Draft 8/12/07: PLEASE DO NOT CITE WITHOUT PERMISSION

Using race or ethnicity as factors in employee and contractor outreach.

By David Benjamin Oppenheimer[1]

I. Introduction.

In 1996 the voters of California adopted Proposition 209, amending the state Constitution to add the following provision:

> "Article 1, section 31 . . . [T]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[2]

This essay addresses whether this prohibition of discrimination and preferential treatment bars government entities in California from using race or ethnicity as factors in outreach programs designed to recruit employees and/or contractors, or from requiring government contractors to use race or ethnicity as factors in their outreach to sub-contractors. I will review the disputes over the meaning of section 31, and particularly the term "preferential treatment," during the Prop 209 campaign, and after it was adopted by the voters. I will conclude that a ban on "preferential treatment" based on race and ethnicity does not prohibit all considerations of race and ethnicity in outreach programs. I will then discuss one justification for using race and ethnicity in outreach programs – as an affirmative anti-discrimination program. I will conclude

---

[1] Professor of Law and Associate Dean for Faculty Development, Golden Gate University School of Law; Associated Scholar, Institute for the Study of Social Change, University of California, Berkeley. I am grateful to Bill Kidder and Stephanie Wildman for their suggestions, and to Julie Ann Talbo for her research assistance on this essay. This essay is an edited version of a paper on higher education outreach and 209, solicited by the Chief Justice Earl Warren Institute at Boalt Hall School of Law, published as The Legality of Promoting Inclusiveness: May the University of California use race or ethnicity as factors in applicant outreach? __ UCLA Chicano Latino Law Review __ (2007). Disclosure: I was an active participant in the campaign against Proposition 209, and one of the spokespersons for the "No on 209" campaign. I was one of the lawyers who met with the staff attorneys of the Office of the Legislative Analyst in an unsuccessful attempt to lobby for a change of some of the language prepared for the Ballot Pamphlet. I was one of the lawyers who consulted on the lawsuit filed against the California Attorney General in an unsuccessful attempt to change the Proposition 209 ballot description (See Lungren v. Superior Court, 48 Cal.App.4th 435 (1996)). I was one of the lawyers who consulted on the post-election constitutional challenge to Proposition 209 (See Coalition for Economic Equity v. Wilson, 122 F. 3d 692 (1997). And, when that decision was appealed, I was one of the lawyers who represented the American Jewish Congress as amicus curiae in the United States Court of Appeal for the Ninth Circuit, where the District Court decision setting aside the election result was reversed. (Id.).

[2] Art. 1, section 31(a), Cal. Const. (West, 2006).

that government entities may use race and ethnicity in outreach to reach minority employees, contractors or subcontractors who otherwise might not apply, as long as the program is broadly designed to also reach other potential recipients, regardless of their race or ethnicity.

II. The 1996 Legal Controversy Over The Meaning of Proposition 209.

When Proposition 209 was placed on the ballot for the 1996 general election, it was the immediate subject of controversy over its meaning. That controversy sparked considerable debate, and pre-election litigation. The two sides couldn't even agree on whether the initiative was about "affirmative action."[3] Opponents of the ballot measure warned voters that it would (or could)[4] bar all affirmative action, while proponents tried to re-assure the electorate that it preserved affirmative action, while prohibiting "preferential treatment."[5]

The ballot argument submitted by the opponents emphasized the harm that passage would have on affirmative action programs, claiming that:

> "the initiative's language is so broad and misleading that it eliminates equal opportunity programs including: [¶] [1] tutoring and mentoring for minority and women students; [¶] [2] affirmative action that encourages the hiring and promotion of qualified women and minorities; [¶] [3] outreach and recruitment programs to encourage applicants for government jobs and contracts; and [¶] [4] programs designed to encourage girls to study and pursue careers in math and science."[6]

In rebuttal, the proponents tried to reassure voters that the initiative wouldn't harm most affirmative action programs, asserting that:

---

[3] Defining the term is often controversial. In prior articles I have identified five models of "affirmative action" – (1) quotas, (2) preferences, (3) self-studies, (4) outreach and counseling, and (5) affirmative anti-discrimination. See David B. Oppenheimer, Five Models of Affirmative Action, 4 Berkeley Women's Law Journal 42 (1989); Understanding Affirmative Action, 23 Hastings Constitutional Law Quarterly 921 (1996).

[4] Lydia Chavez, The Color Bind: California's Battle to End Affirmative Action, University of California Press (1998). As Professor Chavez explains, there was disagreement among the opponents over whether to assume the worst about how the proposition would be interpreted, which might help motivate voters to vote no, or to minimize its impact, in order to support legal arguments to limit its interpretation by the courts if it passed. Thus, the opposition arguments ranged from assertions that it **would** ban all affirmative action, to assertions that it **could** ban most affirmative action.

[5] As Chavez explains, polling data suggested that a majority of voters supported "affirmative action" but opposed "discrimination" and "preferential treatment." Thus, the "talking points" for debaters prepped by the proponents directed them to insist that the proposition preserved affirmative action, while refusing to be drawn into a discussion about what they meant by the term. Id., at 47 (Gallup polls), 80 (telephone polls).

[6] http://vote96.ss.ca.gov/bp/ (follow "California Ballot Pamphlet, General Election, November 5, 1996, hyperlink "Proposition 209"). (Last accessed August 12, 2007).

"Proposition 209 bans discrimination and preferential treatment-period. Affirmative action programs that don't discriminate or grant preferential treatment will be unchanged. Programs designed to ensure that all persons - regardless of race or gender - are informed of opportunities and treated with equal dignity and respect will continue as before."[7]

This controversy over the meaning of the initiative's language was at the heart of the two government-sponsored descriptions provided to voters – the analysis prepared by the Legislative Analyst for the Ballot Pamphlet, and the Ballot Title and Summary prepared by the Attorney General. Consistent with the opposing views of the Proposition's proponents and opponents, the Legislative Analyst described the proposition as an attempt to eliminate "affirmative action," while the Attorney General described it as an attempt to limit "discrimination and preferential treatment," entirely avoiding the term "affirmative action." Within this difference in point of view, the critical question was the meaning of the term "preferential treatment," and thus the breadth of the initiative.

The analysis prepared by the Legislative Analyst recognized the uncertainty over the legal effect of the prohibition of "preferential treatment." The proposition was broadly described as an attempt to limit or bar "affirmative action" programs.[8] The Analyst wrote that "the measure would eliminate affirmative action programs used to increase hiring and promotion opportunities for state or local government jobs, where sex, race, or ethnicity are preferential factors in hiring, promotion, training, or recruitment decisions. In addition, the measure would eliminate programs that give preference to women-owned or minority-owned companies on public contracts. . . . [but that the full impact could not be determined until there were] court rulings on what types of activities are considered 'preferential treatment'. . ." .[9]

The Attorney General submitted a "Ballot Label" and "Ballot Title and Summary" that described the Proposition as concerned with "discrimination and preferential treatment," not "affirmative action," using the following language:

"PROHIBITION AGAINST DISCRIMINATION OR PREFERENTIAL TREATMENT BY STATE AND OTHER PUBLIC ENTITIES. INITIATIVE CONSTITUTIONAL AMENDMENT.

$ Prohibits the state, local governments, districts, public universities, colleges, and schools,

---

[7] Id.

[8] "This measure would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting *to the extent these programs involve "preferential treatment" (emphasis added)* based on race, sex, color, ethnicity, or national origin. The specific programs affected by the measure, however, would depend on such factors as (1) court rulings on what types of activities are considered "preferential treatment". . . ." Analysis of Proposition 209 by the Legislative Analyst, accessible at http://vote96.ss.ca.gov/bp/209analysis.htm (Last accessed August 12, 2007).

[9] Id.

and other government instrumentalities from discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin.

$ Does not prohibit reasonably necessary, bona fide qualifications based on sex and actions necessary for receipt of federal funds.

$ Mandates enforcement to extent permitted by federal law.

$ Requires uniform remedies for violations. Provides for severability of provisions if invalid.[10]

In response to the Attorney General's ballot description, the "No on 209" campaign and other organizations opposed to the proposition petitioned the Sacramento Superior Court for an order requiring the description to be re-written, asserting that the Attorney General's description was misleading because it failed to describe the proposition as an attempt to prohibit affirmative action.[11] The Superior Court agreed, granting a writ of mandate. The court found that "the main purpose or chief point of the initiative, . . ." [is] "to effect changes or stop the affirmative action programs with the [S]tate of California . . . ."[12]

The Court of Appeal reversed. The court found that "any statement to the effect that Proposition 209 repeals affirmative action programs would be overinclusive and hence 'false and misleading' (Elec.Code § 9092)"[13] because "[m]ost definitions of the term [affirmative action] would include not only the conduct which Proposition 209 would ban, i.e., discrimination and preferential treatment, but also other efforts such as outreach programs."[14] Thus, in the view of the California Court of Appeal, Proposition 209 banned discrimination and preferential treatment based on race or ethnicity, but did not ban affirmative action outreach programs. The court did not address whether its definition of affirmative action outreach programs included outreach programs that utilized race or ethnicity.

On November 5, 1996 Proposition 209 passed, receiving 54.6% of the votes cast.[15] It was temporarily stayed by the United States District Court, but that stay was lifted by the United States Court of appeals for the Ninth Circuit. When a petition to review the Ninth Circuit's decision was rejected on November 3, 1997, the Proposition took effect.

In the wake of the initiative taking effect, the dispute over the meaning of the term

---

[10] Id.
[11] See Lungren v. Superior Court, 48 Cal.App.4th 435 (1996) at 437.
[12] Id. at 441 (quoting from Court of Appeal's quotation of Superior Court transcript).
[13] Id. at 442.
[14] Id.
[15] 2003 CA A.B. 2387 (vetoed by Gov. Sept. 29, 2004). See http://vote96.ss.ca.gov/Vote96/html/vote/prop/page.961218083528.html (Last accessed September 24, 2006).

"preferential treatment" has continued. It has been the source of disagreement not only in the courts, as described in Section III *infra*, but among the Legislature and the Executive as well. For example, in 2004 the California Legislature overwhelmingly passed a bill providing that to "consider" race and/or ethnicity does not necessarily constitute "preferential treatment" based on race and/or ethnicity. The bill authorized the University of California and California State University to "consider culture, race, gender, ethnicity, national origin, geographical origin, and household income, along with other relevant factors, in undergraduate and graduate admissions, so long as no preference is given."[16] The Legislative Counsel's office offered a legal opinion that the bill was not inconsistent with Article 1, Section 31 – that an admissions process could consider race as a positive factor in admissions without giving preferential treatment based on race.[17] The bill passed the Assembly by a vote of 47 to 27, and the Senate by a vote of 22 to 13, but it was vetoed by Governor Schwarzenegger.[18] The Governor explained that "[t]he practical implementation of the provisions of this bill would be contrary to the expressed will of the people who voted to approve Proposition 209 in 1996. Therefore, since the provisions of this bill would likely be ruled as unconstitutional, they would be more appropriately addressed through a change to the State Constitution."[19]

Ultimately, the question of what meaning to give the term "preferential treatment" must be left to the California Supreme Court.[20] But the Legislature's interpretation is entitled to great deference when there is ambiguity over a term's meaning.[21]

In light of the 2004 opinions of the Legislative Counsel, the members of the Legislature, and the Governor, as well as 1996 opinions of the Court of Appeals in the *Lungren* case, then-Attorney General Lungren, the Legislative Analyst, and the proponents and opponents of the initiative, we must acknowledge considerable doubt about the meaning of the phrase "preferential treatment" as used in Proposition 209. Clearly, Article 1 section 31 of the California Constitution prohibits the California governmental entities from giving "preferential

---

[16] Assembly Bill 2387 (2003-2004) (Firebaugh). See http://www.leginfo.ca.gov/pub/03-04//bill/asm/ab_2351-2400/ab_2387_bill_20040824_enrolled.html. (Last accessed October 1, 2006).

[17] See Report of Senate Committee on Education, at http://info.sen.ca.gov/pub/03-04/bill/asm/ab_2351-2400/ab_2387_bill_20040824_enrolled.html. (Last accessed October 1, 2006).

[18] See Complete Bill History at http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2351-2400/ab_2387_bill_20040929_history.html. (Last accessed October 1, 2006).

[19] Governor's veto message dated September 29, 2004. See http://www.leginfo.ca.gov/pub/03-04//bill/asm/ab_2351-2400/ab_2387_vt_20040929.html. (Last accessed October 1, 2006).

[20] See Sands v. Morongo Unified School District, 53 Cal.3d 863, 902-903 (1991) (California Supreme Court is the final authority on interpretation of the state Constitution).

[21] See C&C Construction v. Sacramento Municipal Utility District, 122 Cal.App.4th 284, 302 (2004) and cases cited therein. In C&C the Court of Appeals held that the meaning of "discrimination" in section 31 was unambiguous. Id. at 302. For the reasons described herein, it would be hard to reach the same conclusion regarding the phrase "preferential treatment."

treatment" on the basis of race and/or ethnicity. But the ban on "preferential treatment" may not extend to "outreach," "affirmative action," or a decision to "consider" race and/or ethnicity as a "plus factor." With these limitations in mind, how have the courts interpreted the initiative following its adoption by the voters?

III. Judicial Applications of Article 1, Section 31.

By far the most important judicial application of Article 1, section 31 since its adoption by the voters was the California Supreme Court's decision in Hi-Voltage Wire Works, Inc. v. City of San Jose.[22] In *Hi-Voltage*, the white owner of an electrical contracting firm asserted that parts of an affirmative action program run by the City of San Jose constituted "preferential treatment" on the basis of race under section 31. The program included a requirement that companies bidding on City contracts provide notice to "minority owned business enterprises" ("MBE's") and Women owned businesses ("WBE's") of the opportunity to bid on sub-contracts.

The City argued that its plan did not offend section 31 because it was merely an "outreach" plan, not a "preferential treatment" program. It pointed to the fact that contractors were not prohibited from contacting white owned businesses in seeking sub-contractors, they were merely not compelled to contact them.[23] But the court held that "preferential treatment" was "giving a priority or advantage to one person over others,"[24] and that the City was requiring contractors to give preferential treatment to minority sub-contractors over white sub-contractors, since there was no requirement that contract bidders provide notice to white sub-contractors.[25]

In her majority opinion, Justice Brown exhaustively recounted the history of racism against African Americans in American law, and argued that the great triumph of the 1960's was the commitment to make all racial discrimination unlawful, regardless of its target. Thus, providing "preferential treatment" to minority business enterprises, by giving them alone obligatory special notice of bidding opportunities, gave them a "priority or advantage" over other white-owned business enterprises, merely because of the race of the business owner.

Turning from the meaning of "preferential treatment" to the meaning of "discrimination," Justice Brown took an approach that could prove critical to understanding the scope of section 31. Although Justice Brown is regarded as a conservative on racial justice issues, she rejected the prevailing conservative view that limits the legal meaning of the term "discrimination" to intentional discrimination. Instead, she wrote "the voters intended Section 31 . . . 'to achieve equality of public employment, education, and contracting opportunities' [citing *Griggs v. Duke Power Company*[26]] and to remove 'barriers [that] operate invidiously to discriminate on the basis

---

[22] 24 Cal.4th 537 (2000).
[23] Id. at 566.
[24] Id. at 560.
[25] Id. at 563-564.
[26] 401 U.S. 424, 431 (1971).

of racial or other impermissible classification.' [again citing *Griggs*[27]] ."[28] Justice Brown's reliance on the *Griggs* case may prove to be very important in future litigation over the meaning of section 31.

In *Griggs*, the U.S. Supreme Court adopted an "effects test" for employment discrimination to root out conduct that was neutral on its face but discriminatory in application. For many conservatives the *Griggs* case is identified as the first case where the Supreme Court moved away from "color-blindness" and toward support for affirmative action.[29] Here, Justice Brown is recognizing that courts need to look beyond intent to see whether the effects of neutral conduct are discriminatory. In the Hi-Voltage case, this led to the conclusion that white-owned businesses were being unfairly excluded based on the owner's race. But in other recruitment or outreach cases, color-consciousness may be necessary to avoid discriminatory effects. Or, a color-conscious recruitment plan may operate as an anti-discrimination device.

According to Justice Brown's majority opinion, the major problems with the City of San Jose's program was the exclusion of potential white male subcontractors from the group receiving notice of opportunities to bid, solely because of race, coupled with the compulsion to contact potential minority and female subcontractors. "The relevant constitutional consideration is that they [prime contractors] are compelled to contact MBE's/WBE's, which are thus accorded preferential treatment within the meaning of section 31."[30] By contrast, a program would be permissible if "'designed to ensure that all persons – regardless of race or gender – are informed of opportunities and treated with equal dignity and respect.'"[31]

The two principal opinions in *Hi-Voltage* (the majority opinion by Justice Brown,[32] and a concurring and dissenting opinion by Chief Justice George[33]) were both concerned with not over-stating the effects of the decision. Thus, Justice Brown stated that "[a]lthough we find the City's outreach option unconstitutional under section 31, we acknowledge that outreach may assume many forms, not all of which would be unlawful. . . . We express no opinion regarding the permissible parameters of such efforts."[34] Chief Justice George makes the same point, writing "although the arguments in favor of Proposition 209 identified some types of affirmative action programs at which the measure was directed, the argument did not purport to define with any degree of specificity the factors that should be considered in determining whether a program 'discriminates against' or 'grants preferential treatment to' an individual or group on the basis of the prohibited characteristics."

---

[27] Id. at 431.

[28] Hi-Voltage, *supra*, 24 Cal.4th at 549.

[29] See, e.g., Stephan and Abigal Thernstrom, America in Black and White: one nation, indivisible, New York, NY. Simon & Schuster (1997) (and sources cited therein).

[30] Hi-Voltage, *supra,* 24 Cal.4th at 562.

[31] Id. at 564 (quoting from Ballot Pamphlet rebuttal to argument against Prop. 209).

[32] Id. at 541.

[33] Id. at 576.

[34] Id. at 565.

To appreciate the degree to which Justice Brown and Chief Justice George leave open considerations of race that do not constitute "preferential treatment," the concurring opinion by Justice Mosk is noteworthy.[35] Justice Mosk concurred separately because, in his words "I wish to say something more."[36] That something more was that race should never be considered to any degree whatsoever, and Justice Mosk said it alone; no other Justice joined the opinion. As Justice Mosk read the initiative,

> "[n]either section 31's prohibition against the improper assigning of any burden or benefit in the operation of public employment, public education, or public contracting, nor its command of equal treatment therein, is limited solely to ends. Rather, both extend to means as well. Thus, one may not assign any burden or benefit improperly in an attempt to assign some other burden or benefit properly. Similarly, one may not afford treatment that in any respect is unequal in an attempt to afford treatment that in some other respect is equal. For section 31 at least, the end does not justify the means. Rather, means and end must each justify itself in light of section 31's prohibition and command.[37]

In other words, Justice Mosk alone would not permit the use of race or ethnicity even within a plan designed to produce a non-discriminatory result. He rejects the view expressed by Justice Blackmun in the *Bakke* case that "[i]n order to get beyond racism we must first take account of race."[38]

In limiting the scope of their opinions, and leaving room for "affirmative action" programs that take account of race but do not constitute "preferential treatment," both the majority opinion by Justice Brown and the concurring and dissenting opinion by Chief Justice George cited an example of an affirmative action program that did take account of race but did not constitute preferential treatment based on race. They pointed to the City of Los Angeles plan that the California Supreme Court had previously upheld in Domar Electric, Inc. v. City of Los Angeles.[39] The Los Angeles plan required contract bidders to establish that they had provided notice of opportunities to bid on subcontracts to MBE's, WBE's, and "other business enterprises" ("OBE's").[40] The court concluded that the Los Angeles plan did not constitute preferential treatment based on race or sex since it required notice to OBEs as well as MBE's and WBE's. That is, an outreach plan could target women and minorities based on sex, race or

---

[35] Id. at 586.

[36] Id. at 570.

[37] Id. at 571.

[38] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

[39] 9 Cal.4th 161 (1995).

[40] The plan provided, "[i]t is the policy of the City of Los Angeles to provide Minority Business Enterprises (MBEs), Women Business Enterprises (WBEs) *and all other business enterprises* an equal opportunity to participate in the performance of all city contracts. Bidders and proposers shall assist the city in implementing this policy by taking all reasonable steps to ensure that *all available business enterprises*, including local MBEs and WBEs, have an equal opportunity to compete for and participate in city contracts." Id. at 166.

ethnicity, as long as it also targeted other groups on a basis other than sex, race or ethnicity. As the court explained:

> "[T]he outreach program here poses none of the particular evils identified by Domar. The program does not require bidders to contract with any particular subcontractor enterprise, nor does it compel them to set aside any percentage of a contract award to MBE's or WBE's in order to qualify for a municipal contract. And even though the Board's outreach program provides an estimate that a participation level of 1 percent by MBE's and WBE's may be anticipated by the exercise of good faith efforts, a bidder gets no advantage or disadvantage from meeting or not meeting the specified participation level. Thus, the program provides no incentive to a bidder to use MBE's or WBE's if they are inferior in cost or ability, and the market for public contracts among subcontractors remains a level playing field. . . .
>
> As the United States Court of Appeals for the Ninth Circuit recognized, perhaps the most important goal of competitive bidding is to protect against 'insufficient competition to assure that the government gets the most work for the least money.' (citation omitted). Mandatory set-asides and bid preferences work against this goal by narrowing the range of acceptable bidders solely on the basis of their particular class. In stark contrast, requiring prime contractors to reach out to all types of subcontracting enterprises broadens the pool of participants in the bid process, thereby guarding against the possibility of insufficient competition."[41]

Thus, under the reasoning of the Domar Electric decision, an outreach program which considers minority race and/or ethnicity, among other factors, and which is designed so that it does not reach fewer non-minority applicants than would otherwise be recruited, is permissible.

Does the Domar Electric case, which preceded the adoption of section 31, tell us anything about how to interpret section 31? Yes. Both Justice Brown and Chief Justice George cite *Domar Electric* as an example of a permissible affirmative action outreach program. Chief Justice George discussed the relationship between Lungren v. Superior Court, the pre-election decision upholding the Attorney General's ballot description of Proposition 209, and *Domar Electric*. He explained that the correctness of the *Lungren* decision's statement that "affirmative action" is broader than "preferential treatment," and its statement that outreach programs are outside the scope of section 31, is demonstrated by the fact that the Los Angeles "race and sex plus other" plan was upheld in the Domar Electric case.[42]

IV. The Anti-Discrimination Justification for Affirmative Action Outreach Programs.

It's one thing to conclude that under section 31 California state entities may use race and/or ethnicity as factors in outreach programs, and another to conclude that they should. This

---

[41] Id. at 177.

[42] Hi-Voltage, supra, at 594 (concurring opinion of George, C.J.).

section addresses one justification for such policies -- the need to counter structural discrimination against certain minority groups with affirmative anti-discrimination efforts.

As noted *supra*, anti-discrimination efforts may also be described as a form of affirmative action.[43] If an anti-discrimination program operates without "preferential treatment" or "discrimination" it is the kind of affirmative action program that section 31 was intended to retain. Justice Brown's reliance on *Griggs* in her opinion in *Hi-Voltage* supports the position that "discrimination" under section 31 includes unintentional as well as intentional discrimination, and all discrimination is improper under section 31. Thus, if state entities, even without intent, are discriminating on the basis of race and/or ethnicity in their current outreach efforts, they are obligated under section 31 to undertake affirmative anti-discrimination efforts to correct the discriminatory effects of their policies.

As widely reported, state and local government in California are not recruiting or otherwise attracting employees and contracts from anywhere near the number of racial and ethnic minority group members that we should expect. This is not necessarily the result of intentional discrimination on the part of government officials. From what we know about the nature of discrimination there is every reason to believe that unintentional discrimination and structural racism play a substantial role in these disparities. [44] But unintentional discrimination is nonetheless discrimination, and requires a remedy under section 31.

Scientists, courts, and legal scholars are increasingly aware that unintentional racial discrimination permeates American society. In legal scholarship, the ground breaking work of Charles Lawrence in the 1980's demonstrated that the unconscious plays a substantial role in why white Americans discriminate against members of racial and ethnic minorities.[45] In my own work on the subject, building on Lawrence's, I relied on the social psychology of white racism to argue that employment discrimination should be viewed as a form of negligence.[46] Linda Krieger took these concepts to a new level in revealing how the science of cognitive bias demonstrates that it is nearly impossible for a white-dominated society not to discriminate against racial and ethnic minority group members.[47] The scientific evidence that most white Americans have unintended deep seated biased views of African Americans is as unassailable today as Darwinian evolution (and perhaps nonetheless equally controversial).

---

[43] See David B. Oppenheimer, Distinguishing Five Models of Affirmative Action, 4 Berkeley Women's Law Journal 42 (1989); Understanding Affirmative Action, 23 Hastings Constitutional Law Quarterly 921 (1996).

[44] See generally, Michael Brown et al, Whitewashing Race: The Myth of a Color-Blind Society (University of California Press 2003) of which I am one of the seven co-authors.

[45] Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987).

[46] David B. Oppenheimer, Negligent Discrimination, 141 Univ. Of Penn. L. Rev. 899 (1993).

[47] Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161 (1995).

To explore what white bias and structural racism tell us about potential state employees, I suggest we explore the life of a fictional, but demographically typical, African American recent high school graduate, trying to decide between entering college or seeking entry-level employment. What do we know about the life experience of any recent high school graduate in California thinking (or not) about applying to college? First, we know that social class plays a substantial role in how well prepared he or she is for college, and in how well informed he or she is about college opportunities and the application process. Family wealth, family income, parents' educational achievement, high school attended, and neighborhood all act as strong predictors of preparation and information. And, since there is a strong correlation between all five of these factors and race/ethnicity, race and ethnicity also act as strong predictors of preparation and information. The whiter the school and neighborhood, the more likely they are populated by well informed and well prepared students who have more family wealth, more family income, and more parental education.[48]

But class alone cannot fully explain the disadvantages experienced by our seventeen year old African American high school junior. The structure of American racism plays a profound additional role, beyond the disadvantages of low wealth, income and education.[49]

In the case of our African American recent high school graduate, it is likely that his or her (hereafter his) African American parents earn substantially less than similarly educated whites.[50] They are less likely to be hired or promoted than similarly qualified whites, and earn less even if they do hold similar jobs.[51] Even correcting for income, they have far less wealth than whites of similar income, in significant part because whites have typically been granted or inherited the wealth-building advantages of home ownership through government subsidized loans that were restricted to whites until the 1970's, and are still disproportionately granted to whites.[52] If they were able to buy a home, it was probably in a minority neighborhood, where home values rise less quickly than in white neighborhoods, yet they were more likely to pay a higher ("sub-

---

[48] See generally, Jonathan Kozol, Savage Inequalities (1992).

[49] See generally, Michael Brown et al, Whitewashing Race: The Myth of a Color-Blind Society (University of California Press 2003) of which I am one of the seven co-authors.

[50] Among high school graduates, African Americans earn 78 cents for every dollar earned by white Americans. Among college graduates, African Americans earn 84 cents for every dollar earned by white Americans. Even among 25-34 year old college graduates, who have lived their entire lives under the protection of the civil rights laws, the earnings gap is still 15 cents on every dollar. Compare http://pubdb3.census.gov/macro/032006/perinc/new04_003.htm (White earnings) with http://pubdb3.census.gov/macro/032006/perinc/new04_006.htm (Black earnings). (last accessed October 8, 2006).

[51] See, e.g., Margery A. Turner et al, Urban Institute Report 91-9, Opportunities Denied, Opportunities Diminished; Racial Discrimination in Hiring (1991); Jenny Bussey & John Trasvina, Racial Preferences: The Treatment of White and African American Job Applicants by Temporary Employment Agencies in California, Discrimination Research Center (2003).

[52] Douglas S. Massey & Nancy A. Denton, American Apartheid (1993).

prime") interest rate than whites with similar income and credit ratings.[53] They were more likely to need a car to get to and from that home, because subsidized public transportation is disproportionately provided to white neighborhoods,[54] even though the need is greater in minority neighborhoods, where fewer people can afford to own cars. One reason car ownership is out of reach for more African Americans than whites is that car dealers charge whites less than blacks for identical cars,[55] and then charge blacks with the same credit ratings as whites higher interest rates.[56]

One reason that public transit is so much better in white neighborhoods is that minority neighborhoods have less political influence. This also means there is less attention paid to garbage collection, street sweeping, road and sign repair, street lights, fire fighting, water and sewer systems, and other services that support a neighborhood. Why? Partly because the Republican Party has written off the black vote, and often works to suppress it.[57] But it's also because there are fewer black voters per capita because so many black men (currently one in four) have been disenfranchised by our criminal justice system.[58] Why do so many African Americans have criminal records? In part, because African Americans as compared to similarly situated whites are more likely to be: stopped by the police; searched when stopped; arrested; booked on felony charges; refused "OR" release; refused a low bail; refused deferral; charged with a felony; tried, convicted; denied probation; denied an alternative sentence; sentenced to

---

[53] See Debbie Gruenstein Bocian et al, Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages, Center for Responsible Lending (2006).

[54] See, e.g., Juliet Ellis, End Funding Discrimination in Public Transit, San Francisco Chronicle, Dec. 1, 2005; Guillermo Mayer & Richard A. Marcantonio, Bay Area Transit – Separate and Unequal (2005) http://urbanhabitat.org/node/313 (Last accessed October 10, 2006); cf., Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority, 263 F.3d 1041 (9th Cir. 2001), cert. den. 535 U.S. 951 (2002) (affirming special master's orders in consent decree, in case claiming racial and ethnic discrimination in Los Angeles public transit system).

[55] Ian Ayers, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harvard Law Review 817 (1991) (white men offered cars at $818 over dealer cost while black men asked for $1,534 over dealer cost and black women asked for $2,169 over dealer cost; Ayers estimates that blacks pay an extra $150,000,000 annually for new cars because of race-based price discrimination.)

[56] Mark A. Cohen, Preliminary Report on the Racial Impact of FMCC's Finance Charge Markup Policy (2004), http://www.nclc.org/initiatives/cocounseling/FMCC_Cohen.pdf (Last accessed October 10, 2006); Review of Nissan Car Loans Finds that Blacks Pay More (2001) http://www.racematters.org/blackspaymorefornissans.htm (Last accessed October 8, 2006).

[57] See, The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today (People for the American Way - NAACP 2004), http://www.pfaw.org/pfaw/general/default.aspx?oid=16367 (Last accessed October 8, 2006); cf. Spencer Overton, Stealing Democracy: The New Politics of Voter Suppression (2006).

[58] Jeff Manza & Christopher Uggen, Locked Out: Felon Disenfranchisement and American Democracy (2006).

prison; and denied parole. That is, at every step of the criminal justice system African Americans are treated less well than similarly situated white Americans.[59] Our African American recent high school graduate has probably had more encounters with the police, and more serious encounters, than a seventeen year old white American high school junior who had engaged in the same exact conduct.

What has his experience been at school? He has probably been disciplined more than white students who had engaged in the same conduct.[60] His school probably has far fewer resources than schools serving white neighborhoods, including textbooks, classroom space, science labs, language labs, library resources, academic counseling, pre-college counseling, college preparatory classes, advanced placement classes, food service facilities, and athletic facilities.[61] He probably received little or no meaningful pre-college counseling, and thus didn't know which classes he needed to take to qualify for UC or CSU, nor how to prepare for the SAT. His teachers were far less likely to have teaching experience or even permanent teaching credentials. They were likely to have expected less of him academically than they did of otherwise similarly situated white students.[62] And teacher expectations tend to be strong predictors of student performance.[63]

If he had looked for a summer or part-time job, he probably encountered substantial racial discrimination. Employers are less likely to offer him a job than similarly or even less qualified white applicants.[64] In one recent study employers actually preferred white ex-cons over equally qualified black applicants with no criminal record.[65] If he was offered a job, the pay was probably lower and the job responsibilities less desirable than that offered to white students of

---

[59] See Whitewashing Race, *supra*, at 132-160.

[60] Russell J. Skiba et al, The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment (2000), http://www.indiana.edu/~safeschl/cod.pdf (Last accessed October 8, 2006).

[61] Jonathan Kozol, Savage Inequalities, *supra*; Goodwin Liu, Seattle and Louisville, 95 Cal. L. Rev. 277 (2007); Notice of Proposed Settlement, Williams v. State of California, San Francisco Superior Court 312236 (May 17, 2000) http://www.aclu-sc.org/attach/w/williams_notice_settlement.pdf (Last accessed October 8, 2006).

[62] See, e.g., R. F. Ferguson, Teachers' Perceptions and Expectations and The Back-White Test Score Gap. In C. Jencks and M. Phillips (Eds.),The black-white test score gap(pp. 273-317). Washington, DC: Brookings Institution (1998).

[63] See, e.g., Claude M. Steele & Joshua Aronson, Stereotype Threat and The Intellectual Test Performance of African-Americans, Journal of Personality and Social Psychology, 69, 797-811 (1995).

[64] See, e.g., Margery A. Turner et al, Urban Institute Report 91-9, Opportunities Denied, Opportunities Diminished; Racial Discrimination in Hiring, *supra*.

[65] Devah Pager & Bruce Western, Race at Work: Realities of Race and Criminal Record in the NYC Job Market (2005), http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf (Last accessed October 8, 2006).

the same age, experience and qualifications.[66]

If all of this hasn't left our recent grad feeling like an outsider in his own country, he merely needs to go shopping in any local mall or downtown business district. It's likely that as he enters most stores he'll be regarded as a likely potential shop-lifter, followed and/or watched by store personnel. If he stands near a white person on an elevator or at a check-out counter, he's likely to notice him or her clutching his wallet or her purse, probably unconsciously. If he walks down a quiet street, he'll probably have the experience of white people crossing the street to avoid getting too close to him.

While our African American recent high school graduate is fictional, the data I rely on is empirical. But sometimes an anecdote speaks volumes in illustrating the social meaning of data. A few years ago the school board in the largely-white city of Riverside California, home to one of the University of California's campuses, decided to name a new high school after Martin Luther King Jr. The decision sparked a major controversy among white residents, who protested the decision. They explained to the school board that they meant no disrespect to Dr. King, whom they acknowledged was a great American, but they were concerned their children would have a harder time getting into college if they attended a high school named after Dr. King, because college officials would assume they were black.[67]

Each of the disadvantages suffered by our fictional recent grad are interrelated, and cumulative. White Americans disproportionately benefit from government help with housing and transportation, allowing them to save and invest more, even as they are paid more and charged less, and their political influence grows. The effect is like that of compound interest, in which white racial privilege is accumulated exponentially. By contrast, African Americans are disproportionately penalized by the withholding of government assistance, even as they also suffer from systemic bias. With fewer opportunities to earn, save and invest, combined with higher prices for lower quality goods and services, African Americans bear the cost of accumulative disinvestment.[68]

One way to think about the structure of American racism is that it acts as a vast tax and subsidy system.[69] On the tax side, African Americans are assessed a race tax, an extra charge for being black, that requires that they: pay more for lower quality housing that will appreciate at a

---

[66] See, e.g., Margery A. Turner et al, Urban Institute Report 91-9, Opportunities Denied, Opportunities Diminished; Racial Discrimination in Hiring, *supra*.

[67] See Don Terry, Mostly White City Honors Dr. King, Amid Dissent, New York Times Jan. 7, 1998.

[68] This is the central theme, and insight, of Whitewashing Race.

[69] For more on the idea of racism as a form of taxation, see Randall Kennedy, Race, Crime and the Law 159 (1997); Robert S. Chang, Critical Race Studies, Closing Essay: Developing A Collective Memory To Imagine A Better Future, 49 U.C.L.A. L. Rev. 1601, 1609 (2002); Kim Forde-Mazrui, Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations, 92 Cal. L. Rev. 683, 744 (2004).

slower rate; pay more for home and car loans; pay more for goods and services; receive fewer government services, including public transit, garbage collection, street sweeping, and – most importantly – sub-standard education; and be treated with the suspicion that they are dishonest, unintelligent, and potentially violent. The race tax paid by African Americans permits a subsidy payment to white Americans, who, by comparison: pay less for higher quality housing that will appreciate at a faster rate; pay less for home and car loans; pay less for goods and services; receive greater government services, including better (though perhaps still woefully inadequate) education; and are treated without the expectation that their race requires that they be treated with suspicion.

Once we recognize the accuracy of this description of white privilege and black disadvantage, it's hard not to see it as a form of "preferential treatment" for whites, based on race. It should be self-evident that government recruiting that ignores race cannot succeed in recruiting a racially diverse applicant pool. To use race and ethnicity as factors, among other factors, in a recruiting program designed to recruit a broadly diverse applicant pool, is an affirmative anti-discrimination policy. It does not give "a priority or advantage to one person over others;" it does the reverse; it is one step government entities can take to help reduce the unintended discrimination against minorities that permeates California and American society. It fits well within the limitations of section 31 set forth by Justice Brown in Hi-Voltage, "'to ensure that all persons – regardless of race or gender – are informed of opportunities and treated with equal dignity and respect.'"[70] In the absence of such a policy, California government entities searching for employees or contractors cannot hope to recruit as successfully among minority group members as they does among whites.

[70] Hi-Voltage, supra, at 564 (opinion of Brown, J.).