Can We Talk (With or Without Beer)? How Triggers for Unconscious Racism Strengthen the Importance of Dialogue

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CAN WE TALK (WITH OR WITHOUT BEER)?
HOW TRIGGERS FOR UNCONSCIOUS RACISM
STRENGTHEN THE IMPORTANCE OF DIALOGUE

by Adjoa Artis Aiyetoro*

This article is ultimately about healing the racial divide illustrated by the recent arrest of Henry Louis Gates. It expands on the scholarship of unconscious racism by exploring a trigger for unconscious racism that up to this point scholars have only alluded to: the language of race. It argues that society often censures an African descendant speaker who uses the language of race or racism. This censure occurs because many in American society have embraced the myth of a colorblind society. They believe that to assert otherwise and to question whether there are racial implications associated with a given action or decision is to call the actor a racist – a disparaging remark given society’s view that race discrimination is now illegal and someone who is engaging in racially motivated behavior is an evil doer. To support my thesis, two cases are examined: those of Lennox S. Hinds, past director of the National Conference of Black Lawyers, and Wendell L. Griffen, former Judge on the Arkansas Court of Appeals. These legal professionals were subjected to reprisals for suggesting that highly respected officials in the majority society engaged in behavior motivated by race. The article recommends that the dialogue on race become open and free flowing, ending what has become a taboo about speaking honestly about race. It therefore concurs with the position of the White House that instances of accusations of unconscious racism should become “teachable moments” and the subject matter of conversations in communities across the country. Finally, the United States has never gone through a reconciliation process. A part of that process is to have a national conversation on continuing racism. This article suggests that one way to have such a conversation on unconscious racism is to pass H.R. 40, the Reparations Study Bill, which requires investigation into whether American society continues to reflect the vestiges of slavery and Jim Crow and, if so, what remedies can be offered to repair those vestiges.

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1 Dan Lothian, CNN White House Correspondent (July 30, 2009)
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I wish I could say that racism and prejudice were only distant memories ... and that liberty and equality were just around the bend. I wish I could say that America has come to appreciate diversity and to see and accept similarity. But as I look around, I see not a nation of unity but of division --- Afro and white, indigenous and immigrant, rich and poor, educated and illiterate. ... But there is a price to be paid for division and isolation.²

I. INTRODUCTION

The extent of continuing racism in the treatment of African descendants frequently escapes recognition. The country’s public rejection of racism in the United States beginning with the Supreme Court’s denouncement of separate but equal in *Brown v. Board of Education of Topeka* has led some whites to examine their beliefs about African descendant and strive to not see “other;” however, it has driven much of what was identified as intentional discrimination underground, transmuting it into unconscious racism. Charles Lawrence’s brilliant article on unconscious racism has been followed by numerous scholarly articles and studies on unconscious racism as well as the scholarship on implicit race bias. This unconscious racism is often no less harmful to African descendants than intentional discrimination, yet all too often it is not remedied. The scholarship looks primarily at the race of the victim as the trigger for unconscious racism. However, there is some recognition that racially identifiable language can trigger unconscious racism. This article argues that the language combined with the race of the victim is a strong motivating force for unconscious racism. We see this particularly in instances when the African descendant speaker has some stature in the society and is accusing society’s leaders of racially biased treatment.

Recent examples of this are the treatment of Rev. Jeremiah Wright, Ph. D., for his forceful and sharply critical description of historic and current day anti-Black racism. The response to Kanyé West after he opined that President Bush didn’t like Black people as Kanyé West peered upon the tragedy of Katrina is yet

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3 The term “African descendant” is used throughout rather than “Black” or “African American.”
another example. And the recent arrest of Henry Louis Gates many suggest is yet another example. Unlike these examples of press and public discussion, this article looks at two case examples that illustrate how the race of the speaker and the language of race resulted in disciplinary charges being brought under the Rules of Professional Conduct and the Canons of Ethics. It argues that the ambiguity in some of the rules of conduct allow for unconscious racism to be the lens through which behavior is evaluated. It also argues that by seeking to punish African descendant lawyers and judges for speaking openly about racism they observe in governmental entities, it chills such speech and deprives the community of the views of some of its most respected members in times of social-political crisis. Further, it unfairly restricts the ability of the lawyer and judge to be part of an effort to identify, confirm and address systemic racism.

My interest in this topic was sparked years ago when I represented a lawyer and a judge who were accused of violating rules of professional conduct for speech sharply critical of the judiciary. In 1989, I was serving as co-chair of the Board of Directors of the National Conference of Black Lawyers (NCBL), along with Jeffrey Edison. We received a call from Chokwe Lumumba, a member of the NCBL and Chairman of the New Afrikan Peoples Organization (NAPO), who had recently relocated to Mississippi. He had applied to be admitted to the Mississippi Bar and had received a letter indicating that the Mississippi Bar’s Character and Fitness Committee had determined he was not fit to practice in the state because he believed in the “peaceful overthrow of the United States government.”

Attorney Edison and I went to Mississippi and represented Attorney Lumumba before the Mississippi Bar panel, along with Isaac Byrd, who served as local counsel. In 1991, he was admitted to the Mississippi Bar. As Lumumba practiced law in Mississippi, he aggressively confronted what he viewed as racism from judges in the treatment of his clients. He was held in contempt on two occasions followed by disciplinary bar charges brought against him for this same conduct. Jeffrey Edison and I once again went to Mississippi in 2002 to represent Mr. Lumumba on charges that he violated the professional rules of conduct by making statements to Judge Gordon at the end of a hearing in which the Judge denied his request, inter alia, for a new trial in a criminal case due to allegedly improper jury conduct. Attorney Lumumba asserted that his aggressiveness in the courtroom chronicled in the 2002 Formal Complaint was due to what he

9 The New Afrikan Peoples Organization (NAPO) and the Republic of New Afrika (RNA) embrace the view that the federal government should turn over five southern states to New Afrikans (African Americans). The states include Mississippi, Alabama, Louisiana, Florida and Georgia.

10 Opinion and Judgment, The Mississippi Bar v. Chokwe Lumumba, No. 99-208-1 (April 13, 2000)(received a public reprimand for conduct for which the circuit court judge held him in contempt); Mississippi Bar v. Lumumba, 912 So. 2d 871 (Miss. 2005) (suspending Lumumba from practice for, inter alia, statements made to circuit court judge for which he was held in contempt).

observed as racism on the part of the judge in the treatment of his clients.\textsuperscript{12} The charges also included a charge for making a statement to a reporter that was published in the Clarion-Ledger newspaper saying Judge Gordon has “the judicial temperament of a barbarian.”\textsuperscript{13} Although not explicitly raising a charge of racism in the 2002 case, he testified that he wanted to raise concerns about prejudicial portrayal of his client and other criminal defendants before jury panels.\textsuperscript{14}

In 1995, I was called by the Minneapolis NCBL chapter to assist them in supporting Judge LaJune Lange, an African descendant judge (now retired) in Minnesota’s Fourth Judicial District, Hennepin County, Minnesota. On May 30, 1995, Judge Lange held a press conference in her courtroom accusing the Chief Justice of the Minnesota Supreme Court, the Chief Judge of the Fourth Judicial District, and the Chief Judge of the Juvenile Division of cronymism and abuse of power. She also publicized her call for an investigation of the U.S. Attorney’s attempted use of a sealed juvenile file.\textsuperscript{15} Formal charges were filed against Judge Lange on March 20, 1996 by the Minnesota Board of Judicial Standards. Although she did not accuse the judges of “racism,” much was made of her sealing of the file of the minor child of Qubilah Shabazz (daughter of El Hajj Malik Shabazz -- Malcolm X-- and Betty Shabazz) in the formal statement of charges and her subsequent resistance to use of the file by the U.S. Attorney in his prosecution of Qubilah Shabazz.\textsuperscript{16} Judge Lange came to the Juvenile Division committed to addressing issues concerning youth of color, including the increasing number of youth of color being housed in the juvenile detention facilities.\textsuperscript{17} Arguing, inter

\textsuperscript{12} The Mississippi Bar Vs. Chokwe Lumumba, Cause No. 2002-B-1292, Formal Complaint, (August 9, 2002); see also, Transcript of the Proceedings at 2-3, Robert Thames, et. al. v. City of Jackson, No. 92-71-263 (Cir. Court, Dec. 6, 1999)(Lumumba accusing the judge of failing to do justice in an attempt to suppress the rights of black defendants and black plaintiffs);

\textsuperscript{13} The Mississippi Bar \textit{v.} Chokwe Lumumba, Cause No. 2002-B-1292, Formal Complaint, (August 9, 2002)

\textsuperscript{14} Transcript of Hearing before the Mississippi Supreme Court Complaint Tribunal at 188-190, Mississippi Bar \textit{v.} Chokwe Lumumba, No. 2002-1292 (April 22, 2003)(defendants wearing chains in the courtroom for no behavioral reason and negotiating their cases while jury panels observed)(According to the US Census Population, African descendants are approximately 40% of the population in Leake County, Mississippi. U.S. Census Population Estimate 2008, Leake County MS, Fact Sheet. According to Lumumba, at least 50% of the defendants in Leake County Courthouse are African descendant.)

\textsuperscript{15} In Re: Complaint Concerning the Honorable LaJune Lange, C4-96-596 at 2-3 (Minn. October 17, 1996) (Findings and Recommendations of the panel, dismissing the charges against Judge Lange) (incorporating the “Public Statement of Judge Lange distributed at the May 30, 1995 press conference).

\textsuperscript{16} Inquiry Concerning The Honorable LaJune Lange, #95-66, Before the Board of Judicial Standards (Formal Statement of Complaint at 1-4, March 20, 1996).

\textsuperscript{17} Corrected Memorandum in Support of Motion to Dismiss at 3(July 10, 1996); In Re: Complaint Concerning The Honorable LaJune Lange, C4-96-596 at 6 (Minn. October 17, 1996) (Findings and Recommendations of the panel, dismissing the
That the charges violated the First Amendment, we were successful in getting the charges dismissed, the panel holding that the Board of Judicial Standards had not met their burden of showing that Judge Lange had violated the rules with clear and convincing evidence. It declined to address the First Amendment argument.¹⁸

The thought kept occurring to me – does race have anything to do with the charges being brought against Attorney Lumumba and Judge Lange? Of course their conduct was not the usual practice of the bar – lashing out at judges rather than quietly (as if in secret) filing complaints against them for conduct found objectionable. Yet, their language in lashing out challenged not only the expectation that legal professionals present themselves with certain decorum—almost reverence—toward the judiciary. It also raised the spectrum of stereotype: the angry Black man and the sassy Black woman. As I pondered these cases and the question of “what does race have to do with it,” the case of Lennox Hinds came back into my consciousness—a case of the Executive Director of the NCBL accusing the judge in the Assata Shakur (aka Joanne Chesimard) trial of racial insensitivity. The statement was followed by bar charges being brought by the Middlesex County Ethics Committee. And then the case of Judge Wendell Griffen in Little Rock, Arkansas came to my attention. His outspokenness on the issue of racism in the actions of state actors in 2002 and the Bush administration in 2005 resulted in disciplinary charges being brought against him.

This article focuses on the question that was ultimately raised in my consideration of these cases: does the language of race combined with the race of the speaker trigger unconscious racism that leads to the charges being brought by disciplinary boards? This article examines this question by first providing some history of the ethical rules as it relates to the “respect for the judiciary.” Part III describes African descendant legal professionals’ unique relationship to the United States legal system, suggesting that respect for the judiciary in the face of racism may mean something different to African descendants than to white legal professionals. A discussion of unconscious racism and how it is triggered in Part IV adds the insights of this author that the language of race, the calling out of what appears to be racially based actions, triggers unconscious racism. The focus on the two examples of Lennox S. Hinds and Wendell Griffen takes place in Part V as I utilize the principles of unconscious racism to analyze the charges brought against them. The article suggests some non-litigation strategies to minimize the use of unconscious racism in the treatment of African descendants in Part VI.

II. HISTORY OF THE RULES OF ETHICS

¹⁸ In Re: Complaint Concerning The Honorable LaJune Lange, C4-96-596 at 31-32 (Minn. October 17, 1996) (Findings and Recommendations of the panel, dismissing the charges against Judge Lange)
A number of scholars have presented the history of the development of legal ethics in the United States. For purposes of this article, the rules that are of most concern are those used to discipline a lawyer or judge for language that raises questions about the racial fairness of judges or other public officials in the conduct of their business. These rules fall generally under the category of rules that require “respect for the court” either implicitly or explicitly. Of concern is the development of the protection of the administration of justice from criticism by those most likely to know of racial bias, resulting in charges that the conduct of both judges and lawyers who raise the public concern of racial bias in the conduct of a public official impugn the character of the administration of justice.

The ethical rules in the United States are organically connected to rules developed in England in the 15th century. The caveat to respect the court seemed at that time to be based on protecting the court from the aggressions of litigators generally. As the legal practice developed in the United States, the concern for respecting the court was incorporated in the early treatises providing guidelines for the conduct of lawyers. Alabama, the first state to codify ethical rules for lawyers, made this concern for respect for the courts the first duty of the lawyer. The Alabama code became the model for other states as well as the ABA.

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19 Carol Rice Andrews, Standards of Conduct for Lawyers: An 800-year Evolution, 57 SMU L. Rev. 1385 (2004); James E. Moliterno, Lawyer Creeds and Moral Seismography, 781 Wake Forest L. Rev. 831 (1997); Allison Marston, Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association, 49 Ala. L. Rev. 471 (1997); James M. Altman, Considering the A.B.A.’s 1908 Canons of Ethics, 71 Fordham L. Rev. 2395 (2003); see also, Walter Burgwyn Jones, Canons of Professional Ethics, Their Genesis and History, 7 Notre Dame L. Rev. 483 (1932); HENRY S. DRINKER, LEGAL ETHICS (5th ed. 1896); GEORGE SHARSWOOD, AN ESSAY: PROFESSIONAL ETHICS 61 (5th ed. 1896). Sharswood indicated that fidelity to the court meant to exhibit “outward respect in words and actions.” The text suggests that this fidelity and outward respect is a requirement of conduct when the lawyer is before the court. However, as in Hoffman’s resolution III, supra note 23, the respect seems to be due the office and not necessarily the person. Id. at 61-62.

20 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752 (2d ed. 1946)(Resolution III: “To all judges, when in court, I will ever be respectful: they are the Law’s vicegerents; and whatever may be their character and deportment, the individual should be lost in the majesty of the office.” Resolution IV: Should judges, while on the bench, forget that, as an officer of their court, I have rights, and treat me even with disrespect, I shall value myself too highly to deal with them in like manner. A firm and temperate remonstrance is all that I will ever allow myself.”) In Resolution VI, Hoffman addresses respect to “the various officers of the court.” Id. at 753. And, GEORGE SHARSWOOD, AN ESSAY: PROFESSIONAL ETHICS 61 (5th ed. 1896). Sharswood indicated that fidelity to the court meant to exhibit “outward respect in words and actions.” The text suggests that this fidelity and outward respect is a requirement of conduct when the lawyer is before the court. However, as in Hoffman’s resolution III, supra note 23, the respect seems to be due the office and not necessarily the person. Id. at 61-62.

21 Carol Rice Andrews, Standards of Conduct for Lawyers: An 800-year Evolution, 57 SMU L. Rev. 1385, 1436 (2004); Allison Marston, Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association, 49 Ala. L. Rev. 471, 472, 494 (1997-1998) (based on “the writings of George Sharswood;” consulted both Hoffman and Sharswood’s material); Walter Burgwyn Jones, Canons of Professional Ethics,
Indeed, the 1908 Canons of Professional Ethics were based significantly on the Alabama Code of Ethics. It is, therefore, not surprising that Canon 1 incorporates the Alabama Codes admonition that the lawyer has a duty to the courts to maintain a respectful attitude and that this duty is owed the office and not the individual in the office. This Canon explicitly seeks to protect judges from “unjust criticism” and to control the way complaints about judges are handled, requiring that they be submitted “to the proper authorities.” Likewise, Canon 32 admonishes the lawyer not to “render service or advice involving … disrespect of the judicial office, which we are bound to uphold…”

The ABA made significant revisions to the 1908 Canons of Professional Ethics in 1969, when it adopted the Model Code of Professional Responsibility, and in 1983 when it adopted the Model Rules of Professional Conduct. These revisions retained the focus on “respect for the court;” however, revisions to the rules reflected a change in the law on protected speech. For example, Rule 8.2 (a) in the 1983 revision incorporates the *New York Times v. Sullivan* approach and prohibits a lawyer from making a statement “the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity..."
of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.”

The universality of respect to the court in the codes applicable to lawyers encompasses the conduct of judges who are also lawyers. It is also carried over into the Model Code of Judicial Conduct. Judges are admonished to “uphold the integrity and independence of the Judiciary.” Judges are to act in ways that gain the public’s respect such that it gives deference to the court’s judgments and rulings. However, in most jurisdictions that have adopted Canon 1 in its mandatory form (“shall uphold the integrity and independence of the judiciary) discipline can only be imposed if other canons are designated as the basis of discipline as well. The requirement that judges respect and comply with the law, Canon 2A, similarly implies respect for the office of the court since “it promotes public confidence in the integrity and impartiality of the judiciary.” Canon 4’s admonition to conduct extra-judicial activities in a manner that does not “demean the judicial office” and Canon 5A(3)’s requirement that candidates for judicial office “maintain the dignity appropriate to the judicial office” are yet other ways of saying that judges and judicial candidates must respect the institution of courts.

33 Annotated Model Code of Judicial Conduct Canon 1 13 (Commentary) (2004)
III. THE CODES AND CANONS OF CONDUCT AND AFRICAN DESCENDANT LEGAL PROFESSIONALS

A. Relationship to the law as a member of an oppressed group

Some scholars have suggested that some of the rules of ethics reflected a bias against ethnic lawyers working primarily in urban areas.\(^{37}\) Others argue that codification of the rules of ethics served to reinforce the power of the legal elites.\(^{38}\) A question remains as to whether this admonition to respect the court and punishment for disrespecting the court\(^{39}\) may mean different things for lawyers and judges who are members of a racial or ethnic group that was subject to court treatment and rulings that denied them their dignity and their right to be treated as the equals of whites in this society. Since this article’s focus is on African descendants, this brief discussion of the history of maltreatment by the courts and the continuing concern of racial treatment in contemporary cases will focus on cases involving African descendants.

African descendant lawyers and judges have the unique experience of being members of a racial group that was enslaved in the United States. Enslavement as well as the brutalization and dehumanization of African peoples that was its hallmark was supported by the laws of the colonies and states that embraced it and the United States from 1619 to 1865 until the passage of the Thirteenth Amendment. The maltreatment of enslaved Africans has been chronicled by a number of scholars;\(^{40}\) and, there are numerous cases of courts upholding the differential treatment of enslaved Africans.\(^{41}\) One such case is the

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39 Discipline for “disrespecting the courts” frequently comes in the form of finding the lawyer or judge violated a canon or code of conduct by speaking publicly about some matter that the disciplinary board found violated one or more of the rules. The legal parameters for punishing lawyer and judge speech are discussed infra, Part V.


41 See generally, A. Leon Higginbotham, In the Matter of Color: Race and the American Legal Process – The Colonial Period (1978) (Higginbotham looks only at the colonial
1855 Missouri case of an enslaved woman, Celia, who admitted to killing a rich white farmer who attempted to rape her. Although in 1855 it was not a crime for a “woman” to defend herself in an attempted rape, that right was not enjoyed by an enslaved African woman who was required, therefore, to submit to rape or be charged and convicted, as in this case, with murder.

At the beginning of Reconstruction, the Radical Republicans organized the repeal of the Black Codes which were supported by Andrew Johnson’s administration and placed the formerly enslaved African and African descendants “in a kind of twilight zone between slavery and freedom.” The Black Codes included vagrancy laws that required African descendants to provide proof of employment and residence. Or they would be fined, and unable to pay the fine, jailed. After Reconstruction Jim Crow laws were instituted in the southern states, resulting in legal segregation of the races in all areas of life. However, segregation was not confined to the South. Just as slavery existed in northern states, so did segregation after the abolition of slavery. In 1896, the United States Supreme Court sanctioned Jim Crow by holding in Plessy v. Ferguson that separate facilities for the races were constitutional. It was not until 1954, in the case of Brown v. Board of Education, that this holding was overturned and Jim

period in this treatise and describes the evolution of the treatment of enslaved Africans in Virginia, Massachusetts, New York, South Carolina, Georgia and Pennsylvania; Gloria J. Browne-Marshall, Race, Law, and American Society: 1607 to Present (2007) Browne-Marshall provides an excellent overview of the cases and events highlighting almost 400 years of Africans and African descendants being subjected to racism and disparate treatment. She particularly identifies cases in the area of criminal justice that occurred to the era of enslavement of African peoples, id. at 164-167.


Kenneth M. Stampp, The Era of Reconstruction 1865-1877 80-81 (1965)


John Hope Franklin & Alfred A. Moss, Jr., From Slavery to Freedom: A History of African Americans 290 (8th ed. 2004)(In approximately 1875, Tennessee enacted the first Jim Crow laws and the other Southern states followed.)


John Hope Franklin & Alfred A. Moss, Jr., From Slavery to Freedom: A History of African Americans 447-448 (8th ed. 2004)(Schools were segregated in a number of states, including New Jersey, Ohio, Illinois and Indiana. These states did not follow the lead of New York, which passed legislation in 1900 prohibiting separate schools. African descendants were forced, or minimally “urged” to attend racially segregated schools.)

163 U.S. 537 (1896).

Crow began to topple. Yet, from 1954 to 2007, there was evidence that the hope placed in Brown had been misplaced. And that hope appears to have been dashed with the Supreme Court’s decision in Parent’s Involved in Community Schools v. Seattle School District.

Violence against Africans and African descendants during slavery did not end with abolition. The history of violence against Africans and African descendants, including lynchings, is legendary and examples of it span the 20th and 21st centuries. After slavery and the violence that was its essence, lynching is perhaps the crime that most implicates local and state officials as well as the United States government. It became the hallmark of violence against African descendants after the Civil War, existing through Reconstruction although, particularly under Radical Reconstruction, state governments and Congress made attempts to stem the violence. Since much of this violence was meant to dissuade

52 The common belief is that lynching means the hanging of a victim by mob action. However, the actual definition of lynching is “execution without due process of law.” AMERICAN HERITAGE DICTIONARY 748(2nd ed. 1985). Lynchings include mob violence that led to the deaths of civil rights workers in the Sixties. See generally, Margaret A. Burnham, The New Southern Justice: Toward a Theory of Anti-Civil Rights Violence 13-15(2009)(Unpublished draft with author.)(Burnham distinguishes the anti-civil rights violence from lynching based on the frequently public display of lynchings as contrasted to the more clandestine acts of anti-civil rights violence although it often led to the death of the victim. She described the similarity as the premeditated nature of the acts.)
54 JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 275-276(8th ed. 2004) (The violence against Africans and African descendants was perpetrated secret societies the most powerful being the Knights of Ku Klux Klan and the Knights of the White Camelia.); see also, John A. Carpenter,
African descendants from participating in the political process, Congress’s attempt to stop the violence was to pass legislation that made it a punishable crime to prevent a person from voting. However, these efforts did not stop the lynchings of African descendants. Indeed, the United States Senate resisted efforts to pass specific legislation against lynching. On June 13, 2005, it passed by voice vote a resolution “Apologizing to the victims of lynching and the descendants of those victims for the failure of the Senate to enact anti-lynching legislation.” Between 1900 and 1902, there were 214 lynchings. Between 1882 and 1968 over 4,740 people, predominantly African descendants, had been murdered by lynching and 99% of the perpetrators went unpunished. These lynchings were not confined to the South as Blacks were murdered by mobs in Illinois and other states.

In addition to the horrors of lynching, African descendant communities have been destroyed and many residents murdered by white mobs often enraged by the assumption of dignity by African descendants in the community. These acts

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56 [S. Resolution 39, 109th Cong. (2005) (enacted)(Eighty-nine senators voted yes and 8 senators refused to vote on the resolution).]


58 S. Resolution 39, 109th Cong. (2005) (enacted). These numbers, therefore, do not include the lynchings that took place between 1965 and 1981.


of mob violence have been called “race riots;” however in most instances these 
were massacres of African descendants and destruction of their businesses and 
communities. To exacerbate the injury, courts have failed to provide a remedy for 
the injury caused to the African descendant communities and their residents.  
Indeed, legislative and executive bodies have failed to provide reparations for 
injuries caused by white mob violence directed at the African descendant 
communities. The one exception is the Florida legislature that in 1994 provided 
reparations for the survivors of the 1923 Rosewood Massacre, their descendants as 
well as establishing a scholarship fund for minorities with priority to direct 
descendants of the Rosewood families.  

Most African descendant lawyers know some of this history that speaks to 
the unwillingness of the society, as represented by the legislative, judicial and 
executive branches, to acknowledge the past and make reparations for the injuries 
caused by these actions, many of which were supported by direct governmental 
involvement and at best, governmental non-action.  

The Philadelphia Race riot of 1918 in RACE, LAW AND AMERICAN HISTORY 1700 – 1990, 
(African descendants moving into predominantly white neighborhoods and editor 
of Philadelphia Tribune, the leading African descendant newspaper urged African 
descendants to defend themselves); Dorothy Beeler, Race Riot in Columbia 
descendant man defending his mother who was either struck or cursed by white store 
employee and blacks set up post at entrance to black community after rumors of lynching 
shooting four officers who did not follow instructions to halt); Gloria J. Browne-
Marshall, Race, Law, and American Society: 1607 to Present 178 (2007) and Grif 
descendant farmers organizing to get market prices for their crops ); Randall 
Kenney, Foreword to Alfred L. Brophy, Reconstructing the Dreamland: The Tulsa Race 
Riot of 1921 IX(2002) (Whites resentful of the vibrant, ambitious African descendant 
community, Greenwood, and responding to false allegations that an African 
descendant man had sexually assaulted a white woman);  

19, 2004), aff'd, 382 F.3d 1206 (10th Cir. 2004).  
62 In 1994 the Florida legislature passed the Rosewood Compensation Act, Laws of 
Florida, 1994, c. 94-359 (In addition to the material reparations the State of Florida 
acknowledged that the community was destroyed by white violence and took 
responsibility for not stopping it. It also directed the state university system to 
continue to conduct research and provide instruction on Rosewood.) See also, 
Kenneth B. Nunn, Rosewood, in WHEN SORRY ISN’T ENOUGH: CONTROVERSY OVER APOLOGIES 
AND REPARATIONS FOR HUMAN RIGHTS 435 (Roy L. Brooks ed. 1999).  
63 On July 29, 2008, Congressman Steve Cohen spoke in support of House Resolution 
194, “apologizing for the enslavement and racial segregation of African-
Americans,” introduced by him in February 2007. This resolution in some ways 
supported reparations broadly defined by resolving that the House of 
Representatives "expresses its commitment to rectify the lingering consequences of 
the misdeeds committed against African Americans under slavery and Jim Crow 
and to stop the occurrence of human rights violations in the future.” On June 18,
timely manner has led to continuing consequences being suffered by African
descendants through discrimination by default or unconscious racism in health
care, criminal punishment and wealth and poverty. It has been argued that despite
significant educational and professional achievements “blacks must still expect to
encounter discrimination and circumscribed opportunity.” Prof. McGee suggests
that more highly educated African descendants may have a heightened sensitivity
to discrimination.

B. Treatment of African descendant legal professionals by white legal
professionals

In addition to this general knowledge of racially derogatory treatment from
1619 to the present, African descendant lawyers and judges are even more familiar

2009, the United States Senate apologized for the enslavement and racial
segregation of African-Americans that included a reparations: “(2) Disclaimer.--
Nothing in this resolution—

(A) authorizes or supports any claim against the United States; or
(B) serves as a settlement of any claim against the United States.”

It seems particularly ironic that the Senate would disavow claims for reparations
given that in the concurrent resolution it states that “the vestiges of Jim Crow
continue to this day.”

64 See LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 115-134
(2006)(Describing discrimination in medical care); VERNELLIA R. RANDALL, DYING WHILE
BLACK (2006)(Discussing racial disparities in health care and the ultimate cost of such
disparities); Kevin Outterson, Tragedy & Remedy: Reparations for Disparities in Black
Health, 9 DePaul J. Health Care L. 735 (2006); HEATHER C. WEST, PH.D. & WILLIAM J. SABOL,
PH.D., BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008-STATISTICAL TABLES, Table 16
(2009)(African descendant males comprise 40% of the prison population compared
with 34% for white males; African descendant women comprise 33% of the prison
population compared with 46% for white women. African descendants are
approximately 13% of the United States population.); NATIONAL URBAN LEAGUE, THE STATE
OF BLACK AMERICA 2009, THE EQUALITY INDEX OF BLACK AMERICA 25-41 (e.g., Median
household income for African descendants is 65% of median household income for
whites, the life expectancy for whites is 5 years longer than for African descendants,
average sentence for murder is 24 months longer for African descendant men than
for white men and 79 months longer for African descendant women than for white
women).

65 Henry W. McGee, Jr., Black Lawyers and the Struggle for Racial Justice in the
AMERICANS AND THE LEGAL PROFESSION IN HISTORICAL PERSPECTIVE 211, 218 (Paul Finkelman ed.
1992); David B. Wilkins & Mitu G. Gulati, Why Are There So Few Black Lawyers in
Corporate Law Firms?: An Institutional Analysis, 84 California Law Review 493 (1996);
Adjoa Artis Aiyetoro, Truth Matters: A Call for the American Bar Association to
Acknowledge Its Past and Make Reparations to African Descendants, 18 Geo.

66 Henry W. McGee, Jr., Black Lawyers and the Struggle for Racial Justice in the
AMERICANS AND THE LEGAL PROFESSION IN HISTORICAL PERSPECTIVE 211, 218 (Paul Finkelman ed.
1992)
with the insults that African descendant witnesses, attorneys and on occasion judges, have had to suffer both during the period in our history when racist treatment of African descendants was acceptable behavior and after it became unacceptable. “…Societal racism, even unintentionally, often affects the adjudicatory and fact-finding process of courts.” African descendant witnesses have been disrespected by courts allowing prosecutors to call them by their first names while they addressed the white witnesses with the appropriate “Mr. or Miss Jones,” for example. Segregation in the courthouses was not found to be a violation of the constitution until 1963 in *Johnson v. Virginia*. Judges have allowed racially biased statements by prosecutors to remain on the record as well as to appeal to stereotypes of African Americans such as fears of violence or propensity to rape white women. Judges have used racial slurs such as “nigger” and racially demeaning characterizations of African descendants in the courtroom and have allowed attorneys to use these terms when addressing defendants, even attorneys representing defendants. In addition to being subjected to racial slurs or

68 A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 137-138 (1996)(Higginbotham provides cases through the early 1980s and suggests that at the time of writing his text, this may still be a problem, although perhaps a more isolated one.)
70 A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 139-145 (1996)(Higginbotham notes that these acts of racism are not confined to the South, providing examples from Illinois and California.)
71 A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 145-151(1996); Randall Coyne and Lyn Entzeroth, Report Regarding Implementation of the American Bar Association’s Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions, 4 Geo. J. on Fighting Poverty 3, fn 310 (1996)(example of defense attorney using “ole nigger” to refer to his client during opening statement as well as impugning his client’s intelligence); Stephen Bright, Challenging Discrimination in Capital Cases, 21-FEB Champion 19, 21 (1997)(Addressing resistance of courts to address racial issues Bright gives an example of the Georgia Supreme Court in 1987 ruling in support of a motion to recuse the trial judge in a capital case, not recounting the evidence submitted to support the motion: that the judge, inter alia, “tolerated gross underrepresentation of blacks in the grand and trial juries, mistreated black attorneys in court, used racial slurs,…”); Thomas P. Krzeminski, Individual Rights, 29 Rutgers L.J. 1111, 1113,fn14 (1998)(indicating that some courts find that abuse of the right to free speech occurs when the speaker uses racial slurs and providing an example of the North Carolina Supreme Court’s holding that the district attorney’s repeated references to an African American man as “nigger” was not protected speech but rather were “fighting words.”); A. Leon Higginbotham, Racism in American and South African Courts: Similarities and Differences, 65 N. Y. U. L. Rev 479, fn 326-327 (1990)(California judge publicly censured for making repeated racial slurs in numerous contexts including in chambers conferences or in the presence of court personnel.); Dorothy A. Brown,
hearing or knowing of African descendant witnesses or parties being treated in a racially demeaning way, African descendant lawyers have been more generally subjected to demeaning treatment by the judiciary. The 1991 study in New York, suggests that use of such slurs when addressing attorneys was a continuing problem at least in the 1990s. In the 1930s, Carter Godwin Woodson led a study of the professional “Negro man,” a portion of which is devoted to the legal professional. The data collected by Woodson indicated that African descendant attorneys in the south had a restricted practice with a few exceptions. The interviews with lawyers across the country suggested that they had various experiences, a number indicating that the white bar discriminated against African descendants and that some judges were not fair to African descendants and African descendant lawyers’ clients favoring the white witnesses (especially females) and white attorneys. Other scholars indicate that African descendant lawyers received poor treatment by the courts throughout the nation, particularly in the years preceding the mid-1960s.

FAITH OR FOOLISHNESS, 11 Harv. Blackletter L.J. 169, 174(1994)(reviewing J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944(1993)) (“blacks had to contend with courtroom bigotry” including racial slurs such as “niggers” or “darkies.”); J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944 200(1993)(example of case in which presiding judge turned from African descendant attorney whenever he spoke and allowed the prosecuting attorney to refer to the attorney and his client as “niggers” and “darkeys.” The defendant was found guilty.); Stephen B. Bright, Discrimination, Death and Denial: The tolerance of Racial Discrimination in Infliction of the Death Penalty, 35 Santa Clara L. Rev. 433, 444-445 (1995)(Judge and defense attorney called African descendant defendant “colored boy” and allowed the prosecuting attorney to call him by his first name; defense attorney was court-appointed and expressed a negative attitude towards African descendants and indicated “he uses the word ‘nigger’ jokingly.”).


77 A. Leon Higginbotham, Jr., A Tribute to Justice Thurgood Marshall, 105 Harv. L. Rev. 55, 57 (1991)(recounting the use of racial slurs towards blacks in court and threats and harassment directed to Thurgood Marshall in the 1930s, 1940s and 1950s. See also, Mark Curriden, A Supreme Case of Contempt: A tragic legal saga paved the way for civil rights protections and federal habeas actions, ABA Journal 35, 35(June 2009) (African descendant attorneys representing Edward Johnson who was convicted for rape and murder of a white woman in Chattanooga and sentenced
Margaret Russell, in her analysis of the racial treatment of Christopher Darden and Johnny Cochran, provides examples of what she terms “unrelenting mistreatment to which minority attorneys are subjected.” In addition to the overt racism of racial slurs, she argues that African descendant legal professionals are put into a box where their credibility on the race issue is challenged either by being accused of not seeing race when it is a factor or being accused of an oversensitivity to race and thereby “playing the race card.” Of particular relevance to the thesis of this article is Russell’s argument that lawyers associated with racial justice are frequently assumed to have “compromise[d] their ethics and their professionalism” by “their race-based advocacy as well as their race.” Russell adds another aspect of racially demeaning treatment of African descendant judges. She indicates that they are subjected to recusal motions when they are identified as having ties to the racial justice, including the civil rights movement. Judge Higginbotham’s response to a recusal motion in Pennsylvania v. Local Union 542, International Union of Operating Engineers, exposed the disability African descendant judges face in the eyes of some whites who are accused of racial discrimination. They make the incorrect assumption that the African descendant judge’s support for to death in Chattanooga, TN entered the case on appeal and obtained a stay of execution in order to appeal to the U.S. Supreme Court. Noah Parden argued the case after being persuaded by Styles Hutchins to co-represent Johnson with him on appeal. Johnson was lynched by a mob with the collusion of Shipley, the sheriff. The U.S. Supreme Court tried Shipley and others for contempt of the Supreme Court and they were found guilty and sentenced to short terms in jail. Parden and Hutchins lost their practices and they and their families were threatened with violence and their homes were destroyed by fire. They, therefore, were forcibly uprooted from Chattanooga because of their advocacy for an African descendant convicted man and never returned to Chattanooga after the Supreme Court hearing in Washington, D.C.).

78 Margaret M. Russell, Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Straitjacket of Legal Practice, 95 Mich. L. Rev. 766, 769(1997) (e.g. recounting survey in New York by New York Judicial Commission on Minorities indicating that 14 percent of the respondents referenced incidents where judges, lawyers, or courtroom personnel made racially derogatory comments, including racial slurs “often” or “most of the time” and twenty percent indicated this occurred “sometimes.”)


80 Margaret M. Russell, Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Straitjacket of Legal Practice, 95 Mich. L. Rev. 766, 783(1997)

81 Margaret M. Russell, Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Straitjacket of Legal Practice, 95 Mich. L. Rev. 766, 776-779(1997)(discussing recusal motions lodged against Judge Higginbotham and Judge Motley because of their association with civil rights. Russell suggests that the assumption is that African descendant judges will be biased by their loyalties to the group and thus “taint professional ethics in a way that “majority” affiliations will not.”)

racial justice means that she cannot fairly judge a race discrimination case because that support translates into being antiwhite.\textsuperscript{83}

Even more familiar is the post civil rights era treatment of African descendant attorneys who have had to contend with being mistaken for a paralegal or who have had to contend with patronizing treatment from judges. The fact of the Black Codes in the South and cases, pre- and post slavery,\textsuperscript{84} that appeared to many to undermine the rights of equal treatment under the law for African descendants has led to a hyper-vigilance of many African descendants in the legal profession to issues of racism and conduct of members in the legal profession as well as actors outside the legal profession that may appear to be oppressive to African descendants. In the African descendant community, African descendant lawyers and judges are held in high esteem and it is expected that they will protect the community and advise it of acts that may continue the stigma of racial caste or that may be, because of the racial caste system, acts that deprive an African descendant or African descendants of fundamental rights in the legal system or in society generally such as the right of due process or to life, liberty and property.

Racially conscious African descendant legal professionals often view their allegiance to the legal profession as co-equal, if not secondary, to their allegiance to the African descendant community and the need to disclose racism that is continuing in the legal system or society more generally.\textsuperscript{85} This dual allegiance and their public expressions of this commitment to the African descendant community may at times be seen as disrespect for the court by those who do not have that allegiance or elevate the office of the court above the responsibility to expose racial injustice.

IV. UNCONSCIOUS RACISM


\textsuperscript{84} See, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) and Plessey v. Ferguson, 163 U.S. 537 (1896).

\textsuperscript{85} Lawyer activists such as Lennox Hinds and Chokwe Lumumba and other members of the National Conference of Black Lawyers have as their primary purpose to utilize their legal skills for the liberation of African descendants. This can lead to conflicts with the ethical committees when these lawyers challenge racism in the courts or react in some way to perceived racism in the courts. \textit{See discussion infra, Part V. Critical race theorists have committed their legal scholarship to “challeng(ing) the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole.”} \textit{Introduction, Critical Race Theory: The Key Writings That Formed the Movement}, xii, xii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas eds. 1995).
“Racism” is …..the assignment of negative value to the traits commonly associated with a disfavored race, and the subordinate ranking of the race on the social hierarchy.\textsuperscript{86}

As the history of conscious racism described suggests, it was not unusual for an African descendant to be subjected to government supported overt racism through the mid-60s. A survey conducted by the New York Judicial Commission on Minorities suggested that use of racial epithets continued to be an issue in 1991.\textsuperscript{87} The incidents of conscious racism decreased as the three branches of the federal government began to act to uphold the rights of African descendants. The Supreme Court overturned \textit{Plessy v. Ferguson}\textsuperscript{88} in \textit{Brown v. Board of Education}\textsuperscript{89} in 1954, beginning the demise of “separate but equal.”\textsuperscript{90} The society that may have once turned a blind eye to the brutality and inhumanity of Jim Crow was confronted with it through the televised attacks on civil rights workers. And a number of lynchings/brutal murders of these workers also received worldwide publicity.\textsuperscript{91} Federal troops were sent to Little Rock, Arkansas\textsuperscript{92} and Alabama to protect Black students from violence by whites as they attempted to integrate schools. The Civil Rights Act was passed in 1964 and the Voting Rights Act in 1965. The federal government was taking a stand against conscious racism. This stand against conscious racism gradually led to racism becoming disfavored in the society. Racism did not go away. Much of conscious racism, although not all of it, was repressed and expressed in ways that led to decisions based on

\textsuperscript{86} DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 516 (6th ed. 2008).


\textsuperscript{88} 163 U.S. 537 (1896).

\textsuperscript{89} 347 U.S. 483 (1954).

\textsuperscript{90} Of course, the Supreme Court’s decision did not end all segregation. For example, in the legal arena it was not until 1963 that the Supreme Court found segregated seating in courts violated the equal protection clause of the 14th Amendment. Johnson v. Virginia, 373 U.S. 61 (1963).


\textsuperscript{92} See GLORIA J. BROWNE-MARSHALL, RACE, LAW, AND AMERICAN SOCIETY: 1607 TO PRESENT 31 (2007)(President Eisenhower “reluctantly” sent the 101st Airborne to Little Rock, AR to restore order after the Little Rock Nine integrated Central High School. Troops had to escort the students daily to class to protect them from the white crowds. Eisenhower stated that the ruling in \textit{Brown v. Board of Education} “should not be allowed to create hardship or injustice (for Whites).” Id.
concealed racism.\textsuperscript{93} The Supreme Court developed a standard to prove racial discrimination in violation of the 14\textsuperscript{th} Amendment that required proof of intentional discrimination -- disparate results were insufficient.\textsuperscript{94}

This meant that those who held white supremacist views and had openly expressed them without censure, including through the use of racial slurs and demeaning characterizations, could no longer openly use those views as the basis for government decisions, such as employment, without chancing censure.\textsuperscript{95} One can surmise that many did not accede to the view that “all men and women are equal” simply because the federal government said so. However, many began to self-censor. Others who had not consciously embraced white supremacy and demeaning views of African descendants, including African descendants, had internalized racist thought through their pores as they grew up in the United States and were exposed to the predominant view of white supremacy and the verbal, emotional and physical violence attendant to maintaining it in place.\textsuperscript{96}

In 1987, Charles Lawrence wrote the seminal piece on unconscious racism.\textsuperscript{97} The article is a reply to the Supreme Court’s decision in \textit{Washington v. Davis} and its progeny that in order to prove racial discrimination in violation of the 14\textsuperscript{th} Amendment, one has to prove that the decision maker intended to discriminate, creating a motive based burden of proof.\textsuperscript{98} Thus, a perpetrator or conscious wrongdoer is required. Lawrence’s article and subsequent studies and scholarly articles raise a hue and cry against \textit{Washington v. Davis}’s conclusion that the U.S. Constitution only requires the judiciary to remedy racism for which there is a known perpetrator that is brought before the court. The Court thereby leaves no remedy for racist treatment of African descendants when there is no proof of a motive to discriminate – it just happens. Many of the scholars argue, supported by


\textsuperscript{94} \textit{Washington v. Davis}, 426 U.S. 229 (1976).

\textsuperscript{95} See, A. Leon Higginbotham, \textit{Racism in American and South African Courts: Similarities and Differences}, 65 N. Y. U. L. Rev 479, fn 326-327 (1990)(California judge publicly censured for making repeated racial slurs in numerous contexts including in chambers conferences or in the presence of court personnel). But see Margaret M. Russell, \textit{Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Straitjacket of Legal Practice}, 95 Mich. L. Rev. 766, 769 (1997) (New York survey revealing that 14% of respondents heard racially demeaning language from lawyers, judges or courtroom personnel “often” or “very often.”)


research studies and analysis, that racism today is not consciously intended and there is no “bad person” in the traditional sense. The Court’s decisions have also resulted in a sensitivity around the charge of racism – that saying an action was racist has become itself a slur and people take umbrage when decisions for which they give a non-racist reason appear to others to be based on race. So in addition to limiting the definition of racism such that we are unable to get at the vestiges of slavery and Jim Crow through the legal system, the Court has, one trusts unwittingly, supported the continuation of unconscious racism and “the assignment of negative value to the traits commonly associated with a disfavored race, and the subordinate ranking of the race on the social hierarchy.” The uproar in the activist and scholarly community is strong because of the evidence that unconscious racism is pervasive in this society. Some scholars and activists have borrowed the concept of unconscious racism and developed a very similar, but to Lawrence, distinctive theory of implicit bias. In unconscious racism, racist

99 Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 324-325(1987); LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 8 (2006). But see, Richard Delgado, Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection, 89 Geo. L. J. 2279, 2289-2291 (2001)(He quarrels with Lawrence’s postulation of unconscious racism because according to Delgado it is a way to take the attention from the purpose of racism which is for whites to receive a material advantage over African descendants. He suggests that in order to gain this material advantage we “develop and propagate attitudes and beliefs that justify what we have done; other actors, including legal ones, join in.” Id. at 2289. Rather than seeking accommodation with the intent requirement, Delgado recommends that Washington v. Davis be challenged frontally and say that the requirement is “an evasion” and “unnecessary.” Id. at 2290.)

100 Not all may be able to be shown to be racially discriminatory in the sense that you have a similarly situated white that was not treated in the same way.


decision makers repress their racist views of African descendants or others and are unaware that they have unconsciously imbibed and articulated the racist views from a society built on racism that is pervasive and malignant. According to Lawrence, those who support implicit bias are arguing that it is business as usual and not malignant. 104

Lu-in Wang has an interesting approach to this question that appears to embrace the malignancy of unconscious racism, although, she, like Lawrence, Dovidio and others urge that it is pervasive. She talks about discrimination by default. She makes the point that the advantage of being white was obtained through the “anticompetitive conduct of racism, including slavery and Jim Crow.” 105 She argues among other things that white dominance in the legal system has occurred because whiteness has become the de facto standard through intentional exclusion of non-whites. 106 This de facto standard has been developed by the exclusion of non-whites for so long from the mainstream and racist depictions of them even after their legal inclusion.

A. Triggers for unconscious racism

The question arises as to whether we can identify situations that are more prone to allow the expression of unconscious racism. Unconscious racism will not be a factor in a decision where the African descendant clearly meets the criteria or clearly does not meet the criteria whether it be for employment, or as in the context of this article, for sanctioning for violation of the rules of conduct. It also seems unlikely that where criteria are specific and the decision-maker has no discretion that unconscious racism would arise. For example, if passing the test with 70 or more points qualifies you for the job, a person with 70 or more points gets put on the list of qualified candidates. The difficulty comes when there are two or more people qualified for the job. If the rule is highest score wins, again there is no problem. If the African descendant receives the highest score, she gets the job. However, in most situations the decision-maker has some discretion and considers

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other factors that are not as cut and dry as points on a test. For example, in employment situations decision-makers often consider factors such as ability to get along with others and to be part of a team. For management and executive positions the decision-maker may consider leadership ability, ability to express oneself in writing or orally. Again, if among the, let’s say three candidates for the position, the African descendant had far superior qualifications, unconscious racism would not come into play.107

Unconscious racism, therefore, is more likely to be expressed in ambiguous situations.108 If the three candidates were only a few points apart and the African descendant was the highest or tied for first with good skill sets, but not far superior, unconscious racism would lead the decision-maker to fall back on stereotypes such as African descendants are aggressive and thus may not work well as a member of a team. Rather than relying on this as a reason, the decision-maker may rely on the fact that the African descendant’s job history indicated he changed jobs every 3 or 4 years; whereas, the white candidate held his last job for 6 years.

This leads to another point concerning the ambiguity in the situation. Often the multiple explanations include one that is not based on race at all.109 Decisions that appear to many to be based on race are provided a non-racist rationale. In these situations, people who have internalized negative racial views of African descendants may treat them harshly. And because there may be a non-racist reason proffered for the conduct, one is left to surmise whether the conduct was due to race or the non-racial explanation.

107 Of course, that does not rule out conscious racism and the decision-maker consciously deciding that he would work better with the second ranked white person than the far superior African descendant. However, in this era of racism being unacceptable, Wang suggests that people would avoid discrimination in clear situations to preserve a non-racist image. LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 42-43 (2006).


109 Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 341,325, 375, 387 (1987); LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 42, 44 (having legitimate reason for decision does not negate racial bias as the reason for the decision), 48(may have relied on nondiscriminatory reason yet saw it as persuasive because of person’s race) (2006); John F. Dovidio and Samuel L. Gaertner, Aversive Racism and Selection Decisions: 1989 and 1999, 11 Psychological Science 315, 315 (2000)(discrimination occurs when bias is not obvious or can be rationalized on the basis of some factor other than race).
Of course, in these situations we are talking about a decision-maker who has discretion. The employer could have chosen to hire the African descendant applicant rather than the white applicant but for the intrusion of unconscious bias. The police officer could have chosen to take the child offender home rather than to the police station. The ethics committee could have chosen to not act on a complaint rather than file a formal complaint against the attorney or judge. This discretion allows repressed views about people to be acted upon below the surface and lead to treatment that does not entangle the person in a negative situation or one that does.

Making a decision about the meaning of a behavior can also be the ambiguity. In making the decisions about behavior that is unclear, stereotypes come into play. In fact, behavior that fits a stereotype often triggers unconscious racism. A study testing the response of whites to African descendants shoving whites and whites shoving African descendants revealed that African descendants who shoved whites were viewed as violent by 75% of the respondents; whereas, whites who shoved African descendants were seen as violent 17% of the time. The whites’ view of African descendants who shoved whites as violent comports with the stereotype of African descendants. Other stereotypes such as lack of control of instincts, angry Black man or uppity “nigger” can be used to justify decisions to sanction or otherwise treat African descendants negatively.

Stereotypes or assumptions about African descendants that place them in a lesser light (unqualified or violent rather than playful or angry Black man) seem to be triggered and acted upon when there is ambiguity in the situation and when the decision maker has discretion to make a decision or choice. I suggest that there is an unexamined trigger for unconscious racism—the language of African descendants who are labeled “angry” due to the uncompromising nature of their language. An African descendant speaker who raises the language of race or racism is subject to being censured by those in the society who embrace the myth of a colorblind society and the view that to assert otherwise and to question whether there are racial implications associated with a given action or decision is to call the actor a racist – a disparaging remark given the society’s finding that race discrimination is now illegal and someone that is engaging in behavior that is motivated by race is an evil doer.

B. The Language of Race

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Our brain is not nearly as omnipresent yet it, too, monitors the conversations around us. Certain words, or the way they are said, can trigger an internal alarm that alerts us to someone to watch out for. Our individual alarm triggers reveal the blueprint of our soul.\textsuperscript{112}

No one doubts the importance of language. We use language to communicate ideas and feelings. It is something children learn through listening to those around them and it is essential to have some mastery of language to progress through life and to attain success in professions such as the law. “Language includes sounds, units of meaning, and grammatical structures, as well as the contexts in which they occur.”\textsuperscript{113} There is a field committed to the study of language, linguistics, and a subfield that studies the social context for language, sociolinguistics. The same word or phrase can mean different things in different countries or even regions of the same country. Race, class, gender as well as context affect language and its use.\textsuperscript{114}

As discussed in the preceding section, Part III, during slavery and Jim Crow it was not unusual for African descendants to be treated in disparaging ways, including being addressed with demeaning labels such as “nigger.” Race and racism was part of the very fabric of the society, and although other racial groups were treated in a racist fashion, the premier story of racism in the United States has been the treatment of African descendants. When the country embraced slavery and Jim Crow, the voices against such racism were fighting the status quo. The voices grew in number and volume as those in the trenches continued to organize the legal strategy and the mass organizing strategy. The movement to end Jim Crow, the hallmark of post-slavery racism, won a significant “victory” in the Supreme Court with Brown v. Board of Education overturning Plessy v. Ferguson. The mass organizing, with the help of television broadcasting the worst of the conditions in the South,\textsuperscript{115} led to the passage of the Civil Rights Act and the Voting Rights Act. The country became officially a non-racist country. Courts found for plaintiffs alleging discrimination and affirmative action plans were developed as a remedy for past discrimination. Yet, as the effort to end the disparities in our society that are the children and grandchildren of Jim Crow and enslavement, respectively, progressed, a number of whites joined by some African descendants began to challenge the stretch from ending de jure racism to ending disparities that are its progeny. The birth of “colorblindness” that actually had its first sighting in the Justice Harlan’s dissent in Plessy v. Ferguson,\textsuperscript{116} is seen in cases like Regents

\textsuperscript{113} \textbf{JOHN M. CONLEY AND WILLIAM M. O’BARR, JUST WORDS: LAW, LANGUAGE, AND POWER} 6 (1998)(Conley and Barr wrote this book as a merger of sociolinguistics and law and society to organize the most significant research in law and language. It investigates places “where language and justice converge.” \textit{Id. at} 14)
\textsuperscript{114} \textit{Id. at} 10
\textsuperscript{115} Note that it is important to remember that segregation, as slavery, was not confined to the South.
\textsuperscript{116} Plessy v. Ferguson, 163 U.S. 537, 559 (1896)(Harlan, J. dissenting).
of Univ. of Cal. v. Bakke. In these cases, and others, with the exception of
Plessy, the Supreme Court sided with whites and held that using race as a factor in
making decisions violated the 14th Amendment’s Equal Protection Clause. The
jurisprudence of “colorblindness” supported the movement among whites to end
the “special treatment” of African descendants unless you can show that the use of
race to create a remedy is directly connected to a history of discrimination by the
actor.

With colorblindness came a repression of the discussion of race in our
society. If the society is colorblind, there is no need to discuss race. Or, perhaps
the unease of discussion of race was that it would reveal the truth that the society
was not colorblind because a few cases and legislators said it was— that it would
take much more work and a full discussion of race to remedy the harm done by
slavery and Jim Crow. The society bought the easy answer; however, that racism is
only conscious, intentional racism. It dismissed the possibility that racism had so
become a part of what this country was and that its people, both African
descendant and white, had been interacting in a racist society for so long, that what
once could be expressed openly and with little fear of reprisal was now being
expressed without the signals of “old-fashioned” racism. Ending de jure
discrimination and the embrace of racial equality by the government entities,
making the intentional, conscious (“old-fashioned”) racist subject to censure
whether officially or through community response, also ended the ability to openly
discuss race and the continuing maltreatment of African descendants because they
are identified as African descendants. People became uncomfortable with the
discussion and protective of those whose conduct appeared to be making a racial
distinction rather than supporting at least a conscious investigation into whether
the conduct was triggered by race. The association of racism with a conscious

118 See generally, Neil Gotanda, A Critique of “Our Constitution is Color-
Blind Racism: How to Talk Nasty about Blacks without Sounding “Racist.” 28
Critical Sociology 41 (2002), Andrew E. Taslitz, Racial Blindsight: The
119 Wendy L. Moore, Reproducing White Power and Privilege: The Manifestation of Color-Blind
Racism in Elite United States Law School (August 2006)( unpublished manuscript on file with the
American Sociological Association. http://www.allacademic.com/meta/p_mla_apa_research_citation/1/0/5/0/1/pages105017/p 105017-1.php (Moore conducted ethnographic research in two elite law schools in the urban
Midwest. One example of racism given by students of color was that a white professor went into the
building after hours followed by two African descendant students, one of whom was in his class. He
slammed the door behind him (and in their face). They took this to be an act of racial bias as did the
other students of color who raised this example. White students, two white faculty members and an
administrator of color raised this as an example when asked about racism in the school; however,
they “uncomfortably dismissed the relevance of the incident. …clearly uncomfortable with the idea
of racism in the law school… And the notion that racism must be equated with conscious invidious
intent was the underlying assumption of their story-lines…” Id. at unnumbered page15.
act that is now illegal makes the accusation that race was a factor in a decision analogous to a racial slur. Discussions about race, particularly cross-racial discussions, have become particularly difficult and emotional. They have in fact become taboo.

This response to a discussion about race has turned the tables on what was an effort to end the unequal treatment of African descendants based on race. It made an attempt to engage in speech that shines a light on continuing racism, whether consciously caused or not, the problem rather than racism itself. The speaker becomes the problem and an anathema rather than the possibility that racism is continuing without the display of racial animus. Rather than identifying and condemning the conduct as implicating racial bias, the racially demeaning conduct is protected by the theory of Washington v. Davis that has been adopted by popular culture: racism is conduct carried out with conscious racial animus. The disparities that we see in treatment, the incidents where African descendants are singled out for demeaning treatment are given non-racial explanations or explanations that are tied to the race of the victim and not the race of the actor. For example, African descendants are disproportionately represented on death row because they commit more crimes. It protects ongoing racism from investigation and resolution. It thus sustains the disparities that we see in our educational systems, criminal punishment systems and employment, to name a few. It has silenced most people, even African descendants, because of the fear that raising what appears to them to be the continuing problem of racism will lead to accusations that they are calling someone a racist, they will be ostracized or ignored or that they will not be advanced in their place of business.

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121 In her paper describing the ethnographic research at two elite Midwestern law schools, Moore describes an incident in which an African-descendant male law student was the only African descendant person in a Criminal Procedure class of 85 students. When he read the fact pattern that was the basis for the exam, he saw that the major drug dealer shared his name and later, upon being questioned about it, the professor said he had not realized that he had a student in the class with that name. Wendy L. Moore, Reproducing White Power and Privilege: The Manifestation of Color-Blind Racism in Elite United States Law Schools, unnumbered page 16.

122 Of course, this argument is belied by the studies that have been conducted. See e.g., McClesky v. Kemp, 481 U.S. 279 (1987) (Discussing Baldus studies on Georgia capital punishment cases finding that race was the primary factor in the disparity between whites charged with capital murder as compared to African descendants charged with capital murder.).

123 See, Charles R. Lawrence III, Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy), 11 Yale L. J. 1353, 1367 (2005)(Lawrence did not raise the issue of race for fear that his neighbor would think he was calling him a racist.); Kimberlé Williams Crenshaw, Foreword: Toward A Race-Conscious Pedagogy in Legal Education, 11 Nat’l Black
The treatment of Dr. Jeremiah Wright is but one example of the attempt to marginalize a speaker who bluntly expresses his view of continuing racism in the United States, in the context of the horrors of slavery and Jim Crow for which the United States has failed to atone. It is an example of Lawrence’s concern that the taboo on talking about race implicates free speech and equality. Dr. Wright’s story line was not (and is not) the story line of a now humbled nation that does not take race into consideration in making decisions. Instead it was (and is) the story line of anger and rage at past and continuing racism in the United States and the desire to expose it fully and seek an appropriate remedy. It is a story shared by a number of African descendants not only in Chicago, judging by the numbers that belonged to and attended his church when he was a member, it is a story line shared by African descendants and some whites throughout the nation. All of those who support his basic story line, given in highly rhetorical and colorful form, may not support everything he says, like AIDS was created for African Americans. However, whites embracing the notion of a “colorblind” society attack these extreme statements to marginalize all of his comments.

It is the language of race that raises the response, a language that says yes there is continuing racism in the United States and we must fix it that is heard as accusing this society of being racist, that racial slur that derogates the entire white population in this society. It says that you must speak of race in the way that we can accept as supporting our colorblind perspective if you are going to be allowed to speak and not shouted down. It denies the need for remedies for continuing racism because it is not based in conscious racial animus (really meaning that there is no smoking gun and only where there is a smoking gun can you fairly say

L.J. 1, 5 (1988)(Minority law students learn to be silent and not raise the emotion issue of race to avoid “derision or disregard”); Anna Quindlen, The Caucasian Card, Newsweek, August 9, 2008, at ----, --- (Silence from people who have complaints about institutional slavery but have learned “to get along it’s imperative to go along.”); Margalynne J. Armstrong and Stephanie M. Wildman, Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight, 86 N. C. L. Rev 635, 642, fn. 23 and 24 (indicating that people of color, for example, African descendants, in corporate America cannot advance if don’t conform to “successful racial types” citing to Devon W. Carbado & Mitu Gulati, Race to the Top of the Corporate Ladder: What Minorities Do When They Get There, 61 Wash. & Lee L. Rev. 1645, 1645 (2004) (Implicit in this argument is that they do not step out of the “successful racial type: to point out the disparity in hiring African Descendant corporate types.).


the action was racist)\textsuperscript{126} of white people. By doing so, it dismantles in the majority’s mind the need for continued focus on racism in its newer form, denial of racial animus, true or false, and the continuing consequences of an openly racist society, whether conscious or unconscious.\textsuperscript{127} So it not only leads to a disavowal of a need for affirmative action, it leads to a significant opposition to reparations in the white community.\textsuperscript{128} The popular adoption of the majority’s holding in Washington v. Davis has lent support to a white mass embrace (with some African descendant support) of the view that racism is no longer alive and that the continuing disparities are the fault of the African descendant population. Thus, as Lawrence points out, decrying the right of African descendant leaders to “say it plain” and to strip the advocates of the “colorblind” society of the myth undermines equality.\textsuperscript{129} The natural result of chilling speech and calling plain speech reflecting the experience of many African descendants and their supporters heretic supports the myths that (1) there is no longer any racism and (2) there is no need to discuss and develop further remedies for enslavement, Jim Crow and the continuing consequences of those eras, i.e., continuing disparities through “unconscious” racism.

The chill affects the ability of African descendant communities that have been historically victimized by racism from the white population to speak clearly and advocate for anti-racist focus in their communities. Laura Desimone studied Centerville, described as an 80% African American town in the rural South. She was examining the role that language played in the way the community deals with historic and continuing racial disparities. Consistent with the discussion above, she found that the white minority embraced colorblindness and presented that view

\textsuperscript{126} Some scholars argue that the fact that there is no evidence of conscious, intentional racism, does not mean that it is not conscious. The actor may be skilled in masking her racial animus and therefore what these studies are arguing as unconscious bias, for example, may not all be unconscious, just undisclosed. Hart Blanton and James Jaccard, Unconscious Racism: A Concept in Pursuit of a Measure, 34 Annu. Rev. Sociol. 277, 280, 282(2008).

\textsuperscript{127} The Diane Rehm Show, National Public Radio (July 23, 2009 (first hour)), The arrest of Henry Lewis Gates is an example of this phenomenon. The response to the accusations that this was racial in nature was that Sgt. Crowley is not racist, in fact he teaches a racial profiling course to officers. This response is in keeping with Washington v. Davis edict that racial discrimination requires a racial animus. The popular adoption of this definition creates a defensive response for Crowley and his supporters who equate the statement that race was implicated in the arrest of Prof Gates with calling the Sergeant racist. Although this adds to the discussion in the academy and community about racial profiling and unconscious racism, the actors in the police department have distanced themselves from an opportunity to investigate how racial stereotyping – the angry Black man- may have triggered the decision to arrest Prof. Gates.

\textsuperscript{128} See generally, MELISSA NOBLES, THE POLITICS OF APOLOGY (2007).

in the media, which they controlled. Correspondingly, in interviews with whites and African descendants she found that they would talk about race loaded issues without mentioning race. For example, race was not mentioned (1) in discussing the proposal to close the elementary school in Centerville, which was attended by the majority of the African descendant population; (2) the practice of tracking in the public schools and that an African descendant parent refused to allow her child to be placed in a Special Education class for fear that she would be “permanently labeled a ‘problem child’; and, (3) the disproportionate numbers of African descendant school dropouts.” The language of colorblindness and the denial of racial bias in the media and in the perspectives of the minority, but powerful white population sent a message to the majority African descendant population such that they presented the same denial of race as a factor in their less thriving community.

The view that racism is no longer a problem because the country has embraced the definition of racism as being a consciously admitted reliance on racial animus in making a decision involving an African descendant clearly places a chilling effect on any speech that would address racism in situations where there is no a clear evil doer. The discomfort in the discussion is connected to the view that there must be a bad guy and if you are saying that someone’s actions are racially based you are calling them a racist – an evil person. Yet there is scholarship that demonstrates that whites also respond to the language of race by treating African descendants in discriminatory ways. This suggests that signals that someone may be an African descendant continue to result in disparate treatment.

Devine conducted a study published in 1989 that triggered unconscious stereotypes of African descendants. Devine primed participants with words related to African descendant stereotypes that were camouflaged by being presented to them for 80 milliseconds and then masked by jumbled letters. After this presentation, the participants were given a paragraph with an actor engaged in ambiguous hostile behavior. The race of the actor was not identified; however, after being primed with stereotypes of African descendants, the participants were more likely to describe the ambiguous behavior as hostile. Blanton and Jaccard suggest that this study should not lead to the conclusion that there is “an epidemic of untapped and largely unconscious racism in American society.” Rather, they refer to other studies that used words that were “less racist in nature, such as ‘black,’ ‘ethnic’ ‘afro’.” These studies found that the individuals who reported

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higher levels of racial prejudice prior to the priming associated the target actors in the study with African descendants. “This finding suggests that even when people are not conscious of the factors that cause them to act; they may nonetheless act in ways that largely reflect their conscious held attitudes.”

Marianne Bertrand and Sendhil Mullainathan’s study of the response to applications with “white names” as compared to applications with “African descendant names” clearly supports the argument that speech can trigger racially based responses. They compiled the same resumes, some applicants with higher skills and others with lower skills, and varied the names of the applicants (in both groups) by giving some names traditionally associated with whites and others names traditionally associated with African descendants. They sent out approximately 5,000 resumes in response to more than 1300 employment ads. They found that those with names associated as African descendant names needed to send out 50% more applications than those with names associated with whites. They found that these results were consistent in both cities in which they conducted the field study: Chicago and Boston.

The reprisals to the African descendant lawyer or judge that suggests that a highly respected official in the majority society is engaging in behavior motivated by race thus can lead to the effort to find that the actor has violated the codes of conduct or canons of judicial ethics.

V. SPEAKING OUT AGAINST RACISM

As described in Part III, African descendants have had to work to achieve recognition of their basic civil and human rights since arriving in the colonies. For African descendants who chose law as a career, many, often out of necessity and

\[134\] Hart Blanton and James Jaccard, Unconscious Racism: A Concept in Pursuit of a Measure, 34 Annu. Rev. Sociol. 277, 280(2008) (Blanton and Jaccard conclude, after describing the shoving study by Duncan (BL Duncan, Differential social perception and attribution of intergroup violence: testing the lower limits of stereotyping of blacks, 34 J. Pers. Soc. Psychol. 590 (1976) that some of the participants who viewed the act of a African descendant shoving a white as hostile as compared to finding the shove by a white of an African descendant was not hostile may have been conscious of their view that African descendants are more violent, but not conscious of the fact that they were influenced by this view in deciding whether the same shove was hostile or not.)


often by choice, took civil rights cases. They had experienced personally racism as lawyers and as African descendants. They were both the objects of discrimination as well as the advocates of the rights of African descendants. African descendant lawyers were involved in the effort to end discrimination in national bar associations, working through the National Bar Association and supported by the National Lawyers Guild, and to have African descendant lawyers appointed judges. They worked together with the broader African descendant community and supportive whites to end Jim Crow. Because of this history African descendant lawyers, along with ministers, were considered spokespersons for and leaders of the African descendant community. The community often relied on the African descendant lawyer to lend credence to their gut feeling that an action or inaction implicated their Africanness and voice publicly their reality.

Hinds, Griffen and Lumumba were identified with racial activism on behalf of the African descendant community. Hinds through his directorship of the National Conference of Black Lawyers had gained a national reputation as a legal activist on racial matters. Griffen was active in racial justice issues in the army and throughout his college and law school years. Although this article will focus on the cases of Hinds and Griffen because of their explicit statements about race that served as a catalyst for ethical charges, it is important to note that legal activists with a national and local reputation for being militantly outspoken on the issue of race may be lightning rods for sanctions. Lumumba is such a lightning rod. His very presence in the courtroom signifies the language of race. He is well known nationally and locally for not only defending ordinary people but also taking on some of the more racially controversial legal defense cases, similar to Hinds’ identification with the Black Panther Party and Joanne Chesimard (aka Assata Shakur). In fact in 1977 he was an attorney for Assata Shakur on murder charges that were dismissed in Brooklyn, New York. He has represented other

139 See e.g., Affidavit of Lennox Hinds, Esq., Joint Appendix, 58a, filed in Middlesex County Ethics Committee vs. Garden State Bar Association, 457 U.S. 423 (1982) ("As chief executive officer of the NCBL, my responsibilities include the duty to develop opportunities to educate people in the various States on specific criminal trials and other legal issues which reflect racism in the administration of the criminal justice system, . . ." Id. at 59a). Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131 (D. Okla. Mar. 19, 2004), aff’d, 382 F.3d 1206 (10th Cir. 2004) (A team primarily African descendant lawyers, led by Charles J. Ogletree, Jr. responded to the request of the grassroots movement in Tulsa for reparations for the 1921 Tulsa Race Riot and supporting the movement’s belief that reparations were owed). See also, BEFORE THEY DIE (Mportant Films 2008) (A film that features the survivors of the 1921 Tulsa Race Riot and the lawyers that represented them.). The effort to find a legal remedy for unconscious racism is yet another example. The legal effort was spearheaded by Charles Lawrence’s article and one of the foremost leaders has become Eva Paterson, President, and Equal Justice Society.
members of the Black Liberation Army as well. His politics are known to be racially radical as he is the National Chairman and co-founder of the New Afrikan Peoples Organization (NAPO) founded in 1984. His reputation for organizing against racism in Jackson, Mississippi and throughout the country is well known to officials in there as is his unrelenting and non-deferential stance in court when he believes that his clients, who are overwhelmingly African descendant, are receiving unfair treatment.  

When the lawyer or judge speaks out to inform the community of what in her view appears to be racism, infringing on the right to equality and justice or confirming the community’s perception she crosses two lines: (1) she has spoken the language of race, that uncomfortable conversation, and thus to the resistant hearer, has called the actor a racist; and (2) in some instances, she places herself in the position of having disciplinary charges brought against her because of her audacious conduct.

A. Lennox Hinds

The trial judge in the Joanne Chesimard case “does not have the judicial temperament or the racial sensitivity to sit as an impartial judge.”

In 1973, Joanne Chesimard (aka Assata Shakur), member of the Black Liberation Army, an arm of the Black Panther party, was accused of killing a New Jersey State trooper. Shakur was originally scheduled to go to trial with her co-defendant, Clark Squire (aka Sundiata Acoli), in Superior Court in Middlesex County, New Jersey; however, Judge Leon Gerofsky granted a motion for a change of venue to protect the defendants from “transitory passion and prejudice.” The case was then scheduled to be tried in Morris County, New Jersey. Shakur’s co-defendant’s case did go forward; however, her trial was postponed due to her

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141 Chokwe Lumumba Biographical Sketch (on file with author). See also, Hadges and Künstler v. Yonkers Racing Corp., 48 F.3d 1320, 1331 (1995) (District court judge appeared to have a bias against activist attorneys especially those “who represent unpopular clients or causes.”).


pregnancy. She went to trial in 1977 for the murder in the Superior Court, Law Division, in New Brunswick, New Jersey.

The racially tense atmosphere that resulted in the change of venue from which the jury was selected continued to be the climate in 1977. Lawyers from New Jersey and New York formed a coalition to, inter alia, monitor the trial on a daily basis to evaluate allegations of racism. The coalition had serious concerns about the conduct of the trial. The seating of an all-white jury, and five jurors who were related in some way (relatives or close friends) to law enforcement, raised concern for the fairness of the proceedings.

In the midst of the racially charged climate that existed in 1973 at the time the charges for murder were brought and through Shakur’s 1977 trial, the National Conference of Black Lawyers lent its support to Assata Shakur in an attempt to assure that she was treated fairly and humanely. Lennox Hinds was the Director of the National Conference of Black Lawyers (NCBL) from the time of Shakur’s arrest in 1973 through her trial in 1977. He represented her in civil actions challenging her conditions of confinement; however, he was not a member of her criminal defense team. Hinds observed the proceedings and shared his views of the proceedings in his capacity as the director of NCBL. On January 20, 1977, after observing the proceedings and while the jury was being impaneled, Hinds called a press conference at his office in New Brunswick where he issued a press statement, portions of which were printed in New Jersey and New York papers. Hinds did not mince any words. He called the proceedings a “legalized lynching,” accused the judge of questioning the prospective jurors such that he was creating “a hangman’s court,” and indicating that the trial judge did not have “the judicial temperament or racial sensitivity to sit as an impartial judge.” Finally, a

151 In the Matter of Hinds, supra note __, at 610, 486. See also, Garden State Bar Assn, supra note __, at 428, 122.
153 Lawrence Nagy, U.S. Judge declines to stop Chesimard trial but orders hearing, Newark Star Ledger, January 21, 1977, Plaintiffs’ Exhibit 3, Joint Appendix, Middlesex County Ethics Committee v. Garden State Bar Assn., 457 US 423, 73 L Ed 2d 116 (1982); In the Matter of Hinds, supra note 2, at 611, 487. See also, Garden State Bar
television station played a portion of the press conference exchange in which Hinds indicated that “[w]e feel that it is a kangaroo— it will be a kangaroo court unless the judge recluses [sic] himself….”

At the request of a member of the Middlesex County Ethics Committee who read the news accounts, an investigation of Hinds was begun. Judge Appleby did not recuse himself. The trial went forward and Joanne Chesimard (aka Assata Shakur) was found guilty of aiding and abetting a murder and given a life sentence. The Ethics Committee stayed its proceedings pending the completion of the trial. It then reinstituted its investigation of the complaint in December 1977, concluded that there was probable cause to find that Hinds’ speech violated DR 1-102(5) (conduct prejudicial to the administration of justice) and DR 7-107(D) (prohibiting extrajudicial statements by lawyers associated with the prosecution or defense in a criminal matter), and, served charges on Hinds on January 3, 1978. Rather than answering the charges, Hinds and three organizations filed suit in the United States District Court for the District of New Jersey asking the Court to enjoin the state proceedings asserting that the disciplinary rules were violative of their First Amendment rights and were facially vague and overbroad and that these constitutional claims could not be addressed by the Middlesex Ethics Committee. The case went up to the Supreme Court of the United States and it held that the federal courts should abstain after receiving assurances from the New Jersey State Supreme Court that its procedures allowed for an immediate review of the constitutional challenges. The New Jersey Supreme Court determined that the rules were not unconstitutionally vague or overbroad; however, they were unclear as to what “associated with the prosecution or

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154 In the Matter of Hinds, supra note _, at 611, 487.
155 Garden State Bar Assn., supra note _, at 428, 122.
156 In the Matter of Hinds, supra note _, at 611, 487; see also, State of New Jersey v. Joanne Chesimard, Docket No. 16828, Brief and Appendix in Support of Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division, 1 (Jan. 21, 1980) (“…judgment, entered on March 25, 1977, sentencing prisoner to life in prison…”) and Brief and Appendix for the State of New Jersey in Opposition to Petition for Certification, 1 (Feb. 4, 1980) (“…defendant was immediately sentenced by Judge Appleby on the murder conviction to life imprisonment.”).
157 See, In the Matter of Hinds, supra note _, at 611, 487; Garden State Bar Assn., supra note _, at 428, 122.
158 See, In the Matter of Hinds, supra note _, at 612, 487; Garden State Bar Assn., supra note _, at 429, 122. The proceedings in state and federal court were intermixed. Initially the state proceedings were stayed pending the determination of the U.S. District Court which denied the injunction and dismissed the complaint. After this occurred, the Supreme Court of New Jersey stated that it would immediately consider the constitutional claims and subsequently modified the rules to allow for an interlocutory appeal to the New Jersey Supreme Court of constitutional claims. The U. S. Supreme Court held that Younger v. Harris, 401 US 37, 27 L Ed 2d 669, 91 S Ct 746 (1971) applied to civil matters and that abstention was proper in this case. Garden State Bar Assn., supra note 9, at 432, 122; 437, 128.
defense” meant and that there was no factual record to determine whether Hinds was so associated. It clarified that phrase and, held that it would not be retroactive to Hinds. It dismissed the complaint against Hinds. 159

B. Wendell Griffen

Wendell Griffen was an Arkansas Court of Appeals judge from January 1, 1996 to December 31, 2008.160 Judge Griffen is also an ordained Baptist minister.161 Judge Griffen was the subject of an investigation which led to formal charges by the Arkansas Judicial Discipline and Disability Commission (“Commission”) on two occasions, in 2002 and 2005. On both occasions the allegations of violation of the Arkansas Code of Judicial Conduct were based on statements made on issues concerning discriminatory treatment of African Americans.

In early 2002 the University of Arkansas at Fayetteville (“University”) fired its basketball coach, Nolan Richardson, an African American, despite his having the best winning record in the university’s history.162 The Arkansas Legislative Black Caucus held a public meeting on March 18, 2002, for comment on his firing at which Judge Griffen spoke. He put himself in context by indicating not only his present and most recent past employment but also his relationship to the University of Arkansas, having received his undergraduate and law degrees from the University and having served as president of the Black Alumni Society of the Arkansas Alumni Association.163 He then put the firing of Nolan Richardson in context. Judge Griffen outlined a history of low numbers of African American students and faculty at the University, including problems with financial aid for African American students and lack of African American full professors and chairs of departments.164 Judge Griffen encouraged the Arkansas Legislative Black Caucus to use their vote to send a message to the University of Arkansas at Fayetteville that they will not tolerate a continuing history of racial inequities:

Our citizens are still paying, financially, emotionally, academically, and culturally, for inequities in public secondary

159 In the Matter of Hinds, supra note _, at 630, 497; 635-636, 500. The Court never reached the question of whether Hinds’ First Amendment rights were violated by the application of the rules because it indicated that whether his speech could be sanctioned depended on whether he was “associated with” the defense of Assata Shakur and whether his speech was “reasonably likely to interfere with a fair trial.” Id. at 495, 6226. See generally, id. at 495-496, 627-628.
161 Id. at 4.
163 Id.
164 Id.
education that followed the curse Governor Faubus left our state. …Do not reward the captains of colleges and universities with personnel actions, admission standards, and institutional practices and policies that exclude, inhibit, and mistreat black students, faculty, staff, and citizens by appropriating more tax revenue to their schools. Previous appropriations have been used to maintain longstanding inequities, so use your appropriation votes to show that you will not be a willing accomplice to that injustice.\textsuperscript{165}

The Commission received two complaints from named complainants concerning a statement Judge Griffen made that “People of color want to send their children to places where they will have strong positive role models.” This statement was published in a number of newspapers, including the Arkansas Times, USA Today, New York Times and the Arkansas Democrat-Gazette. The Commission received an anonymous complaint about Judge Griffen’s appearance before the Arkansas Legislative Black Caucus.\textsuperscript{166} It notified Judge Griffen of the complaints and that it was initiating an investigation of whether his conduct violated Canons 2A, 2B, 3B(5), 4A, 4C(1). The Commission dismissed the complaints concerning the people of color statement and proceeded to a determination on the complaint concerning Judge Griffen’s appearance before the Arkansas Black Legislative Caucus.\textsuperscript{167} The Commission, after hearing, determined that Judge Griffen’s appearance before the Arkansas Legislative Black Caucus only violated Canon 4C(1),\textsuperscript{168} dismissed the other allegations and issued a letter of admonishment that indicated, among other things, that his appearance before the Arkansas Legislative Black Caucus was not concerning a matter involving his interests.\textsuperscript{169} Judge Griffen responded by filing a complaint for declaratory and injunctive relief in the federal district court asserting that the issuance of the Letter of Admonishment was unconstitutional. The federal district court dismissed the complaint for lack of jurisdiction since the state agency and the Arkansas Supreme Court had not ruled on the constitutionality of this action.\textsuperscript{170} Griffen filed a Petition for Writ of Certiorari with the Arkansas Supreme Court and that court issued the writ and quashed the admonishment finding that the Canon violated the First Amendment because it did not put Judge Griffen on notice as to

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{165} Id.
\item\textsuperscript{166} Id. at 527.
\item\textsuperscript{167} Id. at 528.
\item\textsuperscript{168} “A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge’s interests.”
\item\textsuperscript{169} Griffen v. The Arkansas Judicial Discipline and Disability Commission, 130 S.W. 3d 524, 529-530 (Ark. 2003).
\item\textsuperscript{170} Griffen v. Arkansas Judicial Discipline and Disability Commission, 266 F.Supp.2d 898 (E.D. Ark. 2003)
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what is proscribed by the language “in a matter involving...the judge’s interests.”

The Commission received complaints concerning comments made by Judge Griffen primarily while making public addresses to organizations such as the NAACP and the National Baptist Convention in 2005 and 2006 as well as written statements issued in 2006 contained in a press release and an article published in the Arkansas Times. The Commission issued two complaints concerning these statements. In the formal statement of charges issued by the Commission on April 17, 2007, the Commission charged Judge Griffen with violation of Canons 1 and 2A, 2B, 4A(1), 4B and 5A(1)(b) of the Arkansas Code of Judicial Conduct for statements made that were (1) critical of the Bush Administration’s handling of the tragedy of Hurricane Katrina (it “revealed ‘the scab of racism and classism’”), and reportedly criticizing more generally President Bush, Vice President Cheney, the late President Ronald Reagan, the Christian right, and Supreme Court Justice Clarence Thomas, (2) critical of President Bush’s nomination of John Roberts for Chief Justice of the United States Supreme Court, (3) supportive of an increase in the minimum wage, (4) voicing opposition to the Iraq war and the bashing of immigrants and homosexuals, and, (5) critical of President Bush’s policies as representative of what he termed a “unilateral presidency.”

The Arkansas Judicial Discipline and Disability Commission held a hearing on March 16, 2007, and voted 5-3 to bring formal charges against Judge Griffen and conduct a full disciplinary hearing. The formal charges were filed on April 18, 2007. Judge Griffen filed his answer on April 24, 2008. On August 8, 2007, the Commission panel assigned to hear the pending charges against Judge Griffen recommended that the full Commission grant the summary judgment motion because it was their finding that the statements complained of

171 Griffen v. The Arkansas Judicial Discipline and Disability Commission, 130 S.W. 3d at 538.
173 Id. at 2.
174 Id. at 2 and supporting the charge by attaching a posting in The Columbus, Georgia Ledger-Inquirer’s web page as attachment 2. This posting also reported the accusation that the Bush Administration had mishandled Hurricane Katrina.
175 Id.
176 Id.
177 Id. at 3.
179 Formal Statement of Charges, In the Matter of: Wendell L. Griffen, supra note __.
180 Answer to Formal Statement of Charges, In the Matter of: Wendell L. Griffen, supra note __.
were protected by the First Amendment. The full Commission determined, after review of Republican Party of Minnesota v. White and Jenevien v. Willing that the speech that served as the basis of the complaints against Judge Griffen was protected speech.

C. Why Unconscious Racism?

There were no public statements made by the charging bodies in New Jersey or Arkansas that could lead one to believe that the charging of Hinds and Griffen were acts of conscious racism. Yet, if one applies the situational components that provide fertile ground for the expression of unconscious racism discussed infra, one could easily reach the conclusion that the charges from the Middlesex County Ethics Committee and Arkansas’s Judicial Disability and Discipline Commission were triggered, in large part, by unconscious racism.

1. Language of Race

Hinds and Griffen, two African descendant legal professionals, used the language of race to alert the community to a racial issue in an important transaction that affected the community and in some sense to chastise a high status white government official for his conduct. In Hinds case, the situation was more localized (although with national implications since the Black Panther Party was national in scope) and in Griffen’s case it was more national in scope, given the broad media coverage on the tragedy of Hurricane Katrina, particularly in New Orleans, and the fact that the response to Hurricane Katrina required the federal government’s involvement. The language of race used by the African descendant, high profile legal professionals was sharp and clear: “the judge did not have the judicial temperament or racial sensitivity” and Bush’s actions post Katrina revealed “the scab of racism and classism.” The persons in charge of the initiating a process to determine whether the language should result in a formal complaint were white. In addition to the actual words spoken by Hinds and Griffen, the situations about which they spoke were infused with race.

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181 Report to the Arkansas Judicial Discipline and Disability Commission Recommending Dismissal of These Cases, In re The Honorable Wendell L. Griffen, (Nos. 05-328 and 05-356).
182 416 F.3d 738 (8th Cir. 2005).
183 493 F.3d 551(5th Cir. 2007).
184 Final Decision and Order, In the Matter of: Honorable Wendell L. Griffen (Commission Case No. 05-328 and 05-356) (September 27, 2007).
185 Considering institutional racism, an African descendant in that role who identified strongly with that role could possibly have had triggered unconscious racial bias. Eva Paterson & Kimberly Thomas Rapp & Sara Jackson, The Id, the Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence’s Vision to Mount a Contemporary Challenge to the Intent Doctrine, 40 U. Conn. L. Rev. 1175, 1188-1189 (2008)(Persistence of structural racism).
**Hinds**

The Joanne Chesimard case, being tried in New Jersey, had captured local and national news. The Black Panther Party, of which she was a local leader, was waging an offensive across the United States for equality and justice for African descendants. Their tactics were aggressive, both in providing essentials to the poor African descendant community and in protecting themselves and the community from police violence. Confrontations with the police were not unusual. However, some would call this a race war with the police on the side of the forces identified by the Black Panthers as being impediments to justice. The arrest and charging of Assata Shakur and her co-defendant, Sundiata Acoli, was covered by the local papers. And when information was shared with the community that Joanne Chesimard, known as Assata Shakur was being subjected to unconstitutional living conditions, including brutality, the National Conference of Black Lawyers (NCBL), through its director, Lennox Hinds, agreed to represent her. Hinds was not a part of the criminal defense team; however, because of the racial implications of the trial and the importance of assuring that the trial was fair, Hinds was present in court on a frequent basis. His statement to the press was a way of informing the community that the conduct of the trial might be tainted by race in this era of colorblindness. The complaint against Hinds was filed with the executive director of the Middlesex Ethics Committee by a member of the committee after the statements made by Hinds were published.

**Griffen**

Wendell Griffen is well-known in Arkansas as being plain spoken on issues of race. He has a history of being involved in a number of organizations, some focusing on African descendant issues such as the National Bar Association, the NAACP (until he went on the bench and believed some may find his membership ethically problematic) and the Black Alumni Association of the University of Arkansas. After becoming a judge in 1996, he ran afoul of the commission (spell out) when he spoke in support of Nolan Richardson, the African descendant University of Arkansas basketball coach who was fired. He spoke at a meeting called by the Legislative Black Caucus on this firing and called to task the University of Arkansas for what he felt was racial injustice in the treatment of

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186 Resumé, Wendell L. Griffen (on file with author) and August 18, 2009, Interview with Wendell L. Griffen.

187 See, Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race, Again*, 15 B.C. Third World L.J. 1, 9-10 (Richardson leader in the Black Coaches Association that addressed issues of N.C.A.A. policies and practices that limited African descendant players. He reminded Lawrence of a “race man,” someone who loved who he was, not someone who disliked members of other races.).
faculty and staff of African descent. As will be discussed infra, the full commission decided to sanction Griffen, as violating Arkansas Rule of Professional Conduct 4 C (1). However, this was reversed by the Arkansas Supreme Court.

So, when he spoke out again, in 2005 by saying, among other things, that race was implicated in the Bush administration’s handling of Hurricane Katrina, the commission used its discretion to respond to an anonymous complaint filed about the reported statements by submitting the complaint to Judge Griffen followed by filing a statement of allegations. The only daily newspaper in Arkansas carried editorials that highlighted the importance of the statement about race. In fact, articles that appeared about the 2005 charges seldom mentioned any of his other statements, focusing rather on the statement that race was a factor in the response of the Bush administration to Hurricane Katrina. The question is whether the commission was influenced by or in agreement with these articles and was motivated by the stereotype of “angry Black man” breaking the taboo against an open discussion about race in the treatment of African descendants. Did the statement, and complaints about the statement, tap an unconscious stereotype that Griffen was an “uppity Black man” who had the audacity to suggest that the Bush administration acted in a racist way, breaking the taboo against speaking about race and questioning whether there are racial implications in certain conduct. Was this somehow counter not only to the role of “judge,” not making public statements on politically contentious issues, but also to the need to maintain the illusion of a “colorblind society” at least as it relates to the power structure of this society? That the commission may have been unconsciously motivated by the race of the actor and his statement about race can be implied from a number of factors:

1. The Commission was unsuccessful in sanctioning Judge Griffen in 2002 for statements in support of Nolan Richardson and the accusation that the University of Arkansas’s actions in firing him had racial implications. Griffen called out the University system’s flagship campus and dared to accuse it not only of taking race into account in firing Coach Richardson, but also of failing to assure a racially diverse faculty, staff and student body. Canon 4(C) in 2001 allowed judges to

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188 Statement of Wendell L. Griffen, Arkansas Legislative Black Caucus Public Hearing, Inequities in Higher Education (March 18, 2002).
189 Editorial, Wendell Griffen vs. Ike: And every other Republican in sight, ARKANSAS DEMOCRAT-GAZETTE, September 13, 2005, at 4B; Editorial, Here we go again: Wendell Griffen’s latest brouhaha, ARKANSAS DEMOCRAT-GAZETTE, November 10, 2005, 8B.
190 Id.. Perhaps as a result of this, the liberal media’s focus was on the Hurricane Katrina statement. See, e.g., Ernest Dumas, Editorial, Old-time lynching, Arkansas Democrat-Gazette, May 10, 2006.
191 Republican Party of Minnesota v. White, 536 U.S. 765, 802, 122 S.Ct. 2549, 2537 (2002)Stevens, J., dissenting)(“Importance of maintaining public confidence in the ‘disinterestedness’ of the judiciary. …’(recusal) can(not) overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy.”)
speak to the legislature on issues about which they had an interest.\footnote{\textsc{Griffen v. Arkansas Judicial Discipline and Disability Commission}, 130 S.W.3d 524 (2003).}

The Arkansas Supreme Court found this language to be ambiguous and in ruling in Griffen’s favor requested that the Commission review the Canon and recommend changes to the Arkansas Supreme Court to remove the ambiguity.\footnote{This was actually done in 2004 when the Commission recommended that the exception language concerning interest be deleted from the Canon and the Arkansas Supreme Court adopted this change. In Re: Arkansas Code of Judicial Conduct, Canon 4C (1), 358 Ark. 499 (2004).}

(2) The Commission held a hearing on September 15, 2006, to determine how to proceed on the statement of allegations. It decided to dismiss the allegation that Judge Griffen’s statement that the Bush administration’s actions in response to Hurricane Katrina raised the “scab of racism and classism.”\footnote{Transcript of Hearing at 26, In the Matter of the Honorable Wendell L. Griffen, No. 05328 & 05-356 (Filed September 21, 2006).} On March 16, 2007 the Commission held a probable cause hearing in which it determined to proceed with a formal disciplinary hearing. Despite the dismissal of the accusation concerning race in the response to Hurricane Katrina, the formal charges included this allegation.\footnote{Formal Statement of Charges at 2, No. 2, In the Matter of Wendell L. Griffen, No. 05-328 & 05-356 (April 18, 2007).}

2. Decision-makers discretion

The persons who decided to issue charges against Hinds and Griffen had the discretion to determine that the conduct complained of did not violate the disciplinary rules. They could have simply ignored the complaint or given them notice of the complaint without taking further action. At each step of the process the disciplinary bodies could have determined not to go forward.

In the case of Lennox Hinds, the Middlesex County Ethics Committee could have determined that the speech did not raise a question of violation of the rules. It could have decided not to engage in an investigation or once the investigation was completed, not to accept the recommendation to file charges against Hinds.\footnote{\textit{In the Matter of Lennox S. Hinds}, 90 N.J. 604, 611, 449 A.2d 483, 487 (1982) (Middlesex County Ethics Committee authorizing investigation, adopting recommendation of the investigating body and approving filing of charges against Hinds.). Hinds refused to answer the complaint and immediately filed an action in federal court challenging the constitutionality of the action against him by the Middlesex County Ethics Committee. \textit{Garden State Bar Ass’n v. Middlesex Cty. Ethics Com.}, rev’d \textit{Garden State Bar Ass’n v. Middlesex Cty. Ethics Com.}, 643 F.2d 119, (3d Cir. 1981) rev’d \textit{Middlesex Ethics Comm. v. Garden State Bar Ass’n}, 457 U.S. 423, 102 S.Ct. 2515 (1982) The U.S. Supreme Court held that the federal courts have no power to review the action of a state ethics committee in disciplining its members.}
In Arkansas, the executive director and the commission exercised discretion at several points during the proceeding, including the Executive Director determining that the anonymous complaint was within the Commission’s jurisdiction, the Investigation Panel determining that there was sufficient cause to proceed; and the decision by the Investigative Panel to file a formal statement of allegations after which a hearing will be held before a Hearing Panel, serving a notice of charges, receiving the response from Griffen on the notice of charges and determining there was sufficient evidence to go forward with a probable cause hearing and the filing of formal charges against Griffen.

3. **Ambiguity**

The ambiguity that presents itself in these cases is the ambiguity that presented itself in our examples in the section on Unconscious Racism. In the cases of Griffen and Hinds the question is whether their conduct is prohibited by the rules, much like a question of whether the person to be hired has the qualities needed to satisfy the job description when some of the qualities are subjective. So, whether the person will be a team player is a judgment call that the person making the hiring decision will have to determine. Both cases ask the question of whether a lawyer or judge may question the racial motivation of a high sitting official, implicating the First Amendment and the responsibility of an attorney to seek justice. In the case of Hinds, he questioned the judge in the Joanne Chesimard (aka Assata Shakur) case and in the case of Griffen, he questioned the president of the United States and his administration. Both these cases reveal the taboo against talking about race in a way that insinuates that an action may be racist and attempts to use the rules of conduct to effectuate that taboo.

**Hinds**

The Middlesex County Ethics Committee responded to the newspaper article and television report quoting Lennox Hinds as saying, inter alia, that the judge in the Joanne Chesimard case did not have the “judicial temperament” or the “racial sensitivity” to try the case. It initiated an investigation of Lennox Hinds, should abstain from interfering in a state attorney disciplinary proceeding since the New Jersey Supreme Court would afford an immediate review of the constitutional challenges.

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197 According to the Associated Press, the executive director indicated that Republican Party of Minnesota v. White, did not apply to Arkansas’s Code of Judicial Conduct. See supra Part IV.


staying it until after the trial of Assata Shakur. After the trial the investigation was completed and the Committee decided to file charges that Hinds’ speech violated DR 7-107(D), which restricts the speech of lawyers and law firms associated with the parties in a criminal matter. It also claimed that his speech violated DR 1-102 (A) (5), alleging that the speech was “prejudicial to the administration of justice.”

The ambiguity in this case is whether DR 7-107 (D) applies to the speech of an attorney who was not identified on the court papers as a member of the defense team. The rule’s prohibition against speaking about the proceedings in a matter was limited to the attorneys associated with the prosecution or defense of a criminal matter. The ambiguity was in the term “associated with.” This ambiguity allowed the Commission to connect the dots in a way that supported their conclusion that Hinds’ conduct was within the scope of the rule. Perhaps the Commission assumed this association because he had represented Joanne Chesimard (aka Assata Shakur) in a civil matter involving her conditions of confinement. Their vision may have also been obscured by the fact that in his statement Hinds indicated that he spoke on behalf of Chesimard’s counsel because they were subject to a gag order.

The New Jersey Supreme Court had never interpreted this rule. The cases that had been brought in other jurisdictions were against attorneys who officially represented one of the parties in the case. The Supreme Court of New Jersey in its decision in In the Matter of Lennox S. Hinds noted the question before it was whether the language “associated with” in Disciplinary Rule 7-107 (D), Code of Professional Responsibility included attorneys not of record, since Hinds was not on the papers as being a member of the defense team. Although the Court argues that the term is not “esoteric or abstruse,” the fact is that the Ethics Committee could have found that the rule did not apply because Hinds was not an attorney of record. The Court’s decision not to apply this interpretation to Hinds because it was “the first opportunity we had to define the proper scope…” suggested that an interpretation could have been made that the term covered only attorneys of record.

Griffen

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205 Id. at 628, 496.
206 Id. at 636, 500.
The only time the Arkansas Supreme Court has addressed an issue of pure speech in determining whether a judge has violated a Canon of Ethics has been in Judge Griffen’s 2002 case involving his urging the Legislative Black Caucus to withhold funding from the University of Arkansas until it addressed issues of racial inequality. And in that case the Court found that Canon 4 C (1) was “vague and indefinite …” and quashed the admonishment of Judge Griffen. Although the Court indicated that it did not view Republican Party of Minnesota v. White, as controlling in this case (speech in front of a legislative body), it did not determine whether public statements of position by elected judges would be controlled by White. In responding to the charges filed against him in 2005 and 2006, Judge Griffen argued, inter alia, that the case of Republican Party of Minnesota v. White held that his speech was protected by the First Amendment.

Republican Party of Minnesota v. White, decided three years before the complaint was made concerning the 2005 statement, addressed the First Amendment rights of a candidate for judicial election. In White, the Supreme Court decided whether a judicial candidate could be precluded from announcing her positions on current issues. The Supreme Court said no. The candidate had the right to inform the public of her positions on issues of importance to the community. How broadly White will be applied is a question that will be answered as other cases come before the courts. For example, does it apply generally to all judges who are standing for election, whether or not the election is to be held in the near future and the judge has put in her name as standing for re-election? That seems to be a fair interpretation of White, since otherwise, a person who is not a judge can engage in pre-election lobbying of the public for some months before the deadline to file the papers to be a candidate and possibly gain some advantage over the judge who is currently seated and planning to run for re-election. The other question is whether it applies to speech uttered in communities outside of the state for which the candidate will stand for election? Again it seems fair to say that, as in this case, the statements will reverberate to the candidate’s community, some members of the community may be present in the audience, and it would be overly restrictive of the right to express views to narrow that right to a specific locality.

The Court also disabused people of the myth that judges should not speak on controversial issues. “Judges often state their views on disputed legal issues – in classes that they conduct, and in books and speeches.” The Court indicated that all the Supreme Court justices came to the Court with opinions on many legal issues quoting former Chief Justice Rehnquist:

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated

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207 Griffen v. Arkansas Judicial Discipline and Disability Commission, 130 S.W.3d at 538.
209 Id.
at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another.\footnote{Republican Party of Minnesota v. White, 536 U.S. 765, 777, 122 S.Ct. 2528, 2536 (2002).}

The Court held that it is a violation of the First Amendment to prohibit a judicial candidate from expressing their opinions on controversial legal and political issues.\footnote{Republican Party of Minnesota v. White, 536 U.S. 765, 788, 122 S.Ct. 2528, 2542 (2002).}

One could argue that ambiguity has been created partly by the fact that in Arkansas charges for violation of the Canons of Ethics have tended to focus on illegal behavior or behavior that directly affects parties in litigation. The Arkansas Supreme Court and Court of Appeals have considered whether certain judge conduct violated Canons 1, 2A, 2B.\footnote{Canon 1. A judge shall uphold the integrity and independence of the judiciary. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.} The conduct considered included whether a judge questioning a witness for the prosecution violated Canons 1 and 2;\footnote{Willis v. State of Arkansas, 2007 WL 2660245 (Ark. App.) (The Court of Appeals did not reach this question because the defendant had failed to preserve it by objecting to the questions the judge asked the witness.)} whether a judge disqualifying an attorney for judge shopping was performing his duty under Canon 1;\footnote{Valley v. Phillips County Election Commission, 347 Ark. 494, 183 S.W.3d 557 (2004) (The Court supported the disqualification based on judge’s duty under Canon 1.).} whether a judge’s personal solicitation of funds for his campaign violated Canon 1;\footnote{Simes v. Arkansas Judicial Discipline and Disability Commission, 368 Ark. 577, 247 S.W.3d 876 (2007).} whether a judge violated Canons 1 and 2 A by failing to honor a subrogation agreement, by issuing checks when insufficient funds, by not paying federal personal income tax, and by operating a motor vehicle with a fictitious license plate tag;\footnote{Judicial Discipline and Disability Commission v. Thompson, 341 Ark. 253, 16 S.W.3d 212 (2000) (finding violations of these and other Canons and removing judge from office).} whether a judge continuing on the bench when

\begin{itemize}
\item \footnote{Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.}
\item A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
\item B. A judge shall not allow family, social, political or other relationships to influence the judge’s judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.
\end{itemize}
charged with automobile-related misdemeanors would violate Canons 1 and 2;\footnote{\textit{In re Davis}, 358 Ark. 351, 189 S.W.3d 444(2004)(The Court agreed with the Commission that these Canons required a temporary suspension with pay until the misdemeanors were resolved.)} whether Canons 1 and 2 require a chancellor to recuse herself when a former law partner is a party in the case;\footnote{\textit{Dolphin v. Wilson}, 328 Ark. 1, 942 S.W.2d 815 (1997)(The Court said recusal wasn’t mandated when prior partner is of counsel; however, troubled that is party yet no hearing was requested or held on this issue. The judge’s decision not to recuse was affirmed because no abuse of discretion.)} whether losing demeanor in court violates Canons 1 and 2;\footnote{\textit{Skokos v. Gray}, 318 Ark. 571, 886 S.W.2d 618 (1994)(The party sought certiorari to consider whether the Chancellor should recuse self. The Court noted that there was a "contest of wills" between attorney and Chancellor and implied that a judge’s loss of demeanor would violate Canons 1 and 2. Court declined to change Chancellor’s decision not to recuse.)} whether a district judge violates Canons 1 and 2 when he serves as a civil attorney for a county and represents the defendant in a civil action involving a plaintiff whom he arraigned as a district judge in a criminal matter;\footnote{\textit{Johnson v. Steed}, 2007 WL 433566 (W.D.Ark.) (Court held that in light of Canon 2, it was inappropriate for the district judge to serve as counsel for the defendants.)} whether a judge violates Canons 1 and 2 when the judge makes statements to the press about a criminal case before him and provides a book to the victims and their families on child sexual abuse;\footnote{\textit{Walls v. State of Arkansas}, 341 Ark. 787, 20 S.W.3d 322 (2000) (The court held that Canon 2 A is not violated when the judge has the same interest as any other property owner in the county.)} whether losing demeanor in court violates Canons 1 and 2;\footnote{\textit{Worth, et. al., v. Benton County Circuit Court}, 351 Ark. 149, 89 S.W.3d 891 (2002) (The court held that Canon 2 A is not violated when the judge has the same interest as any other property owner in the county.)} whether a justice violates Canon 2A when he sits on a case which has the same issues as a previous case in which he wrote a dissenting opinion;\footnote{\textit{Huffman v. Arkansas Judicial Discipline and Disability Commission}, 344 Ark.274, 42 S.W.3d 386 (2001) (The Court said this violated Canon 2 A.)} whether a judge violates Canon 2A when he is a member of the class seeking relief from certain property taxes;\footnote{\textit{Black v. Steenwyk}, 333 Ark. 629, 970 S.W.2d 280 (1998) (This did not violate the canon because found no evidence of bias in the record although Court expressed concern.)} whether a judge violates Canon 2 when he has stock in the company seeking a temporary restraining order;\footnote{\textit{U.S. Term Limits, Inc, et. al. v. Hill, et. all}, 315 Ark. 685, 870 S.W.2d 383 (1994) (The justice indicated that the bias referred to in Canon 2 A must "stem from an extra-judicial source and result in an opinion on the merits of some basis other than what the judge learned from his participation in the case." Id. at 687, 385 citing \textit{United States v. Grinnell Corp.}, 384 U. S. 563. 393 (1966).} whether a judge violates Canon 2 when he has stock in the company seeking a temporary restraining order;\footnote{\textit{Worth, et. al., v. Benton County Circuit Court}, 351 Ark. 149, 89 S.W.3d 891 (2002) (The court held that Canon 2 A is not violated when the judge has the same interest as any other property owner in the county.)} whether a Chancellor violates Canon 2 A when she is in a landlord-tenant relationship with an attorney for a party;\footnote{\textit{Huffman v. Arkansas Judicial Discipline and Disability Commission}, 344 Ark.274, 42 S.W.3d 386 (2001) (The Court said this violated Canon 2 A.)} whether the judge violates Canon 2 B when he has one counsel in a matter before him serve as a pallbearer for his
father. The conduct, therefore, that the Arkansas Supreme Court has historically found to violate Canons 1 and 2 do not relate to opinions of global social justice and political issues.

Matthews v. Rodgers, 279 Ark. 328, 651 S.W.2d 453 (1983) (Given the circumstances, no communication of impartiality.)

As noted in the vignette on Judge Griffen, the charges related to some matters that arguably did not raise the question of race except from the perspective that an "angry Black man" is daring to challenge the highest offices of the United States. I focus on the statements that directly implicate race because it is clear from the media coverage of his statements and the way in which the Executive Director reinserted the race charge after the panel had determined to eliminate it, strongly suggests that this was about race.
4. Non-racial reason for charges

As indicated earlier, there is nothing in the record that is a smoking gun to suggest that the standard of Washington v. Davis was met in these cases, and that Hinds or Griffen could prove intentional racism. Rather the actors rely on the conduct of the legal professionals in bringing the charges of violations of the codes of conduct for lawyers and judges. They do not associate this conduct or the reason they are concerned about the conduct with race.

In the case of Hinds, the reliance was on the fact that he had some relationship with the defense team although the Committee knew he was not a member of the defense team. Ostensibly, therefore, the Ethics Committee acted in good faith to assert that he should be subject to DR 7-107 (D).

The charges against Judge Griffen seem to be a stretch both from the perspective of the First Amendment and the cases that appear to have been subject to the charge of violating the Canons as discussed supra, Part V. C. 3. (ambiguity). It appears that the Commission’s Executive Director and the Commission assumed that taking positions on controversial political and social justice issues impugns the integrity of the court, giving the impression that a judge cannot be impartial on matters that come before the court that may relate to the controversial issues. However, the charges actually impugn the integrity of Judge Griffen and undermine the responsibility of parties that may come before him. Canon 3 E (1) requires a judge to disqualify himself or herself “in cases in which the judge’s impartiality would be questioned.” As the Supreme Court indicated in White, the bias with which the Canons are concerned is the bias against the parties and whether a judge could be fair to the parties even on an issue about which he or she has some views.229 This is a case-by-case determination. The Supreme Court in Arkansas shares that view.230 It is the electorate's responsibility to determine whether it wants a judicial candidate to be seated who has certain views on the issues about which it is concerned.231 That being said, the Canons themselves provide the cover of legitimacy, or that there is a non-racial reason for the charges. They carry the imprimatur of legitimacy. The Canons do not raise race and there is nothing in the statements in the charges (check complaint) that would explicitly raise the issue of race.

D. The Effect of this Unconscious Racism

The effort to sanction these legal professionals by charging them with violations of the ethical codes was unconsciously an effort to silence their voices suggesting that racism, whether conscious or unconscious, may be alive and well in some of the highest offices of the land – the judicial and the executive offices.

The importance of a judge and lawyer being free to speak about what she or he observes in the body politic as it concerns race is tied to the effect race has had on African descendant legal professionals and their communities. The African descendant legal professional doesn’t lose his or her interest in addressing issues of race and racism in the nation simply because he or she becomes a legal professional. Indeed, one could argue that given the history of race and racism in the law in the United States, there is a duty on the part of the African descendant legal professional to identify, when seen, those places in which continuing racism may exist and negatively affect the African descendant community. Getting feedback from people of high stature in the community, such as a lawyer or judge, also alerts the community to signs that race may be a factor, intended or unintended, in the treatment of their communities. It gives credence to the “suspicion” some may have; however, because of the myth of a colorblind society that many have embraced, one questions whether race played a part in the treatment of the African descendant community or not. If the ethical codes can be read to prevent a legal professional from expressing the view that race was implicated in the actions of a high governmental official, whether in the executive or judicial branch, it not only undermines the right to free speech, it undermines the right of African descendants to remedy racism in the society and it reinforces the tenacious existence of unconscious racism.

Just the bringing of the charges against these high profile African descendant men serves to chill other voices who don’t want to suffer the consequences. They may view bringing the charge of racism as particularly risky since Washington v. Davis has defined racism as intentional racial animus, discrediting even today the continued urgings of scholars and activists that racism continues in another form without the markings of conscious animus.

The effort to sanction these legal professionals is particularly insidious because the efforts were made at the time of raging national public debate. To attempt to silence their voices through sanctions infringed not only on their right to participate in this robust debate but on the community’s right to hear a view that may dissent from the majority’s view. The attempt, consciously or unconsciously, was to silence the minority where their positions on race, (and in

232 See, discussion supra, Part III.
233 See, Pennsylvania v. Local Union 542, International Union of Operating Engineers, 388 F. Supp. 155 (E.D. Pa. 1974) (Judge Higginbotham responding to defendants’ motion to recuse himself because, inter alia, he was a participant in causes to correct social injustices to African descendants.) Id. at 158.
235 See, supra Part IV.
237 Although Hinds’ statements went to the trial of Assata Shakur and not to the national debate about the Black Panther Party, his support of Assata Shakur’s right to a fair trial, unbiased by race, can certainly be viewed as a support for the rights of the Black Panther’s.
Judge Griffen’s case the Iraq War and gays and lesbians), clashed with the position of the mainstream, majority views.\textsuperscript{238}

The attempt to sanction Hinds and Griffen for statements about race springing from unconscious racism reinforces what Judge Higginbotham called the “precept of inferiority.”\textsuperscript{239} It suggests that the treatment of African descendants in demeaning and possibly unconstitutional ways is acceptable, thus maintaining the precepts of African descendant inferiority and white superiority. That the ethics committees were unsuccessful does not mean they were ineffective. As discussed supra it served to chill the speech of other legal professionals. It required these voices for a minority view on race and perhaps one most notably shared by the African descendant communities, to spend years and resources to defend against these charges.\textsuperscript{240} And, ultimately the causes for which they were raising the question of race were not redressed.\textsuperscript{241} These results are not dissimilar from the failure to address unconscious racism in other arenas. The racial gaps that we see in employment, health care and criminal punishment, to name a few, that arguably result from unconscious racism, are sustained by our failure to talk about the role that race plays in maintaining these gaps, even though one of the highest legislative branches of government attests to the continuing consequences of slavery and Jim Crow.\textsuperscript{242}

\textsuperscript{238} The political mainstream viewed the Black Panthers as a danger to the country and needing to be exterminated. This effort was led by J. Edgar Hoover and the F.B.I. Similarly, the issue of the conscious or unconscious maltreatment of the majority African descendant population in New Orleans in the immediate aftermath of Katrina was a view reported as being the view of a minority, African descendants and their spokespersons such as Kanye West and Rev. Al Sharpton. The majority in Congress and in the country appeared to support the Iraq War. The majority also took a position against gay marriage. Indeed, it is clear that Judicial Discipline and Disability Commission was speaking to the majority with its charges: the Republican Presidential candidate prevailed in 2004 and 2008 in Arkansas.

\textsuperscript{239} A. LEO\textsc{e}N HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 7-17 (1996).

\textsuperscript{240} Hinds spent 5 years (1977-1982) fighting the charges in the federal courts and the New Jersey Supreme Court. Griffen spent two years (2005-2007) defending himself against the charges.

\textsuperscript{241} Joanne Chesimard aka Assata Shakur was convicted by the jury in 1977. The Black Panther Party was destroyed by collaboration of federal and state law enforcement agencies. The allegations that race is a factor in state and federal government treatment of the post-Katrina crisis in New Orleans continue. And, Judge Griffen lost his bid for another term on the Arkansas Court of Appeals.

\textsuperscript{242} S. Con. Res. 26, 11\textsuperscript{th} Cong. (2009) (Apologizing for the enslavement and racial segregation of African-Americans.) (Whereas the system of de jure racial segregation known as “Jim Crow”, which arose in certain parts of the United States after the Civil War to create separate and unequal societies for Whites and African-Americans, was a direct result of the racism against people of African descent that was engendered by slavery; Whereas the system of Jim Crow laws officially existed until the 1960s—a century after the official end of slavery in the United States—until Congress took action to end it, but the vestiges of Jim Crow continue to this day.).
Finally, the failure to take seriously unconscious racism in the professional disciplinary system and society in general by openly discussing it and developing appropriate remedies, feeds the disdain that some African descendant legal professionals (and others) feel towards the society, including the judiciary, and its failure to truly confront continuing racism. It elicits four kinds of responses from African descendant lawyers. First, those like Hinds and Griffen, will directly address the issue of continuing racism in the judicial and executive branches of government and defend their right to do so. Second, those like Chokwe Lumumba whose whole biography, including his legal practice, suggests a no-sense approach to racism in the society, confronting it frontally and aggressively. In his dealings with the judiciary, he will challenge directly conduct on the part of a judge that he feels disrespects him and his clients, who are primarily African descendants, exposing himself to possible contempt charges and charges of violating the ethical codes of conduct. Third, those who are chilled by the possibility of sanctions, despite the caselaw on attorneys and judges freedom to speak with some limitations, and will not challenge a judge or other high government official who appears to be acting in a racist manner. Many of these are not simply concerned with the possibility of having to defend against sanctions. They are concerned about ostracism. Fourth, those who accept the theory that racism is only acting with conscious racial animus and thus without a smoking gun, would view the treatment of African descendants as having a non-racial basis.

VI. IS THERE A REMEDY?

When the majority of white Americans consider the history of this nation, they are apt to conclude that the blood of the Civil War washed clean the sins of slavery and that the marches of the civil rights movement erased the remaining vestiges of segregation and racial oppression. Others not given to excessive historical introspection believe—almost equally sincerely—that they personally have nothing whatever to do with slavery, segregation, or racial oppression because neither they nor—as far as they know—their ancestors ever enslaved anyone, ever burned a cross in the night in front of anyone’s house, or ever denied anyone a seat at the front of a bus. And so, between the self-absolving denial of the latter group and the self-congratulation—which is a deeper form of self-absolution—of the form, it becomes nearly

\[^{243}\text{See, e.g., State of Oklahoma, ex rel. Oklahoma Bar Association v. Porter, 766 P.2d 958 (1988). The case of LaJune Lange, discussed in the Introduction, falls in this category as well. Although she challenged what she saw as abuse of authority and elitism in the Minnesota Judicial system, her willingness to do so resulted in her having to defend herself against ethical charges.}\]
impossible to have an honest discussion about what used to be called “the Negro Problem.”

The only way to minimize, if we can’t eliminate, unconscious racism, is to make actors conscious of the fact that they may have unconscious racial motivations. Eva Paterson, President of the Equal Justice Society, is spearheading an effort to have the courts accept the proof of unconscious racism, particularly in situations where patterns of racially disparate impact are clear, as a violation of the equal protection clause. Charles Lawrence in his 1987 article, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, proposed a cultural meanings test, does the community view race as significant? Linda Hamilton Kreiger argues that implicit bias is cognizable under Title VII and that the courts should recognize this. The base of the argument around recognizing unconscious racism as proof of violations of the constitution or statutory law governing discrimination is that *Washington v. Davis*’s requirement of proof of racial animus for a violation of the equal protection clause prevents a remedy for unconscious racism which, as the studies have demonstrated, results in negative treatment of African descendants as a result of their race.

The holding of *Washington v. Davis* has become the popular view of the definition of racism and racist. So as discussed earlier, it has led to a taboo on speaking about race because the implication is that if race is raised as being involved in decision making it engenders a defensive response of “I am not a racist!!” Thus, as Higginbotham points out in the quote in the beginning of this section and the scholars who write about the taboo opine, the discussion is never had on how race may be a factor. Without the discussion, in fact with the defensive response that stops the discussion, the racially disparate impacts in all areas of life continue, maintaining the myths of white supremacy and African descendant inferiority.

I agree with the arguments of the legal scholars and activists that the *Washington v. Davis* standard needs to be modified to allow for proof of unconscious racism. The studies described in this article attest to its existence and importance in decision-making that stigmatizes African descendants and their communities and results in racial disparities. The problem is vaster than what civil litigation can address. Since we cannot litigate every instance of unconscious

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248 See, Part Part IV.
racism, even those instances where we see a pattern, there needs to be public policy and public education approaches to discuss its existence, the fact that it is a vestige of slavery and Jim Crow and the importance of recognizing that the evidence of it may exist in what appears to some to be non-racial decision making. As this article points out in the examples of Hinds and Griffen, lawyers and judges are exposed to the possibility of sanctions by engaging in behavior that triggers unconscious racism. This is particularly true in periods when race is a hot button issue in the society. In the late 1960s and 1970s the government initiated COINTELPRO, the government led campaign to infiltrate and destroy the Black Panther Party, among others, that was militantly dedicated to the development and protection of the African descendant community. In 2005 the pictures display nationally of predominantly African descendants being stranded in New Orleans after Hurricane Katrina, bodies floating in the water, people standing on top of structures begging for help and bodies crammed into the stadium raised the cry from many of racialized treatment of the majority African descendant population in New Orleans Hurricane Katrina’s aftermath.

There is also significant pressure on African descendant lawyers and judges not to weigh in on issues of racism in their communities and even in their cases for fear of being sanctioned or ostracized, or for lawyers, fear of hurting their clients. There has been discussion nationally that African descendant attorneys are disproportionately sanctioned for ethical violations in the practice of law. The reason given is that they are more likely solo practitioners or in small firms without sufficient resources. Our search found one lawsuit that alleged racial discrimination in the attorney disciplinary process. The National Conference of Black Lawyers initiated a project in 2008 to gather data, inter alia, on allegations that attorneys who advocate strongly for African descendant defendants in criminal cases are more likely to be held in contempt. The following are some specific recommendations:

1. The American Bar Association should support the development of state studies of the disciplinary system of judges and lawyers to determine whether African descendant attorneys and judges perceive the disciplinary process to be racially biased and to recommend that states gather data on sanctions by race to determine whether African descendant lawyers and judges are disproportionately sanctioned.

249 See, DEBORAH L. RHODE AND DAVID LUBAN, LEGAL ETHICS ----(4th ed. 2004)
251 Interview with Florence Morgan, Member, National Steering Committee, National Conference of Black Lawyers and Chair, New York City Chapter, August 17, 2009. (On file with author.)
252 The National Center for State Courts encouraged state court systems to create tasks forces on racial fairness in the courts beginning in the early 1990s. http://www.ncsconline.org/wc/courtopics/StateLinks.asp?id=75&topic=RacFai. These reports addressed the perception of racial bias in the court system and did not address the disciplinary system for lawyers and judges. However, these reports are instructive because a number of them suggest that people of color litigants
2. As the late Judge Higginbotham suggested in the above quote from SHADES OF FREEDOM introducing Part VI, we will not end the unconscious racism if we don’t discuss it. State bars should include in their state studies multi-racial discussion groups across the state that are led by trained facilitators to assist in the dialogue on perceptions of racial bias in the disciplinary system for lawyers and judges.

3. As the scholars and studies showed, unconscious racism is a national phenomenon, largely due to the taboo placed on talking about race once we “solved” the race problem in the 1960s by outlawing race discrimination and the 1976 ruling that racism means racial animus. Although there has been some discussion on race relations (for example the racial fairness studies discussed supra and the Race Commission organized by President Clinton and Chaired by John Hope Franklin), there has been no nationally sanctioned discussion on what the Senate called the “vestiges of Jim Crow” which it links to the vestiges of slavery. Rather than encourage such discussion, the Senate chose to disclaim the use of the apology to support any claim against the United States. It could have encouraged such a discussion by indicating its support for H.R. 40, The Reparations Study Bill introduced by Congressman Conyers every Congressional session since 1989. This bill would require the discussion of the continuing consequences of slavery and Jim Crow, which would include necessarily the discussion of unconscious racism and a remedy for it.

VII. CONCLUSION

See e.g., New Jersey indicating in Report 1 filed in 1984 and Report 2, filed in 2000, that there was a lack of minority representation on juries and in 1984, the finding was that judges some judges diminish access to justice for minorities because of use of different standards of credibility. There is no report from Mississippi. Arkansas did not submit a report to the National Center for State Courts; however, it created a Task Force on Race and Gender Fairness to look at whether the rules of conduct for judges and attorneys needed to be modified. The recommendation to change disciplinary rule 8.4 (d) to include discriminatory conduct by attorneys was accepted by the Arkansas Supreme Court. See In re: Appointment of an Ad Hoc Task Force to Determine the Need for Rule Changes for a Supreme Court Committee on Race and Gender Fairness in the Arkansas Legal System, 340 Ark. 751 (2000).

253 S.Con. Res. 26, 111th Congress (Apologizing for the enslavement and racial segregation of African-Americans).


255 See, Dr. Ron Daniels’ VANTAGE POINT, Passing HR 40: Towards a Real Conversation on Race in America(Week of August 3, 2009)(On file with author);
The fact of slavery refuses to fade, along with the deeply embedded personal attitudes and public policy assumptions that supported it for so long. . . . Despite undeniable progress for many, no African Americans are insulated from incidents of racial discrimination. Our careers, even our lives, are threatened because of our color.256

The ethics committees unconsciously sought to punish Judge Griffin and Hinds due to the taboo against speaking of race generally and the fact that the taboo may be heightened for those of such high status. The attacks against Griffen and Hinds, and other similar attacks, e.g., Jeremiah Wright and Skip Gates, actually keep us from discussing the real issues of whether there is a continuing saga of racial bias going on although one not meeting the standard of Washington v. Davis. The discussion gets sidetracked into whether, in these instances the judge should have spoken or the attorney should have spoken and we fail to look at whether, indeed, there is some grounds for suggesting that race is implicated in the decision of our highest officials; or more generally, whether unconscious racial bias against African descendants continues as a lingering consequence of slavery and Jim Crow.

As the studies that have been discussed in this article indicate, the problem of unconscious racism is not confined to one locality or one point in time. The problem is a national problem that may be responsible in large part for the continuing disparities in any number of categories including wealth and income, percentage of population with chronic diseases, and incarceration rates. These disparities are not insignificant and to impair the ability of the African descendant communities to thrive and flourish. Failure to expose and discuss issues of ongoing, unconscious racism prevents the imposition of a remedy to minimize if not eliminate these ongoing disparities and undermines the true equality of African descendants.