



"White Lies In Dublin Docklands" by William Murphy [image: black graffiti that says "White Lies" on a white background] — the origin of this image is actually interesting and folks should click on the link and read it. It has nothing to do with this essay and everything to do with gentrification in urban Ireland.

Diversity is a Dangerous Set-up

Recreational antiracism won't change anything: a review of Jonathan Kahn's critique of implicit bias discourse.



Chanda Prescod-Weinstein

Follow

Jan 24, 2018 · 25 min read

This piece is long, but you should read it anyway.

Abstract: *Trying to use science to analyze and fix racism is a dangerous proposition. The science behind implicit bias **may** be bunk. Promoting diversity rather than substantive structural change will not create equal opportunity and equal outcomes. A focus on implicit bias at the expense of an attention to both explicit bias and the impact of bias may in fact be harmful to the fight for equality. And Black people — from folks on the street to the first Black Supreme Court Justice — have been trying to tell y'all this.*

I. SCOTUS v. Equal Protection Clause

Many Americans are so frightened of an honest confrontation with history that modern academic literature outside of critical race theory has largely supplanted discussions of racism with analyses of “bias,” which both describes the same exact phenomenon as “racism” but without the historical weight of, “Remember when the genocide against Native Americans began and *a lot* of Africans were kidnapped and forced into multigenerational slavery?” This is of course pretty uncomfortable history to recall; frankly, there’s something wrong with you/your world view if it doesn’t evoke feelings of discomfort. (Like, you might be a zombie named Antonin Scalia.)

In his highly useful and readable book *Race on the Brain: What Implicit Bias Gets Wrong About the Struggle for Racial Justice*, legal scholar and historian Jonathan Kahn makes a compelling argument that, fueled by scientism in the cognitive psychology and legal communities, implicit bias has become a master narrative of American race relations which displaces a focus on the unique history of American white supremacy in favor of a focus on the value of “diversity.” To support his point, Kahn provides a useful overview of 40 years of literature on affirmative action, racism, diversity, and implicit bias. His analysis is rooted in the work of legal scholars who specialize in critical race theory such as Charles Lawrence III, Ian Haney López, and Nancy Leong, and he critiques the work of legal theorist Jerry Kang and social psychologists Mahzarin Banaji and Anthony Greenwald. Kahn also newly introduces the term “recreational antiracism” to describe the move to supplant anti-racist activism with the more-palatable-to-white-people focus on “diversity.”

In tandem with this shift toward diversity in the last 40 years has been a move away from recognizing the social value of integration programs with a deeply felt concern about properly measuring “merit.” Underlying this is the belief that there is an inherent tension between meritorious hiring/admissions and fair treatment for minoritized

communities. Kahn confronts this debate head on about half way through the text: “The neoliberal ideal of merit . . . reduces the subject to nothing more than his or her ability to perform specified tasks, whether playing an instrument or taking a standardized test.” (p. 113)

This comes from a chapter entitled, “Deracinating the legal subject.” He helpfully explains what deracinate means (because I definitely didn’t know): “to strip the individual of history and identity, much as the color-blind ideal would leave behind society’s history of race and racism.” Without harping on it, the running thread in Kahn’s analysis is how race discourse thinks about time and via time, history. When legal discourse is stripped of the history of forced servitude and genocide, then the only time in racial discourse that matters is now — not anything that happened before. In this context, assessing experiences of bias requires only considering the intent of someone who might be biased. When the history of forced servitude and genocide *do* matter, then all of the time from the beginning of those historical phenomena until now matters, and in assessing experiences of bias, the impact on history’s victims of bias is salient.

These different relationships to time and the deracination of legal subjects and legal histories are the product of a conservative turn in equal protection jurisprudence — legal case making. Increasingly, jurists no longer accept discussions of the impact of racism as a basis for equal protection jurisprudence. However negatively impacted a Black person may be by “bias,” the law now considers whether a white person *intended* to be racist as evidentiary standard for claims of discrimination under civil rights law. White feelings are now the center of legal decision making about Black experiences with racism.

This turn in the legal cases that shape equal access in education and especially academia is clear when you compare the two biggest landmark cases on race and education: *Brown v. Board* (1954) and *Regents of the University of California v. Bakke* (1978). *Brown* is primarily remembered as the end of segregation in schooling (although we all know that’s not quite how things turned out), but equally important to their conclusion is how they arrived at it, since the comments of the majority functionally become law. Writing for the majority, Chief Justice Warren highlighted as “intangible considerations” of equal treatment a student’s “ability to study, to engage in discussions and exchange views with other students, and, in general, to learn [their] profession,” further noting that

segregation based on race “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”

The majority opinion forcefully argues that even while segregated schools might tangibly be materially equal, there were certain intangibles associated with segregation — namely the message it sent to Black students about their very humanity — that would disadvantage Black students. This logic is of interest both because it centers the impact on the victims as the most significant reason that separate is always unequal, but also because it is an early attempt to introduce the science of psychology into the judicial record.

Importantly, *Brown* stood for quarter century as the gold standard of how to interpret the reconstruction-era Equal Protection Clause of the Fourteenth Amendment to the US Constitution, ratified in 1868, very evidently to protect Black people from what would come to be known in parts of the country as Jim Crow laws:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is in this context that I state: I am against diversity as an industry and as an ideological ideal because I think it is the wrong central tenet to operate from. The correct central tenet, in my opinion, is equity, which is established in the supreme law of the United States (the Constitution) as the Equal Protection Clause. For me, the Equal Protection Clause gains this central status through an interpretation that Owen Fiss frames as the antisubordination school of thought, which is that the law should not “aggravate” or “perpetuate . . . the subordinate status of a specially disadvantaged group.” (Kahn, p. 2) The antisubordination school of thought arises in the context of discourse about how to effectively use the law to redress historical injustices, and it specifically posits that the

idea of “protected classes” such as racial minorities and women is in fact consistent with the Equal Protection Clause.

The Equal Protection Clause guarantees that the law must protect all people equally. The antistatist school holds that because of American racial history, it is necessary to affirmatively protect racial minorities in order to successfully meet the demands of the equal protection. In other words, unless the law actively defends the rights of minorities to equal protection, their rights **will be violated** — because of the unique history of subordination of minorities in the US. Therefore, programming that affirmatively acts in favor of minorities is both consistent with the equal protection clause *and* not an attack on those who have been equally protected under the law from day one (white men). There is no equality for minorities without affirmative action that recognizes and accounts for historical injustices.

A stance toward diversity arises in opposition to this standpoint via the *Regents of University of California v. Bakke* case (1978), which is often remembered in popular discourse as a case that ended race-based quotas in admissions but upheld the consideration of race as one factor among others. The back story is worth knowing: Bakke, a white male NASA engineer, sued the University of California after he failed to get himself admitted to medical school **twice** because he firmly believed that quotas for minoritized students meant that one of them had gotten *his* spot. (In other words, Bakke truly was the original Fisher, who is a weak copy of her more accomplished predecessor.) The outcome of *Bakke* was a very divided court: in a compromise, five justices voted to end quotas while upholding the legality of considering race among other factors, but it appears only Justice Powell concurred with the total outcome of the case. Tacitly, he acknowledged historical context, admitting that the Fourteenth Amendment was written with the “one pervading purpose” being “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him.”

Justice Powell follows this with a blatant misrepresentation of how race is constructed in an American context, to the point of entering a falsehood onto the record, by claiming, “By that time [1930s], it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of

the Equal Protection Clause, the United States had become a Nation of minorities.” (As of 2017, white Americans are still a demographic majority.)

He goes on to say that white people are owed the protection of the Equal Protection Clause of the 14th amendment, as if in the century plus since the 14th amendment was passed, Black people had gained the structural capacity to disadvantage white people. So even after admitting to the history and intent of the 14th Amendment, Powell nonetheless ignores and subverts that original purpose by ignoring precedence and using an ahistorical “plain language” reading of the text of the Equal Protection Clause.

Powell then advocates that everyone should copy Harvard (his alma mater), which had studiously avoided being overrun by these apparently all-powerful minorities (magical Negroes?) by only taking race into consideration among a spectrum of other qualities that produce a “diverse” student body. Powell proposed that this restrictive and limited use of race during admissions was only acceptable for the purposes of promoting “beneficial educational pluralism” and stated that “an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”

It is here, in response to the demand of a white NASA engineer who failed to get into medical school twice, that the supreme court of the land rearranges the weights so that reckoning with the past is no longer a feature of how race is considered in the law, but rather minority classmates are valuable because of the way they serve some vague concept of diversity. A powerful rhetorical shift is at play here because this is in fact a throwback reference to diversity in *Brown*, where the court concerns itself with the negative impact on Black students if they do not have equal access to diverse educational opportunities. In *Bakke*, the court concerns itself with what happens to white individuals if they don't get the opportunities now made specifically available to Black, Chicano (the court's word of choice), and Asian applicants. Notably, Powell wasn't confident enough to make this argument without pretending that the United States was a majority minority nation and that whiteness didn't exist.

II. Diversity v. Undoing White Supremacy

The focus on diversity, in other words, was a conservative stance intended to re-center white people's needs in discourses on race. *Bakke* was the end of admissions as a potential site of social justice and equitable opportunity, and the beginning of minority students being seen as pedagogical tools that serve the needs of institutions and their white students. As someone who has spent years objecting to having this narrative applied to her, it was informative to learn where it had come from. Not only that, but legal scholars had been warning anyone who would listen that this was a likely outcome since it happened: just one year after the ruling, Charles Lawrence III and Joel Dreyfuss published *Bakke Case: The Politics of Inequality* which “argues that the court’s ruling of reverse discrimination will impede Black progress and encourage racism.” (back cover)

Eight years later, Lawrence published a seminal article — “The Ego, The Id, and Equal Protection” (1987) — where he describes the role unconscious racism may play in the power structures that “impede Black progress.” Kahn quotes Lawrence’s 2008 look back on this piece, “Unconscious Racism Revisited”:

[Behavioral realism] may have undermined my project by turning our attention away from the unique place that the ideology of white supremacy holds in our conscious and unconscious beliefs. I find this outcome unfortunate, if unintended, as the ubiquity and invidiousness of racism was the central lesson of my article. I further express my fear that cognitive psychology’s focus on the workings of the individual mind may cause us to think of racism as a private concern, as if our private implicit biases do not implicate collective responsibility for racial subordination and the continued vitality of the ideology and material structures of white supremacy. In its most extreme manifestation, this view of implicit bias, as evidence of only private, individual beliefs, is expressed as a right to be racist. (p. 146)

This is a powerful indictment of a focus on implicit bias and diversity at the expense of a larger program of antiracist activity. Of course, had affirmative, equitable opportunity remained a priority, diversity would have naturally occurred, as was the case with the quota system prior to *Bakke*. If you focus on equal access and equal rights, and make them a reality, your classrooms will be diverse. In other words, institutions need to just admit and hire minorities.

But, we all know what people say about just hiring and admitting people, either because it’s a belief we hold or one we’ve had to confront. “But I don’t want to sacrifice quality to

hire someone less qualified.” First, per the earlier quote from Kahn’s text, the belief that minoritized people are more likely to be less qualified is a neoliberal ideal of meritocracy that is highly suspect because

- a. it contains a negative implicit statement about minority intellects as potentially compromising quality.
- b. the deracination of minoritized peoples fails to account for how being a minority can enhance a candidate’s ability to execute their job. For example, minority professors are more likely to be able to bond with minoritized students over experiences of minoritization in a way that serves the student’s pedagogical experience. That’s a plus, not a minus, and it’s one you can’t see if you strip faculty of their identity markers.
- c. although it’s easy to use test scores and other inputs as simple proxies for intelligence, this is not like a physics experiment where there is a clean, known or at least knowable equation relating input and output. We know that test scores correlate highly with ascribed identities such as gender and race. To ignore that data is to engage in scientism that contravenes a fundamental tenet of the scientific method: follow the data.

From a legal perspective, the Equal Protection Clause is part of the supreme law of the land, the Constitution. I believe that a reasonable turn in contemporary jurisprudence would be to claim that the Equal Protection Clause cannot be satisfied unless considerations of affirmative equal access are considered supreme over other considerations such as mild, debatable differences in quality. This shift would in part be predicated on moving away from neoliberal visions of meritocracy that rely on deracinating the legal subject and recognizing that our history will always be part of our story, even if the weight it carries and the impact it has changes with time.

Importantly, Kahn strongly makes the historiographic case that beginning with the landmark *Bakke* case, jurisprudence indeed shifted toward a neoliberal, color-“blind” vision of meritocracy, where considerations of race are always suspect, no matter what the historical context. (This is known as the anticlassification school of thought, and it is embraced by ultra-conservative jurists such as the late Supreme Court Justice Antonin Scalia.)

And, the central thesis of Kahn’s book, sadly, is that implicit bias-based analyses have come to serve as a vehicle for this contraversion of the Equal Protection Clause and the laws Congress legislated to enact it (especially Title VI of the Civil Rights Act of 1964).

Indeed, implicit science cognition researchers have advocated a scientific approach to interpreting how and when discrimination arises and in the process have both accepted and facilitated the conservative framing of racial bias. At the start of the chapter “Accepting Conservative Frames,” Kahn notes:

Much of the behavioral realist approach to racial justice . . . embraces the conservative focus on intent and then applies ISC [implicit social cognition] theory to show how shifting from conscious to unconscious mental states allows behavioral realists to make clear and strong cases for redressing racial bias in ways that pass muster under existing conservative legal doctrine. (ibid, p. 63)

He again cites legal and critical race studies theorist Charles Lawrence III:

When we make the pragmatic argument that we must accept piecemeal and inadequate reforms because there is no political will to make structural change, I fear that we have accepted the status quo so easily because we have lived with inequality for so long that it seems natural — that we have lost our sense of outrage because we believe some part of the nature story that says this is where poor black children are supposed to be. (ibid, p. 63)

Kahn and Lawrence are both challenging a conservative framing that posits that conscious, overt racism is a thing of the past and that only implicit biases beyond our conscious reach are responsible for facilitating contemporary American white supremacy. In this conservative framing, society is deracinated of structural flaws and discrimination becomes both privatized and unconscious. I believe that when you apply Kahn and Lawrence’s analyses to the deployment of “diversity” (which is now a multimillion dollar industry that has been taken up by over 90% of large organization in the United States) it becomes clear that focusing on diversity (and a deficit model of minority students) is in fact implicitly accepting a conservative framing of how to respond to the continuous unfolding of historical American white supremacy.

While Kahn does not tackle the semantic shapeshifting at the forefront of diversity discourse, the terms “anti-racism” and “decolonization” are often adopted as labels in a manner that deracinate them of meaning. As the idea of diversity becomes corporatized, workers — self-proclaimed allies — shift their vocabularies away from “diversity” toward anti-racism and decolonization in order to seem more “woke.” Yet they engage in this behavior without undoing their fundamental commitment to the

underlying neoliberal narratives that maintain white supremacy, such as the myth of meritocracy. It is here where Kahn's concept of recreational antiracism seems most valuable. At best the semantic re-arranging is virtue signaling, but more insidiously the coopting of "activist vocabulary" is an active effort to avoid disrupting the structure of whiteness. It is telling, in this context, that the implicit bias discourse and the ideal of general colorblindness has been met with almost no visible resistance among white academics, even self-described allies. Recreational antiracism with an emphasis on implicit bias is the best of both worlds for allies: virtuous and comfortable.

III. Scientism v. Black Testimony

Implicit bias is not the only framework available to us, however. Kahn describes Lawrence's proposed "cultural meaning test," which "was primarily interpretive in nature and looked to broad cultural and historical phenomena to evaluate whether a particular act conveys a shaming or stigmatizing message. Lawrence suggested that the cultural meaning of an act was 'the best available analogue for, and evidence of, a collective unconscious that we cannot observe directly.'" In other words, Lawrence sought to use the practice of acknowledging cultural and historical context to make structural biases visible to jurists tasked with recognizing race-based behavior and the role it was playing (whether problematic or equally protecting).

Curiously (but perhaps not surprisingly), many (but not all) implicit science cognition researchers such as Harvard social psychologist Mahzarin Banaji and implicit bias-based jurisprudence advocates like UCLA legal scholar and Vice Chancellor for Diversity (seriously) Jerry Kang have actively discounted the viewpoint of Black American legal scholar Charles Lawrence. I tend to believe that this is collegial gaslighting: two non-Black scholars telling a Black one that he (and, for example, about 80% of young Black Americans) are wrong to think that we still live daily with people who are consciously biased against us.

A common experience I have had as a leader in the discourse about minorities in physics is having to explain to people over and over again that not all bias is implicit and that our discourse about minorities is fundamentally flawed if a central tenet is protecting members of the majority from feeling guilty about racism, sexism, transphobia, &etc. Contemporary analyses of implicit bias centers *motivations* of aggressors over the impact they have on victims. This can enhance minority experiences of discrimination by

marginalizing their testimony about these experiences in favor of aggressor defenses which amount to, “It’s not my fault that I’m ignorant.” There is an implicit emotional labor demand here: that minorities persistently be understanding of actions that brutalize their hopes and dreams. The task falls to the minority to understand that the white man meant no harm when told her in the middle of a calculation that she didn’t *seem* Black; she is left holding the emotional bag while he carries on with his day.

But there is also a problematic legal outcome associated with skewing focus toward intent rather than impact. As described by Kahn (2017) and Lawrence (2008), this is connected to a shift in discrimination jurisprudence away from legally considering the impact of bias (however it arises) on victims toward considering the intent of the biased person. This leads to a bizarre conundrum: how can you possibly end experiences with discrimination if someone has to intend to discriminate in order for the discrimination to be seen as discrimination? In other words, the focus on implicit bias makes structural discrimination permanent by refusing to acknowledge that it exists or reckon with it. Most people don’t want to admit that they meant to do it or think their racist ideas are both not racist and in fact highly defensible.

What I learned from the book is to be both suspicious of the intentions and knowledge bases of implicit social cognition researchers as well as suspicious of the empirical “facts” that they claim undergird the need to make the law subordinate to science. As Kahn describes in his introduction,

Behavioral realism generally does not employ essentialist categories of race, but it does tend to create or reproduce essentialist understandings of racism — that is, it constructs racism as a natural, biological process. (p. 12)

Even as the idea that race is a social construct with real life implications is gaining wider and wider acceptance, the master narrative of implicit bias as the dominant racial discourse is reifying the idea that racism is biological and therefore “natural.” What a handy excuse to have for one’s racism: “I’m not bad. I’m just drawn that way.” This is an especially interesting claim in the context of Nell Irvin Painter’s *History of White People*, which makes clear that race and racism as we understand them are actually relatively new concepts to homo sapiens, only evolving during the last 300 years or so. Indeed, although the idea of race evolved with modern colonialism, one cannot even truly blame

the process of colonization for it — the Romans managed to do large-scale colonization without a concept of race just fine.

It is on this topic that *Race and the Brain* makes an interesting turn from legal analysis and history to society, technology, and society studies text. Kahn goes on to say that “behavioral realism valorizes the scientific method as an autonomous means to resolve complex social, historical, and political issues.” (p. 13) Here, perhaps, he and I have a mild disagreement. Where he sees behavioral realism as fully engaging the scientific method, I see selective data collection with a careful construction of “observer.” Within the implicit bias framework, the first observer is a cognitive psychologist — who, as of 2014, in 99% of cases is going to be non-Black — that confidently defines racism in whatever way seems most reasonable to them, develops a rubric for qualitatively assessing a subject’s conscious racism, and then uses various techniques to assess unconscious bias. The techniques usually involve testing that measures response times to particular image and word-based associations and fMRI-based image studies of brain activity while looking at these same associations. One increasingly common technique is pairing the time studies and fMRI. The subjects in these studies are usually either college students or college-educated.

It should be obvious even to the amateur how much can go wrong here. We know that we still don’t really understand what is going on with the brain even when we are looking directly at it with fMRI. Implicit bias assessments assume a linearity that may be a fantasy, and fMRI still relies significantly on human interpretation and analysis to make meaning of the images. Further, with the time testing, it is easy to suggest alternative interpretations, including that a person might be slower to respond to images of African Americans because they are in fact highly conscious of bias. Furthermore, one is hard pressed to see how these tests could adequately address the reality of double and triple binds: how can the test measure the mixed role that racism and sexism play in the lives of Black women? Kahn indicates that there is some discussion about this in the literature, but not much. (Although this month the NYT had a highly readable op-ed about how blinding gender in hiring doesn’t help diversity in the long run.)

Most problematically in my view however is the the actual construction of the cognitive psychologist as an authoritative observer of bias. With the significant exclusion of Black Americans (and other underrepresented minorities) from the work of cognitive

psychology (thanks, Bakke!), can we trust that cognitive psychology has successfully developed methods that indeed comprehensively define racism and can properly assess where it is not manifest? Scientism teaches us that the answer is yes, that the standpoint of a researcher is entirely irrelevant to their discursive choices. But to me this is a faulty application of the scientific method because it ignores the significant sociological data which suggests that there is disagreement — even among minoritized people — about the role racism plays in every day life and even how it manifests. By allowing cognitive psychologists who are almost 100% not Black to define racism for Black people, those embracing implicit bias results are ignoring salient data. This is not what the scientific method teaches us to do.

This is all actually science where there is no widespread consensus, where standpoint matters very much, and where human interpretation plays a major role in drawing conclusions. The push to institutionalize the results of implicit bias *theory* before we are certain that the theory actually describes reality highlights the dangers of scientism to science. But the damage to science is perhaps the least of my concerns here. As a Black scientist, I find it hard to think of something more insulting to minoritized students of science — it is damaging to people who experience cognitive dissonance every time we hear that implicit bias is the root of our problems. We ourselves have observed over and over that explicit bias continues to be a problem. Do these observations not count as data? (In the epistemology corner of the philosophy community, ignoring the victims' analysis of racism is sometimes termed "testimonial injustice," and colloquially the act of explaining someone's own experience of racism to them is often called "whitesplaining.")

The phenomenon of testimonial injustice is, in my view, a core analytic issue. Kahn cites Richard Ford's distinction between scientism's "facts" and the law: "Discrimination' is not a fact in and of itself; it is a narrative, an interpretation." (p. 181) Indeed, while behavioral realists purport to bend the law to the will of science — in service of ending discrimination of course — they also propose that whether discrimination has occurred is a matter of "objective" and "meritocratic" analysis. By taking this viewpoint, behavioral realists accept the conservative framing that recognizing discrimination should rely solely on what the arbiters of objectivity believe. These are usually white men who have risen up through the very so-called "meritocratic" methods whose potential for bias are under investigation. Missing here is a narrative interpretation of

events and structures through the standpoint of actual victims: a focus on intent, unconscious or conscious, is simply incomplete. By turning their backs on the Warren court's logic of impact in *Brown v. Board*, legal scholars have subjected Black Americans and other minoritized peoples to a structural testimonial injustice, making it a matter of normative jurisprudence.

It's not difficult to see that testimonial injustice in the name of both ending bias and "diversity" has a functional logic to it. The testimony of actual victims about the impact of discrimination on them necessarily shifts power to the disenfranchised, valorizing their needs as the most compelling state interest. By focusing on diversity instead of redressing structural power imbalances, organizations and the courts make superficial visual changes while maintaining the systems that violate the command of equal protection in 1868: to fully enfranchise those who were once counted as three fifths of a person. Indeed, by accepting a conservative frame of focusing on intent rather than impact, advocates of supplanting judgment with implicit bias science — whether they intend to or not — operate to further institutionalize testimonial injustice while simultaneously eliminating any possibility of legal recourse against it.

Interestingly, in a bit of meta-testimonial injustice, in a review of *Race on the Brain* over at Science, Kang completely misrepresents Kahn's analysis of the relationship between behavioral realism and promoting intent-based jurisprudence. Kang complains, "Kahn also engages in guilt by association by intertwining behavioral realism with *Washington v. Davis*, the Supreme Court case that held that self-conscious intent to harm minorities and not mere disparate impact is necessary to establish an equal protection violation . . . What's odd is that behavioral realists have persistently criticized *Washington v. Davis* for insisting on self-conscious intent, which is behaviorally unrealistic." The premise of Kang's complaint is that Kahn unfairly associates behavioral realists with the court's contention in *Washington v. Davis* — where the logic of *Bakke* first took shape — that "intent" is necessary to establish that an activity is biased, a position that behavioral realists have criticized. But Kahn never says Kang et al. believe that conscious intent must be met to establish a finding of discrimination. Instead, he makes a compelling argument that behavioral realists accepted the court's framing in *Washington v. Davis* by continuing to focus on the biased abuser's (un)conscious state of mind, rather than on the impact of bias on the victim. Kahn evokes this case in his chapter "Accepting Conservative Frames" as an example of the logical groundwork that behavioral realism

fundamentally accepts, to the detriment of equality efforts. Presumably Kang read this chapter, but in his review he doesn't even attempt to rebut Kahn's analysis.

In his conclusion, Kang says, "Behavioral realists bet . . . on the facts." But the proposal that all courts need is good data is evidently profoundly flawed when you look at, yes, the historical facts. Consider the words of Supreme Court Justice Thurgood Marshall — the first African American appointed to the supreme court, the lawyer who tried *Brown* before the court, and the only Black judge on the court during his 24 years there. In his separate decision in *Bakke*, Marshall wrote a furious dissent with the court's logic, citing data (which in 2017, as predicted by Lawrence and Dreyfuss, is not significantly different):

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely \$110 more than a white male who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.

Evidently, the court explicitly knew of significant *empirical* data which indicated that Black Americans were still largely victims of significant structural bias. But they didn't care nearly as much as they were concerned with the right of a white man who couldn't get into 11 different medical schools to have a spot that had been reserved to produce sorely needed Black doctors. Importantly also, the juxtaposition of this data with the prior existence of the quota programs as well as post-*Brown v. Board* integration indicates that unequal opportunities and unequal outcomes are a negative feedback loop. Without equal outcomes, children are not truly afforded equal opportunities.

Without equal opportunities, equal outcomes are impossible. Quotas were part of a program to eviscerate that loop.

Justice Marshall, having spent his life fighting to create those openings for Black Americans, told the court exactly what they were doing:

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years, Negroes have been discriminated against not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact.

In subsequent cases such as *Richmond v. Croson* (1989), instead of responding to Marshall's analysis in *Bakke*, the court simply ignores time and history as factors. Justice Sandra Day O'Connor writes, "There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." It is difficult to avoid the conclusion that by refusing to consider the force of historical phenomena as evidence, the courts are actively setting the bar impossibly high when it comes to programs that might serve minorities. The trend continued into the 21st century with Chief Justice William Rehnquist's majority opinion in the 2003 University of Michigan affirmative action case, *Gratz v. Bollinger*. In his opinion, Rehnquist emphasizes his belief that any "racial classification" is "simply too pernicious to permit any but the most exact connection between justification and classification," such that he considered an application review system for scoring applicants that assigned points to underrepresented minorities for the purposes of "educational diversity" still insufficiently "narrowly tailored" to its purpose.

History — if we are still allowed to reference that — teaches us that when it comes to the law, what matters isn't data but rather the moral standpoint of the people evaluating it. While the Warren Court understood the moral primacy of analyzing equal opportunity in the context of denied justice for Black Americans, the court majorities of today, like

many white Americans, are tired of feeling guilty about things their ancestors did. Rather than confronting this moral failing, the scientists who valorize scientism are building their careers coddling this dangerous and wide-reaching white fragility.

Kahn concludes his text with a demand that (white) Americans interrogate the stories that they have been telling themselves about race and racism and where they are located: in the body or rather as historical phenomena that are continuously unfolding. “It is not about equal protection under the law; it is about the substantive constitutional value of not being devalued and humiliated by the state on the basis of the fundamental aspect of one’s identity . . . Behavioral realism ultimately is a means to frame and tell a story about the nature of racism and its effects on American society. It is this story, not the technology itself, that needs to be contested.” (p. 233)

There is simply no diversity program which will contest the narrative that the daily indignities of racism are salient because of what they tell us about the perpetrators, rather than how they brutalize the dignity and lives of its victims. But brazenly contest it, we must.

Why is equality so assiduously avoided? Why does white America delude itself, and how does it rationalize the evil it retains?

The majority of white Americans consider themselves sincerely committed to justice for the Negro. They believe that American society is essentially hospitable to fair play and to steady growth toward a middle-class Utopia embodying racial harmony. But unfortunately this is a fantasy of self-deception and comfortable vanity.

— Dr. Martin Luther King, Jr., Where do we go from here, 1967

. . .

Acknowledgments I appreciate the generosity of Charles Lawrence III, Mari Matsuda, Fred Smith, Johnny Eric Williams, Saurabh Jha, Amy Slaton, Sarah Tuttle, Risa Wechsler, Brian Keating, Courtney Bass, The Technologist, and The Husband for helpful suggestions, feedback, and encouragement while I was working on this document. I still have a lot to learn. ❤️

[Racism](#)

[Diversity](#)

[Diversity In Tech](#)

[Law](#)

[Supreme Court](#)

[About](#) [Help](#) [Legal](#)

Get the Medium app

