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ARTICLES

RACE, TRUST, ALTRUISM, AND RECIPROCITY

*George W. Dent, Jr. **

I. INTRODUCTION

Trust, altruism, and reciprocity are attracting growing attention from scholars. Interest began with psychological experiments showing that people often are altruistic, trust others, and reciprocate the benevolence of others far more than economic models of “rational” human selfishness predict.¹ These findings inspired social scientists to discover what factors promote or hinder cooperation.² Legal scholars have employed this learning to determine how the law does or could facilitate or discourage cooperation in many contexts, including business transactions and the workplace.³ The influence of race on cooperation has been studied in specific areas, but so far no one has considered how the new learning might improve race relations and racial equality. This Article makes an initial effort to do so.

Trust in others is essential to human interaction, especially in dealings too complex for the parties’ rights and duties to be de-

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1. “The empirical challenge to the self-interest hypothesis began in the 1980s when experimental economists started to study bilateral bargaining games in controlled laboratory settings.” Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1663 (2003).

2. *Cf. id.* at 1665–67 (discussing the theory of reciprocal fairness).

3. See generally Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003) (reviewing CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002)).

tailed in writing. Trust grows when each side's contribution is reciprocated by the other's, but not if reciprocity is withheld. Likewise, trust shrinks rapidly if one party abuses the other's trust by acting opportunistically. People often eschew gain and help the needy; but altruism dwindles if the recipients do not seem truly needy, do not try to help themselves, or if others who could help refuse to do so and "free ride" on those who are altruistic.

The dearth of racial trust in America is dramatically manifested in the separation so often chosen by both blacks and whites.⁴ Distrust blocks cooperation and altruism between the races and obstructs efforts to solve virtually every social problem.⁵ Part I of this Article reviews the learning about trust, altruism, and reciprocity. Part II applies this knowledge to better understand racial division and inequality in America, and why many policies and positions do not ameliorate these ills and indeed may exacerbate them. Part III discusses our goals in race relations, Part IV prescribes principles to foster interracial trust, and Part V proposes some specific steps to reduce racial inequality while building trust.

II. TRUST, ALTRUISM, NORMS, AND LAW

A. *Trust, Fairness, and Reciprocity*

The social sciences long assumed that people act only from material self-interest and are suspicious of others.⁶ Accordingly, it was assumed that an individual transacts with another only when, by his own actions, or by invoking the law, he can avoid any noncooperation or opportunism of the other that would deny him the material gain he expects from the transaction.⁷

4. See generally FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 295–306 (1995) (discussing levels of trust within several American ethnic groups).

5. *Id.*

6. "[E]conomic analysis generally begins by assuming that people behave like *homo economicus*—that they are perfectly rational and purely self-interested actors." Lynn A. Stout, *On the Proper Motives of Corporate Directors (Or, Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1, 9 (2003).

7. See *id.*

If true, these assumptions pose many problems. First, no one entering a contract completely foregoes trust and relies solely on self-help or enforcement; no one contracts with someone who swears to cheat whenever it suits him to do so.⁸ Further, even simple exchanges involve too many contingencies to be fully covered in a contract: “[a]ll contracts are incomplete.”⁹ This is particularly true in complex transactions. The paradigm is marriage, which entails so much interaction that no contract, however long, could begin to specify the rights and duties of the spouses. The same is true of intricate business deals, like joint ventures. Written contracts are insufficient where it is hard to monitor the other party’s performance and to prove a breach to a court, as when a party promises its best efforts over a long time in a complex project.¹⁰

A low level of trust suffices for the many contracts where the parties need not work together after agreement is reached. Even in a complex exchange, like a corporate merger, major terms can be spelled out adequately and the threat of legal enforcement largely deters opportunism.¹¹ Deeper cooperation is possible only because the model of *homo economicus* is false; people often interact on a basis of trust and benefit by so doing.¹² People who trust achieve “substantially higher efficiency levels” in their transactions.¹³ For this reason many employers cultivate trust in the workplace.¹⁴ Trust reduces transaction costs: “there is less need to spell things out in lengthy contracts; less need to hedge against unexpected contingencies; fewer disputes, and less need

8. See FUKUYAMA, *supra* note 4, at 25.

9. Scott, *supra* note 1, at 1641.

10. See, e.g., Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265, 267–68 (1988). A fully specified contract may be impractical because “performance may be prohibitively costly to measure and to specify in a way that contractual breach and the extent of damages can be proven to the satisfaction of the court.” *Id.* at 267–68; see also Ilya Segal, *Complexity and Renegotiation: A Foundation for Incomplete Contracts*, 66 REV. ECON. STUD. 57, 58 (1999) (stating that contracts tend to be less complete when the transaction is more complex).

11. See JORDAN D. LEWIS, *TRUSTED PARTNERS: HOW COMPANIES BUILD MUTUAL TRUST AND WIN TOGETHER* 261–64 (1999).

12. See generally Stout, *supra* note 6, at 12 (“Social dilemma experiments accordingly demonstrate, rather conclusively, that people often behave altruistically.”).

13. Ernst Fehr & John A. List, *The Hidden Costs and Returns of Incentives—Trust and Trustworthiness Among CEO’s* 1, 17 (manuscript Nov. 2002); see also FUKUYAMA, *supra* note 4, at 151 (cataloging the benefits of trust).

14. See Carbado & Gulati, *supra* note 3, at 1789.

to litigate if disputes arise.”¹⁵ Conversely, “where trust is gone . . . the agency costs incurred by the team members—the costs of mutual monitoring if you will—are likely to increase.”¹⁶ Benefits flow from cooperation. In “a carefully worked out relationship one gets performance only to the letter of the contract,”¹⁷ whereas in a transaction based on trust, both sides may contribute more than the minimum required by their contract.¹⁸

Trust works because most people do not conform to the model of narrow material selfishness.¹⁹ Most people value “fairness and reciprocity.”²⁰ Thus, in games in psychological experiments where a player may choose either to keep an entire sum of money or to share with other players, most people share.²¹ Most people also reciprocate the fairness of others, “reward[ing] generous . . . offers with generous efforts (even when it is costly for them to do so).”²²

Unfairness is also reciprocated. People who feel mistreated usually retaliate even if they know that retaliation will be costly for them.²³ People judge others less from the effects of their actions than from their apparent intentions: “It is not what happens in relations so much as how that is interpreted, and how people infer and attribute competencies and motives to people that mat-

15. FUKUYAMA, *supra* note 4, at 151.

16. Lawrence E. Mitchell, *Trust and Team Production in Post-Capitalist Society*, 24 J. CORP. L. 869, 870 (1999).

17. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 64 (1963). The process of negotiating a contract may itself undermine trust and cooperation. See *supra* note 10. Therefore, parties often forego contracts altogether. This is typical in marriage. It is also done in some business deals. See LEWIS, *supra* note 11, at 263.

18. See LEWIS, *supra* note 11, at 263–64.

19. See Stout, *supra* note 6, at 11–12.

20. Scott, *supra* note 1, at 1662.

21. See generally Robyn M. Dawes & Richard H. Thaler, *Anomalies: Cooperation*, 2 J. ECON. PERSP. 187, 192–95 (1988) (discussing altruism); Robyn M. Dawes et al., *Cooperation for the Benefit of Us—Not Me, or My Conscience*, in BEYOND SELF-INTEREST 108–10 (Jane J. Mansbridge ed., 1990) (discussing experiments supporting group-identity hypothesis); Robyn M. Dawes, *Social Dilemmas*, 31 ANN. REV. PSYCHOL. 169, 182–88 (1980) [hereinafter Dawes, *Social Dilemmas*] (reviewing dilemma games studies); David Sally, *Conversation and Cooperation in Social Dilemmas: A Meta-Analysis of Experiments from 1958 to 1992*, 7 RATIONALITY & SOC'Y 58, 68 (1995).

22. Scott, *supra* note 1, at 1664.

23. See George Loewenstein, *Emotions in Economic Theory and Economic Behavior*, 90 AM. ECON. REV. 426, 429–30 (2000); Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281, 1284 (1993). An emotionally based commitment to retaliate even at (short-term) cost to oneself and an ability to signal this (i.e., to warn others) may help to deter mistreatment by others. See ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* 2 (1988).

ters, in the formation or destruction of trust."²⁴ A person's willingness to trust and be fair is not the same in all circumstances and for all other people; it depends on context and the identity of the other. "Social capital"—that is, "social networks and the norms of reciprocity and trustworthiness that arise from them"²⁵—varies from culture to culture.²⁶ Social capital promotes economic growth; in nations with high social capital people can more easily enter into the complex transactions that are crucial to growth in this era of advanced technology and global competition.²⁷

Trust also varies among subgroups.²⁸ People "tend to gravitate toward what is familiar and predictable [and] . . . to shy away from and mistrust what is different."²⁹ "[P]rejudice may have evolutionary roots, having developed as a quick, crude way for early humans to protect themselves from danger."³⁰ How one classifies

24. BART NOOTEBOOM, *TRUST: FORMS, FOUNDATIONS, FUNCTIONS, FAILURES AND FIGURES* 24 (2002); see also Scott, *supra* note 1, at 1666 (stating "the key is how a person interprets the actions of the other party").

25. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000).

26. See FUKUYAMA, *supra* note 4, at 25–26; Joseph Henrich et al., *In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies*, 91 *AM. ECON. REV.* 73, 76–77 (2001). To some extent, however, the tendency to reward cooperation and generosity and to retaliate against unfairness seems to be biologically programmed. See ALEXANDER J. FIELD, *ALTRUISTICALLY INCLINED? THE BEHAVIORAL SCIENCES, EVOLUTIONARY THEORY, AND THE ORIGINS OF RECIPROCITY* 10 (2001) (concerning "fundamental aspects of human nature, and . . . the attempts by economists and other social scientists to identify its essential features and explore its implications"). Reciprocity that is not economically self-serving at the individual level may be beneficial at the group level. *Cf. id.* at 93–94; ELLIOTT SOBER & DAVID SLOAN WILSON, *UNTO OTHERS: THE EVOLUTION AND PSYCHOLOGY OF UNSELFISH BEHAVIOR* 6 (1998) (exploring "the concepts of altruism and selfishness in evolutionary biology, psychology, and philosophy").

27. Social capital affects "the ability of people to work together for common purposes in groups and organizations." FUKUYAMA, *supra* note 4, at 10. "The ability to associate depends, in turn, on the degree to which communities share norms and values. . . . Out of such shared values comes trust, and trust . . . has a large and measurable economic value." *Id.*; see also James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 *AM. J. SOC.* S95, S104–05, S116–17 (Supp. 1988).

28. See generally FUKUYAMA, *supra* note 4, at 295–306 (discussing levels of trust within several American ethnic groups).

29. LEE GARDENSWARTZ & ANITA ROWE, *DIVERSE TEAMS AT WORK: CAPITALIZING ON THE POWER OF DIVERSITY* 63 (2003); see also GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 4, 19 (1954); Vincy Fon & Francesco Parisi, *The Limits of Reciprocity for Social Cooperation* 22 (2003), at <http://www.law.gmu.edu/faculty/papers/docs/03-08.pdf> (last visited Apr. 2, 2005) (stating that "behavioral patterns of reciprocity tend to emerge in close-knit environments with homogeneous players, but do not thrive in highly heterogeneous groups").

30. Nancy Wartik, *Hard-Wired for Prejudice? Experts Examine Human Response to*

others as similar or different, however, is influenced by one's society: distinctions of clan, tribe, nationality, race, and religion may or may not be considered to render another person too different to be trusted. Social trust can also arise, though, from "the establishment of a civic consciousness, that is, on strong evaluations based on a shared tradition of civic engagement."³¹

Group identity is not always firmly fixed and may even "be transiently delineated through a flip of a coin."³² Thus in a gym class students will work hard for their team to beat the other team, even when teams are picked at random. Cooperation is also influenced by authority. Thus participants in experimental games are more cooperative if the organizers tell them to be so.³³ Sometimes an industry is dominated by one group partly because of high levels of trust among members of the group.³⁴ Subgroup cohesion, however, can either enhance or undermine solidarity in the broader society.³⁵

Some techniques for creating trust and empathy are matters of common sense. To befriend a new neighbor it is self-evident that one should be friendly, look for common interests, show trust in the neighbor (as by lending a tool or utensil), and cooperate in solving mutual problems. The task is more difficult when the parties are diverse, especially if there is a history of distrust between them.³⁶ Methods have been identified to nurture trust and empathy in difficult situations ranging from troubled marriages to strategic alliances between businesses from different industries or nations.

Trust is influenced by the "amalgam of signals we receive about such matters as what *other* people expect, what *other* people need, and what *other* people are likely to do."³⁷ We have more trust in

Outsiders, N.Y. TIMES, Apr. 20, 2004, at F5 (reporting on conclusions of recent studies linking prejudice with evolution).

31. ADAM B. SELIGMAN, *THE PROBLEM OF TRUST* 78 (1997).

32. Sally, *supra* note 21, at 68.

33. "[P]articipants appear to follow instructions ordering them to cooperate or to compete." *Id.* at 78. This is "slightly bewildering to an economist, because the instruction to cooperate does not change the stated payoffs of the game." *Id.*

34. See Donald McCloskey, *Bourgeois Virtue*, AM. SCHOLAR, Spring 1994, at 177, 183-84 (explaining that exchange is often focused within an ethnic group because of trust).

35. See FUKUYAMA, *supra* note 4, at 159 (stating that "[working] class solidarity deepens the divisions between management and labor in Britain").

36. See *id.* at 295-96.

37. Stout, *supra* note 6, at 13.

those who share our values.³⁸ Trust inspires trust; we tend to trust people we perceive to be trusting, but “[s]ignals of mistrust breed mistrust.”³⁹ Similarly, “if people receive signals that they are not trusted, they are likely to become less trustworthy.”⁴⁰ We trust those whom we know from experience to be trustworthy.⁴¹

Trust builds slowly but erodes quickly.⁴² Once mistrust emerges it is difficult to reverse:

[M]istrust tends to feed upon itself even more than trust does. (Mis)trust by X tends to engender (mis)trust on the part of Y, which justifies and deepens X's (mis)trust. While trust can be falsified because it leads to reliance on others that can be disappointed, mistrust cannot, because it blocks trusting action that might disprove it.⁴³

People can work consciously to create mutual trust.⁴⁴ Trust grows with familiarity, so people can build trust just by socializing.⁴⁵ Communications of good will increase cooperation.⁴⁶ Being friendly, however, complicates exchange relationships. Each party has an incentive to bargain hard for favorable terms. Thus in negotiating a sale—of a car, a house, or a business—each side usually seeks the best terms for itself and neither may care what

38. “As a general rule, trust arises when a community shares a set of moral values in such a way as to create expectations of regular and honest behavior.” FUKUYAMA, *supra* note 4, at 153; see *supra* notes 19–22 and accompanying text.

39. Tamar Frankel, *Trusting and Non-Trusting on the Internet*, 81 B.U. L. REV. 457, 459 (2001). “People who distrust the motives of others tend to have more rigid and narrow expectations and to provoke the very reactions they fear.” John G. Holmes & John K. Rempel, *Trust in Close Relationships*, in CLOSE RELATIONSHIPS 187, 190 (Clyde Hendrick ed., 1989). Conversely, “those who are more willing to trust other people are likely to be equally trustworthy in that they are less likely to lie, cheat, or steal.” David Good, *Individuals, Interpersonal Relations, and Trust*, in TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 3, 32 (Diego Gambetta ed., 1988).

40. Tamar Frankel & Wendy J. Gordon, *Introduction*, 81 B.U. L. REV. 321, 322 (2001).

41. See Thomas Gautschi, *History Effects in Social Dilemma Situations*, 12 RATIONALITY & SOC'Y 131, 132 (2000); EUGENE BARDACH, GETTING AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMANSHIP 256 (1998); see JUDITH INNES ET AL., COORDINATING GROWTH AND ENVIRONMENTAL MANAGEMENT THROUGH CONSENSUS BUILDING x (1994).

42. See NOOTEBOOM, *supra* note 24, at 2.

43. *Id.* at 89. This effect operates on groups as well as individuals. See Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 72 (2003) (referring to a “self-sustaining atmosphere of distrust”).

44. See LEWIS, *supra* note 11, at 3–18 (discussing ways to build trust).

45. See BARDACH, *supra* note 41, at 256–59 (stating that familiarity usually enhances trust).

46. See Sally, *supra* note 21, at 69, 80, 83.

the other thinks of it after the deal closes.⁴⁷ In such cases aggressive negotiating tactics—stating extreme demands, belittling the other side's concerns and requests, insistence on one's legal rights, fighting tooth and nail on many issues, and making threats—are considered profitable.⁴⁸ This is especially so for lawyers, who are trained to treat litigation as the paradigm for interaction.⁴⁹ A reputation for pugnacity is often an asset; it encourages the other side to lower its expectations.⁵⁰

When parties must cooperate, these tactics can backfire.⁵¹ Even if they reach agreement, they will distrust each other. Each side must then spend more time and effort to monitor the other than it would if they trusted each other. Each will press its legal rights to the limit and contribute only what it must in order to avoid sanctions that would cost more than the effort needed to avoid the sanctions.⁵² This is especially true if one side considers the agreement unfair. In handling the unforeseen problems that plague all complex transactions the parties will fail utterly to make mutually beneficial adjustments or, at best, will need difficult, expensive negotiations to make such adjustments.⁵³ In short, the relationship each party will gain is less than it could have had with trust and cooperation.

It is difficult to strike the perfect balance between pursuing one's own interests and promoting trust. One can be too trusting and concede too much. On the other hand, it is tempting for a stronger party to impose a one-sided bargain on the weaker. That ploy can be self-defeating, however, because it provokes resentment in the weaker party, who may retaliate when performing under the agreement, even at cost to itself.⁵⁴

47. *But see* LEWIS, *supra* note 11, at 40–41.

48. *Id.*

49. *See* George W. Dent, Jr., *Lawyers and Trust in Business Alliances*, 58 *BUS. LAW.* 45, 53, 58–59 (2002).

50. *Id.* at 58.

51. "Pressing the other firm to retreat, or making implied threats, lowers people's enthusiasm and causes them to withhold information and protect their interests." LEWIS, *supra* note 11, at 45; *see also* Ronald J. Gilson & Robert H. Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 *OR. L. REV.* 1, 10–11 (1995) (calling the desire of each side to maximize its own profit a pitfall in bargaining).

52. LEWIS, *supra* note 11, at 44–45.

53. *See id.* at 39–40.

54. *See supra* note 23 and accompanying text (discussing the tendency to retaliate). Japanese firms often negotiate to build trusting relationships, not to gain one-sided terms.

There are methods for building trust without sacrificing vital interests. People more readily accept plans that they have helped to create;⁵⁵ they are less cooperative if they feel disrespected.⁵⁶ It helps if each party determines which terms of the relationship are vital to it and is flexible on matters of less importance.⁵⁷ It also helps for each party to explain why it needs a particular term; trust erodes when one side cannot understand the demands of the other.⁵⁸ It helps if parties freely share information. Trust grows when each side feels it is fully informed and that the other does not conceal information. Each side can earn trust by proposing solutions that expand the total pie so that both sides are winners.⁵⁹

Since we trust those who share our values, each side can show the other its commitment to certain values.⁶⁰ Trustworthiness and commitment to shared norms can be attested by third parties. We have greater trust in a new restaurant if it has received good reviews. Many individuals, businesses, and organizations work hard to build and maintain good reputations because they know that reputation is a basis for trust.⁶¹ The best basis for trust, is that in past dealings another has vindicated our trust.

See Darin Bifani, *Win the Battle or Build a Relationship?, How Japanese Style Could Help American Negotiators*, BUS. LAW TODAY, May/June 2003, at 25–26.

55. See Kahan, *supra* note 43, at 20.

56. See Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 369, 384, 389 (2001).

57. See generally *id.*

58. See Joel Brockner & Phyllis Siegel, *Understanding the Interaction Between Procedural and Distributive Justice: The Role of Trust*, in TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH 390, 391 (Roderick M. Kramer & Tom R. Tyler eds., 1996) [hereinafter TRUST IN ORGANIZATIONS] (discussing interorganizational trust). “[P]rocedural justice positively influences trust.” *Id.* at 402.

59. Margaret A. Neale & Max H. Bazerman, *Perspectives for Understanding Negotiation: Viewing Negotiation as a Judgmental Process*, 29 J. CONFLICT RESOL. 33, 40 (1985) (calling this approach “integrative bargaining”); see also JAMES C. FREUND, SMART NEGOTIATING: HOW TO MAKE GOOD DEALS IN THE REAL WORLD 21–22 (1992).

60. See Jörg Sydow, *Understanding the Constitution of Interorganizational Trust*, in TRUST WITHIN AND BETWEEN ORGANIZATIONS: CONCEPTUAL ISSUES AND EMPIRICAL APPLICATIONS 31, 38 (Christel Lane & Reinhard Bachmann eds., 1998) (referring to building trust by the “signalling of shared assumptions and understandings at the very beginning. Competence, benevolence, and integrity, which are assumed to be important antecedents of trustworthiness on an interpersonal level . . . should have a similar effect at the interorganizational level, as long as those characteristics are attributed to the organization . . . in question”).

61. See, e.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745–62 (2001) (discussing the importance of commercial reputation in building trust in the cotton industry).

By definition, though, trust entails risk. Therefore, in extending trust, people tend “to proceed in small steps that yield little risk.”⁶² “As partners fulfill their exchange obligations, cooperation rises to higher levels.”⁶³

Trust can exist between organizations as well as individuals.⁶⁴ Thus a company engaged in or exploring a joint venture can earn the trust of another firm by showing its commitment to honesty, openness, cooperation, fulfillment of promises, and such; in short, by the same methods by which one individual earns the trust of another. Trust can also extend to more amorphous institutions like government or securities markets.⁶⁵ Those who trust government to be honest and fair are less likely to resist its acts or to violate the law than are those who do not trust government.⁶⁶

Behavior and attitudes that build trust—friendliness, openness, flexibility, and generosity—do not come naturally to many people, especially where there is already conflict and mistrust between the parties. Again, this is natural because trust entails making oneself vulnerable and hence is dangerous. Natural selection weeds out those who trust too much.⁶⁷

62. NOOTEBOOM, *supra* note 24, at 90. Initially, the parties may employ “safeguards,” such as “contracts, supervision, dependence, hostages [and] reputation.” *Id.* As trust grows, these safeguards may be dropped.

63. Rachel E. Kranton, *The Formation of Cooperative Relationships*, 12 J.L. ECON. & ORG. 214, 227 (1996); *see also* Walter W. Powell, *Trust-Based Forms of Governance*, in TRUST IN ORGANIZATIONS, *supra* note 58, at 51, 60 (“The process is iterative—the level of cooperation increases with each agreement between the same partners . . .”).

64. *See generally* TRUST IN ORGANIZATIONS, *supra* note 58; TRUST WITHIN AND BETWEEN ORGANIZATIONS: CONCEPTUAL ISSUES AND EMPIRICAL APPLICATIONS (Christel Lane & Reinhard Bachmann eds., 1998) (compiling discussions of conceptual issues and theories of interorganizational trust).

65. *See* PIOTR SZTOMPKA, TRUST: A SOCIOLOGICAL THEORY 43–44 (1999) (discussing “trust directed at institutions and organizations”); Lynn A. Stout, *The Investor Confidence Game*, 68 BROOK. L. REV. 407, 426–30 (2002) (discussing trust behavior in the stock market).

66. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 170, 178 (1990). Several studies examine this phenomenon with regard to the siting of hazardous waste facilities. *See* Robin Gregory et al., *Incentives Policies to Site Hazardous Waste Facilities*, 11 RISK ANALYSIS 667, 672 (1991); Howard Kunreuther et al., *Public Attitudes Toward Siting a High-Level Nuclear Waste Repository in Nevada*, 10 RISK ANALYSIS 469, 480 (1990); Howard Kunreuther & Doug Easterling, *The Role of Compensation in Siting Hazardous Facilities*, 15 J. POLY ANALYSIS & MGMT. 601, 601–05 (1996).

67. *See* SOBER & WILSON, *supra* note 26, at 3.

B. *Altruism*

People have a tendency to act altruistically, that is, with an inclination to help those who need help even if no equal material consideration is expected in return. This tendency, too, varies among individuals and among cultures and depends heavily on context. People are more generous to those they consider to be like themselves.⁶⁸ Although by definition altruism precludes material reciprocation, donors generally expect gratitude. Most want recipients to be deserving in that their needs cannot be met by their own efforts and do not stem from their own misconduct.⁶⁹ They also want recipients to make good use of help received.⁷⁰ However, altruistic inclinations are diminished by “undue pressure or manipulateness on the part of the person seeking help.”⁷¹

Altruism is also affected by the conduct of other potential donors. People want others who are able to donate to do so, to make an equal sacrifice; many people are altruistic if others pitch in, but not if they think others are free-riding—that is, sharing the benefit that accrues to all society from help to the needy while refusing to contribute themselves.⁷²

68. See Harvey A. Hornstein, *The Influence of Social Models on Helping*, in ALTRUISM AND HELPING BEHAVIOR: SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES 29, 31–36 (J. Macaulay & L. Berkowitz eds., 1970) (presenting study showing that altruism is more likely to the extent that there is a similarity or relationship between the potential donor and donee).

69. See Leonard Berkowitz, *Social Norms, Feelings, and Other Factors Affecting Helping and Altruism*, in 6 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 63, 104 (Leonard Berkowitz ed., 1972) (“People are much more willing to aid someone requiring assistance because of factors beyond his control than a person whose dependency is his own fault.”).

70. See NANCY EISENBERG, ALTRUISTIC EMOTION, COGNITION, AND BEHAVIOR 198–99 (1986) (stating that expected utility influences altruism); Shalom H. Schwartz & Judith A. Howard, *Internalized Values as Motivators of Altruism*, in DEVELOPMENT AND MAINTENANCE OF PROSOCIAL BEHAVIOR: INTERNATIONAL PERSPECTIVES ON POSITIVE MORALITY 229, 236 (Ervin Staub et al. eds., 1984) (stating that altruistic behavior is less likely when potential donors believe that help “would not be effective”).

71. Shalom H. Schwartz, *Normative Influences on Altruism*, in 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 221, 264 (Leonard Berkowitz ed., 1977); Berkowitz, *supra* note 69, at 105 (discussing a study showing college students more likely to help someone in need if they felt free to refuse aid than if they felt compelled to help).

72. See EDWARD O. WILSON, SOCIOBIOLOGY: THE NEW SYNTHESIS 114, 120–21 (2000); Dawes, *Social Dilemmas*, *supra* note 21, at 182–88 (reviewing many studies finding that people are more likely to cooperate if they think others will cooperate); Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOLOGY 35, 35–39, 45–54 (1971).

C. Law and Norms

Like social scientists, legal scholars long assumed that people are selfish;⁷³ hence the law need only provide the right material incentives in order to induce desired behavior. Although material incentives matter and are often potent, they are not the sole determinants of behavior. People often act against their own best interests. They eat unhealthful diets and, of greater significance to the law, many people repeatedly commit crimes even though the odds of eventually being caught and suffering severe penalties (both legal and social) are very high. Thus material incentives created by law may have little effect. Severity of penalties, for example, has little impact on the amount of street crimes.⁷⁴

Societies must often rely on obedience to the law by most citizens even when it is not in their interest to obey. For example, for many kinds of tax cheating the risk of being caught is low. The law must depend on voluntary compliance because it is too costly to audit more than a small percentage of tax returns.⁷⁵ Finally, in order to thrive, society, especially a democracy, needs far more civic activism than is induced by self-interest. Even the minimal civic act of voting is not in a citizen's self-interest; since the odds are small that one vote will alter the result of an election, the effort required to vote exceeds the likely benefit. A fortiori, it does not serve one's self-interest to undertake civic or charitable activities.

Material incentives can even backfire. A person inclined to act out of altruism may come to view the act in terms of self-interest if offered a reward for so doing. She may then find the incentive too small and decide not to act.⁷⁶ Also, many people act altruisti-

73. See WILSON, *supra* note 72, at 117-18.

74. Cf. Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, in 23 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 21 (Michael Tonry ed., 1998) (explaining that people do not perceive social and economic costs of punishment to be strictly proportional to punishment received).

75. See Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis*, 1 J. PUB. ECON. 323, 334 (1972); FRANK A. COWELL, CHEATING THE GOVERNMENT: THE ECONOMICS OF EVASION 73-74 (1990); Steven Klepper & Daniel Nagin, *The Criminal Deterrence Literature: Implications for Research on Taxpayer Compliance*, in 2 TAXPAYER COMPLIANCE: SOCIAL SCIENCE PERSPECTIVES 126, 142 (Jeffrey A. Roth & John T. Scholz eds., 1989).

76. As stated by Professor Kahan:

The simple existence of an incentive scheme can be seen as a cue that other individuals are not inclined to cooperate voluntarily . . . This inference can

cally if others do likewise.⁷⁷ One who learns that others are being paid for their civic efforts may demand equal pay or simply drop the activity despite an offer of pay. Coercion can also backfire. People who are inclined to act voluntarily may become resentful and refuse to perform an act if told that they are required to do it.⁷⁸ “It would be a mistake, though, to conclude that material incentives invariably diminish trust. . . . [T]he situation will likely be different if individuals start out with the belief that most other individuals are inclined to shirk or free-ride. In that case, the advent of a credible reward or penalty can work”⁷⁹ Thus the effect of incentives varies with context.

Voluntary civic activity and compliance with law therefore depend not only on material incentives but on norms. Recently “[l]egal scholars have rediscovered social norms.”⁸⁰ There must be “a cultural infrastructure of social norms, learned dispositions to respect property and keep promises and pay taxes and refrain from private violence to settle disputes, and of a certain degree of mutual trust—confidence that others will, within limits, for the most part, also respect the norms.”⁸¹

Norms operate in two ways.

One is that individuals have *internal incentives* . . . namely, they will feel virtuous if they adhere to them, and experience guilt if they do

in turn trigger a reciprocal disposition to withhold voluntary cooperation In addition, the existence of incentives can *mask* voluntary contributions to public goods, thereby diluting the power of such contributions to trigger reciprocal cooperation. Relatedly, incentives can *crowd out* dispositions such as altruism by extinguishing the opportunity of individuals to demonstrate (to themselves and to others) that they are willing to sacrifice material gain for the public good.

Kahan, *supra* note 43, at 76–77.

77. See *supra* note 72 and accompanying text.

78. People respond more positively when they are treated “in a civil rather than a coercive fashion.” Dan M. Kahan, *A Colloquium on Community Policing: Reciprocity, Collective Action, and Community Policing*, 90 CALIF. L. REV. 1513, 1525 (2002). Coercion “actually *undermines* the incentive that individuals have to collaborate with each other.” *Id.* at 1526.

79. Kahan, *supra* note 43, at 77.

80. AMITAI ETZIONI, *THE MONOCHROME SOCIETY* 163 (2001). For further relevant literature, see *id.* at 285–86 n.2.

81. Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 42, 44 (Deborah L. Rhode ed., 2000). Similarly “a social order based on laws can be maintained without massive coercion only if most people most of the time abide, as a result of supportive social norms, by the social tenets embedded in the law.” ETZIONI, *supra* note 80, at 171. For further discussion on the intersection of law and morals, see *id.* at 155–59.

not. Second, individuals have *external incentives* to obey moral notions in that they will be praised by others for that behavior and admonished, scolded, or otherwise punished for immoral behavior.⁸²

Norms are shaped by many forces, such as family, neighborhood, and religion. Law and government are less decisive but do play a role, especially in the long term. Material incentives matter,⁸³ so taxing or penalizing certain acts tends to reduce their frequency, while conduct that is subsidized tends to increase. Again, however, material incentives sometimes backfire.

Government also shapes norms through education. Opposition to moral education in public schools is waning now, partly because of the realization that all education promotes some norms.⁸⁴ In addition to formal schooling, government educates through publicity, as by giving or requiring consumer goods to disclose health and nutrition information. Since trust and altruism tend to be reciprocated, government can encourage these traits by publicity.⁸⁵ Publicity is important not only because citizens lack information but also because in processing information “people rely on a limited number of heuristic principles” that can “lead to severe and systematic errors.”⁸⁶ For example, “[p]eople care about fairness, but their judgments about fairness are systematically biased in their own direction.”⁸⁷

Finally, government influences norms through the expressive function of law. As well as providing material incentives, law is an expression of authority that most people respect.⁸⁸ Despite

82. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 604 (2004). For more information on social norms, see Richard H. McAdams & Eric B. Rasmusen, *Norms in Law and Economics*, in HANDBOOK OF LAW AND ECONOMICS (A. Mitchell Polinsky & Steven Shavell eds., forthcoming 2005) (discussing social utility of guilt, esteem, and shame).

83. See *supra* text accompanying notes 76–79.

84. “A major goal of education . . . is to foster internalization of social norms by children and thus to affect their preferences.” ETZIONI, *supra* note 80, at 176. “Public schools typically foster, despite recent tendencies to deny this fact, a long list of values . . .” *Id.* at 196.

85. See Kahan, *supra* note 43, at 102 (stating that government can encourage Good Samaritanism “through public commendations of individuals who engage in heroic behavior”).

86. Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974).

87. CASS R. SUNSTEIN, HAZARDOUS HEURISTICS 21 (Univ. of Chi. Law Sch., Pub. Law and Legal Theory Working Paper No. 33, 2002), at <http://www.law.uchicago.edu/academics/publiclaw/resources/33.crs.hazardous.pdf> (last visited Apr. 2, 2005).

88. See Chris Guthrie, *Insights from Cognitive Psychology*, 54 J. LEGAL. EDUC. 42, 45

wide skepticism about politics in America now, there is an “increasing tendency to look to law as an expression and carrier of the few values that are widely shared in our society.”⁸⁹ Many battles are fought over the symbolism of law. Thus there was fierce debate over the constitutionality and fairness of criminal sodomy laws even though they were rarely enforced in the few states that had them.⁹⁰ Both sides cared about these laws because of their moral condemnation of homosexual acts.⁹¹ Many legislative resolutions are declarations with no practical effect and are sought by some group solely for symbolic purposes.

The impact of law on norms is negligible when it clashes with deeply ingrained attitudes. When people are conflicted over competing values, though, law can be influential. People are also affected by the attitudes of those they consider their peers. When the law promotes norms embraced by many citizens, the two together can alter the attitudes (or at least the behavior) of dissenters.⁹² When law takes one side on an issue on which many citizens are ambivalent, it can precipitate “norm cascades” in which social consensus changes rapidly.⁹³

If conditions are not ripe for a norm cascade, the expressive use of law may help to create such conditions. If broad support for a norm is lacking, attempts to establish that norm by coercion may be frustrated: “police grow more reluctant to arrest, prosecutors to charge, juries to convict, and judges to punish.”⁹⁴ This problem can be avoided if lawmakers apply “gentle nudges” rather than

(2004) (stating that “we tend to defer to those whom we perceive to be authority figures”).

89. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 3 (1991). See generally McAdams & Rasmusen, *supra* note 82 (describing how law can intentionally or unintentionally undermine, facilitate, create, or perpetuate norms including reciprocity).

90. See generally Christopher R. Leslie, *Lawrence v. Texas as the Perfect Storm*, 38 U.C. DAVIS L. REV. 509, 511–16 (2005).

91. *Id.*

92. See SHAVELL, *supra* note 82, at 618 (stating that the law can lend authority to norms expressed by private individuals and groups).

93. See Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 757, 759 (2003) (reviewing *Heuristics and Biases: The Psychology of Intuitive Judgment* (Thomas Gilovich et al., eds. 2002)). Professor Kahan expresses the same idea in referring to “multiple equilibria punctuated by tipping points.” Kahan, *supra* note 43, at 75 (emphasis added). That is, an increase (or decrease) in the contributions of a few to collective goods can start a “chain reaction” pushing the larger group over a tipping point, moving the group willingness to contribute to a higher (or lower) equilibrium. *Id.* at 79.

94. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607–08 (2000).

“hard shoves”⁹⁵ to punish people more receptive to the desired norm. Merely labeling an act as criminal may persuade people that it is socially harmful.⁹⁶ If that happens, lawmakers can then make greater use of coercive law.

D. *Law and Trust*

Like the relationship between law and norms, the relationship between law and trust is complicated. People inclined to cooperate voluntarily may bridle if subjected to legal compulsion to do so. Thus in business deals cooperation is often greater when parties rely on informal understandings and good faith rather than on enforcing detailed contracts to the letter.⁹⁷ Because coercion can backfire, legal scholars disagree about laws that mandate behavior to help others or impose liability for supposed misconduct in relationships of trust. “Legalizing” a relationship may impair its benefits by introducing fear of legal liability.⁹⁸ It may also suppress some people’s cooperative inclinations.⁹⁹ Lack of legal re-

95. *Id.* at 608.

96. See JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 7–8 (1974) (discussing the general effects of criminal punishment on society).

97. See *supra* notes 17–18 and accompanying text.

98. Fear of liability may deter a party from revealing information or admitting error as a step toward reconciliation. Roy J. Lewicki & Barbara Benedict Bunker, *Developing and Maintaining Trust in Work Relationships*, in TRUST IN ORGANIZATIONS, *supra* note 58, at 114, 128–36 (discussing steps required to repair broken trust). For example, “[i]t is commonly accepted that some physicians try to avoid malpractice claims by practicing defensive medicine, or physician behavior guided to reducing liability risk rather than what physicians consider to be in the best interests of patients.” Robert A. Bevenson et al., *Medical Malpractice Liability Crisis Meets Markets: Stress in Unexpected Places*, Issue Brief No. 68, Center for Studying Health System Change, Sept. 2003, at <http://www.hschange.com/CONTENT/605/?topic=topic03> (last visited Apr. 2, 2005). See Bryan A. Lang & LiLan Ren, *Medical Liability Insurance and Damage Caps: Getting Beyond Band Aids to Substantive Systems Treatment to Improve Quality and Safety in Healthcare*, 30 AM. J.L. & MED. 501, 502 (2004) (“Limited insurance and potential liability has also led to defensive medicine, in which providers try to avoid lawsuits by ordering tests, procedures, and anything else that might help protect against liability.”). The low standard of care for corporate directors is often defended on the ground that a higher standard would make directors excessively cautious. See Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1663–70 (2001) (providing overview of duty of care).

99. See Bruno S. Frey, *How Intrinsic Motivation Is Crowded Out and In*, 6 RATIONALITY & SOC’Y 334 (1994); Bruno S. Frey, *Institutions and Morale: The Crowding-Out Effect*, in ECONOMICS, VALUES, AND ORGANIZATION 437, 439–42 (Avner Ben-Ner & Louis Putterman eds., 1998). Others argue that the expressive use of law can promote cooperation. See Robert Cooter, *Do Good Laws Make Good Citizens?: An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1597–1600 (2000).

course, however, may deter people from trusting others. In many countries, for example, investment in public companies is low because law offers no relief to investors abused by breaches of trust.¹⁰⁰

Similarly, there is debate whether the expansion of individual rights in America during the 1960s and 1970s weakened “communal institutions” that long inculcated important social norms.¹⁰¹ Some think the rights revolution damaged America, in part by diverting political issues to the courts and away from democratic institutions where negotiation, compromise, and coalition-building bring disparate groups together and teach them to cooperate.¹⁰² An excellent example is the debate over abortion. In America, one side asserts the right to life of the unborn child, while the other asserts the pregnant woman’s right to control her body.¹⁰³ Both are absolute positions that preclude compromise and lead to endless acrimony.¹⁰⁴ By contrast, in Europe the debate remains in the political arena and has reached a broadly accepted compromise without the hostility of the debate in America.¹⁰⁵ In relationships of trust and cooperation—good marriages, for instance—people rarely press their legal rights and “the assertion of rights is usually a sign of breakdown in a relationship.”¹⁰⁶

Critics of the obsession with rights advocate greater attention to duties.¹⁰⁷ To the biblical question “Am I my brother’s keeper?,”¹⁰⁸ more and more Americans reply “Certainly not.”

100. See Jennifer Tobin & Susan Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties*, *2 (Jan. 3, 2005), at http://www.law.nyu.edu/weilerj/spring05/globalization/Rose-AckermanFDI_BITs.pdf (last visited Apr. 2, 2005).

101. FUKUYAMA, *supra* note 4, at 315. “[T]he cumulative and unintended effect [of forbidding discrimination by private organizations] was for the state to become an enemy of many communal institutions. Virtually all communities saw their authority weakened. . . .” *Id.* Disgruntlement over America’s obsession with rights is also common on the far left. “[R]ights are said to be alienating. They separate people from each other—‘stay away, I’ve got my rights’—rather than encouraging them to form close, respectful communities.” RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 24 (2001).

102. See GLENDON, *supra* note 89, at 76–89, 171 (discussing lack of responsibility dialogue).

103. See *id.* at 64–66.

104. See *id.*

105. See *id.* at 65.

106. *Id.* at 175.

107. In America, unlike other liberal democracies, “rights have an absolute character that is not balanced or moderated by constitutional language outlining duties to the com-

Modern liberal polities, in order to live up to their own professed ideals, require not only a citizenry that is prepared to accept some responsibility for the less fortunate, but citizens who are willing, so far as is possible, to take responsibility for themselves and their dependents. Conservatives tend to lament deficiencies in the latter area; progressives, in the former. But neither finds in American public discourse a ready vocabulary to express these important (and inseparable) concerns.¹⁰⁹

III. RACE IN AMERICA TODAY

A. *Distrust and Despair*

Forty years ago most Americans were optimistic about race relations. After World War II, court decisions and state and federal statutes forbade most state-sponsored and much private discrimination. Racial hostility appeared to be crumbling. It seemed that racial inequality could be quickly narrowed and soon eliminated.¹¹⁰

There has been progress. Polls document changing attitudes about race.¹¹¹ African Americans now hold positions that many blacks and whites thought whites would never have allowed. Blacks have made economic progress both absolutely and relative to whites.¹¹² Unfortunately, progress has been small and slow.

munity or responsibilities to other people." FUKUYAMA, *supra* note 4, at 315.

108. *Genesis* 4:9.

109. GLENDON, *supra* note 89, at 105.

110. "In the heyday of the civil rights movement . . . those who fought for racial equality were optimists, and that optimism seemed vindicated by events." BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 2 (Abigail Thernstrom & Stephan Thernstrom eds., 2002) [hereinafter BEYOND THE COLOR LINE].

111. In a 1995 poll, only thirty percent of blacks agreed that "the problems that most blacks face are caused primarily by whites," and only twenty-five percent of blacks believed that "the most important step in improving race relations involve[d] 'white Americans doing more to recognize and reduce racism by whites against blacks.'" Everett C. Ladd, *What Americans Think About Race and Ethnicity*, in BEYOND THE COLOR LINE, *supra* note 110, at 53, 56.

112. In a 1985 poll, sixty-six percent of blacks surveyed felt that as a group they were "making progress" in America, although sixty-one percent of blacks in leadership positions said the group was "going backwards." Martin Kilson, *Problems of Black Politics: Some Progress, Many Difficulties*, *DISSENT*, Fall 1989, at 526, 527. See generally STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997); Finis Welch, *Half Full or Half Empty? The Changing Economic Status of African Americans, 1967-1996*, in BEYOND THE COLOR LINE, *supra* note 110, at 181 (discussing how the status of African Americans has changed over the past thirty years in re-

Even in the prosperous 1990s, while the economic status of blacks rose, the gap with whites barely narrowed.¹¹³ In some ways conditions have worsened. Unemployment and illegitimacy rates, once approximately equal by race, are now much higher for blacks.¹¹⁴ A large number of blacks now seem to comprise an underclass, unconnected to mainstream American society in school, work, or residence.¹¹⁵

Views diverge about what went wrong. Some consider the second-class status of blacks immutable. Derrick Bell wrote,

Those who urge emigration would not be guilty of exaggeration were they to argue as follows:

*Black people will never gain full equality in this country. Even our most successful efforts will produce no more than temporary "peaks of progress." Given this unassailable truth, blacks need to acknowledge the permanence of their subordinate status.*¹¹⁶

In this view, whites get both material and psychological benefits from repressing blacks.¹¹⁷

If the permanence thesis is correct, it is worse than useless to seek racial progress. Many social problems can be ameliorated; it would be foolish or callous to waste resources on immutable ills. It would also be pointless for blacks (especially the young) to pur-

gards to the labor market). In some categories blacks now earn more than whites with equal credentials. See Abigail Thernstrom, *The Racial Gap in Academic Achievement*, in BEYOND THE COLOR LINE, *supra* note 110, at 259, 261–62.

113. See Roger O. Crockett & Peter Coy, *Progress Without Parity*, BUS. WK., July 14, 2003, at 100.

114. See SANDRA LUCKETT CLARK & MAI WEISMANTLE, U.S. CENSUS BUREAU, EMPLOYMENT STATUS: 2000, CENSUS 2000 BRIEF 5 (Aug. 2003) (showing 3.0% unemployment rate for whites and 6.9% for blacks).

115. See *id.*

116. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 62 (3d ed. 1992).

117. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 7–8 (1992) (discussing racial consciousness of whites); DELGADO & STEFANCIC, *supra* note 101, at 7 (stating that “racism advances the interests of both white elites (materially) and working-class people (psychically)”; ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 60 (1992) (stating that “no white American, including those who insist that opportunities exist for persons of every race, would change places even with the most successful black American”). Such views are not uncommon. “Pessimism is strikingly pervasive in civil rights circles today.” BEYOND THE COLOR LINE, *supra* note 110, at 2. This was not always the case. See *supra* note 110 and accompanying text. Some whites do derive psychic satisfaction and material advantage from the inferior status of blacks. See Carbado & Gulati, *supra* note 3, at 1764 (stating that “race-based employment decisions will not necessarily be motivated by racial animus but by an employer’s interest in realizing the efficiency gains of homogeneity”).

sue education, hard work, and other middle class values that bring success for other Americans. Indeed, if this path is blocked by racism, it may make sense to adopt an oppositional culture that flouts (white) middle class values, seeks solace in substance abuse, and strikes back with crime.¹¹⁸ If the permanence thesis is wrong, it is also counterproductive. "Poorly conceived allegations of racial misconduct . . . spread harmful confusion."¹¹⁹ They may dissuade people from undertaking beneficial action.

Some who do not necessarily embrace the permanence thesis still reject a liberal approach to race problems because they consider it rests on a "[m]istaken belief that sweeping social reform can be accomplished through speech and incremental victories within the system."¹²⁰ In this view, "[e]verything must change at once,' otherwise the system merely swallows up the small improvement one has made, and everything remains the same."¹²¹ It is hard to imagine, though, how everything in our society could change at once, so this position also seems to lead to despair.

B. *Reasons for Hope*

Most Americans, black and white, reject the permanence thesis. Since race is so sensitive an issue, helpful objectivity can be gained by comparing other protracted group conflicts. For centuries France and Germany fought wars that cost millions of lives.¹²² This hostility seemed permanent, but within a few years after World War II, the two were military allies and partners in an economic union that brought unprecedented prosperity to both.¹²³ This development is not unique or even unusual. As one more example, Protestants and Catholics slaughtered each other

118. See *infra* notes 157–63 and accompanying text (discussing the "oppositional culture").

119. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 8 (1997).

120. DELGADO & STEFANCIC, *supra* note 101, at 146 (calling this belief the "empathic fallacy").

121. *Id.* at 57.

122. See John Norton Moore, *Beyond the Democratic Peace: Solving the War Puzzle*, 44 VA. J. INT'L L. 341, 428 (2004).

123. See, e.g., Frans B.M. de Waal, *Evolutionary Ethics, Aggression, and Violence: Lessons from Primate Research*, 32 J.L. MED. & ETHICS 18, 20 (2004).

for centuries.¹²⁴ Today, few even know what these wars were about.

Group hostility ends when each side realizes that it loses from conflict and can gain from cooperation.¹²⁵ That realization, however, comes less from changing individual minds than from changes of generations; a generation committed to endless combat dies off and is succeeded by a generation that sees the futility of strife and the promise of collaboration. This evolution often takes longer than a single generation, and how long it takes depends largely on the wisdom of the leaders of each group.

Progress is slow because people do not naturally see the benefits of cooperation; it is an acquired taste. An old joke tells of a genie who promises to grant a Russian peasant his greatest wish. The peasant does not hesitate; he knows just what he wants—the death of his neighbor's cow. Much of the world still thinks like that, which is why so many group conflicts persist. Conciliation is also blocked by the machinations of those who profit from continued conflict. In Europe's religious wars, for example, many ecclesiastics and soldiers on both sides gained position, power, and prestige from the strife.¹²⁶

Martin Luther King, Jr. understood the importance of cooperation.¹²⁷ Most white Americans now realize that discrimination against blacks is not only harmful to blacks, and unjust, but also damages whites. Whites in the old Confederacy were not the richest white Americans, but the poorest.¹²⁸ Since the end of segrega-

124. See Daniel Philpott, *Religious Freedom and the Undoing of the Westphalian State*, 25 MICH. J. INT'L L. 981, 981 (2004).

125. See *infra* text accompanying note 284.

126. 1 Leonardo Bruni, *Introduction to HISTORY OF THE FLORENTINE PEOPLE* x (James Hankins ed., Harvard Univ. Press 2001).

127. He said: "We must all learn to live together as brothers. Or we will all perish together as fools. We are tied together in the single garment of destiny, caught in an inescapable network of mutuality." Martin Luther King, Jr., *Remaining Awake Through a Great Revolution*, Sermon at the National Cathedral (Mar. 31, 1968), in *A KNOCK AT MIDNIGHT: INSPIRATION FROM THE GREAT SERMONS OF REVEREND MARTIN LUTHER KING, JR.* (Clayborne Carson & Peter Holloran eds., 1998). Derrick Bell agrees that whites will allow black progress when there is a convergence of the interests of both, but he mistakenly believes that such occasions are rare. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980); Derrick A. Bell, Jr., *California's Proposition 209: A Temporary Diversion on the Road to Racial Disaster*, 30 LOY. L.A. L. REV. 1447, 1452 (1997).

128. See Staige Blackford, *One Man's South*, 44 EMORY L.J. 847, 848–49 (1995) (discussing inferior conditions of southern states as compared to their northern neighbors in the nineteenth century).

tion, the condition of Southern whites compared to other white Americans has not deteriorated but improved. Skilled, productive, and prosperous blacks who are integrated into the American economy and society compete with whites for desirable jobs, but they are a much greater asset to the nation than they are as a downtrodden minority.

Blacks can gain even more than whites from cooperation. White Americans alone are numerous and wealthy enough to comprise a market large enough to be efficient. Further, many white-owned American firms operate in global markets, which increases opportunities for profitable exchange. The African-American market by itself is too small to be efficient in most industries and is not well integrated into global markets.¹²⁹

Although African Americans have made economic progress in recent decades, that progress may not accelerate, and may even slow further, unless race relations improve. The ethnic profile of America is changing; Hispanics now outnumber blacks as America's largest minority.¹³⁰ Perhaps blacks can increase their economic and political power by coalescing with other, growing minority groups. The interests of minority groups, however, are not all the same. For instance, racial preferences for blacks in university admissions harms Asian Americans.¹³¹ Further, where the situations of various minorities are similar, they may compete for benefits rather than cooperate.¹³² Because of competition from

129. See generally e. christi cunningham, *Identity Markets*, 45 HOW. L.J. 491 (2002) (describing "identity markets" based on race and the detrimental effects on black workers and the perception of black workers).

130. Press Release, U.S. Census Bureau, *Hispanic Population Reaches All-Time High of 38.8 Million, New Census Bureau Estimates Show* (June 18, 2003), available at http://www.census.gov/Press-Release/www/releases/archives/hispanic_origin_population/001130.html. (last visited Apr. 2, 2005); see also Haya El Nasser, *39 Million Make Hispanics Largest U.S. Minority Group*, USA TODAY, June 19, 2003, at A1.

131. See Linda Chavez, *Promoting Racial Harmony*, in THE AFFIRMATIVE ACTION DEBATE 314, 320 (George E. Curry ed., 1996) (citing a University of California report stating "Asian-American admissions would increase by 15 to 25% if the university based its decisions on academics and socioeconomic status but not race"); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 68 (2002) ("Increasingly, affirmative action in effect punishes the stunning academic and economic achievements of many Asians by excluding them, like whites, from eligibility for preferences.").

132. See NICOLÁS C. VACA, *THE PRESUMED ALLIANCE: THE UNSPOKEN CONFLICT BETWEEN LATINOS AND BLACKS AND WHAT IT MEANS FOR AMERICA* 11-12 (2004); MARK R. WARREN, *DRY BONES RATTLING: COMMUNITY BUILDING TO REVITALIZE AMERICAN DEMOCRACY* 27 (2001) (documenting frequent political competition between blacks and other minority groups).

immigrant workers, for example, blacks have fled regions of high immigration.¹³³ The growing number and variety of ethnic minorities in America may dilute the empathy of whites for African Americans.

Current demographic trends reinforce a national ideological shift toward social libertarianism and economic conservatism. Although racial preferences in hiring and admissions for blacks and some other minorities are common, antipoverty programs are out of fashion in both political parties. Thus it was a Democratic president, Bill Clinton, who declared an end to "welfare as we know it."¹³⁴ While social welfare spending has increased for programs like drug benefits for the elderly that benefit the broad middle class,¹³⁵ they do not particularly aid blacks, especially poor blacks.¹³⁶ To the extent that whites acknowledge any debt to blacks, they are likely to feel that this debt is being discharged by racial preferences in employment and school admissions and minority set-asides for government contracts. These programs, too, confer little benefit on the poor.

In sum, the neglect of race relations is not benign for blacks. Progress toward racial equality will require special efforts entailing increased trust and cooperation between the races.

133. See Steven A. Holmes, *Immigration Fueling Cities' Strong Growth, Data Show*, N.Y. TIMES, Jan. 1, 1998, at A10 (noting "debate over whether increased competition for jobs in areas where immigrants have clustered is pushing out people who are already living there, or whether those who depart would have left anyway, lured by better economic prospects elsewhere"); Kenneth B. Noble, *Blacks Say Life in Los Angeles Is Losing Allure*, N.Y. TIMES, Jan. 8, 1995, at A1 (reporting emigration of blacks from Los Angeles to neighboring counties and out of state and movement of Hispanics into formerly black neighborhoods). Many employers prefer immigrant workers to African Americans. "Employers perceive a stronger work ethic among immigrants of all racial groups, and a greater willingness to accept and retain low-wage jobs." Harry J. Holzer & Paul Offner, *The Puzzle of Black Male Unemployment*, 154 PUB. INT. 74, 76 (2004).

134. Jason DeParle, *The Clinton Welfare Bill: A Long, Stormy Journey*, N.Y. TIMES, July 15, 1994, at A1.

135. See Medicare Prescription Drug Improvement and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (2003).

136. See, e.g., Robert Conot, *Saul Alinsky Lives: Populist Groups Go Back to Basics, Revive Poverty War*, L.A. TIMES, Sept. 17, 1989, at 3.

C. Sources of Mistrust

There is ample reason for racial mistrust in America. People naturally fear those who differ from themselves,¹³⁷ so some racial mistrust is probably instinctive. More important are the “history effects”¹³⁸ of slavery, Jim Crow segregation, discrimination and charges of innate racial inferiority. Whites who have not contributed to this history are hurt if they are personally mistrusted; they feel this mistrust is irrational. To make sense of the world, however, all people use heuristic devices to place things in categories.¹³⁹ In other words, all people employ stereotypes. In cases of group hostility, people distrust all members of the opposing group.

In part, this is rational, even necessary. Even if one realizes that most members of the other group are not dangerous, some of the others *are* dangerous and one cannot tell which those are. The costs of an injury (whether physical, financial, or emotional) from mistaken trust usually exceed the benefits of mistaken mistrust. Most people are risk averse, so mistrust of all members of the other group is often an individually rational choice. People who distrust another often construe ambiguous behavior to confirm the distrust. An innocent glance may be construed as a hostile glare or a lascivious leer. If a white waitress is rude to all customers, a white customer will probably conclude that the waitress is rude to everyone. A black customer, though, may assume that the waitress is rude only to African Americans.

Stereotypes distort reasoning even if (perhaps especially if) they are unconscious.¹⁴⁰ Stereotypes “undermine an observing agent’s ability to see . . . [the stigmatized] as a person possessing a common humanity with the observer—as ‘someone not unlike

137. See *supra* notes 28–30 and accompanying text.

138. See Gautschi, *supra* note 41, at 132–33 (theorizing that “history effects” impact people’s choices about the future).

139. See DIANE ACKERMAN, AN ALCHEMY OF MIND: THE MARVEL AND MYSTERY OF THE BRAIN 54–59 (2004) (describing how the human brain, in order to make sense of the world, seeks patterns).

140. “Attitudes about stereotypic characteristics of groups of people can influence the way we behave, without our having any awareness of this influence, or even of the attitudes themselves.” JANICE NADLER, FLOUTING THE LAW: DOES PERCEIVED INJUSTICE PROVOKE GENERAL NON-COMPLIANCE? 24 (Northwestern School of Law, Law & Econ. Research Paper No. 02-9, 2002), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=353745 (last visited Apr. 2, 2005).

the rest of us.”¹⁴¹ Negative stereotypes create “stereotype threat,” that is, fear and self-doubt that cause victims to perform less well than they otherwise would when subject to scrutiny.¹⁴² False stereotypes can be corrected. Familiarity with members of another group generally reduces negative attitudes about the group.¹⁴³ For both blacks and whites, the more acquaintances they have among the other race, the more likely they are to have positive attitudes about that race.¹⁴⁴ Unfortunately, racial integration is uncommon in America today; perhaps even less common now than a few decades ago. Racial separation was initially imposed by whites and to some extent still is, but is now often chosen by blacks.

Racial separation is a cause as well as an effect of racial strife. Same-group identity encourages people to cooperate; different-group identity impairs cooperation.¹⁴⁵ “Multiculturalism,” which is so fashionable now, especially in academia, often has the latter effect. Multiculturalism holds that people (at least nonwhites) derive meaning and values from their cultural identity group—typically an ethnic or religious group.¹⁴⁶ This causes social “fragmentation”¹⁴⁷ and “denial of the idea of a common culture and a

141. GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 67 (2002).

142. See generally *id.* at 17–54 (detailing how stereotypes affect the holder as well as the object).

143. See C. DANIEL BATSON, *THE ALTRUISM QUESTION: TOWARD A SOCIAL-PSYCHOLOGICAL ANSWER* 218–19 (1991). Of course, those who begin with more positive attitudes about the other race are likely to develop more acquaintances among its members, so causation runs both ways.

144. See *id.*

145. See Sally, *supra* note 21, at 68, 78.

146. For example, one major academic organization urged “the study of one’s own particular inherited and constructed traditions [and] identity communities.” ASS’N OF AMERICAN COLL. AND UNIV., *THE DRAMA OF DIVERSITY AND DEMOCRACY: HIGHER EDUCATION AND AMERICAN COMMITMENTS* xx–xxii (1995); see also Ramin Afshar-Mohajer & Evelyn Sung, *The Stigma of Inclusion: Racial Paternalism and Separatism in Higher Education*, TEX. EDUC. REV., Winter 2003–04, at <http://www.educationreview.homestead.com/2003stigma.html> (last visited Mar. 29, 2005) (describing various college programs that encourage minority students to cultivate a separate ethnic identity). These programs not only divide minorities from whites but also fracture minorities into smaller and smaller identity groups.

147. ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* 21 (rev. ed. 1998); see also SELIGMAN, *supra* note 31, at 155 (arguing that multiculturalism points to “a reemergence of group identities” that are “contrary to those classic ideas of the individual that we associate with bourgeois political forms and that were indeed essential to that mode of social organization”). “The problem with multiculturalism as it is practiced in the American educational system is that its underlying objective is not to understand but to validate the non-Western cultures of America’s various ethnic and racial minorities.” FUKUYAMA, *supra* note 4, at 320.

single society.”¹⁴⁸ Arthur Schlesinger wrote: “[w]atching ethnic conflict tear one nation after another apart, one cannot look with complacency at proposals to divide the United States into distinct and immutable ethnic and racial communities, each taught to cherish its own apartness from the rest.”¹⁴⁹

Expressions of despair like Professor Bell’s become self-fulfilling prophecies.¹⁵⁰ One who despairs does not bother to strive for racial progress. Statements that racism is immutable also undermine trust. If whites profit from racial discrimination, blacks properly suspect that expressions of racial goodwill by whites are tricks to divert black resistance or, at best, naive self-delusion.¹⁵¹ Such attitudes persuade John McWhorter that “black America is currently caught in certain ideological holding patterns”—chief among them being the ideology of permanent victimhood—and that these today are ‘much more serious barriers to black well-being than is white racism.’”¹⁵² Again: “Mistrust tends to feed on itself.”¹⁵³

Racial hostility affects behavior in other ways. Some black youth who think that paths to success open to others are closed to them take alternate routes (like crime) or abandon hope and seek solace in drugs.¹⁵⁴ Racial animus affects not only the choices people have (or think they have) but also the values they weigh in making choices. Again, those who think society treats them fairly tend to accept and follow society’s rules, even when they could profit by breaking the rules; but those who feel abused often retaliate, even if they know retaliation will cost them.¹⁵⁵

148. SCHLESINGER, *supra* note 147, at 141.

149. *Id.* at 22; see also FUKUYAMA, *supra* note 4, at 272 (stating that “ethnic diversity can be a serious obstacle to the development of a common culture”).

150. See *supra* note 116 and accompanying text.

151. Thus black parents teach their children “to be cynical, skeptical, and on guard toward White people and White-controlled institutions, including the public schools, as well as toward Black authorities in the system whom they regard as White representatives.” JOHN U. OGBU, *BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT* 41 (2003). As a result, “students did not view their present schooling as a preparation for their future Rarely did students make the connection between their school career and what they wanted to be in adult life.” *Id.* at 167.

152. John H. McWhorter, *Still Losing the Race?*, COMMENTARY, Feb. 2004, at 37.

153. See *supra* text accompanying note 43.

154. See OGBU, *supra* note 151, at 159–60.

155. See *supra* note 23 and accompanying text.

Victims of stereotypes often respond in ways that confirm the stereotype, thereby creating a “feedback loop.”¹⁵⁶ Some blacks have adopted an “oppositional culture” shaped by hostility to white culture.¹⁵⁷ Many black students claim doing well in school is “acting white.”¹⁵⁸ This attitude helps explain why blacks do worse than whites even when socio-economic differences are factored out.¹⁵⁹

Oppositional culture corrodes relations within the minority group. Many blacks express admiration for black criminals as rebels against the white power structure.¹⁶⁰ Most victims of black criminals, however, are themselves black, despite denunciation by black leaders of black-on-black crime.¹⁶¹ This crime also sours whites’ attitudes toward blacks.¹⁶² The oppositional culture is profitable for some.¹⁶³

156. See LOURY, *supra* note 141, at 26–27, 105, 160; see also BAKARI KITWANA, *THE HIP HOP GENERATION: YOUNG BLACKS AND THE CRISIS IN AFRICAN AMERICAN CULTURE* 137–40 (2002) (stating that the oppositional culture (including gangster rappers) glories in and flaunts many black stereotypes).

157. For discussions of oppositional culture, see FREDRICK C. HARRIS, *SOMETHING WITHIN: RELIGION IN AFRICAN-AMERICAN POLITICAL ACTIVISM* 133–53 (1999); YANICK ST. JEAN & JOE R. FEAGIN, *DOUBLE BURDEN: BLACK WOMEN AND EVERYDAY RACISM* 36–39 (1998).

158. See OGBU, *supra* note 151, at 85. Professor Ogbu reported that nearly half the black high school students interviewed in an affluent suburb believed that “highly educated Blacks and successful Black professionals in White establishments and institutions gave up or abandoned their culture and racial identity.” *Id.* at 206–07. They believed “[i]t was not cool to work hard in school or be academically engaged.” *Id.* at 213. This view is not limited to conservatives. See *THE BLACK-WHITE TEST SCORE GAP* 24, 45–46 (Christopher Jencks & Meredith Phillips eds., 1998) (stating that black students will perform better if their parents change the way they “deal with their children”); Bob Herbert, *Breaking Away*, N.Y. TIMES, July 10, 2003, at A23 (“[T]his perverse peer pressure to do less than your best in scholarly and intellectual pursuits is holding back large numbers of black Americans, especially black boys and men.”). Black students perform better in schools that require parents to support academic effort. See *BEYOND THE COLOR LINE*, *supra* note 110, at 270 (reporting the experience of KIPP Academy in New York City).

159. See OGBU, *supra* note 151, at 34–36.

160. See KENNEDY, *supra* note 119, at 26–27 (referring to the popularity of criminals in black culture); Regina Austin, *The Black Community’s Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1776 (1992) (referring to “a subtle admiration of criminals” among many blacks); Mark Naison, *Outlaw Culture and Black Neighborhoods*, 1 RECONSTRUCTION 128, 128–30 (1992) (explaining the “outlaw culture” that has developed among black youth).

161. See JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* 38 (1996); see also John J. DiIulio, Jr., *The Question of Black Crime*, 117 PUB. INT. 3, 7 (1994); Adam Walinsky, *The Crisis of Public Order*, ATLANTIC MONTHLY, July 1995, at 39, 47.

162. See Christopher A. Bracey, *Thinking Race, Making Nation*, 97 NW. U. L. REV. 911, 929 (2003) (reviewing GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (2002))

Resentment of another's success is common to humans, especially when the other resembles ourselves. A poor black may more easily accept the success of whites, which seems to confirm racial injustice, than the success of fellow blacks, which shows that success for blacks is possible, so that those who fail should blame themselves. Some black students who deprecate education pressure other blacks to do likewise, a phenomenon called the crab-bucket syndrome.¹⁶⁴ Ironically, this practice mimics the racial repression of the old South by punishing blacks who show any ambition or initiative. Some blacks also resent black entrepreneurs and deny them patronage. This helps explain why black entrepreneurs are often less successful in their own neighborhoods than immigrant competitors.¹⁶⁵

Psychological damage to blacks helps to explain an apparent paradox:

[W]hile whites complain that blacks are too race conscious, the African-American problem has been, in a way, that blacks have never been race conscious enough to stick together in tightly knit economic organizations. . . . [T]here are not the same traditions of trust and solidarity linking black merchants with their customers as in America's ethnic communities. Not only are blacks mistrusted by the surrounding white community, but . . . they mistrust one another.¹⁶⁶

Again, altruism thrives when benefactors feel that beneficiaries are like themselves and deserve help because they act responsi-

("Nothing has proven more corrosive of modern American race relations than the perceived link between blackness and rampant criminality.").

163. Today the protest identity is a career advantage for an entire generation of black intellectuals, particularly academics who have been virtually forced to position themselves in the path of their university's obsession with "diversity." Inflation from the moral authority of protest, added to the racial-preference policies in so many American institutions, provides an irresistible incentive for black America's best minds to continue defining themselves by protest. Shelby Steele, *The Age of White Guilt and the Disappearance of the Black Individual*, HARPER'S, Nov. 2002, at 33, 38. Black intellectuals who reject this identity risk the "fate of invisibility." *Id.*

164. See, e.g., Ron Suskind, *Against All Odds: In Rough City Schools, Top Students Struggle to Learn—and Escape*, WALL ST. J., May 26, 1994, at A1 (describing instances of the syndrome).

165. "[T]he lack of a black entrepreneurial class has for long been a staple of the sociological literature." FUKUYAMA, *supra* note 4, at 297; see also Ezra W. Zuckerman, *On Networks and Markets* by Rauch and Casella, eds., 41 J. ECON. LITERATURE 545, 556 (2003) (referring to "the well-known weakness of African American (retail) entrepreneurship [that] may result in part from the absence of [ethnic] networks").

166. FUKUYAMA, *supra* note 4, at 295–96.

bly.¹⁶⁷ Separationism and the oppositional culture reduce the altruism of whites by making blacks more distant and different from whites. Since altruism is contagious,¹⁶⁸ declines in altruism trigger a chain reaction. The downward spiral is fed by declarations like Professor Bell's that racial progress is impossible because people are less altruistic if they think altruism can do no good: "the greater the perceived benefit to others, the greater the incidence of cooperation."¹⁶⁹

In the logic of the oppositional culture, victim status may become a goal itself. Many cultures glorify victims; the veneration of martyrs in Christianity and Islam is one example.¹⁷⁰ The multiculturalism now in fashion requires victim status, whether based on race, gender, class, or sexual preference. Victim status seems especially desirable when the alternative is mundane. Racial equality for blacks means moving into middle class existence with jobs like accounting, mowing the lawn, and paying the kids' dentistry bills. This type of lifestyle may seem unappealing, particularly as contrasted with the heroic age of protest in the civil rights movement.¹⁷¹ Thus, there is ambivalence about whether equality is desirable.

There is also ambivalence about how to achieve equality. For a disadvantaged group to commit to improve itself seems to concede some fault for its problems. Even blacks who favor greater self-help hesitate to say so for fear of abetting "blaming the victim."¹⁷² The group may, therefore, insist that all concessions come from the dominant group. This attitude seems to underlie demands of some blacks for reparations.¹⁷³ On the other hand, a "gift" of equality does not restore honor.¹⁷⁴ To accept relief as charity be-

167. See *supra* notes 68–70 and accompanying text.

168. See *supra* note 72 and accompanying text.

169. Stout, *supra* note 6, at 13.

170. Thus it is said that Palestinian leader Yasser Arafat "prefer[red] to play the victim rather than the statesman." Thomas L. Friedman, Editorial, *Arafat's War*, N.Y. TIMES, Oct. 13, 2000, at A33.

171. See KITWANA, *supra* note 156, at 153 (describing the effects of the civil rights movement as "large and transformative").

172. See Risa E. Kaufman, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusions Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301, 310 (1997).

173. See KITWANA, *supra* note 156, at 25–26 (stating that some black Americans' desires for reparations are fueled by the lack of economic equality, even during a time of American economic growth).

174. Bracey, *supra* note 162, at 934 ("As both Tocqueville and Patterson observed, the

lies the claim that one is a victim and entitled to relief. To demand relief as a right is coercive, however, and donors resist coercion. Thus, a dispute about whether to label relief as charity or reparations can thwart agreement even if the parties can settle on the amount of relief.

Heuristic biases further complicate race relations. People want to be fair but tend to favor themselves in gauging what is fair. Thus people give themselves too much credit when they succeed and too little blame when they fail,¹⁷⁵ and they underestimate the obstacles to success that others face. This bias abets the belief of many whites that many blacks do not deserve help. Blacks may overstate the obstacles they face and underestimate their ability to overcome obstacles.

D. *The Difficulty of Dialogue*

When trust is deep, people can discuss and usually resolve disputes. Mistrust feeds on itself, however, making it hard even to discuss reconciliation. Because of the sad history of race relations in America, discussions about race tend to be aggressive and acrimonious, and lawyers tend to be among the most rigid and dogmatic participants. Professor Burlette Carter believes:

[Whites] are often stunned by a guilt that they are not sure is their own, but that they feel as deeply as if it were. And we [African Americans] are left angry—at ourselves for expecting mutual vulnerability—and at them for, once again, we believe, shifting the focus of our comments from our pain to their guilt. And so the next time . . . we simply say nothing at all.¹⁷⁶

Professor Carter also refers to “the impasse that African Americans know exists between them and whites in public conversation, an impasse indicative of a larger life separation.”¹⁷⁷

Ironically, the wealth of opportunities for mutually beneficial racial cooperation is a problem. When both sides realize that the

bestowal of freedom and civil rights do little to restore honor.”).

175. “People care about fairness, but their judgments about fairness are systematically biased in their own direction.” SUNSTEIN, *supra* note 87, at 21.

176. W. Burlette Carter, *What’s Love Got To Do with It? Race Relations and the Second Great Commandment*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 133, 134 (Michael W. McConnell et al. eds., 2001).

177. *Id.* at 135.

range between their reservation points (points beyond which an agreement is not beneficial) is narrow, there is little to negotiate. When the range is broad, though, each side may haggle endlessly in pursuit of an agreement more favorable to itself and closer to the other's reservation point.¹⁷⁸

IV. THE UNCERTAIN GOALS

Deep trust is needed only for collaboration to pursue complex goals. If there is no shared goal—if, say, the goal is only to avoid interracial conflict—deep trust is unnecessary. Discussions of race in America often assume an agreed goal, such as equality. The meaning of equality is notoriously elastic, however.¹⁷⁹ As in the famous case of the two ships called *The Peerless*,¹⁸⁰ two people may use the same word but mean very different things.

Acceptance of minorities by the majority in America is conditioned on assimilation.¹⁸¹ Assimilation entails acceptance of established standards of conduct—speech, dress, and manners—and of certain values associated with Protestantism.¹⁸² Protestants formed “the mold within which American culture as such was cast in the nineteenth century, and other religious groups like Catholics and Jews who had no experience of voluntaristic religion in Europe gradually came to share similar qualities . . . they assimilated the same value system.”¹⁸³

Assimilation allows some cultural distinctiveness; Italian Americans did not have to abandon opera in order to be accepted in America. In practice, however, group identity declines and often virtually vanishes. For example, except for a few innocuous cultural festivals, there is no identifiable Scottish American or

178. See RUSSELL B. KOROBKIN & JONATHAN ZASLOFF, ROAD BLOCKS TO THE “ROAD MAP”: A NEGOTIATION THEORY PERSPECTIVE ON THE PAST FAILURE AND FUTURE PROSPECTS OF “LAND FOR PEACE” 38 (UCLA Sch. of Law, Law & Econ. Research Paper No. 04-4, 2004), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=512064 (last visited Apr. 2, 2005).

179. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982).

180. *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (1864).

181. See Reed Ueda, *Immigration and Group Relations*, in BEYOND THE COLOR LINE, *supra* note 110, at 37, 37.

182. See BELL, *supra* note 116, at 58–59.

183. FUKUYAMA, *supra* note 4, at 293.

Dutch American community.¹⁸⁴ Many consider assimilation benign, especially as compared to oppression of the minority. Many African Americans, however, want to preserve their culture rather than be engulfed by the white majority.¹⁸⁵

For decades a primary goal of the civil rights movement was racial integration. As de jure segregation ended, though, many blacks shunned integration except in government and the workplace; they accepted or preferred separate residential and social communities. No doubt, this attitude stemmed in part from the persistent indifference or hostility of whites to integration. The arrival of any substantial number of blacks in a neighborhood or public school routinely precipitated "white flight."¹⁸⁶

Separation is now common not only in neighborhoods, schools, and churches but even in universities. Many have dormitories and academic and extracurricular programs dedicated primarily to blacks.¹⁸⁷ This separation finds theoretical justification in multiculturalism's insistence on a strong group identity.¹⁸⁸ Separation also appeals to some black politicians and academics (called "race men"¹⁸⁹) whose positions depend on continuing racial tension.

Separation entrenches racial tension. As noted earlier, trust and cooperation are easier between people who know each other and consider themselves similar;¹⁹⁰ racial separation makes trust and cooperation harder. Separation does economic harm to minorities. Many black neighborhoods are distant from most jobs, especially better paying jobs.¹⁹¹ High unemployment, broken families, low commitment to education, and rampant drug abuse

184. See Reed Ueda, *Immigration and Group Relations*, in *BEYOND THE COLOR LINE*, *supra* note 110, at 39.

185. See generally Philomena Essed & David Theo Goldberg, *Cloning Cultures: The Social Injustices of Sameness*, 25 *ETHNIC & RACIAL STUD.* 1066 (2002).

186. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 515 (1992) (Blackmun, J., concurring) (accepting the term "white flight" to describe the migration of whites from mixed race areas to the suburbs).

187. See Afshar-Mohajer & Sung, *supra* note 146, at 5–23 (documenting racial separation in campus programs and facilities).

188. See *supra* note 146 and accompanying text.

189. See *HAZEL V. CARBY, RACE MEN* 4 (1998).

190. See *supra* notes 29–31, 45 and accompanying text.

191. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 42 (1987); see also Andrew Hacker, *Saved?*, *N.Y. REV. BOOKS*, Aug. 14, 2003, at 22, 24 (stating that there are "several reasons" for the racial gap in academic performance but that "at the center is the racial isolation" of African Americans).

and crime in these communities leave young people few good role models. It is hard for them to learn the keys to economic success since they have little contact with the business and professional worlds and major nonprofit organizations. Higher education helps blacks who pursue it to overcome these obstacles, but the racial separation common on American campuses now reduces that benefit.

Most whites dislike separationism and favor assimilation for blacks and other minorities, even though whites created segregation and still often reinforce it. Although African Americans have a right to resist assimilation, American principles guarantee a right to pursue happiness, not to economic equality.¹⁹² It is accepted that individual economic success is tied to adoption of middle class norms.¹⁹³ Economic success of a group also requires that it follow these norms.¹⁹⁴ Many whites will not be troubled by economic inequality between the races if many blacks reject these norms and embrace an ethic that hinders economic progress.

We do not need comprehensive agreement on cultural assimilation or on all other goals, however; indeed, it is common for parties who lack trust to begin with limited cooperation.¹⁹⁵ Blacks and whites can agree on many steps even if they disagree on others. Further, attitudes are not uniform among either blacks or whites; opinions diverge widely in each group. Since it is reasonable for any group to resist the imposition of another culture, it must be stressed that there is nothing inherently "white" about these values. Though once identified with Protestantism,¹⁹⁶ they were never embraced by all American Protestants, and Francis Fukuyama says that they "later became deracinated from those ethnoreligious roots and became a broadly accessible identity for all America."¹⁹⁷

192. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

193. See Daniel Markovits, *How Much Redistribution Should There Be?*, 112 YALE L.J. 2291, 2295–97 (2003) (referring to consensus among philosophers that equality should correct for luck but not for morally responsible choices).

194. Multiculturalism, including black separatism, "represent[s] a mode of identity contrary to those classic ideas of the individual that we associate with bourgeois political forms and that were indeed essential to that mode of social organization." SELIGMAN, *supra* note 31, at 155.

195. See *supra* note 62 and accompanying text.

196. See *supra* text accompanying note 183.

197. FUKUYAMA, *supra* note 4, at 270.

The only error in this statement is that, while these values did abet the "rise of the United States as a dominant global economic power,"¹⁹⁸ they are not uniquely American. They are what Max Weber called the Protestant Ethic, to which he credited the economic rise of northwestern Europe.¹⁹⁹ This ethic, however, is also not inherently Protestant or European. The economic ascent of Japan, South Korea, Taiwan, Hong Kong, and Singapore is attributed to similar values, which are said to stem from the indigenous culture.²⁰⁰ These are simply values that promote success in a capitalist democracy. Urging people to adopt these values does not imply that they were previously doing anything wrong. For individuals, groups, and entire nations, external conditions beyond their control often preclude prosperity. Only when these conditions are removed do values determine economic success.²⁰¹

V. BUILDING INTERRACIAL TRUST AND EMPATHY

Despite many difficulties, there are some sources of interracial trust and empathy in America today, and the literature on trust and altruism suggests techniques to build on them.

A. *Existing Sources of Trust and Empathy*

Race relations in America are not unrelievedly bleak. There has been progress, albeit slow and uneven.²⁰² Many Americans feel trust and empathy for and behave altruistically toward other races in general or at least to personal acquaintances of a different race or to institutions that promote interracial empathy. Trust can take root and grow when two sides share basic norms. Despite the important differences already mentioned, "there are many more beliefs, dreams, and views that whites and nonwhites

198. *Id.*

199. See generally MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parson trans. 1930).

200. See FUKUYAMA, *supra* note 4, at 182–83. Japanese Buddhism promoted an ethic "comparable to early Puritanism" in the West. Furthermore, it is still "critical to the success of Japanese export industries." *Id.* "All East Asian cultures share a similar work ethic." *Id.* at 343.

201. See *infra* notes 230–31 and accompanying text.

202. See *supra* notes 114–15 and accompanying text.

of all colors share than those that divide them.”²⁰³ On many issues—such as school prayer, school vouchers, abortion, and concern about crime, violence, and drugs—African Americans are more conservative than whites.²⁰⁴

Religion influences behavior as well as attitudes: “Religion, independent of social class, reduces deviance.”²⁰⁵ African Americans have deep religious beliefs, primarily Christian.²⁰⁶ White Americans, too, are highly religious (at least compared to other Western peoples), as are Hispanics, who are now America’s largest ethnic minority.²⁰⁷ Judeo-Christian values are deeply ingrained in Western culture, especially in America. These values were openly avowed by the Founders. The Declaration of Independence proclaims that all people “are created equal” and “endowed by their Creator with certain inalienable Rights,” including “Life, Liberty and the pursuit of Happiness.”²⁰⁸ Even Americans who reject Jewish and Christian religions accept these values. Thus, religion can be a powerful adhesive.

The religious commitment shared by black and white Americans is the source of much of the good in our race relations. The abolitionists appealed not to secular beliefs but to Christianity as they persuaded western nations (including, eventually America) that slavery, though common across the globe throughout history, was immoral.²⁰⁹ Martin Luther King, Jr. and the civil rights

203. ETZIONI, *supra* note 80, at 7.

204. *Black Magic*, ECONOMIST, July 15, 2000, at 29, 30; see also Ralph R. Reiland, *Crime and Race*, 45 FREEMAN 516, 517 (1995) (stating that blacks are conservative on crime issues); John M. McWhorter, *Why Blacks Should Give Bush a Chance*, CITY J., Spring 2001, at 28 (stating that blacks favor school prayer); Juan Williams, *Bush Shouldn't Write Off the Black Vote*, N.Y. TIMES, June 16, 2004, at A21 (noting that many blacks support school vouchers).

205. John J. DiIulio Jr., *Supporting Black Churches*, in BEYOND THE COLOR LINE, *supra* note 110, at 156. “Among the most important [African-American institutions] historically have been various black churches and religious groups, which have provided an important counterweight to the atomizing forces to which the community was subject.” FUKUYAMA, *supra* note 4, at 303.

206. See, e.g., The Pew Forum on Religion & Public Life, *Religion and Politics: Contention and Consensus*, at <http://pewforum.org/publications/surveys/religion-politics.pdf> (last visited Apr. 2, 2005).

207. See *supra* note 130 and accompanying text.

208. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see RICHARD VETTERLI & GARY BRYNER, IN SEARCH OF THE REPUBLIC: PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT 4, 47 (1987) (describing the Founders’ belief in religion as a source of public virtue).

209. See RODNEY STARK, FOR THE GLORY OF GOD: HOW MONOTHEISM LED TO REFORMATIONS, SCIENCE, WITCH-HUNTS, AND THE END OF SLAVERY 338–59 (2003).

movement preached Judeo-Christian ideals to convince America that Jim Crow segregation was a sin.²¹⁰ These ideals also hold that it is not enough to grant others legal freedom. God commands us to “give to the poor.”²¹¹ Not surprisingly, then, religious Americans are more inclined to undertake charitable activity.²¹²

The duty of brotherhood extends beyond our relatives, tribes, countrymen, or our ethnic or racial group. It is universal, embracing even members of rival tribes, like the injured Levite who the Good Samaritan rescued.²¹³ As St. Paul said, in Christianity “[t]here is neither Jew nor Greek,” all mankind is one.²¹⁴ We are commanded to forgive, to “[l]ove your enemies, [and] do good to them which hate you.”²¹⁵ In racial conflict, where normal human tendencies are to be aggressive, uncooperative, and stingy—attitudes that breed fear and hostility—Judeo-Christian principles can promote trust and altruism. Not all nominal Jews or Christians work to overcome racial injustice. Religious beliefs vary, and although Judeo-Christian ideals spearheaded abolition and the civil rights movement, their opponents also appealed to religion and still do.

The appeal to religion does not mean that atheists should be excluded from racial dialogue or that religion should be established by government. Most nonreligious Americans accept norms like liberty and equality that stem from the Judeo-Christian tradition. Government grants to religiously-affiliated institutions make sense when they are the best candidates to implement social programs, but this does not establish religion. Interracial dialogue need not even refer to religion; if trust is strong, shared values become axiomatic. Judeo-Christian ideals do not delineate a specific, comprehensive social program, so theological allies can disagree on policies. Still, shared faith gives black and white Americans both motive and means to cooperate.²¹⁶

210. See David A.J. Richards, *Ethical Religion and the Struggle for Human Rights: The Case of Martin Luther King, Jr.*, 72 *FORDHAM L. REV.* 2105, 2151 (2004) (stating that Dr. King “drew upon something that American whites and blacks deeply shared: constitutionalism and a religion that was broadly Judaeo-Christian”).

211. *Matthew* 19:21.

212. See DiIulio, *supra* note 205, at 155.

213. *Luke* 10:30–37.

214. *Galatians* 3:28.

215. *Luke* 6:27.

216. See WARREN, *supra* note 132, at 27 (describing success of local interracial coalitions).

Differences of opinion between black and white Americans often stem more from disparities in socio-economic factors like income, education, and occupation than from race per se.²¹⁷ Trust can develop between subgroups,²¹⁸ including members of different races who are similar with respect to these social factors and, therefore, likely to have similar values. There are two caveats, however: first, there are areas of disagreement, including some of the most sensitive issues in race relations;²¹⁹ second, shared values are not the same thing as shared opinions.

[N]umerous surveys indicate that poor Americans on welfare have similar attitudes toward work, thrift, and dependence that middle-class people do. But having the opinion that it is important to work hard is different from having a work ethic, that is, being habituated to getting up early in the morning to go to a dull or unpleasant job and deferring consumption for the sake of long-term well-being.²²⁰

Thus, people who profess similar values may react differently to initiatives and incentives.

On the other hand, people can agree on a policy even if they disagree on the reasons for the policy. “[W]hile various groups in a society may hold to different ultimate values, they may be able to agree to support the same public policies, albeit on different grounds.”²²¹ Such agreement is common in pluralistic democracies.

B. *Increasing Interracial Trust and Empathy*

How can the techniques for building trust and empathy be used to improve race relations in America? An initial step is to get the two sides better acquainted in settings that highlight their mutual goodwill, common values, and interests and discourage dis-

tions despite significant sectarian theological differences).

217. *See id.* at 25–26.

218. *See supra* notes 28–35 and accompanying text.

219. *See* WARREN, *supra* note 132, at 15.

220. FUKUYAMA, *supra* note 4, at 38 (footnotes omitted); *see also* Lawrence M. Mead, *A Biblical Response to Poverty*, in *LIFTING UP THE POOR: A DIALOGUE ON RELIGION, POVERTY & WELFARE REFORM* 53, 66–67 (2003) (stating that the poor express the same attitudes about work as the better-off, “[b]ut for obscure reasons, the poor often fail” to work, to educate themselves and support their families).

221. ETZIONI, *supra* note 80, at 245. In such cases, however, consensus is more fragile than it is when both groups share the same values.

putes. Cultural differences can be explored respectfully. Each side must take care not to imply its own superiority or to deprecate the other side. Multiculturalism and activities exhibiting cultural diversity can serve these purposes and so combat the deprecation of African and African-American people and culture. Sometimes, though, these efforts belabor supposed evils of Western civilization.²²² This should be avoided.

A policy against disputes may itself spark disagreement. Aggrieved people want their grievances to be addressed. If, for instance, a marriage counselor advises a troubled couple not to discuss violence in their relationship because they disagree about it, an abused spouse may justly feel that violence is the source of their trouble and that the marriage cannot survive without discussing it. In race relations, a key issue is whether racial inequality stems from white racism or from insufficient effort by African Americans. Although this is a fair question, the discussion often collapses into a blame game of mutual recrimination that destroys trust and respect and blocks agreement or cooperation.²²³

No answer to this question can please everyone, but a partial answer may satisfy many. Part of the problem is conflicting conceptions of "racism." Most whites relate it to current conduct. Seeing how much racial discrimination and prejudice have declined, they deny that racism is still common. Whites must acknowledge, however, that the subordinate status of blacks stems not from moral or intellectual inferiority, but from history. People of any race who are denied education, skilled employment, and equal protection of the law cannot thrive as do those who have enjoyed these benefits.

This is true not only for groups within a society, but of entire nations. Current economic disparities among European countries show the irrelevance of race in this regard. Nations recently freed from Soviet enslavement lag far behind nations long free.²²⁴ Un-

222. See *supra* notes 145-49 and accompanying text.

223. Thus Julian Bond, then chairman of the National Association for the Advancement of Colored People, decried the "new racists," [who] see continuing black-white disparities as the consequence of 'family breakdown,' a 'lack of middle-class values,' a paucity of 'education and skills,' and of the 'absence of role models.'" See *BEYOND THE COLOR LINE*, *supra* note 110, at 6. "[T]hese are symptoms. Racism is the cause; its elimination is the cure." *Id.*

224. See *Unicef Warns of Poverty-Struck Kids in East Europe and Ex-USSR*, ANSA MEDIA SERVICE, Oct. 21, 2004.

fortunately, people freed from oppression are often slow to embrace the individual habits that bring success in a free society and the political programs of liberal, capitalist democracy.²²⁵ A good example is eastern Germany, which still lags behind the west despite national reunification. Eastern Germans lack the work ethic, initiative, thrift, and solicitude for clients and customers that western Germans have.²²⁶ This is not surprising. These traits do not come naturally to humans; they must be learned, and not primarily in formal schooling, but in the family and community as one grows up.

The economic success of some Asian nations is also instructive. These nations were once poor by American standards because of conditions beyond their control. When conditions changed, they achieved economic growth (despite a dearth of natural resources) by promoting education, industry, enterprise, thrift, and cooperation.²²⁷

Once, it was not only pointless but dangerous for blacks to pursue education or display enterprise. In the old South, it is said, "whites don't care how close Negroes get, just as long as they don't get too big."²²⁸ Blacks who showed any ambition were dressed down and humiliated and could be robbed, beaten, imprisoned, or slain.²²⁹ Some may consider these facts too well known to merit repetition, but given the long history of racial slander alleging the innate inferiority of blacks, it is important to repeat this truth.

Even though current conditions stem from history, it does not mean we have no control over the future. We have free will and can make progress individually, in groups, and as a nation. After World War II, many countries made remarkable economic gains. Also, Victorian England achieved striking social progress, largely

225. See Bertrand Benoit & Hugh Williamson, *The Border That Separated Two Countries Is Long Gone But Starkly Different Economic Performance and Political Affiliations Show the Divisions Persist*, FIN. TIMES, Sept. 23, 2004, at 17.

226. See *id.*

227. See World Economic Forum, *Global Competitiveness Report* tbl.1, at http://www.weforum.org/pdf/GCR/Growth_competitiveness_Index_2003_comparisons (last visited Apr. 2, 2005) [hereinafter *Global Competitiveness Report*].

228. See Gregory D. Stanford, *Hypersegregation Label Still Applies to Area Suburbs*, MILWAUKEE J. SENTINEL, Jan. 19, 2003, at 4J. Comedian Dick Gregory also retorted, "in the North, whites don't care how big Negroes get, just as long as they don't get too close." *Id.*

229. See *id.*

by private efforts.²³⁰ The civil rights movement succeeded in ending de jure segregation and outlawing racial discrimination by the government and, in many areas, by private parties.²³¹ It proved the fatalists wrong: racial progress is possible in America.

Any reference by whites to values or behavior of African Americans provokes objections that this lets whites off the hook for the race problem they created. Many African Americans also call for better values and behavior.²³² These advocates are not, as sometimes charged, just a few unrepresentative black conservatives. Many are liberals who certainly do not let whites off the hook.²³³ To reduce racial hypersensitivity on this issue it should be stressed that people of all colors often must work hard to overcome injuries (physical or otherwise) suffered through no fault of their own.²³⁴ This is true of communities and nations devastated by, perhaps, a hurricane or military invasion, as well as individuals. It should also be stressed that most disadvantaged Americans are white²³⁵ and that they are exhorted to adopt the same attitudes and conduct that is urged on African Americans.

The other side of the blame game is the charge that all whites are morally responsible and legally liable for the plight of blacks. This charge underlies the reparations movement, which demands that white Americans pay for the injuries to blacks. The legal basis for the claim is flimsy. The closest precedent for reparations—the payments by Germany and a few German companies to some

230. See generally GERTRUDE HIMMELFARB, *POVERTY AND COMPASSION: THE MORAL IMAGINATION OF THE LATE VICTORIANS* (1991).

231. See 42 U.S.C. § 2000a (2000).

232. Felicia R. Lee, *Cosby Defends His Remarks About Poor Blacks' Values*, N.Y. TIMES, May 22, 2004, at B7.

233. See, e.g., Bob Herbert, Editorial, *Civil Rights, The Sequel*, N.Y. TIMES, July 7, 2003, at A13 ("My suggestion: Hammer home the need to stop the self-destruction that continues to block the advancement of millions of black Americans.").

234. "You can blame a person for knocking you down but you can't blame that person if you refuse to get back up However much slave history taught us about the injustice and misery we as a people had suffered, it did not excuse us from assuming responsibility for ourselves and each other by altering its course." BENJAMIN KARIM ET AL., *REMEMBERING MALCOLM* 109 (1992) (quoting Malcolm X).

235. The average poverty rate from 2001 to 2003 was 10.2% for whites and 23.7% for blacks. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2003, at 12 (2004), available at <http://www.census.gov/prod/2004pubs/p60-226.pdf> (last visited Apr. 2, 2005). There were, however, approximately twenty-three million poor whites and eight million poor blacks. *Id.* See also Michelle Conlin & Aaron Bernstein, *Working and Poor*, BUS. WK., May 31, 2004, at 58, 61 (reporting that fifty-eight percent of working poor in United States are white and fourteen percent are black).

victims of the Holocaust and their children—is far different from the claims of the reparations movement.²³⁶ In general, the idea of racial guilt and group reparations are in bad odor; no reparations have been paid by or even seriously demanded from the aggressors of World War II or from Russia for the enslavement of eastern Europe after that war.

Although reparations are often posed as an alternative to calls for self-help that let whites off the hook, many proposals for reparations blur this distinction. Liability to a class is usually discharged by payments to each of its members, but many calls for reparations eschew this remedy in favor of funding better schools for blacks.²³⁷ This is wise, but it points out the folly of using the term “reparations.” Calls for better schools acknowledge that the problems of blacks stem, in part, from poor education. Education requires not just good schools but effort by students and their families. Providing better education rather than cash, then, in effect requires reciprocal effort. Demands for reparations are also coercive and thus reduce the altruism of donors.²³⁸ They are unwise because the cooperation of whites is essential.

Demands for reparations are also morally flawed. Most whites are not personally guilty of racial wrongs or even the descendants of people guilty of such wrongs. They reasonably deny liability, especially since victims of racial discrimination are either dead or have legal recourse against actual wrongdoers. Reparations are demanded for all African Americans, but some are recent immigrants; they and their ancestors suffered no discrimination in America.

Finally, the detriments suffered by blacks because of race are not the only injuries suffered by Americans. The most important determinant of the economic success of Americans is the quality of the parenting they receive.²³⁹ People are also influenced by the

236. See generally Gabriel Schoenfeld, *Holocaust Reparations—A Growing Scandal*, 110 COMMENTARY 25 (2000).

237. See Carlos Sadovi, *Reparations for Descendants of Slaves: Do Companies Owe a Debt?*, CHARLOTTE OBSERVER, Jan. 11, 2004, at 1E (stating that plaintiffs in lawsuit seeking reparations want recovery to be used to fund social programs); Tara Young, *Professor: Slave Reparations Go Beyond Money; Movement Is About Recognition, He Says*, TIMES-PICAYUNE (New Orleans), Apr. 16, 2004, at Metro1 (quoting reparations movement leader Charles Ogletree, Jr. as saying that reparations should be used to fund programs, not just be given to people in cash).

238. See *supra* notes 71, 78 and accompanying text.

239. Not only are children unable to choose their parents, but the parents also lack

neighborhood in which they grow up and the schools to which they are sent, matters over which they have no control. Although on average blacks trail whites economically,²⁴⁰ many blacks have achieved economic success, and most poor Americans are not black.²⁴¹ Disadvantaged whites may reasonably ask why they should not only be denied benefits demanded for blacks who are better off than themselves but should also be expected to pay part of those benefits.

Similar objections apply to the programs of racial preferences that are now widespread. These programs produce paltry benefits for a handful of the least needy blacks.²⁴² In college admissions they affect only a few elite schools.²⁴³ Most beneficiaries are capable people who would have done quite well anyway; preferences merely bump them up a notch or two.

Lowering standards for blacks may sap their will to do their best.²⁴⁴ Black students admitted to schools for which they are not

complete control over the quality of parenting they give. Parents who are poor or disabled are less able to give their children good care. SUSAN E. MAYER & LEONARD M. LOPOO, HAS THE INTERGENERATIONAL TRANSMISSION OF ECONOMIC STATUS CHANGED? (Joint Center for Poverty Research, Working Paper No. 227, 2001) available at http://www.jcpr.org/wpfiles/mayer_lopoo.PDF?CFID=4460116&CFTOKEN=65444000 (last visited Apr. 2, 2005).

240. "In 1995, the median income for black families was \$25,970, while the figure for whites was \$42,646." JOHN H. MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA 9 (2000).

241. See *supra* note 235.

242. See *Grutter v. Bollinger*, 539 U.S. 306, 354 n.3 (2003) (Thomas, J., dissenting) ("[T]he Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation."); Martin Trow, *Preferential Admissions in Higher Education*, in BEYOND THE COLOR LINE, *supra* note 110, at 295 (noting that "in 1995, 30 percent of black undergraduates [at the University of California at Berkeley] came from families earning over \$70,000"). Further, at some campuses as many as two-thirds of black students are not descendants of American slaves but West Indian and African immigrants or their children or children of biracial couples. Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones?*, N.Y. TIMES, June 24, 2004, at A1.

243. See Trow, *supra* note 242, at 294 (stating that "no more than a hundred or so out of the 3,700 colleges and universities in the United States" "have more applicants than they can admit").

244. Out of deference, elite universities have offered the license *not* to compete to the most privileged segment of black youth, precisely the segment that has no excuse for not competing. . . . [W]hites and especially Asians have had to compete all the harder for their spots. So we end up with the effect we always get with deferential reforms: an incentive to black weakness relative to others.

SHELBY STEELE, A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA 127 (1998); see also *Grutter*, 539 U.S. at 377 (Thomas, J., dissenting) (stating that the racial preferences system reduces incentive for black applicants to improve their

academically qualified tend not to perform well.²⁴⁵ They suffer a stigma because everyone knows just by looking at them that they are less qualified than their classmates. Simultaneously, the belief that any shortcoming of blacks stems from white racism gives black students an easy alibi for poor performance.²⁴⁶ When they take the next step (such as graduates seeking jobs), they suffer because others (like prospective employers) know that they were admitted with lesser credentials. Further, racial preferences do nothing for the vast majority of blacks who are not candidates for the few positions allotted by racial preferences. Not surprisingly, many blacks oppose preferences.²⁴⁷

Although the benefits of racial preferences are minuscule and ill-targeted, they provoke terrible resentment among whites. This resentment may be unwarranted, but it is not surprising. If a prestigious school gives fifty seats to minorities through race preferences, fifty other applicants who would otherwise have been admitted are rejected, but these fifty are not identified. Hundreds of applicants may believe they were rejected because of race preferences. Hundreds more suspect they would not have been admitted even without racial preferences, but still resent the admission of minorities with weaker academic credentials than their own.²⁴⁸ Further stoking resentment is the realization that many beneficiaries of racial preferences are wealthier than applicants who were rejected.²⁴⁹ Some whites also object that, if a debt is owed to African Americans, it should not be foisted arbitrarily on a few random individuals by discriminating against them in employment

LSAT scores); PAUL A. ZOCH, *DOOMED TO FAIL: THE BUILT-IN DEFECTS OF AMERICAN EDUCATION* 198 (2004) (arguing that American schools need to demand more of students of all colors).

245. See *Grutter*, 539 U.S. at 372 (Thomas, J., dissenting) ("These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition."); Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 *UCLA L. REV.* 1583, 1605–08 (1999).

246. See STEELE, *supra* note 244, at 125 (stating that this attitude "never requires that [African Americans] actually develop as Americans, and absolutely never blames blacks when they don't develop").

247. See PAUL M. SNIDERMAN & THOMAS PIAZZA, *BLACK PRIDE AND BLACK PREJUDICE* 149–50 (2002) (reporting that eighty percent of blacks oppose admitting less qualified black students over more qualified white students even if the disparity is slight); see also McWhorter, *supra* note 152, at 41 (citing a poll showing that eighty-six percent of black voters opposed racial preferences).

248. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 *MICH. L. REV.* 1045, 1046–48 (2002).

249. See generally *id.*

or school admissions; rather, the burden should be borne by all whites, preferably in proportion to their ability to pay.

Whatever the moral merits of racial preferences, resentment is a political problem for blacks. Because of both their own votes and the desire of many whites for greater racial equality, blacks have substantial political clout—substantial, but not limitless. Resources squandered on racial preferences cannot be devoted to other goals. Many whites believe that the current racial preferences exhaust the political capital of blacks. Thus, the opportunity costs of racial preferences are high.

Racial preferences are touted—and were upheld by the Supreme Court of the United States—as a means of achieving vital diversity.²⁵⁰ This claim is widely considered weak or a mere subterfuge.²⁵¹ Efforts to document the educational benefits of racial diversity have been embarrassing failures.²⁵² This is not surprising; ethnic homogeneity (in colleges and elsewhere) does not pre-

250. *Grutter*, 539 U.S. at 328 (holding that a public law school “has a compelling interest in attaining a diverse student body”).

251. *See id.* at 383 (Rehnquist, C.J., dissenting) (calling the university’s claim to be seeking a critical mass of minorities for purposes of educational diversity “simply a sham”); Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 CARDOZO L. REV. 379, 407 (1979) (“[T]he checkered history of ‘diversity’ demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals.”); R. Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 122 (1979) (“I have yet to find a professional academic who believes the primary motivation for preferential admissions has been to promote diversity in the student body for the better education of all the students.”); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997) (“Everyone knows that in most cases a true diversity of perspectives and backgrounds is not really being pursued.”); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POLY REV. 1, 34 (2002) (“[M]any of affirmative action’s more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.”); Randall Kennedy, *Affirmative Reaction: The Courts, the Right and the Race Question*, AMERICAN PROSPECT ONLINE, Mar. 1, 2003 (stating that “[m]any who defend affirmative action for the sake of ‘diversity’ are actually motivated by a concern that is considerably more compelling . . . a commitment to social justice”); Orlando Patterson, *Affirmative Action: The Sequel*, N.Y. TIMES, June 22, 2003, at 11 (stating that no one really believes the diversity rationale for racial preferences). The ruse is further indicated by the fact that supposed advocates of diversity show no interest in intellectual diversity. “Selective schools . . . have done little to attract students who are politically conservative or devoutly religious. . . . How many have enough undergraduates to form a ‘right to life’ chapter, for example?” Hacker, *supra* note 191, at 22.

252. Both the methodology and the conclusions of these studies have been refuted. *See, e.g.*, Stanley Rothman et al., *Racial Diversity Reconsidered*, 151 PUB. INT. 25, 29–38 (2003) (discussing the empirical flaws of these studies and the results obtained with improved methods).

vent nations like Japan and the Scandinavian countries from competing successfully in the global economy.²⁵³ The diversity rationale also treats preferences for blacks as a benefit primarily to whites even though they are promoted largely by blacks.

Whites are unlikely to warm to race preferences. Many feel that the racial discrimination cited to justify preferences has already dwindled so that preferences should now end. Some states now outlaw preferences in school admissions;²⁵⁴ others may follow suit.²⁵⁵ Although the Supreme Court upheld racial preferences,²⁵⁶ its demand that applicants be weighed individually and that race not be a dominant factor in admissions will be hard for some schools to meet.²⁵⁷ They can admit a "critical mass" of blacks (always five to ten percent of each class) only by using academic standards so much lower as to flunk the requirement that race be just one of many plus factors.²⁵⁸

Indeed, the Court upheld a law school's racial preferences only by accepting some factual claims derided as "simply a sham" by

253. See *Global Competitiveness Report*, *supra* note 227, tbl.1.

254. See, e.g., CAL. CONST. art. 1, § 31.

255. Karen W. Arenson, *Ballot Measure Seen in Wake of Court Ruling*, N.Y. TIMES, July 10, 2003, at A17 (reporting that African-American businessman Ward Connerly, who led the successful effort to pass California's Proposition 209, plans to put a similar measure before Michigan voters); Hacker, *supra* note 191, at 22 (stating that after decisions in *Gratz* and *Grutter* "it seems likely that at least a few other [states] will now be inclined to" adopt laws forbidding racial preferences).

256. See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

257. See *Grutter*, 539 U.S. at 348–49 (Scalia, J., dissenting) (listing several possible issues for future litigation); Carl Cohen, *Winks, Nods, Disguises—and Racial Preference*, 116 COMMENTARY 34, 37 (2003) (noting the sheer magnitude of the task of individualizing admissions reviews at University of Michigan, which has 25,000 undergraduate applicants annually); Mike France & William C. Symonds, *Diversity Is about to Get More Elusive, Not Less*, BUS. WK., July 7, 2003, at 31 (stating that the Court's ruling will force schools to engage in a "laborious" analysis requiring employment of more admissions officers); Hacker, *supra* note 191, at 22 (concluding that the University of Michigan "may have a hard time" satisfying *Grutter*).

258. See *Grutter v. Bollinger*, 288 F.3d 732, 796–97 (6th Cir. 2002) (Boggs, J., dissenting) (finding that the University of Michigan Law School gave "very substantial additional weight" to minority applicants for admission), *aff'd*, 539 U.S. 306 (2003); Trow, *supra* note 242, at 298–301 (describing the lengths to which the University of California at Berkeley's Law School, Boalt Hall, had to go to meet its goals for enrolling African-American students); 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, 14–18 (1997) (showing that most black law students would not have been admitted if admissions were based solely on undergraduate grades and LSAT scores); Lino A. Graglia, *Winks, Nods—and Preferences*, WALL ST. J., June 25, 2003, at A12 (noting that almost no African Americans meet the median GPA and LSAT scores of white students at the half-dozen top law schools).

Chief Justice Rehnquist.²⁵⁹ Rejection of the college's somewhat different program led Justice Ginsburg to predict that schools may "resort to camouflage" and "winks, nods, and disguises."²⁶⁰ Soon the Court will face new cases in which lower courts reject such claims.²⁶¹ Then the Court, hoist by its own petard, must strike down most racial preferences or change its standard. The Court also expressed doubt that preferences will be needed for more than twenty-five years.²⁶² This declaration will fuel demands to begin phasing out preferences, thereby lowering their benefits and raising their political cost to blacks.

Despite the gross flaws in racial preferences as a solution to America's racial problem, it is understandable that blacks cling to them. A person may agree that her house or car is not ideal for her needs, but she will not accept its simply being taken away from her. The obvious solution is to trade in the unsuitable item for one more appropriate. A trade-in makes sense for racial preferences. In economic terms, they are not *Pareto Optimal*.²⁶³ Although there will be no consensus on a substitute, both sides can easily identify measures more beneficial to blacks and less objectionable to whites. Some of these are discussed below.²⁶⁴

How can a trade-in be negotiated? Racial preferences are granted by many businesses, government agencies, schools, and nonprofit organizations.²⁶⁵ Negotiations with each would be impractical. Many of these institutions also lack resources that can be substituted in exchange. Indeed, many institutions seem to have adopted racial preferences out of a feeling that they should do *something* about racial inequality and could not think of anything else to do. In other words, preferences are a gesture by

259. *Grutter*, 539 U.S. at 383 (2003) (Rehnquist, C.J., dissenting).

260. *Gratz v. Bollinger*, 539 U.S. 244, 304–05 (2003) (Ginsburg, J., dissenting).

261. See Cohen, *supra* note 257, at 38 ("[I]t will be very hard [for universities] to hide the reality of their practices, and these will be subjected to continuing adverse scrutiny."). This prediction has already been vindicated. See *Parents Involved in Cmty. Schs. v. Order Seattle Sch. Dist. No. 1*, 294 F.3d 1085 (9th Cir. 2004) (striking down racial preferences in public school assignments in Seattle).

262. *Grutter*, 539 U.S. at 343.

263. An economic situation is *Pareto Optimal* "when an individual cannot move into a better position without putting someone else into a worse position." *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 405 (John Downes & Jordan Elliot Goodman eds., 4th ed. 1995).

264. See *infra* Part VI.

265. See PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 140–43 (2003).

whites primarily to assuage their guilt.²⁶⁶ Accordingly, arranging a trade-in will require national leadership that includes, but is not limited to, the federal government.

One obstacle to a trade-in is that preferences have spawned an industry employing many blacks.²⁶⁷ These programs need administrators. Also, since many blacks admitted or hired under preferences are less qualified than their white colleagues,²⁶⁸ they need special assistance, like remedial courses and retention programs. The desire of some blacks for separation from whites, intensified by the stigma of preferences, leads to the creation of separate facilities, activities, and academic programs for blacks. All these initiatives have to be staffed. Those employed in this industry would be threatened by the end of preferences.²⁶⁹

Although the economics of a trade-in are easy, the politics are hard. In a pluralist democracy, a small group that profits from a program that disserves society as a whole often prevails if the program's costs to the majority are so diffused that few are motivated to oppose it. Accordingly, the terms of a trade-in should be as explicit as possible so that its potential beneficiaries, especially among blacks, will be motivated to support the trade-in.

C. *Limiting the Group of Discussants and the Scope of Discussion*

The current animosity in race relations makes it desirable to limit the participants in racial dialogue. In group relations, levels of trust typically vary among the members of each group and from one locale to another.²⁷⁰ It makes sense for each side to choose members with higher levels of trust to negotiate and exe-

266. See *id.* at 151 ("Affirmative action is often justified as a means of compensating groups that have been victimized in the past by persecution and discrimination inflicted by the dominant majority.").

267. See OFFICE OF RESEARCH, INFORMATION & PLANNING, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, CHARACTERISTICS OF PRIVATE SECTOR EMPLOYMENT 2 (2003) (noting that blacks are the minority with the highest percentage of private sector employment).

268. See Thernstrom & Thernstrom, *supra* note 245, at 1610–11.

269. However, most of these people are skilled professionals who can find jobs elsewhere; indeed, some would certainly wind up producing something of use to society, which they are not doing now.

270. See Michael W. Macy & John Skvoretz, *The Evolution of Trust and Cooperation Between Strangers: A Computational Model*, 63 AM. SOC. REV. 638, 651 (1998).

cute joint projects.²⁷¹ Since familiarity often breeds trust, cooperation may work best at the local level, where people know each other better.²⁷²

An agent who impedes a mutually desirable bargain should be fired.²⁷³ It is especially imperative to exclude obstructionists in emotional areas like race relations. Since interracial cooperation is needed, it is not enough for the two sides to bargain aggressively; discussions should enhance trust so as to promote continuing cooperation. Discourtesy to the other side, displays of suspicion, and aggressive negotiating erode trust.²⁷⁴ Since some African-American leaders (at least in Congress) mistrust whites and support policies offensive to whites,²⁷⁵ it would be wise to seek a "coalition of the willing." This already happens to some extent at the local level,²⁷⁶ and opportunities for cooperation may be growing, since minority leaders are becoming more moderate.²⁷⁷ The issues for discussion should also be restricted. Where trust is low, parties should put aside grudges and seek common ground, "contemplating visions about what the future could bring if only the dispute that confronts them can be surmounted."²⁷⁸ Cooperation can expand as commitments are fulfilled and trust grows.²⁷⁹

Putting the two limitations together, some groups will be able to reach agreement on certain issues, other groups on other issues. Of course, this already happens; various groups of black and

271. See JOSEPH L. BADARACCO, JR., *THE KNOWLEDGE LINK: HOW FIRMS COMPETE THROUGH STRATEGIC ALLIANCES* 141 (1991) (stating that a successful alliance needs "champions" . . . on both sides—that is, managers with appropriate skills who are personally committed to making the venture work"); LEWIS, *supra* note 11, at 29 (stating that negotiating is so important that some firms "select people with less than perfect intellects but with excellent interpersonal skills").

272. See WARREN, *supra* note 132, at 27 (describing success of many local interracial coalitions); Macy & Skvoretz, *supra* note 270, at 653–58.

273. See KOROBKIN & ZASLOFF, *supra* note 178, at 33.

274. See *supra* notes 38–50 and accompanying text.

275. See Tamar Jacoby, *From Protest to Politics: Still an Issue for Black Leadership*, in *BEYOND THE COLOR LINE*, *supra* note 110, at 369, 371–73 (documenting a gap in attitudes about race between black leaders and black public); see also *supra* note 112; *infra* text accompanying notes 333–34.

276. See *Black Magic*, *ECONOMIST*, July 15, 2000, at 29, 30 (reporting that some local Republican officials have developed trust and cooperation with African Americans).

277. See ETZIONI, *supra* note 80, at 30–32.

278. Howard Raiffa, *Analytical Barriers*, in *BARRIERS TO CONFLICT RESOLUTION* 132, 140 (Kenneth J. Arrow et al. eds., 1995). See also CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR REDUCING CONFLICT* 177–81 (1986).

279. See *supra* notes 62–63 and accompanying text.

white Americans cooperate on issues on which they agree.²⁸⁰ These efforts need to be expanded. To some extent, this can be done by private initiative, but the potential for private efforts alone is limited. To maximize progress, government involvement is needed.

D. *Legal Liability vs. Moral Duty*

Although the legal basis for reparations is weak, Judaism and Christianity instruct those who are able to aid all who need help.²⁸¹ Arguing moral duty rather than legal liability has several advantages apart from avoiding the jurisprudential flaws of the latter. Psychologically, it is easier to accept a moral duty to help the needy than to admit legal liability, which implies an admission of personal fault. Coercion provokes resistance,²⁸² but voluntary donations make donors feel virtuous. It is also more appealing morally to aid the needy than it is to pay a legal debt to each member of some group regardless of the individual recipient's need.

The civil rights movement succeeded largely by squeezing the conscience of whites.²⁸³ Most abolitionists were whites appealing to the Christian beliefs of fellow whites.²⁸⁴ By contrast, the urban riots of the late 1960s precipitated a conservative tide in politics and accelerated white flight from cities.²⁸⁵ The push for racial preferences and reparations have frittered away much political

280. See WARREN, *supra* note 132, at 247 (noting the collaboration of black and white Americans around a common policy agenda).

281. See Melanie D. Acevedo, Note, *Client Choices, Community Values: Why Faith-Based Legal Services Providers Are Good for Poverty Law*, 70 *FORDHAM L. REV.* 1491, 1523–24 (2002).

282. See *supra* notes 71, 78, 94–95 and accompanying text.

283. The exposure to the world of segregation and discrimination by the civil rights movement also damaged the United States in the Cold War struggle with Communism. Desire to end this negative publicity abetted the agreement of whites to end this mistreatment. See MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 107–13 (2000); Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 *MINN. L. REV.* 1447, 1546–47 (2003).

284. See Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 *ARIZ. L. REV.* 293, 305 (2002).

285. See Feld, *supra* note 283, at 1546–47 (describing conservative impact of urban riots on criminal law policies); Clarence Page, *What Brown Did Not Bring to Education*, *CHI. TRIB.*, Mar. 17, 2004, at E29 (stating that urban riots helped cause white flight).

capital while yielding little benefit.²⁸⁶ Stern reminders of Judeo-Christian moral duties and the notion that whites themselves would profit from the economic progress of African Americans, coupled with offers of cooperation, can be effective, but militance will fail.

Programs based on moral duty are also likely to be better for the needy. Legal debts must be paid unconditionally, but charities can impose duties on recipients. These conditions can be buttressed by moral suasion as well as legal sanctions. Thus community leaders can exhort recipients of aid to keep their side of the bargain; reparations carry no such moral duty. Further, performance standards can be imposed on aid programs. Effective programs can be given increased funding while failed programs can be terminated. Reparations cannot be so treated.

Aid to the needy, both individuals and nations, is more effective when performance standards are imposed on recipients and compliance is monitored. Even most liberals now admit that the rapid expansion in the 1960s and 1970s of social welfare programs, with few conditions on recipients, did not work well.²⁸⁷ Many became dependent on welfare and lost the chance to climb the employment ladder and become good role models for their own children and their neighbors.²⁸⁸ In the 1990s, welfare restrictions and renewed emphasis on work helped many make economic progress while producing little of the indigence and other horrors that some had predicted.²⁸⁹ This approach worked in part because recipients themselves approved it.²⁹⁰ The reforms of the 1990s were far from perfect, though. Many who left welfare for work remain

286. See *supra* notes 238, 248 and accompanying text.

287. See June E. O'Neill & M. Anne Hill, *Gaining Ground? Measuring the Impact of Welfare Reform on Welfare and Work*, Manhattan Institute Civic Report No. 17, at 2 (July 2001).

288. See Margo D. Butts, *Urban Welfare Reform: A Community-Based Perspective*, 22 *FORDHAM URB. L.J.* 897, 898–99 (1995).

289. See Rebecca M. Blank & Robert F. Schoeni, *Changes in the Distribution of Children's Family Income over the 1990s*, 5 (Jan. 2003), available at <http://www-personal.umich.edu/~bschoeni/blankschoeni%20pp.pdf> (last visited Apr. 2, 2005); O'Neill & Hill, *supra* note 287, at 4.

290. "[M]any welfare recipients themselves [said] that they needed the push of a work requirement to overcome their own lack of initiative in finding jobs or training experiences that later turned out to be valuable to them." Mary Jo Bane, *A Catholic Policy Analyst Looks at Poverty*, in *LIFTING UP THE POOR: A DIALOGUE ON RELIGION, POVERTY & WELFARE REFORM* 12, 47 (2003); see also Mead, *supra* note 220, at 94 ("All told, reciprocity emerges as clearly the best approach to aiding the poor through government . . .").

in or near poverty.²⁹¹ Americans should be much more generous to these people. Demanding reciprocity and effective programs abets generosity.²⁹² Most Americans prefer assistance that requires reciprocal effort from recipients and helps them become independent.²⁹³

Government can learn from private charities that appeal to donors by publicizing their accomplishments. Governments can set performance targets for their programs. Setting targets is particularly effective when the money goes to private organizations. Government bureaucrats cannot be fired for failing to meet goals, but grants to private groups can be ended. Organizations seeking government money can be required to state their targets. To obtain grants, they have an incentive to set their goals high. To keep the money flowing, they then have an incentive to meet their own stated goals.

E. *Racialized vs. Universal Programs*

People tend to trust and cooperate with those they consider like themselves and to distrust those they consider different.²⁹⁴ However, notions of who is like us and who is different often are not deeply rooted but mutable and manipulable.²⁹⁵ The very act of designating subgroups strengthens trust and cooperation within each subgroup but weakens trust and cooperation between subgroups.²⁹⁶ Because of the complexity of and ambivalence about race in America, the inclination of Americans to trust and cooperate with people of another color is highly unstable and subject to outside influence.

To enhance trust and cooperation between blacks and whites, we should stress our commonalities (like Judeo-Christian ethics)

291. See Katherine Hunt Federle, *Child Welfare and the Juvenile Court*, 60 OHIO ST. L.J. 1225, 1231–32 (1999).

292. See *supra* note 70 and accompanying text.

293. See MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 58–59, 184–92 (1999).

294. See *supra* notes 29–30 and accompanying text.

295. See *supra* notes 31–35 and accompanying text.

296. See Macy & Skvoretz, *supra* note 270, at 648 (noting that neighbors tended to both trust and cooperate with each other, while they did not cooperate with strangers in one part of the experiment).

and play down differences. Racial preferences and reparations divide us by race and thus erode trust and cooperation.²⁹⁷ Some local initiatives achieve cooperation by pursuing not "affirmative action" but "affirmative opportunity."²⁹⁸ Proposals that harp on supposed behavioral shortcomings of poor blacks but not of poor whites are also divisive. Although the poverty rate is higher among blacks, there are more poor whites in America,²⁹⁹ so blacks and whites can unite on an agenda to help the needy. The poor of all races generally lack political clout; they need allies. When people feel they need each other, they tend to eschew prejudice.³⁰⁰

The problems of the poor will not be cured by neglect (benign or otherwise). Even in the prosperous 1990s, the income gap between blacks and whites barely shrank, and the gap between rich and poor actually grew within each race.³⁰¹ Social mobility also declined. That is, not only did the amount of poverty persist, but the poor were largely the same people and not a randomly rotating group of people either temporarily down on their luck, or young or newly arrived in America and destined to achieve prosperity quickly.³⁰²

Efforts (unlike racial preferences and reparations) not limited to blacks may be derided as "color blind" and inadequate. Justice Harry Blackmun claimed: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."³⁰³ President Lyndon Johnson said: "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others.'"³⁰⁴

297. See SCHUCK, *supra* note 265, at 165, 199 (stating that racial preferences are "socially inflammatory" and that race is "the worst imaginable category around which to organize group competition and social relations more generally"); see also *supra* note 248 and accompanying text (noting that racial preferences can cause white resentment toward minorities).

298. See WARREN, *supra* note 132, at 252; see also *id.* at 247-48 (describing work of Industrial Areas Foundation in many cities and other efforts in interracial cooperation).

299. See *supra* note 235.

300. See WARREN, *supra* note 132, at 27.

301. See ETZIONI, *supra* note 80, at 76-77, 148.

302. See Gene Koretz, *Land of Less Opportunity*, BUS. WK., June 30, 2003, at 28.

303. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

304. Lyndon B. Johnson, *To Fulfill These Rights*, Address at Howard University (June

Many people are hobbled for many reasons, however, only some of which relate to race. It is just to help all these people. "We should help people who need help. There are, in fact, no races that need help; only individuals, citizens."³⁰⁵ President Johnson's metaphor has another implication: we can help those who have been hobbled to join the race by giving them therapeutic counseling and equipment and economic support during therapy, but they themselves must make a special effort for that therapy to succeed. In a sense this is unjust because those who were not hobbled need not exert that effort, but such injustice is a result of past events that we cannot change.

It is misleading to call measures color blind just because they omit explicit racial criteria. Again, while most poor Americans are not black, they are disproportionately black,³⁰⁶ so programs for the poor disproportionately benefit blacks. For example, residents of poor neighborhoods are often isolated from jobs.³⁰⁷ Efforts to bring them to jobs and to bring jobs to them need not be race-based; since the problem is particularly acute for blacks, even color-blind programs to mitigate the problem would benefit them disproportionately. More generally, we can examine the racial effects of all public policies and prefer those that promote racial equality and harmony.

Justice Blackmun was wrong that "[t]here is no other way."³⁰⁸ Millions of blacks, like other Americans beset by problems they did not make, have achieved economic success without racial preferences or reparations. Perhaps Justice Blackmun believed that racial preferences would greatly advance racial equality. That belief is now obviously wrong. An "other way" is not only possible but necessary, because racially discriminatory measures will not overcome inequality.

4, 1965), *reprinted in* THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 126 (Lee Rainwater & William L. Yancey eds., 1967).

305. Steele, *supra* note 163, at 42.

306. The American Marketplace, Most Poor Are White: Although Blacks Are More Likely to be Poor, Whites Account for the Majority of People Living in Poverty 161 (1999); *see also supra* note 235.

307. *See* Maurice E.R. Munroe, *Unamerican Tail: Of Segregation and Multicultural Education*, 64 ALB. L. REV. 241, 247-49 (2000); Michael H. Schill, *Deconstructing the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 802 n.36 (1991).

308. *Bakke*, 438 U.S. at 407 (Blackmun, J., dissenting).

Eschewing racial discrimination does not preclude acknowledgement of race. Since racial separation in housing and education damages blacks,³⁰⁹ both government and private groups may fairly consider race by encouraging integration. Also, since attitudes and behavior often vary by race, it makes sense to learn the differences and to address problems in ways that take them into account. Since many blacks suspect a conspiracy to infect them with AIDS,³¹⁰ for example, different approaches to AIDS education may be warranted in predominantly black schools. Such efforts do not discriminate because programs in mostly white schools would be equally funded; they would simply use different approaches.

College programs to recruit students are another area where racial distinctions make sense. High school students' knowledge about higher education varies by race even after correcting for factors like family income and parents' education. Schools may reasonably pursue black students in ways that take these differences into account. Outreach programs targeted to black students do not violate the rights of any individual. This is important both because the Constitution's guaranty of equal protection applies to individuals, not racial groups,³¹¹ and because the protection of individuals embodied in this and other clauses of the Constitution reflects the value afforded to individuals (as opposed to identity groups) in western civilization and especially in America. Even if group level discrimination is not illegal, it is divisive and should be employed only when nondiscriminatory measures will not work.

Although programs should not be racialized, it is helpful if they are supported by black leaders. People more readily accept decisions that they helped to make.³¹² Such acceptance is particularly important when a project requires not just their acquiescence but also their active support, as is the case with programs to improve the education or employment of some group.

309. See Munroe, *supra* note 307, at 244–53.

310. See Darryl Fears, *Study: Many Blacks Cite AIDS Conspiracy; Prevention Efforts Hurt, Activists Say*, WASH. POST, Jan. 25, 2005, at A2.

311. “[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1 (emphasis added).

312. See Brockner & Siegel, *supra* note 58, at 391; Kahan, *supra* note 43, at 20 (stating that negotiations with communities promote their acceptance of government actions).

F. *The Role of Government*

Through the 1960s and 1970s, civil rights leaders worked to equalize the legal and political rights of African Americans.³¹³ The effort largely succeeded: discrimination in voting, employment, housing, and other areas by both government and private entities was forbidden.³¹⁴ Additional antidiscrimination laws probably would not produce major benefits. First, antidiscrimination laws in employment work best on large employers, for which statistical patterns can be shown and litigation achieves economies of scale by handling several cases at once.³¹⁵ Hence antidiscrimination laws give a competitive advantage to smaller firms, which are harder to sue and not covered at all by some of these laws.

Some employers diminish the bite of these laws by hiring fewer minorities to begin with, since discrimination in hiring is harder to prove than discrimination in firing or promotion.³¹⁶ Some employers simply locate facilities where few minorities live.³¹⁷ Others use independent contractors, who often are not covered by discrimination laws, instead of employees.³¹⁸ Enactment and enforcement of antidiscrimination laws may also backfire by conveying the impression that discrimination is more common than it actually is, thereby erroneously increasing resentment among minorities and suggesting to whites that discrimination is socially (if not legally) acceptable.³¹⁹

313. See generally JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994) (chronicling the civil rights movement).

314. See *supra* note 231 and accompanying text.

315. See Jane Howard-Martin, *A Critical Analysis of Judicial Opinions in Professional Employment Discrimination Cases*, 26 *HOW. L.J.* 723, 727 (1983).

316. See Paul Oyer & Scott Schaefer, *The Unintended Consequences of the '91 Civil Rights Act*, *REG.*, Summer 2003, at 42, 47 (concluding that because of the 1991 Act, "employers with higher susceptibility to employment discrimination litigation reduced their hiring of protected workers").

317. Richard D. Kahlenberg, *Class-Based Affirmation Action*, 84 *CAL. L. REV.* 1037, 1072-73 (1996) (indicating that incentive programs are used to lure business to economically depressed areas).

318. These avoidance tactics do not mean that these employers are racially biased. A racially homogeneous workforce may be more profitable. See *supra* note 117. Also, litigation is expensive even if the employer is ultimately exonerated. Unbiased employers may take steps to minimize minority employment to avoid these costs. See Oyer & Schaefer, *supra* note 316, at 47.

319. See *supra* notes 77-79 and accompanying text.

Antidiscrimination laws still play a positive role. They not only prevent and remedy discrimination but also signal, through the expressive function of law, that our society cares about minorities and condemns racial bias. The potential of antidiscrimination laws is limited, though. To make major progress toward racial harmony and equality, we must look elsewhere.

VI. POSSIBLE STEPS

The primary purpose of this Article is not to propose programs to reduce racial inequality, but to show how principles of trust can facilitate such programs. It may be useful to identify some helpful steps, however. These measures will not appeal to all and do not comprise a total agenda. Again, though, a national consensus is unnecessary; many of these steps can be taken by state or local governments or private groups. Although they are limited, cooperation on these steps could raise interracial trust: "The joint solution of conflict can enhance and deepen trust, in several ways."³²⁰ Increased trust can dispel pessimism and trigger positive norm cascades and so ignite a virtuous cycle of improved behavior and interracial cooperation. The measures suggested entail both concrete programs and the expressive function of law.

A. *Social Welfare Measures*

Antipoverty measures disproportionately benefit blacks,³²¹ but are new programs politically viable now? Even the Clinton Administration tightened standards for welfare programs,³²² and the George W. Bush Administration has extended these efforts. Still, much can be done. First, projects by state and local governments and private groups are possible. Second, even the present administration supports some social welfare programs through faith-based initiatives.³²³ President Bush and many other Republicans acknowledge a religious duty to help the needy.³²⁴ Since religion

320. NOOTEBOOM, *supra* note 24, at 93.

321. See *supra* notes 112–15 and accompanying text (documenting economic inequality of African Americans).

322. See *supra* note 134 and accompanying text.

323. See Thomas W. Ross, *The Faith-Based Initiative: Anti-Poverty or Anti-Poor?*, 9 GEO. J. ON POVERTY L. & POL'Y 167, 167–71 (2002).

324. See *id.* at 167.

and churches are so strong among American minorities, blacks can join Hispanics and other minorities, Republicans, and many Democrats to urge action to discharge that duty. It helps that many religious minority leaders share the preference of conservatives for programs that seek to improve the conduct of recipients.

1. Trade-In Racial Preferences

Beneficial programs could be enacted in exchange for a trade-in of racial preferences. Until recently, a trade-in might have been dismissed by conservatives hoping that the Supreme Court would soon forbid them anyway. The Court's recent rulings dispel that hope,³²⁵ but they also impose conditions that make racial preferences even less valuable than before to blacks. Thus, a trade-in is now more attractive for both sides. Blacks in Congress will not readily accept a trade-in; they are politically wedded to preferences and to the black elite that most benefits from them. Almost all have safe seats and are more concerned with increasing their influence in the Democratic Party than with striking deals with Republicans. Blacks outside of Congress lack these conflicting interests and could discuss a trade-in. Such a deal would boost the popularity of the President and Republicans with minorities while pleasing conservatives by ending preferences.

Preferences could be ended by amending the Civil Rights Acts to make explicit what was intended when they were enacted: forbidding racial discrimination by agencies of state, local, and federal governments (including state colleges and universities), by private recipients of government money (including firms that receive government contracts and private colleges and universities that receive government money), and businesses engaged in interstate commerce.³²⁶

325. See, e.g., *Concrete Works of Colo., Inc. v. City & County of Denver, Colo.*, 540 U.S. 1027, 1027 (2003) (denying a petition for review of Denver's use of preferences in awarding public construction contracts).

326. See 42 U.S.C. §§ 1981 to 2000h-6 (2000 & Supp. I 2001).

2. Education and Job Training

Increased education raises incomes.³²⁷ Pell Grants, the core federal program for poor college students, once covered eighty-four percent of the cost of a four-year public university; they now cover only forty-two percent.³²⁸ Raising Pell Grants would enable thousands more African Americans to get a college education, which benefits not only themselves, their families, and their communities, but also the entire nation by increasing overall productivity and reducing social pathology. Racial preferences, by contrast, do not increase black enrollments at all since those who receive such preferences would attend college anyway.

Cooperation could also expand choice in education. Most blacks support voucher and charter school programs that give parents a choice of school.³²⁹ Political conservatives and many other white and minority parents also support these initiatives.³³⁰ Unfortunately, politics have blocked these options at the national level.³³¹ Blacks in Congress oppose them, probably because teacher unions are a juggernaut in the Democratic Party.³³² Most Republican legislators also ignore school choice because their suburban constituents are content with their public schools and alternatives would draw off students, thereby reducing economies of scale in the public schools.³³³ By contrast, many African Americans consider their schools inadequate.³³⁴ Vouchers and charter schools would not eliminate economies of scale in large cities, and black students profit from these choices.³³⁵ It may, therefore, be possible

327. See Lynn A. Karoly, *Investing in the Future: Reducing Poverty Through Human Capital Investments*, in UNDERSTANDING POVERTY 314, 321 (Sheldon H. Danziger & Robert H. Haveman eds., 2001).

328. See France & Symonds, *supra* note 257, at 30; Editorial, *Punishing the Pell Grant Program*, N.Y. TIMES, Oct. 29, 2003, at A24.

329. See Clint Bolick, *Schools That Work for Minority Students*, in BEYOND THE COLOR LINE, *supra* note 110, at 277, 285–86 (reporting results of several polls); Samuel G. Freedman, *Increasingly, African-Americans Take Flight to Private Schools*, N.Y. TIMES, May 19, 2004, at B11.

330. See, e.g., James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2051 n.23 (2002).

331. See *id.* at 2079.

332. See *id.* at 2082.

333. See *id.*

334. See generally Bolick, *supra* note 329, at 277, 278–81 (describing problems of predominantly African-American public schools).

335. See Jay P. Greene & Marcus A. Winters, *Competition Passes the Test*, EDUC. NEXT, Summer 2004, at 66, 68–69 (finding that vouchers improved public school performance in

to enact voucher plans limited to urban areas or to low income families.³³⁶ Given the hostility of Democrats and the indifference of Republicans to vouchers at the national level,³³⁷ local programs are more plausible for now.

More effort should be made to urge black students toward careers in business. That is where the money is. Blacks thrive in many fields, especially entertainment, sports, and politics, but few do so in business.³³⁸ Increasing the number of successful black business people would promote economic equality and counter stereotypes that blacks are less capable than whites in some areas. Increasing interracial commerce would also improve race relations. "Doing business with people, even at a distance, usually involves acknowledging their humanity."³³⁹

All schools should be required to set high standards for all students, and parents should be exhorted to help their children meet these standards.³⁴⁰ Like other measures recommended here, this one would not be limited to blacks and would probably benefit more whites; however, blacks would reap a disproportionate share of the benefits because of the current racial achievement gap in education. Many schools produce good academic results with students of disadvantaged backgrounds.³⁴¹ A large fraction of these are charter or private schools, but some are just well-run

Florida); Greg Winter, *Charter Schools Succeed in Improving Test Scores, Study Says*, N.Y. TIMES, July 20, 2003, at A24.

336. See Ryan & Heise, *supra* note 330, at 2047.

337. See *supra* notes 332–33 and accompanying text.

338. See FLOYD H. FLAKE & M. ELAINE MCCOLLINS FLAKE, PRACTICAL VIRTUES: EVERYDAY VALUES AND DEVOTIONS FOR AFRICAN AMERICAN FAMILIES xv–xvi (2003) (arguing that adulation of hip-hop celebrities and athletes has been particularly damaging to black youth by eroding traditional African-American morals); Brent Staples, Editorial, *Broken Hoop Dreams for the Basketball Players of Coney Island*, N.Y. TIMES, Feb. 1, 2004, § 4, at 10 (describing the deceptive lure of professional sports to the detriment of education among young blacks).

339. Robert Wright, Editorial, *Two Years Later, a Thousand Years Ago*, N.Y. TIMES, Sept. 11, 2003, at A25.

340. Rigor of curriculum and parent participation are two important elements of educational achievement and of the current "achievement gap" between black and white students. See Educational Testing Service, *Parsing the Achievement Gap: Baselines for Tracking Progress* 8–9, 20–21 (2003) [hereinafter *Parsing the Achievement Gap*]; see also ZOCH, *supra* note 244, at 198 (arguing that American schools need to demand more of students of all colors).

341. See ABIGAIL THERNSTROM & STEPHAN THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING 43 (2003).

public schools.³⁴² All of these schools insist on order, discipline, testing, parental involvement, and high student performance.³⁴³

Those whose education still leaves them suboptimally employed should have access to good job training, which is another win-win measure for blacks and whites.³⁴⁴

3. Tax Relief for Low Income Workers

Another fertile field for interracial agreement is tax relief for low income workers. Welfare reform freed many people from dependence on government handouts, but the newly employed—and many other low wage workers—remain in or near poverty.³⁴⁵ Although they pay no federal income taxes, they face heavy Social Security charges and state and local taxes.³⁴⁶ Lowering their taxes would pay three dividends. It would raise incentives to get off welfare and stay off. Most beneficiaries will quickly spend the added income, thereby stimulating economic demand. And this boost will be concentrated in minority neighborhoods that especially need it.

A further step is to expand the Earned Income Tax Credit (“EITC”).

A parent earning \$10,000 a year can qualify for as much as \$4,000 a year in tax refunds. This is the equivalent of turning a \$6-an-hour job into an \$8.40-an-hour job. Unlike an increase in the minimum wage, it doesn't affect employers' labor costs and hence their willingness to hire low-skilled workers. And it has a powerful record of encouraging work.³⁴⁷

342. See *id.* at 43–44.

343. See *id.* at 39–40, 47–49, 55–60, 69–70; see also *Parsing the Achievement Gap*, *supra* note 340, at 18–19 (finding that school safety is an important element of student achievement and of the current “achievement gap” between African-American and white students).

344. See Holzer & Offner, *supra* note 133, at 83–84 (suggesting that low-income men should have access to job training).

345. See *supra* notes 289–90 and accompanying text.

346. See, e.g., Jonathan Chait, *For Richer; Conservatives v. Capitalism*, *NEW REPUBLIC*, Oct. 29, 2001, at 15; Conlin & Bernstein, *supra* note 235, at 64 (“Payroll taxes are a huge burden on the working poor.”).

347. Isabel V. Sawhill, *The Behavioral Aspects of Poverty*, *PUB. INT.*, Fall 2003, at 79, 92; see also Holzer & Offner, *supra* note 133, at 83 (advocating an expanded EITC). Another advantage of raising the EITC rather than the minimum wage is that much of the latter goes to workers who are not poor, like middle-class teenagers working to make extra

4. Criminal Laws

Blacks and whites should cooperate to reform criminal laws. Minorities, especially blacks, have been devastated by the huge number of criminal convictions and incarcerations, especially in the "war on drugs."³⁴⁸ Many minority neighborhoods have been ruined by drugs and the crime that attends their sale and use,³⁴⁹ we must not accept this. The war on drugs, however, has failed; it does not reduce drug abuse or even raise the street price of drugs.³⁵⁰ Simply releasing jailed drug offenders would wreak more havoc on already ravaged neighborhoods. This danger can be reduced by freeing only prisoners less likely to commit crimes and then subjecting those released to rehabilitation and careful monitoring.

No such program can be perfect; many participants will relapse, but the net effect will be positive. Criminal conviction and imprisonment of black men are now so common that they have lost their stigma in black communities and even to some extent become normative; to many, an initial arrest and conviction are not a disgrace but a rite of passage.³⁵¹ Long sentences for mere possession or small sales of drugs diminish respect for law among the many people who consider these sentences unjust.³⁵² Reducing arrests and incarceration would improve respect for law and relations with police in minority communities.

Whites would also benefit from these steps. Many whites also incur excessive and counterproductive criminal sentences. The high cost of prisons is straining state budgets.³⁵³ Some states are

spending money.

348. See Thomas Adcock, *Old-Fashioned Politics; Attorneys/Candidates Discover a Winning Strategy in Door-to-Door Democratic Campaigns*, N.Y.L.J., Oct. 8, 2004, at 16 (describing a district attorney candidate who campaigned on the idea that drug laws have an unfair impact on minorities).

349. See Stephen Ohlemacher, *Proposals Target Sentencing Bias*, HARTFORD COURANT, Apr. 6, 1999, at A3 (noting the disparate impact of illegal drugs and crime on minority neighborhoods).

350. See generally Adcock, *supra* note 348 (noting politician's belief in the ineffectiveness of drug laws).

351. See LOURY, *supra* note 141, at 80–81, 201 fig.19 (reporting that the incarceration rate for black males is seven times that of white males).

352. Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 J. GENDER RACE & JUST. 1, 30 (1997) (stating that "the extremely high number of neighborhood men under the control of the criminal justice system itself can reduce respect for the law").

353. See Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y.

reacting by lowering prison populations with early release programs.³⁵⁴

5. Immigration

America is inundated with unskilled immigrants who compete for jobs with unskilled natives.³⁵⁵ The impact is evident in the response of blacks, who are fleeing regions of high immigration.³⁵⁶ The claim that unskilled immigrants take only jobs that natives do not want³⁵⁷ is debunked by economist Robert Kuttner: “funny thing—when employers pay decently, American workers wait in line all night to apply.”³⁵⁸ Reducing immigration would not only provide jobs for many natives who would otherwise be unemployed, but would also put upward pressure on wages for the low-

TIMES, Nov. 10, 2003, at A1.

354. See Editorial, *Creating the Next Crime Wave*, N.Y. TIMES, Mar. 13, 2004, at A16 (“In recent years, 25 states have eased sentencing policies and reinstated early release and treatment programs for drug offenders, now about a quarter of the nation’s prisoners.”); Adam Liptak, *Sentences Are Too Long or Too Short. Rarely, Just Right*, N.Y. TIMES, Aug. 24, 2003, § 4, at 3 (“Several financially strapped states . . . have eased sentencing laws in the past year.”).

355. See GEORGE J. BORJAS, HEAVEN’S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY 19–20, 66–67 (1999); STEVEN A. CAMAROTA, CENTER FOR IMMIGRATION STUDIES, IMMIGRATION FROM MEXICO: ASSESSING THE IMPACT ON THE UNITED STATES 21–23, 27–28 (2001); Roger O. Crockett, *Why Are Latinos Leading Blacks in the Job Market?*, BUS. WK., Mar. 15, 2004, at 70 (quoting Reverend Jesse Jackson saying that many Latinos “are hired to do work that blacks once had”).

356. This migration is logical; while median household incomes generally rose during the 1990s, they fell in areas of high immigration. See Peter Y. Hong, *The U.S. Census: Data Reflects California’s Highs, Lows*, L.A. TIMES, June 5, 2002, at B1; Scott Martelle & Erin Chan, *Income Drop in 90s Cut a Broad Swath, Data Show*, L.A. TIMES, Aug. 27, 2002, at B1; Janny Scott, *Census Finds Rising Tide, and Many Who Missed Boat*, N.Y. TIMES, June 17, 2002, at B1; Janny Scott, *Manhattanites Fared Best in New York City in 1990s*, N.Y. TIMES, May 24, 2002, at B4. Ironically, many go to the old Confederacy. Vernon M. Briggs, Jr., Editorial, *Immigration Policy Sends Blacks Back to South*, N.Y. TIMES, Feb. 1, 1990, at A22.

357. See Jean Baldwin Grossman, *The Substitutability of Natives and Immigrants in Production*, 64 REV. ECON. & STAT. 596, 602 (1982) (stating that the influx of immigration does not seriously affect natives); NAT’L RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 218 (James P. Smith & Barry Edmonston eds., 1997).

358. Robert Kuttner, *Bush’s Cynical Immigration Gambit*, BUS. WK., Feb. 9, 2004, at 20.

skilled.³⁵⁹ These workers would benefit further if given tax relief so that they could take home more of their wages.³⁶⁰

Cheap immigrant labor keeps prices down.³⁶¹ Immigrant workers are also more docile because they fear that any trouble will lead to their deportation, especially if they are here illegally.³⁶² Competition from immigrants intimidates native workers who might otherwise be more assertive.³⁶³ The benefits of immigrant labor are outweighed, though, by its costs. In areas of high immigration, local governments are overwhelmed by the added cost of social services and law enforcement.³⁶⁴ Increased unemployment and lower incomes of natives also create social costs.³⁶⁵

Politicians of both parties hesitate to restrict immigration both because of donations from employers of immigrants and for fear of offending voters from ethnic groups with many immigrants. Black politicians share this reluctance. Like their hostility to school vouchers, it stems partly from concern for their standing in the Democratic Party. Most Americans, however, want to reduce immigration.³⁶⁶ Private groups and sympathetic politicians in both races should publicize this issue and pressure the federal government to act.

359. Conlin & Bernstein, *supra* note 235, at 62 (“Curbing the flood of unskilled immigrants . . . would ease some of the gravitational pressure on low-end pay.”).

360. *See supra* notes 345–46 and accompanying text.

361. *See* Donald L. Barlett & James B. Steele, *Who Left the Door Open?*, TIME, Sept. 20, 2004, at 52 (“[M]any citizens quietly benefit from the flood of illegals because the supply of cheap labor helps keep down the cost of many goods and services . . .”).

362. Further, “employers—some of whom are nonwhite themselves—say they find inner-city employees [who are largely Black] to be unreliable.” Mead, *supra* note 220, at 65.

363. *See* Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1379–80 (2005).

364. *See* ROY BECK, THE CASE AGAINST IMMIGRATION: THE MORAL, ECONOMIC, SOCIAL, AND ENVIRONMENTAL REASONS FOR REDUCING U.S. IMMIGRATION BACK TO TRADITIONAL LEVELS 203 (1996); Eric Bailey & Dan Morain, *Anti-Immigration Bills Flood Legislature*, L.A. TIMES, May 3, 1993, at A3.

365. *See* BECK, *supra* note 364, at 203–04.

366. *See* Stephen Dinan, *Americans Oppose Increase in Immigration*, WASH. TIMES, Jan. 8, 2004, at A1.

6. Encouraging Charity

One problem with government social welfare programs is that they diminish donations to private charities.³⁶⁷ Also, cuts in the highest federal income tax rates reduce the tax benefits of charitable donations by the wealthy, who are the largest donors.³⁶⁸ Those concerned about the needy should support government action to encourage private charity.

The proposed Charity Aid, Recovery, and Empowerment ("CARE") Act of 2003 was approved by the Senate on April 9, 2003, and was introduced in the House of Representatives.³⁶⁹ It would increase the tax incentives for much charitable giving.³⁷⁰ One problem with private charity is that much of it goes to activities that give little or no aid to the needy.³⁷¹ Many of these activities (the arts, for instance) are worthy, but the poor need more help, and the disproportionate number of blacks among the needy strengthens the case for action. Federal, state, and local governments should give better tax treatment to philanthropy for the poor. The expressive function of government should also be used to promote philanthropy simply by publicizing the efforts and accomplishments of charities for the poor.

B. *The Expressive Function of Law*

If race relations were rational, there would be no problem to discuss—all groups benefit from cooperation and trust. Sadly, race relations often provoke irrational emotions. Racial harmony is also hindered by subgroups that profit from racial separation and strife. The government influences race relations by affecting

367. See A. Abigail Payne, *Does the Government Crowd Out Private Donations? New Evidence from a Sample of Non-Profit Firms*, 69 J. PUB. ECON. 323, 324–25, 343 (1998); Richard Steinberg, *Does Government Spending Crowd Out Donations?: Interpreting the Evidence*, 62 ANNALS PUB. & COOP. ECON. 591, 591 (1991). But see Cagla Okten & Burton A. Weisbrod, *Determinants of Donations in Private Nonprofit Markets*, 75 J. PUB. ECON. 255, 268, 271 (2000).

368. See, e.g., Evelyn Brody, *Charities in Tax Reform: Threats to Subsidies Overt and Covert*, 66 TENN. L. REV. 687, 694 (1999).

369. Charity Aid, Recovery, and Empowerment Act of 2003, S. 272, 108th Cong. (2003).

370. See Scott M. Michelman, *Faith-Based Initiatives*, 39 HARV. J. LEGIS. 475, 475 n.8 (2002).

371. See Michael M. Burns, *Fearing the Mirror: Responding to Beggars in a "Kinder and Gentler" America*, 19 HASTINGS CONST. L.Q. 783, 802 (1992).

not just people's material interests, but also their attitudes through its expressive function.³⁷² Despite extensive (and often justified) skepticism about government in America today, the prestige of the law remains high. Thus, opposing groups battle fiercely about whether the Confederate flag will fly over the South Carolina state house³⁷³ and about the Supreme Court's disposition of criminal sodomy laws that are almost never enforced.³⁷⁴ These controversies entail few material consequences, but the results can significantly alter public opinion.

The effects of the expressive function of government are slight when people's beliefs are firmly entrenched, but much greater in areas like race where beliefs are ambivalent, amorphous, and volatile.³⁷⁵ Government's expressive influence is greatest in national institutions, especially the presidency, Congress, and the federal courts, but local governments can also play a role. The Republican Party could be especially influential. In most elections, the majority of whites vote Republican,³⁷⁶ so blacks realize that Democrats, even a Democratic president, do not speak for most white Americans. A commitment to racial equality from Republicans would indicate a general consensus among whites.

Government can improve race relations by simply teaching that everyone benefits from racial trust and cooperation. Most people do not instinctively grasp this truth; fear and suspicion of others seems to be more natural, especially with racial groups that look different.³⁷⁷ Fear and suspicion are abetted by the related misconception that human relations are zero sum games so that any gain by one group must come at the expense of others. Government can counter this error by proclaiming the opportunity for mutually profitable, win-win results from collaboration.

372. See *supra* notes 88–89 and accompanying text.

373. See Jim Davenport, *S.C. Removes Rebel Flag from Statehouse*, CHARLESTON GAZETTE (West Virginia), July 2, 2000, at A8; Rick Freeman, *S. Carolina's Allegiance to the Flag; State is a Sports Outcast Because of Confederate Link*, WASH. POST, May 20, 2000, at D1.

374. See Melanie C. Falco, Comment, *The Road Not Taken: Using the Eighth Amendment to Strike Down Criminal Punishment for Engaging in Consensual Sexual Acts*, 82 N.C. L. REV. 723, 723–24, 752 (2004); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 103–04 (2000).

375. See *supra* text accompanying notes 176–78.

376. JAMES M. GLASER, *RACE, CAMPAIGN POLITICS, AND THE REALIGNMENT IN THE SOUTH* 9 (1996).

377. See *supra* notes 29–30 and accompanying text.

By its expressive function, government also influences norms.³⁷⁸ Again, moral suasion is most effective not when it attacks deeply held norms, but when it shows people that one of their norms conflicts with another norm that they value more highly. The abolitionists persuaded most Americans that their Christian faith demanded liberty for all, including slaves, and that their own forefathers had so proclaimed in the Declaration of Independence.³⁷⁹ Today, government can inculcate not just tolerance, but respect and care for other groups by reminding us that, like the Good Samaritan, we are our brother's keeper.³⁸⁰

No particular plan is required for this purpose; care and respect can be shown in many ways. Some manifestations can be purely expressive, as in statements and personal gestures of friendship and concern. Such statements are rightly dismissed as empty rhetoric, though, unless backed by concrete acts. Government leaders do not enhance trust if they profess concern about education for African Americans but take no action while opposing racial preferences in schools.

Race relations are affected not only by attitudes about race per se but by the attitudes of the prosperous to the needy. Many whites harbor no bias against blacks but do little on their own to help the poor and generally oppose such help from government.³⁸¹ Because the poor are disproportionately black,³⁸² many African Americans suspect these whites of racism. The suspicion may be mostly wrong, but given the history of race in America, it is to be expected. Even if they believe denials of racial prejudice, many poor Americans, white as well as black, resent refusals of the comfortable to help them.³⁸³

Here again the expressive power of government can be decisive. Most people's attitudes about the poor are mutable.³⁸⁴ They are

378. See *supra* notes 88–96 and accompanying text.

379. See Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785, 798–99 (1995); see also *supra* note 209 and accompanying text.

380. See *supra* note 213.

381. See Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287, 320 (2000).

382. See Reginald Leamon Robinson, "The Other Against Itself": *Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15, 78–79 (1993); *supra* notes 113 and accompanying text.

383. See *supra* note 54 and accompanying text.

384. See Michelle S. Jacobs, *Full Legal Representation for the Poor: The Clash Between*

influenced, inter alia, by the expected effectiveness of the help, the level of contributions by others, and the merit of recipients.³⁸⁵ Thus, in addition to promoting government aid to the poor, government leaders can publicize successes achieved through private charity and the cooperation of the recipients.

People are also motivated by ideals; this includes “visions about what the future could bring if only the dispute that confronts them can be surmounted.”³⁸⁶ Many politicians are loathe to proclaim ideals; the first President Bush scoffed at the “vision thing.”³⁸⁷ Optimism also collides with the fatalism about race propounded by people like Derrick Bell and a broader skepticism about human behavior that now seems pervasive in America.³⁸⁸ But Judaism and Christianity project visions of universal brotherhood and of a society transfigured by concern for the needy. America, more than any other nation, was founded on a vision of liberty, the “pursuit of happiness,”³⁸⁹ and “a more perfect Union” that would “promote the general Welfare.”³⁹⁰ To envision a better world is as American as apple pie, and high government officials can use their prestige to inspire us to strive for that vision. Such efforts not only influence many people directly but can also precipitate a “norm cascade” that sweeps up others.³⁹¹

Some so-called conservatives deny that social progress is possible,³⁹² but the Judeo-Christian principles embraced by most conservatives forbid such despair, and the success of America itself empirically refutes it.³⁹³ The vision of racial harmony and equality is also appealing because it entails the practical as well as the idealistic—all Americans would gain from it. Thus leaders should not stress the sacrifices necessary to achieve this vision, although

Lawyer Values and Client Worthiness, 44 HOW. L. J. 257, 298–99 (2001).

385. See *supra* notes 69–72 and accompanying text.

386. Raiffa, *supra* note 278, at 140.

387. See Mary McGrory, *Faint-Hearted Phrasemakers*, WASH. POST, July 24, 1988, at C1.

388. See generally JEDEDIAH PURDY, FOR COMMON THINGS: IRONY, TRUST, AND COMMITMENT IN AMERICA TODAY xi–xv, 38–39 (1999) (describing and decrying the skepticism).

389. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

390. U.S. CONST. pmbl.

391. See *supra* note 93 and accompanying text.

392. See John L. Hill, Note, *Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis*, 76 GEO. L.J. 2045, 2069 & n.95 (1988).

393. See *supra* notes 167–69.

the task will be expensive and emotionally difficult; such messages are not well received in our self-centered, materialistic age. Rather they should stress material profits to be earned in the future and the honor, pride, and satisfaction to be gained now.

Pursuit of common goals can be thwarted by subgroup interests.³⁹⁴ Republicans may hesitate to increase Pell Grants because much of the benefit would go to people who would not vote for them anyway. Instead, they would prefer to cut taxes or provide benefits for their own supporters. On the other side, blacks in Congress hesitate to trade in racial preferences or to cooperate with Republicans because some of their influential constituents benefit from preferences and because cooperation would boost Republicans at the expense of Democrats.

It would be naive to exhort politicians to reject special interests and serve the common good. As public choice theory shows, government officials are normal humans—they generally pursue their own interests by favoring those who can elect, hire, promote, or fire them.³⁹⁵ Like others, public officials sometimes rise above self-interest and act altruistically, especially if the costs to them are low. Altruism alone, however, will not effect major change on important issues. A more promising path is for citizens concerned about the poor to exert political pressure that makes it profitable for government officials to address their concerns. Since new, powerful grass roots movements are rare, it is more likely that existing institutions could change their agendas to apply more of the desired pressure on government.

CONCLUSION

Racial inequality remains America's biggest problem. The disadvantaged state of so many African Americans is not only unjust but also costly to whites. In recent decades, progress in narrowing this disparity has slowed to a crawl. This inertia is especially frustrating because there are many helpful steps on which most Americans can agree. These measures are not being taken now because mistrust between the races thwarts collaboration. Tech-

394. See generally discussion *supra* Part II.A.

395. For an explanation of public choice theory, see Dennis C. Mueller, *Public Choice in Perspective*, in PERSPECTIVES ON PUBLIC CHOICE 1, 3-8 (Dennis C. Mueller ed., 1997).

niques for reducing suspicion and building trust have been identified and applied in many contexts, including some local efforts at racial cooperation. This Article has discussed these techniques and shown how they could be used to break out of the current stalemate and achieve real progress toward equality.
