

# HYPE AND REALITY IN AFFIRMATIVE ACTION

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The question of how we claim to know the things that we know lies at the heart of the affirmative action debate. In approaching this pivotal question we must distinguish between two distinct kinds of claims to knowledge. First, there are claims concerning the concrete operation of the world. For example, how do we claim to know whether pervasive and severe discrimination against blacks, Hispanics, and women exists? Conservatives make claims to knowledge in this area that, if true, severely undermine the case for affirmative action. Specifically, they contend that federal court decisions and civil rights legislation since the mid-1960s have cleared the way for black advancement in jobs and education.<sup>1</sup> Consequently, it only makes sense to talk of an American racist *past* (Jim Crow legislation, public lynchings, flagrant discrimination in hiring, lending, schooling), not of an American racist *legacy* (continuing discrimination—conscious and unconscious—throughout the nation’s social, economic, and political life). In the words of one popular conservative, “[T]he American black, supported by a massive body of law and the not inconsiderable goodwill of his fellow citizens, is basically as free as he or she wants to be.”<sup>2</sup> The primary obstacle to black advancement, from this perspective, is not racial discrimination, but rather psycho-cultural defects in blacks themselves, such as

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1. See Martin Kilson, *Anatomy of Black Conservatism*, 59 *TRANSITION* 7 (1993) (identifying Thomas Sowell, Shelby Steele, and Stephen L. Carter as proponents of this position).

2. SHELBY STEELE, *CONTENT OF OUR CHARACTER* 175 (1990). In support of this point, Steele says, “Since there are laws to protect us against discrimination, preferences only impute a certain helplessness to blacks that diminishes our self-esteem.” *Id.* at 90.

paralyzing self-doubt,<sup>3</sup> "enemy-memory,"<sup>4</sup> and "integration shock."<sup>5</sup>

Conservatives have enjoyed spectacular success in portraying post-civil rights America as practically color-blind. Thus, a recent survey found that sixty-eight percent of the white respondents believed that blacks enjoy the same or more opportunity as do whites to be "really successful and wealthy."<sup>6</sup> A majority of the poll's white respondents believed that, educationally, the average black American is just as well-off or better off than the average white American;<sup>7</sup> nearly half of the whites polled (forty-seven percent) believed that blacks enjoy the same standard of living as whites.<sup>8</sup> Another poll by People for the American Way found that most Americans believed that the predominant type of discrimination today is "reverse discrimination,"<sup>9</sup> a phenomenon wherein countless young white male victims have been deprived of educational and employment opportunities by undeserving blacks, Hispanics, women, and other marginalized groups. Given such factual assumptions, it is not hard to fathom the growing popularity of anti-affirmative action referendums in states across the nation. Who would not be deeply disturbed—outraged, even—to discover that a group of people who faced virtually no unjust discrimination routinely receive preferential treatment in hiring and education? (The fact that white men legally enjoyed precisely such preferential treatment for an overwhelming

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3. Steele explains: "I think black Americans are today more oppressed by doubt than by racism and that the second phase of our struggle for freedom must be a confrontation with that doubt." *Id.* at 54.

4. Steele further opines: "I believe that one of the greatest problems black Americans currently face—one of the greatest barriers to our development in society—is that our memory of oppression has such power, magnitude, depth, and nuance that it constantly drains our best resources into more defense than is strictly necessary." *Id.* at 151.

5. *Id.* at 46. "[The myth of black inferiority] threatens to make us realize what is intolerable to us—that we have some anxiety about inferiority. We feel this threat unconsciously as a shock of racial doubt delivered by the racist anti-self (always the inner voice of the myth of black inferiority)." *Id.*

6. See David Benjamin Oppenheimer, 23 HASTINGS CONST. L.Q. 921, 959 (1996) (quoting MOLLYANN BRODIE, *THE FOUR AMERICAS: GOVERNMENT AND SOCIAL POLICY THROUGH THE EYES OF AMERICA'S MULTI-RACIAL AND MULTI-ETHNIC SOCIETY* (1995)).

7. See *id.* at 959-60.

8. See *id.* at 959.

9. Janine Jackson, *Press Finds "New Candor" in Old Stereotypes*, EXTRA!, July-Aug. 1992, at 14, 15.

preponderance of American history will not concern us at present.)

The problem with both the color-blind America and reverse discrimination contentions is that their proponents fail to support them empirically, opting instead for groundless pronouncements and naked assertions.<sup>10</sup> Part I seeks to debunk both contentions on the basis of compelling empirical evidence of widespread present-day discrimination against socially marginalized groups. I then consider the possibility that the willingness of some white Americans to uncritically accept the rhetoric of reverse discrimination reflects a need to preserve their self-esteem and sense of entitlement by scapegoating minorities.

The second kind of claim to knowledge at the heart of the debate centers on intangible qualities like merit and just deserts. How do we claim to know, for instance, that a person "deserves" a particular benefit or burden? The epistemological question here is whether the standards used to gauge desert—especially standardized tests, on which blacks and some other minorities typically score lower than whites—are as accurate in indicating the abilities and aptitudes of blacks and certain other minorities as they are for whites. Part II begins with a look at recent research suggesting that standardized tests are particularly unreliable indicators of the abilities of blacks.

On another level, questions of how we claim to know a person's "deserts" raises pressing questions of fairness. Specifically, are we evenhanded in our determinations of what people deserve, or do our institutions and decisionmakers determine deserts in ways that unfairly further the interests of the dominant group? I will approach this question through a criminal law analogue because the concept of just deserts has received greater examination here than in any other area of American jurisprudence. By examining whether legislators and judges who administer the criminal law have been able to develop principled and racially inclusive standards for determining just deserts, we can gain insight into the likelihood that expositors of such standards in other areas—such as college admission or job recruitment—have employed principled and racially inclusive standards. I argue that the standards formulated by judges,

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10. See, e.g., Coretta Scott King, *Man of His Word*, N.Y. TIMES, Nov. 3, 1996, § 10, at 15 (noting that "[t]hose who say that affirmative action is no longer necessary rarely cite statistics to support their argument, for the evidence of continuing pervasive discrimination against minorities and women is overwhelming").

legislators, and commentators to determine deserts in criminal law are not principled and coherent, but rather self-serving and hypocritical, especially redounding to the detriment of minorities from disadvantaged backgrounds.

Part III discusses how popular approaches to affirmative action mimic the self-serving hypocrisy that characterizes approaches to desert in the criminal law. Specifically, affirmative action critics vehemently denounce departures from the pure merit paradigm of job mobility and educational advancement when such departures accrue primarily to the benefit of minorities; however, they either actively endorse or selectively ignore equivalent departures that benefit primarily white males. "White affirmative action," in a word, gets a free pass from critics. I consider how this glaring lacuna in anti-affirmative action rhetoric exposes the lack of impartiality, objectivity, and fairness on the part of critics.

## I. CONFRONTING THE FACTS OF ENTRENCHED BIAS

The linchpin of the conservative assault on affirmative action is the proposition that racial discrimination is a rapidly vanishing vestige of a benighted but bygone era.<sup>11</sup> For if racial discrimination is no longer a significant barrier to minority mobility, if equal opportunity abides, if the playing field is level, then it seems obvious to many that affirmative action victimizes deserving whites for the sake of underachieving, unqualified minorities. Yet, proponents of this position typically offer little or no empiri-

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11. Although Shelby Steele, an especially popular affirmative action critic, gestures half-heartedly at the reality of racial discrimination in America today, he continuously downplays its significance, always steadfast in his assertion that whatever residual racial discrimination remains pales in comparison to the psycho-cultural impediments blacks inflict on themselves. *See e.g.*, STEELE, *supra* note 2, at 9-10 ("Since there are laws to protect us against discrimination, preferences only impute a certain helplessness to blacks that diminishes our self-esteem."); *id.* at 90 ("I think blacks have been more preoccupied with pride over the past twenty-five years because we have been more exposed to integration shock since the 1964 Civil Rights Act made equal opportunity the law of the land (if *not quite* the full reality of the land)." (emphasis added)). In view of the mountain of evidence of rampant modern day racial discrimination discussed below, saying equal opportunity is "not quite" the full reality of the land is like saying the Rocky Mountains are "not quite" the unremittingly flat cornfields of Nebraska!

cal support for it.<sup>12</sup> This is hardly surprising given the abundant evidence that racial bias still runs strong and deep in America.

Consider, first, the evidence of massive discrimination in housing markets and residential choice. A 1988 study undertaken by the Department of Housing and Urban Development compared the experiences of teams of black and white auditors sent out to seek housing in twenty metropolitan areas.<sup>13</sup> The study found that when housing availability and financial assistance were considered together, black homeseekers faced a greater than fifty percent likelihood of discrimination by real estate agents.<sup>14</sup> The likelihood of a black homeseeker suffering racial discrimination in at least one of three visits was greater than ninety percent.<sup>15</sup> Where additional unadvertised units were available, the probability that they would be shown to whites but not blacks was sixty-five percent.<sup>16</sup>

Housing discrimination, in turn, places enormous downward pressures on the social and economic mobility of minorities, since "residential mobility is a major avenue of social mobility."<sup>17</sup> Specifically, such discrimination perpetuates what sociologists Douglas S. Massey and Nancy A. Denton call "hypersegregation," a phenomenon that features a high concentration of segregation (that is, a highly uneven distribution of blacks and whites in a community), extreme isolation of blacks from whites, and a concentration of blacks near the central business district, where crime and poverty are the greatest.<sup>18</sup> Blacks trapped in such environments "have little direct experience with the culture, norms, and behaviors of the rest of American society and few social contacts with members of other racial groups."<sup>19</sup> According to Massey and Denton, sixteen metropolitan areas (accounting for more than one-third of black Americans) were hypersegregated in 1980.<sup>20</sup> Moreover, a National Academy of Sciences study of

12. See, e.g., King, *supra* note 10.

13. See DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 101-102 (1993).

14. See *id.*

15. See *id.* at 102-03.

16. See *id.* at 104. Furthermore, the probability that unadvertised units would be recommended to whites but not to blacks was a startling 91%. See *id.*

17. Kilson, *supra* note 1, at 9 (quoting Douglas Massey, Director of the University of Chicago Population Center).

18. See MASSEY & DENTON, *supra* note 13, at 74-75.

19. *Id.* at 77.

20. See *id.* at 75-76.

housing patterns found that, on a segregation index scale of zero to one hundred, the average index for blacks living in the sixteen metropolitan areas with the largest black populations (based on the 1980 Census) was eighty.<sup>21</sup> The study concluded that "it would take about sixty years for the black-white index to fall to the [segregation index] currently observed for Hispanic and Asian-Americans."<sup>22</sup>

Undercover investigations, in which people who are alike in virtually every way except race or ethnicity apply for the same benefit, provide powerful smoking gun proof of widespread housing discrimination. As a result, few people question the fact that this kind of discrimination persists. If more federal agencies follow the lead of the Department of Housing and Urban Development and provide money for undercover operations aimed at ferreting out discrimination, evidence of discrimination in employment and business as compelling as that in housing is certain to turn up. Such evidence could dispel the preposterous belief evidenced in the poll by People for the American Way that the main type of discrimination today is "reverse discrimination."<sup>23</sup>

However, resistance to efforts to get at the truth through undercover tests must first be overcome. For example, in 1991, the Board of Governors of the Federal Reserve rejected a proposal to use undercover testers to expose mortgage lenders who discriminate against minority borrowers.<sup>24</sup> This decision was made even though a 1992 study by the Federal Reserve Bank of Boston, involving an analysis of 1,991 mortgage applications in the Boston area in 1990, revealed a startling disparity between home loans granted to white and black applicants with comparable incomes.<sup>25</sup> According to this study, black home buyers at all income levels were denied mortgages at more than twice the rate of white borrowers.<sup>26</sup> The best excuse Alan Greenspan, Chairman of the Federal Reserve Board, could come up with for not support-

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21. See Kilson, *supra* note 1, at 9.

22. *Id.*

23. See Jackson, *supra* note 9, at 15.

24. See Steven A. Holmes, *U.S. Is Asked to Expand Undercover Bias Testing*, N.Y. TIMES, Sept. 26, 1991, at A18.

25. See Keith Bradsher, *A Second Fed Bank Study Finds Disparities in Mortgage Lending*, N.Y. TIMES, July 13, 1995, at D1; see also Editorial, "Test" Home Loans, CHRISTIAN SCI. MONITOR, June 2, 1992, at 20.

26. See "Test" Home Loans, *supra* note 25, at 20.

ing an undercover investigation with respect to this disparity was that he had "questions about whether the central bank should be sponsoring and supporting deception."<sup>27</sup>

Fortunately, a few undercover audits of employer hiring practices have received funding. One large study, carried out under contract with the General Accounting Office, involved 360 hiring audits on randomly selected employers in Chicago and San Diego.<sup>28</sup> Each audit employed two-man Hispanic/Anglo teams of young males whose job-related characteristics were carefully matched.<sup>29</sup> The results showed that foreign-looking and -sounding Hispanics faced a significantly greater burden than their Anglo counterparts in obtaining interviews and offers of employment for low-skilled, entry-level jobs.<sup>30</sup> Specifically, Hispanic testers were three times more likely to encounter unfavorable treatment when applying for jobs than were similarly qualified Anglos; Anglos received thirty-three percent more interviews than Hispanics; and Anglos received fifty-two percent more job offers than Hispanics.<sup>31</sup> In another study, white and black job seekers applied for entry level jobs in Washington, D.C. and Chicago during the summer of 1990.<sup>32</sup> In Washington, D.C., the white auditors were more than three times more likely to receive job

27. Holmes, *supra* note 24, at 18.

28. See HARRY CROSS ET AL., EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS 2 (Urb. Inst. Rep. 90-4, 1990).

29. See *id.*

Trained, male college students in their early twenties served as matched Hispanic and Anglo testers who were similarly qualified in key job-related characteristics. Considerable time was spent on tester training, and controls were introduced for the quantity and quality of educational background, work experience, age, citizenship (all were U.S. citizens), physical condition, availability, fluency in English, dress, height, weight, salary desired, demeanor, etc.

*Id.*

30. See *id.* at 61.

The study chose to sample low-skilled, entry-level jobs where the bulk of young Hispanic adults begin their working careers. These include jobs in hotel, restaurant and other services, retail sales, office work, management (mainly trainee positions), technical areas, and general labor, including manufacturing. Since disparate treatment of Hispanics at the entry level can compound the adverse effect on upward mobility, identifying and eliminating entry-level barriers facing Hispanic job seekers could provide the greatest leverage in improving their employment opportunities.

*Id.* at 2.

31. See *id.* at 61-62.

32. See MARGERY A. TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING (Urb. Inst. Rep. 91-9, 1991).

offers than were the black auditors;<sup>33</sup> in Chicago, the white auditors were twice as likely to receive a job offer.<sup>34</sup>

Undercover studies have also proven useful in exposing discrimination in ordinary consumer transactions such as buying an automobile. Thus, two recent audit studies of new car dealerships found that dealers systematically offered lower prices to white male testers than to similarly situated black testers.<sup>35</sup> Although audits provide convincing proof of bias, other kinds of empirical evidence of entrenched and pervasive bias can be equally persuasive. Psychological studies, for instance, can expose the wellsprings of discrimination in the unconscious workings of the human mind.

#### A. *Ubiquitous Discrimination and the Cognitive Unconscious*

Some of the most revealing and compelling proof of the ubiquity of racial bias comes from recent research on the nature and operation of stereotypes. The good news is that racial prejudice has declined steadily over the last half century and may be at an all-time low in present-day America. Between 1956 and 1990, reports on attitudes of white Americans toward black Americans show a steady increase in the percentage of whites who favor equality for blacks in all areas of American society.<sup>36</sup> The bad news is that stereotype-driven racial discrimination has probably never been stronger or more prevalent than it is now. This may sound paradoxical, but only because most people collapse the distinction between stereotypes and prejudice. Once we properly recognize this critical distinction, however, it becomes easier to see how even racially liberal decisionmakers can unintentionally but systematically discriminate against negatively stereotyped groups.

Stereotypes are deeply ingrained in children's memories at an early age, before they have the cognitive skills to make their own

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33. See *id.* at 41 tbl. 4.4.

34. See *id.*

35. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991); Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 113 (1995).

36. See Charles E. Case & Andrew M. Greeley, *Attitudes Toward Racial Equality*, 16 HUMBOLDT J. SOC. REL. 67, 68 (1990).

rational decisions regarding the validity of the stereotypes.<sup>37</sup> For example, Dr. Phyllis Katz reports a chilling case of a three-year-old child, who upon seeing a black infant said to her mother, "Look mom, a baby maid."<sup>38</sup> By the time the child turned three, before she had developed the cognitive ability to judge the appropriateness of the stereotypical ascription, the associational link between black women and certain social roles and attributes was already forged in her memory.<sup>39</sup>

Prejudice, on the other hand, consists of derogatory *personal beliefs*,<sup>40</sup> that is, propositions that people endorse and accept as being true.<sup>41</sup> A prejudiced person, in other words, endorses or accepts the content of a negative cultural stereotype.<sup>42</sup> Thus, a person can be racially liberal and still carry in his or her memory ingrained stereotypes of minorities.

Understanding stereotypes as ingrained mental reflexes carries enormous implications for judgments and evaluations of stereotyped groups. When cues of group membership such as race trigger well-learned associations such as stereotypes, people may unintentionally but automatically make biased judgments against members of stereotyped groups. Numerous psychological studies have demonstrated that when decisionmakers are

37. See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 6 (1989).

38. See Phyllis A. Katz, *The Acquisition of Racial Attitudes in Children*, in TOWARDS THE ELIMINATION OF RACISM 125, 147 (Phyllis A. Katz ed., 1976).

39. Mary Ellen Goodman found that children between the ages of three and four already possess racial awareness, and many express strong racial attitudes. See MARY ELLEN GOODMAN, RACE AWARENESS IN YOUNG CHILDREN 47, 245, 252-54 (rev. ed. 1964). More recent research confirms that children typically show evidence of racial awareness by age three or four and that by the time they reach first grade, racial awareness is very well-established. See Katz, *supra* note 38, at 125-26; see also Harold M. Proshanky, *The Development of Intergroup Attitudes*, in 2 REVIEW OF CHILD DEVELOPMENT RESEARCH 311, 314-15 (Lois Wladis Hoffman & Martin L. Hoffman eds., 1966). My personal experience with my own son locates the age of racial awareness even earlier. When my son was two years old, having just crossed the threshold of intelligible speech, he announced to his mother and me that his own (in my view, gloriously kinky) hair was "not pretty." Then, pointing to our television and the image there of a model sporting cascading waves of decidedly unkinky hair for a shampoo commercial, he said, "her hair pretty . . . mine not pretty."

40. Of course, a person can be prejudiced in favor of a group as well as against one. See GORDON W. ALLPORT, THE NATURE OF PREJUDICE 6-7 (1954).

41. See Anthony R. Pratkanis, *The Cognitive Representation of Attitudes*, in ATTITUDE STRUCTURE AND FUNCTION 71, 91 (Anthony R. Pratkanis et al. eds., 1989).

42. See Margo J. Monteith et al., *Prejudice and Prejudice Reduction: Classic Challenges, Contemporary Approaches*, in SOCIAL COGNITION: IMPACT ON SOCIAL PSYCHOLOGY 323, 333-34 (Patricia G. Devine et al. eds., 1994).

presented with *identical* information about a black and a white actor, they tend to make much more negative social judgments about the black one.<sup>43</sup>

In order to see how a stereotype (essentially a kind of habit) can unconsciously drive a person's responses to others, consider how habits generally are formed. According to cognitive psychologists, "Habits are the results of automatic cognitive processes."<sup>44</sup>

43. See, e.g., Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595-97 (1976). Duncan had 104 white undergraduates individually rate a series of interactions between two "other subjects" that culminated in an ambiguous shoving event. The two "other subjects" (both male) were actually confederates acting out a script. The experimental session consisted of a videotape of the two actors discussing a hypothetical problem; however, the subject who observed the tape was led to believe that the discussion actually was taking place in another room. See *id.* at 592-93. The subject was asked to evaluate the behavior of the "actors" six times at precise intervals, which the experimenter signaled to him during the tape. See *id.* To evaluate the actors' behavior, the subjects had to fit the behavior into one of ten major categories on a rating form. The ten major categories were dramatizes, gives information, gives opinion, gives suggestion, asks for information, asks for opinion, asks for suggestion, playing around, aggressive behavior, and violent behavior. See *id.* at 594. The subjects' final evaluations—their sixth ratings—were designed to coincide with the heated discussion and ambiguous shove near the end of the interactions; thus, this sixth rating was the major dependent measure. See *id.* at 592.

The major independent variables were the racial identities of the actor who initiated the ambiguous shove (the "harm-doer") and the actor who received the shove (the "victim"). See *id.* The subjects were randomly assigned to one of the following experimental conditions (tapes): black protagonist/white victim; white protagonist/black victim; black protagonist/black victim; white protagonist/white victim. See *id.* at 592-94. The results of this experiment are disturbing and unequivocal. When the protagonist was black and the victim white, 75% of the subjects characterized the ambiguous shove as "violent behavior," whereas when the protagonist was white and the victim black, only 17% so characterized it. On the other hand, 42% of the subjects perceived the shove as "playing around" or "dramatizing" when the protagonist was white and victim black, compared with only six percent in the black-protagonist/white-victim conditions. See *id.* at 595. The discrepancy between white-protagonist/white-victim condition and black-protagonist/black-victim condition was also drastic: 69% of the subjects perceived the within-group (black-black) condition as violent compared with 13% in the white-white conditions. See *id.* Thus, the subjects in this experiment were much more likely to characterize an act as violent when it was performed by a black than when the same act was committed by a white. See *id.*; see also H. Andrew Sager & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 594-97 (1980) (finding that both black and white children rated ambiguously aggressive behaviors—such as bumping in the hallway—of black actors as being more mean or threatening than the same behaviors of white actors).

44. Ronis et al., *Attitudes, Decisions, and Habits as Determinants of Repeated Behavior*, in ATTITUDE STRUCTURE AND FUNCTION, *supra* note 41, at 213, 219.

As Patricia G. Devine points out, "Automatic processes involve the unintentional or spontaneous activation of some well-learned set of associations or responses that have been developed through repeated activation in memory."<sup>45</sup> Controlled processes, on the other hand, "are intentional and require the active attention of the individual."<sup>46</sup> Learning to drive a car provides a useful illustration of this distinction. When you first get behind the wheel, virtually every maneuver is a controlled response. Deciding when and how to apply your foot to the pedals as you turn the steering wheel or manually shift gears demands concentration and effort. After enough practice, however, these maneuvers become automatic. You can accelerate, brake, and steer while contemplating health care reform or talking to a traveling companion. The well-learned motor responses occur without conscious effort.

Understanding the cognitive underpinnings of habits sheds light on the mechanism by which well-intentioned people may routinely discriminate against blacks (and members of other stereotyped groups). Just as habitual responses (like putting on a seat belt) may be triggered automatically by the presence of relevant environmental cues (like sitting in a car),<sup>47</sup> stereotype-congruent responses may be triggered automatically by a group membership cue such as a person's racial identity. Thus, a racially liberal decisionmaker may constantly, albeit unwittingly, fall into the habit of discriminating.

The mounting empirical evidence of ubiquitous unconscious discrimination against blacks and other stereotyped groups further exposes the chimera of a color-blind America.<sup>48</sup> Wherever social judgments about blacks are made (in settings ranging from job interviews to corporate boardrooms), there is a demonstrable tendency toward unconscious discrimination. It is pervasive present discrimination against blacks, not past discrimination alone, that justifies affirmative efforts at inclusion. Yet, affirmative action is routinely characterized as a remedy for *past*

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45. Devine, *supra* note 37, at 6.

46. *Id.*

47. See Ronis et al., *supra* note 44, at 232.

48. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (canvassing the psychological studies that show unconscious discrimination against stereotyped groups to be ubiquitous).

discrimination. In truth, it is often an indispensable means of leveling today's playing field.

### *B. Racial Hoaxes and Racial Theodicy*

The ubiquity of stereotypes and the success of conservatives in distracting attention from the empirical realities of racial discrimination only *partially* explains the prevalence of the erroneous belief among whites that white men are the group most discriminated against in America. My strong sense is that this belief also stems from the need of many whites for a kind of racial theodicy—an explanation of why bad things happen to good white people or, more to the point, why whites do not always land the job or school of their choice.

A few years ago, for example, one of my white colleagues (a close friend) advertised for a research assistant. Sifting through a pile of applications, he narrowed the choice to two candidates—one, a black woman, the other, a white man who also happened to be a good friend of my colleague. As far as paper credentials, the two were roughly equivalent, except that the black woman had a fluency in foreign languages that made her better suited for the kind of research in which my friend was interested. Hence, he chose her. However, to soften the sting of rejection for his white male friend, my colleague told his friend that *he* really was the most qualified for the position, but that the black woman was given the nod because of affirmative action. My colleague meant no mischief by this gesture; I have known him to go well beyond the call of duty in the name of racial justice, sometimes at significant personal sacrifice. The affirmative action canard was merely meant to serve as an anodyne for the pain of rejection sure to be suffered by a close personal friend.

Based on discussions with students and colleagues, my strong sense is that this kind of incident is not uncommon. Moreover, this incident suggests a comparison—the “racial hoax.”<sup>49</sup> In 1994, Susan Smith, a white, South Carolina mother, told police that an armed, young, black male carjacker had driven off with her two children in the backseat.<sup>50</sup> Several days after an intensive federal

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49. See Don Terry, *A Woman's False Accusation Pains Many Blacks*, N.Y. TIMES, Nov. 6, 1994, § 1, at 32.

50. See Rick Bragg, *Police Say Woman Admits to Killings as Bodies of 2 Children Are Found Inside Her Car*, N.Y. TIMES, Nov. 4, 1994, at A1.

and state manhunt for the supposed black carjacker, Smith confessed to fabricating the whole story and murdering her own sons.<sup>51</sup> In 1989, Charles Stuart told police that he and his pregnant wife were shot and robbed by a black man.<sup>52</sup> After an extensive search in which black men in a largely black neighborhood were randomly searched and arrested, police learned that Stuart had killed his own wife and unborn child as part of a scheme to cash in on an insurance policy.<sup>53</sup> Both whites who scapegoat affirmative action for white failures and those who perpetrate the Stuart and Smith kind of racial hoax wrongfully exploit racial stereotypes in order to shift blame to blacks. The spirit of this all-too-common phenomenon is aptly—albeit bluntly—captured by comedian Paul Mooney in his routine, “1-900-Blame-A-Nigger”:

Didn't some White man in Boston shoot his pregnant wife and then shot hisself, crying, “Oh niggers did it.” Always trying to blame some niggers. That's why I'm gonna start a new ad: 1-900-Blame-A-Nigger. So when White folks get in trouble, just call my agency. “Hello, Blame-a-Nigger. I just pushed my mother down the stairs. I don't want to go to jail. Send a nigger over here right away.”

Mooney might have added an extension for affirmative action scapegoating: “Hello, Blame-a-Nigger. I just got a rejection letter from a job or school. Send me the names of some successful black applicants right away, so I can reassure my friends, family, and myself that I really did deserve it but lost out to some less deserving black.”

## II. IN SEARCH OF JUST DESERTS

Besides the question of whether America is sufficiently color-blind to obviate the necessity of affirmative action, the other issue at the heart of the debate is whether affirmative action does

51. *See id.*

52. *See* Fox Butterfield & Constance L. Hayes, *Motive Remains a Mystery in Deaths That Haunt a City*, N.Y. TIMES, Jan. 15, 1990, at A1; Constance L. Hayes, *Illusion and Tragedy Coexist After a Couple Dies*, N.Y. TIMES, Jan 6, 1990, § 1, at 24.

53. *See* Fox Butterfield, *Boston Tries to Minimize Racial Anger*, N.Y. TIMES, Sept. 28, 1995, at A16; Kirk Johnson, *In Boston, A Storm of Recriminations*, N.Y. TIMES, Jan. 5, 1990, § 1, at 8.

violence to the merit principle by requiring unqualified or less qualified persons to be selected for scarce opportunities in employment and education. Under the merit principle, people get what they “deserve”—no more, no less. A person’s deserts, in turn, are supposedly determined on the basis of certain standards and approaches carefully calculated to gauge deserts. The legitimacy of these standards and approaches hinges on their accuracy, neutrality, and objectivity. To be accurate, these standards should identify deserts consistently across a range of testing situations and not fluctuate wildly in their results when there is a minor and irrelevant change in the testing environment. To be neutral and objective, these standards should be applied in a way that is not self-serving or hypocritical.

In the next two sections, I argue that the standards and approaches currently employed to gauge deserts are neither accurate, neutral, nor objective in relation to blacks and other marginalized groups. After considering research in social psychology that calls into question the accuracy of one kind of standard (the kind found in standardized tests for admission to graduate schools), I turn to the criminal law setting to expose the proclivity of decisionmakers to approach the issue of deserts in ways that promote the interests of the dominant group at the expense of consistency and fairness.

#### *A. Stereotypes and the Reliability of Standardized Tests*

The just deserts model presumes that scores on standardized tests measure “merit” and that, therefore, these scores should serve as a primary basis for allocating educational positions and other scarce opportunities. During a discussion of racial justice I led at Dickinson Law School, for example, a white male law student stated bluntly, “With my LSAT scores, if I were black, I’d be at Harvard.” Even if we assume the extremely dubious proposition that standardized tests are designed to measure “merit” (let alone that we can arrive at a coherent and unbiased definition of merit), hard empirical research on stereotypes offers insight into why many blacks perform poorly on standardized tests and consequently undermines the legitimacy of such tests when it comes to black test takers.

Claude Steele, a Stanford social psychologist, has identified the phenomenon of “stereotype vulnerability” as a hidden psychological tax on black test takers that tends to drag down

their performance.<sup>54</sup> In a series of experiments, Steele and his colleagues gave two groups of black and white Stanford students the same test involving the most difficult verbal skills questions from the Graduate Record Exam. The groups were given different explanations for this exam. Researchers told one group that the test merely sought to research “psychological factors involved in solving verbal problems,” whereas the other group was told that the exam was “a genuine test of your verbal abilities and limitations.”<sup>55</sup> The blacks who thought they were merely solving verbal problems scored the same as the whites (who performed equally in both situations). In contrast, the group of black students saddled with the extra burden of believing that the test measured their intelligence scored significantly below all the other students.<sup>56</sup> Steele theorizes that students’ efforts not to confirm the stereotype caused them to work too quickly or inefficiently; he refers to this phenomenon as “stereotype vulnerability.”<sup>57</sup> Additional experiments show that stereotype vulnerability can drag down the performance of women who believe that a given math test shows “gender differences.”<sup>58</sup> Even white men may be vulnerable to stereotypes; their scores dropped dramatically in testing situations where they believed their ability would be measured against that of Asians.<sup>59</sup>

These remarkable findings imply that the grievance of the white male student at Dickinson is misplaced. Rather than saying, “With my objective test scores, if I were black, I’d be at Harvard,” it would be more accurate to say, “If I had started out with precisely the same native intelligence I now possess, but suddenly turned outwardly black and became saddled with stereotype vulnerability, I would not have scored as high as I did as a white male.” In other words, someone who runs the mile in a slower time of, say, five minutes while lugging a twenty-five pound weight may have the potential to be just as fast as—if not faster than—someone else who traverses the same distance in four minutes without the added weight.

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54. See Ethan Watters, *Claude Steele Has Scores to Settle*, N.Y. TIMES, Sept. 17, 1995, § 6 (Magazine), at 45.

55. *Id.*

56. *See id.*

57. *Id.*

58. Elaine Woo, *Probing the Psych-Out Power of Stereotypes; Fear Feeds Vulnerability, Study Finds*, HOUSTON CHRON., Dec. 17, 1995, at A1.

59. *See id.*

*B. Just Deserts and Affirmative Action: A Criminal Law Analogue*

At first glance, there might seem to be little connection between approaches to criminal liability and the issues that drive the affirmative action debate. Upon deeper reflection, however, one finds revealing parallels. Discussions in both areas turn decisively on conceptions of just deserts. Indeed, nowhere in the law has the concept of just deserts been more fully elaborated than in the criminal law. Of course, when we refer to deserts in the criminal law setting, we are usually referring to an evaluative basis for allocating blame and punishment, whereas deserts in the affirmative action setting usually focus on the evaluative basis for allocating praise and reward. However, at its core, this is a distinction without a difference. Regardless of whether we are talking about blame and praise or reward and punishment, the key question is whether the evaluative basis for allocating the one or the other is consistently applied across similar cases in the interests of neutrality and objectivity.

Thus, particularly keen insight into the bias in the dominant group's approach to the issue of deserts can be achieved through careful study of how it is approached in criminal law. I will show that approaches to this issue in the criminal law are not principled, neutral, or objective. Once we see how easily conceptions of desert are manipulated to disadvantage out-groups in the criminal law, it may prove easier to appreciate the same process of manipulation in areas such as affirmative action, where these conceptions figure centrally.

1. Just Deserts and the Disadvantaged Social Background Excuse

According to the just deserts school of criminal justice, "(1) punishing wrongful conduct is just only if punishment is measured by the desert of the offender, (2) the desert of an offender is gauged by his character—i.e., the kind of person he is, (3) and therefore, a judgment about character is essential to the just distribution of punishment."<sup>60</sup> To determine an actor's deserts under this rationale, we must assess his or her character. Only

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60. GEORGE FLETCHER, *RETHINKING CRIMINAL LAW*, § 10.3, at 800 (1978).

if we can infer a blameworthy character from the actor's wrongful conduct does he deserve to be punished. Normally, we can infer a blameworthy character from the actor's decision to break the law. However, the inference from bad act to bad character only holds true if the defendant's decision or choice to break the law was "free." If the defendant's choice was determined by external forces, that choice does not tell us what kind of person he or she is. Thus, "if a bank teller opens a safe and turns money over to a stranger, we can [normally] infer that he is dishonest. But if he does all this at gunpoint, we cannot infer anything one way or the other about his honesty."<sup>61</sup> Thus, the search for deserts in the criminal law boils down to a determination of whether the actor's decisions were significantly influenced by his circumstances. Only freely made decisions reveal the actor's deserts.

To gauge deserts, therefore, the criminal law must have rules and standards for when an actor's decisions are determined by his circumstances, that is, for when he is "excused" for his wrongdoing. Progressive scholars and judges have proposed new determinist excuses aimed at accommodating the pressures that disproportionately affect blacks and other marginalized groups. Yet, their proposals have been greeted by scathing criticisms. These criticisms, as I will illustrate, share several common features. First, critics commonly greet progressive proposals for the recognition of new excuses with apocalyptic cries predicting the imminent downfall of justice as we know it. However, the wide acceptance of similar determinist excuses, such as duress and provocation, belies such claims and makes them appear hypocritical. Second, the hypocrisy evident in the criticisms of more racially inclusive approaches to deserts in the criminal law setting parallels the hypocrisy of criticisms of more racially inclusive approaches to deserts in the affirmative action setting.

Consider, first, the reaction of one leading critic to an exceptionally modest new determinist excuse proposed by Professor Richard Delgado. Delgado proposed that the law recognize an excuse for persons whose crimes were induced by coercive persuasion, popularly known as brainwashing.<sup>62</sup> Under his proposal, the defense was to be limited to persons whose

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61. *Id.*

62. See Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1, 11 (1978).

mental state had been forcibly altered by brutal external pressures applied by a powerful captor.<sup>63</sup> Moreover, the defense could not be invoked by someone who voluntarily joined the group that allegedly brainwashed him, or whose condition could otherwise be attributed to some "choice" on his part.<sup>64</sup>

Despite the limited scope of Delgado's proposal, Professor Joshua Dressler warned that recognizing such an excuse threatened the collapse of the entire system of criminal blaming!<sup>65</sup> According to Dressler, recognizing Delgado's excuse would put us on a slippery slope, inevitably leading to recognition of a universal excuse based on the influence of external circumstances on a defendant's choice.<sup>66</sup> Dressler ended his apocalyptic critique by chiding Delgado for ignoring the dire implications of his revolutionary suggestion.<sup>67</sup>

Dressler's strenuous rebuke of Delgado's proposed determinist excuse is puzzling. The criminal law has long recognized a number of determinist doctrines and such recognition has not come close to precipitating the collapse of the entire system of criminal blaming. Duress, provocation, and insanity are just a few such determinist excuses. Thus, one must ask, what it is about the proposal of new determinist excuses, however modest, that causes critics to resort to resplendently apocalyptic rhetoric in denouncing them. The reason is that new determinist doctrines push for more inclusive approaches to desert than those inscribed in the narrowly circumscribed handful of currently recognized excuses. Once we break through the strict confines of existing excuses and begin recognizing other situations in which a decision to break the law may be blameless because it is determined by preceding factors, we naturally begin to wonder why we do not inquire into the roots of decisions to break the law in *all* criminal cases. Why not always broaden the time frame and consider the impact of background circumstances on a defendant's capacity to choose? For example, why not weigh the impact of a disadvantaged social background on a defendant's

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63. *See id.* at 19-22.

64. *See id.* at 20-21.

65. *See* Joshua Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 MINN. L. REV. 335, 339-40 (1979).

66. *See id.* at 342-43.

67. *See id.* at 360.

criminal behavior in all cases in which the defendant comes from such a background?

Judge David Bazelon proposed just such a defense, first in a 1972 court opinion<sup>68</sup> and again in a 1976 law review article.<sup>69</sup> Bazelon's proposal grew out of his realization that a number of defendants who suffered cognitive and volitional defects that constitute excuses in cases where mental illness is found could not satisfy certain technical requirements of the definition of legal insanity.<sup>70</sup> Upon further reflection, Judge Bazelon realized that the mental impairments afflicting these defendants were the product of social, economic, and cultural deprivations or of racial discrimination, rather than of a clinically defined mental illness.<sup>71</sup> Accordingly, he proposed a jury instruction that would permit acquittal where the crime was caused by the defendant's disadvantaged background.<sup>72</sup> Specifically, Judge Bazelon would instruct the jury to acquit if it found that, at the time of the offense, the defendant's "mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act."<sup>73</sup> Although Judge Bazelon did not expect his new instruction to generate a flood of acquittals,<sup>74</sup> he hoped that it would force jurors to confront the causes of criminal behavior and, in turn, compel the community to own up to its responsibility for the crime and for the plight of the accused.<sup>75</sup> According to Judge Bazelon, "It is simply unjust to place people in dehumanizing social conditions, to do nothing about those conditions, and then to command those who suffer, 'Behave—or else!'"<sup>76</sup>

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68. See *United States v. Brawner*, 471 F.2d 969, 1032 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part).

69. See David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976). Cf. Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. J. 9 (1985) (elaborating upon his earlier limited proposal of a "brainwashing" excuse to articulate a theory supporting a disadvantaged background excuse).

70. See Bazelon, *supra* note 69, at 394.

71. See *id.*

72. See *id.* at 395-96.

73. *Id.* at 396.

74. See *United States v. Brawner*, 471 F.2d 969, 1034 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part); Bazelon, *supra* note 69, at 398.

75. See Bazelon, *supra* note 69, at 389, 396-98.

76. *Id.* at 401-02.

Given reactions like those of Dressler to Delgado's carefully circumscribed brainwashing excuse,<sup>77</sup> it is not hard to imagine the thundering chorus of scholarly condemnation that greeted Judge Bazelon's disadvantaged social background excuse.<sup>78</sup> However, Judge Bazelon's critics failed to answer *why* it is appropriate for courts to recognize the restricted determinism of duress or provocation but not the fuller determinism of the disadvantaged social background excuse. If the goal of criminal punishment is to target those whose "true" character has not been unduly distorted by environmental pressures, what difference does it make whether his choice to do wrong is rooted in an immediate threat from an armed assailant (restricted determinism) or a brutally abusive childhood (fuller determinism)?<sup>79</sup>

Opponents of more racially inclusive excuses, such as Judge Bazelon's disadvantaged social background excuse, contend that our feelings of sympathy for the disadvantaged persons whom Judge Bazelon would excuse actually grow out of a sense of "elitism" and "condescension" rather than altruism.<sup>80</sup> Professor Michael Moore, for example, argues that our sympathy for the disadvantaged defendant "betokens a refusal to acknowledge the equal moral dignity of others."<sup>81</sup> He asserts that in not condemning the "unhappy deviant" from a disadvantaged background, we imply that he is not expected to live up to the same "high moral standards" by which we judge ourselves and that he is a less complete human being than we are.<sup>82</sup>

The problem with this critique of the social deprivation excuse is that it proves too much; its logic applies equally to the defenses of duress and provocation—determinist doctrines that mainstream commentators fully endorse. Thus, why not attribute our feelings of sympathy for the "unhappy deviant" who, in the heat of passion, kills his spouse, to a sense of elitism or conde-

77. See Dressler, *supra* note 65, at 342-43.

78. See, e.g., Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 284-85 (1987); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1146-47 (1985); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976).

79. Cf. Bob Herbert, *See-No-Evil Mayors*, N.Y. TIMES, Jan. 8, 1996, § 1, at 27.

80. See Moore, *supra* note 78, at 1147.

81. Moore, *supra* note 78, at 1147.

82. *Id.* Moore remarks that our sympathy for the disadvantaged defendant "betokens a sense about one's self—as the seat of subjective will and responsibility—that one refuses to acknowledge in others." *Id.*

scension that implies "the unhappy deviant" is not expected to live up to the same "high moral standards," by which we judge ourselves?

Some may argue that persons who violate the law but escape punishment via duress or provocation defenses are indeed held to the same "high moral standards" by which we judge ourselves. However, these "high moral standards," which largely limit our currently recognized legal excuses, only make allowances for short-run pressures that immediately precede the crime for which the defendant stands accused. Long-term background pressures of the kind generated by a bleak and oppressive social background simply do not count among our 'high moral standards' and corresponding legal excuses.

This viewpoint, wherein duress and provocation are neatly cordoned off from the social deprivation excuse, is flawed because it fails to recognize that the official expositors of *our* high moral standards are neither impartial nor objective. They do not stand behind a Rawlsian veil of ignorance that masks information about their own background when deciding which excuses to recognize. They already know that they do not have to worry about emotional and psychological effects of a desperately impoverished and brutal social background because the vast majority have led privileged lives. In contrast, they are as likely as anyone to surprise a cheating spouse *in flagrante delicto* or encounter the various other short-run immediate pressures of the kind that constitute duress and provocation. Thus, it is in *their* interest to defend the excuses that may benefit them, while dismissing excuses that address pressures to which they will not be subjected.

Persons administering a given body of rules commonly engage in rampant definitional gerrymandering in favor of their own interests. Professor Mark Kelman illustrates the dynamics of such gerrymandering with this loose analogy:

A large social group is setting up a massive health insurance, risk-pooling plan. Should treating hemophilia be included? Since hemophilia is a purely hereditary ailment, everyone will know whether he faces high bills for the disease. Purely selfish insurance purchasers will exclude the disease from coverage. If the defense of duress is "insurance" against being blamed or incarcerated, the dominant social group will exclude

"long-term pressures" as a covered syndrome since they already know they will not be afflicted.<sup>83</sup>

While any system is susceptible to definitional gerrymandering, this legal gerrymandering dynamic is particularly disturbing precisely because it is so insistently denied. Were mainstream commentators to admit that our current approaches to just deserts turn not on objective moral truth, but rather on political, ideological, and social psychological grounds, we could honestly reevaluate their fairness. Central to this reevaluation would be recognition of our tendency to systematically ignore or undervalue the interests of socially marginalized groups in framing conceptions of deserts. I have confidence, born of empirical research, that once we admit our discriminatory tendencies, we can combat them. But we cannot combat what we deny or ignore.

### III. THE COMMON THREAD OF HYPOCRISY IN APPROACHING DESERTS IN THE CRIMINAL LAW AND AFFIRMATIVE ACTION

The parallels between the rhetoric employed by the critics who attacked Bazelon's social deprivation excuse and the rhetoric employed by many critics of affirmative action are striking and revealing. Recall Moore's admonition that in not condemning the "unhappy deviant" from a disadvantaged background, we imply that he is not expected to live up to the same high standards by which we judge ourselves.<sup>84</sup> Similar rhetoric is often employed by opponents of affirmative action. These opponents argue that public policy intervention to rectify black mobility difficulties deviates from the pure merit or just deserts approach to allocating opportunities and, thereby, demeans its beneficiaries.

These rhetorical similarities are more than coincidental. They reflect the dominant group's common ideological anxiety regarding the validity of the "just deserts" justification given the prevailing social distribution of rewards and punishments. Once we admit that our conventions for attributing blame to others are biased and logically incoherent, we start to question whether the ones we use for attributing merit are just as biased and self-serving. Put differently, if wrongdoing is frequently excused on

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83. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 646 n.144 (1981).

84. See Moore, *supra* note 78, at 1147.

the basis of adverse environmental factors, would our achievements be similarly undermined or written off as the result of similar factors, as opposed to being lauded as the result of personal choice and hard work? Nathan Caplan and Stephen Nelson aptly describe the interrelationship of popular conceptions of blame and self-congratulatory conceptions of merit as follows:

Person-blame interpretations reinforce social myths about one's degree of control over his own fate, thus rewarding the members of the great middle class by flattering their self-esteem for having "made it on their own." This in turn increases public complacency about the plight of those who have not "made it on their own."<sup>85</sup>

#### A. *The Old Boy Network*

The affirmative action debate provides another illustration of the dominant group's tendency to condone practices that promote its own interests, while hypocritically condemning analogous practices that primarily promote the interests of marginalized groups: the old boy network. As we know, arrangements that go beyond considerations of "pure merit" in job recruitment and job entry are endemic to the American job market.<sup>86</sup> Forms of preferential assistance that disproportionately benefit white males constitute the vast, but unacknowledged, antarctic of white affirmative action.<sup>87</sup> These arrangements include a buddy network among professionals, assistance from clubs and cliques, and even government programs that grant affirmative assistance in the form of tax cuts and subsidies to targeted groups like veterans, businesses, or agricultural producers.<sup>88</sup> In contrast to affirmative action, however, these pervasive forms of preferential assistance are rarely criticized as assaults on the pure merit paradigm.

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85. Nathan Caplan & Stephen D. Nelson, *On Being Useful: The Nature and Consequences of Psychological Research on Social Problems*, 28 AM. PSYCHOLOGIST 199, 210 (1973).

86. For the sake of argument, I will assume the extremely dubious proposition that currently accepted tests and credentials actually measure "merit."

87. As relative newcomers to certain job markets from which they were undemocratically excluded, blacks, Hispanics, and women are not in the same position as white men to give preferential assistance to members of their own group.

88. See Kilson, *supra* note 1, at 11-12.

In contrast, affirmative action programs are singled out for condemnation as instances of "reverse discrimination" if these programs help women, blacks, and Hispanics gain access to certain job markets and educational institutions from which they have been undemocratically excluded. Moreover, conservatives' insistence that black beneficiaries of affirmative action should feel self-doubt and moral ambiguity directly contradicts the experiences of innumerable white male businessmen, farmers, builders, bankers, and manufacturers who garner affirmative assistance benefits without feeling the slightest self-doubt.

Self-doubt and self-assurance should stem not from how one gains access to opportunities, but what he or she does with them. For example, Niko Pfund, former Editor-in-Chief of *NYU Press*, frankly described himself to me as a white "affirmative action baby." Specifically, he benefited from the legacy admission program at Amherst College described in detail below.<sup>89</sup> Nevertheless, he does not droop his head and slink around his office under the weight of moral ambiguity. Just the opposite, he has been a Wunderkind in the publishing industry, recently graduating from Editor-in-Chief to Director of *NYU Press* at the unprecedented age of thirty-one. The superlative quality of his work leaves little room for self-doubt. Similarly, little room for self-doubt is left by the accomplishments of Professor Richard Delgado, a contributor to this symposium and a law professor of color; in a recent study of the most prolific law professors and faculties during a five-year period (1988-1992) in the twenty most-cited law reviews, Delgado ranked as the most prolific professor in the country.<sup>90</sup> Indeed, Delgado alone has published more times in prestigious, oft-cited law journals than entire faculties of some law schools that are traditionally ranked within the top twenty in the nation!<sup>91</sup>

The antidote for such concerns can be summed up in one word—performance. Minorities and women who benefit from affirmative action should be judged by the same standards as the countless white males who benefit from the varied forms of white affirmative action. If, and only if, they perform up to the stan-

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89. See *infra* notes 92-96 and accompanying text.

90. See James Lindgren & Daniel Seltzer, *The Most Prolific Law Professors and Faculties*, 71 CHI.-KENT L. REV. 781, 794-95, 804 (1996).

91. Cf. Jean Stefancic & Fred R. Shapiro, *The Trends in Legal Citations and Scholarship: Introduction*, 71 CHI.-KENT L. REV. 743, 744 (1996).

dards of the position do they stay. Thus, far from contradicting the pure merit model of mobility, affirmative action complements it by enabling minorities and women to access the conveyor belt of experience, gain pure merit capability, and prove it through performance.

### B. *The Legacy Student*

The debate over affirmative action in college admissions is also shrouded in hypocrisy. While righteous indignation over affirmative action for women and minorities in college admissions abounds, one rarely hears these same critics attack "legacies"—an obvious violation of the pure merit paradigm. Legacies, the children of alumni, are overwhelmingly white and affluent, and they enjoy a huge edge in the admissions process. At Harvard College, for instance, more whites gain entry as legacies than do all the black, Hispanic, and Native American students combined, including those admitted as part of the regular admissions stream and those who received special consideration in the admissions process as members of disadvantaged groups.<sup>92</sup> According to the *Wall Street Journal*, "The percentage [of legacies] accepted at most selective colleges is often more than twice that [accepted from among the remaining] general pool of candidates."<sup>93</sup> To convey an idea of how admissions decisions are made at selective schools, one selective college agreed to let a staff reporter for the *Wall Street Journal* sit in on deliberations.<sup>94</sup> The reporter's description of the operation of this predominately and *disproportionately white* form of affirmative action is telling:

At Amherst, each [legacy] receives a "pink sheet" rating for the parents' support of the college in work such as admissions interviewing and fund-raising, and also for financial contributions. Problems occur when the pink sheet is "hot" and the candidate isn't.

In late February, as the staffers winnow the stack of applications prior to committee work, they are already struggling. "She's a dull kid. She wasn't so bad in interview,

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92. See David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 965 (1996).

93. *Admissions Crunch: Top Colleges Remain Awash in Applicants Despite a Smaller Pool*, WALL ST. J., Apr. 2, 1985, at A1.

94. See *id.*

but these essays. . . .” Mr. Thiboutot says of one applicant. “The only reason she’s staying in is she’s a.d.,” he adds, using office shorthand for “alumni daughter.”

In committee, rejecting an applicant with “hot pink” is more difficult. “We’ve got one that’ll have to go up the hill,” Mr. Bedford says, meaning that the staff will talk to the college president before making a decision likely to draw angry protests. “You can’t let the head office get blindsided,” Mr. Bedford explains.<sup>95</sup>

The irony here is that foes of affirmative action for historically marginalized groups vigorously contend that the marginalized status of one’s ancestors should not matter in the present-day allocation of opportunities. Yet, in the well-established and prevalent practice of legacy admissions, decisionmakers review both the past *privileged* status of the applicant’s ancestors who were enrolled in the host institution and present privilege (since extent of contributions is considered) for purposes of allocating scarce opportunities.

Thus, with legacies, the selfishly selective process of determining just deserts seems to boil down to this: If allocating benefits on the basis of the status of a person’s ancestors primarily benefits the dominant group, the principle of allocation escapes serious criticism; but if the primary beneficiaries are members of subordinate groups, the principle of allocation comes under withering attack as “reverse discrimination.”<sup>96</sup>

## CONCLUSION

E Pluribus Unum. Only a heart of stone would not be moved by this lilting Latin phrase. It succinctly voices the hopes and dreams of millions of Americans and embodies our highest

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95. *Id.*

96. Recent events in the story of the University of California Regents’ assault on affirmative action underscore the first-degree hypocrisy practiced by many anti-affirmative action activists. After many Regents sanctimoniously denounced affirmative action in higher education and voted it out of existence in the California system, a *Los Angeles Times* investigation revealed that several Regents—as well as state politicians vocally opposed to affirmative action—used their influence to get relatives, friends, and the children of their business associates into UCLA. See Ralph Frammolino & Mark Gladstone, *UCLA Chief Admits Possible Favoritism; Chancellor Charles Young Acknowledges Applicants Sponsored by Regents and Other Officials May Have Been Given Admission Preferences*, L.A. TIMES, Mar. 17, 1996, at A3.

aspirations as a nation. Little wonder then, that this ringing phrase is frequently deployed by critics of affirmative action. Calls by marginalized people for affirmative assistance, say critics, are "turning" us into a divided society, the implication being that if only these groups would end their obsessive fixation on their perceived victimization, *E Pluribus Unum* could become a reality. From this perspective, only a truly neurotic person of color could see himself or herself as a victim deserving affirmative assistance.

I have sought to debunk the factual assumptions on which this perspective rests. Empirical research proves that, far from being color-blind, post-civil rights America is rife with discrimination against marginalized groups. The justification for affirmative action lies in this demonstrable and endemic present-day bias, not merely in some historical wrongs that have no relevance to the practices and attitudes of today.

I have also sought to expose the hypocrisy in the approaches American society takes toward determining who deserves what. My criminal law analogue points out the self-serving inconsistencies in the dominant group's formulation and application of conceptions of just deserts. Expositors of these conceptions—whether the setting is criminal law or affirmative action—adopt the tone of impartial and objective finders of the truth. However, their conceptions are *not* inclusive; they do not accommodate the experiences and circumstances that disproportionately affect disadvantaged people. Thus, their attacks against affirmative action ring hollow: they reserve their righteous indignation for those forms of affirmative action that disproportionately benefit whites, especially white males. Given the entrenched, pervasive, and intractable reality of white affirmative action, affirmative action for marginalized groups represents an extremely modest step toward a more level playing field.

