

Excavating Race-Based Disadvantage Among Class-Privileged People of Color

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ABSTRACT

The aim of this article is to begin to theorize the fraught space within which class-privileged racial minorities exist—the disadvantage within their privilege. The article posits that the invisibility of the racial subordination of wealthier people of color (that is, their marginalization on account of their race) is fertile soil for the germination of post-racialism—the sense that we, as a nation, have overcome our racial problems. The dramatic visibility of the minority poor’s suffering, combined with the relative invisibility of the suffering of those minorities who are not poor, breeds the belief that class is now the main issue; it breeds the belief that class is the thing that really matters. If, as post-racialism suggests, class is the real problem, then we can, and ought to, dismantle any racial stratification that we witness through race-neutral, class-based means. But, if race remains a real problem—that is, if people and groups continue to be disadvantaged on account of their race—then the class-based mechanisms will not actually eliminate racial inequality. Thus, it is important for us to see the race-based disadvantage that class-privileged people of color endure in order to defeat post-racial thinking.

The article demonstrates that the illegibility of the racial subordination of wealthier people of color is owed, in part, to our existing theories of racial discrimination. It shows that our theories of racial discrimination have led us to conceptualize economic disadvantage as constituting the entire universe of racial disadvantage. If economic disadvantage does, in fact, constitute the universe of racial disadvantage, then those who are not economically disadvantaged (i.e., wealthier people of color) have not been racially disadvantaged at all. However, the reality is that economic subordination is just one element of racial subordination. Racial discrimination has disadvantaged people of color not only economically, but also socioculturally and politically. Thus, if we are to bring visibility to the racial subordination that wealthier people of color experience—a visibility that may keep post-racial thinking at bay—then we have to theorize the noneconomic injuries that racial discrimination inflicts.

This article begins this endeavor in Part I by documenting, again, class-privileged racial minorities’ disadvantage. Part II then identifies how theory has come to obscure this disadvantage. It shows that scholars have largely conceptualized two modalities of racial discrimination: individualist and institutional. It then shows how scholars have conceptualized institutional racial discrimination as predominately affecting poor people of color; we think of it as the modal-

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ity of discrimination that bears the most responsibility for the poor's spectacular deprivation. Meanwhile, scholars have come to conceptualize the racial discrimination that wealthier people of color encounter, when they encounter it, as usually of the individualist variety. This article calls this the discrimination-class schema.

When scholars go on to deny the significance of individualist racial discrimination in the post-civil rights era, the modality of racial discrimination that wealthier people of color are imagined to encounter most often is dismissed as insignificant in the contemporary present. This obscures the disadvantages that this group experiences on account of its race. Part III goes on to identify other contributors to the illegibility of class-privileged racial minorities' racial disadvantage, naming as culprits the conceptual collapse of race and class, the use of descriptive statistics, and explicit attestations that discrimination produces economic disadvantages. Part IV then attempts to complicate the existing theories of discrimination to remedy the problems that this article identifies. It proposes avenues that race scholars might take in order to destabilize the discrimination-class schema, identifying as paramount the necessity of theorizing noneconomic categories of disadvantage.

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EXCAVATING RACE-BASED DISADVANTAGE AMONG CLASS-PRIVILEGED PEOPLE OF COLOR

Silence is like starvation. Don’t be fooled. It’s nothing short of that, and felt most sharply when one has a full belly most of her life. When we are not physically starving, we have the luxury to realize psychic and emotional starvation.¹

INTRODUCTION

In February 2016, students at Harvard Law School (“HLS”) began to occupy a student lounge in the Caspersen Student Center—renaming the space “Belinda Hall” to honor an enslaved woman whose uncompensated labor made her owners, the Royall family, so wealthy that they were able to bequeath the funds that would establish HLS.² The students, a collective that called itself Reclaim Harvard Law, demanded that the school remove from its official shield the crest of the Royall family, establish a Critical Race Theory program and meet deadlines for hiring faculty members who could teach courses in the program, reform the mandatory 1L curriculum so as to expose HLS students in their first year to critical analyses of the relationship between racial hierarchies and law, and take steps to ensure that low-income students can attend HLS.³ They decided to occupy the space after the law school administration failed to respond to their demands in a way that they deemed satisfactory.⁴

The Reclaim movement incited many responses from observers—some supportive, some unsympathetic. Responses in the latter camp frequently gave voice to the sense that the student agitators lacked standing to lodge any complaints against HLS. These skeptics denied that the student agitators could justifiably complain about race because they denied that the student agitators could be conceptualized as *disadvantaged* in any way. After all, they were students at Harvard Law School.⁵ Reclaim’s critics often articu-

¹ Cherríe Moraga, *La Güera*, in *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* 22, 23–24 (4th ed. 2015).

² Claire E. Parker, *Law School Activists Occupy Student Center*, *HARV. CRIMSON* (Feb. 17, 2016, 9:43 PM), <http://www.thecrimson.com/article/2016/2/17/activists-occupy-wasserstein/> [<https://perma.cc/V5B8-YPG3>].

³ RECLAIM HARVARD LAW SCH., RECLAIM HARVARD LAW DEMANDS (Dec. 4, 2015), <https://reclaimharvardlaw.wordpress.com/demands/> [<https://perma.cc/BL8W-9FWC>].

⁴ See Parker, *supra* note 2.

⁵ Consider coverage of Reclaim by *The Daily Signal*, a news site created by The Heritage Foundation, a conservative think tank:

lated the idea that to speak of a “racially disadvantaged Harvard student” was, at best, oxymoronic; at worse, it was an exercise in sophistry.

The belief that there is no such thing as a “racially disadvantaged Harvard student” is related to the broader societal tendency to conceptualize class-privileged black people, and class-privileged racial minorities more broadly, as unaffected by processes that burden them *on account of their race*. The tendency is to think of them as immune from the practices and the treatment that have conspicuously and devastatingly disadvantaged their poorer brethren. We often do not see their marginalization.

The invisibility of the *racial* subordination of wealthier people of color—that is, their marginalization on account of their race—is profoundly problematic because it is fertile soil for the germination of post-racialism. Post-racialism is the sense that we, as a nation, have overcome our racial problems.⁶ It is an ideology that asserts that race is simply not as important as it once was.⁷ It acknowledges that our racial past is horrible, but it declares that the present is a brand new day. Post-racialism asserts that if racial

For months now, students and faculty at Harvard Law School have banded together to create what they have labeled the ‘Reclaim Harvard Law Movement.’ While not really a movement, these privileged students are making increasingly silly demands. . . .

. . . . [These student protestors] seek to benefit from the “privilege” that association with Harvard Law School provides while at the same time employing the language and tactics that cultural elites on the left have given them to engage in behavior that . . . assuages their guilt for taking advantage of the many privileges that their association with the school will provide.

Andrew Kloster, *The Absurd Demands of Harvard Students Who Feel Guilty About Their ‘Privilege’*, DAILY SIGNAL (Apr. 11, 2016), <http://dailysignal.com/2016/04/11/the-absurd-demands-of-harvard-students-who-feel-guilty-about-their-privilege/> [https://perma.cc/VLY9-W48W]. Consider as well responses to an article covering the Reclaim movement on *The Guardian’s* webpage: “They’re at Harvard. They’ll be fine and they know it.” Fulton, Comment to Jamiles Lartey, *Racism at Harvard: Months After Protests Began, Students Demand Concrete Change*, GUARDIAN (Apr. 13, 2016, 8:14 PM), <https://www.theguardian.com/education/2016/apr/13/racism-harvard-law-school-slaveholder-seal> [https://perma.cc/MUD8-RJWX]; see also ID4368353, Comment to Jamiles Lartey, *Racism at Harvard: Months After Protests Began, Students Demand Concrete Change*, GUARDIAN (Apr. 13, 2016, 11:40 AM), <https://www.theguardian.com/education/2016/apr/13/racism-harvard-law-school-slaveholder-seal> [https://perma.cc/786A-3BH7] (“Oh would that those in possession of the passport to lifelong privilege conferred by Harvard would simply be grateful for that fact.”). Consider as well a comment posted in response to the *Harvard Law Record’s* article about the student agitation:

Do you think these legal beagle snowflakes are going to get out of school and open free legal aid clinics in the big cities? Wake up. No, with a Harvard Law degree, they’ll go to work for the man. They’ll end up in some corp legal herd or in the government at the NSA or the FBI, etc.

Edward Raley, Comment to Marlen Thaten, *Reclaim Harvard Law, Please Stop Destroying Yourself*, HARV. L. REC. (Apr. 4, 2016, 8:14 AM), <http://hlrecord.org/2016/04/reclaim-harvard-law-please-stop-destroying-yourself/> [https://perma.cc/SQT2-N7Q2].

⁶ Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1601 (2009) (observing that post-racialism contends that the nation has “transcended racial divisions of past generations”).

⁷ Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 968 (2010).

discrimination occurs today, it is an anomaly: a one-off occurrence that does not disrupt the fact that, as a general matter, the nation is one in which individuals and groups are not disadvantaged because of their race.⁸ Finally, and crucially, post-racialism acknowledges that racial stratification exists in the country. But it insists that such stratification is the effect of other forces—namely class.⁹

Professors Mario Barnes, Erwin Chemerinsky, and Trina Jones have incisively explained why post-racialism is an ideology that we ought to resist with all of our might. They write that “being post-racial eliminates the need for policies that address the continuing legacy of America’s racist past,”¹⁰ like race-based affirmative action, race-conscious school integration plans, and race-conscious protections of voting rights. They observe that:

Declaring U.S. society to be post-racial allows opponents of race-based remedies and programs to seem noble rather than racist [It becomes] possible to oppose race-based approaches without seeming regressive. It allows those who oppose affirmative action or the continuation of race-based remedies, like section five of the Voting Rights Act, to take the moral high ground; they are the ones who have moved on to a new, more enlightened era, while

⁸ See *id.* at 968 (“[P]ost-racialism is a set of beliefs that coalesce to posit that racial discrimination is rare and aberrant behavior as evidenced by America’s and Americans’ pronounced racial progress.”).

⁹ See Cho, *supra* note 6, at 1602 (“Theoretical post-racialists reject race-based remedies because they believe that such remedies obscure a more fundamental problem, typically one of class-based injuries.”).

It is worth noting that there exists a significant contingent of people who believe that it is not class that explains racial stratification, but rather individual behavior. The idea is that, if racial minorities are overrepresented among those who are incarcerated, or if their life expectancies are shorter, or if they find themselves living in segregated neighborhoods, the causes of these outcomes are located in the individual. Racial minorities might inhabit a culture that inclines them towards criminal behavior. See, e.g., OSCAR LEWIS, *THE CHILDREN OF SANCHEZ: AUTOBIOGRAPHY OF A MEXICAN FAMILY* 465 (1961) (articulating the “culture of poverty” theory, which claims that people are impoverished because they embrace values or engage in behaviors that trap them and their families in a cycle of poverty). Or they might have problematic genes that predispose them to early death; Dorothy E. Roberts, *Is Race-Based Medicine Good for Us?: African American Approaches to Race, Biomedicine, and Equality*, 36 J.L. MED. & ETHICS 537, 542–43 (2008) (noting “a renewed belief in inherent racial differences” and observing that this belief places “the responsibility for ending health disparities on individual health decisions or on taking race-based medications”). Or they might simply prefer to live around other racial minorities. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 750 (2007) (Thomas, J., concurring) (offering that segregated neighborhoods and, therefore, segregated schools, can result “from any number of innocent private decisions, including voluntary housing choices”).

This article does not attempt to engage with those who believe that racial stratification is the product of individual behavior—in large part because people holding those beliefs likely do not believe that post-racialism is a problem; those persons are likely to believe that the nation is, indeed, post-racial. This article is directed to those who believe that post-racialism is a problem, who want to identify factors that led to the rise of post-racial thinking, and who are interested in defeating this type of thinking.

¹⁰ Barnes et al., *supra* note 7, at 975.

those who are trying to continue race-conscious remedies are mired in the past.¹¹

This article argues that the relative hiddenness of the racial subordination that wealthier racial minorities endure has contributed to post-racial thinking.¹² When the subordination of wealthier racial minorities is not read-

¹¹ *Id.* at 976.

¹² This is not to argue that the racial subordination that wealthier racial minorities experience has been hidden *entirely*. Indeed, many of the conversations about race in legal scholarship are about middle-class people of color. For example, race scholars have spilled a lot of ink thinking about hate speech and hate crimes on college campuses—spaces that poor people of color typically are unable to access. *See, e.g.*, MARI MATSUDA, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993); Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 *WAKE FOREST L. REV.* 353, 354 (2009); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 *HARV. C.R.-C.L. L. REV.* 133, 135 nn.11–12 (1982); Mari Matsuda, *Public Response to Hate Speech: Considering the Victim's Story*, 87 *MICH. L. REV.* 2320, 2332–33 (1989). In a similar vein, one might say that the conversation about racial microaggressions is really about class-privileged people of color, as racial microaggressions are thought to be significant when (or, perhaps, because) they happen to people of color who have managed to access spaces that have been inaccessible historically to racial minorities and/or who are thought not to “belong” in certain spaces (read: wealthier people of color). *See, e.g.*, Daniel Solorzano, et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students*, 69 *J. NEGRO EDUC.*, 60, 70–71 (2000); Tara Yosso, et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate for Latina/o Undergraduates*, 79 *HARV. EDUC. REV.* 659, 659–60, 672 (2009); *see also* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *CORNELL L. REV.* 1259, 1262 (2000) (exploring the significance of “identity performance” for racial minorities who work in exclusive, elite workplaces).

However, the debate around affirmative action demonstrates that although race scholars have discussed issues that affect class-privileged people of color, they largely have failed to demonstrate this group’s *racial* subordination. To explain, some commentators have attempted to impeach the legitimacy of race-based affirmative action by observing that many beneficiaries of these programs are class-privileged and, as such, have not *really* been disadvantaged. *See, e.g.*, RICHARD D. KAHLBERG & HALLEY POTTER, *A BETTER AFFIRMATIVE ACTION: STATE UNIVERSITIES THAT CREATED ALTERNATIVES TO RACIAL PREFERENCES* (2012). They claim that those who need the most help—poor racial minorities—do not reap the benefits of affirmative action programs. *See id.* Supporters of race-based affirmative action, in turn, have defended these programs on a number of grounds. They have noted that the number of people of color, specifically black and latinx people, in elite institutions would plummet if the programs were eliminated. *See, e.g.*, Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What’s In A Definition?*, 88 *DENV. U. L. REV.* 807, 832–33. They have argued that the black middle class is a product of race-based affirmative action and the perpetuation of this group depends on such programs. *See, e.g.*, Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 *U. COLO. L. REV.* 939, 950–51 (1997). They have argued that in law school admissions, test scores do not actually measure whether one will succeed in law school or in one’s legal career and, therefore, illegitimately identify racial minorities as “unqualified” for certain institutions of higher learning. *See, e.g.*, Onwuachi-Willig & Fricke, *supra* at 807, 830. And, of course, they have argued that racial minorities bring a unique perspective into the classroom that benefits everyone in the environment. *See Grutter v. Bollinger*, 539 U.S. 306, 318 (2003); *see also* Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies that We Tell About the Insignificance of Race*, 96 *B.U. L. REV.* 55, 106–08 (2016) [hereinafter *Class-Based Affirmative Action*] (defending race-based affirmative action by arguing that it is immoral to deny the continuing significance of race, and the abandonment of race conscious programs performs that denial). However, only rarely do defenses of affirmative action observe that those class-privileged people of color who *do* make it into elite institutions have less wealth, are sicker, and die earlier than their class-privileged

ily discernible, we perceive poor racial minorities as the only group that has been affected by racially burdensome practices and processes.¹³ The dramatic visibility of the poor's suffering, combined with the relative *invisibility* of the suffering of those who are not poor, breeds the belief that class is now the main issue—the thing that *really* matters. It breeds the belief that while the racial inequality that we witness today might have had its origins in racial issues, race no longer determines why people of color are on the bottom of social hierarchies: class now makes those determinations. This belief leads to the post-racial thought that if we want to dismantle the racial stratification that we witness, we can—and ought to—do it through race-neutral, class-based means.¹⁴

Thus, the aim of this article is to begin to theorize the fraught space within which class-privileged racial minorities exist—the disadvantage within their privilege. It begins this much-needed theorization by charting how we have gotten here: a place where the well-documented marginalization of class-privileged racial minorities is known (i.e., the wealth gap, racial disparities in health, residential segregation), but nevertheless unnoticeable. What has made it difficult for us to appreciate their subordination?

The article answers that the illegibility of the racial subordination of wealthier people of color is owed, in part, to our existing theories of racial discrimination. This article traces how our theories of racial discrimination have come to obscure the discrimination that class-privileged racial minorities experience and identifies how we ought to augment our theories of racial discrimination so as to make the racial subordination of wealthier people of color discernible.

This article observes that prevailing theories of racial discrimination have led us to focus most of our attention on how racial discrimination has produced the disproportionate poverty that people of color presently bear. That is, we have come to focus on how the country's history of racial dis-

white counterparts. That is, very rarely do defenses of affirmative action argue that class-privileged people of color who benefit from affirmative action are actually *disadvantaged*. *But see generally* Devon Carbado, Kate M. Turetsky, & Valerie Purdie-Vaughn, *Privileged or Mismatched: The Lose-Lose Position of African-Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISC. 174 (2016); Richard Rothstein, *The Colorblind Bind*, AM. PROSPECT (June 22, 2014), <http://prospect.org/article/race-or-class-future-affirmative-action-college-campus> [<https://perma.cc/DF98-CEMC>]. Even rarer are defenses that argue that the wealthier beneficiaries of race-based affirmative action, if disadvantaged, are disadvantaged in ways that are structural and discursive and not in ways that are perpetrated by individual bad actors. *See discussion infra* notes 115–21 and accompanying text. I take this to mean that the disadvantage that class-privileged racial minorities have experienced *on account of race* is invisible in important ways.

¹³ WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 1–2 (3d ed. 2012) (“[W]hereas the previous barriers were usually designed to control and restrict the entire black population, the new barriers create hardships essentially for the black underclass . . . [W]hereas the old barriers bore the pervasive features of racial oppression, the new barriers indicate an important and emerging form of class subordination.”).

¹⁴ *See, e.g.*, KAHLBERG & POTTER, *supra* note 12.

crimination is embedded in our class structure. This is true: our country's history of racial discrimination certainly is embedded in our class structure. But it is risky to acknowledge this without simultaneously acknowledging, loudly and often, that racial discrimination is embedded in places *other* than our class structure. Indeed, this article contends that the failure to acknowledge the fact that racial discrimination has had effects beyond class disadvantage—that racial discrimination has disadvantaged the economically privileged—has helped to lead us to post-racialism and post-racial thinking.

Thus, our theories of racial discrimination have led us to conceptualize economic disadvantage as constituting the entire universe of racial disadvantage. If this is true—if economic disadvantage does, in fact, constitute the universe of racial disadvantage—then those who are not economically disadvantaged (i.e., wealthier people of color) have not been racially disadvantaged at all. However, the reality is that economic subordination is just one element of racial subordination. Racial discrimination has disadvantaged people of color not only economically, but also socially, culturally, and politically.¹⁵ Thus, if we are to bring visibility to the racial subordination that wealthier people of color experience—a visibility that, possibly, may keep post-racial thinking at bay—then we have to theorize the noneconomic injuries that racial discrimination inflicts.

This article begins this endeavor in Part I by documenting, again, class-privileged racial minorities' disadvantage. Part II then identifies how theory has come to obscure this disadvantage. It shows that scholars have largely conceptualized two modalities of racial discrimination: individualist (which is perpetrated by individual actors) and institutional (which usually takes the form of race-neutral policies and practices that disproportionately burden or harm people of color). It then shows how scholars have conceptualized institutional racial discrimination as predominately affecting poor people of color; we think of it as the modality of discrimination that bears the most

¹⁵ I am reminded of an argument that literary theorist Saidiya Hartman makes in her exploration of racial domination during slavery and Reconstruction: while it was largely understood that the Reconstruction Amendments were intended to end chattel slavery, it was unclear just what exactly constituted chattel slavery. See SAIDIYA HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH CENTURY AMERICA 115–24 (1997). If chattel slavery was nothing more than forced labor, then the Reconstruction Amendments were only properly directed at ensuring that black people (and possibly others) were not forced to labor anywhere. Thus, using the Amendments to address other forms of black marginalization—along social, political, or cultural lines—was improper and a misapplication of the Constitution. However, if chattel slavery was much more than forced labor—if it was also about political inequality, about the construction of a racial hierarchy in which black people are the despised bottom, about denying the humanity and dignity of the enslaved, about sexual and sexualized violence—then the Amendments were properly directed at eliminating these forms of subjugation as well.

To return to class-privileged racial minorities: if racial discrimination does nothing more than cause economic disadvantage, then we properly direct our efforts to aiding those who have suffered economic disadvantage. But, if racial discrimination is about much more than economic disadvantage, then we ought to direct our efforts to undoing other forms of marginalization as well.

responsibility for the poor's spectacular deprivation. Meanwhile, scholars have come to conceptualize the racial discrimination that wealthier people of color encounter, when they encounter it, as usually of the individualist variety. This article calls this *the discrimination-class schema*.

When scholars go on to deny the significance of individualist racial discrimination in the post-civil rights era, the racial discrimination that scholars imagine to affect wealthier people of color is dismissed as insignificant in the contemporary present. This obscures the disadvantages that this group experiences on account of its race. Part III goes on to identify other contributors to the illegibility of class-privileged racial minorities' racial disadvantage, naming as culprits the conceptual collapse of race and class, the use of descriptive statistics, and explicit attestations that discrimination produces economic disadvantages. Part IV then attempts to complicate the existing theories of discrimination so as to remedy the problems that this article identifies. It proposes avenues that race scholars might take in order to destabilize the discrimination-class schema, identifying as paramount the necessity of theorizing noneconomic categories of disadvantage.

A brief note before continuing: Liberal and radical race scholars frequently call racial discrimination "racism." Thus, they tend to speak of "racism" perpetrated by individuals and "racism" perpetrated by institutions or structures. However, identifying a phenomenon as "racist" or an example of "racism" frequently works to end conversations. When a speaker declares a thing or person to be racist, it does not tend to invite listeners who are not already sympathetic to characterizing the thing or person as racist to engage with the speaker. That is, calling a thing racist does not lead persons who do not already believe the thing to be racist to contemplate the characteristics of the thing that has led the speaker to describe it as racist. Accordingly, I largely do not refer to *racism* in this article, instead choosing to use the language of *racial discrimination*. I do not make this choice because I believe the phenomena that I discuss in this article are not examples of racism. Quite the contrary: I have been, and continue to be, an avid proponent of labeling as *racism* the various mechanisms that function to shorten and reduce the quality of the lives of people of color in this country and around the world.¹⁶ Instead, I make the choice to avoid the language of racism in this

¹⁶ Critical race theorist Ian Haney López offers an explanation for this choice that I find particularly compelling. In defending his choice to use the term "racism" when describing race-neutral laws, policies, and programs that sustain racial hierarchies, López writes that identifying these practices as a form of racism is "an analytic and a political decision." See Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1071 (2010). He continues:

Referring to "racism" aims to evoke a sense of moral repugnance and social duty by vivifying the fundamental injustice of entrenched racial inequalities To call current racial patterns "racism" is to make a claim on that national moral obligation; in contrast, to relinquish the notion of racism, and even of race, is to cede one's claim on the nation's conscience.

Id. at 1071–72.

article because I believe that for many readers, it will obscure more than it illuminates. Thus, I largely speak of individualist racial discrimination instead of individualist racism, and institutional racial discrimination instead of institutional racism, although I believe that the terms in each pair refer back to the same phenomena.

I. THE BLACK MIDDLE CLASS: PRIVILEGED DISADVANTAGE, OR DISADVANTAGED PRIVILEGE

How privileged is the black middle class? The answer that one gives to that question may depend on to whom one is comparing the group. Generally, the black middle class is compared to their black counterparts without class privilege—those folks who are sometimes referred to as the “underclass” or the “urban poor.” When one compares the black middle class to this “truly disadvantaged” group, the former seems to be doing better than fine.¹⁷ They appear to be successful, living the American dream.¹⁸ As one scholar recently put it, “Unlike the urban underclass, the black middle class lives in a world filled with options. They are not restricted in the ways their forbears were by segregation. They are members of not just a race, but also an affluent, economic class.”¹⁹ Meanwhile, we rightfully conceptualize the black poor as terribly subjugated by a range of mechanisms that seem to make their indigence permanent.

However, when one compares the black middle class to their white counterparts—that is, the white middle class—the picture becomes less rosy. Indeed, it is when we judge wealthier racial minorities against those who share their class privilege, as opposed to those who share their racial ascription, that their subordination is thrown into sharp relief.

¹⁷ CHARLES T. BANNER-HALEY, *THE FRUITS OF INTEGRATION: BLACK MIDDLE-CLASS IDEOLOGY AND CULTURE, 1960–1990* 78 (1994) (“Among African Americans, opportunities continue to open up for the educated middle class while the urban poor appear stuck in a quagmire of unstable families, intermittent employment, welfare dependence, and the temptations of crime.” (quoting WILLIAM P. O’HARE ET AL., *African Americans in the 1990s*, POPULATION REFERENCE BUREAU (1991)); ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 8 (1993) (noting that many argue that any disadvantages that the black middle-class experience “pale by comparison with those of the underclass, the group that truly deserves our attention”); JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 34 (1994) (noting that we tend to look at the black middle class as evidence that “all blacks who ‘get it together’ and work hard enough can ‘make it’ in the United States”); Leland Ware & Theodore Davis, *Ordinary People in an Extraordinary Time: The Black Middle-Class in the Age of Obama*, 55 *How. L.J.* 533, 535 (2012) (“As we enter the second decade of the 21st Century, an examination of the status of African American families reveals a mixed picture; the best of times for some, the worst of times for others. For those in a position to take advantage of the opportunities created by the Civil Rights revolution, the gains over the last generation have been remarkable. For those left behind in America’s impoverished communities, the obstacles to advancement are more daunting today than they were a generation ago.”).

¹⁸ See Derrick Bell, *Racism is Here to Stay: Now What?*, 35 *How. L.J.* 79, 87 (1991) (noting that the black middle class has achieved “a success that is both enviable and—many whites and some blacks think—attainable by all blacks”).

¹⁹ Ware & Davis, *supra* note 17, at 539.

We can begin with their health. Studies have documented that racial minorities endure increased levels of morbidity and mortality *even when one controls for class*.²⁰

Consider racial disparities in maternal mortality. Class-privileged black women die during pregnancy and childbirth at rates that are significantly higher than their white counterparts.²¹ That is, *racial disparities in maternal mortality rates persist across income levels*. Now, many are aware that there are racial disparities in maternal mortality in the U.S.; many may even be aware of the specifics—that three to four times as many black women as white women die on the path to motherhood.²² However, the tendency has been to attribute this tragic disparity to poverty—to assume that because black people in the U.S. disproportionately bear the burdens of poverty, this disproportionate indigence is reflected in the rates at which black women die during pregnancy, childbirth, or shortly thereafter.²³ However, this assumption is not entirely correct. It is not only poor black women who are dying on the path to motherhood. Wealthier black women are dying, too; and they are dying more frequently than wealthier white women. This means that it is not solely *poverty* that is killing black women.

The excess mortality among wealthier black women attempting motherhood suggests many things. First, it suggests that race really does matter;²⁴ it can be the difference between health and sickness, life and death. Second, it suggests that class privilege does not entirely erase the effects of the absence of race privilege. For pregnant black women who find themselves at the higher levels of the socioeconomic ladder, disadvantage persists despite their class privilege.

²⁰ See *infra* notes 22, 27, 28, 30 and accompanying text.

²¹ AMNESTY INT'L, DEADLY DELIVERY: THE MATERNAL HEALTH CARE CRISIS IN THE USA: ONE YEAR UPDATE 7 (2011), <https://www.amnestyusa.org/wp-content/uploads/2017/04/deadlydeliveryoneyear.pdf> [<https://perma.cc/29ZB-ZRZU>] (“The risk of maternal mortality has remained 3 to 4 times higher among black women than white women during the past 6 decades. *Racial disparities were also seen in all income groups, with black women facing approximately three times higher maternal mortality risk compared to white women at low, middle, and high income levels*” (emphasis added)).

²² Andreea Creanga, Cynthia Berg, Jean Ko, Sherry Farr, Van Tong, F. Carol Bruce & William Callaghan, *Maternal Mortality and Morbidity in the United States: Where Are We Now?*, J. WOMEN'S HEALTH, 23, 4–5 (2014).

²³ I explore this phenomenon—where the public tends to believe that statistics that describe black people actually only reflect the black poor, thereby making invisible the marginalization that the black middle-class experiences—in *infra* notes 172–77 and accompanying text.

²⁴ It is important to emphasize here that I am not arguing that “race really does matter” because race is in the genes and genetic differences between the races explain racial disparities in health. I strongly reject biological notions of race. See Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 39–40 (2013) [hereinafter, Bridges, *Dangerous Law*]. Instead, I am arguing that “race really does matter” because the racial categories that we have socially constructed impacts individuals’ physical bodies; race matters because our socially constructed racial categories influence whether individuals are sick or healthy and whether they live or die.

Further, the infants born to class-privileged black women die at rates that are much higher than the babies born to their white counterparts.²⁵ Indeed, racial disparities in infant mortality and morbidity *increase* as one moves up the income ladder. That is, the rates at which poor black babies and poor white babies die are closer than the rates at which wealthier black babies and wealthier white babies die.²⁶ As one commentator put it, “contrary to what one might predict, these studies provide evidence that racial differences are larger among women perceived to be at lower risk for poor outcomes.”²⁷

What is true with respect to racial disparities in infant mortality is true as a general matter: Racial disparities in health tend to *increase* as one moves up the socioeconomic ladder.²⁸ In other words, poor black people and poor white people sometimes have levels of health that are more comparable to one another than the levels of health of wealthier black people and wealthier white people. This suggests that our antipoverty programs have managed to make race have less of an impact on poor people’s health.²⁹ This is a

²⁵ See Marsha Lillie-Blanton et al., *Racial Differences in Health: Not Just Black and White, but Shades of Gray*, 17 ANN. REV. PUB. HEALTH 411, 416 (1996) (conducting a survey of the literature and reporting that “[f]our of the five studies of infant mortality . . . found higher mortality rates among African American than white women of a similar social strata”); Kenneth C. Schoendorf et al., *Mortality Among Infants of Black as Compared with White College-Educated Parents*, 326 NEW ENG. J. MED. 1522, 1523 (1992) (“The infant mortality rate in the college-educated black population was 10.2 per 1000 live births, whereas the infant mortality rate in the college-educated white population was 5.4 per 1000 live births. After we adjusted for age and parity, time when prenatal care began, and marital status, the likelihood of death for a black infant was 1.82 times that for a white infant . . .”); CDC, *Racial and Ethnic Disparities in Infant Mortality Rates—60 Largest U.S. Cities, 1995–1998* (Apr. 19, 2002), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5115a4.htm> [<https://perma.cc/7TZR-A336>] (“Racial disparity in [infant mortality rates] has not been explained fully by differences in socioeconomic status. Black infants born to college-educated parents have higher [infant mortality rates] than white infants born to parents of similar educational background Education of the mother does not confer the same level of protection against infant mortality among black women as it does among white women.”).

²⁶ See Lillie-Blanton et al., *supra* note 25, at 429 (“Studies of infant outcomes provide evidence that racial disparities persist within each social stratum, but are most pronounced for women in higher socioeconomic positions.”).

²⁷ *Id.* at 417; see also J.W. Collins, *Preterm Birth Among African American and White Women with a Lifelong Residence in High-Income Chicago Neighborhoods: An Exploratory Study*, 17 ETHNICITY & DISEASE 113, 115 (2007) (noting that “[e]xploratory data show that African American women unexposed to the health-eroding consequences of early-life and cumulative exposures to neighborhood poverty still have a twofold greater preterm birth rate than their White peers”).

²⁸ See James S. House & David R. Williams, *Understanding and Reducing Socioeconomic and Racial/Ethnic Disparities in Health*, in PROMOTING HEALTH: INTERVENTION STRATEGIES FROM SOCIAL AND BEHAVIORAL RESEARCH, 89, 105 (B.D. Smedley & S.L. Syme eds., 2000) (noting that for many health indicators, “the racial gap becomes larger as [socioeconomic status] increases”); Lillie-Blanton et al., *supra* note 25, at 429 (“One would expect that discrimination based on income and race would translate into low-income African Americans having worse health outcomes relative to low-income whites. Surprisingly, however, racial disparities were found to be less dramatic among the poor than the nonpoor when examining data for all causes [of death].”).

²⁹ See Lillie-Blanton et al., *supra* note 25, at 429 (arguing that if racial disparities in health are smaller amongst those with lower incomes, then “social welfare programs in health and

triumph, undoubtedly. But, it reveals that something that cannot be fixed by antipoverty programs is threatening the health of people of color. That something, of course, is race.³⁰

That racial disparities in health persist across income levels could mean several things. It could mean that the private health insurance plans that class-privileged racial minorities have, and the fact that they can use that insurance to access private hospitals and doctors, does not necessarily translate into their receiving the same quality of care that their class-privileged white counterparts receive.³¹ Stated bluntly, racial disparities in health across income levels could mean that physicians have racial biases (be they implicit or explicit), and these biases cause them to offer people of color a lower quality of care. There is evidence to support this possibility.³² For example, studies have shown that, even when one controls for differences in insurance status, age, income, and co-morbidities, providers offer black people less effective treatment for heart disease and kidney disease, making it less likely that black people will receive coronary artery bypass surgery or kidney transplantations.³³ As one report stated, “[E]ven after adjusting for severity of illness, [socioeconomic status] and/or insurance status, blacks are less likely to receive a wide range of medical services than are whites.”³⁴

income maintenance . . . may have prevented poor blacks from doing any worse than poor whites”).

³⁰ See House & Williams, *supra* note 28, at 96 (noting that “the most important implication of th[e] finding [that there are racial disparities in health even among those at the top of the socioeconomic ladder] is that it is not just the material, psychological, and social conditions associated with severe deprivation or poverty (such as lack of access to safe housing, healthy food, and adequate medical care) that explain socioeconomic inequalities in health”).

³¹ See COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE & BD. ON HEALTH SCIS. POLICY, *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* 5 (Brian D. Smedley, Adrienne Y Stith, & Alan R. Nelson eds., 2003) [hereinafter *UNEQUAL TREATMENT*] (“Evidence of racial and ethnic disparities in healthcare is, with few exceptions, remarkably consistent across a range of illnesses and healthcare services . . . [R]acial and ethnic disparities remain even after adjustment for socioeconomic differences . . .”).

³² *UNEQUAL TREATMENT*, *supra* note 31, at 2–3 (citations omitted) (“Relative to whites, African Americans—and in some cases, Hispanics—are less likely to receive appropriate cardiac medication or to undergo coronary artery bypass surgery, are less likely to receive peritoneal dialysis and kidney transplantation, and are likely to receive a lower quality of basic clinical services such as intensive care, even when variations in such factors as insurance status, income, age, co-morbid conditions, and symptom expression are taken into account.”); House & Williams, *supra* note 28, at 98 (citations omitted) (“Many studies have found racial/ethnic differences in the receipt of therapeutic procedures for a broad range of conditions even after adjustment for insurance status and severity of disease. These disparities exist even in contexts where differences in economic status and insurance coverage are minimized, for example, the Veterans Administration Health System and the Medicare program.”).

³³ See *UNEQUAL TREATMENT*, *supra* note 31, at 2–3.

³⁴ David R. Williams & Chiquita Collins, *US Socioeconomic and Racial Differences in Health: Patterns and Explanations*, 21 *ANN. REV. SOC.* 349, 367 (1995). Also disturbing is the fact that racial minorities are *more* likely to receive procedures that are widely considered undesirable. See *UNEQUAL TREATMENT*, *supra* note 31, at 6 (noting that African American Medicare patients are 2.4 and 3.6 times more likely to be castrated or to have their limbs amputated).

The fact that racial disparities persist even when one controls for class could also mean that there is something *unhealthy* about living in a social environment in which one is a racial minority;³⁵ it could mean that enjoying class privilege does not entirely eliminate the unhealthy quality of that environment. There is evidence to support this view as well.³⁶ What is important about this research is that it demonstrates that it is not only poverty that is shortening the lives of racial minorities, as it is so often assumed.³⁷ Rather, *race* is also abridging and reducing the quality of the lives of racial minorities, including those with class privilege.

We can look beyond health for evidence that race disadvantages wealthier racial minorities. Consider their experiences in the housing market. Wealthier black people live in less affluent homes and neighborhoods than their white peers.³⁸ The neighborhoods in which class-privileged black people live tend to be closer to poor black neighborhoods³⁹ and, as a consequence, tend to feature the social dislocations (crime, poorer quality schools,

³⁵ Being a racial minority does not have to mean, as a matter of necessity, that one's social environment is unhealthy. One can certainly imagine social environments in which racial minorities are culturally, socially, and politically valued. In such an environment, the fact of inhabiting a body that is racialized as a minority one likely would not be a health- and life-limiting proposition. Thus, if the unhealthiness of the social context in which racial minorities live partially explains racial disparities in health across income levels in the U.S., then it is important to acknowledge that there is nothing inevitable about that unhealthiness.

³⁶ Jen'nan Ghazal Read & Michael O. Emerson, *Racial Context, Black Immigration and the U.S. Black/White Health Disparity*, 84 SOC. FORCES 181, 181 (2005) (stating that preliminary evidence shows that black immigrants to the U.S. only enjoy levels of health that are comparable to white U.S.-born persons when these immigrants hail from countries that are majority black, and noting that their levels of health approximate U.S.-born black persons when they hail from countries that are majority white).

³⁷ See Lillie-Blanton et al., *supra* note 25, at 428 ("Disproportionately high rates of poverty among minority Americans have led many to assume that racial differences in social class account for persistent racial disparities in health.").

³⁸ Bart Landry & Kris Marsh, *The Evolution of the New Black Middle Class*, 37 ANN. REV. SOC. 373, 388 (2011) (noting that the black middle class lives in less affluent neighborhoods than their white counterparts) (citing Richard D. Alba, John R. Logan and Brian J. Stults, *How Segregated are Middle Class African Americans?*, 47 SOC. PROBS. 543, 554 (2000)); Malamud, *supra* note 12, at 970 (observing that "blacks, regardless of their income level, own worse houses in worse neighborhoods—a pattern that extends even to middle-class suburban blacks"); Ware & Davis, *supra* note 17 at 563 ("Blacks live in neighborhoods that are, on average, 15 to 20% less affluent than other groups with a comparable status.").

³⁹ SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 135 (2004) (noting that black middle class neighborhoods "usually provide the buffer from ghettos for the rest of society"); Malamud, *supra* note 12, at 969 ("The black suburban middle class is segregated into black enclaves near the fringe of the ghettos it has escaped."); Audrey G. McFarlane, *Operatively White?: Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness*, 72 L. & CONTEMP. PROBS. 163, 168 (2009) ("[P]ublic and other low-income housing projects had long been relegated to border black middle-class neighborhoods, while distant white neighborhoods were protected from such encroachments."); Ware & Davis, *supra* note 17, at 563 ("[M]any suburban blacks live in older, inner-ring suburbs that are less affluent, less white, and have higher levels of crime and social disorganization than suburban communities where comparable whites reside.").

etc.) that poverty so often causes.⁴⁰ The consequences of residential segregation for people of color are many, and most of them are bad. As Bennett Capers summarizes it:

Entrenched segregation tends to deny racial minorities equal access to jobs, government resources, amenities, and . . . quality schools. Segregation also tends to disproportionately burden racial minorities with society's detritus: Power plants and hazardous waste facilities, group homes for the mentally disabled, halfway houses, shelters for the homeless, and public housing projects.⁴¹

Part of the issue is that class-privileged black people find it difficult to live in racially integrated neighborhoods; while the neighborhoods in which they live are more racially integrated than those in which their poorer counterparts live, they nevertheless are quite segregated.⁴² The pattern is that white residents of a neighborhood will tolerate a certain number of black people as their neighbors. But after a certain threshold is reached, white residents will move out.⁴³ It does not matter that the black people moving into a neighborhood share their white neighbors' class privilege.⁴⁴ What matters is that black residents are black.

⁴⁰ Landry & Marsh, *supra* note 38, at 388 (noting that middle class black people "live in areas with more negative characteristics, such as poverty, more female-headed households, and fewer college graduates than middle-class whites" and that they "are more likely to be exposed to environmental hazards than are their white counterparts").

⁴¹ I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 44–45 (2009).

⁴² Andrew L. Spivak & Shannon M. Monnat, *The Influence of Race, Class, and Metropolitan Area Characteristics on African-American Residential Segregation*, 94 SOC. SCI. Q. 1414, 1432 (2013) ("[W]hile poor (\$14,999 or less) black households live in neighborhoods that are, on average, 61 percent black and 28 percent white, affluent (\$1,00,000 or more) black households live in neighborhoods that are, on average, 45 percent black and 44 percent white. The difference across income groups, while significant, also illustrates the strong influence of race for even the most affluent (6.7 percent) of black households Even as greater income allows some members of a group to translate their class gains into residential mobility, biases associated with race continue to stratify African Americans into neighborhoods that are far more segregated than those of their white class counterparts." (emphasis added)).

⁴³ CASHIN, *supra* note 39, at 136 (observing that "[w]hen migrating blacks reach a critical mass, whites flee"); DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 58 (2014) ("The racial composition of neighborhoods changes quickly once the numbers reach a certain threshold or 'tipping point.'").

It may be important to note that it is incorrect to believe that "white flight" is a practice that happened at mid-century, but no longer happens in the "modern" present. Instead, white flight is an enduring feature of the U.S. landscape. See Daniel T. Lichter, et al., *Toward a New Macro-Segregation? Decomposing Segregation Within and Between Metropolitan Cities and Suburbs*, 80 AM. SOC. REV. 843, 845–46 (2015) (noting that there has been an increase in white people "concentrating in places that are overwhelming[ly] white, especially at the metro fringe" and that many white families are "hunkering down in all-white neighborhoods, affluent gated communities, or unincorporated housing developments at the exurban fringe").

⁴⁴ CASHIN, *supra* note 39, at 156 ("[A] concentration of racial minorities—particularly of black people—can and often does lead to a decline in access to and influence of dominant institutional actors that shape markets Empirical studies show that commercial disinvestment in majority-black communities, even affluent ones, is commonplace."); McFarlane, *supra* note 39, at 182 ("[S]egregation leads to lower land values, less money for public educa-

Moreover, the white people with whom wealthier black people share neighborhoods tend not to share their black neighbors' socioeconomic status; that is, their white neighbors tend to be poorer than they are.⁴⁵ Further, when wealthier black people create enclaves of their own—middle- and upper-middle black communities—these neighborhoods are not comparable to the ones that their wealthier white counterparts create. *Despite the residents' class privilege*, these communities do not attract the businesses, jobs, shops, amenities, and investment that make neighborhoods covetable and comfortable.⁴⁶ The constellation of all of these facts has led some researchers to conclude that, despite the class privilege of the black middle-class, “race powerfully shapes their residential options.”⁴⁷ Race matters. Indeed, “at no point do blacks attain residential parity with whites—that is, the communities in which they reside have less affluence and other less desirable characteristics (e.g., more crime) than the communities where whites with similar personal and household characteristics are found.”⁴⁸

We can also look to income and wealth for evidence that race disadvantages wealthier racial minorities. Studies have shown that black professionals earn 75% to 85% of the incomes that their white counterparts earn.⁴⁹ Part

tion, reductions in school quality, and fewer commercial amenities located in and around black segregated neighborhoods. Thus, middle class black persons are still suffering from highly-disadvantageous segregation.”).

⁴⁵ Alba, Logan & Stults, *supra* note 38, at 556 (noting that “middle-class blacks tend to live with whites who are less affluent than they are”).

⁴⁶ CASHIN, *supra* note 39, at 156 (“[A] concentration of racial minorities—particularly of black people—can and often does lead to a decline in access to and influence of dominant institutional actors that shape markets . . . Empirical studies show that commercial disinvestment in majority-black communities, even affluent ones, is commonplace.”); McFarlane, *supra* note 39, at 182 (“[S]egregation leads to lower land values, less money for public education, reductions in school quality, and fewer commercial amenities located in and around black segregated neighborhoods. Thus, middle class black persons are still suffering from highly-disadvantageous segregation.”).

⁴⁷ Alba, Logan & Stults, *supra* note 38, at 544.

⁴⁸ *Id.* at 556. The fact that class-privileged racial minorities live in poorer and more racially segregated neighborhoods than their class privilege ought to allow reduces their “social capital—that varied bundle of resources and connections we have at our disposal, sometimes without realizing it, as a result of our social relationships.” Capers, *supra* note 41, at 50. Those who live in more affluent neighborhoods have access to more affluent neighbors, who might have valuable information to share about sundry, but potentially impactful, topics, including job opportunities, investment tips, estate planning, and college admissions advice. Affluent neighbors might also share access to their friends and colleagues, who also might be rich in social capital. Essentially, residence in a more affluent neighborhood increases access to privilege and networks of privilege—something that can have profound material consequences. Economist Glenn Loury was willing to conclude decades ago that because of racialized differences in access to social capital, “equal opportunity laws cannot be relied on to eliminate economic differences between the races, even over the long run.” Glenn Loury, *A Dynamic Theory of Racial Income Differences*, in *WOMEN, MINORITIES, AND EMPLOYMENT* 153, 156 (P.A. Wallace & A. LeMund eds., 1977). Thus, the inability of wealthier people of color to live in integrated neighborhood despite their class privilege disadvantages them in innumerable ways.

⁴⁹ See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 55 (4th ed. 2013) (referring to studies that show that “blacks earn less than whites at every educational level” and that “even as

of the reason for this disparity is that black professionals tend to be employed in the public sector, which does not pay as much as the private sector.⁵⁰ Further, when black professionals work in the private sector, they disproportionately work in positions regarding “minority affairs;” these are positions that concern managing the business’s relationship with racial minorities (in the workplace, in the marketplace, or in the “community” that a business’s products or services affect).⁵¹ These jobs tend to pay less than other positions, and they tend to lack the opportunities for promotion that other positions have.⁵²

Racial disparities in wealth are even more dramatic: College-educated black people hold about 13% of the wealth that their white counterparts hold.⁵³ Indeed, “[t]he poorest white families—those in the bottom quintile of the income distribution—have slightly more wealth than black families in the middle quintiles of the income distribution.”⁵⁴ The disparity here is extraordinary: while white families whose heads hold a college degree have on average \$180,500 in wealth, black families with similarly credentialed heads have almost an eighth of that wealth—\$23,400.⁵⁵ While black families with incomes between \$54,000/year and \$93,000/year have \$36,430 in wealth, white families in that income bracket have almost four times that much—\$136,390.⁵⁶ It is important to observe that the reason why class-privileged black people have less wealth than their white counterparts has nothing to do with spending habits. Rather, it has everything to do with the weight of accumulated racial subordination. As legal scholar Deborah Malamud puts it, “all of the multi-generational disadvantages the black middle class suffers in housing, occupational segregation, education, and income translate into lower lifetime earnings, diminished return on housing capital, diminished

blacks move up the occupational hierarchy, their income falls further behind their white peers”); Landry & Marsh, *supra* note 38, at 385 (“Depending on the year and groups compared, researchers found estimates of black income percentages of white incomes of 85% among upper-middle-class black and white males and females in 1988 . . . ; 79% among black and white dentists and lawyers in 1990; and 76.3% among black and white professionals in 1990 [B]lack males with post-baccalaureate degrees received only 74% of their white peers’ income in 2000.”).

⁵⁰ Elizabeth Higginbotham, *Black Professional Women: Job Ceilings and Employment Sectors*, in *WOMEN OF COLOR IN U.S. SOCIETY* 113, 119 (Maxine Baca Zinn & Bonnie Thornton Dill eds., 1993) (noting the concentration of black professionals in the public sector).

⁵¹ See COSE, *supra* note 17, at 65 (“[B]lack executives have landed, out of all proportion to their numbers, in community relations and public affairs, or in slots where their only relevant expertise concerns blacks and other minorities.”); FEAGIN & SIKES, *supra* note 17, at 162–63 (noting that many black managers and professionals have been “ghettoized in positions oriented to affirmative action, special markets, or minority communities”).

⁵² See COSE, *supra* note 17, at 64–65.

⁵³ DARRICK HAMILTON, ET AL., *UMBRELLAS DON’T MAKE IT RAIN: WHY STUDYING AND WORKING HARD ISN’T ENOUGH FOR BLACK AMERICANS* 3 (2015).

⁵⁴ *Id.*

⁵⁵ *Id.* at 5.

⁵⁶ *Id.* at 7.

likelihood of inheritance of wealth from parents, and therefore into reduced wealth accumulation over the life course.”⁵⁷

Some might be tempted to argue that the disparities documented here are not *caused* by race, but rather are merely *correlated* with race. Indeed, the most likely alternative explanation for disparities in health and housing is wealth. The argument is that if one compares people of color with white people who hold similar amounts of wealth, then any apparent disadvantages will disappear. This is simply not true. Racial minorities are steered to different, poorer neighborhoods without respect to the amount of wealth that they hold.⁵⁸ Without regard to their ratio of assets to debt, racial minorities with “black sounding” names (like Lakisha and Jamal) receive fewer job interviews than persons with “white sounding” names (like Emily and Greg).⁵⁹

⁵⁷ Malamud, *supra* note 12, at 983. Lacking wealth, of course, leads to other disadvantages for class-privileged black people. See, e.g., CREDIT SUISSE, WEALTH PATTERNS AMONG THE TOP 5% OF AFRICAN AMERICANS 21 (2014) (“Several studies prior to the 2008 real estate crisis show that, even at higher levels of income, African-Americans had less access to prime lending than white families at the comparable income level.”); Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 190 (2008) (citations omitted) (referring to studies that demonstrate persistent racial disparities in the mortgage market, including that “even at the highest income level, blacks are almost three times as likely to get their loans from a subprime lender as are others”); Ware & Davis, *supra* note 17, at 571 (discussing studies that “found that African Americans were less likely than whites to receive loans from regulated lenders” and “that regardless of lender type and income level, African Americans were more likely than whites to receive higher priced loans”).

Of course, receiving less favorable loan terms and being shunted to the subprime loan market may not be due to the smaller amounts of relative wealth that black applicants possess, but rather may be due more directly to their race. See CASHIN, *supra* note 39, at 36–37 (“Even after controlling for differences in creditworthiness, studies have found large differences in mortgage loan denial rates between minority and white applicants. And often minorities who are successful in obtaining a mortgage receive less generous loan amounts and terms Blacks living in predominately black neighborhoods are frequently redlined by mainstream mortgage lenders and are forced to rely on the predatory loans made available by the subprime market.”).

⁵⁸ See OFFICE OF POLICY DEV. & RESEARCH, U.S. DEPT’ HOUS. & URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 31, 55–56 (2013); George C. Galster and Erin Brooke Godfrey, *By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000*, 71 J. AM. PLAN. ASS’N 251, 260 (2005).

⁵⁹ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 997–98 (2004) (demonstrating that “Asian sounding” names and “foreign sounding” names, in addition to “black sounding” names, are also penalized in the labor market); see also RUPA BANERJEE, ET AL., DO LARGE EMPLOYERS TREAT RACIAL MINORITIES MORE FAIRLY? A NEW ANALYSIS OF CANADIAN FIELD EXPERIMENT DATA 2, 5 (2017) (reporting that individuals with names suggesting Indian, Pakistani, or Chinese origin were 28% less likely to receive an interview in Canada); Magnus Carlsson & Dan Olof Rooth, *Evidence of Ethnic Discrimination in the Swedish Labor Market Using Experimental Data*, 14 LAB. ECON. 716 (2007) (showing that applicants with “Swedish-sounding names” received 50% more callbacks than identical applications with “Middle Eastern sounding names”); Sonia K. Kang, et al., *Whitened Resumes: Race and Self-Presentation in the Labor Market*, 61 ADMIN. SCI. Q. 469, 491–92 (2016) (showing that Asian individuals could double their chances of receiving a callback interview if they made their names more “white sounding” and eliminated from their resumes any references to race-based organizations to which they may have belonged); Philip Oreopoulos, *Why Do Skilled Immigrants Struggle in the Labor Market? A Field Experiment*

White people will begin moving out of a neighborhood when the number of black residents reach a certain number irrespective of the wealth possessed by their neighbors of color.⁶⁰ Indeed, calling many of the disparities itemized above *race-based* disadvantages is no mistake. Race—not class—*causes* the inequality.⁶¹

In light of the documented disadvantages at which class-privileged black people find themselves,⁶² it is a wonder that anyone could proclaim that this group is doing just fine. Nevertheless, that is precisely what one hears in the debate around race-based affirmative action. At the very top of the list of things that opponents of race-conscious programs identify as simply wrong about these efforts⁶³ is their tendency to benefit class-privileged black people.⁶⁴ This group of beneficiaries, they argue, does not need help.

with *Thirteen Thousand Resumes*, 3 AM. ECON. J. ECON. POL'Y 148, 168 (2011) (showing discrimination against “Asian sounding” names in the labor market in Canada).

⁶⁰ See CASHIN, *supra* note 39; ROITHMAYR, *supra* note 43.

⁶¹ It is important to note that while the research indisputably establishes that class-privileged black persons endure race-based burdens in housing, employment, health, and other domains, the weight of the research establishes that *nonblack people of color* also endure similar race-based burdens. See MARGERY A. TURNER, ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: PHASE 2-ASIANS AND PACIFIC ISLANDERS, 1-1, 3-6 to -11 (2003) (concluding that “significant discrimination against . . . Hispanic homebuyers still persists in both rental and sales markets of large metropolitan areas nationwide” and showing that, although people of Asian descent are often excluded from research on racial discrimination in the housing market, realtors and brokers do not inform prospective Asian buyers and renters about available properties and do not give them the same information about financial assistance that they give their white counterparts); MARGERY A. TURNER ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: PHASE 3-NATIVE AMERICANS 4-1 (2003) (showing that indigenous renters and homebuyers endure greater discriminatory treatment in the housing market than black, Latinx, and Asian renters and homebuyers); Bertrand & Mullainathan, *supra* note 59 (citing studies documenting that nonblack people of color have less favorable outcomes in the labor market when they have “nonwhite sounding” names). Thus, this is not solely a story about the race-based disadvantages that class-privileged black people encounter. This is a story about race-based inequality, more generally.

⁶² We might add to the list of items that serve as evidence that the black middle class endures racial subordination in spite of their class privilege the fact that black middle-class students do not perform as well as their white peers on standardized tests. See Malamud, *supra* note 12, at 978 (noting that the educational performance gap “is not solely caused by poverty; it exists across the socioeconomic spectrum” and that “[b]lack middle-class children do worse in school than (seemingly) similarly situated white middle-class children”). However, I conceptualize this truth as an effect of all of the other types of racial subordination identified here, rather than an independent item. See, e.g., *id.* (“Black middle-class suburban schools score only a little better than poor city schools, in part because black suburban schools have high proportions of low-income students.”).

⁶³ I itemize the entire list of reasons that opponents of race-based affirmative action give for their opposition in Bridges, *Class-Based Affirmative Action*, *supra* note 12, at 80–94.

⁶⁴ See KAHLBERG & POTTER, *supra* note 12, at 5 (citing research showing that “86 percent of African Americans at selective colleges were either middle or upper class” as a reason to oppose race-based affirmative action); Malamud, *supra* note 12, at 939 (“To its critics, one of the flaws of race-based affirmative action is that its main beneficiaries are economically privileged members of the eligible minority groups.”); Antonin Scalia, *The Disease as Cure: “In Order To Get Beyond Racism, We Must First Take Account of Race,”* 1979 WASH. U. L. REV. 147, 153–54 (1979) (articulating that he opposes race-conscious admissions pro-

They are class-privileged, after all. If anyone needs help, they argue, it is the poor. And, as a general matter, race-based affirmative action does not benefit poor people.

It is true that poor students generally do not benefit from race-conscious admissions programs;⁶⁵ it is also true that educational institutions should make efforts to ensure that they include poor students. However, these facts say nothing about the propriety of race-based affirmative action programs. Class-conscious admissions programs and race-conscious admissions programs are not mutually exclusive; they both can be appropriate and just.

However, opponents of race-based affirmative action argue that race-conscious programs, unlike their class-based counterparts, are inappropriate and unjust. They argue that these programs are illegitimate, in part, because they benefit members of the black middle class—persons who are not disadvantaged, they argue.⁶⁶ The evidence that this is simply not true is not hard to find. Something has made it impossible for us to see or to take seriously this disadvantage. What follows in the subsequent Parts is an attempt to explain this invisibility.

Again, it is paramount that we see and take seriously the disadvantage that class-privileged people of color experience because the invisibility of this disadvantage makes post-racial thinking more tenable. Post-racialism, which asserts that race simply does not matter anymore, thrives in a context in which poor people of color appear to be the only people of color who are disadvantaged. If indigent people of color are the only people of color who are burdened, class appears to be the best explanation of their suffering.

grams because he is “not willing to prefer the son of a prosperous and well-educated black doctor or lawyer—solely because of his race—to the son of a recent refugee from Eastern Europe who is working as a manual laborer to get his family ahead”).

⁶⁵ See KAHLBERG & POTTER, *supra* note 12, at 5 (showing that poor students of color are rarely admitted to universities via race-based affirmative action programs).

⁶⁶ Justice Thomas made this argument during his Senate confirmation hearings. When asked to describe what he thought was wrong or unfair about race-based affirmative action programs, he said, “I believe it . . . doesn’t say that this kid has to come from a disadvantaged background, it doesn’t say that the kid has to have had problems in life. It is race-specific, and I think we all know that all disadvantaged people aren’t black and all black people aren’t disadvantaged. The question is whether or not you are going to pinpoint your policy on people with disadvantages, or are you simply going to do it by race.” *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 360 (1991) (statement of J. Clarence Thomas). Prior to this statement, Thomas had articulated support for affirmative action programs like the ones from which he had benefitted, saying that affirmative action programs back in his day were engaged in “an effort to determine whether kids had been disadvantaged, had socioeconomic disadvantages.” *Id.* at 358. Thus, to Thomas, socioeconomic disadvantages count. Because only some black people have these socioeconomic disadvantages, only some of them have the disadvantages that count. It is, therefore, unfair to implement programs that uniformly give black people “preferences” in admission because such programs will benefit black people without socioeconomic disadvantages.

What Thomas (and many, many others) miss here is that socioeconomic disadvantages do not constitute the universe of disadvantage. One can be advantaged socioeconomically, but disadvantaged in a range of other ways. See discussion *infra* notes 184–85 and accompanying text.

However, class cannot explain the burdens that class-privileged people of color endure. Instead, race must explain those burdens (and, likely, the burdens that poor people of color endure as well). It is for this reason that it is imperative for us to *see* the race-based burdens that class-privileged people of color experience in order to *see* that race continues to matter. And if we see that race continues to matter, the assertion that we have finally arrived at a post-racial society is placed on unsustainable grounds.

II. THE RACIAL DISCRIMINATION BINARY

When one canvasses the literature, one notices the emergence of two definitions of racial discrimination. Scholars and commentators almost invariably identify a form of discrimination that is the product of individual action and a form of discrimination that is the product of institutions/structures. This is the racial discrimination binary—the idea that, together, individualist racial discrimination and institutional/structural racial discrimination constitute the universe of racial discrimination.⁶⁷

The racial discrimination binary has functioned to obscure the race-based discrimination that class-privileged people of color experience, as its logic leads to the discrimination-class schema (which proposes that institutional discrimination is the primary cause of poor racial minorities' subordination while individualist discrimination is the form of racial discrimination that more affluent racial minorities encounter when they chance upon it). The logic of the discrimination-class schema leads, in turn, to the proposition that the racial discrimination that wealthier people of color typically

⁶⁷ See e.g., STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (1967) (“Racism is both overt and covert. It takes two, closely related forms: individual whites acting against individual blacks and the total white community against the black community. We call these individual racism and institutional racism.”); Ashley Doane, *Racial Discourse and Racial Politics*, 32 *CRITICAL SOC.* 255, 267 (observing that “the key division in the debate over the nature of racism is between the definition of racism as individual attitude or behavior (hatred, stereotyping, unequal treatment) and the view of racism as a set of systemic and institutional practices”); Gilbert C. Gee & Chandra L. Ford, *Structural Racism and Health Inequities: Old Issues, New Directions*, 81 *DU BOIS REV.* 115, 116–17 (2011) (“[T]he metaphor of an iceberg is useful for describing the levels at which racism operates. The tip of the iceberg represents acts of racism, such as cross-burnings, that are easily seen and individually mediated. The portion of the iceberg that lies below the water represents structural racism; it is more dangerous and harder to eliminate.”); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 *YALE L.J.* 1717, 1811 (2011) (“Purposeful racism is directed racial status-enforcement motivated by an intent to discriminate harmfully. Institutional racism is directed or undirected racial status-enforcement influenced in an unrecognized manner by racial institutions.”); Pager & Shepherd, *supra* note 57, at 182 (noting that scholars have created a “two-part definition” of racism that includes “individual discrimination” alongside “institutional processes”); William M. Wiecek, *Structural Racism and the Law in American Today: An Introduction*, 100 *KY. L.J.* 1, 3 (2012) (noting that “sociologists have distinguished between two manifestations of racism: [t]raditional racism, of the Jim Crow, Ku Klux Klan variety” and “[s]tructural racism, also known as institutional racism”).

endure is unsystematic, trivial, or nonexistent. This proposition leads, in turn, to post-racialism. The balance of this Part unpacks this claim.

Before beginning, it is worth noting that, in reality, the dichotomy between individualist and institutional discrimination is a false one. Apparent acts of individualist discrimination are frequently informed by institutional processes. Indeed, institutions *create* individualist discrimination in an important sense. I unpack the blurriness that actually categorizes the boundary between these two modalities of discrimination in Part III. However, despite the mutually constitutive nature of the two, scholars have tended to conceptualize them as strictly dichotomous—a circumstance that leads to the discrimination-class schema and, ultimately, post-racial thinking.

A. *Individualist Racial Discrimination*

Scholars commonly understand individualist racial discrimination as acts that individuals take that function to harm, stigmatize, or otherwise disadvantage a member of a racial group. What makes it racial discrimination is that the individual acts so as to injure the affected party *because of* the affected party's racial group membership.

Writing on the heels of the Civil Rights Movement, psychologist Joel Kovel proposed a schema of individualist racial discrimination that has been quite influential.⁶⁸ Using the language of racism, he identified two types of individualist racial discrimination: dominative racism and aversive racism. Dominative racism is the species of racial discrimination that the average person probably most associates with the term “racism.” It is characterized by a belief in the superiority of the racial in-group and the inferiority of the racial out-group.⁶⁹ Dominative racists are expected to have feelings of hatred, malice, and/or animus towards the targeted racial groups.⁷⁰ They are “bigots,” “segregationists,” and “white supremacists.” Race scholars sometimes refer to dominative racism as “traditional racism” because it is the mechanism that perpetuated racial disadvantage in the decades and centuries that preceded the modern civil rights era. Thus, when members of the Ku Klux Klan burn crosses on the lawns of black families, when anti-Semites deface synagogues by spray-painting them with swastikas, and when employers refuse to hire a qualified job candidate because she is Muslim,⁷¹

⁶⁸ See JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* 3 (1970).

⁶⁹ See *id.* at 32.

⁷⁰ See *id.* at 189.

⁷¹ I have argued elsewhere that “Muslim” and “Jewish,” as well as “Mexican” and “Puerto Rican” are racial categories—even though they do not comfortably fit within racial schematizations that posit the existence of four or five races. See Bridges, *Dangerous Law*, *supra* note 24, at 39–40. These schematizations would understand “Muslim” and “Mexican” to be “religions,” “ethnicities,” or “nationalities”—and not races. I reject these types of schematizations because they are premised on scientifically discredited theories of biological race. *Id.* at 29–36. Moreover, they obscure the work that categories like “Muslim” and “Mexican” do

most people see old-school, individualist, dominative racism and the perpetrators of them as old-school racists.

Race scholars conceptualize aversive racism as the subtler, more modern cousin of dominative racism. As psychologists John Dovidio and Samuel Gaertner, who have written extensively about the topic, explain, “[a]versive racists . . . sympathize with victims of past injustice, support the principle of racial equality, and regard themselves as nonprejudiced, but, at the same time, possess negative feelings and beliefs about blacks, which may be unconscious.”⁷² The Implicit Association Test is probably the most widely recognized measure of aversive racism, or implicit bias.⁷³ The test places users under considerable time constraints and asks them to link images of black and white faces with pleasant and unpleasant words. The test tends to show that the association between white faces and pleasant words (and vice versa) is much stronger than the association between black faces and pleasant words (and vice versa).⁷⁴ This is true even for test takers who disavow harboring any racial animus and who profess a commitment to the ideal of racial equality.⁷⁵

There is now a substantial literature documenting the phenomenon of “implicit bias” or “unconscious racism.”⁷⁶ This literature is comprised of studies that reveal, for example, that people become much more frustrated and hostile when they are asked to repeat a task after being flashed subliminally with the face of a black person, that people feel like the criminal justice system should be much more punitive after being shown a crime story that features the mugshot of a black person, and that people are much more likely to shoot an unarmed black person than they are an unarmed white person and are much more likely *not* to shoot an armed white person than they are

to order society and to distribute resources towards and away from certain groups—much like the traditional racial categories of “black,” “white,” “Asian,” etc. *Id.* at 39–40.

⁷² John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 1, 3 (2004).

⁷³ See *Preliminary Information for Taking an Implicit Association Test*, PROJECT IMPLICIT <https://implicit.harvard.edu/implicit/takeatest.html> [<https://perma.cc/XBJ4-G4BX>].

While recent studies documenting implicit bias tend to rely on cognitive science, one of the first theorizations of implicit bias in legal scholarship relied instead on Freudian psychoanalytic theory. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987). Lawrence theorized that while the ego accepted the post-civil rights era social norm of racial inequality, the id still harbored socially unacceptable ideas about racial minorities. *Id.* at 335–36. Unconscious racism/implicit bias is the product of the ego’s attempt to censor the id. *Id.*

⁷⁴ Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 *CONN. L. REV.* 931, 956–57 (2008).

⁷⁵ *Id.* at 962.

⁷⁶ Implicit bias does have its naysayers, though. See, e.g., Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 *OHIO ST. L. J.* 1023 (questioning the validity of studies that purport to demonstrate the existence of implicit bias).

not to shoot an armed black person.⁷⁷ Legal scholars have written volumes about what the existence of implicit bias should mean for the law.⁷⁸

Of course, dominative racism and implicit bias do not constitute the universe of individualist racial discrimination. Sociologist Eduardo Bonilla-Silva, for one, has argued that we cannot properly categorize the ideology that supports and justifies racial inequality in the present as either dominative racism or a product of implicit bias.⁷⁹ He writes that individualist racial discrimination in its modern iteration “has rearticulated elements of traditional liberalism (work ethic, rewards by merit, equal opportunity, individualism, etc.) for racially illiberal goals.”⁸⁰ Thus, according to Bonilla-Silva, modern-day discriminators do not necessarily hate people of color; that is, they are not dominative racists. Neither are modern-day discriminators unconscious of their racial biases; that is, they do not have implicit biases. Instead, they *consciously* believe racial minorities to be culturally inferior (i.e., lazy, in possession of problematic values, work averse, inclined to criminality).⁸¹ Accordingly, Bonilla-Silva offers a species of individualist racial discrimination that captures individuals’ beliefs in stereotypes about

⁷⁷ See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1491–93 (2005) (discussing these studies).

⁷⁸ See, e.g., Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. REV. 481 (2005); Justin D. Levinson, Robert J. Smith, & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513 (2014); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE. L.J. 2626 (2013); Cass R. Sunstein & Christine Jolls, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006).

Notably, Justice Scalia once articulated his sense that the existence of implicit bias should mean *nothing* for the law. In *McCleskey v. Kemp*, the Court declared the constitutionality of the death penalty despite good statistical evidence that racial bias made it more likely that black defendants would be sentenced to death. 481 U.S. 279, 279–82 (1987). The evidence suggested that the biases that led juries to vote for the death penalty for black defendants—and the biases that led prosecutors to seek the death penalty in the first instance—were implicit: These actors likely were not aware of them. In response to this evidence, Justice Scalia wrote a memo to his colleagues in which he stated that while implicit biases likely made the criminal justice system a deadlier space for black people, this fact was insignificant to him:

I do not share the view, implicit in [the draft opinion in *McCleskey v. Kemp*], that an effect of racial factors upon sentencing, if it could be shown by sufficiently strong statistical evidence, would require reversal. . . . Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial [decisions], is real, acknowledged [in the decisions] of this court and ineradicable, I cannot honestly say that all I need is more proof.

Memorandum to the Conference from J. Antonin Scalia in No. 84-6811—*McCleskey v. Kemp* (Jan. 6, 1987) (on file in the Thurgood Marshall Papers, Library of Congress), *quoted in* Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights and Remedies from the Perspective of Justice Antonin Scalia’s McCleskey Memorandum*, 45 MERCER L. REV. 1035, 1038 (1994).

⁷⁹ See BONILLA-SILVA, *supra* note 49, at 1–4.

⁸⁰ *Id.* at 7.

⁸¹ *Id.* at 2.

members of a racial out-group. That is, when individualist racial discrimination is conscious, it does not have to be the stuff of race-based animus; it can simply be assumptions about the characteristics that members of racial out-groups invariably or usually possess.

While dominative racism, implicit bias, and racial stereotypical thinking are probably the most widely-known iterations of individualist racial discrimination, there are other iterations of individualist racial discrimination that do not comfortably fit within these categories. For example, economist Gary Becker has theorized that sometimes people discriminate because they have a “taste” for it; they simply have a (likely irrational, but definitely costly) desire to associate with or disassociate from a group and its members.⁸² These individuals—who do not want to dominate members of the racial out-group, do not believe in stereotypes about members of the racial out-group, nor are unconscious of their racial biases—are still perpetrators of individualist racial discrimination.

Other theorists have offered the concept of “statistical discrimination,” which occurs when persons discriminate against an individual because he belongs to a group that is statistically more likely to engage in a behavior or to possess a characteristic that the decision-maker finds problematic.⁸³ Privacy scholar Lior Strahilevitz helpfully provides the example of an employer who is disinclined to hire ex-felons in a context in which black males are disproportionately represented among the population of persons who have been convicted of a felony.⁸⁴ In an attempt to avoid hiring ex-felons, this employer may engage in statistical discrimination against black males; that is, he may not hire any individual black male candidate, as the candidate belongs to a group that is statistically more likely to possess characteristics (i.e., the status of being an ex-felon) that the employer finds problematic.⁸⁵ Statistical discriminators, who *rationaly* disadvantage persons on the basis of their group membership, are still perpetrators of individualist racial discrimination.

B. Institutional Racial Discrimination

Scholars credit political activist Stokely Carmichael and sociologist Charles Hamilton with first using the term “institutional racism.”⁸⁶ In their 1967 tome, *Black Power: The Politics of Liberation in America*, they distin-

⁸² GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 6 (1957).

⁸³ Hanming Fang and Andrea Moro, *Theories of Statistical Discrimination and Affirmative Action: A Survey*, in *HANDBOOK OF SOCIAL ECONOMICS* 133, 134–35 (Jess Benhabib, Matthew O. Jackson, and Alberto Bisin eds., 2011).

⁸⁴ Lior Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 366 (2008).

⁸⁵ *Id.* at 365–66.

⁸⁶ López, *supra* note 67, at 1826.

guished individual acts of racism from a source of racial disadvantage that was more covert and subtle, writing:

When white terrorists bomb a black church and kill five black children, that is an act of individual racism, widely deplored by most segments of the society. But when in that same city—Birmingham, Alabama—five hundred black babies die each year because of the lack of proper food, shelter and medical facilities . . . that is a function of institutional racism.⁸⁷

The term became popular over the course of the next several decades, as it gestured to the processes that maintained racial inequality in the post-civil rights era despite the seemingly obvious decline in individualist racial discrimination.⁸⁸ Although widely used, even those on the political left criticized the concept as not being fully fleshed out and, therefore, lacking in explanatory power. Indeed, early in the concept's life, social theorists "warned that the term 'institutional racism' would forever be a political slogan lacking in analytical rigor until it could be more precisely conceptualized, theorized, and subject to empirical investigation."⁸⁹

Interestingly, commentators have made a similar assessment of the concept in more recent years, decades after it was first critiqued as being under-theorized. More than thirty years after Carmichael⁹⁰ and Hamilton coined the term, critical race theorist Ian Haney López observed that "'[i]nstitutional racism' seems to function more often as a label for a problem than as a theory of social behavior. A theory of 'institutional racism' has been elusive."⁹¹ Scores of scholars have attempted to answer the call to define⁹² and

⁸⁷ CARMICHAEL & HAMILTON, *supra* note 67, at 4.

⁸⁸ López, *supra* note 67, at 1726.

⁸⁹ Coretta Phillips, *Institutional Racism and Ethnic Inequalities: An Expanded Multilevel Framework*, 40 J. OF SOC. POL'Y 173, 173 (2011).

⁹⁰ Carmichael later changed his name to Kwame Ture. See *Stokely Carmichael: Biography*, <http://www.biography.com/people/stokely-carmichael-9238629#joining-the-black-panther-party> [<https://perma.cc/Y3FE-LY54>].

⁹¹ López, *supra* note 67, at 1726–27. He goes on to identify two possible definitions: "For some, institutional racism amounts to intentional racism in institutions—that is, purposeful discrimination in formally organized settings. For others, it refers to widespread race-neutral practices that impose harmful effects on minority communities, irrespective of the actions or attitudes of individual decision makers." *Id.* at 1727.

⁹² See, e.g., Gee & Ford, *supra* note 67, at 117 ("Structural racism is defined as the macrolevel systems, social forces, institutions, ideologies, and processes that interact with one another to generate and reinforce inequities among racial and ethnic groups[.]"); Wiecek, *supra* note 68, at 5 ("Structural racism is a complex, dynamic system of conferring social benefits on some groups and imposing burdens on others that results in segregation, poverty, and denial of opportunity for millions of people of color. It comprises cultural beliefs, historical legacies, and institutional policies within and among public and private organizations that interweave to create drastic racial disparities in life outcomes.").

theorize⁹³ institutional racism—or what this article calls “institutional racial discrimination”—with precision.⁹⁴

⁹³ Theorizations of institutional racial discrimination tend to feature four elements. First, most definitions include a lack of intentionality. That is, most scholars posit that the laws, policies, procedures, and programs that function to produce racial inequality—specifically, a racial hierarchy in which white people, as a group, are doing much better than most minority groups—do not have racial subordination as their purpose or design. See, e.g., John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 794-95 (2008) (stating that “racism need not be . . . intentional,” but noting the foreseeability of unintended racial harms). Second, most definitions include an element of banality. That is, the practices that sustain racial inequality are not spectacular. Quite the contrary, they are everyday, prosaic, mundane, ordinary. See, e.g., Doane, *What is Racism? Racial Discourse and Racial Politics*, 32 CRITICAL SOCIOLOGY 255, 267–68 (2006) (describing “structural or systemic racism” as a concept that understands “racial inequality [to be] a pervasive aspect of everyday life and the normal functioning of institutions”) (emphases added). Third, most definitions include an element of race neutrality—the absence of any explicit invocation of race. The idea is that the things that sustain racial inequality are myriad, and the most consequential of them reproduce racial hierarchies without mentioning race at all. See, e.g., López, *supra* note 67, at 1730 (“Racism occurs frequently—and perhaps predominately without any specific invocation of race[.]”). Fourth and finally, most definitions note the irrelevance of the “bad actor.” That is, there is no evil “man behind the curtain” designing and operating the institutions that form the stuff of institutional racial discrimination. According to most definitions, actors—be they good, bad, or indifferent—are irrelevant in the grand scheme of things, as they play a minuscule role in something that is much bigger than themselves. See, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1852 (1994) (“[E]ven in the absence of racism, race-neutral policy could be expected to entrench segregation and socio-economic stratification in a society with a history of racism There is no racist actor or racist policy in this model, and yet a racially stratified society is the inevitable result.”); López, *supra* note 16, at 1040 (noting that some theories of institutional racial discrimination “lack not only intent, but even actors”).

⁹⁴ There remains the question of whether institutional racial discrimination is a synonym for structural racial discrimination, or whether the terms refer to two different phenomena. While most theorists conceptualize the two as synonymous, some differentiate “institutions” and “structures,” and thus differentiate institutional racial discrimination and structural racial discrimination. For example, race theorist John Powell contends that the term “institutional racism” focuses on “intra-institutional dynamics,” referring to the “practices and procedures within an institution” that may have the unintended consequence of disadvantaging racial minorities as a group. Powell, *supra* note 93, at 795–96. He theorizes that the concept of “structural racism” is different, referring to the way that several institutions “interact to produce racialized outcomes.” *Id.* at 793. Thus, within Powell’s schema, a theorist concerned with identifying and dismantling “institutional racism” will be looking within a single, isolated institution for those programs that function to reproduce racial hierarchies. Meanwhile, a theorist concerned with identifying and dismantling “structural racism” will be observing how the practices of multiple institutions, operating within multiple fields, combine in such a way that racial minorities, as a group, are sustained in a subordinate social position. While the goal of Powell’s intervention is to encourage theorists to engage in more systemic, wide-ranging, sweeping analyses of racial discrimination, that work has been done under the banner of “institutional racism” as often as it has been done under the “structural racism” banner. Consequently, today, most theorists thinking about race consider the two terms to be interchangeable. See, e.g., Mario L. Barnes, “*The More Things Change. . .*”: *New Moves for Legitimizing Racial Discrimination in a “Post-Race” World*, 100 MINN. L. REV. 2043, 2096 (2016) (using “structural racism” and “institutional racism” interchangeably); Meera E. Deo, *The Ugly Truth about Legal Academia*, 80 BROOK. L. REV. 943, 951–52 (2015) (“What social scientists call ‘structural racism’ and legal academics call ‘institutional racism’ largely refer to the same ‘complex, dynamic system of conferring social benefits on some groups and imposing burdens on others that results in . . . denial of opportunity for millions of people of color.’”).

Perhaps the biggest controversy around the concept of institutional racial discrimination pertains not to its definition or its contours, but rather to its existence. Many persons—especially those on the political right—are skeptical that there is such a thing called institutional racial discrimination and, if it exists, whether it explains as many social outcomes as progressive race scholars and other sympathizers on the political left believe. For example, in his dissent in *Grutter v. Bollinger*, Justice Thomas did more than rail against race-conscious admissions policies, those who have been admitted pursuant to race-based affirmative action programs, and elitism within legal academia; he also expressed his disapproval of the concept of “institutional racism.”⁹⁵ Thomas theorized that the admissions plan at issue in the case “nearly guaranteed” that black applicants with less than stellar LSAT scores would be admitted to the University of Michigan Law School.⁹⁶ He conjectured that the plan disincentivized black students from studying vigorously for the LSAT.⁹⁷ He suggested that maybe such disincentives were the real reason why black people, as a group, do not perform as well as white people on the LSAT and other standardized tests.⁹⁸ He then acknowledged the speculative nature of his claim and, in the process, took a jab at the concept of “institutional racism”:

It is far from certain that the LSAT test-taker’s behavior is responsive to the Law School’s admissions policies. Nevertheless, the possibility remains that this racial discrimination [in the form of race-conscious admissions programs] will help fulfill the bigot’s prophecy about black underperformance—just as it confirms the conspiracy theorist’s belief that “institutional racism” is at fault for every racial disparity in our society.⁹⁹

To Thomas and like-minded persons, institutional racial discrimination is the stuff of conspiracy theory. Believing that it explains present-day racial stratification is akin to believing that the moon landing was staged in a Hollywood movie lot,¹⁰⁰ or that Tupac is alive and well and living in Cuba.¹⁰¹ However, while it may take an irrational level of skepticism to believe that Neil Armstrong actually was in Los Angeles instead of on the moon in July 1969, and that Tupac Shakur miraculously dodged the hail of bullets that

⁹⁵ 539 U.S. 306, 349–78 (2003) (Thomas, J., dissenting).

⁹⁶ *Id.* at 377.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See, e.g., Ker Than, *Photos: 8 Moon-Landing Hoax Myths – Busted*, NATIONAL GEOGRAPHIC, <http://news.nationalgeographic.com/news/2009/07/photogalleries/apollo-moon-landing-hoax-pictures/> [<http://perma.cc/55AS-Q9WM>] (noting that “[f]orty years after U.S. astronaut Neil Armstrong became the first human to set foot on the moon, many conspiracy theorists still insist the Apollo 11 moon landing was an elaborate hoax”).

¹⁰¹ Maryse Farag, *WTF? Tupac Shakur Has Been Spotted Alive and Living in Cuba*, SUN, <https://www.thesun.co.uk/archives/news/202716/wtf-tupac-shakur-has-been-spotted-alive-and-living-in-cuba/> [<https://perma.cc/JJ45-627B>].

reportedly killed him in September 1996, it does not take an irresponsible level of naiveté to believe that ostensibly race-neutral policies operate so as to make black people and other racial minorities poorer, sicker, more incarcerated, more racially isolated, and less politically represented than their white counterparts. Indeed, scholars have identified numerous institutional mechanisms that produce and reproduce our existing racial hierarchies.¹⁰²

Indeed, it is hard to dispute that many of the policies and practices that race scholars have identified as “institutional racism” do, in fact, disadvantage racial minorities. For example, few would deny that the funding of public schools through property taxes disadvantages racial minorities who, as a group, live in neighborhoods that are poorer and, consequently, have less to offer in property taxes than their white counterparts.¹⁰³ However, the disagreement might lie in whether it is appropriate to identify this funding structure as an example of *racial discrimination*.

C. *The Discrimination-Class Schema: Different Strokes (of Discrimination) for Different Folks*

An analysis of the literature reveals that the racial discrimination binary is part of a more elaborate schema of racial disenfranchisement, with different groups of racial minorities imagined to be affected by different forms of racial discrimination. To be precise, scholars tend to imagine that poor people of color, specifically poor black people, are largely victims of institutional racial discrimination; thinkers propose that macro processes of racial disenfranchisement best explain this group’s marginalization.¹⁰⁴ On the other

¹⁰² See, e.g., Kimberle Crenshaw, Neil Gotanda, Gary Pellar & Kendall Thomas, *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xxix (1996) (noting that present-day ideas about what constitutes “merit”—defined as a resume that features high standardized test scores, high grades, and extracurricular and volunteer activities—is “a mechanism for perpetuating the distribution of rights, privileges, and opportunity” that benefits white people to the detriment of black people); Wiecek, *supra* note 67, at 5 (identifying as institutional racial discrimination the exclusion of agricultural and domestic workers—groups that included most black laborers—from the class of workers eligible for Social Security benefits in 1935, thereby eliminating black people “from even the most modest opportunity that whites enjoyed for wealth accumulation and survival assistance in economic downturns”).

¹⁰³ See Pager & Shepherd, *supra* note 57, at 198 (noting that public schools are subject to funding disparities because they are funded with property taxes, which produces the circumstance that “the broader resources of schools in poor neighborhoods are substantially limited”).

¹⁰⁴ It is worth reiterating that one can only believe that macro processes of racial disenfranchisement explain the marginalization of poor people of color, and poor people more generally, when one rejects individualist explanations of poverty. See KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 35–36 (2017) (explaining that individualist explanations of poverty embrace the idea that “people are poor because there is something wrong with them,” i.e., they are work averse, irresponsible, criminally inclined, promiscuous, unable to delay gratification). Significantly, a majority of Americans presently embrace these explanations of poverty over more structuralist ones. *Id.* at 43–44 (discussing the “substantial literature documenting that the most favored explanation of poverty in the United States is one that identifies individual behaviors as the root of indigence”).

hand, scholars tend to imagine that wealthier people of color, for the most part, have escaped the macro processes of racial disenfranchisement that have ensnared their poorer counterparts. This results in the belief, even in politically liberal circles, that wealthier people of color are not affected by racial discrimination, or, if affected, it is by relatively insignificant individual acts of racial discrimination.

Now, this is not to argue that we have come to conceptualize poor people of color as *never* being affected by individualist racial discrimination and wealthier people of color as *never* being affected by institutional racial discrimination. Quite the contrary, we do appreciate that the different modalities of racial discrimination affect both the poor and their more affluent counterparts. However, we do not believe that they affect the poor and the more affluent equally. Instead, we have come to conceptualize institutional racial discrimination as *predominately* affecting poor people of color; that is, we have come to believe that their spectacular deprivation is the result of institutional discriminatory processes—not individual encounters with discrimination. Meanwhile, we have come to conceptualize the racial discrimination that wealthier people of color encounter—when they encounter it—as *usually* of the individualist variety. The discrimination-class schema maps our tendency to explain the poor’s marginalization largely in terms of institutional racial discrimination and the more affluent’s marginalization largely in terms of individualist racial discrimination.

1. *Wealthier Racial Minorities as Victims of Individualist Racial Discrimination*

When scholars and other commentators conceptualize racial discrimination as affecting and disadvantaging wealthier racial minorities, they are usually talking about individualist racial discrimination. The book, *Living with Racism: The Black Middle-Class Experience*, is representative of this phenomenon.¹⁰⁵ Its authors, Joe Feagin and Melvin Sikes, offer the book as a response to Wilson’s claim in 1978 that race had been declining in significance.¹⁰⁶ Feagin and Sikes counter with the position that not only does race continue to be significant for the black middle class, but *racial discrimination* remains significant to this class-privileged group.¹⁰⁷ However, they use examples of individualist racial discrimination as proof of their claim. Indeed, the book brims with stories about class-privileged black people’s encounters with “old-school,” dominative racism. Interlocutors tell stories of being refused service at hotels and restaurants;¹⁰⁸ of being followed around

¹⁰⁵ FEAGIN & SIKES, *supra* note 17.

¹⁰⁶ See *infra* notes 108–115 and accompanying text.

¹⁰⁷ See FEAGIN & SIKES, *supra* note 17, at 15–18 (discussing “racism as an everyday experience” for the black middle class).

¹⁰⁸ *Id.* at 39–40.

in stores;¹⁰⁹ of being called racial slurs and threatened with physical violence;¹¹⁰ of being told that they were unqualified and that they were admitted to competitive colleges only due to affirmative action.¹¹¹ Indeed, the book even contains a story about a man whose family was subjected to harassment by a member of the Ku Klux Klan¹¹²—the classic symbol of dominative, individualist racism. Further, for Feagin and Sikes, the solution to the continuing significance of race to the black middle class is not institutional transformation, as structures and institutions are not implicated in the type of racial discrimination that they identify as affecting the middle class. Instead, Feagin and Sikes argue that the solution lies in changing the hearts and minds of white people, who are responsible for perpetrating, or remaining indifferent to, individualist racial discrimination:

Until whites recognize that they have been raised in a racist society and harbor its hidden influence even when they deny it, until whites recognize that they too must take action to deal with personal and societal racism, no matter how subtle, and to eradicate it, the racial situation in the United States will only worsen.¹¹³

This is to say that Feagin and Sikes offer individualist racial discrimination as the discrimination that affects wealthier black people. Indeed, one is hard pressed to conceptualize any of the narratives of racial subordination contained in the book as stories of institutional discrimination.¹¹⁴

One can also witness in the debates over race-based affirmative action the conceptualization of individualist racial discrimination as the discrimination that primarily affects racial minorities with class privilege when they encounter race-based disadvantages. In response to the claim that middle-class racial minorities are race-based affirmative action's primary beneficiaries and do not deserve such "preferences," supporters of these programs often respond by pointing out that the class privilege that wealthier people of

¹⁰⁹ *Id.* at 43–44.

¹¹⁰ *Id.* at 50–61.

¹¹¹ *Id.* at 114.

¹¹² *Id.* at 261.

¹¹³ *Id.* at 321.

¹¹⁴ Quite telling is Feagin and Sikes's discussion of residential segregation. They offer individualist racial discrimination as the explanation for residential segregation, noting that a survey showed that 40% of white people expressed approval of a law that gave homeowners the right not to sell their homes to black people and observing that audit studies have documented that black people seeking apartments to rent and to buy are shown fewer units and steered towards different neighborhoods than white people with the same backgrounds. See FEAGIN & SIKES, *supra* note 17, at 22–28. These are acts of individualist racial discrimination. However, high levels of residential segregation, and the fact that black people with high incomes do not live in houses and neighborhoods that are comparable to those in which white people with the same incomes live, can be, and ought to be, explained in structural terms. See, e.g., ROITHMAYR, *supra* note 43, at 58 (stating that people of color have less wealth than white people—even when one controls for income—because of disadvantages that have been locked into the economy and, consequently, black people are less able to accumulate comparable wealth-generating assets, such as houses).

color enjoy does not eliminate all of their race-based disadvantages.¹¹⁵ They argue that, like their poorer brethren, middle-class racial minorities also experience racial discrimination. Yet, the evidence that they invariably offer is acts of individualist racial discrimination.

Consider Justice Sotomayor's dissent in *Schuette v. Coalition to Defend Affirmative Action*,¹¹⁶ in which the Court held that an amendment to a state constitution prohibiting race-consciousness in university admissions did not disturb the Equal Protection Clause. Sotomayor articulated her sense that a post-racial belief that race generally does not matter motivated the majority's decision to uphold the amendment. She disagreed, arguing that race matters because of the "persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities."¹¹⁷ Here, essentially, Sotomayor can be heard to argue that race matters because racial discrimination has produced racial minorities as disproportionately poor.

But she goes on. And, in light of the criticism that race-based affirmative action only benefits class-privileged racial minorities—a criticism that some of her brethren on the Court have made¹¹⁸—her next comments address the significance of race to those racial minorities who are not poor. She writes:

Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you really from?", regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."¹¹⁹

Here, Sotomayor cites several instances of racial marginalization that wealthier racial minorities are just as likely to experience as their poorer counterparts. But each instance is an individual act of racial discrimination. Thus, Sotomayor can be heard to argue that, in keeping with the understanding that individualist racial discrimination is typically the modality of race-

¹¹⁵ See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 56 (2012) ("Affirmative action's defenders often respond by pointing out the various ways in which even privileged blacks suffer racial discrimination.").

¹¹⁶ *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

¹¹⁷ See *id.* at 1676 (Sotomayor, J., dissenting).

¹¹⁸ See discussion of Scalia's and Thomas's opposition to race-based affirmative action, *supra* note 96 and accompanying text.

¹¹⁹ *Coal. to Defend Affirmative Action*, 134 S. Ct. at 1676 (Sotomayor, J., dissenting).

based disadvantage that wealthier racial minorities encounter whenever they come across such disadvantage, race matters because individual acts of racial discrimination injure those racial minorities who have managed to escape the structural forces that subordinate their poor counterparts.

Indeed, in my own defenses of race-based affirmative action, I have made the same rhetorical moves that Sotomayor makes in *Schuetz*: I have cited individualist racial discrimination as evidence of the significance of race to all racial minorities, including those with class privilege.¹²⁰ Riffing off of Sotomayor's defense of affirmative action in *Schuetz*, I wrote:

Race matters when a black woman is not assumed to be the owner of the home in front of which she stands. Race matters when a Latina's doctor offers her a long-acting contraceptive injection while this same doctor offers her counterpart with race privilege a simple birth control pill. Race matters even in hackneyed ways—when a black man finds it impossible to hail a cab in any major metropolitan city. It matters when police stop a black or Latino man while letting white men pass undisturbed. It is undeniable that class privilege ameliorates some of the effects that the lack of race privilege would otherwise produce. But, it should also be undeniable that even those racial minorities with class privilege have had the hurtful experiences described here. Race matters irrespective of class.¹²¹

All of the instances that I offer as evidence of the significance of race to wealthier racial minorities are acts of individualist racial discrimination.

This phenomenon—where examples of individualist discrimination are used to demonstrate the existence of racial subordination for wealthier people of color—is not limited to the affirmative action context. It happens in the criminal justice context as well. Many scholars have argued that racial profiling—and the fact that the practice is an indignity that communicates the profiled person's outsider status—is something endured by people of color of all socioeconomic statuses. In his exposition on the significance of the racial profiling of motorists, a practice that has been dubbed “driving while black,” legal scholar David Harris interviewed class-privileged black people and asked them to recount their experiences with being stopped by the police.¹²² He explained that his choice to interview black people who were not poor was intentional, as focusing on those with some privilege demonstrates that “‘driving while black’ is not only an experience of the young black male, or those at the bottom of the socioeconomic ladder. All blacks confront the issue directly, regardless of age, dress, occupation, or

¹²⁰ See Bridges, *Class-Based Affirmative Action*, *supra* note 12.

¹²¹ *Id.* at 92–93.

¹²² David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999).

social station.”¹²³ Thus, Harris essentially argues, “Wealthier black people are affected by racial discrimination, too!” And the practice that he offers to demonstrate his claim is racial profiling, a practice that best fits on the individualist side of the discrimination binary.¹²⁴

One can also find in the public health literature arguments about the impact of individualist racial discrimination on wealthier people of color. As noted above, racial disparities in health are well-documented.¹²⁵ Moreover, black people have increased levels of morbidity and mortality compared to white people across income levels.¹²⁶ That is, even wealthier people of color are being affected by processes and/or practices that limit the quality and length of their lives. Recent scholarship has attempted to explain racial disparities in health among the wealthy. And, as we might expect given the discrimination-class schema that this Part has identified and outlined, these recent explanations detect individualist racial discrimination as the culprit.¹²⁷ As physician Jack Geiger writes, “[R]acial and ethnic discrimination itself may be an important contributor to health disparities, not merely through the historic and persistent disadvantages it creates for minorities in the American social structure, but also specifically through health provider bias—conscious or unconscious. . . .”¹²⁸ Thus, Geiger can be heard to argue that while

¹²³ *Id.* at 269–70 n.18.

¹²⁴ Actually, there may be reasonable disagreement about whether racial profiling by law enforcement is best understood as a species of individual racial discrimination or institutional racial discrimination. While individual police officers engage in the practice, there may be institutional elements to it as well. For example, it may not be individual police officers who engage in the practice so much as police departments. If so, then the practice seems more like one that is perpetrated by institutions rather than individuals. Further, there is the fact that the Court has interpreted the Fourth Amendment and the Equal Protection Clause to permit racial profiling. *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Whren v. United States*, 517 U.S. 806 (1996). Thus, when one views the practice within the context of the Constitution, one sees that individuals engage in the practice only because larger structural forces allow it. This fact may lead to the conclusion that racial profiling by law enforcement is better conceptualized as an instance of institutional racial discrimination.

¹²⁵ See *supra* notes 22, 27, 28, 30 and accompanying text.

¹²⁶ See WILSON, *supra* note 13, at 188 (noting that black people “at all levels of income have lower life expectancy and higher levels of mortality than comparable whites”).

¹²⁷ Some explanations of why racial disparities in health persist across the socioeconomic spectrum look to the imagined biological/genetic differences between the races. See H. Jack Geiger, *Racial and Ethnic Disparities in Diagnosis and Treatment: A Review of the Evidence and a Consideration of Causes*, in UNEQUAL TREATMENT, *supra* note 31, at 418 (noting that some studies have explained racial disparities in health with the idea that “there are biologically and genetically distinct human races, and that ‘racial’ biologic differences in susceptibility to, manifestations of, or therapeutic responses to specific diseases are significant pathophysiologic contributors to health disparities”). However, good science has debunked the idea that racial disparities reflect biological/genetic differences, as the idea is premised on the fallacy that racial groups represent populations of genetically similar individuals. See Bridges, *Dangerous Law*, *supra* note 24, at 28–36 (discussing the idea of biological race and the wealth of studies disproving its existence).

¹²⁸ Geiger, *supra* note 127, at 418. If we can explain racial disparities in health among those with class privilege in terms of individual bias, the bias may involve thinking of and treating racial minorities with class privilege as indistinguishable from racial minorities with-

structural racial discrimination has decreased the quality and length of life of poor people of color, individualist racial discrimination has done the same to wealthy people of color. The discrimination-class schema is readily apparent.

Other explanations of racial disparities in health across income levels similarly look to the effects of individualist racial discrimination on wealthier people of color. However, these alternative explanations subordinate the significance of provider bias to the significance of a life filled with encounters with individualist racial discrimination. For example, pediatrics professor J.W. Collins notes that racial disparities in infant mortality rates persist across class.¹²⁹ He then attributes elevated rates of infant morbidity among wealthier women of color to “interpersonal racial discrimination.”¹³⁰ That is, the wealthier black women living in high-income Chicago neighborhoods whom he studied counted mostly white people among their neighbors.¹³¹ He conjectures that daily interaction with white people acted as a stressor on the black women studied, thereby increasing their likelihood of giving birth to a preterm infant.¹³² In essence, Collins offers that—in keeping with the discrimination-class schema—wealthier people of color are encountering individualist racial discrimination, and it is shortening their lives.

2. *Poor Racial Minorities as Victims of Institutional Racial Discrimination*

Accounts of institutional racial discrimination seem to suggest that it is primarily poor racial minorities who are its victims. Such accounts suggest that wealthier racial minorities have managed to escape these large-scale processes unscathed.

Consider sociologist William Julius Wilson’s highly influential, and supremely controversial, analysis of the shift that has occurred in the mechanisms that sustain racial hierarchies.¹³³ In *The Declining Significance of Race*, Wilson made the case that, while black people, as a group, had been subordinated by explicitly race-based policies and practices in the pre-civil rights era, this was not true in contemporary times.¹³⁴ Instead, class-based processes now produced black people’s subordinated social position.¹³⁵

out class privilege. *See id.* at 443 (describing a clinician who said that race is used in the clinical encounter because it is understood as being “a proxy for socioeconomic status”).

¹²⁹ *See* Collins, *supra* note 27, at 113.

¹³⁰ *Id.* at 116.

¹³¹ *Id.*

¹³² *See id.* (“An expanding literature provides evidence that African American women’s lifetime exposure to interpersonal racial discrimination is a strong independent risk factor for [having a baby with very low birth weight]. We previously found that the association is strongest among college-educated women, a subgroup most likely to have a lifelong residence in high-income neighborhoods.”).

¹³³ *See* WILSON, *supra* note 13.

¹³⁴ *Id.* at 1–2.

¹³⁵ *Id.*

Hence the title of the book: race was no longer as significant as it had been in years past in explaining racial stratification. Class now had greater explanatory power.

Wilson argues that structural transformations in the economy—the advent of “labor-saving innovations, relocation of industry, labor market segmentation, and the shift from goods-producing to service-producing industries”—are responsible for the present-day subordination of black people.¹³⁶ While these structural shifts have devastated the black poor, Wilson describes the black middle class as having escaped them entirely. Indeed, Wilson describes the black poor as languishing under the weight of these large-scale dislocations while the black middle class thrives.¹³⁷ Thus, if we identify as institutional racial discrimination these dislocations and the concomitant refusal by society to redistribute the burdens that they have produced,¹³⁸ then we can only fairly identify the black poor as its victims.

¹³⁶ *Id.* at 165.

¹³⁷ *See id.* at 22 (“As the black middle class rides on the wave of political and social changes, benefitting from the growth of employment opportunities in the growing corporate and government sectors of the economy, the black underclass falls behind the larger society in every conceivable respect.”).

In subsequent decades, Wilson realized that his portrait of the black middle class had been too sanguine, and he endeavored to qualify his assessment of the group by indicating the contingent nature of its successes. *See id.* at 192 (“[I]f I were writing *The Declining Significance of Race* today, I would . . . underline the role and importance of affirmative action programs. . . . I would discuss the impact of a possible contraction in government employment as well as waning public support for affirmative action on the occupational mobility of the more advantaged and educated African Americans.”).

¹³⁸ Of course, the million-dollar question may be whether we should understand these structural transformations as a species of institutional *racial discrimination*. Many would answer in the affirmative, arguing that “racial discrimination” aptly describes society’s complacency with allowing black people and other racial minorities to bear the brunt of these macro changes in the economy, the lack of political will to reallocate resources to make these structural dislocations less harshly felt by communities of color, and the general willingness to attribute responsibility for poverty to those people of color who are being made to live the indigence that these structural dislocations create. *See* Crenshaw, et al., *supra* note 102, at xxx (“The particularities of race and its persistent presence as an explicit rationalization of structural stratification in the current economy seem hardly to warrant discussion. One would think that the racial composition of the communities which have been chosen to bear the sharp edge of economic dislocation is altogether irrelevant. However, even a cursory review of current national discourses about public education, unemployment, education, immigration, and welfare reform (to take a few examples) demonstrates the degree to which questions of race and racial ideology stand at the very center of today’s debates.”).

Interestingly, it is unlikely that Wilson himself would identify the structural transformations that he describes and the policy choices that we have made (or have failed to make) in response to them as a species of racial discrimination. He seems to embrace a definition of racial discrimination that only includes race-based animus and hatred—dominative racism. In a reflection on *The Declining Significance of Race*, written some forty years after its initial publication, Wilson writes, “Race is still a very important factor in American society not only because of lingering racism, despite Obama’s election, but also because a disproportionate number of people of color concentrated at the very bottom of the economic ladder symbolizes the persistence of racial inequality in the United States.” WILSON, *supra* note 13, at 184. For Wilson, “racism” lingers; but it is something that is altogether distinct from the disproportionate number of black people among the poor. The latter reveals “racial inequality.” But it is not “racism.”

Meanwhile, the black middle class remains untouched, having evaded the ravages of institutional racial discrimination.¹³⁹

More recent investigations are apiece with Wilson's analysis insofar as they identify the black poor as subordinated by institutional mechanisms while suggesting that the black middle class has escaped these processes. Consider legal scholar James Forman's work on mass incarceration.¹⁴⁰ He has argued that framing the incarceration of a devastatingly high number of black people as a "New Jim Crow," an analogy that was popularized by Michelle Alexander's bestselling book,¹⁴¹ is inappropriate because it does not accurately capture the fact that wealthier people of color are not as vulnerable to the criminal justice system as are poor people of color. Whereas the "old" Jim Crow universally subordinated black people, rich and poor alike, mass incarceration today does not. He writes:

[I]ncreased income and educational attainment can bring a measure of protection against some of the criminal justice system's historic anti-black tendencies. Accordingly, in considering mass incarceration, any suggestion that blacks across classes are similarly situated in the face of American racism should be abandoned. . . . [Critical race theorist Mari] Matsuda pointed out that Japanese Americans across classes all shared a similar fate in internment camps during World War II. But prisons . . . are precisely the opposite of internment camps in this regard.¹⁴²

Essentially, Forman can be read to argue that, if the mass incarceration of black males that we witness today is the consequence of institutional racial discrimination in the criminal justice system, then *it is an institutional racial discrimination that has predominately impacted poor black people*. Wealthier black people's incomes allow them to avoid the "anti-black tendencies" of zero tolerance policies in public schools,¹⁴³ the "war on drugs,"¹⁴⁴ the heavy police presence in poor communities,¹⁴⁵ stop-and-frisk,¹⁴⁶ underfunded and overburdened public defender offices,¹⁴⁷ mandatory

¹³⁹ See also Read & Emerson, *supra* note 36, at 183 (arguing that "[r]acism, especially at the institutional level, is . . . the key mechanism through which race operates to perpetuate differences in socioeconomic status").

¹⁴⁰ See Forman, *supra* note 115.

¹⁴¹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

¹⁴² See Forman, *supra* note 115, at 57.

¹⁴³ Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, 92 *NEW DIRECTIONS FOR YOUTH DEVELOPMENT* 17 (2001).

¹⁴⁴ LEIF ROSENBERGER, *AMERICA'S DRUG WAR DEBACLE* 31 (1996).

¹⁴⁵ Arthur L. Burnett, *Race and National Origin As Influential Factors in Juvenile Detention*, 3 *D.C. L. REV.* 355, 356 (1995).

¹⁴⁶ Bennett L. Gershman, *Use of Race in "Stop and Frisk": Stereotypical Beliefs Linger, But How Far Can the Police Go?*, 72-*APR N.Y. ST. B.J.* 42, 42 (2000).

¹⁴⁷ Heather Perry Baxter, *At a Crossroads: Where the Indigent Defense Crisis and the Legal Education Crisis Intersect*, 18 *BERKELEY J. AFR.-AM. L. & POL'Y* 25, 27 (2016).

sentencing,¹⁴⁸ etc. Poor black people are the victims of these practices and programs that, together, comprise institutional racial discrimination in the criminal justice system. Class-privileged black people, on the other hand, are thought to have gone unaffected by this form of discrimination for the most part. Now, this is not to say that we, as a society, do not recognize those occasions when class-privileged people of color are burdened by the criminal justice system. For example, we certainly took notice when a white police officer arrested distinguished black Harvard professor, Henry Louis Gates, inside of his home in Cambridge, Massachusetts.¹⁴⁹ However, when class-privileged people of color find themselves encumbered by the criminal justice system, the tendency usually is to explain those events as an instance of a wealthier person of color getting swept up in the institutional processes that are designed for his poorer brethren. Or, in keeping with the racial-discrimination schema, we explain those events in terms of individualist racial discrimination. Indeed, after Gates's arrest, then-President Obama invited Gates and the officer who arrested him, Sergeant James Crowley, to the White House for a "Beer Summit," suggesting that Gates's arrest was nothing more than a conflict between two individuals that could be resolved over some ice-cold brews.¹⁵⁰

Scholars have also been willing to identify as institutional racial discrimination the failure of the Court to hold that poor people are a suspect class and/or that classifications on the basis of wealth are suspect.¹⁵¹ They

¹⁴⁸ Jeff Lazarus, *Making the Fair Sentencing Act Retroactive: Just Think of the Savings . . . Clause*, 61 CLEV. ST. L. REV. 713, 714 (2013).

¹⁴⁹ *How One Scholar's Arrest Tainted the President's Image as a Racial Healer*, WASH. POST, (Apr. 22, 2016), <https://www.washingtonpost.com/graphics/national/obama-legacy/henry-louis-gates-jr-arrest-controversy.html> [<https://perma.cc/R3SF-J24V>].

¹⁵⁰ *Id.* Of course, Gates's arrest ought not to be explained in terms of Crowley's (good or bad) judgment or personally-held beliefs about race. Gates's arrest, as well as most of the racialized encounters that class-privileged people of color have with the police and the criminal justice system, ought to be explained in institutional terms. As Capers explains, police officers often stop and frisk individuals when they appear not to "belong" in a neighborhood. See Capers, *supra* note 41. Thus, when black persons are in largely white areas, it produces a racial incongruity that may arouse a police officer's suspicions and lead to an encounter. Importantly, institutional and structural forces combine to produce areas as "largely white." Indeed, institutional racial discrimination produces the ubiquitous artifact that we call a "white neighborhood" (as well as the "black neighborhood," the "Mexican neighborhood," and so on). Thus, if Gates aroused the suspicion of the police (or his neighbor, who called the police because he thought that Gates might have been trying to break into his own home), it was because, as a black man in a white neighborhood, he looked "out of place." Institutional processes create the circumstance whereby individuals can appear to be "out of place."

This simply goes to show that the line between institutional racial discrimination and individual racial discrimination is a blurry one, with institutional processes reinforcing and making possible individual actions. I unpack the co-constitutive nature of institutional and individual racial discrimination in *infra* Part IV.

¹⁵¹ See, e.g., Margalynne Armstrong, *Privilege in Residential Housing*, in PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 43, 53 (Stephanie M. Wildman ed., 1996) ("Most frequently, courts protect the 'right' to engage in racial discrimination as an unspoken corollary of the right to discriminate on the basis of income."); Audrey G. McFarlane, *Operatively White? Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness*, 72 L. & CONTEMP. PROB. 163, 163 (2009) ("[S]ociety's unexam-

have noted that, in light of the fact that people of color disproportionately bear the burdens of indigence in this country, discrimination on the basis of income or wealth is tantamount to discrimination on the basis of race.¹⁵² Thus, the Court's refusal to give heightened judicial scrutiny to laws that have either the purpose or effect of burdening the poor essentially licenses discrimination against people of color.¹⁵³ Scholars have argued that this is a form of institutional racial discrimination.¹⁵⁴ Moreover, it is a form of institutional racial discrimination that only affects poor people of color. Wealthier people of color, by definition, are able to escape this race-neutral mechanism of racial subordination, as their class privilege means that they are burdened neither by laws that discriminate against the poor nor a jurisprudence that allows it.

It might be worth noting that those with liberal politics are not the only persons who are open to conceptualizing institutional racial discrimination as affecting, and marginalizing, poor people of color. Every so often one hears someone on the political right articulate this sense. An intriguing instance of this phenomenon occurred in the aftermath of Hurricane Katrina and its devastation of the Gulf Coast. Then President George W. Bush spoke about the "deep, persistent poverty" that "all of us saw on television."¹⁵⁵ He went on to explain that this deep, persistent poverty "has roots in a history of racial discrimination, which cut off generations from the opportunity of America."¹⁵⁶ In essence, Bush argued that those indigent black people who had experienced the trauma and devastation of being trapped in New Orleans after the levees broke were poor because processes that originated in "racial discrimination" had made it impossible for them to attempt to free themselves of poverty. Thus, Bush offered a fairly robust definition of institutional racial discrimination and pointed to a population of poor people of color as having been affected by it.

ined embrace of class discrimination reflects the irony that class is both the preferred method for and the hidden obstacle to racial justice." For a discussion of what is at stake in a holding that the poor is a suspect class, see Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 20–21 (1969) (arguing that the Court ought to find that the poor are a suspect class and, consequently, use strict scrutiny to review laws that burden them).

¹⁵² John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 235 (1982) ("Although in absolute numbers there are more white poor than Black poor, Blacks carry a disproportionate burden of poverty, and thus many times their claims for substantive distributive justice are essentially race claims.").

¹⁵³ See Armstrong, *supra* note 151, at 54 ("When our courts refuse to recognize economic class as a suspect category they protect legally prohibited racial discrimination, allowing those who discriminate to frustrate civil rights goals.").

¹⁵⁴ See *id.*

¹⁵⁵ Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior are Shaping Legal Policy*, 57 EMORY L.J. 311, 405 (2008) (quoting Press Release, Office of the White House Press Sec'y, President Discusses Hurricane Relief in Address to the Nation (Sept. 15, 2005)).

¹⁵⁶ *Id.*

3. *Attestations of the Relative Insignificance of Individualist Racial Discrimination*

How do the racial discrimination binary and the discrimination-class schema outlined above—wherein scholars conceptualize institutional racial discrimination as largely affecting poor people of color and imagine wealthier people of color to be primarily affected by individualist racial discrimination—contribute to the invisibility of the racial subordination of class-privileged racial minorities? The answer is quite simple: While theorists and observers were (inadvertently) constructing the conceptual schema wherein institutional discrimination largely affects poor people of color and wealthier people of color primarily encounter individualist discrimination whenever they do encounter discrimination, progressive thinkers of race simultaneously were arguing that, in the post-civil rights era, individualist discrimination is not nearly as important as institutional discrimination in determining individuals' life chances. Now, race scholars have never argued that individualist racial discrimination no longer exists.¹⁵⁷ Rather, their argument has been that, when we shape our current definitions of racial discrimination on the model of individualist discrimination, we miss the macro, large-scale processes that do *most* of the work in the present of creating and maintaining the racial hierarchies that stratify our society.¹⁵⁸ Their argument has been that when we go searching for individualist discrimination, we overlook the prac-

¹⁵⁷ See, e.g., BONILLA-SILVA, *supra* note 79, at 19 (“Although I hold that the dominant form of racism now practiced is a subtle one, this does not mean I am blind to the vulgar explicit racism now in vogue among the ‘Tea Party’ and others on the right. Racial regimes may change, but that transformation is never complete and remnants of the old-fashioned Jim Crow racism are clearly resurgent. This resurgence is important and clearly influences the life chances of people of color.”).

Roithmayr's work is an instructive metaphor for the approach that progressive thinkers of race have taken to the question of individualist racial discrimination. She begins by noting that research has demonstrated that “racial bias (at least the conscious kind)” has decreased substantially since the days that preceded the civil rights era. ROITHMAYR, *supra* note 43, at 18. She then asks, “In light of that research, could continuing discrimination [of this variety] really explain the kinds of persistent racial gaps that we still see?” *Id.* She answers, “Possibly.” *Id.* She then discusses the numerous auditor studies that have shown that jobseekers and house- and apartment-hunters are disadvantaged by having “black-sounding,” as opposed to “white-sounding,” names. *Id.* at 18–19. Although Roithmayr flags the “possible” importance of individualist racial discrimination, the balance of the book is about institutional racial discrimination and what must be done to dismantle institutionalized inherited disadvantage.

¹⁵⁸ See, e.g., ALEXANDER, *supra* note 141, at 183 (“When we think of racism we think of Governor Wallace of Alabama blocking the schoolhouse door; we think of water hoses, lynchings, racial epithets, and ‘whites only’ signs. . . . Our understanding of racism is therefore shaped by the most extreme expressions of individual bigotry, not by the way in which it functions naturally, almost invisibly (and sometimes with genuinely benign intent), when it is embedded in the structure of a social system.”); BONILLA-SILVA, *supra* note 79, at 52 (“[C]ivil rights organizations such as the NAACP and the National Urban League continue to fight the enemies of the past, like the Ku Klux Klan or their Tea Party cousins, but not the contemporary structures and practices that are *primarily* responsible for post-civil rights racial inequality.” (emphasis added)); LÓPEZ, *supra* note 67, at 1723 (arguing that institutional racial discrimination “constitutes a significant source of social harm” and “may well constitute *the greatest source of ongoing harm to minority communities*” (emphasis added)).

tices and policies that are the *real* problem—the stuff that is doing the heavy lifting when it comes to producing and reproducing racial inequality in the post-civil rights era.

When we read attestations of the *relative* insignificance of individualist racial discrimination together with affirmations that individualist discrimination is the form of discrimination that racial minorities with class privilege typically encounter, we arrive at following claim: the form of racial discrimination that wealthier racial minorities typically encounter is relatively insignificant. It encourages us to believe that the middle class is not *really* affected by racial discrimination—at least not the kind that counts. We direct our focus to the “discrimination that matters” (i.e., institutional) and the people who our conceptual schema tells us are affected by it (i.e., the poor).

This thinking is put clearly on display in legal scholar Stephen Carter’s reflection on race-based affirmative action, which he said “does nothing at all for the true victims of racism.”¹⁵⁹ Here, Carter proclaims that the poor, for whom affirmative action does nothing at all, are the “true victims” of racism. This permits us to conclude that the wealthy, for whom affirmative action has done wonders, have not truly been victimized. According to Carter, whatever racism the wealthy experience is negligible. Or, at least, it pales in comparison to what the poor endure.

It is worth repeating how this tendency to conceptualize class-privileged racial minorities as typically affected by minor individualist discrimination has contributed to the rise of post-racialism: When the racial subordination of wealthier racial minorities is made invisible—when we believe that racial discrimination has not touched this class-privileged group in a way that counts—then, we, like Carter above, come to conceptualize poor racial minorities as being racial discrimination’s only victims. If this is correct—if discrimination has only truly affected the poor—then we are invited to imagine that *the primary effect of racial discrimination is poverty*. Indeed, we are invited to imagine that the *only* effect of racial discrimination is poverty—that poverty represents the entirety of racial subordination. Further, if it is true that poverty represents the entirety of racial subordination, then race and racial discrimination are irrelevant today. Race and racial discrimination may be important when explaining the origins of current racial stratification. But they are not important in understanding the mechanisms by which racial stratification persists. Instead, class is key; class, today, explains racial stratification.

This is post-racialism: the idea that historical racial disadvantage now takes the form of class disadvantage, making race and racial discrimination insignificant elements in any story told about present-day social inequities.

¹⁵⁹ STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 233 (1992).

III. OTHER CONTRIBUTORS TO THE INVISIBILITY OF WEALTHIER RACIAL MINORITIES' SUBORDINATION

The discrimination-class schema outlined above does not bear the sole responsibility for making invisible the marginalization of racial minorities with class privilege. Other factors are also operating. This Part identifies three.

A. *The Conceptual Collapse of Race and Class*

The tendency of many thinkers of race to collapse the categories of race and class has contributed to the invisibility of the racial subordination of wealthier people of color. The conceptual collapse of race and class results in an inaccurate, and not at all believable, rendering of all racial minorities as poor.¹⁶⁰

One frequently can spot the conceptual collapse in the writings of third-wave feminists. For example, consider a chapter written by black feminists Barbara and Beverly Smith in the celebrated anthology *This Bridge Called My Back*, a collection of writings by feminists of color that is widely considered a classic.¹⁶¹ In the chapter, the Smiths ruminate about the importance of adding to the feminist movement the voices of women who are not privileged along the lines of race, class, and sexuality. When they note that black lesbians are more vulnerable to homophobic attack, they reason that this vulnerability is due to the fact that black lesbians do not “have white skin

¹⁶⁰ Several scholars have observed the conceptual collapse of race and class and have criticized it. See, e.g., RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 10 (2012) (noting the persistence of stereotypes equating race and poverty); Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1904 (1994) (observing that social class has, at times, been “treated as coextensive with race”); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2035 (1991) (arguing that “key proponents of the existence of the voice of color have conflated two distinct notions when speaking of the voice’s existence: race and socioeconomic class membership”); Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE. J.L. & FEMINISM 13, 16–18 (1991) (responding to critics who accuse her of gender essentialism and of ignoring racial differences among women by noting that “a theory does not become ‘essentialist’ to the degree it discusses gender as such, nor is it saved from ‘essentialism’ to the degree it incorporates race or class” and observing that when many feminist scholars discuss racial differences among women, they do “virtually nothing with class,” thereby constructing all women of color as poor). Interestingly, Johnson’s critique of the conflation of race and socioeconomic status includes hints of post-racialism. He writes that black scholars may privilege the voices of poor people of color—and deny that wealthier people of color exist—“because the major difference remaining between Blacks and whites, now that de jure segregation has been eliminated, is socioeconomic.” Johnson, *supra*, at 2039. Johnson here states that class that is the most relevant marker of difference, leading the reader to the post-racial conclusion that race is an *irrelevant* marker of difference.

¹⁶¹ Barbara Smith & Beverly Smith, *Across the Kitchen Table: A Sister-to-Sister Dialogue*, in *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* (Cherrie Moraga & Gloria Anzaldúa eds., 1st ed. 1981).

privilege or class privilege to fall back on”¹⁶² Quite subtly, but also quite clearly, the Smiths construct all black lesbians as poor. There is no acknowledgment that there are black lesbians who *do* have “class privilege to fall back on.”¹⁶³

Consider as well white feminist Phyllis Palmer’s reflections on third wave feminism.¹⁶⁴ She writes that white women ought not to exclude black women from conversations about feminism; in fact, she argued, they ought to listen to black women closely, as changes in the economy were causing more white women to lead lives akin to those that black women had always lived—that is, impoverished ones.¹⁶⁵ Hence, Palmer constructs all black women as poor. She writes that:

[T]here are areas of policy making that white women as researchers, teachers, and activists should be addressing and asking women of color about. White women must do this both because more of us are now living existences more similar to Black women’s and because we will become stronger advocates for the poorest women by letting ourselves be directed by agendas set by Black, Hispanic, Native American, and immigrant women.¹⁶⁶

Now, if appreciable numbers of Black, Hispanic, Native American, and immigrant women were *not poor*, for example, it would be nonsensical to believe that the agendas that they would set would, as a matter of course, represent the interests of the “poorest women.” Accordingly, in order for Palmer’s reasoning to make sense, all of the women of color that she lists must be poor.

The conceptual collapse of race and class is not found solely in third-wave feminist scholarship; one can also find it in the scholarship of critical race theorists writing within the legal academy. For example, Mari Matsuda, a leading critical race theorist, once argued, like Palmer, that those who are most the dispossessed in society ought to set the agenda for social justice.¹⁶⁷ And, like Palmer, Matsuda offered a homogenized conceptualization of ra-

¹⁶² *Id.* at 125.

¹⁶³ Angela Davis, a feminist and advocate for racial justice, has also fallen victim to the conceptual collapse of race and class in her scholarship. Writing about the passage of the Hyde Amendment, which prohibits the use of federal Medicaid funds to help cover the cost of indigent women’s abortions, Davis observes that “Black, Puerto Rican, Chicana and Native American Indian women, together with their impoverished white sisters, were thus effectively divested of the right to legal abortion.” ANGELA Y. DAVIS, *WOMEN, RACE, & CLASS* 206 (1981). Here, all “Black, Puerto Rican, Chicana and Native American Indian women”—together with their explicitly “impoverished” white counterparts—are poor. Davis’s rendering of history completely obscures that there are wealthier women of color whose ability to access abortion went unaffected by the passage of the Hyde Amendment.

¹⁶⁴ Phyllis Palmer, “*The Racial Feminization of Poverty*”: *Women of Color as Portents of the Future for All Women*, 11 *WOMEN’S STUD.* Q. 4, 4–6 (1983).

¹⁶⁵ *Id.* at 4.

¹⁶⁶ *Id.* at 5.

¹⁶⁷ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323, 324 (1987).

cial minorities as those who are the most dispossessed. She acknowledges that, certainly, all racial minorities are not *really* poor. But she insists that their history of racial subordination has made them poorer than they otherwise would be. She then transforms this *relative* impoverishment into an *absolute* impoverishment, thus constructing all people of color as poor. Consider her argument that Japanese-Americans “bear the continued burdens of racism. Though on the whole successful by standard indicators, many former internees still have not recovered from the economic setback of the evacuation [during World War II]. The Japanese American elderly frequently live below the poverty line.”¹⁶⁸ Here Matsuda asks us to discount the admitted fact that Japanese Americans are “on the whole successful by standard indicators” and focus instead on the elderly Japanese Americans who are mired in poverty. The latter are being asked to stand for the whole population.

The problem with collapsing the distinction between racial minority status and poverty is that it simply is not credible.¹⁶⁹ We are all well aware that many racial minorities are not poor.¹⁷⁰ Thus, when we hear arguments that suggest the universality of poverty among racial minorities, we tend to correct the exaggeration by assuming that the speaker is *actually* talking about the poor. So, when Matsuda argues that the Japanese and Japanese Americans who were detained during World War II “still have not recovered from the economic setback of the evacuation,” we understand her to mean that there are many former internees *who are poor* who still have not recovered from the Japanese internment. This correction results in the complete erasure of the effects that the Japanese internment has had, and may continue to have, on wealthier Japanese people.

Again, when observers collapse race and class and assume that racial minority status is equivalent to being poor, it encourages the reader to presume that the observer is not actually talking about class-privileged racial minorities. This obscures the effect that any racially subordinating event—like Japanese internment, or chattel slavery and Jim Crow, or the Holocaust, or the forced sterilization of women in Puerto Rico—has had on wealthier racial minorities; this group appears to have escaped any negative consequences of the event. Importantly, this leads us to perceive poor people as the only affected group. In the absence of evidence that the same process that has disadvantaged poor people has also disadvantaged wealthier people

¹⁶⁸ *Id.* at 377.

¹⁶⁹ Another problem with collapsing the distinction between racial minority status and poverty is that it suggests the appropriateness of collapsing the distinction between white racial status and affluence. This collapse leads to the belief that all white people are wealthy. This, of course, is untrue. Moreover, it leads to the complete erasure of poor white people—a result that may not only produce bad theory, but may set the stage for significant political backlash.

¹⁷⁰ See House & Williams, *supra* note 28, at 104 (“Although there is a strong relationship between race and [socioeconomic status], they are not equivalent. For example, the rate of poverty is three times higher for blacks than for whites, but two-thirds of blacks are not poor, and two-thirds of all poor Americans are white.”).

(although it has not led to their indigence), it becomes easier to believe that the effects of racial discrimination can be seen entirely in socioeconomic status. That is, it becomes easier to believe that poverty is the *only* consequence of racial discrimination. What had its origins in race now plays out in class. When we perceive poverty as the *only* form that historical racial disenfranchisement takes, we witness the seedling of post-racialism.

B. *The Problem with Descriptive Statistics*

The intellectual shortcut that the conceptual collapse of race and class encourages—that is, thinking that because an observer has not mentioned the effects that a racially subordinating event has had on wealthier people of color, the event has not affected wealthier people of color at all—is also encouraged by the use of descriptive statistics. To explain, descriptive statistics describe a characteristic that a group, as a whole, possesses.¹⁷¹ While these statistics are helpful in understanding what is happening to a group, they are not helpful in understanding how different parts of the group may be differently situated.¹⁷² So, for example, when we read the statistic that “one of every three black American males born today can expect to go to prison in his lifetime,”¹⁷³ we know that black males, as a whole, are being arrested, incarcerated, and released on parole at devastatingly high rates. However, we do not know whether poor black males are being arrested, incarcerated, and released on parole more frequently than wealthier black males, or whether black males in the south come into contact with the criminal justice system more frequently than black males in the north, etc.

Public health scholar Marsha Lillie-Blanton has written about the use of descriptive statistics in the population health context, noting that because descriptive statistics about the health of black people, as a whole, do not reflect socioeconomic differences within the group, people tend to believe that the statistics simply reflect the fact that black people are disproportionately poorer than other racial groups. She observes that when viewing statistics that show that black people, on average, die three to four years earlier than white people, on average,¹⁷⁴ people attribute this difference to the widely known fact that black people are disproportionately poorer than white people.¹⁷⁵ Essentially, the familiar fact that black people are dispropor-

¹⁷¹ See Lillie-Blanton et al., *supra* note 25, at 412–13.

¹⁷² See *id.*

¹⁷³ REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM I (Aug. 2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> [<https://perma.cc/J6DM-PS2S>].

¹⁷⁴ NAT'L CTR. FOR HEALTH STAT., HEALTH, UNITED STATES, 2015: WITH SPECIAL FEATURE ON RACIAL AND ETHNIC HEALTH DISPARITIES 22 (2016), <http://www.cdc.gov/nchs/data/hus/hus15.pdf#015> [<http://perma.cc/G47H-A6T9>].

¹⁷⁵ See Lillie-Blanton et al., *supra* note 25, at 413 (“The practice of reporting unadjusted descriptive statistics by race is commonplace and has led many to question whether current

tionately represented among the nation's poor causes observers to fall victim to the conceptual collapse of race and class. When exposed to descriptive statistics about the black race, observers tend to assume that the usually damning statistics describing black people are damning because of black people's disproportionate poverty. In other words, we do not believe that the statistics are actually describing class-privileged black people; instead, we believe that they are describing those at the bottom of the socioeconomic ladder.¹⁷⁶ The effect is to make it seem that wealthier people of color have escaped the negative phenomenon described in the statistic. We perceive wealthier people as unaffected or all right. Their subordination is obscured, and we are back to the process described above:

1. We perceive poor people as the only affected group.
2. This leads us to believe that racial discrimination's effects are *entirely* socioeconomic.
3. This leads us to understand poverty to be the *only* consequence of racial discrimination.
4. This leads us to perceive class disadvantage as the *only* form that historical racial disenfranchisement takes.
5. Post-racialism is strengthened.

C. Explicit Attestations that Race and Racial Discrimination Has Produced Economic Advantages and Disadvantages

For years, race scholars have argued that race and racial discrimination are mechanisms that dominant racial groups have used to create and protect economic advantages. And these scholars are right. Racial subordination certainly *has* generated and protected economic advantages for white people; conversely, racial subordination certainly *has* economically disadvantaged various groups of people of color. However, this fact—that racial discrimination has produced economic injuries—easily is corrupted into the claim that racial discrimination has *only* produced economic injuries, ignoring the fact that racial discrimination has also produced sociocultural and political injuries. This corrupted claim suggests that those racial minorities who have not been injured economically—class-privileged racial minorities, it would seem—have been unaffected by racial discrimination.

racial disparities in health are a consequence of higher poverty rates among minority populations rather than race-specific barriers in society.”).

¹⁷⁶ Complicating things is the fact that some descriptive statistics of black people *really are not describing class-privileged black people*, but instead are describing their poor counterparts. This is particularly true of statistics relating to criminal justice—i.e., the “one in three” statistic mentioned in *supra* note 173 and accompanying text. See Forman, *supra* note 115, at 132 (noting that mass incarceration “does not impact middle- and upper-class educated African Americans in the same way that it impacts lower-income African Americans” and observing that “one of mass incarceration’s defining features is that, unlike Jim Crow, its reach is largely confined to the poorest, least-educated segments of the African American community”).

Critical race theorist Cheryl Harris's classic article, *Whiteness as Property*, is an instructive place to begin.¹⁷⁷ The thrust of the article is to argue that white racial privilege is comfortably understood as a species of property, as it has acquired many of the characteristics given to legal property, like the right to use and enjoy and the absolute right to exclude. Further, Harris proposes that affirmative action programs are a means to destabilize and dismantle this species of property.¹⁷⁸ Throughout the article, Harris describes how race and racial discrimination have been used to enable white people to enjoy monopolies over certain economic opportunities and, thus, how racial discrimination has been economically advantageous to this group. She begins the article with a story about her grandmother, whose ability to pass as white had "a certain economic logic."¹⁷⁹ Acquiring a contingent form of whiteness enabled her grandmother to get better paying jobs in white neighborhoods and gave her "higher economic returns in the short term, as well as greater economic, political, and social security in the long run. Becoming white meant gaining access to a whole set of public and private privileges that materially and permanently guaranteed basic subsistence needs and, therefore, survival."¹⁸⁰ In essence, being white was an economically valuable proposition.¹⁸¹ Conversely, being black was economically detrimental.

¹⁷⁷ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1725, 1731 (1993) (arguing that not only does whiteness satisfy theoretical definitions of property, but that it also meets "functional criteria of property"—meaning that "the law has accorded 'holders' of whiteness the same privileges and benefits accorded holders of other types of property").

¹⁷⁸ *Id.* at 1779.

¹⁷⁹ *Id.* at 1713.

¹⁸⁰ *Id.*

¹⁸¹ Roithmayr has done recent work that also demonstrates how racial subordination has facilitated economic subordination, showing how "racial cartels" locked people of color out of jobs and industries in earlier moments in our nation's history. See ROITHMAYR, *supra* note 43, at 29–31, 60–66. She demonstrates how these race-based economic disadvantages, which occurred in the relatively distant past, have been perpetuated over time and have functioned to disadvantage racial minorities in the present. In essence, she shows how race and racial discrimination have produced, and continues to produce, economic advantages and disadvantages.

There are many other examples of this phenomenon. Consider undocumented immigration from Mexico and Central America. Anthropologist Nicholas de Genova and others have argued that the category of the "illegal alien," especially because commentators so frequently use it to signify Mexican migrants, is a racialized one. See Nicholas P. De Genova, *The Legal Production of Mexican/Migrant "Illegality"*, 2 LATINO STUD. 160, 161–62 (2004) ("Mexican migrants are . . . racialized as 'illegal aliens' . . . Thus, as a simultaneously spatialized and racialized social condition, migrant 'illegality' is also a central feature of the ways that 'Mexican'-ness is thereby reconfigured in racialized relation to the hegemonic 'national' identity of 'American-ness[.]'). He and others have also argued that "illegality" is a condition of possibility for "deportability"—the status that enables the government to forcibly remove an individual without documentation from the country. *Id.* at 161. This deportability makes it difficult for those who inhabit the status of "illegal alien" to demand the wages paid to documented members of the workforce as well as other workplace protections. See *id.* This produces "illegal aliens" as an abundant source of cheap labor—something that is economically advantageous, and profitable, to employers. Nicholas P. De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419, 439–40 (2002) ("The cate-

While few would dispute that race and racial discrimination have produced economic advantages for dominant racial groups, this truth is easily perverted into the supposition that race and racial discrimination have *only* produced economic advantages for dominant racial groups. That is, the idea that racial subordination facilitates economic subordination is easily simplified into the idea that racial subordination *only* facilitates economic subordination—that economic subordination constitutes the universe of racial subordination. If this is true, those who have not been obviously economically subordinated (i.e., class-privileged racial minorities) have escaped racial subordination in its entirety.

The truth is that while economic subordination is certainly an element of racial subordination, it is just one of many elements.¹⁸² Racial discrimination has disadvantaged people of color economically, but also socioculturally¹⁸³ and politically.¹⁸⁴ If racial discrimination is only about economic

gory ‘illegal alien’ is a profoundly useful and profitable one that effectively serves to create and sustain a legally vulnerable—and hence, relatively tractable and thus ‘cheap’—reserve of labor.”). Thus, race—in this context, the racialized category of the “illegal alien”—produces economic advantages to American businesses.

¹⁸² While Malamud has done extraordinary work in bringing to light the racial subordination that class-privileged racial minorities endure, she nevertheless focuses on their economic subordination—which limits her view of the disadvantage that they experience. She helpfully acknowledges that “the poor do not have a corner on the market where discrimination against African Americans is concerned. Black middle-class families are systematically disadvantaged in comparison with seemingly “similarly situated” white families.” See Malamud, *supra* note 12, at 988. However, she makes statements that suggest that the market of discrimination, which the poor have not yet cornered, is entirely composed of economic disadvantage. See *id.* at 992–93 (“[T]he social processes through which the black middle class becomes and remains economically disadvantaged are driven by and mediated through race. Ignoring race misses the point and distorts the results.”).

¹⁸³ “Sociocultural disadvantage” refers to the disadvantages caused by narratives that circulate within society that describe people of color as pathological, deviant, dangerous, or otherwise undesirable. These narratives are familiar. They include the black welfare queen, the black male criminal, the “illegal” Latinx immigrant, and the aberrantly overachieving Asian person. The concept of discursive discrimination, described in Part IV, should be understood as a form that sociocultural disadvantage takes.

¹⁸⁴ “Political disadvantage” refers to the fact that racial minorities probably do not enjoy the level of political representation that their numbers might demand. See John D. Griffin & Brian Newman, *Minority Report: Evaluating Political Equality in America* 195 (2008) (stating that “whites are often better represented than African-Americans and Latinos” and that “[t]his is true even beyond the effects of income differences between the groups and even when minorities make up a substantial proportion of a constituency”). I state that it is *probably* true that racial minorities do not enjoy the level of political representation that their numbers might demand because the question of how to measure political representation is a hotly debated one. See *id.* at 6 (discussing three different measures of political equality and political representation). However, if the political representation of people of color is appropriately measured by the number of people of color currently holding an elected office—an admittedly controversial way of measuring political representation, as it assumes that only people of color can represent the political interests of other people of color—then we can conclude that people of color are, indeed, politically disadvantaged. See Karl Kurtz, *Who We Elect: The Demographics of State Legislatures*, ST. LEGISLATURES MAG. Dec. 2015, <http://www.ncsl.org/research/about-state-legislatures/who-we-elect.aspx> [<http://perma.cc/H4SW-YB94>] (noting that only nine percent of state legislators are black, although black people represent thirteen percent of the total population); *Current Governors*, NAT. GOVERNORS ASS’N, <https://www.nga.org/cms/governors/bios> [<http://perma.cc/4JDW-VUDB>] (showing that 47 of the 50 governors

subordination and poverty, then it would make sense to believe that poor people of color have a monopoly on racial disadvantage, as they are the ones living in poverty. Further, it would make sense to believe that our “race problem” is past tense, living on solely in stratification along class lines. Race would be relevant only when providing a history of how we got here; it would be irrelevant when describing, and imagining remedies to improve, the present. But if racial discrimination is about so much more than economic subordination, then it would make less sense to believe that poor people of color have a monopoly on racial disadvantage. It would make less sense to believe that our race problem is past tense. It would allow us to imagine that race continues to be relevant, staving off post-racial thinking.

The belief that economic subordination comprises the universe of racial subordination likely contributes to the tendency of some scholars to deploy class as a metaphor for race, using economic language to describe racial disadvantage. Indeed, Harris describes white privilege as a “valuable asset” and a form of “compensation” to poor white people,¹⁸⁵ and W.E.B. Du Bois once referred to the “psychological wage” of racial superiority that he believed white people receive.¹⁸⁶

In fact, this slippage between class and race—which may slip into a post-racial supposition that class *is* the new race—may be both a cause and an effect of the fact that we frequently measure racial progress with economic indicators. Indeed, scholars frequently use levels of income as measures of racial progress. Consider the argument that Wilson made in *The Declining Significance of Race* that antidiscrimination laws and affirmative action programs had dramatically improved the lives of scores of black people.¹⁸⁷ To measure this improvement, he did not attempt to quantify black

appear to be non-Hispanic white persons); Cristina Marcos, *115th Congress Will Be Most Racially Diverse in History*, HILL (Nov. 17, 2016, 6:00 AM), <http://thehill.com/homenews/house/306480-115th-congress-will-be-most-racially-diverse-in-history> [https://perma.cc/ZC9S-JFD5] (noting that 49 of the 535 members of Congress—seven percent—are black); Tyler Reny & Sayu Bhojwani, *Minority Representation Gaps, By the Numbers*, WASH. POST (Oct. 22, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/10/22/minority-representation-gaps-by-the-numbers/?utm_term=.7be46f7c2a40 [https://perma.cc/EL45-H7BW] (noting that while black people make up 12.6 percent of the population, they only constitute 8.1 percent of state legislators, observing that seven percent of Congress are Latinx although Latinx people are 17 percent of the U.S. population, and stating that only 2.4 percent of Congress is Asian American even though Asian Americans are 5.8 percent of the total population). Reny and Bhojwani go on to note that “only 5.1 percent . . . of state assembly and senate seats are held by Latinos or Asian Americans, far below their combined share (nearly 23 percent) of the population.” *Id.*; see generally Griffin & Newman, *supra*.

¹⁸⁵ See Harris, *supra* note 177, at 1759.

¹⁸⁶ See Wiecek, *supra* note 67, at 11. If it is problematic to refer to a racial “psychological wage” because it facilitates the slippage between race and class, then it probably is even more problematic to actually quantify that “psychological wage,” which is what political scientist Andrew Hacker attempted to do. See ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992). Hacker asked a group of white students how much money they would need to be paid in order to agree to change their race to black. He writes, “[M]ost seemed to feel that it would not be out of place to ask for \$50 million, or \$1 million for each coming black year.” *Id.* at 32.

¹⁸⁷ See WILSON, *supra* note 13.

people's political participation and representation, examine cultural discourses about them, or measure the rates at which they die from certain diseases. Instead, he measured their income, observing that "as late as 1969 black males aged twenty-five to twenty-nine . . . earned eighty-three percent as much as their white counterparts. In 1977, on the other hand, twenty-five to twenty-nine-year-old black males . . . earned ninety-three percent as much as their white counterparts."¹⁸⁸ Wilson offered this narrowing of the income gap between black and white male workers as definitive proof that the U.S. had made great strides in overcoming the historical racial subordination that black people had endured.¹⁸⁹ Now, there is no doubt that the U.S. made great strides in overcoming historical racial subordination between 1969 and 1977. However, if racial subordination is more than economic subordination—if economic disadvantage exists alongside political and sociocultural disadvantage within the universe of racial disadvantage—then evidence of economic gains tells only part of the story. We cannot offer economic evidence *alone* as proof that the race problem has been solved.

When one conceptualizes economic subordination as constituting the totality of racial subordination, then one is led to believe that it is a misnomer to call present racial inequality a "race problem." Present-day racial inequality becomes nothing but a class problem (albeit a class problem with racial origins), and post-racial, class-based interventions become the best way to address it. Indeed, Wilson once embraced this logic, arguing that because "the problem of economic dislocation is more central to the plight of the black poor than is the problem of purely racial discrimination," the better remedies were race-neutral, class-based approaches.¹⁹⁰

¹⁸⁸ *Id.* at 177.

¹⁸⁹ That Wilson understands economic subordination to constitute the universe of racial subordination is even more apparent in his analysis of black women's incomes. He writes that black women's "income and occupational attainment are closer to those of white women than the economic position of black men is to that of white men's. . . . [I]n 1977, among year-round, full-time workers, black female college graduates earned on the average slightly more (\$12,740) than their white counterparts (\$12,456) . . ." *Id.* at 178. He concludes that "in 1977 the major job-market problems confronting black women were associated with sexual rather than racial status." *Id.* In essence, Wilson understands income parity between black and female workers as all the proof that one needs to demonstrate that race no longer poses a significant disadvantage to black female workers. Indeed, Wilson argues that if this group runs into any problems in the workplace, it must be on account of its sex. He does not ask about the types of jobs that black women hold as compared to white women (i.e., government versus private sector), their experience working these jobs (i.e., how are they perceived and how does that perception impact their interactions with coworkers), whether they feel empowered in the workplace, etc. Asking these types of questions may reveal that, while black women have achieved income parity, their race still matters. That is, asking these types of questions may reveal that economic disadvantage represents only a slice of the totality of racial disadvantage.

¹⁹⁰ *Id.* at 182. Importantly, Wilson reversed his position years later, writing that he no longer holds the view that policymakers should shift their focus to race-blind, class-conscious programs. *Id.* at 200. His revised opinion appears to be due to a realization that racial subordination is more than simply economic subordination. Wilson explains that he has come to champion the continued use of race-conscious efforts because he has been confronted with evidence that:

Scholars have not only used economic measures to demonstrate racial progress, as did Wilson. They have also used them to argue that race relations have not improved as much as the more sanguine reports would have us believe.¹⁹¹ For example, Bonilla-Silva has observed that society has taken the growth and success of the black middle class, measured by commonly used economic indicators, as evidence that the country has finally triumphed over racial discrimination. He responds by using those same economic indicators to counter those who would triumphantly declare the end of racial inequality, writing, “To be sure, African Americans have experienced significant progress in several areas of their economic life over the past three

[C]hildren’s test scores are affected not only by the accumulated cultural capital—cultural skills and knowledge—of their parents, but also by the accumulated cultural capital of their grandparents, meaning that it could take several generations before adjustments in socioeconomic inequality produce their full benefits. Thus, if we were to rely solely on the standard criteria for college admission, such as SAT scores, even many children from black middle-income families would be denied admission in favor of middle-income whites, who are not weighted down by the accumulation of disadvantages that stem from racial restrictions and who, therefore, tend to score higher on the SAT and similar conventional tests. For all these reasons, the success of younger educated blacks remains heavily dependent on affirmative action programs, whereby more flexible criteria of evaluation are used to gauge potential to succeed.

Id. at 201. Wilson can be heard to argue that racial subordination is more than economic subordination, as even when economic subordination has been overcome and income parity has been achieved, black people lack “cultural skills and knowledge” due to the “accumulation of disadvantages that stem from racial restrictions.” That is, Wilson can be heard to argue that within the universe of racial disadvantage exists economic and cultural disadvantage. Thus, he claims, evidence that the economic disadvantage has been overcome does not speak at all to whether cultural disadvantages have been similarly overcome. The persistence of cultural disadvantages signifies the persistence of racial disadvantages. Accordingly, he concludes that class-based interventions alone are insufficient.

However, Wilson’s statement that “it could take several generations before adjustments in socioeconomic inequality produce their full benefits” complicates things. While he acknowledges that economic and cultural disadvantage are both found within universe of racial disadvantage, the above statement appears to suggest that he believes that economic equality is actually the means to achieving cultural equality; it is just that it takes some time before economic equality generates its “full benefits.” If this is, indeed, what Wilson is arguing, then he is still making a post-racial argument. He still believes that class-based interventions are the lever with which one can eliminate all racial disadvantages; it is simply that one needs to wait a long time before these interventions will bear their full fruit.

¹⁹¹ This was the reason why sociologist E. Franklin Frazier penned his damning, controversial critique of the black middle class, *BLACK BOURGEOISIE: THE BOOK THAT BROUGHT THE SHOCK OF SELF-REVELATION TO MIDDLE-CLASS BLACKS IN AMERICA* (1957). He offered that he wrote the book because “[t]he picture which white Americans wanted to present to the world was that although Negroes had been enslaved and had suffered many disabilities since Emancipation, on the whole they were well off economically, had gained civil rights, and had improved their social status.” *Id.* at 10. He had hoped that his book would shatter this sanguine picture of racial progress, demonstrating that “Negroes were not only at the bottom of the economic ladder but that all the pretended economic gains which Negroes were supposed to have made had not changed fundamentally their relative economic position.” *Id.* at 11. Essentially, Franklin endeavored to show that if economic progress measures racial progress, then there had been very little racial progress. This, he hoped, would help to disprove the myth that chattel slavery was not that bad, proving that that it was, instead, “a cruel and barbaric system that annihilated the Negro as a person” *Id.* at 10.

decades Yet their overall economic situation relative to whites has not advanced that much."¹⁹² He goes on to note that there is still a gap in earnings between black and white workers with similar characteristics. While the gap for black men was fourteen percent in 1980, it had increased to sixteen percent by 1985.¹⁹³

Bonilla-Silva's work is laudable; for those of us who believe that the country still has a race problem and are dissatisfied with attestations that the nation has arrived at its post-racial utopia, it certainly is helpful to show that black people economically lag behind their similarly situated white counterparts.¹⁹⁴ However, if, as this article posits, economic measures of racial progress contribute to the perception that the race problem is, at bottom, an economic one, then such counterattacks may be problematic—especially when there is an absence both of noneconomic measures of racial progress and a theory of noneconomic aspects of racial disadvantage.¹⁹⁵

Even when studies appear to be interested in measuring racial progress with noneconomic measures, many of these noneconomic measures are revealed to be, at bottom, about dollars and cents. Consider Feagin's and Barnett's analysis of *Brown v. Board* and the ultimate inability of the case to achieve actual racial integration of public schools.¹⁹⁶ Initially, Feagin and Barnett evaluate racial progress by the number of children of color who at-

¹⁹² See BONILLA-SILVA, *supra* note 79, at 44.

¹⁹³ *Id.* at 46. See also Pager & Shepherd, *supra* note 57, at 187 (noting that the "wages of both blacks and Hispanics continue to lag well behind those of whites").

¹⁹⁴ It is worth noting that some of the literature that shows economic inequality between similarly situated black and white people is incredibly damning. Roithmayr's work offers a particularly unfavorable assessment of racial progress when measured through income and wealth. See ROITHMAYR, *supra* note 43, at 2–6 (noting that the gap in wealth between black and white families increased fourfold in the last two decades, that poor students of color attend underfunded schools relative to their white counterparts, and that black people have been shut out of white people's social networks, which can partially explain gaps in wages and employment). While Roithmayr's investigation is centered on demonstrating how "white advantage" from previous historical periods is locked in through everyday choices made in the present day, it is noteworthy that the only advantages (and, implicitly, disadvantages) that she discusses are economic. See *id.* at 8–9 (noting that during Jim Crow, white "racial cartels . . . generate[d] monopoly profits by excluding competitors," were able to "keep for themselves the best houses, in the best neighborhoods, with the wealthiest neighbors," and worked to divide "the labor market into two racially identifiable segments" with "white unions earn[ing] the highest wages, in the most prestigious jobs," and going on to show how white people currently reap the benefits of these ill-gotten historical advantages, as they manifest in present-day economic inequality between the racial groups).

¹⁹⁵ It is worth mentioning that it is not a sign of intellectual laziness to measure racial progress with economic indicators, nor is it a sign of intellectual laziness to use economic indicators to counter the argument that the nation has made great gains in racial progress. Indeed, this article begins by documenting the racial subordination of class-privileged black people, and three out of the four measures of that subordination were economic. See *supra* notes 20–61 and accompanying text (documenting inequality between the black and white middle classes along lines of neighborhood quality, income, wealth—and health). At present, the tendency to measure racial progress with economic indicators may be a consequence of the fact that we have not seen the need to create noneconomic indicators of racial progress.

¹⁹⁶ Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the Brown v. Board of Education Decision*, 2004 U. ILL. L. REV. 1099 (2004).

tend schools that are not majority-minority.¹⁹⁷ Now, evaluating racial progress through this measure may lead to productive investigations into the noneconomic effects of racial segregation and integration. For example, one might empirically document how children's daily interactions with children of other races lead to the dismantling of negative racial discourses and cultural narratives about the racial other; conversely, one might empirically document how racially isolated children do not have the tools with which to challenge these discourses and narratives.¹⁹⁸ However, Feagin and Barnett do not measure the number of children of color who attend schools that are not majority-minority in order to ask such questions about the noneconomic disadvantages of racial segregation. Instead, they use this measurement of racial progress in order to make an argument that segregation functions to keep money away from students of color. That is, Feagin and Barnett propose that enduring school segregation is a problem because it *economically* disadvantages nonwhite students. As they note, "school desegregation is important for segregated children of color because, as is often said, 'green follows white'—that is, schools with white student majorities typically get better educational resources from those (usually white) officials who have the power to provide such socioeconomic resources."¹⁹⁹ Indeed, for these

¹⁹⁷ *Id.* at 1100 ("Never in U.S. history has there been a year when even half the country's black children attended schools where a majority of children were white.").

¹⁹⁸ Ann Mallatt Killenbeck, *Bakke, With Teeth?: The Implications of Grutter v. Bollinger in an Outcomes-Based World*, 36 J.C. & U.L. 1, 36, 45 (2009).

¹⁹⁹ Feagin & Barnett, *supra* note 196, at 1101. See also BONILLA-SILVA, *supra* note 79, at 26–27 ("As a consequence of resegregation during the decade of the 1990s, U.S. schools were more segregated in the 2000–2001 school year than in 1970. The relevance of this fact is that . . . [s]egregated schools are still profoundly unequal. Inner-city minority schools, in sharp contrast to white suburban schools, lack decent buildings, are overcrowded, have outdated equipment—if they have equipment at all—do not have enough textbooks for their students, lack library resources, are technologically behind, and pay their teaching and administrative staff less . . .").

Indeed, Feagin and Barnett conceptualize civil rights activists' fight against segregated schools in the 1950s and 1960s as one that was primarily motivated by their desire to access the economic resources that white schools monopolized. They write, "From the beginning, black parents and community leaders sought desegregation primarily to secure greater access to educational and related socioeconomic resources. They did not seek desegregation because they felt that black children needed to sit with whites to be educated. The assumption has always been that better school resources come in racially desegregated schools, and this in turn usually means better learning environments and greater achievements for children of color." Feagin & Barnett, *supra* note 196, at 1110. Interestingly, Feagin and Barnett understand black parents and community leaders to have been largely unconcerned with the denial of dignity and humanity that is part and parcel of the separatist mandate that black students could not share educational spaces with white students. They understand these groups to be, on the whole, unbothered by the fact that the purpose and effect of *de jure* segregation was to declare black inferiority and white superiority. Instead, Feagin and Barnett argue that, for these revolutionaries, it all came down to money. See also Harris, *supra* note 177, at 1751–52 (arguing that the Court in *Brown v. Board* was "unwilling to acknowledge any right to equality of resources," thus ignoring the fact that a "very real aspect of injury was that legalized race segregation structured material inequalities into all socioeconomic relations and institutions, including publicly funded schools" and contending that the Court's statement that "separate is inherently unequal" "failed to expose the problem of substantive inequality in material terms produced by white domination and race segregation").

researchers, integrated schools are important not only because they achieve racial progress in the form of economic parity in “socioeconomic resources,” but also because they achieve racial progress in the form of continued economic gains for children of color:

School desegregation has brought African American, Latino, Native American, Asian American, and other students of color improved access to important job networks, most of which are controlled by white employers. Often greater in desegregated schools, networking resources help students later on in securing good jobs and advanced education. Black students from desegregated, substantially white schools typically are more successful in entering into the high-paying job and college networks than those students from traditionally segregated schools.²⁰⁰

Of course, all of these things are likely true, and they are definitely important. However, focusing solely on the economic benefits of racial integration obscures the noneconomic benefits of racial integration. And when one obscures the noneconomic benefits of racial integration, one tends to obscure the noneconomic harms of racial segregation—and racial discrimination, generally. When the noneconomic harms of racial discrimination are hidden, it makes it seem as if the tragedy of racial discrimination is entirely an economic one. Further, it leads us to reason that the problem of racial discrimination will be solved when we have resolved all of our economic issues—when people of color have access to “high-paying job and college networks,” for example. This logic, of course, suggests that the problem of racial discrimination has been solved for class-privileged people of color, whose class privilege seems to suggest that they have access to “high-paying jobs and college networks” and that their economic issues have, indeed, been resolved. The idea that racial discrimination does not affect class-privileged people of color is fertile ground for post-racialism.

It seems clear that the theories of racial discrimination that thinkers of race have offered are no longer sufficient. The racial discrimination binary—wherein there is only institutional discrimination and individualist discrimination—is quite unsatisfactory. As explained above, it fails because its logic leads to the discrimination-class schema, which, in turn, leads to the conclusion that the racial discrimination that wealthier people of color experience is either insignificant or nonexistent. This, consequently, creates a context wherein post-racialism can develop and flourish.

Thus, race scholars need to complicate the racial discrimination binary and expand our theories of racial discrimination if our scholarship is to describe what is going on in the world around us. The following Part embarks on this endeavor of complication. It thinks through how we might destabilize the discrimination-class schema and interrupt the work that it does to hide

²⁰⁰ Feagin & Barnett, *supra* note 196, at 1110–11.

the racial disadvantages that wealthier people of color endure. It proposes that if we hope to make legible the subordination that wealthier people of color experience on account of race—an illegibility that supports post-racialism—the most effective thing we might do is identify and theorize *noneconomic* disadvantages that racial discrimination produces.

IV. DESTABILIZING THE DISCRIMINATION-CLASS SCHEMA

What can those who are committed to racial justice do to make visible the marginalization that wealthier people of color experience? Fortunately, there are several interventions at our disposal.

We might begin by ceasing to diminish the importance of individualist racial discrimination, the variety of discrimination that the discrimination-class schema offers as the most predominate form of discrimination affecting wealthier people of color. This intervention is logical because the discrimination-class schema makes sense to a lot of people—across political orientations.²⁰¹ As such, emphasizing the continuing significance of a strain of racial discrimination that many people acknowledge as impacting wealthier people of color allows those people to understand this group as a *racially* subordinated group without requiring a huge paradigm shift in the way that they conceptualize racial discrimination. That would be a triumph.

The election of Donald Trump to the presidency ought to go a long way toward revitalizing the sense that individualist racial discrimination is significant. Trump was elected to the presidency despite the fact that he openly and unambiguously vilified “Muslims” and “Mexicans,” deploying racial categories in a way that breached the social norms around race that had come to mark the post-civil rights era.²⁰² In so doing, his election did more to demonstrate the power and persistence of individualist racial discrimination than all the studies showing that black homebuyers and renters are steered to different neighborhoods than their white counterparts;²⁰³ that “Emily” and “Greg” get more attention from employers than “Lakisha” and “Jamal”;²⁰⁴ that black patients do not receive the same pain medications as white pa-

²⁰¹ See *supra* note 156 and accompanying text (discussing President George W. Bush’s description of the poor people of color who had been affected by Hurricane Katrina as victims of institutional racial discrimination).

²⁰² Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST, July 8, 2015, https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.23fec5311180 [<https://perma.cc/WK7H-EH8C>]; Ed Pilkington, *Donald Trump: Ban All Muslims Entering US*, GUARDIAN, Dec. 7, 2015, <https://www.theguardian.com/us-news/2015/dec/07/donald-trump-ban-all-muslims-entering-us-san-bernardino-shooting> [<https://perma.cc/RT9Z-P7ZW>].

²⁰³ U.S. DEP’T OF HOUSING AND URB. DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012 at 31, 55–56 (2013); George Galster & Erin Godfrey, *By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000*, 71 J. AM. PLAN. ASS’N 251 (2005).

²⁰⁴ Bertrand & Mullainathan, *supra* note 59, at 992.

tients even when they present to emergency rooms with the same symptoms;²⁰⁵ or that white residents start moving out of neighborhoods once a certain threshold of black residents is reached.²⁰⁶ Indeed, Trump's election has made many observers believe that when race scholars looked to institutional racial discrimination and implicit bias to explain enduring racial inequality in the post-civil rights era, these scholars had been overly hopeful that the mechanisms that perpetuate racial inequality had shifted substantially. That is, Trump's election has caused many to think that when race scholars proposed that conscious, dominative racism and explicit bias were anachronistic relics from the past, we were wrong. Today, there might be a ubiquity to the racial sentiments that once maintained the racial order of things in the pre-civil rights era.

Trump's election and the fact that it appears to demonstrate the health and vigor of individualist racial discrimination—the subordinating process that the discrimination-class schema proposes to be the modality of discrimination that class-privileged racial minorities typically encounter—may help to bring greater visibility to the marginalization that class-privileged people of color experience on account of their race. However, we might also make great gains in the task of demonstrating the racial subordination of wealthier people of color by destabilizing the discrimination-class schema altogether. There are several ways that we might accomplish this destabilization.

A. *Recognizing the Institutional Discrimination that Class-Privileged Racial Minorities Endure*

First, race scholars could show that it is simply wrong to think that class-privileged racial minorities have been untouched by racially disadvantaging institutional processes. While these processes have not *impo- verished* them as they have poor racial minorities, these processes nevertheless have disadvantaged them.²⁰⁷ Further, it is important for thinkers of race to emphasize that while some of the disadvantage that class-privileged people of color may experience may be economic, this is not the universe of disad-

²⁰⁵ Kelly M. Hoffman et. al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PROC. NAT'L ACAD. SCI. 4296 (2016); Astha Singhal, et al., *Racial-Ethnic Disparities in Opioid Prescriptions at Emergency Department Visits for Conditions Commonly Associated with Prescription Drug Abuse*, 11 PLOS ONE 1, 4 (2016), <https://doi.org/10.1371/journal.pone.0159224> [<https://perma.cc/JS27-MR7U>].

²⁰⁶ Leah Platt Boustan, *Racial Residential Segregation in American Cities*, in THE OXFORD HANDBOOK OF URBAN ECONOMICS AND PLANNING 318, 318–39 (Nancy Brooks, Kieran Donaghy, & Gerrit-Jan Knapp, eds., 2011).

²⁰⁷ Compare BANKS, *supra* note 160, at 8–9 (observing that low marriage rates among poor black people have received a lot of attention while the equally low marriage rates among wealthier black people have gone unnoticed, and hypothesizing that the relative invisibility of the marriage decline among the black middle class is due to the erroneous belief that “*successful African Americans are exempt from the influences that have decimated marriage among the poor*” (emphasis added)).

vantage. There are other categories of disadvantage—including sociocultural and political. *It is paramount that we theorize these noneconomic categories of disadvantage, and it is paramount that we theorize the identity and operation of the institutional processes that have impacted wealthier racial minorities along these noneconomic lines.* Potential questions to which scholars might pursue answers in future research include: what kinds of effects does the excess morbidity and mortality that class-privileged people of color experience have on their political representation and on politics, more generally? What are the discursive effects of the fact that class-privileged people of color are sicker and die earlier than their white counterparts? How does the fact that class-privileged people of color find it difficult to live in racially integrated neighborhoods impact their political representation? What are the discursive effects of this residential segregation? Indeed, how does this residential segregation *make* race in very particular ways? There is much work to be done with respect to theorizing the what and the how of the racial disadvantage that class-privileged people of color experience.

B. Acknowledging the Coexistence of Institutional and Individualist Discrimination in the Present and the Past

Second, race scholars might destabilize the discrimination-class schema by challenging the sense that institutional racial discrimination and individualist racial discrimination only run consecutively—never concurrently. Thinkers of race have told a historical narrative in which the nation used to have a problem with individualist discrimination until the Civil Rights Movement and the civil rights revolution happened; now we have a problem with institutional discrimination. This is the narrative that race scholars largely have accepted about racial progress. If the arc of the moral universe is long and it bends towards justice, we can find individualist racial discrimination at the beginning of the arc, institutional racial discrimination in the middle portions of the arc, and at the end of the arc lies a society that has triumphed over institutional racial discrimination—a racial utopia. However, this model suggests that the present historical period, the era of institutional discrimination, is one that does not significantly feature individualist discrimination. As such, it misrepresents our present in ways that obscure the racial subordination of class-privileged racial minorities, those whom the discrimination-class schema suggests are impacted most by individualist racial discrimination.

In order to demonstrate that the arc of our racial universe is not a progression marked by eras in which only one mode of racial discrimination is relevant, it might be useful to demonstrate the simultaneity of individualist and structural discrimination in the pre-civil rights past. Thus, what were the forms that institutional racial discrimination took during chattel slavery—an historical era that we uncontroversially conceptualize as the reign of individualist discrimination? What were the forms that institutional discrimination

took during the Jim Crow era—an era conceptualized similarly to chattel slavery? If we engage in these analyses and recognize that institutional and individualist discrimination have operated *concurrently* in previous historical eras, it will free us to recognize the simultaneity of these modalities of discrimination in the modern present, when individualist discrimination purportedly is no longer significant. Moreover, to the extent that we conceptualize Trump’s election as a shift in how we ought to understand prevailing modalities of racial discrimination in the contemporary U.S.—that is, to the extent that we understand it as marking a return to an era in which *individualist* racial discrimination plays a significant role in producing racial disenfranchisement and racial hierarchy—then we ought to remind ourselves of the persistence of institutional racial discrimination in this new era. The institutions and structures that race scholars have identified as perpetuating racial inequality via race-neutral, oblique, subtle, colorblind mechanisms have not gone anywhere.

C. *Identifying the Distinction Between Individualist and Institutional Discrimination as a False Dichotomy*

Third, we might destabilize the discrimination-class schema by showing that the racial discrimination binary—composed of individualist racial discrimination, on one side, and institutional racial discrimination, on the other—is actually a false dichotomy. That is, conceptualizing individualist and institutional discrimination as perfectly dichotomous and proceeding as if the two mechanisms of racial marginalization are mutually exclusive to one another may cause us to fail to recognize the complexity of the processes at work. In truth, the line between the two types of racial discrimination may, at times, be quite blurry on the ground.

Consider the example of the employer who does not want to hire an ex-convict, engages in statistical discrimination, and refuses to offer jobs to black males because they are statistically overrepresented in the population of ex-convicts. Is this an example of individualist discrimination or institutional discrimination?²⁰⁸ When scholars understand statistical discrimination to be a species of racial discrimination, they typically understand it as the former: an *individual* has taken an act that harms members of a racial group because they are members of that racial group. Formulated this way, the ex-convict-wary employer in the example seems to be engaging in a textbook case of individualist racial discrimination. However, there are significant structural elements to the story. Many theorists have argued that the spectac-

²⁰⁸ Racialized policing is another example. Consider the example of the police officer who wants to prevent crime, engages in statistical discrimination, and stops young black males because they are statistically overrepresented in the population of persons who engage in behaviors that have been criminalized. Is this an example of individualist discrimination or institutional discrimination? See *supra* text accompanying note 151 (discussing Henry Louis Gates’s arrest).

ularly disproportionate incarceration of black males is a product of institutional racial discrimination.²⁰⁹ Indeed, Michelle Alexander has described mass incarceration as the result of “a tightly networked system of laws, policies, customs and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.”²¹⁰ Thus, if our hypothetical employer statistically discriminates against black males, large-scale processes that have made black males an overrepresented population within the employer’s disfavored group necessarily inform her individual decision. In other words, her individual acts of racial discrimination are, in important ways, products of institutional acts of racial discrimination.²¹¹ Because of the frequently co-constitutive nature of the two types of discrimination,²¹² it may be analytically incorrect for people to conceptualize the two as mutually exclusive. Race scholars could destabilize the discrimination-class schema by demonstrating this.

What this example illustrates is that individualist and institutional racial discrimination are not perfectly dichotomous. As such, we ought to challenge formulations of individualist racial discrimination that are overly individualizing. Conceptions of individualist discrimination at present tend to disconnect the harborers of such sentiment from the structures that make the sentiment “make sense.” A more promising conception would understand

²⁰⁹ See, e.g., López *supra* note 16; Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1300 (2004) (arguing that mass incarceration is a species of structural racism and contending that it “is the most effective institution for inscribing [racial] barriers in contemporary community life and transferring racial disadvantage to the next generation”)

²¹⁰ ALEXANDER, *supra* note 141, at 13.

²¹¹ This may not only be true for contemporary types of racial discrimination, but also for “old-school” dominative racism. For example, imagine a dominative racist living in a Boston suburb who believes that black people are dirty, lazy, and violent and, consequently, engages in terroristic tactics to prevent black families from moving into the neighborhood. This actor’s beliefs in black people’s racial inferiority, and his consequent individualist acts of racism, may, in important ways, be products of institutional racial discrimination. That is, because of structural forces—like the macro-level transformations in the economy that Wilson describes in his scholarship, the siting of low-income housing in these areas, and the exodus of jobs and the middle class to the suburbs—poor black people have been relegated to hypersegregated, disinvested neighborhoods. Because of the high concentration of poverty that characterizes these neighborhoods, they become sites of physical disrepair, welfare dependence, and crime—that is, the stuff that is taken by the dominative racist as proof that the black people who live there are dirty, lazy, and violent. Cf. IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 10 (2006) (observing that racial meanings, “while originally only ideas, gain force as they are reproduced in the material conditions of society” and noting that “the resulting material conditions becom[e] part of and reinforcement for the contingent meanings understood as race”). In this way, large-scale processes inform the dominative racist’s beliefs and decisions. In other words, his individualist racial discrimination is a product of institutional racial discrimination.

²¹² In order for individualist racial discrimination and institutional racial discrimination to be co-constitutive, it is not enough for institutional discrimination to inform individual acts of discrimination; individualist discrimination must also inform institutional acts of discrimination. This would happen whenever a person with an aversion, be it rational or irrational, towards a racial group is responsible for the implementation of an institutional practice—or fails to prevent the performance of an institutional practice—that sustains racial stratification.

individualist discrimination to be far from a character flaw, but rather a belief system that undergoes constant reality testing. We, as a society, have erected institutions that have produced a world in which it “makes sense” for individuals to fear black males; to believe in the procreative irresponsibility of black females; to think of black communities as welfare dependent and, therefore, lazy; to conceptualize Mexican immigrants as criminals, rapists, and drug dealers; and to homogenize an incredibly heterogeneous group of Muslims as potential terrorists. Accordingly, to the extent that there is obvious and undeniable racial stratification and inequality, we ought to *expect* individualist racial discrimination. Such beliefs should only be unexpected when we have created a world in which there are no external data that could be used to give them validity—when we have dismantled the institutions that produce a society that gives those beliefs some degree of rationality. Which is to say: we might destabilize the discrimination-class schema by demonstrating that the racial discrimination binary is, itself, unstable.

Recognizing that institutional discrimination may help to constitute individualist discrimination allows for the insight that individualist discrimination is not necessarily a personality trait that a person either has or does not have. That is, institutions and structures may *produce* individualist discrimination and *create* individual discriminators. And the converse is likely true: institutions and structures can dismantle individual discrimination and eliminate individual discriminators.

In this vein, consider, once again, the election of Trump to the presidency. There is an abundance of ways in which we might understand the role of race and racial discrimination in that phenomenon. We might simply deny that Trump deployed racism; we might claim that it is not at all racist to describe Mexicans as criminals and rapists and to propose banning Muslims from immigrating to the U.S.²¹³ This position avoids the necessity of interrogating the relationship that those who voted for him had to racism. However, if we maintain that Trump deployed racism, then we have to ask why those who supported him did so. There are at least two possibilities: Trump supporters voted for him either *because of* or *in spite of* the problematic and dangerous way that he deployed race. Both possibilities incite us to question the origins of these orientations towards racial discrimination.

Conceptualizing an individual’s orientation towards racial discrimination as a character flaw or a personality trait leads us to conclude that Trump supporters have always been racially biased. They were born that way or became that way as young children. However, if orientations towards racial discrimination are the product of institutions and structures, then we might question the large-scale, macro processes that allowed individuals to either actively support racial discrimination or simply countenance it.

²¹³ See Lee, *supra* note 202.

The economy and the disappearance of middle-skill, middle-wage jobs set the context for Trump's election to the presidency.²¹⁴ Indeed, one of Trump's campaign promises was to "make America great again" by bringing back middle-skill, middle-wage jobs that he accused leftist policies of shipping overseas or otherwise eliminating.²¹⁵ Also constituting the context for Trump's election was the spectacular death and destruction that ISIS was determined to produce in Syria and Iraq—images of which were broadcast around the world. Although people and communities in the U.S. are, geographically speaking, far removed from that tragedy, the fear of terrorism within the borders made the crisis seem very much local.²¹⁶ Cultural transformations in the U.S. also formed the context in which Trump was elected to the presidency. *Obergefell v. Hodges* signaled the discursive inclusion of gay and lesbian persons and the families that they create into the body politic.²¹⁷ This inclusion decentered the heteronormative family,²¹⁸ which had been fundamental in the nation's cultural imagination since its inception.²¹⁹ Moreover, in the early parts of 2016, it appeared that the country was well on its way to conceptualizing transgender persons as valuable members of

²¹⁴ Mark Muro, *Manufacturing Jobs Aren't Coming Back*, MIT TECH. REV. (Nov. 18, 2016), <https://www.technologyreview.com/s/602869/manufacturing-jobs-arent-coming-back> [<https://perma.cc/W2Q8-2CT9>]; David Autor, *The Polarization of Job Opportunities in the U.S. Labor Market: Implications for Employment and Earnings*, CTR. FOR AM. PROGRESS & HAMILTON PROJECT 2–7 (2010), <http://economics.mit.edu/files/5554> [<https://perma.cc/7BA6-EVVG>].

²¹⁵ Tessa Berenson, *Read Donald Trump's Speech on Jobs and the Economy*, TIME (Sept. 15, 2016), <http://time.com/4495507/donald-trump-economy-speech-transcript> [<https://perma.cc/4TBH-D4SS>].

²¹⁶ Acts of violence perpetrated in the U.S. by people claiming loyalty to the Islamic State or who could be identified by race or religion with the Islamic State's ideology—for example, the Pulse nightclub massacre in Orlando, FL and the bombings in the Chelsea neighborhood of Manhattan in September 2016—likely contribute to the sense that "radical Islam" poses a direct and immediate threat to the U.S. See Todd Green, *Is Islam Responsible for the Orlando Nightclub Shooting?*, HUFFINGTON POST (June 14, 2016), http://www.huffingtonpost.com/todd-green-phd/is-islam-responsible-for-_b_10449060.html [<https://perma.cc/UL8K-4REN>]; Renae Merle et. al., *Suspect in N.Y., N.J. Bombings Arrested After Shootout; FBI Says 'No Indication' of Terror Cell*, WASH. POST, Sept. 19, 2016, https://www.washingtonpost.com/news/post-nation/wp/2016/09/18/three-mysterious-incidents-in-new-york-new-jersey-and-minnesota-raise-fears-of-terrorism/?utm_term=.76b88ee5e40f [<https://perma.cc/TX79-PHBW>].

²¹⁷ *Obergefell v. Hodges*, 576 U.S. 2, 13–17 (2015).

²¹⁸ Of course, *Obergefell* might not have decentered the heteronormative family as much as it simply allowed lesbian and gay couples to occupy the roles traditionally occupied by different sex couples. See Jeremiah A. Ho, *Find Out What It Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination*, 2017 UTAH. L. REV. 463, 506 ("Kennedy's judicial extension of the right to marry possibly imported same-sex couples into a heteronormative world. In this way, the *Obergefell* decision recognized and preserved the heterosexual presence of marriage, envisioned same-sex couples as seeking the right to marry, and invariably played the dynamics in order to extend the right to same-sex couples by relying on respectability politics.").

²¹⁹ See Jacqueline Hudak & Shawn Giammattei, *Doing Family: Decentering Heteronormativity in "Marriage" and "Family" Therapy*, in 6 CRITICAL TOPICS IN FAMILY THERAPY 49–58 (Thorana Nelson & Hinda Winawer eds., 2010).

the nation.²²⁰ These cultural transformations would seem like a loss to those with a commitment to heteronormativity and a nostalgia for a past in which sexual minorities and transgender persons were socially and legally marked as deviant. Thus, an economy that contains fewer jobs that can support a middle class; ISIS and the fear of Muslim-perpetrated domestic terrorism; and the cultural inclusion of sexual minorities and transgender individuals into the body politic together constituted the context within which over 60 million persons could actively support, or simply countenance, racial discrimination.

Now, if we pay particular attention to the *structural* nature of the transformed economy, the *structural* forces that allowed ISIS to develop, and the *structural* nature of the cultural changes in the U.S. regarding sexual minorities and transgender persons, then we can see how *structural forces led to the development of individuals who would support or countenance racial discrimination*.²²¹

This insight might be an occasion for both consternation and optimism. With respect to consternation, the insight that individual orientations to racial discrimination are not personality traits, but rather are structurally produced, may make us less optimistic about polls that show that millennials overwhelmingly voted against Trump in the most recent presidential election.²²² If those votes were cast in order to repudiate the racism that Trump deployed, this antiracist orientation is not something that is inherently embedded in millennials' characters. Instead, it is something that may shift, change, and disappear in response to large-scale processes that envelop them. At the same time, however, the insight that structural forces can generate individualist racial discrimination may be a cause for optimism, as it suggests that there is nothing inherently enduring about the problematic racial worldviews that people have and the racially discriminatory choices that

²²⁰ See, e.g., Emanuella Grinberg, *Feds Issue Guidance on Transgender Access to Bathrooms*, CNN (May 14, 2016, 3:48 AM), <http://www.cnn.com/2016/05/12/politics/transgender-bathrooms-obama-administration/> [<https://perma.cc/C6TB-59JA>]; Tim Stelloh, *In Post-Caitlyn World, More Acceptance of Transgender People Expected: Survey*, NBC NEWS (June 9, 2015, 11:48 AM), <http://www.nbcnews.com/news/us-news/post-jenner-world-more-acceptance-transgender-people-expected-survey-n371831> [<https://perma.cc/22FQ-DPHY>]; Lana Ulrich, *Explaining Bathroom Bills, Transgender Rights, and Equal Protection*, NAT'L CONST. CTR.: CONST. DAILY (May 6, 2016), <http://blog.constitutioncenter.org/2016/05/explaining-bathroom-bills-transgender-rights-and-equal-protection/> [<https://perma.cc/9YYC-APEU>].

²²¹ This proposition extends the insight that others have made in different contexts. For example, in response to arguments that criminality is a personality trait that the black criminal possesses, race scholar Paul Butler has argued that structures produce the black criminal and black criminality. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 691–98 (1995).

²²² Emily Richmond et. al., *Dissecting the Youth Vote*, ATLANTIC (Nov. 11, 2016), <http://www.theatlantic.com/education/archive/2016/11/dissecting-the-youth-vote/507416/> [<https://perma.cc/7WK4-GUAH>].

people have made. Structural transformation can change individuals' relationships to racial discrimination.²²³

D. Theorizing Racial Discrimination that is Neither Individualist nor Institutional

Fourth and finally, an important intervention that race scholars can make to destabilize the discrimination-class schema is to theorize species of racial discrimination that are neither individualist nor institutional. This will be a challenge, as we have thought of racial discrimination as consisting of only these two modalities for quite a long time.

We could begin by developing the concept of *discursive racial discrimination*, defined as enduring narratives about racially unprivileged groups that exist within our cultural repertoire and that mark racially unprivileged people as deviant from the norm that white people represent. Discursive racial discrimination operates to disadvantage people of color while simultaneously naturalizing the dominant position that white people enjoy. Importantly, discursive racial discrimination is neither institutional nor individualist; it is a liminal category of racial discrimination that defies this racial discrimination binary.

To illuminate this concept, it might be helpful to consider the example of affirmative action. In Justice Thomas's dissent in *Grutter v. Bollinger*, he argued that affirmative action policies mark black individuals who gain access to the institutions that implement these policies as undeserving of their place there.²²⁴ The existence of an affirmative action program stamps onto all black bodies the message that they would not be there but for the race-conscious allowances that have been made in the admissions criteria. Affirmative action tars all black individuals as unqualified. Thomas argued that this

²²³ In this vein, consider the spike in hate crimes and hate speech after Trump's election. See, e.g., Melanie Eversley, *Post-Election Spate of Hate Crimes Worse Than Post-9/11, Experts Say*, USA TODAY, Nov. 14, 2016, <http://www.usatoday.com/story/news/2016/11/12/post-election-spate-hate-crimes-worse-than-post-911-experts-say/93681294/> [<https://perma.cc/4VGE-WHBF>]. We might explain this phenomenon in terms of Trump having legitimated the racially discriminatory beliefs that individuals held before Trump's election, but had suppressed given the social norms that repudiated such racial worldviews. See Dana Milbank, Opinion, *Trump's Campaign Made it Safe to Hate Again. Will He Turn that Around?*, WASH. POST, Nov. 15, 2016, https://www.washingtonpost.com/opinions/trumps-campaign-made-it-safe-to-hate-again-will-he-turn-that-around/2016/11/15/f7d69e6a-ab76-11e6-977a-1030f822fc35_story.html [<https://perma.cc/NJF9-QKES>]. This explanation of the rise in hate-related incidences is consistent with understanding individualist racial discrimination to be a personality trait—an enduring aspect of one's character that persists across time and social context. However, if we understand Trump's election as having *institutionalized* racial discrimination in some important sense—indeed, his election embeds the racial discrimination that he represents into the executive branch and the federal government for the next four years—then we might understand the rise in hate-related incidences as demonstrations of the ways in which institutions and structures *produce* individualist racial discrimination. In other words, Trump's election did not necessarily legitimate racial discrimination; it may have created it.

²²⁴ *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting).

was true without regard to whether an individual actually is a beneficiary of a race-conscious program.²²⁵

There is a lot of accuracy to Thomas's claims. Many certainly believe that black people in institutions that historically have been racially exclusionary—like the black students who initiated the Reclaim movement at Harvard Law School—are not qualified to be there. However, this does not counsel in favor of eliminating affirmative action programs, as Thomas believes. Rather, it simply illuminates the fact of discursive racial discrimination. That is, it reveals that there are persistent narratives about black inferiority that exist in society—narratives that persist despite changed societal conditions. This is to say that just as surely as black people's presence in institutions from which they have been excluded historically is taken to demonstrate their inferiority, their *absence* from these same institutions would be taken to demonstrate the same.

The racially discriminatory nature of this discourse becomes more perceptible when we observe that no corresponding narrative exists about white people in these same institutions. We do not have stories in our cultural repertoire that construct white people as unqualified for, and undeserving of, the seats that they held in these institutions during the decades that featured the formal and informal exclusion of people of color. Further, even when white people are excluded from these institutions—when Barbara Grutter or Abigail Fisher fail to win a seat in their first-choice school—they are *still* constructed as qualified and deserving. Even supporters of affirmative action concede their qualifications and their deservingness²²⁶; we simply explain that a policy designed to expand access to these institutions has redistributed their seat away from them and other qualified, deserving applicants.²²⁷

It is important to note that economic resources will not eliminate the noneconomic disadvantages that discursive racial discrimination perpetuates. Many, if not most, of the black students in elite institutions have access to an abundance of economic resources.²²⁸ However, their class privilege does not allow them egress from persistent, adaptive narratives about black inferiority.

²²⁵ *Id.*

²²⁶ Notably, there was a salient contingent of commentators who were willing to question the qualifications and deservingness of Abigail Fisher. See Abby Jackson, *People are Tweeting a Modified Beyonce Lyric to Mock the Woman at the Center of the Supreme Court's Case on Affirmative Action*, BUS. INSIDER (June 27, 2006, 6:18 PM), <http://www.businessinsider.com/what-becky-with-the-bad-grades-means-2016-6> [<https://perma.cc/5P82-2GS4>].

²²⁷ See *Fisher v. Univ. of Texas at Austin*, 136 S.Ct. 2198 (2016); *Grutter*, 539 U.S. 306.

²²⁸ Valerie Strauss, *Why We Still Need Affirmative Action For African Americans in College Admissions*, WASH. POST: ANSWER SHEET (July 3, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/07/03/why-we-still-need-affirmative-action-for-african-americans-in-college-admissions> [<https://perma.cc/Y4KF-5ZGA>]; Mikhail Zinshteyn, *The Growing College-Degree Wealth Gap*, ATLANTIC, Apr. 25, 2016, <http://www.theatlantic.com/education/archive/2016/04/the-growing-wealth-gap-in-who-earns-college-degrees/479688/> [<https://perma.cc/H738-HMK8>].

It is important to note as well that discursive racial discrimination and the noneconomic harms that it inflicts may also produce economic disadvantages. Certainly, narratives about black inferiority may cause employers to overlook black candidates for jobs or to pay them less if they are hired; narratives about black inferiority may cause white homeowners to move when there is an influx of black residents into a neighborhood. However, discursive racial discrimination ought not to be reduced to these economic disadvantages. Black people who have to navigate, negotiate, and negate incessant discourses about their inferiority are harmed even when they get the job and the high salary; they are harmed even when their new white neighbors welcome them with open arms. It is not at all unreasonable to believe that the inferior states of health that class-privileged people of color inhabit relative to their white peers are a testament to this harm.²²⁹

CONCLUSION

This article has observed that the race-based disadvantage that class-privileged people of color endure has been obscured, and it identifies our theories of racial discrimination as responsible for this obfuscation. The article shows that we have come to conceptualize two modalities of racial discrimination—individualist and institutional; this is the racial discrimination binary. Further, we have come to think of poor people of color as most affected by the institutional variety of racial discrimination, while conceptualizing class-privileged people of color as primarily encountering the individualist variety of racial discrimination; this is the discrimination-class schema. Because most agree that individualist racial discrimination in the post-civil rights era is nowhere near as impactful as it was in the pre-civil rights era, we conceptualize affluent people of color as impacted by the variety of racial discrimination that is not really that meaningful in modern times. The suffering that they experience on account of their race gets diminished, and oftentimes erased entirely, as a consequence. The only suffering that remains legible is that endured by poor people of color. The vividness of the poor's suffering, combined with the indiscernibility of the race-based disadvantages borne by wealthier people of color, leads us to believe that only the poor are burdened by racial discrimination. This in turn suggests that economic disadvantage is the form that racial disadvantage takes in the post-civil rights era and that class is the new engine of racial inequality. This is post-racialism: the sense that race does not matter anymore.

As this article identifies theory as responsible for obscuring the race-based disadvantages shouldered by more affluent people of color, it identifies theory as the cure. If we are to defeat post-racial thinking, we have to destabilize the discrimination-class schema. We have to theorize noneconomic forms of race-based disadvantage. And we have to think

²²⁹ See *supra* notes 20–37 and accompanying text.

outside of the racial discrimination binary and theorize modalities of discrimination, like discursive racial discrimination, that are neither individualist or institutional.

Developing our theories of racial discrimination—expanding them, adding nuance to them, sharpening them—is necessary. It is necessary if we are to bring into stunning relief the marginalization that class-privileged racial minorities endure *on account of race*. It is necessary if we are going to rise to the challenge that post-racialism—and now, in the era of Trump, post-post-racialism—poses to racial justice. And it is necessary if we simply want to understand what is going on in our present-day society. It has been over fifty years since Carmichael and Hamilton introduced the concept of institutional racism to the country. It seems highly unlikely that the conceptual tools that were developed to describe a nation that was just emerging from an age of legally sanctioned racial apartheid are as capable of describing a nation that is a half a century into an experiment in formal racial equality. As our society is not stagnant, the theories that describe our nation ought not to be stagnant. They ought to shift, evolve, transform, adjust—ever-responsive to the social milieu that they are designed to explain.