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# Circumventing Racism: Confronting the Problem of the Affirmative Action Ideology

Christopher T. Wonnell\*

## I. INTRODUCTION

Despite the gains of the civil rights movement,<sup>1</sup> it is generally agreed that the economic status of the black underclass has not significantly improved in recent years, and may in fact have declined.<sup>2</sup> Explanations for this phenomenon differ, but an increasingly common interpretation is that purely formal equal opportunity is insufficient to bring about substantive changes in the plight of victims of racism.<sup>3</sup> Instead, more liberal use of race conscious remedies such as affirmative action for blacks, Hispan-

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\* Professor of Law, University of San Diego. B.A. 1979 Northwestern University, J.D. 1982 University of Michigan. I have benefited greatly from the comments of Larry Alexander, Kevin Cole, Paul Horton, Robert Klonoff, Evan Lee, and Maimon Schwarzschild. Given the nature of the subject matter and claims being made herein, the usual disclaimer about full responsibility for the article's conclusions resting upon the author is particularly important to stress.

1. These gains include much substantive economic progress for significant segments of the black population. See Wilson, *Race-Specific Policies and the Truly Disadvantaged*, 2 YALE L. & POL'Y REV. 272, 272 (1984):

The median annual income for black married couple families in 1982 was \$20,586, compared to \$26,443 for white married couple families. The gap was even narrower in households where both husband and wife were employed; this was especially true for couples between the ages of 24 and 35 where the difference in annual income between blacks and whites was less than \$3,000. And the fraction of black families earning \$25,000 or more (in 1982 dollars) increased from 10.4 per cent in 1960 to 24.5 per cent in 1982.

2. See *id.* at 273 ("But for millions of other blacks, most of them concentrated in the ghettos of American cities, the past three decades have been a time of regression, not progress.").

3. See, e.g., Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201 (1982). "Equality of opportunity is a variant on the theme of social Darwinism. . . ." *Id.* at 236.

While many tenets of American ideology can be embraced advantageously by the upwardly mobile blacks whose lives approximate life in the national mainstream, these very tenets that may enhance individual freedom and reinforce national values do little or nothing to relieve the oppression of those so unequal that they literally reside in another America.

*Id.* at 242-43.

ics, and other groups is indicated to effectuate improvements that are tangible and not merely symbolic.<sup>4</sup>

This article offers a very different appraisal of the problem of racism and its economic effects. This appraisal sees affirmative action programs, and more specifically the ideology they tend to generate, as more clearly a part of the problem than of its solution. In the interpretation of the economic problems of minorities offered here, the urgent need is to identify strategies to circumvent racism, and yet those strategies inevitably will seem particularly foreign to those whose experiential base has been heavily influenced by their status as beneficiaries of affirmative action programs.

The argument is divided into four parts. Part I offers an extended definition of the challenge posed by racism in its various forms. This includes both the problems of existing conscious and subconscious racism and the very serious but subtle phenomenon of the embedded effects of past racism. Part II offers both a sociobiological explanation for the cause of racism and a strategy for employing those same sociobiological theories to circumvent racism, i.e., to keep it from holding down the economic status of the minority underclass. Part III then sets forth the problem of the affirmative action ideology, which is a way of looking at racial problems that greatly helps beneficiaries of those programs to cope with the pressures posed by the possibility of tokenism. Part IV argues that the affirmative action ideology represents an obstacle to the kinds of reforms, including a competitive market economy, an educational voucher scheme, and a relatively conservative approach to employment discrimination policy, that would be of most help to the minority poor.

## II. DEFINING THE CHALLENGE OF RACISM

Affirmative action programs are widely regarded as a remedy for racism, past and present.<sup>5</sup> For that reason, it is important to begin the analysis with a clear definition of what is and what is not racist. Unfortunately, this matter of definition has proven to be a difficult task—so difficult, in fact, that any definition of manageable length offered at the outset of an article

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4. See Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1349 (1988).

5. See Brooks, *Civil Rights Scholarship: A Proposed Agenda for the Twenty-First Century*, 20 U.S.F. L. REV. 397, 401 (1986).

would inevitably be seen as question-begging. There is nothing particularly unusual about "racism" as a term in this regard; any word that carries with it strong emotional connotations, positive or negative, as well as apparent prescriptions for action that would affect many interests, will be the source of battle over rival attempts to tap that emotional source for different referents.

It is tempting, therefore, to say that one's definition of "racism" should simply be inferred subliminally from the totality of uses to which one puts the term. While there is some truth to this, the problem is that it makes one's message difficult to interpret and understand while in the process of reviewing it. A compromise solution seems to be in order, which states a working definition of the term that anticipates the cluster of its future uses. This approach implicitly asks the reader for a favor: to accept the definition initially solely for the purpose of understanding the author's message, and to reserve judgment on whether to embrace that definition for any other purpose. With a word like "racist," about which everyone has strong preconceptions, this is not an easy thing to ask. The alternatives, however, such as doing without the term altogether, leaving it hopelessly vague, or allowing anyone to permanently define such an emotionally laden term as they choose, are even worse.

Let us begin with the clearest case of racism. This is a conscious differential sympathy for the well-being of people of one's own race for the reason that they are of one's own race.<sup>6</sup> White supremacist groups are thus racists, which should not be too surprising.

An objection to this aspect of the definition should be addressed. It might be said that it includes not only white supremacy, but also the ethnic and racial pride of disadvantaged minorities.<sup>7</sup> Indeed, the objection could be put more strongly, that in the West, *conscious* differential sympathy is thought by whites not to be terribly respectable and is thus often repressed. Accordingly, this definition might lead to the atrocious conclusion that minorities are more clearly racists than whites.

This objection is misplaced. It is true that the definition makes it possible for members of any race to be racists, but that

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6. See Calmore, *supra* note 3, at 208 ("Such indifference is racist when it effectively denies benefits to members of the subjugated group or imposes burdens on them which would not be denied or imposed if they were white.") (footnote omitted).

7. This point is made by Calmore, *id.* at 206, where it is suggested that "racism" by a subordinate group member is a contradiction in terms.

hardly seems to be a disadvantage.<sup>8</sup> There is, however, a difference between sympathy for members of one's own race because they are one's race and sympathy for members of one's own race because they happen to fall under the category of broader non-racial justifications for differential sympathy. For example, a black leader who believed that a legacy of slavery constituted a reason for adopting compensatory policies would not be a conscious racist, but rather a well-intentioned reformer seeking to correct an injustice which happened to have afflicted blacks and not others.

A second type of racism, which is probably far more common among whites in the modern United States than the first, is subconscious differential sympathy for one's own race because they are one's own race.<sup>9</sup> This type of racism can take either a normative or a positive character, and both are important to explore.

The normative version of this subconscious racism would be evidenced by a person who consciously believed she was most committed to non-racial norms that happened to correlate favorably with her own race, but who was in fact more deeply committed to the racial effect than to the non-racial norm.<sup>10</sup> Since this introduces for the first time the notion of depth which is crucial to this article's conclusions, that notion should be illuminated at this point.

When this article says that one commitment is "deeper" than another, it is saying that the individual in question would follow the deeper commitment if the two were to diverge. A white racist, searching for a socially acceptable way of expressing her feelings, might emphasize in her own mind a negative behavioral group characteristic with which to justify her racism. However, if this rationalization became less tenable to hold over time, the individual would gradually switch to another, equally negative stereotype.

The matter of depth has a positive as well as a normative dimension. An individual might feel consciously that she was not

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8. Some reasons for this conclusion are identified in Part II of this article. In essence, the sociobiological mechanisms of racism are themselves no respecters of race.

9. See generally Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (applying both psychoanalytic and cognitive psychology insights to the phenomenon).

10. For a claim that this phenomenon is common in legal academia, see Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Schools*, 20 U.S.F. L. REV. 385, 395 (1986).

anti-minority, but simply neutrally opposed to people fitting the negative behavioral stereotype. However, the same individual might employ tests of or proxies for that negative trait in the case of minorities that she did not employ for whites, or that she would cease to employ if whites rather than minorities failed those tests or proxies.<sup>11</sup>

Since depth is a counterfactual notion, there may often be a shortage of evidence to establish convincingly that a person is or is not a subconscious racist of this type. Various forms of indirect evidence might be employed, such as an individual who was always opposed to blacks and Hispanics for one set of traits but also opposed to Jews and Asians for other, contradictory sets—never, of course, seeing herself as simply pro-WASP. The fact that such racism is difficult to prove will have many practical effects in the world, including both racist actions that are never properly identified and individuals who are falsely accused of such racism.<sup>12</sup> Nevertheless, it is crucial to include these notions within the term “racist,” since it captures so much of the way racism by whites in the United States works.<sup>13</sup>

A third form of racism, more complex than the first two, is the conscious or subconscious use of race as an accurate but imperfect proxy for non-racial factors in situations where the deepest commitment is to the non-racial factors and to the best empirical methods of identifying their proxies rather than to racial effects.<sup>14</sup> Clearly, extreme cases of this behavior are racist; indeed, the whole idea of refusing to treat a person as an individual but assuming that because she is of Race X she must have Trait Y is a paradigm case of racism.<sup>15</sup>

The problem here is not the use of proxies as such. Most decisions are made on the basis of limited information that requires the use of some variables as signs or proxies for others.<sup>16</sup> Nor is the problem even racial proxies as such. An insurance

11. This corresponds closely to the second meaning of the word “discrimination” in T. SOWELL, *MARKETS AND MINORITIES* 19-20 (1981).

12. Professor Lawrence argues that courts should look to the “cultural meaning” of a particular action as a way of detecting subconscious racism without explicit evidence of its presence. Lawrence, *supra* note 9, at 355.

13. See *id.* at 351.

14. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 624 (3d ed. 1986).

15. See T. SOWELL, *MARKETS AND MINORITIES* 32 (1981) (“[C]hoosing cost-bearers on the basis of race or ethnicity goes counter to general conceptions of justice. . .”).

16. On the general phenomenon of proxies, or “sorting and labelling,” see T. SOWELL, *KNOWLEDGE AND DECISIONS* 86-93 (1980).

company need not be considered racist for calculating that the chances of a black person's acquiring sickle cell anemia are greater than a white person's chances. The use of racial proxies is objectionable and racist when it stigmatizes and falsely stereotypes individuals with a negative cultural profile that is itself inexplicable in the absence of a history of racism.<sup>17</sup>

Had there never been racism of other kinds, the use of race as a proxy might have been no more objectionable than, say, the use of small size as a proxy for likely success as a jockey; however, such a world has no practical relevance for the present use of stigmatizing racial proxies.<sup>18</sup> It may be possible to imagine scenarios in which there simply is no choice in the circumstances but to act on the basis of racial proxies,<sup>19</sup> but this article is concerned primarily with employment and other substantial economic decisions where that is unlikely to be the case.

As with all definitions, an important part of the definition of the term "racist" would be to establish who was *not* a racist within its terms. The definitions suggested thus far would indicate that an employer, for example, might not be racist for refusing to hire a minority employee in certain circumstances. For instance, the employer might want to hire an employee who produced the most widgets per hour and care genuinely and deeply about productivity and not care about race. Nor was the employer concerned about widget production as a proxy for a deep concern with race; she produced widgets without regard to the race that benefited from them or from the process of their production. Such an employer might have hired Chinese workers in one decade, Hispanics in another, whites in still another, always looking for the workers who could produce the most widgets. She would be applying a consistent test of when an employee was likely (as a factual matter) to produce more widgets, or in

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17. See Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 247 (1983).

18. See Lawrence, *supra* note 9, at 351 ("Stigmatizing actions harm the individual in two ways: They inflict psychological injury by assaulting a person's self-respect and human dignity, and they brand the individual with a sign that signals her inferior status to others and designates her as an outcast.") (footnote omitted).

19. See T. SOWELL, *MARKETS AND MINORITIES* 32 (1981) ("How far should presorting go before judging individuals? There is no categorical answer. It is an incremental decision, based on the changing incremental costs and incremental benefits of doing so."); Alexander & Alexander, *The New Racism: An Analysis of the Use of Racial and Ethnic Criteria in Decision-Making*, 9 SAN DIEGO L. REV. 190, 223 (1972) ("[R]ational prejudices are unjust if the person making the judgment about another. . . could and should make an effort to gather more information about that individual before making the judgment.").

other words, a test that changed over time only in response to improvements in accuracy and not in response to race.

An objection to the assertion that such an employer is not racist, and therefore that this type of behavior does not fit into the definition of racism, will undoubtedly be raised. Apart from the matter of whether any employer would fit this idealized portrait of the non-racist (which is not primarily a definitional issue), it will be said that much is overlooked even in this ideal. More strongly, it will be said that it is here that I have loaded the deck against affirmative action by defining out of existence many of the most serious racially-based problems faced by minorities.<sup>20</sup>

This objection would be valid if the above-described account of the problem of racism were complete. Saying that the employer's actions evidenced no racism would ignore the fact that racism might be a major reason why minority workers produced fewer widgets than whites, by virtue of the legacy of past and present discrimination that diminishes self-confidence, deprives one of skills and cultural advantages, and thus diminishes productivity.<sup>21</sup> In short, this exclusion would ignore the problem of the embedded effects of racism, a problem that may well be more severe than the problem of current racism itself.

The term "institutional racism" is often used to describe this phenomenon,<sup>22</sup> but after considerable reflection I have decided that the disadvantages of this term outweigh its advantages. The difficulty with this concept is two-fold. The first is that the term seems to beg the question of remedies by saying that the institutions which are processing the effects of racism are themselves the problem.<sup>23</sup> This may be true, but it is also possible that the institutions themselves serve valuable functions for all races and should be preserved, while a more direct approach to the problem of the embedded effects of racism should be entertained. The second problem with the term "institutional racism" is that it inevitably suggests a link with existing, individual racism that may or may not be present.<sup>24</sup> It is

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20. See Crenshaw, *supra* note 4, at 1345.

21. *Id.*

22. See Calmore, *supra* note 3, at 210 ("Institutional racism, over the long run, has the most serious consequences of any form of racism.").

23. See Crenshaw, *supra* note 4, at 1348 ("The recognition on the part of civil rights advocates that deeper institutional changes are required has come just as the formal changes have begun to convince people that enough has been done.").

24. See Calmore, *supra* note 3, at 209 ("[W]hites are socialized under the influence



certainly possible that the inequalities which are a product of the embedded effects of past racism are themselves tolerated for racist reasons, while comparable inequalities without a racial distribution would never have been countenanced. In that case, it is quite appropriate to describe present policy makers (and any citizens whose preferences they are representing) as individual racists. But the embedded effect of racism is a problem in its own right, even if it is not preserved by conscious or subconscious individual racism.<sup>25</sup> For the sake of clarity and to avoid begging questions, therefore, the enormous problem of the embedded effect of racism will be described in that way, as a problem in its own right, rather than as a distinct "type" of the same phenomenon of racism.

A quick summary of the definition of racism might now be in order. Conscious racism is differential sympathy for persons of one's own race for the reason that they are of one's own race. Subconscious racism is the denial of conscious racism that is lacking in either normative or positive depth. The use of race as a stigmatic proxy for non-racial traits when other information is available, perhaps at somewhat greater cost, is also a racist practice. Conscious, subconscious, and proxy racism are examples of individual racism, which should be distinguished from the extremely serious problem of the embedded effects of a history of such racism. As a concept, "institutional racism" does a good job of calling attention to this enormous problem, but it does so in a way that suggests misleading analogies to individual racism and that begs remedial questions. The challenge of racism facing minorities inheres both in individual racism and in the embedded effects of that individual racism, past and present.

### III. A STRATEGY FOR CIRCUMVENTING RACISM

With racism now defined, it is possible to ask several pertinent questions about the phenomenon. For example, how widespread is it, i.e., does it reflect the attitudes of just a few or of the great majority? And how deep is racism, i.e., would it yield readily to moral education or to countervailing incentives of varying degrees?

These are difficult questions to answer simply by looking at

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of institutional racism, which consists of those racist policies and practices that are built-in components of the very structure and process of most American institutions.").

25. See *infra* notes 83-91 and accompanying text.

the "naked" world since racism comes in so many guises, and subjective experiences of its prevalence inevitably will differ. The more productive strategy is to ask a more basic question first; namely, what could possibly cause a phenomenon as curious as racism? An analysis of the cause may offer indirect evidence on questions of racism's breadth and depth in any given society.<sup>26</sup>

In searching for the cause of racism, it is helpful to focus upon the essential oddity of the phenomenon from a rationalist perspective. One of the most striking features of racism, as numerous commentators have noted, is its apparent irrationality.<sup>27</sup> From a moral point of view, race seems only imperfectly correlated with normatively important features of the world such as need or merit.<sup>28</sup> Moral philosophy is cosmopolitan; racism is parochial. From a more prudential perspective, the only form of racism with clear practical utility is race-as-proxy racism; it is easy enough to see how self-interest could lead one in many cases to use race as an inexpensive proxy for relevant non-racial traits.<sup>29</sup> But it is not obvious that a pure racism would be a very helpful tool in advancing most ordinary human objectives and purposes—it certainly does not help in building the proverbial "better mousetrap."<sup>30</sup>

A second striking feature of racism, particularly noteworthy given its apparent irrationality, is its ubiquitous character over space and time.<sup>31</sup> In saying this, I am including, perhaps contro-

26. Curiously, few treatments of the racism question even ask this question of causality explicitly. An exception is Delgado, *The Ethereal Scholars: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 314-16 (1987). Delgado notes that racism may serve psychoanalytic, socioeconomic, and social-psychological functions, but does not explain why classifications by race and ethnicity accomplish these functions more readily than other classifications. *Id.* at 316.

27. See P. VAN DEN BERGHE, *THE ETHNIC PHENOMENON* 2-3 (1981) ("The liberal tradition held . . . [that] racism and ethnocentrism are irrational, dysfunctional attitudes, if not downright aberrations, to which certain rigid, authoritarian types of personality are especially prone."); Lawrence, *supra* note 9, at 330 ("[Racism] is . . . arguably dysfunctional to the extent that its irrationality prevents the optimal use of human resources.").

28. See Alexander & Alexander, *supra* note 19, at 200-02.

29. Again, the prudential rationality of the use of race as a stigmatic proxy does not imply the moral acceptability of this type of practice.

30. See *supra* note 27 and accompanying text.

31. See Delgado, *supra* note 26, at 316 ("Most Americans harbor some degree of racial prejudice.") (footnote omitted); P. VAN DEN BERGHE, *supra* note 27, at xi:

In liberal ideology, ethnocentrism and racism are archaic, irrational residues of preindustrial societies, which can be expected to yield to universalism under conditions of "modernization." In the socialist tradition, these phenomena are

versially, ethnocentrism within the notion of "racism." There really is no scientific basis for a clear-cut distinction among the races<sup>32</sup> (as there is between the sexes, where the defining feature is the physical function of reproduction). Moreover, ethnocentrism shares with racism an apparent parochialism for those of "one's own kind,"<sup>33</sup> and seems no more rational from a moral or prudential perspective than any other preference given to people because of their apparently overlapping ancestry with oneself.

The ubiquity of racism and ethnocentrism simply boggles the mind. Early history was characterized much more by ethnocentrism than by racism in a narrower sense, for the uncomplicated reason that people could not travel very far and therefore did not often encounter wholly different races.<sup>34</sup> However, small groups evolved with considerable degrees of in-breeding,<sup>35</sup> and the history of the relations among these groups is largely a history of opportunism at best, and often enslavement, domination, and war.<sup>36</sup> Needless to say, when the races did interact, phenomena such as the persecution of "middleman minorities,"<sup>37</sup> coloni-

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seen as the product of the capitalist mode of production and as misguided forms of "false consciousness" destined to wither away after the advent of socialism. Both ideological traditions have been equally at a loss to explain the persistence, indeed the resurgence, of ethnic and racial sentiments in both the advanced capitalist and socialist societies. These sentiments will not obligingly go away, as both ideologies predict.

32. See A. MANTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 4-5 (5th ed. 1974). Ethnocentrism suffers from a very similar indeterminacy. Alexander & Alexander, *supra* note 19, at 201; Comment, *Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts*, 41 U. MIAMI L. REV. 823 (1987).

33. See P. VAN DEN BERGHE, *supra* note 27, at 15:

The notion that ethnicity has something to do with kinship or "blood" is not new. Indeed, descent seems to be, implicitly and very often explicitly, the essential element of the definition of those groups of "significant others" that go under a wide variety of labels: tribe, band, horde, deme, ethnic group, race, nation, and nationality."  
(emphasis in original).

34. Indeed, in many cases a specific ethnic group migrated sufficiently that "race-like" physical features fail to explain patterns of intragroup sympathy. The ethnic group with a mythology of shared ancestry in such cases is more often identifiable by a common language and behavior than by physical attributes. See P. VAN DEN BERGHE, *supra* note 27, at 31.

35. See D. FREEDMAN, *HUMAN SOCIOBIOLOGY: A HOLISTIC APPROACH* 137 (1979).

36. See *id.* at 138.

37. See P. VAN DEN BERGHE, *supra* note 27, at 137-56.

alism,<sup>38</sup> destruction of native cultures,<sup>39</sup> and the slave trade<sup>40</sup> became prevalent.

Even today, racism (often dignified with labels such as "nationalism") is a potent force around the world. Societies that are multiethnic or multiracial often become powder kegs with levels of oppression apparently deemed tolerable in uniraical societies.<sup>41</sup> Wars between distinct racial or ethnic groups tend to have a ferocity and sense of total commitment to them; they generally lack the rules of civility and restraint that often characterize intraethnic conflicts.<sup>42</sup> The twentieth century has seen some of the worst persecution of middleman minorities in history, including massacres of the Armenians, Jews, and most recently, the Chinese "boat people" in Southeast Asia.<sup>43</sup>

In short, racism is so pervasive that it must have a perverse "logic" of sorts, albeit not the rationality of moral theory or prudential calculation.<sup>44</sup> Any given interethnic conflict of course has a chemistry and cultural history all its own, but such conflicts are too frequent, and their cultural histories too different and often contradictory, for one to remain satisfied with an absence of *general* explanations.<sup>45</sup> People simply seem to be able to dress interethnic and interracial enmity in every cultural garb the human mind has devised, and one must learn what it is about people in general that predisposes them to such perversity.

Of course, what people have in common is their biological nature, and sociobiology does indeed have a theory of racism. Sociobiologists seek to explain the behavior of animals, including human beings, by applying Darwin's model of natural selection together with Mendel's theory of the inheritance of genes.<sup>46</sup> The

38. See *id.* at 85-110.

39. See D. FREEDMAN, *supra* note 35, at 136.

40. See P. VAN DEN BERGHE, *supra* note 27, at 113 ("In an endeavor to arrive at a definition of slavery that made sense cross-culturally, I came very close to restricting the concept of slavery to *interethnic* forms of unfreedom and, therefore, to equating slavery with a particular form of ethnic (or race) relations.") (emphasis in original). Here the distinction between ethnicity and race is particularly important since early slavery was very often perpetrated by one ethnic group against another of the same "race."

41. See D. FREEDMAN, *supra* note 35, at 138 (listing examples of modern interethnic conflicts).

42. For evidence that intergroup relatedness is usually regarded as a mitigating factor in primitive tribal conflicts, see J. ALCOCK, *ANIMAL BEHAVIOR* 475 (3d ed. 1979).

43. See P. VAN DEN BERGHE, *supra* note 27, at 137-56.

44. See *id.* at 35.

45. See D. Freedman, *supra* note 35, at 138-39.

46. See E. WILSON, *SOCIOBIOLOGY: THE ABRIDGED EDITION* 3-4 (1980).

theory predicts that organisms will tend to behave in such a way as to enhance the fitness of their genes. Sociobiology has been dubbed "selfish gene" theory, since the biological world behaves *as if* genes consciously attempted to use organisms to help them to reproduce.<sup>47</sup>

One way for the selfish gene to reproduce itself is of course to contribute to the creation of an organism that will look after its own survival and reproduction. In this sense, the self-interest of organisms is indicated by the "self-interest" of successful genes.<sup>48</sup> However, genes can also contribute to their own long-run survival by encouraging organisms to behave altruistically toward those who share a similar genetic structure.<sup>49</sup> The differential sympathy of organisms toward their kin is thus likely to be a predisposition created by their successful, and therefore "selfish" genes.<sup>50</sup>

Numerous sociobiologists have applied this paradigm to the area of intraethnic sympathy. The most comprehensive work in this direction is probably that of Pierre van den Berghe.<sup>51</sup> Van den Berghe notes that most of human history took place within small groups of at most a few hundred people.<sup>52</sup> The tendency of such groups to inbreed was so great that most group members were quite closely related to each other through large numbers of overlapping lines of descent.<sup>53</sup> Members of these groups would thus have a biological predisposition to be somewhat altruistic toward each other, an altruism that undoubtedly contributed to the functional success of such groups.<sup>54</sup>

Modern ethnic groups, of course, are much larger in size,

47. See generally R. DAWKINS, *THE SELFISH GENE* (1976).

48. See Krebs, *The Challenge of Altruism in Biology and Psychology*, in *SOCIOBIOLOGY AND PSYCHOLOGY: IDEAS, ISSUES AND APPLICATIONS* 81, 92 (1987).

49. See *id.* at 92-93.

50. See Hamilton, *The Genetical Evolution of Social Behavior* (pts. I & II), 7 *J. THEORETICAL BIOLOGY* 1, 17 (1964).

51. P. VAN DEN BERGHE, *supra* note 27.

52. See *id.* at 22 ("[T]he primeval model of the human ethnic group is, in fact, the breeding population of a few hundred individuals.").

53. See D. FREEDMAN, *supra* note 35, at 137-38.

54. See Krebs, *supra* note 48, at 111:

Several studies have found that perception of similarity evokes empathic reactions. Indeed, perception of similarity may be a precondition for empathy. Interestingly, in one study Klein found that ethnic similarity, but not similarity of attitudes or interest, evoked empathy in young girls. Empathy may serve as a proximal (psychological) mechanism intervening between phenotype matching and altruism.

(citations omitted).

and the degree of genetic relationship among members is correspondingly diluted. Biological ties encouraging group altruism are thus likely to be considerably weaker, and the extent of sacrifice to be expected of each individual for her group correspondingly less.<sup>55</sup> Nevertheless, van den Berghe observes that ethnic groups very frequently seek to maintain mythologies of common ancestry, that there is enough common genesis to give such myths credibility, and that appeals to preserve a tight-knit community of one's own kind strike a resonant chord with many people by virtue of eons of evolution of their mental wiring.<sup>56</sup> In van den Berghe's words, we are a species who is "genetically programmed to behave beneficently toward those in whom we recognize ourselves."<sup>57</sup>

Sociobiology is a young science; it is bitterly opposed in general by many people, and sociobiological theories of racism are unlikely to make it any more popular.<sup>58</sup> Debate over such subjects typically entails criticism of sociobiology as reactionary and dangerous pseudoscience,<sup>59</sup> and counterattacks based upon the undesirability of shying away from scientific truth because it seems incongruent with some normative creed.<sup>60</sup> As sociobiological theories of racism become more widely known, this debate is likely to be played out once again; so it seems appropriate to make some preliminary comments on that issue.

For this purpose, it is useful to bring in Professors Lempert and Saltzburg's concept of "regret matrices," drawn from decision theory and employed to great effect in evidence law.<sup>61</sup> The idea is that on any given factual question, people have to make decisions knowing that the evidence is inconclusive and that they might be mistaken. If they make an error, they will feel some regret, but the extent of that regret may be quite different depending upon the direction of the error. One might feel far

55. This point is urged strongly in Silverman, *Race, Race Differences, and Race Relations: Perspectives from Psychology and Sociobiology*, in *SOCIOBIOLOGY AND PSYCHOLOGY: IDEAS, ISSUES AND APPLICATIONS* 205, 216-17 (1987).

56. See P. VAN DEN BERGHE, *supra* note 27, at 24-27.

57. *Id.* at 260; accord, D. FREEDMAN, *supra* note 35, at 129; Krebs, *supra* note 48, at 102.

58. See, e.g., P. KITCHER, *VAULTING AMBITION: SOCIOBIOLOGY AND THE QUEST FOR HUMAN NATURE* 3-4 (1985).

59. *Id.* at 10.

60. See, e.g., P. VAN DEN BERGHE, *supra* note 27, at 5.

61. See R. LEMPERT & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES* 151 (1977).

more regret in convicting an innocent person than in acquitting a guilty person, for example, and this difference might be quite defensible given the nature of the two risks. One also might feel less regret in convicting an innocent person who is nevertheless "bad" in other ways—and this is generally considered a major reason for the exclusion of such irrelevant and prejudicial evidence.<sup>62</sup>

In deciding whether people are biologically predisposed to racism and ethnocentrism, it is also possible to make two kinds of errors. One might conclude that such a predisposition exists when it does not, and one might conclude that no such predisposition toward racism exists when in fact it does. In my opinion, much of the opposition to sociobiology stems from the types of regret matrices people bring with them to this issue. If those regret matrices reflect the genuine risks that attach to the two kinds of error, there is nothing irrational about insisting upon a higher standard of proof one way than the other.

For that reason, it is useful to explore the nature of the opposition to sociobiological theories of racism to discover the underlying regret matrix being employed. From the intensity of the opposition to such sociobiological insights, it seems likely that many people feel it would be much worse to accept a theory that racism is biological when it is not rather than to reject a theory that racism is biological when it is. The question is why the two errors are weighted in this particular way, and whether they ought to be so weighted.

There appear to be two reasons for insisting upon a very high standard of proof of biological theories of racism. The first is that commentators realize many people employ the "naturalistic fallacy" of assuming that what is natural to human beings must be a good thing.<sup>63</sup> One can imagine a latent racist's relaxing and saying "So what if I'm a racist; that's just human nature." The second reason, not wholly unrelated to the first, is that if racism comes to be seen as "hard wired," society may lose the collective will to resist it, regarding such an enterprise as hopeless.<sup>64</sup> These concerns certainly give reason to believe that if

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62. See *id.* at 152 (mention of insurance might alter regret matrix in negligence lawsuit).

63. But see, e.g., P. VAN DEN BERGHE, *supra* note 27, at xii.

64. See Alper, *Ethical and Social Implications*, in *SOCIOBIOLOGY AND HUMAN NATURE* 195, 208 (1978).

sociobiological theories are wrong, much harm is done by their being accepted.

The same kinds of reasoning might suggest that there is little to be lost if sociobiological theories of racism are in fact true but not believed. Suppose that it is only a myth that racism is an unnatural passion—could it not be a productive myth? It is true that such an unseen force might keep non-discrimination policies from being wholly effective, but they still might generate considerable improvement in weakening whatever biological instincts do exist. Perhaps there is very little to regret in being wrong in this particular direction, so the sociobiologists' burden of proof should be set at an extremely high level.

This regret matrix is rational and unobjectionable *provided* that it has assessed the harm of the two errors correctly. Still, it must be acknowledged that such a matrix is not terribly conducive to the pursuit of truth since minor doubts in one direction will be accorded greater weight than major doubts in the other. And if the regret matrix has *misanalyzed* the harm of the two errors, such a truth-dysfunctional matrix can be the source of grievous problems.<sup>65</sup>

The contention to be offered here is that such a regret matrix is not justified by the harms of the two errors. Microeconomic theory will be employed to reassess the propriety of this regret matrix. Indeed, it can be said that this is one of the principal contributions of microeconomics more generally—by pointing to the ubiquity of unintended consequences, it shows how serious harm can come from factual errors in any particular direction.<sup>66</sup> Microeconomics tends to teach a reverence for truth, or, to put it more neutrally, a frequent need for regret matrices that weight errors in conflicting directions more equally than is common among commentators unaware of microeconomic reasoning and conclusions.

In essence, microeconomic theory tends to make it appear likely that serious harm will result if racism does in fact have a biological basis, but this does not come to be understood. Policies will be chosen that inflame racial hostility by tying the ordinarily rather weak, but always latent force of racism to such forces as self-interest and ideology. More seriously still, policies

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65. See Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669, 696-709 (1986).

66. See *id.* at 704-06.



will be overlooked that circumvent racism, that untie it from self-interest and ideology and thus keep it from blocking the economic improvement of minorities.

In order to circumvent racism, some force must be tapped that has the same scope and power that racism has. Again, sociobiology seems to be the most plausible place to look for such a society-wide counterforce. The same theory that suggests people will have a natural tendency toward racism also establishes that they will have *stronger* natural tendencies toward self-preference and preference for their own family.<sup>67</sup> This is because the selfish gene will cause organisms to prefer organisms with the most similar genetic material, which clearly points toward the organism itself and to its progeny.

Indeed, a definition of the microeconomic term "self-interest" would be quite similar in form to the definition previously given of the term "racism." An individual is self-interested if she prefers her own welfare to that of others because it is her welfare. That self-interest might be professed consciously, or it might be identified because the individual's professed altruistic motives could be shown to be lacking in empirical or normative depth. So defined, it is clear that self-interested behavior in its conscious and especially its subconscious forms is absolutely ubiquitous.

The strategy for circumventing racism is thus to tie non-racist behavior to the stronger spurs of self-interest and family loyalties. Institutions must reward non-racist behavior and/or punish racist behavior; indeed, the very words "reward" and "punish" seem to speak to the strategy of tying remote-from-ordinary human passions to the far-from-remote passion of self-preference.

In the long run, one would hope that this strategy might even have the effect of decreasing racist sentiment itself. Since self-interest is a more powerful passion than racism, and since psychology teaches that individuals have an incentive to remove states of cognitive dissonance, a set of institutions that tied self-

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67. See Krebs, *supra* note 48, at 102:

It is important to note that however disposed we may be biologically to favor members of our own ethnic groups, there is nothing in sociobiological theory that negates the possibility that individuals will feel disposed to behave prosocially toward strangers and members of different ethnic groups (or to behave aggressively toward relatives and members of ingroups) when such behavior enhances their inclusive fitness (or, more exactly, when [it] did so in their evolutionary past).

interest to non-racist behavior might lead over time not merely to a decline in racist behavior but also to a decline in racist attitudes.<sup>68</sup> This in any event is much more plausible than the thesis that such institutions would lead to a significant watering down of self-interested behavior or attitudes in order to preserve racism.

Of course, an alternative strategy to tapping self-interest would be to encourage directly a cosmopolitan ethic in which individuals would cease to feel any significant preference for themselves or for their racial or ethnic group. The dynamic traced above suggests a serious risk for such a strategy. Individuals who become convinced that the only moral thing to do is to subordinate one's self to the community will have an overpowering incentive to define that "community" in narrow, race-specific terms. Philosophies of self-denial are generally cosmopolitan in theory but intensely nationalistic in practice, since they deny legitimacy to the only passion capable of holding racism in check—day after day, for person after person.<sup>69</sup>

Let us therefore return to the strategy of tapping rather than suppressing self-interest, wishing to enlist the only passion sufficiently pervasive and reliable to combat racism. As noted before, this strategy can be pursued with either rewards or punishments—indeed, the difference between the two being a matter of essentially conventional baselines. How would this strategy look in practice?

One approach would be to explore the use of the competitive market economy as a mechanism for making racism costly to self-interest. Many economists have pointed out that in certain situations employers who discriminate place themselves at a competitive disadvantage.<sup>70</sup> An employer who hires the most productive workers at the lowest cost will make more money than an otherwise similar employer who hires less productive or more costly workers because they have white skin.

This strategy has been viciously attacked in many different ways, so it is important to be quite precise and clear regarding which of the many objections offered is valid and which is not. It is often said that white employers entertain false beliefs about

68. See L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

69. See F. HAYEK, *THE ROAD TO SERFDOM* 139 (1944).

70. See, e.g., W. WILLIAMS, *THE STATE AGAINST BLACKS* 27 (1982); see also T. SOWELL, *MARKETS AND MINORITIES*, 28 (1981).

the productivity of minority employees.<sup>71</sup> This is a classic case of conflict between the empirical assumptions of a person who has something to lose from being wrong and the empirical assumptions of a person who has nothing to lose.<sup>72</sup> Government officials and academic commentators can hide from facts to embrace whatever beliefs about minorities are fashionable, but employers pay a price for hiding. Put another way, employers' empirical assessments are richer than the commentators' assessments, because the passion of self-interest is deeper than the academic or political commitment to objectivity.

Another objection often noted is that racism is a taste much like any other, and hence markets will respond to satisfy such a taste.<sup>73</sup> Workers who dislike minorities will work for less money if an all-white working environment is offered. Employers who dislike supervising minorities will pay more money if they can have white employees. Consumers will not wish to consume services offered by minorities because of their own racism. Even if profits are lower, competition will not eliminate the pressure because the employer will not mind "consuming" racism on the job even at a cost of reduced profits.

This objection is not so much wrong as it is grossly overstated. As many sociobiologists have pointed out, there is no biological reason to believe people would be inclined to make large sacrifices of their own material interest for the sake of their racism.<sup>74</sup> Of course, it is important to remember the definition of racism. People will pay thousands of dollars to live in an all-white neighborhood and send their children to all-white schools as long as the neighborhoods and schools differ as dramatically in safety and quality of life as they do.

By contrast, the pure taste of race for its own sake, while quite pervasive, is also quite capable of being circumvented with the healthy kick of self-interest. Those who are inclined to doubt this thesis should review the painstaking works of Thomas Sowell, which represent perhaps a thousand pages of rich empirical evidence of self-interest's triumphing over racism in societies

71. See, e.g., Crenshaw, *supra* note 4, at 1345.

72. See Wonnell, *Contract Law and the Austrian School of Economics*, 54 *FORDHAM L. REV.* 507, 540-42 (1986).

73. This objection is noted in T. SOWELL, *MARKETS AND MINORITIES* 26-27 (1981), along with the fact that certain economic conditions can make such a taste very expensive to satisfy.

74. See, e.g., Silverman, *supra* note 55, at 218; Krebs, *supra* note 48, at 101.

throughout the world.<sup>75</sup> Thus, while the free market will indeed result in the racist tastes' commanding a price, they are unlikely to command anything close to the price that one might be tempted to infer from the significant black-white (or Hispanic-white) income differentials.

Two other objections cannot be dismissed as readily, however, since they do not entail the foolish betting against the power of the pocketbook motive. The first is that the free market will use race as a proxy for other traits when costs to look beyond such a proxy for more penetrating measurements of the ultimate trait exceed benefits.<sup>76</sup> Supposing that persons of Race X as a class *do* have some positive cultural trait more frequently than persons of Race Y, and there is no readily obtainable alternative proxy for that productivity-linked trait, employers may be quite rational to hire the Race X employee even in the specific case where (unknown to the employer) the Race Y person was a more productive employee. Since other employers will face the same lack of knowledge accessible at low cost, competition will have no tendency to punish such racist practices.<sup>77</sup>

Regrettably, this objection is quite valid. Of course, entrepreneurs will always be looking for tests that are affordable and that predict better than race.<sup>78</sup> But if race were highly correlated with traits employers are trying to avoid (or to attract), there might also be a market for instruments that are proxies for race but that will not look that way to courts.<sup>79</sup>

A second valid objection is that the free market system is no panacea for the problem of the embedded effects of past racism. If an individual minority employee is likely to be less productive than an individual white employee because of a history of discrimination and cultural disadvantage, the employer will hire the white employee due to processes of self-interest and competitive pressure.<sup>80</sup> The same can be said for landlord-tenant, creditor-debtor, and other relations where the races have often clashed economically. The free market system may penalize in-

75. T. SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* (1984); T. SOWELL, *THE ECONOMICS AND POLITICS OF RACE* (1983); T. SOWELL, *ETHNIC AMERICA: A HISTORY* (1981); T. Sowell, *MARKETS AND MINORITIES* (1981).

76. See T. SOWELL, *KNOWLEDGE AND DECISIONS*, 87 (1980).

77. *Id.*

78. See generally I. KIRZNER, *COMPETITION & ENTREPRENEURSHIP* (1973).

79. This, for example, was alleged to be the case for a testing procedure in *Washington v. Davis*, 426 U.S. 229 (1976).

80. See T. SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 77-86 (1984).

dividual racism (of the non-proxy variety) but it serves only to validate embedded real differentials that can be traced to a climate and history of racism.

To summarize, the free market approach as a strategy for enlisting self-interest on the side of opposing racism is a mixed blessing. It will in fact work to remove systematic errors that white employers, landlords, creditors, etc. entertain about blacks or other minority groups as a class. It will in fact dramatically lower income differentials that are not the product of real differentials to the small differentials people will tolerate to vindicate their taste for pure racism. However, it will not eliminate the rational use of race as an inexpensive proxy for real differences nor will it solve the problem of the embedded effects of past racism which accounts in large measure for those real differences.

A few observations should be made about the problem, present even in a free market, of racism in the race-as-an-inexpensive-proxy variety. The first point is that this is not an explanation of the income gap between blacks and whites (or any other two groups) considered as wholes.<sup>81</sup> The market will not misread entire classes by the use of proxies; it will misread the productivity of individuals by falsely attributing to them the median group characteristics. Indeed, the use of proxies works to the benefit of the individuals who are lower in productivity than the median of their racial group, since it will be too costly for employers (and creditors, etc.) to discover this fact. This, of course, is not to deny the devastating effect that race-as-proxy racism has had on particular individuals. It is simply to say that the very large gaps between group averages in income must look to alternative explanations such as the embedded effects of past racism.

A second point about race-as-proxy racism inheres in its implications for remedies. In education, for example, this form of racism could suggest the desirability of reforms such as blind grading of examinations and standardized tests graded by machines unable to detect the race of the student. In employment, one might want to encourage merit testing of various sorts as an alternative to individualized interviews and the like where an individual's race would stand out. Civil rights laws might insist that employers demonstrate that they at least seriously evaluate

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81. See T. SOWELL, *MARKETS AND MINORITIES* 31 (1981).

individual minority group members on their individual merits rather than dismiss them as members of the "wrong" group. Clearly, these remedies, quite conservative by modern standards,<sup>82</sup> would do little to remedy the overall black-white income gap. But that is simply the remedial analog to the fact that such a gap conceptually cannot be the product of race-as-proxy racism.

This brings us to the problem of the embedded effects of racism, where the market accurately processes the fact that many members of minority groups have lower productivity, and ignores the fact that this lower productivity is itself the product of a history and climate of racism. What remedy is indicated for this quite pervasive problem?

The most logical remedy would seem to be to take steps calculated to remove the cultural handicaps that a legacy of racism has left and that the market is now accurately processing. Of course, it is one thing to say that removing cultural handicaps would be helpful; it is quite another to identify policy levers that could effectuate such a change. Part of the solution is no doubt in the court of minority individuals, who must take the initiative for themselves and for others of their group. But there are steps that policy making authorities could take to provide a favorable environment for such initiatives to take hold.

To a great extent, of course, values that allow a person to succeed in any society are formed in childhood, where education plays such a crucial role. The urgent need, therefore, is that any minority parent who wishes to have his or her child removed from the destructive environment of the poverty cycle and exposed to the necessary education must have that opportunity. But it will not do to have another government program run by self-styled "experts" in "teaching the poor." The acquisition of values and capabilities necessary for economic success is a subtle process that must take into account both the fact of the pre-existing values and their positive features.

Since the whole regime is grounded in biological theories, it is appropriate that one count on the biological tie between parent and child as the bedrock idea of a plan. A program should succeed or fail based upon its ability to secure the consent of individual parents for their individual children. Even the racism

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82. See Scalia, *The Disease as Cure: "In order to get beyond racism, we must first take account of race."*, 1979 WASH. U.L.Q. 147, 150.

of individual minority group members for their own race could be used to great advantage, as their sympathies are both tapped to contribute to a program and disciplined by the need to secure the consent of those with the still stronger passion of family ties.

This suggests the need for an educational voucher program of the kind advocated for years by Milton Friedman,<sup>83</sup> and not simply for primary and secondary education but for preschool day care as well. Educational vouchers operate on the principle of parental choice. Rather than paying schools directly, the government would provide the vouchers in the first instance to parents. These vouchers would then entitle those parents to send their children to any approved school, and the schools would receive government assistance based upon their redeeming the vouchers of the parents who selected that particular school. It is extremely important that the voucher idea be seen not simply as a desirable educational reform in general but also as a crucial instrument for the empowerment of minorities.<sup>84</sup>

It may be asked whether some parents, minority and otherwise, would be able to make competent educational decisions under a voucher program for their children.<sup>85</sup> However, the voucher idea, by directly empowering individual parents with thousands of dollars bestowable by a mere act of will, greatly changes the private cost-benefit calculation of advertizing to the child's educational needs. As in the market generally, one can to a considerable extent judge by results, obviating the need to be an expert in matters of technique.<sup>86</sup> No doubt many parents would not catch on to the best programs at first, but the success of those who did would serve as models for others perceptive enough to imitate if not to pioneer. As Thomas Sowell has so correctly observed, it is a distinct disservice to deny minorities the opportunity to improve by some moving ahead of others, insisting that there be no progress for any unless there is immediate and equal progress for all.<sup>87</sup>

One can only speculate—and it is important that one can do no more than speculate—as to the precise character of the day

83. See M. FRIEDMAN, *CAPITALISM AND FREEDOM* 85-107 (1962).

84. See Sowell, *Tuition Tax Credits: A Social Revolution*, in *EDUCATION: ASSUMPTIONS VERSUS HISTORY* 103 (1986).

85. See M. FRIEDMAN & R. FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 160 (1980).

86. See T. SOWELL, *KNOWLEDGE AND DECISIONS*, 38 (1980).

87. See Sowell, *supra* note 84, at 106.

care and educational system that would evolve. Perhaps it would be a country program far away from the problems of the urban core along the lines of many private academies. Perhaps education for many would be more vocationally or skills-oriented, or perhaps less. Perhaps it would focus more on matters of basic life management traditionally thought of as taught in homes rather than schools. What one needs to set in motion is a process of improvement, of learning what it takes to build on good values and change bad ones. The competitive market has steadily improved the quality of stereophonic sound systems and almost any other gadget one can name; it is tragic beyond words that competition for the favor of caring parents has been suppressed in this most important of areas.

It is not possible in the space available to examine all of the advantages and disadvantages of the voucher system. For present purposes, the important point is that some scheme of this general nature, which ties cultural progress to the spurs of self-preference and familial loyalties, should be at the forefront of thought about the improvement of the economic status of the minority underclass.<sup>88</sup> Unfortunately, as the next section of the article will argue, the current intellectual climate on matters of race has evolved in directions that make it difficult even to give voucher schemes serious attention as the kind of remedy minorities most urgently need.

As possible solutions to the embedded effects of racism, programs such as vouchers would have the not inconsiderable advantage of appealing to whites (except the public school bureaucracy). Markets are efficient; they generate a lot of bang for the buck. The white society as a whole would benefit from the economic improvement of minorities, although some white competitors would individually lose; that is the anti-mercantilist doctrine of Adam Smith.<sup>89</sup> The education of children is already perceived to be a governmental responsibility, so the program would not work against an individualist ethos.<sup>90</sup>

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88. Many of the objections to the alleged "anarchy" of vouchers can be met with some modest concessions to enforced uniformity in certain areas, leaving the crucial room for competition in others.

89. See A. SMITH, *THE WEALTH OF NATIONS* 472-73 (1776) (A. Skinner ed. 1974).

90. For these reasons, the voucher idea is the perfect candidate for political acceptability in the terms identified by W. J. Wilson. It need not even be pitched politically as a specially earmarked benefit for the poor or minorities, although with larger families and poorer public schools, they surely would benefit disproportionately. On these factors influencing the political acceptability of reforms intended to aid minorities, see Wilson,



Programs of this nature would help to confront both the embedded effects of racism and proxy racism. Embedded racism would decline because the beneficiaries of the program would lose some of the legacy of past discrimination, becoming more productive as workers, and as market participants generally. No doubt racists would resent the growing progress of minorities, but they would have no plausible legitimate basis upon which to hang their racism, as they do now with the ideology of individualism and its "blame the victim" orientation. Proxy racism would also decline, as the growing number of top quality minorities made it more and more costly to assume that an individual minority group member must have the group-average characteristics.

Economic success, of course, is no guarantee of immunity from racist oppression, as various middleman minority groups can amply attest. However, the success obtained via this route would have one highly desirable characteristic: it is difficult to take away without invoking openly racist legislative premises. Since the wealth will have been made along "meritocratic" standards acceptable to the dominant ideology, there will be a shortage of plausible "neutral" pegs upon which to hang racist legislative actions. Of course, this means that a strong constitutional shield against facially racist statutes is a necessary supplement to the free market/voucher scheme for the economic emancipation of minorities.

Hundreds of billions of dollars have been spent for the ostensible purpose of helping minorities. Why should one believe that this idea would work any better than those in the past? The reason, of course, is its firm rooting in the very worst of human nature: racism, self-preference, mindless preference for one's children. No grim truths about the human condition have been wished away; to the contrary, they have been deliberately harnessed. Moreover, some of those past programs which work on very similar principles—namely, food stamps and rent subsidies—have been markedly successful, and their continuance or expansion would be a desirable supplement to this program to assist those who consider themselves too old for the kind of educational initiative being contemplated.<sup>91</sup>

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*supra* note 1, at 285.

91. See Chamberlain, *Privatization*, FREEMAN, June 1988, at 247-48.

#### IV. SEVEN PROPOSITIONS OF THE AFFIRMATIVE ACTION IDEOLOGY

It is now time to face one of the unhappiest truths of all. This is the problem of affirmative action programs and the myths about matters of race that they tend to generate. The problem is not simply that these myths are untrue, but that they are highly dangerous in blocking the kinds of changes which are necessary for helping the minority underclass.

These comments should not necessarily be taken as an argument that affirmative action programs, especially those that involve only a very modest "bump" for their beneficiaries and not a large dropping of standards, should be scrapped altogether. Such a conclusion would require much more discussion of the putative benefits of affirmative action than I can offer here.<sup>92</sup> Instead, these comments should be seen as identifying one serious disadvantage that tends to come with affirmative action, but that might conceivably be resisted once it is identified. Even this disadvantage possibly could be less of a problem in fields where the standards of performance are sufficiently within the reach of anyone; the problem may be more serious in academia and the professions than with affirmative action on the assembly line.<sup>93</sup>

"Affirmative action" is a term used in its modern sense, not in the original sense of taking the initiative to see to it that qualified minorities that are available are not overlooked.<sup>94</sup> In its modern sense, affirmative action involves the conscious lowering of standards, traditionally understood. Students are to be admitted to schools with credentials that would not entitle them to acceptance if they were white.<sup>95</sup> Employees are to be hired for

92. It would also require a discussion of other pragmatic disadvantages of affirmative action, such as its tendency to encourage employers, fearful of affirmative action at retention and promotion levels, to refrain from hiring marginal minorities, as well as its tendency to encourage firms to move to areas where there are few minorities. See Scalia, *supra* note 82, at 156; Sowell, *Are Quotas Good for Blacks?*, 65 COMMENTARY 39, 40 (June 1978).

93. In truth, my sympathies are with Thomas Sowell's view that standards are appropriate for all jobs, including those labelled "unskilled." T. SOWELL, KNOWLEDGE AND DECISIONS 47-48 (1980). The statement in the text is more a concession to the fact that the evidentiary base of this article is tilted toward academia and the professions than to confidence that other jobs would not have similar problems.

94. Of course, even in this sense it involves preferential treatment (in recruiting) for minorities. See Brooks, *supra* note 5, at 406.

95. This is evident, for example, in a perusal of the undergraduate GPA and MCAT of whites and minorities in the *Bakke* case (which struck down the program for its rigid quota system rather than for this effect alone). See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

and retained in jobs with backgrounds similarly inadequate for majority applicants, and so on. Of course, these definitions of affirmative action would themselves be viciously attacked,<sup>96</sup> but that, it will be contended, is part of the problem.<sup>97</sup>

The fault for the present situation lies largely with those whites (myself included) who favored affirmative action without thinking through what it would be like to be a beneficiary of the system. Like women on a pedestal, there was little thought given to the matter of what one should believe or do once one was in this particular status. Being the beneficiary of a remedy for past discrimination, being the first minority to be an X, even being a role model, are concepts rather clearly envisioning whites as actors and minorities as objects of action. If any thought was given to this matter, it was simply assumed that minorities would be much like whites in these positions, although grateful to liberal whites for the chance.

Of course, the beneficiaries of affirmative action have not been content with this status as passive objects of others' beneficence. In recent years, the law reviews and other academic sources have been filled with the thoughts of those beneficiaries on questions of race, and the treatments are so similar to each other that it can be said that a new ideology has been born. It is therefore appropriate to explore that ideology at some length, including the way in which affirmative action programs virtually guarantee the evolution of such an ideology, as well as the probable effects of that ideology on the minority population as a whole. The remainder of this article is devoted to exploring this ideology. It is useful to first discuss the new ideology generally, and follow that discussion by seven propositions which summarize the core features of that new ideology, indicating how logically the ideology follows from the pressures created by living within an affirmative action world.

This ideology is a counterweight to the obvious anti-affirmative action story which would say that minority member benefi-

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96. See Brooks, *supra* note 5, at 411-12 ("Affirmative action was never designed to guarantee a job for every qualified minority, let alone any unqualified minority."); Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 315 (1984) ("[I]n imposing quotas, the law neither requires nor expects employers to hire unqualified people in order to satisfy judicial goals and timetables.").

97. See Scalia, *supra* note 82, at 149 ("Unfortunately, the world of employment applicants does not divide itself merely into 'qualified' and 'unqualified' individuals. There is a whole range of ability—from unqualified, through minimally qualified, qualified, well-qualified, to outstanding.").

ciaries are unqualified tokens. The literature on affirmative action has discussed the problem of tokenism and the psychological harm this problem inflicts on those perceived as tokens.<sup>98</sup> That literature has generally concluded, and I agree, that people have developed sufficient coping mechanisms to ensure that this psychological harm is not an argument against affirmative action.<sup>99</sup> Indeed, I would put the point more strongly: given the intensely felt convictions of so many beneficiaries of affirmative action programs that those programs are desirable, it is paternalistic, gratuitous, and wrong to cite the beneficiaries' interest as a reason for opposing the programs.<sup>100</sup>

Still, the pressures of tokenism are relevant in an indirect way. The problem is precisely the nature of the coping mechanisms that have evolved, together with the likely effects of those mechanisms on third parties, especially the black underclass. This mechanism is most directly perceptible in academia, since the way in which academics cope with problems is to write about them in public places. Nevertheless, the intellectual statement of the new ideology may very well be symptomatic of unarticulated methods of coping likely to be employed by affirmative action's beneficiaries in many other areas.

The new ideology emphasizes not merely the breadth but the *depth* of racism, suggesting that racism runs far too deeply in the white mind to imagine that ordinary market forces of self-interest and/or cultural progress could make a significant difference. Indeed, this ideology holds that racism pervades the very structures of "objective" thought, suggesting that reason itself may not yield to openly race-conscious confrontational strategies for overcoming the problem. This ideology can be broken down into seven core propositions which are identified below. In summarizing the core features of the new ideology, it should be added that by quoting exemplars of this ideology in the margin, I am not asserting that any specific individual is personally a beneficiary of affirmative action. As any Marxist can attest, an ideology can be sufficiently pervasive to affect even individuals

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98. See, e.g., Bell, *The Supreme Court 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 77 (1985); Greene, *Equal Employment Opportunity Law Twenty Years After the Civil Rights Act of 1964: Prospects for the Realization of Equality in Employment*, 18 SUFFOLK U.L. REV. 593, 609 (1984).

99. See Bell, *supra* note 98, at 77-78.

100. See Brooks, *supra* note 5, at 407 ("In any event, the administration's concern for minority dignity is not the sort of government solicitude minorities themselves desire.").

who themselves do not meet the defining objective characteristics of the class which spawns that ideology. I realize that this statement is insufficient to remove the suspicion of ad hominem attack; one of the problems of affirmative action is undoubtedly that minorities who are not the beneficiaries of any "bump" are grouped together with those who are,<sup>101</sup> but further individualization in this case seems clearly inappropriate.

**PROPOSITION ONE. FORMALLY RACE-NEUTRAL STANDARDS APPLIED BY PREDOMINANTLY WHITE INSTITUTIONS ARE, AS A GENERAL RULE, NORMATIVELY AND/OR EMPIRICALLY RACIST; NON-RACIST STANDARDS OF THIS TYPE ARE THE EXCEPTION.**

The important feature of this proposition is its assertion of the *generality* of the phenomenon of racist standards.<sup>102</sup> That white people are, as a general rule, racist, is probably not to be doubted, given the biological point urged earlier. But this is a proposition not about white people as individuals, but about the standards which are likely to evolve under a variety of institutions, including the competitive institutions where economic theory suggests that racist standards would tend to be squeezed.

Yet it is an essential corollary of this proposition that racism will not be observed to decline noticeably in competitive institutions, and may indeed be observed to increase. The great virtue of capitalism for racial and ethnic minorities—that it makes the "natural" biological racism costly to effectuate in the economic world—will come to be seen as entirely mythical. Indeed, this persistence of racism in the face of competitive pressures that might be thought to reduce it will require explanation on the part of thoughtful beneficiaries of affirmative action.

One explanation is of course available: the merit standards represent genuine merit, and the beneficiaries of affirmative action simply do not meet those legitimate standards. The standards might be relaxed in non-competitive periods, but they will be tightened when good performance is most needed.

It is important to note that this explanation by no means implies that minority beneficiaries could not excel by many accepted and legitimate meritocratic standards.<sup>103</sup> Rather, the

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101. See Scalia, *supra* note 82, at 157.

102. See Calmore, *supra* note 3, at 209 ("[W]hites are socialized under the influence of institutional racism, which consists of those racist policies and practices that are the built-in components of the very structure and process of most American institutions.").

103. See Scalia, *supra* note 82, at 155-56 (noting that black students at Cornell

problem is that affirmative action has systematically taken people out of environments where they could excel along legitimate meritocratic standards and placed them in environments where they often cannot. Students accepted under affirmative action programs at Harvard could easily meet or surpass the meritocratic standards at somewhat lesser schools, but the lesser schools are populated with affirmative action students with still lower qualifications.

It is hardly surprising that this explanation would be accepted by the beneficiaries of affirmative action only after exhausting all possible alternative explanations. It would be a terribly painful thing to acknowledge that one was in fact less capable of meeting legitimate standards than the people with whom one interacted on a daily basis as putative equals. Instead, the legitimacy of the "merit" standards would be questioned,<sup>104</sup> and the matter of competition would have to be explained in another way.

The global character of the proposition would be important for an additional reason. It is not to be denied that many standards, especially in non-competitive environments, are frivolous, foolish, and very possibly racist.<sup>105</sup> Such standards ought to be replaced with other standards. The problem is that affirmative action beneficiaries will discover when they interact with each other that the standards employed by thousands of institutions of all kinds differ dramatically from each other in every imaginable way, except that they all disadvantage minorities.<sup>106</sup> This is simply because affirmative action is extraordinarily insidious in this way; it incorporates by reference every merit standard of whatever kind, and places people into institutions when they do not meet the credentials specially selected to indicate probable

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scored in the upper 25% on high school standardized tests, but that many encountered difficulty because placed into a school where most students were in the upper 1% of test scores).

104. See Calmore, *supra* note 3, at 236 ("Equality of opportunity is a variation on the theme of social Darwinism, implying a meritocracy and assuming, as a given, the legitimate value of the current system of distributing economic, social, and political benefits.").

105. I have argued this in the occupational licensing area. See Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L.Q. 91 (1983).

106. Thus, Professor Brooks urges the development of a support system of minority law professors, and says that minorities will then realize that "racism is a by-product of another person's or institution's insecurity, inadequacy, and self-doubt" and not their own. Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. REV. 419, 426 (1986).

competence in that specific field. Thus, if the beneficiaries are unwilling to accept the idea that the merit standards of their specific institution are valid, they will not be motivated to choose different merit standards of other institutions. Instead, the attack must be on the white-defined notion of "merit" itself, in whatever form it might appear.<sup>107</sup>

In some cases, of course, the validity of a merit standard might be fairly uncontroversial, as when it deals with actual performance in positions of responsibility toward other people. In such instances, the affirmative action ideology will see the problem to be with the empirical judgment of those whites (in white-dominated institutions) who claim that minorities empirically do not meet those factual standards. This empirical claim would be similar to the indictment of the merit norm itself in its global character.<sup>108</sup> Racist empirical assessment would come to be seen more as the rule than the exception.<sup>109</sup>

Like the normative claim, the core of the empirical indictment is this claim of generality. That whites are, as a general rule, racist in their empirical assessments of minority performance, is very likely true. However, one should observe that this tendency toward systematic empirical error will decline in competitive institutions where the cost of being wrong increases.<sup>110</sup> In the world of affirmative action, however, no such phenomenon will be observed; indeed, one may well observe empirical judgment of minority performance becoming worse in such environments.<sup>111</sup> There is a very logical explanation for this: the empiri-

107. See Greene, *supra* note 98, at 602 ("Tacitly, the dominant group [white males] has created an academic culture which embodies, as an essential element in its meritocracy, the lack of 'others.'").

108. See *id.* at 610 ("Untainted evaluations are hardly possible in skewed situations accompanied by perceptual distortion. Moreover, these skewed situations make it possible to maintain the idea—and the reality—that white males are entitled to prestigious and influential employment as a matter of course.").

109. See *id.* at 612:

[Q]uotas are important as a means to the end of group empowerment and as a means to the end of perceptual accuracy. . . . The perception research indicates that the judgment process is influenced by the power relationships we perceive around us. It is not likely that these perceptual tendencies will be changed unless the world around us speaks a different message.

110. Professor Lawrence argues, quite plausibly: "To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism." Lawrence, *supra* note 9, at 322.

111. Thus, Professor Lawrence moves from his statement about individual intentions directly to a conclusion about behavior of employment institutions: "Thus, an individual may select a white job applicant over an equally qualified black and honestly

cal judgments are substantially right, not grievously wrong, and they become increasingly right as competitive conditions tighten. But of course this explanation is too painful to accept, so some alternative explanation must be found.

**PROPOSITION TWO. RACISM IS CENTRAL TO THE SELVES OF MOST WHITES; INDEED, IT IS SO CENTRAL THAT NEITHER THE ACTIONS OF MINORITIES TO SATISFY WHITES NOR THE VOLUNTARY SELF-INTEREST OF WHITES CAN CONSTITUTE A SERIOUS REMEDY TO SUCH LEVELS OF RACISM.**

The important thing about this proposition is its claim about the central role that racism plays in the lives and self-concept of most whites.<sup>112</sup> Thus, this proposition goes beyond the proposition that racism is a part of the selves of most whites, which in my judgment is very likely true. It goes to the issue of the depth of racism, asserting that racism goes deeper than other passions, even the passion of self-interest, since the white "self" is such a thoroughly racist entity.<sup>113</sup>

This proposition could help to explain the anomaly posed by the problem that competitive institutions did not seem to reduce the magnitude of the racism noted in Proposition One. Under competitive pressure, whites will indeed search for solutions that accurately depict their self-interest, but they will face an insoluble mental block when confronting the possible idea that it is their empirical error in assuming that minorities are less productive which might be the problem.<sup>114</sup> The idea that minorities might be as productive as whites is a truth too painful

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believe that this decision was based on observed intangibles unrelated to race." *Id.* at 343.

112. See Crenshaw, *supra* note 4, at 1356 ("Gordon, Freeman, Tushnet, and Gabel fail to analyze racism as an ideological pillar upholding American society, or as the principal basis for Black oppression."); Calmore, *supra* note 3, at 203 (racism has overwhelming significance for "the full truth of [racism] . . . implies the necessity for increasingly fundamental changes in the sociopolitical and economic spheres of American life.").

113. See Crenshaw, *supra* note 4, at 1369 ("Thus, this Part examines the deep-rooted problem of racist ideology—or white race consciousness—and suggests how this form of consciousness legitimates prevailing injustices and constrains the development of new solutions that benefit Black Americans.").

114. See *id.* at 1378:

Racial hierarchy cannot be cured by the move to facial race-neutrality in the laws that structure the economic, political, and social lives of Black people. White race consciousness, in a new form but still virulent, plays an important, perhaps crucial, role in the new regime that has legitimated the deteriorating day-to-day material conditions of the majority of Blacks.



to accept, even if one's failure to accept it is causing grave financial loss year after year.

The idea that racism runs this deep would help to explain much of the rest of the affirmative action experience. Especially if affirmative action is carried to the degree of "bumping" people up many levels, the result may be that one is now simply beyond the point where hard work and the other "Calvinist" virtues are likely to do much good.<sup>115</sup> If even the hardest working affirmative action beneficiaries are encountering persistent hardship and criticism, it may come to appear that no amount of hard work does much good in winning the favor of white's positive judgment.<sup>116</sup> From the perspective of the affirmative action beneficiary, the most palatable explanation for this phenomenon is that white judgment is simply incorrigible when it comes to minorities, and that the assimilationist strategy is hopeless.<sup>117</sup>

**PROPOSITION THREE. THE PATH OF PROGRESS FOR MINORITIES CONSISTS OF A CONFRONTATIONAL STRATEGY CALCULATED TO SEE TO IT THAT WHITES NEVER MAKE DECISIONS AFFECTING MINORITIES WITHOUT CONSCIOUSLY ADVERTING TO MATTERS OF RACE.**

The world of affirmative action is a world in which what goes on inside the minds of white people is absolutely critical to the status of beneficiaries.<sup>118</sup> However, as the previous propositions noted, the affirmative action world view requires that such a mind be incorrigibly racist at a very deep level, deeper even than monetary self-interest. On the other hand, affirmative action programs are a reality all over the United States, and in most cases they were implemented by whites under pressure from minorities.

What is the common denominator of all the diverse racist

115. See Graglia, *Race-Conscious Remedies*, 9 HARV. J.L. & PUB. POL'Y 83, 87 (1986).

116. See Brooks, *supra* note 106, at 421-22.

117. See Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503, 509 (1986) ("The unusual, and often highly politicized, status of the few minority and women professors on law faculties will frequently thwart assimilation, even if these individuals attempt to acculturate themselves to traditional roles.").

118. See Crenshaw, *supra* note 4, at 1358-59:

The most significant aspect of Black oppression seems to be what is believed about Black Americans, not what Black Americans believe. Black people are boxed in largely because there is a consensus among many whites that the oppression of Blacks is legitimate. . . .

In this sense, the civil rights movement might be considered as an attempt to deconstruct the image of "the Negro" in the white mind. (emphasis in original).

“merit” standards that is not also present in the case of the whites who adopted affirmative action programs? Clearly, the answer is that the former standards were often designed without a conscious concern for matters of race, while the latter were not. Once inside the affirmative action world, minorities lose from almost every decision made by whites when they fail to consciously think about race—ranging from policies of blind grading to casual conversations about the quality of scholarship over lunch.<sup>119</sup> It is only natural to assume that such must be the case outside the affirmative action world as well, especially since the story which would distinguish the two worlds is so unpalatable.

The strategy for minorities is indicated by the nature of the problem. Clearly, the white mind cannot be left alone in making decisions, under the comparatively modest scrutiny required to see to it that conscious racism is not playing an important part in the decisions. Rather, constant pressure must be applied by minorities as such toward whites as such.<sup>120</sup> To be effective, that pressure cannot be episodic, affecting simply hiring decisions and the like, for then the deep subconscious racism will take over and eat away at the gains incrementally through promotion and retention decisions or more subtle dispensations of praise and criticism. The white mind really needs a continuous guardian, and minorities should endeavor never to let it operate on its own dynamic to whatever extent practicable.<sup>121</sup>

The strategy for reform is clear: racial confrontation, racial rhetoric, open expression of deep hostility toward the thought processes of the other race, race-specific policies, followed by

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119. See Delgado, *supra* note 26, at 309 (“What holds [minorities] back is simply racism—the myriad of insults, threats, indifference, and other ‘microaggressions’ to which we are continually exposed.”) (footnote omitted); *id.* at 317 (“In private settings, prejudicial behavior and speech are much more likely to appear.”).

120. See *id.* at 322 (“The views of various scholars on racism coalesce to form a ‘confrontation theory,’ which describes the best means of confining and combatting racism.”).

121. See Bell, *supra* note 10, at 394:

But until the Academy felt public pressure to act, they had functioned for generations with only white males permitted inside their prestigious walls. Until the late 1960’s, only a few blacks had held regular positions at white law schools. Then, in the space of a decade, the numbers increased to a few hundred, sufficient only to show what could be done when action was required. Now, the pressures are gone, and qualifications again are said to render minority hiring the employment equivalent of the impossible dream.

suspicious monitoring of one race by the other.<sup>122</sup> Of course, no one is unaware that this strategy carries risks of degenerating into race warfare of the kind so common around the world and down through history.<sup>123</sup> But since the strategy at least works a fair amount of the time, and the race-neutral meritocratic approach almost never works within the experience of the affirmative action beneficiary, the balance tips in favor of this method of helping minorities.<sup>124</sup>

**PROPOSITION FOUR. IT IS AN INDIVIDUAL VIRTUE, NOT A VICE, TO BELIEVE IN THE TRUTH OF FAVORABLE FACTUAL STATEMENTS ABOUT MINORITIES MORE DEEPLY THAN ONE BELIEVES IN RACE-NEUTRAL CANONS OF METHODOLOGY.**

The earlier propositions indicated the importance that the affirmative action vision attaches to white beliefs about minorities. In the main, these are factual beliefs, including the beliefs about the factual accuracy of certain credentials as effective indicators of performance in some particular area. Thus, it is important that whites should come to entertain beliefs about minorities that are at variance with the kind of beliefs they are predisposed by racism to hold.

The important thing about this proposition is that virtue is defined by the end state belief reached as opposed to the method by which it is reached.<sup>125</sup> Indeed, this vision would be very much inclined to define "racism" differently from the way it has been defined here. The definition would be of the character "the belief that whites possess valuable traits to a greater extent than other races," a conclusion which logically could be reached after no inquiry or after following a quite sophisticated methodology.<sup>126</sup>

This proposition is not difficult to understand, given the pressures created by the world of affirmative action. If purportedly race-neutral tests invariably disadvantage minorities, and

122. This is most evident in the stinging attacks directed by minorities against other minorities for refusing to play this game. See, e.g., Bell, *supra* note 10, at 393.

123. See T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 118-19 (1984).

124. See Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 347 (1987) ("'[P]ower,' Douglass reminded us, 'concedes nothing without a struggle. It never did, and it never will.' In the twentieth century, people of color, poor people and indigenous people who accept the truth of Douglass' words are organizing around vital issues.") (footnote omitted).

125. See Bell, *supra* note 10, at 391.

126. See Calmore, *supra* note 3, at 207.

racism is such a powerful subconscious force that not even monetary self-interest can dislodge it, it is not much of a step to say that purportedly race-neutral methodologies of fact finding are themselves probably racist. Virtue consists in recognizing this, and going directly to the conclusion, adjusting matters of methodology as necessary.

The definitional approach taken in this article represents a deliberate break from the assumption of Proposition Four. "Racism" is not a value-neutral word; it is intended both by this article and by the affirmative action proponents as, generally speaking, a vice. Thus, this article defines "racism" in terms of seeing negative traits that are not there, rather than simply seeing negative traits. For it is wrong to identify virtue and vice more strongly with the conclusion of factual inquiry than with its method.<sup>127</sup>

It is not, however, unprecedented. Stalin, for example, made a hero out of Lysenko for his crackpot genetic theories and condemned cybernetics as "bourgeois idealistic pseudo-science."<sup>128</sup> Galileo was punished for following scientific method to conclusions unpalatable to the prevailing conceptions about what ought to be true and therefore must be true. Radically tilted regret matrices are not the monopoly of any particular race.

Of course, the ability of determined academics to preserve a vision is a continuous source of wonder. One can say that science is itself racist, and that if science is indeed helpful in identifying truth in the sense of correspondence with the facts, then correspondence-truth is racist too. This, however, is a strategy recommended only for theorists, and not for people who need to interact with the world as it is in ten thousand ways per day in order to survive.

The commitment to sound methodology, and ultimately to correspondence truth, is more often stated as a platitude than explicitly argued for. After all, it surely is sensible to say that many values, such as avoiding the intense suffering of millions of people, are more important than pedantic factual truths. A deep commitment to truth as such often comes only when one realizes

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127. I have argued elsewhere that this pressure on empirical judgment is an important criterion for deciding among political philosophies. See Wonnell, *Problems in the Application of Political Philosophy to Law*, 86 MICH. L. REV. 123 (1987); Wonnell, *Compatibilist Philosophy in Reflective Equilibrium: A Challenge for the World of the Socialist Calculation Problem*, 11 HARV. J.L. & PUB. POL'Y (1989) (forthcoming).

128. See Wonnell, *supra* note 65, at 696-709.

the practical harm that arises from false positives as well as false negatives on a given question.<sup>129</sup>

This is undoubtedly the root of the problem underlying Proposition Four. Given the earlier propositions, it does not seem that there would be much harm from believing that minorities had certain desirable traits if in fact they did not. This might be relevant if minorities could benefit from acquiring such traits, but the earlier propositions, based on life within the affirmative action umbrella, made that seem unlikely. By contrast, if people start to believe that minorities have negative traits, they may scuttle affirmative action and its proven benefits. The harm, really, is from the belief—whether or not it is true.<sup>130</sup> Thus, the vice consists of holding that belief for any reason.

Many unpleasant features of affirmative action programs follow, if not as a logical consequence, then at least in a plausible coherence with Proposition Four. People of any race who have no ability or interest in the area of factual methodology have an easy trip to virtue simply by believing and mouthing the appropriate slogans and cant. The most widely admired whites are those who convey in their voice the most sincere and gushing praise for the work of minorities vis-a-vis whites, with standards that would probably be contradictory if they were not so inscrutable.<sup>131</sup> Hypocritical statements are repeated so many times that a section of the mind is cabined off in which those statements are actually believed—but only long enough to vote on affirmative action matters, after which everyone returns to her merit-judged work.<sup>132</sup>

**PROPOSITION FIVE. FUNDAMENTALLY, BOTH THE INTERESTS AND IDEOLOGIES OF WHITES AND MINORITIES ARE IN IRRECONCILABLE CONFLICT.**

The idea that the interests of whites and minorities conflict in a way that makes them less reconcilable than the interests of individual whites vis-a-vis each other is a plausible corollary of

129. See Wonnell, *Causal and Normative Underpinnings of Legal Controversies: The Constrained Vision of Thomas Sowell* (Book Review), 21 U.C. DAVIS L. REV. 1009 (1988).

130. See Crenshaw, *supra* note 4, at 1358-59.

131. On the general dynamic of exaggerated academic tolerance, especially by white academics in the 1960s, see A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 316-18 (1987).

132. See *id.* at 95 ("And everywhere hypocrisy, contempt-producing lies about what is going on and how the whole [affirmative action] scheme is working.").

everything that has been said before. All races might be thought to benefit from initiatives that increase the size of the pie by generating higher productivity and less harm from externalities. In the experience of the affirmative action beneficiary, however, actions that minorities take to improve their productivity lead to little in the way of benefit from whites.<sup>133</sup> Even after considerable effort, affirmative action beneficiaries still receive the same types of exaggerated, implausible, patronizing praise from some whites and vigorous attack from others.<sup>134</sup>

This phenomenon, however, is not interpreted as a by-product of the affirmative action dynamic. Instead, it is said that whites have such a mental block about minorities that they fail to see improvements when they are made.<sup>135</sup> The conclusion, however, is the same: white and minority interests cannot be harmonized, because it is of the essence of the whites' interest to see minorities do poorly.<sup>136</sup> The proven path of personal progress is by highlighting the conflict of interests, not by trying to smooth it over.

The problem is not simply that the interests are in conflict, a conflict which might be resolved by compromise if not by harmonization. Rather, the conflict of interest has become a conflict of ideologies, which are creeds that cannot be compromised morally.<sup>137</sup> Individualism, free markets, the development of productive skills and their accurate translation by the markets into personal and social wealth: this is seen as the white ideology.<sup>138</sup>

133. See Wright, *The Color Line Still Exists*, 20 U.S.F. L. Rev. 515 (1986) ("I often feel adrift in a world where the more I do to prove my intelligence and competence, the more I am required to prove.").

134. See Brooks, *supra* note 106, at 420 ("On the other hand, they [tenured minority law professors] stand alone in an environment that offers token support and frequent antagonism.").

135. See Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 407 (1987):

I, on the other hand, was raised to be acutely conscious of the likelihood that, no matter what degree of professional or professor I became, people would greet and dismiss black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational and probably destitute. Futility and despair are very real parts of my response.

(footnote omitted).

136. See Crenshaw, *supra* note 4, at 1362 ("There was something significant about affirmative action and other civil rights policies that gave rise to a crisis in a way that other more devastating or more common ideological disruptions have not. This suggests that the relatively subordinate status of Blacks serves a stabilizing function in this society.").

137. See T. SOWELL, *MARXISM: PHILOSOPHY AND ECONOMICS* 59-67 (1985).

138. See Bell, *supra* note 10, at 388-90:

One is led into a quasi-Marxist scheme, and perhaps even more exaggerated than Marxism, since the values that make one a good worker and the values that make one a good capitalist have a fairly considerable overlap.

This of course is happy news for white opponents of individualist ideology, who see in affirmative action beneficiaries a useful ally.<sup>139</sup> Such an alliance, however, is quicksand for minorities, which many of the most perceptive minority commentators on civil rights issues are beginning to see.<sup>140</sup>

The rallying cries of the white anti-individualism commentators such as those in the critical legal studies (CLS) movement are altruism and community.<sup>141</sup> For minorities, these are incredibly unreliable reeds upon which to hang their hopes. Altruism is never terribly strong, and in the racial area it fights with the natural anti-altruism known as racism. And the idea that the individual should subordinate herself to the community has a chance of mass appeal largely in proportion to how narrowly defined from the standpoint of race and nationality the relevant "community" is.<sup>142</sup>

Minority commentators know all of this, of course, but they have long since become reconciled to the need to make choices

Perhaps this theory /the creed of white academics that capitalism generates widespread wealth/ was once believable, but the record of capitalism is that its hallmarks of efficiency and productivity are gained at a very high price. Its essence is exploitation . . . .

. . . . In actual fact, the nation's earliest wealth was based on slavery.

. . . .

This is a horrible legacy, but it is one that should not be forgotten the next time one of the more arrogant members of the Academy suggests, in any of the myriad ways available, that minority students and teachers are simply not intellectually ready for the rigors of academic life.

139. See Bracamonte, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297, 297-98 (1987).

140. In particular, the critical legal studies movement de-emphasis on formal structures such as rights has resonated poorly with civil rights scholars. See *id.* at 298; Delgado, *supra* note 26, at 314-15; Williams, *supra* note 135, at 405-06.

141. See, e.g., Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1717-21 (1976). I have discussed Kennedy's dichotomy of individualism and altruism in Wonnell, *Problems in the Application of Political Philosophy to Law*, *supra* note 127, at 130-37.

142. See Delgado, *supra* note 26, at 314:

There are no guarantees that racism would not resurface in the CLS communities. To date, Critics have not articulated a psychological or political theory of the origin of racism or of how it could be eradicated. If racism were to surface in a CLS-style Utopia, there would be no rules, rights, federal statutes, or even courts to counteract it.

based upon the perceived lesser of two evils. The ideology of individualism is, within the experience of the affirmative action beneficiary, essentially useless in helping minorities.<sup>143</sup> Of course, it was useful for a time, when explicitly racist discriminations were legally effectuated, but it has little further utility, and those past gains seem relatively secure.

This article will undoubtedly do a little bit to push minorities further away from individualism, which is the last thing I want to do. Given the intensity of the new ideology, the politic move is obviously to support affirmative action programs, and indeed to show that "true" individualism (or whatever) would call for such programs.<sup>144</sup> But such a story seems quite strained, and the refusal to play that game undoubtedly feeds directly into the affirmative action world view that individualism is a white person's ideology.

Needless to say, this new paradigm has minorities confronting quite a challenge. It is urged that white and minority interests on most important matters are in direct conflict, and that the need is for race-conscious pressure to take from whites and redistribute to minorities.<sup>145</sup> It is further urged that the conflict of interest is a conflict of ideologies. Thus, the affirmative action world view places minorities on the opposite side of white self-interest, white racism, and white ideology—perhaps the three strongest forces in a white-dominated society, undoubtedly made stronger by their congruence and mutual reinforcement. It is no wonder that much civil rights writing in the new tradition seriously explores the possibility that further peaceful change is impossible, and that total despair is in order for minorities.<sup>146</sup>

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143. See Marshall, *A Comment on the Nondiscrimination Principle in a "Nation of Minorities,"* 93 YALE L.J. 1006, 1009-10 (1984) (restating holding of *Brown* in group rather than individualist terms).

144. For truly sad evidence of this, consider the following statement in Matsuda, *supra* note 124, at 331: "Overcoming such criticism [of CLS] is possible. Critical scholars condemn racism, support affirmative action, and generally adopt the causes of oppressed people throughout the world."

145. See Crenshaw, *supra* note 4, at 1365 ("The underlying problem, especially for African-Americans, is the question of how to extract from others that which others are not predisposed to give.")

146. See Brooks, *supra* note 5, at 417:

The final issue is almost unthinkable: namely, whether words are enough to win the civil rights debate. Given the fact that the present social arrangement has worked well for white men as a whole, why should they listen to what minorities have to say, especially when we offer no threat to them? What I fear most is that Thrasymachus of Plato's Republic might be right: Justice "means what is for the interest of the stronger, ruling party."



The contrast between the affirmative action approach and the strategy outlined in the prior section is nowhere more clear than in this area. The prior strategy sought to circumvent white racism by appealing to white ideology and long run self-interest, leaving racism somewhat naked and undefended. This alternative strategy, which stimulates not only white racism but white ideology and self-interest as well, faces a much more difficult set of obstacles. The logic of the problem is almost inexorable: white people will unleash racist sentiments dressed in the language of ideology to protect their self interest the next time it appears seriously threatened for any reason.<sup>147</sup> Once again, it is not that the new ideology is blind to this danger. Rather, it is blind to the alternatives, which are not experienced as viable when living within the affirmative action world.

**PROPOSITION SIX. THE WHITE "MERITOCRACY" HAS BECOME THE GREATEST ENEMY OF A VALUABLE DIVERSITY OF GENUINELY MERITOCRATIC TRAITS.**

The focus on a diversity of meritocratic standards should have been expected from the outset.<sup>148</sup> People who are placed into environments on the calculated assumption that they are not likely to excel in them will not cheerfully play their assigned role as lower-merit-but-necessary-instruments-for-social-purposes individuals. People of all races desire to excel in something, not merely to meet minimum standards of "acceptable" performance. Thus, if minorities are placed into institutions where excelling by traditional meritocratic standards is unlikely, the attack on those standards *as not capturing the true diversity of meritocratic performance* is inevitable.<sup>149</sup> This move comfortingly adjusts the terms of debate from one over higher

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(footnote omitted).

147. See T. SOWELL, *THE ECONOMICS AND POLITICS OF RACE* 254 (1983) ("But the politicization of race and the polarization of societies has historically been far more than an incidental cost. History shows repeated and sustained retrogressions, agonies of oppression, and trails of blood when racial animosities are stirred.").

148. Matsuda, *supra* note 124, at 343-44 (author urges "a personal commitment to read minority and feminist writings in equal quantities with mainstream scholarship"). Matsuda defines "mainstream" scholarship as "the standard androcentric and ethnocentric primary and secondary writings that are the traditional raw materials of legal scholarship." *Id.* at 344 n.91.

149. See Brooks, *supra* note 5, at 414 ("Holmesian jurisprudence explains how distinct minority legal perspectives might be created. . . . Because of racism and discrimination, most minorities simply have completely different experiences than their white counterparts.").

and lower performance on a common scale of excellence to one over a diversity of incommensurable performance indicators.<sup>150</sup>

The diversity position gains credibility, of course, from the fact that a wider scope of excellences has many advantages. Undoubtedly the society benefits greatly from individuals with different talents and outlooks bringing new approaches previously not seen by traditional perspectives. Moreover, as Robert Nozick has written persuasively, a diversity of standards of excellence serves the useful function of avoiding the stifling despotism of a unitary society-wide standard of value.<sup>151</sup> There is value to having enough different standards so that everyone can excel at some recognized test and place that test subjectively higher in importance than many others would place it.

The problem is that the proliferation of diverse standards has diminishing returns in terms of these benefits, while the affirmative action generated need for such diversity recognizes no such limitations. Indeed, Robert Nozick seems to have missed the problem of such limits as well. In the capitalist society that Nozick favors, there are indeed many diverse standards of excellence, but there is a unitary, sometimes stifling, concern that seems to be an obsession of the overwhelming majority and the source of unpleasant public rankings of merit—the passion for making money. Is this simply a problem with capitalism, or is it saying something about necessary limits on the proliferation of diverse excellences?

The latter is the more persuasive explanation. The problem consists of human interdependence and the resulting need to focus one's attention on narrow features of the environment to learn important truths needed by others.<sup>152</sup> Of course, simple, agrarian societies cannot tolerate much in the way of diversity—everyone must be farming most of the time in order to survive. Modern, technological societies, however, merely require a different kind of slavery to the facts if the benefits of such societies are to be tapped. In a capitalist society, the need for such gluing of the mind to predictable paths is brought home by the

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150. In academia, new genres of writing that purport to reflect the "minority perspective" have arisen with their own, somewhat inaccessible, standards of non-traditional excellence. Some of those pieces, for example, have become heavily laced with non-propositional writing such as fictional tales and poetry and extended autobiographical commentaries.

151. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 239-46 (1974).

152. See Wonnell, *supra* note 72, at 516-23.

passion for money, which comes from identifying modes of technique that provide services valued by others. In a socialist society, the same need is brought home to people by the commands of the central planning authorities. One way or another, we cannot all "do our own thing" and still be able to live comfortably on the efforts of millions of others in tapping truths useful for serving our needs.

Once again, none of this is to deny the benefits of a diversity of excellences. Since there must be limits on such diversity if the benefits of modern society—or any society, for that matter—are to be attained, the question remains how to draw such limits sensibly. Unfortunately, the affirmative action world interjects irrelevant passions to the center of that question—diversity is favored not for its demonstrable benefits in a particular case but for the need to avoid the predictable pressures of affirmative action on merit standards.<sup>153</sup> The difficult matter of reconciling the costs and benefits of diversity should not be decided by the desperate quest of minority beneficiaries—and whites as well, who often welcome a chance to excuse poor performance by proliferating unhelpful new standards—for the self-esteem taken away by affirmative action.

**PROPOSITION SEVEN. THE DISTINCTION BETWEEN INDIVIDUAL RACISM AND THE EMBEDDED EFFECTS OF THAT RACISM OUGHT TO BE COLLAPSED WITH THE USE OF TERMS SUCH AS "INSTITUTIONAL RACISM."**

One of the central concepts of this article has been the difference between individual racism and the embedded effects of that racism. Individual racism is utterly pervasive but not horribly deep; it is difficult to conquer but not too hard to circumvent. The embedded effect of centuries of that racism is a more chronic problem, and requires long-run strategies to raise productivity and thus compensate for the legacy of discrimination, educational vouchers being the most important policy initiative. The new ideology tends to obscure the distinction between these two types of racism-related problems. In this ideology, both problems call for the same remedy—affirmative action—and thus little is gained by helping racists to "divide and conquer" the message of racism in this way.<sup>154</sup> Once again, the affirmative

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153. See A. BLOOM, *supra* note 131, at 94.

154. See Calmore, *supra* note 3, at 207-08 ("These [cultural] disabilities, largely a legacy of earlier racism, are now cited to justify present and future racism. By disregarding or minimizing—'whitewashing' if you will—historic consequence, the new racism is a

action world is experienced as a world in which cultural changes accomplish little, ostensibly because whites do not care, but in fact because minorities have been systematically placed into environments where hard work and related virtues are unlikely to be enough to excel by that environment's standards. Since cultural progress seems so implausible as a root to success, the distinction between individual racism and the embedded effects of that racism seems unimportant.<sup>155</sup>

Something else is gained by the slurring over of this distinction: the rhetorical power of the affirmative action message increases, as everyone hears what they most want to hear in that message. "Institutional racism" is the perfect rhetorical notion for selling affirmative action to whites. It challenges the legitimacy of neither their standards nor their empirical acumen; it simply says that they have a duty to rescue victims of the wrongs of others of their race, wrongs from which they personally may have indirectly benefited.

I myself was once a strong supporter of affirmative action as a remedy for institutional racism. It seemed that institutions needed to try harder with minorities in order to equalize their overall life chances, given the legacy of discrimination. I believed strongly that in many areas the increase in equal opportunity would more than compensate for the short-run decline in quality pending educational initiatives that would make affirmative action programs increasingly unnecessary.

What was overlooked, however, is that embedded racism is not a philosophy that can be lived by the beneficiaries of affirmative action. Nor, I venture to say, can it be lived by whites on a day-to-day basis if they wish to maintain ordinary standards of honesty, integrity, and good will. These two points should now be explored.

Embedded racism speaks to differences in real traits of whites and minorities, which institutions rationally perceive, take to be important, and act upon, but that are the product of a legacy of racism. This is a very hard thing for beneficiaries of affirmative action to accept for long. Consider a medical student in the affirmative action program challenged in the *Bakke* case,

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perverted confirmation of the 'just-world hypothesis.' ") (footnote omitted).

155. See Greer, *The Structural Basis of National Oppression*, in *BLACK LIBERATION POLITICS: A READER* 7 (E. Greer ed. 1971) ([T]he nation's "constant tendency to understate the extent and depth of the institutional structures of racism in American life is not surprising; for to acknowledge it is to indict America's political economy.").

for example.<sup>156</sup> In 1973 the entering credentials of students in that program were as follows:<sup>157</sup>

	Grade point average		Medical College Admission Test			
	Science	Overall	Verbal	Quant.	Science	GenInfo
Non-aff. act.	3.51	3.49	81	76	83	69
Minorities	2.62	2.88	46	24	35	33

An affirmative action student in this program, like almost all students, will ask herself from time to time whether she really has what it takes to become an excellent member of her chosen profession. Can she say to herself that GPA and MCAT scores are valid and important indicators of probable success in medical school, which in turn is a valid and important indicator of probable success in medicine, and that she is in this school because its administrators are advancing a social agenda of their own? This is a philosophy for the study—not for one's living truth. Individual racism is the living truth of the beneficiaries of affirmative action. It does more than simply justify the programs to whites; it also explains the beneficiaries' own experiences to themselves in the right way.

The same problem with the embedded racism story affects whites. Suppose that a student with these entering credentials does poorly on early examinations in medical school and asks the professor whether she is as good a student as the others in the class. Should a white professor respond that she is not quite as strong as the other students, that hard work may not be enough to compensate for this, and that such a problem was only to be expected given her entering credentials, but that she should stick it out anyway given the social benefits of affirmative action?

Such a professor feels intense pressure from both sides: to shade the truth and make this student feel better about herself, or to tell the truth and be far crueler than is within his or her character. The most intense pressure, of course, is to escape this dilemma by rationalizing it away: the work really is good, or grades are not really very important.<sup>158</sup> That move, given its motivation, represents self-deception, and also deceives the student, who needs accurate feedback for planning her life.<sup>159</sup> Yet it

156. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

157. *Id.* at 265, 277 n.7 (1978).

158. See Scalia, *supra* note 82, at 148 ("There is, of course, a lot of pretense or self-delusion (you can take your choice) in all that pertains to affirmative action.").

159. Again, I do not wish to rest too much on this idea; undoubtedly most benefi-

is likely to be selected anyway in preference to a frank statement that this individual is in a place that may well be over her head because a remedy for the embedded effects of racism was needed.

Above all, what was ignored in the institutional racism story was the problem of ordinary human relations between individual whites and individual minorities in an institution tilted to remedy the embedded effects of racism. Civilized social life often requires subtle gradations of gentle criticism and praise; it is one of the ways in which we all improve ourselves without gratuitous cruelty. When performance is significantly below the standards, however, there is no way to be kind and honest at the same time. Instead of useful incremental criticism and praise, minorities will often receive a useless alternation of exaggerated, patronizing praise and global criticism of irremediable problems. It is small wonder that affirmative action's beneficiaries strongly wish to be together and share experiences with other such beneficiaries; no one else could fully understand what it is like to live in such an environment.<sup>160</sup>

These problems simply go with affirmative action as a concept, and would apply without regard to race to anyone systematically placed into environments in which the best indicators available were not optimistic for more than modest success. Yet in the racial area, the problem of racism, on the part of both whites and minorities, always lurks in the background. Minorities who share experiences and find them quite universal will invariably be attracted to individual racism as the causal agent for these problems. Whites who had trained themselves not to use race as a proxy for low quality will find that this is almost impossible in the affirmative action world where the highest quality minorities have been siphoned off to other institutions where

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ciaries of affirmative action would freely waive their right to be told the truth about their progress if this waiver were necessary to keep the programs going. Still, the lack of feedback keeps the beneficiaries from benefiting as much as they otherwise might, and imposes genuine harm on third parties, for example, when the ideology is permitted to grow essentially unchecked.

160. And, of course, the key message at these meetings is that the ambivalence minorities are feeling, given their feedback, is a problem with whites and not with their own work. For example, Professor Brooks told a conference of minority law teachers that they "have the right to be angry about centuries of racial exploitation and present-day racism, but on the other hand, they do not have the right to feel guilty about these matters, to suffer low self-esteem, or to react in other self-destructive ways." Brooks, *supra* note 106, at 426.

they can be suitably underqualified.<sup>161</sup> The distrust of individual whites and individual minorities for each other in any environment where judgment of quality is required will make the combination of tolerable personal relations and personal integrity impossible.<sup>162</sup>

Indeed, this article itself simply repeats at a somewhat more abstract level the human problems inherent in affirmative action at the level of everyday experience. I am conscious that this article's words are very hard indeed, accusing a class of already disadvantaged individuals of coping with self-esteem problems through the evolution of a dangerously false ideology. Instincts of simple kindness suggest that such a piece never should be written at all, but then what would happen to one's basic sense of integrity, and to the truth if one is indeed correct?

Ironically, once within the affirmative action ideology, minority commentators themselves often feel much the same pressure. They have become convinced that their white colleagues are utterly racist at the deepest levels, but their basic sense of kindness tells them that they should soften those motivational accusations.<sup>163</sup> They also come to feel, however, that any such softening comes at the tragic price of a loss of truth and their own sense of intellectual integrity.<sup>164</sup>

For these reasons, I no longer place a great deal of hope in the idea that affirmative action can be seen primarily as a remedy for the embedded effects of past racism. That story is simply not a psychologically stable one for either whites or minorities in practice. Instead, the various forms of denial of reality identified in the earlier propositions indeed may be inevitable consequences of affirmative action.<sup>165</sup>

161. See A. BLOOM, *supra* note 131, at 96.

162. This is essentially the basis for Bloom's conclusion that "[a]ffirmative action (quotas), at least in universities, is the source of what I fear is a long-term deterioration of the relations between the races in America." *Id.* at 96-97.

163. See, e.g., Lawrence, *supra* note 9, at 326 ("We cannot be individually blamed for unconsciously harboring attitudes that are inescapable in a culture permeated with racism.").

164. A perusal of the other footnotes of this article suggests that the affirmative action ideology is not opposed generally to explicit assertions of racist motivations.

165. Or, at a minimum, this seems to be true if affirmative action "bumping" is carried to any degree similar to that involved in the *Bakke* case (which struck down the program for its formal quota nature and not for the degree of the effective bump given). Perhaps a modest bump would have a quite different dynamic, since minority beneficiaries would need to work hard to do well, but would not feel so threatened that they felt a need to evolve the affirmative action ideology.

Given its rhetorical power, the embedded effect of past racism, or "institutional racism," is unlikely to disappear as a major part of the case for affirmative action. And, of course, it is a major part of the case for the kinds of educational reforms outlined earlier in this article. But affirmative action rhetoric, when spoken by its beneficiaries, will increasingly slur over the distinction between embedded racism and the much more palatable account of individual racism. Minorities' alleged "cultural problems" will be put into quotation marks, signs of the racism of anyone who would suggest their reality and importance, and the embedded racism case for affirmative action will come to be seen increasingly as counterfactual.<sup>166</sup>

The term "institutional racism," by strongly implying that the problem inheres in the racism of the institution and its defenders rather than in the culture of minorities seems well suited to this objective of de-emphasizing the difference between individual racism and the embedded effects of its legacy. In other words, only racists see the central problem as cultural differences. But even if it were, those cultural differences would themselves be the product of racism, and thus an argument for the institutional change of affirmative action.<sup>167</sup> The other propositions identified here could then be embraced with zest.

#### V. CONCLUSION: AFFIRMATIVE ACTION IDEOLOGY AS A TRAGIC OBSTACLE TO NEEDED CHANGES

It is time to connect this account with the free market/educational voucher discussion of the prior section. It should be evident how uneasily the affirmative action ideology coheres with the ideas which are most needed to help the minority underclass. That ideology denies the prospect for major improvement through cultural change and eschews cooperative in favor of confrontational strategies, individualism in favor of communitarian approaches, and competitive in favor of altruistic institutions.<sup>168</sup>

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166. See Crenshaw, *supra* note 4, at 1379 ("The rationalizations once used to legitimate Black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of Blacks through reference to an assumed cultural inferiority.").

167. See Calmore, *supra* note 3, at 210 ("Institutional racism, over the long run, has the most serious consequences of any form of racism. . . . This brief discussion of racism hints at the depth and breadth of a basic ideological vector cutting across every sphere of American life.").

168. See *supra* note 138 and accompanying text.



It attributes claims of cultural problems to white bias, and urges minorities to reject white standards as racist rather than to meet them. The affirmative action ideology makes it difficult to embrace the intellectual foundation not only for this relatively sweeping reform, but for other initiatives based upon similar ideological thinking that could do major things for the minority underclass, such as the repeal of occupational licensing restrictions and minimum wage laws.<sup>169</sup>

What is needed at the present time is a sense of tragedy. As long as the minority middle class is heavily caught up in the affirmative action net, it will be ideologically alienated from the reforms needed to help the minority underclass. Yet because the affirmative action ideology evolves with such inexorable logic from its conditions of origin, that ideology will be dominant among minority opinion leaders. The minority underclass, quite understandably, will be far more persuaded by the almost unanimous minority sentiments about what would improve their condition than by anything a white person could say. The few minority voices in the wilderness, such as Thomas Sowell, upon whose great work into the significance of cultural differences this article has sought to draw, will be dismissed as Uncle Toms.<sup>170</sup>

One final remark is necessary to tie together the account of this particular tragedy. If racism is sociobiological, a predisposition of human nature, it must be asked where a commentator can find an objective position from which to discuss "neutrally" the problems of race. Is not the commentator, who after all is attacking a very widely held view in the minority academic community, himself subject to the kinds of sociobiological forces affecting others?

Now it is true that sociobiology does not say that external "phenotypes" such as behavior are determined by genes alone; those genes interact with an environment.<sup>171</sup> Trees are not preselected to grow to a certain height by their nature regardless of the soil in which they are placed. It is tempting, therefore, to say that growing up in the liberal atmosphere of modern

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169. See W. WILLIAMS, *THE STATE AGAINST BLACKS* (1982).

170. And, in keeping with Proposition Four, Sowell is often treated as if he had simply asserted that cultural differences were important, and had never amassed his mountains of evidence. See, for example, the treatment of Sowell in Crenshaw, *supra* note 20, at 1379.

171. See Fuller, *What Can Genes Do?*, in *SOCIOBIOLOGY AND PSYCHOLOGY: IDEAS, ISSUES AND APPLICATIONS* 147, 151 (1987).

academia, and thus internalizing the idea that racism is wrong and that people should be judged as individuals, has successfully conquered any innate racism.

While a tempting move, this rationalization is not ultimately persuasive. There surely is a difference between the conscious intellectual acceptance of the proposition that racism is immoral and a complete absence of subconscious racism in one's actual behavior.<sup>172</sup> Undoubtedly society has achieved much by emphasizing these cosmopolitan normative propositions,<sup>173</sup> but it is more than doubtful that a behavioral psychologist would have a difficult time showing that people who accept these propositions behave differently with regard to minorities for subconscious reasons.

The claim to a sufficient degree of objectivity to give a true account of this tragedy lies elsewhere, in what might be considered a particular viewpoint of theory and practice.<sup>174</sup> The account offered here of both the proper approach to the problem of the economic status of minorities and the affirmative action obstacle to that approach is an account grounded at the level of universal and universally accessible human incentives. These incentives have sufficient opportunity to manifest themselves in thousands of otherwise radically distinct environments that one can hope an intersubjective science of these incentives is indeed possible.<sup>175</sup>

The actual techniques for helping the minority underclass will not come from someone whose expertise is in the matter of universal abstractions, but from someone sufficiently caring and immersed in the concrete reality of a specific culture to bring

172. See Krebs, *supra* note 48, at 101:

Studies have found that racial discrimination is often masked, but may seep out in subtle and disguised ways. For example, Weitz found that nonverbal, but not overt, behavior correlated with racial prejudice; and Goodstadt found that prejudiced individuals may behave prosocially toward members of minority groups in order to maintain a nonbigoted public image.

(citations omitted).

173. This article should by no means be seen as arguing against universal dignity and respect positions such as that of Karst, *supra* note 17, at 247-48. To the contrary, the sociobiological predisposition makes it more important than it would otherwise be to continuously reemphasize those commitments. Yet a system should not be designed in such a way as to produce catastrophic results if people periodically lapse into their primitive biological nature, for they surely will.

174. This is a central theme in the two articles of mine cited in note 127, *supra*.

175. The ideal of a nonracial science is defended in Alexander & Alexander, *supra* note 19, at 259, and also in A. BLOOM, *supra* note 133, at 93.

about the necessary changes. It would not be terribly surprising if even the weak racism of sociobiology gave minority participants an advantage in this endeavor over their white counterparts, however well-intentioned.

This, however, is the whole point of the voucher scheme: to give people who are willing to devote their lives to identifying ways of educating minority children to the ultimate satisfaction of their parents a chance to do so. There is nothing unscientific about the idea that the judgments of practitioners in certain settings should be treated as privileged, but it is universally accessible (and thus nonracial) science that must identify the theoretical conditions for such claims of privileged status.