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CRITICAL RACE THEORY, COGNITIVE PSYCHOLOGY, AND THE SOCIAL MEANING OF RACE: WHY INDIVIDUALISM WILL NOT SOLVE RACISM

Greta McMorris*

*Racism is so universal in this country, so widespread and deep-seated, that it is invisible because it is so normal.*¹
Shirley Chisholm

“[R]ace is our ‘American obsession.’”² With a history steeped in racist attitudes and laws, issues of race are inescapable and have divided America since its creation. The legal and political systems of this country have never been immune from the effects of race issues and have regrettably served to perpetuate and amplify racism’s destructive force.

Almost half of the men who signed the Declaration of Independence owned slaves.³ At its inception, the Constitution, which promised equal treatment, did not apply to people of color. In 1790, Congress restricted naturalization to White people.⁴ Thomas Jefferson believed Blacks were “‘inferior to the [W]hites in the endowments both of body and mind.’”⁵ Issues of Black and White relations resulted in the creation of the Republican party and “caused the Democratic party to label itself ‘the [W]hite man’s party’ for almost a century.”⁶ The first presidential veto to be overridden by Congress was the 1866 Civil Rights Act.⁷ Supreme Court Justice James McReynolds was a White supremacist who called Blacks “niggers.”⁸

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1. *Quoted in* HEART FULL OF GRACE 223 (Venice Johnson ed., 1995).

2. JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG 132 (1995) (citing STUDDS TERKEL, RACE: HOW BLACKS AND WHITES THINK AND FEEL ABOUT THE AMERICAN OBSESSION (1992)).

3. *See id.* at 139.

4. *See* HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 1 (1996) (citing Act of March 26, 1790, ch. 3, 1 Stat. 103). Racial prerequisites for citizenship remained in some form until the Immigration and Nationality Act of 1952. *See id.* (citing Immigration and Nationality Act of 1952, § 311, ch.2, 66 Stat. 239 (codified as amended at 8 U.S.C. § 1422 (1988))).

5. Derrick Bell, *Racial Realism – After We’re Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393, 395 (1990) (quoting ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820, 91 (1971) (quoting NOTES ON THE STATE OF VIRGINIA (Abernethy ed., 1964))).

6. LOEWEN, *supra* note 2, at 131.

7. *See id.*

8. A. Leon Higginbotham, Jr., *An Open Letter To Justice Clarence Thomas From A Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1006 n.3 (1992) (citing Randall Kennedy, *Race*

The state of Alabama still makes it unconstitutional for Whites and Blacks to marry.⁹ Even today Representative Bob Barr and Senator Trent Lott are alleged to have associations with the racist organization known as the Council of Conservative Citizens.¹⁰

Because of America's obsession with race, we have all shared in the racist experience – the experience of acknowledging and accepting “race” as a reality and determinate of another's worth. The experience is typified by “many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites.”¹¹ Thus, to the extent we share and are influenced by the experience, we inevitably become racists.¹²

While attempts have been made to eliminate racism, many proposals fail to understand its origins and manifestations. Indeed, racism is a nebulous and complex concept.¹³ The primary obstacle, however, is that it has so infected American society that it impairs our ability to detach ourselves from it long enough to identify an appropriate cure.¹⁴

Critical Race Theory (“CRT”), a growing body of jurisprudence, has made such an attempt. CRT recognizes that racism is a normal and ingrained feature of American society.¹⁵ To deal with the subtle forms of American racism, CRT challenges the existing body of civil rights law by exploring new approaches to racial justice.¹⁶ It observes that “[f]ormal conceptions of equality treat racism as an anomaly, an illness, a sort of cancer on an otherwise healthy body. They are aimed at deviations from a status quo or baseline assumed to represent equality.”¹⁷ In an effort to dispute the anomalistic approach to racism, CRT proposes “the call to

Relations Law and the Tradition of Celebration: The Case of Professor Schmidt, 86 COLUM. L. REV. 1622, 1641 (1986)). Higginbotham notes that it was not uncommon for courts to tolerate the use of terms like “nigger,” “black rascal,” or “burr-headed nigger” when referring to Black defendants. *Id.* (citing A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 542-43 (1990)).

9. See Marlon Manuel, *Moot or Not, Interracial Marriage Still an Issue Alabama Legislators Marshal Forces to Repeal Ban in Constitution*, ATLANTA J. & ATLANTA CONST., Dec. 20, 1998, at A08, available in 1998 WL 3732152.

10. See ADL: *Racist Organization Masquerading as “Conservative” Group to Host David Duke in Nation's Capital on Jan. 2*, U. S. NEWSPAPER, Dec. 21, 1998, available in 1998 WL 24335969; see also James Ridgeway, *Impeachment Leaders Addressed Racist Group: Confederacy With Dunces*, THE VILLAGE VOICE 49, Dec. 29, 1998, available in 1998 WL 20493644. The Council of Conservative Citizens is a successor of the White Citizens Council, which spread terror through the African-American community during the civil rights movement. See *id.* During his 1992 keynote address to the CCC, Lott was quoted as saying the members of the CCC “stand for the right principles and the right philosophy.” *Id.*

11. Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

12. See *id.*

13. See LAWRENCE A. HIRSCHFELD, *RACE IN THE MAKING* 159 (1996).

14. See Lawrence, *supra* note 11, at 321. Lawrence describes racism as a disease and asserts that our contamination with the illness impairs our recognition of the disorder. See *id.*

15. See CRITICAL RACE THEORY: THE CUTTING EDGE xiv (Richard Delgado ed., 1995) [hereinafter “CRITICAL RACE THEORY”].

16. See *id.*

17. Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1393 (1991).

context," which insists that the legal community give attention to "the details of minorities' lives as a foundation for our national civil rights strategy."¹⁸

CRT's critics posit that its recognition of race identification perpetuates racism by reinforcing stereotypes.¹⁹ They suggest that Individualism, or "color-blindness," will cure problems of racism by ignoring race. This is first accomplished by perceiving the individual not as a member of an identifiable racial group, but as an individual. Second, the "raceless" individual would then be evaluated on his or her merit.

Conceptually, Individualism is a "powerful ideological cultural value."²⁰ It relies on American ideals (or myths) of individual heroes such as the cowboy, frontiersman, and entrepreneur. The "American" individual has the "freedom to be left alone, to be her own person, to speak out, to participate freely in the community, and . . . have her rights respected."²¹

However, while Individualism sounds attractive in theory, it assumes that "race" identification is an individualized process; however, it evolves from the introduction of racist thoughts and attitudes from the time we are born into American society. Individualism presumes that we live in a social vacuum and are capable of making reasoned decisions about others based on individual traits and merit. We are, however, creatures of our environment, and the conclusions we ultimately draw about others are inevitably tied to where we begin.

This Comment posits that viewing Individualism as a cure for racism will fail because the underlying motivations that perpetuate racism are larger than the individual.²² Under a psycho-social paradigm, the perpetuation of racism occurs at two levels: first through society's acceptance of racist beliefs, and second through the individual's acceptance of racist beliefs. Both of these processes give race its social meaning.

Part I provides an overview of CRT, its critics, and Individualism, and thereby lays the foundation for the context in which most of the current debate about racism has arisen. Part II explains how the concept of race and racism developed. It then discusses cognitive psychology theory and its explanation for the development and retention of stereotypes, how we use stereotypes to make decisions about others and situations, and the difficulty of altering stereotypes. Part II also asserts the incompatibility of Individualism with these cognitive processes, and explains how the critics of CRT have failed to account for developing understandings in

18. CRITICAL RACE THEORY, *supra* note 15, at xv.

19. See Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257 (1996) (stating that the government creation of groups of social "outcasts" creates social pariahs); Toby Egan, Comment, *Critical Race Theory's Individual Flaw*, 67 UMKC L. REV. 661 (1999). But see Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456, 2464-65 (1994) (arguing that Blacks are not victims of caste distinctions and their lack of success may be attributable to the individual's lack of motivation).

20. Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1516 (1998).

21. *Id.* at 1515.

22. Individualism as an *ideal* is a noteworthy aspiration, and should be the goal of every human being. Its premise is synonymous with "The Golden Rule," and as a spiritual or moral endeavor it is not the intent of this author to minimize, or demean its worth. However, its applicability to the legal system is problematic in that human cognition is a far more determinate factor of human behavior. In the same way that the Golden Rule has not cured racism, neither will Individualism.

psychology of race identity. Part III discusses one of CRT's initiatives, affirmative action, proposing that it is consistent with cognitive theory. Ultimately, legal reform should be tailored to reflect human behavior, not human ideals.

I. CRITICAL RACE THEORY AND ITS CRITICS

A. Critical Race Theory

CRT began "in the mid-1970s with the realization that the Civil Rights Movement of the 1960's had stalled and that many of its gains . . . were being rolled back."²³ Critical Race theorists believed new approaches and theories were needed to understand and deal with "the complex interplay among race, racism, and American law."²⁴

CRT, one of the most recent theories to emerge from the school of jurisprudence,²⁵ is still in a state of evolution.²⁶ While the writings that make up its scholarship are various and diverse, CRT identifies ten themes that run throughout its writings.²⁷ The first theme is a "critique of liberalism."²⁸ Many CRT scholars are not content with liberalism as a means of addressing the American race problem. CRT asserts that liberalism, embodied as "a system of civil rights litigation and activism characterized by incrementalism, faith in the legal system, and hope for progress,"²⁹ has failed to render equality for minorities, and, thus, must be examined.

The second theme, and most characteristic aspect of CRT, is storytelling and "naming one's own reality."³⁰ CRT advocates the use of storytelling to provide a forum for the marginalized voice, which is silenced by the law through "rigid categories and [traditional] ways of speaking."³¹ Through "personal histories, parables, chronicles, dreams, stories, poetry, fiction, and revisionist histories,"³² the

23. Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 461 (1993).

24. *Id.*

25. See ROBERT L. HAYMAN, JR. & NANCY LEVIT, JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES 385, 385-86 (1994).

26. 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, 2161 (1992) (CRT concepts are "open and still being explored.").

27. See Delgado & Stefancic, *supra* note 23, at 461-63 (detailing the ten themes of CRT).

28. See, e.g., Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389 (1991) (reviewing ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* (1990)) (arguing that the problems with liberalism, Brooks points out, can be addressed through CRT); Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797 (1990) (attempting to achieve a common ground between "upbeat liberalism" and the Critical left).

29. CRITICAL RACE THEORY, *supra* note 15, at 1.

30. *Id.* at 37. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (discussing storytelling and its purpose and use in CRT); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (advocating storytelling as a means to move beyond essentialism).

31. CRITICAL RACE THEORY, *supra* note 15, at 37.

32. MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 5 (1993).

marginalized voice is allowed to teach us other realities that we need to know in our world.³³

“Revisionist interpretations of American civil rights law and progress” describes the third theme of CRT.³⁴ Writings embodying this theme address the ineffectiveness of anti-discrimination law throughout American history, and note its almost cyclical progress, as demonstrated by advancements in discrimination law followed by sudden retreats.³⁵

The fourth theme is a greater interdisciplinary understanding of the underpinnings of race and racism. Several CRT writers apply insights on race and racism gained from social science to legal problems.³⁶ The fifth theme, “structural determinism,” focuses on how the structure of legal thought and culture affects its content. Believing the structure of the legal system maintains the “status quo,” these authors try to understand how we are influenced by “categories, tools and doctrines” so we may work towards liberation.³⁷

The sixth theme notes the intersections between race, sex, and class, and the commonalities among oppressed groups.³⁸ These authors examine whether race, sex, and class are separate disadvantaging factors, whether they blur, or whether one acts as a primary factor in confrontations.³⁹ Writings focused on essentialism and anti-essentialism make up the seventh theme of CRT. Authors under this genre examine overlapping and competing communities.⁴⁰ Many authors urge the use of broader definitions when determining the characteristics of particular groups.⁴¹

The eighth theme of CRT is cultural nationalism/separatism.⁴² This strain of CRT holds that minorities may best preserve and promote their interests by separating from mainstream America. The ninth theme focuses on legal institutions, critical pedagogy, and minorities in the bar. It examines, primarily, minority

33. Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990).

34. Lawrence, *supra* note 11, at 319 (noting the failure of current Fourteenth Amendment litigation and proposing a new Supreme Court test).

35. Delgado & Stefancic, *supra* note 23, at 462.

36. *See e.g.* Lawrence, *supra* note 11, at 317. *See also* Vargas, *supra* note 20, at 1493 (discussing various theories of psychology and sociology and their impact on racist thinking).

37. CRITICAL RACE THEORY, *supra* note 15, at 205. *See e.g.*, Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3 (1979) (arguing minority admissions policy are Band-Aid approach to increasing minority admissions, and serve primarily to maintain status quo); Gerald Torres and Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 (noting the structure of legal thought results in primarily a majoritarian perspective).

38. *See, e.g.*, Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877 (1992) (discussing the impact of stereotypes of Black women as sexually unattractive or prostitutes); Kimberle Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

39. CRITICAL RACE THEORY, *supra* note 15, at 241.

40. *See id.* at 281.

41. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (criticizing theorists that assume commonality among all experiences of woman).

42. *See, e.g.*, Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (comparing the Black nationalist movement of the 1960s with current CRT discourse).

participation in the law and legal academia.⁴³ The tenth theme focuses on criticism, self-criticism, and responses to criticism of CRT.⁴⁴

At least three discrete arguments emerge out of CRT's ten themes. First, CRT challenges legal theories based on color-blindness, which has been the prevailing definition of racial justice.⁴⁵ "Critical Race Theory argues that color-blindness contains a conservative, if not stagnating, component: the implication that America's social life and institutions are essentially culturally neutral, objective, and meritocratic – except for past, overt racial exclusions."⁴⁶

Second, CRT challenges assimilation theories that call for minorities to integrate into mainstream society. Integration is viewed as embodying a conservative norm, which may invite minorities to enter, but allows the institutions to stay the same.⁴⁷ In other words, the existing dominant culture continues to set "the agendas, expectations, and methodologies that must be followed to gain admission to, and operate successfully within, the corridors of power."⁴⁸ CRT asserts that the right to play in the game is meaningless if you are powerless to change the rules.⁴⁹ CRT asks, then, for something greater than colorized institutions.⁵⁰

Third, CRT hopes that by using an epistemology based on historical and cultural communities of identity, culturally vibrant communities will emerge.⁵¹ These communities will be joined together by virtue of their shared institutions and social spaces.⁵²

B. Critics of Critical Race Theory

1. *The Critics: Generally*

As with any legal theory, CRT has its share of critics. It was described by Richard Posner as the "lunatic core" of the radical fringe of the legal academy.⁵³ George Will accused CRT of "playing the race card."⁵⁴ Daniel Farber and Suzanna

43. See, e.g., Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46 (1990-91) (maintaining that legal academia can benefit from the minority voice); Derrick A. Bell Jr., *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319 (1986) (arguing that law school faculties should include a representative number of minorities).

44. See, e.g., Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (criticizing Bell, Delgado and Matsuda for CRT principles).

45. See *Forward to the Symposium on Race Consciousness and Legal Scholarship*, 1992 U. ILL. L. REV. 945 [hereinafter "*Symposium*"].

46. *Id.* at 945.

47. *See id.*

48. *Id.*

49. *See id.*

50. *See Symposium, supra* note 45, at 945.

51. *See id.* at 946.

52. *See id.*

53. Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40, available in 1997 WL 9026229 (reviewing DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997)).

54. George F. Will, *Playing the Race Card*, PORTLAND OREGONIAN, Nov. 29, 1996, at B08, available in 1996 WL 11410731.

Sherry have described Critical Race Theorists as “the radical multiculturalists”⁵⁵ whose work reflects “an abandonment of moderation and a dearth of common sense.”⁵⁶ The harshness of these comments indicate not only the controversy surrounding CRT, but also “a breakdown in the civility of academic discourse and an extraordinary tolerance of intolerance.”⁵⁷

CRT has, however, generated some valid criticism. CRT’s critique of liberalism has been criticized by Douglas Litowitz for its failure to properly define liberalism, which evolved from the teachings of John Stuart Mill, John Rawls, and Ronald Dworkin, and is epitomized by the tenet “that the right precedes the good: the state should be neutral between competing conceptions of the good life.”⁵⁸ Litowitz is disturbed by CRT’s criticism of liberalism because liberals generally have been active supporters of minority rights.⁵⁹ Thus, to critique liberalism is to blame the wrong theory.

CRT’s use of storytelling also has been criticized. Randell Kennedy has charged not only that there is no single nonwhite voice, but that minority voices have not been excluded from legal scholarship. Such an assertion, Kennedy states, insists on privileging minority voices over majority voices, which have an equal right to be heard.⁶⁰ Farber and Sherry criticize storytelling because the stories are unverifiable and may be atypical of the experiences of the majority of a group.⁶¹

The personalized stories that arise from storytelling are described as narcissistic.⁶² CRT is criticized for presuming that “each race has a unique view of the law” by virtue of “some special knowledge” acquired through group membership.⁶³ The primary assertion is that personal stories based on experiences associated with race do not equal legal scholarship, nor do they provide compelling constitutional doctrine. The law, critics assert, does not turn on personal experiences, but rather on public issues.⁶⁴

The most persuasive criticism of CRT, however, is that its usefulness is limited to mere consciousness raising, and as such, it fails to establish policy on a doctrinal level.⁶⁵ Support for this criticism is found by virtue of the fact that many Black scholars are vehemently opposed to affirmative action, while at the same time opposed to racism.⁶⁶ Thus, while CRT adequately describes racism and elevates our

55. Nancy Levit, *Critical of Race Theory: Race, Reason, Merit and Civility*, GEO. L.J. (forthcoming 1999) (citing DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 3 (1997)).

56. *Id.* at 5.

57. *Id.*

58. Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503, 512 (1997).

59. *See id.* at 516.

60. *See* Delgado, *supra* note 33, at 96 (citing Randell Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989)).

61. *See* Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 835-38 (1993).

62. *See* Litowitz, *supra* note 58, at 516.

63. *Id.* at 519.

64. *See id.* at 518.

65. *See id.* at 529.

66. *See id.* at 528.

sensibilities to racism, the correct prescriptive remedies or legal polices will not automatically arise from this heightened understanding of racism.

2. *Individualism and Color-blindness*

Individualism is a discrete sub-section of CRT's critics. Its major premise is that individuals are the proper social units of consideration.⁶⁷ It "insists on the primacy of individuals, not groups, in our constitutional scheme and views the individual as the object of fundamental rights."⁶⁸ Justice Brown's statement in *Plessy v. Ferguson*⁶⁹ epitomizes Individualist thought: "If the two races are to meet upon terms of social equality," he stated, then "it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."⁷⁰ Any attempt to group persons by race denies individuality and uniqueness.⁷¹ The Individualists believe that, by ignoring race, racism will be cured because racism only occurs when we judge others based on race.

Individualism makes a number of assumptions. First, it presumes that group identification is at the root of racism.⁷² "Racism" is thought to occur when stereotypes of a race are applied to members of a race. For Individualism, "stereotypical thinking is the logical fallacy of assuming particular members of a group possess the characteristics generally associated with group members."⁷³ Individualists posit that one is not a racist if he or she does not make a judgment about another person based on membership in a racial group.⁷⁴

Second, Individualism presumes that individuality is the proper way to evaluate others. This presumption has explicit support in American constitutional law, particularly equal protection law. In *Shelley v. Kraemer*,⁷⁵ the Court noted that the Fourteenth Amendment created rights that are only guaranteed to the *individual*.⁷⁶

67. See Egan, *supra* note 19.

68. Charles Fried, Metro Broadcasting, Inc. v. FCC: *Two Concepts of Equality*, 104 HARV. L. REV. 107, 108 (1990), cited in John E. Morrison, *Color Blindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 325 (1994). Morrison refers to this type of Individualism as "essential [I]ndividualism." Morrison, *supra*. Ultimately it leaves two choices, Individualism or group think, with group think characterized as the racist alternative. *Id.* at 325-26.

69. 163 U.S. 537 (1869), overruled by *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

70. *Id.*, cited in Morrison, *supra* note 68, at 324..

71. See Egan, *supra* note 19, at 680.

72. See *id.*

73. Morrison, *supra* note 68, at 329.

74. See *id.*

75. 334 U.S. 1 (1948).

76. See *id.* at 22. The first section of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

In *Adarand Constructors, Inc. v. Peña*,⁷⁷ the Court stated that it is the *individual* who is entitled to judicial protection from classifications based upon his race.⁷⁸ In these cases, the Court “applies the principle of [I]ndividualism to require reliance on a ‘color blind doctrine’ that all individuals, regardless of race . . . be treated the same under the law.”⁷⁹

A third presumption made by Individualists is that people have a “choice” in the amount of weight they accord race when evaluating another person.⁸⁰ Each characteristic of a person can be accepted or rejected “upon its merit and the ability or willingness of that person to do so.”⁸¹ The rejection of race as a determinate of character, according to the Individualist, is witnessed in the abolition of slavery.⁸²

Fourth, Individualism presumes that merit is the proper measure of individual character.⁸³ Judgment based on a person’s race (group identification) violates a principle of individual merit.⁸⁴ This presumption assumes that an unbiased way of measuring merit exists, and implicitly denies that merit is itself a social construct.

II. WHY INDIVIDUALISM WILL NOT CURE RACISM

Individualism relies heavily on a person’s ability to judge another person based on an independent evaluation absent considerations of race. This independent evaluation, however, is not only difficult, but unlikely based on how people think and behave. Drawing on the work of cognitive psychology, this Section addresses how racist and prejudiced beliefs are created by society and transmitted to individuals. These beliefs serve as the starting point for the evaluations we make about others. Thus, under a psycho-social paradigm, where you end up is inevitably tied to where you begin.

A. The Development of Race and Racism

Color is more than an idle statistic; it is an enduring reality. It is America’s way of life.

*Bruce Wright*⁸⁵

“[R]ace is not real, not natural.”⁸⁶ In fact, there is no biological basis for the socially designated “races” we have developed.⁸⁷ This appears counter-intuitive.

77. 515 U.S. 200 (1995).

78. *See id.* at 224.

79. Vargas, *supra* note 20, at 1515-16.

80. Egan, *supra* note 19, at 687.

81. *Id.*

82. *See id.* (noting that slavery would not have ended but for a rejection by White Americans of the belief that African-Americans were not inferior).

83. *See id.*

84. *See* Vargas, *supra* note 20, at 1518.

85. BRUCE WRIGHT, BLACK ROBES WHITE JUSTICE 14 (1987).

86. HIRSCHFELD, *supra* note 13, at ix.

87. *See id.* *See also* Robert L. Hayman, Jr. & Nancy Levit, *Un-Natural Things: Constructions of Race, Gender, and Disability*, in CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS (forthcoming from Yale University Press 1999). Hayman & Levit note that the smallest portion of

Indeed, we see differences in skin tone and features, and we see that those differences can be categorized to some extent. However, scientific research has revealed that humans cannot be separated into discrete biological kinds,⁸⁸ and where “racial” differences exist, it is a consequence of social choices, not nature.⁸⁹

The concept of race in the Western world stems from a need to justify two historical processes: first, the taking of land from indigenous peoples, and second, enslaving Africans to work the land.⁹⁰ Prior to European nations joining in the slave trade, Africans were not regarded as inferior.⁹¹ To justify slavery, however, Africans were characterized as stupid, backward, and uncivilized.⁹² French social philosopher Montesquieu noted in 1748 that “it is impossible for us to suppose these creatures to be men, because, allowing them to be men, a suspicion would follow that we ourselves are not Christian.”⁹³ Thus, innate potential in Blacks was denied when it became clear continuing slavery had greater economic advantage than abolishing it.⁹⁴ The contradiction between this exercise of oppression and America’s ideology of freedom and equality is exemplified in Thomas Jefferson’s statement regarding slavery: “I tremble for my country when I reflect that God is just, and his justice can not [sic] sleep forever.”⁹⁵

The legal system actively participated in developing the concept of race. For example, in 1790, Congress limited naturalization to “White persons,” which prompted considerable effort by the courts to define “White.”⁹⁶ In *In re Ah Yup*,⁹⁷ the court struggled with whether a person from China fit within the statutory meaning of “White person.” The court concluded that the Chinese are not White by reasoning that:

genetic variation is between groups that have been considered “races.” Notably, no gene perfectly discriminates among the traditionally classified racial groups. *See id.* K.C. Cole states that in a chemical sense, we really blend in with each other. As our molecules continuously drift off the surface of our skin, we blur into each other’s space like perfume. *See* K.C. COLE, *THE UNIVERSE AND THE TEACUP: THE MATHEMATICS OF TRUTH AND BEAUTY* 48 (1998).

88. *See* HIRSCHFELD, *supra* note 13, at 3.

89. *See* Hayman & Levit, *supra* note 87.

90. *See* LOEWEN, *supra* note 2, at 136.

91. *See id.*

92. *See id.* *See also* Hayman, & Levit, *supra* note 87 (describing how race developed as an exception to the rules of liberty and equality to justify slavery).

93. LOEWEN, *supra* note 2, at 136 (citing FELIX OKOYE, *THE AMERICAN IMAGE OF AFRICA: MYTH AND REALITY* 37 (1971)).

94. *See* Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism*, in *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* 139, 143 (Richard Delgado & Jean Stefancic eds., 1997).

95. *NOTES ON THE STATE OF VIRGINIA* 156 (1800) *cited in* HAYMAN & LEVIT, *supra* note 25, at 395 n.2.

96. In 1870, the Act was amended to conform to the requirements of the Fourteenth Amendment by including “aliens of African nativity and [] persons of African descent.” Act of July 14, 1870, ch. 255, § 7, 16 Stat. 254. Thus, citizenship was restricted to “free [W]hite persons” and persons of African descent. Immigrants seeking citizenship generally attempted to fall under the umbrella of “[W]hite person,” which was less limiting than the requirement of African descent. *See* LOPEZ, *supra* note 4, at 52.

97. 1 F. Cas. 223 (C.C.D.Cal. 1878) (*reprinted in part in* LOPEZ, *supra* note 4, at 209-12).

The words “[W]hite person,” . . . taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But these words in this country, at least, have undoubtedly acquired a well settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance⁹⁸

The courts also evaluated immigrants’ appearance and characteristics,⁹⁹ skin tone,¹⁰⁰ country of birth,¹⁰¹ and percentage of “[W]hite blood” to determine whether they were White.¹⁰² The legal system’s engagement in such racist rhetoric legitimized the concept of race.

Once the concept of race is accepted, racism emerges by virtue of affiliation with a particular “group.” The ease with which racist attitudes develop was demonstrated in a groundbreaking experiment by Jane Elliot. Elliot, an elementary school teacher, divided her third-grade class into two groups on the basis of eye-color: blue eyes and brown eyes.¹⁰³ On the first day of the experiment she told the class that blue-eyed people were better and smarter than brown-eyed persons, and that blue-eyed children were not allowed to play with brown-eyed children. Within about twenty minutes, the brown-eyed students became withdrawn and began to fail in their school work. The blue-eyed students became superior, arrogant, condescending and nasty. In fact, a fight broke out after one student called another “brown-eyes.” The following day, Elliot told the children brown-eyed people were better than blue-eyed persons. Predictably, the brown-eyed students began to succeed, and the blue-eyed students became withdrawn.¹⁰⁴

Skin color is about as arbitrary as eye color and, indeed, once enough people believe there is a justifiable superiority in one of the classifications, in-group/out-group hostility emerges. Elliot’s experiment demonstrates the power of simply *defining* race – the definition creates a new “truth.” Patricia Williams recalled her realization that she belonged to the undesirable “colored” group in the following way:

I remember with great clarity the moment I discovered that I was “colored.” I was three. I already knew that I was a “[N]egro”; my parents had told me to be proud of that. But “colored” was something else; it was the totemic evil I had

98. *Id.*

99. *See In re Najour*, 174 F. 735 (N.D. Ga. 1990) (noting that the applicant had “the appearance and characteristics of the Caucasian race.”).

100. *See Ex parte Shahid*, 205 F. 812 (E.D.S.C. 1913) (noting that the applicant was walnut in color, somewhat darker than the “usual mulatto of one-half mixed blood between the white and negro races.”).

101. *See United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923). In *Thind*, the applicant was born in India. *See id.* at 206. The Court noted that “[i]t may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them to-day” *Id.* at 209.

102. *Ex Parte Shahid*, 205 F. at 815 (almost Black inhabitant of India is not White by virtue of infusion of White blood 30 to 40 centuries ago).

103. *See A Class Divided* (PBS Frontline Documentary, 1986) (on file with author).

104. *See id.*

heard my little [W]hite friends talking about for several weeks before I finally realized that I was one of *them*. I still remember the crash of that devastating moment of union, the union of my joyful body and the terrible power-life of that devouring symbol of negritude. I have spent the rest of my life recovering from the degradation of being divided against myself, within myself; I am still trying to overcome the polarity of my own vulnerability. The tense poised trembling whirling joy of my morality. The immortal unrelenting finality of my dangerous bottomless [B]lack fate.¹⁰⁵

Williams' experience reflects the point in life when race is defined for many of us. The definition is further developed throughout our lifetime.

B. Cognition: How racism perpetuates itself

Any legal theory that presumes to modify or control human behavior must first examine how humans think and interact. To lay down legal principles without doing so is an exercise in futility. Thus, psychological and sociological principles are a good place to start. The following sections discuss how individuals acquire and assimilate new information through the development of schemas (ways of categorizing information) and heuristics (ways of processing information), as well as the experience of dissonance when certain information is received.

Under a psycho-social paradigm, the weaknesses of Individualism become apparent. A simple proclamation that *we should perceive* people as individuals will not disturb the powerful effect of human cognition, as the following sections illustrate.

1. Schemas

We simplify things by categorizing them.¹⁰⁶ "Schemas are ways of looking at the world that organize past experience and provide a framework for understanding subsequent experience."¹⁰⁷ They are organizational frameworks we have been developing since childhood that are acquired through our experiences.¹⁰⁸ For example, if someone says the word "bird," you will conceptualize a bird. The type of bird, whether a bluebird, hawk, or ostrich, depends on the type of schema you have developed for birds. The type of schema you develop depends on your experience, and likely will include the first type of bird you saw when the concept was introduced to you. The same is true if someone says the word dog, house, and so on.¹⁰⁹

Stereotypes are a type of schema. Stereotypes are "cognitive frameworks consisting of knowledge and beliefs about specific social groups."¹¹⁰ They involve

105. Patricia J. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2140 (1989) (emphasis in original).

106. See David G. Myers, PSYCHOLOGY 574 (1986).

107. *Id.* at 71.

108. See ROBERT A. BARON & DONN BYRNE, SOCIAL PSYCHOLOGY: UNDERSTANDING HUMAN INTERACTION 121 (1994).

109. Chances are these simple schemas can be traced back to early childhood and the pictures you saw associated with letters of the alphabet or your first reading words.

110. BARON & BYRNE, *supra* note 108, at 231.

generalizations about the traits or characteristics of members of various social groups.¹¹¹ Stereotypes are powerful and begin to develop at a very early age. An experiment conducted by Stanley Milgram demonstrates the power of stereotypes.

Milgram invited high school teachers to interview eleven and twelve year-old children.¹¹² The teachers were asked to probe the limits of the child's knowledge of science, literature, and current events so they could determine a proper grade placement. During the interview, however, Milgram transmitted responses to the teacher's questions through a wireless radio receiver in the ear of the child. Unknown to the teachers, they were carrying on a conversation with Milgram. Milgram noted that while the teachers generally rated the children as above average, they were unwilling to recognize the genius before them. The unwillingness was attributed to general preconceptions the teachers had about the ability of eleven and twelve year-olds.

The same is true of the stereotypes or "schemas" we develop about members of minority groups. For instance, if you are asked to describe an "Asian-American," your description will depend on the "schema" you have developed for Asian-Americans, which in turn will depend on your past experiences with Asian-Americans, as well as the various information you have received through your environment. Your schema may include a belief that they are all highly intelligent and proficient in math, science and engineering.¹¹³ This schema will be reinforced every time you see an example of a highly intelligent Asian-American.¹¹⁴

Of course, the example above is a positive schema. African-Americans, generally, are on the receiving end of negative stereotypes.¹¹⁵ Images of African-Americans tend to reflect laziness, ignorance and violence. The sources of these images began very early in American history, and our individual histories. The following section outlines the history of the creation of the African-American image. These images were portrayed in popular media, such as newspapers, music, and the stages of America, and have helped to create the schemas we carry regarding African-Americans.

a. Creation of the African-American Schema

The African-American image has been distorted in the most grotesque and calculated manner since the early 1800s. Thomas D. Rice, a White entertainer, began impersonating Blacks in the 1820s.¹¹⁶ Donning a face painted black with tar, Rice would dance in tattered clothes for White audiences across the country. The

111. *See id.*

112. *See MYERS, supra* note 106, at 576 (citing Stanley Milgram, *Cyranoids*, paper presented at the meeting of the American Psychological Association, Toronto, Canada (Aug. 1984)).

113. *See* Robert S. Chang, *Toward an Asian Legal Scholarship: Critical Race Theory, Post-Structuralism, And Narrative Space*, 1 *ASIAN L.J.* 1 (1994) (noting that characterizing Asians as "hardworking, intelligent, and successful" perpetuates the "model minority" myth).

114. Note, however, that when you see information inconsistent with your schema, it creates dissonance. *See infra* notes 193-95 and accompanying text.

115. Positive images may include athletic proficiency, the ability to dance well or entertain. However, even these "positive" schemas have negative effects because of their limiting nature.

116. *See Ethnic Notions* (Resolution/California Newsreel, 1986) (on file with author).

concept for his routine came from watching a crippled Black slave dance, which Rice evolved into the exaggerated "Jim Crow dance" that entertained and amused White Americans for years.¹¹⁷ The association of slaves with dancing became so powerful, in fact, that it was not uncommon for them to be depicted as dancing and rejoicing on the auction block as they were being sold into slavery.¹¹⁸

In 1843, singing groups known as minstrels began to don Black painted faces and perform as groups.¹¹⁹ In fact, minstrelsy was an important form of mass entertainment from 1850 to 1930.¹²⁰ In the spirit of T. D. Rice, these entertainers took their acts on the road. Inevitably, the depictions of Blacks were copied by other entertainers, and characters evolved into more elaborate caricatures.

"Zip coon" was a spin on the "Jim Crow" act, and was portrayed as a Black man who haphazardly attempted to assimilate into White society.¹²¹ His attempt to imitate White behaviors and mannerisms portrayed him as an inarticulate incompetent who used large, make-believe words to personify great intellect. That image reinforced the idea that Blacks were too inferior to maintain the status enjoyed by Whites.¹²² They were seen as ignorant, bumbling idiots whose feeble attempts to assimilate became not only further justification for slavery, but a source of entertainment.

These racist sentiments were reflected in the politics of the day as well. Without television, political parties held rallies to galvanize party support.¹²³ These rallies often included music. A favorite song of the Democratic party in 1864, is presented below. It was sung to the tune of "Yankee Doodle Dandy":

THE NEW NATIONAL ANTHEM¹²⁴
"NIGGER DOODLE DANDY"

Yankee Doodle is no more,
Sunk his name and station;
Nigger Doodle takes his place,
And favors amalgamation.

CHORUS:
Nigger Doodles all the go,

117. *Id.* See also 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) (noting that Rice is thought to have even borrowed the cripple's clothes for a more authentic presentation).

118. See *Ethnic Notions*, *supra* note 116.

119. See *id.*

120. See LOEWEN, *supra* note 2, at 132. Loewen notes that by presenting these heavily caricatured images of Blacks as happy on the plantation, but lost and incompetent off of it, the shows demeaned Black ability. *Id.* at 157.

121. See *Ethnic Notions*, *supra* note 116.

122. See *id.* See also Kathleen Neal Cleaver, *The Antidemocratic Power of Whiteness*, 70 CHIKENT L. REV. 1375, 1381 (1995) (noting that Zip Coon came to personify the stereotypical irresponsible, dandified free Northern Black).

123. See LOEWEN, *supra* note 2, at 148.

124. *Id.*

Ebony shins and bandy,
 "Loyal" people all must bow,
 To Nigger Doodle dandy.

The white breed is under par
 It lacks the rich a-romy,
 Give us something black as tar,
 Give us "Old Dahomey."

CHORUS:

Nigger Doodle's all the go. . . .

Blubber lips are killing sweet,
 And kinky heads are splendid;
 And oh, it makes such bully feet
 To have the heels extended.

CHORUS:

Nigger Doodle's all the go. . . .

In the early 1900s, the image of the "Happy Sambo" developed.¹²⁵ Epitomized by a simple, loving and docile Black man, he was classically portrayed as carefree and irresponsible. The Happy Sambo had a child-like contentment and consistently avoided work. This image was created in part to perpetuate the image that Blacks were content, carefree and happy in their role as slaves. It also made it clear that Blacks were too ignorant to be successful in America. Thus, discrimination and segregation were justifiable.¹²⁶

While the Happy Sambo was the depiction of the Black male, the Black female was commonly depicted as the familiar "Mammy" character.¹²⁷ Aunt Jemima, the image associated with pancake mix, is probably the most familiar depiction of Mammy. The Black Mammy also emerged as a defense to slavery.¹²⁸ She was characterized as docile, loyal, protective of the White house, and happily obedient in her role as a White caretaker.¹²⁹ She was the antithesis of the ideal woman;¹³⁰ a fat Black woman whose presence never evoked sexual tension.¹³¹

Among her own people, however, the Mammy was portrayed differently. She was in charge and domineering, even controlling the men in her social groups.¹³² Thus, her image had the effect of depicting the Black woman as being anything but

125. See *Ethnic Notions*, *supra* note 116.

126. *Id.* See also George Fredrickson, *White Images of Black Slaves (Is What We See in Others Sometimes a Reflection of What We Find in Ourselves?)*, in *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* 38-45 (Richard Delgado & Jean Stefancic eds., 1997) (detailing history of the "Sambo" stereotype).

127. See *Ethnic Notions*, *supra* note 116.

128. See *id.*

129. See *id.*

130. See *id.*

131. See *id.*

132. See *Ethnic Notions*, *supra* note 116.

the genteel and subservient epitome of the ideal White woman, while also reinforcing the idea that the Black male lacked the strength of character to properly control his own people and, therefore, lacked the character to become a productive member in White society.

The image of African-Americans changed after slavery was abolished. While the Mammy and Happy Sambo images were reinforced to further justify the nostalgia of slavery, the freed slaves became threats to White society. Post-slavery, Black men were portrayed as brutes and threats to the establishment.¹³³ In the infamous movie *Birth of a Nation*, which opened in 1915, brutish Black men were portrayed (by White men in Black face) as pursuing White virgins.¹³⁴ The movie not only incited White violence, but justified it.¹³⁵ Lynching Black men became necessary and justifiable to protect the virtuous White female from out-of-control Black brutes. Even Woodrow Wilson, the twenty-eighth president of the United States, commented favorably on the movie.¹³⁶ Blacks were an offense to civilization and a challenge to Reconstruction.

In the 1930s, the brute character was still a popular image, but during this time he acquired a penchant for razors.¹³⁷ Advertisements and cartoons commonly depicted Blacks with over-sized razors.¹³⁸ This violent image could be seen in the depictions of Black soldiers during World War I, who were often portrayed as starting fights when they were not serving White soldiers, or dancing and entertaining.¹³⁹

Even during the 1930s the nostalgia for the antebellum south was not forgotten, as Margaret Mitchell's book, *Gone With the Wind*, reflects. In describing Reconstruction, the author states that the freed slaves "conducted themselves as creatures of small intelligence might naturally be expected to do. Like monkeys or small children turned loose among the treasured objects whose value is beyond their comprehension, they ran wild – either from perverse pleasure in destruction or simply because of their ignorance."¹⁴⁰

These powerful images were carried into high school history lessons, where they were further perpetuated. In a 1950 American history textbook, the authors stated that "[a]s for Sambo, whose wrongs moved the abolitionists to wrath and tears, there is some reason to believe that he suffered less than any other class in the South from its 'peculiar institution.'"¹⁴¹ American history lessons generally painted

133. *See id.*

134. *See id.* *Birth of a Nation* was first a book written by D. W. Griffith that went on to become a Broadway play prior to hitting the silver screen. *See also* LOEWEN, *supra* note 2, at 157-58.

135. *See Ethnic Notions, supra* note 116.

136. *See id.* Woodrow Wilson, who was openly hostile to Blacks, won the presidency in 1912, during which time he segregated the federal government. Notably, President Warren G. Harding, Wilson's predecessor, was inducted into the Ku Klux Klan in a White House ceremony. During the Wilson and Harding administrations, more than 100 race riots broke out, including a little known riot in Tulsa, Oklahoma, in which Whites dropped dynamite from a plane on a Black neighborhood, killing more than 75 people and destroying 1,100 homes. *See* LOEWEN, *supra* note 2, at 158-59. Support for racism in the executive branch reinforced racist ideology within the American community.

137. *See Ethnic Notions, supra* note 116.

138. *See id.*

139. *See id.*

140. MARGARET MITCHELL, *GONE WITH THE WIND* 645 (1936).

141. LOEWEN, *supra* note 2, at 133 (citing SAMUEL ELIOT MORISON & HENRY STEELE

a picture of America as being "lily-white," and when reference was made to African-Americans, they were regarded as a "race of former slaves."¹⁴²

Regrettably, these images are not peculiar to America's complicated past. While such overt depictions of racism are seen less often, traces of these images still exist. The "Mammy" image was popularly reinforced by Nell Carter's character in the television program "Gimme a Break," where she portrayed a Black housekeeper and caretaker to a White family. She was happy in her role as caretaker, and gladly fulfilled her duties as the matriarch of the White family. The Happy Sambo and Zip Coon resurfaced in images such as Jimmy Walker's character, "J.J.," in "Good Times." "Kid Dyn-o-mite" reinforced the idea that Blacks are a source of amusement, but are too child-like and incompetent to assimilate into White culture.¹⁴³ The Black brute was reflected in George Bush's 1984 presidential campaign when he released the infamous Willie Horton ads, which sought to attack Dukakis for pardoning a Black rapist.¹⁴⁴ In the style of *Birth of a Nation*, the ads stirred feelings that the streets would not be safe for White virgins if Dukakis were elected.

These images still have powerful effects. In an experiment conducted by B. L. Duncan "a white man shoving a black man tended to be perceived by whites as 'horsing around,' while the same behavior by the black towards the white was more likely to be seen as 'violent.'" ¹⁴⁵ It is not surprising, then, that Latrell Sprewell, a Black professional basketball player for the Golden State Warriors, was suspended from the National Basketball Association for one year, and had his contract voided after attacking his coach.¹⁴⁶ In contrast, Kevin Greene, a White professional football player for the Carolina Panthers, was suspended for one game after shoving his coach on national television.¹⁴⁷ The Sprewell incident created a stir of controversy and was described as "barbaric" with a "baseness about it that

COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* (1950)). Notably, Morison and Commager were two northern Pulitzer Prize - winning historians. See *id.* at 133 n.11.

142. GORDON W. ALLPORT, *ABC'S OF SCAPEGOATING* 23 (4th ed. 1963).

143. Images reinforcing White superiority have been popularly reinforced in television programs such as "Webster" and "Different Strokes." Both shows feature wealthy White families that took in poverty stricken Black children. These programs leave the impression that upward mobility for Blacks is only possible on the coat-strings of a generous White person. Merit and individualism is less an issue than whether your dead mother was the housekeeper for the wealthy "Mr. Drummond."

144. See Fred Siegel, *Obstructed View for the Boys on the Bus*, *NEWSDAY*, Aug. 20, 1989, at 14, available in 1989 WL 3403308. It is not surprising that fictitious Black "brutes" have been accused of crimes by White perpetrators. Susan Smith implicated a Black car-jacker for the murder of her two sons. See Tracie Reddick, *Race Issues Boiled Over In 1995*, *TAMPA TRIB.* Dec. 28, 1995, at 1, available in 1995 WL 14560360. Charles Stuart, likewise, implicated a "black man with a raspy voice" for the murder of his wife. See D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 *GEO. L.J.* 437, 501 (1993). Both Smith and Stuart were the actual perpetrators of the crimes, but the police invested hours of time and manpower chasing these "phantom" Black killers.

145. MYERS, *supra* note 106, at 572 (citing Birt L. Duncan, *Differential Social Perception and Attribution of Inter-group Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 *J. PERSONALITY & SOC. PSYCHOL.* 590-98 (1976)).

146. See Bob Padecky, *It's Not an Issue of Black and White*, *PRESS DEMOCRAT*, Dec. 23, 1998, at C1, available in 1998 WL 17050746.

147. See *id.*

repulses us in its primitiveness."¹⁴⁸ The Greene incident, on the other hand, was described as "an act that can be seen daily in bars all across America, and at least once or twice every Sunday in the stands at every NFL game."¹⁴⁹

The potency of the distorted Black image is reflected in words like "barbaric" and "primitive" and is illuminated even further when contrasted with words used to describe Whites and their behavior. Kimberle Williams Crenshaw, a Critical Race scholar, captures these "oppositional dualities" by comparing the traditional images of Blacks with the traditional images of Whites, as the following chart indicates:¹⁵⁰

WHITE IMAGES	BLACK IMAGES
Industrious	Lazy
Intelligent	Unintelligent
Moral	Immoral
Knowledgeable	Ignorant
Enabling Culture	Disabling Culture
Law-Abiding	Criminal
Responsible	Shiftless
Virtuous/Pious	Lascivious

This chart reflects the normatively positive images associated with Whites, and the subordinate and aberrational images associated with Blacks.¹⁵¹ These images become the basis of what cognitive theorists term "person types – sets of traits that past experience tells us tend to cluster together."¹⁵² How we use these images and "person types" to process and assimilate information about others is illustrated in the following section on heuristics.

2. Heuristics

*"All things being equal, most of us will do the least amount of mental work we can get away with in most situations."*¹⁵³

Heuristics, the simple decision-making rules we use to make inferences or draw conclusions, help minimize the mental effort we use when confronted with new information.¹⁵⁴ Heuristics can best be characterized as mental "shortcuts." For example, if asked to determine the size of a room, we may "pace off" its distance by assuming our foot length equals one foot to arrive at a rough estimate

148. *Id.*; see also David Steele, *Player Attacks Coach: Oh, the Lack of Outrage*, THE S. F. CHRON., Dec. 18, 1998, at E1, available in 1998 WL 3930586 (noting the Sprewell incident appeared on "Nightline" and "60 Minutes," and Sprewell himself was described as a "cancer," "locker-room poison," "tuhg," and "gangster.").

149. Padecky, *supra* note 146.

150. Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373 (1988).

151. *See id.*

152. BARON & BYRNE, *supra* note 108, at 72.

153. *Id.* at 86.

154. *See id.* at 87.

of its length and width.¹⁵⁵ Or, to determine the distance of an object we may rely on the object's clarity.¹⁵⁶ The further away an object is, the less clearly we see it, and the closer an object is, the more clearly we see it. Thus, clarity becomes another heuristic, or short-cut, for determining distance. We use these shortcuts when we have no other way of acquiring or processing the information we seek.

While there are many types, representativeness and availability are two frequently used heuristics.¹⁵⁷ The representativeness heuristic is employed when we seek to determine whether an object belongs to a particular class.¹⁵⁸ The availability heuristic concerns the ease with which certain information comes to mind. When used in the social context, their use necessarily draws on the schemas and stereotypes we have developed.¹⁵⁹ In fact, we use our schemas and stereotypes in the same way we use our foot to determine the size of a room, as a shortcut.

a. *Representativeness*

The representativeness heuristic is based on the following principle: "The more similar an individual is to 'typical' members of a given group, the more likely he or she is to also belong to that group."¹⁶⁰ For example, consider a description of the following person: you are told that your next door neighbor is neat, has a good vocabulary, reads a lot of books, is shy, and dresses conservatively. Is it more likely that she is an executive, librarian, waitress, or dancer? Using the representativeness heuristic, the description best fits the traits associated with librarians.¹⁶¹ While the representativeness heuristic may be grossly accurate at times, it frequently leads to errors.¹⁶² The most common error is the base-rate fallacy.¹⁶³

The base-rate fallacy is the failure to consider prior probability when determining the likelihood, or base-rate frequency, of an outcome.¹⁶⁴ For example, if base-rate information were added to the description of the hypothetical individual above, it should affect the conclusion drawn regarding the neighbor's occupation. Thus, if we were told that there were more waitresses in the population, this should effect our assessment of the individual's occupation. However, people tend to ignore base-rate information, and instead, rely on the representativeness heuristic.

Amos Tversky and Daniel Kahneman noted that subjects in their experiment evaluated the likelihood that an individual belonged to a particular group by the degree to which the individual's description was representative of stereotypes, with little or no regard for the prior probability of the categories.¹⁶⁵ The subjects were given descriptions of several individuals and were asked to determine the likelihood

155. *See id.*

156. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 1* (Daniel Kahneman et al. eds., 1982).

157. *See id.*

158. *See id.* at 4.

159. *See* BARON & BYRNE, *supra* note 108, at 89.

160. *Id.* at 87.

161. *See id.*

162. *See id.*

163. *See* Tversky & Kahneman, *supra* note 156, at 4.

164. *See id.*

165. *See id.* at 5.

that the individual was an engineer or a lawyer. The first group was told that the descriptions had been drawn from a group of one hundred professionals, seventy of whom were engineers and thirty of whom were lawyers. The second group was told that thirty of the groups members were engineers and seventy were lawyers. The authors noted that when applying Bayes' rule, the ratio of the odds should be $(.7/.3)^2$, or 5.44, for each description.¹⁶⁶ Thus, the odds that the description belongs to an engineer should be higher in the first group than in the second. However, the subjects in both groups produced almost identical probability judgments. They ignored base-rate information, and relied, rather, on the degree to which the description was representative of engineers or lawyers.

The experience of New York City judge Bruce Wright illustrates a compelling example of the representativeness heuristic. Bruce Wright, a Black judge, was rushed to the hospital after feeling faint one afternoon during trial.¹⁶⁷ While laying on a stretcher in a curtained off area of the emergency room, he noticed a poor White derelict lying in a stretcher not far from him. The man appeared to be intoxicated, wore soiled clothing and sneakers, needed a shave, and was drooling and singing in garbled syllables. The judge then heard a nurse, just outside his curtain, say: "Hurry doctor, we have a judge who is ill."¹⁶⁸ The doctor opened the curtain, looked at the judge and the White derelict, and rushed to the side of the White man saying, "Judge, what seems to be the matter?"¹⁶⁹

Indeed, the doctor's stereotypes regarding judges and Black men were too powerful to overcome *obvious* information to the contrary.¹⁷⁰ "Compared with a poor, ragged, homeless white unfortunate, unshaven and drooling, a well dressed [B]lack simply could not be the judge."¹⁷¹

b. Availability

The availability heuristic relies on ease of recall, and is employed when frequency or probability is estimated by the ease with which we recall instances or associations.¹⁷² Namely, the "easier it is to bring instances of some group or category to mind, the more prevalent or important these are judged to be."¹⁷³ For example, one may determine the likelihood of having a heart attack or getting cancer by recalling similar occurrences among one's friends.¹⁷⁴ The availability heuristic is useful in determining frequency or probability, because instances of large classes are recalled faster than instances of less frequent classes.¹⁷⁵

166. *See id.*

167. *See* BRUCE WRIGHT, BLACK ROBES WHITE JUSTICE 24 (1987).

168. *Id.*

169. *Id.* at 25.

170. The judge's story illustrates two competing schemas. One is that judges tend to dress in suits, and not in tattered clothing. The other is that judges are not Black.

171. WRIGHT, *supra* note 167, at 25.

172. *See* Tversky & Kahneman, *supra* note 156, at 163, 164.

173. BARON & BYRNE, *supra* note 108, at 89.

174. *See* Tversky & Kahneman, *supra* note 156, at 1, 11.

175. *See id.*

In one study, 100 subjects were asked which is more common – words that start with the letter *k*, or words with *k* as the third letter.¹⁷⁶ A majority of the subjects stated that words starting with the letter *k* are more prevalent.¹⁷⁷ Interestingly, words with *k* as the third letter are twice as prevalent in the English language.¹⁷⁸ The subjects were relying on the availability heuristic. Words such as “king,” “kid,” or “kiss” come to mind more readily than words such as “awkward,” “ask” or “unknown.”

The availability heuristic inevitably relies on our existing schemas and experiences, and its use tends not only to draw off stereotypes, but also to perpetuate them. It does so for two reasons. First, when information is easy to remember, we recall more of it.¹⁷⁹ Thus, we judge easy to remember information as more frequent or likely to occur.¹⁸⁰ Negative stereotypes about minorities are easily recalled for two reasons. First, minorities are generally more salient than majority group members.¹⁸¹ That is, they stand out and draw attention, and, therefore, leave vivid impressions.¹⁸² Second, we tend to pay more attention to negative social information than we do to positive social information.¹⁸³

The second reason availability perpetuates stereotypes is because they serve as “expectations that can function to guide and shape reality.”¹⁸⁴ In one study, subjects were given sentences such as “Carol, a librarian, is attractive and serious.”¹⁸⁵ One of the traits was stereotypic of the occupation (i.e. serious for librarian) and the other was stereotypic for another occupation (i.e. attractive for stewardess, but not librarian).¹⁸⁶ After reading several of these trait association sentences, the subjects were more likely to misremember the trait-occupation pairings in favor of stereotypical associations. Thus, the availability heuristic not only reinforced stereotypes, but drew attention to information that conformed to the stereotype – in essence, they served to shape the reality of the perceiver.

To the extent that Individualist theorists presume that we can judge others based on individual traits and merit, they greatly over-estimate the human mind. First, the availability heuristic can be employed with absolutely *no* conscious racist motivation. The subject merely draws off past experiences and exposures to quickly organize and retain information, generally without knowing he or she is

176. *See id.* at 12.

177. *See id.*

178. BARON & BYRNE, *supra* note 108, at 89.

179. *See id.*

180. *See id.*

181. *See* Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 190, 192-93 (Daniel Kahneman et al. eds., 1982).

182. This also explains why people tend to remember “token” minorities as America’s success stories, and, therefore, proof that racism no longer exists.

183. *See* BARON & BYRNE, *supra* note 108, at 97. Some researchers describe this phenomenon as automatic vigilance. This is based on the rationale that negative information alerts us to potential dangers. *See id.* (citing F. Pratto & O. P. John, *Automatic Vigilance: The Attention-Grabbing Power of Negative Social Information* 51 *J. PERSONALITY & SOC. PSYCHOL.* 380-91 (1991)).

184. Taylor, *supra* note 181, at 197.

185. *Id.* (citing D. L. Hamilton & T. R. Rose, *Illusory Correlation and the Maintenance of Stereotypic Beliefs* (1978)) (unpublished manuscript, University of California at Santa Barbara).

186. *See* Taylor, *supra* note 181, at 198.

doing so. Thus, even the self-professed “non-racists” are subject to human cognitive forces and stereotypes they may not have realized they acquired. Second, the availability heuristic shapes the information we see, making it difficult to make fully informed inferences. As the experiment with trait-occupation association demonstrates, our attention is drawn to information consistent with existing beliefs.

For example, in one experiment, John Dovidio tested Whites’ *conscious* beliefs about stereotypical characteristics of Blacks and Whites.¹⁸⁷ He presented White subjects with the categories “Blacks” and “Whites” on a computer screen and asked participants to respond as quickly as possible to positive and negative stereotypes.¹⁸⁸ Faster reaction time was an indicator of stronger trait association.¹⁸⁹ While subjects were no more likely to associate negative traits with Blacks than with Whites, they associated positive traits less often with Blacks than they did with Whites.¹⁹⁰ Dovidio later conducted a similar experiment to measure Whites’ *unconscious* beliefs about stereotypical characteristics of Blacks and Whites, by subliminally presenting the categories of “Blacks” and “Whites.”¹⁹¹ The results revealed that not only did the participants associate fewer positive traits with Blacks, but on an unconscious level, they associated more *negative* traits with Blacks.¹⁹² The availability heuristic is, thus, a powerful heuristic. When we employ the availability heuristic to process information, we see the world not as it is, but as we have been conditioned to see it.

3. *Cognitive Dissonance*

Stereotypes are difficult to modify because information inconsistent with them creates dissonance. Cognitive dissonance is an unpleasant feeling “that arises when we discover inconsistency between two of our attitudes or between our attitudes and behavior.”¹⁹³ For example, if you believe that protecting the environment is important, you may experience dissonance if you drink from a Styrofoam cup or drive a gas-guzzling car. The existence of dissonance motivates two types of behavior: first, dissonance reduction, and second, avoidance of situations and information that will likely cause dissonance.¹⁹⁴

Baron and Byrne illustrate how cognitive dissonance occurs in relation to affirmative action by examining the following scenario:

You have always been in favor of affirmative action . . . Now, however, you learn that because of this policy one of your friends has been passed over for a promotion, even though your friend has more experience than a minority candidate who *was* promoted. While you are in favor of affirmative action, you also believe that people should be promoted on the basis of merit . . . you

187. See John Dovidio, *The Subtlety of Racism*, 47 TRAINING & DEV. 51, 55 (1993).

188. See *id.*

189. See *id.*

190. See *id.*

191. See *id.*

192. See Dovidio, *supra* note 187, at 55.

193. BARON & BYRNE, *supra* note 108, at 158.

194. See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 3 (1957).

have come face to face with the fact that two of your attitudes are inconsistent – they just don't seem to fit together.¹⁹⁵

When dissonance such as this is produced it can lead to attitude changes so that one's attitude more closely reflects one's words and behaviors. Thus, doing or saying things inconsistent with our beliefs may cause us to change our *attitude* to reduce the dissonance created by the inconsistency.

With respect to the scenario of affirmative action above, one of our attitudes will have to change to reduce the dissonance: either our belief in affirmative action or our belief in meritocracy. Because we will generally change our attitudes to reflect positions most favorable to us, Whites are more likely to change their attitude towards affirmative action, because, realistically, they may be the next one passed over for promotion.

To illustrate one of the ways this attitude change can occur, consider Delgado's discussion of "imposition language." It illustrates one way people attempt to rationalize dissatisfaction with affirmative action (or change their attitude). It requires first that:

We decide the group is asking for "special" status. We find their demands excessive, tiresome, or frightening At first, justice seemed to be on their side. But now we see them as imposing, taking the offensive, asking for concessions they do not deserve. Now they are the aggressors and we the victims The imposition narrative delegitimizes the reform movement, portraying it as unprincipled. But by a neat switch, it also enables us to feel comfortable about withdrawing our support; the imposition paints us as morally entitled to oppose the movement and brings it to a halt.¹⁹⁶

Notably, this is nothing more than an attempt to reduce dissonance. Characterizing the minority as unreasonable allows altruistic values associated with fairness and equality to be reconciled with feelings of anger, prejudice, and elitism. Thus, the attitude towards affirmative action is changed, while the attitude towards meritocracy is preserved.

C. Rethinking Individualism

"We see things not as they are but as we are."
Anais Nin¹⁹⁷

African-Americans are not perceived as individuals. In fact, "black individuality, emerging from the amorphous mass of unworthy darkness, seems to intensify distrust" ¹⁹⁸ Blacks have never been characterized in American society as individual participants. Indeed, reality dictates that, "Blacks are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of

195. BARON & BYRNE, *supra* note 108, at 157-58.

196. Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025, 1026 (1994).

197. LOEWEN, *supra* note 2, at 232.

198. WRIGHT, *supra* note 167, at 162.

the group; and much of our action, institutional and personal, is based on these perspectives.”¹⁹⁹

Individualism will fail to cure racism for three reasons. First, it does not acknowledge and account for the human cognitive function. As illustrated by cognitive theory, we make decisions about others by drawing off of categories, or “person types.” Our cognitions are so strong, that while we may believe we are making individual decisions, we are actually making group decisions. Thus, on a doctrinal level, Individualism’s major premise will prove unworkable. Second, Individualism does not recognize a White identity. In so doing, it perceives itself as a passive observer of racism, rather than an active participant. Third, it fails to recognize the subtlety of racism. While persons may self-report that they are applying the Individualist program, subtle racism, operating through cognitive frameworks, still occurs.

1. *The Human Cognitive Factor*

Individualism posits that we should evaluate others through “colorblind” lens based on individual merit. It is at this level, the assessment of another, that it seeks to cure racism. Individualism asks that we ignore stereotypes and our reliance on short-cuts. This is not, however, the level at which racism can be cured. The power of stereotypes and heuristics has been demonstrated through psychological research.

We will use these mental processes as we always have. Indeed, they serve a valuable purpose.²⁰⁰

Racism can only be cured at the level where the beliefs are transmitted – stereotypes. Inevitably, this requires a new collective vision and approach to racism and minorities. As demonstrated, the current collective vision has been the source of many of the stereotypes and beliefs we hold, which is due in part to its reliance on the exclusion of minorities and maintenance of the status quo. Thus, if ending racism is a prerogative, this aspect of the collective belief system must be dismantled.

CRT not only examines this aspect, but seeks to dismantle it and reconstruct a new and more inclusive collective vision; a vision that includes minorities.²⁰¹ The effectiveness of CRT’s chosen methods is irrelevant at *this* point in the inquiry.²⁰² What is most significant is that CRT attacks the problem at the appropriate level, the level of transmission or social construction.

Individualism, however, preserves the current vision by failing not only to address our inherent cognitive thought processes, but the relationship that the current vision has with them. It shifts the focus to the individual, as if this hypothetical person lives in a vacuum. Indeed, this “individual” is capable of assessing a situation or person on merit alone by considering only the information

199. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 148 (1976).

200. We generally do not have time to evaluate every situation or set of data in a comprehensive and thorough fashion. Indeed, as we move through life, we take great pride in our ability to make decisions quickly and efficiently *because of* our prior experiences.

201. Recall the ten themes of CRT. See notes 27-44 *supra* and accompanying text. Critiques of liberalism, structuralism, and legal institutions explore how these mechanisms perpetuates racism.

202. But see discussion of affirmative action, *infra* notes 269-99 and accompanying text.

in front of him or her. Psychological theory disproves this assertion. Thus, its major premise fails because we do not judge people on an individual basis — even if we think we do and even if the Supreme Court tells us we should.²⁰³

“You do not get people to diet by telling them they are not hungry.”²⁰⁴ That, however, is precisely what Individualists would have us believe: if we merely tell people to view everyone on an individual basis and merit alone, they will do so. We are being asked to ignore the “hunger pains,” or the basic realities we have been taught about minorities. Ignore the images of the brutish Black male committing acts of violence and being taken into police custody with regularity on news programs. Ignore the image of the illiterate Black welfare mom with uncombed hair, missing teeth, and soiled clothing you routinely see in the media. Ignore the image of the barefoot, dirty and unruly Black child you see running through the projects. Ignore the image of the gangster rapper, who only speaks ebonics through a mouth full of gold teeth, “totes” a gun to kill cops, and probably cannot wait to rape your White daughter after he holds up a liquor store on his way to make a drug deal, after he kills a few members of a rival gang who shot his “homey” last week. Ignore all of that, along with the justifiable fear you have developed based on these images!

Rather, notice that most African-Americans are *not* in jail. Most African-Americans are not on welfare.²⁰⁵ Most African-Americans are God-fearing, regular churchgoers who care about issues of morality and spirituality. Notice that most African-Americans value education and aspire, like everyone else, to accomplish the “American dream.”²⁰⁶ African-American teenagers are less likely to use drugs, alcohol, or cigarettes.²⁰⁷ Notice that you rarely see the image of the *nuclear* Black family saying grace before they enjoy a meal purchased with hard earned money.

203. See, e.g., *Adarand Constructors, Inc. v. Peña* 515 U.S. 200 (1995) (noting that the individual is the proper point of constitutional inquiry). Notably, the Supreme Court held in 1923 that the Naturalization Act’s reference to “White person” imported “a racial and not an *individual* test . . . to indicate only . . . persons of . . . the Caucasian race.” *United States v. Bhagat Singh Thind*, 261 U.S. 204, 208 (1923) (emphasis added).

204. HIRSCHFELD, *supra* note 13, at xiii.

205. Notably, Blacks represent only 36.4% of welfare participants. ADMIN. FOR CHILDREN AND FAMILIES, U. S. DEPT. OF HEALTH & HUMAN SERV., AID TO FAMILIES WITH DEPENDENT CHILDREN: PERCENT DISTRIBUTION OF FAMILIES BY RACE OF NATURAL OR ADOPTIVE PARENT (visited Jan. 7, 1999) <<http://www.acf.dhhs.gov/program/afdc/reports/1994/char/table10.htm>>. Additionally, twice as many Whites receive assistance as Blacks. JAN TIN, U. S. CENSUS BUREAU, DYNAMICS OF ECONOMIC WELL-BEING: PROGRAM PARTICIPATION, 1992-1993, at 2 (1996).

206. Blacks are just as likely as Whites to complete high school, as portrayed by the following statistic: 82.5% graduation rate for Blacks, compared to 86.5% for Whites. U. S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT OF PERSONS 15 YEARS OLD AND OVER, BY AGE, SEX, RACE, AND HISPANIC ORIGIN: MARCH 1998 (last updated Sept. 16, 1998) <<http://www.census.gov>>.

Interestingly, in Great Britain, Blacks are twice as well educated as Whites and twice as likely to become professionals. Tony Brown notes that this is not reported in the American press because “it would conflict with the image of the downtrodden, illiterate Blacks in America who suffer from a chronic case of *The Bell Curve*.” TONY BROWN, *BLACK LIES, WHITE LIES* 135 (1995).

207. Only 0.8% of Black high school seniors use cocaine, compared to 3.1% of Whites. Further, 8.2% of Black high school seniors smoke cigarettes, compared to 32% of Whites. 11 percent of Black high school senior drink heavily, compared to 32% of Whites. BROWN, *supra* note 205, at 135 (citing Barbara Reynolds, *Black Teens Are Leaders in Saying No to Drugs*, N. Y. TIMES, at 9A).

Notice that the image of the Black professional is *not* entirely made up of professional athletes and entertainers.

Individualists are attempting to "convince people that something they know perfectly well is not the case."²⁰⁸ However, "you do not get someone to stop deeply cognizing race by telling them they do not."²⁰⁹ We cannot deny that racist thinking is deeply embedded in our conceptual endowment, and the susceptibility to think in racist terms is within all of us by virtue of our cognitive endowment.²¹⁰ In essence, we think in racist terms because we have been taught to. We store this information in our cognitive endowment along with everything else we encounter in our environment. We draw on our cognitive endowment and think in terms of what we have been taught because we are human. Indeed, we are "[a]ll too human."²¹¹

How we change stereotypical thinking is much more difficult than understanding how this type of thinking operates. Additionally, how we change people's ideas about Individualism is equally difficult, because "Individualism" is such a powerful American concept. Altering the "Individualist" precept, however, must occur before a new collective vision can be achieved.

According to social judgment theory, attitude change depends on message perception.²¹² The extent of attitude change depends on whether the message falls within "the latitude of acceptance or not."²¹³ Attitude change increases with discrepancy as long as the message falls within the latitude of acceptance, but decreases if the discrepancy is so large that the message falls in the latitudes of rejection.²¹⁴ If the message is within the latitude of acceptance, "the source is seen to be fair, intelligent and wise."²¹⁵ If it falls within the latitude of rejection, "the source is seen as biased, dull-witted, and lacking knowledge in the area."²¹⁶ Additionally, the credibility of the source magnifies the degree of attitude change.²¹⁷ Thus, credible sources have a wider latitude of acceptance and a narrower latitude of rejection.²¹⁸ Conversely, non-credible sources have a narrower latitude of acceptance and a wider latitude of rejection.²¹⁹

208. HIRSCHFELD, *supra* note 13, at xiii.

209. *Id.*

210. *See id.*

211. Friedrich Nietzsche, *Human, All-Too-Human*, in THE PORTABLE NIETZSCHE 51 (ed. Walter Kaufmann 1954). "Human, all too human," was Nietzsche's phrase for human psychology. In *Human, All-Too-Human*, he described the original error of philosophers as a lack of historical sense. They proceed, he stated, "from contemporary man and think they can reach their goal through an analysis of this man." *Id.* In this sense, Individualists share the original error, because they fail to examine racism historically. Rather, they view present-day man as a "measure of all things," and not as a "man of a very limited time." *Id.*

212. *See* JOHN E. HUNTER ET AL., MATHEMATICAL MODELS OF ATTITUDE CHANGE: CHANGES IN SINGLE ATTITUDES AND COGNITIVE STRUCTURE 56 (1984).

213. *Id.*

214. *See id.* at 56-57.

215. *Id.* at 57.

216. *Id.*

217. *See* HUNTER ET AL., *supra* note 212, at 65.

218. *See id.*

219. *See id.*

This theory illustrates two points. First, the successful *application* of a legal theory based on Individualism depends primarily on how consistent it is with the subject's already held beliefs. At the same time, the ability to change attitudes about the efficacy of Individualism also depends on how consistent such information is with the subject's already held beliefs. Second, it provides at least one explanation for CRT's heavy criticism.

The latitude of acceptance relies on pre-existing information. As noted above, information regarding minorities, particularly African-Americans, is based on negative stereotypes, transmitted consistently through American sub-culture²²⁰ and popular culture. Thus, attitude change will only occur to the extent information falls within the individual's latitude of acceptance. The latitude of acceptance will inevitably vary, depending on the individual's experiences and exposure. It is safe to assume, however, that any given individual in America has been exposed to a baseline amount of information regarding African-Americans, as well as a baseline amount of information regarding Whites. Inevitably, attitude change will only occur *to the extent it falls within the pre-determined latitude of acceptance*. Thus, meritorious information associated with African-Americans may be lost in the transmission because it is not within the zone of acceptance.

The same is true with regard to the concept of individuality. Although there is compelling evidence that it will not work when applied in the social context, information disputing its validity is inconsistent with information already held by most Americans. Individualism is, after all, the American way.

This helps explain at least some of the more vehement criticism of CRT. CRT's message fundamentally contradicts long-standing ideals about Individualism and self-determination. Much of the criticism leveled at CRT is based on this contradiction. Individualists often point to Critical Race Theorists to make the "attitude adjustment." CRT is asked to stop considering race as a factor. Race, after all, does not determine who you are, Critical Race Theorists are told. Holding on to race limits change, and therefore limits progress. Holding on to race denies individuality. It is interesting that CRT is believed to be clinging to race as if it serves as a security blanket, while the "correct thinking" Individualists have long abandoned such unenlightened thinking.

Individualists, however, epitomize the very ideology they so readily attack, because they prove that race matters. To the extent that Individualists spend enormous amounts of space in Law Review and legal journals across the country trying to convince us that race does not matter, it certainly seems to matter when *minorities* and their allies begin to talk about it. White Individualists never have to consider race; thus, their Whiteness is only defined by minorities. Every time a Critical Race Theorist talks about race, Whiteness is illuminated. This, of course, is undesirable. First, with Whiteness comes association with a "group," which

220. America's subculture consists of groups like the White militia and neo-nazis. Andrew MacDonald's book, *The Turner Diaries*, is representative of this sub-culture. For example, he states that "gangs of Black thugs hang around parking lots and school playgrounds . . . looking for any attractive, unescorted White girl . . ." ANDREW MACDONALD, *THE TURNER DIARIES* 58 (1978). *The Turner Diaries* was thought to serve as the blueprint for the Oklahoma City bombing committed by Timothy McVeigh. Phil Fairbanks, *Radical Fringe's Violent Bond Born In Confinement*, BUFF. NEWS, Nov. 8, 1998, at A1, available in 1998 WL 6052250. It has gone through six printings, selling 198,000 copies.

fundamentally contradicts with Individualism. Second, with White racial identification comes responsibility – you can no longer ignore racial problems and the perpetuation of those problems. Individuality allows Whites to shift the blame and guilt associated with living in a racist society, to minorities.²²¹ “Let go of race,” CRT is told, because if it is Black, then the other is White.

2. *Failure to Recognize a White Identity Perpetuates Racism*

Irrespective of Individualists’ assertions to the contrary, there exists a White identity. In its initial development, the White identity begins with the passive absorption of stereotypes and subtle messages about race.²²² Typically unaware of the assimilation process, Whites have internalized the existing racial stereotypes. Perceiving themselves as color-blind, Whites often externalize racism by perceiving it as something outside themselves, while failing to see how they contribute to the problem of racism. Further, racism is perceived as manifesting itself only in “the *behavior of individuals*, rather than as an *institutionalized system of advantage* benefitting Whites in subtle as well as blatant ways.”²²³ When racism is perceived to occur only through the “acts of individuals,” ideologies of change are targeted at modifying individual behavior – hence Individualism. Thus, awareness of the White identity can serve as a valuable tool in the effort to end racism, because it creates an awareness of everyone’s role in racism.

Corvin and Wiggins have identified four stages in the development of White identity.²²⁴ In Stage one, *Acceptance*, the White person “denies that there is a race problem, tends to have a ‘people are people’ view of the world, and operates under an unconscious assumption of Whiteness as the ‘norm.’”²²⁵ These Whites want to be perceived as non-racists, but believe non-Whites should assimilate to dominate White culture.²²⁶ This “people are people,” or “Individualist,” attitude denies cultural differences and perpetuates existing White norms as the status quo. Regrettably, many Whites are not aware they are in this stage of identity development.

Stage two of White identity development, *Resistance*, is typified by “feelings of anger about being brainwashed by American myths.”²²⁷ The person recognizes racism in society and may even seek to actively demonstrate against it, but fails to see his or her own personal racism. Beverly Daniel Tatum, Ph.D., refers to this stage as *disintegration*, which is marked by feelings of dissonance that result from the contradiction between the recognition of societal racism and the idea of an American meritocracy.²²⁸ Reactions in this stage can go one of two ways: the

221. See Morrison, *supra* note 68, at 329.

222. See BEVERLY DANIEL TATUM, PH.D., “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?”: AND OTHER CONVERSATIONS ABOUT RACE 95 (1997).

223. *Id.* (emphasis added).

224. See Sue Ann Corvin & Fred Wiggins, *An Antiracism Training Model for White Professionals*, J. MULTICULTURAL COUNSELING & DEV. 105, 108 (1989).

225. *Id.*

226. See *id.*

227. *Id.*

228. See TATUM, *supra* note 222, at 98.

individual may attack the validity of information received about racism,²²⁹ or the individual may act on the discomfort.²³⁰

In stage three, *Redefinition*, the person redirects "their energy toward the emergence of White identity and, consequently, a White culture without racism."²³¹ Recognizing that racism must be addressed, the person, through self-exploration, reevaluates personal goals and values. During this stage, however, the White person may intellectually understand racism, yet may not know what to do about it.²³² What often arises is a "guilty White Liberal" persona, typified by a desire to associate with people of color to reduce the feelings of guilt.²³³

Stage four, *Internalization*, "represents the White person's integration of his or her race into his or her identity."²³⁴ In this stage, White persons fully recognize their "Whiteness" and their existence in a multicultural society. They also seek to find a more positive White identity, "that take them beyond the role of victimizer."²³⁵

To truly combat racism, stage four must be achieved. It will not be achieved, however, through a stage one philosophy of "people as people," as the Individualists propose. The value of White identity awareness is that those who achieve it become credible sources to change the minds of others.²³⁶ Under social judgment theory, the message of a credible source will have a greater impact on attitude change.²³⁷ White sources may very well be perceived as more credible to other Whites, as opposed to Blacks, who are often perceived as "complain[ing] too much about racism."²³⁸

3. *Failure to Recognize the Subtlety of Modern-Day Racism*

Modern-day racism is not the old-fashioned overt racism of the past. Rather it occurs in subtle forms that Individualism fails to recognize. John Dovidio, a professor of psychology, describes this subtle type of racism as "aversive racism," and the form it takes is characteristic of many White Americans who believe they are not racists.²³⁹ Dovidio notes that the basis of the ambivalence aversive racists experience is their convictions of justice, fairness, and racial equality along side unavoidable racial biases.²⁴⁰ Aversive racists will discriminate "when appropriate

229. *See id.* Recall that, under Social Judgment Theory, this is a common reaction when information is perceived to be outside the latitude of acceptance. *See HUNTER ET AL., supra* note 212, at 56-57.

230. *See TATUM, supra* note 222, at 99.

231. Corvin & Wiggins, *supra* note 224, at 108.

232. *See TATUM, supra* note 222, at 106. Tatum refers to this as the *pseudo-independent stage*. *See id.*

233. *See id.*

234. Corvin & Wiggins, *supra* note 224, at 108.

235. TATUM, *supra* note 222, at 107-08.

236. *See HUNTER, supra* notes 212-19 and accompanying text.

237. *See id.*

238. Richard Cohen, *Generation of Bigots*, WASH. POST, July 23, 1993, at A23.

239. Dovidio, *supra* note 187, at 52. Many of these people harbor negative racial feelings and beliefs they are either, unaware of, or distance themselves from to maintain an image of being non-prejudiced. *See id.*

240. *See id.*

(and thus inappropriate) behavior is not obvious or when . . . a negative response on the basis of some factor other than race [is present]."²⁴¹ Thus, when they discriminate, it is in a way that insulates them from believing their behavior was motivated by race.

Dovidio identifies six traits common to most aversive racists. First, endorsement (in principle) of fair and just treatment of all groups.²⁴² Second, unconscious harboring of negative feelings towards other races, and therefore, avoidance of interracial interaction.²⁴³ Third, when such interaction is unavoidable, aversive racists feel anxiety and discomfort and attempt to disengage from the interaction quickly.²⁴⁴ Fourth, adherence to strict rules and codes of behavior in interracial interaction to avoid the "appearance" of being prejudiced.²⁴⁵ Fifth, frequent assertions of being "color-blind," under the presumption that if they do not see race, then no one can "accuse" them of being racist.²⁴⁶ Sixth, expression of negative feelings towards members of other races in subtle ways that can be rationalized.²⁴⁷

These characteristics manifest themselves in subtle forms of racism. For example, Dovidio tested his presumption of subtle racism by creating an experimental environment in which White subjects were told in one setting that they were the only witness to a serious accident in which the victim screamed for help.²⁴⁸ In the other setting the subjects were one of three witnesses that could hear the scream for help.²⁴⁹ Dovidio then altered the setting in one more way – in half the cases the victim was Black, and in the other half the victim was White.²⁵⁰ Dovidio predicted that an aversive racist who was the only witness to the accident would not discriminate against the Black victim, but when he or she was not the only witness, they would discriminate, based on their ability to justify inaction – someone else could help the victim.²⁵¹

The results were striking. When the White subjects were the only witness to the emergency, they helped White and Black victims equally.²⁵² However, when the White subjects were not the only witness, they helped the Black victim *half* as often as the White victim – thirty-eight percent of the time for Black victims versus seventy-five percent of the time for White victims.²⁵³ Presumably they were able

241. *Id.* at 53.

242. *See id.*

243. *See id.*

244. *See* Dovidio, *supra* note 187, at 53.

245. *See id.*

246. *See id.*

247. *See id.*

248. *See id.* at 53-54.

249. *See* Dovidio, *supra* note 187, at 54.

250. *See id.*

251. *See id.* This is known as the bystander effect. When a person is the only witness to an emergency, they will help because they bear 100 percent of the guilt and blame for not helping. However, when a person is not the only witness, responsibility is shared and less clearly defined. Thus, the bystander can rationalize not helping on the presumption that "someone else will intervene." *See id.*

252. *See id.*

253. *See id.* Had the situation been real and the accident serious enough to result in a fatal injury, the White victim would have died 25% of the time, while the Black victim would have died 62% of

to rationalize not helping, under the belief that someone else would. This rationalization allowed White participants to reduce the dissonance created by the two conflicting beliefs they held: one, that they are not racist and do not discriminate, and two, that they harbor negative feelings towards members of another race.

In another experiment, Dovidio found that when White subjects were given an opportunity to rate positive and negative characteristics of Blacks and Whites on a scale of one to seven, subtle biases existed.²⁵⁴ While the subjects did not rate Whites and Blacks differently on the negative scale, ratings on the positive scale revealed a significant difference.²⁵⁵ Blacks were not rated as positively as Whites.²⁵⁶ Thus, aversive racists resist believing that Blacks are bad, or worse than Whites, but they do believe that Blacks are not as good.²⁵⁷

The same pattern of bias was also reflected when Dovidio placed the subjects in the context of making an important personnel decision.²⁵⁸ Subjects were asked to make admission decisions for their university.²⁵⁹ A photograph of the applicant was placed on each fictitious file. Subjects rated unqualified applicants equally, regardless of race.²⁶⁰ However, when the applicant was qualified, subjects rated the White applicant *as more qualified*, even when the credentials for the White and Black applicant were the same.²⁶¹

Herein lies the cause of the "glass ceiling," which is responsible for less minority representation in higher status positions. Notably, while 30.1 percent of all White workers have management or some other professional/specialized job, only 19.8 percent of all Black employees hold those same positions.²⁶² Further, the median income for Whites in 1997 was \$38,972, while the median income for African-Americans was \$25,050.²⁶³

Thus, an individual or merit-based approach to racism will fail. Aversive racism, by its nature, occurs *at* the individual level.²⁶⁴ "Aversive racists recognize that prejudice is bad, but they do not recognize that they are prejudiced."²⁶⁵ Aversive racism begins with transmission of racist ideologies and beliefs and results

the time. *See id.* The experiment was based on the 1964 murder of Kitty Genovese in New York. After being attacked and stabbed in the parking lot of her building, she screamed for help. While lights came on in her building, none of the 38 witnesses intervened or called the police during the 45 minute attack. *See id.* at 53.

254. Dovidio, *supra* note 187, at 54.

255. *See id.*

256. *See id.*

257. *See id.*

258. Dovidio, *supra* note 187, at 56.

259. *See id.*

260. *See id.*

261. *See id.*

262. *See* U.S. BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES: EMPLOYED PERSONS BY OCCUPATION, RACE, AND SEX (visited Jan. 7, 1999) <<ftp://ftp.bls.gov/pub/special.requests/lf/att10.txt>>.

263. *See* U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, INCOME AND POVERTY 1997: AFRICAN AMERICANS (visited Jan. 7, 1999) <<http://www.census.gov/Press-Release/cb98-176.html>>.

264. It also occurs at the institutional and cultural levels. *See* Dovidio, *supra* note 187, at 57; *see also* Corvin & Wiggins, *supra* note 224, at 106.

265. Dovidio, *supra* note 187, at 57.

in White ethnocentrism.²⁶⁶ Efforts to eliminate racism will only work, as noted in the preceding section, when Whites first address their "Whiteness."²⁶⁷ Only then is it possible to identify and examine the biased modality through which social information is processed.

III. CRITICAL RACE THEORY, COGNITIVE PSYCHOLOGY AND AFFIRMATIVE ACTION

*"I'd be willing to bet . . . not one of the senators who voted to confirm Clarence Thomas would hire him as their lawyer."*²⁶⁸

Affirmative action is one of many initiatives associated with CRT and has emerged as a controversial issue in legal discourse, as well as, American politics. Opponents of affirmative action seize upon Martin Luther King Jr.'s acknowledgment that special treatment for Blacks fundamentally conflicts with the idea of opportunity based on individual merit.²⁶⁹ Proponents note that King also stated, "a society that has done something special *against* the Negro for hundreds of years must now do something special *for* him."²⁷⁰ King realized that our nation has never acted on a color-blind basis.²⁷¹ The entire affirmative action discourse, however, generally lacks an historical perspective.²⁷²

The history of racism in America is well documented,²⁷³ and is usually conceded by both sides.²⁷⁴ There is also, however, a history behind affirmative action that, not surprisingly, stems from governmentally sanctioned discrimination. During the post-New Deal era, two things occurred. First, key Congressional committees in the 1930s were controlled by White Southerners who did not allow coverage under the "universal" entitlement of Social Security for agricultural laborers and domestics – occupations held by a majority of Black workers.²⁷⁵ Second, the federal government allowed skilled trade unions to exclude African-Americans.²⁷⁶

266. See Corvin & Wiggins, *supra* note 224, at 106.

267. See *id.*

268. Higginbotham, Jr., *supra* note 8, at 1020 (citing Peter Binzer, *Bowser Is an Old Hand at Playing the Political Game in Philadelphia*, PHILA. INQUIRER, Nov. 13, 1991, at A11 (quoting Charles Bowser)).

269. See Eric Foner, *Hiring Quotas For White Males Only*, THE NATION, June 26, 1995, at 924, available in 1995 WL 12423299.

270. *Id.* (emphasis in original).

271. See *id.*

272. See *id.*

273. See *supra* notes 11-32 and accompanying text.

274. See Vargas, *supra* note 20, at 1523-24 (noting that most Americans know American history contains "ugly episodes of prejudice and discrimination.").

275. See Foner, *supra* note 269, at 924. Eighty percent of Black female workers were excluded and forced to rely on the less generous welfare system. See *id.*

276. See Jill Quadagno, *Race and American Social Policy*, 76 PHI KAPPA PHI J. 35, 37 (1996).

A shift in policy occurred after the Watts riot,²⁷⁷ with special emphasis placed on one particular demand – the right to work.²⁷⁸ Following the riot, job training programs expanded and emerged, and by 1968 African-Americans constituted a majority of the participants in these programs. The ability to get jobs after the training programs, however, “made visible the barriers to equal opportunity erected by the unions.”²⁷⁹

The Johnson administration attempted to elicit union compliance with Title VII of the Civil Rights Act of 1964.²⁸⁰ However, the unions continued to engage in discriminatory practices. Therefore, in 1968, the Department of Labor ruled that contractors would not receive federal contracts unless they took “affirmative action” to prove that minorities would be represented.²⁸¹ This new affirmative action created antagonism among White workers, typified by a belief that “[r]everse discrimination’s just not right. We earned our jobs, by God, by being white.”²⁸²

The constitutionality of various affirmative action programs has been tested for the past sixteen years.²⁸³ Against this historical backdrop of racism and discrimination, the Supreme Court ultimately held that all race-based affirmative action plans are subject to strict scrutiny.²⁸⁴ The test is so strict (as its name implies) that few programs can pass it.²⁸⁵

The irony in the Supreme Court’s current position is that we need affirmative action programs now more than ever. A national poll taken on behalf of the Anti-Defamation League revealed that for the first time in this century, young White adults have a less tolerant attitude towards Blacks than White adults over the age of thirty.²⁸⁶ The poll indicated that these young adults, compared to adults between thirty and forty-nine, thought Blacks “complain too much about racism,” “stick together more than others,” and “prefer to stay on welfare rather than work.”²⁸⁷

277. In 1965 a race riot occurred in the Watts section of Los Angeles. It left 34 people dead, and \$200 million in property damage. THE NEW YORK PUBLIC LIBRARY AMERICAN HISTORY DESK REFERENCE 113 (Marilyn Miller & Marian Faux eds., 1997).

278. See Quadagno, *supra* note 276, at 37.

279. *Id.*

280. 42 U.S.C. § 2000e et seq. (1994).

281. See Quadagno, *supra* note 276, at 37.

282. Calvin Trillin, *Doing the White Male Kvetch*, THE NATION, Apr. 10, 1995, at 478, available in 1995 WL 12423094.

283. See CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW 230 (1998). See, e.g., Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (holding that FCC minority preference in licensing is constitutional under intermediate scrutiny test); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 498-502 (1989) (holding that minority-based set aside program is unconstitutional under strict scrutiny test); Fullilove v. Klutznick, 448 U.S. 448, 492 (1980) (upholding the constitutionality of federal minority set aside program); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 280 (1978) (holding that race may be considered in admissions programs, but may not be the only factor).

284. See *Adarand v. Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

285. See MOTLEY, *supra* note 283, at 230. Strict scrutiny requires that the set aside program be “a necessary means of advancing a compelling governmental interest.” See *Adarand*, 515 U.S. at 219.

286. See Cohen, *supra* note 238, at A23.

287. *Id.* One reason given is that the under-thirty generation is “pathetically ignorant of recent American history.” See *id.*

These attitudes, which are held by our future leaders, lead some to believe that we are in the midst of a crisis.²⁸⁸

Under cognitive theory, however, affirmative action can be a useful tool to change attitudes, because it is an “in your face” attitude adjustment. It does not rely on an individual’s ability to make an independent assessment of others. It does not rely on change occurring in the latitude of acceptance of a new idea. Rather, it forces dissonance. You see minorities engaging in activities and behavior that is inconsistent with negative stereotypes. Thus, it forces new schemas, which in turn, create a new body of information from which to draw when we apply heuristics.

Affirmative action also serves as a type of forced compliance. Forced compliance is a term used by psychologists to describe situations in which we are forced to do or say something inconsistent with our beliefs (i.e. hire minorities even though you believe them incompetent).²⁸⁹ To reduce the discomfort and dissonance created by the inconsistency, some change generally occurs – either in behavior or attitude. If affirmative action *forces behavior*, then changes in attitude may occur to match behavior.²⁹⁰

Additionally, affirmative action can facilitate “self-correction” of the faulty inferences drawn by use of the availability heuristic.²⁹¹ The availability heuristic relies on our ability to recall information.²⁹² The self-correction occurs in the body of information we recall. For example, if several of one’s friends have recently had heart attacks, one may exaggerate the prevalence of heart attacks. However, this estimate should self-correct when one encounters others who have not had heart attacks. Similarly, affirmative action places more minorities in roles that are inconsistent with prevailing stereotypes. In this sense, it gives additional data from which to draw when making inferences about other minorities, and attacks racism at the point it does its most damage – when we make the *pre-judgment*, or prejudicial inference.

Critics of affirmative action argue that it stigmatizes minorities, describing it as a “badge of inferiority [that] may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”²⁹³ The argument, however, is disingenuous. Eric Foner notes that he has “yet to meet the white male in whom special favoritism (getting a job, for example through relatives or an old boys’ network, or because of racial discrimination by a union or an employer) fostered doubt about his own abilities.”²⁹⁴ And there is some irony in the fact that Blacks were historically *denied* jobs based on their race, and are now told they are not *entitled* to jobs based on race.²⁹⁵

The backlash against affirmative action is not surprising, however, from an historical perspective. Generally, when Blacks begin to achieve marginal success in mainstream society, legal obstacles to that success are resurrected or created.

288. *See id.*

289. *See* BARON & BYRNE, *supra* note 108, at 159.

290. *See id.*

291. *See* Taylor, *supra* note 181, at 200.

292. *See supra* notes 172-92 and accompanying text.

293. ROBERT L. HAYMAN, JR., *THE SMART CULTURE* 320 (1998) (quoting Supreme Court Justice Clarence Thomas) (citations omitted).

294. Foner, *supra* note 269, at 155.

295. *See* Williams, *supra* note 105, at 2141.

Few people know, for instance, that the first Black player in major league baseball was not Jackie Robinson.²⁹⁶ In fact, Blacks played in the major leagues during the nineteenth century, but were forced out in 1889.²⁹⁷ Additionally, Black jockeys rode in the Kentucky Derby until 1911 when they were removed after winning fifteen of the first twenty-eight derbies.²⁹⁸ Legal segregation was on the heels of Black success. Indeed, Whites have traditionally "attacked the richest and most successful African-Americans . . . so upward mobility offer[s] no way out for Blacks but only [makes] them more of a target."²⁹⁹

Cognitive theory paints a grave portrait of America if anti-discrimination law continues to be whittled away. Based on the history of race and racism in this country, racial tension will continue to exist and foster in-group/out-group hostility. Additionally, aversive racism will effectively serve as an implicit form of segregation, because Blacks will continue to be perceived as less qualified than Whites. Regrettably, the courts can do little to intervene, because the unconscious cognitive factors that facilitate those decisions fail to rise to the level of "intent."

CONCLUSION

We generally do not discriminate against others based on their shoe-size, birth date, or inseam. Each of these are benign characteristics that draw little, if any, of our attention. They could, however, serve as an equally efficient way of classifying people, indeed, as efficient and arbitrary as race. Colorblind policies, which focus on individual merit, presume that race is a benign characteristic. However, race, unlike shoe size, has been given meaning, and that meaning carries into our perception and judgments of others. Individualism cannot erase that meaning by ignoring it, and, because it ignores racial meaning, it is destined to fail.

Additionally, Individualism cannot be legislated; it requires a change of heart that must take place at the individual level – one person at a time. Overt behavior, on the other hand, can be controlled through legislation. Thus, legal theories should be adopted based on society's behavior. Cognitive theory provides a body of knowledge from which legal theorists may draw when drafting legislation and rules of law for the masses. Affirmative action is one legal construct that works effectively against powerful cognitive forces. That is not to say that affirmative action will alone cure racism, but it provides at least one method that may be employed in the fight against racism.

One closing thought: Individualism is often characterized as an "enlightened" view of race and racism. It may very well be. However, legal doctrines that seek to modify the behavior of the collective should be crafted with the "least sophisticated consumer"³⁰⁰ in mind. Not everyone is so enlightened or so well-educated about race, and may be unaware of their own role in racism. How enlightened are you?

296. See LOEWEN, *supra* note 2, at 155 (citing MICHAEL L. COOPER, PLAYING AMERICA'S GAME 10 (1993)).

297. *See id.*

298. *See id.*

299. *Id.*

300. To borrow a term from consumer protection law.

