THE RACIAL PLACEBO EFFECT AND THE CONSEQUENCES OF INSTITUTIONAL DENIAL: HOW *HENDERSON* PROMOTES LIBERTY AND JUSTICE FOR ALL

Clifford D. Dawkins, Jr.[1]

Abstract

The gap in the racial views of the justice system has a fundamental effect on the lives of citizens, particularly where race serves as our variable. This work challenges the criminal justice system's pronounced predilection for colorblindness in the ruling process by asking, "[i]f the people that make up our legal system harbor passive prejudices that may play out in the administration of justice, is our system functionally flawed and arguably unfair?" There are two foundational questions this work seeks to answer: (1) how do hegemonic social perceptions influence the provision of a fair and neutral justice system, and (2) how can our justice system move in the direction of becoming more equitable. In essence, we are seeking to understand how the implicit biases of our criminal justice system's arbiters affect the overall efficacy of the system.

"Part I" of this work will introduce theoretical analyses. The first theory is called the "Institutional Denial Theory." Through this theory we will consider the phenomenon of our justice system failing to recognize the fact that the individuals that make it up can and, more likely than not, do have biases that affect the outcomes of cases, and therefore the overall fairness of the system. The second theory is called the "Racial Placebo Effect Theory." This theory describes the phenomena of our justice system perceiving itself as taking affirmative steps to ensure fairness and neutrality is afforded to all citizens, but not actually doing much to address issues of systemic racial disparities, thereby aiding in the perpetuation of an inequitable system and undermining its own legitimacy. Together, these theories suggest that the justice system has much room to grow.

I will address the practical application of "Part I" of this work in "Part II." Utilizing the recent New Jersey Supreme Court decision in *State v. Henderson*, Part II of this work will consider the

---

[1] Clifford D. Dawkins Jr. is a J.D. Candidate for May of 2015 at Rutgers School of Law- Newark. He earned his Master of Public Policy in 2012 from the Edward J. Bloustein School at Rutgers University. He earned his Bachelor of Science Degree from Cornell University in 2010. The writing of this note commenced in the Fall of 2013 and was completed in April of 2014.

contemporary example of the *Florida v. Zimmerman* [hereinafter Trayvon Martin Case] as a case study demonstrative of the negative impact of colorblindness on our legal system. *Henderson* will serve as an example of how our justice system might build toward one that is universally perceived as equitable and legitimate.

Introduction

Inspired by the ascendancy of President, Barack H. Obama, a national debate has erupted centering on the question of whether we have entered into a post-racial era as a society.[2] The importance of this debate is undeniable, as children today are aware of and have deeply reckoned with those racial concerns that permeate virtually all aspects of American life.[3] While some would argue that the advancements people of color have made in the American context (i.e., the first non-white President, as well as increases in general minority wealth) suggest American society has finally rid itself of the deleterious vestiges of racism, others argue that post-racial rhetoric undermines the substantial percentage of people of color "[e]nmeshed in crushing poverty; underperforming public schools; rampant unemployment; substandard healthcare; cycles of violent crime and imprisonment; and dysfunctional, underserved neighborhoods."[4] To this point, one scholar argues that post-racial proponents are flawed in their overall logic, stating that:

> [l]eaving [the most vulnerable] behind to focus exclusively on building black wealth and making the

---

[2] *See Under Obama, Is America 'Post-Racial'?*, N.Y. TIMES (Sept. 21, 2011), http://www.nytimes.com/roomfordebate/2011/09/21/under-obama-is-america-post-racial (introducing a web-based platform allowing voluntary participation in a public debate centered on whether President Obama's approach to racial politics via Kennedy-like "transracial universalism" suggests we have become a post-racial society).

[3] *See generally* Louise Derman-Sparks, Carol Tanaka Higa & Bill Sparks, *Children, Race and Racism: How Race Awareness Develops*, EARLY CHILDHOOD EQUITY ALLIANCE, http://www.teachingforchange.org/wp-content/uploads/2012/08/ec_childrenraceracism_english.pdf (last visited Oct. 4, 2014).

[4] Earl G. Graves, Sr., *Civil Rights for a New Generation: Rescuing the Abandoned*, BLACK ENTERPRISE (Aug. 22, 2013), http://www.Blackenterprise.com/blogs/march-on-washington-anniversary-new-civil-rights-movement/.

> black middle class more secure is the equivalent of shutting down the Underground Railroad and ending the abolitionist movement based on the twisted logic that all deserving black people had been freed and the rest were just meant to be slaves.[5]

Correspondingly, while the post-racial debate takes place largely in the social realm, there are marked implications for this debate in the legal realm. That is, the legal system, and particularly the criminal justice system, is linked to and impacted by the sociocultural predilections of the nation.[6] Aharon Barak argues that judges are vested with the responsibility of "maintain[ing] the coherence of the legal system as a whole."[7] While admitting that there are limitations on judges with regard to the amount of autonomy over the creation and sustenance of the various sources of law, the author suggests judges, as representatives of the legal realm, have a significant impact on society through their decisions.[8] Additionally, in characterizing the link between the legal and social spheres via the role of judges as arbiters of justice, Barak states, "[t]he judiciary and each of its judges must safeguard both formal democracy, as expressed in legislative supremacy, and substantive democracy, as expressed in basic values and human rights."[9] In essence, Barak is making the case that judges serve as the link between the law and society, as their decisions affect the interactions of citizens.[10]

The link between law and society is elementary to the subsequent discussion. That is, we are compelled to understand first how law influences society, and, inversely, how society influences the law. Barak's assertion that judges serve as the link between law and society is telling, but only serves as our starting point for considering the link. Commonly judges are assisted in their decisions by other parties integral to the legal system, such as their clerks, attorneys, experts, courtroom personnel, and, perhaps most notably, jurors.

---

[5] *Id.* (alteration in original).

[6] *See* Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 25 (2002).

[7] *Id.*

[8] *See id.* at 25-26.

[9] *Id.* at 26.

[10] *See id.*

Working together, these parties attempt to administer the law in a neutral and equitable fashion.

In the dominant discourse, each individual that makes up the legal system is assumed to be fair and objective, devoid of bias, and to take seriously his or her commitment to afford parties in dispute the utmost justice. Still, some would challenge these notions of neutrality and fairness in our American justice system, and, interestingly, these conflicting views often play out along racial lines.[11] That is, white Americans tend to be proponents of the status quo legal system because they perceive it as color blind[12] (meaning the system treats all citizens the same regardless of race); however, people of color tend to gaze upon our justice system with skepticism and distrust because they perceive it as prejudicial to members of their racial group.[13]

Generally, the question of perceptual difference is anchored in the concept of the legitimacy of our justice system. Correspondingly, research demonstrates "a key factor" in establishing the legitimacy of our national justice system is the perceived procedural fairness of the system.[14] Researchers Thibaut and Walker suggest that a justice system regarded as universally equitable "facilitates the maintenance of positive relations among group members—preserving the 'fabric of society'…."[15] The importance of the procedural question boils down to trust in the goodness of the justice system, and an acceptance of the justice system as a legitimate objective authority.[16]

---

[11] *See* John Sides, *White People Believe the Justice System is Color Blind. Black People Really Don't*, WASH. POST WONKBLOG (July 22, 2013, 12:20 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/22/white-people-believe-the-justice-system-is-color-blind-black-people-really-dont/ (describing the phenomenon of white people believing in the promise of fairness in the criminal justice system and people of color rejecting the notion that the justice system delivers on the promise of fairness and equal treatment).

[12] *Id.*

[13] *See id.*

[14] Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups, in* 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 115, 133-140 (Mark P. Zanna ed., 1992), *reprinted in* CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 42, 42-43 (Mark S. Brodin et al. eds., 4th ed. 2012).

[15] *Id.* at 43 (quoting JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (Lawrence Erlbaum Associates, eds., 1975).

[16] *Id.* at 44.

The implications of individuals in society perceiving the justice system as legitimate are of a significant magnitude. According to Tyler and Lind, "[s]ince the legitimacy of authorities is often viewed as a 'cushion of support' that helps societies to survive difficult periods in history, the weakness of the support underlying the American legal, political, and economic systems seemed to point to a potentially dangerous vulnerability to destructive social unrest[]."[17] Tyler and Lind's assertion helps us to understand the gravity and grand implications of the link between society and the law, but also suggests that the two can, and have, historically worked in concert to safeguard against the negative impacts of social unrest and aid in yielding national progress.

More specifically, in 2013 scholars from Georgetown University and George Washington University conducted research looking into the perceptual differences among racial groups along the black/white binary and yielded several noteworthy findings through their study. These scholars suggest that "while about 25 percent of whites disagreed with the statement that the 'courts give all a fair trial,' more than 60 percent of African Americans disagreed."[18] Through this finding the authors assert, "[u]sing every possible barometer, we found that blacks doubted the fairness of the justice system much more than whites."[19] Moreover, the authors explain the perceptual differential in terms of almost subconsciously held values of the racial groups. To the point, the authors explain that approximately sixty percent of whites "believed that blacks *deserve* to be imprisoned more frequently[,]" often basing this belief on the preconceived notion that blacks "are more inclined to commit crimes or just less likely to respect authority." [20] While the notions held by white citizens themselves are based in seemingly innocent or at least subconscious values, their perceptions and prejudices do have implications on the overall justice system, as we will see.

The gap in the racial views of the justice system has a fundamental effect on the lives of citizens, particularly where race serves as our variable. The authors of the aforementioned multi-university study suggest it boils down to "African Americans attribut[ing] [adverse legal] outcomes to procedural bias, while whites

---

[17] *Id.*
[18]*See* Sides, *supra* note 12.
[19] *Id.*
[20] *See Id.* (emphasis added).

are more willing to attribute them to character flaws of blacks."[21] Still, some inquire as to the significance of these vantage points. That is, can it be said that these sociocultural perceptions have any substantial effect on the provision of an equitable and just legal system? The authors of the multi-university study suggest the effects of these perceptions have a substantial impact on the justice system where they explain, "when blacks are cynical and whites are sanguine about the justice system, they tend to interpret the behaviors of agents of the system (such as police officers and judges) through these lenses, leading to what might be a perpetual spiraling effect."[22] The authors go on to frame this "spiraling effect" in terms of how agents of the justice system interact with the public, again, controlling for the factor of race.[23] The result was somewhat startling given the pronounced racial progress of our nation.

Utilizing survey research methods, the authors found whites "were much more likely to judge blacks as guilty of the alleged crimes, assume blacks would commit more crimes in the future, and favor much harsher punishments for black than white suspects."[24] This finding in particular is among the most telling, as it is of tremendous significance for our understanding of what the system can do to better live up to its promise of equity and fairness for all citizens of the United States. That is, if the people that make up the system are incapable of neutrality or harbor passive prejudices that may play out in the administration of justice, than our system is functionally flawed and arguably unfair.

Accordingly, there are two fundamental questions this work seeks to address: (1) how do hegemonic social perceptions influence the provision of a fair and neutral justice system, and (2) how can our justice system move in the direction of becoming more equitable. In order to resolve these inquiries, this work will proffer two theoretical lenses through which we might view the justice system.

I will address the theoretical analyses in Part I of this work. The first theory is called the "Institutional Denial Theory." Through this theory we will consider the phenomenon of our justice system failing to recognize the fact that the individuals that make it up can and, more likely than not, do have biases that affect the outcomes of

---

[21] *Id.* (alteration in original).

[22] *Id.*

[23] *See id.*

[24] Sides, *supra* note 12.

cases, and therefore the overall fairness of the system. The second theory is called the "Racial Placebo Effect Theory." This theory describes the phenomena of our justice system perceiving itself as taking affirmative steps to ensure fairness and neutrality is afforded to all citizens, but not actually doing much to address issues of systemic racial disparities, thereby aiding in the perpetuation of an inequitable system and undermining its own legitimacy. Together, these theories suggest that the justice system has much room to grow.

I will address the practical application of Part I of this work in Part II. Utilizing the recent New Jersey Supreme Court decision in *State v. Henderson*[25], Part II of this work will consider the contemporary example of the Trayvon Martin Case as a case study that demonstrates the negative impact of colorblindness in our legal system. *Henderson* will serve as an example of how our justice system might build toward one that is universally perceived as equitable and legitimate. *Henderson* is a recent New Jersey criminal case concerning, in relevant part, New Jersey's courts' eyewitness identification procedures.[26]

In *Henderson*, Chief Justice Rabner, writing for a unanimous court, suggests that the Manson/Madison Doctrine, a doctrine concerning eyewitness identification in criminal cases, no longer adequately meets its stated goals, as "it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony."[27] Moreover, applying the relevant portions of the holding in *Henderson* to an analysis of the Trayvon Martin Case[28], this work will suggest that the outcome of the case would more likely than not have been quite different under a *Henderson* analysis.

---

[25] 208 N.J. 208 (2011).

[26] *Id.* at 217.

[27] *Id.* at 285.

[28] Tamara F. Lawson, *A Fresh Cut in an Old Wound-A Critical Analysis of the Trayvon Martin Killing: the Public Outcry, The Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271, 310 (2012) (This article "encouraged its reader to consider that the impact of race can vary for different people depending on whether or not one is negatively marked by race . . . [and suggested that] race is uniquely embedded, consciously or unconsciously, in the legal analysis of criminal law. . . . Racial stereotypes are still part of American culture, and, by default, part of the American criminal justice system. Instead of being color-blind, an impossible exercise, the impact of race must be addressed head-on and become openly part of the legal critique.") (alteration in original).

The Trayvon Martin Case arguably hinges on racial dynamics in the modern justice system.[29] In the Trayvon Martin Case a young African American teenager from Florida was killed by a community watchman who perceived the him as an outsider and a threat to the local community.[30] According to scholar Tamara Lawson, in the course of the Trayvon Martin Case*,* the nation focused intently on Trayvon's race.[31] Lawson explains, "[r]ace had a striking impact on the analysis."[32] Nonetheless, Lawson suggests that the root of the controversy surrounding the Trayvon Martin Case is the fact that a minor was murdered and the known killer was not held accountable.[33] Additionally, Lawson states, "This narrative projected a suggestion of racial bias as the unspoken motivation for the prosecutor's initial leniency."[34] To the point, Lawson explains, "[r]ace is salient in evaluating a jury's reaction to a black victim[.]"[35] Moreover, Lawson suggests, "empirical studies have confirmed that race routinely impacts charging decisions."[36] Considering the fact that the Trayvon Martin Case seems to suggest, "an individual's racial identity has real and sometimes deadly, consequences, for those who are negatively marked by race,"[37] it is important that our legal system takes seriously the implication of race on the provision of fairness in the pursuit of liberty and justice for all.

In all, this work seeks to offer a basis for the rudimentary understanding of the racial issues that hinder the ability of our legaly system to fully live up to its promise, and offers recommendations for how our justice system might build on the advancements made through New Jersey's *Henderson* decision.

---

[29] *See generally id.* (explaining the legal and social atmosphere preceding the Trayvon Martin shooting).
[30] *See id.* at 299-300 (explaining the "stand your ground law" and how it applies to the killing of Trayvon Martin).
[31] *Id.* at 293.
[32] *Id.*
[33] *See id.* at 294-95.
[34] Lawson, *supra* note 28, at 294.
[35] *Id.* at 310.
[36] *Id.* at 293.
[37] *Id.* at 279-280.

I. Theoretical Analyses

A. Institutional Denial Theory

The Institutional Denial Theory describes the phenomenon of our justice system shying away from the inclusion of sociocultural issues within its legal proceedings. The court's long-held disposition can be said to amount to a state of constant denial about the effects of divorcing sociocultural considerations from legal ones. Still, before we can fully understand the theory, we must first understand the context of its development.

i. The Supreme Court Battle Over Colorblindness

One of the most infamous examples of the justice system's rejection of sociocultural considerations is seen in the plurality opinion rendered by Chief Justice Roberts of the United States Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*.[38] *Parents Involved* is a case where Seattle school districts voluntarily adopted student assignment plans based on racial classifications to achieve diversity in the classroom settings of the district.[39] Most relevant to our discussion, in closing his opinion Chief Justice Roberts states, "[t]he way to stop discriminating on the basis of race is to stop discriminating on the basis of race."[40] Here Chief Justice Roberts, in his circular logic, seems to suggest that the means by which we might remedy consequences of past discrimination and prevent future discrimination is to set racial considerations wholly aside in our daily endeavors. He essentially suggests that we should ignore the existence of race with the hope that the issues attendant to race fade away along with our appreciation of it. The sentiment is undoubtedly wonderful, though remarkably myopic.

---

[38] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) [hereinafter *Parents Involved*]; *see also* Bill Mears, *Divided Court Rejects School Diversity Plans*, CNN.COM (June 28, 2007, 7:17 PM), http://www.cnn.com/2007/LAW/06/28/scotus.race/ (describing the contention within the court over the race question and characterizing the Supreme Court as a "conservative majority led by Chief Justice John Roberts[.]").

[39] *See Parents Involved*, 551 U.S. at 710.

[40] *Id.* at 748.

By contrast, in her recent dissenting opinion in *Schuette v. Coalition to Defend Affirmative Action,* Justice Sotomayor expresses her disagreement with the desire of her colleagues on the bench to "leave race out of the picture entirely[.]"[41] *Schuette* is a case where the Supreme Court was to decide whether to uphold a vote in Michigan for an amendment to the state's constitution that prohibits state universities from considering race as part of its admissions process.[42] Reversing the lower court's decision, the Supreme Court held that the voters' decision to amend their state constitution did not violate the Equal Protection Clause of the United States' Constitution.[43] This decision essentially allows states to undermine Affirmative Action via referendum. Critiquing the reasoning of the plurality opinion, which she equates to Justice Robert's reasoning in *Parents Involved*, Justice Sotomayor explains, "[i]t is a sentiment out of touch with reality, one not required by our Constitution, and one that has properly been rejected as 'not sufficient' to resolve cases of this nature."[44] In enumerating sociocultural evidence supportive of her position, she explains, "Race . . . matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities."[45] Denouncing the plurality's interpretation, a view she calls "regrettable," she explains that examining the impact of race in court proceedings does not per se perpetuate racial discrimination.[46] In what is perhaps the most impactful segment of her opinion, Justice Sotomayor directly challenges the long held belief of our nation's highest court, articulated by Chief Justice Roberts in *Parents Involved*, which suggests that colorblindness in legal proceedings is most helpful in discouraging discrimination. Utilizing Justice Roberts phrasing she states, "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."[47] Furthermore, speaking directly to her fellow justices, Justice Sotomayor calls for their participation, as agents of

---

[41] 134 S. Ct. 1623, 1675 (U.S. 2014).

[42] *Id.* at 1629.

[43] *Id.* at 1636.

[44] *Id.* at 1675.

[45] *Id.* at 1676.

[46] *Id.*.

[47] *Schuette*, 134 S.Ct. at 1676.

the Courts and upholders of the United States Constitution, to take care to afford equal protection to all Americans.[48] In her pragmatism and candor, Justice Sotomayor explains, "[w]hile '[t]he enduring hope is that race should not matter[,] the reality is that too often it does'. . . it cannot be wished away."[49]

ii. Defining Justice

In support of Justice Sotomayor's assertions, contemporary scholars like Tim Wise[50], a sociologist specializing in antiracism, argue that being able to set aside racial considerations in daily life is a privilege reserved for white Americans.[51] The significance of Wise's assertion is that it speaks to the sociocultural differences between the races and how their perceptions are shaped by their experiences. Wise's work supports the idea that the individuals that make up our justice system can and, more likely than not, do have biases that affect the outcomes of cases, and therefore the overall fairness of the system.

Correspondingly, in developing our foundation for understanding, it is important to have an idea of what is meant when

---

[48] *See id.* (explaining "[a]s members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.").

[49] *Id.* at 1675 (quoting *Parents Involved*, 551 U.S. at 787) (Kennedy, J., concurring in part and concurring in judgment).

[50] *See* Tim Wise, *About*, TIM WISE.ORG (Nov. 15, 2013) http://www.timwise.org/about/.

[51] *See No Talking Points: Tim Wise Tells CNN's Don Lemon The 5 Things White People Should Do To Improve Race Relations*, YOUTUBE (Aug. 10, 2013), http://www.youtube.com/watch?v=gNm4d5prXBY (describing five ways white citizens can recognize their privilege and mitigate racial issues: 1) recognize that history does matter, 2) assume that people of color know their lives better than you, 3) recognize that having minority friends does not mean you are devoid of racial bias, 4) consider the fact that even when racism was blatant during the height of discrimination, polls of white citizens showed they did not consider the issue legitimate, and 5) consider the fact that statistics are inaccurately used to justify racial prejudice); Tim Wise, *On White Privilege,* YOUTUBE (Feb. 19, 2008), http://www.youtube.com/watch?v=J3Xe1kX7Wsc (describing the historical circumstances that led to the construction of race in the United States from the perspective of lower class whites); Tim Wise, *Tim Wise Pathology of White Privilege,* YOUTUBE (July 20, 2012), http://www.youtube.com/watch?v=e2iPt96hziM (describing the luxury of white citizens not having to worry what other people think).

we talk about the aspirational concept of justice, as well as whether our system affords justice for all. Rudimentary to our understanding is the notion that our perceptions are shaped by our experiences.[52] Thus, it follows with regard to our experiences with the justice system, as the old adage suggests, "our perceptions become our realities."

In formulating our perceptions of justice, we first look to our nation's founding fathers for clues. Our first President, General George Washington, once said, "[t]he administration of justice is the firmest pillar of government." [53] Thus, President Washington established the important role of our system of government in affording justice for all citizens of the United States. Furthermore, in those early days the drafters of the DECLARATION OF INDEPENDENCE stated in the immortal provision of the document, "[w]e hold these truths to be self-evident, that *all men are created equal*, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[54] The words of the Declaration seem to suggest that at its moral core the United States should aspire to be a nation that treats all of it citizens equally. Still, the American historical and contemporary contexts have shown that we are quite distant from reaching the lofty goal of universal equality. Further, the gap in the experiences of American citizens along racial lines implies there are divergent views of justice.

The idea that there are divergent views of justice is by no means novel. One of the earliest known works by an African American that might provide us with a foundation for understanding the difference in how whites and non-whites view the concept of

---

[52] *See* Kendra Cherry, *Perception and the Perceptual Process*, ABOUT.COM (Nov. 16, 2013), http://psychology.about.com/od/sensationandperception/ss/perceptproc.htm (describing how we come to perceive through our interactions with our immediate environment and states, "[p]erception is our sensory experience of the world around us and involves both the recognition of environmental stimuli and actions in response to these stimuli.").

[53] George Washington, *BrainyQuote: George Washington,* BRAINYQUOTES.COM, http://www.brainyquote.com/quotes/quotes/g/georgewash383558.html#D25hvcYMtSGbwcGu.99 (last visited Oct. 11, 2014).

http://www.brainyquote.com/quotes/quotes/g/georgewash383558.html#D25hvcYMtSGbwcGu.99.

[54] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

justice is found in DAVID WALKER'S APPEAL.[55] Published in the early nineteenth century, DAVID WALKER'S APPEAL serves as one of the earliest critiques on the American sociocultural context from the perspective of an American-born person of color, for which Walker spent approximately a decade researching the "history, theology, philosophy and sociology" of the United States.[56] In his APPEAL, Walker guides the reader through a close reading of the Declaration of Independence through the lens of the victims of racial injustice in the United States, and makes a marked comparison between the sufferings of the brave souls who fled the tyranny of Britain to establish this country and the sufferings of blacks under the rule of the United States, in an attempt to draw attention to the irony of the circumstance of slavery.[57] Throughout this portion of his work, he calls attention to the hypocrisy of the United States' sociocultural context and explains that his work is a function of his personal experiences, as well as the experiences of others similarly situated, stating, "I do not speak from hearsay—what I have written, is what I have seen and heard myself."[58] Walker's statement further bolsters our previous assertion that perception is a function of experience.[59] Of note, Walker's work informed the philosophical foundations and work of civil rights era activists such as Reverend Dr. Martin Luther King Jr.'s ("MLK") "proposition that racism is inevitably a vicious sin and that God commands us to resist injustice by civil disobedience," as well as Malcolm X's "assertion of the right to self-defense, that human rights supersede civil rights, and that the fight for freedom is justified by any means necessary."[60] Of course, both MLK and Malcolm X went on to contribute substantially to the progress, which resulted from the Civil Rights Movement of the 1960s.[61] Walker's view of justice included not only the idea of equal rights and

---

[55] DAVID WALKER, DAVID WALKER'S APPEAL (Black Classic Press ed., 1993) (1830) (also known as "David Walker's Appeal To the Coloured Citizens of the World, but in particular, and very expressly, to those of the United States of America.").

[56] *Id.* at 9-10.

[57] *Id.* at 94-99.

[58] *Id.* at 96.

[59] *See* Cherry, *supra* note 52.

[60] WALKER, *supra* note 55, at 11.

[61] John Blake, *Malcolm and Martin, Closer Than We Ever Thought,* CNN.COM (May 19, 2010, 11:36 AM), http://www.cnn.com/2010/LIVING/05/19/Malcolmx.king/ (describing the two civil rights leaders as being the "embod[iment of] the 'yin and yang' deep in the soul of Black America.") (citation omitted).

treatment by the government and its institutions, but also the idea that charity to the most vulnerable citizens of the United States is an important aspect of the provision of a just system. Hence, quoting Mr. Elias B. Caldwell, an early 19th century lawyer from the District of Columbia, Walker explains,

> Americans ought to be the last people on earth, . . . to cry peace and contentment to those who are deprived of the privileges of civil liberty, they who have so largely partaken of its blessings, who know so well how to estimate its value, ought to be among the foremost to extend it to others.[62]

Walker's assertion cuts against our customary contemporary belief that democracy and justice require us to do what is best for the majority of citizens in spite of the consequences to the marginalized minority.

Over time, many sociological scholars, leaders, and social activists have built on Walker's articulation of African American perceptions of systemic justice. Marcus Garvey, the Jamaican born social leader responsible for the largest mobilization of people of African descent in the Western Hemisphere and one of the most influential people of African descent in history,[63] developed a strong perception of justice for people of color in Western civilization. More specifically, Garvey explains, "[i]f you are strong you have justice on your side. If you are weak you are at the mercy of the dispenser of justice."[64] Garvey expresses a fundamental notion, posited first in Walker's work, that the majority's will determines the extent and type of justice to be afforded fellow citizens. The will of the majority becomes dangerous where race is the defining characteristic of the majority group, as has been the case in our nation since its inception. Moreover, Garvey proffers examples of the manifestation of injustice in a system characterized by a staunch power differential between the races. He states, "[t]he number of blacks in jails, prisons and

---

[62] WALKER, *supra* note 55, at 71.

[63] *See generally* COLUMBUS SALLEY, THE BLACK 100: A RANKING OF THE MOST INFLUENTIAL AFRICAN AMERICANS, PAST AND PRESENT 79-82 (Citadel Press 1999) (providing background on Marcus Garvey).

[64] MARCUS GARVEY, MARCUS GARVEY SAID... 87 (Ken S. Jones ed., United Coop. Printers 2002) (1993).

reformatories of the United States, the British West Indian and other colonies and countries, the protectorates and dominions of Great Britain and France in Africa, is shamefully in excess, proportionately, of all other race groups to the populations. ... Something is wrong."[65] In all, we take from Garvey's philosophies and initiatives that race is a social construct; thus, the Court's preference to divorce the social from the legal necessarily leads to an ignoring of race in the legal context leading to the hardships racial minority citizens have endured for many generations and continue to endure today.

iii. Considering Cultural Dissonance & Implicit Bias

Even if one accepts the premise that there are divergent race-based views of justice in our nation, we must explore further the potential impact of these views on the dissemination of equal justice within our criminal justice system. One catchall term that might describe this divergence is known as "cultural dissonance." Cultural dissonance describes the situation where parties have "differing sociocultural and experiential backgrounds." [66] Consequently, a voluminous number of court decisions are arguably unfair because "they conform to certain prejudices and stereotypes held by the judge and/or jury."[67] Today, it is common parlance to state that the various minority groups in the United States have cultures all their own. Gazing through the eyes of the majority, we might consider these minority cultures as "subcultures." Often given their history of turmoil in the American context, these subcultures may have divergent beliefs from the majority group, and may even harbor certain values antagonistic to the majority group's values. This cultural divergence cultivates systemic tension that can result in inequitable legal outcomes. As scholar Nancy Kim explains, the danger of this tension is seen where

---

[65] *Id.*

[66] Nancy S. Kim, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, 17 U. FLA. J.L. & PUB. POL'Y 199, 201-02 (2006) (suggesting "the definition of crimes (in particular, the definition of the mens rea element of the crime) fails to capture the moral blameworthiness of the defendant" and that courts "have rendered decisions lacking in cohesiveness.").

[67] *Id.* at 201.

> a decision-maker may adhere strictly to the definition of a crime which may unfairly punish a member of a cultural minority or, having decided that the crime does not adequately reflect culpability, the decision-maker makes a decision freed from the constraints imposed by the literal definition of a particular crime.[68]

Kim goes on to explain, "[i]n the latter case, the result is often based upon unreliable evidence that conforms to the decision-maker's biases and prejudices."[69]

Generally, our legal system assumes judges and juries share a single culture and experience with defendants.[70] Kim suggests this assumption is faulty and that the "well-established promise of the law . . . of a jury comprised of 'one's peers' which presumably safeguards against prejudice," may not account for a court's "fail[ure] to account for the cultural dissonance that often exists between the judge/juror and the accused." [71] Thus, cultural dissonance gives us some preliminary insights into the causes of the disproportionality in adverse legal outcomes on minority defendants.

Another theoretical framework we might look to for some guidance on the question of the impact of divergent views of justice is the concept of "implicit bias." In 2012, Jerry Kang and a group of scholars came together to explore the notion of implicit bias.[72] Their team included "legal academics, scientists, researchers, and even a sitting federal judge[.]"[73] Kang and his team sought to explore bias in the court system through "behavioral realism…[with the goal of] distinguish[ing] between explicit, implicit, and structural forms of bias."[74] Their work develops the foundation for how we might begin to understand and remedy the effects of cultural dissonance on legal outcomes.

---

[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *See id.* at 201-202.
[72] Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1124-35 (2012).
[73] *Id.* at 1124.
[74] *Id.*

The concept of implicit bias suggests that there are "attitudes or stereotypes that affect our understanding, decision-making, and behavior, without our even realizing it."[75] Their work establishes social cognitive means of measuring the "existence and impact of implicit biases—without relying on mere common sense."[76] By contrast, explicit biases are biases that we hold that we are more aware of. We share these biases with others if socially acceptable, but conceal them easily if found to be social unacceptable.[77] For example, one may believe that African American youth culture demonstrates poor moral values, but one would not make such a pronouncement around friends and loved ones of African American descent. Correspondingly, it is no surprise that the authors begin their analysis by expressing that people often think and act irrationally.[78]

Kang's team explains there are various types of implicit bias that can subconsciously affect court proceedings. For example, they explain, "[o]ne type of bias is driven by attitudes and stereotypes that we have about social categories, such as genders and races."[79] Essentially, they describe implicit "attitudes" as the relationship between a cultural group and society's positive or negative sentiments toward that group; they describe implicit "stereotypes" as the relationship between the existence of the cultural group and socially imposed character traits.[80] The authors caution, "[a]lthough interconnected, attitudes and stereotypes should be distinguished because a positive attitude does not foreclose negative stereotypes and vice versa."[81]

Kang's research team further explains that both attitudes and stereotypes can manifest themselves on a subconscious level that does not necessarily allow for one to balk and purposefully, introspectively

---

[75] *Id. at 1126*.
[76] *Id.*
[77] *See id.* ("[E]xplicit biases are attitudes and stereotypes that are consciously accessible through introspection and endorsed as appropriate. . . . By contrast, implicit biases are attitudes and stereotypes that are not consciously accessible through introspection.")
[78] *See* Kang et al., *supra* note 72, at 1126.
[79] *Id.* at 1128.
[80] *Id.*
[81] *Id.* at 1128-29 ("For instance, one might have a positive overall attitude toward African Americans and yet still associate them with weapons. Or, one might have a positive stereotype of Asian Americans as mathematically able but still have an overall negative attitude towards them.").

reckon with their own personal biases.[82] This inability to correct for personal bias can impact one's behavior and approach to problem-solving, because one does not have to be cognizant of the existence of their biases for their biases to "function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness."[83] Therefore, based upon the research performed by Kang's team's, we might conclude that implicit biases are constantly at work within us all, and we can attribute a great deal of influence to the affects of our preconceived stereotypes and attitudes, even if we do not deliberately apply them or work to mitigate them in our daily decision-making processes. Furthermore, if these implicit biases are functioning at a subconscious level, it follows that the courts are not immune to implicit biases, as courts are made up of human beings susceptible to personal prejudices.

Even if we assume, arguendo that these implicit biases exist, we must examine further the extent and magnitude of their potential impact on court proceedings. Citing research conducted by hundreds of social psychologists, Kang's team proclaims, "implicit bias is pervasive (widely held), large in magnitude (as compared to standardized measures of explicit bias), dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are separate mental constructs), and predicts certain kinds of real-world behavior."[84] Accordingly, the focus of researchers has shifted from exploring the existence and affect of implicit biases to understanding, and perhaps manipulating, implicit biases such that we can change or mitigate their effects.[85]

In addition to the individual implicit and explicit biases, there exist also "structural biases."[86] Structural biases are those biases that are characterized by a "set of processes that produce unfairness in the courtroom."[87] That is, the processes and procedures of the court can perpetuate unequal treatment and/or intensify disparate treatment of minorities in the system without formally doing so, because of our implicit biases about the cultural subgroup they seem to represent.[88]

---

[82] *Id.*
[83] *Id.* at 1129.
[84] Kang et al., *supra* note 72, at 1130-31.
[85] *Id.*
[86] *Id.* at 1133 ("Other names include 'institutional' or 'societal.'").
[87] *Id.*
[88] *Id.*

As Kang and his team explain, "structural bias can produce unfairness even though no single individual is being treated worse right now because of his or her membership in a particular social category."[89] These structural aspects of bias are often overlooked or undermined given our assumptive narrative that the legal system is the great equalizer and protector of individual rights. Of course, as we have seen, this courtroom fairness narrative is viewed, in most instances, as pure and true to the majority group in most instances, while it is perceived as fiction to minority citizens in most instances.[90]

Hence, we see that implicit biases may feed into our notions of fairness and equality at a subconscious level. This might suggest that our legal system is flawed because it is made up of human beings, which are necessarily fallible. This is a simple enough notion if you consider it in terms of building a house from imperfect materials. If the foundation for your structure is constructed of flawed material, you might not be surprised when the final product shows signs of imperfection. Additionally, Kang and his research team suggest that explicit bias, implicit bias, and structural forces often reinforce and perhaps amplify the deleterious effects of each other.[91] Thus, it is of tremendous significance to our analysis to explain that there is more to the outcomes of our legal system's cases than technical posturing and the perceived theater of the courtroom.

B. Racial Placebo Effect Theory

Racial Placebo Effect Theory describes the phenomenon of our justice system believing and/or announcing it is taking affirmative steps to remedy the harmful influence of America's past and present racial biases, but not taking steps that would yield beneficial results in achieving our aspirational criminal justice system. The concept of the "placebo effect" is borrowed from the realms of biology and cognitive science and deals with active healing processes in the brain that "can arise not only from a conscious belief in a drug but also

---

[89] *Id.* at 1133. ("For instance, the threat to fairness posed by jurors with explicit negative attitudes toward Muslims but who conceal their prejudice to stay on the jury is quite different from the threat posed by jurors who perceive themselves as non-biased but who nevertheless hold negative implicit stereotypes about Muslims." *Id.* at 1334.)

[90] *See* Sides, *supra* note 12.

[91] Kang et al., *supra* note 72, at 1134.

from subconscious associations between recovery and the experience of being treated…."[92] That is, the placebo effect suggests "subliminal conditioning can control bodily processes of which we are unaware, such as immune responses and the release of hormones."[93] For example, a doctor might prescribe placebos (a pill or some form of medication that does not do what it purports to do) to help a patient "alleviate pain, depression, anxiety, Parkinson's disease, inflammatory disorders and even cancer."[94] In the context of our nation's criminal justice system, when the body of courts suggests that an issue affecting the liberty of a minority defendant, who is invested in the subculture of his or her group, or is perceived as such, can be decided without any racial considerations, the court is engaging in the prescription of placebo treatment. This is because the courts cannot efficaciously remedy problems impacted by sociocultural issues by employing racially neutral means, just as a doctor cannot wholly cure cancer by prescribing his or her patient painkillers. Even with modest gains made over time, we might argue that such gains are attributable to our subconscious desire to see our sociocultural ailments cured, and, consequently, our legal system progress.

Returning to the example from *Parents Involved*, one can see that the plurality opinion announces a standard, narrowly tailored analysis by requiring a showing that race is necessary in any given government action.[95] While in this case the minimal effect tends to show that race is not exactly necessary, we learn that part of the purpose of this inquiry is to test whether the purpose of the government actor's purported efforts is actually that which is necessary and in accordance with the suggested goal.[96] Essentially, the court is encouraging a "colorblind" approach to the application of the law, attempting to mitigate racial considerations as much as possible,

---

[92] Maj-Britt Niemi, *Placebo Effect: A Cure in the Mind,* SCIENTIFIC AMERICAN (Feb. 25, 2009), http://www.scientificamerican.com/article.cfm?id=placebo-effect-a-cure-in-the-mind; *see also* Bruton v. United States, 391 U.S. 123, 132 (U.S. 1968) (Demonstrating the court's understanding of the term and provides an example of its use of the "placebo" concept, and explaining in Footnote 8, "Judge Hand referred to [limiting instructions for inadmissible hearsay] as a 'placebo,' medically defined as 'a medicinal lie.').

[93] *Id.*

[94] *Id.*

[95] *See* 551 U.S. at 748.

[96] *See generally id.*

and mute sociocultural pronouncements in favor of a more mechanical, technical analysis.

On the contrary, in Justice Kennedy's concurrence in *Parents Involved,* he explains that there are problematic issues that arise in the colorblind context.[97] In line with Justice Sotomayor's dissent in *Scheutte*,[98] Justice Kennedy explains that the plurality has gone too far in suggesting race must never be seen as a legitimate factor in broad legal analysis, and expresses that while most desire for race to not be an enduring and determinative factor in our social and legal outcomes, in reality it too often is.[99] Furthermore, Justice Kennedy explains that courts should be able to use race conscious metrics in a general way.[100] Thus, we might conclude that Justice Kennedy is attempting to bring attention to the fact that those courts ignoring race and/or relegating racial considerations to the margins, may ultimately produce results that are inherently unfair because they do not give due consideration to all relevant facts and variables. In this way, courts may be said to propagate the downside of ignoring race in the legal context when racial issues are pervasive in everyday life. Still, how do we know the court's disposition, methods, and holdings are actually placebos for remedying systemic inequities? One might look to the disproportionate adverse legal outcomes minority defendants experience both historically and contemporarily.

i. Understanding Our System's Symptoms

The Racial Placebo Effect Theory*,* in part, suggests that the court has not actually taken affirmative steps to remedy the vestiges of slavery and eliminate racial inequity in the provision of equal justice for all. To this point, we must work backwards from our conclusion to consider those symptoms associated with race in the context of legal proceedings and outcomes. Renowned professor of law, activist, and writer, Michelle Alexander, suggests that the legal system's relationship to minorities is as bad as, if not worse than, it has ever been.[101] In general, she explains, "although Jim Crow laws are now off

---

[97] *See id.* at 782-98.
[98] 134 S. Ct. 1623 (2014).
[99] *See Parents Involved in Cmty. Sch.*, 551 U.S. at 782-89.
[100] *Id.*
[101] *Legal Scholar: Jim Crow Still Exists in America*, NPR (Jan. 16, 2012), http://www.npr.org/2012/01/16/145175694/legal-scholar-jim-crow-still-exists-in-

the books, millions of blacks arrested for minor crimes remain marginalized and disfranchised, trapped by a criminal justice system that has forever branded them as felons and denied them basic rights and opportunities that would allow them to become productive, law-abiding citizens."[102] Furthermore, Alexander describes the consequences of our system of disproportionality as harmful to people of color, but blacks in particular, branding them as

> criminals and felons, and then when they're released, they're relegated to a permanent second-class status, stripped of the very rights supposedly won in the civil rights movement — like the right to vote, the right to serve on juries, the right to be free of legal discrimination and employment, and access to education and public benefits.[103]

She argues that advancements made by our nation during the 1960s, and the overall struggle for Civil Rights, become moot or rather evaporate once a person has incurred a felonious conviction, thus breathing new life into what we might consider the modern incarnation of Jim Crow.[104]

Ultimately, Alexander suggests, "[t]he more things change, the more they remain the same."[105] In this vein, she suggests that each new generation forms new means of protecting the interests of their own, thus undermining our ability to achieve true egalitarian democracy.[106] The consequences are undeniably severe and pervasive,

---

america ("Today there are more African-Americans under correctional control — in prison or jail, on probation or parole — than were enslaved in 1850, a decade before the Civil War began. There are millions of African-Americans now cycling in and out of prisons and jails or under correctional control. In major American cities today, more than half of working-age African-American men are either under correctional control or branded felons and are thus subject to legalized discrimination for the rest of their lives.").

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 1 (2010).

[106] *See id.* ("In each generation, new tactics have been used for achieving the same goals….").

and persist inter-generationally.[107] Alexander suggests that the only real change we've seen is in the language we use to talk about race, not really the circumstances, power, or privileges afforded to individuals based on their race.[108] This assertion lends significant support to the Racial Placebo Effect Theory.

More specifically, in her work, The New Jim Crow: Mass Incarceration in the Age of Colorblindness, Alexander walks the reader through a recitation of the circumstance wrought by our predilection for race neutral and/or colorblind systemic policies. She explains, "[i]n the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt…instead we use our criminal justice system to label people of color 'criminals' and then engage in all the practices we supposedly left behind."[109] Alexander suggests that we have not made true sociocultural progress; rather, we have redefined and reassigned terms to make ourselves more comfortable with the language, to avoid the socially taboo, and to subversively reinforce those racial values that have been a part of American culture since our nation's very inception.[110] Alexander believes, as we established below through our Institutional Denial Theory, "racial stereotyping can permeate subjective decision-making processes at all levels of an organization, with devastating consequences."[111] Furthermore, these biases manifest as hegemonic beliefs and scientific rationales "attributing the staggering increase in incarceration rates in communities of color to the predictable though unfortunate, consequences of poverty, racial segregation, unequal educational opportunities, and the presumed realities of the drug market, including the mistaken belief that most drug dealers are black or brown."[112]

---

[107] *See id.* at 1-2 ("An extraordinary percentage of black men in the United States are legally barred from voting today, just as they have been throughout most of American history. They are also subject to legalized discrimination in employment, housing, education, public benefits, and jury service, just as their parents, grandparents, and great-grandparents once were.").

[108] *Id.* at 2.

[109] *Id.*

[110] *See generally id.*

[111] ALEXANDER, *supra* note 105, at 4.

[112] *Id.* at *4-5*.

Particularly telling are Alexander's findings on what makes our nation's statistical realities as shocking and scandalous as they seem to be. According to Alexander, America is the only country in the world that imprisons such a high number of its racial or ethnic minorities, even citing that we incarcerate a greater proportion of our black population "than South Africa did at the height of apartheid."[113] Prison entry rates like those seen in our nation's capital where three out of every four young black men (or more) go to prison, are seen in minority communities nationwide.[114] This is especially perplexing when research shows "people of all colors *use and sell* illegal drugs at remarkably similar rates," and when "whites…are more likely to engage in drug crime than people of color," but do not face the same penalties.[115]

Consider the severity of living under circumstances where "as many as 80 percent of young African American men now have criminal records and are thus subject to legalized discrimination for the rest of their lives," which has the effect of essentially banishing them from "mainstream society."[116] These circumstances begin to look less like a function of individual choices and more like inevitabilities to those living through them.

According to Alexander, our contemporary criminal justice system is simply a neo-racial caste system that knowingly seeks to relegate certain individuals to second-class status.[117] Alexander explains her definition and use of the "racial caste" terminology by stating, "I use the term…the way that it is used in common parlance to denote a stigmatized racial group locked into an inferior position by law and custom."[118] Accordingly, she further explains, "the American penal system has emerged as a system of social control unparalleled in world history…[and] the primary targets of its control can be defined largely by race."[119] Of course, the remedies to these

---

[113] *Id.* at 6.
[114] *Id.* at 6-7.
[115] *Id.* at 7 ("In some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men.").
[116] *Id.*
[117] ALEXANDER, *supra* note 105, at 13 ("The [racial caste] system operates through our criminal justice institutions, but it functions more like a caste system than a system of crime control.").
[118] *Id.* at 12.
[119] *Id.* at 8.

issues do not rest with the law alone, but also with our society's policies and social customs.[120]

Finally, Alexander posits a theory as to why our courts, and often society alike, choose to opt for a Racial Placebo Effect, in place of straightforward sociocultural-informed approaches to racial issues. Alexander believes we avoid racial conversations as a society because we are "ashamed of our racial history."[121] This recognition, whether conscious or subconscious, helps us to understand both why most prefer to address issues involving racial considerations using race neutral means, rather than utilizing methods inclusive of racial considerations, as well as why these racial placebos do not work. Race, being a social construction, must not be ignored by our courts. If it is, we become susceptible to the toxic circumstances that we face as a nation today. To this point, Alexander states, "[a]lthough this new system of racialized social control purports to be colorblind, it creates and maintains racial hierarchy much as earlier systems of control did."[122] Her statement sums up the dangers of the courts' consistent subscription to and application of the Racial Placebo Effect Theory, as well as builds a sense of urgency around why we must take immediate and affirmative steps to nullify the effects of Institutional Denial.

II. Practical Application of Our Theories

The fundamental promise of our criminal justice system is that all citizens will be afforded an opportunity to pursue justice when one's rights have been putatively violated. For several contiguous generations, this promise has been seen as a little more than rhetoric. MLK's famed remarks on August 28, 1963, at the "March on Washington", express eloquently the shortcomings of our system, and the reasons why so many perceive the promise of "liberty and justice for all" to mean "liberty and justice for all of privilege and power." In his statement, affectionately known as the "I Have A Dream Speech," MLK spoke of a promissory note written by our nation's forefathers

---

[120] *Id.* at 13 ("The term *mass incarceration* refers not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs. . .").
[121] *Id.*
[122] *Id.* at 13.

and made out to us, the multicultural heirs of their grandiose accomplishments.[123] MLK explained,

> [t]his note was a promise that all men, yes, black men as well as white men, would be guaranteed the 'unalienable Rights' of 'Life, Liberty and the pursuit of Happiness.'. . . Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked 'insufficient funds.[124]

In his timeless expressiveness, MLK sums up the disposition of most Americans who understand the detriments of a justice system suffering from the ailment of Institutional Denial and the failing to treat itself by prescribing systemic Racial Placebos in place of meaningful, race-conscious remedies.

Having established that much of the woes of our justice system today have persisted over time, we might find modern relevance in MLK's words. With his mastery of the language of the heart, MLK encapsulates beautifully our purpose in working toward a more equitable justice system. He states,

> we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. And so, we've come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.[125]

MLK's articulation of the collective frustration of communities of color, as well as the patience and cooperation necessary for bringing about national progress, is the foundation upon which we are able to understand and apply practically our two theories—Institutional Denial Theory and Racial Placebo Effect Theory.

---

[123] *Martin Luther King Jr.: I Have a Dream*, AMERICAN RHETORIC, http://www.americanrhetoric.com/speeches/mlkihaveadream.htm (last visited Oct. 9, 2014).
[124] *Id.*
[125] *Id.*

Utilizing contemporary examples, the subsequent text of this work will apply these two theories in an effort to examine and analyze how we might move our system and society in a direction that will bring us closer to the realization of our aspirational justice system.

A. State v. Henderson

State v. Henderson serves as a contemporary example of how our justice system might build toward one that is universally perceived as equitable and legitimate.[126] The case involves two defendants, facing murder convictions, who were seen by the victim's neighbor at the time of the murder.[127] The neighbor and the defendants in this case are of different racial ethnicities. One of the defendants looked familiar to the neighbor, while the other was referred to as "a stranger."[128] The neighbor testified to being held at gunpoint for the duration of the event that led to the victim's murder, and that he'd seen the "stranger" defendant, but not particularly well.[129] The main focus of the Court's determination in this case was that the "stranger" defendant claimed that he had been misidentified as an accomplice to the murder in this case.[130] The Court affirmed the Appellate Court's decision that challenged the status quo procedure for applying eye-witness identification evidence in court proceedings and remanded the case to the trial court explaining, "we believe that it is essential to educate jurors about factors that can lead to misidentifications…" which might lead to deterrence of wrongful convictions.[131] Central to its holding, the Court explains that the test presently used in evaluating the dependability of eyewitness identifications is in need of revision.[132] Most notably, the Court makes clear the importance of its ruling in helping to further our legal system, when Chief Justice Rabner announces, "[i]ndeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country."[133]

---

[126] *See generally* 208 N.J. 208 (N.J. 2011).
[127] *Id.* at 220.
[128] *Id.*
[129] *Id.*
[130] *Id.* at 217.
[131] *Id.* at 302-303.
[132] 208 N.J. at 218. (Stating, "[s]tudy after study revealed a troubling lack of reliability in eyewitness identifications.").
[133] *Id.*.

Turning to the two theories previously discussed, the relevant issues that this case identifies are, wrongful convictions and how race might play into the high frequency of their occurrences. More specifically, under the Institutional Denial Theory, we see a court system that tends to believe in the soundness and fairness of its decisions generally, and a divergent reality, particularly for defendants of color. For example, *Henderson* pronounced the New Jersey Supreme Court's apprehension regarding the lack of reliability in eyewitness identifications.[134] The *Henderson* court notes a high frequency of wrongful convictions due to misidentification and flaws in what they term "cross-racial identification."[135] According to *Henderson*, "[a] cross-racial identification occurs when an eyewitness is asked to identify a person of another race."[136] The court states, "[f]rom social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real."[137] Still, the impact of the frequency of these wrongful convictions is exaggerated along racial lines.[138]

Considering the Racial Placebo Effect Theory, we see the consequences of our justice system's failure to take affirmative steps toward remedying issues related to cross-racial identification, namely, wrongful convictions. Wrongful convictions are severe systemic glitches. They deprive innocent defendants of their liberty, freedom, and, presumably, their ability to pursue happiness, all of which are guaranteed to all American citizens through our Declaration of Independence and Constitution. The implications for minority individuals and their communities are likely worse, "and are more likely to be, and to be perceived as being, the result of at least unconscious prosecutorial bias during the bargaining process."[139] Furthermore, "particularly where race is a salient factor, the

---

[134] *Id* ("[W]e conclude that the current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.").

[135] *Id.* at 267.

[136] *Id.* (citation omitted).

[137] *Id.* at 218.

[138] *See generally* Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L.REV. 393, 393-459 (2009).

[139] *Id.* at 430.

communities most harmed by crime can suffer from the state's efforts to punish it, and may suffer entirely undeserved group-based disesteem."[140]

Having identified and thoroughly researched the issues, *Henderson* creates outstanding precedent that arguably revolutionizes our legal system. *Henderson* held that "jury instructions on the reliability of cross-racial identifications are necessary when 'identification is a critical issue in the case' and there is no independent evidence corroborating the identification."[141] By creating and institutionalizing mandatory jury instructions that pay respect to cultural dissonance and implicit biases, the *Henderson* court has affirmatively begun to imbed sociocultural considerations into the process of legal analysis. *Henderson* provides us with a good example of how we might begin to push our justice system toward truly affording liberty and justice to all, particularly given our understanding of the implications of the system's default position of colorblindness and divorcing of all things legal and sociocultural.

For the purposes of subsequent discussion, we will look to *Henderson* to stand for the proposition that our justice system can and should recognize that racial perspectives have a significant impact on our ability to provide for equal justice through our decision-making processes, even if held at an unconscious, cognitive level. This recognition has potential to lead to a more equitable system by opening the door for legal professionals, experts, and advocates alike to develop new means of developing a modern and progressive system, steadfast in its traditions, but ever marching toward the fulfillment of its promise—a promise articulated by MLK as "the riches of freedom and the security of justice."[142] Still, we must consider what the implications of such developments might have on our nation's legal statistics and outcomes should we come to a place where we might readily employ and benefit from them. Accordingly, I will consider the recent events surrounding The Trayvon Martin Case, and its exceptionally controversial verdict.

---

[140] *Id.* at 447. ("Because the harms of racial disesteem affect non-defendants too—innocents temporarily ensnared by the system, neighborhoods devastated by poverty and despair, tarnished raced reputations of individuals neither directly brought into the system nor condemned to life in blighted locations—Modified Do-Justice Adversarialism cannot alone cure the current dominant model's ills.") *Id.* at 448.

[141] *Henderson*, 280 N.J. at 240 (citation omitted).

[142] *See* ALEXANDER, *supra* note 107, at 4-5.

B. The Trayvon Martin Case

The Trayvon Martin Case is perhaps the most culturally impactful case of the past decade, drawing national media coverage, attention from scholars of virtually all realms of academia, spawning protests nation-wide, and even arousing social commentary from the President of the United States.[143] The case involved controversy concerning the fatal shooting of 17-year-old Trayvon Martin who was on his way home from a local store where he had purchased a can of iced tea and a bag of skittles.[144] Martin was accosted by one, George Zimmerman, a neighborhood watch volunteer, an altercation ensued, and Martin was killed in the confrontation.[145] The case ignited a national discussion on the implications of race in the criminal justice system.[146] According to one report, the family attorney suing on behalf of Trayvon Martin stated, "'[t]he whole world was looking at this case…[w]e'd be intellectually dishonest if we didn't acknowledge the racial undertones in this case…[s]o we have to have very responsible conversations about how we get better as a country and move forward from this tragedy and learn from it.'"[147] The case opened our national consciousness to the divergent views of justice that play out along racial lines, and set the stage for new efforts to reform specific laws, as is seen in recent efforts to overturn "stand your ground laws" in Florida.[148]

Nonetheless, we might consider a campaign to shift legal precedent myopic in light of the fact that precedents can and sometimes do get overturned over time. While we might make

---

[143] *See* Greg Botelho & Holly Yan, *George Zimmerman found not guilty of murder in Trayvon Martin's death*, CNN (July 14, 2013), http://www.cnn.com/2013/07/13/justice/zimmerman-trial/; *see also* Stephanie Condon, *Obama: "If I had a son, he'd look like Trayvon*,*"* CBS NEWS (Mar. 23, 2012), http://www.cbsnews.com/news/obama-if-i-had-a-son-hed-look-like-trayvon/; *see also Nationwide protests over Trayvon Martin case,* CBS NEWS (2013), http://www.cbsnews.com/pictures/nationwide-protests-over-trayvon-martin-case/10/.

[144] *See* Botelho & Yan, *supra* note 143.

[145] *See id.*

[146] *See* Botelho & Yan, *supra* note 143; *see also* Condon, *supra* note 143; *see also Nationwide protests over Trayvon Martin case*, *supra* note 143.

[147] Botelho & Yan, *supra* note 143.

[148] *See* Morgan Whitaker, *Stand your ground repeal rejected in Florida, MSNBC (Nov. 7, 2013),* http://www.msnbc.com/msnbc/stand-your-ground-repeal-rejected-florida.

modest gains through shifting precedent, as seen in the recent examples of verdicts disempowering the Voting Rights Act of 1965, as well as the verdict allowing for states to circumvent national laws upholding Affirmative Action in aforementioned *Schuette v. Coalition to Defend Affirmative Action*, and the historic example of the courts forcing the application of heightened scrutiny in all instances involving racial considerations, we might also see the limits of attempting to make lasting institutional progress through targeting precedent. Instead, we ought to consider shifting how our justice system approaches its analytical processes, as demonstrated in *Henderson*. That is, we might consider developing institutional enhancements that build means for achieving sociocultural equity into our legal decision-making processes.

i. Institutional Denial Theory and The Trayvon Martin Case

Institutional Denial Theory readily applies to the Trayvon Martin Case because the Florida Court seemed to have purposefully avoided the issue of race, even though the masses nation-wide believed that racism was rudimentary in its analysis.[149] Thus, the effects of Institutional Denial in this case played a significant role in leading to the acquittal of Martin's assailant, and what many perceive as an all too predictable miscarriage of justice in the final analysis.[150] The consequences are perceivably devastating to the legitimacy of the court, which is essential to its authority.[151] Again, we see in the Trayvon Martin Case, an example where sociocultural considerations are overlooked at the detriment of the promise of the system.

Paramount to our understanding of the Trayvon Martin Case is the fact that the court rendered directions to the jury to refrain

---

[149] *See* Tom Foreman, *Analysis: The Race Factor in George Zimmerman's Trial*, CNN (July 15, 2013), http://www.cnn.com/2013/07/14/justice/zimmerman-race-factor/index.html ("Suspected racism in the justice system, deep-seated, secretive and historic, was the crux of the case for millions. That was what made it a national story, instead of merely a local tragedy.").

[150] *See id.* ("With the verdict, the winning side felt that justice was served. And the other? Georgetown's Jackson summed up his thoughts…'I am sad to say that I expected this verdict,' he said. 'There is much to love about our country, but there are also things that happen to black people every day that make you want to put your head down and cry.'").

[151] *See generally id.*

from referencing race, which was a clear signal to many that Martin's killer would escape punishment for his crime.[152] These directions, as well as the Court's general discomfort with sociocultural issues, are the antithesis of the example set forth in *Henderson* and can be traced to the verdict.

ii. Cultural Placebo Effect Theory and The Trayvon Martin Case

Cultural Placebo Effect Theory applies here as well, as we can see the grave consequences of our courts remaining in denial about the implications of race in a given case- namely, a "strengthening [of] racial animosity and negative stereotypes, both white and black."[153] In essence, the court's predilection for race-neutral analysis is their purported treatment for the disease brought on by racial intolerance in broader society. Still, the court's disposition here clearly serves as a placebo. The implications of the Placebo Effect of ignoring race in our system yielded negative consequences in the Trayvon Martin Case, in the sense of denying a family, and an invested society, justice.[154]

As discussed above, cultural perception and individual biases can and often do determine the outcomes of legal cases.[155] Moreover, "scholars have found that cultural perceptions may compromise an individual's view of a threat and its corresponding level of dangerousness." [156] Given the fact that minority defendants are typically gazed upon with cynicism and/or a presumption of guilt due to negative associations socially imposed on their cultural groups, it follows that these perceptions "distort[] the reasonableness standard in self-defense law and could lead a jury to accept as reasonably justified a killing that is actually based on racial stereotypes instead of an actual deadly threat."[157]

---

[152] *See id.* ("'This verdict was prepared from day one,' George Ciccariello-Maher said. 'From the media campaign of demonizing Martin, to the selection of a non-black jury, to the instruction not to refer to race. . . his was the chronicle of an acquittal foretold.'").

[153] Lawson, *supra* note 30, at 273.

[154] *See id.* at 283-84.

[155] *Id.* at 301.

[156] *Id.*

[157] *Id.* (alteration in original).

If we consider the fact that an unarmed teenager was profiled, pursued, and shot to death, we might question how the known killer was fully acquitted of the act. We might also question how the court came to conclude that the unarmed teen was the aggressor or somehow was deserving of his fate. Basically, the holding could be narrowed and reasonably construed to suggest that fear of black male youth is a legitimate, exculpable reason for murder. Accordingly, one can see the merit in the suggestion that sociocultural biases can lead to systemic "glitches" in the provision of equal justice for all.[158]

In all, the Florida Court's decision to perpetuate the tradition of divorcing sociocultural considerations from legal analysis represents a clear example of placebo treatment. Race permeated all conceivable aspects of this case.[159] As scholar Tamara F. Lawson states, "[r]acial stereotypes are still part of American culture, and, by default, part of the American criminal justice system."[160] Furthermore, akin to Justice Sotomayor's stance in *Schuette v. Coalition to Defend Affirmative Action*, Lawson asserts, "[i]nstead of being color-blind, an impossible exercise, the impact of race must be addressed head-on and become openly part of the legal critique."[161] Lawson suggests that the consequence of not properly addressing sociocultural issues head-on is the creation of "laws that enable race, or the fear of race, to be a guise to harm the disfavored race"[162] consequences, we know maintain and perpetuate the Prison Industrial Complex.

iii. Henderson's Effects on The Trayvon Martin Case

It is not difficult to see how jury instructions can directly affect the verdict. As stated, the *Henderson* Court developed jury instructions that require consideration of cross-racial identification.[163] In contrast, racial considerations did not arise during jury

[158] *Id.* ("One's perception of a threat involving a black victim can be unconsciously impacted by race and trigger an over-reaction to an actually non-threatening, non-deadly encounter.").
[159] Lawson, *supra* note 30, at 310.
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Henderson*, 208 N.J. at 298-99.

deliberations in the Trayvon Martin Case.[164] The first of the nearly all white jury to come forward, juror B37, demonstrated the extent to which race played a part in deliberations through her remarks, which showed her ability to identify with the killers whiteness more so than her ability to sympathize with the death of a black child.[165] Juror B37 spoke about the defendant in the case in almost endearing terms.[166] Her articulation of the circumstances gave the public a good look into the ways in which our implicit racial biases might orient us to favor one party at the expense of another.[167] Thus, the provision of "*Henderson*-like" jury instructions would more likely than not have led to a more equitable outcome in the Trayvon Martin Case, as it would have forced the jurors to reckon with these issues and include them in their final analyses.

Conclusion

Contemporary scholars often debate whether and how our criminal justice system can be positively transformed. Some suggest that change is best affected through the political process and legislation, while others call for a more grassroots approach. I submit that one significant means of helping our system to progress is by way of encouraging open and honest discussion about race, rather than the status quo approach whereby our society and our legal system mute racial considerations as much as possible. *Henderson* proffers a tangible

---

[164] Josh Levs et al., *Exclusive: Juror Pushes for New Laws Following Zimmerman Trial*, CNN (July 18, 2013), http://www.cnn.com/2013/07/17/justice/zimmerman-verdict-aftermath/ ("Juror B37 said she didn't think Zimmerman racially profiled Martin and said the topic of race never came up during jury deliberations.").

[165] *See generally* Lauren Rankin, *What Juror B37's Comments Reveal About White Womanhood*, POLICYMIC (July 17, 2013), http://www.policymic.com/articles/55035/what-juror-b37-s-comments-reveal-about-white-womanhood.

[166] *See id.*

[167] *See id.* ("As feminist writer Jessica Valenti noted, 'white women — all of us — are taught to fear men of color,' and she's right. Whether explicit or implicit, white women learn to cling their purses close to their body, to walk a little faster down the street, or to lock their car doors when in the presence of men of color, namely Black men. This is a kind of daily racism in which all white women participate, whether consciously or not, because we so often allow it to go unchecked, even in ourselves.").

example of how we can make lasting impact on our legal system. Most saliently, we learn from *Henderson* that institutionalizing racial and sociocultural considerations in the process of legal analysis will enable our criminal justice system to exit its state of denial and begin to directly treat the disease caused by racial inequity, which has inflicted our nation for far too long. Institutional changes are no doubt the most difficult to achieve, but they are ultimately the most lasting. Accordingly, I submit that institutional impact should be the focus of modern legal movements.

Even so, we must also keep in mind that our legal and political systems are designed to evolve at an immensely slow pace. Expediency, however, should not be the metric by which we measure success as a society, as it is fixated on the short-term. Instead, we might be better served by defining success in the long-term, for instance, the scope and longevity of efforts to better our legal system. As MLK stated, "The arc of the moral universe is long, but it bends towards justice."[168] This notion is not one promoting passivity; rather, it requires our collective effort to bend "the arc" in the direction of justice.[169] Hence, as legal scholars, practitioners, and leaders, we are empowered to take affirmative steps to push for progress together, and I have faith in our profession that we can and will. When we do, only then will America we be able to tout with confidence that she is living up to her promise of "freedom and justice for all."

---

[168] Chris Weigant, *Bending The Arc*, HuffingtonPost.com (August 28, 2013), http://www.huffingtonpost.com/chris-weigant/bending-the-arc_b_3833103.html.

[169] Id. (Stating, "The arc doesn't passively bend on its own. It must be bent. We all must bend it together.").