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“YOU’VE GOT TO BE CAREFULLY TAUGHT”: JUSTIFYING AFFIRMATIVE ACTION AFTER CROSON AND ADARAND

DONALD L. BESCHLE*

In this Article Professor Beschle assesses the continuing legitimacy of affirmative action as a governmental response to racial discrimination. The author begins with a historical review of Supreme Court decisions in which the Court has determined the circumstances under which affirmative action programs are permissible. Next, Professor Beschle surveys the views of contemporary social scientists who contend that racial bias is an instinctive human characteristic, rather than simply a learned attitude. Finally, the author considers the implications of the work of these theorists for the future of affirmative action. Professor Beschle concludes that the ongoing need for governmental action to offset intransigent human prejudice justifies the continuation of affirmative action programs and that the social sciences provide vital insights for the design of future efforts at affirmative action.

INTRODUCTION

You’ve got to be taught to hate and fear,
You’ve got to be taught from year to year,
It’s got to be drummed in your dear little ear,
you’ve got to be carefully taught.

- Oscar Hammerstein II, *South Pacific*

When lyricist and former law student Oscar Hammerstein wrote these lyrics for *South Pacific*, the modern civil rights movement was still young; its major victories were years away. Segregation was still legal, common, and widely accepted; but there was also much reason for optimism. The armed forces had just been integrated, the 1948 Democratic Party platform had endorsed a civil rights plank strong

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enough to spur segregationists to walk out of the convention and run their own candidate,¹ and the litigation campaign that would culminate in *Brown v. Board of Education*² was underway.³ Thus, it was not entirely surprising that Rodgers and Hammerstein would create a musical that would address the problem of racism.

In 1949, the nation had just emerged from a crusade against Nazi Germany and its ideology of racial purity. The contrast between the articulated ideals for which millions of Americans proudly fought and the persistent inequalities of American life created a dissonance that would require resolution through the victories of the civil rights movement.⁴ The first phase of the movement was aimed at the most blatant and offensive forms of racial discrimination, those officially endorsed and enforced by state law.⁵ The abolition of state-enforced segregation led to the second phase, the 1960s movement to outlaw racial discrimination by private parties in employment, housing, and other decisions.⁶ The legitimacy of these claims is now conceded by nearly all except those on the fringes of American political and legal thought.⁷ Contemporary support for the principle of non-

1. See SEAN D. CASHMAN, *AFRICAN-AMERICANS AND THE QUEST FOR CIVIL RIGHTS* 99-108 (1991).

2. 347 U.S. 483 (1954).

3. For an extensive history of the legal strategies of the NAACP leading up to and culminating in *Brown*, see MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW* 42-167 (1994). For an insider's view of the same history, see JACK GREENBERG, *CRUSADERS IN THE COURTS* 54-211 (1994).

4. Gunnar Myrdal writes:

Fascism and nazism are based on a racial superiority dogma . . . and they came to power by means of racial persecution and oppression. In fighting fascism and nazism, America had to stand before the whole world in favor of racial tolerance and cooperation and of racial equality. It had to denounce German racialism as a reversion to barbarism. It had to proclaim universal brotherhood and the inalienable human freedoms.

GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 1004 (20th anniversary ed., 1962). For a description of civil rights activity during World War II, see PAULA F. PFEFFER, A. PHILIP RANDOLPH, *PIONEER OF THE CIVIL RIGHTS MOVEMENT*, 45-168 (1990). After the war, "many Americans found segregation an embarrassment . . . that gave Soviet propagandists ammunition . . ." DONALD G. NIEMAN, *PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT* 143 (1991).

5. See GREENBERG, *supra* note 3, at 54-362.

6. See generally GERARD N. ROSENBERG, *THE HOLLOW HOPE* 42-169 (1991) (surveying and analyzing judicial, legislative, and executive action over the course of the civil rights movement following the *Brown* decision). Rosenberg concludes that the role of courts in bringing about change was relatively insignificant. *Id.* at 156.

7. There are exceptions. Richard Epstein mounts a "frontal intellectual assault" on "the social consensus that supports one or another version of the modern antidiscrimination principle," RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 6 (1992), arguing that free market

discrimination can obscure the fact that the victories of the 1950s and 1960s were achieved only in the face of fierce opposition.⁸ At least some of this opposition was based upon the claim that separation of the races, and perhaps even hostility among them, was so prevalent throughout human history that it could be described as part of human nature.⁹ One response to such a claim, of course, is that it is irrelevant. To establish that something is "part of human nature" is not to establish that it is just or desirable. Much of law quite openly acts to counter what many would claim to be natural human tendencies. Many thinkers contend that aggression and violence are innate tendencies of human nature,¹⁰ but that surely does not lead them to the conclusion that society should not act to deter and, if necessary, punish expression of the instinct.

Perhaps a more common response to the claim that racial bias is natural, though, is, like Hammerstein, to deny it. People, one might argue, are born without prejudice. It is entirely the consequence of pernicious social influence. Eliminate the teaching and social reinforcement of prejudice, and all would be well. This optimistic view struck a responsive chord with many in the 1950s and 1960s, and continues to do so. The view of human nature as intrinsically free of bias may well have contributed to the essential victories of the civil rights movement in that era; ironically, it may now serve to impede further progress.

Since the late 1960s, the most controversial issue concerning civil rights has been the question of the legitimacy of affirmative action.¹¹

pressures will solve the problems of racism better than government action, *id.* at 412-21. For examples of responses, see Norman C. Amaker, *Quitin' Time? The Antidiscrimination Principle of Title VII vs. the Free Market*, 60 U. CHI. L. REV. 757 (1993); Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993).

8. See, e.g., FRED POWLEDGE, *FREE AT LAST?* 115-94, 253-332 (1991). For a description of legislative opposition to the Civil Rights Act of 1964, see ROBERT D. LOEVY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964* 153-224, 287-314 (1990).

9. Thus, George Wallace argued that God intended the separation of the races and that "[a]ll mankind is the handiwork of God." LOEVY, *supra* note 8, at 221. Myrdal wrote of the importance of "the anti-amalgamation" doctrine as among races and its importance in an America otherwise dedicated to the assimilation of immigrant cultures. MYRDAL, *supra* note 4, at 50-67.

10. See, e.g., ROBERT ARDREY, *THE TERRITORIAL IMPERATIVE* 332-44 (1966); KONRAD LORENZ, *ON AGGRESSION* 23-48 (1966). Of course, not all agree. See, e.g., ERICH FROMM, *THE ANATOMY OF HUMAN DESTRUCTIVENESS* 89-184 (1973).

11. For representative academic positions on both sides of the issue, see *Affirmative Action Symposium*, 21 GA. L. REV. 1007 (1987); *Symposium*, 26 WAYNE L. REV. 1199-1362 (1980); *Symposium, Employment Discrimination, Affirmative Action and Multiculturalism*,

Once overt discrimination against racial minorities is forbidden, may government go further and target assistance to those same minorities? Affirmative action has caused some rupture among those who made up the early civil rights coalition;¹² but to a large extent, the opponents of affirmative action have been the very same people who opposed enacting the nondiscrimination principle during the earlier civil rights struggle.¹³ These people now embrace the nondiscrimination principle and proclaim it to be the cornerstone of their present stance. They argue that the abolition of overt racial discrimination has returned us to a pristine state of equality. Any attempt by the state to go further and tip the scales in favor of racial minorities violates the nondiscrimination principle. They may once have opposed that principle, but like the stereotypical religious convert, having seen the light, they now have become its most fervent adherents, to the point of criticizing the backsliding of those who were once believers, but have strayed.¹⁴

This Article contends that courts, and even most advocates of affirmative action, have accepted too uncritically as an analytical starting point the proposition that people begin essentially bias-free and develop racial prejudice only as a consequence of identifiable, culpable acts by individuals or institutions. Under this view, affirmative action must be justified by the identification of the guilty act that has disturbed the status quo, and then must be tailored to do

41 DEPAUL L. REV. 981 (1992).

12. See Morris B. Abram, *Fair Shakers and Social Engineers, in RACIAL PREFERENCE AND RACIAL JUSTICE: THE NEW AFFIRMATIVE ACTION CONTROVERSY* (Russell Nieli ed., 1991). Abrams, writing from a "perspective as an early participant in the civil rights cause," praises the early vision of the civil rights movement, which he describes as aimed at "equality of opportunity." *Id.* at 31. He laments the commitment of some of the civil rights community, starting in the late 1960s, to "equality of results." *Id.* at 32.

13. For example, as a politically active journalist in the 1960s, Jesse Helms opposed that decade's civil rights legislation; subsequently, as a United States senator, Helms attempted to pre-empt the Civil Rights Act of 1991 by amending the existing 1964 Civil Rights Act to provide that there be no preferential treatment accorded anyone in employment on the basis of race. Nicole L. Gueron, Note, *An Idea Whose Time Has Come: A Comparative Procedural History of The Civil Rights Acts of 1960, 1964 and 1991*, 104 YALE L.J. 1201, 1209 (1995). Senator Strom Thurmond, who fought civil rights legislation fiercely in the 1950s and 1960s, praised the Reagan-era U.S. Commission on Civil Rights. Jocelyn C. Frye et al., Comment, *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449, 450-51 (1987).

14. For example, Ronald Reagan, whose first significant political activity was to support Barry Goldwater, an opponent of the 1964 Civil Rights Act, made opposition to Carter administration affirmative action policies "a centerpiece of his campaign" in 1980, and did so using the rhetoric of equal opportunity and nondiscrimination. Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1751 (1991).

no more than return society to that initial, bias-free state. While no one can seriously doubt that culture, society, and both formal and informal education can nurture prejudice, social science provides strong evidence that Hammerstein got it wrong. People naturally tend to favor those most like themselves. It takes work to overcome this tendency—to get people to the point where there is no more “hate and fear.” The abolition of invidious prejudice, when it occurs, is one of society’s finest accomplishments, not merely something that comes naturally.

Once we realize that, in fact, “you’ve got to be carefully taught” to regard people who are different in some salient way as nonetheless equals, we can approach the question of affirmative action in a new way. We can move beyond a focus on guilt or innocence, and toward the achievement of a more equitable society, as the compelling interest justifying at least some forms of affirmative action. But this will require serious reconsideration of the premises, legal and extralegal, that have formed the basis of the last twenty-five years of the affirmative action debate.

Part I of this Article will sketch the debate in the courts over affirmative action, culminating in the recent “strict scrutiny” cases of *City of Richmond v. J.A. Croson Co.*¹⁵ and *Adarand Constructors, Inc. v. Peña*,¹⁶ paying particular attention to the question of what circumstances the Supreme Court has seen as justifying government race consciousness. Part II will survey social science findings suggesting that bias toward those like oneself is a pervasive human trait, but one that can be countered by social institutions. Part III will then discuss the relevance of these findings to the enterprise of framing a new way to analyze the legitimacy of affirmative action.

I. AFFIRMATIVE ACTION IN THE COURTS: THE SEARCH FOR GUILT

The modern history of affirmative action is generally regarded as beginning with executive orders issued during the late 1960s and early 1970s by the Johnson and Nixon administrations.¹⁷ But affirmative

15. 488 U.S. 469 (1989).

16. 115 S. Ct. 2097 (1995).

17. Exec. Order No. 11,246, 3 C.F.R. 339 (1965), *reprinted as amended in* 42 U.S.C. § 2000e (1988) (President Johnson); Exec. Order No. 11,458, 3 C.F.R. 779 (1969), *superseded by* Exec. Order No. 11,625, 3 C.F.R. 616 (1971), *reprinted as amended in* 15 U.S.C. § 631 (1988) (President Nixon); Exec. Order No. 11,518, 3 C.F.R. 907 (1970), *reprinted in* 15 U.S.C. § 639 (1988) (President Nixon). Professor Devins points out that, even prior to the passage of the 1964 Civil Rights Act, “the line separating equality of

action had a nineteenth century "prehistory," one that may shed some light on the modern debate. In the aftermath of the Civil War, the Thirteenth Amendment abolished slavery and the Fourteenth Amendment prohibited at least the most blatant state-sponsored racial discrimination.¹⁸ While neither provision was uncontroversial,¹⁹ these steps were not only just, but also inevitable in light of the Union victory.²⁰

To many, however, the formal equality called for by the Civil War amendments seemed inadequate. In the wake of generations of slavery, would not more be required to make equality, or at least equal opportunity, a reality? Congress responded in two ways that were to prove more controversial, and also more fragile, than the amendments. First, while rejecting calls to redistribute the plantation land of former slaveholders and provide newly freed slaves with "forty acres and a mule,"²¹ Congress did establish the Freedman's Bureau.²² The Bureau had a mandate to provide education and other forms of assistance to former slaves.²³ In its short lifetime, and with limited resources, the Bureau did achieve some substantial

treatment from equality of result was blurred. . . . While President Kennedy argued against 'hard and fast quotas,' he also advised employers to 'look over employment rolls, look over areas where we are hiring people and at least make sure we are giving everyone a fair chance.' " Devins, *supra* note 14, at 1738 (citing PUB. PAPERS: JOHN F. KENNEDY, 1963, at 633-34). Thus, the suggestion that the 1964 Act envisioned rigid "colorblindness" is at least questionable.

18. U.S. CONST. amends. XIII, XIV. From its earliest days, the Fourteenth Amendment prohibited blatant discrimination against blacks. See *Strauder v. West Virginia*, 100 U.S. 303, 305-10 (1879) (holding that the state could not bar blacks from serving on juries).

19. See HORACE E. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 55-139 (1965); JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* 50-288 (1984); G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* 12 HOUS. L. REV. 1, 7-14 (1974).

20. "The proslavery cause knew it had lost the slavery issue with the victory of northern arms . . ." Buchanan, *supra* note 19, at 7-8.

21. See CLAUDE F. OUBRE, *FORTY ACRES AND A MULE: THE FREEDMEN'S BUREAU AND BLACK LAND OWNERSHIP* 181-83 (1978).

22. Act of July 16, 1866, ch. 200, 14 Stat. 173; Act of March 3, 1865, ch. 90, 13 Stat. 507; see Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 755-75 (1985).

23. The 1865 Freedman's Bureau Act gave the Bureau "the control of all subjects relating to refugees and freed men." Act of March 3, 1865, ch. 90, 13 Stat. 507. On its face, the Bureau, then, was authorized to aid not only blacks, but also white war refugees. In practice, the services were largely provided only to blacks. Schnapper, *supra* note 22, at 760-61.

success, especially in establishing schools.²⁴ But from its inception, it was highly controversial. Opponents characterized government assistance to former slaves as an unwarranted advantage. They argued that the war had sought only to establish formal, legal equality.²⁵ In the face of sustained opposition, the Bureau was allowed to expire in the early 1870s, barely a decade after the end of the war.²⁶

In addition, the Reconstruction-era Congress outlawed racial discrimination by private parties operating public accommodations.²⁷ However, in the *Civil Rights Cases*²⁸ of 1883, the Supreme Court held that Congress lacked the power to do this.²⁹ Nineteenth century concepts of the scope of federal power under the Commerce Clause of Article I were too narrow to permit regulation of businesses not engaged in shipping goods across state lines.³⁰ The Court also held that neither the Thirteenth nor the Fourteenth Amendment authorized Congress to go this far.³¹ Of particular interest for our purposes is the language used by the Court to chide Congress for providing former slaves with “special” privileges:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable con-

24. “In most years more than two-thirds of all funds expended by the Bureau were used for the education of freedmen. In each of the years immediately prior and subsequent to the adoption of the fourteenth amendment, the Freedman’s Bureau educated approximately 100,000 students, nearly all of them black.” Schnapper, *supra* note 22, at 780-81. Probably the most lasting legacy of the Bureau was the incorporation of Howard University. *Id.*

25. In language reminiscent of modern criticism of affirmative action, opponents in the 1860s argued:

A proposition to establish a bureau of Irishmen’s affairs, a bureau of Dutchman’s affairs, or one for the affairs of those of Caucasian descent generally, who are incapable of properly managing or taking care of their own interests by reason of a neglected or deficient education, would, in the opinion of your committee, be looked upon as the vagary of a diseased brain.

H.R. REP. NO. 2, 38th Cong., 1st Sess., at 2 (1864). For additional remarks by opponents of government assistance to former slaves, see Schnapper, *supra* note 22, at 763-65.

26. Schnapper, *supra* note 22, at 783.

27. Act of March 1, 1875, ch. 114, 18 Stat. 335.

28. 109 U.S. 3 (1883).

29. *Id.* at 25.

30. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 16-18 (1895) (holding that the manufacture of goods is not interstate commerce justifying congressional regulation).

31. The Fourteenth Amendment was held to authorize Congress only to legislate against state action. *Civil Rights Cases*, 109 U.S. at 10-19. The Thirteenth Amendment, which does apply to private, as well as state, action, was held to authorize Congress only to address “badges and incidents of slavery,” *id.* at 20; denial of access to an inn, public conveyance or theatre was held not to qualify as such, *id.* at 20-24.

comitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws

...³²

This remarkable sentence encapsulates the debate over what would later come to be known as affirmative action. Where is the line between the protection of equality and the provision of special favor? Is special favor ever warranted or even necessary as a means of assuring actual equality? If so, is this merely a temporary condition, or is there justification for extended, if not permanent, measures? The nineteenth century judicial answer to these questions was clear. In a world where permission to discriminate on the basis of personal characteristics was the norm, to outlaw racial discrimination by private parties was to provide special protection.³³ Less than twenty years after the abolition of slavery, after only minimal efforts at "affirmative action" by the Freedman's Bureau, the Supreme Court could, in effect, declare that the original state of fairness had been restored.³⁴ Further race-conscious aid to former slaves was not only inappropriate; it was also unconstitutional.

Any questions about affirmative action obviously faded from the scene as *Plessy v. Ferguson*³⁵ endorsed the constitutionality of segregation.³⁶ The struggle to overrule *Plessy* took center stage for decades, and would not be successful until *Brown v. Board of Education*³⁷ in 1954. The Civil Rights Act of 1964³⁸ and additional civil rights legislation of the 1960s³⁹ restored and expanded upon the

32. *Id.* at 25.

33. The assumption that the right to discriminate was the norm was cited by Senator Strom Thurmond decades later in the debate over the Civil Rights Act of 1964: "Freedom of the individual to choose his associates or his neighbors; to use and dispose of his property as he sees fit; to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from government interference." Strom Thurmond, Statement (Radio) In Opposition to Proposed Statute Which Would Make Businessmen Sell and Serve to Negroes, recorded 6 June 1963, Speeches, Box 19, Thurmond Collection, quoted in LOEVY, *supra* note 8, at 166.

34. *Civil Rights Cases*, 109 U.S. at 24-25.

35. 163 U.S. 537 (1896), overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

36. *Id.* at 550-52.

37. 347 U.S. 483 (1954).

38. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 1971, 1975, 2000a to 2000h-5 (1994)).

39. Most significantly, the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)) and the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3533, 3601 to 3614, 1614a, 3615 to 3619, 3631 (1994)). For a comprehensive history of the adoption of these statutes and their affirmance by the Supreme Court, see STATUTORY

guarantees of nondiscrimination struck down in 1883. By the mid-1960s, these statutes were no longer seen by most people as providing "special" treatment. The baseline from which most Americans calculated was now a norm of non-prejudice, at least with respect to race. Thus, while there was strong opposition to the legislation of the 1960s, prevailing sentiment saw it as merely fixing a distortion of the natural state of things, much like the abolition of slavery had been a century earlier.

But in the late 1960s, as in the late 1860s, victory struck many civil rights advocates as, if not hollow, at least incomplete. Echoing advocates of the Freedman's Bureau, modern voices persuasively argued that decades of injustice called for more than merely banning future acts of overt racial discrimination. Government should take positive steps to achieve real, not merely formal, equality. But here, as in the nineteenth century, opposition was, over time, effective in the political and judicial arenas.

The first form of modern "affirmative action" to be passed upon by the Supreme Court to a large extent established the model for analysis of subsequent cases. This precursor involved busing and other steps toward integrating public schools, measures we would not now identify as affirmative action. The *Brown* decision called for an end to formal segregation, but it did not explicitly call for positive steps to assure the actual integration of schools.⁴⁰ Southern resistance to even minimal compliance led to demands for more forceful action. By the late 1960s, courts were ordering states and localities to take positive actions, such as busing to achieve racial balance, in addition to merely removing formal barriers to integration.⁴¹ Of course, such steps require government sensitivity to the racial composition of public schools. Opponents, then, could claim that these remedies themselves violated *Brown's* command that government be "colorblind."

HISTORY OF THE UNITED STATES: CIVIL RIGHTS: PART II 1467-1837 (Bernard Schwartz ed., 1970).

40. The 1954 *Brown* decision remanded the case to the district court to consider the question of remedies. 347 U.S. at 495-96. This led to "*Brown II*," *Brown v. Board of Educ.*, 349 U.S. 294 (1955), which called for "such orders . . . as are necessary and proper to admit to public schools on a racially non-discriminatory basis with all deliberate speed the parties to these cases." *Id.* at 301.

41. See, e.g., *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968). For a summary of desegregation decisions nationwide during the late 1960s and early 1970s, see GARY ORFIELD, *MUST WE BUS?* 11-39 (1978).

In 1971, the Supreme Court upheld race-conscious remedies in *Swann v. Charlotte-Mecklenburg Board of Education*.⁴² The Court focused on the fact that busing and other steps ordered by the lower court were in response to past state-sponsored segregation.⁴³ State and local school authorities had “ ‘the affirmative duty to take whatever steps might be necessary’ ”⁴⁴ to end racial discrimination; where they failed, “the scope of a district court’s equitable powers to remedy past wrongs is broad.”⁴⁵ The reasoning of *Swann* can fit comfortably into the framework of strict scrutiny. Government—in this case the federal courts—may do what is necessary to achieve the compelling interest of eliminating the effect of past constitutional violations.

But *Swann*’s holding that race-conscious remedies were authorized to eliminate the effects of past *de jure* segregation could easily become a principle that only a showing of past guilt could justify such action. Indeed, subsequent cases established that a school district that had not violated the Constitution could not be included in a court-ordered busing plan.⁴⁶ A link was thus established between race-conscious action benefitting minorities and a particularized finding of guilt on the part of those required to act. To put it another way, race-conscious action benefitting minorities was viewed as a penance for past sins with the aim of restoring the pre-sin state, presumably one of race-neutral harmony.

This analysis is unsurprising in light of the fact that it arose from a court reviewing the actions of another court. The classic model of the role of the judiciary is one that involves a finding of guilt, or at least of fault, that declines to disturb the status quo in the absence of such a finding, and that seeks only to restore the status quo rather than actively to pursue social change.⁴⁷ Some may argue that this

42. 402 U.S. 1, 22-31 (1971).

43. *Id.* at 6-11.

44. *Id.* at 15 (quoting *Green*, 391 U.S. at 437-38).

45. *Swann*, 402 U.S. at 15.

46. The key decision was *Milliken v. Bradley*, 418 U.S. 717 (1974), reversing a district court plan that would have required integration of the Detroit schools and those of a number of suburban districts, where findings of past segregation were limited to Detroit. *Id.* at 745-47.

47. Sir William Blackstone writes:

Now, since all wrongs may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner . . . or, where that is not a possible, or at least not an adequate, remedy, by

model is more myth than reality, but even if it is, it is undoubtedly a powerful myth, with an impact on the reality of judicial behavior.⁴⁸

The model of legitimate behavior by the political branches of government is quite different. Legislatures need not confine themselves to repairing cracks in the status quo. They are expected to be forward-looking, to change things for the better. Of course, they must do so within the constraints of the Constitution. Thus, when courts were called upon to review segregation and other forms of government action clearly disfavoring racial minorities, it was clearly a large step toward the equality envisioned by the Fourteenth Amendment to strike them down, and to do so by formulating the principle that the Constitution is "colorblind." But what would be the consequences of that attitude when courts were called upon to review efforts to improve the status of racial minorities, efforts that might not be clearly limited to fixing the consequences of prior illegal acts?

In *Regents of the University of California v. Bakke*,⁴⁹ a sharply divided Court ruled on an affirmative action plan implemented by the medical school of the University of California at Davis, a young school with no history of discrimination.⁵⁰ The school reserved 16 of the 100 seats in its entering class for "economically and/or educationally disadvantaged" applicants.⁵¹ While the formal criteria for inclusion in this group did not exclude whites, only blacks, Mexican-Americans and Asians were admitted on this basis.⁵²

Four Justices would have held that this program violated federal statutes prohibiting racial discrimination in higher education; they felt no need, then, to address the question of whether the program would,

making the sufferer a pecuniary satisfaction in damages

3 WILLIAM BLACKSTONE, COMMENTARIES 1112 (W. Lewis ed. 1902).

48. For example, when Warren and Brandeis advocated the recognition of a right to privacy by courts, they did not merely advocate it as a good thing, but argued that it was implicit in existing common law. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197-213 (1890). In other words, one who violated it was disturbing the status quo as to rights. See also HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 450-54 (William N. Eskridge, Jr. & Philip P. Frickey, eds. 1994) (outlining the Warren-Brandeis argument that a right of privacy was a natural development from common law principles).

49. 438 U.S. 265 (1978).

50. *Id.* at 272. The school opened in 1968 and began affirmative action admissions in the early 1970s. *Id.*

51. *Id.* at 274.

52. *Id.* at 275-76. "Indeed, in 1974, at least, the special [admissions] committee explicitly considered only 'disadvantaged' special applicants who were members of one of the designated minority groups." *Id.* at 276.

if permitted by statute, nonetheless violate the Constitution.⁵³ Four Justices would have upheld the program.⁵⁴ They read the statutes as barring only discrimination that would violate the Constitution.⁵⁵ This conclusion, of course, made it necessary to address the constitutional question. These Justices felt that “benign” racial classifications could be upheld if they “serve[d] important government objectives and . . . [were] substantially related to those objectives.”⁵⁶ Eliminating “serious and persistent underrepresentation of minorities in medicine,” which could be seen as a consequence of past social discrimination even if no specific guilt could be attributed to the medical school at Davis, would serve as such an objective.⁵⁷ Justice Powell cast the deciding vote against the program in question, but in favor of the proposition that some affirmative programs could be justified.⁵⁸ Using the language of strict scrutiny, but in a way that would not guarantee that all programs must fail, Justice Powell maintained that an interest other than remedying past constitutional violations might serve to justify race-conscious acts.⁵⁹ In the context of higher education specifically, Justice Powell found such an interest in the enhancement of the educational environment caused by a diverse student body.⁶⁰ But, Justice Powell insisted, that interest must be pursued through narrowly tailored means. Race may not override all other factors, but it may be one part of the mix of considerations in the admissions process.⁶¹ *Bakke*, then, endorsed the proposition that at least some affirmative action programs could be forward-looking and could be justified even in the absence of specific fault on the part of the entity adopting them for past racial discrimination. It did so, however, by the most fragile of margins.

53. *Id.* at 408-21 (Stevens, J., concurring in the judgment in part and dissenting in part). Justice Stevens was joined in his opinion by Chief Justice Burger and Justices Stewart and Rehnquist. *Id.* at 408.

54. *Id.* at 324-79 (Brennan, J., concurring in the judgment in part and dissenting in part). Justice Brennan was joined in his opinion by Justices White, Marshall, and Blackmun. *Id.* at 324.

55. *Id.* at 325 (Brennan, J., concurring in the judgment in part and dissenting in part).

56. *Id.* at 359 (Brennan, J., concurring in the judgment in part and dissenting in part).

57. *Id.* at 370-71 (Brennan, J., concurring in the judgment in part and dissenting in part).

58. *Id.* at 319-20.

59. *Id.* at 311-14. Justice Powell found that the university's decision that a diverse student body would promote the overall quality of education raised issues of academic freedom, which “though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.” *Id.* at 312.

60. *Id.* at 312.

61. *Id.* at 314-19.

Even affirmative action's strongest supporters on the Court focused more on past guilt, albeit that of society as a whole, than on the future.

Justice Powell's forward-looking rationale lost ground in subsequent cases. Cases after *Bakke*, most of them involving employment rather than education, overwhelmingly focused on the existence and specificity of past guilt to justify affirmative action. Consciously or not, the judicial model that privileges the status quo until concrete specific fault is established, and then tailors a remedy to restore the state of things prior to the violation but to go no further, has become almost the exclusive analytical tool.

Thus, in *Wygant v. Jackson Board of Education*,⁶² the Court rejected the contention that a racially diverse public school faculty would enhance the educational environment as a sufficient justification for race consciousness in a school district's layoff policy.⁶³ Most of the dissenters pointed to past discrimination in arguing in favor of the plan;⁶⁴ only Justice Stevens shifted the focus of inquiry:

In my opinion, it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future. Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future.⁶⁵

This is the most succinct call for a forward-looking approach, one that does not exclusively focus on guilt, in affirmative action jurisprudence. But it has been a call that has gone unanswered. For the most part, the cases have turned on questions of guilt and innocence. Is the party implementing the plan guilty of past discrimination? How specific must guilt be? How badly does the program hurt "innocent" victims?⁶⁶ By no means has this meant an

62. 476 U.S. 267 (1986).

63. *Id.* at 274-76. The specific contention of the school board was the need for more minority faculty role models. *Id.* at 274. The Court found this too amorphous, and essentially the equivalent of merely relying on "societal discrimination." *Id.* at 276.

64. Justice Marshall, in an opinion joined by Justices Brennan and Blackmun, outlined a history supporting a finding of past discrimination in hiring. *Id.* at 297-99 (Marshall, J., dissenting).

65. *Id.* at 313 (Stevens, J., dissenting).

66. The "innocent victims" argument appeared quite significant in *Wygant*, particularly to Justice White, who cast the deciding vote. *Id.* at 294-95 (White, J., concurring). Layoffs

unbroken line of rejection for affirmative action. In several cases in which reasonably strong showings of past discrimination were made, the Court approved not only *Bakke*-like use of race as a factor, but also the use of numerical goals in hiring and promotion.⁶⁷ Still, divisions on the Court both as to outcomes and reasoning persisted. It was not until 1989 that a clear majority emerged for application of a single approach.

In *City of Richmond v. J.A. Croson Co.*,⁶⁸ the Court held that state or local efforts to implement affirmative action must survive strict scrutiny.⁶⁹ This, said the Court, would not be an invariably fatal test.⁷⁰ But, except for Justice Stevens,⁷¹ the majority appeared to regard "rectify[ing] the effects of identified discrimination" as essentially the only interest justifying race-conscious remedies.⁷² Even then, the Court would have preferred a race-neutral response.⁷³ The window for permissible race-conscious action was summarized in one sentence: "In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."⁷⁴

Once again, even the dissenters spoke primarily in terms of remedying the past. Unlike the majority, they would have been willing to take note of discrimination by society at large, or by a

have been consistently held to be more problematic than refusals to hire or promote, since these impinge upon, if not vested rights, at least "settled expectations" of white workers. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1533-37 (1988).

67. *United States v. Paradise*, 480 U.S. 149, 166-67 (1987); *Sheet Metal Workers, Local 28 v. EEOC*, 478 U.S. 421, 482-83 (1986); see also *Johnson v. Transportation Agency*, 480 U.S. 616, 640-42 (1987) (upholding a gender-based affirmative action policy).

68. 488 U.S. 469 (1989).

69. *Id.* at 493-98. As Justice Marshall pointed out in dissent, this was the first time that a majority of the Court unambiguously endorsed strict scrutiny as the appropriate standard for review of affirmative action programs. *Id.* at 551 (Marshall, J., dissenting).

70. *Id.* at 509-11.

71. "I . . . do not agree with the premise that seems to underlie today's decision . . . that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong." *Id.* at 511 (Stevens, J., concurring in part).

72. *Id.* at 509.

73. The majority stated:

Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. . . . The city may also act to prohibit discrimination in the provision of credit or bonding by local supplies and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.

Id. at 509-10.

74. *Id.* at 509.

particular profession—not merely discrimination by the specific entity administering the affirmative action program⁷⁵—but still the focus of the dissenters remained on guilt at some level. Affirmative action continued to be a remedy for a specific wrong, a punishment for guilt, aimed only at restoring the pre-guilt status quo of nondiscrimination.

Croson was distinguished a year later in *Metro Broadcasting v. FCC*.⁷⁶ Citing the 1980 case of *Fullilove v. Klutznick*,⁷⁷ the Court held that an affirmative action plan adopted by Congress rather than by a state or locality should be evaluated under something less than strict scrutiny.⁷⁸ This, held the narrow five-four majority, was due to the provision of the Fourteenth Amendment giving Congress the power to enact legislation in pursuit of the goal of equal protection.⁷⁹ Thus, more deference was due to a congressionally adopted affirmative action plan. The Court accepted the goal of achieving diversity in programming as justifying an FCC program making minority ownership a factor in awarding broadcast licenses.⁸⁰ This holding can be seen as a victory for forward-looking affirmative action; it did not rest on FCC culpability in prior licensing decisions. But the victory was temporary. The recent Supreme Court decision in *Adarand Constructors, Inc. v. Peña*⁸¹ overruled *Metro Broadcasting*, holding that federal, as well as state and local, affirmative action programs must be subjected to strict scrutiny.⁸² At the same time, however, Justice O'Connor's opinion emphasized that strict scrutiny did not, in this context, inevitably mean invalidation of all affirmative action programs:

75. While the dissenters insisted that Richmond had made a sufficient particularized showing of past discrimination in the local contracting industry, *id.* at 530-35 (Marshall, J., dissenting), they also cited the general, pervasive history of discrimination in Richmond, *id.* at 544-46 (Marshall, J., dissenting).

76. 497 U.S. 547 (1990).

77. 448 U.S. 448 (1980). The Court held that Congress had the authority to enact affirmative action programs that were narrowly tailored to eliminate discrimination; these would be judged by a less rigid standard than the one used in *Bakke*. *Id.* at 490-92.

78. The majority stated:

We hold that benign race-conscious measures mandated by Congress—even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important government objectives within the power of Congress and are substantially related to achievement of those objectives.

497 U.S. at 564-65.

79. *Id.* at 563.

80. *Id.* at 566-79.

81. 115 S. Ct. 2097 (1995).

82. *Id.* at 2112-13.

The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test⁸³

Thus, the question of what qualifies as a compelling interest remains significant. There is much in *Adarand* to support the notion that only clearly identified past discrimination will suffice. The Court quoted *Wygant* to the effect that a showing of "societal discrimination" is an insufficient foundation for affirmative action.⁸⁴ In describing *Metro Broadcasting* and its perceived flaws, the Court stressed that "the FCC policies at issue did not serve as a remedy for past discrimination."⁸⁵ Even the dissenters, apart from Justice Stevens,⁸⁶ characterized the core purpose of affirmative action as "to remedy past discrimination,"⁸⁷ while differing on how much deference should be given to a congressional finding that a particular program serves that end.⁸⁸

On the other hand, as Justice Stevens pointed out, the Court approvingly cited Justice Powell in *Bakke* as applying strict scrutiny to affirmative action, and in that case, Justice Powell explicitly stated that the forward-looking interest of a school in a diverse student body could justify some forms of affirmative action.⁸⁹ Further, Justice Stevens expressed hope that a significant part of *Metro Broadcasting* had survived:

Thus, prior to *Metro Broadcasting*, the interest in diversity had been mentioned in a few opinions, but it is perfectly clear that the Court had not yet decided whether that

83. *Id.* at 2117.

84. *Id.* at 2109.

85. *Id.* at 2112.

86. Justice Stevens restated his position that seeking future benefits of diversity can serve as a sufficient interest to justify narrowly tailored affirmative action programs, even under a strict scrutiny analysis. *Id.* at 2127-28 (Stevens, J., dissenting). He further pointed out that the majority endorsed the version of strict scrutiny Justice Powell used in *Bakke*, a decision which was not based upon particularized past discrimination. *Id.* at 2127 (Stevens, J., dissenting). Thus, he contended, *Adarand* does not require the conclusion that all affirmative action must be remedial. *Id.* at 2127-28 (Stevens, J., dissenting).

87. *Id.* at 2131 (Souter, J., dissenting).

88. *Id.* at 2132-34 (Souter, J., dissenting).

89. *Id.* at 2127 (Stevens, J., dissenting). Justice Souter also noted that the majority endorsed Justice Powell's version of strict scrutiny, and that Powell concurred in upholding the affirmative action program of *Fullilove*. *Id.* at 2131 (Souter, J., dissenting).

interest had sufficient magnitude to justify a racial classification. *Metro Broadcasting*, of course, answered that question in the affirmative. The majority today overrules *Metro Broadcasting* only insofar as it is 'inconsistent with [the] holding' that strict scrutiny applies to 'benign' racial classifications promulgated by the Federal Government. . . . The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case—and I do not take the Court's opinion to diminish that aspect of our decision in *Metro Broadcasting*.⁹⁰

Justice Stevens, then, continues to advocate a forward-looking approach to affirmative action, and reminds us that the possibility of such an approach has not yet been definitely foreclosed, even in the era of strict scrutiny.⁹¹ Still, the general tenor of recent opinions suggests that the Court will find a compelling purpose for affirmative action only in conjunction with a reasonably particularized showing of guilt somewhere in the past. Explicitly or implicitly, affirmative action is treated as a court would treat punishment; that is, affirmative action is inappropriate in the absence of a clear finding of fault.

As we have seen, the model of affirmative action as punishment had its seeds in the school desegregation cases, when courts were called upon to compel compliance with the letter and spirit of *Brown*. Courts, of course, disturb the status quo only upon a showing of fault. They have a commission only to repair, not a general commission to improve, the status quo; but this model has carried over to the Supreme Court's analysis of legislative efforts at affirmative action, and that is troubling.

In a legislative forum, the status quo is less privileged than it is in a court. A legislature need only determine that the status quo is inadequate to carry out legitimate ends; it need not determine that someone, or even society at large, is somehow "guilty" in order to act.⁹² To demand an initial showing of guilt as a prerequisite is to

90. *Id.* at 2127 (Stevens, J., dissenting).

91. *Id.* (Stevens, J., dissenting).

92. Hans Linde notes that:

The simplest model of a 'case' is the decision of a dispute between two parties by an impartial judge The proceeding will be initiated by one party, private or public, who has some claim against another It is not initiated by the court. . . . The proper extent of remedial action must be argued. . . . By contrast [t]he objective [of legislative action] is not to decide what existing law means or how it applies to disputed facts, but to choose a policy and translate it into the

treat a legislative act as if it were a judicial act. This may be at the heart of the confusion regarding affirmative action.

An imperfect, but instructive, analogy might be drawn with judicial responses to acts of private corporations. If *A* seeks compensation for injuries from *B*, a corporation, and *B* resists, a court will no doubt focus on the question of whether *B* is at fault for causing the injury to *A*. A court would surely not award compensation simply on the grounds that society would be better off if a sum of money were transferred from *B* to *A*.

But if *B*, out of a charitable impulse, decided to contribute to a fund to pay the medical bills of *A*, to whom it had no legal obligation, would a court necessarily find that this would violate the rights of a dissenting shareholder who complains that the money should be retained by the corporation or paid out as a dividend? Here, the court will look to whether *B* is pursuing a legitimate corporate purpose, but it will not see expiation of *B*'s guilt as the only possible justification.⁹³ Such forward-looking concerns as improving the company's image or strengthening the community in which it operates might justify this act of charity. In short, a voluntary act to make things better is not treated the same way as a demand that a reluctant party act to the same end.

Of course, one might respond that the analogy is inappropriate since it does not involve a constitutional command. Government, under *Brown*, has the obligation not to discriminate on the ground of race. This obligation is weightier than the corporate duty to act for the benefit of its shareholders, and demands a more rigorous justification. This may or may not be a valid point, but for our purposes it may be less important than a more subtle one.

In the normal course of things, a corporation or a legislature has great leeway to act to change things for the better because it is implicitly accepted that the status quo is imperfect. If we somehow could establish that corporate welfare was at its absolute maximum prior to a decision to make a charitable contribution, it might then be

concrete form of a new law Of course . . . these are oversimplified models

.....
HANS LINDE ET AL., LEGISLATIVE AND ADMINISTRATIVE PROCESSES 49 (1981).

93. See *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 404-05 (Del. Ch. 1969) (holding that corporations are authorized to make reasonable charitable gifts). For an overview of courts' treatment of corporations in these situations, see Kenneth B. Davis, Jr., *Discretion of Corporate Management to Do Good at the Expense of Shareholder Gain—A Survey of, and Commentary on, the U.S. Corporate Law*, 13 CAN.-U.S. L.J. 7 (1988).

said that a decision to make the contribution was improper. Of course, such an argument rarely, if ever, will arise. A condition of imperfection is assumed to exist; but in the field of affirmative action, there seems to be an implicit assumption that the starting point for individuals and society is perfect, that is, one of no discrimination on grounds of race or other illegitimate concerns. Since the norm is nondiscrimination, courts are skeptical of whether discrimination exists in any concrete situation.⁹⁴ This may explain why evidence of intent is required to find a constitutional violation,⁹⁵ a discriminatory effect is likely to come from something other than race consciousness since "colorblindness" is the norm. Discrimination must be proven.

Where discrimination is proven, it may be dealt with, but only to restore the status quo that existed prior to the specific act of discrimination that disturbed the "colorblind" starting point. Courts, then, are operating from the same premises as Hammerstein was in *South Pacific*. The natural state for people is one of non-discrimination. Where discrimination exists it must be due to some discrete decision by an individual or a social institution to disturb the status quo. Eliminate that sin, and nondiscrimination is restored. Any race-consciousness beyond that point itself disturbs the natural harmony among races.

For the most part, both sides have implicitly adopted this world view for the affirmative action debate. The debate, then, becomes one largely devoted to examining the past for evidence of guilt, leveling charges of guilt, issuing denials, and determining a resolution that leaves at least one side, and perhaps both, feeling victimized. But is this the only possible approach to the pursuit of racial equality? Perhaps more importantly, is this approach based upon an accurate view of the nature of discrimination?

II. IS DISCRIMINATION ALWAYS A CONSEQUENCE OF GUILT?

Apart from the fringes of American legal and political debate, almost all would agree that in an ideal world, race would be an irrelevant consideration in allocating scarce economic resources or social rewards. The total defeat of the explicit defense of segregation and white supremacy is perhaps most strikingly evident in the fact

94. Current law "assumes that the interaction of private forces will automatically yield just outcomes so long as government coercion is avoided." GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 586-87 (1991).

95. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-68 (1977); *Washington v. Davis*, 426 U.S. 229, 247-48 (1976).

that not only the intellectual and political heirs of those who virulently defended segregation, but in some cases those very same people now fervently invoke the language of "colorblindness" and rigid racial neutrality in their opposition to affirmative action.⁹⁶

This language is enormously appealing; but to what extent does it describe the world as it exists without active social intervention, and to what extent does it merely describe an aspiration that will require much conscious effort to achieve? Surely, history suggests that great caution is appropriate when government takes race into account. As we have seen, no voices on the Supreme Court have seriously advocated permitting race-conscious action without some reasonably strong effort to justify it.⁹⁷ Successful justifications have usually been "backward-looking," that is, framed as remedies for past acts of discrimination clearly departing from the ideal of race neutrality.⁹⁸ Occasionally a Supreme Court Justice⁹⁹ or academic commentator¹⁰⁰ will argue for the legitimacy of "forward-looking" justifications. Such an argument contends that the political branches of government are not limited to fixing discrete past wrongs, but may also further the goal of bringing about, in fact, a race-neutral society.

While much can be said for a "forward-looking" approach, the tendency of courts to more readily accept the notion of affirmative

96. See *supra* notes 13-14.

97. To the contrary:

Undoubtedly, a court should be wary of a governmental decision that relies upon a racial classification. 'Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic,' a reviewing court must satisfy itself that the reasons for any such classification are "clearly identified and unquestionably legitimate."

Adarand, 115 S. Ct. at 2120 (Stevens, J., dissenting) (quoting *Fullilove v. Klutznik*, 448 U.S. 448, 533-35 (1980) (Stevens, J., dissenting)). "My view has long been that race-conscious classifications designed to further remedial goals 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand constitutional scrutiny." *Croson*, 488 U.S. at 535 (Marshall, J., dissenting) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (Brennan, J., concurring in the judgment in part and dissenting in part)).

98. See *supra* notes 62-91 and accompanying text.

99. Most significantly, Justice Powell in *Bakke*, see *supra* notes 50-61 and accompanying text, and, consistently, Justice Stevens, see *supra* notes 65, 71, 86, 90-91 and accompanying text, make this argument.

100. See, e.g., Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of 'Diversity'*, 1993 WIS. L. REV. 105, 153-61; Michel Rosenfeld, *Metro Broadcasting v. FCC: Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583, 599-609, 631-35 (1991); Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 91-98 (1986).

action as punishment for past sins has led most advocates of such programs also to adopt the language of remediation. Commonly, affirmative action will be justified as a response to "institutional racism," that is, a racism that is not necessarily the fault of any particular party, but rather the consequence of decades, even centuries of acts, conscious and unconscious.¹⁰¹

Calls for the recognition of "institutional racism," however, draw great opposition. This is not surprising. Perhaps the most frequent argument made by opponents of affirmative action is that they, as individuals, are "innocent."¹⁰² They did not own slaves—in most cases neither did their direct ancestors—and no one can point to instances in which they personally discriminated against racial minorities in hiring or other decisions.¹⁰³ The acceptance of guilt is not psychologically easy even when personal responsibility is clear.¹⁰⁴ Where there is no sense of personal responsibility, the call to acknowledge guilt is likely to be resisted even more fiercely.¹⁰⁵

As Professor Kathleen Sullivan has pointed out, these charges of unconscious or institutional racism in some ways resemble notions of original sin,¹⁰⁶ but in a very individualistic society, demands that one do something to atone for one's share of original sin do not draw a positive response.¹⁰⁷ This problem is compounded by the fact that

101. See, e.g., Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 328-44 (1987).

102. Thus, Justice Powell criticized the affirmative action plan at issue in *Bakke* for punishing "innocent" whites for "grievances, not of their making." 438 U.S. 265, 298 (1978) (opinion of Powell, J.); see also *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 575 (1984) (holding that "it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern-or-practice suit such as this").

103. See Sullivan, *supra* note 100, at 85-86.

104. See Kate Nace Day, *The Moral Confusion of Affirmative Jurisprudence or When Will We Learn to Bear the Shame of Guilt?*, 16 VT. L. REV. 777, 803-34 (1992).

105. Herbert Morris writes:

[T]he claim that we are all responsible for everything, particularly when tied to narrower cases, say, being told that as whites we are responsible for the condition of the black man, responsible even for the evils perpetuated before our birth, produces not just intellectual disagreement, not just critical analysis but unquestionably, in the case of some people, considerable anger

HERBERT MORRIS, ON GUILT AND INNOCENCE 116 (1976), *quoted in* Day, *supra* note 104, at 820.

106. Sullivan, *supra* note 100, at 91-92.

107. Kathleen Sullivan writes:

[A] focus on sin begets claims of innocence. Making an employer or union atone for its past discrimination would all be very well, these claims go, but that is not what affirmative action does. For it is not the errant management that "pays" for affirmative action, but "innocent" white workers. And retribution breaks

in contemporary usage the word "racist" is a powerful epithet. In the famous case of *Chaplinsky v. New Hampshire*,¹⁰⁸ the Supreme Court recognized the incendiary potential of epithets in limiting the First Amendment protection given to even politically tinged "fighting words."¹⁰⁹ In the early 1940s, "fascist" was a powerful charge. It is unlikely that calling someone an "unconscious fascist" or an "institutional fascist" would have been that much less an insult. Furthermore, while a charge of racism may not lead to physical retaliation, it is more likely to lead to strong, reflexive denial than to acceptance and action to reform.

By framing the debate as one of guilt, both sides, although they put forward different definitions of guilt and reach different conclusions as to whether it exists, implicitly accept a crucial starting point. As reflected in Hammerstein's lyrics, the implicit assumption is that the starting point for the human condition is one of acceptance of differences, and the absence of any biases. Racism, or other invidious prejudices, are the consequence, however indirect, only of discrete social decisions to move away from that position. If no evidence of particular guilt can be established, then there is no problem for government to remedy. Only a remedy can satisfy the call for heightened or strict scrutiny, not a program merely seeking to improve things, since, after all, a bias-free situation cannot be improved upon.

Perhaps we should accept the notion that only government acts that seek to fix a problem, in this case the existence of racial bias, should satisfy strict scrutiny. If so, might there be a significant problem utterly unconnected with "guilt," even of the "institutional"

down when aimed at innocent targets. Dead bosses' guilt cannot taint live workers' jobs.

Id. at 94. Professor Day discusses the distinction between guilt, which focuses on a personal transgression, and shame:

It is possible that the observer might experience a sense of shame even though she does not feel that she herself has personally transgressed a moral principle. Normally, we do not feel guilt for another person's actions. But, it can be otherwise with shame. . . . The observer feels shame because she identifies with a larger group which includes those who are guilty.

Day, *supra* note 104, at 815-16. American law, notes Professor Day, is focused on guilt rather than shame. *Id.* at 831-34.

108. 315 U.S. 568 (1942).

109. *Id.* at 573. The defendant was convicted of violating an ordinance forbidding anyone from calling another by "any offensive or derisive name." *Id.* at 569. His use of the words "God damned racketeer" and "damned Fascist" were held not to be protected by the First Amendment since they were "fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572.

sort? To locate such a problem, a response to which might well serve as a compelling government interest, we must begin by asking whether our suppositions about human reaction to encounters with difference are correct.

Social scientists and psychologists have put forward a number of different theories to explain the existence of prejudice. As Professor John Duckitt has noted, different theories have been stressed at different times, and usually the proponents of any theory do not claim that one explanation is exclusive; instead, there seem to be several causal factors working together in any society.¹¹⁰ Before 1920, there was essentially no work done on the subject of prejudice because the existence of real differences between the races was widely, if not universally, accepted. Thus, "prejudice" was not seen as a problem. "Attitudes of racial superiority or antipathy to Blacks were widely accepted as inevitable and natural responses to the seemingly obvious 'inferiority' and 'backwardness' of Blacks and other colonial peoples."¹¹¹

Starting around 1920, however, the dominant thinking began to shift: "In 1920, most psychologists believed in the existence of mental differences between races; by 1940 they were searching for the sources of 'irrational prejudice.'"¹¹² If stigmatization and ostracism of minorities were not the consequences of real difference, what did cause racial and other forms of prejudice? Different theories emerged. On the simplest level, they could be divided into two types: those that see prejudice as originating within the individual and those that see prejudice as externally imposed by society.¹¹³ Within these broad categories, further distinctions were drawn.

Early studies, during the 1930s and 1940s, looked primarily to the individual. Although it might be triggered by external social stress or frustration,¹¹⁴ "prejudice could be seen as the result of the operation of universal psychological processes such as defense mechanisms."¹¹⁵

110. John Duckitt, *Psychology and Prejudice: A Historical Analysis and Integrative Framework*, 47 AM. PSYCHOL. 1182, 1182-83 (1992).

111. *Id.* at 1183-85.

112. Franz Samuelson, *From 'Race Psychology' to 'Studies in Prejudice': Some Observations on the Thematic Reversal in Social Psychology*, 14 J. HIST. BEHAVIORAL SCI. 265, 265 (1978), quoted in Duckitt, *supra* note 110, at 1185.

113. "[I]t has been suggested that only two basic kinds of theory or levels of analysis are needed—societal-level sociological theories, on the one hand, and individual-level psychological theories, on the other hand." Duckitt, *supra* note 110, at 1182.

114. *Id.* at 1186.

115. *Id.* at 1185.

This tendency to scapegoat, or to displace hostility toward outsiders, could be seen as something present to some degree in everyone, and therefore could explain the nearly universal presence of prejudice against minority or other outgroups.¹¹⁶

During the 1950s, focus remained on the individual, but prejudice was less likely to be seen as normal and universal. Instead, perhaps largely in response to the experience of Nazism, prejudice was now seen as a pathology.¹¹⁷ Consequently, the crucial social scientific question became that of identifying and describing the personality structures and characteristics making individuals prone to prejudice.¹¹⁸ This was the era that gave rise to the famous descriptions of the authoritarian personality¹¹⁹ and the tolerant personality.¹²⁰ Prejudice was something to be found only in certain individuals and addressed as any other individual pathology.

During the 1960s and 1970s, however, the dominant explanations shifted from individual psychology to external social and cultural factors.¹²¹ If prejudice was an aberration, as contended in the dominant theories of the 1950s, then how could extremely widespread prejudice in certain social groups or regions be explained? In its simplest form, this new theory would maintain that "prejudice is to be understood as a social or cultural norm, and that, furthermore, when this is not the case, it is unlikely to be of social significance."¹²² The work of eliminating prejudice, then, would focus on changing social norms, beginning, of course, with the law. As Duckitt has noted, this is "a basically optimistic view of the future of race relations."¹²³ Eliminating segregation and outlawing overt racism would eliminate the essential social supports, and therefore, eliminate prejudice itself.

More so than the dominant theories of the 1930s, 1940s and 1950s, these social-cultural theories have been put to the empirical test. Changes in law and social attitudes concerning the acceptability of racial prejudice may have reduced levels of prejudice, but they

116. *Id.* at 1185-86.

117. *Id.* at 1186-87.

118. *Id.* at 1186.

119. See generally THEODOR W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950) (providing a post-World War II study of the "potentially fascist individual").

120. See generally James G. Martin & Frank R. Westie, *The Tolerant Personality*, 24 *AM. SOC. REV.* 521 (1959) (presenting a study of factors leading individuals to tolerance).

121. Duckitt, *supra* note 110, at 1187-88.

122. *Id.* at 1187 (quoting John C. Turner & Howard Giles, Introduction, *INTERGROUP BEHAVIOUR* 12 (John C. Turner & Howard Giles eds., 1981)).

123. Duckitt, *supra* note 110, at 1187.

have by no means eliminated it.¹²⁴ Some of those committed to external explanations of prejudice explain its persistence in terms of quite rational self-interest. Whites simply seek to maintain advantageous positions in the labor market and elsewhere in society.¹²⁵ But several studies indicate that political positions such as opposition to affirmative action or opposition to the election of a black mayor are not correlated with the degree to which whites actually feel their concrete interests challenged.¹²⁶ Rather, they are largely a matter of symbolism.¹²⁷

A large body of relatively recent research seems to return in some ways to the model prevalent in the 1930s, that is, the position that there is a normal, if not universal, tendency to categorize others as like and unlike oneself, and to display a bias toward one's "in-group." By no means does this deny the significance of external social norms. Such norms can act to reinforce and nurture this tendency; they can also act to counter it. It appears, though, that social norms do not fully explain the existence of bias.¹²⁸

Experiments have shown consistently that people are more likely to act in an altruistic way toward strangers whom the subject believes to be like him or her. Thus, people will more likely refuse to assist foreigners, or those who do not speak the native language well, than

124. See Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546, 560 (1980) (concluding that attitudes have changed more than behavior).

125. See, e.g., Benjamin Bowser, *Race Relations in the 1980s: The Case of the United States*, 15 J. BLACK STUD. 307, 318 (1995) (stating that racism is "a consequence of elite group self-interest and the desire to maintain historic privilege"); Lawrence Bobo, *Whites' Opposition to Busing: Symbolic Racism or Realistic Group Conflict?*, 45 J. PERSONALITY & SOC. PSYCHOL. 1196, 1208-09 (1983).

126. See, e.g., Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCHOL. 414, 427-30 (1981); David O. Sears et al., *Whites' Opposition to 'Busing': Self-Interest or Symbolic Politics?*, 73 AM. POL. SCI. REV. 369, 380-83 (1979).

127. David Sears comments:

According to this theory, people acquire in early life standing predispositions that influence their adult perceptions and attitudes. In adulthood, then, they respond in highly affective ways to symbols that resemble the attitude objects to which similar emotional responses were conditioned or associated in earlier life. Whether or not the issue has some tangible consequence for the adult voter's personal life is irrelevant. One's relevant personal 'stake' in the issue is an emotional, symbolic one.

Sears et al., *supra* note 126, at 370-71.

128. See Duckitt, *supra* note 110, at 1188-89.

native speakers.¹²⁹ They are less likely to assist strangers whom they believe do not share their values, even where the assistance is of minimal cost or inconvenience. In a broader sense, the ability to act altruistically has been linked with the ability to take the perspective of others,¹³⁰ that is, to see or at least imagine similarity or identity with the other.

One might contend that the results in these studies simply illustrate the effect of the subject's socialization, that is, that they had been taught that foreigners or other groups were less deserving of help. But studies have shown that when subjects are divided into groups on grounds that have nothing to do with traditional social prejudices, and when contact between the groups is minimized in order to minimize the possibility of realistic bases for antagonism, groups continue to show clear biases against the outgroup.

For example, a 1973 study¹³¹ looked at the behavior of subjects playing a Prisoner's Dilemma Game, a classic social science model that explores whether a subject will act selfishly or cooperatively.¹³² Half of the pairs playing the game were told that they had matching personality profiles; the other half were told that they had discrepant profiles.¹³³ The pairs told that they were similar exhibited far more cooperative behavior.¹³⁴ Another study divided subjects into three groups who were told that the groups were composed of those who had indicated similar preferences among photographs, although they had actually been assigned at random.¹³⁵ With no prior or expected future interaction either with their own or the other group, they were asked to rate members of each group on personality traits. There was

129. See Roy E. Feldman, *Response to Compatriot and Foreigner Who Seek Assistance*, 10 J. PERSONALITY & SOC. PSYCHOL. 202, 206-12 (1968).

130. See Bill Underwood & Bert Moore, *Perspective-Taking and Altruism*, 91 PSYCHOL. BULL. 143, 169-71 (1981).

131. Kenneth L. Dion, *Cohesiveness as a Determinant of Ingroup—Outgroup Bias*, 28 J. PERSONALITY & SOC. PSYCHOL. 163 (1973).

132. In a "prisoner's dilemma" game, the best result is reached for each subject when both choose to cooperate; but when only one acts cooperatively and the other "double-crosses" him, the former fares far worse. Thus, the game largely tests one's willingness to trust that another will behave cooperatively. See Anatol Rapoport, *Prisoner's Dilemma*, in 3 NEW PALGRAVE DICTIONARY OF MONEY AND FINANCE 973-74 (1992).

133. Dion, *supra* note 131, at 165.

134. *Id.* at 167.

135. Marilyn B. Brewer, *In-Group Bias in the Minimal Intergroup Situation: A Cognitive-Motivational Approach*, 86 PSYCHOL. BULL. 307, 308 (1979) (summarizing the study conducted in W. Doise et al., *An Experimental Investigation Into The Formation of Intergroup Representation*, 2 EUR. J. SOC. PSYCHOL. 202 (1972)).

a significant tendency to rate members of one's own group more positively.¹³⁶ Thus, researchers have concluded that:

[T]he mere perception of belonging to two distinct groups—that is, social categorization per se—is sufficient to trigger intergroup discrimination favoring the ingroup. In other words, the mere awareness of the presence of an outgroup is sufficient to provoke intergroup competitive or discriminatory responses on the part of the in-group.¹³⁷

As Professor Duckitt points out in his survey of research into prejudice, this model, in which “[i]ntergroup bias and discrimination are . . . seen as inevitable outcomes of a normal, natural, and universal cognitive process that function[s] to simplify and make more manageable the complexity of the social world,” does not account for all types of bias.¹³⁸ By itself, this model explains neither the differences in levels of prejudice among individuals, nor the line between merely self-favoritism and active dislike or hatred of the outgroup.¹³⁹ Duckitt states that “[t]his suggests that . . . ingroup bias may be only a precursor of prejudice that can be elaborated into prejudice under particular social conditions.”¹⁴⁰ He calls for an integration of approaches to the study of prejudice that draw on both individual cognitive factors and social factors.¹⁴¹

Developmental psychology would also seem to lend support to the proposition that the initial reaction to a perception of difference is to disfavor it. Infants and small children, although they vary in the intensity of their reaction, are wary of strangers.¹⁴² One experiment showed that fifth and sixth grade students performed worse and displayed higher levels of anxiety where an arithmetic test was proctored by a stranger than by a teacher they knew.¹⁴³ At the same time, the tendency to fear strangers can be overcome. Studies show that a small child will learn to be open to strangers through

136. *Id.*

137. Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, in *THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS* 33, 38 (William G. Austin & Stephen Worchel eds., 1979).

138. Duckitt, *supra* note 110, at 1188-89.

139. Studies differ on “whether [in-group bias] rests on enhancement of the in-group, devaluation of the out-group, or both.” Brewer, *supra* note 135, at 321-22.

140. Duckitt, *supra* note 110, at 1189.

141. *Id.* at 1189-91.

142. See Ross A. Thomson & Michael E. Lamb, *Security of Attachment and Stranger Sociability in Infancy*, 19 *DEV. PSYCHOL.* 184, 189-91 (1983).

143. Arnold P. DeRosa & Frank Patalano, *Effects of Familiar Proctor on Fifth and Sixth Grade Students' Test Anxiety*, 68 *PSYCHOL. REP.* 103, 109-11 (1991).

observing his or her mother: If the mother is friendly and open toward strangers, or to a particular stranger, the child will copy that friendliness.¹⁴⁴

What does all of this suggest? Clearly, the question of the origins of prejudice is not an either-or choice between internal and external factors. Social norms can support and help fuel prejudice. People do teach others "to hate and fear," and that is surely significant. But these findings strongly suggest that all prejudice does not flow from external factors. Thus, if we could successfully eliminate social norms favoring prejudice, we would be left not with a starting point of nondiscrimination, but still with an individual tendency to perceive differences between people and to display a bias against those perceived as different and in favor of those seen as similar to the self. Thus, the minimization, if not the elimination, of prejudice depends not merely on the elimination of social norms supporting discrimination, but on the active process of teaching and modeling tolerant behavior.

An interesting study by David Frey and Samuel Gaertner illustrates this point and also highlights the significance of social clues or pressures.¹⁴⁵ Frey and Gaertner constructed a study in which the subjects, white female undergraduates, observed workers performing a task that required them to form words from Scrabble letters.¹⁴⁶ The subjects were free to assist the workers.¹⁴⁷ Conditions were manipulated to induce the subjects to believe that the workers were having difficulty either because of their own poor work habits or because of the difficulty of the task.¹⁴⁸ Subjects would then be asked to help, with the requests coming either from the workers or from a third party.¹⁴⁹ Half of the workers were white, half black.¹⁵⁰

As one might expect, subjects were significantly more likely to help workers when the source of the difficulty was not seen to be the

144. See Candice Feiring et al., *Indirect Effects and Infant's Reaction to Strangers*, 20 DEV. PSYCHOL. 485, 490 (1986); Carolyn Zahn-Waxler & Marian Radke-Yarrow, *Child Rearing and Children's Prosocial Initiations Toward Victims of Distress*, 50 CHILD DEV. 319, 327-29 (1979).

145. David L. Frey & Samuel L. Gaertner, *Helping and the Avoidance of Inappropriate Interracial Behavior: A Strategy that Perpetuates a Nonprejudiced Self-Image*, 50 J. PERSONALITY & SOC. PSYCHOL. 1083 (1986).

146. *Id.* at 1084.

147. *Id.* at 1085.

148. *Id.*

149. *Id.*

150. *Id.*

worker's poor work habits, but instead, was seen to be something not the worker's fault.¹⁵¹ But there were also distinct racial differences. When the source of the worker's problem was the difficulty of the task, and the worker directly asked for help, the subjects assisted white workers only slightly more often than black workers.¹⁵² But when the subjects perceived the source of the worker's problems as the worker's fault, and the worker asked for help, the subjects assisted white workers 73% of the time and black workers only 33% of the time.¹⁵³

However, when a third party made the request, the results were dramatically different. Not only was the entire difference in the subjects' willingness to assist black and white workers whose problems appeared to stem from their own work habits eliminated, in fact the subjects were slightly more likely to assist the black workers.¹⁵⁴ Thus, in the absence of social reinforcement of the appropriateness of helping blacks who were in the same objective circumstances as whites, white subjects were much more likely to overlook a white worker's own fault for his predicament than a black worker's. This effect was eliminated when helping blacks was endorsed by a third party.

This experiment seems to illustrate several points. It is unlikely that the subjects consciously set out to act in a biased manner. When they saw a clearly "deserving" black, they were almost as willing to help as when they were approached by a "deserving" white. When they refused to help an "undeserving" black, it is likely that they consciously acted on the basis not of race, but of their reaction to the worker's own fault in creating the problem. Yet they were far more willing to help "undeserving" whites. They were, then, less critical and more forgiving of their own group. Yet, one suspects they were not conscious of this. Thus, when social pressure was not brought to help the outgroup, subjects could show a bias, yet believe, and even justify if asked, that there was a race-neutral explanation for their behavior in each individual case.

A recent study of bank lending habits by the Federal Reserve Bank of Chicago produced results quite similar to Gaertner and

151. *Id.* at 1086 tbl. 1.

152. *Id.*

153. *Id.*

154. *Id.*

Frey's experimental findings.¹⁵⁵ The study compared the treatment of mortgage applicants of different races who had similar credit histories.¹⁵⁶ Black and Hispanic applicants with clearly good credit histories were accepted about as often as comparable white applicants.¹⁵⁷ However, among applicants with "marginal" credit histories, twice as many minorities were rejected as were whites.¹⁵⁸ Bias is likely to emerge in cases in which it is not overt or even conscious. In each individual case of rejection, the loan officer could plausibly contend that it was the objective factor of a weak credit history, rather than the race of the applicant, that led to rejection. Yet, the same credit history might be looked upon more leniently if the loan officer felt a similarity between himself and the applicant. Therefore, the study concluded that "[t]hese findings are consistent with the existence of a cultural affinity between white lending officers and white applicants, and a cultural gap between white loan officers and marginal minority applicants."¹⁵⁹

One's tendency to start with an aversion to those who are different does not mean that one ought, or must, maintain that attitude. Substantially all theories of developmental psychology maintain that growth and maturity are processes by which one's concern moves from the self outward. In terms of individual cognitive psychology, Jean Piaget has demonstrated that the child begins from a completely egocentric position, gradually learns to respect the reality of persons and things outside the self, and ultimately develops the capacity to empathize with and understand the feelings of others.¹⁶⁰

Lawrence Kohlberg maintains that a process of ethical maturity requires that the individual progress from a point of concern with the welfare of those closest to the self, to a respect for the pragmatic

155. William C. Hunter & Mary Beth Walker, *The Cultural Affinity Hypothesis and Mortgage Lending Decisions*, Federal Reserve Bank of Chicago, Working Paper 95-8 (July 1995).

156. *Id.* at 1-3.

157. *Id.* at 18.

158. *Id.*

159. *Id.* at 16.

160. See generally JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1932) (tracing the stages of a child's moral growth). For a discussion and application of Piaget's work in a legal context, see Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 781-94 (1995); Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry Into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477, 493-513 (1995).

value of rules in promoting the welfare of the community, and finally to a universal set of ethical norms in which, presumably, strangers will be regarded with the same concern as neighbors.¹⁶¹ Kohlberg's work has been criticized by some, most notably Carol Gilligan and other feminist theorists, who maintain that a commitment to universal norms is not necessarily the highest form of ethical thinking.¹⁶² Gilligan, for instance, argues that care and concern for particular others can be just as valid an ethical position as respect for abstract norms, and that such ethical thinking is more prevalent among women.¹⁶³

Whatever their differences, Kohlberg and Gilligan share with other social scientists the position that the individual grows by moving beyond selfishness, by learning to respect and empathize with others and by overcoming the initial fear and aversion to difference. It is also important to note that in the view of these social scientists this process of growth does not occur easily, and does not occur in everyone.¹⁶⁴ Indeed, Kohlberg maintains that only a small fraction of people reach the highest levels of moral reasoning.¹⁶⁵ A significant number of adults never progress beyond more narrow conceptions of whose welfare counts and why.¹⁶⁶ While only the truly antisocial never progress beyond the initial stage of complete childish selfishness, many live their entire lives making moral distinctions merely on the basis of the proposition that following clear rules will make life more harmonious in one's immediate community.¹⁶⁷

Thus, much social science evidence suggests that the view represented by Hammerstein's lyrics is quite flawed. We do not begin life with an attitude or tendency to respect and value those who are

161. LAWRENCE KOHLBERG, *ESSAYS IN MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT* 44-62, 172-205 (1984). Kohlberg's theories are summarized in Steven Hartwell, *Promoting Moral Development Through Experimental Teaching*, 1 *CLINICAL L. REV.* 505, 506-12 (1995).

162. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 31-63 (1982).

163. *Id.* Steven Hartwell summarizes and analyzes the critiques of Kohlberg. Hartwell, *supra* note 161, at 512-22.

164. *See* Hartwell, *supra* note 161, at 511; *see also* Paul T. Wangerin, *Objective, Multiplistic and Relative Truth in Developmental Psychology and Legal Education*, 62 *TUL. L. REV.* 1237, 1273-81 (1988) (applying this theory to the process of development of skills during legal education).

165. KOHLBERG, *supra* note 161, at 55-58.

166. Some of Kohlberg's findings indicate "that Stage 4 [rules are followed because conformity to rules is generally good] is the dominant stage of most adults." *Id.* at 55-57.

167. *Id.* at 55-68.

different, which needs only to be protected from negative social influence in order to flourish. Instead, we begin with a tendency toward selfishness. As we grow to understand the reality of the existence of others, we learn to empathize, but our initial tendency is to do so in ways that favor those perceived as most like ourselves. However, this is no cause for despair, only for vigilance.

This is also, of course, no reason to deny the existence and pernicious effect of external social influences that nourish the original tendency toward selfishness. The potential for society to do harm along these lines is great, and to that extent, the warning of Hammerstein's lyrics is accurate. Yet merely eliminating negative influences, it seems, will not be enough. Clearly, individuals can grow beyond exclusive concern for self and those perceived as most similar to self. But this requires active support from other individuals and institutions.

This support will not be a matter simply of a one-time inoculation of the individual against prejudice. Studies have shown that many people conform to norms of tolerance and the avoidance of discrimination only where clear social norms support them.¹⁶⁸ Thus, social neutrality will permit selfish and intolerant attitudes to flourish. Consequently, more than neutrality is required. On a larger scale, we can see the persistence of hostility to outgroups in the world's recent epidemic of nationalist and ethnic violence within what have been for decades larger multiethnic communities. Croatian-Serbian, Hutu-Tutsi, Armenian-Azerbaijani, and other clashes vividly illustrate that progress toward harmonious intergroup relations is not inevitable and is subject to sharp reversal.

How, then, should all of this affect the debate on affirmative action? When we work from the assumption that individuals tend to favor similar, "ingroup" people, the analysis of what government can and should do becomes quite different from that which flows from a starting point in which we maintain that our initial tendencies are not to discriminate.

168. See, e.g., C. Daniel Batson et al., *Social Desirability, Religious Orientation and Racial Prejudice*, 17 J. FOR SCI. STUDY RELIGION 31, 37-40 (1978) (stressing the importance of social norms in accounting for the absence of prejudice); Glenn A.E. Griffin et al., *A Cross-Cultural Investigation of Religious Orientation, Social Norms and Prejudice*, 26 J. FOR SCI. STUDY RELIGION 358, 363-65 (1987) (same).

III. IMPLICATIONS FOR THE FUTURE OF AFFIRMATIVE ACTION

“I am against nature. I don’t dig nature at all. . . . I think the truly natural things are dreams, which nature can’t touch with decay.” - Bob Dylan¹⁶⁹

If we abandon the idea that in the absence of positive social—and particularly government imposed—incentives to discriminate, we will all assume our natural position of nondiscrimination, in realization that the tendency to discriminate in favor of those like oneself appears to be universal, what does this mean for affirmative action? The first thing that must be emphasized is that what is “natural,” whether a function of sociobiology or universal aspects of very early childhood socialization, is not necessarily desirable.¹⁷⁰ Much can be said for the proposition that human aggression is “natural.” Certainly this does not lead to the conclusion that government must accept or be indifferent to violence. On the contrary, it provides an even stronger incentive for government and other social institutions to act vigorously to curb it.

Similarly, the most cogent response to those who defended racial segregation as “natural” was to maintain that such an approach says nothing about the future. People and societies also have a natural potential for growth, and just as government must assist in curbing any natural inclinations toward inappropriate aggression, it must assist in curbing any natural inclinations toward racial and ethnic prejudice. The first step, of course, is to prohibit overt discrimination against racial minorities; but is this all that is necessary, or indeed, all that is constitutionally permitted?

Certainly, when government makes race a factor, something beyond minimal scrutiny is required. No Supreme Court justice has ever called for complete deference to the legislature, state or national, in this sensitive area.¹⁷¹ At the very least, some degree of narrow tailoring will be required and an important, if not compelling, government interest must be shown.¹⁷² The majority of the findings

169. *Quoted in* ROBERT ANDREWS, *THE COLUMBIA DICTIONARY OF QUOTATIONS* 622 (1993).

170. For a discussion of the growth of the human sense of moral responsibility from concern with small groups to concern for larger communities, see JAMES Q. WILSON, *THE MORAL SENSE* 191-221 (1993).

171. *See supra* notes 97-99 and accompanying text.

172. *See supra* notes 97-99 and accompanying text.

discussed here most directly address the existence of a sufficiently strong government interest.

As we have seen, advocates of “forward-looking” rationales for affirmative action have had little success persuading courts of the importance, if not the validity, of their asserted goals.¹⁷³ While this may be due in great part to the difficulty of precisely outlining the future goal in mind, it may also be due in some measure to the distinction between fixing something that is deficient, on the one hand, and merely improving a generally acceptable state of affairs, on the other. Given that the former is generally what courts do, judges are obviously more likely to see such interests as “compelling,” that is, essential government activity.¹⁷⁴ The latter, on the other hand, is more likely to be seen as less central to government’s role.

The Court, in searching for “backward-looking” justifications, works with the implicit assumption that discrimination is the product only of conscious, culpable acts. Because of this it insists on a demonstration of concrete “guilt.” Often, of course, this is absent. In these cases, defenders of affirmative actions are prone to accept the necessity of a showing of guilt, but to argue that a more diffuse and subtle form of guilt is present, often described as “unconscious racism” or “institutional racism.”¹⁷⁵

But the charge of institutional racism usually is ineffective to change minds. First of all, the claim is unlikely to create actual feelings of guilt. The difference here might be analogized to the difference between responsibility for one’s own conscious sins and a feeling that one participates, as a human being, in some type of “original sin.” A credible theological argument can be made that the imperfections of the human condition doom us all to some measure of sin despite our best efforts to avoid any conscious transgression. But it is difficult to feel a sense of actual guilt for “original sin”; it is the equivalent of feeling guilt about one’s own existence. Attempts to persuade one who feels no guilt not only to accept it, but to accept it along with the epithet of “racism,” are likely to be futile.¹⁷⁶

173. See *supra* notes 69-70, 84-87 and accompanying text.

174. Determining what constitutes a compelling government interest, as opposed to one that is merely legitimate or important, is one of the more difficult questions of constitutional law. See generally *Conference on Compelling Government Interests: The Mystery of Constitutional Analysis*, 55 ALB. L. REV. 534 et seq. (1992) (symposium presenting various positions on the nature of compelling interests).

175. See Lawrence, *supra* note 101, at 328-44.

176. See *supra* notes 93-95 and accompanying text.

Can we design a type of affirmative action that satisfies strict scrutiny without resort to "guilt"? We can, if we accept the following propositions. First, government is authorized to take steps to assure equal opportunity and to eliminate race as a salient factor in important decisions concerning employment and education. Second, the human predisposition to favor those perceived as similar to oneself appears to be nearly universal. Therefore, although it is surely necessary to prohibit conscious acts of racial discrimination, this will likely be insufficient. At least some further steps are necessary to make our natural biases evident and to counteract them. But this need not be done under the labels of "guilt" or "shame."¹⁷⁷

Some other types of bias recently identified by social science provide a rough analogy. Studies over the last two decades have convincingly demonstrated that teachers, employers, and others consistently act, in evaluating and relating to students, employees, and others, with a bias in favor of physically attractive people.¹⁷⁸ For the most part, this is not intentional or even conscious.¹⁷⁹ Teachers, for example, will rate the written work attributed to attractive students as being objectively better than the same work attributed to unattractive students.¹⁸⁰

Clearly, this is wrong. What would a conscientious school administrator do to assure that it did not happen in his or her school? One possibility would be to issue a memorandum instructing faculty not to discriminate against unattractive students in assigning grades or other rewards, or in the manner in which they deal with students in

177. Indeed, there are many reasons to believe that attempts to trigger guilt or shame may be counterproductive. One study demonstrates that whites who have taught themselves to act in a non-hostile way toward blacks often regress to more hostile attitudes if they perceive that they have been insulted by blacks. Ronald W. Rogers & Steven Prentice-Dunn, *Deindividuation and Anger-Mediated Interracial Aggression: Unmasking Regressive Racism*, 41 J. PERSONALITY & SOC. PSYCHOL. 63, 70-72 (1981). Thus, if charges of racism are perceived as insults by whites, these accusations may act as self-fulfilling prophecies.

178. See, e.g., Karen K. Dion et al. *What Is Beautiful Is Good*, 24 J. PERSONALITY & SOC. PSYCHOL. 285, 288-89 (1972); Karen K. Dion, *Physical Attractiveness and Evaluation of Children's Transgressions*, 24 J. PERSONALITY & SOC. PSYCHOL. 207, 213 (1972); Barrie J. Guise et al., *Effects of Physical Attractiveness on Perception of Social Skill*, 54 PERCEPTUAL & MOTOR SKILLS 1039, 1040-42 (1982).

179. Karen Dion, for example, has found that adults will perceive transgressions by an attractive child as being less serious than those same acts committed by an unattractive child. Dion, *supra* note 178, at 212.

180. See Margaret M. Clifford & Elaine Walster, *The Effect of Physical Attractiveness on Teacher Expectations*, 46 SOC. EDUC. 248, 255-56 (1973); Lina Zahr, *Physical Attractiveness and Lebanese Children's School Performance*, 56 PSYCHOL. REP. 191 (1985).

class. But this memo would likely have little effect. Since the biases are unconscious and unintentional, no teacher would be likely to regard it as relevant to his or her own performance.

Another alternative would be for the administrator to act affirmatively. Of course, this does not mean that the principal would instruct teachers to assign a certain number of "As" to physically unattractive students; but it might mean that, in the first instance, the administrator would explain the social science findings to the teachers. Additionally, the administration might ask the teachers to consider whether these types of unconscious biases are occurring in their own classroom. Such actions would not be taken with an intent to trigger guilt or shame about past performance but rather to spark a commitment to become a better teacher.

The teacher might be asked to focus specifically on whether physically attractive students seem to be receiving a disproportionate share of classroom attention or rewards. If this should prove to be the case, a reexamination of supposedly objective criteria would be in order, involving consideration such as the following: Is it really true that the work product of unattractive students is inferior on assignments such as essays, where there is room for subjective judgment? Is it really necessary for all of the roles in the school play to go to attractive students? Of course, there may be no evidence of such a bias in an individual classroom, but the question of whether there is must be highlighted in order to be addressed.

Once raised, the question may lead to some changes that we might describe as affirmative action. In class, the teacher might act to assure that a mix of attractive and unattractive students receives attention, regardless of which students consistently raise their hands to volunteer. Outside of class, close cases in casting the school play might be decided to assure that physical appearance is not unconsciously acting as the deciding factor by seeing to it that some less attractive students win roles. As long as this type of behavior is limited to self-critical efforts to guard against unconscious bias, and does not go further to assure unwarranted rewards for unattractive students, none of this activity can be seen as illegitimate.

Similarly, with respect to race, it may be insufficient merely to tell decisionmakers to disregard race. To a great extent, the tendency to favor one's ingroup is not intentional or even conscious; but if behavior is monitored, and it shows a pattern of results that indicates the presence of bias, this should serve as a constitutionally sufficient predicate for at least some affirmative steps. These measures need not include strict, outcome-based steps such as quotas or set-asides,

but they surely may include reexamination of the validity of previously imposed criteria if these criteria tend toward an outcome that shows a bias against an outgroup. How much weight should be assigned to differences on a standardized test, as opposed to other criteria of academic or job performances?¹⁸¹ Should the low bid trump all other factors in awarding public contracts?¹⁸²

Under strict, or even heightened scrutiny, two questions are to be addressed. At least in theory, the initial question, the presence of a compelling or substantial state interest, must be answered in the affirmative to justify any type of affirmative action. If the legacy of *Croson* and *Adarand* is that only specific acts of past discrimination will ever serve to justify affirmative action, then it would follow that even the least objectionable programs, such as outreach programs targeted to minorities but granting no further favoritism, would be problematic. But in light of Justice O'Connor's hedging as to just how strict the strict scrutiny of *Adarand* is¹⁸³ it seems unlikely that these cases actually have gone that far.

If Justice Powell's conclusion that limited forms of affirmative action are justified in higher education admissions¹⁸⁴ still survives, then two things seem true. First, at least in some cases, individualized past guilt is not necessary to justify affirmative action, and second, the two parts of the strict scrutiny test may not be entirely independent inquiries. In other words, in *Croson* and *Adarand* the absence of individualized past guilt may not have been sufficient to support the scope of the particular plan at issue, but a more narrowly tailored plan might have been justified on some other rationale.

Thus, the existence of a bias toward those perceived as similar to oneself, together with the clear fact that race is a much more obvious cognitive distinction than many other qualities, should suffice to provide a compelling interest for government programs carefully designed to counteract that bias. In all likelihood, this rationale will be insufficient to justify the most aggressive forms of affirmative action, those that set aside fixed percentages of participation for minorities. Such programs, if justifiable at all, will have to depend on the type of showing of past discrimination demanded in *Croson* and *Adarand*.

181. Allan Bakke based his claim of entitlement largely upon his test scores. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 277-78 n.7 (1978).

182. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2102-04 (1995).

183. See *supra* notes 82-83 and accompanying text.

184. See *supra* notes 58-61 and accompanying text.

The rationale set forth above should, however, be sufficient to justify more modest programs. When statistics indicate that minorities are underrepresented, outreach efforts to include qualified minorities in the applicant pool may be called for. More important, a self-critical attitude toward the value of currently used decisionmaking criteria may be appropriate. Might too much emphasis be placed on performance on standardized tests, and not enough upon prior academic or work experience, in decisions involving academic admissions or job promotion?¹⁸⁵ Do hiring decisions involving college graduates place too much emphasis on the reputation of the school attended, automatically preferring the graduate of Harvard over the graduate of Howard? Making such inquiries does no more than offset natural biases. In appropriate contexts, such as university admissions decisions, the existence of a “forward-looking” reason to regard diversity as directly related to the mission of the institution involved might combine with the need to counteract natural bias to justify the “plus factors” treatment of racial diversity approved in *Bakke*. But, again consistent with *Bakke*, programs that go further will require a higher level of justification.

If we accept the notion that the fundamental rationale behind affirmative action is to counterbalance the natural tendency to favor those like oneself, we are led to several interesting subsidiary conclusions. First of all, in certain contexts, this theory does accept the real possibility of a “reverse discrimination,” though on a narrower plane than the term is now often used. The tendency toward bias to ingroups is not exclusively held by whites. Thus, where minority groups have acquired political and economic power, they will not be able to justify their affirmative action programs as easily on the grounds that they are offsetting ingroup bias. Perhaps the strongest defense of at least the outcome in *Croson* focuses on the fact that the program was adopted by a majority black city council.¹⁸⁶ While this fact should not be determinative, it does seem to call for a more careful explanation than is required for a program not adopted to benefit the ingroup of those who adopted it.

185. Justice William O. Douglas was skeptical of affirmative action in university admissions, but even more opposed to reliance on standardized tests. See Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, § 6 (Magazine), at 36, 52.

186. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 524 (1989) (Scalia, J. concurring) (finding that the set-aside was “clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group”).

This analysis should also have an effect on the question of the permissible duration of affirmative action programs. One consistent theme has been that affirmative action should be temporary, lasting only as long as necessary to eliminate the effects of the previous guilty acts that disrupted the presumed normal state of equal treatment.¹⁸⁷ But, as we have seen in a number of cases involving school desegregation,¹⁸⁸ courts have had little success determining just when prior guilt has been fully expiated. Much of this confusion may flow from the assumption that only two alternatives exist, conscious overt bias and non-bias, rather than allowing for the third possibility, the existence of a natural, unconscious bias in favor of one's own ingroup. Current law insists on the termination of affirmative action when the more obvious form of bias ceases, and in effect declares the more pervasive form of bias to be acceptable.

If there is something quite artificial about current attempts to delineate acceptable duration periods, does that mean that some forms of affirmative action will be permanent? While we need not go so far, it may be the case that at least some minimal requirements of conscious monitoring of diversity and outreach efforts will be necessary for the foreseeable future. At some point, it is possible that social conventions will have become so strong that they will seem to offset natural biases with no nudging by government, but that day hardly seems imminent.

Another possibility is that at some point, while individual biases will remain, those in a position to exercise those biases will roughly reflect the composition of the community as a whole. In such a case, no group will be systematically disfavored, since the ingroup biases of decisionmakers will more or less offset each other. While bias will continue to exist, there may well be no strong sense that it amounts to social injustice, since the system as a whole will not work against any particular groups. To some extent, this must remain only speculation; but as inconsistent as it is with commonly accepted notions, a minimal level of race consciousness, that is, enough to alert decisionmakers to the possibility that they are acting in a biased way, may be necessary as a permanent offset to what appears to be a permanent tendency toward bias.

187. "The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring).

188. *See, e.g., Freeman v. Pitts*, 500 U.S. 940 (1992); *Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237 (1991).

Adarand has been cited by some as the death knell for affirmative action. Only a few years ago, however, the same was said of *Croson*. *Croson*, of course, did not end affirmative action at the state and local levels, but it did require government to think more rigorously about the ends and means of the programs. *Adarand* calls for the federal government to do the same. The most aggressive forms of affirmative action, those that employ numerical goals or set-asides, seem clearly to be limited to instances where a demonstration of intentional past discrimination can be made. The elimination of such discrimination, however, should not be seen as the sole possible justification for any type of program that is sensitive to race. The evidence of a pervasive tendency for people to favor those perceived as similar to themselves provides a compelling justification for government programs that go no further than insisting that decision-makers monitor this tendency and take steps necessary to offset it.

CONCLUSION

It is ironic that an optimistic and apparently quite benign view of human nature could serve to impede the very goal of eliminating racial bias sought by those who were the first to promote it. But the notion that we start life with a natural sense of inclusive egalitarianism and that biases result only from the introduction of pathologies by society seems to have done just that. Courts, whose own traditional role is to fix disturbances in the status quo, have taken that perspective as their model of what serves as a compelling state interest, and insisted on the identification of discrete acts of racial bias to justify affirmative action. Their goal is to restore the initial, presumably bias-free, state of things, and to go no further. Anything beyond that would itself be bias.

But social science supports a contrary view. People begin life with a tendency to discern similarities and differences between themselves and others. This leads throughout life to a bias toward those perceived as similar, and against those perceived as different. Reduction and elimination of these biases is achieved through personal and social growth and change; it does not just happen. When we adopt this view, we can see that government's job to create a community free of racial bias requires more than the elimination of overt guilty acts. While that sort of racism no doubt exists, and must be dealt with, unconscious biases also present social problems appropriate for a legislative response.

To recognize the tendency toward bias is not necessarily a pessimistic position, any more than it is pessimistic to recognize the

need to inoculate people against physical disease. Optimism looks to the future, and insists that we can move beyond where we now find ourselves. Evidence of individual and social growth indicates that bias can be overcome, that people can extend their ideas of who belongs as part of their "ingroup." But the negation of bias requires effort; it is not merely something that comes naturally. Thus, while the elimination of overt acts of past racial discrimination clearly serves as a compelling state interest, it should not be the only interest sufficient to justify affirmative action. Legislatures have a compelling interest in creating equal opportunity, and to do this may require at least limited action to offset natural biases.

This recognition does not eliminate the need to tailor the affirmative action response. Programs that monitor the actions of decisionmakers, point at evidence of possible unconscious bias, and insist on outreach and careful reconsideration of the validity of currently employed standards for distributing rewards, clearly act to offset natural biases. Programs that go further, to set firm numerical goals, may well go too far in response to this interest, and be appropriate only for cases of overt, intentional bias; but the need for some forms of affirmative action will persist regardless of the presence of such overt, guilty acts.

Oscar Hammerstein was surely correct in his assessment of the importance of social influence in determining the level of racial bias. Society can nurture and exacerbate existing biases, and in these cases, remedial action is called for. But his ironic assertion that people have to be taught to hate and fear masks the actual truth that it is the absence of hate and fear that must be carefully taught. While *Croson* and *Adarand* may make the most aggressive forms of affirmative action extremely rare, they should not be read to eliminate the possibility that government may act, in a self-critical way, to assure that natural biases are offset.

