

# AFFIRMATIVE ACTION, DIVERSITY, AND THE BLACK MIDDLE CLASS

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To its critics, one of the flaws of race-based affirmative action is that its main beneficiaries are economically privileged members of the eligible minority groups.<sup>1</sup> Supporters of race-based affirmative action, particularly in the sphere of education, have responded by claiming (implicitly or explicitly) that economic inequality is not, in fact, the reason for race-based affirmative action at all. Instead, they embrace *diversity* as affirmative action's central goal—and in so doing, they find a justification for continuing to include the middle class in minority affirmative action programs.<sup>2</sup> The decision to concede away the economic

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1. See, e.g., RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 42, 46-47 (1996); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 314 (1994) (listing "affirmative action is exploited by middle-class African Americans" as a standard critique of affirmative action). Some critical race theorists critique affirmative action for this reason, even if they see themselves as nonetheless compelled to support it. See, e.g., Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1598 (1989); see also CHARLES T. BANNER-HALEY, *THE FRUITS OF INTEGRATION: BLACK MIDDLE-CLASS IDEOLOGY AND CULTURE, 1960-1990*, at 54, 66 (1994); DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 140-61 (1987); Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1226 (1991); Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599, 644-45 (1992). The point was made early on by Justice Stevens in his dissenting opinion in *Fullilove v. Klutznick*, 448 U.S. 448, 538 (1980) (Stevens, J., dissenting). But see CHARLES R. LAWRENCE III & MARI MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 181 (1997) ("The myth that affirmative action helps only the privileged . . . is part of a propaganda campaign intended to make affirmative action seem like cream-skimming for the privileged.").

2. For academic works relying on the diversity rationale, see, for example, Amy Gutmann, *Responding to Racial Injustice*, in K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 106, 127-28 (1996); CHRISTOPHER EDLEY, JR., *NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES* 123-41 (1996). Although those who argue in favor of diversity

inequality rationale for including the minority middle class in affirmative action programs has the appearance of being relatively cost-free, given that the Supreme Court has rejected "societal discrimination" as a ground for affirmative action. If the Court will not buy it, it seems to make perfect sense to give it away.

But appearances are deceiving. This paper shows, in Part I, that the cost of conceding away the economic disadvantage of the minority middle class is in fact unacceptably high.<sup>3</sup> Although the Supreme Court's affirmative action jurisprudence prefers diversity to societal discrimination as a rationale for affirmative action,<sup>4</sup> the diversity rationale is highly problematic and ought not to be made to stand alone. Instead, the diversity rationale is most persuasive when it is augmented by the view that past and present race-based economic inequality is the reason we cannot achieve meaningful levels of integration without using affirmative action. Second, this paper shows, in Part II, that the minority middle class—not merely the minority poor and working class—suffers race-based economic inequality. Using the black middle class as my example,<sup>5</sup> I demonstrate that the black middle class is systematically worse off than the white middle class on numerous economic dimensions. I argue in Part III that so long as race-based affirmative action remains an available strategy, there is good reason to use it to redress the economic gap between the white and black middle classes. I conclude in Part IV by admitting and examining some of the political costs of relying on the relative economic disadvantage of the minority middle class as a rationale for affirmative action.

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as the core purpose of affirmative action do consider the existence of economic inequality as well, these arguments only touch upon the situation of the black middle class in passing, and focus most of their attention on the situation of the black poor. See, e.g., David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 958-96 (1996). What is missing is any clear defense of economic inequality as a reason for affirmative action on behalf of the black middle class.

3. For a discussion of my use of the term "economic," see *infra* text accompanying note 64.

4. See *infra* notes 21-27 and accompanying text.

5. For a discussion of why particularism is necessary even though it has disturbing implications for coalition-building, see *infra* Part IV.

I. FEELING THE POLITICAL/LEGAL SQUEEZE: THE BLACK MIDDLE CLASS AND THE CENTRALITY OF THE DIVERSITY RATIONALE FOR AFFIRMATIVE ACTION

I shall contend, in Part I.B., that one of the key reasons contemporary supporters of affirmative action heavily rely upon the diversity rationale for affirmative action is the awkwardness of defending affirmative action for the black middle class on any other ground. But there is, of course, a far simpler explanation for the popularity of the diversity rationale: the economic-inequality rationale for affirmative action rests upon the existence of present and past "societal discrimination." Anyone who has read the Supreme Court cases knows that the Court does not accept the remedying of past or present societal discrimination as an acceptable justification for affirmative action.<sup>6</sup> Why, then, look any further for an explanation of the shift to diversity?

To answer this question, I must begin by explaining why the Supreme Court's decisions are not a complete explanation for the current emphasis on diversity as the justification for affirmative action. And, since I do not support dismantling affirmative action,<sup>7</sup> I must also explain why, in light of the Court's rejection of societal discrimination as a rationale for affirmative action, it is neither legally irresponsible to continue to stress the existence of societal discrimination nor politically irresponsible to claim, as I do here, that the diversity rationale is unconvincing unless it is coupled with an understanding that race-based economic inequality stands in the way of achieving diversity without affirmative action. Part I.A. addresses both issues.

A. *Diversity Versus Inequality: Why the Court Is Not the Sole Explanation or Constraint*

For decades, the Supreme Court was the major institutional locus for the debate on affirmative action. This does not mean other institutions, private and public, were not and are not

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6. See *infra* note 27 and accompanying text.

7. See Deborah C. Malamud, *Values, Symbols and Facts in the Affirmative Action Debate*, 95 U. MICH. L. REV. 1668 (1997) (reviewing APPIAH & GUTMANN, *supra* note 2; EDLEY, *supra* note 2; KAHLENBERG, *supra* note 1; JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* (1996)).

involved in affirmative action decisionmaking. To the contrary, the Supreme Court has never adopted the view that affirmative action is constitutionally required in those situations in which it is constitutionally or, under Title VII, statutorily permitted.<sup>8</sup> Thus, public and private institutions have for years acted under the assumption that they have complete freedom to refrain from using affirmative action, and their decisionmaking has thus always been a part of the affirmative action debate.<sup>9</sup> State polities have begun to use the initiative process to amend state constitutions to bar affirmative action and have met with political and legal success.<sup>10</sup> Congress remains an important actor, not only because it controls the use of affirmative action in the federal sector, but also because Congress has long assumed itself free to order private employers to cease practicing affirmative action by amending Title VII and similar statutes to provide that affirmative action is actionable discrimination.<sup>11</sup> Affirmative action thus has been a project of the American polity at large, not of the Supreme Court alone.

Why, then, was the Supreme Court so central to the affirmative action debate? Power is, of course, the most important reason. Congress and the executive can and should consider the Constitution in their decisionmaking, but a ruling by the Court that an action of the political branches is unconstitutional ends the debate.<sup>12</sup> Because the constitutionality of an action may

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8. *But see* David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99 (arguing that in some circumstances affirmative action may be constitutionally required).

9. *See, e.g.*, DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* (1992) (discussing the politics of affirmative action at the University of California).

10. *See* *Coalition for Econo. Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997) (upholding Proposition 209, the California Civil Rights Initiative, under the Equal Protection Clause and Title VII of the Civil Rights Act of 1964). For a contrary view, see Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019 (1996).

11. If this were not the case, then the failure of Congress to amend Title VII to prohibit affirmative action when such an amendment was under consideration in 1972 could not be treated as evidence of congressional acquiescence in or support of affirmative action. For a discussion of the 1972 legislative history, see KATHANNE W. GREENE, *AFFIRMATIVE ACTION AND PRINCIPLES OF JUSTICE* 51-54 (1989).

12. On the question of the extent to which Section Five of the Fourteenth Amendment gives Congress the power to revisit the Court's judgment on the interpretation of the Fourteenth Amendment, see *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (striking down the Religious Freedom Restoration Act as outside Congress' Section Five powers; the Court found that the purpose of the Act was the

depend upon its purposes, it is important that those who create and implement affirmative action programs correctly anticipate which purposes the Court would uphold and which it would strike down. Proponents of affirmative action have every incentive to rely solely upon justifications that they know will pass judicial muster. Thus, the Court has the unique power to control not only what institutions do on the affirmative action front, but also what they say—and thus the Court directly affects the arguments the public will hear from government officials.

In statutory interpretation, the formal powers of Congress and the Court are reversed: the Court can interpret an ambiguous statute to prohibit affirmative action, but Congress is always free to restore the status quo by adopting new legislation.<sup>13</sup> But legislative overrides are easier to threaten than to deliver, given the difficulty of turning the congressional agenda to any particular issue.<sup>14</sup> Furthermore, the Supreme Court itself changes the playing field when it steps up to bat. For example, in *United Steelworkers of America v. Weber*,<sup>15</sup> the Supreme Court interpreted Title VII to permit voluntary affirmative action because it found that Congress in 1964 could not possibly have intended anything so retrograde as the principle of complete color blindness. This decision bolstered the argument that anti-discrimination without affirmative action was unthinkable.<sup>16</sup> And, most important, the Court's approval of voluntary affirmative action made affirmative action the status quo, placing the burden on opponents of affirmative action to defend the need for change.<sup>17</sup>

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overturning of a prior Supreme Court decision).

13. For a recent example, see the provisions of the Civil Rights Act of 1991 rejecting the Supreme Court's interpretation of disparate impact theory in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

14. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); GLEN ROBINSON, AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW (1991); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

15. 443 U.S. 193 (1979).

16. Justice Rehnquist authored a powerful dissent in *Weber*—meaning that the opposing arguments were also there to be heard. See *id.* at 219. But majorities generally speak louder than dissents, except for those dissents that, in retrospect, become the majority view. See, e.g., *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

17. Even the opinion of a single Justice has the power to change the status quo—as did Justice Powell's opinion in *Regents of the University of California v.*

But sheer power is not the only reason that the Court has dominated the affirmative action debate for so long. Another reason is publicity. The decisions of Congress to mandate affirmative action (such as minority set-asides in government contracting), of administrative agencies to use affirmative action as their antidiscrimination mechanism of choice, or of private businesses to adopt affirmative action plans took place in relative secrecy. Affirmative action provisions spread from statute to statute with little public attention.<sup>18</sup> The Equal Employment Opportunity Commission's reasons for favoring affirmative action are now the subject of historical discussion,<sup>19</sup> but they were not laid out before the public in clear and resonant language. Private businesses are private, and so long as the EEOC was on their side, they could work out their programs in the seclusion of their own headquarters or at the negotiating table with their own unions. None of these chapters of the affirmative action story were subject to the same scrutiny that the Court's divided pronouncements were; only in the case of the courts (most prominently the Supreme Court) do individual governmental actors clearly articulate the reasons for their decisions in a form that is made accessible to the lay public by the news media.<sup>20</sup>

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*Bakke*, 438 U.S. 265, (1978), although 20 years of social practice consistent with his opinion make it far more robust as a social force than it was on the day it was written. See Malamud, *supra* note 7 (discussing symbolic dangers of abandoning affirmative action). For a discussion of restorative rhetoric in the civil rights field, see, e.g., Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229-31 & n.9 (1995) [hereinafter Malamud, *Minuet*].

18. See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (discussing affirmative action provision of the Small Business Act that was incorporated by reference in many other statutes); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (noting that the city of Richmond, Virginia, had borrowed its definition of the minority groups eligible for local affirmative action from federal legislation without any modification to make it relevant to local circumstances—including the reference to "Aleuts," none of whom lived in Richmond).

19. For an excellent discussion of the early history of EEOC affirmative action policy, see SKRENTNY, *supra* note 7, reviewed in Malamud, *supra* note 7.

20. There is broad agreement among political scientists who study the Supreme Court that the public does not closely follow the Court, and that the Court therefore has only a limited capacity to shape public opinion. See, e.g., THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 142-45 (1989); Gregory A. Caldeira, *Courts and Public Opinion*, in JOHN B. GATES & CHARLES A. JOHNSON, THE AMERICAN COURTS: A CRITICAL ASSESSMENT 304 (1991); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). There are, however, particular circumstances that make the Court's decisions uniquely salient. See Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public*

The Court's constitutional affirmative action decisions suggest a continuum of the relative safety of potential justifications for affirmative action programs.<sup>21</sup> At the safest end of the continuum is the use of affirmative action to remedy the institution's own past discrimination.<sup>22</sup> But past discrimination is notoriously difficult to prove, and may in fact be absent. Under *Regents of the University of California v. Bakke*,<sup>23</sup> colleges and universities may use affirmative action to achieve diversity in admissions: the Fifth Circuit in *Hopwood v. Texas* may have declared *Bakke* dead,<sup>24</sup> but it lacked the power to make it so. Whether diversity is a proper rationale for affirmative action beyond the specific context of *Bakke* is an open question.<sup>25</sup>

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*Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986). For the suggestion that in these important cases the reasons the Court gives for its decisions, and not merely the decisions themselves, influence public opinion of the Court, see Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 659 (1992).

21. Needless to say, the Court has not given clear or steady guidance in the affirmative action arena. Accord Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CAL. L. REV. 1179, 1185 (1996) ("It is easy to be skeptical about the Supreme Court's affirmative action cases. From the standpoint of the rule of law, the cases are truly a mess. This was so from the very start."). Thus "suggest" and "relative safety" are the proper terms; nothing clearer can be substituted.

22. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986); *Local 28, Sheet Metal Workers' Nat'l Ass'n v. EEOC*, 478 U.S. 421 (1986). Where the affirmative action program is adopted by a state or local legislative body, the purpose of "eradicat[ing] the effects of private discrimination within its own legislative jurisdiction" is also permissible, if appropriate factual findings are made. *Croson*, 488 U.S. at 491-92. Much depends on the definition of the "institution" and the length of the relevant time frame. See, e.g., *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.) (holding that the University of Texas Law School, rather than the Texas public educational system, is the relevant institution and that *de jure* discrimination by the University of Texas Law School in the 1960s and earlier is irrelevant), *cert. denied*, 116 S. Ct. 2581 (1996).

23. 438 U.S. 265 (1978).

24. See *Hopwood*, 78 F.3d at 944.

25. The Supreme Court's approval of affirmative action to enhance broadcast diversity in *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), expressly rested on the use of intermediate scrutiny, but the use of intermediate scrutiny as the relevant standard for congressional affirmative action was overturned in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2095 (1995). The Court has yet to revisit the question under strict scrutiny. Under Title VII, the United States Court of Appeals for the Third Circuit recently rejected educational diversity as a reason for affirmative action in the layoff of otherwise equally qualified teachers, in an opinion that by its terms also rejected diversity as a ground for affirmative action in teacher hiring. See *Taxman v. Board of Educ. of Piscataway Twnshp.*, 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997).

"Diversity" as a broad-based rationale thus occupies an intermediate position on the affirmative action safety continuum. The most dangerous end of the continuum is occupied by "role model" theories<sup>26</sup> and by "societal discrimination."<sup>27</sup> The cautious position, then, is to abandon societal discrimination as a rationale for affirmative action and to justify affirmative action entirely on diversity. Diversity is not a sure thing, but it seems to beat the practical alternatives.

But is it true "caution" to refrain from arguing that societal discrimination exists, even when arguing to the Court? To restrict oneself to arguments the Court now accepts is to forget the basic legal realist tenet that the reason a judge votes the way he votes is not necessarily the reason he is prepared to set forth as his official rationale.<sup>28</sup> A judge will be more likely to read precedent as permitting a broader range of action if the judge is personally convinced there are good reasons to do so, even if those good reasons are reasons (like societal discrimination) that must go unstated. Thus, a justice faced with the question whether diversity as a justification for affirmative action survives strict scrutiny might well be influenced by her (unstated) views about why diversity cannot be achieved without affirmative ac-

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26. For a rejection of role model theory in the context of affirmative action in faculty layoffs, see Justice Powell's plurality opinion in *Wygant*, 476 U.S. at 267; see also *Crosby*, 488 U.S. at 497 (approving of the *Wygant* plurality's position on role model theory). For a discussion of role model theory, see Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377 (1996).

27. The Court's leading condemnation of the "societal discrimination" justification as "compelling" justification for affirmative action is the majority opinion in *Crosby*, 488 U.S. at 496, 503, 505; see also *Wygant*, 476 U.S. at 276; *Bakke*, 438 U.S. at 309.

28. For some classic statements of this insight, see AMERICAN LEGAL REALISM 164-231 (William W. Fisher III et al. eds., 1993). A favorite of mine is the following:

[W]hen the case is difficult or involved . . . I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.

. . . . I speak now of the judgment or decision, the solution itself, as opposed to the apologia for that decision; the decree, as opposed to the logomachy, the effusion of the judge by which that decree is explained or excused. I speak of the judgment pronounced, as opposed to the rationalization by the judge on that pronouncement.

Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929), reprinted in AMERICAN LEGAL REALISM, *supra*, at 202, 204.

tion—which might well turn on the effects of societal discrimination.<sup>29</sup> Ultimately the ideal is to convince the Court to bring its stated rationale into line with its felt commitments, and to do so where necessary by reconsidering its prior opinions and decisions. Until that happens, the advocate has two jobs: to convince the Court it wants to go her way and that there is an intellectually honest way to do so. To the extent that advocates limit their arguments to ones that are currently acceptable to the Court as permissible rationales, they do only part of their job.

Suppose, however, that we stop being judicial realists for the moment and take the view that, in advocacy to the courts, one cannot allude to arguments the courts have rejected in the past. Does that mean that *public discourse* on affirmative action should restrict itself to rationales upon which the courts are presently willing to rely? Absolutely not.

It is more true now than ever that the judiciary is just one of many powerful loci of the affirmative action debate. Public institutions are taking advantage of their power to refrain from using affirmative action (as the Regents of the University of California did in ordering its constituent institutions to refrain from affirmative action), and state and local governments are asserting their power to restrict the use of affirmative action by public institutions within their own jurisdictions (as the citizens of California did in Proposition 209, the California Civil Rights Initiative). Affirmative action is thus in danger not just as constitutional doctrine, but as public and industrial policy. As a consequence, affirmative action advocates must convince a wide range of public and private decisionmakers that affirmative action is a good idea. What the Court finds convincing may not convince the broader polity, and vice versa. It is thus a good thing that academics and publicists are not barred from arguing that societal discrimination is also a reason to retain affirmative action, even if public bodies could not satisfy the Court by claiming that the government's "purpose" in pursuing affirmative action is the eradication of societal discrimination.<sup>30</sup>

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29. Although as a technical matter this unstated insight would be more relevant to the question of narrow tailoring than to the question of the constitutionality of diversity as a purpose, real-life decisionmakers often escape such doctrinal constraints by approaching cases holistically. For a statutory example, see Malamud, *Minuet*, *supra* note 17.

30. We are not yet to the point in Fourteenth Amendment "intent" analysis that government programs can be shot down because some voters were persuaded by

### B. *Diversity and the Black Middle Class*

We have seen that the Supreme Court shapes the public debate on affirmative action but by no means completely constrains it. If the defense of affirmative action has come to center on the value of diversity, the Supreme Court's jurisprudence is not the only reason. The other major reason is that the diversity rationale seems, at first glance, the only way to justify affirmative action once it is acknowledged that its beneficiaries are generally the most economically privileged members of the eligible minority groups.

When William Julius Wilson pointed out that race-based affirmative action benefits the black middle class and not the "truly disadvantaged" members of the black community,<sup>31</sup> he may not have realized the political implications of his work. He probably did not intend that his scholarship would become central to those arguing for the abandonment of existing affirmative action programs.<sup>32</sup> It was instead his hope that his work would support political action to provide a different kind of intervention for the poorest blacks—namely, the kind of massively expensive anti-poverty programs that would be politically palatable only if they reached out to all poor people without regard to race. As of yet, Wilson's work has not borne the fruit he hoped for; we have

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judicially disapproved arguments in the news media and in academic journals. In her important work on ballot initiatives, where the population at large essentially is the legislature, Jane Schacter has demonstrated that in discerning the intent of the voting public for constitutional purposes, "courts rely heavily on formal interpretive sources, such as statutory text, language in related legislation, judicial opinions, canons, and, on occasion, ballot pamphlets or voter guides" published by the official supporters of the initiatives, but "widely ignore media and advertising as sources of popular intent even though . . . social science research about voter behavior in ballot campaigns suggests that voters most regularly consult and seek guidance from these sources." Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 95 YALE L.J. 107, 111 (1995). If courts eschew the pursuit of popular intent even in the case of ballot initiatives, where it is most relevant, and if they do so, as Schacter argues, because of a correct intuition that "the pursuit of popular intent is doomed to fail," there is certainly no cause for courts to pursue the popular intent approach to ordinary legislation. *Id.*

31. For the phrase and the argument, see WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 112-18, 146-49 (1987).

32. See Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1847 n.4, 1861 (1996) (discussing William Julius Wilson's work, the widespread misunderstanding of its motives, and its importance for the affirmative action debate).

not achieved massive intervention on behalf of the poor.<sup>33</sup> Wilson's work has, however, borne unexpected fruit for the anti-affirmative action camp, which uses it to argue that race-based affirmative action ought to be dismantled because it helps privileged blacks, not disadvantaged blacks.

Wilson's work calls for an answer from advocates of race-based affirmative action. No one, to my knowledge, has successfully refuted Wilson's claim that the African Americans who succeed in taking advantage of affirmative action are economically advantaged compared to the African Americans who do not. Nor has anyone succeeded in refuting the claim that there are whites who are far poorer than the average black affirmative action beneficiary.<sup>34</sup> The best one can do in refuting Wilson is to argue that affirmative action was never meant to be a program for the poor, and need not be defended as one. But that only raises more questions: What *is* the reason for affirmative action? Why should so much energy be spent protecting a program that mostly helps relatively privileged people?

From that point, the argument can go in two directions. One is to justify affirmative action on grounds other than economic disadvantage. The other is to admit that affirmative action is about economic disadvantage but to claim that the relevant economic comparison is between the black middle class and the white middle class, rather than between the black middle class and either the white or the black poor—and, further, that the relative disadvantage of the black middle class is a serious enough problem to justify the use of affirmative action. I advocate the latter strategy, but it is the former that is now in the ascendancy.

### 1. The Advantages of the Diversity Rationale

Embracing the diversity rationale has a number of clear advantages for advocates of the view that the black middle class is a proper beneficiary of affirmative action. I shall discuss only a few of them here.

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33. See WILSON, *supra* note 31, at 163-64. President Clinton's recent welfare reform initiative counts as a massive intervention, but its status as an intervention on behalf of the poor is hotly debated. See, e.g., Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, March 1997, at 43.

34. For the claim, see, for example, KAHLENBERG, *supra* note 1, at 44-46.

a. *Lowering the Costs of Affirmative Action*

Once affirmative action is placed on the foundation of diversity, Wilson-esque critiques of affirmative action are silenced. All African Americans have the experience of being African Americans. African American culture is not the culture of poverty, and therefore one can be economically indistinguishable from a white person and still be culturally and experientially distinct as an African American. Because middle-class blacks are unproblematically bearers of American black experience, there is every reason to turn to them, rather than to poorer blacks, to integrate middle-class institutions.<sup>35</sup>

It makes intuitive sense that two people who have the divide of race between them will be most able to bridge that gap if they are not also divided by class. At times, of course, the process of bridging the racial gap between the white and black middle classes is painful precisely because the gap is wide and the only available explanation is race. This is one of the many lessons of the O.J. Simpson case, where the most painful image for many whites was seeing blacks "just like them" (in every respect but race) applauding a decision that "similarly situated" whites deplored. But painful though it may be at times, integrating within social classes simplifies the process of integration by limiting difference to a single dimension.

Using members of the black middle class to satisfy the diversity goals of affirmative action lowers the institutional costs of pursuing affirmative action in more measurable ways as well. Let me use the educational setting as an example. The test scores that are the most conventional performance predictors vary strongly with parental income: the children of higher-income parents tend to get higher test scores.<sup>36</sup> If affirmative

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35. For an illustrative counterexample, see RICHARD L. ZWEIGENHAFT & G. WILLIAM DOMHOFF, *BLACKS IN THE WHITE ESTABLISHMENT? A STUDY OF RACE AND CLASS IN AMERICA* (1991). Zweigenhaft and Domhoff describe a 1960s experimental program in which a number of northeastern elite prep schools admitted poor blacks, with considerable success. The program relied on the unusual nature of the boarding school as a "total institution" in the sociological sense of the term, "a place where inner-city black children could be "destigmatized" and taught a new social identity that would reward them handsomely if they were willing to pay the price." *Id.* at 15.

36. See, e.g., KAHLBERG, *supra* note 1, at 99 (table listing SAT scores by family income); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 42 (1997). For a critique of test

action on behalf of blacks must be restricted to students from low-income families, the gap between the entry-level credentials of black and white students will be far larger than it is under current affirmative action practices. That restriction will make affirmative action more costly to the institutions using it, both in academic remediation costs and in reputational costs to the institution's measured competitiveness. Institutions may well respond by deciding not to use affirmative action at all. But if affirmative action is about diversity and not disadvantage, these costs can be dramatically diminished. Diversity goals can be met by admitting higher-scoring children of higher-income black parents, thus gaining diversity with the smallest possible gap in test scores between the school's black and white students.

*b. Avoiding Hard Questions About Black Middle-Class Performance*

The diversity rationale makes it irrelevant that middle-class blacks do not perform as well as a group as do middle-class whites on the traditional "merit" criteria. In the current literature, there is much debate about what has been called the "radical critique of merit"—the claim that traditional merit criteria are inappropriate and serve only to perpetuate white hegemony.<sup>37</sup> The need to argue against merit criteria is particularly great when those criteria are standing in the way of the trope-worthy "son of a successful Pittsburgh neurosurgeon"<sup>38</sup> (or other similarly situated scions of the black middle class) who attended good, integrated middle-class schools. In the (seeming) absence of a good explanation for why he cannot meet the merit criteria, the only alternative is to attack the merit criteria themselves.

One strategy for attacking merit criteria is provided by disparate impact theory. This theory, where available,<sup>39</sup> strikes

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scores as predictors, see Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065 (1997).

37. I draw the phrase "radical critique of merit" from Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995). For the view that Farber and Sherry's notion of the "radical critique of merit" is a straw man, see Frank Wu, *From Black and White and Back Again*, 3 ASIAN L.J. 185, 215 (1996).

38. EDLEY, *supra* note 2, at 81, 126.

39. Disparate impact analysis is available under Title VII, but not under the

down merit criteria that have a disparate impact on minorities if what they define as merit does not bear a close enough relationship to the job or program in question.<sup>40</sup> As a result, standardized tests and other merit criteria in a number of fields have been struck down by disparate impact litigation. But disparate impact litigation is slow, complex, and expensive. And it is by no means clear that courts properly faced with the issue will conclude that, to choose an example relevant to my presumed readership, law schools cannot use the Law School Admission Test ("LSAT") (based on its capacity to predict first-year law school grade point average) because law school grades do not predict bar-exam passage or success as a lawyer.<sup>41</sup>

It is far more straightforward simply to declare that diversity is merit. Businesses now say that they need a diverse workforce to serve a diverse customer base in the United States and abroad; schools now say that minority students are needed to prepare white students to function in a multicultural world. "Merit," in this new sense, means the candidate's ability to serve the needs of the institution and its constituents viewed as a whole—not an abstract measure of the qualities of the individual candidate in comparison to all others.<sup>42</sup> We have already learned, through the disparate impact analysis employed in *Griggs v. Duke Power Co.*,<sup>43</sup> that merit means that we must judge the individual in relation to the job, not in the abstract.<sup>44</sup> If diversity is part of the job, only diverse candidates need apply. Thus, race can become what it was expressly forbidden from becoming under the

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Constitution. See *Washington v. Davis*, 426 U.S. 229 (1976).

40. The traditional critique of the use of standardized tests—the critique embodied by the disparate impact standard of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)—assumes that the reason African Americans score poorly on the tests is the history of educational disadvantage that is the legacy of discrimination. The *Griggs* approach does not rest on the view that tests are "biased": it is not necessary under *Griggs* to demonstrate that blacks actually are equal to whites in the skills the tests do measure, but the tests are failing to measure black skills accurately. It rests, instead, on the fact that the test, however accurate it is at measuring what it measures, is an arbitrary "headwind" because it is not necessary to have the skill that the test measures to do the job. *Id.* at 432.

41. For the suggestion that bar-exam passage is a proper benchmark of success in the law school setting, see Wightman, *supra* note 36, at 35-39.

42. For some particularly utilitarian examples of the merit critique, see, for example, Gutmann, *supra* note 2; Yxta Maya Murray, *Merit-Teaching*, 23 HASTINGS CONST. L.Q. 1073, 1080 (1996).

43. 401 U.S. 424 (1971).

44. See *supra* note 40.

language of Title VII: a bona fide occupational qualification for the job.<sup>45</sup>

The view that “diversity is merit” also has the advantage of side-stepping the question of why the “black son of a successful Pittsburgh neurosurgeon”<sup>46</sup> deserves special preferences. The diversity rationale is based upon white utility, not minority desert. Businesses and government agencies need minorities in order to function in a diverse world. In the competitive marketplace, business and governmental utility, not individual desert, determines who gets the scarce places in society’s game of musical chairs. Individuals have no entitlements, they only have uses. And if some groups are more useful than others, the less useful groups who come to be excluded have no valid reason to complain.

*c. Making Affirmative Action Permanent*

Finally, the diversity rationale makes it unnecessary to answer the hardest question about a program of affirmative action: the question of when it is time to stop. Under the diversity rationale in its purist form, institutions are free to determine how much diversity they need to accomplish their unique missions. Indeed, if Justice Powell’s opinion in *Bakke* is to be followed, it would seem that affirmative action can be a permanent program if diversity is its goal. Justice Powell did not ask in *Bakke* whether Harvard had a date in mind when it would revert to admissions by the numbers. There was no expectation that admissions by the numbers was the “right” way to do admissions, or that only temporary, societal circumstances disabled Harvard from being able to recruit the “right” number of blacks, athletes, bassoonists, and legacies strictly “by the numbers.”

Indeed, in a purely diversity-based system, there would be little basis for judicial supervision of “numbers” at all. Justice Powell did not state the view in *Bakke* that the outer limit on the inclusion of minorities in a diversity-based affirmative action program is defined by the proportion of minorities in the relevant population. There is a theory-based reason for this omission: diversity as a basis for affirmative action is not by its terms based

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45. See 42 U.S.C. § 2000e-2(e)(1) (authorizing a bona fide occupational qualification defense for “religion, sex, or national origin,” but not for race or color).

46. EDLEY, *supra* note 2, at 81.

on the existence of discrimination. Therefore, the proportionality assumption—the assumption that absent discrimination all groups would be proportionately represented in all areas of the economy—is irrelevant.

Thus, an institution might decide, for any of a number of good pedagogical or business reasons, that its diversity needs call for overrepresenting some groups and underrepresenting others. For example, a school or employer might decide that members of minority groups will only feel comfortable if they have safety in numbers, and that, therefore, minorities must be overrepresented if they are to feel comfortable enough to fully deliver the benefits of diversification to the institution.<sup>47</sup> Freedom from the need to adhere to a limit of societal proportionality would be particularly helpful to a self-acknowledged affirmative action program for the black middle class; it would avoid the difficult question of whether blacks, absent discrimination, would be drawn to each of the varied middle-class educational and economic niches in the same proportion as whites.<sup>48</sup>

## 2. The Disadvantages of the Diversity Rationale

I am personally committed to fostering diversity in the institutions of which I am a part. At the same time, however, I am not satisfied with resting race-based affirmative action solely on a diversity rationale.<sup>49</sup> Upon closer examination, what appears

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47. This might well be the case, if the analogy to African Americans' comfort levels with integration in housing is at all relevant. See *infra* text accompanying notes 72-73.

48. The proportionality assumption is particularly problematic where it is expected to work at the micro-level. Cf. *Taxman v. Board of Educ. of Piscataway Twnshp.*, 91 F.3d 1547 (3rd Cir. 1996) (en banc) (holding that affirmative action cannot be used to maintain the integration of a high school's business department, where African Americans were in fact overrepresented in comparison with the relevant labor market in the district and high school as a whole), *cert. granted*, 117 S. Ct. 2506 (1997).

49. For other recent critiques of diversity as a rationale for affirmative action, see, e.g., Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839 (1996); Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059 (1996). The public critics of the diversity rationale tend, unlike me, to also be public critics of race-consciousness and affirmative action in general. See Chen, *supra*, at 1910 ("There is a way out of this hell. Contrary to the preference of an overwhelming majority of law professors, just say no to affirmative action and its racialist defense."); see also Volokh, *supra*, at 2059 (stating that he generally disagrees with the other frequently stated justifications for race-consciousness).

to be the advantage of the diversity rationale—its movement away from issues of social justice—becomes its disadvantage.

a. *Ignoring the Problem of Black Middle-Class Performance Does Not Make It Go Away*

Reliance on the diversity rationale is dangerous if no effort is made to account for the reason why the black middle class cannot compete using traditional merit criteria. For years, it was possible to be silent on this question because it was possible to deny how white our institutions would be without affirmative action. But times have changed. *Hopwood* has demonstrated that the performance of black and white admitted candidates on the University of Texas Law School's entrance criteria were markedly different under affirmative action. The law schools at Boalt Hall and the University of Texas will have virtually no African Americans in their first post-affirmative action entering classes.<sup>50</sup> The popular and academic literatures are coming forward with evidence that differences in college and graduate school entrance credentials exist even between members of the black and white middle classes.<sup>51</sup> Silence in the face of these differences is irresponsible, especially in light of the legal, moral, and political problems the differences present.

Significant interracial performance differences present a legal problem because Justice Powell in *Bakke* never explicitly stated that race could be given significantly greater weight as a "plus factor" than that which is given to other diversifying experiences or characteristics. To argue for giving race greater weight, it would be extremely helpful to have an explanation of why blacks—including the black middle class—need the thumb on the scale to be so heavy. On the moral and political level, to be silent in the face of a black-white performance gap is to treat the gap as normal or natural, as something to be expected. But why *should* we expect it, when the comparison is between subgroups of the middle class? If no one is willing to come forward and loudly pronounce that something has gone amiss in the compari-

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50. Peter Applebome, *Minority Law School Enrollment Plunges in California and Texas*, N.Y. TIMES, June 28, 1997, § 1, at 1.

51. See, e.g., Wightman, *supra* note 36, at 43 ("The data also show that the mean LSAT for upper-SES [socio-economic status] black students is more than one standard deviation below the mean for lower-middle SES white students.").

son or that the appearance of economic equality between the black and white middle classes means only that we have not been looking hard enough or measuring economic status carefully enough, then the voices of the *Bell Curve*<sup>52</sup> crowd go unanswered.

There is an alternative, of course. One might instead argue that test bias is the reason members of the black middle class perform poorly on traditional merit criteria—that so-called merit criteria merely measure exposure to white culture. There are good arguments that, broadly speaking, cultural differences between blacks and whites exist in America. But American subcultures are sufficiently intermixed,<sup>53</sup> and such cultural explanations are sufficiently contentious,<sup>54</sup> that affirmative action advocacy is far better served by not resorting to cultural explanations of this sort. It is far better, first and to the extent possible, to ferret out the economic differences that separate the black and white middle classes.

Consider for the moment one black and one white middle-class household, and assume that the households are exactly equal according to the conventional measures of economic achievement, such as income, parental occupation, and parental education.<sup>55</sup> It is all too easy for opponents of affirmative action to ask, why is the black child unable to compete with the white child on standard achievement measures? What is it about being African American that gets in the way? The radical critic of merit will respond by pointing to test items that seem to be measuring familiarity with white experience and white culture. For example, she will argue that a young black child has no particular reason to know the meaning of the word "yacht." The problem with her argument is that the same may be true of a white

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52. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (claiming that blacks are less intelligent than whites). For a collection of essays in response to *The Bell Curve*, see *MEASURED LIES: THE BELL CURVE EXAMINED* (Joe L. Kincheloe et al. eds., 1996).

53. For discussion of the difference between racial culture and racial identity, see K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, in APPIAH & GUTMANN, *supra* note 2, especially at 85-105. Appiah speaks simultaneously against the politics of recognition and in favor of the racial (and other kindred) identities that add richness to life without "subject[ing] us to new tyrannies." *Id.* at 104.

54. See, e.g., Chen, *supra* note 49; Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123 (1997).

55. See KAHLENBERG, *supra* note 1, at 129, 131.

middle-class child—at least if personal experience is to be the measure.

It may be the case that, because books about yachting are unlikely to have black characters, black middle-class parents are less likely to choose those books to read to their children. In this sense, race in general and the history of race discrimination (which has stood in the way of blacks accumulating the wealth to own yachts) in particular may have an effect on children's performance, through the vehicle of parental choice. But this is a subtle argument, one that whites may not be prepared to accept, at least not without blaming the black middle-class parent for failing to invite his child to extend her imagination to the full range of experiences that wealth can buy.

There is a counterargument, which is that the test also ought to punish white parents for failing to expose their children to black culture, by including black cultural items on the test. But why is yachting a feature of "white" culture, as opposed to a feature of the culture of wealth? And why even invite this contentious discussion, if instead it turns out that the black and white families in my example are not, in fact, economically situated as similarly as they first seemed, in ways relevant to exposure to the culture of yachting?

Suppose now that, although the white family and black family have the same income, the white family inherited a summer home on a lake and just bought a small boat—so that dinnertable conversation often turns to boats and boating. Or the white child has a cousin whose family has sufficient wealth to own a boat, and the child developed a keen interest in boating while visiting that cousin. Or the white family belongs to an all-white country club—or, perhaps, a country club that in practice requires higher incomes from black than from white applicants. The club's membership includes many wealthy families, some of whom own yachts, and whose children often talk about their experiences with the children of the non-yachting members of the club. Or the white family lived on the side of town with the most fashionable suburbs and was able to convince a bank to let it stretch to buy a more expensive house near the local marina.

In all of these circumstances, it is not simply "white culture" that is increasing the white middle-class child's exposure to the vocabulary of boating. The differences are, instead, economic. For the white family, the likelihood of inheritance means that income does not define the limits of the power to accumulate

wealth. For the white family, its middle-class income does not place it at the very top of the achievement range of its extended family or its circle of friends and acquaintances. A middle-class income thus buys the white family the opportunity to associate with wealthier relatives and friends and to live in proximity to symbols of wealth. These differences are not cultural in origin; though they may generate cultural results. They are economic—or socioeconomic, if one prefers that term for a view of economic inequality that is comprehensive enough to include its social and cultural dimensions and repercussions. To the extent that systematic economic inequality can be proven, there will be fewer skeptical whites and fewer accusations leveled at black parents when the time comes to explain why white middle-class children know about yachts and middle-class black children do not.

*b. The Limits of Institutional Utility and the Critique of Merit*

Advocates of the diversity rationale place institutional utility at the center of affirmative action policy. In doing so, they make four key errors: (1) understating the continuing importance of quantifiable merit criteria in the selection of (non-diverse) candidates for scarce positions; (2) failing to see that the usefulness of diversity is context-dependent, and that limiting affirmative action to contexts in which diversity is most useful tends to perpetuate the traditional occupational segregation of African Americans; (3) legitimating the tendency of institutions to place burdens on diverse candidates that white candidates do not face; and (4) forgetting that utility is a double-edged sword, in that utility arguments can also be used to justify institutional preferences for homogeneity.

The diversity rationale is predicated on the view that institutions ought not, and do not in fact, reward abstract merit when they select among candidates. Instead, institutions are viewed as having a wide range of goals in mind in their decision-making. For this reason, diversity advocates claim, permitting institutions to consider diversity as a goal in candidate selection is not an unprecedented departure from what would otherwise be a pure merit system. It is, instead, merely an acknowledgment that diversity is one among many permissible goals that institutions can pursue through their selection processes.

To be fair, merit-critics must acknowledge that merit-based systems no longer claim to be measuring "abstract merit"—at least if they purport to comply with the legal constraints of modern antidiscrimination law. If an institution is using a test that would withstand disparate impact scrutiny, the test is not measuring abstract merit but is, instead, measuring appropriate levels of job- (or program-) related skills or knowledge. When diversity is used as a justification for selecting a candidate whose measured skills or knowledge fall below the level the institution otherwise considers its minimum selection standard, it is not abstract merit that is being compromised. It is job-related merit (and that is the sense in which I will use the term "merit" in this discussion). One must be clear, then, that there is a real trade-off between diversity and merit as the institution has (legitimately) defined it through its normal selection process.

Trade-offs are possible, of course, and are often wise. But the question of whether diversity-based selection is a breach of the status quo turns not merely on the wisdom of racial diversity as an institutional goal, but also on whether and to what extent the institution *also* deviates from its merit selection standards to meet goals *other than* the goal of racial diversity. For some institutions (colleges admitting legacies and athletes, for example), the answer might be that such breaches in merit selection take place with great frequency. (The intuition that this is in fact the case animates Justice Powell's embrace of diversity-based college admissions in *Bakke*.) For other institutions (municipal institutions selecting candidates in rank order off of civil service lists), the answer might be that breaches in merit selection are exceedingly rare. Thus there is no single answer to the question whether diversity-based selection is a breach of the status quo. It depends on the institution and its selection practices.

The claim that diversity-based selection is not a breach of the status quo is only slightly less problematic if we assume, with the radical critics of merit, that many of the selection criteria now in use would *not* survive disparate impact analysis. Suppose an employer is about to make fifteen promotions and gives a standardized test to screen applicants. The employer offers promotions automatically to the ten top scorers, all of whom are white and have test scores at or over ninety. The next five scorers down on the list are also all white, and have scores ranging from eighty-five to eighty-nine. But to meet institutional diversity needs (let us say this is a police department that strongly believes

it needs minority-group members at all ranks of its service), the employer bypasses them and instead offers promotions to the five highest minority scorers on the test, whose scores ranged from eighty to eighty-four. Suppose also that the test is not sufficiently job-related to survive disparate impact scrutiny. The fact would remain that having a score below ninety serves as an absolute promotion bar for white employees—but not for black employees.

It is certainly true that the employer in my example cannot claim that its decision to hire the top ten scorers is based on any legally recognized concept of merit. In that sense, there is no legally cognizable merit-based social cost to bypassing the five next-highest-scoring white candidates. But there *is* a social cost nonetheless—the cost to fairness in deviating from an otherwise-uniformly applied selection criterion. What puts an affirmative action program within *Bakke's* comfort zone is that race is not the *only* diversification goal, and that candidates of all races have the opportunity to have their special talents and abilities considered as part of the process. Thus, in my example the employer's status quo would be consistent with departing from strict test-rank-order promotion for the purpose of achieving diversity only if the employer had goals *other* than racial diversity for which it was willing to deviate from that standard criterion (for example, having an advanced degree or living in a high-crime neighborhood). That condition is not met in my example—and in many real-life selection processes.

It is far too easy to say, in my example, that we should never worry about diversity-based departures from the status quo when the status quo is a selection system that would not survive disparate impact scrutiny. An employer might well prefer to use voluntary affirmative action in my example than to either run the risk of a disparate impact suit or undergo the expense of developing a better test. But the use of affirmative action would have far less legitimacy than would the other two alternatives because it would leave the test—the flawed status quo—unchallenged and in place. Race would rightly be seen as the only exception to what is otherwise a uniformly applied rule. Whether applying a rule strictly to (all) whites but not to (some) blacks is fair does not turn solely on whether the rule itself is fair. Differential application of the rule is a problem in and of itself.

One might also contend that it is unrealistic to restrict the use of the diversity rationale to those institutions that deviate from their uniform selection criteria for a wide range of reasons

other than race. Why cannot an institution claim that its only legitimate need that cannot be met by using standardized selection criteria is the goal of racial diversity? My answer is that institutions ought to make precisely that claim—but with the addition of one important additional concept. What they *ought* to argue—as openly as they argue the philosophical and practical virtues of diversity—is that because of the cumulative effects of societal discrimination, it is now the case (and will likely be the case for the foreseeable future) that there are not enough racially diverse candidates who meet the standard entry criteria. That is precisely what I mean when I say that the diversity rationale for affirmative action cannot stand alone. It must be combined with an acknowledgment of the pervasive patterns of social and economic disadvantage that stand in the way of the full development of the competitive potential of the minority middle class.

In sum, so long as quantifiable merit criteria remain central to the selection of candidates for scarce positions, diversity advocates will have a difficult time claiming that the selection of candidates to meet diversity goals is fully consistent with existing patterns of candidate selection. The more the actual world of candidate selection resembles Justice Powell's image of Harvard College admissions in *Bakke*, the stronger diversity advocates' claim will become. But we are not there yet. Where institutions are uniquely compromising uniform standards in order to achieve racial diversity, the legitimacy of doing so turns largely on something outside of the diversity rationale itself: namely, the existence and effects of societal discrimination.

A second major difficulty with the diversity rationale's emphasis on institutional utility is that it echoes and, in part, legitimates the concentration of African Americans in the fields in which their diverse perspectives are seen as most necessary to serve African American customers and clients. A diversity rationale based upon institutional utility is weakest in areas of greatest traditional black underrepresentation. At first glance, diversity is more valuable for human resource administrators than for chief financial officers, for staff than for line functions in corporations, for a career in law or social work than for a career in geology or physics. Within any given field, diversity is conventionally seen as more valuable in subspecialties of the field that deal particularly with the interests and needs of minority populations: family practice versus surgery; employment and labor law versus corporate and securities law. If affirmative

action is to be repositioned on the foundation of institutional utility instead of social justice, we run the risk that the affirmative action programs that are the most defensible will be the ones that perpetuate rather than break down patterns of minority-group educational and occupational segregation.

Arguments certainly can and should be made that the value of diversity ranges far more broadly than the conventional eye can see. For example, those schooled in the history of science might well understand that the scientific method is not itself the sole (or even the primary) source of creativity in the hard sciences;<sup>56</sup> instead, the growth of science requires that the broadest range of human insight and experience be used to identify and solve scientific problems. But many of these arguments will be subtle and controversial even among specialists in the relevant fields of endeavor. For example, not all theoretical physicists will agree that racial diversity makes for better theoretical physics research. Convincing the lay population that racial diversity is as necessary in physics as it is in social work will not be easy, at least if the diversity rationale and the role-model rationale for affirmative action are to be kept separate. Thus, it will be difficult to take the institutional-utility justification for diversity far enough because it will be least understood and least accepted where it is most needed as an engine for integration.

Third, the utilitarian justification for diversity is also problematic to the extent that it implies that minority candidates are brought into an institution both to do the jobs that whites do and to do the additional job of specializing in white-minority relations.<sup>57</sup> Suppose a school district hires two new teachers, one white and one black. As a diversity hire, the black employee was hired with less previous job experience and poorer academic preparation; therefore, she assumes (with some reason) that she

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56. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962). This Kuhnian argument has a much broader reach than do more traditional arguments that, for example, African American scientists are needed to shift priorities toward sickle cell anemia research or to study the etiology of heart disease among young African Americans, or even that a minority-relevant practical problem might well turn into the occasion for advances in scientific theory or technique that might otherwise have not occurred. My thanks to Professors Homer Neal and Jeffrey Lehman for raising for me the issue of the value of diversity for creativity in pure science.

57. Cf. Delgado, *supra* note 1.

must work especially hard at her assigned tasks in order to compete and succeed. She is perfectly willing to do so—she is a hard worker and has always learned well on the job. But while the white teacher spends almost all of her time improving her teaching, the black teacher is also asked to serve on the district's affirmative action committee, which is made up mostly of minority employees and includes heavy obligations to identify, recruit, and counsel minority hires. The white teacher occasionally is asked to do administrative assignments, too, but these assignments are sporadic and higher-status, and bring her into contact with top (white) management. Every once in a while, the black teacher is put on a high-profile administrative assignment, but that usually occurs when higher management anticipates that some minority-relevant subject matter will be discussed. In these situations, she is usually the only minority-group member on the committee, and she feels that she will be viewed as a troublemaker because the positions she takes on these issues are generally not accepted by the committee as a whole. But she also feels that she has to take these positions—because why else would she have been put on the committee?

Suppose the district decides to fire the black teacher because her teaching is not progressing as quickly as a similarly situated white teacher's. One might, and should, argue that there is something unfair about this firing because she is not similarly situated: she is carrying a heavier administrative load. That is a fine, conventional argument. But what if she is fired because she is not good enough at recruiting minority candidates, or at presenting the views of minority group members to the central administration, or at meeting and getting to know white employees in order to make them feel more comfortable in their relations with blacks? In response, one would ask whether doing so was a part of her job description or whether similar demands were placed on the white teacher. But, in the utilitarian theory of diversity, the employer is willing to hire a black candidate with lesser conventional qualifications precisely because she can serve the employer's needs for a black employee—needs that go beyond just "being there." The implicit contract is something like this: "It may take you longer to become a great teacher—you may never become a great teacher—but you will meet my needs in other ways." Therefore, it would seem quite legitimate for the employer to fire the minority hire who does not succeed at the job of being an efficacious minority-group employee. Even if it is not

legitimate to fire the black employee (this is, after all, an implicit amendment to an otherwise generally applicable written contract, and one on which there has been no meeting of the minds), it would seem, at the very least, legitimate for the employer to be silently disappointed with the black employee. The black teacher, if she is a nuanced reader of social interaction, will see and feel her employer's disappointment, even if her employer never voices it.

Here, again, employer utility and social justice do not coincide. All things being equal, members of minority groups would far prefer to be hired for their general abilities, rather than for their particular ability to be a member of a minority group.<sup>58</sup> If economic inequality is the reason their abilities are not great enough to earn them the jobs they desire, or if they have not had sufficient opportunity in the past to manifest their abilities, it would be far preferable to say so, rather than to pretend that all things are equal when they are not and then uniquely predicate minority workers' job entitlements on their ability to deliver diversification services.

Finally, reliance on the principle of employer utility is a double-edged sword. If the employer's sense of the needs of his business (or the school's sense of its own educational mission) defines merit, what response is there to the company (or school) that defines homogeneity, rather than diversity, as merit? So long as whites are dominant in our economy, a market preference for homogeneity will harm blacks. If utility-based preferences for minorities ought to be encouraged and utility-based preferences for whites ought to be banned, the difference cannot be based on the narrow definition of utility used in the current affirmative action debate. The difference must instead be based on social justice goals, which are served by one set of preferences but not by the other. Rather than keep these policy choices hidden, it is better to bring the social justice norms underlying the debate to the surface.

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58. See, e.g., STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991).

c. *The Problem of Preferences Against Members of "Overachieving" Minorities*

Another problem with a pure diversity rationale is its political unpalatability to groups that ought to be part of the civil rights coalition, but that are currently "overrepresented" in choice positions. I think here of the classic American "model minorities": Jews and, more recently, Asian Americans. If diversity is what counts, was Harvard right to think that it was bad for Harvard as an institution to have "too many" Jews?<sup>59</sup> Is the University of California system right to be worried about having "too many" Asians? Can one run an affirmative action program on a diversity rationale without ultimately telling some applicants that the admission standards for them will be higher because we already have enough (or too many) of their "kind"?

Part of the "overrepresentation" problem stems from the overrepresentation of members of a minority group in one field, which often results from their history of discriminatory exclusion from other fields. For example, Jews in New York came to dominate civil service employment in general, and the teaching profession in particular, when they faced barriers to graduate school entry and employment in fields like law and medicine. Today, Asian Americans may well be overrepresented in the sciences in part because perceived—or, in the case of very recently arrived immigrants, real—linguistic difficulties bar their entry into the humanities. Some minority groups may become overrepresented in education-intensive fields because their members are highly motivated to avoid the severe discrimination they believe is prevalent in the blue-collar workforce. It may come about that the last generation's oppressed minority is now dominating the employment field that remains the best access route for members of other, competing minority groups.

But strong cultural preferences develop around the occupational choices of those who were once constrained by discrimination; and often, the impediments to movement into alternative occupational niches remain in place because of discrimination in those niches. There are desegregationist arguments in favor of

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59. For a discussion of anti-Jewish admission policies at Harvard and other elite schools in the 1920s and onward, see John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491 (1993).

using the law to break up ethnic niches. But doing so raises highly contentious inter-minority conflicts—a lesson I learned by coming of age during the 1960s school decentralization crisis in New York, which so strained the traditional civil rights coalition between Jews and African Americans in this country.

Thus, on a pragmatic level, there is reason to fear the coalitional consequences of a diversity-based rationale for affirmative action. It would be far better for inter-minority relations if the argument could be made that social justice, not merely employer utility, requires that those racial and ethnic minority groups that are better off make room for those groups that are now more strongly suffering the effects of discrimination.

*d. The Very Permanence of Diversity-Based  
Affirmative Action Is Part of the Problem*

The difficulties with the diversity rationale for affirmative action are exacerbated because it is a rationale that knows no end point. Affirmative action can be temporary (even if temporary is measured in generations rather than in years) only if it is based on an identified social problem that we are simultaneously working to cure. The diversity rationale contains no internal limiting principle of this sort—not even, as we have seen, populational proportionality.

The situation would be far different if the need for affirmative action were grounded, at least in part, in the still-existing economic inequality suffered by the black middle class. It could then be said, as Christopher Edley has written, that the need for affirmative action will end when the inequality between blacks and whites caused by societal discrimination has ended.<sup>60</sup> Standing alone, his statement hardly provides a promising end point. But when it is compared with the diversity rationale's alternative—the complete lack of an end point—his vision looks well-bounded.

If a purely diversity-based rationale fails to convince, then the alternative is to resist resting race-based affirmative action on the diversity rationale alone. Both in legal and political discourse, affirmative action advocates must be prepared to embrace a social justice explanation for the need for and appropri-

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60. See EDLEY, *supra* note 2, at 278.

ateness of affirmative action for the black middle class. The necessary predicate of any such social justice claim is a persuasive demonstration that the black middle class, because of its race, is economically disadvantaged compared to the white middle class. I turn to making that demonstration in Part II.

## II. FEELING THE REAL-LIFE SQUEEZE: THE COMPARATIVE ECONOMIC POSITION OF THE BLACK MIDDLE CLASS

Close examination of the economic situation of the black middle class reveals that it is, in the aggregate, systematically worse off than the white middle class, and is thus systematically at a competitive disadvantage in a white-dominated economy and society.<sup>61</sup> There is strong evidence that race is a factor in black middle-class economic status in the crucial areas of housing, work, income security, education, wealth accumulation, and the intergenerational transmission of middle-class status. In each of these areas, a combination of present discrimination and the lingering effects of past discrimination suppresses the economic performance of the black middle class. Thus, as Barbara Jordan stated in a recent address on the situation of the black middle class, "Black families have made it, but they have caught onto the economic ladder and social ladder by their fingernails."<sup>62</sup>

Before I begin my analysis of the economic situation of the black middle class, I must raise two methodological caveats and one definitional clarification. First, American social scientists do not share a single definition of what it means to be "middle-class,"<sup>63</sup> and the literature on the black middle class is no different in this respect. Studies use different definitions, which stress income, education, or occupation as the most central factor

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61. For helpful reviews of the situation of the black middle class, see ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993); JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* (1994); BART LANDRY, *THE NEW BLACK MIDDLE CLASS* (1987).

62. Barbara Jordan, *Making It—Losing It*, 5 *TEX. J. WOMEN & L.* 217 (1996).

63. The problems are not limited solely to the definition of "middle-class": they plague discussions of class generally. For discussions of the difficulties of operationalizing a legal concept of class for purposes of class-based affirmative action, see Malamud, *supra* note 32, at 1860-94; Maria Cancian, *Race-Based v. Class-Based Affirmative Action in College Admissions* (October 1996) (manuscript on file with author), *excerpted in* LA FOLLETTE POLICY REPORT, Spring/Summer 1996, at 10-12 (using simulation techniques to demonstrate that different definitions of "disadvantage" will yield markedly different "disadvantaged" populations).

in defining middle-class status and which choose different ranges as defining the middle class for each relevant variable. My discussion here cannot be more rigorous or consistent than the literature from which it draws, but the lack of clear consensus on the boundaries of the black middle class should not stand in the way of recognizing the broad race-based patterns of disadvantage that I describe.

Second, there is inevitably a substantial time lag between the publication of a social-scientific study and the collection of the data upon which the study draws. For this reason, the large-scale studies of the comparative economic circumstances of the black and white middle classes that are being published in the 1990s draw on data from the 1980s and earlier. It is thus difficult to paint a perfectly accurate picture of the economic circumstances of the black middle class in the late 1990s. But this is not a new problem for legal analysis; after all, litigated "facts" predate Supreme Court opinions by as much as a decade. The best one can do in applying data to legal policy questions is to use the available data and extrapolate based on what is known of the social processes that generated them.

For both of these reasons, I shall rely more on broad descriptions of processes and trends than on the specific quantitative results of particular studies. Whether the income or wealth of the average black middle-class family is *x* or *y* percent smaller than that of the average white middle-class family depends on many factors: for example, how one defines "middle-class," "income," "wealth," and "family"; whether the calculation is based on a one-year snapshot or an average of a number of years; and from which particular year or years the data are drawn. I shall occasionally use numbers as a way of explaining the quantum of the economic differences I am describing, but I shall not attempt to quantify each and every comparison I make. To do so would too readily lead to misrepresentation and misplaced concreteness.

Finally, I need to explain what I mean by relative "economic" disadvantage. My view of "economic" is an expansive one. It is not only money but it is all that money is supposed to buy. If two people have the same amount of money, but one is barred from purchasing the goods that the other can purchase, the difference is economic. Furthermore, "economic," as I use the term, includes the accumulation and expenditure of all forms of capital, not merely money. Education is social capital; so is occupational

status.<sup>64</sup> Therefore, if two children attend the same school, but one of the children encounters a learning environment that subverts her success in school, the resulting inequality (her failure to graduate, her poorer grades, or her diminished confidence in her learning ability) is economic. Economic inequality, in my usage, is thus inequality in all goods (abstract and concrete) that are valued in the society, and in the capacity to obtain, enjoy, accumulate, and transmit them.

### A. *Housing Segregation*

One of the greatest sources of economic inequality for the black middle class is housing discrimination and its systematic effects.<sup>65</sup> This seems counterintuitive at first because it is inconsistent with the frequent observation that the black middle class has succeeded in escaping the ghetto and moving into the suburbs—something it is often criticized for having done.<sup>66</sup> But the term “suburbs” is a bit like the term “middle-class”—it means one thing for whites and another for blacks.

The black suburban middle class is segregated into black enclaves near the fringe of the ghettos it has escaped.<sup>67</sup> Indeed,

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64. My concept of social capital is drawn from the work of Pierre Bourdieu. For a helpful discussion of Bourdieu's work on social capital, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1003 (1995).

65. For the recognition of housing segregation as central to black economic inequality, see, for example, DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 8 (1993) (“Residential segregation is the institutional apparatus that supports other racially discriminatory processes and binds them together into a coherent and uniquely effective system of racial subordination.”); WILSON, *supra* note 31. What is less widely recognized is that housing segregation pervasively affects not only the ghetto poor, but the black middle class. See *infra* notes 67-88 and accompanying text.

66. See, e.g., BANNER-HALEY, *supra* note 1, at 52 (criticizing the black middle class on this issue). For the view that the escape of the black middle class from declining neighborhoods has been exaggerated, see Douglas S. Massey et al., *Migration, Segregation, and the Geographic Concentration of Poverty*, 59 AM. SOC. REV. 425, 433-34 (1994). Massey and his co-authors argue that nonpoor blacks leave poor black neighborhoods far more often for other poor (or even poorer) neighborhoods than for more affluent neighborhoods. This is in part because homeowners in declining neighborhoods find themselves unable to sell their homes, and if they do sell they find all they can afford is another house in another declining neighborhood. See *id.*; see also Scott J. South & Kyle D. Crowder, *Escaping Distressed Neighborhoods: Individual, Community, and Metropolitan Influences*, 102 AM. J. SOC. 1040 (1997).

67. It is important to note not only that for blacks suburbanization “has less effect on levels of segregation” than it does for Asians or Hispanics, but also that

the black middle class is hardly less segregated than the black lower class.<sup>68</sup> The chief reason for this is quite clear: discrimination audits of both the housing market and the market for ancillary services (insurance, mortgages, and so on), demonstrate the existence of discrimination in these markets.<sup>69</sup> Black clients are pervasively denied access to houses in white neighborhoods, and black Realtors are pervasively denied access to white-owned properties and to white clients, thereby becoming unwitting and unwilling agents of the discriminatory housing markets they decry.<sup>70</sup> The result is not merely that a lower proportion of blacks at a given income own houses. Rather, the result is that blacks, regardless of their income level, own worse houses in worse neighborhoods—a pattern that extends even to middle-class suburban blacks.<sup>71</sup>

Discrimination in the smoking-gun sense of the term is not the sole cause of racial segregation in housing markets. Data show that black middle-class families would prefer to be living in more integrated settings. The problem is that black families prefer to be in neighborhoods that are approximately fifty percent

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"blacks are less suburbanized than Hispanics or Asians." Douglas S. Massey & Nancy A. Denton, *Suburbanization and Segregation in U.S. Metropolitan Areas*, 94 AM. J. SOC. 592, 613 (1988). For discussions of black suburbanization patterns, see, for example, sources cited *supra* notes 65-66; see also Elizabeth D. Huttman & Terry Jones, *American Suburbs: Desegregation and Resegregation*, in URBAN HOUSING SEGREGATION OF MINORITIES IN WESTERN EUROPE AND THE UNITED STATES 335 (Elizabeth D. Huttman et al. eds., 1991). For leading examples of research in the field of black residential segregation, see generally MASSEY & DENTON, *supra* note 65; GARY ORFIELD & CAROLE ASHKINAZE, *THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY* (1991) (describing a study of the Atlanta metropolitan area); Reynolds Farley et al., "Chocolate City, Vanilla Suburbs: Will the Trend Toward Racially Separate Communities Continue?", 7 SOC. SCI. RES. 319 (1978). The research results are generalizable beyond the cities focused on by the lead studies. See, e.g., Keith R. Ihlandfeldt & David L. Sjoquist, *The Impact of Job Decentralization on the Economic Welfare of Central City Blacks*, 26 J. URBAN ECON. 110, 111 (1989) (discussing generalizability of Atlanta study).

68. See NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 144 & 145 tbl.3-7 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989) [hereinafter *A COMMON DESTINY*] (stating that the segregation index in 16 metropolitan areas for black families with incomes of \$50,000 and above is essentially equal to that for black families in poverty).

69. For a useful summary of "discrimination audits" through the use of testers in a number of fields, including housing, see CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA (Michael Fix & Raymond J. Struyk eds., 1993).

70. For black real estate brokers as unwilling participants in the process of housing discrimination, see ORFIELD & ASHKINAZE, *supra* note 67, at 77.

71. See *id.* at 97.

black, but white families begin to sell their homes and move out of the neighborhood when blacks reach far smaller proportions.<sup>72</sup> What black middle-class families perceive as an optimally integrated neighborhood is, in fact, a neighborhood far along in the process of resegregation. A mutually satisfactory equilibrium of integration cannot exist with such starkly different preferences.<sup>73</sup>

However, not all black middle-class households would choose integration, even if integrated neighborhoods were available to them. There is a degree of willing self-segregation in the black middle-class community. But it is "willing" only in the sense that choosing segregation is often perceived as the lesser of two evils.<sup>74</sup> Race makes daily life in a white-majority world a struggle for middle-class blacks; even educated and highly successful middle-class blacks deal daily with racial insults.<sup>75</sup> For some, "home" must be a place of safety from the insults of white society. As one black professional woman stated: "I can't see whites every day. It's not that I dislike them or anything, but there is a membrane of coping that you have to wear to be around them all the time."<sup>76</sup>

The very proximity of black suburban enclaves to the inner-city ghetto fringe means that property values, and the rate of increase in property values, is generally lower in black than in white suburbs.<sup>77</sup> Similarly, black suburban areas are generally not the places the most prosperous suburban-fringe businesses

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72. See MASSEY & DENTON, *supra* note 65, at 92-93 & tbl.4.3. For similar findings, see A COMMON DESTINY, *supra* note 68, at 143-44.

73. Cf. MASSEY & DENTON, *supra* note 65, at 96 (discussing Schelling model showing how "rather small differences in racial tolerances between blacks and whites can lead to a high degree of residential segregation"); Farley et al., *supra* note 67, at 333-38.

74. Accord Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1103 (1996) (stating that the choices made by the black middle class are a result of the limited number of options available to them); Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 808 (1996) (stating that "voluntary" implies a free choice between at least two options, but here there is a need to escape racism, and therefore not much of a choice).

75. See, e.g., ZWEIGENHAFT & DOMHOFF, *supra* note 35, at 150 ("[M]ost blacks are exposed to recurring humiliation of a sort that most white people do not even recognize. Many social psychology experiments have demonstrated the subtle and not-so-subtle ways whites treat blacks differently. These daily insults hold true even for educated and highly successful middle-class blacks . . .").

76. SAM FULWOOD, III, *WAKING FROM THE DREAM: MY LIFE IN THE BLACK MIDDLE CLASS* 205 (1996).

77. See ORFIELD & ASHKINAZE, *supra* note 67, at 60.

develop, and therefore black suburbanites do not live as close to the best jobs as do white suburbanites.<sup>78</sup> African Americans are thus often blocked by discrimination from buying houses in areas with high and rapidly increasing housing values, better schools, and better work opportunities.

One thing living in a middle-class suburb is supposed to buy is residential class homogeneity; one no longer has to deal (at and near home, at least) with people markedly worse off than oneself. This means that the efforts of parents to pass their middle-class status to their children are reinforced rather than impeded by their children's likely school and neighborhood contacts. But black suburban enclaves are generally too small to provide class homogeneity.<sup>79</sup> Thus, even when members of the black middle class move to the suburbs, "[b]ecause of segregation, middle-class blacks are less able to escape [the poor] than other groups, and as a result are exposed to more poverty."<sup>80</sup> For example, middle-class black suburbs are often too small to support their own school systems, so that the children of the black middle class attend public schools that include large working-class and poor populations from poorer portions of the ghetto fringe. As a result, black suburban schools have far more low-income students than do white suburban schools: in Atlanta, twice as many.<sup>81</sup>

A related concomitant of middle-class status is supposed to be relative safety from crime. Indeed, the middle-class attitude—one of openness and trust—is built, in part, on the relative safety in which the middle class lives. But, because its pattern of residential class heterogeneity, the black middle class is the group in society most victimized by crime.<sup>82</sup> A black middle-class

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78. *See id.* at 97.

79. The fact that black middle-class families are less likely than white middle-class families to experience class homogeneity in their lives is not limited to neighborhood factors. Writing in 1987, Bart Landry reported:

[A]round 80 percent of the black middle class is today first generation. This is true no less of the upper than the lower-middle-class stratum. Thus, with 40 and 23 percent of the black middle class having moved up from the skilled and unskilled strata of the working class, respectively, most of its members continue to have roots stretching far down into the neighborhoods and homes of truck drivers, assembly line workers, and waiters.

LANDRY, *supra* note 61, at 86.

80. MASSEY & DENTON, *supra* note 65, at 9.

81. *See* ORFIELD & ASHKINAZE, *supra* note 67, at 127.

82. *See, e.g.*, A COMMON DESTINY, *supra* note 68, at 471. For the relationship between home ownership and attitudes toward law enforcement in the black

child must, to survive, have more of a sense of street smarts than a white middle-class child—street smarts that are often manifested in behaviors that whites misinterpret as meaning that a middle-class black is not middle-class at all.<sup>83</sup> As if greater exposure to crime were not problematic enough, members of the black middle class are in conflict about whether they have the luxury to simply protect their own interests by being “tough” on crime, or whether they must instead feel solidarity with the black criminals whose targets they are.<sup>84</sup> Indeed, these conflicts may well exist within families: to the extent that members of the black middle class are first-generation class migrants, they are more likely to have extended family members who have not escaped from the criminogenic conditions of unemployment and hopelessness that are so prevalent within the black underclass.

For those black middle-class families who break out of the segregation of black suburbs and live in overwhelmingly white neighborhoods, one would expect a far sunnier picture. But even

community, drawing on this feeling of economic entrapment, see Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137 (1997).

83. For a discussion of the problem from the point of view of black men, see ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* 163-89 (1990); for a discussion from the point of view of whites, see JONATHAN RIEDER, *CANARSIE: THE JEWS AND ITALIANS OF BROOKLYN AGAINST LIBERALISM* 85 (1985). Anderson describes blacks as afraid that whites will not be able to read the signals of their middle-class status; to Rieder, the fear is well-founded. Sam Fulwood wrote a first person account discussing his reaction as a middle-class African American to his first contact with the poor African American children in his integrated school:

I hated them for being so rude and obnoxious, imposing their disinterest in school and hostility toward the system on everyone else.

To be honest, I hated them for another reason. Even when they were not around, their presence stalked me. We had little in common. But our shared accident of birth—being born black in America—compelled a comparison. By merely being a dark disruption, they drew attention to themselves and, indirectly, to me. *All anyone was was blackness. And it was confusing to some whites . . .*

FULWOOD, *supra* note 76, at 33 (emphasis added).

84. For the claim that the black middle class should express solidarity with black criminals, see generally Regina Austin, *“The Black Community,” Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1993). For a similar dynamic affecting black women on the issue of domestic violence within the black community, see generally Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, 32 HARV. C.R.-C.L. L. REV. 49 (1997). In general, the black middle class is often exhorted by black civil rights leaders to fulfill its special responsibility to “put a hand back for our brothers and sisters” in poverty. Jordan, *supra* note 62, at 219; see also Gutmann, *supra* note 2, at 169-72 (exploring the issue of black middle-class responsibility).

for them, segregation takes its toll on the social return to their housing capital. The evidence shows that black families in white neighborhoods do not interact with their white neighbors (and vice versa).<sup>85</sup> Not surprisingly, then, having a higher-class neighbor has been shown to have a positive effect on black children's education only if that higher-class neighbor is also black.<sup>86</sup> One expects that word-of-mouth hiring patterns would, for this reason, not assist black suburbanites living in white neighborhoods because if they do not interact with their white neighbors, they cannot benefit from them as job contacts.<sup>87</sup> Black middle-class parents who choose to live in white suburbs are faced, then, with neighborhoods that are lonely places for them, and that are not delivering the supposed socioeconomic benefits of integration.<sup>88</sup>

### B. Work

Our discussion of housing segregation shows that the black middle class does not live in close proximity to areas of job growth and is not well-connected to word of mouth hiring networks for good jobs. There are also myriad other ways in which the black middle class is occupationally disadvantaged compared to the white middle class.

Take the case of black professionals. It is tempting to view "the professions" as a uniform group of high-prestige occupations. But "using the general occupational category of 'the professions' hides race/gender differences that occur at more detailed levels of analysis among the different professional occupations, say

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85. Cf. Beverly Daniel Tatum, *Out There Stranded? Black Families in White Communities*, in BLACK FAMILIES 214, 220-21 (Harriette Pipes McAdoo ed., 3d ed. 1997).

86. See Greg J. Duncan, *Families and Neighbors as Sources of Disadvantage in the Schooling Decisions of White and Black Adolescents*, 103 AM. J. EDUC. 20, 48 (1994) ("[O]ur evidence suggests that affluent neighbors appeared to benefit black males only if those affluent neighbors were themselves black.").

87. For a discussion of the importance of word-of-mouth hiring, see, for example, FARRELL BLOCH, *ANTIDISCRIMINATION LAW AND MINORITY EMPLOYMENT: RECRUITMENT PRACTICES AND REGULATORY CONSTRAINTS* 9-13 (1994).

88. Black parents in white neighborhoods often respond to this loneliness by working hard to give their children a sense of positive black identity—which often involves joining special clubs that create a black social life outside of the neighborhood. See, e.g., MARLENE KIM CONNOR, *WHAT IS COOL? UNDERSTANDING BLACK MANHOOD IN AMERICA* 80 (1995) (describing role of Jack and Jill clubs for black middle-class families in white neighborhoods).

between lawyers and nursery-school teachers.”<sup>89</sup> Black professionals are concentrated in the least prestigious and least remunerative professional occupations.<sup>90</sup> For example, a black professional is more likely to be a social worker, and less likely to be a lawyer, than is a white professional. Comparisons of blacks and whites both between and within professions show that blacks are most likely to be found in niches in which they are serving the needs of the black population.<sup>91</sup> For this reason, black professionals have been fittingly called “colonized professionals.”<sup>92</sup> For example, in the public sector (where black professionals are disproportionately found), black professionals are most likely to be serving the needs of the minority poor. In the private sector, black professionals disproportionately work in fields like personnel and labor relations. They often become specialists in issues of race and are courted away from more prestigious positions with greater potential for advancement by employers who see black employees as valuable to the minority affairs specialties within the firm.<sup>93</sup>

Even when blacks and whites are in the same profession, they are not likely to be in equivalent positions because the professions are sharply hierarchical. For example, “a lawyer ‘working’ the district court in a city like New York” (who is more likely to be black) is in a far worse position in prestige and income than a lawyer working on Wall Street (who is more likely to be white).<sup>94</sup> And even within the same firm, black and white professionals are often treated differently with regard to the work they do and the training they receive.<sup>95</sup>

Similar patterns of racial differentiation are found in the careers of black supervisors. Black supervisors and white supervisors are not similarly situated in many important ways.

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89. NATALIE J. SOKOLOFF, *BLACK WOMEN AND WHITE WOMEN IN THE PROFESSIONS: OCCUPATIONAL SEGREGATION BY RACE AND GENDER, 1960-1980*, at 43-44 (1992).

90. *Cf. id.* at 120.

91. *See* SOKOLOFF, *supra* note 89, at 73.

92. *Id.* at 123 (drawing on the terminology of Elizabeth Higginbotham).

93. *See id.* at 71; *supra* Part I.B.2.b.

94. SOKOLOFF, *supra* note 89, at 123. Sokoloff shows similar patterns for pharmacists—meaning that the patterns are not limited to the traditional “learned professions.” *Id.*

95. *See* David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 564-84 (1996).

Black supervisors are most likely to be working in positions in which they are supervising other blacks.<sup>96</sup> Blacks in supervisory positions often report that they feel they need to be more qualified than whites in order to advance. To a degree, evidence has been found to support that claim: when blacks are promoted, they are promoted on the basis of objective criteria, whereas whites have the opportunity also to be promoted based on white managers' subjective impressions, which are predicated on whiteness.<sup>97</sup> Black supervisors are also less likely to have hiring and firing authority and are less likely to supervise large numbers of employees.<sup>98</sup>

Finally, members of the black middle class do not generally get the same income return as do whites for their occupational achievements, including their time on the job.<sup>99</sup> This means that African Americans do not merely suffer a psychological blow from their lesser social status when compared to whites in the "same" occupations; they suffer in their wallets as well.

### C. *Income Security*

Black middle-class incomes are less stable than those of white middle-class families for a number of reasons. A high wage at any one time for a black worker is less predictive of permanent high earnings than it is for a white worker.<sup>100</sup> Furthermore, black

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96. See Charles W. Mueller et al., *Particularism in Authority Outcomes of Black and White Supervisors*, 18 SOC. SCI. RES. 1 (1989); see also Richard G. Dudley, Jr., *Blacks in Policy-Making Positions*, in BLACK FAMILIES IN CRISIS: THE MIDDLE CLASS 15-26 (Alice F. Coner-Edwards & Jeanne Spurlock eds., 1988).

97. See Mueller et al., *supra* note 96, at 2. It has been suggested that similar processes take place in hiring, where blacks are more dependent upon satisfying formal criteria because "nonformal processes . . . favor people we know, people who are like us." Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1727 (1995). These authors do not discuss hiring or promotion decisions in which diversity is a selection criterion. Their work suggests, however, that when employers do not use diversity as an express criterion, they tend instead to seek homogeneity. This in turn supports the contention (which I have not explored in this article) that affirmative action is useful as a prophylactic against intentional (albeit subconscious) discrimination.

98. See Mueller et al., *supra* note 96, at 7.

99. See LANDRY, *supra* note 61, at 123-29.

100. For data showing that affluence is less persistent for blacks than for whites, see, for instance, Linda Datcher-Loury, *Racial Differences in the Stability of High Earnings Among Young Men*, 4 J. LAB. ECON. 301 (1986). Datcher-Loury found that 44% of blacks versus 51% of whites persisted in affluence over a three-year period. See *id.* at 311. One suspects the differences would have been greater had the

middle-class families are more likely than white middle-class families to be dependent on the full-time incomes of both spouses.<sup>101</sup> This has a number of implications for the security of the middle-class status of the black middle class. First, the family's middle-class status is already predicated on putting the family's full adult wage-earning potential to work. If one of the two adults loses a job, middle-class status is lost. By contrast, the white middle-class wife may well have job-related skills that could be used in the event that the husband loses a job; her potential to add income to the family by starting to work or increasing her hours of work is untapped, and serves as a backstop for the family. Second, the income of the second wage earner in the black middle-class family goes in significant part to pay for her cost of participating in the workforce (transportation, clothing, and so on) and for the purchase of family support services on the open market.<sup>102</sup> Thus the amount of money brought in by a wage earner with a stay-at-home spouse is worth more to the family than that same income brought in by two wage earners.

The reliance of black families on dual incomes has implications not only for income security, but also for the social and cultural capital of the family. Not having a stay-at-home spouse means there is no "soccer mom" to maximize the child's ability to participate in after-school programs in suburban communities. It means there is no parent at home to help with homework during the pre-dinner hours.<sup>103</sup> Given the strains of parenting black children in a racially charged society,<sup>104</sup> the problem of the tradeoff between additional income and additional parenting time is particularly difficult for African American families to bear.<sup>105</sup>

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periods of study been longer.

101. See, e.g., Paul C. Glick, *Demographic Pictures of African American Families*, in *BLACK FAMILIES*, *supra* note 85, at 133.

102. See LANDRY, *supra* note 61, at 138-41.

103. See Tatum, *supra* note 85, at 217. "With so much energy expended in the maintenance of family income, there is little left for child rearing and household maintenance." *Id.*

104. See James S. Jackson et al., *Family, Socialization Environment, and Identity Development in Black Americans*, in *BLACK FAMILIES*, *supra* note 85; Sheree Marshall, *Ethnic Socialization of African American Children: Implications for Parenting, Identity Development, and Academic Achievement*, 24 *J. YOUTH & ADOLESCENCE* 377 (1994); Jeanne Spurlock & Martin B. Booth, *Stresses in Parenting*, in *BLACK FAMILIES IN CRISIS: THE MIDDLE CLASS*, *supra* note 96.

105. See, e.g., A COMMON DESTINY, *supra* note 68, at 276-77, 524.

It is easy to think that because dual income households are the trend in American society generally, reliance on dual incomes will soon no longer be a comparative disadvantage for black families. But one must remember that more white mothers in two-income households are working because middle-class male income is not keeping up with perceived middle-class family needs. Black male income is suffering at least as great a decline relative to needs as white male income. Yet, as already noted, black families are likely to have already committed all their adult wage earners to the labor market. White families' greater untapped ability to recruit a second wage earner will tend to push white middle-income households ahead of that of blacks for some time to come.

#### *D. Education*

There are systematic differences between the black and white middle classes both in educational inputs (such as schooling processes) and educational outputs (such as achieved performance and the return to educational capital as reflected in future income, wealth, and occupation).

Unlike the legal literature, the literature in the field of education focuses significant energy on understanding the black-white performance gap. This gap is not solely caused by poverty; it exists across the socioeconomic spectrum. Black middle-class children do worse in school than (seemingly) similarly situated white middle-class children—which means that middle-class socioeconomic status is not as strong a predictor of educational success for blacks as it is for whites.<sup>106</sup> The relevant literatures discuss a number of mechanisms that are involved in the process of black middle-class underachievement, ranging from the demographic to the psychological.

The segregation of the black middle class into suburban enclaves on the fringes of ghettos has implications for the comparative educational situation of black middle-class families. Black middle-class suburban schools score only a little better than poor city schools, in part because black suburban schools have high proportions of low-income students (for reasons

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106. See John U. Ogbu, *Racial Stratification and Education in the United States: Why Inequality Persists*, 96 TCHRS. C. REC. 264, 283 (1994); see also A COMMON DESTINY, *supra* note 68, at 367.

discussed in the section on housing segregation<sup>107</sup>). Even within predominantly white schools, black students face significant segregation. Various forms of what has been called "second-generation discrimination" take place in mixed schools.<sup>108</sup> Ability-group tracking occurs most in racially balanced schools.<sup>109</sup> Tracking and discipline both have the effect of resegregating schools at the level of the individual class.<sup>110</sup>

These problems are exacerbated by the complex psychosocial dynamics of race in educational settings—dynamics that extend to the black middle class.<sup>111</sup> It should come as no surprise that discrimination causes its harms through human mediation and interpretation. As anthropologist John Ogbu puts it, "[R]acial stratification . . . enters into and adversely affects black education through *black people's own perceptions and responses* to their schooling in the context of their overall experience of racial subordination."<sup>112</sup> Several approaches have been taken to explain the social psychology of race in the school setting.

One phenomenon that has long been noted in the educational literature is the problem of the disidentification of black children from the schooling process. This phenomenon is present in black middle-class households as well as poorer black households.<sup>113</sup> The problem is not that black middle-class parents fail to stress the need for achievement. The problem is that children hear about and verbally support academic achievement but avoid engaging in behavior that manifests concern with achievement.

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107. See *supra* Part II.A.

108. For the concept of second-generation school discrimination, see KENNETH J. MEIER ET AL., *RACE, CLASS, AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION* (1989).

109. See *A COMMON DESTINY*, *supra* note 68, at 82. *But cf.* MEIER ET AL., *supra* note 108, at 123 (noting that second-generation discrimination occurs in northern as well as southern schools).

110. See MEIER ET AL., *supra* note 108, at 134.

111. See Claude M. Steele, *Race and the Schooling of Black Americans*, *ATLANTIC MONTHLY*, April 1992, at 68, 70 ("[A]chievement deficits occur even when black students suffer no major financial disadvantage . . .").

112. Ogbu, *supra* note 106, at 288. This is the most controversial aspect of Ogbu's work in the sense that it is so easily read as blaming blacks for their own suboptimal responses to discrimination, as well as lauding those minority groups—like the Chinese—whose responses foster superior school performance. See *id.* at 291. See *infra* Part IV.B. for a discussion of the implications of a group-specific approach to the minority middle class.

113. See Ogbu, *supra* note 106; Steele, *supra* note 111; see also Harriette Pipes McAdoo, *Upward Mobility Across Generations in African American Families*, in *BLACK FAMILIES*, *supra* note 85, at 147.

As a result, black middle-class children tend to sever the building of self-esteem from the achievement process and put less effort into school performance.<sup>114</sup>

School disidentification has a psychological and a social dimension. On the psychological level, disidentification with achievement norms serves as a way to maintain self-esteem in the face of poor performance (or the risk thereof).<sup>115</sup> On the social level, black middle-class children perceive themselves as having to choose between solidarity with fellow black students (some of whom are not high achievers) and achievement.<sup>116</sup> Since going over to the achievement side is no guarantee that the high-achieving black child will be accepted as such by white teachers and peers, the temptation to maintain solidarity is great.

[O]nce disidentification occurs in a school, it can spread like the common cold. Blacks who identify and try to achieve embarrass the strategy [of disidentification] by valuing the very thing the strategy denies the value of. . . . Defectors are called 'oreos' or 'incognegroes.' One's identity as an authentic black is held hostage, made incompatible with school identification.<sup>117</sup>

Black students thus come to enforce underperformance as a prerequisite to full group membership. Observing these patterns of underachievement, teachers exacerbate the problem by contributing to the disidentification process; they keep their academic expectations of black students low and seek to reinforce the students' self-esteem despite their poor performance.<sup>118</sup>

School disidentification is not the only mechanism of black academic underperformance. Claude Steele, an experimental social psychologist, has made the most serious effort to date to explain the underperformance of black college students whose board scores and socioeconomic status predict high performance. His answer is the "social-psychological predicament" he calls

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114. See, e.g., Ronald D. Taylor et al., *Explaining the School Performance of African-American Adolescents*, 4 J. RES. ON ADOLESCENCE 21, 38 (1994).

115. See Steele, *supra* note 111.

116. See FULWOOD, *supra* note 76, at 35.

117. See Steele, *supra* note 111, at 75.

118. There is debate in the education literature as to whether and how the race of the teacher affects this process. See, e.g., Karl Alexander et al., *School Performance, Status Relations, and the Structure of Sentiment: Bringing the Teacher Back in*, 52 AM. SOC. REV. 665, 674, 679-80 (1987).

“stereotype threat.”<sup>119</sup> To Steele, black students do not merely fear their own individual failure. Instead, and uniquely in comparison to white students, black students are sharp interpreters of signals that suggest that their own performance will be taken as indicative of the capacities of their racial group in general, and they perform markedly worse under this pressure. Thus, the psychological and the social meet in the school experience of black students; the testing situation triggers the black students’ stereotype vulnerability—itsself part and parcel of their sense of racial solidarity—and their performance suffers. Over time, the experience of stereotype threat itself fosters school disidentification: “It may pressure the person to define or redefine the self-concept such that school achievement is neither a basis of self-evaluation nor a personal identity.”<sup>120</sup>

Racial solidarity is thus a factor both in school disidentification and in stereotype vulnerability. But racial solidarity may also be a survival issue for black students, thus creating for them a double bind. It should not be surprising that black students are influenced in their school behavior by an ethic of racial solidarity. The issue of race versus class solidarity is pervasive in the literature on the black middle class in general. Data from the 1980s suggest that the black middle class identifies more strongly with its race than with its class, and that racial identification in fact increases with education.<sup>121</sup> (When black intellectuals perceive this pattern to be in jeopardy, they criticize the black middle class for the change.)<sup>122</sup> It seems almost impossible that a black middle-class parent, herself in conflict over issues of racial and class identification, would have an easy time instructing her child to leave race solidarity behind during the school years and focus exclusively on academic achievement.<sup>123</sup>

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119. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995).

120. *Id.* Ironically, disidentification might in fact help mitigate the effects of stereotype vulnerability in actual performance: “[F]or Black students who care about the skills being tested . . . the stereotype loads the testing situation with an extra degree of self-threat . . .” *Id.* at 798-99.

121. See Lisa A. Kelly, *Race and Place: Geographic and Transcendent Community in the Post-Shaw Era*, 49 VAND. L. REV. 227, 304 n.241 (1996).

122. See Jordan, *supra* note 62.

123. See Marshall, *supra* note 104, for rich discussions of black middle-class parents’ decisionmaking on the appropriate manner to introduce issues of race.

In any event, it is by no means clear that a strategy of racial disidentification would work for black students. First and foremost, racial identification is not solely a matter of choice. Black students find themselves subjected to public displays by teachers who make it quite clear that they have low expectations of their black students, regardless of ability. "To focus too strongly on oppositional identity . . . would be to miss the point that racism is still the fundamental problem."<sup>124</sup> Second, there is evidence that constructive involvement in race-based student organizations is helpful for black students, particularly in majority-white institutions.<sup>125</sup> Often, a student may start out thinking that she does not need the support of her group, but finds with experience that she does.<sup>126</sup> Absent evidence that racial self-identification alone makes being black in America a difficult experience—and no such evidence exists—it is hard to believe that the underachieving black student has the key to her academic prison cell in her own pocket.

Academic performance is not, of course, the only way of measuring educational "outputs." Another traditional output variable is the "return to education." Generally, a given quantity of education buys the black middle-class family less income than it does the white family.<sup>127</sup> Blacks are likely to be overeducated for the jobs they are in,<sup>128</sup> meaning that their jobs are incommensurate with their level of educational achievement.<sup>129</sup> Since

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124. ZWEIGENHAFT & DOMHOFF, *supra* note 35, at 166.

125. See Judith R. Mayo et al., *Social Integration and Academic Performance Among Minority University Students*, 36 J.C. STUDENT DEV. 542 (1995).

126. That has certainly been my experience as a woman in law teaching: I have become far more conscious than I was at the outset of the implications of being in a small minority as a woman on my faculty.

127. See, for example, John S. Akin & Irv Garfinkel, *The Quality of Education and Cohort Variation in Black-White Earnings Differentials: Comment*, AM. ECON. REV., Mar. 1980, at 186, for a review of the large returns-to-education literature.

128. See Greg J. Duncan & Saul D. Hoffman, *The Incidence and Wage Effects of Overeducation*, 1 ECON. EDUC. REV. 75, 76 (1981) (reporting that "black males have both the lowest average level of educational attainment and the highest percentage—nearly 50 percent—of workers with more education than their jobs require"). One thinks of typical discrimination cases in which the black male candidate claims to be "more qualified" because he is more educated. See, e.g., U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713 n.2 (1983). In a society in which we generally take more education to mean more abstract merit, and in which abstract merit (measured by education) is so often rewarded, the fact that blacks are concentrated in jobs in which their additional increments of education do them no good fuels a perception of race discrimination.

129. See McAdoo, *supra* note 113, at 154 (discussing mismatch between black

“surplus” education—education not necessary for one’s job—has only about half the return in income than does education that is job-required, overeducated blacks do not capture the full value of their education.

*E. Wealth Accumulation*

Careful study of racial differences in the accumulation of wealth demonstrates the “precariousness, marginality, and fragility” of the black middle class.<sup>130</sup> Blacks in white-collar occupations own fifteen cents for every dollar owned by white-collar whites; their “claim to middle-class status is based on income and not assets.”<sup>131</sup> If the average black household had “the same income, age, occupational, educational, and other attributes as the average white household,” it would still have \$25,794 less in assets than the average white household.<sup>132</sup> At least for high-income black families, the problem does not seem to be conspicuous consumption; high income black and white families have similar savings rates.<sup>133</sup> Instead, the wealth differentials between blacks and whites with similar demographic attributes stem from a number of different factors that stand in the way of the generation and transmission of wealth—factors that are closely tied to race.

Most of these factors have already been canvassed above. Put simply, all of the multi-generational disadvantages the black middle class suffers in housing, occupational segregation, education, and income translate into lower lifetime earnings, diminished return on housing capital, diminished likelihood of inheritance of wealth from parents, and therefore into reduced wealth accumulation over the life course.

An additional factor standing in the way of wealth accumulation by the black middle class is the strong expectation of mutual aid within black families. Pressures to contribute to the needs of other members of the extended family are particularly great on the approximately eighty percent of black middle-class members

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fathers’ education and occupation).

130. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 92-93 (1995).

131. *Id.* at 95.

132. *Id.* at 134.

133. *See id.* at 107-08.

who are in the first generation of their family to reach middle-class status. First-generation status makes it more likely that an individual is the best-off person within his circle of extended family and friends, and is thus subject to a wide range of mutual aid expectations.<sup>134</sup>

Compared to the white middle class, then, the black middle class has less opportunity to accumulate wealth and is less able to keep whatever wealth exists within the nuclear family. Less available wealth means diminished opportunities.

#### *F. Intergenerational Status Transmission*

Class is an intergenerational phenomenon.<sup>135</sup> If that were not the case, we would not make the assumption that the child of middle-class parents is herself a "middle-class" child, and it would not be disturbing to our set expectations if, in later life, the child of middle-class parents failed to at least sustain (if not exceed) the middle-class status with which she was born. Yet the inheritance of middle-class status is never automatic, and numerous strategies exist to maximize heritability. We have already surveyed many of those strategies. Middle-class status is inherited through the social networks made available through residential choice, through the facilitation of educational achievement (school choice, parental investment in the child's educational progress, and so on), through occupational examples and

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134. See generally Rose Merry Rivers & John Scanzoni, *Social Families Among African Americans: Policy Implications for Children*, in BLACK FAMILIES, *supra* note 85, at 341-43. For a personal account of both the joys and economic predicaments of the interdependency of the black extended family, written by a black southern law student, see John Simpkins, *All in the Family*, NEW REPUBLIC, July 1, 1996, at 27. He sharply focuses the predicament as follows:

The deep logic of black and rural family life means that resources—medical care, tuition, whatever—are spread to whomever needs them most. Denying them to cousins, aunts, uncles, because they are 'only' cousins, aunts, uncles is not merely alien, but offensive. For people with decent salaries but no inherited wealth, this endless succession of family obligations can make it impossible to accumulate wealth. Everyone survives, but people with the ability and opportunity are prevented from moving ahead.

*Id.*

135. For a recent discussion of the influence of family background on economic status, see Gary Solon et al., *A Longitudinal Analysis of Sibling Correlations in Economic Status*, 26 J. HUM. RESOURCES 509 (1991). For a review of the literature on the heritability of poverty, see Mary Corcoran, *Rags to Rags: Poverty and Mobility in the United States*, 21 ANN. REV. SOC. 237 (1995).

contacts, and through the transmission of wealth. But we have seen that the black middle class is comparatively disadvantaged on each of these dimensions. Compared to the white middle class, the black middle class has greater difficulty transmitting middle-class status to the next generation.

Wealth provides an example of how the black middle class is disadvantaged in this regard. Wealth helps as a mechanism of class inheritance because parents can loan or give children money to help them with their education, home purchase, and so on. To do this, the parents must have the opportunity to accumulate sufficient wealth to share with their children.<sup>136</sup> But we have seen that, typically, the black middle-class family has far less wealth than the white middle-class family. The timing of parental economic need is also different for white and black middle-class families. For many families, equity in a home is the family's major financial asset, and, through an increase in housing values, home equity is expected to be a significant help to the parents in retirement. Therefore, it is less essential for middle-aged parents to have substantial liquid savings—which in turn means that parents can afford to share some of their pre-retirement surplus income with their adult children as the children establish middle-class households of their own. But because the homes of black middle-class families are not located in neighborhoods of rapid property-value appreciation, similar generosity comes at a higher cost to black middle-class families. The same result occurs if the family is expected to aid more-distant relatives, thereby cutting into the funds available to their own children.

Similar stories could be told about all the other dimensions of class heritability. An educated mother who works has less time to follow her child's progress in school. A father or mother who is occupationally frustrated cannot serve as an unmitigatedly positive model of professional attitudes and aspirations. Schools that create double binds of stereotype threat and the temptations of disidentification cannot foster black middle-class achievement. Daily humiliation engenders aggressive or withdrawn responses

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136. Wealth transmission is also helped by multigenerational middle-class status: middle-aged parents can afford to share more with their children if they receive or expect to receive substantial inheritances from their parents' generation. See *A COMMON DESTINY*, *supra* note 68, at 294.

that are inconsistent with the "proper" middle-class attitudes of trust and openness.

In light of these patterns, it should come as no surprise that far fewer black than white middle-class parents succeed in passing their status to their children.<sup>137</sup> This result is merely the temporal expression of the racially determined fragility of the black middle class.

### G. *The Management of Rage*

Connected to all of what we have discussed, but also important as an independent factor in the inequality of the black and white middle classes, is the issue of racial humiliation and its consequences in the lives of the black middle class.<sup>138</sup> Blacks as influential in their fields as historian John Hope Franklin report that they never have the opportunity to function in the "comfort zone" in which whites live.<sup>139</sup> First-person and fictional accounts by members of the black middle class describe daily indignities—or, as one blunt commentator describes them, "the daily bullshit Blacks put up with; small, subtle, annoying bullshit."<sup>140</sup> Certain examples have become canonical in legal circles, such as Patricia Williams' story of being denied entrance to an open Benneton store by a gum-chewing, buzzer-wielding young white store clerk,<sup>141</sup> and Cornel West's account of being dressed in a business suit en route to an important meeting and being unable to hail any one of numerous empty cabs in downtown New York.<sup>142</sup> The canon grows with every published first-person narrative by an African American scholar unwilling to remain silent about the private costs of being a member of the African American middle class in a hostile white-dominated country.

137. There is evidence that only one-third of upper-middle-class black parents pass that status down to their children, as opposed to 60% of upper-middle-class white parents. See OLIVER & SHAPIRO, *supra* note 130, at 158.

138. See *supra* text accompanying notes 74-75.

139. FULWOOD, *supra* note 76 (quoting John Hope Franklin).

140. CONNOR, *supra* note 88, at 86. One example she gives is a white listener mis-hearing "Howard" University for "Harvard" when a young black man named the university he attended.

141. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-51 (1991).

142. See CORNEL WEST, *RACE MATTERS* xiv-xv (1993). For a description of how West's taxicab experience can be generated by processes of statistical discrimination, see BLOCH, *supra* note 87, at 30.

The result, for many, is rage—a phenomenon brought into popular view in Ellis Cose's book provocatively entitled *The Rage of a Privileged Class*<sup>143</sup> and recently explored by bell hooks in her collection of essays entitled *Killing Rage: Ending Racism*.<sup>144</sup> In the lead essay, hooks describes her emotions after experiencing "sequences of racialized incidents involving black women" in the course of boarding an airline flight, emotions directed toward the white male who had displaced hooks' black female traveling companion from a seat in the first-class section of the plane:

I felt a "killing rage." I wanted to stab him softly, to shoot him with the gun I wished I had in my purse. And as I watched his pain, I would say to him tenderly "racism hurts." With no outlet, my rage turned to overwhelming grief and I began to weep, covering my face with my hands. All around me everyone acted as though they could not see me, as though I were invisible, with one exception. The white man seated next to me watched suspiciously whenever I reached for my purse. As though I were the black nightmare that haunted his dreams, he seemed to be waiting for me to strike, to be the fulfillment of his racist imagination. I leaned towards him with my legal pad and made sure he saw the title written in bold print: "Killing Rage."<sup>145</sup>

Members of the white middle class are not forced to confront racialized experiences of humiliation, rage, and grief in daily life.<sup>146</sup> Nor do they understand how these experiences are reflected in African Americans' presentation of self in the white world. Indeed, whites instead blame blacks (especially black men) for having a "bad attitude"—a stance of aggression, hypersensitivity, and mistrust that whites misread as adolescent and irresponsible.<sup>147</sup> As I have already noted in the context of black middle-class victimization by crime,<sup>148</sup> white members of the middle class have the luxury of developing the openness and social ease that are markers of middle-class status. Middle-class blacks, rightly fearing humiliation and racial confrontation in the

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143. See COSE, *supra* note 61.

144. See BELL HOOKS, *KILLING RAGE: ENDING RACISM* (1995).

145. *Id.* at 11.

146. That is not to say that daily life is free from turmoil for the white middle class. See WILLIAM IAN MILLER, *HUMILIATION* (1993).

147. See CONNOR, *supra* note 88, at 12-13.

148. See note 83 and accompanying text.

white-majority settings in which they must so often function, do not. Rage is thus not merely a psychological phenomenon. It is also a source of economic disadvantage: rage leads to the development of a social persona that is foreign and at times frightening to those in the white middle class who so often hold the keys to black economic advancement.

### *H. Summary*

In sum, the poor do not have a corner on the market where discrimination against African Americans is concerned. Black middle-class families are systematically disadvantaged in comparison with seemingly "similarly situated" white families. To ignore this fact when defending affirmative action is both a strategic and a moral mistake.

## III. MAKING THE CASE FOR AFFIRMATIVE ACTION FOR THE BLACK MIDDLE CLASS

The previous section provides the raw material for a defense of race-based affirmative action as what it is: a program that predominantly benefits the black middle class. The case made by the socioeconomic and social-psychological data is a compelling one. Once one moves beyond facile comparisons, the black middle class and the white middle class are systematically different on every meaningful measure of class privilege.

My major emphasis in this article is to explain why the economic case for black middle-class affirmative action ought to be made, and why the evidence supports the claim that the black middle class is economically disadvantaged in comparison with the white middle class for reasons centrally related to its race. But demonstrating that the black middle class suffers race-based economic disadvantage is only part of the larger project of defending race-based affirmative action on behalf of the black middle class. I shall thus also outline the remainder of the necessary steps to concluding that race-based affirmative action on behalf of the black middle class remains good policy—and why they are steps worth taking.

Affirmative action is a problematic approach to remedying economic inequality, one that ought not be used when other politically feasible approaches are likely to be efficacious within a reasonable time frame. Thus, a necessary step in endorsing

race-based affirmative action on behalf of the black middle class is the absence of effective alternative approaches on the horizon.

One alternative approach is to wait for the market to take care of the problem. But by all indications, the wait will be intolerably long. This article has demonstrated the extent to which housing segregation fuels economic inequality for the black middle class. Scholars of housing segregation predict that it will take fifty years to reduce black housing segregation even to the troubling levels of segregation experienced by Asian Americans and Hispanics.<sup>149</sup>

In the areas of income and occupation, black middle-class occupational concentration in the public sector places the black middle-class community at particular risk in the current period of governmental downsizing—particularly the downsizing of the welfare programs that black professionals disproportionately administer. Similar trends threaten the progress of the black middle class in the private sector; in times of downsizing, middle managers far removed from the firm's productive activities are usually the first to go, and minority-affairs specialists in personnel departments hardly seem like bread-and-butter employees who must be spared the corporate axe. The first major period of improvement in the situation of black workers came during a period of economic growth in fields blacks were qualified to enter. Economic growth in middle-class jobs is now taking place in technical fields, like computer science, in which African Americans have not traditionally participated. If patterns of occupational segregation continue to disadvantage the black middle class, its comparative situation will not improve.

There is no more reason to be optimistic on the educational front. The educational community is only beginning to understand some of the processes that stand in the way of black middle-class achievement. It is far easier to describe "wise schools"<sup>150</sup>—schools that do not create stereotype threat and that do not foster disidentification—than it is to create them. Stan-

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149. See *A COMMON DESTINY*, *supra* note 68, at 89-90 ("If black-white residential segregation continued to decline at the rate observed in the 1970s, it would take five or six decades for blacks to reach the levels of residential segregation now observed among Hispanics and Asian Americans."); see also *MASSEY & DENTON*, *supra* note 65, at 88 ("No matter how socioeconomic status is measured . . . black segregation remains universally high while that of Hispanics and Asians falls progressively as status rises.").

150. See *Steele*, *supra* note 111, at 75.

standardized tests remain an important fact of educational life and may well become more important if presidential educational initiatives take hold. Black middle-class educational underachievement may thus be with us for many years to come.

As to the dynamics of humiliation and rage that so plague members of the black middle-class community, no end is in sight. Not until the economic situation of the entire African American community in this country improves will the black middle class be free of the joint burdens of self-identification with and victimization by the black poor. And it may take even longer for white Americans to learn how to recognize members of the black middle class as middle-class, at least from the distance of moving taxicabs and darkened urban streets.

For the reasons described, it is ill-advised to wait for market forces to remedy the problems of the black middle class. An alternative solution would be to use our arsenal of antidiscrimination laws to redress the situation of the black middle class. In general, I would much prefer this strategy to affirmative action—but I doubt that we will commit ourselves to it in earnest, and even then I doubt that it would work with acceptable speed. My review of the literature on black middle class economic disadvantage shows it to be a diffuse and deeply rooted phenomenon. The economic predicament of the black middle class is caused by and reflected in a wide range of areas of social and economic life. Many discrete social processes would need concerted legal attention. To make matters worse, the problem is rooted in deep-lying racial aversions and misunderstandings that have thus far been resistant to change through law.

Take, for example, the housing segregation that underlies the economic disparity between the white and black middle classes. Innovations in investigatory techniques are revealing patterns of discrimination in mortgage and insurance markets, and those patterns are likely to be ameliorated by legal pressure. But the law has no way of stopping white homeowners from leaving their neighborhoods when the proportion of new black neighbors exceeds whites' low threshold of tolerance for integrated living.

Similar problems exist in other areas in which private choices that generate discriminatory results are often treated as immune from legal redress. Examples in the employment arena include

employers' use of word-of-mouth hiring<sup>151</sup> and employers' adverse decisionmaking on a wide range of seemingly minor employment issues that cumulatively have devastating effects on black middle-class professional advancement.<sup>152</sup> It is easy to say that judicial decisions rejecting legal challenges to these actions are wrong, and could readily be reversed by a right-minded Supreme Court or Congress. But the decisions grow out of the courts' own threshold of tolerance for the use of their busy dockets to micro-manage the employment process.<sup>153</sup> Unless we commit sufficient resources to the judicial system, judges will find shortcuts. In education, it is far more difficult to pinpoint and legally redress the classroom dynamics through which equal educational opportunity is denied to black students in majority-white classrooms than it is to mandate integration—and we all know how difficult it has been to do the latter.

The lesson of the last thirty years of antidiscrimination enforcement is that discrimination is a subtle and adaptive phenomenon that is tenacious beyond the reasonable expectations of the framers of our antidiscrimination laws. One can easily understand the temptation to use affirmative action to simulate the results *effective* antidiscrimination laws would have produced. Affirmative action is a poor substitute—but eliminating affirmative action will not make the problem go away.

Another possibility would be to use class-based rather than race-based solutions to address the gap between the black and white middle classes. This suggestion seems counterintuitive; in general parlance, the whole point of class-based affirmative action is to move affirmative action *away* from benefiting the black middle class.<sup>154</sup> But one might also use the concept of class—defined and measured in a sophisticated way—as a way of addressing the problems of the black middle class. When studies

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151. EEOC v. Consolidated Serv. Sys., 989 F.2d 233 (7th Cir. 1993).

152. For example, compare *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995) with *Strother v. Southern Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir. 1996) (taking opposing positions on whether exclusion from training seminars is actionable under Title VII). My thanks to Catherine Fisk for calling these and similar cases to my attention.

153. See Catherine Fisk, *Judicial Intervention in Ongoing Employment Relationships* 15-19 (May 31, 1997) (unpublished manuscript, on file with author).

154. See, e.g., KAHLBERG, *supra* note 1; Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913 (1996) (analyzing class-based affirmative action as a program for the poor).

show that blacks of a certain socioeconomic status are worse off in some way than corresponding whites, the result can mean two things. It can mean that measurement of "socioeconomic status" is not capturing all relevant dimensions of socioeconomic difference between seemingly similarly situated blacks and whites. Or it can mean that "race" is having effects over and above those of "socioeconomic status" on the life chances of blacks and whites. These characterizations are significantly different, although perhaps not different enough in a world in which courts are likely to scrutinize race-based claims buried in class-based accounts.

But class-based affirmative action can only be of help to the black middle class if class-based programs adopt a complex understanding and operationalization of class—something they are not likely to do.<sup>155</sup> One could, for example, grant affirmative action eligibility to students who live in majority-black suburbs or who attended suburban schools with unusually high proportions of low-income students. One could treat high parental income as disqualifying for affirmative action purposes only if the parents' income comes from one wage earner in a two-parent household, or only if it is at or above the national average income for the parents' specific occupations. One could ask the kinds of questions necessary to ferret out the differences between high- and low-status lawyers, or between staff- and line-level corporate management positions. In this way, one could attempt to concretize the specific ways in which the economic accomplishments of members of the black middle class can be overstated, and do so in a race-neutral way.

But even the most complex measure of class would have difficulty capturing all the significant class effects of being born black in America. One can measure the racial and income composition of a neighborhood, but without considering race, there is no way to capture the fact that blacks do not gain the full social benefits of having better-off white neighbors. One can look at the racial composition of schools, but if only black students suffer stereotype threat within those schools, the differences between the schooling process for blacks and whites will be ignored. Stated simply, the social processes through which the black middle class becomes and remains economically disadvan-

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155. See Malamud, *supra* note 32, at 1894-1900.

taged are driven by and mediated through race. Ignoring race misses the point and distorts the results.

With no other ameliorative solution on the horizon, then, the case for affirmative action on behalf of the black middle class seems to be a tenable one. But other questions, of a moral, practical, and political nature, must also be asked and answered. One important question is whether the economic differences between the black and the white middle classes are large enough or pervasive enough to warrant affirmative action as a remedy. Moral philosophers struggle with the question of which kinds of inequalities ought to be tolerated and which cured—and their struggles often involve examples of stark differences between relative haves and have-nots. It is certainly reasonable to ask the question whether race-based economic differences among members of the American middle class are on a scale that makes remediation through affirmative action appropriate.

The differences between the black and white middle classes seem, at first glance, large enough and comprehensive enough to warrant intervention; it is deeply disturbing that without affirmative action, elite educational institutions would be as white today as they were before the civil rights revolution,<sup>156</sup> and the economic inequalities that underlie the results seem strong candidates for redress. But similar patterns and magnitudes of inequality exist among whites of different social classes. Would one also intervene on behalf of the white poor to advance its competitive position vis-à-vis the white upper middle class? Or on behalf of the white lower-middle class to help it compete against the white wealthy? One need not answer these questions, however, to conclude that affirmative action for the black middle class is appropriate. The reason is race. Race—meaning a systematic and long-standing pattern of race discrimination—is what accounts for the persistent economic differences between the black and white middle classes. Those differences may seem small when compared with the gap between rich and poor in this country. But because race creates the difference, the difference weighs heavily on the moral scale.

Several ancillary distributive questions remain, however, even if one believes that the persistent differences between the

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156. See, e.g., Wightman, *supra* note 36, at 41; see also Applebome, *supra* note 50.

white and black middle classes are morally worthy of remediation. First, does affirmative action on behalf of the black middle class disproportionately disadvantage the most vulnerable whites—and, if so, can it be justified? Some of the “losers” from race-based affirmative action on behalf of the black middle class will be the poorest performers among the white middle and upper-middle classes. For them, one may have little sympathy, given their relative economic privilege and the greater opportunities they had available to them because of their race. But some of the losers will be the very best performers from the white lower-middle and working classes—who worked very hard to earn a place “next on the list” under traditional merit criteria. Is the *racial* disadvantage of being black and middle-class a more powerful barrier to personal and intergenerational advancement than the *class* disadvantage of being white and lower-middle or working-class? I suspect (from personal experience growing up white and lower-middle class) that it is, and until white lower-middle and working-class students who make it into professional school start complaining that taxicab drivers in New York City will not pick them up or that “loss prevention” agents trail them in department stores, that will remain my judgment. But it has long been argued that our focus on race blinds us to the distinct injuries of class in America, and there is considerable merit to the argument. The class distributional consequences of affirmative action—the question of who, precisely, is doing the losing—must therefore be carefully monitored.<sup>157</sup> So must any tendency of affirmative action on behalf of African Americans to disproportionately disadvantage members of other racial minority groups.

Another important distributive question is whether the racial inequality suffered by the black middle class ought to be receiving remedial attention when the far more pressing needs of the black

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157. Another response to white working-class claims of injustice is that the white working class has for years been at an unfair competitive advantage because of its culturally sanctioned (and, in the case of immigrant groups like the Irish, often hard-fought) “whiteness.” I shy away from placing heavy reliance on the blameworthiness of the white working class, in large part because the white working class is, in its own way, a victim of the racial division in America that cost this country a united working class. See DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991). For examples of the growing literature on “whiteness,” see IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

poor go unredressed. There are good arguments that when it was initially created, affirmative action distracted the American polity from wholeheartedly pursuing the far more expensive programs that would have been necessary to aid the poorest African Americans.<sup>158</sup> But that does not mean that abandoning affirmative action for the black middle class now would result in a rechanneling of funds and institutional energies toward the black poor. Absent such a showing, it makes little sense to ask the black middle class to wait its turn.

One must also question the distributional equity of affirmative action *within* the black middle class. I have explained at length elsewhere that the tendency of any program of affirmative action is to disproportionately benefit the most privileged members of the eligible class.<sup>159</sup> The black middle class is disadvantaged relative to the white middle class, but not uniformly so; there is significant variation in the degree to which members of the black middle class have escaped segregation and the economic effects of discrimination. Among those whose test scores (or other measured qualifications) place them below non-affirmative action entry thresholds, the candidates whose scores are the highest—those at the top of the bottom so to speak—will be the most desirable affirmative action candidates. In the aggregate, the highest-scoring affirmative action candidates will also be the candidates whose experiences are least marred by the patterns affecting the black middle class as a whole. The dynamic of relative advantage of affirmative action beneficiaries thus occurs within the black middle class. It is, as they say, turtles all the way down. Does this mean that affirmative action for the black middle class is indefensible? I think not. It just means that it is not perfect. The problem is that there is no easy way precisely to identify which individual members of the black middle class failed to meet traditional entry standards because of lack of talent and energy and which suffered from the performance-impeding dynamics of race and racism. Self-reporting (such as the now-common admissions essay asking “explain how you have suffered discrimination or overcome disadvantages”) can be untrustworthy not only because it can be self-serving, but also because discrimination and its effects can be

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158. See SKRENTNY, *supra* note 7, at 142.

159. See Malamud, *supra* note 32.

so subtle—or, in a sense, so ordinary and taken for granted—as to fall outside the range of easy self-reflection. In the end, the question must be whether it is appropriate to reach out to the black middle class as a whole—even to the “black son of a Pittsburgh neurosurgeon.” I think the answer is “yes,” because I do *not* think that there is any stratum of the black middle class that is free of the social, psychological, and economic pressures of race.

In addition to the distributive issues I have addressed, affirmative action on behalf of the black middle class also raises questions of efficacy. Can it work for its beneficiaries? Or does it simply exacerbate the problem it is supposed to solve? Here the honest answer must be that affirmative action is not all forward motion; it does hurt even as it helps.

In particular, affirmative action seems to play a natural part in sustaining the psychodrama of negative stereotyping and stereotype threat. Once it is known that black students in the aggregate have lower predictor scores and that affirmative action is often the reason they were admitted, the stereotype of lesser desert becomes a part of the problem. Black students will perform worse to the extent they feel their white peers are waiting for them to conform to the stereotype by failing. There is no reason, however, to think that these stereotype-threat effects will be less severe under a program of affirmative action with *diversity* as its rationale. Once the predictor statistics are generally known—as they now are known to the law school community in the aftermath of *Hopwood*—the cycle of stereotype threat is unavoidable. The only difference is that, if the reason for affirmative action is thought to be white utility, then affirmative action supporters can ignore some of the negative effects of affirmative action on its recipients. Those effects become the recipients' problem—unless the negative effects become extreme, they do not interfere with the “diversification” process that is the white stake in affirmative action. At least if the focus of affirmative action policy shifts away from helping white institutions, proponents of affirmative action will be careful about monitoring affirmative action programs to make sure the net direction of movement is forward.

For all these reasons, I continue to support race-based affirmative action for what it is: a program that benefits the black middle class and goes some small distance toward remedying its race-based economic disadvantage.

## IV. CONCLUSION AND BROADER IMPLICATIONS

I sense that I am fairly representative of the portion of liberal and moderate America on whose court the battle for affirmative action in America must be fought. So let me describe us. We are people for whom the issue of affirmative action is important but not to the point of being constitutive of our political and moral identity. I once confessed to a colleague (a tenured colleague and a philosopher to boot—what a fool I am!) that I tend not to participate in legal debates on abortion because the “me” that is having the debate could not have been having the debate if abortion rights had not been secure when I needed them.<sup>160</sup> I know what it means to have a core belief that is not amenable to the ordinary techniques of political and intellectual persuasion. But on the issue of affirmative action, I am part of a large and politically important group of people of all races in this country for whom the issue is *not* presently constitutive in this sense. We are people in need of good arguments, arguments we can not merely articulate in good faith but that can genuinely motivate our decisions on affirmative action.

I view both the need for and the justice of race-based affirmative action on behalf of the black middle class as legitimately contestable. This means that I must identify the weaknesses in what currently pass as the “best” arguments and seek to make better ones with the hope they can persuade those of my kind who have not yet crossed over to a moral and political space in which arguments no longer matter.

My conclusion is this. I would personally benefit from increasing the diversity of my professional and personal community, and I fear the symbolic significance of abandoning affirmative action before we become a truly integrated society. But, at bottom, it is the capacity of affirmative action to contribute to the remediation of persistent race-based economic inequalities that leads me to support affirmative action on behalf of the black middle class. The diversity rationale for affirmative action on

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160. Cf. Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115, 1115 (1996) (“I am a product of affirmative action. Thus, to imagine a world without affirmative action would require that I imagine a world without me, something that I am not inclined to do.”).

behalf of the black middle class does not convince me if it stands alone.

There are, however, some disturbing implications of finding it necessary to base the continuing case for race-based affirmative action on the socioeconomic fragility of the black middle class—above and beyond the already-noted fact that the Supreme Court does not now see societal discrimination as a legitimate reason for affirmative action. I shall end by discussing those implications.

### A. *Saying Words That Hurt*

It may be counterproductive to racial justice to poke holes in the seeming economic security of the black middle class. What I am saying is that two middle-class families, white and black, that seemingly look the same on the “normal” indicators of socioeconomic status most likely do not; in fact, look the same when one takes a closer look. In a sense, the last thing the minority community needs is the publication of facts that would tend to justify whites in the belief that, appearances aside, the black middle class is not “just like us” after all.

Exposing the precariousness of the black middle class is a problem in that the amassed evidence is a likely source of discomfort for some members of the black middle class—one that in a very real sense adds insult to injury. Furthermore, there are practical implications to publicizing these facts within the legal community. What does my account do, just for starters, to housing or employment discrimination litigation that is based on the pairing of similarly situated “testers”? Does it justify a landlord’s decision to deny an apartment to a black family earning a certain amount per year on the statistically grounded assumption that the family’s ability to pay the rent and maintain a middle-class lifestyle is likely to be dependent on two incomes rather than one or that the family is less likely to have sufficient wealth to see it through spells of unemployment?

The answer here has to be that the option of hiding from the facts is no longer available: the facts of black middle-class disadvantage are well-known in social-scientific circles and need to become part of the legal and political debate. As to the “testers” example, the fact that generalizations about black middle-class disadvantage are statistically true does not authorize landlords to act on them. Statistical discrimination is unlawful,

and landlords and employers must therefore judge individuals and families on their own economic circumstances and use only such criteria as they are prepared to use in a race-neutral way and that are closely related to their legitimate needs. But policymakers cannot afford to view the public policy needs of communities in the same way landlords are required to view their leasing decisions. Social policy assessments must be made in the aggregate, on the basis of larger societal patterns. The societal pattern I have documented is the pervasive comparative disadvantage of the black middle class—a disadvantage that is not generated through race-blind processes and that therefore cannot be cured through race-blind solutions.

*B. Intraminority Differences and the Coalition-Building Costs of Empirical Particularism*

The other major political problem with my approach is that it makes the appropriateness of race-based affirmative action turn on the empirically demonstrable economic disadvantage of particular minority groups. Empirical particularism is not an ideal way to build coalitions. Some of the patterns I have pointed to in the disadvantaging of the black middle class either do not exist or exist to a far lesser extent for other minority groups. Can coalitions among peoples of color—and between peoples of color and women—survive the particularizing of the extent of their socioeconomic disadvantage?

The most that can be done, I think, is to consistently stress two concepts: (1) the relevant comparison is not between the Asian American and black middle classes, for example, but between each viewed separately and the white middle class; and (2) the racial basis of a minority group's disadvantage matters more than the magnitude of the disadvantage. But resources are scarce,<sup>161</sup> and stark differences in the magnitude of minority middle-class disadvantage are hard to ignore. Furthermore, the different circumstances of different minority groups mean that an affirmative action policy that advantages one minority group in relation to whites might well disadvantage another. For example, it would benefit blacks in relation to whites to radically de-

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161. For dilution arguments, see EDLEY, *supra* note 2, at 152-53.

emphasize test scores for college admissions, but that change would disadvantage Asian Americans relative to whites.

Empirical particularism, then, means that some intergroup conflicts that might otherwise be suppressed by a broad-based diversity rationale for affirmative action will become salient. I thus close what is already a sufficiently controversial paper by suggesting that advocates of racial and gender justice must, in the coming years, address more explicitly the proper boundaries of self- and group-interest and group altruism in civil rights scholarship and practice.<sup>162</sup>

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162. For a thoughtful step in that direction, see GABRIEL CHIN ET AL., BEYOND SELF-INTEREST: ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE, A POLICY ANALYSIS OF AFFIRMATIVE ACTION 2 (no date) *available in* <http://www.sscnet.ucla.edu/aasc/policy/txtonly/index.html> (visited Aug. 11, 1997) (concluding that Asian Pacific Americans "must stand up for affirmative action, whether or not [they] are directly included in such programs").