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Book Review

Justifying Racial Reform


Davison M. Douglas*

[African Americans] want what is due them, rather than pity and sympathy. They think that if you have to make people look bad or broken up before you can get the country to give them what they should have by right, then that's the same old racism and segregation at work.—African-American minister, 1965†

African Americans have had an undeniably unique experience in this country, surviving three centuries of the ravages of slavery and postemancipation oppression. How has this history affected subsequent generations of African Americans? And in what ways should contemporary public policy be reshaped to account for this legacy?

Social scientists and policymakers have wrestled with these questions for more than a century. Their conclusions, not surprisingly, have varied dramatically over time. Daryl Michael Scott, in his fascinating new book, Contempt and Pity: Social Policy and the Image of the Damaged Black Psyche, 1880-1996, has written a history of the ways in which intellectuals and policymakers have both characterized the personality of African Americans and used those characterizations to influence this country's racial policies. Although these characterizations, or "images," have

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1. P. 185 (quoting ROBERT COLES, CHILDREN OF CRISIS 143 (1967) (emphasis in original)).
varied, a common theme of the last fifty years (but with roots in the writings of W.E.B. Du Bois at the turn of the century) has been the effort by racial liberals to construct African Americans as damaged and to use that "damage imagery" to build support for progressive racial policies. The arguments in favor of school desegregation in *Brown v. Board of Education* and affirmative action in the mid-1960s, for example, were premised in part on the notion that African Americans had been damaged by racial discrimination and segregation.

Scott argues that although damage imagery may have played an important role in efforts to attack segregation and racial discrimination, the use of this imagery has had profound negative consequences for African Americans and should be eschewed. According to Scott, liberal use of damage imagery has "made black rights contingent upon white sympathy and superiority rather than black equality and citizenship." Moreover, the use of such imagery, designed to evoke sympathy, too often evokes contempt and is easily co-opted to justify anti-black attitudes and policies. As long as African Americans are conceived of as "damaged," or a "problem people," they will inevitably remain mired in negative stereotypes and will seek to define themselves against a white norm.

Scott's intellectual history is not chiefly concerned with legal doctrine, but his analysis has significant implications for the contemporary legal and political debate over race-conscious social policies. The central issue in this country's racial policy during the last thirty years has been whether the race of individuals should matter in an array of public and private decisions: who is admitted to a university, who is employed, how voting challenges to affirmative action in university admissions have escalated within the past few years. In 1996, the United States Court of Appeals for the Fifth Circuit found the University of Texas School of Law's consideration of race in its admission policy to violate the Fourteenth Amendment. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). Affirmative action policies at other universities, such as the University of Michigan and the University of Washington, have also recently been challenged in litigation. See *Gratz v. Bollinger*, No. 97-75231 (E.D. Mich. filed Oct. 14, 1997); *Smith v. University of Wash. Law Sch.*, No. 97-335 (W.D. Wash. filed Mar. 15, 1997); *Harvey Berkman, Supremes May Get Other Affirmative Action Cases*, NAT'L L.J., Dec. 8, 1997, at A10. California Proposition 209, approved by the voters, bars the use of race in the admission practice at schools in the California university system. CAL. CONST. art. I, § 31.

Both governmental entities and private businesses have used affirmative action policies in their hiring practices for the past quarter century. Increasingly, the use of affirmative action among governmental employers is under challenge. Affirmative action promotion policies for police officers have been held unconstitutional. See *Middleton v. City of Flint*, 92 F.3d 396 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1552 (1997); *Police Ass'n v. City of New Orleans*, 100 F.3d 1159 (5th Cir. 1996). An affirmative action hiring program for a fire department was held unconstitutional in *Alexander v.
districts are constructed, how government contracts are distributed, and how children are assigned to school. Proponents of color blindness argue that consideration of race in these decisions, even if done for benign reasons, is both unconstitutional and immoral. Critics of color blindness argue that attention to race is justified given this country's past treatment of racial minorities. Reasons proffered in support of race-conscious programs such as affirmative action vary, but one important rationale has been that such programs are necessary to mitigate the harmful effects of years of racial discrimination in this country.

Should this nation continue to follow remedial policies that involve race consciousness, such as affirmative action and school desegregation? If so, in justifying such policies, should policymakers reject considerations that African Americans have been harmed or "damaged" by our history of

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Estepp, 95 F.3d 312 (4th Cir. 1996), cert. denied sub nom. Prince George's County v. Alexander, 117 S. Ct. 1425 (1997). In Taxman v. Board of Education, 91 F.3d 1547 (3d Cir. 1996), cert. granted, 117 S. Ct. 2506, and cert. dismissed, 118 S. Ct. 595 (1997), a school board was not permitted to advance the goal of racial diversity through nonremedial discriminatory layoffs. See id. at 1567; see also Messer v. Meno, 130 F.3d 130 (5th Cir. 1997) (reversing the trial court's dismissal of a discrimination claim against the Texas Education Agency for implementing a gender and racial work force balance program).


9. In Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), the Supreme Court struck down the federal government's practice of giving general contractors on government construction projects a financial incentive to hire subcontractors controlled by socially and economically disadvantaged groups defined by race and ethnicity. See id. at 205-06; see also Contractor's Ass'n v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996), cert. denied, 117 S. Ct. 953 (1997) (finding that the city's set-aside program for black construction contractors was not narrowly tailored to serve a compelling state interest).


racial discrimination and segregation? Scott is wary of reliance on damage imagery, but he leaves open the question of how to justify remedial racial policies without resorting to notions of harm.\(^\text{13}\)

I. History of the Use of Damage Imagery

The bulk of Scott's book is a consideration of the ways in which social scientists have depicted African Americans over the course of the last century. Although racial conservatives dominated this depiction during the pre-World War I period, after the war, the construction of the image of the black psyche was controlled by racial liberals. During the post-World War II era, racial liberals depicted African Americans as damaged by racial discrimination and segregation and used this damage imagery to urge an end to such practices. Since the mid-1960s, the image of African Americans as damaged has been hotly contested, but the use of damage imagery to justify various social policies has continued.

Scott's intellectual history begins with the assumption that "social scientists are unable to overcome bias or the social and intellectual context in which they labor."\(^\text{14}\) Accordingly, the construction of the black personality by social scientists has ebbed and flowed, shaped in part by the ideologies of those constructing the image. By tracing the development of social scientific perspectives on African Americans, and their resulting influence on policymakers, Scott offers a fascinating perspective on the development of racial policy in the twentieth century.

A. The Age of Jim Crow, 1880-1920

During the last decade of the nineteenth century and the first decade of the twentieth century, the South embraced an expansive policy of racial degradation, characterized by rigid segregation, disfranchisement, and frequent lynching.\(^\text{15}\) During this period, racially conservative social scientists dominated the depiction of black personality. Most of these social scientists justified oppressive social policies and practices such as segregation and disfranchisement by arguing that African Americans suffered an innate inability to compete with whites that prevented them from

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13. Although Scott does not explicitly address the issue of what racial policies are appropriate at the end of the twentieth century, he does make clear that "my disagreement with certain integrationist assumptions looms large in my analysis," P. xviii, and that the embrace of certain race-conscious policies in the 1960s such as affirmative action "exceeded anything envisioned in the American creed." P. 139.


assimilating into an advanced civilization. These experts did not associate the social and psychological problems of blacks with the oppression suffered under slavery and segregation. Rather, they argued that it was freedom from slavery that was the cause of black distress:

Ever since the antebellum period, conservative whites, believing that slavery was a boon to the African, argued that African Americans could not survive as free people. A corollary to this view was that black mental health suffered in the state of freedom. The alleged higher rates of insanity among free blacks in northern cities was proffered as evidence.16

Conservatives used theories of black damage to justify policies of segregation and disfranchisement, believing "that segregation was a humane form of social control because it provided the 'child race' the space to develop."17 As to the adverse effects of segregation, most social scientists believed that blacks were generally satisfied with their state; only the mulatto was unhappy with segregation.18

Some social scientists of this time period offered a different perspective, accepting the notion of black inferiority, but rejecting the notion that biological background necessarily determined one's status in the world. These social scientists supported segregation, but posited that in time African Americans might sufficiently develop to warrant entry into the mainstream of American civilization.19

One black scholar, W.E.B. Du Bois, explored the social and psychological impact of the adverse environment in which blacks lived. At the end of the nineteenth century, Du Bois called for examination of "the tangible phenomena of Negro prejudices in all possible cases; its effect on the Negro's physical development, on his mental acquisitiveness, on his moral and social condition."20 Du Bois described the psychological strife that African Americans experienced as a result of oppression, with the purpose of eliciting further study of the effects of racial discrimination and

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16. P. 12. For example, Arrah B. Evarts, a government physician, commented in 1914: "It has been said by many observers whose word can scarce be doubted, that a crazy negro was a rare sight before emancipation. However that may be, we know he is by no means rare today." P. 13 (quoting Arrah B. Evarts, Dementia Precox in the Colored Race, 1 PSYCHOANALYTIC REV. 394 (1914)).


18. As Alfred Stone, a "planter-turned-social-psychologist," suggested: "The varied tragedy of human life furnishes few more pathetic spectacles than that of the educated mulatto. . . . Frequently inheriting from the superior race talents and aspirations the full play of which is denied him by his kinship with the inferior—through no fault of his own he is doomed to be an anachronism in American political and social life." P. 15 (quoting ALFRED HOLT STONE, STUDIES IN THE AMERICAN RACE PROBLEM 436 (n.d.)).

19. See p. 12 (outlining the distinction between accommodationists and competitive racists).

support from middle class whites for the plight of African Americans. Du Bois's work, however, failed to have its desired effect. It would be another fifty years before social scientists would embrace the use of damage to shape social policy.

B. The Interwar Years, 1920-1945

During the years between World War I and World War II, racially liberal social scientists replaced racial conservatives as the dominant group of experts studying African-American personality. These experts downplayed the view that blacks were biologically inferior to whites. For experts during these years,


culture and the social environment replaced biology as the means of explaining black behavior. . . . This shift was the product of a social science community in which the leading experts who specialized in fields that dealt with race and African Americans believed that blacks could be assimilated into the mainstream of American life.22

At the same time, some interwar social scientists concluded that racial discrimination had damaged black psyches, particularly self esteem, but that this “personality damage was an outgrowth of being the subordinate group, not of the inability of blacks to compete with whites.”23 For those social scientists who did find damage, it was most acute for those African Americans who lived in close proximity with whites: “[T]he assumption that underpinned the leading theories of the interwar years was the same as the prevailing one of the Progressive Era: social and cultural proximity, not distance, caused damage to the psyches of members of subordinated groups.”24

Interwar social scientists were divided on the issue of whether African Americans suffered self hate as a result of their predicament. Some social

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21. W.E.B. Du Bois took this posture in his books, THE PHILADELPHIA NEGRO 394-97 (Schocken Books 1967) (1899) (suggesting that discrimination hinders blacks and that whites have a duty to stop discrimination primarily for their own sakes), and DU BOIS, supra note 2, at 475-92 (presenting the status of race relations and suggesting that both races should work together for mutual benefit).
22. P. 19.
23. P. xii.
24. P. 21. Many of these theorists focused particularly on the position of the black elite: “In the two classic field studies that employed caste-and-class theory, the personalities of the black elite were depicted as relatively more damaged than those of the masses. The greater damage among the middle class resulted from their greater social and cultural proximity to the dominant class of the white caste.” P. 27.

But many “interwar social scientists did not believe that the black psyche was in a state of crisis as a result of racial prejudice and discrimination. In the two major research projects on African Americans in the Interwar years, this view was reinforced. Personality damage was either ignored as a major issue or presented as a minor problem.” Pp. 32-33.
scientists, such as Kenneth Clark, who would embrace self-hate theory during the post-World War II period when damage imagery was used for instrumental purposes, rejected self-hate theories during the interwar years.\textsuperscript{25}

One of the most significant and ambitious studies of race during the pre-1945 period was a fifteen-hundred page report produced under the direction of a Swedish economist, Gunnar Myrdal, entitled \textit{An American Dilemma}.\textsuperscript{26} Myrdal's critique of American race relations largely ignored the issue of psychological damage among African Americans. Rather, Myrdal emphasized the fact that patterns of racial segregation and racial discrimination were inconsistent with the nation's political ideals.\textsuperscript{27}

Yet for the most part, social scientists during the interwar years did not attempt to shape social policies affecting African Americans.\textsuperscript{28} During the early twentieth century, crusading experts, believing that social engineering was possible, had aggressively used their theories of black inferiority to justify segregation and disfranchisement. Social scientists of the interwar period abandoned this activism, and "pressed for the social sciences to become even more like the natural sciences."\textsuperscript{29} As a result of this reluctance to mix scientific inquiry with social activism, few interwar social scientists pressed for social change or made appeals to white sympathy. This reluctance to influence political attitudes would abruptly change during the post-World War II era.

\textbf{C. The Civil Rights Era, 1945-1965}

During the post-World War II era social scientists studying race recast both their conclusions as to the effects of racial discrimination on the black psyche and their willingness to use damage imagery to influence social policy. The most interesting chapters of Scott's book delineate the ways in which racially liberal social scientists argued that blacks had been


\textsuperscript{26} Gunnar Myrdal, \textit{An American Dilemma: The Negro Problem and Modern Democracy} (1944).

\textsuperscript{27} According to Scott,

Rather than manipulating the therapeutic as a means of dramatizing the evil of segregation, rather than presenting blacks as objects worthy of pity, Myrdal built his critique of American race relations around the nation's political ideals and appealed to the country's sense of justice. To the expert from abroad, the striking aspect of American race relations was that they contradicted the American political ideals of equality and opportunity. Pp. 34-35.

\textsuperscript{28} For example, the studies produced for the American Youth Commission (AYC), which Scott describes as the era's "most important effort to comprehend the psychological effects of segregation on the black psyche," downplayed damage imagery and made no appeal for white sympathy. P. 66.

\textsuperscript{29} P. 58.
harmed by segregation to support desegregation and antidiscrimination policies during the twenty years following the end of World War II.

During this time period, racial liberals continued to dominate the construction of the image of African Americans, but they stressed the damaging effects of racial discrimination and segregation on the black personality to a far greater degree than had their interwar predecessors. Part of this emphasis on the black psyche reflected a burgeoning interest in psychology during the postwar era. This interest in psychology influenced the various social sciences, as historians, sociologists, political scientists, and anthropologists increasingly incorporated psychological theories into their work.30

Moreover, social scientists embraced the notion that they should use their research to influence social policy. For example, in 1951, sociologists organized the Society to Study Social Problems for the purpose of fostering "co-operative relations among persons and organizations engaged in the application of scientific sociological findings to the formation of social policies."31 The most dramatic example of this use of social science to influence policy was the use of damage imagery to appeal to white middle-class sensibilities about the harms of segregation and discrimination. As Scott notes:

Oppression was wrong, liberals suggested, because it damaged personalities, and changes had to be made to protect and promote the well-being of African Americans. Rather than standing on the ideals of the American creed . . . liberals capitulated to the historic tendency of posing blacks as objects of pity. Liberals proceeded as if most white Americans would have been willing to grant black people equal rights and services only if they were made to appear psychologically damaged and granted a special status as victims.32

This use of damage imagery played a particularly prominent role in the challenge to segregated schools that culminated in Brown v. Board of Education. In seeking to overturn the separate but equal doctrine of Plessy v. Ferguson,33 NAACP strategists understood that attacking school segregation simply on the grounds that racial classifications violated the Equal Protection Clause of the Fourteenth Amendment was insufficient given prior Supreme Court decisions that accepted the legitimacy of racial classifications in public education.34 In addition, they needed to establish that

30. See pp. 72-73.
31. P. 73.
32. P. xiii.
33. 163 U.S. 537 (1896).
34. For example, the Supreme Court implicitly endorsed the legitimacy of school segregation in Gong Lum v. Rice, 275 U.S. 78, 85-87 (1927) (holding that a Chinese citizen was not denied equal protection of the laws when she was required to attend a public school for "colored" students); Berea
segregation in fact caused harm to black children and hence these children could not receive an equal education in a segregated school. The Court in *Plessy* had held that segregation did not “stamp[] the colored race with a badge of inferiority.” 35 The burden of the NAACP strategists in *Brown* was to establish that school segregation did in fact cause harm to black children.

The Supreme Court had opened the door to such a strategy in *Sweatt v. Painter* 36 by holding that segregated black students could not receive an equal legal education because of the intangible factors that accompanied the training of lawyers. 37 To extend this notion of educational disadvantage created by segregation to the elementary and secondary level, the NAACP set out to demonstrate that segregation caused psychological harm to black children. Yet by the early 1950s, no published study had conclusively found that separate but equal schools caused psychological harm to black children and that that harm inhibited the ability of black children to learn. 38 As Scott notes, Without such studies, of course, the question of whether children damaged by segregated schools had learning disabilities resulting from segregation rather than other factors could not be answered, leaving those who proffered an opinion to engage in pure speculation. To be sure, there were damage findings among black children of school age, but the methodologies applied in these studies could not implicate segregated schools as the culprit. 39

Although Kenneth Clark, when approached by the NAACP, initially indicated that he could not establish that school segregation caused

*College v. Kentucky*, 211 U.S. 45, 58 (1908) (holding that it is not unconstitutional for states to prohibit incorporated schools from educating white and minority students together); and *Cumming v. Board of Education*, 175 U.S. 528, 544-45 (1899) (refusing to compel a school board to close a high school for whites after the school board closed the local black high school).

37. See id. at 634 (stating that a “law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts”).

But in the postwar era, “[t]he social science literature that dealt with the black ego was markedly different” than before. “Scholars were now more than willing to advance the notion that African Americans suffered from self-hate, the most extreme identity problem, and to make it a central part of understanding the behavior of African Americans.” P. 82.

39. P. 123.
psychological harm to black children, Clark did eventually conclude from his famous doll studies that children in segregated schools were in fact psychologically damaged in ways that inhibited their ability to learn.\(^{40}\)

Moreover, thirty-five leading social scientists signed a statement prepared by Clark that was appended to the plaintiffs' brief in *Brown* and that affirmed the psychological harm to black children caused by school segregation.\(^{41}\) With the issue of school segregation at stake, liberal social scientists closed ranks to issue their condemnation.

The Court embraced the psychological argument in *Brown*: "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*," the Court wrote, "modern authority" supported the view that school segregation "generates a feeling of inferiority as to [black children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone."\(^{42}\) Thus, segregated schools could never be equal.

In the wake of *Brown*, damage imagery became part of the rhetoric against segregation. For example, Ralph Bunche attacked school segregation a few months after the *Brown* decision, arguing that the average black father "wants for his children the best education possible on the same basis as other American children and under conditions which will not scar them with the psychological wounds of inferiority through enforced segregation."\(^{43}\) Similarly, Martin Luther King, in his famous letter from the Birmingham jail in 1963, opposed segregation by arguing that "any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality."\(^{44}\) King's letter was designed in part to appeal to white

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\(^{40}\) Clark asked a number of black children to select the "nice" doll between a black and a white doll and concluded from their answers that black children in segregated schools suffered psychological harm that inhibited their ability to learn. These studies are described in KENNETH B. CLARK, PREJUDICE AND YOUR CHILD 17-24 (2d ed. 1963). To Scott, and other observers as well, Clark's "reasoning was tortured" and was influenced by his keen desire to strike a blow against segregation. P. 124. For critics of Clark's conclusions, see RALPH ROSS & ERNEST VAN DEN HAAG, THE FABRIC OF SOCIETY 165-66 (1957) ("Professor Clark tested sixteen children between the ages of six and nine in Clarendon County, South Carolina, and elsewhere about three hundred children. This number would be too small to test reaction to a new soap."); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 164-66 (1955) (questioning Clark's objectivity and testing methods); Ernest van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69, 69 (1960) ("Probably Professor Clark has done but negligible damage to the Negro cause and to the integrity of our judicial processes. But I remain disturbed about the disrepute his 'evidence' could not fail to bring to social science if it were taken seriously.").

\(^{41}\) See pp. 129-30.


\(^{44}\) P. 138 (quoting MARTIN LUTHER KING, JR., *Letter from a Birmingham Jail, in Why We Can't Wait* 76, 82 (Mentor 1964) (1963)).
sensibilities about the injustice of racial oppression. Indeed, much of the rhetoric and action of the black freedom struggle of the early 1960s was designed to appeal to Northern white sympathies.

According to Scott, in the wake of the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, "the American creed of equal opportunity and democracy was on the verge of realization. The main legal barriers preventing blacks from entering the mainstream of society no longer existed." Yet despite this success, most civil rights activists did not believe that they had reached the end of reform. Instead, they shifted their attention toward improving the economic status of African Americans. "Operating on the premise that African Americans had a need for and a claim to special assistance, a race-conscious liberalism appeared that called for the state and business to take a race-based approach to black economic empowerment and social rehabilitation." According to Scott, this "idea of race-conscious social policies exceeded anything envisioned in the American creed."

Those who supported the new race-conscious liberalism put forth a case for black exceptionalism. "Invoking damage imagery and manipulating the therapeutic ethos, race-conscious liberals, taking their cue from black leaders, argued that blacks, unlike immigrants, were owed and in need of preferential, compensatory programs." For example, Whitney Young of the National Urban League proposed a domestic Marshall Plan which called for $20 billion in government programs to deal with the legacy of generations of oppression of African Americans. Kenneth Clark also called for compensatory programs for blacks, saying, "If we're going to correct this past damage, we are going to have to correct it by direct, effective action which takes into account the nature of the damage."

During the 1960s, one of the programs that would eventually capture both governmental and business support was the idea of the benign use of race in hiring decisions. One of the earliest endorsements of this type of affirmative action was President Lyndon Johnson's executive order 11,246, which required government contractors to make adequate use of minority workers. President Johnson justified affirmative action at his 1965 commencement speech at Howard University by describing African Americans

45. P. 139.
46. P. 139.
47. P. 139.
48. P. 140.
49. See p. 148.
as burdened by "the scars of centuries" that inhibited their ability to compete.\footnote{51}

\textbf{D. The Radical Critique of Damage Imagery, 1965-1980}

During the late 1960s, radical social scientists sharply rejected damage imagery as a way of describing African Americans, instead promoting the image of the "resilient black psyche."\footnote{52} The intellectual impulses that drove this rejection of damage were rising racial pride and a rejection of assimilation as a social goal. To be sure, black nationalists had long used damage imagery in their appeals for support. As Malcolm X wrote in his autobiography: "You cannot find one black man . . . who has not been personally damaged in some way by the devilish acts of the collective white man!"\footnote{53} However, as Scott notes, radicals in the late 1960s adopted Malcolm X's macho style, but rejected his use of damage imagery. The Black Power generation was "well aware of the meaning of damage imagery in the political culture. The conservative co-optation of damage imagery to explain the [Watts] riot[] was well known to radicals."\footnote{54} Aware of the political uses of social science imagery, radical social scientists moved away from pathology and towards a reinterpretation of black psychology that celebrated the strength and resiliency of black people and culture. They argued "that blacks were seen as pathological primarily because they deviated from white norms, which were used as the universal standard of health."\footnote{55}

The radical rejection of damage imagery also involved labeling as racist anyone who used such imagery. Finding no meaningful distinction between damage imagery and innate inferiority, "the radicals placed a moral stigma on damage imagery and those who produced it."\footnote{56} As a result, many liberals abandoned damage imagery or at least deemphasized it. Others continued to speak of damage, but, to insulate themselves from charges of racism, made clear that the cause of damage was "the social

\footnotesize{\textsuperscript{51} Lyndon B. Johnson, Commencement Address at Howard University: "To Fulfill These Rights" (June 4, 1965), in \textit{2 Public Papers of the Presidents of the United States: Lyndon B. Johnson} 1965, at 635, 636 (1966).}

\footnotesize{\textsuperscript{52} P. 162.}

\footnotesize{\textsuperscript{53} P. 165 (quoting MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 269 (1965) (emphasis in original)).}

\footnotesize{\textsuperscript{54} P. 170 (footnote omitted). According to Scott, The Watts riot transformed the political equation and placed conservatives in control of damage imagery. In the public discussion after Watts, the image of the black family as the source of psychological and social pathology loomed large. The social problems associated with the black family became the basis for the conservatives' riot theory.}

\footnotesize{P. 156.}

\footnotesize{\textsuperscript{55} P. 179.}

\footnotesize{\textsuperscript{56} P. 177.}
system” or other factors external to the black community. For example, the Kerner Commission report on civil disorders emphasized the role of white racism in the urban riots of the 1960s. But although the radicals minimized the use of damage imagery for a few years, they could not stop its use.

E. Contemporary Use of Damage Imagery

Despite the radical rejection of damage imagery, the depiction of black people as uniquely damaged by their group experience has continued. Since the late 1970s, the ever-worsening conditions for many urban blacks—high crime rates, drug use, poor educational outcomes—has led to a resurgence of the use of damage imagery. In light of these conditions, many liberals, silenced during the late 1960s and 1970s by the radical critique, have rediscovered damage imagery. As Scott notes, “the worsening social conditions and the concomitant rise in violent crimes in the black community have caused left-of-center experts to slowly but surely reconsider and abandon the moratorium on damage imagery.” Moreover, for many left-of-center experts, the “rediscovery of pathology represents an attempt at social realism rather than an appeal directed at gaining white sympathy.” Once again, liberal social scientists and policymakers are using the language of damage to support new racial policies.

At the same time, conservative experts and policymakers have increasingly blamed the pathology of black families and culture for the social problems of African Americans, although extending the blame in recent years to Great Society programs that have created black dependency.

57. See p. 182.
58. P. 193.
59. P. 196. As sociologist Orlando Patterson commented in 1993, given the social crisis in the black community, “it is perhaps overdefensive and counterproductive to emphasize the ‘resilience’ and ‘strength’ of the black family . . . .” P. 197 (quoting Orlando Patterson, Blacklash: The Crisis of Gender Relations Among African Americans, 3 TRANSITION (n.s.) 15 (1993)). In a similar vein, Afrocentric experts, recognizing self-image problems among black males, have proposed all-black, all-male schools to serve the needs of black youth. See Joshua E. Kimerling, Black Male Academies: Re-Examining the Strategy of Integration, 42 BUFF. L. REV. 829, 833-34 (1994) (discussing the trend toward the increased use of all-black, all-male public educational academies). In arguing for the establishment of these schools, however, they have avoided appeals for white sympathy.
60. For example, in 1996, philosopher Richard Rorty called for liberals to develop a means of conveying the suffering endured by victims of discrimination to the self-interested middle class. See Richard Rorty, What’s Wrong with ‘Rights’, HARPER’S, June 1996, at 15, 15-18 (arguing that a rights-based political discourse fails to assist the empowerment of traditionally disadvantaged groups). In 1991, Representative John Conyers of Michigan introduced legislation that called for a commission to “examine the institution of slavery, subsequent de jure and de facto racial and economic discrimination against African Americans, and the impact of these forces on living African Americans.” P. 190 (quoting H.R. 1684, 102d Cong. (1991)).
61. Justice Clarence Thomas pursued this theme of dependency in Adarand, commenting that preferential programs such as affirmative action not only "marginalize" minority with a
Scott argues that damage imagery has assumed "an important part of the foundation of conservative reform. Republicans have successfully promoted the image of an underclass as a pathological creation of the liberal state, and damage imagery now underwrites the dismantlement of social welfare policy and the expansion of the federal criminal justice system . . . ." For Scott, the conservative use of damage imagery bears the potential for greater harm:

As America moves further to the Right, the experts' emerging consensus on black people as damaged becomes more perilous. In social policy making, damage imagery has ever served the cause of the hegemonic political ideology. . . . With vast segments of the white middle class experiencing downward mobility, they see themselves as the true victims and reserve their pity for personal use. Joining ranks with the less fortunate whites, they increasingly harbor contempt for blacks.  

Certainly, the embrace of damage imagery as a significant method of characterizing African Americans shows no signs of abating.

II. The Wisdom of Using Damage Imagery to Justify Remedial Policies

What can we say about the efficacy of using damage imagery to win support for racial reform policies? Scott argues that though the use of damage imagery to attract white support for antidiscrimination measures may have contributed to certain victories such as the Supreme Court's Brown decision, it has ultimately harmed the black community. According to Scott, appealing to white sympathy to win support for racial fairness has had the effect of maintaining "a paternalistic relationship between whites and blacks" and making "black rights contingent upon white sympathy and superiority rather than black equality and citizenship." Moreover, when justice claims are grounded in notions of damage, the emphasis can quickly shift from the injustice of past discrimination to the claim that black people are inherently pathological. For example, focusing on black pathology can "justify neglect and draconian policies,"  such as increased incarceration of African Americans and the jettisoning of economic assistance programs. In addition, damage imagery "has made the black community wary of self-

but they also "may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

62. P. 199.

63. P. 202 (footnote omitted).

64. P. 184.

65. P. xviii.
examination and self-criticism . . . , [a] most unfortunate development for a people in need of self-knowledge." 66

Scott argues that civil rights activists during the 1950s and 1960s should have grounded their racial justice claims not on appeals to white sympathy, but on the notion that segregation and discrimination are inconsistent with the American creed and with our fundamental notions of equality. For example, Scott criticizes the Brown decision in part because the Court "suggested oppression had to cease not because blacks were equal citizens who deserved justice but because they were humans and segregation was inhumane." 67 Similarly, the use of damage imagery to invoke support for affirmative action "played on white paternalism rather than the need to make amends for social injustices." 68

Yet Scott's critique of the liberal use of damage imagery raises two issues. First, could racial reformers during the civil rights era have captured political and cultural support for desegregation without using arguments grounded in notions of harm or damage? Second, how should racial reformers justify their policy initiatives today?

A. The Politics of Racial Reform

Scott criticizes the racial reform efforts of the civil rights era, arguing that "[r]ather than standing on the ideals of the American creed and making reparations for the nation's failure to live up to the separate-but-equal doctrine of Plessy v. Ferguson, liberals capitulated to the historic tendency of posing blacks as objects of pity." 69 But Scott's critique of racial liberals during the 1950s and 1960s betrays a misunderstanding of the politics of racial reform in this country.

Racial reform in this country has typically required an appeal to white interest. Derrick Bell, who makes the point most starkly, has argued that white elites will recognize the rights of African Americans and other persons of color "only when such recognition serves some economic or political interests of greater importance to whites." 70 Indeed, during the civil rights era, desegregation initiatives frequently served white political and economic interests, creating what Bell labels an "interest convergence" 71 that made racial reform possible.

66. P. xviii.
67. P. 184.
68. P. 184.
69. P. xiii.
For example, during the late 1940s, a number of Northern states and cities enacted legislation and ordinances barring racial discrimination in public accommodations, employment, education, and housing. These measures were motivated in part by the desire of white elites to capture political support from the growing number of black voters and to stem burgeoning racial tensions and fears triggered by wartime urban riots.72 Similarly, the support of the United States government for desegregation in the Brown case, as evidenced by the Solicitor General's brief, was grounded in part in the belief that desegregation served important foreign policy interests as America engaged in a Cold War struggle to win support from nonwhite peoples in Third World nations.73 During the early 1960s, some Southern cities enacted antidiscrimination ordinances to defuse economically embarrassing demonstrations and to avoid experiencing economic losses from racial unrest such as those suffered in Little Rock and Birmingham.74 As one Southern mayor explained his city's decision to end public accommodations discrimination: "[As a result of demonstrations,] the community's pocketbook is placed in jeopardy, as Birmingham and other cities have learned from experience. Whether we like it or not, we are pressed by circumstances . . . to break with long accepted social and economic patterns."75 Similarly, Lyndon Johnson's affirmative action policies enjoyed significant support from white business elites who understood that these policies could prove useful in stemming unwanted urban unrest.76 "If they're working, they won't be throwing bombs in your homes and plants," Lyndon Johnson told business leaders.77 "Keep them busy and they won't have time to burn your cars."78

Although Bell argues that white elites will not support racial reform absent political or economic advantage, white interests in racial reform are

72. See Davison M. Douglas, The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North, 44 UCLA L. REV. 677, 719-20 (1997) (discussing how northern whites began supporting civil rights initiatives because of the black population shift to the north, the resulting enhanced black political power, and fears of black radicalism).

73. See Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61, 80-93 (1988) (arguing that international attention given to racial segregation was troublesome and embarrassing enough to cause the U.S. government to participate in the desegregation cases).


75. Douglas, supra note 74, at 102.

76. See Skrentny, supra note 11, at 89-91.

77. Id. at 91 (quoting Joseph A. Califano, Jr., The Triumph & Tragedy of Lyndon Johnson: The White House Years 226 (1991)).

78. Id.
probably broader than raw political or economic gain. Indeed, as Scott argues, appeals to white moral sensibilities did play a role in the success of desegregation initiatives during the civil rights era. Both the litigants in \textit{Brown} and the racial demonstrators in the early 1960s understood the power of appeal to white sympathies. Even though the Supreme Court could have declared school segregation unconstitutional without evidence of harm, the evidence of educational harm from segregation made it easier for the Court to deal with its earlier precedents.\textsuperscript{79} Similarly, Martin Luther King and the Southern Christian Leadership Conference understood that violent repression by Southern law enforcement officers of nonviolent protesters would win support of middle class Northern whites for civil rights initiatives. Indeed, the selection of Birmingham, home to notoriously repressive law enforcement, to launch a major civil rights protest in 1963 was deliberate. These strategies succeeded. White support for the major civil rights legislation of the mid-1960s was greatly enhanced by white indignation at the violent response to black protesters in cities such as Birmingham and Selma.\textsuperscript{80}

In his interpretation of the black freedom struggle of the early 1960s, Scott celebrates the “bottom-up” quality of the mass movement:

\begin{quote}
The 1960s witnessed and was transformed by the activism of southern blacks. Beginning with the sit-ins of college students in 1960, blacks wrested control over the direction of racial liberalism from experts and national politicians, who preferred to direct change from the top down. Picking up support from liberal white students and elites who controlled vital institutions—the unions, the churches, the synagogues—black leaders were able to organize massive support for the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act. In the end, . . . [i]t was the social activism of those said
\end{quote}

\textsuperscript{79} Moreover, arguments grounded in the harm of segregation were effectively used by other civil rights litigators during the 1950s and 1960s to justify desegregation positions. For example, African-American parents challenging school segregation in Charlotte that resulted in the Supreme Court’s decision in \textit{Swann v. Charlotte-Mecklenburg Board of Education}, 402 U.S. 1 (1971), used evidence to show that segregated black children had poorer educational outcomes than did white children, even though, in the wake of \textit{Brown}, it was unnecessary to prove that segregation actually harmed black students. \textit{See} \textit{Swann v. Charlotte-Mecklenburg Bd. of Educ.}, 306 F. Supp. 1291, 1296-97 tbl. (W.D.N.C. 1969), \textit{vacated}, 431 F.2d 138 (4th Cir. 1970), \textit{aff'd in part}, 402 U.S. 1 (1971). But “[a]s the plaintiffs’ counsel Adam Stein later explained: ‘We had had enough experience trying discrimination cases to know that many district judges were going to do less than the law required unless they could be persuaded that there was something particularly bad going on that needed to be corrected.’” \textit{Douglas, supra} note 74, at 159-60. The strategy worked. The district court judge, in justifying a sweeping desegregation order, commented: “This alarming contrast in performance . . . was not fully known to the court before he studied the evidence in the case. It can not be explained solely in terms of cultural, racial or family background without honestly facing the impact of segregation. . . . Segregation produces inferior education . . . .” \textit{Swann}, 306 F. Supp. at 1297.

\textsuperscript{80} \textit{See} \textit{David J. Garrow, Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference} 227-30 (1986).
to be too afflicted to stand up for their own rights that brought an end to social exclusion.81

To be sure, the success of the black freedom struggle of the 1960s is an enduring tribute to bottom-up activism and the courage of countless individuals. But to some extent, this success was a function of the protesters’ ability to appeal to white sensibilities, or in the words of Bell, to create a convergence of interests between blacks and whites.82 Speaking in terms of the “damage” or “harm” caused by segregation became an important means of appealing to white interests.

As Scott argues, racial liberals may have unwittingly stigmatized African Americans by using damage imagery to appeal to white sensibilities, but Scott underestimates the political necessity of appealing in some way to white interests to justify racial reform. If one accepts the view of Bell concerning the profound resistance of white America to racial reform,83 then appeals to white interests were probably necessary during the civil rights era and may still be necessary, just as Bell’s interest convergence theory is likely applicable today. Theories of damage or harm are not the only ways of making such appeals. But if remedial justifications grounded in harm are rejected, then alternative methods of securing white support for racial reform will have to be found.

B. Justifying Racial Reform

Scott’s book is primarily concerned with the ways in which prior generations have constructed African Americans as damaged. Yet Scott’s critique of damage imagery invites the question of how contemporary policymakers should address issues of race in this country. Although critical of much current integrationist sentiment,84 Scott at least impliedly

82. Scott recognizes that those radicals who rejected damage imagery in the late 1960s and early 1970s ignored the importance of the legitimization of reform:

Committed to a social theory that viewed social change as taking place from the bottom up, the radical critics of damage imagery never addressed the need of policymakers to find a top-down justification for making political and economic changes. Those who exercise power generally recognize the need for legitimating ideas. In ways that their radical critics failed to appreciate, postwar liberals who manipulated damage imagery were sophisticated experts and politicians who understood how to make public policy from the top down.

Pp. 183-84. Scott notes, for example, that race-conscious programs such as affirmative action “exceeded the normal bounds of the American creed,” and that therefore proponents of such programs needed to manipulate damage imagery to win support. P. 184.
84. “[M]y disagreement with certain integrationist assumptions looms large in my analysis. Like many other blacks who believe in pluralism, I take issue with the integrationist belief that black institutions are inherently inferior.” P. xviii.
endorses the notion of compensatory reparations for African Americans, criticizing, for example, recent congressional initiatives for failing to seek such reparations.85

Implicit in Scott's endorsement of reparations is the notion that African Americans have been harmed by the legacy of segregation and discrimination and should be compensated in some way for that harm. Indeed, other claims for reparations, such as for Japanese Americans86 or Native Americans,87 have been justified as redressing harm suffered as a result of egregious governmental conduct.88 Yet, while Scott appears to endorse "preferential programs" of a nonspecific nature grounded in the "obligation of the nation to pay reparations for violating black rights,"89 he vehemently argues against the proposition of using harm to justify pro-black social policies.90 Scott does not explain the apparent contradiction between his support for reparations and his opposition to using notions of harm to support remedial policies.

The current debate over affirmative action, the most controversial of race-conscious preference programs (and about which Scott unfortunately


86. Congress enacted the Civil Liberties Act of 1988 to compensate Japanese Americans forced to leave their homes and relocate in concentration camps in the western United States during World War II. The legislation provided $20,000 and an apology to those persons of Japanese ancestry who were interned at that time. See Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988).

87. In 1946, for example, Congress established an Indian Claims Commission to adjudicate claims by Indian tribes not merely for treaty violations, but also on the ground that some treaties between the United States and Indian tribes were negotiated on the basis of fraud, duress, unconscionable consideration, and the absence of fair and honorable dealings. See BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 22 (1973); H.D. ROSENTHAL, THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION (1990); see also Howard Schneider, Canada Apologizes for Abusing Native Peoples, WASH. POST, Jan. 8, 1998, at A1 (announcing the establishment of a "healing fund" to compensate those native Canadian children "who suffered physical and mental abuse at the government-run schools").

88. Over the years, various demands have been made for the payment of reparations to African Americans. One such demand, in 1969, called for monetary reparations "due us as people who have been exploited and degraded, brutalized, killed, and persecuted." BITTKER, supra note 87, at 4.

89. P. 184.

90. Scott apparently objects to reliance on any notion of harm to justify racial reform, as when he writes:

In 1991, rather than proposing reparations for the violations of black rights, Representative John Conyers of Michigan introduced a bill before Congress that called for a commission to "examine the institutions of slavery, subsequent de jure and de facto racial and economic discrimination against African Americans, and the impact of these forces on living African Americans." P. 190 (quoting H.R. 1684, 102d Cong. (1991)). Scott's objection to Conyers's proposed legislation is curious given that it was designed to lay the groundwork for the type of reparations program that Scott appears to favor. See BELL, supra note 83, at 51 (describing Conyers's 1991 bill as "reparations legislation").
says little), illustrates the possibility of justifying preferential programs without reference to theories of harm. Although one traditional justification for affirmative action has been the idea that it redresses the effects of past discrimination, at least two other justifications quite apart from damage theory have assumed importance in the debate over affirmative action. One justification, which dates back to early discussions of affirmative action, is the notion that benign considerations of race are needed to overcome ongoing discrimination against persons of color. Even though antidiscrimination laws are now in place that govern the workplace and the university, affirmative action may be needed to address subtle forms of discrimination that the legal system has not corralled. This justification is not remedial in nature but is rather prophylactic and does not depend on showings of past harm for its legitimacy. A second justification is that affirmative action promotes a more racially and ethnically diverse workplace or classroom.

But a full rejection of remedial justifications for racial policies may bring unintended consequences. The contemporary debate over urban school desegregation is instructive. During the past decade, support for an end to busing in urban school districts has increased among both whites and blacks. Yet some fear that the end of school busing will inevitably harm black children. Gary Orfield and Susan Eaton of the Harvard Project on School Desegregation explain:

When discrimination is officially declared to have fully been rectified and the policies for resegregation are accepted by courts and community leaders as educationally sound, the blame for the pervasive inequalities that remain tends to be shifted to minority families and communities, the teachers, and the educational leaders. When discrimination is declared cured, the system can no longer be blamed.


92. See Edley, supra note 91, at 78-79.

93. See id. at 79. One critique of diversity rationales is the view that they stereotype minorities as possessing a shared outlook, a criticism with which Scott is likely sympathetic. See, e.g., Paul Butler, Affirmative Action and Criminal Law, 68 U. Colo. L. Rev. 841, 852-53 (1997).

94. For example, black mayors in several major cities, including Cleveland, Denver, and Minneapolis, have supported the termination of mandatory desegregation plans, despite the resegregative effects of those decisions. See Davison M. Douglas, The End of Busing?, 95 Mich. L. Rev. 1715, 1731 & n.67 (1997) (book review).
The predictable failure of inner-city segregated schools then feeds cynicism and generates attacks on the entire system of public education. The failure often reinforces white stereotypes about what critics describe as the inferior culture of minority families, reinforcing growing suburban resistance to providing state resources to heavily minority urban school systems.  

One may disagree with Orfield and Eaton's conclusions about the value of school integration, but their comments are a reminder that if notions of harm from the legacy of discrimination are jettisoned, African Americans are increasingly vulnerable to claims that poor social, educational, and economic outcomes are a function of their own moral failure and pathology. If we abandon the notion that African Americans have been harmed by decades of discrimination and segregation, then "blaming the victim" becomes a much simpler task.

Resolution of the issue of whether to use harm-based remedial justifications may lie in a closer analysis of the type of harm, or damage, to which Scott objects. Scott's objections are largely directed at descriptions of African Americans as psychologically and culturally damaged. Discussion of the pathology of the black family or black males suggests the basic inferiority of black culture. Discussion of nonpsychological damage, such as poor education or lack of necessary job skills, to support remedial claims is somewhat removed from notions of inherent inferiority and closer to a more value-neutral notion of harm. For example, would Scott object to remedial programs justified on the grounds that African Americans have been denied equal educational opportunities and hence possess fewer job skills?

Scott wants racial liberals to stop using damage imagery and notions of harm, but those intent on finding black culture inferior will hardly cease their efforts to examine and analyze the reasons for poor social outcomes in the black community. For over a century, the image of the African American has been the subject of debate among social scientists, pundits, and policymakers—both conservative and liberal—and this debate will undoubtedly continue. If racial liberals refrain from probing notions of harm and damage, as Scott urges, the conversation will nevertheless continue, only to be dominated by those who have considerably more "fear and contempt" for African Americans than sympathy.  

III. Conclusion

Scott has written a fascinating book about the ways in which intellectuals and policymakers during this century have depicted the African-American personality and used notions of damage to justify racial reform. Though this use of damage imagery reflected humanitarian impulses, it did arguably have the effect of making “black rights contingent upon white sympathy and superiority rather than black equality and citizenship.”97 By the same token, exploiting notions of harm was probably necessary to achieve the desegregation and antidiscrimination goals of the civil rights era.

Scott’s book leaves us with the question of how best to justify racial reform. Should notions of damage and harm be entirely abandoned? Scott’s call for social scientists and policymakers “to place the inner lives of people off limits”98 is understandable, but to the extent that it curbs ongoing exploration of the reasons for poor outcomes in certain social groups, it is misguided. The answer may lie in finding new ways of speaking about the harms of past discrimination that avoid reaffirming tortured notions of black inferiority.

97. P. 184.
98. P. xix.