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THE ROAD TO THE BENCH: NOT EVEN GOOD (SUBLIMINAL) INTENTIONS

LATEEF MTIMA†

INTRODUCTION

"Speak thou with us, and we will hear . . ." Exodus 20:19.

In the beginning, the drafters of a particular state constitution mandated that the number of judgeships allocated to each of its towns and cities would be determined by size of population, and that individual judges would then be elected by popular vote. The state has always had both black and white citizens, but in the days in which blacks were effectively denied the right to vote, even in those areas of the state where blacks constituted a majority of the population, only whites were ever elected to the bench.

When the federal constitutional rights of black Americans began to be legally recognized and enforced, however, some whites in the state feared that black judges would completely replace white judges in those towns and cities in which blacks constituted a majority. These fears may have been somewhat allayed when a previously unexploited loophole in the state constitution was de-
ployed by whites in the state legislature. You see, the state constitution permitted the appointment of an unlimited number of “temporary” judges to the bench whenever they were needed to address heavy judicial backlogs. So, for the next thirty years, the state’s governors, all of whom were white, appointed dozens of “temporary” judges, most of whom were also white and many of whom held their “temporary” positions on the bench for decades.

Even a casual observer could easily conclude that, with regard to the election of the state judiciary, state law had been manipulated in a way that diminished the rights of black taxpayers. The attitude of some state officials was: “Where they have the numbers, let the blacks elect their own judges.” But constitutional compliance notwithstanding, there will also always be plenty of qualified white judges available to fill the slots—especially, perhaps, in connection with those cases in which it appears doubtful that a black judge is likely to reach the “right” decision. Thus, for some three decades, two essentially separate and presumably unequal roads to the bench were maintained throughout the state.

Which antebellum or Jim Crow state in America’s historic South does the foregoing tableau describe? Unfortunately the state in question is not only outside the South, but the relevant period is neither ante-bellum, nor Jim Crow, nor even the pre-Civil Rights Era. The state described above is New York in the last three decades of the twentieth century.

This Article will discuss how covert, subjective, and subliminal racial biases combine with and even replace the more traditional obstacles to equitable African American participation in the present-day justice system. These biases limit the number of black judges and also foster and replicate racial bias against blacks throughout other aspects of the judicial selection and appointment process. First, this Article will briefly recount the historical exclusion of African Americans from the judiciary prior to the Civil Rights Era. Next, the lack of proportionate increase in African American representation within the judiciary in the post-Civil Rights Era will be examined. It is this lack of proportional progress, despite the removal of many *de jure* barriers to black participation, which implicates the issue of covert and subliminal racial bias, and it is the special obstacle that this form of discrimination presents to blacks competing for positions of high social, political, and professional prestige that will be specifically explored.

In addition, this Article will propose as one means of addressing the resulting disproportionately small number of black judges, that greater attention be paid to the meaningful inclusion of African Americans within the nation’s elite corporate law firms and similar professional positions. From a strategic standpoint, these entities offer a logical target for this kind of affirmative diversification initiative. As compared with much of the rest of the legal profession, the continued lack of genuine racial integration within these firms is increasingly difficult to explain or defend, at least in accordance with post-Civil Rights Era
mores. Indeed, it is not entirely hyperbole to say that, even today, most of America’s major corporate law firms, as well as many “in-house” corporate counsel departments, remain almost as lily white as a pre-Civil Rights Era country club. In terms of proportionate inclusion of African Americans into their ranks, the elite corporate law firms remain some thirty years behind not only most of the legal profession, but much of American society.

Perhaps even more important, meaningful diversification of these particular professional environments will provide equal opportunity for black lawyers to demonstrate their abilities to perform in highly competitive and professionally challenging positions of significant responsibility and authority. This will better enable black judicial aspirants to obtain the kind of professional experience generally regarded as a necessary complement to the political connections that are typically prerequisite to a position on the bench. Indeed, because these firms serve as an important professional “pipeline” to the judiciary and other positions of authority in American society, this would also give black lawyers greater access to many of the legal, business, and political conduits of power. Greater access to these conduits is necessary to forge the strategic alliances essential to attaining judicial office.

Finally, meaningful diversification of these influential legal entities is also likely to provide a less direct, but no less important, benefit with respect to the racial attitudes of many present and future non-black jurists, as well as other members of the legal profession. One often overlooked byproduct of the exclusion of blacks from the professional environments, in which many other lawyers must “cut their teeth” before becoming judges, is that it increases the likelihood that the ultimate pool of judges will be disproportionately composed of individuals who have had little professional interaction with black attorneys as peers. Lacking these and other relevant opportunities to broaden their racial perspectives and experiences, these lawyers are more likely to carry outmoded racial attitudes with them as they ascend to the bench. Bringing racial diversity to the elite corporate law firms and similar professional settings will not only enhance judicial and other professional opportunities for blacks, but can also provide many non-black lawyers, including those who will eventually nominate, appoint, or serve as judges, with the kind of continuous professional interaction with black lawyers that can be critical to overcoming both conscious prejudice as well as subliminal racial biases.

**WHEREAT LIES THE ROAD . . . ?**

There are many reasons why some Americans today do not believe that black Americans have the same opportunities for legal justice in America as do white Americans. As the foregoing revelations with respect to the New York judicial selection process suggest, one basis for these beliefs stems from suspicions regarding the racial make-up of the American bench. For one thing, the
percentage of judges in America who are black is much smaller than the percentage of blacks in the population overall. In light of the history of race in American society, including manipulations of legal and governmental processes such as the one described above, many people understandably believe that the paucity of black judges is a deliberate and significant limitation upon the opportunities for black participants in the judicial system to receive equitable treatment.

Others observe that the actual number of black judges is not the sole or even the most salient issue with respect to the question of race and the judiciary. Certainly it should not be the case that for any American seeking legal redress, whatever her color, her best hope for receiving a fair dispensation is to appear before a judge of her own race. It is thus argued that to improve the availability of equitable legal justice for black Americans it is not enough to work toward a judiciary that is more racially representative. It may be even more important to impact the very racial perspectives that spur some whites and others to vitiate the judicial selection process in the first place, especially when one considers that some of these same people will themselves one day become judges and will preside over controversies involving black litigants or parties represented by black counsel.

One key factor that significantly impacts the issue of race and the American bench with respect to both proportionate racial representation as well as the racial attitudes of some white and other non-black judges is the traditional career path that most candidates must follow in order to become a judge. Probably the most important prerequisite to obtaining judicial office is the forging of significant political "connections," whether through political party activity, formal government service, or professional activity in local and national bar associations. Indeed, such connections are especially important with respect to the federal bench, because there are no elected positions in the federal judiciary.

In addition to having effective political connections, however, experience in certain practice areas and environments, particularly the large—and extremely influential—corporate law firms, has also been traditionally favored in assessing a lawyer's suitability to ascend to the position of judge. Validly or not, the training offered by such firms is generally considered first-rate by those appointing or nominating judges. Often within these powerful professional enclaves, many aspiring young lawyers are first exposed to the legal, business, and political powerbrokers with whom they must become allied if they are to become serious judicial contenders.

Initially, it would seem then that the very nature of the traditional career path to a judgeship at least partially accounts for the inability of blacks and some other minorities to obtain equitable representation within, and treatment by, the judiciary. Until fairly recently, blacks were simply not permitted to participate in most of those professional and political endeavors considered essential to quali-
fying for judicial office. Often denied the right even to vote, blacks previously wielded little political clout. And prior to the 1970s, the African American presence in major corporate law firms and similar professional environments was all but nonexistent. Thus, the exclusion of blacks from the relevant political and preparatory professional activities made it difficult for African Americans to travel the traditional road toward qualifying for the bench. The absence of blacks from judicial positions, in turn, reinforced widely held beliefs that blacks were not suitable to fill them.

It would be difficult to deny, however, that much progress has been made in many of these and related areas of society since the Civil Rights Era. African Americans have made concrete advances in the American political arena and have also achieved significant increases in law school enrollments over the past thirty years. Nonetheless, this progress has yet to result in anything even close to proportionate or equitable representation of African Americans within the American judiciary.

This lack of proportionate increase in the number of black judges, together with the contention that some current political, social, and judicial attitudes toward blacks often remain less than progressive, suggests that the removal of the de jure obstacles that impeded African American access to the judiciary has only partially redressed the problem. Blacks are no longer formally denied pertinent political and professional opportunities. The issue today is thus one of covert, subjective, and even subliminal concerns on the part of some non-blacks regarding the ability of blacks to preside fairly and competently over non-blacks or otherwise to fulfill adequately the obligations of judicial and other authority positions.

Express aspirations of racial equality notwithstanding, if some members of the legal profession retain covert and subconscious doubts about blacks, then the opportunity to experience firsthand conduct and capabilities that contradict such preconceptions is likely to prove an effective means of dispelling these apprehensions. Routinely working with or being advised by African American attorneys in connection with complex and high-profile legal matters and with such black lawyers participating as fully accepted members of an elite (and therefore presumed competent) legal cadre will make the proposal of a black judicial nominee an uncontroversial expectation.

Full participation in the elite corporate law firm arena will not only better position black judicial hopefuls to obtain specific kinds of relevant professional experience, but it will also provide black lawyers with greater opportunities to forge the critical alliances prerequisite to actually attaining judicial office. Infusing genuine racial diversity into this particular professional context will also expose many non-black, elite professionals to an increased level of professional interaction with black lawyers, which will better enable them to transcend any conscious prejudices or subliminal racial biases that they may still retain. Indeed,
the elimination of such lingering covert or subliminal perceptions of black lawyers and other black professionals may be one of the most important benefits to be derived from diversifying the elite corporate law firm, as the issue of implicit racial attitudes becomes increasingly important in post-Civil Rights American society.

**EXCLUSION FROM THE BENCH IN THE PRE-CIVIL RIGHTS ERA**

Prior to the Civil Rights Era, African Americans were generally precluded from holding judicial or other significant public office or, for that matter, from undertaking many of the civil, social, or professional endeavors that most other Americans took for granted as part of their birthright:

One of the main reasons that we are a democratic country . . . is because of our insistence that virtually all our judicial officers be elected by the people or confirmed by the elected representatives of the people. Such “mirror representation” . . . is the essence of our democracy and underlies our guarantees for “equal justice under law.” Yet it was 76 years after 1776 before the first black man in America was permitted to occupy a judicial post. And it was another century before blacks in any noticeable numbers were allowed to assume even a minor role as magistrates in a few of our city and state courts. Thus, for all but the last decade of our entire national existence, blacks have been virtually excluded from the judicial decision-making function in our society.

In many instances, there were express prohibitions against blacks working in certain capacities or engaging in many professional and business activities, such as joining the American Bar Association, which were prerequisites to attaining such positions. Many of the nation’s law schools did not admit blacks, and even those blacks who were able to earn law degrees were not afforded the full range of opportunities and privileges attendant to the profession. For example, it was not until 1943 that the *de jure* prohibition against black lawyers joining their white peers in the powerful American Bar Association was lifted. However,

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the ABA has played and continues to play a critical role in the judicial selection process by, among other things, providing candidate “approval ratings” to assist in the evaluation of judicial nominees.5

But even in the absence of such de jure barriers, it was usually unnecessary to forbid blacks expressly from holding judicial or similar office.6 Effectively denied the right to vote, African Americans were thoroughly bereft of political influence, a vital prerequisite to attaining judicial office:

Excluded from the political mainstream, blacks were simply not in a position to develop or benefit from the kind of political patronage that traditionally opens avenues to political appointments, or to engender the political backing essential to a successful bid for elective office.8

Moreover, prior to the 1970s, black lawyers did not enjoy large or influential private practices. Most black lawyers were government employees, and those in private practice worked primarily as sole practitioners, sometimes forming small law firm partnerships but generally serving a very limited client base. Consequently the black private practitioner served a clientele composed principally of individuals, and almost exclusively of blacks.9 Moreover, the practice areas in which most African American lawyers did find work were limited and provided few opportunities to forge influential relationships. Black lawyers had their largest practices in the areas of criminal law, personal injury, and domestic relations, and found little to no opportunity in the commercial areas, like labor or tax


8. Pitts and Vinson, 2 Harv BlackLetter L J at 32 (cited in note 5).

9. See generally Richard L. Abel, American Lawyers 105 (Oxford 1989). See also Smith, Emancipation at 11 (cited in note 4) (“With a few exceptions, the clientele of most black lawyers before and after the Post-Reconstruction era were black, even in major cities with large ethnic populations.”); Segal, Blacks in the Law at 17 (cited in note 3).
"The opportunity of black lawyers in the free market was not free. Since the white commercial community hardly ever used the services of black lawyers, the black lawyers never developed wealth or influence in the commercial community." Indeed, even "[b]lack clients often used black lawyers in almost hopeless criminal matters but turned to white lawyers in the more lucrative civil cases." Accordingly, significant commercial and corporate representations by black lawyers were virtually nonexistent in the pre- and early Civil Rights Era. "[B]lack sole practitioners surveyed in 1966 earned very little, even less than black lawyers employed in government—a reversal of the relationship among white lawyers . . . . Just as racial minorities have greater difficulty entering the profession than either earlier immigrant groups or women, so they appear to have greater difficulty attaining the most desirable positions within it."

Thus, the inherent structure of the road to judicial office was hostile to African American professional participation and progress. The traditional judicial selection process emphasized professional qualifications and experience more typically associated with the career patterns enjoyed by white attorneys, and it valued the input of professional and political networks from which blacks were historically excluded. Correspondingly, the selfsame barriers that blocked African American access to the educational and professional experiences valued in judges also served to preserve the American bench almost exclusively for whites.

Notwithstanding these social and political obstacles, it is important to note that even prior to the civil rights advances that began in the 1960s, a few blacks did become state court judges and some were even appointed to the federal bench. Robert Morris was the nation's first black judge, appointed to the Magistrates Court in Boston, Massachusetts, in 1852. The first black appellate judge was Jonathan Jasper Wright, who was elected to the South Carolina Supreme Court in 1870. And the first black federal judicial officer was Robert H. Terrell, appointed a Justice of the Peace in Washington, D.C., in 1901.

With the advent of the Civil Rights Movement, blacks made important advances within the judiciary, not the least of which were the appointments of Thurgood Marshall to the United States Court of Appeals for the Second Circuit and, of course, ultimately to the United States Supreme Court, and Constance B.

10. Segal, Blacks in the Law at 89 (cited in note 3).
12. Id at 4.
13. Abel, American Lawyers at 107 (cited in note 9).
14. Pitts and Vinson, 2 Harv BlackLetter L J at 27 (cited in note 5); Segal, Blacks in the Law at 233 (cited in note 3).
15. Crockett, 19 Wayne L Rev at 66 (cited in note 1); Smith, Emancipation at 406, 422 (cited in note 4) (At age thirty-one, "Jane Matilda Bolin broke ground for all women when, in 1939, she became the first black woman judge in American law.").
Motley to the District Court for the Southern District of New York. Motley has written:

[In 1966] I [became] the first black woman appointed to the federal bench . . . Eleven black men had been appointed to the federal bench: William H. Hastie to the district court in the Virgin Islands in 1937 and to the District Court in Philadelphia in 1949; Irvin C. Mollison to the customs court in New York in 1945; Scovel Richardson to the same customs court in 1957; Walter A. Gordon to the district court in the Virgin Islands in 1958; James B. Parsons and Wade McCrae to the district courts in Chicago and Detroit, respectively, in 1961; Leon B. Higginbotham to the district court in Philadelphia in 1964; Spottswood W. Robinson III and William B. Bryant to the district court for the District of Columbia in 1964 and 1965, respectively; and James L. Watson to the custom court in New York in 1966. Thurgood Marshall, of course, had been appointed to the Court of Appeals for the Second Circuit in 1961 but had not yet been appointed to the Supreme Court.16

In light of these and other social, political, and legal changes brought about by the Civil Rights Movement, many expected that the floodgates to judicial opportunity would swing wide open for blacks and that, at the very least, the rate of African American appointment and election to judicial office would remain commensurate with that of other social progress in the nation. “The civil rights revolution succeeded in whittling away restrictions and penalties which had barred blacks from participation in our social and political affairs . . . . These factors, combined with increasing pressures to enforce more vigorously the equal rights guarantees of our Constitution and its amendments, portend even more significant changes in the future composition of those who administer justice in our society.”17 Unfortunately, long after the express constructs of “separate but equal,” Jim Crow, and “benign neglect” began to be dismantled, de facto barriers to African American ascension to the bench would persist, precluding the anticipated proportionate representation of blacks within the post-Civil Rights American judiciary.18

BLACK JUDGES IN THE POST-CIVIL RIGHTS ERA

The relationship between influential political connections and a successful bid for judicial office has traditionally been fairly direct, and indeed so much so that some commentators have questioned whether its significance sometimes outweighs that of candidates’ substantive merit. “In this country where so many

of our judges are elected to office in popularity contests and so many even of those who are appointed are selected with political considerations in mind, professional competence cannot be taken for granted and hence considerable attention is devoted here to the need of professional training and experience."

During the Civil Rights Era, blacks' nascent social equality presented opportunities for political activism, recognition, and alliances, such that strategic political relationships would become as beneficial to blacks seeking judicial office as they had traditionally been for whites. "My two and a half years in the political arena," writes Judge Constance Motley, "greatly broadened my knowledge about the operations of the New York State legislature and of New York City, knowledge that has proved invaluable during my judgeship . . . . I learned first-hand about New York's power groups and how they operate, sometimes together and sometimes not, to achieve political goals. There is no substitute for first-hand experience in the legislative and executive branches of government."

Black political activists and judicial hopefuls alike began to deploy the tools of political patronage to influence judicial selection, as well as other sociopolitical appointment and election outcomes. "[T]he participation in politics by the black lawyer was seen as an avenue of power, as a way to influence the court system in the same way the white folks did. Since judges were elected, and since elections were controlled through the political party machinery . . . black lawyers became active in the party of their choosing in order to influence elections and to benefit from them." Consequently, African Americans made important progress in the political arena during the 1960s and 1970s, and that progress helped to spur significant increases in the number of black judges. With respect to the federal bench, the number of black judges began to move beyond that of periodic, token appointments. And with the election of Jimmy Carter in 1976, the federal judiciary witnessed the appointment of an unprecedented number of black judges to its ranks. "The Carter Administration . . . carried out a concerted effort to 'balance' the federal bench through increased appointments of minorities and women. The insertion of an additional criterion for judicial selection, a demonstrated 'commitment to equal justice under the law,' expanded the pool of eligible applicants to include more women and minorities."

But while the political activism and social progress that helped open the

23. Moloney Smith, 28 U Rich L Rev at 181 (cited in note 18) ("Of his 258 nominations, Carter nominated 40 (15.5%) women and 55 (21.3%) minorities. During his term, 38 (14.7%) black judges were appointed."). See also Segal, Blacks in the Law at 229 (cited in note 3).
24. Pitts and Vinson, 2 Harv BlackLetter LJ at 39 (cited in note 5). Indeed, blacks enjoyed similar progress in the state courts during this period. See Segal, Blacks in the Law at 229 (cited in note 3).
doors to the judiciary would continue beyond the 1970s, the executive initiative to include blacks within the federal judiciary evaporated once President Carter left office. And in the state courts, the momentum of the Civil Rights Movement dissipated as an atmosphere of anti-affirmative action and racial backlash took hold of the nation:

Despite dramatic gains in the legislative arena in the past 20 years, racial diversity on state courts remains a much lauded but seemingly elusive goal. Only 3.8% of all state court judges are African American. In jurisdictions with large African American populations, the figures are disturbingly similar. In New York State for example, only 6.3% of the state’s judges were African American in 1991, although African Americans constituted 14.3% of the state’s population. In Georgia, where 27% of the population is African American, only 6% of the state’s judges are African American. These figures stand in stark contrast to the gains made by minorities in state legislatures. Those gains—directly attributable to the Voting Rights Act’s removal of the structural impediments to meaningful electoral participation by minority voters—have not been mirrored in judicial fora.

**POTHOLES IN THE ROAD IN THE POST-CIVIL RIGHTS ERA**

One cause for blacks’ diminishing gains in the judiciary may rest with the inability of African American lawyers to buttress the post-Civil Rights Era political advancement with acceptance in certain pertinent professional tiers in corporate America. Even throughout the Civil Rights heyday, the major corporate law firms and in-house counsel departments failed to open their doors to black lawyers. Thus, black judicial hopefuls, though better positioned than in

25. See generally Harold A. McDougall, *Black Baltimore: A New Theory of Community* (Temple 1993); David K. Shipler, *A Country of Strangers* 16 (Alfred A. Knopf 1997) (“In 1992 ... the number of blacks in Congress jumped from 26 to 39, and then to 41, the highest in history ... Between 1970 and 1993, blacks holding elected positions at the federal, state, and local levels went from 1,469 to 8,015. The number of black state legislators rose from 307 in 1979 to 511 in 1993 ... and mayors [went] from 48 in 1970 to 338 in 1993.”).

26. Elizabeth Chambliss, American Bar Association Commission on Racial and Ethnic Diversity in the Profession, *Miles to Go 2000: Progress of Minorities in the Legal Profession* 16 (“The ABA Directory of Minority Judges of the United States places minority representation among all judges (including federal, state, and administrative judges, etc.) at 6.0 percent in 1997 [including] 2.8 percent African American.”).

27. Moloney Smith, 28 U Rich L Rev at 182 (cited in note 18) (“out of President Reagan’s 379 appointments, 31 (8.2%) were women and 7 (1.8%) were black. President Bush appointed more than 200 judges, and only 13 were black.”); Steven Keeva, *Slow Integration*, Dec-78 ABAJ 28 (1992); Nancy B. Broff and Nan Aron, *Judgeships Made Easy*, NY Times 35 (Apr 18, 1986).

28. Ifill, 39 BC L Rev at 95-96 (cited in note 2); Moloney Smith, 28 U Rich L Rev at 180-81 (cited in note 18) (“In 1991, the total number of black judges was 895. Of these, 822 serve on state courts, representing an increase of 14% from 1986. At the federal level there has actually been a decrease in the number of black judges, from 99 in 1986 to 73 in 1991.”).

the pre-Civil Rights Era, continue to lack a significant piece of artillery in the campaign for judicial office.

Many commentators contend that the reason for the lack of African American ingress into the elite corporate ranks is the same reason many black lawyers, including even those who possess both the political and professional prerequisites, are unable to advance within the judiciary. The cause proffered is simple racial bias, whether in connection with the recruitment and selection of candidates or with respect to mentoring and other professional development opportunities.\(^3\)

On the other hand, there are those commentators who argue to the contrary. They insist that racial animus has little or nothing to do with either the low numbers of blacks on the bench or the disproportionately small number of African Americans occupying other positions in the upper echelons of the legal profession overall. They cite a variety of alternative economic, political, and even educational or vocational explanations, not the least of which are that current discrimination remedies are inefficient and heavy-handed and that some blacks impede their own progress by being overly “race sensitive” or resistant to constructive advice and criticism.\(^3\)

While these opposing views perhaps reflect more oversimplification than indisputable fact or outright inaccuracy, the overall lack of African American progress at these upper ranks, especially when compared with the advances made by many other previously disenfranchised groups, does make the likelihood of at least some kind or degree of racial bias difficult to discount.\(^3\)

from law schools has increased significantly in the recent decades, blacks still make up a very small minority of the lawyers working in large corporate law firms”); Lateef Mtima, *African-American Empowerment Strategies for the New Millennium—Revisiting the Washington—Du Bois Dialectic*, 42 Howard L J 391, 405 (1999); Pearce, 42 Howard L J at 60 (cited in note 2); Pitts and Vinson, 2 Harv BlackLetter L J at 31 (cited in note 5).

30. Christopher McKnight, *Does Racism Keep the 4th Circuit Incomplete?*, at http://www.law.com (visited July 31, 2000) (“The Republican-controlled Senate has been holding up confirmation of minority nominees for four vacancies on the 4th U.S. Circuit Court of Appeals, demonstrating racist and sexist tendencies, according to the Congressional Black Caucus . . . . As of last November, the Senate had confirmed 42 percent of Clinton’s white nominees, but less than 18 percent of his black nominees. Representative Mel Watt, D-N.C., attributes the difference to race. ‘Race is a major factor in the Senate process of confirmation of nominees . . . . and race is still a very large issue in America.’”). See also Terry Carter, *Divided Justice*, Feb-85 ABA J 42 (1999).

31. See Carter, Feb-85 ABA J 42 (cited in note 30). See also Joan Biskupic, *Politics Snare Court Hopes of Minorities and Women*, USA Today 1A, 11A (Aug 22, 2000) (“No nominee is being denied the chance to serve as a federal judge because of his or her race or gender,’ . . . says [Senate Judiciary Committee Chairman Orrin Hatch. And according to] Sen. Jeff Sessions . . . . The idea that there has been some obstruction of Clinton’s nominees is ludicrous. If there’s any bias regarding minorities, it’s a reluctance to oppose”).

32. See Watters, 10 Natl Bar Assn Mag at 1 (cited in note 18) (“Despite all of the rhetoric about affirmative action, the percentage of black judges and lawyers has remained unchanged for the past 30 years . . . . Black judges and lawyers remained at a paltry 2.7 percent of all judges and lawyers for decades . . . . White females on the other hand, greatly expanded their ranks of attorneys and judges, going from 16 percent to 23 percent during the past decade. It is a sad commentary that affirmative action has been a substantial benefit to white females, but has just barely enabled our numbers from falling even
theless, the likelihood of some racial inequity does not inevitably lead to the conclusion that rank racial bigotry remains rampant within these segments of American society. Instead of outright, consciously racist views, it may be that subconscious or subliminal racial attitudes infect the relevant evaluation and selection processes, and do so in ways that facially race-neutral evaluation mechanisms are ill equipped to counteract.

Consequently, protective mechanisms that presuppose the absence of significant racial bias in the relevant appointment and selection process, and so principally because the law explicitly states that racial discrimination is no longer permitted to affect such decisions, are likely to prove less than wholly effective where such bias manifests itself in forms that register "below the radar" of the checks and balances inherent in the process. Indeed, in some situations, appointment and selection processes constructed or assessed without considering race, or perhaps more pointedly, without considering racism, can affirmatively engender racial inequities precisely because they fail to account for the fact that such attitudes continue to influence subjective evaluations—notwithstanding the express, post-Civil Rights Era directives that such notions are anathema to merit assessment in an enlightened society.

An examination of African American participation and progress in connection with prevailing state and federal judicial selection processes helps to delineate the problem. In general, facially "race-neutral" selection procedures notwithstanding, the more subjective evaluation mechanisms disproportionately disfavor African American candidates. And while the cause for this imbalance may not be a reemergence of outright racist views, it appears that racial bias in some form is an important explanatory factor.

**IN A NEW YORK STATE OF MIND: RACIAL BIAS AND THE JUDICIAL SELECTION OF STATE JUDGES**

At the state level, judges are typically both elected and appointed. And while the precise application and combination of these mechanisms naturally varies from state to state, judicial selection procedures are generally composed of both "objective" and "subjective" evaluation avenues and criteria.

The New York State judicial selection process provides a concrete opportunity to compare objective with subjective judicial selection pathways toward discerning how covert and subliminal racial bias may affect outcomes under otherwise "neutral" selection procedures. Though race neutral on its face, there is little dispute that New York's "dual-track" judicial appointment system, de-
scribed above, has shortchanged that state’s black and other racial minorities. Although elected judges outnumber appointed ones in most parts of New York state, in New York City, where racial minorities comprise a majority of the resident population, slightly more than half the judges have been appointed as opposed to elected. And there is no question that the New York appointment mechanism has disproportionately favored whites. “Of the 146 [appointed] justices assigned to the city, only 10% are African-American, Hispanic or Asian, while among the city’s regular 152 elected justices, 35% are from minority groups.”

To be fair, the genesis of the New York problem is the fact that the state constitution limits the number of judgeships to one for every fifty thousand residents. Because of its higher crime rate, however, New York City has a denser caseload than other cities in the state and therefore requires more judges. Instead of moving to amend the state constitution to address New York City’s unique needs, for the past thirty years the state legislature has co-opted the “temporary” appointment procedure, which was initially instituted in the 1970s to stem the overflow of new drug cases arising under the Rockefeller drug laws.

Given its origins, it can certainly be argued that, albeit inequitable in application, the temporary appointment system was not intended as a racially biased procedure. However, once the New York legislature granted the governor the power to fill these “temporary” judgeships, they inevitably became political plums to be doled out in gratitude for political patronage. To the extent that blacks have not benefited from these opportunities, however, their exclusion

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35. NY Const Art 6 § 6.
36. In 1973, then Governor Nelson Rockefeller pushed through the legislature new “get tough” drug legislation, which increased criminal penalties and limited plea bargaining options in connection with drug offenses. In response to critics’ concerns that the stiffer penalties would overload the courts with hundreds of additional cases, the Governor proposed that he use his authority to appoint additional judges to the New York Court of Claims, and these additional judges could then be “temporarily” assigned to the state trial courts. See Robert Hermann, History of a Mess: The ‘Acting Justices’, New York LJ 2 (Dec 20, 1994). See also E.R. Shipp, Must New York Bend the Law to Make the Courts Work?, NY Times § 4, 6 (Feb 7, 1982).
37. Evan Haynes, The Selection and Tenure of Judges 97-98 (National Conference of Judicial Councils 1944). See also Vanderbilt, 36 BU L Rev at 36 (cited in note 7) (“Many states adopted provisions for filling judicial office by popular election; the ‘mode of selection by legislature or by the governor and the legislature was widely condemned as introducing the evils of party politics into judicial appointments. It was openly asserted that judicial places were to become the spoils of partisan conflict and selections were made not on account of ability and fitness but as rewards for political service.”); John Gibeaut, Bench Battle, Aug-86 ABA J 42, 43 (2000) (“Although 31 state constitutions still envision trial judges facing opponents in contested elections, in some of those states more than half the judges actually reach the bench via appointment by the governor after a judge retires midterm, according to a study by the American Judicature Society. When election time rolls around, challenges to appointed incumbents are almost as rare as snow in subtropical Manatee County [Florida]. ‘It’s a huge patronage scam . . . . It always has been and always will be as long as that system exists.’”); Dunn, 4 Hofstra L Rev at 298-301 (cited in note 1).
was never the express objective of this "racially neutral" judicial balancing
department.

Even accepting that the laudable approach of judicial appointment by
"merit" must pragmatically encompass appointments for patronage,38 the
tremendous racial disparities revealed in comparing the respective racial make-ups
of New York's appointed and elected judiciaries render the separate allegation of
racial bias a difficult one to repudiate.39

The 25-year-old practice of appointing acting justices to the Supreme Court is vir-
tually a whites-only promotion system . . . . Manhattan and the Bronx, the two judi-
cial districts with the state's highest percentage of minority residents, are the only
tones in the state where the appointed justices outnumber the elected . . . . In both
boroughs, whites form a disproportionately higher share of the appointed justices.
In the Bronx [with a 93.6% minority population] 45% of elected justices are from
minority groups, compared with 8% of appointed ones. In Manhattan [with a
65.5% minority population] minorities comprise 28% of the elected but only 9%
of the acting justices.

In the words of one veteran Hispanic New York judge, if the appointments
have anything at all to do with merit, "[t]he merit system 'seems to find 'merit'
only with white men."40 And additional evidence suggests that the racial inequi-
ties that appear to result from this kind of subjective merit assessment should
not be discounted as the provincial idiosyncrasy of an isolated, antediluvian
state.

RACIAL BIAS AND THE FEDERAL JUDICIAL SELECTION PROCESS:
ACCIDENTALLY ON PURPOSE?

On the one hand, the overall percentage of black federal judges is more ra-
cially representative than the corresponding numbers in the state judiciary. On

38. See David Adaman and Philip Du Bois, Electing State Judges, 1976 Wis L Rev 731, 765-67
(1976).
39. While it is possible that the racial disparities might also be attributed to a lack of "political
savvy" on the part of black judicial aspirants, the relevant indicia tend to suggest otherwise. First, even the
most jaded political analyst must concede that judicial appointments are at least sometimes based princip-
ally on merit. In such instances the element of political patronage is de-emphasized and some competent,
albeit "unsavvy," blacks could be appointed. But more to the point, the growing success of African Ameri-
cans in obtaining political office in New York and other states suggests an increasing political dexterity,
which necessarily encompasses a greater appreciation for the role of political patronage in obtaining or
conferring appointments.
41. Id. See Margaret Y.K. Woo, Reaffirming Merit in Affirmative Action, 47 J Legal Educ 514, 517-18
(1997). For similar criticisms of the judicial election process, see Ifill, 39 BC L Rev 95 (cited in note 2). The
exclusion of blacks from the major corporate law firms exacerbates the problem; foreclosed from the
professional environments in which the "power brokers" do business, black attorneys' chances to become
professionally intimate with those who make or influence such appointments are even further diminished.
See Dunn, 4 Hofstra L Rev at 298-99, 302 (cited in note 1).
the other hand, the federal selection process is a highly subjective one in that all federal judges are appointed and there are no elected seats on the federal bench. And when the experiences of black judicial candidates are compared with that of white nominees, race does seem to continue to play a determinative role in the federal judicial selection process.

While President Clinton tried to pick up where the Carter Administration left off in nominating blacks to the federal bench, black nominees appear to run a different gauntlet than that faced by white nominees. Although all the Clinton nominees were obviously submitted for consideration by a Democratic administration to a Republican-dominated Congress, nominees who were white, especially white males, moved through the confirmation process faster and, indeed, were more likely to be confirmed than nominees who were black. The bipartisan Constitution Project found that the rejection rate for white nominees was half that for minority nominees. As of the end of 1997, 87 percent of the Clinton nominees who had been waiting the longest for confirmation were minorities and women, while the fastest confirmations were those of white men. "The nominees who are female or minority have had the worst time of it. Of the 10 nominees who have been waiting a year or more for confirmation, seven are female or minority. The 11 judges who have managed to be confirmed in 1999 include eight white men."

The nomination of African American district court judge James A. Beaty, Jr., to fill a vacancy on the United States Court of Appeals for the Fourth Circuit provides a tableau of disparate treatment endured by a black judicial nominee. The Fourth Circuit Court of Appeals had no black judges when Judge Beaty was first nominated by President Clinton in 1995, and the situation had not improved when he was again nominated in 1997. While awaiting his confirmation hearing, however, two more seats opened on the very same court, and white candidates were subsequently nominated to fill them. Judge Beaty watched as

42. See generally Carl Tobias, Fostering Balance on the Federal Courts, 47 Am U L Rev 935, 942, 950 (1998) ("the Clinton Administration compiled an excellent record of judicial selection during its initial year. President Clinton enjoyed great success in naming and nominating exceptionally talented women and minorities, eclipsing the Reagan Administration's efforts and easily outdistancing those of Presidents Bush and Carter. The Clinton Administration espoused clear objectives for appointing judges and instituted effective selection practices, especially for identifying and nominating very competent female and minority attorneys . . . The President named 198 lawyers to the federal courts; sixty (thirty percent) of those judges are women and fifty-five (twenty-eight percent) are minorities. This record is unparalleled."); Chambliss, Miles to Go 2000 at 14 (cited in note 26) ("President Clinton has appointed more African Americans to the federal bench (57) than the last three Presidents combined . . . and with higher ABA approval ratings.").


45. Where Are the Judges? Ask the U.S. Senate, The Tennessean 12A (Aug 21, 1999). See also Biskupic, USA Today at 1A (cited in note 31) ("A review of Clinton’s nominees reveals that though he has diversified the bench more than any other president, the nomination process . . . has become a political meat grinder, especially for African-Americans, Hispanics and women . . . 35% of Clinton’s minority nominees have not been confirmed by the Senate, compared with a 14% failure rate among whites").
these candidates not only proceeded to their confirmation hearings but also had their nominations confirmed, while he continued to wait for his own confirmation hearing. That hearing never came.46

As for the all white bench of the Court of Appeals for the Fourth Circuit? It is perhaps of some notable irony that the Fourth Circuit has been described as "the only circuit court in the Deep South having no African-American representation on its judiciary [yet it] has the largest African-American population of any circuit . . . except for the District of Columbia Circuit."47 And the condition does not appear to be an accidental one. "For the past seven years, the Clinton Administration has tried to appoint a black jurist to the all-white U.S. Court of Appeals for the Fourth Circuit, but not one of his nominees has been given even a hearing in the Senate, notwithstanding the fact that there are four vacancies on the 15-member court."48 Indeed, the court's Chief Judge, J. Harvie Wilkinson, has been credited with saying that the court does not need any more judges and that it would "lose a sense of collegiality if it grew too large."49

Nonetheless, some staunch defenders of the confirmation process still contend that "[r]ace probably has less to do with [the treatment of black judicial nominees] than the fact that minority candidates are more likely to hold views at odds with Republican senators."50 But it is difficult to grasp the basis for the implication that white Democrats have views more like those of white Republicans than like those of black Democrats. Given that all of the nominees were proposed by the same Democratic administration, just what exactly is it that white Republican senators find compatible in the views of white Democrats that they are unable to discern in the Democrats "of a different color"?

**SUBLIMINAL RACIAL BIAS IN SELECTION AND APPOINTMENT TO THE JUDICIARY**

Mickey Edwards, a former Oklahoma congressman, Harvard professor, and co-chairman of Citizens for Independent Courts has said:

> It does seem to me that there is a problem. Being a Republican and knowing some

47. Id. Indeed, the concerns raised by Judge Beaty's situation have been voiced in connection with the treatment of many other black nominees. See, for example, David Goldstein, Black Lawyers Ask Clinton to Bypass Senate, Appoint 6, The Houston Chronicle 14 (Nov 13, 1999) (suggesting that the rejection of Missouri Supreme Court Judge Ronnie White for a federal judgeship stirred even more controversy, prompting the Congressional Black Caucus to express to President Clinton "profound doubts about fair and unbiased treatment" for black and other minority nominees).
48. David G. Savage, Clinton Losing Fight for Black Judge, LA Times A1 (July 7, 2000). See also Chambliss, Miles to Go 2000 at 15 (cited in note 20) ("Senator Jesse Helms . . . has blocked the confirmation of three consecutive African American nominees, despite the fact that the seat has been vacant since 1994 and has been designated a judicial emergency.").
of these people in Congress, it's hard for me to argue there is racism involved. But it demands an explanation.\footnote{51}

The disproportionately low number of black judges and, indeed, the apparent exclusion of black lawyers from many other positions of authority and prestige in the legal profession inevitably implicate the question of racial bias in the attendant selection and appointment processes. Although race has been extirpated from virtually all express qualification criteria in the United States, common sense and experience suggest that it is "implausible that racist attitudes, so widespread in contemporary society, should be significantly absent from the world of work where predominantly white employers, supervisors, and union officials decide whether blacks should be rewarded equally with whites."\footnote{52}

One consequence of the Civil Rights Era that complicates the issue of racial bias in various selection and evaluation processes has been the displacement of overt racial bigotry in favor of covert stereotypical opinions about blacks. "What has changed in recent years is the way people speak in public. Indeed, even in private conversations, the coarser kinds of descriptions are less often heard. [This is especially true with respect to the highly educated professionals, in] that the choice to go on with formal learning usually reflects a wish to raise oneself socially and professionally, which in turn calls for more caution in speech and demeanor."\footnote{53}

Even when there are no blacks within earshot, it can be difficult to get some non-blacks to speak frankly about their feelings toward black people, especially with regard to the question of blacks' abilities or qualifications to fulfill certain roles in American society. "In an unusually candid summary of the attitude among many white lawyers toward black associates, one [corporate law firm] partner [said], 'Anyone who spends any time in the profession would know there are lots of minorities, African-Americans especially, who are running around with Harvard and Yale degrees who are not qualified in any sense. They

\footnote{51. See Biskupic, USA Today at 11A (cited in note 31).}

\footnote{52. Gertrude Ezorsky, Racism & Justice 14 (Cornell 1991); Annie Murphy Paul, Where Bias Begins: The Truth About Stereotypes, 31 Psychol Today 52, 55 (1990) ("Children don't have a choice about accepting or rejecting these conceptions, since they're acquired well before they have the cognitive abilities or experiences to form their own beliefs. And no matter how progressive the parents, they must compete with all the forces that would promote and perpetuate these stereotypes: peer pressure, mass media, the actual balance of power in society."). See generally Cynthia R. Mabry, "Love Is Not Enough!" In Transracial Adoptions--Scrutinizing Recent Statutes, Agency Policies, And Prospective Adoptive Parents, 42 Wayne L Rev 1347 (1996). For an argument that such prejudices are indigenous to certain fundamental, religious-expansionist underpinnings of American society, see Michael DeHaven Newsom, The American Protestant Empire: A Historical Perspective, 40 Washburn L J 187, 188-89, 243 (2001) ("Chattel slavery might appear at first to be an example of colonial exceptionalism. However, both [Anglican] Dissenters and Anglicans participated in the building of the 'peculiar institution,' making it a pan-Protestant undertaking. Chattel slavery also stands as a wretched example of the idea of 'perpetual reformation mandated by the social covenant.'").}

have been solicited and tutored and polished up and sent out to the profession and they're not up to grade, for whatever reason.' This is not an unusual opinion among white lawyers at ... elite firms, merely one that is rarely articulatd.\textsuperscript{54}

The fact that there are few bigots today blatantly swaggering about polite professional society has, for some, genuinely clouded the picture as to the extent to which racial prejudice against blacks remains a professional or, for that matter, even a social reality.\textsuperscript{55} The post-Civil Rights etiquette that necessitates the camouflaging of certain racial views not only conceals affirmative prejudice but also makes it difficult for some non-bigots to appreciate or even acknowledge the existence of covert or reflexive and subconscious racial biases. Nonetheless, despite society's newfound impatience with outright racial epithets, there remain sufficient indicia that some basic, underlying apprehensions about blacks have not all together disappeared:

[A]s much as anything else, being 'black' in America bears the mark of slavery. Even after emancipation ... the ideology that had provided the rationale for slavery by no means disappeared ... Immigrants only hours off the boat, while subjected to scorn, were—and still are—allowed to assert their superiority to black Americans. And in our own time, must it be admitted at the close of the twentieth century that residues of slavery continue to exist? The answer is obviously yes. The fact that blacks are separated more severely than any other group conveys that message. Indeed, the fear persists that if allowed to come closer, they will somehow contaminate the rest of society.\textsuperscript{56}

The fact that it is no longer considered appropriate to express openly racial


\textsuperscript{55} Kevin Sack and Janet Elder, Poll Finds Optimistic Outlook But Enduring Racial Division, NY Times 1 (July 11, 2000) ("Thirty-five years after the dismantling of legalized segregation ... blacks and whites continue to have starkly divergent perceptions of many racial issues and they remain largely isolated from each other in their everyday lives ... On many questions, particularly those related to whether blacks are treated equitably and whether race plays too large a role in the national discourse, blacks and whites seemed to be living on different planets. Blacks were roughly four times more likely than whites to say that they thought blacks were treated less fairly in the workplace, in neighborhood shops, in shopping malls and in restaurants, theaters, bars and other entertainment venues.").

\textsuperscript{56} Hacker, Two Nations at 15-16 (cited in note 53); Lisa Crooms, Speaking Partial Truths and Preserving Power: Deconstructing White Supremacy, Patriarchy, and the Rape Corroboration Rule in the Interest of Liberation, 40 Howard L J 459, 474-90 (Winter 1997); Shipler, A Country of Strangers at 9 (cited in note 25) ("neither deference nor defiance has been effective for black Americans as a whole. No degree of personal success quite erases the stigma of black skin, as many achieving blacks realize when they step outside their family, neighborhood, or professional environment into a setting where their rank and station and accomplishments are not known."); Mabry, 42 Wayne L Rev at 1399-1402 (cited in note 52) ("African Americans' accomplishments do not shield them from racism. Despite affirmative efforts by United States Presidents, Congress, individual citizens, and the courts to eliminate discrimination, society is as color-struck as ever .... Race matters in employment .... Race matters in the criminal justice system .... Race even matters in cities where the population of African Americans is substantial .... it is possible that 'one day ... children will not be judged by the color of their skin, but by the content of their character.' However, that day is neither today nor tomorrow.").
Intolerance may not only drive these opinions "underground," but it may sometimes contort these views or reactions into a more unconscious, subliminal abscess:

Social behavior is ordinarily treated as being under conscious (if not always thoughtful) control. However, considerable evidence now supports the view that social behavior often operates in an implicit or unconscious fashion. The identifying feature of implicit cognition is that past experience influences judgment in a fashion not introspectively known by the actor. . . . The theorized ordinariness of implicit stereotyping is consistent with recent findings of discrimination by people who explicitly disavow prejudice.57

Recently, scholars of psychology, sociology, and law have contributed significantly to the broadening discourse on subliminal racial bias against blacks and others in post-Civil Rights America.58 While most commentators agree that neither the precise nature and extent of subliminal racial prejudice in American society nor, for that matter, definitive methods of detecting, assessing, and addressing such bias have been discerned, the effects of prejudice on routine reactions toward blacks are nonetheless concrete.59 Moreover, while subliminal racial

57. Anthony G. Greenwald and Mahzarin R. Banaji, Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes, 102 Psychol Rev 4, 4-27 (1995); Charles R. Lawrence III, The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism, 39 Stan L Rev 317, 330, 335 (1987) ("racism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is a part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities . . . . But how is the unconscious involved when racial prejudice is less apparent—when racial bias is hidden from the prejudiced individual as well as from others? Increasingly, as our culture has rejected racism as immoral and unproductive, this hidden prejudice has become the more prevalent form of racism."); Mtima, 42 Howard L J at 418 (cited in note 29) ("The success of the Civil Rights Movement is that most white Americans no longer have to be persuaded that blacks are human beings, or that racial discrimination is morally wrong. Nonetheless, certain stubborn, racially reflexive fears and perceptions persist, which prevent many whites from regarding or interacting with blacks fully as equals, especially in highly subjective or intimate situations."); Shipler, A Country of Strangers at 5 (cited in note 25).


59. Deana A. Pollard, Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege, 74 Wash L Rev 913, 915 (1999) ("empirical psychology studies . . . show that intentional, conscious discrimination is only a small fraction of workplace discrimination and that most discriminatory acts result from unconscious stereotyping and cultural bias that never enter into the decision maker's conscious mind—hence the outrage felt by defendants when accused of intentional discrimination."); Murphy Paul, 31 Psychol Today at 82 (cited in note 52) ("We can't claim that we've eradicated prejudice just because its outright expression has waned. What's more, the strategies that were so effective in reducing that sort of bias won't work on unconscious beliefs . . . . Exhortation, education, political protest— all of these hammer away at our conscious beliefs while the bedrock below remains untouched.").
bias may hamper blacks in a variety of social and vocational contexts, its effects are likely to be most pernicious in those situations in which highly subjective assessments and decisions are generally made, such as selection and appointment to the judiciary, promotion to corporate law firm partnership, and similar "upper level" employment decisions. "[U]pper level employment decisions are likely to turn on subjective, discretionary assessments of intangible qualities like 'judgment,' 'leadership,' 'initiative,' and 'sensitivity.' In contrast, standards for hiring and promotion in lower level jobs often can be objectified and the requisite job skills articulated and measured."[60]

It does not take rocket science to perceive how highly subjective criteria can be deployed unfairly to exclude blacks from influential or privileged positions, even in the absence of any affirmative or conscious prejudice against blacks. "Discrimination may . . . arise from stereotyped characterizations of a profession or job, rather than of a particular . . . group. Employers in a profession that has traditionally been white and male may unknowingly gauge female and minority group applicants against the stereotype, and conclude that they lack the intangible qualities indicative of professional aptitude and competence. The public view of the profession as white and male reinforces[ this] attitude."[61] Indeed, even where decisionmakers have been specifically admonished not to mistake qualities or characteristics that are generally associated with groups who have traditionally dominated a certain profession for qualities or characteristics that are actually essential or relevant to successful performance in that profession, these express admonitions and directives don't always reach subconscious mores and assumptions:

[T]he lesson [of racial prejudice] is not explicit: It is learned, internalized, and used without an awareness of its source. Thus, an individual may select a white job applicant over an equally qualified black and honestly believe that this decision was based on observed intangibles unrelated to race. The employer perceives the white candidate as 'more articulate,' 'more collegial,' 'more thoughtful,' or 'more charismatic.' He is unaware of the learned stereotype that influenced his decision. Moreover, he has probably also learned an explicit lesson of which he is very much aware: Good, law-abiding people do not judge others on the basis of race. Even the most thorough investigation of conscious motive will not uncover the race-based stereotype that has influenced his decision. [62]

Some recent studies in connection with subliminal racial bias have shed further light on its probable effects on the overall status of blacks in America.

61. Id at 1629; Lawrence, 39 Stan L Rev at 317-18 (cited in note 57).
62. Lawrence, 39 Stan L Rev at 343 (cited in note 57). See also Greenwald and Banaji, 102 Psychol Rev at 20 (cited in note 57) (citing studies showing that "White interviewers maintained greater physical distance, demonstrated less eye contact, and administered shorter interviews when interacting with Black (as opposed to White) interviewees.")
Some of the more interesting revelations concern the relationship between such reflexive racial bias on the one hand and conscious intellectual beliefs about blacks on the other.

For example, in 1995, Professors Mahzarin R. Banaji and Anthony G. Greenwald devised the Implicit Association Test (the “IAT”) as one means by which to gauge subliminal social biases in connection with such issues as race.\(^6\)

In essence, the test consists of showing the test taker a picture of a white person and a picture of a black person, to which the labels “good” or “bad” are alternately affixed.\(^6\) The test taker is then asked to match rapidly the picture labeled “good” with various positive images and ideas flashed before her, and to match rapidly the picture labeled “bad” with various negative images and ideas. The test taker’s biases or predilections are revealed if she is able to match more easily the appropriate picture with the corresponding images and ideas whenever a certain picture is given the “good” or “bad” label. Thus, for example, a person who can quickly make accurate matches when the picture labeled “good” is that of a black person but then makes many matching mistakes when the “bad” label is given to the picture of the black person is revealed to have an unconscious preference for thinking of blacks as “good” and an unconscious resistance to associating blacks with things that are considered “bad.”\(^6\)

Among the various findings and conclusions derived from the results of random application of the IAT, perhaps one of the most interesting is that a number of genuinely liberal whites who took the test discovered that, notwithstanding their sincere beliefs in racial equality, they still harbor subconscious preferences for whites.\(^6\) The IAT revelation that is perhaps the most sobering, however, is that a number of blacks who took the test discovered that they also harbor subliminal predilections in favor of white people.\(^6\)

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63. See Anthony G. Greenwald, et al, Measuring Individual Differences in Implicit Cognition: The Implicit Association Test, 74 J Personality & Social Psychol 1464, 1464-80 (1998). Professors Greenwald and Banaji are among the leading researchers in this area, and their IAT and attendant findings have been widely disseminated. The IAT can be self-administered at http://www.yale.edu/implicit, where additional information about the IAT and its use and application can be obtained.


65. Id at 1465.

66. Id at 1474-75.

67. Dateline (NBC television broadcast, Mar 19, 2000); Shipler, A Country of Strangers at 278 (cited in note 25); Anthony Paul Farley, The Black Body as Fetish Object, 76 Or L Rev 457, 480 (1997) ("On a spring day of my eighth grade year, 1976, on a bus chartered for a class trip to Washington, D.C., one of my school-mates stood and began to comb her long, brown hair. She was tall and cool and pretty. She combed her long, brown hair slowly and deliberately. After a long while she turned and addressed us all, 'Whose comb was this? Thanks, I'm all done.' No one responded. It seemed as though the unknown owner of the comb must not have been listening. Just then, one of our class mates answered in a mirthful voice, 'It's Farley's comb.' I, Farley, was the only black person on this otherwise all-white school trip to the nation's capital. My classmates burst into laughter. The girl with the long brown hair turned crimson and began to cry in loud, long sobs. The sobs quickly turned into the sounds of retching which were accompanied by shudders running through her hunched form. She may have vomited. While her personal trauma unfolded, accompanied by squeals of laughter from all of her white classmates, I said nothing.").
The IAT and similar studies provide empirical support for the position that for many Americans racial bias against blacks is today more often an unconscious and reflexive reaction, sustained even in direct contradiction to a person’s conscious intellectual views:

Previously, researchers who studied stereotyping had simply asked people to record their feelings about minority groups and had used their answers as an index of their attitudes. Psychologists now understand that these conscious replies are only half the story. How progressive a person seems to be on the surface bears little or no relation to how prejudiced he or she is on an unconscious level . . . . The idea of unconscious bias does clear up some nettlesome contradictions . . . . It helps explain how good people can do bad things." Because our conscious and unconscious beliefs may be very different—and because behavior often follows the lead of the latter—’good intentions aren’t enough.’

These revelations raise some particularly troubling questions when it comes to evaluating the progress—or lack thereof—of blacks with respect to many elite or upper level (and therefore highly subjective) positions in society, such as selection and appointment to the judiciary. If some Americans retain unconscious, negative reactions towards blacks in general, and at the same time they are only comfortable with the prospect of whites holding important, authoritative positions in society, the ramifications for blacks competing for positions such as judgeships, or as associates or partners in corporate law firms, or any other positions of authority and prestige, are portentous. The subjective assessments deployed in judicial and similar employment selection contexts repeatedly require non-black decision makers to consider choosing black candidates over white and other non-black candidates for positions traditionally occupied principally by white males. Blacks seeking to occupy such roles are therefore acting in direct contravention of virtually every traditional, covert, and subliminal racial convention that permeates American society.

To presume then that non-black evaluators of subjective qualification criteria either consciously or subconsciously disregard the race of black candidates is at best naïve:’

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68. Murphy Paul, 31 Psychol Today at 53, 55 (cited in note 52). See also Sack and Elder, NY Times at A23 (cited in note 55) ("85 percent of whites [polled] said they did not care whether they lived in areas where most of their neighbors were white or where most were black. But two-thirds of the whites said they thought most white people preferred to live in white areas. And perhaps most telling, 85 percent said they actually live in areas where they have no or few black neighbors, the same percentage that said they had no preference."); Pollard, 74 Wash L Rev at 917 (cited in note 59).


70. Moloney Smith, 28 U Rich L Rev at 184 (cited in note 18) ("Probably no white male attorney has ever been mistaken for a court reporter at a deposition, yet Muzette Hill, a black woman attorney, has been so mistaken at every deposition she has ever attended . . . . Black women [attorneys] not only contradict[s] society’s definition of ‘woman,’ but society’s definition of people of color as well.").

71. Barroff, 73 Colum L Rev at 1632 (cited in note 60) ("Subjective procedures can result in dis-
Many whites require that [their] interactions [with blacks] eschew an unacceptable level or kind of interracial intimacy . . . . It may be [however] that the issue of interracial intimacy in the business context is not so much the extent of the intimacy, but [rather] how the interaction affects the ability of whites to retain a perception of a status superior to blacks . . . . Interracial intimacy in the business context may even be desirable where it somehow reinforces, but by all means does not threaten the white client, customer, co-employee or supervisor's sense of a superior racial status . . . . Lawyers [however] are almost always regarded in our society as having a superior educational, professional and social status. As the clients of a black attorney, whites would often be required to reveal intimate vulnerabilities or shortcomings to a black person, who in turn would be perceived as being in a position to judge or even look down on their white clients.

Moreover, subliminal bias is especially pernicious where subjective assessments are made, because racial bias in this context is more likely to go undetected—not only by third parties to the decision, but by the perpetrator herself:

When racism operates at a conscious level, opposing forces can attempt to prevail upon the rationality and moral sensibility of racism's proponents; the self-professed racist may even find religion on the road to Damascus and correct his own ways. But when the discriminator is not aware of his prejudice and is convinced that he already walks in the path of righteousness, neither reason nor moral persuasion is likely to succeed. The process defect is all the more intractable, and judicial scrutiny becomes imperative.

Is there any position that African Americans may seek and attain in American society that presents a greater challenge to traditional and reflexive notions of affirmative action? Through the exercise of an interviewer's or grader's discretion, for employment criteria to be applied unevenly . . . . The interviewer or tester may not even be aware of the way in which his judgments put women or minority candidates at a disadvantage."

72. Mtima, 42 Howard L.J. at 416-41 (cited in note 29). See also McKnight, Does Racism Keep the 4th Circuit Incomplete? (cited in note 30); Lawrence, 39 Stan L. Rev at 372 (cited in note 57) ("whites are not accustomed to seeing blacks in positions of authority or power. Black managers, black professors, and black doctors are confronted with reactions ranging from disbelief to resistance to concern about their competence. The historical exclusion of blacks from these jobs has been rationalized by a belief in their unsuitability for these roles. What is at issue here is not just occupational stereotypes born out of habit. These stereotypes manifest a larger and more complex ideology that has legitimized the white-over-black authority relationship [and] the fact remains that many individuals in our culture continue to resist and resent taking orders from blacks.").

73. Greenwald and Banaji, 102 Psychol Rev at 6 (cited in note 57) ("The empirical phenomena of implicit social cognition involve introspectively inaccessible effects of current stimulus or prior experience variations on judgments and decisions . . . . these effects often result in subjects making judgments that they would regard as nonoptimal if made aware of the source of influence. Furthermore, these effects are likely to occur in situations that involve economically and socially important decisions, such as hiring, educational admissions, and personnel evaluations.").

74. Lawrence, 39 Stan L Rev at 349 (cited in note 57); Pollard, 74 Wash L Rev at 920 (cited in note 59) ("Although we may not choose to view women as intellectually incompetent sex objects or blacks as criminals, the media bombard us with these images, impressing stereotypes onto our cognitive processing that likely affect our behavior.").
of the proper place for blacks than that of a judge? How often can non-blacks realistically be expected (subconsciously) to conclude that a black candidate is the “better man,” not only for highly competitive, elite positions but also as a final arbiter with responsibility for and authority over non-blacks’ individual and collective fates? While indisputable social progress has been achieved since the Civil Rights Era, many non-blacks remain consciously and subconsciously hesitant to accept African Americans fully as equals and are concomitantly apprehensive of any complete surrender to “black” assessment, equity, judgment, or authority:

The [race] recusal cases demonstrate the pervasiveness of what Judge [A. Leon] Higginbotham has described as ‘an inherent disquietude’ of some white litigants to accept African American trial judges as autonomous legal decision makers in cases where race is at issue. By seeking the recusal of African American judges based on the appearance of bias, these litigants suggest true impartiality can be exercised only by white male judges .... African American judges are still expected to pass a ‘race test’ to prove their impartiality. Concern about the impartiality of African American judges regularly finds expression in the judicial selection forum. The appointment or election of African American judges is viewed with suspicion and often seen as a response to narrow, parochial interests rather than as benefiting the judicial system as a whole. 75

REPAVING THE ROAD

The problem of subliminal bias against blacks is obviously one that encompasses a plethora of legal, social, and psychological issues. But insofar as its particular impact upon the racial attitudes and composition of the judiciary is concerned, perhaps one practical way of dealing with its effects may actually be to approach the problem indirectly. If the issue is primarily one of covert and unconscious perceptions of blacks, then strategies designed to impact these perceptions, as opposed to the conditions that result from them, may have the most beneficial—and long-lasting—effects:

[C]hildren learn lessons about race at [an early age, and] most of the lessons are tacit rather than explicit. Children learn not so much through an intellectual understanding of what their parents tell them about race as through an emotional identification with who their parents are and what they see and feel their parents do .... If we do learn lessons about race in this way, we are not likely to be aware that the lessons have even taken place. If we are unaware that we have been taught to be afraid of blacks or to think of them as lazy or stupid, then we may not be conscious of our internalization of those feelings and beliefs. 76

75. Ifill, 39 BC L Rev at 118 (cited in note 2).
76. Lawrence, 39 Stan L Rev at 338 (cited in note 57); Michael Eric Dyson, Race Rules: Navigating the
In this regard, increasing current efforts to bring genuine racial diversity to the major corporate law firms could prove an efficacious means to these ends. Pragmatically speaking, this professionally privileged realm offers an appealing target for racial diversification initiatives. Generally viewed as elitist to begin with, the process of hiring and promotion in these firms has long been suspected as not as race neutral as many claim.\(^7\)

Although overt exhibitions of racist attitudes are unlikely at any of the major law firms and, indeed, for the past several years most of the major firms have expressed the desire to increase their percentages of minority lawyers, the fact remains that the latter simply has not occurred. While there are few express indications that non-blacks who practice in these firms are skeptical of the capabilities of African American attorneys, the impact of these racial apprehensions becomes evident in the paucity of black lawyers who are hired by the elite firms and the even smaller number who stay with their firms, make partner, and then elect to remain after achieving this exalted status. Whereas at least some, albeit limited, measurable progress has been made by African Americans within the judiciary, when it comes to the major corporate law firms, African American “progress” has remained completely out of step with all other phases of the profession—and American society as a whole.\(^7\) Decades behind the rest of the nation, law firms must admit that racial bias plays a part in explaining the black/white disparity. Nonetheless, the stubborn resistance to integration displayed by many of the law firms continues to set them apart from many other employers in the legal profession.\(^7\) Hence, the dismal reality of their diversity track records limits their ability to argue convincingly that affirmative diversifica-

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\(^7\) Color Line 215 (1996) (“In the ‘60s and before, acts of hatred had symbolic clarity because blacks and whites shared an ecology of race. A church burning was undisguised racial hatred. A cross burning was meant to intimidate ‘uppity’ blacks . . . . But in our more racially murky era—an era in which the ecology of race is much more complex and choked with half-discarded symbols and muddied signs—our skills of interpretation have to be more keen, our readings more nuanced. There’s little doubt that most of the vitriolic expressions of racism have been forced underground by the success of the ‘60s black freedom struggles. But symptoms of racial antipathy persist, even if they’re harder to prove and far more difficult to analyze.”).

\(^7\) Doreen Weisenhaus, Still a Long Way to Go For Women, Minorities, Nat L J 1, 50 (Feb 8, 1988) (“The Commission on Minorities in Profession . . . in 1986 . . . reported that ‘residual’ discrimination still persists in some of the legal profession, and that some hiring and promotion processes and criteria continue to limit minorities’ opportunities even though they are not intended to do so.”)(emphasis added)); Anna Snider, Minority Progress in Law Profession Appears Stalled, New York L J 1 (Aug 7, 1998).

\(^7\) Richard Zitrin and Carol M. Langford, Firm Against That Flag, Legal Times 68 (Mar 27, 2000).

\(^7\) Watters, 10 Natl Bar Assn Mag at 1 (cited in note 18) (“The under-representation of blacks in large law firms shows no sign of changing . . . .The number of African American associates in the largest 250 national law firms demonstrated little growth during the past five years moving from 1,311 to 1,641. On the partnership level, the past five years have produced no growth in the number of black partners as a percentage of white partners (1.2 percent), and a slight increase in actual numbers moving from 287 to 351.”); Chambliss, Miles to Go 2000 at 6 (cited in note 26) (“Minority representation in upper-level jobs remains minuscule, especially in the for-profit sector. Minority representation among law partners remains less than 3 percent in most cities [and] among general counsel in the Fortune 500 is 2.8 percent.”).
tion measures will unfairly tip the scales in favor of black candidates.80

While certainly not the only avenue to or prerequisite qualification for the bench, corporate law firm employment remains a vital portal not only to the judiciary but also to many other important positions in the legal profession. "Corporate positions are not only important in directing economic affairs, but also as symbolic indicators of increasing black participation in the corporate sector. They represent points of access and influence on government and other private sector activities."81 Indeed, even after black lawyers excel in other areas, many still doubt their ability to fulfill positions of leadership, at least until their facility in the corporate sector has been demonstrated. Remembering her interview with the judicial appointment committee chairman, Judge Constance Motley writes, "Even though I had argued many cases in the Supreme Court and in federal courts, some lawyers, who were not interested enough to inquire as to the cases I had handled, thought I was not qualified for a seat on the federal bench. They viewed the federal district court as a place where Wall Street lawyers represented major American corporations and not where civil rights litigation took place, especially not in New York."82

As long as black lawyers are more or less excluded from major corporate law opportunities, they remain at a serious disadvantage in competing for seats within the judiciary as well as for inclusion in other significant legal, political, and economic undertakings in American society:

[T]he impact of the . . . problem of the lack of Black lawyers surely extends beyond the lack of representation in the elective political process. Indeed the impact of this scarcity extends in great measure to those 'power pockets' and influential political lobbies in American society that historically have created, controlled, or dominated the process of societal decision. In this arena, the need for Black lawyers in the offices of major law firms, corporations, brokerage houses, and banks—the real power pockets in American society—is plainly apparent.83

80. Alexander Stille, Little Room at the Top for Blacks, Hispanics, Natl L J 1 (Dec 23, 1985) ("In what has become an increasingly clear trend, the number of women at the nation's largest law firms is rising rapidly, while the proportion of black and Hispanic lawyers has remained virtually unchanged"); Rita Henley Jansen, Minorities Didn't Share in Firm Growth, Natl L J 1, 28 (1990) ("At the beginning of the decade, women constituted 2.8 percent of all partners in the largest 151 law firms; at its close, the percentage had more than tripled—9.2 percent of all partners in the largest firms were female. But there is not such good news for minorities. In 1981, 0.47 percent of all large-firm partners were black. In 1989, black partners still had not accounted for even 1 percent of the total"). See also Abel, American Lawyers at 105-06 (cited in note 9) (noting the generally small numbers in law firms through the 1980s); Wilkins and Gulati, 84 Cal L Rev at 564 (cited in note 29) ("Virtually all the blacks who start at a given elite law firm leave before becoming partner.").


83. Harry T. Edwards, A New Role for the Black Law Graduate: A Reality or an Illusion?, 69 Mich L Rev 1407, 1415 (1971). Indeed, the professional backgrounds of federal judges, available at the Federal Judiciary website, may lend some empirical support for the observations of Judge Motley and Judge Edwards. A
As was the case in the pre-Civil Rights Era, excluding blacks from prerequisites to authoritative or other elite positions has the same effect as expressly barring them from competing for the ultimate position itself. By contrast, meaningful racial diversification of the elite corporate law environment will provide equal opportunity for today's black lawyer to demonstrate her ability to excel in positions of significant responsibility and authority. It will better enable the black judicial hopeful to garner the kind of professional experience typically regarded as prerequisite to qualifying for the bench. This will also give aspiring black judges greater access to the legal, business, and political inroads of power, which can lead to judicial and other high office.

When blacks routinely hold such prestigious positions as practicing corporate attorneys, non-blacks both within and outside of the profession will begin to grow comfortable with the idea of blacks sitting not only as judges but also in other positions of high authority. "Through practice . . . people can weaken the mental links that connect minorities to negative stereotypes and strengthen the ones that connect them to conscious positive beliefs." But as New York State Judge Bruce Wright's anecdote teaches, as long as relatively few blacks hold these positions, their numbers will remain insufficient to overcome the stereotypes and biases that continue to impede black progress:

One afternoon, during a trial, I felt so faint and weak I could not carry on . . . . I was taken out of the courthouse lashed to a stretcher . . . . In the emergency room of the hospital, I was placed in a curtained-off area where there were two beds . . . . On one there was a white man, obviously one of the poor derelicts now and then brought in from the Bowery. He appeared to be in a state of joyous alcoholic bewilderment. He needed a shave; neither his soiled sneakers nor his socks matched; he drooled a bit and sang softly in garbled syllables. As I watched him from my bed, I felt pangs of pity . . . . I felt guilty for being dressed in a three-piece suit and a clean shirt. I heard a nurse outside the curtained area say, 'Hurry, doctor, we have a judge who is ill.' A white doctor parted the curtains . . . . looked at me and then at the white derelict. He hurried to the side of the white man, lifted his wrist, as though to test his pulse, and said, 'Judge, what seems to be the matter?'

cursory comparison of the career paths of the sixty-six black district judges appointed since 1980 with those of their white counterparts shows that while most of the appointees, regardless of race, gained experience in both the private and public sectors before ascending to the bench, 24 percent of the black judges had not been in private practice. This observation is not only consistent with the historical exclusion of blacks from many private practice opportunities, but it also implicates the question of whether black lawyers might increase their chances of becoming judges if their professional backgrounds mirrored more closely the typical careers of white attorneys.

84. See Bartnoff, 73 Colum L Rev at 1621 (cited in note 60) ("To the extent that Blacks and Puerto Ricans are disproportionately screened out by the examination for Assistant Principal [in the New York City school system] they are not only prevented from becoming Assistant Principals but they are kept out of the pool of eligibles for future examinations for the position of Principal as well.").
85. Murphy Paul, 31 Psychol Today at 82 (cited in note 52).
86. Bruce Wright, Black Robes, White Justice 24-25 (1987); Mabry, 42 Wayne L Rev at 1385 (cited in
DIVERSIFICATION OF THE ELITE CORPORATE LAW FIRMS AND THE ELIMINATION OF (SUBLIMINAL) RACIAL BIAS IN SUBJECTIVE CONTEXTS

Increasing the number of black lawyers in the major corporate law firms may not only lead to a rise in the number of African American judges, but it could also have a positive effect on the racial attitudes of many non-black lawyers, including those who will eventually play critical roles in the selection and appointment of, or who may themselves one day become, judges. Concededly, there are probably at least a few lawyers, and perhaps even some judges, who harbor definite, albeit appropriately masked, racial bias toward African Americans, especially when assessing blacks who hold or seek positions that only whites are expected to occupy. It may well be that in some cases opening up broader opportunities for black lawyers will do little to dispel preconceived racial attitudes.

Moreover, considering the extent to which issues of race permeate American society, it is simply unrealistic to expect that even those few judges who have actually had some concrete diversity training will respond appropriately to allegations of racial discrimination in connection with highly subjective assessments and decisions:

The percentage of judges who consciously discriminate is likely minuscule. Far more failures to scrutinize employment actions can be explained by an unconscious discrimination. Many judges simply may not recognize when a discriminatory employment practice is before them, especially where the practice involves facially neutral subjective criteria . . . . Having personally succeeded in the system, they have no reason to doubt the existence of a genuine meritocracy or its uniform applicability . . . . Short of situations of egregious discrimination . . . they may blithely find for the defendant, feeling confident they have considered all aspects of the case. Such judges are not moral reprobates; they feel their duties are con-

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note 52) ("a few strokes of a pen will not erase racism in America. Racism will not disappear overnight just because Congress passed new legislation").
87. Iff, 39 BC L Rev at 139-40 (cited in note 2) ("A racially homogeneous work environment may . . . permit judicial indifference to minority racial perspectives and issues. A racially diverse work environment for judges may have exactly the opposite effect."). See also Renee Loth, [Governor] Weld’s Hunt for Judges, Boston Globe A19 (July 7, 1991).
88. Jane Howard-Martin, A Critical Analysis of Judicial Opinions in Professional Employment Discrimination Cases, 26 Howard L J 723, 740-41 (1983) ("Some members of the judiciary may consciously discriminate against minorities and women. Xenophobes, chauvinists or racists may feel that the professions offer inappropriate employment to women, Blacks or ethnic Americans. Perhaps the entire group is considered ignorant or incapable of competence. More probably, conscious discrimination is motivated by fears of a threat to the American system, with its current distribution of power favoring white males. They may recognize that the dominance of WASP males requires the existence of an underclass and as more members of this underclass gain power, they will demand fundamental change and have the ability to effectuate these changes . . . For judges who consciously discriminate, an easy way to deter access of the underclass to positions of control is to refuse to question the decisions of employers whose practices have begun the process, a conspiracy of sorts to maintain control.").
 Roundtable

sciously performed. They are merely to be chided for their nearsightedness, and must be introduced to the realities of discrimination.

Given that the traditional career path to judgeship is one not especially hospitable to blacks, non-black lawyers who pursue such roads to the bench are not likely to have had significant experience working with African Americans. Consequently, they are less likely to have developed firsthand, impartial (much less favorable) impressions of black attorneys' skills or to appreciate some of the more subtle manifestations of covert or subliminal bias in elite and other highly subjective contexts.

If black lawyers are generally excluded from the traditional training grounds of judges and other leaders, there are limited opportunities and incentives for non-blacks in the profession to question their individual racial attitudes and few professional situations in which non-black lawyers encounter challenges to any conscious or subliminal biases they may have. Pursuing the majority of one's legal career in professional environments that tout excellence, but in which there are few if any blacks, is likely to do very little to reinforce even conscious beliefs in racial equality, and even less to dismantle subliminal biases about blacks and their professional or intellectual capabilities:

Judges are not immune from our culture's racism, nor can they escape the psychological mechanisms that render us all, to some extent, unaware of our racist beliefs . . . . Judges continue to come primarily from elite white backgrounds. They undoubtedly share the values and perceptions of that subculture, which may well be insensitive or even antagonistic toward the values, needs, and experiences of blacks and other minorities.

All of the social processes that engender racial prejudice, most of which occur outside of conscious thinking, are mutually reinforcing. Indeed, there is little in routine American society to counteract such impressions, subliminal or otherwise. More often than not, American social culture tends to support and even reward majority individuals when they embrace these preconceptions, which

89. Id at 741-42. Chris Guthrie, Jeffrey J. Rachlinski and Andrew J. Wistrich, Inside the Judicial Mind, 86 Cornell L Rev 777, 779-80 (2001) ("Legal realists have argued that judges make choices that reflect their political ideology; proponents of critical legal studies have complained that judges favor the existing power structure; critical race and feminist scholars have argued that race and gender heavily influence judicial decisions; and law and economics scholars have asserted that judges make self-serving decisions designed to advance their political fortunes. Our research, however, identifies a more fundamental source of systematic judicial error: wholly apart from political orientation and self-interest, the very nature of human thought can induce judges to make consistent and predictable mistakes in particular situations.").

90. Moloney Smith, 28 U Rich L Rev at 186 (cited in note 18) ("there are different pathways to the bench which may influence the perspective of a judge. Most white male judges are prosperous, having risen through the ranks in a traditional fashion [and are] more likely to have private law firm careers, ties to the local community and the appropriate political contributions.").

mischaracterize various differences between members of the majority and racial outgroups. This is particularly true for non-black individuals engaged in elite professional environments. What can reasonably be expected of non-black professionals who spend years forging their skills in environments in which, at every level of competition, the "best and brightest" are virtually all white? In proposing or evaluating judicial candidates, they are largely bereft of any personal experience with which to assess or recommend black aspirants to judicial office. And should one of these elite, non-black lawyers herself become a judge, what level of racial sensitivity can be legitimately expected of her, whose first significant professional encounter with a black attorney occurs when he appears in her courtroom? To say the least, it seems less than reasonable to expect that judge to approach ecumenically allegations of racial discrimination, especially those raised by black professionals in connection with the very same highly subjective and predominantly white employment situations from which that judge came to her seat on the bench.

Indeed, some commentators have observed that the monochromatic career experiences of many judges seem to have rendered them incapable of approaching such cases through any means other than a search for traditional indicia of overt racial animus. And in the absence of these outmoded and largely irrelevant guideposts, some judges seem unable to ferret out any but the bluntly obvious discriminatory conduct:

There is a disturbing trend among the judiciary . . . to avoid an in-depth review of a professional employment discrimination case. Some judges are seemingly oblivious to the possibility of the existence of discrimination in professional jobs. Others, while recognizing that employment discrimination exists, go out of their way to avoid finding the practices of a professional employer suspect. Plaintiff's evidence is treated to a superficial examination or weighed in light of the defendant's overall attitude despite significant evidence of discrimination in the case before them.

92. See Lawrence, 39 Stan L Rev at 338 (cited in note 57).
93. Moloney Smith, 28 U Rich L Rev at 192, 194 (cited in note 18) ("Recognizing that a judge has a particular perspective does not negate the element of impartiality in judicial proceedings . . . . If the critical step of acknowledgment does not occur, the perspective can influence the behavior of the judge without any conscious recognition . . . . Today, many problems recognized as legitimate causes of action are related to gender or race . . . . A member of the establishment . . . may be resistant to change. Connection with the judged, or the lack thereof, will affect the evaluation of the facts."). See also Tobias, 47 Am U L Rev at 955-56 (cited in note 42).
95. Howard-Martin, 26 Howard L J at 724 (cited in note 88). See Kathryn Abrams, Critical Strategy and the Judicial Evasion of Difference, 85 Cornell L Rev 1426, 1433 (2000) ("Perhaps the most invidious development has occurred in the Title VII liability context: the courts have deployed critical theorists' nuanced tools of description against those theorists' very antidiscrimination goals. . . . [S]ome judges use these nuanced accounts, not to render a more complex picture of group based identity, but to deny that group members have suffered discrimination. . . . These varied forms of judicial difference evasion make clear that critical analyses of difference and group-based discrimination—illuminating though they may
In those cases in which a judge is unable to perceive actual, albeit subtle or subliminal, bias, the end injustice extends beyond the wrongful denial of a deserved legal remedy. Perhaps worse, the (unknowing) perpetrator has now been affirmatively reassured that she need not reexamine her attitudes or conduct because she has received judicial imprimatur that she is behaving in a fair and equitable manner. “When the intent requirement [in discrimination jurisprudence] produces a finding of no constitutional injury, this finding is generalized to mean that no actual injury has occurred.”

This, of course, is one of the principal reasons that some commentators are so vehemently critical of the prevailing judicial approach to racial discrimination suits, particularly where such suits involve elite and other subjective employment situations. In general, the courts currently reject evidence of disproportionate or disparate impact of the complained of conduct on the affected racial group as dispositive proof of actionable, that is intentional, racial discrimination in an individual case. Instead, a showing of a specific, conscious intent by the defendant to discriminate is required to sustain a discrimination verdict.

Consequently, the individual plaintiff’s recovery for racial discrimination is typically dependent upon the ability of the factfinder, herself likely afflicted by a degree of (at least) subliminal bias, to recognize and condemn overt racial discrimination in all its myriad forms. In cases involving less than overt conduct, however, it is necessary that the factfinder not only ascertain covert and even subliminal racial bias, but also vilify the racial attitudes, misconceptions, and related conduct of a defendant whose professional or social experiences likely mirror her own. After forging these socio-intellectual divides, the factfinder, in order to return a verdict for the plaintiff, must believe that the defendant’s discriminatory conduct, whether overt, covert, or subliminal, was intentionally harmful, resolving thereby all pivotal inferences against the defendant and in favor of a plaintiff who does not fit the conventional or subliminal notion of “qualified”

that critical analyses of difference and group-based discrimination—illuminating though they may be—are not being embraced by mainstream judicial decision makers.

96. Lawrence, 39 Stan L Rev at 325 n 31 (cited in note 57).
97. See generally Tracy E. Higgins and Laura A. Rosenbury, Agency, Equality, and Antidiscrimination Law, 85 Cornell L Rev 1194 (2000); Foster, 72 Tulane L Rev 1065 (cited in note 58); Lawrence, 39 Stan L Rev 317 (cited in note 57); Pollard, 74 Wash L Rev 913 (cited in note 59). Evidence of disparate impact or treatment can be used, however, to demonstrate institutional bias or a pattern and practice of discrimination against an entire class of complainants. See, for example, e. christi cunningham, The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Claims, 30 Conn L Rev 441, 447-50 (1998) (comparing individual and group claims in the context of Title VII disparate treatment and disparate impact claims). See also Higgins and Rosenbury, 85 Cornell L Rev at 1205 (“Disparate impact doctrine is the area of federal employment discrimination law that most directly emphasizes group identity and its relationship to employment patterns. . . . The simple idea behind this doctrine is that employment practices that disproportionately disadvantage or exclude members of certain groups must be eliminated unless justified by business necessity. Employers are responsible for the removal of such barriers whether or not they were erected for exclusionary purposes. . . . The standard is one of neutrality of impact, not neutrality of intent.”).
in the first place.

A possible illustration of this process may be the well known case of Lawrence Mungin. Mungin was a black Harvard law graduate who sued his corporate law firm employer when he was passed over for partnership. Mungin had joined the firm as a lateral associate with the understanding that he would be considered for partnership within a year. However, few senior-level assignments reached Mungin’s desk in the ensuing twelve months, and Mungin was ultimately denied partnership on the stated grounds that he had not demonstrated partnership level capability.

In his discrimination lawsuit, Mungin alleged, among other things, that because of his race, the firm denied him a fair chance to demonstrate his capabilities as an experienced attorney and thereby provide him with a genuine opportunity to attain partnership. Mungin adduced evidence of mistreatment by his superiors to support his claim that the firm’s failure to provide him with appropriate assignments was racially motivated. A racially mixed jury heard this evidence, concluded that it proved racial discrimination, and awarded Mungin $2.5 million in damages.

On appeal to the District of Columbia Court of Appeals, two white judges on a three-judge panel voted to reverse the jury verdict in its entirety. These judges determined that because there was evidence that some white associates were also treated badly by the firm, as a matter of law the incidents described by Mungin constituted racially neutral mistreatment. The reversing judges may not have considered sufficiently that some people mistreat different people for different reasons and that upon hearing the evidence as to the particular ways in which Mungin was mistreated the jury concluded that the motivation for Mungin’s mistreatment was racial (perhaps even covert or subliminal) in nature. In reversing the jury’s determination of the facts as a matter of law, however, these judges effectively substituted their view that Mungin’s mistreatment

98. See Mungin v Katten, Muchin & Zavis, 116 F3d 1549 (DC Cir 1997). This case is the subject of Barrett’s The Good Black (cited in note 54).
99. The third member of the panel, Chief Judge Harry Edwards, voted to affirm in part and remand for reconsideration as to the amount of the damage award. See Mungin, 116 F3d at 1558.
100. According to Barrett, Mungin’s law firm was a place of “equal opportunity unhappiness.” Barrett, The Good Black at 3 (cited in note 54).
101. Among the incidents about which Mungin presented evidence to the jury were: his exclusion from bankruptcy practice group meetings despite the fact that he was a senior associate in the group; the calling in of a white associate from another office to pitch the firm’s bankruptcy capability to an important new client; being given paralegal level assignments; and once being invited to an important client meeting only to learn that his sole responsibility was that of carrying the overhead projector for the presentation. See Barrett, The Good Black at 47, 101, 123, 125, 190 (cited in note 54). See also Higgins and Rosenbury, 85 Cornell L Rev at 1212-13 (cited in note 97) (“Courts are willing to credit motivations other than discrimination for an employer’s pretextual explanation of a hiring decision . . . in disparate impact cases. . . . Courts are increasingly willing to regard employers’ decisions as neutral with respect to group-based characteristics such as race or gender and to view the seemingly identity-based consequences of those decisions as resulting from nondiscriminatory or color-blind factors. The doctrinal trend is toward accepting formally neutral decisions at face value and viewing instances of discrimination as anomalous and irrational.”).
could not have been racially motivated or that, even if it was, any racial dispar-
agement was unintentionally inflicted. This substitution may reflect certain sub-
liminal limitations on the part of the reversing judges, rather than the absence of a “reasonable jury”:

Consider the way a white judge might be expected to approach a minority appli-
cant’s challenge to a government employment test. Typically the test will have
been developed by other whites (likely white males) based on their own accultur-
ated assumptions about what it takes to do the job . . . . If, on a particular test, 
white applicants as a group outscore minority applicants, that experience tends to 
reinforce not only the applicants’ belief in the test’s validity but also any subcon-
scious assumptions they may have about racial superiority . . . . Furthermore, when 
a minority candidate goes to court to challenge a test’s capacity to predict job per-
formance, the challenge is apt to go against the grain of the judge’s own accultur-
ated assumptions about the testing system. The judge, too, has a psychological 
state in the validation of the sorting mechanisms that brought him his own posi-
tion and status—mechanisms that are the cultural analogues of the challenged test.
The whole system of testing and credentials turns out to be self-perpetuating, with 
our judges doing their part.

To focus exclusively on whether the defendant “intentionally” discriminated
(or whether a judge is “deliberately” ignoring indicia of racial bias) in highly sub-
jective contexts is to miss an extremely critical point. Assessing allegations of
discrimination exclusively by the “intentional” commission or omission of overt
acts, or for that matter the presence or application of “racially neutral” criteria,
while largely ignoring or minimizing concrete evidence of disparate impact
seems to produce a disconnect where highly subjective assessments and sub-
liminal racial biases are at issue.103 Traditional notions of intent simply do not

102. Karst, 61 S Cal L Rev at 1961 (cited in note 90). The complex problems raised by Mungin’s
story certainly go beyond the issue of subliminal racial bias and the appropriate response in the post-Civil
Rights Era. Questions regarding African American integration and assimilation, its role in the acquisition of
equal social and legal rights, and the function of law in balancing these concerns are also implicated. These
and other issues are explored in greater detail in a forthcoming article, Looking for Mr. Good Black: The Real
Tragedy of Lawrence D. Mungin and Other Children of the Dream.

103. Shipler, A County of Strangers at 280-81 (cited in note 25) (“In the realm of proper political dis-
course, where overt racial slurs can destroy a career, the expression of prejudice takes on a more circuitous 
route . . . . You’re not allowed to characterize black people as incompetent, but you may preach the abol-
ation of affirmative action because it promotes ‘unqualified’ blacks over ‘qualified’ whites. In American 
public life, where it is no longer admissible to assert the mental inferiority of black people, it is perfectly 
fine to argue policies that grow out of that assumption, so long as the core stereotype is left unstated.”). See also Higgins and Rosenbury, 85 Cornell L Rev 1194, 1195-96 (cited in note 97) (“the Supreme Court 
increasingly has interpreted the Equal Protection Clause as a mandate for the state to treat citizens as if 
they were equal—as a limitation on the state’s ability to draw distinctions on the basis of characteristics
such as race and, to a lesser extent, gender. . . . In the context of race, the court has struck down not only
race-specific policies designed to harm the historically oppressed, but race-conscious policies designed to 
foster racial equality. Although in theory the Court has left open the possibility that benign uses of race
may be constitutional under some set of facts, in practice it has yet to identify such a policy since it
adopted strict scrutiny across the board. [And as] the Supreme Court narrowed the scope of benign race
based categories permitted by the Constitution, political forces have launched attacks on affirmative action
account for the fact that subjective decisions and attitudes about race are often influenced by factors that cannot be accurately characterized either as intentional (consciously deliberate) or unintentional (entirely fortuitous and uninfluenced by the actor's express beliefs or opinions). Consequently, to require proof of conscious motivation as a prerequisite to legal recognition that a decision has been improperly infected by racial bias is to overlook much of what has been discovered about how the human mind actually works and the profound importance of the history of American race relations in the development of the individual and collective American subconscious. The disconnect between enlightened aspirations and the reality of the continuing legacy of historical racism merely provides a breeding culture for the post-Civil Rights incarnation of racial discrimination.

However the courts ultimately resolve the overall "intent versus impact" debate, in the interim, genuine diversification of the elite law firms and similar professional contexts could help make the disagreement more academic than real. The meaningful inclusion of black lawyers within the elite professional environments could provide the kind of continuous professional interaction with blacks that many non-black lawyers might utilize in overcoming conscious or subliminal bias. This could affect some non-black lawyers who have responsibility for corporate attorney recruitment and mentoring, who notably play or will play a prominent role in the selection of the judiciary, and who themselves as-


105. Higgins and Rosenbury, 85 Cornell L Rev at 1195-96, 1215-20 (cited in note 97). See also Lawrence, 39 Stan L Rev at 349 (cited in note 57) ("by only suspecting laws that classify by race on their face or are the result of overtly self-conscious racial motivation, the theory stops an important step short of locating and eliminating the defect it has identified. Where a society has recently adopted a moral ethic that repudiates racial disadvantaging for its own sake, governmental decisionmakers are as likely to repress their racial motives as they are to lie to courts or to attempt after-the-fact rationalizations of classifications that are not racial on their face but that do have disproportionate racial impact."); Pollard, 74 Wash L Rev at 932 (cited in note 59) ("Because overt racism and sexism are on the decline and employers have become sophisticated about discrimination law, direct evidence of discriminatory animus is rare. Many plaintiffs must resort to proving discrimination indirectly by presenting evidence that the defendant fabricated pretextual reasons for the adverse decision in order to hide its true discriminatory purpose. The plaintiff must prove that the defendant is not only bigoted, but is lying to the court and jury—a difficult burden to meet when the defendant is unaware of the unconscious bias and a jury can see the real shock and indignation at being accused of bigotry and perjury."). Some commentators argue, however, that the intent approach can be construed as encompassing redress for unconscious bias. Foster discusses the proposition that "there are three levels of intent—specific, general, and unconscious—that can violate the Equal Protection Clause." "Intent" under this broader construction "can range from a specific desire to harm the affected group, to general knowledge that harm is substantially certain to occur, to an unconscious bias towards the affected group... [by] continuing to perpetuate the 'myth' of one static intent, the current [judicial approach to discrimination cases] conceals the range of its potential for identifying racial (and other forms of) discrimination." Foster, 72 Tulane L Rev at 1072 (cited in note 58).
pire to the bench. "The way to get there," according to one major law firm's managing partner, "is to reach a critical mass of diversity. Once you get that critical mass, diversity becomes accepted, it becomes the norm. If that happens, other things will take care of themselves."

Preconceived notions are more likely to be changed by drawing attention to their inaccuracy and by providing for regular, concrete encounters that further undermine or disprove them. As the opening quotation of this Article declares: "Speak thou with us and we will hear . . . ."107 Indeed, society's post-Civil Rights Era experience would seem to validate this approach. How many vocations today considered "women" or "minority" jobs were previously the exclusive province of white men?108 Bringing meaningful integration to the major corporate law firms improves the odds that conscious and subliminal biases against blacks by professionally cloistered lawyers will be effectively challenged. In the case of the lawyer who will one day play a role in assessing the qualifications of black judicial candidates, such biases will be challenged before she is called upon to undertake these critical, subjective evaluations. And in the case of the lawyer who is a future judge, these biases will be challenged before she reaches the bench.109 All of this increases the likelihood that the effects of any lingering, subliminal racial bias will be curtailed, perhaps even eliminated in these contexts or at least appropriately redressed in the courts.110

107. Exodus 20:19. See Pollard, 74 Wash L Rev at 922 (cited in note 59) ("To break the bad habit of unconscious negative and automatic discriminatory attitudes, a person must consciously activate unbiased beliefs each time a stereotype is automatically triggered. The more the individual does this, the more accessible the unprejudiced belief becomes, and at some point the egalitarian belief's accessibility will 'rival' the automatic response."); Lawrence, 39 Stan L Rev at 343 (cited in note 57) ("A crucial factor in the process that produces unconscious racism is the tacitly transmitted cultural stereotype. If an individual has never known a black doctor or lawyer or is exposed to blacks only through mass media where they are portrayed in the stereotyped roles of comedian, criminal, musician, or athlete, he is likely to deduce that blacks as a group are naturally inclined toward certain behavior and unfit for certain roles."); Armour, Negrophobia and Reasonable Racism at 75 (cited in note 58) ("Tacit understandings instill stereotypes in ways that escape conscious detection . . . . If an individual has never known a Black professional or has a mental medley of Black images primarily composed of the comedian, criminal, musician, or athlete stereotypes, no unexpected barriers have materialized to force a detour in his development of negative attitudes toward Blacks.").
108. See, for example, Hacker, Two Nations at 112-19 (cited in note 53).
109. Wright, Black Robes, White Justice at 6 (cited in note 86) ("At the University of Wisconsin, the members of a white fraternity made some candidates for membership paint their faces black and conduct a mock slave auction. Such an occurrence would be little more than an undergraduate prank, immature humor, except for one thing: Those white students will one day become lawyers, public officials, jurors or judges, unshriveled of their pro-slavery sentiments.").
110. Moloney Smith, 28 U Rich L Rev at 197 (cited in note 18) ("The judiciary is an important institution which remains dominated by white males of similar backgrounds . . . . It is important for women, and men of color, to gain representation in this powerful institution. It is a question of power and status, of empowering segments of society and permanently eliminating . . . stereotypes, myths and biases.").
CONCLUSION

If the cases outlawing segregation were wrongly decided, then they ought to be overruled. One can go further if dominant professional opinion ever forms and settles on the belief that they were wrongly decided, then they will be overruled, slowly or all at once, openly or silently.\textsuperscript{111} The societal advances essential to remedying the unequal access to legal justice still endured by black Americans obviously must go beyond judicial appointments or elite corporate law firm hiring. Overt, covert, and subliminal racial bias against blacks not only continues to impede African American progress, but “[t]he historical context of slavery has had profound meanings to, and effects on, not only those who suffered from it but also those whose ancestors benefited from it. Regardless of how differently its benefits are distributed, all American subjects continue to live out its effects.”\textsuperscript{112} Especially in elite and other highly subjective selection contexts, subliminal racial prejudice continues to work against blacks, even in the complete absence of conscious racial bias. Thus, the current myopic preoccupation with overt discriminatory acts and so-called “race neutral” criteria ignores the “don’t ask/don’t tell” incarnation of racial bias in the post-Civil Rights Era and contravenes the acculturated intelligence and everyday realities of all Americans, regardless of color.

More important than what people say about a belief, a practice, or a law is how they actually feel about it. History informs us that explicit repeal is often unnecessary when individuals can effectuate the neutering of laws or other express assurances of individual rights and liberties through collective evisceration of their spirit, despite adherence to their letter.\textsuperscript{113} Crucial to changing the way that some people feel about those who are somehow different from them is impacting their personal experiences, and doing so repeatedly. For all but the most ardent racist, first-hand interaction with African American attorneys and other black professionals who are performing in elite and substantively competitive positions should not only erode explicit or subconscious bias but also replace such preconceptions with affirmative expectations of black competence.

It is also important to articulate expressly that this particular emphasis on greater opportunities for African American attorneys and other professionals should not be misconstrued as merely another instance in which it becomes the victim’s responsibility to uplift and enlighten her oppressor. To the contrary, the idea proposed here is to undertake no more than clearing the way toward ensur-

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  \item Black, 69 Yale L.J at 421 (cited in note 6) (emphasis added).
  \item See, for example, Frank H. Wu, Perspective, The Atlanta Journal-Constitution G2 (July 30, 2000) (discussing a CIA agent’s admitted reliance on racial profiling in identifying and investigating a scientist who was a naturalized citizen from Taiwan as an espionage suspect).
\end{itemize}
ing that blacks receive the same chance to demonstrate their skills and talents that most whites already enjoy. The mere reality of more African Americans in high positions and the impact of their competent performance should prove sufficient to eliminate eventually the corollary problem of blacks being held to higher or otherwise unfair standards of performance.

Given that at least part of the problem may be subconscious rather than overt bias, for some people simply being made aware of their subliminal prejudices will be sufficient to spur them toward appropriate, voluntary corrective action. Specifically with respect to the legal profession and the elite enclaves therein, increasing concrete initiatives from the ABA and the NBA would also help. And as for the genuinely impenitent racists, future victims of discrimination in elite contexts should begin to reassess the efficacy of traditional, individual-plaintiff/monetary-recovery litigation, in favor of more creative application of class action strategies and institutional consent decree style remedies.

Including African Americans within the elite professional echelons broadens the professional vistas for black lawyers and ameliorates the professional experience of their non-black peers. It can also enhance everyday opportunities for the routine challenge of racial misconceptions. Such concrete efforts to confront the depth and breadth of the legacy of racism in American society are the next critical step in rising above and beyond it.