Remedying Unconscious Discrimination: *Chin v. Runnels* and Alternatives to the Intent Doctrine

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I. Introduction

The Fourteenth Amendment to the United States Constitution says, "No State shall make or enforce any law which [denies] to any person within its jurisdiction the equal protection of the laws."[1] When a law is clearly aimed at disadvantaging one distinct group, it is relatively easy for courts to find a violation of the Equal Protection guarantee.[2] However, when the law is facially neutral but has a discriminatory effect on a particular group, current law requires those challenging the law to "prove a racially discriminatory purpose on the part of those responsible for the law's enactment or administration."[3] This virtually insurmountable hurdle for plaintiffs[4] has been widely criticized because it fails to recognize that racism has gone "underground" in American society.[5] Recently, unconscious racism was clearly on display in *Chin v. Runnels*,[6] where a Chinese American unsuccessfully challenged San Francisco's subjective process of selecting grand jury forepersons.[7] This essay begins with a brief introduction to the United States

1. U.S. CONST. amend. XIV, § 1.
2. *See*, *e.g.*, Palmore v. Sidoti, 466 U.S. 429, 433-34 (1984) (holding Florida court's decision to award custody of child to father solely because child's white mother married an African American man violated Equal Protection Clause); Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (holding Virginia statute criminalizing marriage between whites and nonwhites violated Equal Protection Clause because it clearly was "designed to maintain White Supremacy").
3. Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318 (1987).
4. *See id.* at 319 (noting critics' contention that the intent doctrine "places a very heavy, and often impossible, burden of persuasion on the wrong side of the dispute").
5. *See* Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 MICH. J. L. REFORM 247, 267-69 (noting "the government official in present day Equal Protection cases is unlikely to be of the old fashioned George Wallace variety" but instead is likely to think of him or herself as non-racist while simultaneously "acting upon unconscious negative feelings" about other races).
6. 343 F. Supp. 2d 891 (N.D. Cal. 2004).
7. *Chin*, 343 F. Supp. 2d at 892.

Supreme Court's intent doctrine, and then discusses how unconscious discrimination originates and operates and thus why the intent doctrine fails to adequately remedy it. The *Chin* case will be discussed next, followed by a survey of alternatives to the intent standard proposed in the legal literature, with an application of each standard to *Chin*'s facts. The goal of this essay is to provide a greater understanding of why the intent doctrine must abandoned and what alternative standard would best replace it.

II. THE INTENT DOCTRINE

In 1976, the United States Supreme Court announced the intent doctrine in *Washington v. Davis*.[8] African Americans who failed the civil service examination required for police officer training in the District of Columbia challenged the test[9] on the ground that it "ha[d] a highly discriminatory impact in screening out black candidates."[10] While acknowledging that disproportionate impact may be an indication of discriminatory purpose, the Court nonetheless held that such impact "[s]tanding alone . . . does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny."[11] Consequently, because the test was neither created nor administered with the intent to discriminate against African American applicants,[12] the test did not violate the equal protection guarantee of the Fifth Amendment's Due Process Clause.[13] However, Justice John Paul Stevens' concurring opinion held out hope for a more realistic standard. Observing "[i]t is unrealistic . . . to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker," Justice Stevens said that the actual effect of the law is often sufficient to prove intent because "the actor is presumed to have

8. 426 U.S. 229.
9. *Id.* at 232-33.
10. *Id.* at 235.
11. *Id.* at 242.
12. *Id.* at 246.
13. *See id.* at 239 ("[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups."); *id.* at 248 ("[I]t was error to direct summary judgment for respondents based on the Fifth Amendment.").

intended the natural consequences of his deeds."[14] Thus, the government actor's awareness of the discriminatory effect his or her decision will have on a particular group is sufficient to show discriminatory intent.

Any hope that the Court would adopt this effects-based standard was snuffed out three years later in *Personnel Administrator of Massachusetts v. Feeney*.[15] A female state employee challenged on equal protection grounds a state law giving an "absolute lifetime preference" to veterans in state civil service employment.[16] Because 98% of Massachusetts's veterans were male, the plaintiffs argued the law disproportionately impacted females seeking state employment.[17] The Court, explicitly addressing Justice Stevens' argument in *Davis*, observed "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences."[18] Instead, the Court adopted a formulation of intent requiring affirmative purpose to harm on the part of the decisionmaker. In the Court's words "the decisionmaker [must have] selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[19] Having survived for 25 years, this formulation of discriminatory purpose is now the hornbook definition of the intent doctrine.[20]

III. UNCONSCIOUS DISCRIMINATION

A. *Origins and Operation*

One of the primary criticisms leveled at the intent doctrine is its failure to recognize discrimination that occurs outside the decisionmaker's conscious mind.[21] A number of social

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14. *Id.* at 253 (Stevens, J., concurring).
15. 442 U.S. 256 (1979).
16. *Id.* at 259.
17. *Id.* at 270-71.
18. *Id.* at 279.
19. *Id.*.
20. *See*, *e.g.*, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.4 (5th ed. 1995) (quoting the same language from *Feeney* as note 19 *supra*).
21. *See* Lawrence, *supra* note 3 (asserting "requiring proof of conscious or intentional motivation [in equal protection cases] ignores much of what we understand about how the human mind works"); Godsil, *supra* note 5

science and legal scholars have documented the prevalence of unconscious racism in American society, particularly as manifested in stereotypes. For traditional Freudian analysts, stereotypes are merely a manifestation of an individual's own neuroses; when the individual fails to meet his or her own standards in suppressing an instinctive drive, he or she projects those same shortcomings onto other groups.[22] The more commonly accepted cognitive theory posits that stereotypes are a necessary method of categorization that enables humans to deal with the incredible variety of sensations they experience every day.[23] Stereotypes relating to race and gender are learned early in life from authority figures that define the social context in which the child lives.[24] These lessons are learned not from an "intellectual understanding" of the stereotypes but through emotional identification with the person expressing the beliefs.[25] As a result of this early childhood learning, stereotypes are internalized to the point where the individual acts on them unconsciously.[26]

The practical result of stereotyping is the creation of a mental image of the "typical" member of a particular category.[27] This mental prototype acts as a filter through which information about others is processed.[28] One of the consequences of this filtering is that members of the outgroup

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(observing the intent doctrine requires the plaintiff to "prove to the judge's satisfaction that the government official was motivated by the views of an old-fashioned bigot").

22. Lawrence, *supra* note 3, at 333-34.

23. *Id.* at 336-39; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187-88 (1995); R.A. Lenhardt, *Understanding The Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 826 (2004).

24. Lawrence, *supra* note 3, at 338; *see* Lenhardt, *supra* note 23, at 828 (reporting that "[b]y age three, many children have already learned to regard racial minorities as inferior to Whites. And studies suggest that we internalize negative attitudes and responses to racial minorities at an even earlier developmental stage").

25. Lawrence, *supra* note 3, at 338; Lenhardt, *supra* note 23, at 828.

26. Lawrence, *supra* note 3, at 338; *see* Lenhardt, *supra* note 23, at 828 (noting "[r]esponses to these categories become automatic and remain so into adulthood").

27. Krieger, *supra* note 23, at 1189-90.

28. *See id.* at 1190 (stating "categorical structures . . . bias what we see, how we interpret it, how we encode and store it in memory, and what we remember about it later"); Lenhardt, *supra* note 23, at 832 (observing that "schemas [or person prototypes] automatically encode, store, and retrieve social data and information 'in a manner that reflects the structure of the schema'").

are perceived as a homogeneous mass lacking internal diversity of characteristics.[29] For example, a white plant manager's reference to his Salvadoran client as "Mexican" shows "that he perceived Latinos as an undifferentiated group."[30] An individual's mental categories are often reinforced by social context.[31] For example, media portrayals of African Americans as either comedians, criminals, rappers or athletes perpetuates the stereotype that blacks are unfit for other occupations.[32] Furthermore, stereotypes may be so ingrained that they persist even in the face of contrary information, what cognitive psychologists call "illusory correlation."[33] In practical terms, this means that if an individual believes all Asian Americans are highly skilled at mathematics, he or she will continue to hold this belief even after encountering Asian American individuals who are not proficient at math.

These stereotypes are dangerous to society because they reinforce racial stigmatization.[34] Not only do stereotypes generalize common traits to a groups of individuals, they assign a positive or negative label to those groups that influence how others value them.[35] Thus, when confronted with a particular behavior by a member of that group, the individual views that behavior in light of the stereotype.[36] This leads the observer to conclude that the behavior empirically confirms his or her stereotyped belief about that group.[37] For example, one study showed that white children and adults "interpret[ed] ambiguously aggressive behaviors as more threatening and violent

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29. Krieger, *supra* note 23, at 1192.
30. *Id.*
31. *See* Lawrence, *supra* note 3, at 337 (stating that "when prejudiced judgments are made in a social context that accepts and encourages negative attitudes toward the outgroup [this] group judgment reinforces and helps maintain the individual judgment about the outgroup's lack of worth").
32. *Id.* at 343.
33. Krieger, *supra* note 23, at 1195.
34. *See* Lenhardt, *supra* note 23, at 831 (asserting that "[r]acial stigma and stereotypes, in some sense, play mutually reinforcing roles in the dehumanization and marginalization . . . of minority groups").
35. *Id.* at 827.
36. *See supra* note 28.
37. *See* Lenhardt, *supra* note 23, at 833 (noting that because "our experiences of individuals and various situations will always work to confirm our baseline beliefs and assumptions about racially stigmatized individuals . . . [s]tigmatizing behavior becomes cast not as racialized or stereotype-based, but as wholly rational, even empirically based").

when they [were] performed by a Black person than by a White person."[38] This "confirmation" of stereotypes leads to conduct that reinforces racial stigma without the actor being aware that he or she is acting in a racially discriminatory manner.[39] Accordingly, the danger of stereotypes to American society lies in their perpetuation of attitudes of racial inferiority through decisions that conform to these attitudes without the decisionmaker even realizing they are a factor in the decision.[40]

Unconscious mental constructs about race pose a difficult problem for the law because it is extremely difficult to identify them as the source of discriminatory effects.[41] The stereotyping of African Americans into service industry occupations provides a good example.[42] An individual who has internalized this stereotype believes that "blacks as a group are naturally inclined toward certain behavior."[43] As a result, he or she may select a white job applicant over an equally qualified black one merely because of his perception that the white candidate is "more articulate," more collegial," "more thoughtful," or "more charismatic."[44] More importantly for our discussion of *Chin*, studies have shown that stereotypes of Asian Americans manifest themselves in discriminatory ways. Asian Americans are widely perceived as being "passive," "unassertive," "indirect,"[45] "interpersonally weak," and "too quantitative and technical."[46] These

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38. *Id.* at 832.

39. *See* Godsil, *supra* note 5, at 275 (asserting that lawmakers who discriminate against blacks out of a conscious desire to pander to white voters are unconsciously expressing contempt toward blacks).

40. *See* Lenhardt, *supra* note 23, at 835 (observing that persistent stereotypes become cultural truths that "form an essential component of the stigma story that society develops to justify the status quo").

41. *See* Reshma M. Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 405 (proposing that "[t]he failure to endorse legal remediation of unconscious racism arises at least in part from the [Supreme] Court's skepticism about whether unconscious racism can actually be proved in a court of law").

42. *See* Lenhardt, *supra* note 23, at 832 (observing that experiences with minorities in the service industry may lead to an unconscious belief that minorities are best suited to that type of occupation).

43. Lawrence, *supra* note 3, at 343.

44. *Id.*

45. Fed. Glass Ceiling Comm'n, *Good for Business: Making Full Use of the Nation's Human Capital*, 104 (1995), *available at* http://www.dol.gov/asp/programs/history/reich/reports/ceiling.pdf.

perceptions have led to a general stereotype that Asian Americans are not "leadership material."[47] Consequently they are "seriously underrepresented" in management positions and in professional occupations such as law.[48]

B. Recognition by Courts

Although the United States Supreme Court has largely ignored unconscious racism in equal protection cases, some Justices have recognized it in their opinions. In his concurring opinion in *Batson v. Kentucky*,[49] Justice Thurgood Marshall agreed with the majority's ruling that racially-based peremptory challenges in juror selection violated the Fourteenth Amendment's Equal Protection Clause.[50] In addition to overt use of race as a juror criterion, Justice Marshall recognized that "[a] prosecutor's own . . . unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not come to his mind if a white juror had acted identically."[51] Furthermore, he stated, a "judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported."[52] Justice Sandra Day O'Connor made a similar observation in her dissenting opinion in *Georgia v. McCollum*.[53] Disagreeing with the Court's application of *Batson* to deny criminal defendants the right to exercise peremptory challenges based on race,[54] she recognized that "[i]t is by now clear that conscious and unconscious racism can affect the way white jurors

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46. Pat Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 38-40 (1994); *see* Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda & Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 46 (1996) ("In the United States, Asian professionals and Asian Americans of whatever ancestry are imputed with preternatural technical expertise and a near-genetically based knowledge of the intricacies of science and mathematics, as well as predilections to passivity and nonassertiveness.").

47. Fed. Glass Ceiling Comm'n, *supra* note 37, at 105; Chew, *supra* note 38, at 40.

48. Fed. Glass Ceiling Comm'n, *supra* note 37, at 106; Chew, *supra* note 38, at 40.

49. 476 U.S. 79 (1986).

50. *Batson*, 476 U.S. at 97-98.

51. *Id.* at 106 (Marshall, J., concurring).

52. *Id.*

53. 505 U.S. 42 (1992).

54. *McCollum*, 505 U.S. at 59.

perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."[55]

One of the best known lower court decisions involving unconscious racism was the United States District Court for the Eastern District of Missouri's decision in *United States v. Clary*.[56] Edward James Clary, an African American, challenged the federal law requiring a one hundred times harsher sentence for possession of crack cocaine than for possession of cocaine in powder form.[57] The district court made factual findings that, from 1988 to 1992, 92.6% of those convicted for possession of crack cocaine were African American while only 4.7% of those convicted were white.[58] The court concluded that this disparate impact on black defendants may have been the result of unconscious racism by federal prosecutors.[59] Congress was also likely motivated by "unconscious predisposition," said the court, because it failed to account for the "substantial and foreseeable disparate impact" the statute would have on African Americans.[60] In support of this finding, the court "cited several news articles [entered in] the *Congressional Record* which portrayed crack dealers as unemployed, gang-affiliated, gun-toting, young black males."[61] However, the district court's ruling was reversed by the United States Court of Appeals for the Eighth Circuit because Clary had failed to prove Congress acted with a discriminatory purpose in enacting the crack cocaine sentencing statute.[62] Nonetheless, the Eighth Circuit,[63]

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55. *Id.* at 68 (O'Connor, J., dissenting).
56. 846 F. Supp. 768 (E.D. Mo. 1994) [hereinafter Clary I].
57. *United States v. Clary*, 34 F.3d 709, 710 (8th Cir. 1994) [hereinafter Clary II].
58. *Clary I*, 846 F. Supp. at 786.
59. *Id.* at 791.
60. *Id.* at 782.
61. *Id.* at 783-84.
62. *See Clary II*, 34 F.3d at 713 (finding that "both the record before the district court and the district court's findings fall short of establishing that Congress acted with a discriminatory purpose in enacting the statute").
63. *See* Bush v. Commonwealth Edison Co., 990 F.2d 928, 931-32 (8th Cir. 1993) (observing "[i]t can be argued that [the employer's] failure to adhere to [its established disciplinary] rules opens the way to subjective determinations likely to reflect unconscious racial bias").

along with the Ninth,[64] has acknowledged the existence of unconscious racial discrimination in passing, showing that the idea is at least on the radar screens of some federal judges.

IV. *CHIN V. RUNNELS*

Perhaps even more so than *Clary*, the United States District Court for the Northern District of California's recent decision in *Chin v. Runnels*[65] presents persuasive evidence of unconscious racism at work. Mark Shew Fei Chin, a Chinese American man, was indicted by a San Francisco grand jury in 1996 for felony murder, attempted robbery and related firearm charges.[66] After his conviction, Chin challenged the indictment on the ground that "the exclusion of Chinese-Americans, Hispanic-Americans and Filipino-Americans from service as the grand jury foreperson in San Francisco over a 36-year period violated [his] right to equal protection under the Fourteenth Amendment."[67] During the period at issue, the grand jury foreperson was selected by the presiding judge in consultation with the jury commissioner and/or the district attorney serving as grand jury advisor.[68] In these discussions, which were held off the record, the participants typically looked for forepersons with "administrative abilities, leadership and people skills."[69] A "perfect example" of such a person was a foreperson who worked as an insurance claims examiner and "had a totally sunny disposition, [was] friendly [and was a] hardy handshake sort of guy."[70]

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64. *See* Gonzalez-Rivera v. INS, 22 F.3d 1441, 1450 (9th Cir. 1994) (observing that because "racial stereotypes often infect our decision-making processes only subconsciously . . . Border Patrol officers may use racial stereotypes as a proxy for illegal conduct without being subjectively aware of doing so"); EEOC v. Inland Marine Indus., 729 F.2d 1229, 1236 (9th Cir. 1984) (advising that "[a]lthough subjective employment criteria are not illegal per se , courts should examine such criteria very carefully to make certain that they are not vehicles for silent discrimination") (citations omitted); *cf.* Lynn v. Regents of Univ. of Cal., 656 F.2d 1337, 1343 & n.5 (9th Cir. 1981) (noting that a university's "disdain for [the study of] women's issues" evidences a subtle discriminatory attitude toward women that is no "less significant or less unlawful" than overt discrimination based on sex).

65. 343 F. Supp. 2d 891 (N.D. Cal. 2004).

66. *Chin*, 343 F. Supp. 2d at 892.

67. *Id.* at 893.

68. *Id.* at 894.

69. *Id.* at 896.

70. *Id.* at 897.

The evidence presented at Chin's evidentiary hearing clearly indicated a racial imbalance among grand jury forepersons. At the hearing Chin showed that no person of Chinese, Hispanic or Filipino descent had served as grand jury foreperson in San Francisco between 1960 and 1996.[71] The grand jury pools during this period consisted of 13.4% Chinese Americans, 6.9% Hispanic Americans and 4% Filipino Americans.[72] Expert testimony established that the odds of a random selection system not choosing one of those persons as foreperson was .0003%.[73] The grand jury that indicted Chin consisted of seven whites, seven Asian Americans, two Latino Americans and one African American; the foreperson was a white architectural consultant.[74]

Additionally there was evidence that during the later years of the period at issue race was taken into consideration by the presiding judge in selecting grand jury forepersons. In 1992, *People v. Ramirez* challenged the exclusion of women and African Americans from the grand jury foreperson position.[75] The percentage of African American forepersons over the next four years was 19% higher than before *Ramirez*, while the percentage of women forepersons grew 36% during that same period.[76] Chin's experts testified that such an increase could only be the product of conscious decisions by the presiding judge.[77] Likewise, Chin produced evidence that of the three grand juries selected immediately after his petition was filed "two had forepersons with Chinese names and one had a foreperson with a Hispanic name."[78] While the district court suggested this evidence indicated unconscious discrimination against the three underrepresented

71. *Chin*, 343 F. Supp. 2d at 895.
72. *Id.*
73. *Id.*
74. *Id.* at 894.
75. *Id.* at 895.
76. *Id.* at 895-96.
77. *Id.* at 896.
78. *Id.*

groups, the court was unable to grant Chin relief due to the narrow standard of review imposed on habeas proceedings.[79]

V. APPLICATION OF ALTERNATIVE STANDARDS TO *CHIN*

Legal scholars have proposed several alternatives to the intent doctrine. In his seminal work on the subject, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*,[80] Charles R. Lawrence III recognized that although American racism is today largely an unconscious phenomenon, the acts that manifest it often have a shared meaning in our culture.[81] In other words, though the act is not racist on its face, the cultural context in which it occurs makes it clear to the community that it was motivated by racist intent. As an example, Professor Lawrence cites the wall built between white and black neighborhoods in Memphis that was the basis of the equal protection challenge in *City of Memphis v. Greene*.[82] While the city council in that case was apparently motivated by a conscious concern over traffic congestion in the neighborhoods, it was apparent to all in Memphis that the wall was intended to segregate the black neighborhood from the white one.[83] Thus, though the wall was facially neutral regarding race, in the particular cultural context of Memphis, it was clear that the wall served a racial purpose.[84]

To remedy this unconscious racism, Professor Lawrence proposed a "cultural meaning" test. Under this test a court would first determine whether "a significant portion of the population

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79. *See Chin*, 343 F. Supp. 2d at 905 (holding that "by the narrow standard of review applicable to this habeas setting" the court is unable to overturn the state court's decision but observing that the "statistical evidence of the pattern of exclusion [among grand jury forepersons] raises a strong inference that the selection process may not have been race-neutral").

80. 39 STAN. L. REV. 317 (1987).

81. Lawrence, *supra* note 80, at 356.

82. 451 U.S. 100 (1981).

83. Lawrence, *supra* note 80, at 357-58.

84. *See id.* (predicting that if the race of the residents whose traffic was excluded by the wall was left out of the story, "few, if any, [Memphis citizens] would not guess that they were black").

thinks of the governmental action in racial terms."[85] If so, the court would then presume that the decisionmaker was motivated by "unconscious racial attitudes" and apply heightened scrutiny.[86] However, the plaintiff in such a case would not have to prove the causal connection between the attitude and the challenged act.[87] Instead he or she need only show that most people would interpret the act as having racist connotations.[88]

Unfortunately Professor Lawrence does not define the breadth of the social context the court must look to in determining "cultural meaning."[89] The scope of the context could make a crucial difference in a case like *Chin*. Following the scope implicit in Professor Lawrence's Memphis wall example,[90] if the court looks just at the cultural context of San Francisco, a very multicultural city, it would be easy to find the exclusion of Chinese Americans from the grand jury foreperson as evidence of unconscious racial intent. On the other hand, looking to American society as a whole greatly reduces the chance of showing unconscious racism. It is highly probable that a majority of Americans would not view this action as racially motivated and could easily explain away Chin's statistical showing as merely an anomalous result of a valid decisionmaking process. Thus the "cultural meaning" test fails as an agent of social change because it is too closely tied to the existing racial attitudes the test is intended to eliminate.

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85. *Id.* at 356.

86. *Id.*

87. *See id.* at 361 (recognizing difference between determining "a causal connection between two independently specifiable social phenomena [and locating] a particular phenomenon within a category of phenomena" as is done under the cultural meaning test).

88. *See id.* at 362 (asserting that under cultural meaning test social science evidence will not be used to prove a causal relationship but to show "that a particular practice [has] a racially insulting meaning").

89. Perhaps in recognition of this ambiguity, Professor Godsil argues that courts should determine how "a reasonable member of the allegedly affected community would view the action." Godsil, *supra* note 5, at 285.

90. *See id.* at 357-58 (predicting the reaction of *Memphis citizens* to the wall).

A standard recently proposed by Professor R.A. Lenhardt builds upon the work of Professor Lawrence but focuses instead on the racial stigma attached to the particular act.[91] This shift from the perpetrator's intent to the victim's harm would require a court to fist look at whether the challenged action is similar to other past practices with a clear racially discriminatory intent.[92] The court would then assess, through both statistical evidence and expert and anecdotal testimony, the act's effect on the group challenging it.[93] Finally the court would consider the likely future effects of the act, particularly whether it will lead to "increasing racial disadvantage in the long-run."[94] From this analysis a court could determine whether the act "conveyed or carried a risk of conveying negative stigmatic meaning," and, if so, apply strict scrutiny review.[95]

The first criticism of this "stigmatic harm" test is that it appears to be merely an attempt to import the disparate impact doctrine from Title VII employment discrimination cases into the equal protection context, an effort explicitly rejected in *Washington v. Davis*.[96] Moreover, in the intervening thirty years, the Supreme Court has grown less favorable toward disparate impact claims under Title VII;[97] it is thus unlikely the current Court would take a position opposite that of the more liberal *Davis* Court. These jurisprudential difficulties aside, the main problem inherent in the "stigmatic harm" test is the showing of actual harm to the affected class. Though Chin produced substantial statistical evidence, he presented little, if any, evidence of the harm the subjective foreperson selection process had on Chinese Americans (other than, of course, his

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91. *See* Lenhardt, *supra* note 23, at 887-90 (acknowledging agreement with Professor Lawrence's focus on "unconscious cognitive processes" but "adopt[ing] a focus on stigmatic harm instead of the discriminatory motive emphasized by . . . Lawrence").

92. *Id.* at 891-92.

93. *Id.* at 892-94.

94. *Id.* at 894.

95. *Id.* at 895.

96. *See Davis*, 426 U.S. at 238 (concluding "the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it").

97. *See* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 3.35 (2001) (noting the Supreme Court's "hostility to the neutral practice case" in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and concluding that the Civil Rights Act of 1991 did nothing to stem that antagonism).

own indictment). Moreover, the empathy of the court to other governmental decisionmakers could discourage courts from finding racist motives by their colleagues in the political branches.[98] As a result, a court would be more likely to accept the government actor's proffered reason for the act as justifying any adverse impact it may have on minorities, much like the business necessity defense now does in Title VII cases.[99] It is certainly plausible to predict that under the circumstances in *Chin* a court would find San Francisco's interest in having grand jury forepersons with leadership and administrative skills would justify the adverse impact of the subjective selection criteria on Chinese Americans. Accordingly the "stigmatic harm" test falls prey not only to the reliance on existing racial attitudes that hampers Professor Lawrence's "cultural meaning" test, but also to the practical realities of proving actual harm to the affected class.

A standard drawn directly from the Supreme Court's own equal protection jurisprudence in the gender discrimination context may avoid these problems. In *United States v. Virginia*,[100] the Court based its invalidation of the Virginia Military Institute's male-only admission policy in part on its basis in stereotypes about the abilities of women.[101] After observing that under its precedent "state actors . . . may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females,"[102] the Court held Virginia failed to meet

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98. *See* Godsil, *supra* note 5, at 268 (noting that judicial empathy with government actors may makes judges "extremely reticent to conclude that a government actor . . . is a racist").

99. *See* Lewis & Nelson, *supra* note 97, § 3.35, at 190 (acknowledging possibility that the Supreme Court will adopt a definition of business necessity requiring only that "the challenged practice serves to some unspecified degree [the employer's] unspecified general business goals").

100. 518 U.S. 515 (1996).

101. *See Virginia*, 518 U.S. at 550 (citing VMI's own findings that "some women . . . would do well under [the] adversative model" of education as a strong reason against allowing VMI's desire to continue using that model to justify exclusion of females from the school).

102. *Id.* at 542 (internal quotations and citations omitted).

its burden of establishing an "exceedingly persuasive" justification for the admissions policy[103] because the policy was not substantially related to an important governmental objective.[104]

Because unconscious racism is largely a product of stereotypes about a particular minority's "roles and abilities,"[105] it is fitting to import the intermediate scrutiny standard from *U.S. v. Virginia* into the racial discrimination context. Just as in that case, these stereotypes prevent the decisionmaker from assessing the individual qualities of minority group members.[106] Thus, in any situation in which a subjective decision is potentially based on an unconscious racial stereotype, a court would require the decisionmaker to justify its practice by an "exceedingly persuasive" reason showing a substantial relation to important governmental objectives. Applying this standard to the facts in *Chin* would require the court to determine whether the asserted positive traits of leadership and administrative ability are so crucial to effectively leading a grand jury that they justify the exclusion of Chinese Americans, even those who may possess these desired traits, from the foreperson position.

This approach would provides a better mechanism for remedying unconscious racism than the all-or-nothing approach currently required under the intent doctrine[107] because it recognizes, and attempts to account for, the actual manifestation of unconscious stereotypes. Moreover, by automatically applying heightened scrutiny to decisions susceptible to those influences, it avoids the pitfalls inherent in the above two tests by not requiring the plaintiff to produce evidence of actual harm to the affected class nor requiring the court to determine the subjective perception of American society or a particular segment thereof. For these reasons, the automatic application of

103. *Id.* at 546.

104. *See id.* at 533 (setting out standard for reviewing gender-based classifications under Equal Protection doctrine).

105. *See supra* Part II.A (discussing role of stereotypes in selection of minorities for particular positions).

106 *Cf. Virginia*, 518 U.S. at 545-46 (concluding that "women's categorical exclusion [from VMI] in total disregard of their individual merit" did not advance the state's goal of producing "citizen-soldiers").

107 *See* Godsil, *supra* note 5, at 267 (observing that the intent doctrine is a "roadblock for plaintiffs" because it requires the plaintiff to prove "that the government official was motivated by the views of an old-fashioned bigot").

intermediate scrutiny to subjective decisionmaking processes susceptible to unconscious racial stereotypes should replace the intent doctrine as the standard for determining racial discrimination in violation of equal protection.