broader in scope than the cultural meaning test. Because that test turns ultimately on the consensus of community members who likely internalize the effects of stigmatization, it would arguably leave in

would be placed on the results of the detailed analysis. If it showed a serious risk of stigmatic injury, strict scrutiny would apply.

Likewise, courts applying my analysis generally would not be required to try to draw direct, causal connections between the general information of past discrimination they consider under the second prong of the analysis and the stigmatic harm or meaning alleged under prong three, the current context. Apart from being difficult to accomplish,[448] it is questionable whether such connections advance the focus on stigmatic harm I hope to encourage with the application of such an analysis. They are much more closely connected with liberal notions of morality and fault than anything else. The requirement that social and historical context be considered in a meaningful way by courts has far more to do with fostering the critical memory of our racial past than assigning blame, though such assignment may advance important goals in certain contexts. A case challenging a municipality's failure to correct racially stigmatizing conditions, for example, would necessarily require some proof of negligence, or, put differently, of the municipality's ultimate responsibility—despite the absence of what might traditionally be regarded as state action in this area—for the offending conditions.

C. *Applying the Analysis in Old Contexts*

Having set out the structured analysis I propose, I turn to how it would be applied in particular cases. More specifically, I look now to see whether it would produce a different result in two important Supreme Court cases: *Allen v. Wright*[449] and *Milliken v. Bradley*.[450]

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place some policies that carry racially stigmatic meaning and operate to exclude racial minorities as full participants in society.

[448] *See* LOURY, *supra* note 22, at 128; Fiss, *supra* note 163, at 145.

[449] 468 U.S. 737 (1984).

[450] 418 U.S. 717 (1974). In many ways, it would be reasonable to start our inquiry with *Washington v. Davis*, 426 U.S. 229 (1976), in part because it was a focus for both Brest and Lawrence. Because so many scholars have looked at *Davis*, however, another (re)analysis of that case would not add much to the project. For reasons previously articulated by Lawrence and others, I think it is clear that *Davis* would come out differently under the analysis proposed herein. Even in the absence of proof of bad motive, factors such as the past history of skills tests being used to imply black inferiority and deny minorities access to public goods; the symbolism of the police department in a community that has often been terrorized by law enforcement officials; the long-term exclusion of minorities from desirable jobs in both the public and private sectors; and the message sent by black exclusion from public positions that carry authority and power, would hint strongly at a risk of racial stigmatization and citizenship harm. *See, e.g.*, Lawrence, *supra* note 18, at 319–20 (discussing difficulty of proving discriminatory intent and arguing that "injury of racial inequality exists irrespective of the decisionmakers' motives").

1. *Allen v. Wright*

Brown v. Board of Education[451] makes clear that segregated schools impose a racially stigmatic harm on students that violates the Equal Protection Clause.[452] *Brown* confirms that, by placing its imprimatur on efforts to separate the races, the state communicates a negative expressive message about the relative worth of black and white students.[453] The question raised by *Allen* is whether the parents of excluded African-American students could also have standing to challenge the stigmatic harm imposed by the expressive message sent by giving tax-exempt status to single-race schools created to circumvent court-ordered school desegregation.[454]

Under the theory of racial stigma advanced in this Article, the *Allen* parents would have standing to sue as well as to pursue their substantive claims. In *Allen* itself, the Court rejected the plaintiffs' standing claim because it concluded that they had "not allege[d] a stigmatic injury suffered as a direct result of having personally been denied equal treatment."[455] But no showing of intentional discrimination would be required of the plaintiffs under the analysis proposed here. Nor would they be required to show that the actions of the Internal Revenue Service (IRS) in providing tax-exempt status to segregated private schools had deprived them of a specific public benefit. It would suffice for the parents to demonstrate that—given, inter alia, the history of government-supported efforts generally to deny African Americans basic public benefits and specifically to exclude them from educational opportunities—the challenged actions could communicate the negative message that they were "persons of lesser worth."[456] Such a message would, in and of itself, be adequate to secure standing.

When she wrote for the majority in *Allen,* Justice O'Connor suggested that a harm of this sort would be too "abstract" and would

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451 347 U.S. 483 (1954).

452 TRIBE, *supra* note 329, at 1477 (arguing that racial separation conveys "strong social stigma").

453 *See Brown*, 347 U.S. at 494.

454 The parents in *Allen* argued that the Internal Revenue Service actually supported continuing segregation through tax exemptions made directly to the private schools or indirectly through their tax-exempt sponsor organizations. They maintained that the provision of such exemptions violated the IRS's own regulations prohibiting discrimination on the basis of race and stigmatized them in violation of the Fourteenth Amendment. Finally, they argued that the government's actions denied their children the opportunity to obtain an education in a racially integrated environment. The Court held that they lacked standing for this last claim, primarily because the denial of this right, in its view, could not be traced to the IRS specifically. *See Allen*, 468 U.S. at 756–66.

455 *Id.* at 755.

456 *Contra id.* at 755–56 (arguing that granting standing on basis of stigmatic harm alone would overly expand standing).

automatically grant standing to "all members of the particular racial groups against which the Government was alleged to be discriminating."[457] Though broad, the stigma theory I envision for the courts is not as abstract and diffuse as this. If anything, the social science research regarding the cognitive processes associated with racial stigma gives us an opportunity to locate the effects of racial stigmatization in a particular policy or program better than we could have in the past, as it offers a way more concretely to tie stigma to specific programs and the behavior—intended or unintended—of particular individuals. Moreover, as Justice Brennan noted in his dissent in *Allen,* adopting a broad theory of racial stigma would not require us to do away with all of the traditional requirements regarding standing.[458] It would still be necessary for a plaintiff challenging a governmental action to demonstrate that he or she resided in the district or area where the offending policy operated.[459]

Under my analysis, the *Allen* plaintiffs would be entitled to the application of strict scrutiny in their case and would—assuming the interest asserted by the government principally concerned issues relating to administrative convenience and would therefore not be compelling—most likely also prevail on the merits of their stigma claim. The fact that the tax relief to the racially segregated private schools in *Allen* was generally indirect or unintentional would be irrelevant, as intent is not a prerequisite to a finding of racial stigmatization. The *Allen* parents would be able to make out a concrete case of racially stigmatic harm through the evidence of historical discrimination mentioned above and information about the negative citizenship effects the IRS's actions would have on both their current standing in the community and their future ability to develop the social capital and networks necessary for meaningful participation—socially, economically, politically, and otherwise—in society.

2. *Milliken v. Bradley*

Milliken v. Bradley[460] provides another example of a case that would come out differently under the theory and analysis of stigma I

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457 *Id.* Notably, the position Justice O'Connor took in *Allen* conflicts with the position she later took in *Shaw v. Reno* by recognizing the "analytically distinct" claim of the white voters. *See* Shaw v. Reno, 509 U.S. 630, 652 (1993).

458 *Allen*, 468 U.S. at 770–71 n.3 (Brennan, J., dissenting).

459 *Id.*

460 418 U.S. 717 (1974). *Milliken* is widely regarded as the death knell for serious desegregation efforts in American public schools. *See* Gary Orfield, *Turning Back to Segregation*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *Brown v. Board of Education* 1, 2 (Gary Orfield & Susan E. Eaton eds., 1996) [hereinafter DISMANTLING DESEGREGATION]. For a more detailed description of *Milliken*, see Susan E. Eaton et al.,

propose. There, no question existed as to whether a negative expressive message was communicated with respect to the plaintiffs in the case. No one doubted that the incidence of white flight and the exodus of nonminority children from Detroit public schools to those located in suburban school districts sent the message that the African-American children who remained in the Detroit system were defective in some way, or people to be shunned or avoided.[461] Instead, the issue to be decided was: Who could fairly be asked to bear the burden for remedying this state of affairs?[462]

The dynamic theory of stigma and subordination I propose in this Article would provide a basis for upholding the interdistrict remedy the Supreme Court rejected in *Milliken*.[463] Though the district court's finding that state and city public school officials had tried to impede racial integration would be relevant to a determination that the remedy imposed was properly tailored, it would not be dispositive. Similarly, the fact that the suburban districts were not linked directly to efforts to circumvent school segregation would not be determinative. Justice Burger's assertion in his opinion for the Court that, because "[d]isparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere," the "remedy [adopted by any court] must be limited to that system" simply makes no sense in a world that appreciates that racial stigma often occurs in the absence of any intentionally discriminatory acts.[464] A showing that the districts to be affected by the district court's multidistrict desegregation plan had drawn their boundary lines in a discriminatory manner or had somehow arranged for white students residing in Detroit to attend their schools would not be a prerequisite to relief under my proposed analysis.

Still Separate, Still Unequal: The Limits of Milliken II*'s Monetary Compensation to Segregated Schools*, *in* DISMANTLING DESEGREGATION, *supra*, at 143, 143–50.

461 *Milliken*, 418 U.S. at 734–35 (accepting finding that city and state had committed constitutional violations by impeding integration of schools); *see also id.* at 801–02 (Marshall, J., dissenting) (noting that white flight, as response to desegregation, risked re-establishing segregation).

462 *See id.* at 744–46 (discussing scope of remedy and holding it should be limited to district in which violations occurred).

463 *Id.* The stigma theory I advocate differs from the anti-subordination theory advanced by Ruth Colker and others in that it rests, at least in part, on social science insights into the effects of racial stigmatization. *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986). A stigma-based approach should not, however, be understood in any way to be at odds with a theory focused on subordination. Indeed, the stigma theory maps quite neatly onto theories of subordination. It provides a basis for understanding why race-based subordination occurs and how it is perpetuated.

464 *Milliken*, 418 U.S. at 746.

Because my analysis begins with the question of who is harmed, instead of who is at fault, the showing required to justify a remedy of the sort at issue in *Milliken* is entirely different from what the Court suggested in its opinion. To justify its remedy, the district court might have identified or asked the parties to submit historical evidence about the relationship between residential segregation and school segregation.[465] In addition, it might have invited anecdotal testimony[466] or empirical evidence about the current and future effects of white flight on predominantly urban communities and, in particular, on the resources and success of inner-city schools. Such an inquiry would enable the judge to go beyond the simplistic notion that black students can be advantaged simply by being in close proximity to white students and look at the concrete social,[467] economic, and political effects of wholesale withdrawal from urban communities. Above all, it would have kept the focus on the harms to which the *Milliken* students were being subjected.

On a record focused on harm, rather than intent, the systemic level at which racial stigma operates would have been more apparent.[468] Indeed, that record arguably would have made the multidistrict remedy at issue in *Milliken* seem not only appropriate, but *required.*[469] Under a stigma theory, judges would have an obligation

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[465] Justice Marshall's dissent in *Dowell* makes clear that there is often a direct relationship between residential segregation and single-race schools. Oklahoma City Public Schools, for example, at one time ensured that its schools would be race-segregated by relying on and encouraging strict segregation of the races in residential areas. *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 253, 264–65 (1991) (Marshall, J., dissenting).

[466] The introduction of such testimony would give courts a more accurate picture of the actual effect of a challenged program or policy. *See* Jamie L. Wacks, *A Proposal for Community-Based Reconciliation in the United States Through Personal Stories*, 7 VA. J. SOC. POL'Y & L. 195, 207 (2000) ("In addition to being valuable to the individual storyteller, the oral and public testimony of victims infuses history with real life experiences and enriches the national story that is being recorded."); *see also* Matsuda, *supra* note 424, at 324–26 (1987) (advocating focus on experiences and perspectives of people of color).

[467] *Cf.* Missouri v. Jenkins, 515 U.S. 70, 114–23 (1995) (Thomas, J., concurring) (critiquing notion that racially isolated schools are inherently inferior as misguided).

[468] *See supra* Parts I & II (discussing racial stigma and harmful effects thereof).

[469] This discussion of *Milliken* obviously raises the question of how liability would be assessed under a stigma theory and what the range of remedial options would be. I have intentionally set these issues aside in this Article, reserving them for future articles in which they can be explored in detail. It should be said, however, that I envision a fairly broad notion of liability, something approaching strict scrutiny. Strict liability seems most consistent with the notion that the intent of so-called perpetrators, though relevant, should not be determinative in assessing stigmatic effect. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 75 (5th ed. 1984) ("'Strict liability,' as that term . . . is commonly used by modern courts, means liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of duty to exercise reasonable care, i.e., actionable negligence. This is often referred to as liability without fault."). It also best reflects the seriousness of the risk of

to address citizenship harms of this sort and, because of the severity of the injury at issue, would have broad latitude to remedy it. Where the evidence or risk of stigmatization is significant, remedies that go outside district lines or that impose obligations upon individuals who cannot be shown to have acted with bad motive or intent would be permissible, so long as some meaningful connection between the affected district or individuals and the offending conditions could be shown, as was the case in *Milliken*.

D. Applying the Analysis in New Contexts

As illuminating as the exploration of old contexts and cases may be, it is even more important to understand how my analysis would work in new contexts, since the purpose of the approach is to provide guidelines for future efforts to combat the citizenship harms of racial stigma. In this Section, I therefore look at the application of the analysis in the context of both affirmative action in higher education and felon disenfranchisement. The former is an area involving the application of explicit racial classifications, while the latter involves a so-called race-neutral policy that has been shown to have a disproportionate impact on racial minorities.

I use the term "new" somewhat advisedly when talking about these particular contexts. I do not mean to suggest that concerns about racial stigmatization are, in fact, new to those selective institutions of higher education employing affirmative action in the admission of students or, more to the point, to those who oppose the consideration of race as a factor in admissions. Nor do I claim to be the first to raise the question of racial stigma in connection with state laws temporarily or permanently disenfranchising African Americans and other minorities. I refer to these contexts as "new" because in each case there has been an event or series of events that invites or calls for a deeper awareness and analysis of racial stigma and racially stigmatic effects than has heretofore been achieved in these areas. In the case of affirmative action, these events include the Supreme Court's recent decisions in *Grutter v. Bollinger*[470] and *Gratz v.*

citizenship harm and subordination imposed on the racially stigmatized in our society. *See id.* ("In general, strict liability has been confined to consequences which lie within the extraordinary risk whose existence calls for such special responsibility."). In keeping with the imposition of strict liability, I imagine, as the analysis of *Milliken* suggests, a fairly expansive range of remedial options for courts who, after applying strict scrutiny, conclude that a challenged program or policy stigmatizes a group on the basis of race. A remedy could require action from an individual or entity whether or not discriminatory intent could be shown and might very well involve, as a way of eliminating persistent racial inequalities, redistribution of certain goods and resources.

[470] 123 S. Ct. 2325 (2003).

Bollinger[471] regarding affirmative action for institutions of higher education. In the case of felon disenfranchisement, this includes a recent series of lawsuits challenging the constitutionality of laws bearing a disparate racial impact in the case of felon disenfranchisement, including *Hayden v. Pataki*,[472] a lawsuit recently filed by the NAACP Legal Defense and Education Fund and the Community Service Society of New York.

1. The Higher Education and Affirmative Action Contexts

It would be difficult to identify an issue that generates more concern and debate about racial stigma than affirmative action. Questions about the risk of racial stigmatization that affirmative action poses to its beneficiaries are raised in connection with a range of race-conscious programs, as the discussion of *Croson* in Part III suggests. But stigma-based objections to affirmative action have been strongest and loudest in the higher education context, where old narratives about the intellectual inferiority of racial minorities are particularly salient.

Opponents of affirmative action who decry the consideration of race as a factor in admissions and the departure from purely "merit-based" systems it entails typically advance three stigma-related arguments against the consideration of race as a factor in admissions.[473] First, opponents link the risk of racial stigmatization they see under college and graduate school affirmative action programs to the racial stigma imposed by the segregated public schools at issue in *Brown*,

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471 123 S. Ct. 2411 (2003).

472 No. 00–8586 (S.D.N.Y. filed Jan. 15, 2003), http://www.cssny.org/pdfs/complaint.pdf.

473 I use the term "merit" in referring to admissions systems that rely principally on grades and test scores in selecting students because this is the terminology most often employed by the affirmative action opponents whose arguments I discuss. In utilizing their terminology, I do not mean to suggest that such programs are, in fact, based on "merit" alone. A number of commentators have maintained—quite accurately, I think—that programs that emphasize grades and test scores contain their own biases. *See* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 966 (1996) (arguing against attempt to introduce "rationality" into biased educational environments); *see also* Robin West, *Constitutional Fictions and Meritocratic Success Stories*, 53 WASH. & LEE L. REV. 995, 1014 (1996) (emphasizing extent to which current conceptions of merit ignore history of racial exclusion and privileging of whiteness over racial difference). Similarly, I am not suggesting that admissions programs that permit the consideration of race as a factor necessarily entail a departure from meritocracy. As Sturm and Guinier note, race-consciousness and the goal of ensuring academic excellence are by no means in tension with one another. *See* Sturm & Guinier, *supra*, at 958; *see also* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 88 (1998) ("[C]arefully chosen minority students have not suffered from attending colleges heavily populated by white and Asian-American classmates with higher standardized test scores. Quite the contrary—they have fared better in such settings.").

giving their argument power it arguably would not have had on its own.[474] Under this account, affirmative action is bad not only because it denies opportunities to deserving Whites, but also because the consideration of race as a factor in determining eligibility for admission imposes a high personal cost on the very individuals it purports to help. According to this argument, such consideration demeans and demoralizes the beneficiaries of affirmative action programs in the same way that separate-but-equal school policies threatened to impose long-term psychological harm on elementary and secondary school children.[475] It sends those students—not to mention others—the painful message that they are inferior and cannot compete on equal footing with Whites and others who gain admission to advanced study without an explicit, race-based preference.[476]

Second, opponents suggest that, once enrolled, underrepresented minority students will not be able to overcome the stigma imposed upon them by the admissions process.[477] In fact, they argue that the existing racial stigma for those students, as well as the minority group to which they belong, is only exacerbated by affirmative action programs. Here, the theory—supported, to some extent, by numbers that suggest that underrepresented minority students have somewhat lower graduation rates than nonminority students,[478] but greatly contradicted by the large numbers of underrepresented minority graduates who become community leaders upon their graduation from college and graduate school[479]—is that underrepresented minority candidates will not be able to perform well academically once they matriculate because their credentials are not as strong as those of their

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474 *See, e.g.*, CARL COHEN & JAMES P. STERBA, AFFIRMATIVE ACTION AND RACIAL PREFERENCE: A DEBATE 164 (2003) (arguing that race-conscious programs are bad for society).

475 *See* PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 155 (2003) (arguing that observers assume members of favored group are admitted on preferential terms).

476 This account, of course, ignores the extent to which, at the college level at least, access to the goods often considered in assessing merit—e.g., attendance at high-performing schools and enrollment in advanced placement courses—are often highly correlated with affluence and status as a nonminority. *See* Lawrence, *supra* note 155, at 944–45 (discussing case alleging absence of Advanced Placement courses in predominantly minority high schools in California); *see also supra* Part II.A (college admissions narrative).

477 *See, e.g.*, Grutter v. Bollinger, 123 S. Ct. 2325, 2362–63 (2003) (Thomas, J., dissenting).

478 BOWEN & BOK, *supra* note 473, at 55–57 (discussing graduation rates for Blacks and Whites and noting that period in which graduation takes place varies for these groups).

479 *See, e.g.*, David L. Chambers et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000) (documenting success of Michigan Law School's minority graduates).

white peers. Opponents maintain that this poor performance will only serve further to demoralize these individuals. Further, they assert that, in the long run, it will operate to intensify the racial stigma imposed on the minority groups to which these students belong by confirming widely held beliefs about minority inferiority.[480]

Third, opponents argue that the elimination of affirmative action programs would benefit those underrepresented minority students whose grades and test scores are such that they might be able to gain admission to selective institutions without the consideration of their race as a positive factor.[481] Under this account, the central problem of race-conscious admissions programs is that, in tainting all underrepresented minority candidates as less capable than their nonminority peers, it obscures the achievements of those individuals who could have "made it" on their own, without any special assistance.[482] Those who might otherwise have presumed these high-achieving individuals to be equal to nonminorities in terms of intellectual ability, the argument runs, will instead presume them to be academically deficient because of the categorical way in which so-called preferences are employed.[483] Permitting underrepresented minority candidates to compete on equal footing with others, opponents contend, is the only way to avoid these unfortunate, but unavoidable, results of considering race as a factor in admissions.[484]

Over the years, each of these arguments has gained a fair amount of currency in the frequently contentious affirmative action debate.[485] Astoundingly, this is so even though affirmative action opponents—not unlike the Court in the cases discussed in Part III—have put forth very little evidence to substantiate their particular claims of stigma. In some instances, they have managed to identify the rare minority candidate prepared to assert that the use of racial preferences for others

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480 SCHUCK, *supra* note 475, at 155–56.

481 *See, e.g.*, *Grutter*, 123 S.Ct. at 2362–63 (Thomas, J., dissenting).

482 *Id.*; *see also* COHEN & STERBA, *supra* note 474, at 114–15 (citing student opposition to Michigan Law Review's affirmative action program on grounds that it undermined prestige of all minority members of journal).

483 *Id.* A concern for the preferences afforded athletes and so-called legacies—like the young man depicted in Part II's narrative involving the interracial conversation about college admissions—would seem a logical extension of each of these arguments. And yet one rarely hears complaints about the affirmative action that exists for these students. *See* Lamb, *supra* note 232, at 491–92 (noting that preferences for legacy admissions are rarely criticized and arguing they should be abolished).

484 For reasons already alluded to, it is far from clear that eliminating the consideration of race as a factor in admissions would create an equal playing field for minority students. *See supra* Part I.A.4.

485 *See, e.g.*, COHEN & STERBA, *supra* note 474, at 114–15 (asserting that affirmative action programs impugn reputations of beneficiaries).

in their racial group detracts from their own accomplishments.[486] In most circumstances, however, opponents simply advance their assertions with little attempt to support them. The closest they typically come to providing evidence for the stigma argument is pointing to the gap in grades and test scores that frequently exists between white applicants to college and graduate schools and their African-American, Latino, and Native-American counterparts.[487] However, this gap, the contours of which are more modest than opponents would suggest,[488] says very little, if anything, about whether underrepresented minority students actually experience racial stigma as a result of affirmative action policies. Opponents suggest that they *should* because, in their minds, the gap is proof only of underrepresented minority students' unsuitability for admission. There has, however, been no serious effort to show that they *do* in fact suffer racial stigma because of affirmative action policies.

Given the precipitous drop in underrepresented minority enrollment that occurred in California and Texas when those states ceased considering race as a factor in admissions at public colleges and graduate schools, accepting affirmative action opponents' stigma claims without real testing would seem unwise, at best.[489] Nonetheless, their arguments continue to hold sway. This is so even among certain

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[486] *See, e.g., id.* at 114–15, 126–27 (discussing case of unidentified African-American member of Law Review at University of Michigan Law School who purportedly felt that introduction of affirmative action policy for Law Review members took away from fact that he had been invited to join Law Review on basis of grades and written work alone).

[487] *See, e.g., id.* at 139 (asserting that percentage of minorities who perform well on standardized tests is substantially lower than national average); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 401–05 (1997) (asserting that students of color lag not only in standardized test performance, but in measures of academic achievement and preparation such as class rankings, grade averages, and courses taken).

[488] BOWEN & BOK, *supra* note 473, at 74–76 (discussing SAT scores and high school grades for Blacks and Whites).

[489] *See* Thomas D. Griffith, *Diversity and the Law School*, 74 S. CAL. L. REV. 169, 170–71 (2000). Following the adoption of Proposition 209—a measure outlawing the consideration of race as a factor in government programs—in California and the U.S. Court of Appeals for the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that University of Texas Law School could not consider race in admissions), the enrollment of minorities at selective institutions in California and Texas decreased markedly. At UCLA Law School, for example, enrollment of African Americans in the year following the passage of Proposition 209 fell from nineteen to two. Griffith, *supra*, at 170. Boalt Hall Law School at the University of California at Berkeley enrolled only one African-American student that year. *Id.* at 170–71. Latino enrollment at selective California schools also fell dramatically from twenty to seventeen at UCLA Law, and from twenty-eight to seven at Boalt. *Id.* at 171. In Texas, the numbers for minority enrollment were equally devastating. After the Fifth Circuit's decision in *Hopwood*, African-American enrollment at the University of Texas Law School fell from twenty-nine to four; Latino enrollment went from forty-six to thirty-one. *Id.* at 171; *see also* Suzanne E. Eckes, *Race-Conscious Admissions Programs: Where Do Universities Go From* Gratz *and*

minority commentators. In the past, Linda Chavez, Shelby Steele, and Stephen Carter, for example, have each joined the bandwagon, criticizing affirmative action for demoralizing its recipients and exacerbating the myth of minority inferiority, or for detracting from the accomplishment of underrepresented minority students who could gain admission to selective institutions without special consideration of race.[490] Justice Clarence Thomas has also expressed such views,[491] even though, as only the second African American ever to serve on the Supreme Court, he is arguably the most prominent beneficiary of affirmative action in the United States.[492] Indeed, Justice Thomas wrote a blistering separate opinion highlighting the risk of racial stig-

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Grutter, 33 J.L. & EDUC. 21, 58–59 (2004) (noting drop in undergraduate admissions for racial minorities at University of California at Berkeley and University of Texas).

[490] *See, e.g.*, STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 49–50 (1991) ("This dichotomy between 'best' and 'best black' is not merely something manufactured by racists to denigrate the abilities of professionals who are not white. On the contrary, the durable and demeaning stereotype of black people as unable to compete with white ones is reinforced by advocates of certain forms of affirmative action."); Linda Chavez, *Racial Justice: Changing the Tune*, LEGAL TIMES, Dec. 26, 1994, at 28 ("Liberals have never been able to face up to the unintended consequences of affirmative action—either the resentment it evokes among most whites or the stigma it attaches to its beneficiaries."). For another example, see Steele:

> I think that one of the most troubling effects of racial preferences for blacks is a kind of demoralization, or put another way, an enlargement of self-doubt. Under affirmative action the quality that earns us preferential treatment is an implied inferiority. . . .The effect of preferential treatment—the lowering of normal standards to increase black representation—puts blacks at war with an expanded realm of debilitating doubt, so that the doubt itself becomes an unrecognized preoccupation that undermines their ability to perform, especially in integrated situations.

SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 116–18 (1990). Carter, in particular, has written quite powerfully about some of the dilemmas created by affirmative action. He recalls getting a call from Harvard Law School after being denied admission there and being told that the admissions office had made a mistake. Apparently, they had not understood from his application that he was African-American and had concluded that he should not be admitted. When they discovered that Carter was African-American, however, they determined that he was, in fact, qualified and sought at that point to include him in the entering class. Instead of being pleased by this turn of events, however, Carter reports being appalled. He turned Harvard down and went to Yale Law School, where he now teaches, though he acknowledges that race likely played a role in his admission to that school as well. CARTER, *supra*, at 15–17.

[491] *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2362 (2003) (Thomas, J., dissenting); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) ("[T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence.").

[492] *See* Kimberle Crenshaw, *Playing Race Cards: Constructing a Pro-Active Defense of Affirmative Action*, 16 NAT'L BLACK L.J. 196, 201 (1999–2000) (arguing that Justice Thomas and individuals such as Ward Connerly, who is African-American and affirmative action opponent, are themselves beneficiaries of affirmative action).

matization posed by affirmative action programs in *Grutter v. Bollinger*.[493]

Grutter involved the admissions policy employed by the University of Michigan Law School[494] and asked the Court to reconsider the precedent established by its 1978 decision in *Regents of the University of California v. Bakke*.[495] *Bakke* involved the admissions system then employed by the Medical School of the University of California at Davis. Justice Powell wrote the opinion articulating the judgment for a very divided Court in that case.[496] Although Justice Powell found that the Davis program unconstitutionally relied on racial quotas, he concluded that some uses of race in admissions were permissible. More specifically, he found that, in addition to the interest in remedying past discrimination, a state had a compelling interest in designing an admissions program that, like the admissions plan Harvard College employed at the time, sought to achieve the educational benefits that flow from having a student body that is racially diverse.[497]

In the years following the *Bakke* decision, selective institutions of higher education across the country adopted admissions programs justified on grounds of diversity.[498] Conservatives were hopeful that, after cases such as *Adarand Constructors, Inc. v. Pena*,[499] a majority of the Court would reverse *Bakke* and preclude all uses of race in admis-

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493 *See infra* notes 481–484 and accompanying text.

494 *See* UNIV. OF MICH. LAW SCH., REPORT AND RECOMMENDATIONS OF THE ADMISSIONS COMM. 2 (1992), http://www.law.umich.edu/newsandinfo/lawsuit/admissionspolicy.pdf [hereinafter ADMISSIONS POLICY] (detailing admissions policy at issue in *Grutter*).

495 438 U.S. 265 (1978).

496 Four justices voted to uphold the constitutionality of the Davis program on grounds that it satisfied a compelling governmental interest in remedying past discrimination, *id.* at 328, while four other justices voted to strike the program down on grounds that it violated Title VI of the Civil Rights Act of 1964, *id.* at 412–21. Justice Powell provided the fifth vote for both invalidating the Davis program and affirming the notion that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320.

497 *See id.* at 321–24 (discussing Harvard College Admissions Program). As the Court later noted in *Grutter*, "Justice Powell was . . . careful to emphasize that in his view race 'is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.'" Grutter v. Bollinger, 123 S. Ct. 2325, 2337 (2003) (quoting *Bakke*, 438 U.S. at 314).

498 *See, e.g.*, Brief of Harvard University, Brown University, The University of Chicago, Dartmouth College, Duke University, The University of Pennsylvania, Princeton University, and Yale University as Amici Curiae Supporting Respondents at 1, 8–9, *Grutter* (No. 02-241), 2003 WL 399220.

499 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (holding that strict scrutiny applies to all programs employing race as factor, whether state or federal in nature).

sions that were unrelated to remedying past discrimination.[500] But the Court surprised affirmative action opponents and supporters alike by rejecting the notion that the "only governmental use of race that can survive strict scrutiny is remedying past discrimination"[501] and endorsing Powell's opinion in *Bakke*. Writing for the majority, Justice O'Connor agreed with the University of Michigan Law School that there was "a compelling state interest in student body diversity."[502] "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry," she explained, "it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[503] And, Justice O'Connor concluded, it is permissible for the Law School to seek to do that by enrolling a "critical mass" of qualified underrepresented minority students.[504] Because the Law School's admissions system employed no quota and was flexible in nature, considering each applicant on an individualized basis, Justice O'Connor held that, under *Bakke*, it was narrowly tailored and therefore constitutional.[505]

In his opinion concurring in part and dissenting in part, Justice Thomas derided the majority for permitting the "cruel farce of racial discrimination . . . [to] continue" and issued a powerful, although in my view misguided, account of the stigmatic effects of the Law School's policy.[506] He began by focusing on the "overmatched"

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[500] Conservatives had been successful in achieving this result in the Fifth Circuit. *See* Hopwood v. Texas, 78 F.3d 932, 944, 948 (5th Cir. 1996) (holding that diversity rationale is not compelling interest under Fourteenth Amendment). They also achieved some success in the Fourth and First Circuits, where courts struck down race-conscious admissions programs, even though they declined to decide whether the diversity rationale was a compelling interest. *See* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 130 (4th Cir. 1999) (assuming that diversity may be compelling governmental interest without holding this to be case); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 705 (4th Cir. 1999) (stating that question of whether diversity is compelling interest remains unanswered); Wessman v. Gittens, 160 F.3d 790, 795–96 (1st Cir. 1998) (same). Challenges to diversity-based programs were not successful in the Ninth and Sixth Circuits, however. Appellate courts in those circuits embraced the diversity rationale as a compelling governmental interest. *See* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1200–01 (9th Cir. 2000) (holding that Fourteenth Amendment permits consideration of educational diversity as compelling governmental interest that must meet demands of strict scrutiny test); *Grutter*, 288 F.3d 732, 769–72 (6th Cir. 2002) (holding that University of Michigan Law School's admission policy was narrowly tailored to achieve compelling governmental interest in educational benefits of diverse student body), *aff'd*, 123 S. Ct. at 2338 .

[501] *Grutter*, 123 S. Ct. at 2339.

[502] *Id.* at 2338.

[503] *Id.* at 2341.

[504] *Id.*

[505] *Id.* at 2341–42.

[506] *Id.* at 2362–63. Justice Thomas also concerned himself with the gap in admissions test scores, suggesting that the majority's decision in the case permitted the Law School to

underrepresented minority students he described as being thrown into a "cauldron of competition" in which they would never be able to succeed.[507] Affirmative action programs, he maintained, "stamp [such] minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."[508] But he expressed the greatest concern for the "handful of blacks who would be admitted in the absence of racial discrimination."[509] Justice Thomas predicted that these students would be unfairly "tarred as undeserving" and that their achievements would never fully be recognized:

> Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.[510]

One finds surprisingly little in Justice Thomas's opinion to support any of these assertions. In an ordinary case, the majority could be expected to point out this defect. But the *Grutter* majority was unusually quiet on this score. In fact, the majority made no mention of racial stigma whatsoever. Given the concern about the risk of racial stigmatization Justice O'Connor expressed in cases such as *Croson* and *Shaw v. Reno*, one would have expected her to at least

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continue "adherence to [testing] measures it knows produce racially skewed results . . . ." *Id.* at 2360–61.

507 *Id.* at 2362. He predicted that the underrepresented minority students enrolled through Michigan's admission program would be "overmatched" not just in the first year of law school, but through their entire legal careers, as they sought admission to law reviews, law firm jobs, and prestigious judicial clerkships. *See id.* (citing THOMAS SOWELL, RACE AND CULTURE 176–77 (1994) ("Even if most minority students are able to meet the normal standards at the 'average' range of colleges and universities, the systematic mismatching of minority students begun at the top can mean that such students are generally overmatched throughout all levels of higher education.")).

508 *Id.* at 2362 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring)) (internal quotation marks omitted).

509 *Id.*

510 *Id.*

mention the issue in her opinion for the Court.[511] The awkwardness of contradicting a Justice whose views on race issues seem to receive an increasing amount of deference from his peers might explain part of the silence.[512] In my view, however, this omission is probably best explained by the fact that, as we saw in Part III, the Court has no principled and consistent way to address issues of racial stigma, no real way to analyze what, on the surface, appear to be powerful claims about the impact of affirmative action. As a result, its decision, how-

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[511] *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 643 (1993) ("Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.") (citations omitted); Metro Broad., Inc. v. FCC, 497 U.S. 547, 635–36 (1990) (O'Connor, J., dissenting) ("The history of governmental reliance on race demonstrates that racial policies defended as benign often are not seen that way by the individuals affected by them. Today's dismissive statements aside, a plan of the type sustained here may impose 'stigma on its supposed beneficiaries,' and 'foster intolerance and antagonism against the entire membership of the favored classes.'") (citations omitted); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.") (citations omitted). Justice O'Connor's silence is even more confusing when viewed against the other Supreme Court cases in which the constitutionality of race-conscious admissions measures has been raised as an issue. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting) ("A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved: that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer."). In *Bakke*, for example, the Justices openly discussed the issue of stigma and debated whether the concept of racial stigma offered a standard against which the Davis program could be evaluated. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 295 n.34 (opinion of Powell, J.). The dissenters in that case suggested that whether a race-conscious program imposed racial stigma should be central to assessments of its constitutionality. *Id.* at 361–62 (Brennan, J., dissenting) ("[A]ny statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus, our review under the Fourteenth Amendment should be strict—not 'strict' in theory and 'fatal in fact,' because it is stigma that causes fatality—but strict and searching nonetheless."(citations omitted)); *see also id.* at 373–74 (stating that Davis program did not stigmatize discrete group or individual, that race was reasonably used for program's objectives, and that program would not impose same harms as those imposed by programs excluding minorities).

[512] *See, e.g.*, Oral Argument, Virginia v. Black, 123 S. Ct. 1536 (2003) (No. 01–1107), 2002 WL 31838589 (Dec. 11, 2002). During the oral argument in *Black*, a case upholding a Virginia statute banning cross-burning, Justice Thomas, who rarely speaks from the bench, interjected to opine on the fear burning crosses invoke in African Americans, positing that this symbol is "unlike any symbol in our society." Oral Argument at 23, *Black*, *supra*. His comments were widely believed to have influenced the outcome in the case. *See* Paul Butler, *For Two Justices, Past Is Prologue*, LEGAL TIMES, June 30, 2003, at 60. ("*New York Times* reported that the other justices gave Thomas 'rapt attention' and that he appeared to have shifted the balance in favor of allowing the ban on cross burning.").

ever well received and, in my view, well reasoned, was necessarily incomplete.

There are some, no doubt, who will take issue with the notion that it is useful to talk about racial stigma here at all. Unlike some supporters of affirmative action, however, I do not dispute that underrepresented minority students are likely to encounter and perhaps even internalize racially stigmatic meanings at some point in their educational experience. How could this not be the case in a context in which African Americans and other minorities have historically been regarded as inferior? The question the Court should have taken up is not whether stigma attaches at some level, but whether the effects of racial stigma can be linked to Michigan Law School's admissions policy. Justice Thomas and other affirmative action opponents, of course, maintain that programs such as Michigan's *create* racial stigma. But this seems much too simplistic. One could identify countless examples of situations in which the abilities or social status of racial minorities have been discounted or underestimated in the absence of preferential programs.[513] That is what the the narratives regarding the law student and the high-school student related earlier in this Article make clear.[514] The harder question and the one that the *Grutter* majority should have addressed is whether affirmative action programs such as the one employed by the Michigan Law School *exacerbate* the baseline stigma that already exists in society. To get at that question, we must apply the structured analysis proposed earlier.

We begin by asking whether there is anything in the history of the enactment of the Fourteenth Amendment that would lead one to agree with conservative claims that race should never be considered as a factor in government decisionmaking. Certainly, there were those individuals who participated in the debates surrounding the Fourteenth Amendment and other legislation enacted at that time who resisted efforts to offer protection or special aid to newly freed slaves.[515] But there were also those legislators who expressly supported race-conscious government programs.[516] The contempora-

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513 Crocker et al., *supra* note 55, at 517 (detailing incidents in which African Americans are underestimated, regarded as inferior to Whites, and "judged first and foremost on the color of their skin").

514 *See supra* Parts I.A.1, I.A.4, & II.A.

515 *See, e.g.*, Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 763–65 (1985) (quoting Congressman Taylor: "'This, sir, is what I call class legislation—legislation for a particular class of the blacks to the exclusion of all whites . . . .'").

516 *See, e.g., id.* at 777–78 (reporting that "not even the conservative members of Congress objected to identifying by race the beneficiaries of a federal program").

neous enactment of the Fourteenth Amendment and race-conscious legislation—such as that enacting the Freedmen's Bureau, which provided education, land, goods, and other relief to newly freed Blacks[517]—does not, to be sure, mean that there was a clear consensus among legislators on the proper role of race in government programs. But it certainly casts doubt on conservative assertions that the use of race by government should, by definition, be understood to exacerbate racial stigma. In any event, the legislative history that is relevant here would not, without more, be a bar to the affirmative action program utilized by the Law School.

Having established this, we look now to the past for historical analogues of the Michigan program that might reasonably lead a court to conclude that a serious risk of racial stigma exists. Our history in this area is, unfortunately, rife with examples of African Americans and other minorities being denied educational benefits—whether in elementary and secondary schools or at the college and graduate school level. *Brown,* as well as cases such as *Sweatt*[518] and *McLaurin*,[519] highlight the negative consequences exclusion on the basis of race can have.

Even so, it is not clear that these cases stand as the best historical analogues for the program at issue here. Those programs involved exclusion on the basis of race, whereas the Michigan program seeks ultimately to include the broadest range of individuals possible. A court would arguably do best to assemble (on its own or through the parties) information regarding government-sponsored programs that provide educational benefits or other public goods. This line of inquiry would presumably lead the court back to a review of some of the information relevant to the first prong of this analysis and, in the end, a determination that nothing in the past would lead conclusively to a finding that race-conscious admissions programs are *per se* problematic.

But what of the current context? As the earlier discussion suggested, the current debate regarding affirmative action is often quite contentious. A court trying accurately to assess the present effects of a race-conscious program would, by inviting personal and expert testimony, expert reports—such as those submitted by the Law School in *Grutter*—and social science evidence, be obligated to explore the key

517 *Id.* at 789.

518 Sweatt v. Painter, 339 U.S. 629 (1950) (overturning policy denying African Americans admission to University of Texas Law School).

519 McLaurin v. Okla. State Regents, 339 U.S. 637 (1950) (ruling that policy requiring segregation of African Americans admitted to graduate school at University of Oklahoma was denial of equal protection).

arguments about the effects of a particular program before drawing any final conclusions.[520] To initiate its inquiry under this prong, however, the court would presumably start with an evaluation of the program being challenged.

The University of Michigan Law School's admissions policy, in effect since 1992, seeks to identify students for admission who will "contribute to the learning of those around them."[521] Consideration of an applicant's grades and test scores is an important part of the review process under the policy. But, as the Supreme Court recognized in its opinion, "even the highest possible score does not guarantee admission to the Law School."[522] Under the policy, admissions officials, who conduct an individualized review of each file, must also consider "soft variables" such as recommendations, applicant essays, and the strength of the applicant's undergraduate institution.[523]

The ultimate goal under the policy is to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."[524] As a result, the policy permits admissions officials to consider a variety of diversity-enhancing factors in evaluating students. The policy refers to the Law School's commitment to "racial and ethnic diversity with special reference to the inclusion of students from groups which have historically been discriminated against, like African Americans, Hispanics, and Native Americans . . . ."[525] And it contemplates that, by enrolling a "'critical mass' of [underrepresented] minority students," the Law School will "ensur[e] their ability to make unique contributions" to the Law School and achieve educational benefits for all of its students.[526]

Even as it emphasizes the importance of racial diversity, however, the Law School's policy makes clear that it does not define diversity in terms of race alone.[527] Nor does it employ rigid racial quotas.[528] Instead, the admissions office considers each application individu-

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520 *See* UNIV. OF MICH., THE COMPELLING NEED FOR DIVERSITY IN HIGHER EDUCATION, *at* http://www.umich.edu/~urel/admissions/research (last visited Apr. 4, 2004) (compiling expert reports from Thomas Sugrue, Eric Foner, Albert Camarillo, Patricia Gurin, William Bowen, Claude Steele, Derek Bok, Kent Syverud, and Robert B. Webster).

521 ADMISSIONS POLICY, *supra* note 494, at 2.

522 Grutter v. Bollinger, 123 S. Ct. 2325, 2332 (2003); *see also* ADMISSIONS POLICY, *supra* note 494, at 4–5.

523 *Grutter*, 123 S. Ct. at 2332; *see also* ADMISSIONS POLICY, *supra* note 494, at 5.

524 ADMISSIONS POLICY, *supra* note 494, at 9–10.

525 *Id.* at 12.

526 *Id.*

527 *Id.* at 9–12.

528 *See Grutter*, 123 S. Ct. at 2342.

ally.[529] As a result, the statistics for underrepresented minority students vary widely each year, and each admitted student is fully qualified and capable of succeeding academically.[530] Because of the nature of the applicant pool, there are, in terms of averages, some differences in the grades and test scores for underrepresented minority and white applicants. Contrary to what affirmative action opponents typically argue, however, under the Michigan policy, those differences are not overwhelming.[531]

Each of these factors suggests that, consistent with *Bakke,* the Law School's policy minimizes the risk of racial stereotyping and stigmatization for underrepresented minority students in the current context.[532] And there is good reason to believe that, by creating a diverse environment, it enhances learning for all students.[533] This is not to say, of course, that individual minority students never experience the effects of racial stigma. As indicated earlier, they likely will.[534] But

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[529] *Id.* at 2343. The individualized review afforded each applicant under the Law School's policy is relevant as a constitutional matter, *see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317–20 (1978) (opinion of Powell, J.) (setting out standards for "properly devised" admissions programs), but also has practical significance. Research suggests that the way in which an affirmative action program is designed can have an impact on how it is received by the general public. *See* Rubert Barnes Nacoste, *Sources of Stigma: Analyzing the Psychology of Affirmative Action*, 12 LAW & POL'Y 175, 183 (1990). A program that treats applicants as individuals—selected for the unique skills and experiences they would bring to the classroom—would arguably be perceived as "fair." *See id.*

[530] ADMISSIONS POLICY, *supra* note 494, at 2; *Grutter*, 123 S. Ct. at 2345.

[531] The district court found that the median GPA for underrepresented minority students was only approximately one-tenth to three-tenths lower than that of Whites from 1995 to 2000. *See* Brief for Respondents at 9, *Grutter* (No. 02-241), 2003 WL 402236. During this period, the median LSAT score for underrepresented minority students differed by approximately 7 to 9 points. *Id.*

[532] For similar reasons, it should also be understood to minimize the risk of stigmatization for white students. That said, the *Grutter* plaintiffs did not argue that the Law School's policy stigmatized them in any way. *See* Brief for the Petitioner, *Grutter* (No. 02–241), 2003 WL 164185; Petitioner's Reply Brief, *Grutter* (No. 02–241), 2003 WL 1610793. Typically, the stigma argument, though most frequently raised by white plaintiffs and opponents of affirmative action, focuses solely on racial minority students. For obvious reasons, some questions exist as to whether white plaintiffs would have standing to raise a stigma claim on behalf of minority beneficiaries of affirmative action programs. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 931 n.1 (1995) (Stevens, J., dissenting) ("White voters obviously lack standing to complain of the other injury the Court has recognized under *Shaw*: the stigma blacks supposedly suffer when assigned to a district because of their race.").

[533] Expert testimony presented in both *Gratz* and *Grutter* supported this view. *See* Patricia Gurin, *Expert Report of Patricia Gurin*, 5 MICH. J. RACE & L. 363 (1999) (concluding that three empirical studies of university students, as well as existing social science theory, support contention that all students learn better in diverse environment).

[534] To the extent that individuals experience feelings of stigma and self-doubt, studies suggest that it may be offset by factors such as environment and the way that an institution has structured its affirmative action program. *See* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 585–87

for reasons already discussed, they would experience those effects even in the absence of a race-conscious program.[535] And, in any event, any stigma students experience at a personal level is arguably outweighed by the group-level stigma that would attach if affirmative action were not employed at all and the number of minority students on campuses such as Michigan's declined dramatically.[536] Under the stigma theory I advance, group-level harm of this sort poses the greatest risk because it is most likely to prevent racial minorities, as a group, from participating fully in society.

Finally, we turn to the future context. Justice Thomas's dissent suggests a future in which underrepresented minority students who are beneficiaries of affirmative action policies are unable fully to compete with their peers. But this view of the future is greatly contradicted by the history of affirmative action to date. Studies demonstrate that, with affirmative action, racial minorities are better represented in areas such as medicine, law, and business than they ever have been.[537] Moreover, they indicate that the beneficiaries of affirmative action programs often go on to become leaders of their communities and respective professions.[538] In short, programs such as

(2002) (suggesting that manner in which affirmative action program is implemented bears on beneficiary's sense of competence and ability).

535 *See id.* at 585 (arguing that racial minorities' continued participation in affirmative action programs may indicate that beneficiaries do not believe such programs are stigmatizing).

536 We can expect that the expressive message carried by policies that do not seek to include racial minorities would be negative. Additionally, we can expect that the relatively small number of minorities who would be enrolled in the absence of a race-conscious admissions policy would experience greater levels of stigmatization and anxiety. *See* Dovidio et al., *supra* note 377, at 176–78 (reporting studies showing that development of common group identity among students of color can help alleviate negative effects of stigmatization).

537 In *Shape of the River*, their well-regarded study of the consideration of race in higher education admissions, William Bowen and Derek Bok—both experts in the two Michigan affirmative action cases—report that the number of racial minorities graduating from college and professional schools has grown significantly since the 1960s, when affirmative action programs first began to be embraced by colleges and universities. BOWEN & BOK, *supra* note 473, at 9. Between 1960 and 1995, for example, the percentage of African Americans between ages 25 and 29 who had received a college degree increased from only 5.4% to 15.4%. *Id.* at 9–10. Similarly, the percentage of African Americans who graduated from law school and medical school rose dramatically. The percentage of African-American law school graduates rose from less than 1% in 1960 to 7.5% in 1995, while the percentage of African-American medical students increased from 2.2% in 1964 to 8.1% in 1995. *Id.* at 10. Latino graduation rates have also increased substantially in the last few decades. Bowen and Bok indicate that the percentage of Latinos over age 25 who hold college degrees increased from 4.5% in 1970 to 9.3% twenty-five years later. *Id.* at 10. In professional schools, Latino matriculation has almost doubled since 1981. *Id.* at 10.

538 *See* Chambers et al., *supra* note 479, at 401 (documenting success of Michigan Law School's minority graduates); *see also* Greenberg, *supra* note 534, at 584–85 n.358 (discussing success of medical school graduates).

Michigan's operate to break down the barriers to full participation and acceptance for stigmatized individuals. It is therefore plain that affirmative action programs such as Michigan's do not exacerbate racial stigma and in fact serve to counteract some of the marginalizing effects of racial stigma on racial minorities. It is possible to imagine factors that would operate to intensify the negative meanings associated with race in a particular context. But none of those factors are raised by the Michigan policy or, for that matter, by the vast majority of admissions programs now in effect in so many institutions of higher education across the country.[539]

2. *The Felon Disenfranchisement Context*

In the previous Section, we saw how application of the stigma analysis might alter the reasoning employed by a court in evaluating the constitutionality of an affirmative action program. Here, we look at felon disenfranchisement statutes—laws that deprive offenders of the right to vote in state and federal elections as further sanction for the violation of the criminal law—and explore how application of the analysis might change not only a court's reasoning, but also the result in relevant cases. By way of example, we will focus on *Hayden v. Pataki*,[540] a case recently filed by a class of offenders and parolees that challenges New York's felon disenfranchisement statutes as, inter alia, racially discriminatory. Before turning to an analysis of that case, however, it makes sense to first give a brief overview of the history of

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[539] For similar reasons, I believe that the University of Michigan College of Literature, Science and Arts admissions policy at issue in *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), would also survive review under my analysis. The reliance on a fixed-point system in the case makes the analysis somewhat more difficult, but, in my view, ultimately does not depart from individualized review of applicants. *But see id.* at 2427–28 (holding Michigan College of Literature, Science, and Arts' admissions program not narrowly tailored because of reliance on fixed-point system). The hardest case is presented by *Bakke*, where the UC Davis medical school essentially employed a fixed quota in selecting students for its 100-member entering class, reserving sixteen seats for eligible minority students and requiring white students to compete for the remaining eighty-four. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 272–76 (1978) (describing admissions system). Under a diversity rationale, the absence of flexibility in decisionmaking might suggest the presence of the stereotyping about which Justice Thomas and others were concerned. Ironically, the Davis program would most likely weather my proposed analysis best if it rested on a past discrimination rationale, a rationale which the Court rejected as justification for the Davis program in *Bakke*. In that context, the use of quotas—which historically have often been used to harm—to benefit disadvantaged individuals would weigh in favor of upholding the program.

[540] No. 00–8586 (S.D.N.Y. filed Jan. 15, 2003), http://cssny.org/pdfs/complaint.pdf. The *Hayden* case was filed by the NAACP Legal Defense and Education Fund, the Community Service Society of New York, and the Center for Law and Social Justice at Medgar Evers College in Brooklyn, New York.

disenfranchisement laws generally and the specific types of felon disenfranchisement statutes employed in the United States.

Disenfranchisement of the sort now practiced in the United States has its roots in a tradition of imposing "collateral 'civil' consequences" for felony convictions that spans from Greece to early England.[541] Historically, the goal of penal systems in that tradition was to subject offenders to a kind of "civil death" as further punishment for their crimes.[542] In early Europe, for example, this civil death was often accomplished through the deprivation of certain rights, the loss of property, and sometimes even physical injury or death.[543] The United States rejected many of these English practices with independence, but held on to the practice of denying offenders access to the ballot box for the commission of even fairly minor offenses, ostensibly as a way of both communicating disapproval for the offender's behavior and protecting the ballot box from fraud or corruption.[544]

Today, felon disenfranchisement laws in the United States vary widely in their scope.[545] Virtually all states and the District of Columbia prohibit convicted felons from voting while they are incarcerated.[546] But fairly significant differences emerge after the incarceration phase. Thirty-two states prohibit offenders from voting while they are on parole.[547] In addition, twenty-nine of these states deny the franchise to individuals who are on probation.[548] Finally, fourteen states disenfranchise offenders even after they have completed serving

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541 THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 2 (1998) [hereinafter LOSING THE VOTE]; *see also* Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 563 (2003).

542 LOSING THE VOTE, *supra* note 541.

543 *Id.*

544 *See id.* at 2–3; *see also* Martine J. Price, Note, *Addressing Ex-Felon Disenfranchisement: Legislation vs. Litigation*, 11 J.L. & POL'Y 369, 370–71 (2002) (noting that disenfranchisement "served to protect the sanctity of the voting system and ensure that convicts could not influence the lawmaking process"). By some accounts, the disenfranchisement laws employed in the United States rank among the most restrictive in the world. *See* Rebecca Perl, *The Last Disenfranchised Class*, THE NATION, Nov. 24, 2003, at 13 (noting that Supreme Court of Canada recently invalidated felon disenfranchisement laws as antidemocratic and that in countries such as Poland, South Africa, Spain, and Switzerland, even prisoners are permitted to vote).

545 LOSING THE VOTE, *supra* note 541, at 7.

546 *Id.* at 3. Only four states permit convicted felons serving jail time to vote: Maine, Massachusetts, Utah, and Vermont. *Id.*

547 *Id.*

548 *Id.*; *see also* Price, *supra* note 544, at 371–74 (detailing various state disenfranchisement laws).

their sentences.[549] Of this group, ten states have a policy of permanently withholding the right to vote from convicted felons. Those states are Alabama, Delaware, Florida, Iowa, Kentucky, Mississippi, Nevada, New Mexico, Virginia, and Wyoming.[550]

Approximately 3.9 million felons are currently disenfranchised by state laws.[551] The burden of such widespread disenfranchisement does not fall evenly on the general populace, however. Studies indicate that states such as Alabama, Florida, Mississippi, Texas, and Virginia disenfranchise a disproportionate percentage of ex-offenders.[552] Florida alone accounts for roughly a third of all disenfranchised offenders.[553] Statistics also show that, although state disenfranchisement laws tend to be fairly race-neutral on their face, they have a wildly disproportionate impact on racial minorities, particularly African Americans and Latinos.[554] For example, "one in seven of the 10.4 million black males of voting age are either currently or permanently barred from voting due to a felony conviction."[555] Across the nation, these men, who comprise thirteen percent of the overall black population and are disenfranchised at a rate that is almost seven times the national average, make up more than a third of all disenfranchised individuals.[556] In individual states, the numbers are even worse.[557] Over 30% of African-American men, for example, are permanently disenfranchised in Southern states such as Alabama and Florida, whereas only 7.5% of the total population in Alabama, and 5.9% in Florida, is permanently disenfranchised.[558] In places such as Iowa, Mississippi, New Mexico, Virginia, and Wyoming, the numbers are

549 LOSING THE VOTE, *supra* note 541, at 5. Even states that theoretically permit ex-felons to vote make it very difficult to regain voting privileges, requiring offenders in some circumstances to obtain pardons or submit to lengthy re-enfranchisement processes. *Id.*

550 *Id.* at 7; *see also* Price, *supra* note 544, at 372–83.

551 LOSING THE VOTE, *supra* note 541, at 7.

552 Each of these states has disenfranchised at least 125,000 ex-felons. *Id.* at 8.

553 *Id.*

554 *See id.*; *see also* Calmore, *supra* note 245, at 1277–79 (discussing disparate racial impact of current statutes disenfranchising felons); Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1149–59 (1994) (analyzing Census and Department of Justice figures to illustrate disproportionate impact of felon disenfranchisement); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 765–68 (1998) (analyzing 1997 sentencing project to show disparate impact); *see also* Behrens et al., *supra* note 541, at 598 (arguing that, although "race neutral on their face," disenfranchisement laws "are tainted by strategies of racial containment").

555 Tena Jamison Lee, *A Deafening Silence at the Polls: One in Seven Black Males Cannot Vote*, HUM. RTS., Summer 1997, at 12, 12 (reporting results of study produced by The Sentencing Project).

556 LOSING THE VOTE, *supra* note 541, at 8–9.

557 *Id.*

558 *Id.*

nearly as bad. One in four African-American men is permanently disenfranchised in those states.[559]

These statistics, unfortunately, have real consequences for racial minorities and their ability to influence government policy and initiatives at the polls.[560] At the legislative level, a number of steps have been taken to try to address these appalling discrepancies. Several states have modified their disenfranchisement laws[561] and legislation designed to restore voting rights to ex-felons has been introduced in Congress.[562] But the most serious efforts to remedy the disparate impact such laws have on African Americans have taken place in the courts.[563]

Hunter v. Underwood,[564] a Supreme Court decision concerning a 1901 provision of the Alabama Constitution that provided for the disenfranchisement of persons convicted of crimes involving moral turpitude, represents a successful challenge to a statute having a disparate impact on African Americans. Its utility for many disenfranchised individuals, however, has been somewhat curtailed. In invalidating the disenfranchisement provision in that case, the Court did not base its decision on the denigration the statute imposed on African Americans generally. Instead, it pointed to specific evidence suggesting that the Alabama provision, like other Reconstruction-Era statutes, had been enacted as part of a plan purposefully to disenfranchise newly freed Blacks by selecting for disenfranchisement those crimes—like vagrancy, bigamy, living in adultery, or larceny—they were thought more likely to commit than Whites.[565] A finding of similar evidence of intent therefore has been a prerequisite and, ultimately, a barrier to subsequent challenges to felon disenfranchisement laws.[566] In cases in which proof of discriminatory intent has not been forthcoming, the focus on the motives of so-called perpetrators has essentially frus-

559 *Id.* at 8.

560 *See* Lani Guinier, *What We Must Overcome*, THE AM. PROSPECT, Mar. 12, 2001, at 26 (discussing effects of disenfranchisement of voters in 2000 presidential election).

561 *See* Price, *supra* note 544, at 400–06 (discussing states' modification of disenfranchisement laws).

562 *See id.* at 396 (discussing Civic Participation and Rehabilitation Act of 1999, H.R. 906, 106th Cong. (1999), introduced by Michigan Congressman John Conyers).

563 *See, e.g., id.* at 376–95 (discussing equal protection litigation in Voting Rights Act litigation, and state court litigation).

564 471 U.S. 222 (1985).

565 *See id.* at 228–30.

566 *See, e.g.*, Howard v. Gilmore, No. 99-2285, 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000) (rejecting claim of race-based discriminatory intent where disenfranchisement statute was enacted prior to Reconstruction Era); Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998) (rejecting challenge to Mississippi disenfranchisement statute on grounds that no showing of intent with respect to challenged amendment had been made).

trated opportunities meaningfully to address the substantive, stigmatic harms felon disenfranchisement laws impose on racial minorities.

Under the structured analysis I propose, however, judges would not be expected, as they are under *Hunter* and other cases within the *Washington v. Davis*[567] line, essentially to ignore evidence of racial stigmatization and persistent inequality in this way. Indeed, because of the severity of the harm at issue, they would be obligated to undertake an inquiry into the effects, at a citizenship level, of felon disenfranchisement laws such as those described above, whatever the intent of the legislature. The proposed analysis offers courts a way of determining, in a meaningful way, whether the racial disparities regarding disenfranchisement should be regarded as potentially racially stigmatizing and therefore constitutionally problematic. To illustrate why this is so, we apply the analysis to *Hayden v. Pataki*.[568] As explained earlier, *Hayden* involves an equal protection–based challenge to the state of New York's disenfranchisement scheme, which, inter alia, prohibits incarcerated felons and parolees from voting.[569] The class of African-American and Latino plaintiffs in *Hayden* maintains that the challenged scheme has created a situation in which eighty-seven percent of those currently disenfranchised in New York are African-

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567 426 U.S. 229 (1976).

568 No. 00-8586 (S.D.N.Y. filed Jan. 15, 2003), http://cssny.org/pdfs/complaint.pdf. The Hayden lawsuit is one of a number of recent cases that have challenged disenfranchisement measures. *See, e.g.*, Farrakhan v. Washington, 338 F.3d 1009, 1020 (9th Cir. 2003) (reversing district court order and holding that evidence of racial bias in criminal justice system is relevant to disenfranchisement claim); Johnson v. Governor of Fla., 353 F.3d 1287, 1305–06 (11th Cir. 2003) (reversing district court order and holding both that evidence of racial bias in criminal justice system is relevant to disenfranchisement claim and that, where disenfranchisement provision was originally enacted for discriminatory purpose, state had burden of showing reenactment of provision was not discriminatory). In the 1990s, New York inmates brought another suit challenging the state's disenfranchisement laws, but their complaint was dismissed. *See* Baker v. Pataki, 85 F.3d 919, 921 (2d Cir. 1996) (per curiam) (affirming district court decision dismissing complaint alleging racial bias in New York disenfranchisement provisions).

569 *See* First Amended Complaint at 1–2, *Hayden* (No. 00-8586); *see also* N.Y. CONST. art. II, § 3 ("The Legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or any infamous crime."). New York law provides that:

> No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole. The governor, however, may attach as a condition to any such pardon a provision that any such person shall not have the right of suffrage until it shall have been separately restored to him.

N.Y. ELEC. LAW § 5-106(2) (McKinney 1998).

American or Latino and that the disenfranchisement laws thus unlawfully discriminate against racial minorities.[570]

As in the other examples we have explored, a court's primary obligation under the stigma analysis would be to assess whether New York's disenfranchisement laws should be regarded as racially stigmatizing, or potentially stigmatizing. On the first prong of the analysis—which focuses on the history surrounding the Fourteenth Amendment's enactment—there is little, if anything, to suggest that felon disenfranchisement statutes should be regarded as necessarily problematic. Disenfranchisement was widely employed by states prior to the Fourteenth Amendment's ratification.[571] And, as the Supreme Court explained in *Richardson v. Ramirez*,[572] Section 2 of the Fourteenth Amendment—which was designed to ensure voting rights for Blacks—expressly contemplates felon disenfranchisement by states.[573] It provides for a reduction in a state's representation where the right to vote is denied to qualified individuals, except where such individuals have participated in a rebellion "or other crime."[574]

The past social and historical context surrounding felon disenfranchisement provisions, however, suggests that there could be good reason to be concerned that New York's disenfranchisement laws might carry a racially stigmatic meaning. As *Hunter v. Underwood*[575] makes clear and as discussed in Part II, during Reconstruction in particular, states regularly sought to eliminate black voting strength and keep newly freed slaves in a position of subservience with respect to Whites by listing disenfranchisement as a collateral consequence of crimes for which Blacks were often targeted, such as vagrancy, or in which they were presumed frequently to engage, such as bigamy and larceny.[576] The *Hayden* plaintiffs allege that New York delegates enacted legislation with the goal of disempowering Blacks well before

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570 *See* First Amended Complaint at 1, 13, *Hayden* (No. 00-8586).

571 *See* Richardson v. Ramirez, 418 U.S. 24, 48 (1974) (noting that twenty-nine states had disenfranchisement provisions in their constitutions at time of ratification of Fourteenth Amendment).

572 *Id.*

573 *Id.* at 54; *see also* George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of* Infamia, 46 UCLA L. REV. 1895, 1900–01 (1999).

574 U.S. CONST. amend. XIV, § 2.

575 471 U.S. 222 (1984).

576 As one commentator explained, "[n]arrower in scope than literacy tests or poll taxes and easier to justify than understanding or grandfather clauses, criminal disenfranchisement laws provided Southern states with 'insurance if courts struck down more blatantly unconstitutional'" provisions such as poll taxes or grandfather clauses. *See* Calmore, *supra* note 245, at 1277 (quoting Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 538 (1993)) (internal quotation marks omitted).

the Civil War.[577] They maintain, for example, that, during the 1840s, state constitutional debates on the question of suffrage frequently included assertions by white legislators that African Americans should be denied the right to vote because of their involvement in "infamous crimes."[578]

Even apart from any evidence of discriminatory motive that the *Hayden* plaintiffs could muster, however, there is reason to believe that a court might conclude that a serious risk of stigmatic harm exists solely on the basis and strength of the evidence that would be presented under the last two prongs of the analysis. There is, for example, a great deal in the current context to suggest that felon disenfranchisement laws impose a race-based citizenship harm on African Americans and Latinos in particular. First, there are the statistics on incarceration in the state of New York. Although they comprise approximately 30% of the state's population,[579] African Americans and Latinos comprise approximately 80% of the total prison population.[580] According to some accounts, African Americans in New York State are "11.1 times more likely to be sent to prison in a given year than whites."[581]

In addition, consider the state-wide statistics on felon disenfranchisement that the *Hayden* plaintiffs assert in their pleadings: First, "[n]early 52% of those currently denied the right to vote pursuant to New York [law] are Black and nearly 35% are Latino"; and, second, "[c]ollectively, Blacks and Latinos comprise nearly 87% of

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577 *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Judgment on the Pleadings at 11–13, *Hayden* (No. 00-8586); First Amended Complaint at 10, *Hayden* (No. 00-8586).

578 First Amended Complaint at 10, *Hayden* (No. 00-8586) (stating that delegates to 1846 New York Constitutional Convention declared that "the proportion of 'infamous crime' in minority population was more than thirteen times that of white population").

579 According to the 2000 Census, 15.9% of New Yorkers are African American or Black (among those who reported only one race) and 15.1% are Hispanic or Latino. While these categories may overlap, this indicates that no more than 31% of New York's population is Black or Latino. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at tbls. 23, 24 (2002), http://www.census.gov/prod/2002pubs/01statab/pop.pdf.

580 Press Release, Prison Policy Initiative, Study Says Prison Populations Skew New York Districts (Apr. 22, 2002), http://www.prisonpolicy.org/importing/pr.shtml (last visited Apr. 13, 2004).

581 Peter Wagner, *Racial Disparities in the "Great Migration" to Prison Call for Reassessing Crime Control Policy*, Upstate Prison Response, *at* http://www.prisonpolicy.org/articles/upr100701.shtml (Oct. 7, 2001). Some reports indicate that, while 97 out every 100,000 Whites in New York are in prison, 776 Latinos and 1,295 African Americans out of every 100,000 residents are incarcerated. *Id.*

those currently denied the right to vote pursuant to New York [law]."[582]

Together, the statistics on incarceratation in New York and these figures, if proved, would be quite appalling in their own right. But they appear even more troubling when viewed against information regarding the targeting of minorities by law enforcement generally and the operation of the New York criminal justice system in particular. Consider, for example, the fact that African Americans and Latinos make up a disproportionate segment of New York's prison population and are sentenced to incarceration at rates that surpass those of Whites.[583] Also relevant are the figures on the awarding of probation. "Blacks found guilty of felonies are twice as likely as their white counterparts to be sentenced to prison as opposed to probation."[584] The *Hayden* plaintiffs allege that, in 2001, Whites made up 32% of all felony convictions but comprised 44% of those who received probation.[585] African Americans and Latinos, in contrast, who purportedly made up 44% and 23%, respectively, of those convicted of felonies, allegedly comprised only 35% and 19%, respectively, of those who received probation instead of a prison sentence.[586]

Disenfranchisement laws operate to compound inequalities such as those alleged by the *Hayden* plaintiffs. They simply exacerbate the social alienation that African Americans and Latinos already experience as a result of their stigmatized status. In addition to suffering a social death, racial minorities experience a civil death that makes it nearly impossible for them to fully to belong to their communities.[587] The *Hayden* plaintiffs allege that "by implying that [minorities] are unfit to exercise the franchise,"[588] disenfranchisement laws exacerbate the negative attitudes and beliefs already associated with racial difference in this country.[589]

Over the long-term, the isolation that disenfranchisement fosters will make it exceedingly difficult for African Americans and Latinos to gain full acceptance into society. At the local level, disenfranchisement laws will impede the reintegration of felons into their communi-

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582 First Amended Complaint at 13, *Hayden* (No. 00-8586).

583 Wagner, *supra* note 581; *see also* First Amended Complaint at 13, *Hayden* (No. 00-8586) ("Blacks and Latinos are sentenced to incarceration at substantially higher rates than whites.").

584 Juan Cartagena et al., *Felons and the Right to Vote*, GOTHAM GAZETTE, Feb. 17, 2003, *at* http://www.gothamgazette.com/article/feature-commentary/20030217/202/285.

585 First Amended Complaint at 13, *Hayden* (No. 00-8586).

586 *See id.*

587 *See* Harvey, *supra* note 554, at 1174.

588 *See id.*

589 *See* First Amended Complaint at 9–10, *Hayden* (No. 00-8586).

ties.[590] Even beyond this, however, it seems clear that these laws will only intensify the socioeconomic marginalization of racial minorities and prevent them from participating meaningfully in society. It is projected that, if the high rate of incarceration for African Americans continues, between thirty and forty percent of the black male population will eventually lose the right to vote.[591] Once this occurs, there is little chance that African Americans or other similarly situated minorities will be able to avoid total irrelevance in political elections. To get a window on this last point, one need only look at Florida—a state in which a third of disenfranchised individuals reside and where one in four African Americans cannot vote—and the results of the 2000 presidential election. Had felons been allowed to vote, the results of that election might very well have been different.[592]

Assuming all of the foregoing to be true, it would be hard to see how a court could conclude that New York's felon disenfranchisement statutes do not tap into stigmatic meanings about race; a conclusion that disenfranchisement laws impose stigmatic harm and should be subject to strict scrutiny seems virtually inescapable on the strength of prongs three and four of the analysis alone. One could argue that, instead of scrutinizing or invalidating disenfranchisement laws, courts should take a look at the policing and sentencing systems that have so dramatically increased the number of African-American and Latino felons in the last few years. In the end, however, such an argument would not be persuasive under a stigma analysis.[593] Disenfranchisement laws operate to affirm long-standing stereotypes about the ability of minorities to be integrated into society, reinforce ideas about black dangerousness, and exacerbate race-based disparities in other areas. And when confronted with such laws, a court adhering to a stigma theory would be obligated to consider them under the strictest of standards, even if that led to the invalidation of laws that otherwise served a useful societal purpose.[594]

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590 *See* Harvey, *supra* note 554, at 1175.

591 *See* Calmore, *supra* note 245, at 1276.

592 *See id.* at 1275–76 (suggesting absence of disenfranchised felons made difference in 2000 election); *see also* Behrens, *supra* note 541, at 560 (same); Lani Guinier, *supra* note 560 (same); Abby Goodnough, *Disenfranchised Florida Felons Struggle to Retain Their Rights*, N.Y. TIMES, Mar. 28, 2004, at A1 (same); PAMELA S. KARLAN, CONVICTIONS AND DOUBTS: RETRIBUTION, REPRESENTATION, AND THE DEBATE OVER FELON DISENFRANCHISEMENT 13 (Stanford Law School, Working Paper Series, Research Paper No. 75, n.d.), http://papers.ssrn.com/abstract=484543 (same).

593 *See supra* note 568 (listing cases holding racial bias in criminal justice systems relevant to legality of disenfranchisement laws).

594 It is not at all clear to me that disenfranchisement laws, absent the disparate racial impact they carry—particularly those that permanently disenfranchise or affect those who are on parole or probation—do in fact serve a useful purpose in our society. *See* Fletcher,

E. Responding to Possible Objections to the Analysis

The structured analysis set forth in the preceding Sections envisions a rigorous role for courts in identifying racially stigmatic harm—its subordinating effects, as well as the negative expressive message it carries—that impairs the ability of minority groups to participate meaningfully in society. Such a role, in my view, is completely consistent with the obligations courts currently have under the Fourteenth Amendment to ensure race-based equality. While the approach I advocate would, as already described, require judges to consider factors not presently incorporated into the equal protection analysis, it adds no substantive functions or responsibilities to the judicial enterprise. Nor does it detract from tasks that have historically been carried out by legislators or policymakers, who—as I have already asserted[595]—are arguably best situated to develop creative strategies to eradicate the effects of racial stigma. As Part III suggests, courts have long been involved in making decisions about the racially stigmatic effects of government programs and policies. The purpose of my analysis is to offer a clear map or protocol for improving the type of decisionmaking regarding stigmatic harm that judges already conduct in the race context.

Nevertheless, I appreciate that my proposed analysis raises questions about the appropriate role of courts in resolving social problems that must be considered. First among these is the question whether, at the end of the day, judges simply lack the competence to conduct the kind of analysis I propose. As an initial matter, I note that the overall move to look at policies and programs in their proper context is not altogether new for courts. Recent Supreme Court cases, for example, are replete with instances in which one or more members of the Court has urged a sensitivity to the particularities of a particular policy or program and the context out of which it arises.[596] More to the point,

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supra note 573, at 1899 (rejecting felon disenfranchisement rationales). That, however, is not a question I endeavor to address here. Because of the disproportionate effect such laws have on racial minorities, particularly African Americans, the idea that disenfranchisement laws might otherwise serve a useful purpose is beside the point.

595 *See supra* notes 377–381 and accompanying text.

596 *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2338 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."); Saucier v. Katz, 533 U.S. 194, 194–95 (2001) (noting that "inquiry" into whether a right is clearly established for qualified immunity purposes "must be undertaken in light of the case's specific context, not as a broad general proposition"); Capitol Square Review & Advisory Bd. v. Pinnette, 515 U.S. 753, 780 (1995) (O'Connor, J. concurring in part and concurring in the judgment) (noting that "reasonable observer in the [religious] endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears"); *see also Grutter*, 123 S. Ct. at 2338 ("'[I]n dealing with claims under broad provisions of the Constitution, which derive content by an interpretive

as Lawrence noted in defending the application of his cultural meaning test, judges have experience applying analyses of the sort proposed here.[597] Consider, for example, the multi-part test adopted in *Arlington Heights*,[598] which requires judges to consider factors such as the historical background of a policy, the sequence of events leading up to the enactment of that policy, and the legislative or administrative history of that policy in trying to determine whether race was a motivating factor in government decisionmaking.[599] That test focuses on the immediate context in which the challenged decision was made, rather than the multiple contexts—i.e., past, current, and future—explored through my analysis.[600] But it requires a process of inquiry not unlike what I advocate and would result in the production of some of the same types of evidence that would be produced by parties in response to my suggested analysis.

The second concern raised by my proposed analysis relates not to the components of the analysis that courts would be asked to employ, but to the kinds of judgments they would ultimately produce. Under my analysis, courts would be required to make essentially sociological determinations about a policy or program. That judges might be asked to engage in judgments of this sort is, admittedly, somewhat controversial.[601] As Randall Kennedy noted in his article *Persuasion and Distrust*, however, this is so only because of the baseline assumption that judges ordinarily do not make sociology-based decisions.[602] But the "assumption that there exists a judicial method wholly independent of sociological judgment . . . is false."[603] Judges, at some

process of inclusion and exclusion, it is imperative that generalization, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.'" (quoting Gomillion v. Lightfoot, 364 U.S. 339, 343–44 (1960))).

597 Lawrence, *supra* note 18, at 358–59. I respond to this concern by focusing on the overall analysis that would be employed by courts under my approach. It also bears noting, however, that each individual component of my analysis is one with which courts have some familiarity. As Part III illustrates, there is nothing new in suggesting that, for example, courts consider the context in which a constitutional provision was enacted. What is new is the suggestion that courts actively consider that context each time they confront a case in which racial stigma might ultimately be a factor.

598 *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

599 *Id.* at 266–68.

600 One other important difference is, of course, that my analysis focuses on identifying racial stigma, whereas the *Arlington Heights* test focuses on racial motive. *Id.* at 265 ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

601 *See* Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1336–37 (1986).

602 *Id.*

603 *Id.*

level, cannot avoid drawing conclusions about some aspect of social reality in their decisions.[604]

What distinguishes my proposed analysis, of course, is that it invites judges explicitly to consider social science research and historical information as they draw conclusions about this reality, in recognition of the fact that determinations about whether a law or policy carries a racially stigmatic effect is especially sociological in nature and should be made on the basis of sound support.[605] After *Brown* and its consideration of the now often criticized doll test, evidence of this sort has, admittedly, been regarded as somewhat suspect.[606] Essentially, those uncomfortable with the reliance on social science research by courts fear that it is far less concrete and susceptible to testing than other forms of evidence. This critique, however, arguably has less force where one talks about the research regarding the basic concept of racial stigma, as there seems now to be a fairly broad consensus regarding what it is and how it operates.[607] Moreover, the fact that social science evidence is not susceptible to the same kind of testing as in a tort case, for example, does not suggest that it is inherently unreliable. Some testing of the evidence will occur through the adversarial process. And the testing of this evidence—which might concern the operation of racial stigma in human interactions or even the history surrounding an allegedly stigmatizing policy—would assist courts uncomfortable with social science-based evidence to make sound decisions.[608] This is borne out by what increasingly occurs in

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[604] *Id.* at 1337.

[605] *See* Lawrence, *supra* note 18, at 324 (advocating cultural meaning test, which "seeks to understand individual responsibility in light of modern insights into . . . collective behavior").

[606] *See* Missouri v. Jenkins, 515 U.S. 70, 120 n.2 (1995) (Thomas, J., concurring) (discrediting doll test and arguing that there is no evidence that desegregation is responsible for permanent improvement in black children's scholastic achievement).

[607] *See supra* Part I. There is, of course, the possibility that, over the course of time, the consensus over the exact contours of racial stigma will change. This need not be fatal to the analysis I propose. Changes in the consensus over the legitimacy of a particular theory or policy have occurred in other areas of the law. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 313–16 (2002) (discussing change in consensus among states about appropriateness of executing mentally impaired). The courts have adjusted accordingly. *See id.* at 321. And there is no reason to conclude that a similar adjustment would not occur with respect to racial stigma.

[608] *See* Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—and Three Answers*, 2002 U. ILL. L. REV. 851, 856 (citing article in which Monahan and Walker suggest that "adversarial process itself will address some concerns about the ability of courts to adequately appraise social science research"); *see also* Laurens Walker & John Monahan, *Social Authority, Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 478 (1986) (proposing standards for use of social science by courts). An increase in the number of so-called battles of the experts will no doubt flow from this testing. I am not concerned, however, that this would

existing cases. Consistent with the call of legal scholars and social scientists alike, courts, more and more, are considering social science research and other similar evidence in deciding cases.[609] As Professor Tracey Meares notes in an article advocating greater judicial reliance on empirical evidence, judges have employed social science research in trying to understand a range of legal rules, such as the exclusionary rule.[610]

In addition to concerns about the roles that my analysis would ask judges to assume, there will no doubt be some questions about the long-term practical effect of the decisions likely to be made by courts. As previously explained, courts would be required to apply the proposed analysis and determine whether a stigma-related citizenship harm has or could be imposed in cases involving evidence of possible intentional discrimination, as well as those involving policies that have a disparate racial impact.[611] Brest and Justice White, in his opinion in *Davis,* both predicted that a focus on race-neutral policies carrying a disparate impact, in particular, could result in the invalidation of a vast array of policies and programs "important to the efficient operation of a complex industrial society," such as tax or welfare policies.[612] Constraints such as the obligation to satisfy standing requirements, which would still apply under my analysis, and the fact that evidence of a serious risk of stigma and citizenship harm had been shown would trigger strict scrutiny rather than the immediate invalidation of a program, however, would arguably prevent Brest's and Justice White's parade of horribles from occurring on the scale predicted.[613]

That said, it seems inevitable that, because of the explicit focus on racial stigma in both the race-conscious and race-neutral policy contexts, some increase in the number of programs and policies either simply challenged or ultimately invalidated would occur under my analysis. The question that should be asked is whether such an increase would, in fact, constitute the kind of loss to society that Brest claimed. In Brest's view, the fact that a policy carries a potentially

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be a negative development. Experts could do a great deal to advance the inquiry with which judges are charged under the analysis proposed here. And there is every reason to believe that judges, because they deal with experts in so many other contexts, would be able to manage effectively any "battle" that ensues.

609 Meares, *supra* note 608, at 855, 870.

610 *Id.* (discussing specific examples of cases in which courts have considered empirical or social science evidence).

611 *See supra* Part IV.B.2.

612 Brest, *supra* note 27, at 11; *see also* Washington v. Davis, 426 U.S. 229, 248 (1976).

613 That is to say, evidence of stigma would not immediately invalidate a program. Invalidation would occur where the government's interest was insufficiently compelling or where the means used to carry out a particular program or policy were not narrowly tailored to achieve the asserted end.

stigmatizing disparate impact should be forgiven where it could be shown that it serves an important purpose in society.[614] But it is not at all clear to me that the balance should be struck in this way. Indeed, this calculus works only where one minimizes the concrete harms associated with racial stigma. When one acknowledges the extent to which racial stigma impedes opportunities for meaningful participation at a citizenship level, the notion that a policy with racially stigmatic effect should be allowed to endure because it serves a purpose that is important, but not necessarily compelling, seems far less tenable. Though the invalidation of favored policies could be disruptive in some instances, my view is that it would be far better to permit the invalidation of those racially stigmatizing policies that cannot satisfy the requirements of strict scrutiny. Such an approach would send a message about the seriousness of racially stigmatizing harm and the role it plays in undermining the proper functioning of our communities and government, and would operate to validate the experiences of the racially stigmatized. Further, it would have the long-term advantage of ultimately reducing the incidence of racial stigma by permitting the structure of social systems that perpetuate inequity and race-based subordination to be altered.

Not surprisingly, I have posited a world in which courts apply my proposed analysis in good faith and without any particular ideological bent. The possibility that things might not occur in exactly this way brings me to the final concern raised by my analysis: What if, rather than improving judicial decisionmaking in race cases, the proposed analysis simply increases opportunities for purely ideologically driven decisionmaking or, at the very least, bad judging?

With any analysis, there is the possibility that it will be misapplied or ignored by some judges. A court applying my analysis could, to take a now familiar example, look at the evidence compiled and nevertheless conclude that the closing of the pools in Jackson, Mississippi imposed no stigma or citizenship harm on the African-American citizens of that municipality. Because, however, my proposal sets out a specific framework of analysis to be followed in all relevant cases, I believe that the application of the analysis would ultimately decrease, not increase, the likelihood of results being skewed by the particular ideological preconceptions of individual courts. Under my approach, courts would essentially be tied to the proverbial mast as they evaluate individual cases. Where a structured analysis exists and courts have a clear obligation to apply it, the likelihood of arbitrary or purely ideological decisionmaking goes down substantially.

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[614] *See* Brest, *supra* note 27, at 11–12.

Nonetheless, there will likely be those instances in which the application of my analysis would not necessarily lead to different, more stigma-conscious results. This is not, however, fatal to the position that I have taken in this Article. Even where the anticipated result is not substantially different from what one might have seen under the existing legal scheme, the application of my analysis would have the important benefit of requiring decisions regarding racial stigma to be based on something more than the intuition or gut feeling of a particular judge. This would ensure that judges are held accountable for their decisions regarding the effects of racial stigma in a way that they are not today. Furthermore, because the analysis requires consideration of history and social science, among other things, it could ultimately lead to greater awareness on the part of all citizens—whether they are directly involved with the law or not—of our collective racial past and the real, concrete effects that it has on racial minorities today.

CONCLUSION

This Article's purpose has been two-fold. First, I have sought to advance the conversation about the nature of racial injury in the United States in some measure. Through a multi-disciplinary approach embracing social science, history, and narrative, the first part of this Article demonstrated that contemporary conceptions of racial injury are necessarily flawed. The Supreme Court's focus on intent ignores the fact, established by social science research in this area, that much of the racialized conduct and thought that marks our daily lives is initiated by cognitive processes that operate at an unconscious level. Racial stigma, not notions of intent or even theories of unconscious racism, best accounts for the negative meaning still associated with racial difference in this country and begins—in a way that other theories of racial harm cannot—to account for the dogged persistence of discrimination and inequalities in key areas such as education, employment, and health care.

Second, my goal has been to spark a broad-based inquiry into how we, as a nation, can begin to go about eliminating the effects of racial stigma and the citizenship harms that it imposes on African Americans and other racial minorities. I concede that this particular project is not one that can be accomplished in a single article. It will, no doubt, require several more writings, additional thought, and a considerable amount of experimentation. Above all, it will require the attention and energy of other scholars committed to exploring issues of race and equality and, ultimately, to remedying the effects of

racial stigma identified in these pages. I hope that this Article does something to encourage such an investment.

The structured analysis proposed for courts in this Article advances both parts of the agenda just described. By requiring courts to consider issues of context—constitutional, social, historical, current, and future—in resolving race cases, it makes it more likely that racial stigma will be detected and addressed. Moreover, application of this analysis will do a great deal to advance the conversation about the nature of racial injury in the United States. It will help to refocus attention on those most affected by racial stigma and will ensure that judicial decisionmaking is grounded in a more accurate picture of both the realities of our current condition and our collective racial past.

Policy proposals less modest than what has been proposed here will obviously be required if racial stigma is to be truly eradicated. As we celebrate the 50th Anniversary of the decision in *Brown v. Board of Education*, however, I am even more convinced that focusing on courts was the correct way to begin this exploration of racial stigma and its effects. *Brown* stands as a reminder that courts, however imperfect, have a role to play in eliminating the color line DuBois identified so long ago.