RECONCEPTUALIZING THE HARMS OF DISCRIMINATION: HOW *BROWN V. BOARD OF EDUCATION* HELPED TO FURTHER WHITE SUPREMACY

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INTRODUCTION

For decades, literature has played a vital role in revealing weaknesses in law.[1] The classic novel *To Kill a Mockingbird* by Harper Lee is no different.[2] The long-revered work of fiction contains several key scenes that illuminate significant gaps in the analysis of one of our most celebrated decisions: *Brown v. Board of Education*,[3] the case in which the

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[1] See James Seaton, Law and Literature: Works, Criticism, and Theory, 11 Yale J.L. & Human. 479, 480, 505 (1999) ("[L]iterature remains an important source of insight for all those interested in questions of morality and justice, a class that surely includes most lawyers, judges, and law professors. . . . Literature's importance to judges, lawyers, and law professors follows from its importance to human beings in general."). But see Richard A. Posner, Law and Literature: A Misunderstood Relation 79–82 (1988) (arguing that law and literature should be separated and asserting that law is merely another detail in literature).

[2] See generally Harper Lee, To Kill a Mockingbird (1960) (revealing some of the pitfalls in jury selection and deliberation as well as racial bias in the criminal justice system).

[3] 347 U.S. 483 (1954). Legal scholars and historians widely praise the *Brown* decision. See, e.g., Bruce Ackerman, 3 We the People: The Civil Rights Revolution 128, 133 (2014) ("[*Brown*] marks the greatest moment in the history of the Court. . . . *Brown* not only represents the unanimous judgment of the Supreme Court at a great moment in its history. It also expresses the animating logic for the landmark statutes supported by the American people at one the greatest moments in their history."); Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality x (1975) ("Probably no case ever to come before the nation's highest tribunal affected more directly the minds, hearts, and daily lives of so many Americans."); Charles J. Ogletree, Jr., All Deliberate Speed: Reflections on the First Half Century of *Brown v. Board of Education* 13 (2004) ("[*Brown*] is appropriately viewed as perhaps the most significant case on race in America's

U.S. Supreme Court held that state-mandated racial segregation in public schools violated the Equal Protection Clause of the Constitution.[4] In particular, the novel opens a pathway that enables its readers to visualize the full harms of white supremacy, which include not only the detrimental effects of experiencing discrimination for Blacks[5] but also the dehumanizing effects of perpetrating discrimination, whether voluntarily or involuntarily, for Whites.[6] More specifically, the book constructs a narrative from which society can begin to understand how the *Brown*

history."); Michal R. Belknap, The Real Significance of *Brown v. Board of Education*: The Genesis of the Warren Court's Quest for Equality, 50 Wayne L. Rev. 863, 878–79 (2004) ("The reason we should be celebrating *Brown*'s birthday is that it initiated a quest for equality by the Warren Court that over the next fifteen years (1954-1969) transformed and reoriented American constitutional law. *Brown v. Board of Education* was . . . the beginning of a movement to expand the rights of 'just about everybody.'"); Richard Delgado & Jean Stefancic, The Social Construction of *Brown v. Board of Education*: Law Reform and the Reconstructive Paradox, 36 Wm. & Mary L. Rev. 547, 547 (1995) (declaring that "[t]he conventional view holds that *Brown* is one of the two or three most important cases in American legal history"); Michael J. Klarman, How *Brown* Changed Race Relations: The Backlash Thesis, 81 J. Am. Hist. 81, 81 (1994) ("Constitutional lawyers and historians generally deem *Brown v. Board of Education* to be the most important United States Supreme Court decision of the twentieth century, and possibly of all time."); Hon. Constance Baker Motley, The Historical Setting of *Brown* and Its Impact on the Supreme Court's Decision, 61 Fordham L. Rev. 9, 9 (1992) (stating that *Brown* is of "overriding historical, social, and political significance in the life of this nation"); Jack B. Weinstein, *Brown v. Board of Education* After Fifty Years, 26 Cardozo L. Rev. 289, 289 (2004) (asserting that *Brown* "gave impetus to a radical change in this country's conception of the need for equality of opportunity in factual real world terms").

[4] 347 U.S. at 493–95.

[5] Throughout this Article, I capitalize the words "Black" and "White" when I use them as nouns to describe a racialized group; however, I do not capitalize these terms when I use them as adjectives. Additionally, I find that "[i]t is more convenient to invoke the terminological differentiation between black and white than say, between *African-American* and *Northern European-American*, which would be necessary to maintain semantic symmetry between the two typologies." Alex M. Johnson, Jr., Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, 1992 U. Ill. L. Rev. 1043, 1044 n.4 (1992). Professor Kimberlé Crenshaw, one of the founders of Critical Race Theory, has explained that "Black" deserves capitalization because "Blacks, like *Asians* [and] *Latinos*, . . . constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1332 n.2 (1988). Also, I generally prefer to use the term "Blacks" to the term "African Americans" because "Blacks" is more inclusive. For example, while the term "Blacks" encompasses black permanent residents or other black noncitizens in the United States, the term "African Americans" includes only those who are formally Americans, whether by birth or naturalization.

[6] Speaking in a black-white paradigm, this Article assumes the predominant context under which black-white discrimination occurs, one in which Blacks are in the subordinate group and Whites are in the group with power.

Court defined the harms of discrimination too narrowly and, more so, how this limited understanding of the harms of discrimination—here, segregation—has unintentionally resulted in the development of anti-discrimination doctrine that is unable to lead us to true racial equality.

In *To Kill a Mockingbird*, Mayella Ewell, a white woman from a poor family with an infamous reputation in her town, falsely accuses Tom Robinson, a poor and well-respected black man, of raping her in 1930s Alabama.[7] Through adept cross-examination of Mayella, Atticus Finch, the much-revered attorney of the accused, discredits the claims of both Mayella and her father, Robert E. Lee Ewell, also referred to as Bob Ewell.[8] Atticus discredits the Ewells' allegations by demonstrating both that Tom was physically incapable of causing the injuries that Mayella sustained and that Bob Ewell was the only person who could have actually caused those injuries to Mayella.[9]

Later, from Tom Robinson's testimony, readers learn that Mayella regularly invited Tom onto her family's property as he walked to and from his job in the cotton fields; that she routinely asked Tom to perform chores, such as "bust[ing] up a chiffarobe for her"; and that Tom completed all of these chores free of charge.[10] Readers also learn that Mayella "jumped on" Tom on that fateful night, hugging him around the waist before her father suddenly appeared in the window and threatened to kill her before Tom ran away from the angry Bob Ewell.[11] Recalling Mayella Ewell's words before she came on to him, Tom testifies: "She reached up an' kissed me 'side of th' face. She says she never kissed a grown man before an' she might as well kiss a nigger. She says what her papa do to her don't count. She says, 'Kiss me back, nigger.'"[12] In all,

[7] See Lee, supra note 2, at 157–58, 176–77 ("Every town the size of Maycomb had families like the Ewells. No economic fluctuations changed their status . . . Maycomb's Ewells lived behind the town garbage dump in what was once a Negro cabin. . . . Nobody was quite sure how many children were on the place. Some people said six, others said nine; there were always several dirty-faced ones at the windows when anyone passed by. Nobody had occasion to pass by except at Christmas, when the churches delivered baskets, and when the mayor of Maycomb asked us to please help the garbage collector by dumping our own trees and trash.").

[8] Id. at 157–74.

[9] Id. at 171 (explaining that "[Tom Robinson's left arm] ended in a small shriveled hand, and from as far away as the balcony [Scout, the protagonist in the novel] could see that it was of no use to him" and noting that Robinson's "left arm was fully twelve inches shorter than his right, and hung dead at his side").

[10] Id. at 175–76.

[11] Id. at 178–79.

[12] Id. at 178.

Tom Robinson reveals himself to be nothing but an honorable, hard-working, and credible man during the direct examination of his trial testimony.

On cross-examination, however, Tom dooms himself. Already faced with an improbable chance of acquittal because he is a black man accused of raping a white woman in 1930s Alabama,[13] he makes a statement at trial that essentially seals his fate. Responding to Prosecutor Horace Gilmer's question about why he repeatedly performed chores for Mayella free of charge, Tom asserts, "I felt right sorry for her, she seemed to try more'n the rest of 'em—"[14] Tom then pauses, regretting his words. As many students have learned in school since *To Kill A Mockingbird*'s publication in 1960, Tom made a horribly big "mistake" by actually expressing sympathy for Mayella. Tom's mistake was not in actually having sympathy for Mayella—a victim of incest[15] and the oldest of eight kids who received no help around the house from her seven siblings.[16] After all, even Scout, the novel's protagonist, described Mayella as "the loneliest person in the world," as someone so lonely that "[w]hen Atticus asked had she any friends, she seemed not to know what he meant . . . [and] thought he was making fun of her."[17] Rather, as middle school and high school teachers across the country have explained to their students for decades, Tom's mistake was in suggesting, through his own sympathy for Mayella, that any white person could ever be on the receiving end of a black person's sympathy. Among Whites during this period, it was understood that being white, regardless of how bad that white person or her life was, was simply better than being black, regardless of how good that black person or his life was.[18]

[13] See Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1272 (1991) (asserting that "rape accusations historically have provided a justification for white terrorism against the Black community").

[14] Lee, supra note 2, at 181.

[15] Id. at 178 (recounting when Mayella said "what her papa do to her don't count").

[16] Id. at 176 ("Mr. Ewell didn't seem to help her none, and neither did the chillun, and I knowed she didn't have no nickels to spare.").

[17] Id.

[18] Id. at 158. In the book, Scout indicates that Bob Ewell's home was "some five hundred yards" before "a small Negro settlement." Id. Thereafter, she notes: "All the little man on the witness stand had that made him any better than his nearest neighbors was, that if scrubbed with lye soap in very hot water, *his skin was white*." Id. (emphasis added); see W. E. B. Du Bois, Black Reconstruction in America 700 (First Free Press ed. 1998) (1935) (explaining that white laborers were willing to accept their low wages and lot in life during Reconstruction

In addition to analyzing Tom's "tactical" error at trial, classroom teachers across the nation have examined not only the harms of discrimination and subordination that Robinson and other Blacks suffered as a result of an oppressive Jim Crow regime, but also the harms to Whites such as Mayella who were living within the same racial and class caste system of the United States. By these harms, I mean the dehumanizing effects of believing in one's racial superiority and the damaging consequences of unchecked white privilege (for both Blacks and Whites).[19]

As many scholars have explained in their research, whiteness itself holds important psychic value for white citizens in the United States.[20] For many Whites, particularly those of lower socioeconomic status, it provides them with the mental reassurance that they will not be at the bottom of the social hierarchy so long as Blacks remain there.[21] Professor Cheryl Harris explains, "Owning white identity as property affirm[s] the self-identity and liberty of whites and, conversely, denie[s] the self-identity and liberty of Blacks."[22] In *To Kill A Mockingbird*, Bob and Mayella Ewell, two poor white people who were completely debased in Maycomb County by other Whites, cling tightly to the property value of their whiteness.

Indeed, readers see how tightly Mayella Ewell is clinging to this value of whiteness when she, upon being exposed as a liar, screams the following at Atticus and the white male jurors hearing her case: "I got somethin' to say an' then I ain't gonna say no more. That nigger yonder

because they were "compensated in part by a sort of public and psychological wage" as a result of the subordinate position of Blacks); see also Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1707, 1741 (1993) (same); Angela Onwuachi-Willig, Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin, 102 Iowa L. Rev. 1113, 1124–25 (2017) (same); cf. Barbara J. Flagg, "And Grace Will Lead Me Home": The Case for Judicial Race Activism, 4 Ala. C.R. & C.L. L. Rev. 103, 108 (2013) ("But there is one benefit of whiteness that every white person *does* possess on an individual and daily basis: this is the dignitary value of being white.").

[19] See infra Parts II and III.A.

[20] See Du Bois, supra note 18, at 700; see generally Harris, supra note 18 (explaining that the psychological value of whiteness was vital to white workers); Onwuachi-Willig, supra note 18 (noting that white laborers felt that they were not at the bottom of the hierarchy, regardless of their lack of material wealth).

[21] See Du Bois, supra note 18, at 586, 700; Harris, supra note 18, at 1758–59; cf. Onwuachi-Willig, supra note 18, at 1138, 1184–85 (describing Emmett Till as a casualty of the struggle of Whites in Mississippi to maintain the "psychic value of their whiteness" and discussing the implications of hierarchies among racial groups).

[22] Harris, supra note 18, at 1743 (footnote omitted).

took advantage of me an' if you fine fancy gentlemen don't wanta do nothin' about it then you're all yellow stinkin' cowards, stinkin' cowards, the lot of you."[23]

More importantly, Mayella provides readers with a view into how the belief of white superiority and the racial hierarchy that persists in the United States dehumanizes individuals within the racial group in power. For instance, readers see Mayella, "the loneliest person in the world,"[24] use her white privilege to harm the only person who has ever been nice to her—Tom. In essence, readers see how Mayella has become dehumanized by racism and, more so, has become dehumanized by her personal role in perpetuating the racial subordination of others. Specifically, readers witness how Mayella's insistence on clinging to her white skin privilege, as well as her abuse of such privilege, result in an unjust outcome and the perpetuation of an unequal system in society.

In this Article, I review and analyze the Supreme Court's decision in *Brown* as a means of showing how the Court's failure to grapple with the psychic harms of racial segregation for Whites has fostered white supremacy. Specifically, I explain how the Court's failure to examine these unique harms has allowed anti-discrimination doctrine to be framed as a zero-sum game, in which material and status gains for Blacks and other racial minorities are viewed only as losses for Whites. Part I of this Article begins with a summary of *Brown* and an examination of the primary psychological studies that the Court relied on in reaching its unanimous decision. Part II turns to my primary criticism of the landmark decision: that the Court's failure to define and analyze the psychic harms of racial segregation to white children (in conjunction with the material and psychic harms of racial segregation to black children) has resulted in decades of anti-discrimination doctrine that ignores white privilege, the property value of whiteness, and their meaning and impact in society. In so doing, this Part highlights further social science studies, both in the past and the present, that unmask the ways in which white children have deeply internalized the negative racial stereotypes about Blacks that state-mandated racial segregation was intended to communicate. It also exposes the ways in which white children continue to internalize these stereotypes today and do so more deeply than black children. It also demonstrates how such deep internalization of negative racial stereotypes about Blacks and

[23] Lee, supra note 2, at 173.
[24] Id. at 176.

feelings of superiority for Whites stem from law's silence with respect to the psychic harms of discrimination to Whites. Part III then delves into the implications of this gap in the *Brown* decision by examining how the decision brought us to a place where Allan Bakke filed a claim against the University of California, Davis Medical Center,[25] and where Abigail Fisher filed a claim against the University of Texas at Austin.[26] Finally, this Article concludes by briefly asserting how the failure to examine the full harm of discrimination has precluded us from reaching that elusive goal of equality.

I. HOW HARM WAS DEFINED IN *BROWN*

Only eleven pages in length, the *Brown v. Board of Education*[27] decision itself does not mirror its monumental impact on society. *Brown* involved appeals from four different cases in the states of Kansas, South Carolina, Virginia, and Delaware.[28] In each of those cases, black children sought admission to schools that white children attended but were denied admission to because of laws that required or permitted racial segregation in public schools.[29] The plaintiffs in *Brown* argued not only that black schools were unequal to white schools in terms of buildings, books, resources, and other tangible factors, but also that the black schools would never be equal so long as there was state-mandated segregation.[30] Such legally enforced segregation, they said, deprived them of equal protection of the laws under the Fourteenth Amendment.[31]

In each of these cases, except the one in Delaware, the federal trial court denied the children the relief they sought under the "separate but equal doctrine" set forth in *Plessy v. Ferguson*.[32] In Delaware, the trial court abided by the separate but equal doctrine but held that the black children must be admitted to the white schools because the schools were not in fact equal.[33] On appeal, the U.S. Supreme Court examined whether "segregation of children in public schools solely on the basis of race, even

[25] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 277 (1978).

[26] Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2207 (2016); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 301–02 (2013).

[27] 347 U.S. 483 (1954).

[28] Id. at 486.

[29] Id. at 488.

[30] Id.

[31] Id.

[32] Id. (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

[33] Id.

though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities."[34]

Noting that its decision could not turn solely on tangible factors, such as whether black and white schools were equal "with respect to buildings, curricula, [and] qualifications and salaries of teachers," the Court explained that it had to "look . . . to the effect of segregation itself on public education" and that it had to "consider public education in the light of its full development and its present place in American life throughout the Nation."[35] Education, the Court asserted, "is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship."[36] The Court ended by declaring: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[37]

The Court then turned to examine the effect of racial segregation on black children.[38] In so doing, the Court relied in part on studies that were cited in the September 1952 Social Science Statement submitted by the appellants, which included references to findings from psychologists Kenneth B. Clark and Mamie P. Clark.[39] Noting that "it is difficult to

[34] Id. at 493.

[35] Id. at 492–93. The Court noted that its past decisions regarding equal protection claims against graduate and professional programs presented a different question because the programs for white students were clearly superior to those offered to black students. Id. at 491–92. The Court asserted, "In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." Id. at 492.

[36] Id at 493.

[37] Id.

[38] Id. at 494.

[39] Id. at 494–95 & n.11. See Kenneth B. Clark et al., The Effects of Segregation and the Consequences of Desegregation: A (September 1952) Social Science Statement in the *Brown v. Board of Education of Topeka* Supreme Court Case, 59 Am. Psychologist 495 (2004) (publishing statement in the public domain); see also Carl L. Bankston III, Discrimination and State Interest: *Parents Involved in Community Schools v. Seattle School District No. 1* and Conflicting Rationales in Race Conscious School Assignment, 34 T. Marshall L. Rev. 157, 158 (2008) ("A statement by Kenneth Clark, Isidor Chein, and Stuart W. Cook was particularly influential."); Kimberly J. Freedman, Note, *Parents Involved in Community Schools v. Seattle School District No. 1*: A Return to a Separate and Unequal Society?, 63 U. Miami L. Rev. 685, 689 (2009) (citing to the research described in footnote eleven of *Brown* and asserting that "this psychological research forced the Supreme Court to confront the divided state of our nation and acknowledge the profound psychological harms caused by state-mandated segregation").

disentangle the effects of segregation from the effects of a pattern of social disorganization commonly associated with it and reflected in high disease and mortality rates, crime and delinquency, poor housing, disrupted family life, and general substandard living conditions," the Social Science Statement argued that "segregation, prejudices and discriminations, and their social concomitants potentially damage the personality of all children" but do so in different ways and with different impacts for white and black children.[40] Furthermore, the Social Science Statement identified "awareness of social status difference" as a major factor in children's development of a sense of personal inferiority and explained that as black children became increasingly aware of their lower social status position, they more frequently would react with "feelings of inferiority and a sense of personal humiliation."[41]

In making these points, the Social Science Statement cited to a number of different studies, including an earlier study by the Clarks. In that study, the Clarks ran an experiment on 253 black children from the South and the North.[42] Each of these children was presented with four dolls that were identical in every respect except for the color of their skin and hair.[43] Two of the dolls had brown skin and black hair, and two of the dolls had white skin and blonde hair.[44] The children were then asked to respond to eight different requests by choosing one of the dolls and giving it to the experimenter.[45] The requests were as follows:

1. Give me the doll that you like to play with—*(a)* like best.
2. Give me the doll that is a nice doll.
3. Give me the doll that looks bad.
4. Give me the doll that is a nice color.
5. Give me the doll that looks like a white child.
6. Give me the doll that looks like a colored child.
7. Give me the doll that looks like a Negro child.

[40] Clark, supra note 39, at 495.
[41] Id. at 495–97.
[42] Kenneth B. Clark & Mamie P. Clark, Racial Identification and Preference in Negro Children, *in* Readings in Social Psychology 169, 170 (Henry Holt & Co. ed. 1947).
[43] Id. at 169.
[44] Id.
[45] Id.

8. Give me the doll that looks like you.[46]

After verifying that the black children were overwhelmingly able to identify racial difference by skin color between the dolls, the Clarks reported their results.[47] The key results were that the majority of the black children preferred the white doll and rejected the brown doll.[48] In particular:

- 67% (or 169 out of 253) of the black children indicated by their response that they liked the white doll best and would play with the white doll over the brown doll.
- 59% (or 150 out of 253) of black children indicated by their response that the white doll is a nice doll.
- 59% (or 149 out of 253) of black children indicated by their response that the brown doll looked bad, while only 17% (or 42 out of 253) indicated that the white doll looked bad.
- 60% (or 151 out of 253) indicated by their response that the white doll was a nice color, while only 38% (or 96 out of 253) indicated that the brown doll was a nice color.[49]

Basically, the Clarks found that the preference for the white doll was more than simply a preference. It also implied negative attitudes toward the brown doll.[50] In support of their claim, the Clarks also offered some qualitative data. For instance, they asserted that the children would explain their rejection of the brown doll and preference for the white doll

[46] Id.

[47] Id. at 170–71. See also Kenneth B. Clark & Mamie K. Clark, Segregation as a Factor in the Racial Identification of Negro Pre-School Children: A Preliminary Report, 8 J. Experimental Educ. 161, 163 (1939) (addressing how segregation affects the timing of children's racial identification).

[48] Clark & Clark, supra note 42, at 175.

[49] Id. Twenty-four percent of the respondents for Request 3—the request asking subjects to give the doll that looked bad to the experimenter—stated they did not know or gave no response. Id. The Clarks' studies have been critiqued because the black children from the North arguably made more negative associations with blackness than those from the South. See Mario L. Barnes & Erwin Chemerinsky, What Can *Brown* Do for You?: Addressing *McCleskey v. Kemp* as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias, 112 Nw. U. L. Rev. 1293, 1324 (2018) (citing A. James Gregor, The Law, Social Science, and School Segregation: An Assessment, *in* De Facto Segregation and Civil Rights: Struggle for Legal and Social Equality 99, 105 (Oliver Schroeder, Jr. & David T. Smith eds., 1965)).

[50] Clark & Clark, supra note 42, at 175.

by stating that they chose the white doll "'cause he's pretty" or "'cause he's white" and that they rejected the brown doll "'cause he's ugly," "'cause it don't look pretty," or because it "got black on him."[51] One five-year old, dark-skinned black child explained his identification with the brown doll by stating, "I burned my face and made it spoil."[52]

Clearly affected by the Clarks' study as well as other studies, the Court held that "separate educational facilities are inherently unequal."[53] In so doing, the Court identified the effects of the racial segregation on black children.[54] Quoting from the U.S. District Court for the District of Kansas, the Court wrote:

> To separate them from others of similar age and qualifications solely because of their 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 impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. *A sense of inferiority* affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[55]

II. RETHINKING THE HARM OF DISCRIMINATION

The reactions to the decision and reasoning in *Brown* have been varied. While some authors have highlighted *Brown*'s great promise and its great impact on civil rights law in society,[56] others have criticized the decision, with some asserting that the decision's reliance on psychological studies was both flawed and inappropriate.[57] Other scholars have criticized the

[51] Id. at 178.

[52] Id.

[53] 347 U.S. at 495.

[54] Id. at 493–94.

[55] Id. at 494 (alterations in original) (emphasis added) (quoting Findings of Fact and Conclusions of Law at Finding of Fact No. VIII, Brown v. Bd. of Educ., 98 F. Supp 797 (1951) (No. T-316)).

[56] See supra note 3.

[57] See Barnes & Chemerinsky, supra note 49, at 1320–28 (identifying several critiques of *Brown*); see also Anders Walker, Blackboard Jungle: Delinquency, Desegregation, and the Cultural Politics of *Brown*, 110 Colum. L. Rev. 1911, 1928–29 (2010) (detailing Southern politicians' critiques of the use of psychological studies in *Brown*). In 2004, the Honorable

tone and language in *Brown* itself.[58] For instance, Professor Randall Kennedy has lambasted the decision for being too soft in its language.[59] As Kennedy explained, *Brown* failed to take the important step of explicitly acknowledging the actual perpetrators of Jim Crow racism: white Southerners. Kennedy asserted:

> [T]he Chief Justice's description of segregation in *Brown* is strikingly wan. It says remarkably little about segregation's origins, ideology, implementation, or aims. A reader of *Brown* alone, with no knowledge of American race relations, might well be mystified by the hurt and anger of those protesting against segregation, simply because Warren's opinion is so diffident. . . . But Warren's opinion says nothing about the aims of segregation. He concludes that it has baleful effects but avoids mentioning whether those consequences were intentional. Because Warren insisted upon writing an opinion that was non-accusatory, he omitted a central aspect of the segregation story: the reason why white supremacists desired to separate whites and blacks pursuant to the coercive force of state power. *Missing from the most honored race relations decision in American constitutional law is any express reckoning with racism.*[60]

Two additional, unexplored problems in *Brown* are that it failed to acknowledge how white perpetrators and even sympathetic Whites had

Jack Weinstein, who had previously opposed the use of the doll study in the case, explained how years of practicing and judging changed his mind. He proclaimed:

> I must confess my own callow ineptitude in opposing the use of Dr. Kenneth Clark's experiments to prove that separation of children was necessarily socially and psychologically deleterious. I did not realize then (as I do now after years of practice) that judges must be taught to understand the conditions of the real world, and must have a factual hook on which to hang important decisions. I came to love that famous footnote number eleven that so many have derided—with its citation of studies on the negative psychological effects of segregation. Judges must have a window to life, to the hearts and minds of the people we serve, if we are to rule justly. Justices like Cardozo and Holmes recognized the need to candidly acknowledge the repressed biases and ignorance that often rule judicial decision making.

Weinstein, supra note 3, at 291–92.

[58] See Roy L. Brooks, Integration or Separation?: A Strategy for Racial Equality 17 (1996) ("Whether it is conservatives like Justice Clarence Thomas, who faults *Brown* and its progeny for creating 'a jurisprudence based upon a theory of black inferiority,' or liberals like Alex Johnson, who flat out states that '*Brown* was a mistake,' many African Americans who came of age in the 1960s and 1970s have come to reject *Brown*'s assumption regarding African American identity.") (footnotes omitted).

[59] See Randall L. Kennedy, Ackerman's *Brown*, 123 Yale L.J. 3064, 3066–68 (2014).

[60] Id. at 3067–68.

greatly benefitted from a longstanding system of structural racism, and that it failed to look at the full range of the harms of racial segregation, including the dehumanizing effects of racism on Whites and their damaging consequences for our ability to achieve an equal society. Indeed, *Brown* completely failed to even name, much less recognize, the material benefits that had come to Whites, even poor Whites, as a result of Jim Crow racism.[61] As a result, it failed to make clear that enabling a system of true equality, not simply one of formal equality, necessarily meant that Whites could not maintain all of the unearned benefits of whiteness that they were enjoying in a Jim Crow regime. More so, *Brown* failed to recognize the assumptions and the unchallenged notions about black inferiority and white superiority that had not only been internalized by all in society, including sympathetic Whites and Blacks, but that also had become deeply embedded within every aspect of our society. Missing from *Brown* were those important lessons about not just white privilege but also the dehumanizing effects of racial segregation on Whites. What was missing are the lessons we learned from Mayella Ewell in *To Kill A Mockingbird*.

Although *Brown* appropriately focused its attention on the primary targets of systemic racial discrimination—in this case, Blacks—it failed to look at the flip side of the harm of that discrimination, not in material terms, but rather in psychic terms. After all, where there is harm to the outsider—here, Blacks—there is also harm to the insider—here, Whites, the members of the racial group in power. In other words, *Brown* failed to make clear that, just as racial segregation in every aspect of life worked to generate a feeling of inferiority in many black children, such segregation also worked to generate and, in fact, continues to generate a feeling of superiority in white children, a different kind of harm of discrimination but one we must understand if we want to actually achieve full equality.

To understand this harm of racism on Whites, one must look no further than a study conducted by University of Chicago Professor Margaret Beale Spencer, who replicated the doll study with 133 early and middle childhood black *and white* children in the Northeastern and Southeastern

[61] Cf. Rogers M. Smith, Black and White After *Brown*: Constructions of Race in Modern Supreme Court Decisions, 5 U. Pa. J. Const. L. 709, 716–18 (2003) (noting that *Brown* did not discuss how segregation damaged white people and specifically noting that "[p]resenting blacks as the 'damaged race' could easily seem, in short, still to present whites as the 'superior race'").

regions of the United States.[62] Of those 133 children, 65 were in prekindergarten and kindergarten while 68 were in middle school, and 58 were white children while 75 were black children.[63]

In this study, Beale Spencer coded the children's skin tone selections on a scale from one to ten, with one constituting the darkest skin tone and ten representing the lightest skin tone.[64] She then collected the children's number selections on several items for *Color Preference* and *Color Rejection*.[65] Like the Clarks, she discovered that black children, as a whole, have some bias towards whiteness, but that their bias was far less than that of white children.[66] Beale Spencer also found that white children, as a whole, responded with a high rate of "white bias," which means the white children tended to identify their own skin color "with positive attributes and darker skin with negative attributes."[67]

For instance, the statistically significant results of her early childhood sample revealed that:

- When the children were told "show me the 'nice' child," 63% of white children and 38% of black children selected the two lightest skin tones.
- When the children were told "show me the 'bad' child," 59% of white children and 37% of black children selected the two darkest skin tones.
- When the children were told "show me the 'good looking' child," 82% of white children and 29% of black children selected the two lightest skin tones.
- When the children were told "show me the 'ugly' child," 54% of white children and 41% of black children selected the two darkest skin tones.

[62] Jill Billante & Chuck Hadad, Study: White and Black Children Biased Toward Lighter Skin, CNN, http://www.cnn.com/2010/US/05/13/doll.study/index.html (May 14, 2010, 4:24 PM) [https://perma.cc/Q4TB-3MBW]; see also Margaret Beale Spencer, CNN Pilot Demonstration (April 28, 2010), at http://i2.cdn.turner.com/cnn/2010/images/05/13/-expanded_results_methods_cnn.pdf [https://perma.cc/NWA5-2VSG], at 1 (summarizing the results of the CNN pilot study analyzing children's racial beliefs, attitudes, and preferences).

[63] Beale Spencer, supra note 62, at 1–3.

[64] Id. at 4.

[65] Id. at 4–6.

[66] Id. at 12–43.

[67] Billante & Hadad, supra note 62.

- When the children were told "show the child you would like as a 'classmate,'" 89% of white children and 40% of black children selected the two lightest skin tones.
- When the children were told "show the child you would 'like to play with,'" 64% of white children and 20% of black children selected the two lightest skin tones.[68]

In explaining the results of her study, Beale Spencer asserted:

> All kids on the one hand are exposed to the stereotypes . . . . What's really significant here is that white children are learning or maintaining those stereotypes much more strongly than the African-American children. Therefore, the white youngsters are even more stereotypic in their responses concerning attitudes, beliefs and attitudes and preferences than the African-American children.[69]

Even worse, she explained, was that the children's thinking about race did not evolve as they got older; their thinking essentially remained the same, as little changed in the children's responses from age five to age ten.[70]

Beale Spencer suggested a link between the test results of the white children and their parents' unwillingness or failure to talk to their children about race, which black parents must do routinely.[71] She asserted:

> [P]arents of color in particular had the extra burden of helping to function as an interpretative wedge for their children. Parents have to reframe what children experience . . . and the fact that white children and families don't have to engage in that level of parenting, I think, does suggest a level of entitlement. You can spend more time on spelling, math and reading, because you don't have that extra task of basically reframing messages that children get from society.[72]

Like Beale Spencer's remake of the doll study, other studies have revealed how white children more strongly associate negative traits with the racial background of others and positive traits with their own racial

[68] Beale Spencer, supra note 62, at 17–21.
[69] Billante & Hadad, supra note 62.
[70] Id.
[71] Id.
[72] Id.

background.[73] For example, in a study designed to explore whether children linked certain types of behavior or character features with certain racial groups, Professors Jerlean Daniel and Jack Daniel used personal names commonly associated with either Whites or Blacks to examine what stimulated young children to "make race-related stereotypical responses."[74] Testing 182 four-year-old and five-year-old children in a Head Start program (consisting of 52 black males, 50 black females, 42 white males, and 38 white females), the two professors asked four questions related to behavior, with two related to positive characteristics and two related to negative ones, and four questions related to character traits, two positive and two negative.[75] The child subjects were asked to imagine they had moved to a new neighborhood without knowing anyone, and they were asked to respond to the following inquiry at the end of each question: "Guess who . . . ?"[76] A ninth question was asked depending upon the sex or gender of the child.[77] The nine questions were as follows:

> 1. In your new neighborhood, at lunch time, you went to the bathroom. While you were in the bathroom, another child took a bite out of your sandwich. Guess who bit the sandwich, (a) Adam or (b) Jamal? If someone else bit the sandwich, guess who did it (a) Emily or (b) Jasmine?
>
> 2. In your new neighborhood, guess who looks the nicest, (a) Desiree or (b) Rachel? In your new neighborhood, guess who looks the nicest, (a) Tyrone or (b) Tyler?
>
> 3. In your new neighborhood, someone punched someone. Guess who did it, (a) Tiara or (b) Rebecca? In your new neighborhood, guess who punched someone, (a) Andre or (b) Matthew?
>
> 4. In your new neighborhood, guess who is the smartest person in school, (a) Kyle or (b) Malik? In your new neighborhood, guess who is the smartest, (a) Sarah or (b) Shaniqua?

[73] See, e.g., Jerlean E. Daniel & Jack L. Daniel, Preschool Children's Selection of Race-Related Personal Names, 28 J. Black Stud. 471, 486–88 (1998) (examining children's selection of race-related personal names).

[74] Id. at 473.

[75] Id. at 476–79. Five children refused to participate in the study, and another seven were not used in the study because they either communicated an "I don't know" response to each question or "selected all of the first or second answers to all questions." Id. at 476.

[76] Id. at 479.

[77] Id. at 478–79.

> 5. In your new neighborhood, with whom would you like to play, (a) Tanisha or (b) Megan? In your new neighborhood, with whom would you like to play, (a) Donte or (b) Zachary?
>
> 6. In your new neighborhood, guess who is lazy, (a) Lashonda or (b) Victoria? In your new neighborhood, guess who is lazy, (a) Jerome or (b) Dylan?
>
> 7. In your new neighborhood, guess who always brushes their teeth, (a) Lauren or (b) Ebony? In your new neighborhood, guess who always brushes their teeth, (a) Nicholas or (b) Lamar?
>
> 8. In your new neighborhood, guess who is sneaky, (a) Benjamin or (b) Jalen? In your new neighborhood, guess who is sneaky, (a) Hannah or (b) Monique?
>
> 9. In your new neighborhood, guess who looks the most like you (a) Shante or (b) Samantha? (for males: (a) Maurice or (b) Cody?)[78]

In the end, Professors Daniel and Daniel found that while "African American children showed little difference in their selection of African American names for positive and negative behavior attributions, White children significantly selected African American names more often for negative than positive behavior attributions."[79] For positive character questions, the children, whether white or black or boy or girl, chose black girls' names significantly less often than boys' names.[80] As the aforementioned studies reveal, segregation and other forms of racism and discrimination have a negative impact not only on those targeted and marginalized by such systems of oppressions—here, Blacks—but also on those who are privileged by those systems—in this case, Whites. Those harmful effects must not only be identified but also addressed if true equality is to be achieved.

The failure of *Brown*, and in fact, of anti-discrimination law more broadly, to identify one key, harmful consequence of segregation and racism—its dehumanizing effects on Whites—is a lesson that Frederick Douglass, a former slave, once highlighted in his powerful book *Narrative of the Life of Frederick Douglass, An American Slave*.[81] Indeed, one of

[78] Id.
[79] Id. at 486.
[80] Id.
[81] Frederick Douglass, Narrative of the Life of Frederick Douglass, An American Slave 57–58 (Benjamin Quarles ed., Belknap Press of Harvard Univ. Press 1960) (1845).

the most powerful stories about the dehumanizing effect of racism came from Douglass's slave narrative. This particular story revolves around Sophia Auld, Douglass's former white mistress (meaning master); the story traces Auld's transformation from a "white face beaming with the most kindly emotions" and a woman who was willing to teach Douglass to read, to a woman of pure evil, who in many ways was worse than her husband, who himself was a man of ill repute among slaves.[82] In his narrative, Douglass described his mistress's initial difference from other Whites in the system of slavery, explaining that her overall demeanor and disposition towards black slaves was gentler. Specifically, Douglass described Auld as being kind during his first few weeks in Baltimore, stating:

> I was utterly astonished at her goodness. I scarcely knew how to behave towards her. She was entirely unlike any other white woman I had ever seen. I could not approach her as I was accustomed to approach other white ladies. My early instruction was all out of place. The crouching servility, usually so acceptable a quality in a slave, did not answer when manifested toward her. Her favor was not gained by it; she seemed to be disturbed by it. She did not deem it impudent or unmannerly for a slave to look her in the face. The meanest slave was put fully at ease in her presence, and none left without feeling better for having seen her.[83]

As Douglass later detailed in his book, however, the grips of slavery soon took hold of Auld once "[t]he fatal poison of irresponsible power was . . . in her hands" and after her husband insisted that she entirely change her demeanor toward slaves from one of respect to one of clear authority, power, and superiority and that she no longer teach Douglass to read because it would make him think beyond his station in life.[84] According to Douglass, his mistress, at that point, became tainted by her husband's lessons regarding the place of slaves and the expected treatment of slaves, and changed for the worse. Douglass explicated:

> [Her] cheerful eye, under the influence of slavery, soon became red with rage . . . and that angelic face gave place to that of a demon. . . . *Slavery proved as injurious to her as it did to me*. When I went there, she was a pious, warm, and tender-hearted woman. There was no sorrow or

[82] Id. at 55, 57–58.
[83] Id. at 57.
[84] Id. at 57–58.

> suffering for which she had not a tear. . . . Slavery soon proved its ability to divest her of these heavenly qualities. Under its influence, the tender heart became stone, and the lamblike disposition gave way to one of tiger-like fierceness.[85]

Looking back at Douglass's seminal contribution to literature, it is clear that he was ahead of his time because he clearly saw and detailed the harms that could come from participating in subordination as a perpetrator—harms that the *Brown* Court ignored in 1954 and harms that we continue to ignore today in our legal and sociological analyses of discrimination.

But more than just failing to examine and interrogate the ways in which racism dehumanizes Whites, *Brown* failed to identify and explain how such dehumanizing effects are a danger to a society striving for equality and how they must be avoided at all costs. Specifically, *Brown* failed to acknowledge how such dehumanizing effects, along with the presumed sense of superiority that comes to many Whites in our system of racial subordination, leads to the types of oppressive behavior that keep our society from achieving true racial equality.

III. UNDERSTANDING THE FULL HARMS OF DISCRIMINATION

By failing to identify and resist the full harms of discrimination, *Brown* emboldened and furthered white supremacy rather than defeating it. Indeed, *Brown*'s failure to address the full range of harms of racism has resulted in two specific harms to our society. The first harm is a continued and false sense of superiority by Whites that reinforces and strengthens, rather than weakens, the very structures and institutions that work to perpetuate racial inequality. This false sense of superiority is particularly dangerous to a society that seeks racial equality because it results in leaving those in the dominant racial group, Whites, feeling deprived of the material benefits and privileges that their ancestors had when Blacks were denied all privileges and rights by law. It also obscures from them how privilege accumulates over time and across generations. In fact, recent studies reveal a widespread perception among Whites that Whites experience more racial bias against them than do people of color.[86] For example, Professors Michael Norton of Harvard Business School and

[85] Id. at 58, 63–64 (emphasis added).

[86] Michael I. Norton & Samuel R. Sommers, Whites See Racism as a Zero-Sum Game That They Are Now Losing, 6 Persp. on Psychol. Sci. 215, 216–17 (2011).

Samuel Sommers of the psychology department at Tufts University have argued that Whites view "racism as a zero-sum game, such that decreases in perceived anti-Black racism over the past six decades [were] associated with increases in perceived anti-White racism."[87] The second harm is that racism dehumanizes Whites so much that many Whites simply cannot see how direct racial discrimination and harm against Blacks also hurts them. As Norton and Sommers found in their research, "White respondents were more likely to see decreases in bias against Blacks as related to increases in bias against Whites—consistent with a zero-sum view of racism among Whites—whereas Blacks were less likely to see the two as linked."[88] In fact, Norton and Sommers discovered that Whites now perceive anti-white bias to be more prevalent than anti-black bias.[89]

From these two harms comes an even greater harm to society: a limited means for eradicating racial inequality, which I relate below to the persistent challenges to affirmative action. The overall harm is that our society will never be able to achieve racial equality without an acknowledgment of white privilege and the very structures that work to maintain that racial inequality. What the Court failed to explain in *Brown* is that a more just world for Blacks would necessarily mean "losses" for Whites, particularly since *Brown* was handed down in a society in which simply being white meant, by definition, that one was better off than non-Whites and better off for no reason other than whiteness. By failing to acknowledge this reality, *Brown* simply left the door open for future civil rights doctrine to ignore it. In other words, by not discussing the ways in which Whites had developed a false sense of superiority over other racial groups and the ways that white privilege visibly and invisibly operates, the Justices who decided *Brown* left the false impression that all that was needed to achieve true racial equality was formal legal access to what Whites had *real access* to.[90] In essence, *Brown* failed to examine what

[87] Id. at 215.
[88] Id. at 217.
[89] Id. at 216.
[90] See Robert L. Carter, *Brown*'s Legacy: Fulfilling the Promise of Equal Education, 76 J. Negro Educ. 240, 246 (2007) (citing Louis Michael Seidman, *Brown* and *Miranda*, 80 Cal. L. Rev. 673, 680, 717 (1992)) (noting that "[s]ome Whites claim to labor under the outrageous belief that because the Supreme Court declared Blacks to be entitled to equal treatment under the law, any continued racial disparity must be a result of Blacks' own failure to take advantage of the opportunities afforded them" and arguing that "the removal of formal barriers allowed the real reasons for continued racial disparities to become obscured and in this way, *Brown* has reinforced the status quo and legitimized the persistence of White dominance").

Professor Harris calls "the normal and routine rules . . . [that] prefer and disfavor certain people" and in so doing, it failed to explain racial discrimination as a "structural phenomenon," rather than mere episodic occurrences.[91] Sixty-five years later, our legal discourse has still not caught up with the reality of race that was excluded in *Brown*. Nowhere is this gap in our lives and doctrine clearer than in the affirmative action cases, particularly *Regents of the University of California v. Bakke*, which was decided in 1978,[92] and *Fisher v. University of Texas at Austin I* and *II*, which were decided in 2013 and 2016, respectively.[93]

A. The Zero-Sum Game as Allan Bakke Saw It

Bakke, the first case to address the constitutionality of an affirmative action program in higher education, is illustrative of how a sense of white superiority, a failure to account for the realities of racial disadvantage and discrimination in our society, a presumption of continued white access, and the view of a zero-sum game in the quest for racial equality can work to further, rather than challenge, white supremacy and dominance in society. In *Bakke*, Allan Bakke, a white male who had applied to the UC Davis Medical Center, sued, alleging that his equal protection rights had been violated on the grounds of race when he was denied admission to the medical school in both 1973 and 1974.[94] At the time, the medical school had a special program in which it reserved sixteen spots in the class for underrepresented minorities.[95]

In 1973 and 1974, Bakke's application was reviewed through the medical school's general admissions program, and, in both years, Bakke received an interview for a spot in the medical school.[96] In 1974—the year that Bakke filed his lawsuit against the medical school—the student admissions committee member who had interviewed Bakke gave him an overall rating of ninety-four, noting that Bakke was "friendly, well tempered, conscientious and delightful to speak with."[97] However,

[91] Cheryl I. Harris, What the Supreme Court Did Not Hear in *Grutter* and *Gratz*, 51 Drake L. Rev. 697, 701–02 (2003).

[92] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[93] Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013); Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016).

[94] 438 U.S. at 276–78.

[95] Id. at 274–75.

[96] Id. at 276.

[97] Id. at 277 (citation omitted).

Bakke's faculty interviewer, Dr. George H. Lowrey, who chaired the admissions committee, found Bakke to be "rather limited in his approach" to the problems of the medical profession and considered Bakke's "very definite opinions which were based more on his personal viewpoints than upon a study of the total problem" to be "disturbing."[98] Bakke's faculty interviewer gave him the lowest of the six ratings in his application.[99] Ultimately, Bakke was denied admission to the medical school.[100] That year, applicants with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke were admitted under the special program.[101] However, UC Davis Medical Center was not the only medical school to which Bakke had applied.[102] *In fact, Bakke had applied to at least twelve other medical schools, and he had been rejected by all of them*.[103]

The failure Bakke experienced with his other medical school applications is critical because it reveals how a false sense of superiority ultimately led Bakke to think (even though he had been rejected from twelve other medical schools) that the only reason he was denied a spot to UC Davis Medical Center was because of students of color. As Professor Harris explains, "After legalized segregation was overturned, whiteness as property evolved into a more modern form through the law's ratification of the settled expectations of relative white privilege as a legitimate and natural baseline."[104] By filing his lawsuit, despite his complete lack of success with other medical schools, Bakke revealed he had a settled expectation about what was supposed to come to him as a white male.

Even more important, the decision in *Bakke* reveals how the false impression in *Brown* that society could have its cake and eat it, too—meaning that society could achieve true racial equality without Whites losing any advantages that previously flowed to them in an undeniably discriminatory society—allowed too many, including Bakke, to ignore the historical context and the system in which U.S. society was operating (and still is operating). After all, Bakke had filed his claim less than twenty

[98] Id. at 276–77 (citation omitted).
[99] Id.
[100] Id.
[101] Id.
[102] Harris, supra note 91, at 703.
[103] Id.
[104] Harris, supra note 18, at 1714.

years after fourteen-year-old Emmett Till was brutally murdered in Mississippi;[105] a mere ten years after Chaney, Goodman, and Schwerner had been murdered for trying to get the state to allow Blacks to exercise their right to vote;[106] a mere ten years after the Civil Rights Act of 1964 had been enacted;[107] just nine years after the Voting Rights Act was passed;[108] and just six years after the Fair Housing Act was passed.[109] Before those statutes were passed, blatant, outright discrimination against and the terrorizing of Blacks in employment, housing, and the exercise of voting rights had been legally protected. In fact, *Griggs v. Duke Power Co.*, which created disparate impact theory in employment law, and *McDonnell Douglas v. Green*, which created the framework for evaluating discrimination cases with circumstantial evidence, were not decided until 1971 and 1973, respectively.[110] In 1974, 57.6% of black children between the ages of six and eighteen had mothers who had not completed a high school education as compared to 27.1% of white children between those same ages.[111]

Vast disparities also persisted in the medical field. In 1968–69, Blacks accounted for only 2.2% of all students enrolled in medical schools in the United States.[112] UC Davis proclaimed that it was trying to address this shortage of black doctors because the shortage could worsen access to care in low-income communities.[113] After all, geographic areas with substantial concentrations of racial minority groups and impoverished citizens had and still have the lowest physician-to-population ratios, and black doctors were significantly more likely than any other group to have

[105] See Onwuachi-Willig, supra note 18, at 1127–51 (describing and analyzing the murder of Emmett Till); Ronald Turner, Remembering Emmett Till, 38 How. L.J. 411, 414–22 (1995) (same).

[106] See Ben Chaney, Schwerner, Chaney, and Goodman: The Struggle for Justice, 27 Hum. Rts. 3, 3–5, 8 (2000); Mary Beth Tinker, Mighty Times, 68 Ark. L. Rev. 895, 900 (2016).

[107] See Serena J. Hoy, Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts, 16 J.L. & Pol. 381, 393–404 (2000).

[108] Id. at 441–42.

[109] See Otto J. Hetzel, Reflections on the Enactment of the 1968 Fair Housing Act, 48 Urb. Law. 311, 311 (2016).

[110] Hoy, supra note 107, at 426–29 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)); Sandra F. Sperino, Beyond *McDonnell Douglas*, 34 Berkeley J. Emp. & Lab. L. 257, 258 (2013) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

[111] Child Trends Data Bank, Parental Education: Indicators of Child and Youth Well-Being 2–3, 7–8 (2015).

[112] See Damon Tweedy, The Case for Black Doctors, N.Y. Times, May 15, 2015, at SR1.

[113] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 310–11 (1978).

a firm commitment to practicing in underserved areas.[114] Additionally, likely due to the lack of racial competence by doctors, studies revealed that patients of color who were treated by physicians who shared their racial or gender characteristics reported greater satisfaction with their care and higher rates of medication compliance.[115] Yet Allan Bakke failed to even consider the structural advantages he enjoyed and the correlating disadvantages his peers of color suffered, and despite having been denied admission to eleven other schools, Bakke filed his equal protection claim against UC Davis Medical Center.

B. Fisher *Follows* Bakke

Nearly forty years later, Abigail Fisher filed her own challenge to an affirmative action program in Texas with no acknowledgment of the history and current practices of discrimination that had brought affirmative action programs to fruition.[116] Like Bakke, Abigail Fisher revealed through her lawsuit how she, too, had "settled expectations of relative white privilege as a legitimate and natural baseline."[117] After the University of Texas at Austin denied her admission into its undergraduate program, Fisher sued the University, alleging that the school had discriminated against her on the basis of race in violation of the Equal Protection Clause. Explaining her reasons for filing suit, she noted, without any demonstration of her knowledge of other people's activities and grades, "There were people in my class with lower grades who weren't in all the activities I was in, who were being accepted into UT, and the only other difference between us was the color of our skin."[118]

Indeed, as the U.S. Court of Appeals for the Fifth Circuit explained in its 2014 decision:

> Fisher's AI [Achievement Index] scores were too low for admission to her preferred academic programs at UT Austin; Fisher had a Liberal Arts AI of 3.1 and a Business AI of 3.1. And, because nearly all the seats in the undeclared major program in Liberal Arts were filled with

[114] See Tweedy, supra note 112.

[115] See id.

[116] See Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2207 (2016); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 306 (2013).

[117] Harris, supra note 18, at 1714.

[118] Project on Fair Representation, Abigail Fisher vs. University of Texas at Austin, YouTube (Sept. 4, 2012), https://www.youtube.com/watch?v=sXSpx9PZZj4 [https://perma.cc/-DDJ8-ZPFX].

> Top Ten Percent students, all holistic review applicants "were only eligible for Summer Freshman Class or CAP [Coordinated Admissions Program] admission, unless their AI exceeded 3.5." *Accordingly, even if she had received a perfect PAI [Personal Achievement Index] score of 6, she could not have received an offer of admission to the Fall 2008 freshman class. If she had been a minority the result would have been the same.*[119]

In fact, Fisher was also denied admission to the University's 2008 summer admissions program for first-years in which 168 Blacks and Latinos with AI/PAI scores *equal to or higher* than Fisher's were also denied admission.[120] Moreover, Fisher's SAT score of 1180 would have placed her below at least eighty-four percent of the summer-program students at UT Austin in 2008.[121]

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[119] Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 638–39 (5th Cir. 2014) (emphasis added).

[120] Brief for Respondents at 15–16, Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013) (No. 11-345). For example, the University of Texas's Brief stated:

> Although one African-American and four Hispanic applicants with lower combined AI/PAI scores than petitioner's were offered admission to the summer program, so were 42 Caucasian applicants with combined AI/PAI scores identical to or lower than petitioner's. In addition, 168 African-American and Hispanic applicants in this pool who had combined AI/PAI scores identical to or *higher* than petitioner's were *denied* admission to the summer program.

Id.

[121] Compare id. at 15 (identifying Fisher's SAT score of 1180), with Univ. of Tex. at Austin Office of Admissions, The Performance of Students Attending The University of Texas at Austin as a Result of the Coordinated Admission Program (CAP): Students Applying as Freshmen 2008, at 4 (2011), https://utexas.app.box.com/s/d8sehmohs9m43879rp51y-5hatouwysi9/file/23476760785 [https://perma.cc/CD44-PXT7] (demonstrating that a sum of eighty-four percent of the 2008 summer-program freshmen at UT Austin had SAT scores of 1200 or higher). See also William C. Kidder & Angela Onwuachi-Willig, Still Hazy After All These Years: The Data and Theory Behind "Mismatch," 92 Tex. L. Rev. 895, 937 (2014) (reviewing Richard Sander & Stuart Taylor, Jr., Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It (2012)) (noting that Richard Sander, the primary proponent of mismatch theory, argued in his book that "Hispanics who are admitted due to preferences typically enter with markedly less academic preparation," and then cited as his supporting evidence that in 2009 Latinos admitted outside the Ten Percent Plan had SAT scores at the 80th percentile nationally, compared to the 89th percentile for whites and 93rd percentile for Asian Americans, when Fisher's SAT score itself was equivalent or lower to the Latino SAT mean score that Sander and Taylor cited as primary evidence of "markedly less academic preparation" (quoting Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013) (No. 11-345)).

Still, much like Bakke, Fisher failed to think about the structural advantages that had aided her all her life. She did so in part because our current discourse around race—much like *Brown*—does not encourage such thinking about past and present racial discrimination and its effects. In her newspaper interviews, Fisher lamented that she was unable to follow a family tradition of attending the University of Texas, but she did so without any apparent sense of how a tradition of *law*, backed by blatant racism and white supremacy, had kept Blacks from gaining admission to the University until 1950, when Heman Sweatt won his case before the U.S. Supreme Court to gain admission to the law school.[122] Similarly, she proclaimed:

> I took a ton of AP classes, I studied hard and did my homework—and I made the honor roll. . . . I was in extracurricular activities. I played the cello and was in the math club, and I volunteered. I put in the work *I* thought was necessary to get into UT.[123]

Yet, she failed to recognize the great privileges that her comments revealed. For example, she failed to acknowledge what simply having the opportunity to enroll in city and regional youth orchestras said about the resources of her high school or her family.[124] After all, it is the rare public high school that offers cello lessons, and the rare family that has the resources to support such substantial and widespread extracurricular activities. Likewise, Fisher spoke about volunteering,[125] yet she failed to acknowledge how volunteering is frequently a luxury for those students who do not have to keep a paying job to help support their families and, more importantly, how fortunate she was to not be a part of a group to whom people must frequently volunteer help. Finally, Fisher spoke of taking AP classes without any acknowledgment that many schools in the

[122] Angela Onwuachi-Willig, 'I Wish I Were Black' And Other Tales of Privilege, Chron. of Higher Educ. (Oct. 28, 2013), https://www.chronicle.com/article/I-Wish-I-Were-Black-and/142561 [https://perma.cc/J8WC-EZEM]; see also Sweatt v. Painter, 339 U.S. 629, 631–36 (1950) (holding that the Equal Protection Clause of the Fourteenth Amendment required that Sweatt be admitted to University of Texas Law School).

[123] Richard Dunham, Supreme Court Could Decide Future of Affirmative Action in University of Texas Reverse Discrimination Case, Houston Chron.: Texas on the Potomac (Oct. 10, 2012), https://blog.chron.com/txpotomac/2012/10/supreme-court-could-decide-future-of-affirmative-action-in-university-of-texas-reverse-discrimination-case/ [https://perma.cc/8NLK-4FP9] (emphasis added).

[124] Id; see Complaint at 25, Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (Case No. 1:08-cv-00263-SS).

[125] Id.

United States, particularly predominantly minority and rural schools, are unable to offer AP classes as part of their curriculum.[126]

CONCLUSION

In summary, *Brown v. Board of Education* is an important decision that has enabled very significant changes in our society. Its existence should be celebrated far and wide, and its vital meaning in our society should be noted and remembered, but if we truly want to understand how we find ourselves today at a moment of white backlash and at the resurgence of white supremacist sentiments and actions, we have to return to the analysis in *Brown* to see how the gaps in that decision led us to this current racial reality in which history and context are ignored and equality remains elusive.

If we intend to ever achieve true equality, we must take race into account. We must begin to reevaluate the ways in which we have defined the harms of discrimination and inequality. There is no harm in reevaluating how we view the harms of discrimination. The harm is in not doing so.

[126] Id.; Onwuachi-Willig, supra note 122 (noting that many majority-minority schools are unable to offer AP courses); see also Osamudia R. James, White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation, 89 N.Y.U. L. Rev. 425, 475–81 (2014) (discussing how the plaintiffs in "*Hopwood*, *Grutter*, *Gratz*, *Fisher*, and the parents in Louisville and Seattle" all failed to recognize and acknowledge their white skin privilege and all viewed their experience as setting the "norm").