A COMPARATIVE ANALYSIS OF UNCONSCIOUS AND INSTITUTIONAL DISCRIMINATION IN THE UNITED STATES AND BRITAIN

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TABLE OF CONTENTS

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I. INTRODUCTION

On April 22, 1993, eighteen year-old Stephen Lawrence and a companion, Duwayne Brooks, were passing through a London neighborhood on their way home.[1] When they arrived at a bus stop, Stephen went a short distance down the street to see if a bus was approaching. Five or six young white men were gathered on the opposite side of the road. Brooks called out to Lawrence to ask if he could see a bus coming. One of the white youths, who apparently heard something, said "What, what nigger?" The group of whites then hurried across the road and attacked Lawrence. During the scuffle, Lawrence was stabbed twice. Brooks ran from the scene followed by Lawrence, who managed, despite his injuries, to get up and run approximately one hundred yards to the place where he collapsed and bled to death.[2] Three of the white youths were eventually charged, but the Crown Prosecution Service dropped the case in July of 1993, after concluding that the evidence was insufficient to support a conviction. The Lawrence family initiated a private prosecution in April of 1995 which led to murder charges against three men. The case went to trial in April of 1996 and ended with the acquittal of the three suspects. The judge ruled that the critical evidence against them was unreliable and inadmissible. Two other suspects were released from police custody on the same grounds.[3]

There were two police inquiries into the matter after the Lawrence family repeatedly complained about the conduct of the police officials who conducted the original investigation.[4] Both inquiries concluded that the investigation was proper and that there was no evidence of racial bias in the Metropolitan Police Service's actions.[5] The Lawrences persisted with their protests, supported by a number of community organizations. The matter was widely publicized by the media and eventually became a *cause célèbre*. In response to mounting public dissatisfaction, on July 31, 1997, British Home Secretary Jack Straw commissioned a judge, Sir William Macpherson, to conduct an official inquiry

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[1] SIR WILLIAM MACPHERSON OF CLUNY, THE STEPHEN LAWRENCE INQUIRY: PRESENTED TO PARLIAMENT BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT BY COMMAND OF HER MAJESTY, 1999, Cm. 4262-I, at ch. 1 [hereinafter MACPHERSON REPORT]; DOREEN LAWRENCE & MARGARET BUSBY, AND STILL I RISE: SEEKING JUSTICE FOR STEPHEN (2006) (Doreen Lawrence is the mother of Stephen Lawrence).

[2] *See* MACPHERSON REPORT, *supra* note 1; LAWRENCE & BUSBY, *supra* note 1.

[3] MACPHERSON REPORT, *supra* note 1, Chs. 2.3–2.4.

[4] *Id.* chs. 3.1, 4, 9.

[5] *Id.*

into circumstances surrounding Stephen Lawrence's death.[6] A lengthy investigation ensued.[7] Over the next several months hearings were held, witnesses were questioned, and documents were examined. A detailed report was issued in February of 1999 that strongly condemned the police service's conduct.[8] The report concluded that a culture of "unconscious racism" existed within the police service.[9] The report defined institutional racism as:

> [t]he collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.[10]

The Macpherson Report set off shock waves that are still reverberating in Britain. There was a loud public outcry expressing indignation about the way in which the investigation was handled by London's Metropolitan Police Service. Extensive media coverage included a series of front-page articles in the conservative British tabloid, the *Daily Mail*, and a BBC television documentary.[11] As one article noted "even conservative newspapers and commentators have questioned the racist attitudes of many officers revealed by the Macpherson inquiry."[12] A high-level governmental inquiry had found that police misconduct in a murder investigation was the product of

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[6] *Id.* ch. 3.1. *See also id.* ch. 3.23 ("Three Advisers were appointed by the Home Secretary to advise and support the Chairman. These Advisors were Mr. Tom Cook, retired Deputy Chief Constable for West Yorkshire; The Reverend Right D. John Sentamu, the Bishop for Stepney; and Dr. Richard Stone, Chair of the Jewish Council for Racial Equality.").

[7] *Id.* ch. 3.

[8] *Id.* prelim.

[9] *Id.* chs. 6.33, 6.52.

[10] *Id.* ch. 6.34.

[11] A detailed examination of media coverage and public reaction to the Macpherson report can be found in SIMON COTTLE, THE RACIST MURDER OF STEPHEN LAWRENCE: MEDIA PERFORMANCE AND PUBLIC TRANSFORMATION (2004); *see also* BRIAN CATHCART, THE CASE OF STEPHEN LAWRENCE (1999); *Special Report: The Lawrence Inquiry*, BBC NEWS, Mar. 25, 1999, http://news.bbc.co.uk/1/hi/ special_report/1999/02/99/stephen_lawrence/285357.stm.

[12] *Nich Higham, Stephen Lawrence Inquiry, The Media Impact*, BBC NEWS, Feb. 19, 1999, http://news.bbc.co.uk/2/law/special_report/1999/02/99/stephens_lawrence/282378.stm.

institutional racism.[13] This was a watershed moment in British race relations that led to a major revision of Britain's antidiscrimination laws.

American antidiscrimination laws do not recognize unconscious and institutional discrimination, which are as much a problem in the United States as they are in Britain. The civil rights laws of the 1960s were enacted in the context of long-standing public policies and private practices that enforced discrimination and segregation. At that time, discrimination was overt and pervasive. Antidiscrimination laws were premised on identifying individuals and organizations that engaged in overt discrimination or companies that had policies or practices that excluded a disproportionate percentage of minorities without a legitimate business justification. Courts have assumed that discrimination is *conscious* and *motivational* rather than a product of how information is perceived and processed at an unconscious level. They adhere to theories of discrimination that emphasize intentionality. During the last two decades, however, a substantial body of empirical and theoretical work in cognitive psychology has confirmed that the causes of discriminatory actions often operate at an unconscious level without the perpetrator's awareness of the source. Moreover, intentional and unconscious discrimination frequently interact to create a discriminatory environment. Because unconscious and institutional discrimination are not recognized, racial minorities are subjected to different and less favorable treatment than similarly situated whites, but the law does not provide a means of redressing their injuries.

This Article compares unconscious and institutional discrimination in the United States and Britain. It is divided into two major parts. Parts II–VI focus on the United States. Part II begins by examining the history and status of racial minorities in the United States. The next part surveys American antidiscrimination laws. In the part that follows, existing theories of discrimination are examined. That part is followed by an analysis of unconscious and institutional discrimination in the United States. Parts VII–X of this Article consider ethnic minorities in Britain. Part VII starts by examining ethnic minority migration to Britain. That discussion is followed by an examination of ethnic minority employment, housing patterns, and racial problems in Britain's educational system. The next part analyzes Britain's antidiscrimination laws. The Article concludes with an analysis of unconscious and institutional discrimination in Britain and laws that were enacted to address this problem. As the following discussion shows, American jurisprudence is constructed too narrowly in its conception of what constitutes

[13] MACPHERSON REPORT, *supra* note 1, ch. 46.1.

unlawful discrimination. The British have taken steps toward filling in the gaps created by a jurisprudence premised on the perpetrator's motives. American lawmakers should adopt this approach.

II. RACIAL MINORITIES IN THE UNITED STATES

A. African-Americans

To analyze and compare discrimination against ethnic minorities in the United States and Britain, it is useful to consider the background and circumstances of racial minorities in both countries. In 1619, a Dutch ship landed at Jamestown, Virginia.[14] Twenty African slaves were sold to the colonists.[15] This was the beginning of a system that became one of the centerpieces of the colonial economy. African slaves provided an inexpensive source of labor, especially for the large plantations located in the South.[16] By 1776, almost 500,000 black persons lived in the American colonies.[17] When the United States Constitution was drafted in Philadelphia in 1787, it forbade the importation of slaves after 1808, but the institution of slavery was allowed to continue.[18] The Constitution also provided that enslaved persons would to be counted as "three-fifths" of a person for determining congressional representation.[19] By 1860, a year before the outbreak of the Civil War, almost four million enslaved Africans lived in the southern states; another 488,000 free blacks resided in the nation.[20] American laws classified enslaved persons as chattel—the property of their owners.[21] Explaining the legal status of slaves, the Supreme Court stated in the *Dred Scott Case* that blacks were "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect. . . ."[22]

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[14] JOHN HOPE FRANKLIN & ALFRED MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 65 (8th ed. 2000).

[15] *Id.*

[16] *Id.* at 139–40.

[17] *Id.* at 97–98.

[18] *Id.* at 93–94.

[19] U.S. CONST. art. 1, § 2, *amended by* U.S. CONST. amend. XIV, § 2.

[20] FRANKLIN & MOSS, *supra* note 14, at 39–40; Ira Berlin, *Free Negroes 1619-1860*, *in* THE READER'S COMPANION TO AMERICAN HISTORY (Eric Foner & John A. Garraty eds., 1991), *available at* http://www.answers.com/topic/free-negroes-1619-1860.

[21] Scott v. Sandford, 60 U.S. 393, 624–25 (1856).

[22] *Id.* at 407.

The debate over slavery and other issues led to the U.S. Civil War.[23] At the conclusion of the conflict, three important constitutional amendments were ratified: the Thirteenth Amendment abolished slavery;[24] the Fourteenth Amendment guaranteed all persons equal protection of the law;[25] and the Fifteenth Amendment granted voting rights to African-American males.[26] During the Reconstruction Era that followed, African-Americans experienced remarkable progress in the South. Sixteen blacks served in Congress.[27] At the state level, eighteen African-Americans served in various positions such as lieutenant governor, treasurer, superintendent of schools, or secretary of state.[28] African-Americans also held many other elective offices at the state and local levels.[29] In 1877, however, the Hayes-Tilden Compromise, which resolved a contested presidential election, resulted in the withdrawal of federal troops from the South.[30] The Reconstruction Era began to fade. Within a few years, whites seized control of state legislatures, often using violence and intimidation to achieve their goals.[31] Black elected officials were forced from their offices and driven from their homes. A reign of violence and terror ensued.[32] It was in this context that racial segregation was established.[33] The Reconstruction civil rights laws were eviscerated by a series of Supreme Court cases decided from 1880-1900, including *Plessy v. Ferguson*, the decision that endorsed racial segregation.[34] By the first decade of the twentieth century, the Fourteenth and Fifteenth Amendments were effectively nullified in the South. African Americans were disenfranchised, forced to reside in segregated neighborhoods, and limited to the lowest-paying, menial, and service occupations.[35]

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[23] FRANKLIN & MOSS, *supra* note 14, at 243–44.

[24] U.S. CONST. amend. XIII.

[25] *Id.* amend. XIV.

[26] *Id.* amend. XV.

[27] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 352 (1988).

[28] *Id.* at 351–54.

[29] *Id.*

[30] *Id.* at 575–87.

[31] *Id.* at 425–59.

[32] *Id.*

[33] *Id.*

[34] 163 U.S. 537 (1896).

[35] LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 114–78 (1999).

African-Americans reacted to *Plessy* by establishing racial uplift organizations including the National Association for the Advancement of Colored People (NAACP). In the early 1930s, the NAACP hired Charles H. Houston, the dean of Howard University's Law School, to lead the campaign that would challenge segregation in the courts.[36] Houston developed and implemented the long-range legal strategy that eventually resulted in the Supreme Court victories of the 1950s.[37] After a series of successful graduate school cases in the 1930s and '40s, a direct challenge to segregation in schools was launched. The 1954 decision in *Brown v. Board of Education* signaled the end of legal segregation.[38] The marches, boycotts, and demonstrations of the Civil Rights Movement of the 1950s and '60s persuaded Congress to enact the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.[39] These laws ended the era of official, state sanctioned discrimination and segregation.

More than forty years after the enactment of civil rights legislation, there are still significant and longstanding disparities between whites and African Americans. In the 2000 Census, 12.9% of the United States' population identified itself as "black alone" or in combination with one or more other races.[40] According to the census data, a little more than 54% of the black population resided in the South, nearly 19% lived in the Midwest, nearly 18% lived in the Northeast, and almost 10% lived in the West.[41] The 2000 Census also showed that of the localities with populations of 100,000 or more, New York had the largest black population.[42] New York was followed by Chicago.[43] Detroit, Philadelphia, and Houston had black populations numbering between 500,000 and 1 million.[44] The poverty level for African Americans in 2000 was 24.9%.[45] The median income was $30,439.[46] This

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[36] *Id.*

[37] *See generally* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

[38] 347 U.S. 483 (1954); *see also* ROBERT J. COTTROL ET AL., BROWN V. BOARD OF EDUCATION: CASTE, CULTURE AND THE CONSTITUTION (2003).

[39] COTTROL ET AL., *supra* note 38, at 200–07.

[40] JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION IN THE UNITED STATES: CURRENT POPULATION REPORTS 1 (2003), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf.

[41] *Id.* at 3.

[42] *Id.* at 5.

[43] *Id.*

[44] *Id.*

[45] ALEMAYEHU BISHAW & JOHN ICELAND, POVERTY: 1999, CENSUS 2000 BRIEF 5 (2000),

compared to a median income for whites of $45,904.[47] In 2000, the unemployment rate for blacks was 6.9%.[48] With respect to educational attainment levels, 72.3% of the black population aged twenty-five or older had completed high school, 14.3% had a bachelor's degree, and 4.8% held advanced degrees.[49] Blacks are the most segregated minority and also have the lowest income levels.[50] Research analyzing the 2000 Census shows high levels of residential segregation.[51] The data shows that thirty-three of the top fifty metropolitan areas are highly segregated.[52] The remaining seventeen metropolitan are moderately segregated.[53] No areas were within the range that social scientists would consider integrated.[54]

B. Latinos

The ethnic origin category "Hispanic" was developed in 1977 by Directive 15 of the Office of Management and Budget and was implemented as part of the 1980 Census.[55] The Census Bureau defines Hispanic or Latino as those people who classified themselves in one of the specific Spanish, Hispanic, or Latino categories listed on the 2000 Census questionnaire—"Mexican, Mexican American, Chicano," "Puerto Rican," or "Cuban"—as well as those who indicate that they are "other

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available at http://www.census.gov/prod/2003pubs/c2kbr-19.pdf.

[46] CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, MONEY INCOME IN THE UNITED STATES: 2000, at 1, *available at* http://www.census.gov/prod/2001pubs/p60-213.pdf.

[47] *Id.*

[48] SANDRA LUCKETT CLARK & MAI WEISMANTLE, U.S. CENSUS BUREAU, EMPLOYMENT STATUS: 2000, at 5 (2000), *available at* http://www.census.gov/prod/2003pubs/c2kbr-18.pdf.

[49] KURT J. BAUMAN & NIKKI L. GRAF, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT: 2000, at 5 (2000), *available at* http://www.census.gov/prod/2003pubs/c2kbr-24.pdf.

[50] *See* JOHN R. LOGAN, LEWIS MUMFORD CTR. FOR COMP. URBAN & REG'L RESEARCH, UNIV. AT ALBANY, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS AND HISPANICS IN METROPOLITAN AMERICA (2002), *available at* http://mumford.albany.edu/census/SepUneq/SUReport/SURepPage1.htm.

[51] JOHN R. LOGAN, LEWIS MUMFORD CTR. FOR COMP. URBAN & REG'L RESEARCH, UNIV. AT ALBANY, ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND 1 (2001), *available at* http://mumford1.dyndns.org/cen2000/wholePop/WPreport/MumfordReport.pdf.

[52] *Id.* at 7–8.

[53] *Id.* at 8.

[54] *Id.*

[55] *See* Notice & Request for Comment on Recommendations from the Interagency Comm., 62 Fed. Reg. 36874 (July 9, 1997), *available at* http://www.whitehouse.gov/omb/fedreg/directive_15.html.

Spanish/Hispanic/Latino."[56] Persons who indicated that they are "other Spanish/Hispanic/Latino" include those whose origins are from Spain, the Spanish-speaking countries of Central or South America, the Dominican Republic or people identifying themselves generally as Spanish, Spanish-American, Hispanic, Hispano, Latino, and so on.[57]

One commentator explained,

> Mexican Americans/Chicanos, Puerto Ricans, Cuban Americans, and their descendants, the oldest and largest subgroups among a population of some thirty million *Hispanos* in the United States, form the core of a union that matches relatively recent arrivals, predominantly from the Dominican Republic and Central and South America, with long-time U.S. residents; English speaking with Spanish speaking; aliens with citizens; and documented individuals with undocumented immigrants.[58]

Latinos have a long history in America. Spanish settlements in what is now the United States predate the arrival of the Mayflower by more than a century.[59] After the arrival of Spanish Conquistadors in the sixteenth century, Mexico's territory on the North American continent dramatically expanded.[60] In the nineteenth century, the expansionist doctrine of "Manifest Destiny" altered the Mexican landscape.[61] In April of 1836, after the defeat of the Mexican Army at San Jacinto, Sam Houston negotiated a treaty with Mexico pursuant to which Texas became an independent nation. Mexican General Santa Anna, who had been captured, signed the treaty to prevent his execution.[62] After returning to Mexico City, Santa Anna promptly disavowed the document.[63] American efforts to annex Texas succeeded when President James K. Polk dispatched American troops across the Rio Grande. War against Mexico was declared in 1846. After several battles, Mexico City was captured in August of 1847. On February 2, 1848, a treaty was executed in

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[56] *Id.*

[57] *Id.*

[58] Virginia Sánchez Korrol, *The Origins and Evolution of Latino History*, OAH MAG. OF HIST., Winter 1996, *available at* http://www.oah.org/pubs/magazine/latinos/korrol.html.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

Guadalupe Hidalgo, the city to which the Mexican government fled as American troops advanced on Mexico City. The treaty required Mexico to forfeit 55% of its territory. This included areas that are now Arizona, California, New Mexico, and parts of Colorado, Nevada and Utah. Other treaty provisions established the Texas border at the Rio Grande River, and granted citizenship, property, and other rights to Mexican nationals living in the territory ceded to the United States. When the U.S. Senate ratified the treaty, however, it deleted the treaty provision guaranteeing the protection of Mexican land grants.[64] Despite their legal status as American citizens, Mexican-Americans have long been the victims of invidious discrimination. In a 1954 decision, *Hernandez v. Texas*, the Supreme Court held that people of Mexican descent, who were systematically excluded from serving on Texas juries, were protected from discrimination based on national origin under the Equal Protection Clause of the Fourteenth Amendment.[65]

American Imperialism led to the incorporation of other Spanish speaking populations. At the conclusion of Spanish-American War of 1898, Spain ceded what is now Puerto Rico to the United States. It is an American territory, and its residents are U.S. citizens. America has continuously accepted refugees from Cuba since Fidel Castro became the leader of that country in 1959. More recently, Latinos have immigrated to America from Mexico, Central and South America, and the Caribbean. Collectively, Latinos constitute the fastest growing population in the nation.[66] In 2000, approximately 12% of the U.S. population was Latino.[67] Between 1990 and 2000, the Latino population increased by 57.9%. More than three-quarters of them resided in the West or South. Half of all Latinos lived in two states: California and Texas.[68] In 2000, 10.6% of the Hispanic population had four or more years of college education, and 46.4% completed high school.[69] The

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[64] HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT 149–70 (1999).

[65] 347 U.S. 475 (1954); *see also* "COLORED MEN" AND "HOMBRES AQUÍ": HERNADEZ V. TEXAS AND THE EMERGENCE OF MEXICAN AMERICAN LAWYERING (Michael A. Olivas ed., 2006).

[66] *Minorities Getting Closer to the Majority: Hispanics are fastest growing group, increasingly by U.S.-born*, CNN.COM, May 11, 2006, http://www.cnn.com/2006/US/05/10/hispanics/index.htm

[67] MELISSA THERRIEN & ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, THE HISPANIC POPULATION IN THE UNITED STATES: MARCH 2000, at 1 (2001), *available at* http://www.census.gov/prod/2001pubs/p20=535.pdf.

[68] *Id.*

[69] *Id.* at 5.

median family income in 2000 was $33,447.[70] The unemployment rate was relatively low at 5.5%.[71] The poverty rate for the Latino population in 2000 was 22.6%.[72] Latinos were employed in various job classifications: 24.6% of them were employed in technical and sales positions; 22% were employed as laborers or operators; 19.4% held service occupations; 14.4% were in production jobs; 14% had managerial or professional positions and 7% performed agricultural work.[73]

C. Asian-Americans

In the 2000 Census, the term "Asian" referred to "people having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent (for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam)."[74] Constituting 3.6% of the population, people of Asian descent also have a long history in America.[75] From 1848, when gold was discovered in California, to 1882 when the Chinese Exclusion Act became effective, approximately 135,000 Chinese immigrants entered the United States.[76] The migration of large numbers of people from China was fueled by the California Gold Rush.[77] By 1851, there were more than 25,000 immigrants, more than half of whom lived in northern California.[78] As this group's population increased, they were forced to reside in "Chinatowns" because they were prevented by discriminatory practices from living in other communities.[79] Chinese immigrants usually worked in the most dangerous and least desirable occupations.[80] During the 1860s, thousands of

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[70] DENAVAS-WALT ET AL., *supra* note 46, at 1.

[71] CLARK & WEISMANTLE, *supra* note 48, at 5.

[72] BISHAW & ICELAND, *supra* note 45, at 5.

[73] THERRIN & RAMIREZ, *supra* note 67, at 5.

[74] JESSICA S. BARNER & CLAUDETTE E. BENNETT, U.S. CENSUS BUREAU, THE ASIAN POPULATION: 2000, at 1 (2002), *available at* http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf. In 2000, Chinese Americans were the largest Asian group in the United States. Filipinos and Asian Indians were the second largest Asian groups. *Id.* at 7–8.

[75] *Id.* at 1.

[76] Richard P. Cole & Gabriel J. Chin, *Emerging from the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 LAW & HIST. REV. 325, 325 (1999); *see also* IRIS CHANG, THE CHINESE IN AMERICA: A NARRATIVE HISTORY (2003).

[77] Cole & Chin, *supra* note 76, at 326.

[78] CHANG, *supra* note 76, at 47.

[79] Cole & Chin, *supra* note 76, at 330.

[80] CHANG, *supra* note 76, at 47.

Chinese immigrants worked as laborers in the construction of the Central Pacific Railroad.[81]

Strong anti-Chinese sentiments developed almost immediately after their arrival in the United States.[82] Anti-Asian animus, particularly directed against Chinese workers, was prevalent. Local laws, including "pigtail ordinances" which regulated the length of Chinese workers' hair, were enacted.[83] While the hair length regulations were a petty nuisance aimed at a specific immigrant population's cultural grooming conventions, most of the ordinances were substantive regulations directed against the mostly male Chinese workers who were not allowed to bring families with them or to marry easily.[84] The peonage wages and primitive working conditions constituted virtual slavery.[85] Chinese laborers constructed most of San Francisco's transportation and building infrastructure.[86] Having benefited from immigrant labor, local leaders attempted to remove Chinese workers, segregated them, and then harassed them about the squalid conditions in which they were forced to reside.[87] Anti-Asian violence steadily increased, especially in the "Wild West" and the Pacific Northwest; Congress reacted, not by protecting the laborers' rights, but by enacting additional immigration restrictions.

After a long campaign, fueled by racist propaganda, the anti-immigrant movement culminated with the enactment of the Chinese Exclusion Act of 1882.[88] This ended the migration of people from China.[89] Discrimination against Chinese immigrants who remained in America continued. In an 1886 decision, *Yick Wo v. Hopkins*, the Supreme Court struck down a San Francisco ordinance that forbade the operation of laundries in buildings constructed with wood.[90] The ordinance was enforced against laundries operated by Chinese immigrants but not those owned by whites. The Supreme Court held that the law violated the Equal Protection Clause of the Fourteenth Amendment

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[81] Terry E. Boswell, *A Split Labor Market Analysis of Discrimination Against Chinese Immigrants, 1850–1882*, 51 AM. SOC. REV. 352, 361 (1986).

[82] *Id.* at 357.

[83] Ho Ah Kow v. Nunan, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6546) (striking down local ordinance regulating hair length).

[84] BENSON TONG, THE CHINESE AMERICANS 31–35 (2003).

[85] *Id.* at 45–47.

[86] *Id.* at 36–43.

[87] *Id.* at 40; Cole & Chin, *supra* note 76, at 330.

[88] Chinese Exclusion Act, ch. 126, 8 U.S.C. 261 (2007) (repealed 1943).

[89] CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH CENTURY AMERICA (1994).

[90] 118 U.S. 356 (1886).

because, although neutral on its face, it was enforced "with an evil eye and an unequal hand."[91] In a 1927 case, *Gong Lum v. Rice*, the Supreme Court upheld a Mississippi Court's decision that a student of Chinese ancestry was "colored" and therefore not entitled to enroll in segregated public schools that were, by state law, reserved for white students.[92]

People of Japanese descent in America also have a long history that is fraught with invidious discrimination.[93] In the 1880s, there was an economic depression in Japan. Many landless and small landowning farming households sent male family members to work in Hawaii and the United States. The Japanese government approved the emigration of 30,000 workers during this period. After the Chinese Exclusion Act of 1882 became effective, the declining availability of Chinese workers created a labor shortage that Japanese laborers filled. Between 1891 and 1923 approximately 200,000 Japanese immigrants were admitted to the United States. Some of the Japanese workers were able to establish small farms. In *Ozawa v. United States*, the Supreme Court held that as nonwhites, Japanese were not eligible for naturalization as U.S. citizens.[94] The anti-Japanese exclusion movement climaxed with passage of the 1924 Immigration Act, which prohibited the admission of aliens ineligible for citizenship as immigrants.[95] The level of discrimination against Americans of Japanese descent was demonstrated again during World War II. On February 19, 1942, President Franklin D. Roosevelt signed an Executive Order authorizing the Secretary of War to designate parts of the country as Military Areas from which any and all persons might be excluded.[96] The entire Pacific Coast was designated as a Military Area. Under a relocation program, over 110,000 Americans of Japanese descent were sent to detention camps in remote areas.[97] The racially discriminatory order was challenged in *Korematsu v. United States*.[98] In what is seen now as one of its most infamous decisions, the Supreme Court held:

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[91] *Id.* at 373–74.

[92] 275 U.S. 78, 86 (1927).

[93] RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 133, 180 (1989).

[94] 260 U.S. 178 (1922).

[95] Immigration Act of 1924, 8 U.S.C. 216 (1924) (repealed 1952).

[96] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); Korematsu v. United States, 323 U.S. 214, 216 (1944).

[97] *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting).

[98] *Id.* at 224.

> Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily . . . .[99]

Immigrants from other Asian nations have also migrated to America. Koreans migrated to Hawaii and to the American mainland after the 1904–'05 Russo-Japanese War resulted in Japan's occupation of Korea.[100] South Asian Indians began to migrate to the United States after Chinese immigrants were excluded by the 1882 law.[101] People from India were recruited by Canadian railroad companies to work as laborers.[102] Indians were allowed to immigrate without any significant legal barriers because Canada was then part of the British Empire.[103] Canadian Indians subsequently migrated to the Pacific Northwest and California where they were employed primarily as farm laborers.[104] South Asian migration was terminated in 1917 when Congress declared India one of the excluded Asian countries.[105] In *United States v. Bhagat Singh Thind*, the Supreme Court found that a native of India was not white for purposes of naturalization even though anthropologists classified them as white.[106] These restrictions did not halt all Asian immigration. Filipinos began immigrating to the West Coast during the 1920s to work on farms and in canneries.[107] Unlike people in China, Japan, and India, Filipinos were not excluded by the anti-Asian immigration laws because the United States annexed the Philippines after the 1898 Spanish-American War.[108]

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[99] *Id.* at 223.

[100] Choi Zihn, *Early Korean Immigrants to America: Their Role in the Establishment of the Republic of Korea*, 14 E. ASIAN REV. 43, 45–46 (2002).

[101] Chinese Exclusion Act, ch. 126, 8 U.S.C. 261 (2007) (repealed 1943).

[102] TAKAKI, *supra* note 93, at 294–314.

[103] *Id.*

[104] *Id.*

[105] Immigration Act of 1917, 39 Stat. 874 (1917) (repealed 1952).

[106] 261 U.S. 204 (1923).

[107] *See generally* TAKAKI, *supra* note 93, at 315–56.

[108] *Id.*

III. AMERICAN ANTIDISCRIMINATION LAWS

There are several laws that prohibit discrimination against racial minorities. After the Thirteenth Amendment abolished slavery,[109] a number of Southern states reacted by enacting "Black Codes": laws designed to severely limit the rights of former slaves.[110] Congress responded in 1868 with the Fourteenth Amendment. It provides that no state "shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[111] During the Reconstruction Era that followed, Congress enacted a number of laws to enforce the Thirteenth and Fourteenth Amendments. These included § 1981 of Title 42 which prohibits racial discrimination in making and enforcing contracts, participating in lawsuits, and presenting evidence.[112] Another provision, § 1982, protects the rights of African Americans to buy, sell and own property.[113] Other Reconstruction Era laws included those that were intended to prevent the Ku Klux Klan and others from interfering with the rights of African-Americans. These included a civil action for deprivation of rights,[114] conspiracies to interfere with civil rights,[115] conspiracy against rights of citizens,[116] and deprivation of rights under color of law.[117] The Civil Rights Act of 1875 prohibited innkeepers, proprietors of public establishments, and owners of public conveyances from discriminating against African-Americans in the provision of services or accommodations.[118]

The marches, boycotts, and demonstrations of the Civil Rights Movement of the 1950s and '60s persuaded Congress to enact several laws that make it unlawful to discriminate against women and racial minorities. The centerpiece of these was the Civil Rights Act of 1964. Title II of the 1964 Act prohibits discrimination in places of public accommodation.[119] Title VI forbids racial discrimination in any program that receives federal funding.[120] Title VII

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[109] U.S. CONST. amend. XIII.

[110] BROOKS ET AL., CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES 25–26 (1995).

[111] U.S. CONST. amend. XIV, § 1.

[112] 42 U.S.C. § 1981 (2007).

[113] 42 U.S.C. § 1982 (2007).

[114] 42 U.S.C. § 1983 (2007).

[115] 42 U.S.C. § 1985 (2007).

[116] 18 U.S.C. § 241 (2007).

[117] 18 U.S.C. § 242 (2007); *see generally* BROOKS ET AL., *supra* note 110; HAROLD S. LEWIS, CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW (1997).

[118] 18 Stat. 335 (1875).

[119] 42 U.S.C. § 2000(a) (2007).

[120] *Id.* § 2000(d).

prohibits employers from discriminating against individuals on the basis of race, sex, color, national origin, or religion.[121] Other antidiscrimination laws were also enacted during this period. The Equal Pay Act of 1963 prohibits sex discrimination in compensation for the same jobs.[122] The Age Discrimination Act of 1967 makes it unlawful for employers to discriminate against individuals on the basis of age.[123] The Rehabilitation Act of 1973 prohibits the recipients of federal funding from discriminating against individuals with disabilities.[124] The Americans with Disabilities Act of 1990 makes it unlawful for private employers to discriminate against individuals with disabilities.[125] Title IX of the Educational Amendments of 1972 prohibits sex discrimination by educational institutions that receive federal financial assistance.[126] The Voting Rights Act of 1965 outlaws practices that were used to disenfranchise African-American and other racial minorities.[127] The Fair Housing Act of 1968 prohibits discrimination in the sale, rental, and provision of housing on the basis of race, sex, religion, color, national origin, religion, disability, or familial status.[128] The Equal Credit Act makes it unlawful for lenders to discriminate against applicants on the basis of race, color, sex, religion, national origin, marital status, or age.[129] Almost all states have also enacted laws that prohibit discrimination in employment and housing.[130]

IV. TRADITIONAL THEORIES OF DISCRIMINATION IN THE UNITED STATES

In the years following the enactment of the Civil Rights Act of 1964, theories of discrimination emerged. These include, among others, direct evidence, disparate treatment, disparate impact, and sexual and racial harassment. Disparate treatment means that an employer treats some people less favorably than others because of their race, color, religion, sex, national origin, age, or disability.[131] An individual claiming disparate treatment must

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[121] *Id.* § 2000.
[122] 29 U.S.C. § 206(d) (2000).
[123] 29 U.S.C. §§ 621–624 (2000).
[124] 29 U.S.C.A. § 794 (West Supp. 2007).
[125] 42 U.S.C. §§ 12101–12213 (2000).
[126] 20 U.S.C. §§ 1681–1688 (2000).
[127] 42 U.S.C. § 1971 (2000).
[128] 42 U.S.C. §§ 3601, 3619 (2000).
[129] 15 U.S.C. § 1691 (2000).
[130] BROOKS ET AL., *supra* note 110, at 345.
[131] BLACK'S LAW DICTIONARY 504 (8th ed. 2004).

prove that the employer acted with a discriminatory motive.[132] In the 1973 decision in *McDonnell Douglas Corp. v. Green*, the Supreme Court established the order and allocation of proof in such cases: a plaintiff must first establish a prima facie case by proving that she was a member of a protected class, that she applied for an available position for which she was qualified, that she was rejected, and that the job remained open or another applicant was selected.[133]

If the plaintiff establishes a prima facie case, the defendant must state a legitimate, nondiscriminatory reason for its actions.[134] If the defendant satisfies this obligation, the plaintiff can prevail if she can prove that the employer's stated reasons were false and its motives were actually discriminatory.[135] The *McDonnell Douglas* analysis assumes that direct evidence of discriminatory intent is not available.[136] It anticipates that the proof at trial will consist of circumstantial evidence from which an inference of discrimination can be drawn. The prima facie case eliminates the most likely reasons for an individual's rejection and creates a presumption that the employer engaged in discriminatory conduct. If the stated reason is proven to be false, a jury is allowed to infer that the employer acted with a discriminatory motive.[137]

Title VII also prohibits employers from using facially neutral employment practices that have a discriminatory effect. The Supreme Court explained this disparate impact theory in 1971 in *Griggs v. Duke Power Co.* stating, Title VII

> proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.[138]

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[132] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

[133] *Id.* at 802.

[134] *Id.*

[135] *Id.* at 804.

[136] Direct evidence consists of comments, documents or other evidence revealing an explicit intent to discriminate. BLACK'S LAW DICTIONARY 596 (8th ed. 2004); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

[137] *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); *see also* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (3d ed. 1996).

[138] 401 U.S. at 431–32.

A plaintiff in a disparate impact case does not have to prove discriminatory motive. To prevail the plaintiff must prove, through statistical comparisons or otherwise, that an employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the employer fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[139] The complaining party must also "demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice."[140] If the employer proves business necessity, the plaintiff can still prevail by showing that the employer has refused to adopt an alternative employment practice that would satisfy the employer's legitimate interests without having a disparate impact on members of a protected class.[141]

Title VII also prohibits sexual harassment. Under the Equal Employment Opportunity Commission's Guidelines:

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly, a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment

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[139] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

[140] *Id.* § 2000e-2(k)(1)(B)(i). This amendment resulted from decisions beginning with *Watson v. Fort Worth Bank & Trust*, in which Justice O'Connor's plurality opinion argued that when statistical disparities are used to establish a prima facie case under the disparate impact model, the plaintiffs should be required to identify the specific practice that is causing the disparity. 487 U.S. 977, 994 (1988). In *Wards Cove Packing Co. v. Atonio*, the majority endorsed this approach and held that the plaintiffs would "have to demonstrate that the disparity they complain of is a result of one or more of the employment practices of that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for white and nonwhites." 490 U.S. 642, 657 (1989). The justification for this new standard was the majority's concern that without this requirement, employers could be exposed to potential liability for the "myriad" of innocent causes that could lead to a racially imbalanced work force. *Id. Wards Cove* was legislatively overruled, in part, by the Civil Rights Act of 1991. A plaintiff must isolate and identify the practice causing the adverse impact, but if that cannot be done, the decisionmaking process can be treated as an employment practice.

[141] 42 U.S.C. 2000e-2(k)(1)(A)(i)–(ii) (2000).

> decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[142]

Under the first category, an individual in a position of authority conditions an employment benefit on submission to sexual demands. The other category, hostile environment, typically consists of unwelcome comments, jokes, actions, or other verbal or physical conduct of a sexual nature, and submission to such conduct is implicitly or explicitly made a term or condition of an individual's employment. The conduct must be sufficiently severe and pervasive as to unreasonably interfere with the victim's work performance.[143] Isolated or sporadic acts are usually not sufficient. However, in *Harris v. Forklift Systems Inc.*,[144] the Supreme Court held that the conduct need not seriously affect the plaintiff's psychological well-being as a number of lower courts had ruled.[145] It is only necessary to show that the environment would reasonably be perceived as hostile or abusive based on the totality of the circumstances.[146]

Employers are liable when a hostile environment is created by a supervisor with immediate or successively higher authority over the victim. If no tangible employment action is taken (e.g., hiring, firing, failure to promote) the employer can escape liability if it can prove that it took care to promptly prevent and correct any sexually harassing behavior and the victim failed to take advantage of the protective or corrective opportunities that the employer provided.[147] When the harassment results from the actions of a co-worker rather than a supervisor, the employer can avoid liability only if it conducts a prompt investigation and takes appropriate corrective action.[148] Racial harassment is similar to sexual harassment, except that race, rather than sex, is the basis for the conduct. As in sexual harassment, the conduct must have

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[142] 29 C.F.R. § 1604.11(a) (2007); Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986) (endorsing the E.E.O.C.'s Guidelines).

[143] *Meritor*, 477 U.S. at 67.

[144] 510 U.S. 17 (1993).

[145] *Id.* at 22.

[146] *Id.* at 22–23.

[147] Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998).

[148] *Id.*; Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

the purpose or effect of interfering unreasonably with an employee's work performance.[149]

V. UNCONSCIOUS DISCRIMINATION

American antidiscrimination jurisprudence does not provide a means for redressing many of the injuries that the victims of discrimination suffer. The following two parts of this Article examine theories that would close the analytical gaps that currently exist. The Civil Rights laws of the 1960s were enacted in the context of long-standing public policies and private practices that enforced discrimination and segregation. At the time, discrimination was stark, overt, and ubiquitous. There were black jobs and white jobs; men's work and women's work. In the South, schools were segregated as were restaurants, hotels and other places of public accommodation.[150] In the Jim Crow South, it was unthinkable for blacks to consider residing in a white neighborhood. In the North, African-American families were excluded from white neighborhoods by discriminatory practices, many of which were imposed by the Federal Government as it required racially restrictive covenants on federally insured mortgages.[151] Whites and blacks were born in separate hospitals, educated in separate schools, and buried in separate graveyards. The antidiscrimination laws of the 1960s were enacted in this context. They were structured to identify and penalize individuals and organizations that engaged in overt discrimination or companies that had policies or practices that excluded a disproportionate percentage of minorities without a legitimate business justification. Antidiscrimination jurisprudence does not address a species of discrimination that racial minorities frequently experience. With very limited exceptions, cases interpreting Title VII assume that discrimination is motivational rather than cognitive. As a consequence, racial minorities are frequently subjected to different and less favorable treatment in the workplace and elsewhere, but their experiences are essentially *damnum absque injuria*[152] as the law does not provide redress for their injuries.

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[149] LINDEMANN & GROSSMAN, *supra* note 137, at 347–50.

[150] *See generally* TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS, 1965–68 (2006); JOHN LEWIS & MICHAEL D'ORSO, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT (1998); LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW (1998).

[151] BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 18 (Melvin L. Oliver & Thomas M. Shapiro, eds., 1st ed., 1995).

[152] A loss without injury. BLACK'S LAW DICTIONARY 420 (8th ed., 2004).

Throughout the last two decades a substantial body of empirical and theoretical work in cognitive psychology has confirmed that the causes of discriminatory actions often operate at an unconscious level without the perpetrator's awareness of the source. In a path-breaking article published in 1987, Professor Charles Lawrence employed social cognition and Freudian theories in his critique of the limitations of antidiscrimination law. In *The Id, the Ego and Equal Protection Reckoning with Unconscious Racism*, Professor Lawrence stated,

> the theory of cognitive psychology states that the culture-including, for example, the media and an individual's parents, peers, and authority figures-transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings: Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level.[153]

In the years following the publication of *The Id, the Ego, and Equal Protection*, legal scholars have published a large body of research and commentary building on the foundation Lawrence laid. In a 1995 article, *The Content of Our Categories*, Professor Linda Krieger explained that much of the discrimination that occurs now is not the result of conscious animus.[154] Relying heavily on the work of behavioral psychologists, Krieger deployed social cognition theory to explain that decisionmaking relies on "categorization"—grouping like objects together—which is a fundamental part

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[153] Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (footnote omitted).

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

of the process of human cognition.[155] Categorization simplifies the task of processing and retaining information.[156] It allows individuals to "identify objects, make predictions about the future, infer the existence of unobservable traits and or properties, and attribute the causation of events."[157] Categorization operates at an unconscious level.[158] Individuals perceive, categorize, and evaluate information differently depending on the ways in which information is presented and the context in which it is received.[159] The danger of categorization is that it can cause judgment errors that bias decisionmaking.[160] Categorization can make it difficult for an observer to recognize a person's individual characteristics.[161] When an individual is seen as a member of a social group, perceptions about that group's characteristics and behavior influence judgments made about that individual.[162] Stereotyping, Krieger explained, is a form of categorization.[163]

Stereotyping involves, among other things, the creation of a mental image of a "typical" member of a particular category.[164] Individuals are perceived as undifferentiated members of a group, lacking any significant differences from other individuals within the group.[165] Common traits are assigned to the entire group.[166] When a particular behavior by a group member is observed, the viewer evaluates the behavior through the lens of the stereotype.[167] This causes the observer to conclude that the conduct has empirically confirmed his stereotyped belief about the group.[168] As Jody Armour explained "[s]tereotypes consist of well-learned sets of associations among groups and traits established in children's memories at an early age, before they have the cognitive skills to decide rationally upon the personal acceptability of the stereotypes."[169] Stereotypes can be so deeply internalized that they persist

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[155] *Id.* at 1188–90.
[156] *Id.*
[157] *Id.* at 1189.
[158] *Id.* at 1188.
[159] *Id.* at 1191–92.
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.* at 1190–91.
[164] *Id.* at 1189–90.
[165] *Id.* at 1192.
[166] *Id.* at 1198.
[167] *Id.* at 1195–1200.
[168] *Id.* at 1199.
[169] Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the*

even in the face of information that directly contradicts the stereotype.[170] In a 2006 article, Linda Krieger and Susan Fiske explained, among other things, that

> [s]ubtle forms of intergroup bias can infiltrate decision making long before any decision is made. These biases can latently distort the perceptual data set on which that decision is ultimately premised. Often operating outside of the decision maker's attentional focus, and therefore outside his or her awareness, stereotypes can covertly but powerfully influence the way information about the stereotyped target is processed and used. They can shape the interpretation of incoming information, influence the manner in which that information is encoded into and stored in memory, and mediate the ease or difficulty with which the information is retrieved from memory and used in social judgment. A decision maker can act because of or on the basis of a target person's race, sex, or other group status, while subjectively believing that he or she is acting on the basis of some legitimate, nondiscriminatory reason.[171]

In *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, Professor Gary Blasi surveyed experiments, theories, and models in cognitive social psychology and social neuroscience that explain how unconscious stereotypes function in the human mind.[172] The extensive body of research that Blasi catalogued showed that individuals behave in ways that demonstrate that they are heavily influenced by stereotypes, including those

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Prejudice Habit, 83 CAL. L. REV. 733, 741 (1995). Professor Armour cited the case of a three-year-old child, "who upon seeing a black infant said to her mother, 'Look mom, a baby maid.' " This showed that the child had already developed a stereotyped association between African-American women and low-status service occupations. *Id.*

[170] *See also* Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1561–62 (1989) (explaining how racial stereotypes affect the cognitive processes of categorization in individuals).

[171] Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1034 (2006).

[172] Gary Blasi, *Advocacy Against The Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002). *See also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); John F. Dovidio, Samuel L. Gaertner & Kerry Kawakami, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002).

that they consciously disavow.[173] Dovidio and Gaertner use the term "aversive racism" to describe the conduct of individuals who support policies that promote racial equality and regard themselves as not prejudiced but act in ways that disadvantage minorities.[174] Aversive racists often experience feelings of uneasiness or fear in the presence of African-Americans.[175] Their negative attitudes towards minorities are usually unacknowledged because they conflict with their egalitarian value systems.[176] The negative attitudes of aversive racists are rooted in cognitive, motivational, and socio-cultural forces that affect many white Americans.[177] Aversive racists typically do not discriminate against African-Americans when it would be obvious to others and themselves, but they are likely to engage in discrimination when there are race-neutral justifications for their behavior.[178] In one frequently cited study concerning the provision of emergency assistance, white bystanders were as likely to help a black victim as a white victim when the white bystanders were the only witness to an emergency and their personal responsibility was clear.[179] In circumstances in which there were other witnesses to the emergency, they would justify not helping on the belief that someone else would intervene. In this situation, whites helped the black victim half as often as they helped the white victim. Racial bias was expressed in a way that could be justified on the basis of a race neutral reason.[180]

Another recently developed experimental model involves Implicit Association Tests (IAT). The IAT measures automatic association response times between representations for race, gender, and age, and other classifications and positive and negative characteristics.[181] To measure racial associations, test takers' preferences are measured by their response times in pairing positive words or negative words with depictions of alternating white

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[173] Blasi, *supra* note 172, at 1246–74.

[174] Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* STEREOTYPES AND PREJUDICE 289–302 (Charles Strangor, ed., 2000).

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.* at 292.

[179] *Id.*

[180] SAMUEL L. GAERTNER & JOHN F. DOVIDIO, REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL 24–26 (2000).

[181] The tests were developed by Professors Anthony Greenwald, Brian Nosek, and Mahzarin Banaji. *See* Project Implicit, The Scientists, https://implicit.harvard.edu/implicit/demo/background/thescientists.html.

and black faces.[182] Quicker response times to pairing black faces with negative words and white faces with positive words indicate an implicit preference for a black or white face with a negative or positive word.[183] The test is premised on the conclusion that it takes participants longer to associate words and faces that they consider incompatible.[184] The test developers determined that the time differential could be quantified to provide an objective assessment of a test taker's unconscious attitudes.[185] Using the IAT, researchers have documented a marked preference for whites among test takers of different races who consciously believed that their views about race were neutral.[186] The test results indicate that the test taker's attitudes about race were influenced by unconscious bias.[187]

Some decisions have recognized that stereotyping can result in discriminatory treatment, but courts have treated it as a form of intentional discrimination. In *Price Waterhouse v. Hopkins*, a female manager sued Price Waterhouse alleging sex discrimination in violation of Title VII after she was refused partnership in the firm.[188] Price Waterhouse argued that Hopkins' application for partnership was denied because of interpersonal shortcomings that affected her performance.[189] However, employees of Price Waterhouse had stated, among other things, that Hopkins needed to wear more make-up, and to walk and talk more femininely.[190] The Supreme Court held that Hopkins was the victim of sexual stereotyping because attributes deemed positive when possessed by men were viewed negatively when displayed by women.[191] The partners' negative evaluations of Hopkins were shaped by their perceptions about women's typical and acceptable roles in society.[192] The Court found that the Price Waterhouse partners intentionally discriminated

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[182] Project Implicit, http://implicit.harvard.edu/implicit/demo.

[183] *Id.*; Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 971 (2006) (implicit bias should be controlled through a strategy of "debiasing" the law).

[184] Jolls & Sunstein, *supra* note 183, at 971.

[185] *Id.*

[186] *Id.*

[187] Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 484–85 (2005).

[188] 490 U.S. 228 (1989).

[189] *Id.* at 234–35.

[190] *Id.* at 235.

[191] *Id.*

[192] *See* Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOLOGIST 1049, 1050 (1991).

against Hopkins under the "mixed motive" theory because gender discrimination was one of the causes of her discharge.[193]

Despite the findings of psychologists, social scientists, and a large body of legal commentary, courts adhere to theories of discrimination that emphasize intentionality.[194] Discrimination is seen by the judiciary as a relic of a bygone era which is occasionally reflected in the conduct of a few "bad apples" who depart from a colorblind norm.[195] In one of the few cases that acknowledged unconscious discrimination as a violation of Title VII, *Thomas v. Eastman Kodak Company*, the Court of Appeals for the First Circuit stated, "[t]he Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus."[196] Citing Lawrence's and Krieger's articles, the Court explained that "[t]he concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments."[197] *Thomas*, however, is a statistical outlier in the universe of discrimination decisions.

Disparate impact cases focus on the discriminatory effects of facially neutral policies or practices. In such cases, plaintiffs are not required to prove

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[193] *Price Waterhouse*, 490 U.S. at 252. "Mixed Motive" cases refer to circumstances in which a discriminatory motive was one of a number of reasons that result in an adverse personnel decision. *See, e.g.*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). The Civil Rights Act of 1991 codified the "mixed motive" doctrine. It states, "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (2007). *See also* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

[194] Ann C. McGinley, *¡Viva la Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 417 (2000) (discussing current proof models under Title VII and advocating recognition of unconscious discrimination as a violation of Title VII).

[195] For example, in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) a case interpreting the burden of proof in disparate treatment cases, the Supreme Court affirmed a trial judge's finding that disregarded the implications of a supervisor's dishonest testimony about the reasons for discharging a black employee and found a neutral reason for the supervisor's actions, one not supported by any evidence presented during the trial. The *Hicks* majority seemed willing to believe almost any motivation for the employer's actions except unlawful discrimination, even if that meant creating an entirely speculative reason that none of the parties suggested. This approach, which is reflected in decisions considering discrimination claims, assumes a society in which racial and other biases have been all but eliminated. *See* Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RTS. & EMP. POL'Y J. 37 (2000).

[196] 183 F.3d 38, 59 (1st Cir. 1999).

[197] *Id.* at 61.

intent. It is enough to show that a policy causing a disparate impact is not supported by a "business necessity."[198] Educational requirements, standardized test scores, and height and weight requirements are the type of employment practices that have most often been challenged in disparate impact cases.[199] In *Watson v. Fort Worth Bank & Trust*, the Supreme Court allowed a disparate impact challenge to a subjective decisionmaking process.[200] *Watson* involved discrimination claims asserted by a black female employed as a teller by the Fort Worth Bank & Trust. She applied for a number of other positions at the bank that were awarded to white employees.[201] The bank relied on the subjective judgment of white supervisors in making promotion decisions.[202] The Court concluded that disparate impact analysis applied to subjective employment criteria stating "[i]n either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices."[203] To support its ruling the Court stated that,

> even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. . . . If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply.[204]

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[198] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[199] Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (written aptitude tests); Washington v. Davis, 426 U.S. 229 (1976) (written tests); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (prohibition against employing drug addicts); Connecticut v. Teal, 457 U.S. 440 (1982) (written test).

[200] Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

[201] *Id.* at 982.

[202] *Id.*

[203] *Id.* at 991.

[204] *Id.* at 990–91 (footnotes omitted). There was also evidence of stereotyping. Watson was "told at one point that the teller position was a big responsibility with 'a lot of money . . . for blacks to have to count.' " *Id.* at 990.

Courts have found subjective criteria discriminatory under the disparate impact theory in hiring, pay, performance evaluations, transfers, and promotions.[205] In cases where it can be shown that subjective decisionmaking causes a statistically significant disparity, a prima facie case could be established and the employer would have the burden of proving business necessity.[206] However, courts also recognize the need to rely on subjective evaluations and are reluctant to interfere with such judgments, especially those concerning professional, managerial, and supervisory positions.[207]

American courts have become increasingly reluctant and skeptical of claims asserting the traditional theories of disparate treatment and adverse impact. Nevertheless, some commentators have suggested that the disparate impact theory may provide an avenue for challenging unconscious discrimination. Professor Linda Krieger argued, however, that "[t]he disparate impact paradigm as currently constructed is an inappropriate analytical tool for addressing the intergroup biases inherent in subjective decisionmaking."[208] Professor Tristin Green holds a similar view. She stated that "despite its importance to the antidiscrimination project, disparate impact theory is also ill-suited to the task of combating the operation of discriminatory bias in the modern workplace."[209] Disagreeing with Krieger and Green, Professor Charles Sullivan suggested that a renewed focus on the disparate impact theory would remedy unconscious discrimination.[210] Under such an approach, a plaintiff challenging hiring or promotion practices would have to show that minorities were disproportionately underrepresented in higher level job classifications and identify the employment practice that caused this result. Motive would not matter as long as the disparity could be attributed to the employer's actions.

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[205] LINDEMANN & GROSSMAN, *supra* note 137, at 200–02.

[206] Disparate impact cases often rely on statistical disparities to establish a prima facie case. When considering whether a plaintiff meets the requirements of establishing a prima facie case of disparate racial impact using statistical disparities, courts compare the percentage of minorities in the group adversely affected by the employment practice to the percentage of minorities in the total group. This is compared to the percentage of nonminorities adversely affected by the policy. Gross statistical disparities between the percentages of minorities and nonminorities adversely affected can provide a foundation for an inference of discrimination. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1972).

[207] LINDEMANM & GROSSMAN, *supra* note 137, at 205–08.

[208] Krieger, *supra* note 154, at 1231.

[209] Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 138 (2003).

[210] Charles A. Sullivan, *Disparate Impact: Looking Past* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 1000–01 (2005).

The only requirement, Sullivan argued, would be to identify a correlation between race or gender and the absence of employment opportunities.[211]

Statistically significant racial disparities can raise an inference of discrimination.[212] Sullivan's suggestion may work in some cases of subjective decisionmaking but there are significant evidentiary hurdles associated with this approach that suggest it will not be available in most cases. Under the Civil Rights Act of 1991, as part of the prima facie case, the plaintiff is required to isolate and identify the practice causing the adverse impact.[213] If the practices or policies are not able to be separated, the employer's decisionmaking process can be treated as a single employment practice. Disparate impact theory assumes that there is some identifiable policy or practice that is causing adverse affects on a protected group. Unconscious bias can influence decisionmaking long before any final decision is made.[214] It is the product of a cognitive process occurring across time in various circumstances. In claims involving unconscious discrimination, the "employment practice" causing the adverse impact will be difficult to isolate and identify.[215] Despite the attempt of the *Thomas* court to do otherwise, unconscious discrimination cannot be remedied by efforts to shoehorn the problem into the traditional theories of disparate treatment and adverse impact.

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[211] *Id.*

[212] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977).

[213] HAROLD LEWIS, CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW 262–70 (1997).

[214] *See* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 13–14 (2006) (explaining that because disparate impact analysis focuses on discrete employment decisions it is difficult to apply to accumulated episodes of biased judgments and evaluations).

[215] In *Subjective Decisionmaking and Unconscious Discrimination*, Melissa Hart argued that the current Title VII framework provides a foundation for challenging unconscious discrimination and pointed to class actions as a possible vehicle for asserting claims. Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 779–89 (2005). However, class actions challenging discrimination have become increasingly rare. The "typicality" and "commonality" requirements of Rule 23 of the Federal Rules of Civil Procedure makes class actions an unlikely avenue as unconscious and institutional discrimination are experienced in different ways, at different times, and under dissimilar circumstances by individuals working in the same organization. *See* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and its Effects*, 81 TEX. L. REV. 1249, 1263–69 (2003) (describing the difficulties and relative lack of success with class actions in employment discrimination litigation).

VI. INSTITUTIONAL DISCRIMINATION

Unconscious discrimination is an ubiquitous species of bias that should be recognized and redressed by antidiscrimination laws, but that is not the extent of the problem. Many individuals still actively discriminate against racial minorities. Moreover, intentional and unintentional discrimination frequently combine to create a discriminatory environment. Although the terms are sometimes used interchangeably, there is a difference in unconscious discrimination and institutional discrimination. Institutional discrimination refers to organizational customs, practices, and norms that operate to deprive nonwhites of treatment as equals in a broad range of economic, social, and political relationships.[216] Institutional discrimination is reinforced by media images,[217] political discourse, and everyday interactions. Institutional discrimination is pervasive; it functions at the societal, institutional, social, and individual levels. It manifests itself in the workplace, in educational settings, in financial transactions,[218] and in other more informal settings. Manifestations of systemic discrimination are so common that they appear to be "normal" and are unnoticed by those not adversely affected.

In *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, Professor Ian F. Haney López presented a theory of institutional analysis that examines the behavior of individuals in organizational settings.[219] Incorporating "New Institutionalism," a genre of organizational sociology, Haney López explained that individuals engage in unintentional discrimination relying on unexamined understandings that influence their behavior.[220] In organizations, these actions take place without the actor's conscious reflection on the reasons for his conduct. Institutions perpetuate discriminatory practices by establishing "scripts and paths" that guide the individual's behavior.[221] Haney López argues that institutional racism explains how discriminatory actions operate as everyday, "taken-for-

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[216] JAMES M. JONES, PREJUDICE AND RACISM 436–69 (2d ed. 1997).

[217] *See generally* ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA 46–204 (2000).

[218] Cassandra Jones Harvard, *Democratizing Credit: Examining the Structural Inequities of Subprime Lending*, 56 SYRACUSE L. REV. 233 (2006) (describing how lenders target minority communities for higher cost loans).

[219] Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

[220] *Id.* at 1727–28.

[221] *Id.* at 1785–87.

granted" understandings of the social contexts in which individuals operate.[222] The understandings are deeply embedded in an organization's internal culture.[223] They are the unwritten rules; the customs, practices and usages—the way things are done. [224]

To illustrate his theory, Haney López examined the prosecution of a group of Latino activists in Los Angeles Superior Court in the late 1960s.[225] The defendants lodged an Equal Protection challenge to the prosecution on the grounds that Los Angeles grand juries excluded Mexican Americans.[226] During a hearing on the motion, the evidence showed that trial judges nominated only their friends and acquaintances for grand jury service.[227] The evidence also showed that Mexican Americans were not in those circles.[228] Between 1960 and 1969, fewer than 2% of grand jurors seated in Los Angeles County were Mexican Americans.[229] Despite this evidence, the trial judge rejected the Equal Protection claim after concluding that the defendants had not shown that the judges acted with an intent to discriminate against Mexican Americans.[230] Haney López argued persuasively that the Los Angeles case was an example of institutional discrimination.[231] The case showed how individuals who engage in conduct that will have an adverse impact on minorities can do so without discriminatory animus even though the likelihood of a discriminatory outcome was clearly foreseeable. When racial exclusion is institutionalized, as it was in the Los Angeles County grand jury selection system, discriminatory actions can appear to be legitimate and routine. Yet, the effect on the criminal justice system was the same irrespective of judges' motives: a significant segment of the community was excluded from grand jury service; Anglo jurors decided whether to indict Latino defendants.[232]

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[222] *Id.* at 1806.

[223] *Id.* at 1807.

[224] *See* IAN HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2004). In Racism on Trial, Haney López explained, among other things, how race functions as a "common sense" set of ideas that are taken for granted in daily routines. *See also* PHILOMENA ESSED, UNDERSTANDING EVERYDAY RACISM: AN INTERDISCIPLINARY THEORY (1991).

[225] López, *supra* note 219, at 1785.

[226] *Id.*

[227] *Id.* at 186.

[228] *Id.*

[229] *Id.* at 1742.

[230] *Id.* at 1754.

[231] *Id.*

[232] *Id.*

Workplace cultures are also a site for institutional discrimination.[233] Social science researchers have found that recruitment, selection practices, performance evaluations, and the culture of organizations can foster discriminatory practices that are not the product of a conscious intent to discriminate.[234] Culture is rooted in deeply-held beliefs; it consists of shared beliefs, attitudes, assumptions, and values.[235] Workplace cultures shape the ways individuals interact and influences how tasks are accomplished. It fosters the behavioral norms and organizational goals.[236] Workplace culture defines the social and behavioral expectations of an organization.[237] Modes of dress, ways of communicating, and subjects of informal, water cooler, conversations reflect behavioral expectations that occur on a day-to-day basis in the workplace.[238] All employees must adapt to their workplace cultures, but this can be more difficult and burdensome for minority workers. Workplace cultures foster an unstated image of the model employee. The attributes of the model employee are not explicitly connected to race, but they tend to be associated with historically privileged categories of workers. Every individual has attributes that are independent of group identities, but each person's affinities, sense of history, and identity are shaped in part by a group identity. The dominant group's norms are seen as universal rather than reflections of their own ethnic specificity. This assumption devalues minorities' group identities and creates powerful pressures to conform to the norms of the dominate group. There is implicit pressure for minority workers to engage in what Kenji Yoshino describes as "covering" or taking actions (modes of dress, speech, and mannerisms) that minimize a disfavored racial identity.[239] To succeed, minority workers must "cover" and conform to the values and

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[233] Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 678 (2005); *see also* Philip Moss & Chris Tilly, Raised Hurdles for Black Men: Evidence from Interviews with Employers (Russell Sage Found., Working Paper, Nov. 1995), *available at* http://www.rusellsage.org/publications/workingpapers/#social%20Inequality (discussing how the researchers found that a demand for literacy and communication skills, reliance on face-to-face interviews, and employers' perceptions of a deficit in the typical black male's "soft skills" disadvantaged less educated black men). The researchers also found widespread negative employer perceptions of black men in addition to those related to soft skills. *Id.*

[234] Green, *supra* note 233, at 625.

[235] *Id.* at 632.

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

behavioral expectations imposed by the organizational culture.[240] This is even more burdensome on minority women as the dominant culture has been shaped by a white male norm.[241] Minority women also experience intersectional discrimination, a unique form of bias that does not affect minority men or white women.[242]

A study of a mid-Atlantic state agency provides an example of the interaction of conscious and unconscious conduct that created a discriminatory work environment.[243] The study found that the agency's African-American employees were subjected to disadvantageous employment conditions which interfered with their work performance but in most instances, fell short of conduct that courts would construe as actionable claims of discrimination. However, because these employees were treated differently and less favorably than similarly situated white workers, there should be a remedy for their dilemma. The study showed that many African-American employees, while generally describing their workplaces in positive terms, experienced a wide variety of actions that evidenced detrimental conditions to which white employees were not exposed.[244] These included the imposition of what the workers described as "white cultural norms" and other assumptions that displayed an anti-minority bias.[245] The experiences created negative feelings about white co-workers and the workplace itself. Many workers responded to the conditions with adaptive behaviors that affected their work performance, their sense of opportunity in the agency, and other opportunity-seeking behaviors. The interviewees observed these activities in a wide variety of circumstances including informal workplace conversations, the selection process, discipline, training, work assignments, and the distribution of power and authority.

White cultural norms concerning dress, style, appearance, communication, behavior, decorum, and conflict resolution were brought to bear when white

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[240] *Id.* at 127–36.

[241] JACQUELINE J. IRVINE, BLACK STUDENTS AND SCHOOL FAILURE: POLICIES, PRACTICES, AND PRESCRIPTIONS 21–42 (1990) (noting that African American students in predominately white schools face similar pressures which often adversely affect their academic performance).

[242] Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 181 (1997) (describing "racialized (hetero) sexual harassment" that Asian women uniquely experience).

[243] Stephanie A. McClellan, Race at Work: Demystifying the Dominant Race-Neutral Narrative (2004) (unpublished Ph.D. dissertation, Univ. of Del.) (on file with author).

[244] *Id.* at 194.

[245] *Id.* at 157.

co-workers spoke disparagingly about black norms in informal conversations.[246] Whites in positions of authority implicitly demanded conformity to white norms through non-selection of African Americans for desirable assignments and by the imposition of discipline for non-conformity.[247] The study's participants described negative stereotypes of African-Americans that were discussed in the workplace.[248] The stereotypes included African American's work ethic, competence, criminal tendencies, character, temperament, and socioeconomic status.[249] African-American interviewees reported that their work assignments, promotion opportunities, access to training, and discipline were frequently shaped by negative assumptions about them.[250] For example, stereotypes about African-Americans kept one employee pigeonholed in social service work.[251] She was unable to utilize her planning, policy, and evaluation training and skills.[252] She was told that because she "knows the problems of Black people," she was more valuable to the organization in her service position.[253] Other interviewees reported that assumptions concerning black criminality and volatility affected decisionmaking, especially in disciplinary actions involving black males.[254]

Many of the study's participants reported observing direct anti-minority bias.[255] Many interviewees overheard negative comments made by white workers about minorities.[256] More than one-half of the interviewees reported that whites were hired and promoted over equally qualified minority candidates.[257] Agency statistics supported these reports.[258] Most of the white employees hired during the year of the study were placed into higher level jobs than minorities who were hired.[259] The majority of the minority employees were hired into lower level positions. During the same period, white

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[246] *Id.* at 158.
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.* at 154.
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Id.*

employees were awarded 72% of all promotions.[260] One-third of the minority interviewees reported experiencing or observing racial bias in the agency's disciplinary process, citing racial disparities in the infractions noticed by white employers and the severity of disciplinary actions taken.[261] This was also corroborated by agency statistics.[262] The majority of those discharged in every job classification were minorities.[263] The interviewees also reported that white employees were given the most desirable shifts in a twenty-four hour facility, white employees made training opportunities known only to other white workers, and white supervisors were granted more authority in their positions than African-American supervisors.[264]

The interviewees reported that their experiences demonstrated to them the significance of race in the workplace and the resulting disadvantages.[265] Their experiences generated a host of negative feelings including: anger, mistrust, lowered motivation, feeling excluded, and experiencing the imposition of a hostile culture.[266] These experiences also indicated that the potential for discrimination was always present, heightening their fears of discrimination and diminishing their sense of opportunity.[267] The black employees responded to the conditions reported with a variety of adaptive behaviors.[268] Most of them reported "watching and waiting" to see if additional problems would occur, discussing their experiences with fellow minority co-workers, directly challenging racially biased actions at the individual level, and trying to adjust to their environment.[269] The adjustments took many forms: working harder for some, working less hard for others, presenting a positive image to overcome negative assumptions, "code switching" by conforming to the norms imposed, engaging in race-related work, diminishing the value of advancement, no longer seeking advancement, and seeking employment elsewhere.[270] The participants rarely reported discriminatory conduct through the agency's complaint system.[271] This corresponded to the study's finding that the rate of

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[260] *Id.*
[261] *Id.*
[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.* at 160.
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *Id.*

formal complaints was far below the rate of perceived discrimination as reported in the interviews.[272] Interviews of white employees in positions of authority indicated that they did not perceive that race played a significant role in the agency except in the isolated cases of a few "bad apples" and in the minds of overly sensitive minority employees.[273] Discussing their experiences and feelings, and their responses to them, the study's participants described a psychological environment that was burdensome.[274]

Much of the conduct of white supervisors and co-workers reported in the study fell short of what courts would construe as actionable because their actions would be viewed in isolation rather than cumulatively.[275] Courts view discrimination as the product of a single decisionmaker at a particular time. There also must be an adverse personnel action such as a failure to hire, a discharge, a demotion, or a promotion denial to be actionable under Title VII. The Supreme Court has also stressed that Title VII "does not set forth a 'general civility code for the American workplace.' . . . An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience."[276] The work conditions that the African-American employees experienced in the mid-Atlantic state agency were not sufficiently "severe and pervasive" to constitute a hostile work environment.[277] The comments made by white workers reflecting racial bias would likely be dismissed as "stray remarks" in the workplace "unrelated to the decisional process."[278] This shows that there are significant differences in how discrimination is experienced by racial minorities, how it is perceived by non-minorities, and how it is understood by the courts. Traditional theories of discrimination do not address this problem.[279]

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[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415 (2006) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

[277] Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

[278] Stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.

Price Warehouse v. Hopkins, 490 U.S. 228, 277 (1989).

[279] Bagenstos, *supra* note 214, at 40–48 (explaining that problems of workplace bias,

VII. ETHNIC MINORITIES IN BRITAIN

A. Ethnic Minority Migration to Britain

The racial and ethnic composition of Britain is very different from the racial mix in the United States. Britain's ethnic minorities also have a different history. Whereas African Americans and Latinos are the largest minority groups in the United States with a much smaller Asian population, the reverse is true in Britain. Of the ethnic minority groups identified in the Census, the Indian population was the largest, followed by black Caribbeans, Pakistanis, Africans, and Bangladeshis.[280] These groups constitute approximately 70% of Britain's minority population.[281] Small communities of blacks have resided in coastal areas of Britain for centuries.[282] Despite the longevity of some ethnic minority communities, the presence of racial and ethnic minorities in substantial numbers began after the conclusion of World War II, when there was a severe labor shortage in Britain. Initially, immigration from Poland and other European countries was encouraged to meet workforce needs.[283] However, it soon became clear that the supply of European immigrants was not adequate to meet the needs of British industries. Employers were compelled by these circumstances to recruit non-European laborers.

During the post-War period Britain's West Indian colonies were suffering from an economic depression and severe unemployment.[284] Their economies were based primarily upon sugar and other agricultural exports. The Second

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including unconscious and institutional discrimination, are beyond the reach of the existing antidiscrimination doctrine and arguing that social, rather than legal reforms, are needed to achieve workplace equality).

[280] CABINET OFFICE, ETHNIC MINORITIES AND THE LABOUR MARKET, FINAL REPORT 14 (2003), *available at* http://www.cabinetoffice.gov.uk/upload/assets/www.cabinet.office.gov.uk/strategy/ethnic_minorities.pdf.

[281] *Id.*

[282] *See generally* DILIP HIRO, BLACK BRITISH, WHITE BRITISH (1971); *see also* Alfred B. Zack Williams, *African Diaspora Conditioning: The Case of Liverpool*, 27 J. OF BLACK STUDIES 528, 529, 533 (1997).

[283] Kevin C. Wilson, Recent Development, *And Stay Out! The Dangers of Using Anti-Immigrant Sentiment as a Basis for Social Policy: America Should Take Heed of Disturbing Lessons from Great Britain's Past*, 24 GA. J. INT'L & COMP. L. 567, 569–78 (1996).

[284] Vaughn Robinson & Rina Valeny, *Ethnic minorities, employment, self employment and social mobility in postwar Britain*, *in* ETHNICITY, SOCIAL MOBILITY AND PUBLIC POLICY: COMPARING THE US AND UK 419 (Glenn L. Loury et al., eds., 2005).

World War interrupted all trade to the Caribbean and the price of sugar fell dramatically. Many employers established recruiting offices in the Caribbean to recruit workers. West Indians needed work and British industries needed workers.[285] British nationality had been conferred on people residing in colonial territories across the world, all of whom had the right to live and work in Britain. This led to the migration of large numbers of ethnic minorities to Great Britain from Commonwealth countries. On June 22, 1948, the *Empire Windrush*, arrived in England with 492 Jamaican immigrants.[286] This was the beginning of the migration of thousands of West Indians to Great Britain. West Indian servicemen who had been stationed in Britain during the War returned to seek employment; others soon joined them.[287] These workers were concentrated in the hospitality, healthcare and transportation industries.[288] They also worked in manufacturing concerns located in the Midlands.

The post-War migration spike included ethnic minorities from South Asia.[289] Relatively small numbers of South Asian entrepreneurs and professionals had migrated to Britain during the mid-nineteenth century and after. At the beginning of the twentieth century, smaller groups of ex-seamen and ex-soldiers settled in English seaports. When military recruitment caused acute shortages of industrial labor during World War II, South Asians were able to obtain employment in British industries. When the country experienced the post-War economic boom, labor shortages and expanded employment opportunities resulted in large numbers of workers from India, Pakistan and Bangladesh immigrating to Britain.[290]

Migrants from the Indian subcontinent included a substantial number of highly educated people but many had low educational levels. The immigrants included Hindus and Sikhs from India, and Muslims from India, Pakistan, and Bangladesh. Some of the South Asian immigrants were professionals, but most of them took unskilled positions in various industries.[291] In the late 1960s

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[285] *Id.*

[286] *Id.* at 419.

[287] *Id.*

[288] *Id.* at 420.

[289] *Id.*

[290] *Id.* Another "push" factor involved the 1947 partition of British India into two independent nations, India and Pakistan. This resulted in a conflict over control of the Kashmir region. VIRINDER S. KALRA, FROM TEXTILE MILLS TO TAXI RANKS: EXPERIENCES OF MIGRATION, LABOUR, AND SOCIAL CHANGE (2000). The conflict displaced many families residing in the area. *Id.*

[291] National Statistics Online, Ethnicity & Identity: Employment Patterns, http://www.Statistics.gov.UK/CCI/nugget.asp?id=463.

and early 1970s, South Asians residing in East African migrated to Britain as a result of "Africanization" policies in Kenya, Tanzania and Uganda which pressured South Asians to leave those countries.[292] In 1972, Uganda expelled 80,000 Asians.[293] British Government officials were reluctant to admit the Asian refugees, even though the majority of them held British passports.[294] Eventually, 28,000 were allowed to immigrate.[295]

Anti-immigrant sentiment began to emerge not long after the arrival of significant numbers of ethnic minorities.[296] Enoch Powell was an influential Member of Parliament who vigorously advocated against immigrants.[297] In a speech delivered in Birmingham, England, in 1968, Powell said,

> [a]s I look ahead, I am filled with forbidding. Like the Roman, I seem to see 'the River Tiber foaming with much blood'. That tragic and intractable phenomenon which we watch with horror on the other side of the Atlantic . . . is coming upon us here by our own volition and our own neglect.[298]

Powell invoked an image of England overrun by non-white immigrants.[299] The "phenomenon" to which he alluded was race riots that erupted in several American cities during the late 1960s. The speech resonated with many white, working-class Britons who regarded Powell a true English patriot.[300] They agreed with his claim that the British way of life was threatened by the growing number of non-white immigrants. "Powellism" soon became a term denoting, among other things, extreme anti-immigrant views. Powell was not the only elected official who opposed ethnic minority immigration. In a 1978 speech, Margaret Thatcher, who later became Britain's Prime Minister, expressed strong anti-immigrant sentiments. She blamed ethnic minority immigrants for the rising crime rate, street violence and misuse of the welfare

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[292] Robinson & Valery, *supra* note 284, at 435–36.

[293] Keith Somerville, *Ugandan Asian 's-successful refuges*, BBC NEWS, Nov. 8, 2002, http://news.bbc.co.uk/2/hi/2399549.stm.

[294] *Id.*

[295] JOHN SOLOMOS, RACE AND RACISM IN BRITAIN 48–75 (2003).

[296] *Id.*

[297] Wilson, *supra* note 283, at 573.

[298] RICHARD JONES & GNANAPALA WELHENGAMA, ETHNIC MINORITIES IN ENGLISH LAW 13 (2000).

[299] Wilson, *supra* note 283, at 573–74.

[300] *Id.* at 574.

system. Commenting on the growing number of ethnic minority immigrants Thatcher said,

> I think it means that people are really rather afraid that this country might be rather swamped by people with a different culture. The British character has done so much for democracy, for law, and done so much throughout the world, that if there is any fear that it might be swamped, people are going to react and be rather hostile to those coming in. . . . We are a British nation with British characteristics. Every nation can take some minorities, and in many ways they add to the richness and variety of this country. But the moment a minority threatens to become a big one, people get frightened.[301]

Anti-immigrant sentiment is reflected in the growing support for the British National Party (BNP). The BNP is a far-right political party that is strongly opposed to the immigration of non-whites. The party "stands for the preservation of the national and ethnic character of the British people and is wholly opposed to any form of racial integration between British and non-European peoples."[302] It is "committed to stemming and reversing the tide of non-white immigration and to restoring, by legal changes, negotiation, and consent the overwhelmingly white makeup of the British population that existed in Britain prior to 1948."[303] The BNP advocates the use of "firm but voluntary incentives" to remove ethnic minorities from Britain.[304] BNP membership is restricted to "Indigenous Caucasian[s]."[305] In the 2005 general election, the BNP received 192,850 votes.[306] This total was a substantial gain compared to the 47,219 votes it received in 2001.[307] The party has consistently campaigned for the removal of ethnic minorities from Britain.

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[301] *Id.* at 17.

[302] Const. of the British Nat'l Party 3 (8th ed. 2004), *available at* http://www.bnp.org.uk/resources/constitution_8ed.pdf (last visited Sept. 30, 2007).

[303] *Id.*

[304] *Id.* Rebuilding British Democracy: British National Party General Election Manifesto 2005, *available at* http://www.bnp.org.uk/candidates2005/manifesto/manf15.htm.

[305] Const. of the British Nat'l Party, *supra* note 302, at 4.

[306] *Profile: Nick Griffin*, BBC NEWS, Nov. 10, 2006, http://news.bbc.co.uk/1/hi/uk_politics/4670574.stm.

[307] *Id.*

Britain responded to the rising number of ethnic minorities by severely limiting the ability of residents of former colonies to immigrate.[308] Immigrants from Commonwealth countries held British passports and could enter and settle in the country without any restrictions.[309] The Commonwealth Immigration Act of 1962 ended the large scale migration of families from the Caribbean.[310] The Immigration Act of 1972 had the same effect on South Asians.[311] Ethnic minorities have also been subjected to racially motivated violence frequently resulting in serious injuries and fatalities. Several race riots have erupted in British cities during the last five decades resulting in property destruction and injuries to individuals.[312] Immigration restrictions have not halted the growth of Britain's ethnic minority population. In 1991, the ethnic minority population was 3.1 million which was 5.5% of the total population.[313] By 2001, the United Kingdom's non-white population was 4.6 million, which represented 7.9% of the total population.[314]

B. Ethnic Minority Employment

Ethnic minorities in Britain have been consistently employed in lower skilled, lower paying occupations than white workers.[315] When ethnic

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[308] JONES & WELHENGAMA, *supra* note 298, at 11.

[309] *See generally id.*

[310] *Id.*

[311] *Id.* at 17.

[312] *Id.* at 20–25. Race riots have occurred periodically since the 1950s. In 1958 riots erupted in the Notting Hill area of London. Racial tensions escalated into riots in Brixton in 1981. In July of 1981, riots broke out in Liverpool followed by a wave of disturbances in London, Leeds, and other cities. The Handsworth riot broke out in a suburb of Birmingham during the summer of 1981. The Bradford riot took place on July 7, 2001. The Broadwater Farm riot occurred in that area of Tottenham, London, on October 6, 1985. The 1985 Brixton riot started on September 28th. The Brixton riots of 1995 began in December after the death of a twenty-six year-old black man, Wayne Douglas. Racial violence occurred in Oldham over a three-day period in May of 2001. In Burnley, violent clashes between groups of whites, Asians and police occurred from June 23–25, 2001. In July 2001, long simmering racial tensions in Bradford escalated into violence. Eighty police officers were injured by Molotov cocktails and rocks. The Birmingham riots of 2005 were sparked by conflicts between the black and Asian communities. *See Long History of Race Rioting*, BBC NEWS, May 28, 2001, *available at* http://news.bbc.co.uk/1/hi/uk/1355718.stm. *See also* BBC.Co.UK, Hardsworth Riots—Twenty Years On, http://bbc.co.uk/birmingham/content/articles/2005/09/05/handsworth_riots_20years_feature.shtml (last visited Oct. 21, 2007).

[313] ETHNIC MINORITIES IN THE LABOUR MARKET, *supra* note 280, at 15.

[314] *Id.*

[315] *Id.* at 24–26. *See also* JOHN CARTER, ETHNICITY, EXCLUSION AND THE WORKPLACE 24

minorities arrived during the post-War Era they replaced white workers in mills and factories who obtained more attractive and higher paying positions in an expanding economy. During this period, overt discrimination against ethnic minorities in the labor market was wide-spread and accepted as the employer's prerogative.[316] A generation later, ethnic minorities remain overrepresented in unskilled and semi-skilled occupations. They are also concentrated in particular industrial sectors.[317] People of South Asian origin are more likely than whites to be employed in retail distribution. People of Chinese and Bangladeshi origin are concentrated in the hospitality and food service sectors. Pakistani and Bangladeshi men are concentrated in the textile and footwear industries.[318] Black Caribbean males are heavily represented in transportation and communications; they are also employed in the construction industry.[319] Black Caribbean women are overrepresented in the healthcare industry as nurses and other service providers.[320]

Britain's ethnic minorities have consistently had unemployment rates approximately twice those of whites.[321] With the exception of Indian descended men and men of Chinese ancestry, high rates of unemployment have persisted for minority groups.[322] In 1992, the unemployment rate of Bangladeshi, Pakistani and black Caribbean men was 15–20% higher than that of non-minorities.[323] In 2000, this disparity remained.[324] Unemployment levels fell for all groups during the 1990s.[325] However, the overall unemployment rates for minorities at the end of the decade remained substantially higher than that of the white population.[326] In 2001, men of Bangladeshi origin had the highest unemployment rate at 20%. The unemployment rate among Indian men was slightly higher than that for white men; 7% compared to 5% for white males. For all other ethnic minority groups, unemployment rates were between

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(2d ed. 2003); David Mason, *Changing Patterns of Ethnic Disadvantage in Employment*, *in* EXPLAINING ETHNIC DIFFERENCES: CHANGING PATTERNS OF DISADVANTAGE IN BRITAIN 69–86 (David Mason ed., 2003).

316 HIRO, *supra* note 282, at 90–96.

317 ETHNIC MINORITIES IN THE LABOUR MARKET, *supra* note 280.

318 National Statistics Online, *supra* note 291.

319 *Id.*

320 *Id.*

321 *Id.* at 26.

322 *Id.*

323 *Id.* at 19.

324 *Id.*

325 *Id.*

326 *Id.*

two and three times higher than those for white men. Unemployment rates were significantly higher among young people under twenty-five than for older people. Over 40% of young Bangladeshi men were unemployed. Young black African men, Pakistanis, black Caribbeans, and racially-mixed males also had very high unemployment rates that ranged from 25% to 31%. By comparison, the unemployment rate for young white men was only 12%.[327]

The percentage of ethnic minorities living in low-income households was significantly higher than the proportion of white households.[328] For people of Pakistani and Bangladeshi origin, the proportion was 68%. For Indians the proportion was under 30%. In the case of black Caribbeans the proportion was approximately 30%. The proportion of the white population living in low-income households was much lower at 21%.[329] Second-generation minorities have fared better than their parents, but the employment disparities between minorities and whites have not closed. In the 1970s, first-generation minorities had higher levels of unemployment rates than whites. Indian employment levels were close to those of their white counterparts. First generation black Caribbeans had an unemployment rate approximately twice that of whites. By the 1990s, conditions had not improved. Unemployment rates for second-generation black Caribbean and Pakistani men were more than twice those of white men.[330] Among employment rates for men from ethnic minority groups, Indians had the highest employment rate (73%); Bangladeshis had the lowest (55%), which compared to 80% for white men. In 2000, 40 Financial Times Stock Exchange 100 companies found that 5.4% of their employees were ethnic minorities.[331] Only 1% of senior management positions were held by ethnic minorities.[332]

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[327] National Statistics Online, *supra* note 291.

[328] Low-income household was defined as having less than 60% of the median disposable income. National Statistics, Low Income for 60% of Pakistanis/Bangladeshis, http://www.statistics.gov.uk/ccl/nuggest.asp?IDE269&Pos=1&ColRank=1&Rank=374 (last visited Oct. 21, 2007).

[329] *Id.*

[330] ETHNIC MINORITIES IN THE LABOUR MARKET, *supra* note 280, at 25–26.

[331] SANDRA SANGLIN-GRANT & ROBIN SCHNEIDER, THE RUNNYMEDE TRUST, MOVING ON UP? RACIAL EQUALITY AND THE CORPORATE AGENDA: A STUDY OF FTSE 100 COMPANIES (2000).

[332] *Id.*

C. Ethnic Minority Housing Patterns in Britain

Disproportionately high levels of Britain's ethnic minorities reside in housing that is deteriorated and lacking in many amenities.[333] They are also concentrated in ethnic enclaves in inner city communities. The proportion of the ethnic minority population residing in metropolitan London is 47.6%.[334] The other portion of the ethnic minority population is located in other areas. A large portion, 13.6%, lives in the West Midlands (a metropolitan county in Western Central England) and 7.6% reside in Yorkshire (an area in northern England) and Humberside (a county in north east England).[335] Another portion, 6.8%, lives in the North West and Merseyside (a metropolitan county in north west England).[336] In comparison, approximately 10% of Britain's white population resides in Greater London and 4% in the West Midlands.[337] The history of widespread discrimination against ethnic minorities in British housing markets prior to the Race Relations Act of 1976 is well documented.[338]

Despite the prohibitions imposed by Britain's anti-discrimination laws, researchers have found that discrimination by landlords and real estate agents continues to restrict the minority access to higher quality housing.[339] In a study that used 1981 Census data to prepare an index of dissimilarity,[340] researchers concluded that "[n]early 80% of Bangladeshi and Pakistani people, three quarters of Black-Caribbean and Black-African people, and two thirds of Indian people would have had to move for their geographical distribution to be the same as that of White people."[341] There was little change from 1981 to

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[333] ETHNIC MINORITIES IN THE LABOUR MARKET, *supra* note 280, at 30.

[334] *Id.* at 17.

[335] *Id.*

[336] *Id.* at 17.

[337] *Id.*

[338] HIRO, *supra* note 282, at 209–27.

[339] *Id.*

[340] Social scientists measure segregation levels using an "Index of Dissimilarity." The index indicates the degree to which racial groups are evenly distributed among census tracts in a given location. Evenness is defined by examining the racial composition of the city as a whole. Thus, if a city has a 20% black population and 80% white population, an even distribution would reflect these percentages in each census tract. The index ranges from 0 to 100, reflecting the percentage of one group that would have to move to achieve an even distribution of racial groups in the area. A value of sixty or above is considered highly segregated. Values of forty to fifty are usually considered moderate levels of segregation. Values of thirty or less are considered low. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 20 (1993).

[341] David Owen, *The Demographic Characteristics of People from Minority Ethic Groups*

1991.[342] In a study published in 2005, which used 2001 census data, researchers found high levels of segregation among Britain's ethnic minority groups both in schools and in their neighborhoods.[343] There were higher levels of residential segregation for South Asian pupils than for black students.[344] For most minority groups, the data indicated that the levels of school-based segregation were slightly higher than they were for neighborhood segregation.[345] This meant that minority students were more segregated in their schools than in their neighborhoods.[346] This was particularly the case for black Caribbean students, those with Indian ethnicity, students of Pakistani origin, and students with Bangladeshi backgrounds.[347]

Britain's South Asian groups have tended to cluster in ethnic enclaves, often using the resources of their own communities to find employment and housing. There is a debate among researchers concerning the extent to which such enclaves are a product of "self-segregation" or discriminatory practices that constrain housing choices.[348] The "chain migration" of individuals from foreign countries and the emergence of ethnic enclaves are common features in the United States and Britain. New immigrants tend to locate in areas where there are others like them who share the same customs, religion, language, and other bonds of commonality.[349] Ludi Simpson contends that living in

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in Britain, *in* EXPLAINING ETHNIC DIFFERENCES: CHANGING PATTERNS OF DISADVANTAGE IN BRITAIN 1, 41 (David Mason ed., 2003).

[342] *Id.*

[343] SIMON BURGESS, DEBORAH WILSON & RUTH LUPTON, CENTRE FOR ANALYSIS OF SOCIAL EXCLUSION, PARALLEL LIVES? ETHNIC SEGREGATION IN SCHOOLS AND NEIGHBOURHOODS 41 (2005), *available at* http://sticerd.lse.ac.uk/dps/case/cp/CASEpaper101.pdf.

[344] *Id.*

[345] *Id.* at 20.

[346] *Id.*

[347] *Id.*

[348] After riots erupted in three northern English towns in 2001, official responses focused on racial segregation as a long-term cause of disorder, citing "self-segregation" of ethnic minorities as a contributing factor. TED CANTLE, HOME OFFICE, COMMUNITY COHESION: A REPORT OF THE INDEPENDENT REVIEW TEAM (2001), *available at* http://www.communities.gov/uk/documents/communities/pdf/independentreviewteam; JOHN DENHAM, HOME OFFICE, BUILDING COHESIVE COMMUNITIES: A REPORT OF THE MINISTERIAL GROUP ON PUBLIC ORDER AND COMMUNITY COHESION 12 (2001), *available at* http://www.communities.gov.uk/documents/communities/pdf/buildingcohesivecommunities; HERMAN OUSLEY, BRADFORD VISION, COMMUNITY PRIDE NOT PREJUDICE: MAKING DIVERSITY WORK IN BRADFORD (2001), *available at* http://www.bradford2020.com/pride/report.pdf.

[349] DAVID ROBINSON & KESIA REEVE, JOSEPH ROUNDTREE FOUND., NEIGHBOURHOOD EXPERIENCES OF NEW IMMIGRATION: REFLECTIONS FROM THE EVIDENCE BASE (2006), *available at* http://www.jrf.org.uk/bookshop/ebooks/9781859354421.pdf.

proximity to those who share a common language, culture, and background provides many benefits to ethnic minorities.[350] Ethnic enclaves provide social support and facilitate the acquisition of skills that allow new immigrants' integration into employment, education, and other opportunities.[351] The advantages of living close to others who can provide such support are such that some have argued that higher levels of residential integration would undermine the well-being of immigrant minority communities.[352]

There are, however, many constraints that prevent ethnic minorities from exercising the range of housing choices available to whites with comparable resources. Experiences with racial harassment deter minority families from living in many locations.[353] Discriminatory practices in the housing markets limit the mobility of ethnic minorities.[354] In many communities, ethnic minorities are simply not welcomed. Moving to such areas is an invitation to harassment, ranging from verbal abuse and property destruction to violent physical assault.[355] In one study, researchers found that a number of real estate agents stereotyped Asians as being devious and unreliable.[356] Some real estate agents admitted to refusing to work with Asian clients.[357] The Commission on Racial Equality conducted studies that found evidence of discriminatory practices by real estate agents in London and Oldham.[358] In Glasgow, a successful case was brought by an Asian family that had been prevented from viewing a house in a wealthy suburb.[359] One difference between the United States and Britain is the degree of residential segregation. The levels of segregation and concentration of ethnic minorities in Britain are lower than they are in the United States. In 1990, the average level of black-white segregation in the thirty metropolitan areas with the largest black populations

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[350] *See* Ludi Simpson, *Statistics of Racial Segregation: Measures, Evidence and Policy*, 41 URBAN STUDIES 661 (2004).

[351] *Id.* at 664.

[352] *Id.*

[353] Malcolm Harrison, *Housing Black and Minority Ethnic Communities: Diversity and Constraint*, *in* EXPLAINING ETHNIC DIFFERENCES: CHANGING PATTERNS OF DISADVANTAGE IN BRITAIN 105, 111 (David Mason ed., 2003).

[354] *Id.*

[355] *Id.*

[356] Alison Bowes & Duncan Sim, *Patterns of Residential Settlement among Black and Minority Ethnic Groups*, *in* 'RACE,' HOUSING & SOCIAL EXCLUSION 40–60 (Peter Somerville & Andy Steele eds., 2002).

[357] *Id.*

[358] *Id.*

[359] *Id.*

was 73.3%. In 1991, the average level of Caribbean-white dissimilarity for the seventeen British cities in which there were 1,000 or more Caribbean descended residents was 45%.[360]

D. Education

The data concerning the educational attainment levels of ethnic minorities presents a mixed picture. The General Certificate of Secondary Education (GCSE) is an examination taken by most British students at the end of the last two years of compulsory education (Key Stage four).[361] GCSE examinations are broadly accepted as the most important indicator of educational performance.[362] It is an important consideration in hiring decisions and in admission decisions by institutions of higher education.

People with Indian ethnicity, African Asians, people with Chinese ancestry, and black Africans are more likely to have higher qualification levels than whites.[363] However, people with Bangladeshis, Pakistanis and black Caribbean origins have, on average, considerably lower qualification levels than whites.[364] GCSE examinations are a relatively recent development. Historically, British schools did not issue report cards with letter grades as has been the tradition in the United States. Parents received reports evaluating a student's performance once or twice each year.[365] The reports contained statements from

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[360] Ceri Peach, *Social Integration and Social Mobility: Spatial Segregation and Intermarriage of the Caribbean Population in Britain*, *in* ETHNICITY, SOCIAL MOBILITY AND PUBLIC POLICY: COMPARING THE US AND UK 190–91 (Glenn C. Loury et al., eds., 2005).

[361] All British children between the ages of five and sixteen must be enrolled in full-time academic programs. A National Curriculum was introduced in 1992 which defined four "key stages." Key stage one includes students up to age seven (Years one and two); Key stage two applies to students aged seven to eleven (Years three, four, five, and six); Students in Key stage three are eleven to fourteen years old (Years seven, eight, and nine). Students in Key stage four are fourteen to sixteen years old (Years ten and eleven). The National Curriculum's core subjects are English, mathematics and science. Direct.gov, Understanding the National Curriculum, http://www.direct.gov.uk/en/Parents/Schoolslearninganddevelopment/ExamsTestsAndTheCurriculum/DG_4016665 (last visited Oct. 21, 2007). *See also* BBC Action Network Team, The Schools System in England, http://www.bbc.co.uk/dna/actionnetwork/A1181792.

[362] BRIAN SIMON, EDUCATION AND THE SOCIAL ORDER, 1940–1990 (1st ed. 1991).

[363] Tariq Modood, *Ethnic differences in Educational Performance*, *in* EXPLAINING ETHNIC DIFFERENCES: CHANGING PATTERNS OF DISADVANTAGE IN BRITAIN 53–68 (David Mason ed., 2003).

[364] *Id.*

[365] *See generally* CYRIL NORWOOD, THE ENGLISH TRADITION OF EDUCATION 128–87 (1930) (discussing primary and secondary education in England prior to World War II).

each teacher concerning the student's progress and an evaluation, placing the student in the high, middle, or low achieving sector of the class.[366] If students did not perform well, they were not held back, but continued on through the academic progression until they satisfied the mandatory attendance requirement which usually occurred at age sixteen.[367] British secondary schools did not award diplomas. At sixteen, students took the ordinary level (O-level) examination and after doing so, could discontinue their educational careers, as the compulsory attendance requirement had been satisfied. If a student chose to continue she could, at age eighteen, take the advanced (A-level) examination.[368] Admission to British universities depended largely on the success in a series of O-level and A-level examinations.[369] This system was changed by modifications enacted during the Thatcher Administration which introduced the National Curriculum and GCSE examinations.

Students with black Caribbean heritage, students with "Other Black" ancestry, and students with Pakistani ethnicity score, on average, considerably lower on GCSE examinations than white students.[370] While there has been some improvement for most ethnic minority groups, the progress has not been as great for students with black Caribbean or "other" black heritage.[371] The grades available range from A* (the highest) to A, B, C, D, E, F, and G (the lowest). In 2005 only two-thirds (65–66%) of Bangladeshi, Pakistani, black Caribbean and "black other" students who achieved 5+A*-C in any subject and also achieved 5+A*-C in English and math. This is compared to 85% of Chinese students, 84% of white and Asian students, and 82% of Indian students who achieved 5+A*-C in any subjects and also achieved 5+A*-C including English and math.[372] After controlling for year, group, gender, and

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[366] *Id.*

[367] SIMON, *supra* note 362.

[368] *Id.* (discussing changes in the English educational system from World War II through the introduction of the National Curriculum in the 1980s).

[369] *Id.*

[370] Tariq Modood, *The Educational Attainments of Ethnic Minorities in Britain*, *in* ETHNICITY, SOCIAL MOBILITY, AND PUBLIC POLICY: COMPARING THE US AND UK 288–308 (Glenn C. Loury et al. eds., 2005); *see also* Modood, *supra* note 363, at 53–68. Deborah Wilson, Simon Burgess & Adam Briggs, *The Dynamics of School Attainment of England's Ethnic Minorities* (Centre for Mkt. & Pub. Org., Working Paper No. 05/130, 2005), *available at* http://www.bristol.ac.uk/Depts/CMPO/workingpapers/wp130.pdf.

[371] Modood, *supra* note 370, at 291–92.

[372] DEPARTMENT FOR EDUCATION AND SKILLS, ETHNICITY AND EDUCATION: THE EVIDENCE ON MINORITY ETHNIC PUPILS AGED 5–16, at 61–62 (2006), *available at* http://www.dfes.gov.uk/research/data/uploadfiles/0208-2006DOM-EN.pdf.

socio-economic disadvantage, researchers also found that black Caribbean and mixed white and black Caribbean pupils were approximately one and one-half times more likely to be identified as having "Behavioural, Emotional and Social Difficulties" than white students.[373] At the university level, ethnic minorities are not underrepresented relative to their numbers in the general population except for Caribbean males and Bangladeshi women. However, ethnic minority students are concentrated in post-1992 universities and are underrepresented in the older, more prestigious British universities, such as Oxford and Cambridge.[374]

The difficulties for black male students of Caribbean descent are long-standing and well documented. In 1971, Bernard Coard identified some of the discriminatory features of the British educational system. Coard found that disproportionate numbers of black Caribbean students had been wrongly placed in schools for the "educationally subnormal." Because they remained in such schools throughout their educational careers, black students lacked the qualifications for pursuing career opportunities in anything other than low-level positions. Coard attributed the difficulties to low teacher expectations resulting from stereotyped attitudes about the academic aptitudes of black students.[375] White teachers saw their students as aggressive, disruptive, and undisciplined.[376] The teachers' negative and stereotyped attitudes fostered anxiety and hostility among black students.[377]

David Gillborn documented white teachers' stereotyped attitudes toward black male students and presented a vivid example from his own observations.[378] He wrote,

> [a] frequent recipient of teachers' reprimands, for example, was Paul Dixon, a black student who was widely seen as wasting his high ability through adopting " 'the wrong attitude.' " On one occasion I watched as Paul and his close friend Arif Aslam (a young man of Pakistani background) arrived together seven

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[373] *Id.* at 94.

[374] Modood, *supra* note 363, at 59–62.

[375] *Id.* at 37–40.

[376] *Id.* at 35.

[377] Bernard Coard, *How the West Indian Child is Made Educationally Subnormal in the British School System: The Scandal of the Black Child in Schools in Britain*, *in* TELL IT LIKE IT IS: HOW OUR SCHOOLS FAIL BLACK CHILDREN 27, 37–38 (Brian Richardson ed., 2005).

[378] David Gillborn, *Ethnicity and Educational Performance in the United Kingdom: Racism, Ethnicity, and Variability in Achievement*, 28 ANTHROPOLOGY & EDUC. Q. 375, 381–82 (1997).

> minutes late for a class. They went directly to the teacher and apologized for the delay, explaining that they had been talking with a senior member of the staff. Almost half an hour into the lesson, and, *like the rest of the class*, Paul and Arif were holding a low-level conversation as they worked. The teacher looked up from the student he was with and shouted across the room, "Paul. Look, you come in late, now you have the audacity to waste not only your time but his [Arif's] as well." The fact that the students had arrived together and were *sharing* a conversation was lost; furthermore, the teacher's statement explicitly constructed the black student as a time-waster and bad influence, while his Asian friend was placed in the role of blameless victim.[379]

This type of incident illustrates how institutional and unconscious discrimination can disadvantage black students in Britain's schools. Students engaging in the same conduct were judged differently on the basis of race and ethnicity. Commenting on this problem, Professor Mark Christian explained that:

> [b]lack male children of African Caribean heritage have been stereotyped and pathologized as being aggressive to the point that White teachers' expectations are low and any sign of a child's dissent or disruptive behavior leads to a labeling and stigmatization process that follows him or her through each stage of schooling. It is a sophisticated method of labeling that leads to the child being excluded from school.[380]

In 2004, only 17% of males with black Caribbean backgrounds achieved five good GCSE-level qualifications, including English and math GCSEs.[381] As upward mobility is tied closely to educational attainment, black Caribbean

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[379] *Id.* (emphasis in original).

[380] Mark Christian, *The Politics of Black Presence in Britain and Black Male Exclusion in the British Education System*, 35 J. BLACK STUD. 327, 340 (2005).

[381] Gary Eason, *Basics Worry for Ethnic Minorities*, BBC NEWS, Dec. 14, 2005, http://news.bbc.co.uk/2/hi/uk_news/education/4528546.stm; Gary Eason, *Focus on Basics Means Good GCSEs*, BBC NEWS, Dec. 14, 2005, http://news.bbc.co.uk/2/hi/uk_news/education/4528292.stm.

males will be unable to compete effectively in the labor market except at the lower levels.[382]

VIII. BRITAIN'S ANTIDISCRIMINATION LAWS

British laws prohibit discrimination on the basis of sex, race, and disability. Laws include the Sex Discrimination Act of 1975, the Equal Pay Act of 1970, the Race Relations Act of 1976, and the Disability Discrimination Act of 1995. The original law, the Race Relations Act of 1965, outlawed race discrimination in public accommodations.[383] That Act was amended in 1968 to cover employment, education, housing, and the provision of services.[384] The 1968 Act also established a Race Relations Board which was authorized to investigate complaints. The Board was obligated to conciliate discrimination claims and could initiate a civil legal action only if conciliation efforts failed.[385] Aggrieved individuals did not have a private right of action under the 1968 law.[386] The Race Relations Act of 1976 revised and strengthened the 1968 Act. It established the Commission for Racial Equality (CRE) and authorized individuals to initiate civil actions to seek redress for unlawful discrimination in local courts. Employment discrimination cases can now be filed with special employment tribunals.[387] The 1976 Act authorized the CRE to assist claimants and to initiate enforcement proceedings in court.[388] The anti-discrimination laws were administered by three statutory commissions: the CRE, the Equal Opportunities Commission, and the Disability Rights Commission. All three commissions have now merged into the Equality and Human Rights Commission.[389]

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[382] The experiences of black Caribbean students in Britain are similar to those of African American males in American schools: Many white teachers stereotype black males as low achievers whose behaviors are disruptive. JACQUELINE J. IRVINE, BLACK STUDENTS AND SCHOOL FAILURE: POLICIES PRACTICES AND PRESCRIPTIONS 63–79 (1990); *see* Floyd D. Weatherspoon, *Racial Justice and Equity for African-American Males in the American Educational System: A Dream Forever Deferred*, 29 N.C. CENT. L.J. 1, 5 (2006).

[383] Race Relations Act, 1965, c. 73, § 6(1) (Eng.).

[384] Bob Hepple, *The European Legacy of* Brown v. Board of Education, 2006 W. ILL. L. REV. 605, 607–08 (2006).

[385] *Id.*

[386] *Id.* at 608; SANDRA FREDMAN, DISCRIMINATION LAW 44 (2002).

[387] Race Relations Act, 1976, c. 74, § 54 (Eng.).

[388] Hepple, *supra* note 384, at 608.

[389] Welcome to the Equality & Human Rights Commission, http://www.equalityhumanrights.com/pages/eocdccre.aspx.

Over the last decade the protections accorded by Britain's antidiscrimination laws have been considerably expanded. The Human Rights Act of 1998 incorporated key provisions of the European Convention on Human Rights.[390] Another significant development involved the application of the laws promulgated by the European Community (EC).[391] As an EC signatory, Britain was obligated to enact legislation prohibiting categories of discrimination covered by EC laws which were not previously covered by British laws. EC law is paramount; domestic British laws must yield to conflicting EC laws.[392] The European Union has adopted two directives that affected British anti-discrimination laws. One of them, the race directive,[393] requires equal treatment of individuals without regard to race or ethnic origin. The other directive prohibits discrimination on the basis of race, ethnic origin, religion, disability, age, and sexual orientation.[394] Religion, age, and sexual orientation had not been protected classifications under British anti-discrimination laws.[395] Britain's Race Relations Act was amended in 2000 and 2006. Among other changes, the Amendments impose a duty on public authorities to take actions to promote racial equality.[396]

IX. UNCONSCIOUS AND INSTITUTIONAL RACISM IN BRITAIN: THE STEPHEN LAWRENCE INQUIRY

The Stephen Lawrence murder and the resulting investigation provide a textbook example of what institutional racism is and how it functions.[397] In April 1993, Stephen Lawrence and Duwayne Brooks were walking through a London neighborhood when they decided to complete their journey on a bus.

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[390] Hugh Collins, *Social Inclusion: A Better Approach to Equality Issues?*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 897 (2005).

[391] The European Convention and the Court of Human Rights are separate from the European Union.

[392] MICHAEL CONNOLLY, TOWNSEND-SMITH ON DISCRIMINATION LAW: TEXT CASES AND MATERIALS 108–17 (2d ed. 2004).

[393] Council Directive 2000/43/EC, 2000 O.J. (L 180) 22 (EC).

[394] Council Directive 2000/78/EC, 2000 O.J. (L 303) 16 (EC).

[395] *See* Mark Hill, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United Kingdom*, 19 EMORY INT'L L. REV. 1129 (2005) (surveying laws affecting religion and religious practices in Britain).

[396] The 2000 and 2006 Amendments to the Race Relations Act are examined in more detail in the concluding section of this Article. *See infra* note 442 and accompanying text.

[397] The following summary of events was taken from the MACPHERSON REPORT, *supra* note 1.

A group of white youths attacked Lawrence, stabbing him twice during the fracas. Lawrence broke away and ran approximately 100 yards before he collapsed. Two witnesses, a married couple, who were passing by, saw Lawrence clutching his chest and falling to the ground. They attempted to comfort him. Two passengers on a bus observed the attack. Brooks telephoned the emergency health service. When the police officers arrived they did not make any efforts to administer first aid or to ascertain the nature and extent of Lawrence's injuries. They merely checked Lawrence's pulse and breathing to determine if he was still alive.[398] By the time the ambulance arrived, Lawrence was dead.

Confusion and disarray plagued the officers at the crime scene. No one took charge or organized any efforts to initiate a prompt start to the investigation. One officer stated later that there were "quite a lot of senior officers standing around with their hands on their hips."[399] Logs that would have documented what transpired at the crime scene were not recorded. This failure violated established police procedure. Police officers had only limited discussions with Duwayne Brooks at the crime scene. One officer testified later that she could not get much from Brooks because he was agitated and upset. Most of the officers assumed that there had been a fight that resulted in Lawrence's injuries. They did not question Brooks carefully nor did they view him as the victim of a racially motivated attack. Brooks was not interviewed in any depth until several hours later at the hospital where Lawrence's body had been transported.

When Lawrence's parents arrived at the hospital with friends and relatives, the police officers did not greet them with the sympathy that a bereaved family would have expected under the circumstances. The police asked questions that suggested that Lawrence might have been involved in criminal activities. The police were vague and unresponsive to the family's questions. During their efforts to find out what happened and what would be done, the Lawrences felt that the officers' attitudes were patronizing and condescending.[400] The police seemed unsympathetic to their loss. The Macpherson Report concluded that the Lawrences "were never given information . . . to which they were entitled."[401]

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[398] *Id.* chs. 10.16–10.55.
[399] *Id.* ch. 10.31.
[400] *Id.* ch. 4.
[401] *Id.* ch. 46.7.

Over the next two days, the police officers received tips and other information concerning the identity of the attackers. By April 26th, the police had enough information to arrest two of the suspects.[402] However, instead of arresting the suspects, the senior investigating officials chose to proceed using surveillance of the suspects. Setting up that operation was delayed and given lower priority than the ongoing surveillance of a black youth who was suspected of engaging in some petty crimes. The Lawrences soon became concerned about the lack of progress with the investigation and the failure of police officials to respond to their inquiries. Frustrated with the lack of response, the Lawrences retained a solicitor to assist them in their efforts to communicate with the police. When the solicitor made inquiries, police officials became apprehensive. They began to interpret the Lawrences's efforts to obtain information as unwarranted interference. Community groups sympathetic to the Lawrences's difficulties also began to make their own inquiries. Protest marches were organized. Tensions between police officials and the Lawrence family grew.

In response to rising community pressure, on May 6, 1993, police officers decided to arrest the suspects: David Norris, Gary Dobson, and brothers Neil and Jamie Acourt.[403] After the arrests, Duwayne Brooks was brought in to identify the suspects. In separate lineups, Brooks identified two of the suspects who were later charged, but he incorrectly identified an individual who participated in the lineup but was not suspected of any involvement with the murder. After the lineup, Brooks had a conversation with a police officer in which he stated that he could not identify the faces of the attackers based on observations made during the attack. Brooks said some friends had given information about the identities of the attackers. Brooks relied on this information, rather than his own recollection, during the lineup. The Crown Prosecution Service reviewed the evidence and concluded that the evidence, in light of the information concerning Brooks's inability to identify the attackers, was not sufficient to mount a successful prosecution.[404] A private prosecution was subsequently initiated by Stephen Lawrence's parents, but this resulted in an acquittal of the defendants based on a lack of evidence linking them to the attack.[405] There were two police inquiries into the matter. Both inquiries concluded that the investigation was proper and there was no

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[402] *Id.* ch. 46.8.
[403] *Id.* ch. 23.
[404] *Id.* ch. 49.
[405] *Id.* ch. 41.

evidence of racism in the police officials' conduct. The Lawrences persisted with their questions and the matter continued to receive attention in the media and among community groups.

Responding to a mounting public outcry, on July 31, 1997, British Home Secretary Jack Straw commissioned Sir William Macpherson to conduct an official inquiry into the circumstances surrounding Stephen Lawrence's death. Throughout the following months, hearings were held where witnesses were questioned and documents examined. A large record of testimony and documents was developed. The final report was issued in February of 1999. In its concluding sections, the Macpherson Report roundly condemned the actions of the Metropolitan Police Department as well as the two formal investigations. The Report concluded, most notably, that investigation of the murder was infected by institutional racism. The Report stated that: "Racism in general terms consists of conduct or words or practices which disadvantage or advantage people because of their colour, culture, or ethnic origin. In its more subtle form it is as damaging as in its overt form."[406]

The report goes on to say that:

> institutional racism consists of the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.[407]

To support its finding of institutional racism, the report focused on the many instances of misfeasance and malfeasance that tainted the investigation. Several of the officers assumed that there had been a fight, rather than an unprovoked attack. The police failed to appreciate that Duwayne Brooks was a victim of an attack rather than a participant in a fight. The report also concluded that police officials who served as family liaison officers were patronizing and thoughtless; their conduct and attitudes offended the Lawrence family.[408] The police blamed the Lawrence family for the communication

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[406] *Id.* ch. 6.4.
[407] *Id.* ch. 6.43.
[408] *Id.* ch. 26.37.

problems that developed. Many of the officers consistently used inappropriate terms when they referred to blacks, apparently unaware that the term "colored" offended minorities. The failures were never corrected by senior officers. One detective made false statements about the Lawrences's and their solicitor during one of the official investigations. These actions, the report found, amply supported its conclusion that institutional racism influenced the police officers' conduct.[409]

The Macpherson Report illustrates how institutional discrimination can operate to disadvantage ethnic minorities. When individuals are viewed as members of a social group, perceptions about that group's characteristics and behavior influence judgments made about them. Judgments made about group members are filtered through conscious and unconscious stereotypes. This happened throughout the course of the Stephen Lawrence investigation. During the hearings held in connection with the Macpherson inquiry, police officials admitted that officers "stereotyped those with whom they came into contact in the community."[410] They also acknowledged that a "canteen culture" of discriminatory attitudes existed within the police service.[411] Many of the investigating officers assumed at the outset that Stephen Lawrence and Duwayne Brooks were petty criminals who had been involved in a street fight. The murder, in their view, was not a hate crime. Brooks was not carefully questioned at the crime scene because the police officers assumed that he would not be a reliable source of information.[412] The Lawrence family was not accorded the courtesy and sympathy that would have been expected in the wake of their son's tragic death. The Lawrences's questions about the progress of the investigation were not welcomed and soon became a source of irritation for the police. They were viewed as troublemakers intent on causing problems for the police service.

The erroneous assumptions about the nature of the crime and the character of the victims led the police in the wrong direction. Most of the police officers were seasoned law enforcement professionals with many years of experience. Yet, their investigation of the Lawrence murder was lax and haphazard. The perpetrators of the crime were never convicted. The treatment of the Lawrence family ranged from indifferent to hostile. Police officers may not have acted on the basis of overt animus against blacks, but the manner in which the

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[409] *Id.* ch. 46.27.
[410] *Id.* ch. 37.18.
[411] *Id.* ch. 37.24.
[412] *Id.* chs. 5.1–.32.

investigation was carried out—the failure to follow established procedures, their failure to keep proper records or to initiate a prompt and thorough investigation—demonstrates how unconscious and institutional discrimination subverted the operation of Britain's criminal justice system.[413]

X. THE AMENDMENTS TO THE RACE RELATIONS ACT

One response to the Macpherson Report was the 2000 Amendments to the Race Relations Act. The key provisions of the 2000 Amendments state: "It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination."[414] Another provision states:

> [a public authority] shall, in carrying out its functions, have due regard to the need--
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> (a) to eliminate unlawful racial discrimination; and
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> (b) to promote equality of opportunity and good relations between persons of different racial groups.[415]

The Race Relations (Amendment) Act of 2000 imposed a general duty on public authorities to promote racial equality. Public authorities that are affected by the general duty are identified in the legislation.[416] The Secretary of State was authorized to "impose, on such [public authorities] as he considers appropriate, such duties as he considers appropriate for the purpose of ensuring the better performance by those persons of their duties under [the 2000 Amendments]."[417] Exercising this authority, the Secretary imposed an obligation on certain public authorities to publish a Race Equality Scheme. The CRE was authorized by the 2000 Amendments to issue Codes of Practice to provide guidance to public authorities covered by the legislation.[418] The

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[413] Some commentators argue that the Macpherson Report did not go far enough. *See* Lee Bridges, *The Lawrence Inquiry-Incompetence, Corruption, and Institutional Racism*, 26 J.L. SOC'Y 298, 322 (1999) ("[T]he government and the police's commitment to 'anti-racism' is far from wholehearted or holistic and is always likely to be displaced by concerns to 'tackle crime' and 'speed up justice.' ").

[414] Race Relations Act, 1976, c. 34, § 19(B)(1) (Eng.).

[415] Race Relations (Amendment) Act, 2000, c. 34, § 2 (Eng.); FREDMAN, *supra* note 386, at 177–81.

[416] Race Relations (Amendment) Act, 2000, c. 34, sched. 1A.

[417] *Id.* § 71(2).

[418] *Id.* §71(a)–(b).

Codes are not binding laws, but they are "admissible in evidence in any legal proceedings, and if any provision of such a code appears to the court or tribunal concerned to be relevant to any question arising in the proceedings it shall be taken into account in determining that question."[419]

Under the CRE's Code of Practice,[420] public authorities were required to identify each of their functions, to state the purpose of each function, and to assess the relationship of its functions to the promotion of racial equality.[421] Public authorities were also required to determine whether the manner in which a particular function was implemented had an adverse impact on racial groups and to modify any practices or procedures that produced an adverse impact.[422] Public authorities must make the information produced available to the racial groups that are affected by their operations as employees or consumers of services provided by the authority.[423] Analyzing the 2000 Amendments, Professor Sandra Fredman explained

> [e]quality can only be meaningfully advanced if practices and structures are altered proactively by those in a position to bring about real change, regardless of fault or original responsibility.... In order to trigger the duty [to promote racial equality], there is no need to prove individual prejudice, or to link disparate impact to an unjustifiable practice or condition. Instead, it is sufficient to show a pattern of under-representation or other evidence of structural discrimination. Correspondingly, the duty-bearer is identified as the body in the best position to perform this duty. Even though not responsible for creating the problem in the first place, such duty bearers become responsible for participating in its eradication.[424]

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[419] Non-governmental organizations that perform public functions are also covered. *Id.* § 71(c).

[420] COMM'N FOR RACIAL EQUAL, STATUTORY CODE OF PRACTICE ON DUTY TO PROMOTE RACIAL EQUALITY (2002), *available at* http://www.equalityhumanrights.com/Documents/Race/General%20advice%20and%20information/Code%20of%20practice%20on%20th%20duty%20to%20promote%20race%20equality.pdf.

[421] *Id.* at 17.

[422] *Id.* at 18.

[423] *Id.* at 11.

[424] Sandra Fredman, *Equality: A New Generation?*, 30 INDUS. L.J. 145, 164 (2001). *See also* Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 436–38 (2006) (discussing, among other things, the 2000 Amendments to the Race Relations Act).

The Equality Scheme delineates the minimum standards for complying with the general duty to promote racial equality.[425] The Equality Scheme must identify the authority's functions and any policies and proposed policies that are relevant to promoting racial equality.[426] Public authorities must establish a mechanism for assessing the impact of current and proposed policies on the promotion of race equality.[427] They are also obligated to monitor policies and to identify any adverse effects of those policies on racial equality and to publish the findings of those assessments.[428] Public authorities must also take actions to ensure public access to information and services provided by them and to train employees about the obligations established by the general duty.[429] The specific duties delineated in the CRE's Code of Practice concerning employment apply to most of the public authorities. They must monitor the racial and ethnic composition of their workforces and racial and ethnic identities of all applicants for employment.[430] They are also required to track the racial and ethnic composition of employees who receive training and promotions.[431] A public authority with 150 or more full-time employees must monitor the race and ethnicity of employees who receive training, and monitor, by race, employee performance assessments.[432] The race and ethnicity of employees who are involved in grievance procedures, subjected to disciplinary procedures, or end their employment must also be monitored.[433] The public authority is obligated to publish annually the information obtained through the monitoring process.[434]

In response to pressure to create a single Equality Commission, the Equality Act of 2006 was enacted.[435] This law created the Commission for Equality and Human Rights (CEHR).[436] It has now replaced the EOC and Disability Rights Commission, and assumed the functions of the CRE. The 2006 law also forbids discrimination on the basis of religion in the provision of goods,

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[425] Fredman, *supra* note 424, at 165.
[426] *Id.* at 166.
[427] *Id.*
[428] *Id.*
[429] *Id.*
[430] STATUTORY CODE OF PRACTICE ON DUTY TO PROMOTE RACIAL EQUALITY, *supra* note 420, at 13.
[431] *Id.* at 30.
[432] *Id.*
[433] *Id.*
[434] *Id.*
[435] *See* BOB HEPPLE ET AL., EQUALITY: A NEW FRAMEWORK (2000).
[436] Equality Act, 2006, c.3, § 1 (Eng.).

facilities and services, the disposal and management of premises, education, and in the exercise of public functions.[437] The 2006 Act also amended the Sex Discrimination Act of 1975 and the Equal Pay Act of 1970. The Act imposes a duty on public authorities to promote equal opportunities for men and women and prohibits sex discrimination in the exercise of public functions.[438] Public authorities have a statutory obligation to eliminate unlawful sex discrimination and harassment. Public authorities also have specific duties that will affect them in their capacity as employers. They are obligated to review their employment practices including recruitment, hiring, terms and conditions of employment, access to promotions, training, and dismissal, to determine if they are discriminatory.[439] The CEHR is also responsible for promoting an understanding of equality and human rights and for challenging unlawful discrimination. The CEHR is authorized to conduct general and individual investigations and to issue non-discrimination notices in named-person investigations.[440] In general inquiries, the CEHR can explore problem areas, identify barriers to good practice, and make recommendations. The CEHR is also authorized to issue Codes of Practice.[441]

Britain has declined to undertake a program of affirmative action as was done in the United States. Affirmative action, which the British refer to as "positive discrimination," is unlawful in Britain.[442] Some institutions can only engage in a limited form of affirmative action in training programs.[443] While American affirmative action programs have been criticized and are currently under attack,[444] they have created unprecedented educational opportunities for a generation of students, opened employment opportunities for minority workers, and provided a means for minority entrepreneurs to participate in government contracting at the state, local, and national levels.[445]

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[437] *Id.* §§ 44–80.

[438] *Id.* §§ 83–87.

[439] *See generally id.* §§ 83–90.

[440] *Id.* § 16.

[441] *Id.* § 15.

[442] AILEEN MCCOLGAN, DISCRIMINATION LAW: TEXT CASES AND MATERIALS 32 (2000); *but see* Collins, *supra* note 390, at 909 (criticizing the prohibition against positive discrimination and arguing for the legalization of affirmative action).

[443] MCCOLGAN, *supra* note 442.

[444] *See generally* Leland Ware, *Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases*, 78 TUL. L. REV. 2097 (2004).

[445] *See generally* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998).

The 2000 and 2006 Amendments to Britain's Race Relations Act represent a different and novel approach to antidiscrimination law. The antisubordination principle reflects a theory of distributive justice in which the goal is the elimination of inequalities that all minorities experience. The antidiscrimination principle, in contrast, seeks to remedy the specific harms that individuals suffer when they are the victims of unlawful conduct.[446] The new British approach reflects an antisubordination orientation. The American model focuses on the claims of injured individuals. The Amendments to Britain's Race Relations Act impose an affirmative duty on public bodies to promote race relations. Public bodies are required to identify and resolve racial discrimination on their own rather than relying on individuals aggrieved by discrimination to seek redress in individual suits. The burden has been shifted from individuals to prove discrimination. Public bodies must eliminate discriminatory practices using what amounts to internal evaluations and self-audits. If statistically significant racial imbalances are found, the public body will be obligated to determine whether discriminatory practices are causing the imbalance.[447]

This is a promising means of addressing institutional discrimination. Rather than conducting business as usual, public bodies are required to determine what their primary functions are and whether the performance of them adversely affects ethnic minorities. If public bodies fail to respond adequately to their obligations under the Code of Practice, the CRE can initiate a civil action against non-complying bodies. By imposing a positive duty to

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[446] Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997); Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

[447] Statistics have been used in American cases to raise an inference of discrimination. The Supreme Court explained that

> [s]tatistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703 (j) makes clear that Title VII imposes no requirement that a work force mirror the general population.

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977). Statistical evidence is also used in British cases. MCCOLGAN, *supra* note 442, at 320–26.

promote equality on all public authorities, the 2000 Amendments are designed to affirmatively promote equality. There is no similar obligation under American laws. Efforts to challenge systemic discrimination in the United States have been frustrated by rulings in cases such as *Washington v. Davis*,[448] and *McCleskey v. Kemp*.[449] In these cases, the Supreme Court held that official actions of public bodies will not be held unconstitutional solely because they have a racially disproportionate impact. These decisions stressed intentionality and distinguished Constitutional claims from those asserted under Title VII of the Civil Rights Act of 1964. The latter allows disparate impact cases and does not require proof of an intent to discriminate.[450] The requirement that plaintiffs prove that public bodies acted with an intent to discriminate against minorities is difficult to satisfy and has rarely succeeded in recent years.[451]

There are limitations on the scope of the reforms effectuated by the 2000 and 2006 Amendments. The obligation to eliminate unlawful racial discrimination and to promote equal opportunities is a vague and amorphous mandate. There are no discernable standards against which compliance can be measured. When workforce disparities are identified, the prohibition against positive discrimination will prevent any immediate efforts to remedy the imbalance. Furthermore, there is no private right of action under the 2000 Amendments. In *Commissioners of Inland Revenue v. Morgan*, an appellate court held that a claim based on institutional racism is not actionable under the Race Relations Act.[452] The case involved Marlene Morgan, a black barrister, who was employed by Inland Revenue in its solicitors' department.[453] She complained that race discrimination hindered her career progression and that she had been "victimized," which, under American law, is known as unlawful retaliation.[454] After a hearing, an employment tribunal ruled in Morgan's favor.[455] The tribunal found that Morgan had applied for a promotion but a white candidate was selected.[456] A statistical comparison between whites and

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[448] 426 U.S. 229 (1976) (constitutional challenge to standardized examinations that excluded a disproportionate percentage of African American applicants).

[449] 481 U.S. 279 (1987) (constitutional challenge to racial disparities in death penalty cases).

[450] *Id.* at 294.

[451] *Id.*; *Washington*, 426 U.S. 229.

[452] Comm'rs of Inland Revenue v. Morgan, [2002] I.R.L.R. 776 (Employment Appeal Tribunal) (Eng.).

[453] *Id.*

[454] *Id.*

[455] *Id.*

[456] *Id.*

minority solicitors showed that Morgan's rate of progression was slower than her white comparators and that proportionately more minority lawyers waited longer before being promoted.[457] The tribunal also found that Morgan had been "victimized" by a memorandum circulated among employees in the solicitors' department which notified them that she had filed a complaint of race discrimination.[458] That disclosure adversely affected Morgan's relationships with her co-workers.[459] The tribunal also found that institutional racism existed in the Department.[460]

In the appeal, Morgan argued that the solicitors department was infected by institutional racism because the unit had a culture "based on values which did not embrace wholly ethnic minority lawyers."[461] The Court responded stating "[t]here is no legal requirement of the common law or of any statute which requires employers, either of lawyers or of anyone else, to base themselves on 'values' which 'wholly embrace' such of them as are within some ethnic minority, however desirable that might be as a moral precept."[462] The Court also stated,

> [w]e are not saying that something reasonably describable as institutional racism can never be required to be examined into by Tribunals. It would be possible to imagine a body whose habitual rules or practices were such that one could fairly say of the body that as an institution it was racist. Forms of indirect discrimination would, perhaps, be the more likely to bring about some such case. But the charge would be relevant only as a step in the reasoning toward a conclusion that the body was or was not guilty of some unlawful discrimination that fell within the Act.[463]

The Court affirmed the tribunal's findings of discrimination and retaliation against Morgan, but its ruling makes it clear that institutional racism does not state a cause of action under the Race Relations Act.[464]

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[457] *Id.*
[458] *Id.*
[459] *Id.*
[460] *Id.*
[461] *Id.*
[462] *Id.*
[463] *Id.*
[464] *Id.*

The 2000 Amendments have not been an overnight success. One example of the slow pace of progress can be seen in what has happened in local police services. A documentary broadcast by the BBC in October 2003 exposed racism among new recruits at a police training center in England.[465] A reporter posed as a trainee at a National Police Training Center.[466] He also spent eight weeks working as an officer before he was arrested and charged with deception and damaging police property because he had a hidden camera in his bullet-proof vest.[467] The documentary, *The Secret Policeman*, included a scene that showed one officer dressing up in an improvised Ku Klux Klan hood.[468] Another officer made racist remarks about Stephen Lawrence and his family.[469] Other recruits regularly used terms such as "nigger" and "Paki" when referring to ethnic minorities.[470] There was only one ethnic minority recruit in the class and many of the racist comments were made about him.[471] The British public was shocked by the documentary. Despite the attention that the Macpherson report garnered, the enactment of new legislation, and the promises of reform made by the Metropolitan Police Service, racist recruits were still joining the police ranks.[472]

In December 2003, the CRE commenced a formal investigation of the police service in England and Wales.[473] The investigation examined the recruitment, training and management of police officers, the monitoring of these areas by the police service and how police officials were meeting their obligation to promote racial equality.[474] A report of that investigation was issued in March 2005.[475] In 1999 the Home Office established targets for the recruitment, retention and progression of ethnic minority police officers and

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[465] Rebecca Allison, *Secret film catches PC apeing Ku Klux Klan*, GUARDIAN UNLIMITED, Oct. 22, 2003, *available at* http://www.guardian.co.uk/race/story/0,11374,1068034,00.html.

[466] *Id.*

[467] *Id.*

[468] Paul Atkinson, *The Secret Policeman* (BBC television broadcast Oct. 26, 2003), *transcript available at* http://www.blink.org.uk/docs/secret_policeman.htm.

[469] *Id.*

[470] *Id.*

[471] *Id.*

[472] Allison, *supra* note 465.

[473] COMM'N FOR RACIAL EQUALITY, THE POLICE SERVICE IN ENGLAND AND WALES: FINAL REPORT OF A FORMAL INVESTIGATION BY THE COMMISSION FOR RACIAL EQUALITY (2005), *available at* http://www.monitoring-group.co.uk/News%20and%20Campaigns/research%20material/Policing/cre_report_into_police_services.pdf.

[474] *Id.*

[475] *Id.*

staff.[476] The goals were 2% ethnic minorities in 1999, 3% by 2002, 4% in 2004 and 7% by 2009.[477] These goals were based on the proportion of ethnic minorities in the workforce. The target for London was 25% based on its high proportion of ethnic minorities residents.[478] The CRE found that by 2003 only 2.9% of the employees of Britain's local police services were ethnic minorities.[479] The CRE also found that police forces were not progressing at a pace that would reach its 2009 goal.[480] The CRE found that at the current recruitment rate it would "be 2035 before the MPS achieves a truly representative mix."[481]

The CRE determined that very few police authorities have carried out their racial impact assessments and even fewer have published the results.[482] The CRE concluded that there was

> a gap between what [police] forces and authorities claim to be doing to meet the race equality duty and what they are actually doing . . . . Of particular concern [was] the lack of comprehensive ethnic monitoring in accordance with the employment monitoring duty, as well as systematic procedures to address both monitoring and impact assessment requirements across the service.[483]

The CRE also discovered that a disproportionate percentage of ethnic minorities left their jobs during their first six months of employment.[484] Another problem concerned procedures used to select police officers. The Home Office had commissioned the Central Police Training and Development Authority in 2002 to design and validate written and oral assessment tools used to screen candidates.[485] The assessment process, a series of examinations and exercises, tested applicants' potential for teamwork, personal responsibility, community and customer focus, effective communication, problem solving,

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[476] *Id.* at 45.
[477] *Id.*
[478] *Id.*
[479] *Id.*
[480] *Id.* at 48.
[481] *Id.*
[482] *Id.* at 33.
[483] *Id.*
[484] *Id.* at 45.
[485] *Id.* at 52.

resilience, and respect for diversity.[486] The CRE's investigation found that in 2004 white candidates performed significantly better than ethnic minority candidates in all competency areas.[487] Also, there was a significantly lower pass rate for ethnic minority candidates than whites, and large disparities in pass rates were found among different minority groups.[488] The CRE endorsed efforts that were being made to determine the cause of the disparities.[489] During the course of its investigation, the CRE also found deficiencies in the way in which police officers were trained about race and diversity issues and how seriously trainers were treating their obligations under the 2000 Amendments.[490] The report included several recommendations to address the problems that had been identified.

The report shows that the CHER, as the successor to the CRE, will have a heavy administrative and enforcement burden. Institutional reform is a slow process. There are also real and justifiable fears that the CHER's broad mandate to administer and enforce all of Britain's equality laws will dilute the racial focus that was at the core of the CRE's mission. However, an assessment of the efficacy of the 2000 and 2006 Amendments on the status of Britain's ethnic minorities is premature. The evaluation will be appropriate when the duties established have been fully implemented and allowed to operate.

XI. CONCLUSION

> *"It may be true that legislation cannot change the heart, but it can restrain the heartless."*
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> Martin Luther King, Jr.[491]

The Stephen Lawrence case and the British reaction to it underscore the need to reconsider traditional theories of racism when analyzing discrimination claims. American courts have developed a legal regime that emphasizes the motivational aspects of racism. However, new research in psychology and social science shows that an approach that assumes discrimination is conscious

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[486] *Id.* at 51.
[487] *Id.* at 53.
[488] *Id.*
[489] *Id.*
[490] *Id.*
[491] Martin Luther King, Jr., Address to Dartmouth College, Towards Freedom (May 23, 1962), *available at* http://www.dartmouth.edu/~towardsfreedom/transcript.html.

conduct is not adequate in many circumstances. Theories of unconscious and institutional racism provide a new and promising avenue for redressing discriminatory conduct. As American jurisprudence does not recognize these theories, it forecloses the proper resolution of many meritorious claims. Antidiscrimination laws should be interpreted to prohibit practices that perpetuate the subordination of groups disadvantaged by discriminatory practices despite the perpetrator's conscious intent. An antisubordination approach would enable courts to sanction conduct that has the effect of disadvantaging racial minorities. The Supreme Court has consistently rejected the antisubordination theory while rigidly adhering to antidiscrimination principles. The result is that antidiscrimination laws have been interpreted too narrowly, prohibiting only discrete actions motivated, in most cases, by a conscious intent. However, unconscious discrimination can influence conduct long before any final decision is made; it is a material component of a cognitive process occurring across time in differing circumstances.

The Stephen Lawrence case is a textbook example of unconscious and institutional discrimination that leads to a tragic result. In the wake of that incident, Britain has developed a new approach that incorporates theories of unconscious and institutional discrimination. American policymakers should recognize the wisdom of the British example and authorize courts to adjudicate claims of discrimination employing the insights provided by these theories. Although limits exist for what can be accomplished through legislation, legal protections at least afford a foundation for equality and social justice. The official recognition of unconscious and institutional discrimination was a major turning point in Britain, the significance of which should not be underestimated. It is, at minimum, a move in the right direction. Britain's official recognition is a step that American policymakers have been unwilling to take.

In a 2003 survey conducted by the Gallup organization, the majority of white Americans reported their belief that blacks had opportunities that were equal to whites and were not subjected to less favorable treatment on the basis of race.[492] This suggests that the many manifestations of discrimination, including segregated neighborhoods and schools, are so ubiquitous that they

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[492] Among whites, 82% believed that blacks had the same access to housing as whites; 81% believed that educational opportunities were equal and 73% believed that blacks were overall treated the same as whites. Gallup Poll Social Audit, Black - White Relations in the United States, 2002–2003 Update. A recent CNN poll contains similar findings. *Poll: Most Americans See Lingering Racism -- in Others*, CNN.com, Dec. 12, 2006, http://www.cnn.com/2006/US/12/12/racism.poll/index.html.

appear normal and are unnoticed by those not adversely affected. Polling data suggests that most white Americans believe discrimination is a thing of the past that died with the enactment of the Civil Rights laws of the 1960s. They believe that the opportunities available to African Americans, Asians and Latinos are equal to those available to whites. This reflects an apparent belief that America has entered a sort of golden age of race relations in which most, if not all, racial problems have been solved. Discrimination is seen as a relic of the distant past, practiced on rare occasions by a few "bad apples" who depart from an otherwise colorblind norm. This view is not accurate and not shared by those who regularly experience discrimination. Large racial disparities in income, education and home ownership persist.[493] For African Americans, Latinos and other people of color, race continues to be a significant impediment to their everyday well being. This conclusion is amply supported by the empirical evidence and by many years of personal experience. Policymakers must acknowledge the pernicious nature of unconscious and institutional discrimination. New legal remedies are needed to address this problem.

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[493] The Census Bureau reported that in 2005, white households had incomes that were two-thirds higher than blacks and 40% higher than Hispanics. The median income for white households was $50,622 in 2005. The median for black households was $30,939 and $36,278 for Hispanic households. Three-fourths of white households owned their homes in 2005, compared to 46% of black households and 48% of Hispanic households. Thirty percent of white adults had bachelor's degrees in 2005, compared to 17% of black adults and 12% of Hispanic adults. The poverty rate for white households was 8.3% in 2005; 24.9% for black residents; 21.8% for Hispanic residents; and 11.1% for Asian residents. U.S. Census Bureau, American Factfinder, http://factfinder.census.gov/servlet/SAFFFactsCharIteration?_submenuID=factsheet_2&_sse-on.