

The Blame Frame: Justifying (Racial) Injustice in America

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[T]hough the history of ideas is a history of trial-and-error, even the errors illuminate the peculiar nature, the cravings, the endowments, and the limitations of the creature that falls into them . . . ; and they may further serve to remind us that the ruling modes of thought of our own age, which some among us are prone to regard as clear and coherent and firmly grounded and final, are unlikely to appear in the eyes of posterity to have any of those attributes. The adequate record of even the confusions of our forebears may help, not only to clarify those confusions, but to engender a salutary doubt whether we are wholly immune from different but equally great confusions.

—Arthur O. Lovejoy¹

I. INTRODUCTION

We Americans, this Article argues, have long suffered from “great confusions.” On the one hand, we champion the ideals of equality and freedom. Our equality, we declare, is self-evident, as are our inalienable rights to life, liberty, and the pursuit of happiness. In pledging allegiance to our flag, we routinely affirm the goals of liberty and justice for all, and many of us would risk our lives to defend those ideals. We Americans do not tolerate injustice—not on our watch.

Yet history shows us repeatedly betraying those principles. Oppression and unjust restraints on liberty are robust features of America’s national historical landscape. The Salem Witch Trials, the Trail of Tears, the Tulsa Race Riots, and the internment of Japanese American citizens are just a few relatively localized, short-lived instances of larger, more sustained patterns of systemic injustice.

More generally, our history reveals a set of disconcerting truths. The first is that every moment of American history evinces vast disparities of wealth, power, and privilege among groups identified by salient characteristics such as race and gender. The second is that, instead of perceiving those inequalities as conflicting with American ideals, groups with power (and often even groups without) have justified and legitimized those disparities with an arsenal of arguments, assumptions, and stereotypes.

The third general truth is that such justifications often fail the test of time. In hindsight, many of the rationalizations of inequality appear flawed, sometimes shamefully so. Because today we recognize the motivations and prejudices prompting our predecessors to rationalize, perpetuate, and even

¹ ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA* 23 (1936).

expand existing inequalities, we judge their historical actions harshly—as fundamentally unjust and un-American.²

The final general truth hits closer to home. In America today, similarly vast disparities of wealth, power, and privilege persist among groups identified by race, ethnicity, gender, and other salient characteristics. Groups with power and often those without continue to justify those disparities with arguments, assumptions, and stereotypes that depict inequalities as natural or otherwise legitimate, and thus consistent with American ideals. Combining those four truths raises the disconcerting question that motivates this Article: are we, today, so different? Are existing inequalities evidence of continuing oppression and injustice that we have merely cloaked in a modernized system of rationalizations?

If it is true that history repeats itself, then we should be worried. And if, as social psychologists have shown, we tend to see bias in others but to miss it in ourselves,³ then any affirming presumptions about our exceptionalism should be reversed. This Article argues that our generation is not, in ways that matter, different from those that came before.⁴ The bottles have changed, but the wine has not. Lest we be judged harshly by future generations, we should seek out and try to remedy the inequities in our systems that we condemn our forebears for ignoring or tolerating in theirs.⁵

² Looking back, we rarely focus on the fact that the powerful interests promoting those policies (and often even those oppressed by them) did not perceive the policies as inappropriate, much less oppressive, at the time. Instead, we celebrate and associate ourselves with the leaders who challenged the injustices—George Washington, Harriet Tubman, Susan B. Anthony, Martin Luther King, Jr.—and assure ourselves that those they challenged were unenlightened, hypocritical, perhaps even malevolent. The oppressors aren't "us." We rarely ask, and perhaps don't really want to know, precisely how "they" justified practices that today seem so obviously unjust. It is enough that "we" now know better.

³ See Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1660–61 (2004) (briefly summarizing that evidence); Adam Benforado & Jon Hanson, Naïve Cynicism: Maintaining False Perceptions in Policy Debates (Mar. 16, 2006) (unpublished manuscript, on file with authors) [hereinafter Benforado & Hanson, Naïve Cynicism] (reviewing that evidence in detail).

⁴ Of course, we are by no means the first to make such a claim. This Article sketches arguments, to be elaborated in future work, that help explain why the patterns of oppression repeat. It is a piece of a larger project or legal-theoretic approach—sometimes called "situationism" or "critical realism"—intended to incorporate into legal theory and the law the best evidence available about how real humans behave, how they make sense of their worlds, and what moves them. For more complete introductions to critical realism and defense of the assertions we make in this Section, see Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) [hereinafter Hanson & Yosifon, *The Situation*]; see also Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) [hereinafter Hanson & Yosifon, *The Situational Character*]; *infra* note 7 and accompanying text.

⁵ We recognize that terms like injustice and oppression are difficult to define, and that any definition will depend on how the harmful acts or inequities are understood. Indeed, such relativism is part of our point. Oppression is not just in the eye, but also in the mind and motives of the beholder. This Article seeks partially to explain how injustice in our midst is overlooked, even though we often see it clearly in retrospect. For those who want it, we offer this working definition of oppression: the intentional or unintentional system-

This Article attempts to elucidate how our forebears, who were presumably as devoted to justice and liberty in their times as we are in ours, failed to condemn behaviors that are today widely viewed as patently oppressive, unfair, and even evil. In Professor Lovejoy's terminology, how is it that the previous generations' "ruling modes of thought," which were perceived at the time to be "clear and coherent and firmly grounded and final" are today perceived as "great confusions"? The answer, we believe, should "engender a salutary doubt as to whether we are wholly immune from different but equally great confusions."⁶

Our argument unfolds in several Parts. Part II summarizes evidence from social psychology and related fields that helps explain how people who imagine themselves fair and just routinely blame the victims of inequities and excuse the perpetrators or passive observers through "blame frames." Because humans crave justice, salient suffering or inequalities activate an "injustice dissonance" within us. Too often, we alleviate that dissonance, not by addressing the injustice, but by creating an illusion of justice through assumptions, arguments, or stereotypes about the blameworthiness of the victim. Part II then describes three powerful blame frames that have coexisted, while alternating in dominance, throughout American history: the God frame, the nature frame, and the choice frame.

Part III elucidates through a few prominent examples how blame frames have operated throughout history to relieve our forebears' injustice dissonances and to perpetuate systems of oppression. The motivated attributions underlying those blame frames acted to legitimate laws, customs, and practices that today—with the benefit of hindsight and the lens of a new frame—are recognized as clearly unjust.

Part IV argues that we suffer an equally great confusion today, but the injustices that haunt our generation are soothed less by the God and nature frames and more by conceptions of choice. "Choicism" attributes disparities to the preferences and character of individuals and their groups.⁷ Although choicism purports to be colorblind and non-discriminatory, it is, unfortunately, just the latest cloak veiling racism and other groupisms while allowing us to blame victims and excuse non-victims. Part IV, by examining public reactions to Hurricane Katrina and her aftermath, then shows how Americans experienced an unusually powerful and intractable injustice

atic creation, maintenance, or exploitation of advantage by a more powerful group over a less powerful group.

⁶ LOVEJOY, *supra* note 1, at 23.

⁷ Much of the critical realism literature to date has explored the flaws in and effects of this particular species of "dispositionism" that is most prominent in today's culture. See *supra* note 4 (describing the critical realist project). "Choicism" encapsulates the assumption, which surreptitiously undergirds our laws and legal theories, that human behavior reflects a stable set of preferences revealed through a person's choices. In contrast, critical realism recognizes the human animal as a *situational character* who behaves in response to underappreciated situational influences within and around her. See sources cited *supra* note 3 and *infra* note 8.

dissonance when the winds, water, and desperation exposed inequalities that choicism could not readily justify. For at least a moment, Americans faced what seemed to be strong evidence of racial injustice. Part IV reveals some of the ways that a set of overlapping and largely camouflaged blame frames obscured and confused the public discourse regarding Katrina and the injustice dissonance she wrought.

Finally, this Article argues that only by understanding the sources and effects of blame frames can we ever hope to end oppression and thereby live according to the fundamental values we espouse.

II. “PECULIAR . . . CRAVINGS . . . OF THE HUMAN CREATURE”⁸

We tend to be “mental prisoners of the frame provided to us by the . . . situation.”

—Massimo Piatelli-Palmarini⁹

A. *The Psychology of Blame-Framing*

While injustice is difficult to define,¹⁰ it might fairly be described as an undeserved or unfair allocation of privilege and hardship across individuals or groups. Renowned social psychologist Melvin Lerner and his collaborators devoted years to studying how people respond to evidence of injustice;¹¹ his findings provide insight into the source of our great confusions.

⁸ This Article is particularly concerned with the tendencies and biases that characterize our attributions of causation, responsibility, and blame. For further exploration of what social psychology and related social sciences (as well as market practices) teach about the “peculiar nature, . . . cravings, . . . and limitations of the human creature,” see Jon Hanson, Ana Reyes & Dan Schlanger, Attributional Positivism, *The Naïve Psychology Behind Our Laws* (Apr. 2, 2006) (unpublished manuscript, on file with authors); Hanson & Yosifon, *The Situational Character*, *supra* note 4; see also David Arkush & Jon Hanson, *Situating Emotions* (Apr. 21, 2006) (unpublished manuscript, on file with authors); Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy* (Jan. 23, 2006) (unpublished manuscript, on file with authors); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004) [hereinafter Chen & Hanson, *Categorically Biased*]; Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004) [hereinafter Chen & Hanson, *Illusion of Law*]; Daniel Epps, Jon Hanson & Daniel Tehrani, *Freedom/Coercion, Public/Private, and Other Categorical Illusions: A Critical Realist Revival of Legal Realist Insights* (Mar. 6, 2006) (unpublished manuscript, on file with authors).

⁹ MASSIMO PIATELLI-PALMARINI, *INEVITABLE ILLUSIONS: HOW MISTAKES OF REASON RULE OUR MINDS* 30 (1994).

¹⁰ See *supra* note 5 (providing a loose definition of “oppression”).

¹¹ See generally MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* (1980); *THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR: ADAPTING TO TIMES OF*

In a series of experiments, Lerner demonstrated that people crave justice and, consistent with that craving, actively work to eliminate injustice. Lerner also discovered, however, that we often satisfy the craving through troubling means: when alleviating innocent suffering is at all difficult or complex, people reconceive the victim as deserving the suffering by assigning negative characteristics to her. In a typical experiment,¹² subjects were told they were observing a study of learning techniques. As the subjects watched, a volunteer learner appeared to suffer painful shocks as punishment for incorrect answers. One group of subjects was offered a choice either to reassign the learner to a different study with positive reinforcements (monetary rewards) for correct answers, or to allow the punishing electric jolts to continue. A second group of subjects was given no reassignment option—they could only observe helplessly as the learner apparently continued to be shocked for incorrect answers. Afterwards, the subjects were questioned about the person who had supposedly been shocked.

The first group, which had the easy, officially sanctioned option of ending the victim's suffering, typically opted to do so.¹³ That should be unsurprising; after all, what kind of person would not put a stop to undeserved suffering? In a later debriefing, subjects in that first group tended to describe the learners as likeable, innocent victims of shocks who deserved to be reassigned to a positive reinforcement environment. But the second group of subjects, who were not given an option to end the learner's suffering, took a less obvious path to justice. Rather than describing the learner as an innocent victim worthy of sympathy and compensation, these subjects tended to disparage and *blame* the victim. "The sight of an innocent person suffering . . . motivated people to devalue the attractiveness of the victim in order to bring about a more appropriate fit between her fate and her character."¹⁴

Lerner's results powerfully illustrate two ways in which individuals cope when witnessing suffering: we stop the injustice, or we justify it by conceiving of the victim as a person who actually "deserves" to suffer. Thus is revealed one of the sources of our great confusion: we abhor, not injustice, but the dissonance that perceived injustice creates within us.¹⁵ Put an-

SCARCITY AND CHANGE (Melvin J. Lerner & Sally C. Lerner eds., 1981).

¹² See Melvin J. Lerner & Carolyn H. Simmons, *The Observer's Reaction to the "Innocent Victim": Compassion or Rejection?*, 4 J. PERSONALITY & SOC. PSYCHOL. 203 (1966). Our account of the experiment comes mostly from the summary provided in Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030, 1031–32 (1978).

¹³ See Lerner & Miller, *supra* note 12, at 1031 ("[M]ost subjects took advantage of this opportunity to compensate the victim.").

¹⁴ *Id.* at 1032. Lerner and Miller cite numerous additional studies replicating this attribution of blame to harmed individuals. See *id.* at 1050–51.

¹⁵ Although there are several psychological tendencies behind injustice dissonance, this Article, for simplicity, treats it as a subcategory of cognitive dissonance. For an overview of cognitive dissonance and its effects, see Hanson & Yosifon, *The Situational Character*, *supra* note 4, at 107–12.

other way, it is not *justice* that we crave so much as the *perception* of justice. And that craving can often be satisfied far more easily by changing our perception of the victims than by acknowledging and addressing the underlying unfairness.

Lerner's experiment also reveals two attributional elements that very commonly and effectively validate the dissonance-reducing illusion. First, victims are viewed as deserving of their suffering or disadvantage—we "blame the victim." Considerable evidence suggests that we preserve our favorable self-images by attributing responsibility to the harmed individuals, in extreme cases dehumanizing them as demons, beasts, or brutes.¹⁶ Second, non-victims (in this case, the subjects in Lerner's experiment) are perceived as innocent—we "excuse the non-victim."¹⁷ Harmful or unequal outcomes are more tolerable when the individuals or groups that produce, passively observe, or somehow benefit from the harm or harm-causing activity (the perpetrators, beneficiaries, or bystanders) are perceived as innocent.¹⁸

Lerner's subjects disparaged the victim only when they believed themselves powerless to change the victim's suffering.¹⁹ When they could end the shocking easily, they did so. But absent a readily available, script-sanctioned alternative, subjects perceived themselves to have no say over the larger situation. They were simply observers. Of course, that perception was also the product of powerful role schemas and motivated reasoning. The subjects could have at least attempted to stop the shocking by objecting to the experiment, refusing to participate, complaining to the social scientist or the university, calling the police, or even intervening physi-

¹⁶ See MIKA HARITOS-FATOUROS, *THE PSYCHOLOGICAL ORIGINS OF INSTITUTIONALIZED TORTURE* 175–79 (2002); MARTHA KNISELY HUGGINS, MIKA HARITOS-FATOUROS & PHILIP G. ZIMBARDO, *VIOLENCE WORKERS: POLICE TORTURERS AND MURDERERS RECONSTRUCT BRAZILIAN ATROCITIES* 255–57 (2002); see also SAM KEEN, *FACES OF THE ENEMY: REFLECTIONS OF THE HOSTILE IMAGINATION passim* (1986) (providing evidence of that tendency in twentieth-century war propaganda).

¹⁷ For related social psychological evidence regarding the effect of different types of excuses, see Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 *ANN. REV. PSYCHOL.* 527, 537 (2001); see also Bernard Weiner, James Amir Khan, Valerie S. Folkes & Julie A. Verette, *An Attributional Analysis of Excuse Giving: Studies of a Naïve Theory of Emotion*, 52 *J. PERSONALITY & SOC. PSYCHOL.* 316, 316–24 (1987).

¹⁸ "Crediting the process" (or "blaming the process") provides a sometimes alternative, other times complementary mechanism to legitimate (or delegitimate) unequal outcomes. As Dale Miller has summarized, "[p]rocedural justice refers to the fairness of the methods, mechanisms, and processes used to determine outcomes as opposed to the fairness of the outcomes themselves." Miller, *supra* note 17, at 528. Thus even apparently unfair outcomes associated with a procedure or process that is perceived as legitimate—for example, the free market—are generally perceived as just. For an overview of how markets and market outcomes were legitimized (and how governmental and regulatory processes were delegitimized) in the late twentieth century, see Chen & Hanson, *Illusion of Law*, *supra* note 8, at 5–33.

¹⁹ See Lerner & Simmons, *supra* note 12, at 204 ("The other required element is that the observer is powerless to help the victim—given that he acts within the rules of the system in which the event takes place.").

cally to end the shocking.²⁰ Instead, subjects accepted the “situation” defined by the experiment as appropriate, perhaps even inevitable, adopting their role as mere “participants” who could only follow instructions and choose among presented options.²¹

Lerner’s experiment indicates just how ready we are to short-circuit potential perceptions of injustice. When behavior that causes harm is perceived as *normal*—part of the script, the way things are, the plan, nature, or an act of God—that behavior is less likely to be viewed as blameworthy than is *abnormal* behavior. In a related phenomenon, we often deem “omissions” that produce suffering far less culpable than “acts” that lead to similar suffering. For example, some parents are reluctant to vaccinate their child if the vaccination has some mortality risk, even if the risk of death from foregoing the vaccination is substantially greater.²² Similarly, some people have argued that hurricanes should not be seeded, even if seeding would likely reduce the storm’s expected damage.²³ An unseeded hurricane is perceived as an act of nature or God, to which blame does not generally attach. But a person or institution that actively seeded a hurricane would likely be considered responsible for the actual harm that hurricane caused. Thus risks “caused” by salient individual *action* (choosing the vaccine or seeding a hurricane) are perceived as worse than the greater risk posed by *inaction* (the virus or the flooded city).

When individual action is salient, we see choice (and sometimes intent²⁴) and attribute causal responsibility accordingly, but where individuals fail to act, the omissions tend to fade into the surrounding situation.²⁵ Policy and policy analysis reflect that *omission bias*. For example, pharmaceuti-

²⁰ If such reactions seem far-fetched, that may reveal less about their merits than about the strength of the common attributional perception. Upon learning of similar experiments by Stanley Milgram, many students judge such reactions to be entirely appropriate and desirable—though, in practice, they were disappointingly rare. For review, see Hanson & Yosi-fon, *The Situation*, *supra* note 4, at 150–53, 168, 173.

²¹ In other words, subjects generally did not question the legitimacy of the process. *See supra* note 18. A small minority of subjects, however, “condemned the experiment” in written comments; those subjects “exhibited much less rejection of the victim.” Lerner & Simmons, *supra* note 12, at 209.

²² *See* Jonathan Baron & Ilana Ritov, *Reference Points and Omission Bias*, 59 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 475, 476 (1994).

²³ *See* R. A. Howard, J. E. Matheson & D. W. North, *The Decision to Seed Hurricanes*, 176 SCIENCE 1191, 1197 (1972).

²⁴ Indeed, the threshold for attributing intent is often very low. *See* Roderick M. Kramer, *The Sinister Attribution Error: Paranoid Cognition and Collective Distrust in Organizations*, 18 MOTIVATION & EMOTION 199, 207–08, 219–20 (1994).

²⁵ As Dan Kahneman and Dale Miller have illustrated, that is true in part because “it is usually easier to imagine oneself abstaining from actions that one has carried out than carrying out actions that were not in fact performed.” Daniel Kahneman & Dale T. Miller, *Norm Theory: Comparing Reality to Its Alternatives*, 93 PSYCHOL. REV. 136, 145 (1986). It may be true also because people rarely are motivated to look for the possible causal link between our “normal” behavior and the suffering to which it contributes. *See, e.g.*, David B. Sugarman, *Active Versus Passive Euthanasia: An Attributional Analysis*, 16 J. APPLIED SOC. PSYCHOL. 60 (1986) (describing the effects of that tendency in attitudes toward euthanasia).

cal companies have never been held liable for failing to produce vaccines, but have sometimes been liable for the harm caused even by vaccines whose dangers are unavoidable.²⁶ Tort law traditionally has been reluctant to impose responsibility for doing nothing²⁷ and generally imposes no duty to rescue. Thus, the “sunbather who watches a child going under the waves has no duty to dive in the water, throw her a life ring, or even notify a nearby lifeguard.”²⁸

Similar techniques shield the legal regime itself from responsibility. As Philip Bobbitt and Guido Calabresi have argued, lawmakers engage in legitimating subterfuges to avoid explicitly making “tragic choices” that would cause suffering or death.²⁹ Policies ostensibly pursuing some justified end, but having untoward consequences for some groups, typically are viewed less as actions causing harm than as situationally excused omissions.³⁰

Of course, a *purported* goal need not be the *actual* motivation for an act or a policy in order to have the absolving effect. Often a “cover story” need not be very strong to justify harmful conduct. In the Lerner experiment, the subjects without a salient choice to end the shocking (the second group) could more easily excuse themselves from blame than the subjects who were presented an alternative. The “optionless” subjects took cover behind their assigned roles in an ostensibly valuable, scientific inquiry. Stopping the experiment would have required affirmative, abnormal actions—going against the flow. In part because no one expects such actions to be taken, no blame attaches to not taking them. And in part because such omissions would be blameless, no one acts.³¹

²⁶ John K. Iglehart, *Compensating Children with Vaccine-Related Injuries*, 316 NEW ENG. J. MED. 1283–88 (1987); see also *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1295 (5th Cir. 1974).

²⁷ According to the Restatement (Second) of Torts:

The origin of the rule lay in the early common law distinction between action and inaction, or “misfeasance” and “non-feasance.” In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence, liability for nonfeasance was slow to receive any recognition in the law.

RESTATEMENT (SECOND) OF TORTS § 314 cmt. at 116–17 (1965).

²⁸ JOSEPH W. GLANNON, *THE LAW OF TORTS* 199 (2d ed. 2000). In the circumstances in which individuals can be held responsible for their omissions, liability usually depends upon a more evident causal link or some broken script or schema—a person fails to take “ordinary” or “customary” levels of care or has a “special relationship” with the individual in need. See Hanson, Reyes & Schlanger, *supra* note 8.

²⁹ GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES passim* (1978).

³⁰ For example, despite a strong, if somewhat surprising, demonstrated causal link between corn subsidies and the obesity epidemic, most lawmakers reject the relevance of that link for future policy. See Benforado, Hanson & Yosifon, *supra* note 3, at 1791–95 (summarizing the evidence and reactions to it).

³¹ The most famous version of Stanley Milgram’s experiment provides particularly

Two recent experiments illustrate just how little “cover” is needed to abdicate responsibility for others’ misfortune. The first experiment reveals how people exploit “moral wriggle room” when choosing between two outcomes of a game: one allocating a reward equally between two parties, and the other providing the test subject a slightly greater reward while dramatically reducing her partner’s payoff.³² When the payoffs for both parties were immediately visible to the subjects, the vast majority of subjects chose the equitable outcome over the self-interested one. In a variant of the experiment, subjects were initially shown only their own potential payoffs, but could see how each option would affect their partners by pressing a simple “reveal button.” Strikingly, roughly half the subjects opted to maintain their easily cured ignorance in order to help rationalize taking the self-interested option.³³ Inequality, the experiment suggests, is as easy to justify as a button is not to click.

Similar lessons emerged in a second study examining, not experimental games, but the chilling moral quandary of corrections officials “whose job may require taking a human life in the process of applying the legally sanctioned death penalty.”³⁴ In addition to coping by “blaming the victim,” the study found numerous institutional procedures designed to excuse the executioner by, for example, fractionalizing the prerequisite tasks. As part of a group, a team, or a shared project, we can maintain our favorable self-image by imagining ourselves to be just one component in a bigger situation over which we have no control. One San Quentin execution team member, who during his career had strapped down the legs of some 126 recipients of lethal injections, stressed “I never pulled the trigger . . . I wasn’t the executioner.”³⁵ As the study concluded, “[t]o negate moral self-sanctions, executioners do not focus on the taking of life, but rather seek solace in the dignity of the process and in the view that condemned killers have a bestial aspect to their nature and executing them will protect the public.”³⁶

Those two elements together—(1) perceiving the victim as deserving (blaming the victim) and (2) perceiving bystanders or beneficiaries as innocent (excusing the non-victim)—combine to create the perception of, and satisfy the craving for, justice.³⁷ This two-sided tendency evinces what has been dubbed the “ultimate attribution error:”³⁸ when bad things happen to

compelling evidence of that tendency. See Hanson & Yosifon, *The Situation*, *supra* note 4, at 152–54 (describing that experiment and some of its implications).

³² See Jason Dana, Roberto A. Weber & Jason Xi Kuang, Exploiting Moral Wriggle Room: Behavior Inconsistent with a Preference for Fair Outcomes (Sept. 24, 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=400900.

³³ Ignorance may not always be bliss, but it does at times have its rewards.

³⁴ Michael J. Osofsky, Albert Bandura & Philip G. Zimbardo, *The Role of Moral Disengagement in the Execution Process*, 29 LAW & HUM. BEHAV. 371 (2005).

³⁵ *Id.* at 385.

³⁶ *Id.* at 386.

³⁷ Crediting the process also helps justify the outcome. See *supra* note 18.

³⁸ See, e.g., Scott T. Allison & David M. Messick, *The Group Attribution Error*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 563 (1985); Miles Hewstone, *The “Ultimate Attribution Er-*

other groups or their members, we tend to attribute their misfortune to their dispositions (for example, bad character or choices); when our groups or their members harm others, we tend to attribute our behavior to situational forces beyond our control.³⁹ Bad people do bad things, good people do good things, and all “people get what they deserve.”⁴⁰

Recent research provides a more refined understanding of those tendencies and their causes and effects. John Jost and his collaborators have discovered that a threat to the stability or legitimacy of existing arrangements (“system threat”) leads most people—including those disadvantaged by the system—to defend the status quo through legitimizing attributional schemas.⁴¹ Because we crave a just system, we justify systematic inequality and suffering by vulnerable groups through power-affirming attributions. Indeed, many people, particularly those most unsettled by injustice dissonance, embrace whole ideologies that seamlessly meld all evidence of inequality or suffering into situational obscurity.⁴² But ideology does more than simply help justify others’ suffering. In explaining how “ordinary people” can become perpetrators of harm, social psychologist Philip Zimbardo notes the power of “[p]resenting an acceptable justification, or rationale.” Experimenters call such rationales the “cover story” because they “cover up the procedures that follow, which might not make sense on their own.”⁴³ The real-world equivalent of the cover story is known as an ideology⁴⁴ By this account, ideologies reflect subconscious motivations or cravings as much as or more than they reflect reason or logic.⁴⁵

To alleviate the subconscious discomfort of injustice dissonance, we often engage in significant self-deception.⁴⁶ When we cannot evade evidence

ror”? *A Review of the Literature on Intergroup Causal Attribution*, 20 EUR. J. SOC. PSYCHOL. 311 (1990).

³⁹ The ultimate attribution error is a group-based version of a more general attributional bias. When applied on an individual basis, it is known as the actor-observer bias. See E. E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* 79 (E. E. Jones et al. eds., 1972); Hanson & Yosifon, *The Situation*, *supra* note 4, at 157 n.110 (providing a brief summary).

⁴⁰ Lerner & Miller, *supra* note 12, at 1030.

⁴¹ See, e.g., John T. Jost & Orsolya Hunyady, *The Psychology of System Justification and the Palliative Function of Ideology*, 13 EUR. REV. SOC. PSYCHOL. 111 (2002). For a brief overview, see Hanson & Yosifon, *The Situational Character*, *supra* note 4, at 102–05.

⁴² For a recent overview, see John T. Jost & Orsolya Hunyady, *Antecedents and Consequences of System-Justifying Ideologies*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 260 (2005). For a more general description of some sources of relatively situationist and dispositionist ideologies, see Benforado & Hanson, *supra* note 8.

⁴³ Philip G. Zimbardo, *A Situationist Perspective on the Psychology of Evil: Understanding How Good People Are Transformed into Perpetrators*, in *THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL* 21, 28 (Arthur G. Miller ed., 2004).

⁴⁴ *Id.*

⁴⁵ See sources cited *supra* notes 39–40; see also Jack Glaser, *Intergroup Bias and Inequity: Legitimizing Beliefs and Policy Attitudes*, 18 Soc. JUST. RES. 257 (2005); Hanson & Yosifon, *The Situational Character*, *supra* note 4, at 73–75 (describing the role of motivated reasoning as revealed through social psychology and social cognition studies).

⁴⁶ See generally Benforado & Hanson, *Naïve Cynicism*, *supra* note 3 (describing the

tarnishing our positive self-conceptions, we invoke counterexamples that reaffirm our worth, even if they are “completely unrelated to the counterattitudinal behavior.”⁴⁷ Thus, generalized self-affirmation can mollify the dissonance created specifically by our participation in, or complicity with, some sort of harm or suffering.

This Article’s primary thesis is that motivated attributions—including the ultimate attribution error, the omission bias, and system-justifying attributions—produce a distorting frame that allows us to perceive justice in the face of oppression, coercion, and injustice. This *blame frame* shields us from ugly truths and, in part for that reason, perpetuates them. Like a hybrid of Lieutenant Kaffee and Colonel Jessep in *A Few Good Men*, part of us claims to “want the truth,” but another part “can’t handle the truth.”⁴⁸ Without knowing it, we construe our situation in a way that affirms our behavior, thereby giving us a “truth” we can handle. Consequently, we fail to recognize that the “liberty and justice for all” we celebrate in this country has been, and continues to be, more or less an illusion. *That* is our great confusion.

B. “*The Errors Illuminate*”

American history has generated a series of natural experiments in which the American tolerance for injustice has been tested. We have many times occupied a position analogous to that of Lerner’s experimental subjects. As Americans watched, a vulnerable person or group was subjected to shock-like “punishment”; in response, we either condemned the treatment as an injustice requiring redress or, more commonly, made attributions justifying the cruelty.

In the exceptional situation, where it is easy to compensate the victim and punish the perpetrator, the case for redress has been quite strong. Wrongs have been rectified when the victims were manageably few, when we perceived them to be like “us,” and when those responsible for the mistreatment were viewed as a small number of “bad apples.” Similarly, when the applicable schema encourages us to see the victims as particularly sympathetic (e.g., innocent children) and the cause as particularly salient (e.g., a sexual predator) and beyond the victim’s control, the desire to assist and compensate the victims and, if appropriate, punish the injurer can be in-

cognitive gymnastics we undertake to maintain our affirming views).

⁴⁷ ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 221 (1990). As Claude Steele noted, “In ego defense, people are concerned with the big picture It is the war, not the battle, that orients the system.” Claude M. Steele, *The Psychology of Self-Affirmation: Sustaining the Integrity of the Self*, in 21 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 261, 289 (Leonard Berkowitz ed., 1988).

⁴⁸ A FEW GOOD MEN (Sony Pictures 1992).

tense. In short, the simpler and more satisfying the result, the more likely we are to act to restore justice.

But in most situations, power-affirming attributions supplant, or at least temper, our urge to rectify: the victims are blameworthy, those responsible for the injuries are innocent, and the outcomes are just. Throughout history, Americans have employed the same blame frame in natural experiments that Lerner (and others) documented in laboratory experiments. Before returning to illustrate a few of those examples in Part III, we sketch several patterns of power-affirming attributional techniques used to legitimate oppression across different historical periods in the United States.⁴⁹

Much as with Lerner's subjects, Americans' basic attributional framework for justifying inequalities or suffering has been to blame the victims and excuse the non-victims. Outcomes are just in that the powerful are rewarded for their exemplary dispositions while the victims pay the price for their wayward dispositions. In narrative form, the blame frame often sounds something like this:

“We,” who should be advantaged, are acting, if at all, through good intentions, exemplary dispositions, and in accordance with situational forces larger than us.⁵⁰ “They,” because of their aberrant dispositions interacting with or resulting from those same forces, should suffer or be further disadvantaged or separated from us and should not receive our assistance.

That *basic blame frame* has been fleshed out in various incarnations, which have at times vied for dominance, but have nonetheless managed to coexist, often peacefully, throughout most of American history.⁵¹ Among the most successful renditions are the following:

⁴⁹ Limited space here permits us to present only abridged support for our claims regarding the whole of American history. We hope in future work to elaborate with more detailed analysis and evidence.

⁵⁰ Note that the limited (and often motivated) attentiveness to “situation” described here is not equivalent to “situationism” as we mean that term. Typically, the situational factors that are considered are limited to the most salient ones (a phenomenon that we call *naïve situationism*), and once those limited situational influences are plausibly addressed, the dispositionist presumption returns. In addition, a disadvantaged individual or group is often given some initial allowance for lacking information on which to make preference-satisfying choices. However, once such information has been provided, the playing field is presumed level and dispositionist attributions reemerge. See Benforado & Hanson, *Naïve Cynicism*, *supra* note 3, at Pt.III (describing the process of attributing disposition more thoroughly).

⁵¹ Because they satisfy the same underlying psychological craving, these attributional schemas typically, though not always, complement one another and operate cumulatively or interdependently. Individuals select among or combine schemas, depending on factors such as how successfully the schemas satisfy subconscious motives (e.g., simplicity, closure, justice), harmonize with existing, activated schemas, hold up in the face of changing evidence, environments, and experiences, or serve the interests of the most powerful groups, and how vigorously and effectively those schemas are promoted or challenged.

The God/devil schema (“God frame”): Under this frame, outcomes reflect not individual choices, but the presence or absence of God’s grace/will/plan, or, more menacingly, the possessive influence of the devil or other demonic forces. A person’s behavior and place in society are evidence of his godly or ungodly disposition.⁵² When those in power act to advantage their group but harm (or fail to help) others, the God schema excuses such actions as a situationally determined aspect of God’s will or plan, beyond the control of the most powerful mortal.

The evolution/nature/biology schema (“nature frame”): Under this frame, outcomes are dictated not (only) by the divine, but (also) by certain genes or inherited qualities. This hereditary baggage makes a person “fit” or “unfit,” where fitness is measured either generally or specifically for particular roles, activities, or spheres. The expression of determinative genes is evidenced in people’s behavior, wealth, and living conditions; their place in society reveals their position in nature’s hierarchy. And when those in power act to advantage their group, while harming others, those actions are situationally excused as consistent with nature’s laws and desirable evolutionary processes.

The markets/preference-, personality-, or character-based choice schema (“choice frame”): According to this narrative, outcomes reflect the choices of individuals, which in turn reflect the individualized preferences (or perhaps character) of each person or group. People’s behavior, wealth, living conditions, and position in society reveal their preferences, tastes, identities, and ability to make good choices. When those in power act to advantage their own group but harm others, the choice frame excuses those actions as situationally determined by market forces or autonomous individuals’ votes or choices—any other outcome would impede or ignore the preferences of people entitled to choose for themselves.

God. Nature. Choice. Although each schema frames the human animal differently, they all rely upon, or purport to emerge from, a normatively effective and legitimate mechanism or process—one invisible hand or another. Because the mechanism is cloaked in some ultimate touchstone of truth—be it divine inspiration, science, or market success—good and valuable are sorted from bad and costly, and any misgivings about the fairness of outcomes are allayed.⁵³

⁵² Despite originating outside the individual, God or Satan are not “situational” forces as we mean the term, because the fate of the individual under the schema is still perceived as the result of a single or a small number of significant forces inside the person that move her. See *supra* text accompanying note 50 (describing naïve situationism). By a situationist source, we mean a multiplex of (typically) non-salient factors (not currently part of the dominant dispositionist attributional schemas) within and around a person that influences the person’s behavior. See Hanson & Yosifon, *The Situational Character*, *supra* note 4, *passim*.

⁵³ Other possible sources of authority include economics, common-sense or traditional understandings, reason or logic, the text of some document, or the teachings of some individual.

Although they sometimes claim to be scientific, attributional meta schemas tend to be

Individually and collectively, those power-affirming blame frames and others like them⁵⁴ have served to justify systemic inequalities and suffering.⁵⁵ They have rendered palatable many customs, laws, and institutions that we Americans might otherwise have branded oppressive.⁵⁶ Operating largely subconsciously, blame frames are our secret palliative—a coping

tautologically based on either false or non-falsifiable assumptions. While often operating contemporaneously to legitimate particular outcomes, different schemas nonetheless may be in logical conflict with one another. Blame frames gain traction not because they are themselves proven or coherent, but because they satisfy common cravings for reasons, closure, simplicity, and our self-affirming, group-affirming, and system-affirming motives. See Chen & Hanson, *Categorically Biased*, *supra* note 8, at 1174–211; Hanson & Yosifon, *The Situational Character*, *supra* note 4, at 95–135; Benforado, Hanson & Yosifon, *supra* note 3, at 1658–68.

⁵⁴ Additional blame frames that often overlap and coexist with those discussed above include the following:

The history/custom/tradition/precedent schema (the “traditional values frame”): Outcomes reflect the extent to which individuals or groups comply with or deviate from historical lessons, practices, and values that are leading (or led in some prior golden age) to progress and idealized behavior.

The healthy/normal versus diseased/deviant schema (the “normalcy frame”): Outcomes reflect the extent to which individuals or groups have a normal/healthy constitution, or a diseased/deviant constitution.

The culture/leader schema (the “culture frame”): Outcomes reflect the merits of a group’s presumed basic, shared disposition (often called “culture”); salient differences in dress, language, music, customs, and so on are manifestations of the underlying cultural or leadership problem for the disadvantaged group. The more powerful and advantaged groups enjoy the rewards of their superior cultural norms and institutions, while disadvantaged groups must find a way to change their culture (or leaders) to conform with the dominant culture or accept their oppressed role.

⁵⁵ It is worth noting here that even when a meta schema glorifies disadvantaged groups and derogates the advantaged groups, it still often has the effect of legitimating the status quo. See Aaron C. Kay, John T. Jost & Sean Young, *Victim Derogation and Victim Enhancement as Alternate Routes to System Justification*, 16 PSYCHOL. SCI. 240, 240–46 (2005).

⁵⁶ The blame frames, particularly when taken together, are virtually indomitable. A challenge must overcome *both* of the attributional elements (the advantaged “us” are excused and the disadvantaged “them” are to blame), and *all* substitutable blame frames simultaneously. Often, attacking one frame merely makes a substitute frame that equally legitimates existing arrangements appear more moderate, sensible, and palatable in comparison. See *infra* Part IV.A.3 (describing some of the interactions among blame frames).

Furthermore, there are numerous defensive tactics available to powerful groups who seek to protect existing arrangements: presenting “choices” between seemingly conflicting blame frames to elide examination of the dominant framework itself; appealing to in-group associations and out-group threats; creating attributional ambiguity; denigrating situationists or other critics; co-opting critics and criticism; accepting some criticism as subtypes; accepting the criticism but denying the existence of any manageable solution; and accepting criticism and then proposing an illusory or short-lived solution. Thus, absent a major crisis, it is nearly impossible for non-affirming situationist attributions to gain much momentum. See Chen & Hanson, *Categorically Biased*, *supra* note 8, at 1131–216, 1228–33 (describing the role, effect, and stability of schemas); Benforado & Hanson, *Naïve Cynicism*, *supra* note 3, at Part III (summarizing the ways in which existing knowledge structures are maintained); see also *supra* Part II.A (describing the psychological forces that encourage people to embrace blame frames).

Even those disadvantaged by blame frames tend to accept them—particularly when a challenge would seriously question the legitimacy of the system. See *supra* note 41 and accompanying text.

mechanism for times when the dissonance between reality and ideals threatens to overwhelm what we so desperately wish to see. It is these persistent, pervasive, and robust blame frames that make our great confusion possible: they minimize the chasm we otherwise would have to face between our shared experiences and our common, deeply held values of “liberty,” “justice,” and “equality.”⁵⁷

III. “THE CONFUSION OF OUR FOREBEARS”

Locating evil within selected individuals or groups carries with it the “social virtue” of taking society “off the hook” as blameworthy; societal structures and political decision-making are exonerated from bearing any burden of the more fundamental circumstances that create racism, sexism, elitism, poverty, and marginal existence for some citizens.

—Philip Zimbardo⁵⁸

This brief Article cannot hope to present a thorough account of oppression in America. Instead, we offer a sample of illustrations showing how the basic blame frames have lessened the dissonance of this nation’s most salient group-based injustices. Precisely because they are widely acknowledged today, this Part focuses on notorious examples of systemic oppression against Native Americans and African Americans. Our challenge is to understand how the subjugation was rationalized at the time, making it palatable to ostensibly justice-seeking Americans.

A. *Native Americans*

The injustice dissonance posed by the domination of “others” existed even before this country’s colonial origins. Although scholars disagree on exactly how many Native Americans occupied the “New World” when Columbus set out in 1492, there is no dispute that the following four centuries witnessed the systematic dislocation, segregation, annihilation, and impoverishment of millions, with the indigenous population eventually dwindling to roughly 400,000.⁵⁹ As Tocqueville observed in the early nineteenth century:

⁵⁷ In theory, attributional schemas could be applied to absolve disadvantaged groups of responsibility and justify helping them. That, in practice, they are not helps to reveal the motivations underlying those blame frames.

⁵⁸ Zimbardo, *supra* note 43, at 25.

⁵⁹ See Russell Thorton, *Population: Precontact to the Present*, in *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS* 500, 500 (Frederick E. Hoxie ed., 1996).

[T]he European is to the other races of men what man in general is to all animated nature. When he cannot bend them to his use or make them indirectly serve his being, he destroys them and makes them, little by little, disappear before him. The Indian races melt away before the presence of the European civilization as the snow before the rays of the sun.⁶⁰

Historians have noted that European Americans used legitimating attributions to justify this “melting away” of Native Americans. In particular, the God frame and nature frame were integral in excusing the non-victims and blaming the victims. The Christian settlers “had a mission, a divinely appointed ‘Errand into the Wilderness’” to “fulfill[] an evident purpose of God.”⁶¹ In granting the Virginia Company a charter to colonize the territory in 1606, the King urged the propagation “of Christian Religion to such people, as yet live in darkness, and miserable ignorance of the true knowledge and worship of God, and may in time bring the Infidels and Savages living in those parts, to human civility”⁶² “[T]he Pilgrims . . . were certain that God had elected them to salvation and to the establishment of a model community to be emulated by the rest of the world. They expected the Native Americans to conform, to fit into that larger scheme of things.”⁶³ The colonists, in other words, viewed themselves as complying with divine situational forces.

In contrast, the colonists saw the “Infidels and Savages” according to a variety of overlapping, dispositionist stereotypes, which grew increasingly disparaging the clearer it became that the natives were rejecting the newcomers’ customs and resisting their expansions. Invoking the God frame in their frustration, “the Puritans branded . . . [the Indians] disciples of the devil.”⁶⁴ Their savagery was characterized not just by demonic possession, but also by a sub-human nature. European colonists, including William Bradford, William Hubbard, and Mary Rowlandson, “repeatedly contrasted their humanity with the Indians’ animality.”⁶⁵ John Underhill, for instance, wrote that the Indians “run up and down as roaring

⁶⁰ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* VOLUME 1, at 339 (Knopf 12th ed. 1976).

⁶¹ Richard Slotkin & James Folsom, *Introduction* to *SO DREADFUL A JUDGMENT: PURITAN RESPONSES TO KING PHILIP’S WAR, 1676–1677*, at x, 11 (Richard Slotkin & James Folsom eds., 1978).

⁶² *THE FIRST CHARTER OF VIRGINIA*, Apr. 10, 1606.

⁶³ JAMES S. OLSON & RAYMOND WILSON, *NATIVE AMERICANS IN THE TWENTIETH CENTURY* 33–34 (1984) (citations omitted).

⁶⁴ *Id.* at 34 (explaining that this condemnation resulted from the Indians’ “refus[al] to cooperate”). In a widely popular narrative, Mary Rowlandson repeatedly noted the unsettling connection between her Indian captors and the devil, at one point writing: “I may say, without abuse[] [that they are] as black as the devil.” MARY ROWLANDSON, *THE NARRATIVE OF THE CAPTIVITY AND RESTORATION* 52 (University Press, John Wilson and Son 1903) (1682).

⁶⁵ JON T. COLEMAN, *VICIOUS: WOLVES AND MEN IN AMERICA* 32 (2004).

lions . . . compassing all corners of the country for a prey, seeking whom they might devour.”⁶⁶ Those authors thus “cut their adversaries down to [the] level of brutes, while reassuring themselves of their superiority as humans.”⁶⁷

To the industrious Calvinists, the Indians’ work habits provided further evidence of their inferiority. According to one historian, “nearly every description of the Indian character [by European American commentators] contained a standard reference to their (especially male) perverse laziness.”⁶⁸

Such dispositionist stereotypes made it easy to wage war against the Indians and blame them for their own suffering. Indeed, insofar as the colonists perceived the Indians to be a threat to their lives, their beliefs, and their budding civilization, it was difficult to imagine a choice other than war. In the 1590s, Alberico Gentili, Regius Professor of Civil Law at Oxford and one of “England’s most prominent legal theorists” wrote “that Europeans could lawfully wage war against normatively divergent peoples who violated Eurocentrically conceived natural law.”⁶⁹ After all, Indians practiced “sins . . . contrary to human nature, and . . . [recognized] as such by all except . . . brutes and brutish men. And as against such men . . . war is made as against brutes.”⁷⁰ Given how the God and nature frames so easily justified active aggression toward Native Americans,⁷¹ it was a small step to justify the less deliberate, but no less devastating, spread of European diseases. Following a massive smallpox epidemic in the early seventeenth century, for instance, “the Puritans applauded the deaths of thousands of Native Americans as the will of God.”⁷²

In the eighteenth and nineteenth centuries, the westward expansions of the new nation “brought mass destruction to the American Indian population.”⁷³ But the legitimating frames remained largely intact under the doctrine of “Manifest Destiny,” which “saw the Indian’s decline as an inevitable consequence of his racial and cultural weakness and the white man’s

⁶⁶ *Id.* (citing John Underhill, *Newes From America* (London, 1638)).

⁶⁷ *Id.*

⁶⁸ Calvin Martin, *Ethnohistory: A Better Way to Write Indian History*, 9 *W. HIST. Q.* 41, 50 (1978).

⁶⁹ ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 194–96 (1990).

⁷⁰ ALBERICO GENTILI, *DE JURE BELLI LIBRI TRES* 122 (J. Rolfe trans., 1964), *quoted in* Williams, *supra* note 69, at 196; *see also* H. C. PORTER, *THE INCONSTANT SAVAGE* 354 (1979) (noting that “we might lawfully make war against the savages of Virginia” is the thesis of *A Good Speed to Virginia*, published in 1609).

⁷¹ *See, e.g.*, Phil Bellfy, *Savage, Savages, Savagism*, in *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS*, *supra* note 59, at 568, 569 (“The Native Americans’ defense of their homeland in the face of English encroachment was transformed by the English notion of savagism into an assault on civility and Christianity. As with the Spanish, the English colonists found in the notion of savagery a justification for their own imperial ambitions.”).

⁷² OLSON & WILSON, *supra* note 63, at 34.

⁷³ J. T. MORIARTY, *MANIFEST DESTINY: A PRIMARY SOURCE HISTORY OF AMERICA’S TERRESTRIAL EXPANSION IN THE 19TH CENTURY* 5 (2005).

vigor.”⁷⁴ It was “our manifest destiny to overspread the continent allotted by Providence for the free development of our yearly multiplying millions.”⁷⁵

Because of the power of our blame frames, the Native American victims were blamed and the European American non-victims were celebrated:

“We,” who should be advantaged, are acting, if at all, through good intentions, exemplary dispositions, and in accordance with situational forces larger than us. “They,” because of their aberrant dispositions interacting with or resulting from those same forces, should suffer or be further disadvantaged or separated from us and should not receive our assistance.

B. African Americans

1. Justifying Separate but Unequal⁷⁶

During much of the time that Native Americans were being forced out of our young nation, an African slave population was being forced in. By the nineteenth century, the southern United States had developed one of the largest slave societies in the world.⁷⁷ As the transport of human cargo and America’s “peculiar institution” proceeded without interruption for two centuries, the God and nature frames continued to be the primary sources of our “great confusion.”⁷⁸

Some antebellum proponents of slavery believed that God created different “types of mankind” as *separate and unequal*. Africans, in this telling, were descendants of the Biblical figure Ham, son of Noah and the first black man. Africans were thus “cursed by God for all time to atone by servitude for Ham’s sin of dishonoring his father.”⁷⁹

⁷⁴ Slotkin & Folsom, *supra* note 61, at 19.

⁷⁵ John Louis O’Sullivan, *Editorial*, U.S. MAG. & DEMOCRATIC REV., July–Aug. 1865.

⁷⁶ Many of this Section’s themes are elaborated in Hanson & Yosifon, *The Situation*, *supra* note 4.

⁷⁷ 5 AFRICANA: THE ENCYCLOPEDIA OF THE AFRICAN AND AFRICAN AMERICAN EXPERIENCE 195 (Kwame Anthony Appiah & Henry Louis Gates, Jr., eds., 2d ed. 2005).

⁷⁸ Initially, Europeans viewed slaves as prisoners of war, criminals, or heathens whose enslavement was a justified alternative to execution. GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* 71–72 (1981). Pigmentation initially played only an indirect confirming role. Because the English generally associated the color black with evil, filth, and misfortune, they were preconditioned to react negatively to the appearance and culture of the African people. *See id.* at 73–74.

⁷⁹ JOHN R. HOWARD, *THE SHIFTING WIND: THE SUPREME COURT AND CIVIL RIGHTS FROM RECONSTRUCTION TO BROWN* 40 (1999). That script allowed a Georgia court in 1853 to deny that free Blacks had the ability to be citizens, stating “that the social and civil deg-

It was not just that Africans deserved enslavement. Those who promoted or benefited from slavery deserved their privileged status, and were advancing civilization and God's plan.⁸⁰ Indeed, the slave trade promised to transform barbarous heathens into civilized Christians: "Principles of Christianity thus legitimated the system of slavery in the eyes of the slave owners, who could convince themselves they were doing good by enslaving Black people."⁸¹

In the eighteenth and nineteenth centuries, the nature frame's influence grew. With science growing in stature, political and social ideas shifted to place more emphasis on the equality of all "men." As those political conceptions gained momentum, so did the injustice dissonance from continued racist oppression. To relieve that dissonance, the nature frame responded with a proliferation of "scientific" fields devoted to studying physical variation across groups and developing categories of humanity according to ancestry, biology, and race.⁸² Eventually, caste-like distinctions between "white" and "black" emerged, providing a new type of justification for slavery.⁸³

Thomas Jefferson, author of the Declaration of Independence *and* slaveholder, likely felt the injustice dissonance acutely.⁸⁴ He found comfort, however, in seemingly scientific observations regarding the intellectual, physical, and emotional inferiority of Africans:

In general, their existence seems to participate more of sensation than reflection. To this must be ascribed their disposition to sleep when abstracted from their diversions, and unemployed in labor. An animal whose body is at rest, and who does not reflect, must be disposed to sleep of course It is not against experience

radation, resulting from the taint of blood, adheres to the descendants of Ham in this country, like the poisoned tunic of Nessus" D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 463 (1993) (quoting Bryan v. Walton, 14 Ga. 185, 198 (1853)). A further religious justification for slavery was that Jesus appears never to have explicitly condemned slavery, although it existed during his lifetime. See FREDRICKSON, *supra* note 78, at 80.

⁸⁰ FREDRICKSON, *supra* note 78, at 72.

⁸¹ MARGARET L. ANDERSEN & HOWARD F. TAYLOR, *SOCIOLOGY: UNDERSTANDING A DIVERSE SOCIETY* 454 (4th ed. 2006); see also Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659, 667 (2003) ("Rather, it was not until the widespread enslavement of Africans by the Europeans that the myth of Black inferiority was created, and justified by Christianity, in order to protect the economic spoils of slavery against moral attacks." (citing JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM* 53 (1988))).

⁸² FREDRICKSON, *supra* note 78, at 141–42.

⁸³ *Id.* at 85.

⁸⁴ Hanson & Yosifon, *The Situation*, *supra* note 4, at 312.

to suppose, that different species of the same genus, or varieties of the same species, may possess different qualifications.⁸⁵

Following Jefferson's lead, several pseudo-sciences merged with the persistent notions of Social Darwinism in the nineteenth century to lend scientific credence to a conception of whites as a species distinct from, and superior to, blacks.⁸⁶

One of the founders of "anthropometry," Cesare Lombroso, advanced the theory that apes had evolved and were responsible for "the emergence of the black race and, from it, the yellow, and finally the white."⁸⁷ Samuel George Morton gained renown with his hypothesis that races could be ranked through physical measurements, particularly of brain size.⁸⁸ Morton claimed to find considerable empirical support for his theory, which was widely believed. Indeed, the *Charleston Medical Journal* called Morton the South's "benefactor . . . [in] giving to the negro his true position as an inferior race."⁸⁹

Such nature-based distinctions supported the Supreme Court's dismissal of Dred Scott's appeal for freedom in *Scott v. Sanford*.⁹⁰ Emphasizing the framers' original intent, Chief Justice Taney concluded that individuals of African descent—be they slaves or "free"—were not entitled to the rights and privileges of American citizenship and thus could not bring suit in federal court.⁹¹ In surveying cultural and legislative history, Taney divined a continuity of opinion that made no distinction "between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, [fixed] upon the whole race."⁹² Despite the legal changes declaring some free in name, the natural order of things remained fixed, consigning the entire race to "a subordinate and inferior class of beings, who had been subjugated by the dominant race" and thus "had no rights or privileges but such as those who held the power and the Government might choose to grant them."⁹³ To Taney, the intergroup distinctions seemed natural and im-

⁸⁵ Thomas Jefferson, *Notes on the State of Virginia*, in THOMAS JEFFERSON: WRITINGS 123, 265–66, 270 (Merrill D. Peterson ed., 1984).

⁸⁶ Darwinian theories provided fodder for competing evolutionary schools to rationalize their shared racism. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 69–73 (1981).

⁸⁷ CESARE LOMBROSO & GUGLIELMO FERRERO, *CRIMINAL WOMAN, THE PROSTITUTE, AND THE NORMAL WOMAN* 17 (Nicole Hahn Rafter & Mary Gibson trans., 2004).

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *Scott v. Sandford*, 60 U.S. 393 (1857). They even appeared to inform Abraham Lincoln's racial conceptions. See GOULD, *supra* note 86, at 35.

⁹¹ See *Scott*, 60 U.S. at 403; see also MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* 112 (1998).

⁹² See *Scott*, 60 U.S. at 409.

⁹³ *Id.* at 404–05. Taney explained the abolition of slavery in some states as the result of a logical, pragmatic decision based on economic realities arising from the physiological limitations of African Americans, rather than shifting views of rights or racial equality. See *id.* at 406–07.

mutable. Only by understanding African Americans' fixed dispositions, Taney argued, could the words of the founders who declared that "all men are created equal . . . endowed by their Creator with certain unalienable rights" be reconciled with actions that would have otherwise been "utterly and flagrantly inconsistent with the principles they asserted."⁹⁴ Or, in our terms, the otherwise evident injustice could be legitimated only by accepting a credible blame frame.

Along with the God, nature, and other schemas⁹⁵ came a set of basic caricatures: refined and exaggerated stereotypes that reinforced the image of blacks as naturally inferior and destined for subordination to their white guardians.⁹⁶ Developed throughout the antebellum period, these types—including the coon, the pickaninny, the mammy, the tom, and the sambo—have since been reinforced in diverse ways and continue to "form a kind of cultural barometer of the racial climate of the past 150 years."⁹⁷

The coon stereotype depicts blacks as lazy and shiftless. The pickaninny portrays black children as dirty, animalistic creatures with mussed hair and bulging eyes. Neither the coon nor the pickaninny was capable of self-government, and both were subjugated for their own good.⁹⁸ In contrast, the mammy, tom, and sambo were thought to have fully embraced their

⁹⁴ *See id.* at 410.

⁹⁵ Other frames contributed to the defense of slavery. For instance, after signing the Fugitive Slave Act, President Millard Fillmore justified the status quo with the situational forces of custom, precedent, and the threat posed to the union:

God knows that I detest slavery, but it is an existing evil, for which we are not responsible, and we must endure it, and give it such protection as is guaranteed by the Constitution, till we can get rid of it without destroying the last hope of free government in the world.

ROBERT J. SCARRY, MILLARD FILLMORE 181 (2001) (citation omitted); *see also* DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 233 (2001). President James Buchanan had taken a similar position. *See* JAMES A. RAWLEY, RACE AND POLITICS: BLEEDING KANSAS AND THE COMING OF THE CIVIL WAR 141 (1969).

Additionally, the choice frame seems to have helped reduce the injustice dissonance slavery created. Since slavery brought "benefits"—Christianity, civilization, freedom from the dangers of "savagism," and the comforts of being taken care of—blacks were imagined to at least have impliedly consented to enslavement. Because Africans were dispositionally ill-equipped to make choices in their own best interest, whites had the burden of choosing on their behalf. Defenders of slavery asserted that most slaves seemed quite content with servitude—so how could the institution be considered oppressive? *See* KENNETH M. STAMP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 86 (1956). *See generally* Hanson & Yosifon, *The Situation*, *supra* note 4, at 319–21 (describing the role of "choice" in justifying slavery).

⁹⁶ George Fitzhugh, a slavery proponent and celebrated Southern polemicist wrote that "[the Negro] is but a grown up child, and must be governed as a child, not as a lunatic or criminal. The master occupies towards him the place of parent or guardian." GEORGE FITZHUGH, SOCIOLOGY FOR THE SOUTH, OR THE FAILURE OF FREE SOCIETY 83 (1854).

⁹⁷ JAN NEDERVEEN PIETERSE, WHITE ON BLACK: IMAGES OF AFRICA AND BLACKS IN WESTERN POPULAR CULTURE 152 (1992) (quoting ETHNIC NOTIONS (Marlon Riggs 1987)).

⁹⁸ ETHNIC NOTIONS, *supra* note 97.

fortunate roles. The mammy, a dark, overweight, non-threatening character, was idealized for her domestic abilities; she was religious, superstitious, sexless, and above all, loyal;⁹⁹ and she was both eager to serve her surrogate white family and somewhat detached from her own. The tom was the male counterpart to the mammy.¹⁰⁰ With the same dark skin and child-like smile, he worked in the fields or around the plantation as a cook or butler. Usually weak or old, he was also deeply loyal,¹⁰¹ somewhat dependent, and ever appreciative of the care his master provided. The sambo predated the tom, but was similarly docile and loyal. While the tom was older and dedicated to his work, the sambo was young, “care free and irresponsible . . . quick to avoid work while reveling in the easy pleasures of food, dance, and song.”¹⁰² The sambo was vulnerable, easily frightened, and unable to care for himself.¹⁰³ These caricatures, and the expectations and self-fulfilling effects they generated, helped slaveholders individually and collectively to justify slavery and to maintain it, particularly in reaction to the growing abolitionist movement. Slaves were presented as living in their natural and ideal condition—cared for by their owners and ill-equipped for freedom.¹⁰⁴

Again, our blame frames made the victims blameworthy while excusing the rest of us:

“We,” who should be advantaged, are acting, if at all, through good intentions, exemplary dispositions, and in accordance with situational forces larger than us. “They,” because of their aberrant dispositions interacting with or resulting from those same forces, should suffer or be further disadvantaged or separated from us and should not receive our assistance.

2. *Justifying Separate but Equal*

As white Southerners’ situation changed following the Civil War, they continued to dispositionalize blacks. But the blame frames evolved to fit the needs of whites, who faced heightened anxieties about the potential for “black retaliation for two centuries of enslavement, dispossession, corpo-

⁹⁹ See BARBARA CHRISTIAN, *BLACK WOMEN NOVELISTS: THE DEVELOPMENT OF A TRADITION, 1892–1976*, at 11 (1980).

¹⁰⁰ See ETHNIC NOTIONS, *supra* note 97.

¹⁰¹ See DONALD BOGLE, *TOMS, COONS, MULATTOES, MAMMIES, & BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS 4–7* (1994).

¹⁰² ETHNIC NOTIONS, *supra* note 97.

¹⁰³ *Id.*

¹⁰⁴ See Stephanie Yarborough, *Ethnic Notions*, in *ENCYCLOPEDIA OF BLACK STUDIES*, at 234, 234–35 (Molefi Kete Asante & Ama Mazama eds., 2005).

real and psychological cruelty, and social and familial fragmentation.”¹⁰⁵ Following their loss in the Civil War, Southerners also needed to justify laws and practices that would legitimate separation and inequality while still passing constitutional muster. Jim Crow’s “separate but equal” customs and laws were just the ticket.

The post-bellum fears, needs, and constraints contributed to a new, more menacing caricature of the Negro: *the brute*, a “monstrous beast, crazed with lust.”¹⁰⁶ Much as the Native American brutes had been seen “compassing all corners of the country for a prey, seeking whom they might devour,”¹⁰⁷ the Negro brute was seen as “a fiend, a wild beast, seeking whom he may devour.”¹⁰⁸ This new caricature of black men as raging, rapacious, and threatening clashed head-on with the antebellum images of blacks as childlike, happy, and loyal. Emancipation destroyed that loyal, docile sambo, transforming the “good darkie” into the “brutish negro.” Because that “horrible creature” wandered free, “when a knock is heard at the door, [the Southern woman] shudders with nameless horror.”¹⁰⁹ Science was again invoked to make sense of nature’s laws:

A lurid and detailed account of the supposed susceptibility of all Negroes to “sexual madness” was published in a respected journal, *Medicine*, in 1903. “In the increase of rape on white women,” wrote Dr. William Lee Howard, “we see . . . evidence of racial instincts that are about as amenable to ethical culture as is the inherent odor of the race.” The physiological bases of the problem, Howard contended, was “the large size of the negro’s penis” and the fact that he lacked “the sensitiveness of the terminal fibers which exists in the Caucasian.” It followed, therefore, that “the African’s birthright” was sexual madness and excess.¹¹⁰

The brute caricature served several legitimating purposes. Looking backwards, he justified slavery, proving in retrospect that the peculiar institution had been precisely the right antidote to the African’s natural savagism.¹¹¹ In the present, the evolving caricature helped to justify the

¹⁰⁵ JERROLD M. PACKARD, *AMERICAN NIGHTMARE* 41 (2002).

¹⁰⁶ George T. Winston, *The Relations of Whites to the Negroes*, XVIII ANNALS AM. ACAD. POL. & SOC. SCI. 105, 109 (1901).

¹⁰⁷ See *supra* text accompanying note 66.

¹⁰⁸ GEORGE FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND* 276 (1971) (quoting Francis Butler Simkins, *Ben Tillman’s View of the Negro*, 3 J. S. HIST. 166 (1937)).

¹⁰⁹ *Id.* at 278 (citations omitted); see Winston, *supra* note 106, at 109 (“The black brute is lurking in the dark, a monstrous beast, crazed with lust. His ferocity is almost demoniacal. A mad bull or a tiger could scarcely be more brutal.”).

¹¹⁰ FREDRICKSON, *supra* note 108, at 279 (citations omitted).

¹¹¹ “Slavery, it was argued, had Christianized blacks and restrained their baser tendencies, but freedom had resulted in a rapid reversion toward barbarism.” CARY D. WINTZ, *BLACK CULTURE AND THE HARLEM RENAISSANCE* 10 (1996); see also GEORGE M. FREDER-

emerging form of *de facto* slavery and accompanying violence that developed to replace *de jure* slavery.¹¹² As long as black men posed a threat to white women, the case for segregation and subjugation would remain strong. Finally, the brute image justified the chief extralegal means of keeping blacks in their place after the Civil War: large-scale individualized violence, typified by lynching.

Those trends have been attributed generally to underlying “economic distress and political frustration.”¹¹³ Fearing socioeconomic competition from freed blacks and an upheaval in the southern social hierarchy, whites used lynching as the violent counterpart to Jim Crow segregation and disfranchisement to preserve the antebellum state of power relations.¹¹⁴ Toward that end, lynching served at least three main functions beyond the punishment of an alleged offense:

[F]irst, to maintain social order over the black population through terrorism; second, to suppress or eliminate black competitors for economic, political, or social rewards; and third, to stabilize the white class structure and preserve the privileged status of the white aristocracy.¹¹⁵

Although exact numbers are not clear, even conservative estimates suggest that at least 3500 African Americans were lynched during the late

ICKSON, *THE ARROGANCE OF RACE: HISTORICAL PERSPECTIVES ON SLAVERY, RACISM, AND SOCIAL INEQUALITY* 176 (1988) (“The conservative image of blacks as perpetual children who would be content to remain in their ‘place’ as useful menials was thus displaced in the collective mind of the white South by the image of the beast-rapist who needed to be held down by force as he degenerated toward extinction.”).

¹¹² A debt servitude system of sharecropping replaced formal slavery, and new laws known as the Black Codes restricted the civil and legal rights of former slaves. The Black Codes formed the precursor to the systematic segregation and discrimination of the Jim Crow System. See PACKARD, *supra* note 105, at 42.

¹¹³ FREDERICKSON, *supra* note 111, at 177.

¹¹⁴ STEWART E. TOLNAY & E. M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930*, at 19 (1992). The basic approach to social control became more sophisticated with the advent of so-called race riots, violent white romps through black neighborhoods, at the turn of the century. See WINTZ, *supra* note 111, at 9 (explaining that the race riots “were characterized by indiscriminate, wholesale violence directed against all blacks regardless of their actions.”).

Offering a slightly different twist on that story, Joel Williamson, in *THE CRUCIBLE OF RACE* (1984), emphasizes the impact of socioeconomic change on white men’s Victorian sensibility:

Heightened economics distress in the 1880s and 1890s left white men incapable of fulfilling their traditional responsibilities as good providers for their families. Unable to serve their women effectively as breadwinners, white males attempted to serve them in a different way—as protectors against the alleged threat of black rapists.

Quoted in FREDERICKSON, *supra* note 111, at 178.

¹¹⁵ TOLNAY & BECK, *supra* note 114, at 18–19.

1800s and early 1900s.¹¹⁶ The raw numbers are by no means the most chilling aspect of the lynching culture. The events often became community spectacles, in which large crowds—the lynch mob—would gather, people would bring their children, and families would cheer as the black victim met his death. Far from the province of a lawless underclass, local political and business leaders often organized lynchings.¹¹⁷ As one scholar puts it, “[l]ynching had become a ritual of interracial social control and recreation rather than simply a punishment for crime.”¹¹⁸ The lynchings typically were framed as a justified response to the danger that brutish male Negroes posed to white women.¹¹⁹

The animating logic was straightforward. As long as “they” continue to ravish and murder women and children, “we” have little option but to follow with quick and decisive punishment. In that way, an entire socio-economic system was built upon the foundation provided by a caricature, and the associated blame frame.

¹¹⁶ Lynching figures vary depending on the source, but according to the often cited Tuskegee Institute’s Archives, 4732 people were lynched between 1882 and 1951, roughly 75% of them black. See The Charles Chesnut Digital Archives, *Lynchings, by Year & Race, 1882–1968*, http://faculty.berea.edu/browners/chesnut/classroom/lynching_table_year.html (using data compiled from Archives at Tuskegee Institute, Feb. 1979) (last visited Apr. 6, 2006). Reliable figures for lynching were not compiled before Wells-Barnett’s work in 1882. Historians have noted, however, that those figures reflect only reported lynchings. See HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY* 5 (1993); Robert L. Zangrado, *Lynching, in THE READER’S COMPANION TO AMERICAN HISTORY* 686 (Eric Foner & John A. Garraty eds., 1991).

¹¹⁷ Local newspapers sometimes provided advance notice of the events, and railroad companies sold tickets to the advertised venue. Perpetrators tortured their black victims, mutilating the live body and methodically prolonging the death. Afterward, participants and spectators took home fingers, toes, ears, and genitalia as souvenirs. Zangrado, *supra* note 116, at 685; see also ROBERT WEISBROT, *FREEDOM BOUND: A HISTORY OF AMERICA’S CIVIL RIGHTS MOVEMENT* 4 (1990); Ray Stannard Baker, *What is a Lynching? A Study of Mob Justice, South and North*, *McCLURE’S MAG.*, Feb. 1905, at 430, 430.

¹¹⁸ Zangrado, *supra* note 116, at 686.

¹¹⁹ Thomas Nelson Page, an author who once actively publicized earlier stereotypes of blacks as docile and cheerful, promulgated the brute caricature in his fiction at the peak of the lynching phenomenon. See DAVID PILGRAM, *The Brute Caricature*, in JIM CROW MUSEUM OF RACIST MEMORABILIA, FERRIS STATE UNIV., available at <http://www.ferris.edu/htmls/news/jimcrow/brute> (last visited Apr. 16, 2006). He then used that caricature to justify lynching blacks in his *nonfiction* work:

The crime of lynching is not likely to cease until the crime of ravishing and murdering women and children is less frequent than it has been of late The Negro had the same animal instincts in slavery that he exhibits now; the punishment that follows the crime now is quite as certain, as terrible, and as swift as it could have been then [T]he Negro does not generally believe in the virtue of women. It is beyond his comprehension [H]is passion, always his controlling force, is now, since the new teaching, for the white women.

THOMAS NELSON PAGE, *THE NEGRO: THE SOUTHERNER’S PROBLEM* 111–12 (1904). Page ended his work by highlighting the “universal and inexorable” dispositionist law of nature: “races rise or fall according to their character.” *Id.* at 310.

“We,” who should be advantaged, are acting, if at all, through good intentions, exemplary dispositions, and in accordance with situational forces larger than us. “They,” because of their aberrant dispositions interacting with or resulting from those same forces, should suffer or be further disadvantaged or separated from us and should not receive our assistance.

IV. OUR “EQUALLY GREAT CONFUSIONS”

A handful of social and biological scientists over the last 50 years have gradually forced informed people to give up some of the more blatant of our biological errors. But there still must be other countless errors of the same sort that no living man can yet detect, because of the fog within which our type of Western culture envelops us.

—Gunnar Myrdal¹²⁰

In an ignominious ruling at the close of the 1800s, the Supreme Court presaged a shift that would occur in the next century in blame frame dominance: from God and nature to choice. In 1896, Homer Plessy, who was one-eighth African and could “pass” as white, purchased a first-class ticket on the East Louisiana Railroad out of New Orleans. In a largely staged event, Plessy informed the conductor of his “negro” status and then took his seat in the first-class car. Shortly thereafter, he was arrested for refusing to move to the “blacks only” car. In the infamous *Plessy v. Ferguson* opinion,¹²¹ the Supreme Court struggled to alleviate the injustice which Homer Plessy and the facts of his case laid bare.

Recognizing the dissonance, the dissenting Justice John Marshall Harlan called for an end to state-enforced segregation: “We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law.”¹²² Harlan sought to tear down the illusion of “separate but equal,” explicitly rejecting the artifice that segregation’s impact was felt equally because whites were prohibited from sitting in the “blacks only” car.¹²³

But Harlan, the lone dissenter, was ahead of his time. Justice Henry Billings Brown, writing for the rest of the court, invoked a justice-restoring

¹²⁰ GUNNAR MYRDAL, AN AMERICAN DILEMMA 1483 (1944).

¹²¹ 163 U.S. 537, 537–38 (1896).

¹²² *Id.* at 562 (Harlan, J., dissenting).

¹²³ *Id.* at 555.

blame frame to resolve the dissonance the easy way. Brown contended that the problem of “social” inequality (inasmuch as it was a problem) was beyond the reach of laws and lawmakers, including the Court and the Constitution:

Legislation is powerless to eradicate racial instincts If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.¹²⁴

Thus the Majority’s schema excused the non-victims—here, lawmakers. As for blaming the victims, Justice Brown hesitated to follow Chief Justice Taney’s *Dred Scott* opinion in explicitly declaring one race superior,¹²⁵ adhering instead to conditional phrases such as “if one race be inferior”¹²⁶ But the blame frame Brown invoked was just as potent:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.¹²⁷

The problem, then, was one of “choice.” Because “the colored race” could choose otherwise, the problem of stigma was theirs to deal with. More generally, Brown argued, choice offered the only solution to the social problems posed by race in America: “If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and a voluntary consent of individuals.”¹²⁸

In a way, Justice Brown was also ahead of his time. In shifting away from the frame of inferiority toward a frame of equality and choice, he unwittingly prefigured a more general attributional shift that would increasingly take hold over the course of the twentieth century.

¹²⁴ *Id.* at 551–52.

¹²⁵ See *supra* text accompanying notes 90–94.

¹²⁶ *Plessy*, 163 U.S. at 552.

¹²⁷ *Id.* at 551.

¹²⁸ *Id.*; see also *id.* at 544 (“The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.”).

A. *The Emergence of Choicism*

1. *The Crisis in Traditional Blame Frames*

Owing to a series of events, experiences, needs, and struggles, the twentieth century witnessed a fundamental transformation of the dominant attributional schemas. The notion of a natural racial hierarchy did not die, but it has been significantly displaced by the idea that all races are equal.¹²⁹ Space does not permit us to delve into the many and varied reasons for that transformation, but one part of the story is worth emphasizing.

The nature schema was still quite robust in the United States at the outset of World War II. But because Americans envisioned themselves as saving the world from the evils of Hitler, his reliance on nature-framed schemas of racial superiority and inferiority prompted Americans to view those schemas as illegitimate covers for hate-based injustice (a theme that was reinforced by the civil rights movements of the 1960s and 1970s).¹³⁰ What seemed natural and scientifically proven decades before was beginning to seem suspect, dangerous, and shameful. This erosion of a dominant blame frame posed a major problem for Americans: forfeiting their

¹²⁹ See, e.g., BENJAMIN PAGE & ROBERT SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES* (1992); HOWARD SCHUMAN, CHARLOTTE STEEH & LAWRENCE BOBO, *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* (1985). More popular (and less scholarly) writers argue that we have more or less seen the other side of the mountain and that, if we could just eliminate a few harmful, liberal policies, the Promised Land would be ours. See, e.g., DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1996); JIM SLEEPER, *LIBERAL RACISM: HOW FIXATING ON RACE SUBVERTS THE AMERICAN DREAM* (1996).

¹³⁰ For example, because our despised national enemy so enthusiastically and ruthlessly embraced eugenics, many Americans sought to distance themselves from, not simply eugenics, but any notion that races are "superior" or "inferior." Jim Holt, *Measure for Measure: The Strange Science of Francis Galton*, *NEW YORKER*, Jan. 24, 2005, at 84, 84 ("The Nazi experiment provoked a revulsion against eugenics that effectively ended the movement."). Thus in the 1940s, some of America's most egregious eugenics-inspired practices, such as forced sterilization, were ended and many eugenics-inspired laws were repealed. See Michael G. Silver, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 *GEO. WASH. L. REV.* 862, 863 (2004). In another attempt to erase connections between American science and German practices, the journal *Eugenical News* was renamed *Social Biology*, under which name it is still published. See EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE* 425 (2003). More than just distancing ourselves from the horrors of the Holocaust and the villainy of our enemy, Americans sought assurance that our own motives in war were pure, our hands clean, and our cause just. Indeed, this shifting of eugenics from associations with "us" to "them" was so effective that many Americans have been shocked in recent years to learn how robust and popular the science and practice once was among "us." As one author puts it, we are disinclined to believe "the sad truth of how the scientific rationales that drove killer doctors at Auschwitz were first concocted on Long Island." *Id.* at xvii. For interesting accounts of how American eugenics informed and influenced Nazi practices and how eugenics survives today in this country, see *id.* at 280–310; see also STEFAN KUHL, *THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM* (2002); ELOF AXEL CARLSON, *THE UNFIT: A HISTORY OF A BAD IDEA* (2001); NANCY ORDOVER, *AMERICAN EUGENICS: RACE, QUEER ANATOMY, AND THE SCIENCE OF NATIONALISM* (2003).

primary means of blaming the victim and excusing the non-victim made the injustice dissonance far more difficult to accommodate.

That weakened ability to temper unresolved dissonance had many effects over the last century, some of them quite positive. First, as old blame frames justifying racism were discredited, many people appear to have changed their attitudes for the better.¹³¹ Indeed, by some measures, it seems we live in a nation of which the Reverend Martin Luther King, Jr., could only dream: a nation where people are judged not “by the color of their skin but by the content of their character.”¹³² Second, those who continue to endorse the old frames are often labeled “racists,” which, given its modern connotations, is a stinging social appellation. For both of those reasons, one might have expected to see significantly diminished long-term inequalities between the relevant races.

However, scholars examining the trend in explicit attitudes find that the news is not all good. While some groups’ statuses improved greatly over the course of the twentieth century, African Americans (among others) have been largely left behind. Despite persistent racial disparities, the dominant belief is that current arrangements are basically just, fair, and equal. In an attempt to understand how people justify continued disparities, scholars speak of “modern racism,” “symbolic racism,” or “structural racism;”¹³³ some call it “laissez-faire racism,”¹³⁴ or simply a “new type” of racism;¹³⁵ and still others refer to it as “unconscious racism.”¹³⁶

¹³¹ See DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* 92 (1996).

¹³² Martin Luther King, Jr., *I Have a Dream*, Speech Delivered at the Lincoln Memorial (Aug. 28, 1963) (transcript available at <http://www.americanrhetoric.com/speeches/Ihaveadream.htm>).

¹³³ See, e.g., J. B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, in *PREJUDICE, DISCRIMINATION AND RACISM* 91 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (arguing that under existing norms, negative racial attitudes escape censure if presented in “a context in which there is a plausible, nonprejudiced explanation available for what might be considered prejudiced behavior”); Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 3 *J. PERSONALITY & SOC. PSYCHOL.* 414, 416 (1981) (explaining that “[s]ymbolic racism represents a form of resistance to change in the racial status quo based on moral feelings that blacks violate such traditional American values as individualism and self-reliance, the work ethic, obedience, and discipline”).

¹³⁴ See Lawrence D. Bobo & Ryan A. Smith, *From Jim Crow Racism to Laissez-Faire Racism: The Transformation of Racial Attitudes*, in *BEYOND PLURALISM: THE CONCEPTION OF GROUPS AND GROUP IDENTITIES IN AMERICA* 182, 186 (Wendy F. Katkin, Ned Landsman & Andrea Tyree eds., 1998) (“Laissez-faire racism blames blacks themselves for the black-white gap in socioeconomic standing and actively resists meaningful efforts to ameliorate America’s racist social condition and institutions.”).

¹³⁵ See Paul Sniderman, Thomas Piazza, Philip Tetlock & Ann Kendrick, *The New Racism and the American Ethos*, in *REASONING AND CHOICE: EXPLORATIONS IN POLITICAL PSYCHOLOGY* 244, 246 (Paul Sniderman, Richard Brody & Philip Tetlock eds., 1991) (explaining that this new type of racism is “rooted in values held up as quintessentially American: self-reliance, individual initiative, hard work, and individual achievement among them,” and “tends to conceal itself in the cloak of socially acceptable values As a result, the new racism is both hard to identify and easy to defend.”).

¹³⁶ See, e.g., Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with*

2. *The Modern Blame Frame*

Today's racism, despite all the new names describing it, is actually not so different from older forms. To be sure, the bottles have been relabeled, but their contents and intoxicating effects are strikingly unchanged. Like Lerner's subjects, our generation has invented a way to justify existing inequalities across groups. Racial inequalities today are only rarely said to manifest God's will or nature's design; individuals who advance such views are often seen as motivated by ignorance, malignance, or both. Instead, racial inequalities are attributed mostly to the victim's preferences, tastes, personality, and other factors that influence her resultant choices.¹³⁷ Yet, as always, disparities in power and wealth are actually generated through the mostly unseen situation. What has changed, then, is the dispositional story that explains and excuses the results of those primarily situational forces.

Today's river of racial oppression rises from wellsprings so deep and sources so subtle that the same old river rolls by unnoticed; hatred, animosity, or conscious claims of superiority are minor (though salient) tributaries. *Situational racism* operates beneath the surface and outside our purview both because of its unconscious and affective sources,¹³⁸ and because the knowledge structures legitimating it are connected less to how we see "those people" than to how we see *all* people, including ourselves.

According to social psychologists, the "person schema" in Western countries leads most people most of the time to perceive humans as preference-driven *choosers*. As Alan Fiske and colleagues summarize:

- Actions are freely chosen.
- Choices imply a preference.
- Preferences are stable over time.
- Preferences implicate the identity of the self.
- Outcomes are mostly controllable.
- People are responsible for (and hence the self is implicated in) the choices they make and the resultant outcomes.
- [And] [s]mart (good) people make good choices, whose outcomes they are happy with.¹³⁹

Unconscious Racism, 39 STAN. L. REV. 317 (1987). For a summary of the considerable evidence of unconscious racism amassed by Mahzarin R. Banaji and other social cognition scholars in recent years, see Hanson & Yosifon, *The Situational Character*, *supra* note 4, at 59–63.

¹³⁷ Those preferences and choices are sometimes superficially attributed to one or two situational forces, such as "culture" or government policies. See *supra* note 54; *infra* text accompanying notes 272–276.

¹³⁸ See sources cited *supra* note 136.

¹³⁹ Alan P. Fiske, Shinobu Kitayama, Hazel R. Markus & Richard E. Nisbett, *The Cultural Matrix of Social Psychology*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 915, 939

Thus, we tend to assume that what happens to ourselves and others reflects individual preferences and resultant choices. If outcomes—good or bad—are generally controllable by those who experience them, then outcomes reveal something about what each person wants and who each person is. Because outcomes reflect choice, each person is responsible for the outcomes that define her circumstances. And, in turn, those circumstances reveal something about the person behind the choices: good people enjoy good outcomes, and bad outcomes happen to bad people (or, at least, people who make bad choices).

As elaborated elsewhere, choice-based dispositionism, like the other dispositionist theories justifying oppression throughout our history, is badly flawed. Like a magician's diversionary hand-waving, imagined disposition distracts from far more influential situational forces internal and external to us all.¹⁴⁰ This is not a purely innocent mistake; as Lerner's experiment demonstrated, we see "choice" in part because it creates the appearance of justice in the face of inequality and suffering. The choice schema allows us to blame victims and excuse non-victims, thus protecting us from the disturbing reality that variations across groups do not simply reflect a fair and merit-based allocation of resources and opportunities.

The choice schema has become dominant in today's society. Choice, then, is the new race. And "choicism" is the new racism.¹⁴¹ Its influence extends well beyond legitimating racial disparities, as choice has become a way of understanding just nearly everything.

In our market-based democracy, almost all arrangements are presumed to reflect choices—individual and collective. Laws and legal theories are founded on the premise that the consumer is sovereign. Many of America's most influential religions emphasize "choice" as the determining condition of salvation—our choice or God's. Advertisers understand the power of the choice schema: we smoke Virginia Slims because we "see ourselves as King"; we watch Fox News because "they report and we decide"; and we wolf down untold calories at McDonald's because "we're lovin' it." Everything we do directly reflects our preferences, which are manifested in our choices—or so we want to (and are encouraged to) believe. The choice frame is so powerful in part because to question the legitimacy of choice would shake the bedrock on which most of our dominant social, economic, legal, and religious institutions are built.

But we, like our forebears, are deeply confused. Our generation is no less subject to dispositionist illusions and situational blindness than were previous generations. And today's dominant blame frame produces effects

(Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998).

¹⁴⁰ See Hanson & Yosifon, *The Situational Character*, *supra* note 4, *passim*.

¹⁴¹ Critical realists define choicism, a subcategory of dispositionism, as the tendency to ignore non-salient and non-affirming situational forces in favor of judgments about the character, preferences, desert, etc., of individuals or groups based on their apparent choices (no matter how illusory). See *supra* note 7.

virtually identical to those of the past. To be sure, in justifying racial inequalities, “separate and unequal” gave way to “separate but equal,” which has now yielded to “separate but chosen.” While that may seem like significant progress, in all cases, victims are blamed while non-victims are excused, the haves and the have-nots are separated, and the persistent chasm between them (which would otherwise be seen as unjust) is legitimated. As always, the situational influences on the oppressed remain largely ignored, and dispositions are said to determine outcomes. But, under the new frame, those situations are said to reflect people’s choices (in the form of consuming, studying, voting, marrying, taking precautions, having children, exercising, dieting, abiding by laws, accepting Jesus, working hard, and so on). More generally, the choice frame allows our system to maintain its legitimacy in the face of significant inequalities.

3. *The Interaction of Blame Frames*

Because it operates in the shadow of largely discredited, but still salient, traditional blame frames, choicism is, for several reasons, more legitimating than it would otherwise be. First, choicism succeeds by appearing to be very different from the discredited frames and to operate independently of race. Because choicism can be applied “equally” to all people in a “color-blind” fashion, we do not (consciously) associate our choice fetish with race or racism. By “making sense” of racial injustice without making explicit reference to race, choicism provides the perfect palliative: we bear no conscious animosity toward people of color, and if we make distinctions among people, we do so based on the “content of their character.” Far from being unfair or unjust, unequal outcomes are the product of the very feature that makes America great: free choice.

The racist shadow cast by the God and nature frames strengthens choicism in a second way. Based on traditional schemas, a “racist” is typically perceived as a person who consciously believes in the (natural or God-given) inferiority of other races or feels animosity toward (or disregard for) all members of a particular race. In public discourse, “racism” requires something approaching active racial animus. If patent racial prejudice produces inequalities, then there is injustice. Conversely, if our judgments lack such animus or prejudice (if, for example, they seem “color-blind”), and particularly if no one has “acted” to harm anyone, then the resultant inequalities typically are not considered reflective of racial injustice.

Because “racists” are people with ugly prejudices or malignant dispositions, most of us do not perceive ourselves to be racists—indeed, we abhor such people; by adopting this definition, we comfort ourselves with the assurance that we are not among them. Any suggestion that a person, a group, or our system is “racist” is considered a serious attack. To make

such a claim falsely or even to suggest it carelessly—that is, to play the “race card”—is itself an egregious injustice that typically eclipses the purported injustice that prompted the claim. Because “racism” is a dispositionist charge based on inferences from a person’s behavior,¹⁴² and because the accused “racist” has privileged access to her own conscious attitudes and reasoning, very few accusations of racism go unchallenged and the accused virtually always can (and usually do) take offense. Inasmuch as we all want to believe that our system is just, we all have a stake in denying that “racism” somehow underlies systemic outcomes and common practices.¹⁴³ Anyone alleging that unequal outcomes are the consequence of racism therefore takes a profound risk. In sum, the “race card,” is typically trumped by the “race-card card.”¹⁴⁴

Our blame frames thus place those who are concerned about racial disparities in a double bind. Inequalities, by themselves, are legitimated through presumptions of choicism. To rebut that presumption, one must provide compelling evidence of “racism.” To suggest “racism,” however, is to allege something about others’ dispositions, to invite conflict, and to subject oneself to vigorous and indignant backlash.¹⁴⁵ In the end, those who perceive injustice must either accept the presumptions of choicism—in which the victims are blamed and non-victims are excused—or dare challenge those presumptions and risk themselves being disparaged and discredited. Blame frames, therefore, help protect inequalities from being recognized as injustices, not simply by blaming the victim and excusing the non-victim, but also by undermining and deterring those who suggest that the inequalities evince injustice.

In the remainder of this Article, we examine how these key schematic parameters framed our national struggle to reconcile the dissonance created when Katrina exposed our vast racial inequalities. Picking up the story where we left off—near the turn of the twentieth century—the next Section

¹⁴² In other words, the same cognitive limitations that lead to dispositionist racial stereotypes (attributing behavior and outcomes to perceived disposition) contribute to a dispositionist stereotype of “racist.”

¹⁴³ See *supra* text accompanying notes 37–45.

¹⁴⁴ Indeed, even to mention “race” is to tread on thin ice. Race becomes a topic that we avoid because the schematic dynamics push toward combustible endpoints: someone is a “racist” or someone has unfairly played the “race card.” Cf. Jack Shafer, *Lost in the Flood: Why No Mention of Race or Class in TV’s Katrina Coverage?*, SLATE, Aug. 31, 2005, <http://www.slate.com/id/2124688/> (“Race remains largely untouchable for TV because broadcasters sense that they can’t make an error without destroying careers.”); Adam Benforado & Jon Hanson, *The Hitler Card*, BALTIMORE SUN, July 3, 2005, at C5 (making a related argument with regard to those who draw system-challenging comparisons to Hitler). It is worth noting that the combustibility of “race” as a topic serves those who benefit from racial oppression, and the race card can itself be played to deter discussions or discredit those who start them: a race-card card.

¹⁴⁵ The critic would also be subject to the discrediting effects of naïve cynicism (a more general phenomenon of which the race-card card is one example). See generally Benforado & Hanson, *Naïve Cynicism*, *supra* note 3.

provides an abbreviated overview of the situational forces that have contributed to those disparities.

B. Some Situational Sources of Racial Inequalities

1. Long-Term Situation (Twentieth Century)

While “progressive” New Deal legislation offered a launching pad and safety net for many white Americans, for a majority of African Americans it was the same old deal. The National Industrial Recovery Act, for instance, aimed to improve wages, but its prohibition against hiring unskilled labor meant half a million African Americans lost their jobs.¹⁴⁶ The Social Security Act excluded agricultural workers and domestic servants—positions held largely by minorities.¹⁴⁷ The 1935 Wagner Act legalized collective bargaining and union organizing, raising wages and improving benefits for fortunate workers, but again, African Americans were largely excluded from those opportunities—indeed, their exclusion was necessary “in order to prevent scuttling of the entire bill.”¹⁴⁸ In the end, African Americans were in no less precarious and vulnerable a position than they occupied before progressive reforms.¹⁴⁹ As Harvard Sitkoff later explained: “No group needed social security more than Negroes, and none got less of it.”¹⁵⁰

Similarly, the GI Bill paved the way to home ownership for many after World War II, making it possible for “two million . . . veterans and their families [to] achieve[] the American dream—an education, a home, a stable and profitable career, and ownership of their own business.”¹⁵¹ The GI Bill thus “shaped the country we know today.”¹⁵² But the opportunity of home ownership was illusory for minorities, due in part to the “statis-

¹⁴⁶ See Jim Powell, Cato Institute, *Why Did FDR's New Deal Harm Blacks?*, Dec. 3, 2003, <http://www.cato.org/dailys/12-03-03-2.html>.

¹⁴⁷ See Larry Adelman, California Newsreel, *A Long History of Affirmative Action—For Whites*, <http://www.newsreel.org/guides/race/whiteadv.htm> (last visited Apr. 6, 2006) (noting also that the instigation of a payroll tax created a general disincentive to hire more workers).

¹⁴⁸ HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE 52* (1978).

¹⁴⁹ As a contemporary observer described: “The economic situation of the Negroes in America is pathological. Except for a small minority enjoying upper or middle class status, the masses of American Negroes, in the rural South and in the segregated slum quarters in Southern and Northern Cities, are destitute.” MYRDAL, *supra* note 120, at 295.

¹⁵⁰ SITKOFF, *supra* note 148, at 52.

¹⁵¹ MICHAEL J. BENNETT, *WHEN DREAMS CAME TRUE: THE GI BILL AND THE MAKING OF MODERN AMERICA*, at back cover (1996). For a helpful overview of the racial implications of federal housing law and policies in urban areas, see Michael Schill & Susan Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Urban Policy in America*, 143 U. PA. L. REV. 1285 (1995).

¹⁵² BENNETT, *supra* note 151, at back cover.

tically-justified” discriminatory policies of lending agencies.¹⁵³ Indeed, of the \$120 billion in home loans issued between 1932 and 1962, more than 98% went to white families.¹⁵⁴ Redlining and restrictive covenants reinforced neighborhood racial boundaries.¹⁵⁵ Because blacks were effectively barred from new suburban developments, even newly settled areas reflected stark segregation.

Suburbanization, combined with “white flight,” meant many urban jobs were transferred to the suburbs, reducing employment prospects for the low-income and minority populations left behind in the cities. While twenty-two million white people moved to suburbs between 1960 and 1977, only half a million African Americans did. During that same time, the black population living in the country’s inner cities rose by six million.¹⁵⁶ The Federal Highway Act funded a highway system to link cities to growing suburbs, permanently destroying much predominantly minority, low-income housing to build roads on which poor, car-less minorities rarely drove.¹⁵⁷ Such targeted infrastructure development also led to depreciation or significantly lower appreciation in black areas than in white areas, further concentrating wealth among the population already controlling the most assets.¹⁵⁸

African Americans in post–New Deal America were disproportionately and systematically denied access to opportunities for wealth accumulation that policymakers distributed to already privileged groups. More than ends in themselves, these “transformative assets” made it possible for many to withstand temporary job loss or a major health crisis, pay college tuition, make a down payment on a home, start a business, or purchase

¹⁵³ See George M. Frederickson, *Still Separate and Unequal*, N.Y. REV. BOOKS, Nov. 17, 2005, available at <http://www.nybooks.com/articles/18450> (reviewing IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD STORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005)). Although designed to increase home ownership rates, the Federal Housing Administration’s (FHA’s) neighborhood-based loan appraisal system discouraged integrated communities, which were deemed inherently financially risky. *Id.* Furthermore, well into the 1970s, the FHA’s mandatory discriminatory ratings systems barred residents of predominantly black neighborhoods from securing mortgages altogether, or greatly inflated interest rates on their loans. *Id.*

¹⁵⁴ RACE—THE POWER OF AN ILLUSION: EPISODE 3—THE HOUSE WE LIVE IN (California Newsreel 2003) (transcript available at <http://www.newsreel.org/guides/race/Transcript%20Show%203.htm>).

¹⁵⁵ See *id.*; see also MELVIN L. OLIVER, *BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* chs. 1 & 6 (1997) (describing those and other structural sources of wealth and racial inequality).

¹⁵⁶ See GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* 7 (1998).

¹⁵⁷ Cf. MEIZHU LUI, EMMA DIXON & BETSY LEONARD-WRIGHT, *STALLING THE DREAM: CARS, RACE AND HURRICANE EVACUATION, UNITED FOR A FAIR ECONOMY’S THIRD ANNUAL REPORT, STATE OF THE DREAM 2006*, http://www.faireconomy.org/Stalling/stalling_the_dream_2006.pdf (“Only 7% of white households, but 24% of black households and 17% of Latino (Hispanic) households owned no vehicle in 2000.”).

¹⁵⁸ See David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1396 (2004).

a car that might put a good job within reach.¹⁵⁹ Thus, our government opened the door to higher income, greater wealth, and a hopeful future, but effectively labeled it “whites only.” American laws, policies, practices, customs, and expectations quietly and situationally combined in the last century to maintain, and even expand, the longstanding gap between whites and African Americans.¹⁶⁰ And as old forms of racism and blame frames gave way to new, that gap was presumed by many to reflect, not a complex web of race-related influences, but choice.

2. Short-Term Situation (Twenty-first Century)

Well before Katrina’s visit, the gap between whites and African Americans in New Orleans was evident to anyone who cared to look. As of 2004, the proportion of the city’s population living below the poverty line was seventh highest in the nation, with the poverty “highly concentrated among the African American population.”¹⁶¹ Housing patterns followed the general pattern of race- and class-based segregation and inequalities described in the previous Section, with African Americans concentrated in urban areas as a result of white flight.¹⁶² When Katrina rolled in, “racial segregation in the New Orleans metropolitan area was among the highest in the South.”¹⁶³

Although tourist guides declare that New Orleans is “like no other place in America,”¹⁶⁴ evidence suggests that, like much of America, it continues to suffer from unrecognized injustices across lines of race and class. Dis-

¹⁵⁹ See THOMAS SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY passim* (2005).

¹⁶⁰ See *id.* Ira Katznelson aptly describes the process as “white affirmative action.” See KATZNELSON, *supra* note 153, *passim*.

¹⁶¹ ALAN BERUBE & BRUCE KATZ, BROOKINGS INST., *KATRINA’S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA 2* (2005), available at http://www.brookings.edu/metro/pubs/20051012_concentratedpoverty.pdf (noting that although African Americans “made up 67 percent of the city’s total population,” they represented “84 percent of its population [living] below the poverty line.”).

¹⁶² By 2004, the city of New Orleans represented roughly one-third of the larger metro area’s population, but was home to two-thirds of the area’s African Americans. BROOKINGS INST., *NEW ORLEANS AFTER THE STORM: LESSONS FROM THE PAST, A PLAN FOR THE FUTURE 5* (2005), available at http://www.brookings.edu/metro/pubs/20051012_NewOrleans.pdf. As whites began their exodus in the 1960s and 1970s, poverty and blackness became increasingly concentrated within individual neighborhoods. See *id.* Between 1970 and 2000, the city’s white population was cut in half, while the African American population grew by 27%. See *id.* at 9–10. For a description of the effects of white flight on the New Orleans public housing system, see Martha Mahoney, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251, 1253 (1990).

¹⁶³ HARRY J. HOLZER & ROBERT I. LERMAN, URBAN INST., *EMPLOYMENT ISSUES AND CHALLENGES IN POST-KATRINA NEW ORLEANS 2* (2006), available at http://www.urban.org/UploadedPDF/900921_employment_issues.pdf.

¹⁶⁴ Arnold R. Hirsch & Joseph Logsdon, *The People and Culture of New Orleans*, <http://www.neworleansonline.com/neworleans/history/people.html> (last visited Feb. 21, 2006).

parities in housing, employment,¹⁶⁵ healthcare,¹⁶⁶ education,¹⁶⁷ crime,¹⁶⁸ transportation, and environmental protection¹⁶⁹ all reveal persistent inequities that African Americans and other minorities have faced throughout American history.

3. *The Immediate Situation—September 2005*

When Hurricane Katrina made landfall, between 100,000 and 200,000 New Orleans residents—most of them poor and African American—remained in the city, despite a mandatory evacuation order.¹⁷⁰ To many, those who stayed behind seemed foolish, stubborn, or just plain stupid. As is generally the case, imagined dispositions eclipsed a far more powerful situation.

¹⁶⁵ Employment opportunities more or less followed white people to the suburbs. See BROOKINGS INST., *supra* note 162, at 9 (“Employment patterns reflected population change. In 1970, New Orleans had two-thirds of the metro [area]’s total jobs, but by 2000 that share had dropped precipitously to 42%. New Orleans saw a small 3% loss of jobs between 1970 and 2000 But meanwhile, the surrounding parishes’ job growth mushroomed.”) (citing BUREAU ECON. ANALYSIS, COUNTY INCOME AND EMPLOYMENT SUMMARY 1970–2000). Not coincidentally, by 2004, the city’s unemployment rate was over twice the national average, while median family incomes were only two-thirds of the national average. See HOLZER & LERMAN, *supra* note 163, at 1. The low-paying service industry accounted for over a quarter of the jobs remaining in the city, and tourist-trade jobs provided little meaningful security. See *id.*

¹⁶⁶ In the fall of 2005, 21% of Louisiana state residents had no health insurance. See HENRY J. KAISER FAMILY FOUND., A PRE-KATRINA LOOK AT THE HEALTH CARE DELIVERY SYSTEM FOR LOW-INCOME PEOPLE IN NEW ORLEANS 1 (2006), <http://www.kff.org/uninsured/upload/7442.pdf>. An African American baby in Louisiana is twice as likely as a white baby to die as an infant. See DURAND MACKLIN, LA. DEP’T OF HEALTH & HOSPS., MINORITY HEALTH IN LOUISIANA: FROM DISPARITY TO PARITY: 2003 REPORT 3 (2004), available at <http://www.dhh.louisiana.gov/offices/publications/pubs-90/Minority%20Health%20Report.pdf>.

¹⁶⁷ The disparity in higher education is striking: only 13% of black adults in New Orleans in 2004 had earned a college degree, compared to 48% of white adults. See BROOKINGS INST., *supra* note 162, at 7. Patterns of segregation and suburbanization were also evident in the public elementary school system, which was “arguably one of the worst in the country before Hurricane Katrina.” PAUL HILL & JANE HANNAWAY, THE FUTURE OF PUBLIC EDUCATION IN NEW ORLEANS 2 (2006), available at http://www.urban.org/UploadedPDF/900913_public_education.pdf (footnote and citations omitted). Hill and Hannaway note: “Nearly three-quarters (73.5 percent) of the schools in the district had received an academic warning or were rated ‘academically unacceptable’ in the 2003–2004 school year by the state.” *Id.* The following year, barely one in four eighth graders was proficient in reading, and only one in seven was proficient in math. See *id.*

¹⁶⁸ See HOLZER & LERMAN, *supra* note 163, at 2 (“[R]ates of crime and drug abuse in New Orleans were among the nation’s highest.”).

¹⁶⁹ See Beverly Wright, *Living and Dying in Louisiana’s “Cancer Alley”*, in THE QUEST FOR ENVIRONMENTAL JUSTICE 87, 88–93 (Robert D. Bullard ed., 2005); see also John McQuaid, *Cancer Alley: Myth or Fact?*, *Unwelcome Neighbors: How the Poor Bear the Burdens of America’s Pollution*, NEW ORLEANS TIMES-PICAYUNE, May 23, 2000, at A9.

¹⁷⁰ See Linda B. Bourque, Judith M. Siegel, Megumi Kano & Michelle M. Wood, *Weathering the Storm: The Impact of Hurricanes on Physical and Mental Health*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 129, 138 (2006).

The likelihood of a successful evacuation turned on a number of factors beyond many residents' control, including their location, income level, occupation, social networks outside the city, access to private transportation, and access to information.¹⁷¹ Those in upper- and middle-income brackets learned about the impending storm from numerous sources, including the Internet, e-mail, and telephone, whereas those in lower-income brackets depended heavily on television and radio, both of which were slow to sound a heightened alarm.¹⁷² Indeed, the mandatory evacuation order was not given until roughly twenty hours before Katrina made landfall and twenty-five hours before the levees started to fail.¹⁷³ And a surprising number of residents never heard the evacuation order at all.¹⁷⁴ According to the bipartisan Congressional report on the Katrina disaster, the "too little

¹⁷¹ Elizabeth Fussell, *Leaving New Orleans: Social Stratification, Networks, and Hurricane Evacuation*, in UNDERSTANDING KATRINA: PERSPECTIVES FROM THE SOCIAL SCIENCES (2005), <http://understandingkatrina.ssrc.org/Fussell/> (detailing arguments highlighted here). For example, 27.3% of New Orleans households did not have cars, compared to 9.4% of the U.S. population as a whole. *See id.*

It is worth highlighting that the waters unleashed by Katrina were themselves biased—seemingly more eager to pummel low-income areas than wealthy ones. Craig E. Colten, a geologist at Louisiana State University, summarized the gravitational effect this way: "[I]n New Orleans, water flows away from money. Those with resources who control where the drainage goes have always chosen to live on the high ground. So the people in the low areas were the hardest hit." Jason DeParle, *Broken Levees, Unbroken Barriers: What Happens to a Race Deferred*, N.Y. TIMES, Sept. 4, 2005, § 4, at 1. In Congressional testimony, Professor Robert Verchick offered a similar analysis:

The lowest lying areas of New Orleans tend to be populated by those without economic or political resources. The city's Lower Ninth Ward, for example, which was especially hard hit and completely inundated by water, is among its poorest and lowest lying areas. Ninety-eight percent of its residents are African-American.

Hurricane Katrina: Assessing the Present Environmental Status Before the Subcommittee on Environment and Hazardous Materials of the Committee on Energy & Commerce, 109th Cong. (2005) (Statement of Robert R. M. Verchick, Professor, Loyola University New Orleans). Thus, disasters amplify disparities: those with less prior to a disaster find themselves with much less afterwards. *Cf.* David Gonzalez, *Storm and Crisis: The Victims*, N.Y. TIMES, Sept. 2, 2005, at A1 (quoting Martín Espada: "We tend to think of natural disasters as somehow even-handed, as somehow random Yet it has always been thus: poor people are in danger. That is what it means to be poor. It's dangerous to be poor. It's dangerous to be black").

¹⁷² *See* Fussell, *supra* note 171.

¹⁷³ *See* Bourque, Siegel, Kano & Wood, *supra* note 170, at 138. In 2002, a special report by The New Orleans Times-Picayune indicated that avoiding the worst consequences of a major hurricane in New Orleans would require a major evacuation effort. For such an evacuation to be effective, "more than a million people have to travel at least 80 miles over an aging, low-capacity road system," a challenge that would "require[] a 72- to 84-hour window." John McQuaid & Mark Schleifstein, *Left Behind*, NEW ORLEANS TIMES-PICAYUNE, June 24, 2002, at A11.

¹⁷⁴ In a survey of 680 people evacuated to Houston, 25% of respondents said that they never heard the government's evacuation order. WASH. POST ET AL., SURVEY OF HURRICANE KATRINA EVACUEES 5 (2005), available at <http://www.kff.org/newsmedia/7401.cfm>.

too late” evacuation order was an important contributing factor in stranding so many New Orleans residents.¹⁷⁵

Even if they heard and had time to act on the evacuation order, New Orleans’ poor faced the painful prospect of abandoning their only possessions, with no insurance or financial reserves with which to replace them if damaged or stolen.¹⁷⁶

In the end, however, many poor residents were not really focusing on the “Should I go?” question. Instead, they were occupied by the devilish details: “To where?,” “With whom?,” “In what?,” “For how long?,” and “With what money?” An evacuation order is not, after all, an order to the rest of us to assist evacuees. Upon learning of the looming danger, upper- and middle-income residents could make hotel reservations or plan to stay with out-of-town family and friends; they could pack up their cars, crate their pets, withdraw some cash, Ziploc their insurance policies and important papers, and leave their homes with a destination, a map, a tank of gas, and some confidence about the road ahead. Low-income residents, in contrast, had few of those options.¹⁷⁷

As the most obvious barrier to evacuation, the transportation deficit was eventually widely acknowledged. Indeed, the New Orleans Comprehensive Emergency Management Plan had anticipated that “approximately 100,000 citizens of New Orleans do not have means of personal transportation” and mandated that “transportation will be provided to those persons requiring public transportation from the area.”¹⁷⁸

¹⁷⁵ See FAILURE OF INITIATIVE: THE FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H.R. REP. NO. 109-377, at 109–11 (2006) [*hereinafter* FAILURE OF INITIATIVE]. By contrast, neighboring Plaquemines Parish declared a mandatory evacuation forty-five hours before landfall and achieved “an evacuation rate of 97 to 98%, which helped account for the small number of fatalities there—only three.” *Id.* at 113.

¹⁷⁶ As Timothy Bayard, a captain in the New Orleans Police Department who coordinated the post-Katrina evacuation, explained: “This is a poor city. For many of these people, their home is all they’ve got. They don’t want to turn that loose.” Brett Anderson & Jeff Duncan, *Rescuers Face Fight from Those Who Won’t Leave; Nagin Says Use Force to Remove Holdouts*, NEW ORLEANS TIMES-PICAYUNE, Sept. 8, 2005, at A04. According to a survey of Katrina evacuees, 27% said that they resisted leaving because they were afraid their possessions would be stolen or damaged and another 9% said they didn’t want to abandon a family pet. See WASH. POST ET AL., *supra* note 174, at 6.

¹⁷⁷ In one study 55% of the (eventual) evacuees surveyed reported having no car or no way to leave, only 20% had relatives or friends they could move in with, 24% had some insurance, 28% had usable credit cards, and 31% had a bank account from which they could draw money. WASH. POST ET AL., *supra* note 174, at 6, 11; see also Jonathan Tilove, *Katrina’s Whirlwind Exposes America’s Inequalities of Race*, NEWHOUSE NEWS SERV., Sept. 3, 2005, <http://www.newhousenews.com/archive/tilove090305.html> (presenting demographics of vehicle ownership and public transit riders); LUI, DIXON & LEONDAR-WRIGHT, *supra* note 157 (examining the sources and likely future impact of this problem).

¹⁷⁸ FAILURE OF INITIATIVE, *supra* note 175, at 113 (quoting the New Orleans Comprehensive Emergency Management Plan). Similarly, Terry Tullier, acting director of New Orleans’ Office of Emergency Preparedness, predicted in 2002 that in the event of a major hurricane, “a lot of people” would not evacuate, including “the 100,000 who don’t have transportation.” McQuaid & Schleifstein, *supra* note 173, at A11. Dyan French, a commu-

Less obviously, low-income residents could not afford hotels and often could not draw on out-of-town social networks.¹⁷⁹ Because Katrina arrived at the end of the month, residents living from paycheck to paycheck or dependent on government aid had diminished funds with which to purchase gas or otherwise finance an evacuation.¹⁸⁰

Finally, some New Orleans residents no doubt stayed because they were not particularly concerned about the evacuation order—confident that they could weather Katrina’s winds,¹⁸¹ skeptical of or averse to government mandates (which ought to have been understandable to many conservatives who would later criticize them), or perhaps just hopeful for some adventure.¹⁸² Whatever their reasons, for many New Orleanians, forces beyond their control made (or seemed to make) leaving not a viable option.

C. Seeing Situation Through the Eye of a Hurricane

1. Challenging Choicism

Although seeing through the illusion of choice is uncommon, it does happen.¹⁸³ Perceiving situational influences can sometimes even be easy—particularly when situation is salient, when acknowledging situation enhances (or at least does not threaten) our sense of ourselves or our system, or

nity leader in New Orleans, asked this question in her congressional testimony: “Why would you . . . ask a city, where 80 percent of its citizens ride public transport, to evacuate? What [were] they supposed to do? Fly?” FAILURE OF INITIATIVE, *supra* note 175, at 111.

¹⁷⁹ Residents refused to leave on the grounds that they had “nowhere to go.” See Anderson & Duncan, *supra* note 176, at A04 (quoting Rita Maragne, who had lived at the same address for 87 years and remarked, “To hell with the mayor. I’m not going to drink the damn water. Why do I gotta leave? I don’t have nowhere to go.”).

¹⁸⁰ Jonathan Tilove summarized the situation this way: “Evacuation, if you don’t have a car, a credit card or a place to go, sounds like trading the deep sea you know for the devil you don’t.” Tilove, *supra* note 177. Many residents faced still other obstacles. The elderly and disabled were far less likely to evacuate. See Fussell, *supra* note 171 (noting the “additional risks” of evacuation to “the elderly and disabled”). One survey of evacuees found that 38% of residents who did not evacuate were either physically unable or were caring for a disabled person. See WASH. POST ET AL., *supra* note 176, at 7. Countless hospital employees (including doctors and nurses) and city and state employees (including police officers) remained behind to do their jobs. See Fussell, *supra* note 171 (noting that city, state, and federal officials remained to help evacuate citizens, and many hospital workers were left stranded after their patients were evacuated). For a vivid illustration of the disparate experiences of two families from different income groups, see Jodi Wilgoren, *Storm and Crisis: The Economic Divide: In Tale of Two Families, a Chasm Between Haves and Have-Nots*, N.Y. TIMES, Sept. 5, 2005, at A1.

¹⁸¹ Sixty-four percent of those who stayed reported that they did not expect the storm to be as bad as it was. See WASH. POST ET AL., *supra* note 176, at 6.

¹⁸² Apparently, riding out the storm has been something of a New Orleans tradition. See *Survey of Hurricane Katrina Evacuees*, WASH. POST, Sept. 16, 2005, at A16 (quoting one rescuee: “I’m a New Orleans cliché. I stayed for Camille, I stayed for Betsy. You live in New Orleans, it’s something you deal with.”).

¹⁸³ See Hanson & Yosifon, *The Situation*, *supra* note 4, at 157–66 (describing some of the limits of dispositionism); see also *supra* text accompanying note 50 (describing naïve situationism).

when no powerful interests have a stake in framing the matter as “choice.” But it takes an extraordinary event indeed to pierce the veil of choice and reveal the influence of situational forces when doing so opens the possibility that something horribly unfair is afoot.

A “natural disaster” is just such an extraordinary event. Consider the response to the 2004 Tsunami, a horrific tragedy in which approximately 200,000 people were killed¹⁸⁴ and to which America—both its public and private sectors—responded with profound sympathy and generosity.¹⁸⁵ The response was proof to the world and to ourselves that we are generous and caring.¹⁸⁶

Compare that to our response to lung cancer, a disease that has been called “America’s No. 1 killer of both men and women”¹⁸⁷ and that kills roughly 155,000 people in this country every year.¹⁸⁸ To put that in perspective, breast cancer, prostate cancer, and colon cancer combined account for fewer than 130,000 deaths per year.¹⁸⁹ However, there is relatively little sympathy (and thus comparatively little research money) for the victims of lung cancer—as opposed to victims of the latter cancers—owing in large part to the widely held belief (often wrong) that those victims *chose* their fate by electing to smoke, knowing the risks.¹⁹⁰

Americans react very differently to a danger that, like a tsunami, arrives unannounced and impacts victims who had no meaningful warning and were simply located at the wrong place at the wrong time. Even to eyes accustomed to seeing only “free” choice and disposition, whether a person survives or perishes in a tsunami appears to be determined by situation.¹⁹¹ Similarly, at least initially, most people do not perceive vulner-

¹⁸⁴ See U.N. Office of the Special Envoy for Tsunami Recovery, *The Human Toll*, <http://www.tsunamispecialenvoy.org/country/humantoll.asp> (last visited Apr. 6, 2006).

¹⁸⁵ Prior to the tsunami, the American Red Cross had never collected more than \$50 million for an international disaster; it collected over ten times that amount for tsunami relief. See Stephanie Strom, *Figures Reveal Dynamics of Disaster Giving*, N.Y. TIMES, Oct. 23, 2005, at A18. As Patrick Rooney, director of research at the Center on Philanthropy at Indiana University put it, “Giving for the tsunami was literally off the charts.” *Id.*

¹⁸⁶ See, e.g., Terry Everett, *America’s Generosity Abundant in Tsunami Relief*, Jan. 10, 2005, available at <http://www.house.gov/everett/news/columns/col-0110055.asp>.

¹⁸⁷ See Alvin Powell, *Cancer Drug’s Effectiveness Newly Understood*, HARVARD GAZETTE, May 6, 2004, available at <http://www.news.harvard.edu/gazette/2004/05.06/01-lungcancer.html>.

¹⁸⁸ See Dep’t of Health & Human Servs., Ctrs. for Disease Control & Prevention, Lung Cancer Statistics (2006), <http://www.cdc.gov/lungcancer/statistics/index.htm> (citing U.S. Cancer Statistics Working Group, UNITED STATES CANCER STATISTICS: 1999–2002 INCIDENCE AND MORTALITY WEB-BASED REPORT VERSION (2005)).

¹⁸⁹ *Id.*

¹⁹⁰ See Alison Chapple, Sue Ziebland & Ann McPherson, *Stigma, Shame, and Blame Experienced by Patients with Lung Cancer: Qualitative Study*, 328 BRIT. MED. J. 1470 (2005) (studying the stigma of lung cancer among British patients); Becky Evans, *Lung Cancer Stigmatized, Women Say*, ATLANTA J.-CONST., Nov. 14, 2003, available at <http://www.ajc.com/news/content/news/1103/14cancer.html>; Katherine Hobson, *Lung Cancer Etiquette: Thanks for Not Asking if I Smoked*, U.S. NEWS & WORLD REP., Mar. 8, 2006, available at <http://www.usnews.com/usnews/health/articles/060308/8lung.htm> (interview of Lori Hope).

¹⁹¹ Cf. G. Jeffrey MacDonald, *Donors Favor Those “Worthy” of Compassion*, CHRIS-

ability to a hurricane as a matter of choice. A hurricane—particularly a Category 3 hurricane bearing down on one of America’s favorite and most important historical cities—seems more like a situational force.¹⁹²

2. *Witnessing Injustice*

Katrina made landfall on August 29, 2005. One day later several New Orleans levees broke, and three-quarters of the city was flooded, some parts by as much as twenty feet. With a death toll at 1200 to date and hundreds still missing, Katrina was one of the deadliest natural disasters in U.S. history. And it made one heck of a news story.¹⁹³

As the first days after Katrina’s landfall passed, the media coverage shifted seamlessly from “Where will it hit?” and “How bad will it be?” to a horrifying tale of a failing rescue effort. The government replaced the hurricane as the salient cause of the suffering. In both scenarios, the situation was evident, and the choice schema inapt.

Americans witnessed two general types of injustice in the wake of Katrina. First, a group of innocent Americans was suffering; yet the governmental response seemed altogether insufficient, and perhaps even indifferent.¹⁹⁴ “Americans do not stand by and allow innocent Americans to suffer,” we tend to believe. The flawed rescue efforts thus seemed acutely un-American.

On September 1, Anderson Cooper opened his news show, *360 Degrees*, as follows: “This is America? Chaos, anger, a desperate city feeling abandoned.”¹⁹⁵ He then warned viewers, “There is desperation and there is

TIAN CENTURY, Oct. 4, 2005, available at <http://www.christiancentury.org/article.lasso?id=1328> (“[G]iving patterns suggest that donors are losing interest in chronic problems such as poverty, in which suffering is arguably exacerbated by questionable individual choices . . . [C]ompassion is increasingly being reserved for those who appear to have done no wrong.”).

¹⁹² Because our proclivity to see situations is enhanced when a problem is tractable, it may matter that most hurricanes have, in recent memory, come and gone without catastrophic impact on American soil. It may matter that hurricanes are salient actors—personified with names, reified as evildoers, pictured in living color, moving unpredictably as if by their own diabolical intent. It probably makes a difference as well that hurricanes seem to hit coastal towns flush with the wealth of America’s upper crust.

¹⁹³ See Shalia Dewar, *Recovery mission still on for Katrina’s dead*, INT’L HERALD TRIB., Apr. 12, 2006, available at <http://www.int.com/articles/2006/04/11/news/katrina.php> (over 1200 dead); “*Katrina Missing*” List now below 500, L.A. WKLY., May 8, 2006, available at <http://www.louisianaweekly.com/weekly/news/articlegate.pl?20060508m> (458 missing); *Top Global Media Stories for 2005*, GLOBAL LANGUAGE MONITOR, http://www.languagemonitor.com/Media_Analysis.html (stating that “Hurricane Katrina and its aftermath” was the top global media story over the course of 2005, ahead of the war in Iraq, the South Asian Tsunami, and other major events); see also PEW RESEARCH CTR., *HUGE RACIAL DIVIDE OVER KATRINA AND ITS CONSEQUENCES: TWO-IN-THREE CRITICAL OF BUSH’S RELIEF EFFORT 6* (2005) (“Seven-in-ten Americans say they have paid very close attention to news of the hurricane’s impact . . .”).

¹⁹⁴ See PEW RESEARCH CTR., *supra* note 193, at 1–2.

¹⁹⁵ *Anderson Cooper 360 Degrees: Special Edition* (CNN television broadcast Sept. 1, 2005) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0509/01/acd.01.html>).

danger in the city of New Orleans tonight . . . [W]hat you are about to see in this next hour is going to shock you, that this is taking place in the United States of America in this day and age.”¹⁹⁶ On September 2, MSNBC’s Joe Scarborough took a similar tone: “I have got to tell you, I have been involved in a lot of hurricane relief before, and what I have been seeing these past few days is nothing short of a national disgrace.”¹⁹⁷ Two weeks later, President George W. Bush concurred:

We’ve . . . witnessed the kind of desperation no citizen of this great and generous nation should ever have to know—fellow Americans calling out for food and water, vulnerable people left at the mercy of criminals who had no mercy, and the bodies of the dead lying uncovered and untended in the street.¹⁹⁸

The images were shocking precisely because this is the *United States*. Such innocent suffering might be tolerable over there, say, in the “third world,” but not here. *We* are better than that.¹⁹⁹

Connected to those third-world conceptions and images was the growing perception of a second type of injustice.²⁰⁰ As we watched and processed the reports on hurricane recovery, most of us began to notice a fairly obvious, but unsettling, fact: the people stuck in New Orleans were . . . well . . . third-worldish. The images coming out of New Orleans showed “victims” who were desperately poor and predominantly black.²⁰¹ Turn on any television, open any newspaper: the exhausted, desperate, sad, and sometimes angry faces looking back at us were poor and black. Those images made many of us uneasy about our system and ourselves. “Race,” it seemed, mattered.²⁰² And eventually, race became a primary and explicit focus of the news media.

¹⁹⁶ *Id.*

¹⁹⁷ Joe Scarborough, *Regular Joe: A National Disgrace* (Sept. 2, 2005), available at <http://www.msnbc.msn.com/id/8791344>.

¹⁹⁸ President George W. Bush, Address from New Orleans (Sept. 15, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html>.

¹⁹⁹ Professor Rosa Brooks summarized how Americans came to appreciate their “homegrown Third World”; the *New York Times*’s David Carr wrote that “a Third World country had suddenly appeared on the Gulf Coast”; a *USA Today* editorial stated that the “scene in New Orleans resembled that in ‘Third World refugee camps’”; CNN producer Michael Heard described Interstate 10 as “very Third World”; *U.S. News & World Report* commented on the fact that “‘as the Third World images of death and devastation reeled across the nation’s TV screens,’ Americans were stirred to ‘an almost palpable sense of anger’”; and Fox News anchor Shepard Smith stated that “we’ll be ‘forever scarred by Third World horrors unthinkable in this nation until now.’” Rosa Brooks, *Our Homegrown Third World*, L.A. TIMES, Sept. 7, 2005, at B13.

²⁰⁰ See generally Virginia R. Dominguez, *Seeing and Not Seeing: Complicity in Surprise*, in UNDERSTANDING KATRINA: PERSPECTIVES FROM SOCIAL SCIENCES (2005), <http://understandingkatrina.ssrc.org/Dominguez/>.

²⁰¹ See DeParle, *supra* note 171, at 1 (“The white people got out. Most of them, anyway . . . it was mostly black people who were left behind.”).

²⁰² Of course, images depicting racial inequity are nothing new in America. If the “proof”

In an August 31 report, *Slate*'s Jack Shafer was one of the first to break the media's uncomfortable silence:

I viewed enough repeated segments to say with 90 percent confidence that broadcasters covering the New Orleans end of the disaster demurred from mentioning two topics that must have occurred to every sentient viewer: *race and class*. . . . This storm appears to have hurt blacks more directly than whites, but the broadcasters scarcely mentioned that fact.²⁰³

The dissonance and the confusion over what to make of the "race issue" grew, as did the willingness to report on it. On September 1, CNN anchor Jack Cafferty took up Shafer's challenge:

[T]here is a great big elephant in the living room that the media seems content to ignore Almost every person we've seen, from the families stranded on their rooftops waiting to be rescued, to the looters, to the people holed up in the Superdome, are black and poor.²⁰⁴

Wolf Blitzer, on the same broadcast, followed Cafferty with this observation: "[Y]ou simply get chills every time you see these poor individuals [A]lmost all of them that we see, are so poor and they are so black, and this is going to raise lots of questions for people who are watching this story unfold."²⁰⁵ The next day, Reverend Jesse Jackson stated on CNN that race was "at least a factor" in the government's sluggish reaction, adding, "We have an amazing tolerance for black pain."²⁰⁶ Kanye West got more personal that night on live television, declaring, off script, "George Bush

of racism were simply images of disproportionate suffering, we would have collectively acknowledged a racism problem from well before the beginning of this republic. Clearly, more than stark correlations are required to make us concede that racial inequalities might reflect some sort of injustice. What we witnessed in Katrina's wake was exactly what we had missed when the weather was fair, the roads were passable, the French Quarter was hopping, and the Superdome was bubbling with Saints fans. The primary difference between the suffering of poverty-stricken blacks one week after Katrina and their condition one week before was the ease with which we could attribute outcomes to "choice." Before Katrina, the impoverished were blameworthy. After Katrina, they were victims. Cf. David Gonzalez, *From Margins of Society to Center of Tragedy*, N.Y. TIMES, Sept. 2, 2005, at A1 (quoting Mayor Tutwiler of Winstonville, Mississippi, who said "No one . . . checked on a lot of the black people in these parishes while the sun shined.").

²⁰³ Jack Shafer, *Day to Day* (NPR radio broadcast Aug. 31, 2005); see also Shafer, *supra* note 144.

²⁰⁴ *The Situation Room: Aftermath of Hurricane Katrina; New Orleans Mayor Pleads for Help; Race and Class Affecting the Crisis?* (CNN television broadcast Sept. 1, 2005) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0509/01/sitroom.02.html>).

²⁰⁵ *Id.*

²⁰⁶ *Race an Issue in Katrina Response*, CBS NEWS, Sept. 3, 2005, <http://www.cbsnews.com/stories/2005/09/03/katrina/main814623.shtml>.

doesn't care about black people!"²⁰⁷ And even Aaron Brown, on CNN's "Newsnight," introduced the topic, though more gingerly: "Race is always a difficult thing to talk about in the country. But it certainly has become a part of the story."²⁰⁸

Indeed it had. In a matter of a week, the possibility of racial injustice seemed to be *the* story. One *New York Times* reporter described the "growing sense that race and class are the unspoken markers of who got out and who got stuck."²⁰⁹ Another put it this way: "What a shocked world saw exposed in New Orleans last week wasn't just a broken levee. It was a cleavage of race and class, at once familiar and startlingly new, laid bare in a setting where they suddenly amounted to matters of life and death."²¹⁰

3. *Experiencing Injustice Dissonance*

That "cleavage" was both "familiar and startlingly new" for a reason: race and racism were defining, if not wholly determining, the fate of poor blacks of the Gulf Coast (and beyond) long before Katrina appeared on the radar.²¹¹ The striking aspect of the Katrina story is not that it reveals something new about disaster relief, nor that it proves that George W. Bush "doesn't care about black people." Instead, Katrina's aftermath gave Americans a glimpse of a far deeper, more systemic problem that many of us, in calmer climatic conditions, managed to overlook, dismiss, or deny.²¹²

Describing the rude awakening Katrina brought, Nora Gallagher wrote:

We got the story of what is really happening in the United States right between the eyes. We got the story of how poor people live and are treated in this country by watching them suffer and die.

²⁰⁷ Lisa de Moraes, *Kanye West's Torrent of Criticism, Live on NBC*, WASH. POST, Sept. 3, 2005, at C01.

²⁰⁸ *Newsnight: Katrina Day Five, President Bush Visits Disaster Sites, Mayor of New Orleans Criticizes Relief Effort* (CNN television broadcast Sept. 2, 2005) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0509/02/asb.01.html>).

²⁰⁹ Gonzalez, *supra* note 202, at A1; *see also* Tilove, *supra* note 177 ("Look at the tens of thousands of refugees languishing for days at the Superdome and Convention Center, [Robert Bullard] said: 'What you're seeing is not a cross-section of America. What you are seeing are some of the most vulnerable populations that found themselves left behind.'").

²¹⁰ DeParle, *supra* note 171, at 1.

²¹¹ *See supra* Parts IV.B.1–2.

²¹² Natural disasters are known for illuminating disparities that a citizenry has overlooked, and for challenging the attributions that otherwise serve as blinders. *Cf.* John Alter, *The Other America*, NEWSWEEK, Sept. 19, 2005, available at <http://www.msnbc.msn.com/id/3668484/site/newsweek/> ("It takes a catastrophe like Katrina to strip away the old evasions, hypocrisies and not-so-benign neglect. It takes the sight of the United States with a big black eye—visible around the world—to help the rest of us begin to see . . . [the] enduring problems of poverty, race and class . . ."); David Brooks, *The Storm After the Storm*, N.Y. TIMES, Sept. 1, 2005, at A23 ("Floods wash away the surface of society, the settled way things have been done. They expose the underlying power structures, the injustices, the patterns of corruption and the unacknowledged inequalities.").

We got the story because it happened so fast, and right in front of our faces and no one could put a spin on it quickly enough It was raw, it was awful, and it slid under the skin of our sleepy, numb, feel-good lives.²¹³

Watching the nightly news in September of 2005 was like participating in Lerner's experiment. Images of suffering led to injustice dissonance by threatening our affirming self-conceptions both as helping, decent, compassionate people devoted to liberty and justice for all, and also as a society that repudiates the sorts of racial oppression that characterized previous generations.

D. Dealing with Dissonance

The questions nagging many Americans had less to do with literally bailing out New Orleans and more to do with figuratively bailing out our troubled psyches.²¹⁴ As explored below, Americans used a combination of (subconscious) strategies to assuage the injustice dissonance and reaffirm positive self-perceptions. Like the subjects in Lerner's experiment who were presented the option, we expressed sympathy toward, and provided some compensation to, the victims. And, like Lerner's second group, some of us reconciled the apparent injustice through a blame frame (choice), which at least partially faulted Katrina's victims and excused salient non-victims. Finally, denigrating and discrediting those who suggested that Katrina either caused or revealed injustices helped to assuage dissonance and restore perceptions of justice.

²¹³ Nora Gallagher, *Katrina Blew Away Gloss of Business as Usual on TV*, STAR TRIB., Sept. 11, 2005, available at <http://www.commondreams.org/views05/0911-31.htm>. Similarly, Robert Bullard stated that the "graphic images show[ed] our society is so uneven, it is so unfair, it is so unjust." Tilove, *supra* note 177.

Many Americans, it should be noted, denied that unfolding images revealed anything untoward about the role of race in America. See *infra* Parts IV.D.2-5; see also PEW RESEARCH CTR., *supra* note 193, at 2 (observing that although over two-thirds of blacks (71%) surveyed agreed that the disaster showed "that racial inequality remains a major problem," a slight majority of whites (56%) disagreed).

²¹⁴ John McWhorter articulated frustration with society's widespread focus on the dissonance, at the expense of addressing its urgent source:

No one will deny that what we have seen on our television screens points to the tragic realities of racial disparity, in an unusually stark way There is a debate to be had on whether this reality is the legacy of racism—either past or present—but as we face the prospect of finding many thousands of dead as the waters recede, historical debates of this kind can and should wait.

John McWhorter, "Racism!" *They Charged: When Don't They?*, NAT. REV., Sept. 26, 2005, available at http://www.manhattan-institute.org/html/_national_rev-racism_they_charged.htm.

1. *Compensating Victims*

The sight of New Orleans caught in the vise of a brutal hurricane and an inept recovery effort stirred great sympathy for the victims and an urge to compensate them. Initially, the desire to aid seemed quite robust. George W. Bush captured the shared feeling powerfully in his September 15, 2005, speech from New Orleans:

[V]ictims of the hurricane and the flood . . . need to know that our whole nation cares about you, and in the journey ahead you're not alone And tonight I also offer this pledge of the American people: Throughout the area hit by the hurricane, we will do what it takes, we will stay as long as it takes, to help citizens rebuild their communities and their lives.²¹⁵

In the first two weeks following Katrina, Congress members introduced over forty bills related to the relief effort.²¹⁶ Although tax breaks were high on the list of policy responses,²¹⁷ many of the actual or proposed relief efforts—both private and public—were tailored to help victims get a handle on their overturned lives. So far, the Red Cross has raised over \$2 billion for Katrina relief.²¹⁸ Other efforts focused on helping victims with their housing,²¹⁹ cash flow,²²⁰ and educational needs.²²¹ Lawmakers also worried about protecting disaster victims from the harsher bankruptcy laws passed in 2005.²²² Several bills were proposed to help individuals shore up or obtain insurance coverage for their losses.²²³

²¹⁵ Bush, *supra* note 198.

²¹⁶ Lisa Friedman, *Lawmakers Do Something! Rush of Legislation Echoes Frantic Days after Sept. 11*, DAILY NEWS L.A., Sept. 11, 2005, at N10.

²¹⁷ See Internal Revenue Service, *Tax Law Changes Related to Hurricanes Katrina, Rita, and Wilma*, IRS NEWSWIRE, <http://www.irs.gov/newsroom/article/0,,id=152734,00.html> (last visited Apr. 6, 2006); *Congress Passes Katrina Tax Breaks*, CBS NEWS, Sept. 21, 2005, <http://www.cbsnews.com/stories/2005/09/21/katrina/main876066.shtml>.

²¹⁸ Am. Red Cross, *Hurricane Season 2005: A Season in Review*, <http://www.redcross.org/news/ds/hurricanes/2005/facts.html> (last visited Apr. 6, 2006).

²¹⁹ See Erica Molina Johnson, *FEMA to Pay Tab for Katrina Evacuees*, EL PASO TIMES, Feb. 10, 2006, at B1.

²²⁰ For a brief time, \$2,000 vouchers were made available to victims in the forms of debit cards and direct deposits to financial accounts. See Lisa Rein & Christopher Lee, *Debit Card Giveaway Goes Awry in Houston*, WASH. POST, Sept. 9, 2005, at A12. Congress has introduced, but not approved, a fund designed to restore victims to roughly their pre-Katrina condition. See Hurricane Katrina Recovery, Reclamation, Restoration, Reconstruction and Reunion Act of 2005, H.R. 4197, 109th Cong. (2005).

²²¹ See Katherine S. Mangan, *Louisiana Lawmakers Hear of Hurricanes' Impact*, CHRON. HIGHER EDUC., Oct. 21, 2005, at 28.

²²² Jessica Robertson, *Hurricane Katrina Victims May Feel Financial Effects for Years to Come*, WORLD INTERNET NEWS, Dec. 5, 2005, http://soc.hfac.uh.edu/artman/publish/article_315.shtml.

²²³ For a thorough review and helpful analysis of those efforts, see Mitchell F. Crusto, *The Katrina Fund: Repairing Breaches in Gulf Coast Insurance Levees*, 43 HARV. J. ON LEGIS. (forthcoming 2006).

While the urge to compensate Katrina's victims was initially intense, it tapered off quickly. Even before the end of 2005, national politicians' urge to compensate and the federal government's commitment to help clean up and rebuild New Orleans seemed to have lost much of their steam.²²⁴

2. *Blaming Victims*

As argued above, Katrina and the aftermath briefly lifted the rug under which great disparities and injustices have long been swept. Situational forces as powerful as nature have long dominated the lives of those for whom we felt a jolt of sympathy in September 2005. Not only are these invisible—or, at least, unseen—forces largely responsible for continuing disparities across racial and ethnic lines, they are largely responsible for creating the lines themselves.

We overlook those situational forces because of our dogged faith in the illusions of choice and control—the current broom and rug of oppression. The circumstances of every person, we assure ourselves, are under his or her own control. Anyone who wants a better life in this great country (at least now that abolition, the civil rights movement, and affirmative action have leveled the field) need only choose to work and study hard, avoid temptation, run with the right crowd, exercise daily, eat fresh vegetables, double check her credit card statements, say her prayers, invest wisely, and generally want that better life badly enough.

Indeed, choicism enabled us to ignore the reality that people with unmet housing, transportation, cash flow, educational, healthcare, and other needs after Katrina faced difficulties meeting those needs long before Katrina. The critical difference was not simply that the hurricane made the needs more urgent, but rather that, before Katrina, we could easily ignore the struggles of this disadvantaged group—opting never to hit the “reveal” button,²²⁵ presuming instead that their problems were a consequence of their choices, and thus a reflection of their preferences or characters.

Attributing bad outcomes to choice is such a powerful and automatic habit that it shaped initial assessments of even Katrina's aftermath. In a *Time* survey conducted during the week following the hurricane, 57% of respondents agreed that the “people hit by the hurricane” bore a great deal or some responsibility for what went wrong with the relief effort after the hurricane.²²⁶ Many of this country's most influential politicians and commentators viewed Katrina through the same lens. As we illustrate below,

²²⁴ See James Dao, *Louisiana Sees Faded Urgency in Relief Effort*, N.Y. TIMES, Nov. 22, 2005, at A1; see also Nina J. Easton, *Katrina Aid Falls Short of Promises: Antipoverty Funding Loses Momentum*, BOSTON GLOBE, Nov. 27, 2005, at A1; Spencer S. Hsu, *Post-Katrina Promises Unfulfilled on the Gulf Coast, Federal Recovery Effort Makes Halting Progress*, WASH. POST, Jan. 28, 2006, at A1.

²²⁵ See *supra* note 32 and accompanying text.

²²⁶ See Mike Allen, *Living Too Much in the Bubble?*, TIME MAG., Sept. 19, 2005, at 42.

in attributing the disaster's disparate impact to its victim's dispositions, these leaders invoked a variety of not necessarily exclusive themes: victims chose their fates; the victims deserved those fates, and were perhaps even threatening "our" resources with demands to bail them out of a mess of their own making; victims were separate from, and lesser than, us; and, sounding back to the God frame, the victims' moral blameworthiness led God to punish them.

In a CNN interview on September 1, 2005, about progress in New Orleans, Michael Brown, then-director of the Federal Emergency Management Agency ("FEMA"), focused primarily on the alleged choices of New Orleans residents to explain why Katrina's death toll would probably be high, saying "Unfortunately, that's going to be attributable a lot to people who did not heed the advance warnings," and "I don't make judgments about why people chose not to leave but, you know, there was a mandatory evacuation of New Orleans."²²⁷ That same day, Secretary of Homeland Security Michael Chertoff made virtually identical attributions: "[L]ocal and state officials called for a mandatory evacuation. Some people chose not to obey that order. That was a mistake on their part."²²⁸ Senator Rick Santorum (R-Pa.) went further, not only condemning the alleged choices of New Orleans residents, but suggesting that their decisions might warrant criminal sanctions.²²⁹

Conservative commentators seemed particularly attracted to choice-based dispositionist explanations for Katrina's disparate impact. The *Boston Globe's* Jeff Jacoby declared: "There are two races of men in this world

²²⁷ *FEMA Chief: Victims Bear Some Responsibility*, CNN.COM, Sept. 1, 2005, <http://www.cnn.com/2005/WEATHER/09/01/katrina.fema.brown/> [hereinafter Brown Interview]; see also Letter to the Editor, *People Cry Now: Why Didn't They Leave?*, INDIANAPOLIS STAR, Sept. 6, 2005, at 9A. Brown described the bad choices of residents and the difficult situation of officials:

Before Katrina, residents were told to evacuate Many chose not to. . . . Consequently, much time has been spent in rescuing these folks who felt they did not have to follow the orders of their mayor. Now they scream and demand quicker service. To put together a relief effort does not happen overnight; it takes time, at least as much time as people were given warning to evacuate.

Brown Interview, *supra*.

²²⁸ *American Morning: Interview with Homeland Security Secretary Michael Chertoff* (CNN television broadcast Sept. 1, 2005) [hereinafter Chertoff Interview] (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0509/01/ltm.03.html>).

²²⁹ See Sean D. Hamill, *Santorum Retreats on Evacuation Penalty Remarks*, POST-GAZETTE.COM, Sept. 7, 2005, available at <http://www.post-gazette.com/pg/05250/566844.stm>.

[Y]ou have people who don't heed those warnings and then put people at risk as a result There may be a need to look at tougher penalties on those who decide to ride it out and understand that there are consequences to not leaving.

Id. After opponents criticized those remarks, Santorum acknowledged some of the situational constraints that he had overlooked. *Id.*

... the “race” of the decent man and the “race” of the indecent man.’ Each of us chooses which ‘race’ to belong to. In New Orleans last week, the decent and the indecent made their choice.”²³⁰ The Reverend Jesse Lee Peterson interpreted the Katrina experience as Thomas Jefferson once explained antebellum slavery²³¹—as an experiment revealing the contrasting dispositions of whites and blacks:

Say a hurricane is about to destroy the city you live in. Two questions:

1. What would you do?
2. What would you do if you were black?

Sadly, the two questions don’t have the same answer.

To the first: Most of us would take our families out of that city quickly to protect them from danger. Then, able-bodied men would return to help others in need, as wives and others cared for children, elderly, infirm and the like.

For better or worse, Hurricane Katrina has told us the answer to the second question.²³²

An editorial in the conservative *Washington Times* was equally harsh: “[T]housands of New Orleans residents . . . utterly failed to show personal responsibility. They heeded neither common sense nor a respect for their own human dignity, nor the warnings of government, to move out of danger’s path.”²³³

This focus on choice may have helped allay some of the dissonance created by the visions of suffering following the hurricane. For many, though, the dissonance endured and ran deeper. Images of the storm’s aftermath revealed, not only that disproportionate numbers of African Americans had been left behind during the storm, but also that these people had

²³⁰ Jeff Jacoby, Op-Ed, *The Looting Instinct*, BOSTON GLOBE, Sept. 4, 2005, at E11 (quoting Viktor Frankl).

²³¹ See *supra* notes 84–86 and accompanying text.

²³² Rev. Jesse Lee Peterson, *Moral Poverty Cost Blacks in New Orleans*, WORLDNET-DAILY, Sept. 21, 2005, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=46440; see also *id.* (“Had New Orleans’ black community taken action, most would have been out of harm’s way. But most were too lazy, immoral and trifling to do anything productive for themselves.”).

Other conservatives focused less on the choices at the time of the hurricane and more on the antecedent choices to live in New Orleans. One described the city as if it were a choice-making person with a defective disposition: “low-lying, self-indulgent New Orleans, [which] understood its losing bargain with a devil’s fate.” Daniel Henninger, Editorial, *Bureaucratic Failure*, WALL ST. J., Sept. 2, 2005, at A14. On Fox News, Fred Barnes complained about the fact that “we” have to pay for “their” ill-advised choices: “They know they’re going to flood. And when these things happen, they want the taxpayers all over the country to pay, and they do.” Eric Alterman, *Found in the Flood*, NATION, Sept. 25, 2005, available at <http://www.thenation.com/doc/20050926/alterman>.

²³³ Editorial, *Malfeasance of Citizenship*, WASH. TIMES, Sept. 9, 2005, at A22.

in fact been left behind several decades ago—at least. A more fundamental injustice dissonance was thus activated, one that many opinion leaders' comments attempted to highlight or address.

One mechanism used to diminish our dissonance was to attribute the poverty revealed by Katrina to bad choices. The lesson syndicated columnist George Will took from Katrina was “three not-at-all recondite rules for avoiding poverty: Graduate from high school, don't have a baby until you are married, don't marry while you are a teenager. Among people who obey those rules, poverty is minimal.”²³⁴ Fox's Bill O'Reilly similarly considered victims' suffering an ideal case study for another lesson in choicism: “every American kid should be required to watch . . . [how] the poor in New Orleans . . . suffered” and “every teacher should tell the students, ‘If you refuse to learn, if you refuse to work hard, if you become addicted, if you live a gangsta-life, you will be poor and powerless just like many of those in New Orleans.’”²³⁵ And nationally syndicated radio show host Neal Boortz depicted “us” as generous and sympathetic, and “them” as undeserving of our magnanimity: “Yes, we're stepping forward to help . . . these people,” but that “doesn't mean that we must ignore the behavior that put them in this position in the first place. Hurricane Katrina has shown all of us . . . that poverty is a behavioral disorder.”²³⁶ Just like Lerner's experimental subjects, America cringed as we witnessed apparent innocents suffering from lack of the most basic resources. By invoking the choice frame to blame the victims and excuse us (the bystanders), such commentators assuaged our dissonance and defended the status quo.²³⁷

Some religious leaders blended the choice frame with the God frame to explain the suffering: victims reaped the consequences of their ungodly choices. Reverend Bill Shanks, a New Orleans pastor, observed that after the flood, New Orleans is now “abortion free,” “Mardi Gras free,” and free of “the sodomites, the witchcraft workers, [and] false religion” all because God “in His mercy” wanted “all of that stuff out of there.”²³⁸ Even

²³⁴ George F. Will, Editorial, *A Poverty of Thought*, WASH. POST, Sept. 13, 2005, at A27.

²³⁵ Video clip: O'Reilly Suggests Katrina Victims Uneducated, Poor Addicts Who Live “Gangsta Life,” <http://www.pfaw.org/pfaw/general/default.aspx?oid=19453> (last visited Apr. 6, 2006).

²³⁶ Neal Boortz, *Today's Nuze: September 7, 2005*, Sept. 7, 2005, <http://boortz.com/nuze/200509/09072005.html#payout>; *see also id.* (“What we saw in New Orleans was poor people demonstrating the very behavior that made them poor in the first place.”).

²³⁷ We are not claiming that all or even most political pundits or religious leaders embraced choicism to help relieve any injustice dissonance. Many did not. *See, e.g.*, Jim Wallis, *What The Waters Revealed*, 34 SOJOURNERS MAG. 8, 8 (2005) (arguing that “the waters of Hurricane Katrina . . . washed away our national denial of the . . . still-persistent connection of race and poverty in America”). But even when situation is as salient as a devastating hurricane and when inequalities and potential injustices are so patent, many opinion leaders still take psychological shelter behind choicism and other blame frames.

²³⁸ Jody Brown & Allie Martin, *New Orleans Residents: God's Mercy Evident in Katrina's Wake*, AGAPE PRESS, Sept. 2, 2005, <http://headlines.agapepress.org/archive/9/22005b.asp>. Shanks had been warning people to end the growing sin and decadence of the region, lest God do it for them. *See id.* Recall that Puritans believed smallpox epidemics among

in darker religious accounts, where God's mood was irate, not merciful, choice remained central—God punished those who failed to choose Him and His way. “Repent America” made it simple: “Although the loss of lives is deeply saddening, this act of God destroyed a wicked city.”²³⁹ That dispositionist narrative, a species of what might be called “divine attribution error,” attributes Katrina's trajectory and destruction to God's presumed disposition; that God's disposition happens to coincide with the narrator's own worldview reveals the motivated nature of the attribution. In that vein, Louis Farrakhan claimed Katrina's damage was punishment for “the wickedness of the people . . . and the government of America” for the war in Iraq; it marks only the first city that will tumble unless America changes its course.²⁴⁰ In a twist that explicitly invoked the race of the victims, New Orleans Mayor Nagin declared that God is angry, not only with all of America for being “in Iraq under false pretenses,” but also with “black America,” for “not taking care of ourselves,” “our women,” and “our children.”²⁴¹ Finally, one minister took the racial element of the dispositionist attribution even further, suggesting that New Orleans' victims were paying a heavenly price for having placed their faith in the black, democratic Mayor Nagin.²⁴²

In addition to rehabilitation of the choice and God frames, Katrina's immediate aftermath resurrected echoes of racial caricatures prevalent during slavery and Jim Crow.²⁴³ In the passage quoted above,²⁴⁴ Fox's Bill O'Reilly added a caricature of his own: the “gangsta,” who, as an amalgam of the incompetent sambo and the threatening brute, is a bad chooser. Indeed, many in the media and the public seemed almost eager for evidence of our old friend, the untamed black brute—the “savage, animalistic, destructive, and criminal” beast, who is incapable of self-governance, and ready to rape and plunder the moment the lights go off.²⁴⁵

the Indians reflected God's just hand. *See supra* text accompanying note 72.

²³⁹ Press Release, Repent America, Hurricane Katrina Destroys New Orleans Days Before “Southern Decadence” (Aug. 31, 2005), *available at* http://www.repentamerica.com/pr_hurricanekatrina.html (last visited Apr. 15, 2006). The message of compassion intermixed with references to choice and God added: “We must help and pray for those ravaged by this disaster, but let us not forget that the citizens of New Orleans tolerated and welcomed the wickedness in their city for so long.” *Id.*

²⁴⁰ *Hurricane News in Brief*, PHILA. INQUIRER, Sept. 1, 2005, at A14.

²⁴¹ *See* Miguel Bustillo, *Hurricanes May Be God's Punishment, Mayor Says*, L.A. TIMES, Jan. 17, 2006, at A8; *see also* Stan Goodenough, Editorial, *Katrina—The Fist of God?*, JERUSALEM NEWSWIRE, Aug. 29, 2005, <http://www.jnewsire.com/library/article.php?articleid=676> (last visited Apr. 15, 2006) (arguing that Katrina is a consequence of Middle East policies).

²⁴² *See* African American Ministers In Action, People for the Am. Way, *Right-Wing Black Leaders Praise Bennett, Criticize Katrina Evacuees*, http://sites.pfaw.org/mt/aamia/2005/10/right-wing_blac.html (last visited Apr. 15, 2006).

²⁴³ *See supra* text accompanying notes 106–113.

²⁴⁴ *See supra* note 235 and accompanying text.

²⁴⁵ *See* PILGRAM, *supra* note 119; *see also supra* notes 64–67, 106–113 & 119, and accompanying text (describing the brute caricatures of Native Americans and African Americans and the purposes they served).

As many observers saw nothing but the victims' dispositions, the brute provided a satisfying explanation for the (often greatly exaggerated) reports of violence and mayhem among those left in New Orleans.²⁴⁶ In a perverse synergism, the brute caricature reinforced and inflated overblown fears about savage thefts and general lawlessness accompanying natural disasters.²⁴⁷ Indeed, many were convinced that New Orleans blacks had reverted to a Hobbesian state of nature.²⁴⁸ Apparently unaware of historical patterns of fear-mongering during national disasters and of brute-mongering more generally, political commentator Pat Buchanan explained that as soon as Katrina passed, "hundreds of young men who should have taken charge in helping the aged, the sick and the women with babies to safety took to the streets to shoot, loot and rape."²⁴⁹ In Buchanan's view, what made the disaster in New Orleans unique "was the character and conduct of its people," because "when the police vanish, the community disappears and men take to the streets to prey on women and the weak."²⁵⁰ Buchanan then reminded "us" of "our" own great character, reproducing the nineteenth-century

²⁴⁶ For an illuminating account of the sources and consequences of various "disaster myths," including the "civil unrest" frame, see Kathleen Tierney, Christine Bevc & Erica Kuligowski, *Metaphors Matter: Disaster Myths, Media Frames, and Their Consequences in Hurricane Katrina*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 57 (2006).

²⁴⁷ Indeed, false newspaper accounts of brutal thefts are surprisingly common after natural disasters. After the Johnstown flood, "[n]ewspapers carried [false] accounts of gangs of Hungarian men cutting off dead women's fingers to steal their rings." And after the Galveston storm, false reports accused "blacks of cutting off the fingers of corpses to steal wedding rings." See Brooks, *supra* note 212.

²⁴⁸ Carol Swain, a professor of political science and law at Vanderbilt University, invoked Hobbes in calling for adherence to "moral and ethical principles":

Life in a state of nature, [Hobbes] argued, is poor, nasty, brutish, and short. The fact that conditions degenerated so quickly [in New Orleans] is a sign of the spiritual poverty of a small element within the black community.

Jamie Glazov, *Symposium: Katrina, Race, and Silence*, FRONTPAGEMAGAZINE.COM, Sept. 30, 2005, <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=19676>. A music video, entitled "The Battle of New Orleans," similarly drew on Hobbesian anxieties:

[Well, they] [s]tole guns, DVD's, fur coats, cold beer—
They stole some stuff they couldn't even use.
...
And they crapped in the streets.
They raped young women.
They committed every kind of unthinkable sin.

Music Video: The Battle of New Orleans, <http://www.ehowa.com/showmovie.shtml?movie=battleofneworleans.wmv> (last visited Apr. 6, 2006).

²⁴⁹ Patrick J. Buchanan, *Failure of an Idea . . . and a People*, WORLDNETDAILY.COM, Sept. 14, 2005, http://www.wnd.com/news/article.asp?ARTICLE_ID=46315.

²⁵⁰ *Id.* Radio host Dick Staub expressed a similar sentiment, but borrowed language from Dr. Martin Luther King: "I believe the root cause of this sub-human behavior is spiritual and moral. It is back to the issue of the 'content of our character' not the color of our skin . . ." Dick Staub, *Staublog: Human Storm*, CULTUREWATCH, Sept. 1, 2005, http://www.dickstaub.com/culturewatch.php?record_id=905.

racial hierarchy with “us” on top, “Indians” in the middle, and “them” on the bottom: “We are the descendants of men and women who braved the North Atlantic in wooden boats to build a country in a strange land. Our ancestors traveled thousands of miles in covered wagons, fighting off Indians far braver than those cowards preying on New Orleans’ poor.”²⁵¹ Reverend Jesse Lee Peterson also attributed the post-Katrina chaos to brutish racial disposition. Recanting his prior assertion that if blacks were left to run the nation, “they would turn America into a ghetto within 10 years,” he concluded, “I gave blacks too much credit. It took a mere three days for blacks to turn the Superdome and the convention center into ghettos, rampant with theft, rape and murder.”²⁵²

Just as in prior eras, the images of roving man-beasts, though satisfying, were grossly exaggerated.²⁵³ In early September Police Chief Eddie Compass was interviewed on “The Oprah Winfrey Show,” and told of “little babies being raped.”²⁵⁴ CNN host Paula Zahn described “reports” (which turned out to be false) of “bands of rapists, going block to block.”²⁵⁵ Although the most brutish stories later were revealed to be “overblown, if not completely untrue,”²⁵⁶ the rumors nonetheless had the effect of “slow[ing] the response to the disaster and tarnish[ing] the image of many of its victims.”²⁵⁷

3. “Our” Situations (*Excusing the Non-Victim*)

The previous Section explored how blaming the victims of Katrina—attributing their suffering to “their” bad choices (or otherwise deserving

²⁵¹ Buchanan, *supra* note 249.

²⁵² Peterson, *supra* note 232. A *Washington Times* editorial further evinced the Jim Crow stereotype of lawless blacks on the verge of revolt: “their barbarity is, manifestly, kept in check only by watching eyes backed up by close and threatening authority.” Editorial, *supra* note 233.

²⁵³ According to Tim Wise, the Internet played a major role in this modern replica of the traditional blame frame:

[U]rban legends began zipping around the Internet, in the form of e-mails recounting utterly fabricated events. . . . [T]here was the one about the thugs (black and poor of course) who destroyed a rest area on the Louisiana/Texas border . . . even urinating on the walls to show their disregard for civilized norms of behavior [T]he authors of these fantasies . . . end[ed] with the admonition that those displaced by Katrina deserved no respect or assistance, seeing as how they were a bunch of spoiled brats who should be left to their own devices.

Tim Wise, *Katrina Conservative Myth-Making and the Media*, COUNTERPUNCH, Oct. 29–30, 2005, <http://www.counterpunch.org/wise10292005.html>.

²⁵⁴ Robert E. Pierre & Ann Gerhart, *News of Pandemonium May Have Slowed Aid*, WASH. POST, Oct. 5, 2005, at A08.

²⁵⁵ *Id.*

²⁵⁶ *Id.*; see also Earl Ofari Hutchinson, *Race, Lies, and New Orleans*, ALTERNET, Oct. 6, 2005, <http://www.alternet.org/story/26507>.

²⁵⁷ Pierre & Gerhart, *supra* note 254.

dispositions)—reduced our injustice dissonance. A second way to reduce the dissonance, of course, is excusing the non-victims by attributing their actions (and omissions) to larger situational forces over which they or we had no control. This Section will focus mostly on the federal government’s attributions.

On August 28, 2005, over 25,000 New Orleans residents occupied the Superdome, which authorities had labeled a “shelter of last resort.”²⁵⁸ A few days later, two things seemed fairly evident to those reporting or watching the unfolding tragedy: first, the people left in New Orleans were suffering badly; second, the federal government’s relief efforts were deficient and inefficacious. Although two weeks later, President Bush would partially accept responsibility for the federal government’s failures,²⁵⁹ government leaders initially blamed their failings on their situation, and, of course, the evacuees’ choices.

When asked on September 1 about the status of FEMA’s rescue operation, Michael Brown insulated his answer with situational context: “Considering the dire circumstances that we have in New Orleans—virtually a city that has been destroyed—. . . things are going relatively well.”²⁶⁰ When Soledad O’Brien suggested that preparations were insufficient given that “everyone knew a disaster could happen,”²⁶¹ Secretary of Homeland Defense Michael Chertoff downplayed governmental choices and emphasized the power of the situation: “I think people were prepared. But . . . [o]nce the water is there, the physical reality is something that you have to contend with no matter how well-prepared you are.”²⁶² By calling the crisis a “natural disaster” or an “act of God” (echoing two traditional blame frames) and emphasizing how their options were constrained by “physical reality,” officials attempted to evade responsibility for failing to take proactive or corrective steps before or immediately after the storm.²⁶³ Although mounting

²⁵⁸ The state had delivered enough food and water “to supply 15,000 people for three days.” See Dave Walker, *Radio Captures the Horror, Exhaustion*, TIMES-PICAYUNE, Aug. 31, 2005, available at http://www.nola.com/newslogs/breakingtp/index.ssf?/mtlogs/nola_Times-Picayune/archives/2005_08.html#074657.

²⁵⁹ See President George W. Bush, President Welcomes President Talabani of Iraq to the White House, White House Press Conference (Sept. 13, 2005) (“Katrina exposed serious problems in our response capability at all levels of government and to the extent the federal government didn’t fully do its job right, I take responsibility.”).

²⁶⁰ Brown Interview, *supra* note 227. Other officials were much less satisfied with FEMA’s progress; the same day, the head of the New Orleans’ emergency operations described the Superdome as an “incredibly explosive situation” and a “national disgrace.” *Official: Astrodome Can’t Take More Refugees*, FOXNEWS.COM, Sept. 2, 2005, <http://www.foxnews.com/story/0,2933,168112,00.html>.

²⁶¹ Chertoff Interview, *supra* note 228.

²⁶² *Id.*; see also *id.* (attributing communications problems to the fact that “[t]he wireless towers are down. The land lines are flooded,” and, again, “It’s not a question of preparedness. It’s a question of the physical reality”).

²⁶³ Cf. JUDITH N. SHKLAR, *THE FACES OF INJUSTICE 1* (1990) (“When is a disaster a misfortune and when is it an injustice? Intuitively, the answer seems quite obvious. If the dreadful event is caused by external forces of nature, it is a misfortune and we must resign ourselves to our suffering. Should, however, some ill-intentioned agent . . . have brought it

evidence belied their arguments,²⁶⁴ government apologists cried variations of “we’re victims of situation,” often while concurrently excoriating the “choices” of hurricane victims facing the same situational forces and more.²⁶⁵ Presented with no quick fix at hand, much like the optionless subjects in Lerner’s experiment, the government officials saw themselves as actors overcome by the situation.²⁶⁶ “[T]here is no magic wand to wave, no easy solution to providing relief and rescue to the thousands of victims. The enormity of the devastation is hard to comprehend . . . [D]o the critics really think we’re not doing everything we can to help as many as possible?”²⁶⁷

4. *Resolving the Deeper Dissonance: An Opportunistic Narrative*

Blaming the victim and seeing “our” situation may have helped justify the inadequacies of the evacuation process, but these coping mechanisms did little to relieve the deeper dissonance prompted by the more systemic, long-term racial disparities that the crisis brought to the surface, if only briefly.

Libertarian-conservatives seized the opportunity to promote choicism and the related choice-maximizing policy schemas by encouraging market solutions and ending regulatory interference.²⁶⁸ Blaming the victims allowed them to shift the conversation from hurricane response to human culpability. Conservative pundits quickly constructed a single, simple story

about, then it is an injustice and we may express indignation and outrage.”).

²⁶⁴ For an overview of some of the failings in the administration’s response, see Evan Thomas, *How Bush Blew It*, NEWSWEEK, Sept. 19, 2005, at 30–40.

²⁶⁵ In return, government critics took the opportunity to blame Bush policies for much of the exposed poverty. Democrats pointed out that the number of Americans living in poverty increased significantly under Bush’s watch, as did the number of African Americans living in poverty (an increase of 400,000 since 2002). Press Release, Democratic Nat’l Comm., Republicans Had a Chance, but They Made All the Wrong Choices for the American People (Oct. 12, 2005). Former Democratic presidential candidate John Edwards maintained that the poverty Katrina revealed demonstrated the failure of “compassionate conservatism,” as the “rhetoric does not match the reality.” Ronald Brownstein, *Floodwaters Lift Poverty Debate into Political Focus*, L.A. TIMES, Sept. 13, 2005, at A1. Senator Barak Obama (D-Ill.) and members of the Congressional Black Caucus also suggested that Republican policies were to blame for the racial and class divisions that Katrina exposed. See Terry M. Neal, *Race, Class Re-Enter Politics After Katrina*, WASH. POST ONLINE, Sept. 22, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/22/AR2005092200833.html>.

²⁶⁶ President Bush himself underscored that “[t]he storm involved a massive flood, a major supply and security operation, and an evacuation order affecting more than a million people. It was not a normal hurricane.” Even when admitting that Katrina overwhelmed the government on every level, President Bush still seemed to suggest the problem came from some external circumstance: “It is now clear that a challenge on this scale requires greater federal authority . . .” Bush, *supra* note 198.

²⁶⁷ Mike Gallagher, *The Katrina Blame Game*, NEWSMAX, Sept. 6, 2005, <http://www.newsmax.com/archives/articles/2005/9/5/210353.shtml>.

²⁶⁸ See generally Chen & Hanson, *Illusion of Law*, *supra* note 8 (describing the meta policy schemas of maximizing markets and minimizing regulation).

capable of relieving much of the injustice dissonance stemming from Katrina—rescue efforts were badly botched for the *same reason* that many New Orleans residents were living in squalor before the storm: government regulations and interventions do not work.²⁶⁹ Big government never solves social problems; it only creates or magnifies them.

As *Wall Street Journal* editor Daniel Henninger put it: “Big public bureaucracies are going to get us killed. They already have.”²⁷⁰ The Heritage Foundation’s President Edwin J. Feulner, in addition to blaming the City of New Orleans and the State of Louisiana, claimed that “onerous federal regulations delayed the building of critical levees that might have prevented the flooding in the first place.”²⁷¹

The same “government in excess” story resolved any concern about the pre-Katrina condition of the urban blacks who became Katrina’s terrifying and heart-wrenching victims when the levees broke: those are the “primarily immoral, welfare-pampered blacks that stayed behind and waited for the government to bail them out.”²⁷² We were forced to rescue them after Katrina because of our more general rescue policies, which have fostered dependency and sloth for at least half a century. According to Rush Limbaugh, “What we’ve seen in New Orleans is first and foremost the utter failure of generation after generation after generation of the entitlement mentality.”²⁷³ “They had no idea what to do because they’ve been told somebody else was going to fix it.”²⁷⁴ Similarly, Pat Buchanan wrote that “we

²⁶⁹ With respect to the Katrina bailout, for instance, Pat Buchanan asked, “Even if government dithered for days—what else is new?” Buchanan, *supra* note 249. Interestingly, in this narrow instance, the “governmental intervention is bad” argument put many conservatives at odds with the Bush administration, which otherwise embraces the script.

²⁷⁰ Henninger, *supra* note 232, at A14; *see also id.* (“[W]e ought to at least recognize that our increasingly tough First World problems—terrorism, viruses, the rising incidence of powerful natural disasters—are being addressed by a public sector that too often is coming to resemble a Third World that can’t execute.”). A major source of the problem, according to some regulatory critics, is the tremendous *size* of the federal government. Chris Edwards, director of tax policy at the Cato Institute, explains that government failures before and after Katrina illustrate that running such a “vast empire” means policymakers spend little time making sure the basic government functions work. Chris Edwards, *Know Thy Place*, NAT’L REV. ONLINE, Sept. 26, 2005, <http://www.nationalreview.com/comment/edwards200509260807.asp>.

²⁷¹ Edwin J. Feulner, Commentary, *Don’t Bind New Orleans in Red Tape*, HERITAGE FOUND. PRESS ROOM, Sept. 19, 2005.

²⁷² Peterson, *supra* note 232.

²⁷³ Carl Limbacer, *Rush Limbaugh: Katrina’s Lessons*, NEWSMAX, Sept. 6, 2005, <http://newsmax.com/archives/ic/2005/9/6/130300.shtml>. Although political conservatives are generally less inclined to make situationist attributions than are liberals, these quotes illustrate one of several ways that conservatives commonly recognize the role of particular situational forces. *See* Benforado & Hanson, *supra* note 8; *see also supra* note 50 (discussing naïve situationism). The situational forces conservatives recognize are typically limited to “cultural forces” such as hip-hop music or political correctness, and prototypical forms of governmental programs or regulations—generally narrow, ahistorical, and consistent with conservative schemas. *Cf.* Jon Hanson & Adam Benforado, *The Conservative Hypocrisy*, BALTIMORE SUN, Dec. 11, 2005, at 25A (providing some examples of “selective situationism”).

²⁷⁴ Limbacer, *supra* note 273.

saw the failure of 40 years of the Great Society,” which has proven to be “a narcotic, a subtle destroyer of the human spirit.”²⁷⁵ That truth places before us an urgent and pivotal *choice*: “Either we get off this narcotic, or it kills us.”²⁷⁶

While such prescriptions may seem harsh, those making them purport to harbor no racial hostility. They claim that the “human spirit” of *any* group that has been as systematically pampered as blacks have been would be similarly impaired. By actively distancing the theory from any racist overtones, the theory erects a preemptive barrier to anyone seeking to label it racist. In the words of the *Washington Times* editors, “[t]his is not a matter of race, or class, or innate intelligence. It is largely the product of a mental state of dependency induced by deliberate government policy.”²⁷⁷ Taking a page from Justice Brown’s opinion in *Plessy*,²⁷⁸ author and talk-show host Larry Elder suggests that, if there is a race problem, it is the result of those who want to blame everything on race: “What about the damage to the black psyche by so-called civil rights leaders who demand not just equal rights, but equal results, helping to create a victicrat-entitlement mentality?”²⁷⁹

Moved by the power of this logic, and the opening that Katrina provided, many conservative policy analysts hoped to seize the moment to promote free-market policies. Jack Kemp argued that the hurricane had a silver lining or, in his colorful words, provided a “golden opportunity to ‘green line’ the Delta and Gulf Coast with government policies that facilitate and empower the private sector and private citizens.”²⁸⁰ Michael Franc of the Heritage Foundation seconded that upbeat message. Since the “liberal social welfare programs . . . failed the poor in every imaginable way,” conservatives have an “unprecedented opportunity to offer the poor in the Gulf States a comprehensive set of solutions that could improve virtually everything government does.”²⁸¹ Only with such policies can we “reclaim the strewn

²⁷⁵ Buchanan, *supra* note 249 (quoting Franklin Delano Roosevelt).

²⁷⁶ *Id.*; *see also id.* (arguing that “liberalism”—by which he means government programs—is a fraud because poverty remains pandemic).

²⁷⁷ Editorial, *supra* note 233.

²⁷⁸ *See supra* text accompanying notes 124–128.

²⁷⁹ Larry Elder, *Katrina, the Race Card, and the Welfare State*, WORLDNETDAILY, Sept. 8, 2005, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=46218; *see also id.* (“Doesn’t the demand for race-based preferences, set-asides, private sector anti-discrimination laws, social welfare programs, and social ‘safety net’ programs all conspire to say one thing—‘You are not responsible’?”).

²⁸⁰ Jack Kemp, *Imagining the Unimaginable*, HUMAN EVENTS, Sept. 6, 2005, <http://www.humaneventsonline.com/article.php?id=8908>.

²⁸¹ Michael Franc, Commentary, *Legislative Lowdown-Week of September 19th*, HERITAGE FOUND., Sept. 20, 2005; *see also* Tom DeLay, *Republicans Will Defend Taxpayers*, WASH. TIMES, Sept. 26, 2005, <http://www.washingtontimes.com/op-ed/20050925-100730-9874r.htm> (portraying Katrina as a “valuable forum” to promote Republican ideas “over the crumbling and outdated policies of the Democrat-controlled Congresses of past decades.”); Tod Lindberg, Op-Ed, *Post-Katrina Politics*, WASH. TIMES, Sept. 20, 2005, at A17 (arguing that “post-Katrina politics” have provided President Bush with “a real sense of

and damaged human clay into a condition of dignity befitting the American citizen.”²⁸²

5. *Discrediting the Messenger*

Perhaps under ordinary circumstances, the choice narrative would have fully resolved our nascent injustice dissonance: “they” are responsible for their own suffering, and “we” have few means of reducing it other than by eliminating social welfare and profit-reducing regulations. But the unfolding imagery of September 2005 scraped the scab left by America’s shameful history of slavery and racial oppression. While the palliative choice schema might have taken the edge off the sting,²⁸³ Americans continued to be haunted by the question: “Are we racists?”

Katrina brought into full relief the gap between our dispositional conception of “racism” described in Part IV.A and the actual sources of racial injustice in America. Under our current—largely choicist—blame frame, one generally must have racist attitudes and intentions to qualify as “racist.” Racists are those who judge others according to skin color. But, as evidence consistent with racial oppression surfaced and resurfaced after Katrina, questions about our race-related intentions and attitudes became more difficult to dismiss. In a final bid to resolve our lingering dissonance, we Americans assured ourselves that our vision was colorblind and our intentions were pure. Reinforcing these comforting affirmations, pundits and politicians invoked the race-card card²⁸⁴ as they lashed out at those who dared suggest that racial injustice persists in America.

As the post-Katrina injustice dissonance spurred questions about race, many commentators responded by denying race’s relevance and changing the subject to Americans’ laudable compassion and resilience.²⁸⁵ Secretary of State Condoleezza Rice, when asked about the role of race, responded by emphasizing America’s color-blindness: “That Americans would somehow in a color-affected way decide who to help and who not to help, I just don’t

crisis that will allow him to make demands . . . that he could never obtain in the absence of a crisis.”).

²⁸² Editorial, *supra* note 233. The sort of policies that these conservatives have in mind seem to involve providing a more friendly environment for business and encouraging consumer choice. *See, e.g.*, Stuart M. Butler, James J. Carafano, Alison A. Fraser, Dan Lips, Robert M. Moffit & Ronald D. Utt, *How to Turn the President’s Gulf Coast Pledge into Reality*, HERITAGE FOUND., Sept. 16, 2005 (advocating that the President ask for an “Emergency Regulatory Relief Board for the Zone” which, true to its name, would relieve the area of regulations that “unnecessarily impede redevelopment”); Franc, *supra* note 281 (explaining that, in response to Katrina, “leaders in Louisiana and Alabama will have to reform their tort systems” in order “[t]o limit their exposure to the rapacious trial bar”).

²⁸³ Some citizens may have believed that government spokespeople insincerely offered excuses or rationalizations, which may have increased their anger. *Cf.* Miller, *supra* note 17, at 537–38 (summarizing evidence of how disingenuous apologies may heighten anger).

²⁸⁴ *See supra* note 144 and accompanying text (introducing the race-card card).

²⁸⁵ One defense against specific threats to self-image is generalized self-affirmation. *See supra* notes 46–47 and accompanying text.

believe it,” she said. “Americans are generous to each other.”²⁸⁶ Tom DeLay dodged a race question with a similarly general affirmation: “[W]e’re doing a wonderful job and we are an incredibly compassionate people.”²⁸⁷ Rebecca Hagelin, author and vice-president of the Heritage Foundation, reminded her readers about the “heroic acts of selflessness . . . [that are] a testament to the goodness of the American people.”²⁸⁸ In an attack on the dissenters, Brent Bozell III, president and founder of The Media Research Center, warned that “the liberal media” are “milking the Katrina tragedy” by, for example, “fanning the flames of ‘racism’”; he assured his followers that states hit by the hurricane would, in fact, recover because “Americans don’t quit. Knock us down and we come back stronger than ever.”²⁸⁹

This steadfast refusal to engage the race issue led to a series of awkward journalistic colloquies. Confronting images of suffering divided along racial lines, interviewers asked the question: “Are we racists?” Conservative respondents first sidestepped, and then, when pressed, took refuge in a narrow, dispositionist definition of racism by stressing color-blindness and the absence of bad intentions. For example, Lester Holt, an MSNBC anchor, asked then-House Majority Leader Tom DeLay what it says about our country that many of those left behind in New Orleans were “largely black and . . . largely poor.” Annoyed, DeLay accused Holt of “trying to make an issue out of this,” and then emphasized that those rescued were “also black”—after all, “it doesn’t matter what color you are. If you’re in need we’re going to provide assistance.”²⁹⁰

Those seeking to highlight the predicament of the poor and vulnerable of New Orleans got the message—tread lightly around “race” and “racism,” because those who open that conversation risk vehement, system-affirming backlash.²⁹¹ Because even these critics adopted the narrow dispositional definition of racism, they endeavored to demonstrate bad intentions and racial animosity. But such accusations not only missed the situational racism, they also left the critics vulnerable to the race-card card, thus sacri-

²⁸⁶ Farhad Manjoo, *Katrina According to Fox*, SALON, Sept. 3, 2005, <http://dir.salon.com/story/news/feature/2005/09/03/fox/index.html>; see also Rice Defends Bush’s Katrina Response, NEWSMAX, Sept. 5, 2005, <http://www.newsmax.com/archives/articles/2005/9/4/184213.shtml> (“How can that be the case? Americans don’t want to see Americans suffer,” Rice said. “Nobody, especially the president, would have left people unattended on the basis of race.”).

²⁸⁷ *Id.*

²⁸⁸ Rebecca Hagelin, The Heritage Found., *Throwing Out the Thugs*, TOWNHALL.COM, Sept. 6, 2005.

²⁸⁹ L. Brent Bozell III, *Liberal Media Distort Katrina Tragedy for Political Gain*, 12 FLASH NEWS 1, 1–2 (2005).

²⁹⁰ Manjoo, *supra* note 286; see also *supra* note 286 and accompanying text (summarizing Condoleezza Rice’s similar reaction).

²⁹¹ On September 2, for instance, members of the Congressional Black Caucus, the Black Leadership Forum, the National Urban League, and the NAACP, held a news conference in which they complained that the government’s slow response reflected the fact that the victims were poor. See *Race an Issue in Katrina Response*, *supra* note 206.

ficing their own credibility while bolstering the credibility of the accused.²⁹²
A typical invocation of the race-card card warned:

[G]et ready for the ugliness of the race card, which is already being played by the opportunists of the Congressional Black Caucus and race-baiters like Jesse Jackson. Since so many of the victims are poor black people, America just doesn't care, they say. We're intentionally stranding them, leaving them to die. That's all a load of rubbish.²⁹³

Rush Limbaugh asserted that “[t]he whole purpose” of stories examining the racial implications of Katrina “is to eventually indict the American way of life, to indict the American culture, to indict the American society as inherently unfair and racist.”²⁹⁴ Indeed, “the accusation that the delays in rescue efforts were due to racial bias” was deemed,

[O]ne of the most irresponsible, malicious and frankly stupid examples of race-baiting in the long history of that irresponsible, malicious and stupid below-the-belt political tactic, and anyone who participated in spreading it deserves universal condemnation The fact that a majority of the poor who were trapped by the hurricane were black and the fact that rescue efforts were slow does not add up to proof of intentional discrimination.²⁹⁵

By alleging “racism,” then, critics were dismissed and treated as having revealed their own bad attitudes and intentions.

In an apparent effort to elude the race-card card, liberal African American politicians sidestepped the “r” word when asked the big question. When pressed, however, they answered more equivocally than their conservative

²⁹² See *supra* notes 142–145 and accompanying text.

²⁹³ Gallagher, *supra* note 267.

²⁹⁴ Jack Shafer, *The Rebellion of the Talking Heads*, SLATE, Sept. 2, 2005, <http://fray.slate.com/id/2125581/?nav=ais> (quoting Rush Limbaugh).

²⁹⁵ *Katrina Ethics, Part 2: A New Low for TV Journalism*, ETHICS SCOREBOARD, Sept. 7, 2005, <http://www.ethicsscoreboard.com/list/katrina2.html> (concluding, “[t]his is pernicious, hate-mongering nonsense that springs from the same vast well of ignorance, bile and ill-will as other conspiracy theories”). The race-card card was extraordinarily common in post-Katrina commentary. See, e.g., Victor Davis Hanson, *Our Media Hurricane*, TRIB. MEDIA SERVICES, Sept. 19, 2006, <http://www.victorhanson.com/articles/hanson091905.html> (alleging that the “frenzied,” “incompetent” and “disingenuous” media invented race controversies in Katrina’s aftermath); McWhorter, *supra* note 214 (“To claim that racism is the reason that the rescue effort was so slow is . . . nothing more than a handy way to get media attention, or to help sell a new CD. It’s self-affirming, too, if playing the victim is the only way you know to make yourself feel like you matter. It is also absurd.”); Peterson, *supra* note 232 (“Jackson and Farrakhan laid blame on ‘racist’ President Bush [They are] two of the most dishonest elite blacks in America”). The tendency to disparage and dismiss individuals who suggest that race played a role may exemplify a more general phenomenon. See generally Benforado & Hanson, *supra* note 3, *passim* (describing how relative dispositionists reject arguments and evidence of relative situationists).

counterparts, and often cautiously conceded the relevance of race. For instance, in interviewing African American Congressman Elijah Cummings (D-Md.), Wolf Blitzer had to ask repeatedly about suggestions that “race has been a factor” in defining the demographic that was suffering before Cummings would depart from the colorblind position that “it was the frail, the weak, and those that are sick” who were suffering. When Blitzer continued to press, Cummings finally gave in:

Blitzer: “But do you believe, if it was, in fact, a slow response, as many now believe it was, was it in part the result of racism? Is that what you’re suggesting?”

Cummings: “I’m not sure. All I know is that a number of the faces that I saw were African-American, but the Caucus has always stood for all Americans, particularly those who have been often left out of the system.”

Blitzer: “. . . There are some critics who are saying . . . had this happened in a predominantly white community, the federal government would have responded much more quickly. Do you believe that?”

Cummings: “I think that that’s a pretty good probability.”²⁹⁶

The awkward dance lasted even longer when CNN’s Aaron Brown pressed Congresswoman Stephanie Tubbs Jones (D-Ohio) to speak for “black America.” Jones sought to couch her remarks in inclusiveness (“white, black, brown”) even as her interrogator asked how “white America” and “black people in this Country” were reacting:

Brown: “. . . [D]o you think black America’s sitting there thinking, if these were middle class white people, there would be cruise ships in New Orleans, not the Superdome?”

Jones: “. . . We are offended. We are outraged that America, the democracy, is not living up to its calling. We are offended that so many African-American folk—I’m offended that there are black, brown, whatever color they are, they are sitting in the Astrodome somewhere, not being taken care of.”

Brown: “. . . [But] [d]o you think the reason that they’re not there or the food is not there or the cruise ships aren’t there or all this stuff that you believe should be there, isn’t this a matter of race and/or class?”

²⁹⁶ Quoted in *Katrina Ethics*, *supra* note 295, at 148.

Jones: “I think it’s mostly a matter of class, but clearly, race is a factor in the areas in which we’re operating in southern America.”²⁹⁷

As these exchanges indicate, the incendiary conceptions of “race” and especially “racism” effectively removed “injustice” from the conversation. If “racism” had caused the suffering and poverty, that would be an “injustice,” even in our affirming, choicist blame frame. But to attribute the bad outcomes to “racism” would be playing the despicable “race card”—itself an “injustice.” And so, as liberal leaders advanced the claim that “this is an injustice,” journalists parried with “but is it racist?” The schema-induced double bind helped to steer the conversation away from collectively acknowledging the power of situational racism. Given our choice frame, if there is no dispositional racism, then racial disparities do not constitute injustice.

Thus, dispositionist schemas that understand racism as intentional, conscious, deliberate, hate-inflected, or color-oriented prejudice immunize evidence of racial injustice from criticism—precisely because it is, by definition, not racist.²⁹⁸ In that way, traditional blame frames confound social discourse and conspire with choicism to legitimate situational racism. Those who are disinclined to see injustice can inoculate the evidence by pointing out that, because we have no proof of malevolent intent, no one (significant) is a “racist.” And those who believe that persistent racial disparities are proof of injustice must somehow steer wide of insinuating that any individual or the system as a whole is “racist,” for if they appear to play the “race card,” it will likely backfire.

So, are we racist or aren’t we? The politically acceptable and popularly credible responses seem to range from on the left, “sort of, and America should do better”; to on the right, “not in the least! We are, after all, Americans!” As this Article has argued, we believe that this scale is so truncated and the balance so tipped to the right because the dominant attributions and schemas are, as they have almost always been in America, system-legitimizing.

No, we are not racists:

“We,” who should be advantaged, are acting, if at all, through good intentions, exemplary dispositions, and in accordance with

²⁹⁷ *Newsnight with Aaron Brown: Katrina Day Five; President Bush Visits Disaster Sites; Mayor of New Orleans Criticizes Relief Effort* (CNN television broadcast, Sept. 2, 2005) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0509/02/asb.01.html>).

²⁹⁸ For that reason, victims of the “race card” often gain sympathy and support. Cf. Lindberg, *supra* note 281 (“Mr. Bush is . . . lucky: . . . the attempt to blame him personally was so egregious and overreaching that it actually stabilized the political situation for him among core supporters who were otherwise unhappy about what they were seeing on television.”).

situational forces larger than us. “They,” because of their aberrant dispositions interacting with or resulting from those same forces, should suffer or be further disadvantaged or separated from us and should not receive our assistance.

Same as it ever was.

CONCLUSION: “A SALUTARY DOUBT”

All fathers and mothers, in all societies, want their children to be educated, and live free from poverty and violence. No people on Earth yearn to be oppressed

—President George W. Bush²⁹⁹

We are outraged that America, the democracy, is not living up to its calling.

—Congresswoman Stephanie Tubbs Jones³⁰⁰

This Article has been written in the optimistic spirit of Arthur Lovejoy’s observation that “[t]he adequate record of even the confusions of our forebears may help, not only to clarify those confusions, but to engender a salutary doubt whether we are wholly immune from different but equally great confusions.”³⁰¹

Although we Americans have long abhorred injustice, we have for centuries lived in apparent indifference to its presence. Although our self-perceptions have consistently coincided with our aspirations, neither has comported with our practices. In short, Americans have not been the people they have aspired and claimed to be. Social psychology and related fields confirm that no basis, beyond unexamined optimism, exists for believing that modern Americans are an exception.

Looking backwards, injustices our forebears failed to recognize have been increasingly identified and criticized, as time distances “us” from “them.” And so, posterity will no doubt come to see the shameful truths of our generation. The real source of our “great confusion” and our “great sin,” then, is not so much that we have failed to learn our history. Rather, it is that we have yet to critically examine, understand, and, thus, thoroughly doubt ourselves.

When reflecting on lynching brutalities and their accompanying macabre community festivals, or contemplating the motivated logic of “separate but equal” and *Plessy v. Ferguson*, “their” confusions seem obvious—it

²⁹⁹ President George W. Bush, State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

³⁰⁰ *Newsnight with Aaron Brown*, *supra* note 297.

³⁰¹ See *supra* quotation accompanying note 1.

is easy to dispositionalize post-Civil War defenders of legalized segregation (like slaveholders before them) as somehow less than “us.”³⁰² Indeed, when studying the phenomenon in 1930, Dr. Arthur Raper reasoned that the brutality of lynchings “suggests the presence of sadistic tendencies among the lynchers.”³⁰³ But in so doing, we adopt the very quality we abhor in our “racist” predecessors: attributing their failings to inferior dispositions and transferring blame from ourselves to them. We are smug for having rejected the faulty blame frames that persuaded our forebears. But we fail to see our own “equally great confusions.”

The United States Senate only recently acknowledged its failure to pass anti-lynching legislation during the first half of the twentieth century.³⁰⁴ Two hundred resolutions and three bills signed by the House met their demise in the Senate. Finally, on June 13, 2005 the Senate passed Resolution 39, “apologiz[ing] to the victims and survivors of lynching for its failure” to act.³⁰⁵ The senators backing the resolution spoke with disappointment about their forebears’ failings.³⁰⁶ But many were equally eager to distinguish themselves from those bigoted actors. John Kerry (D-Mass.) declared, “it is really hard to believe it happened at all in our country,” and Bill Nelson (R-Fla.) emphasized, “[t]hank goodness we have come to a point at which we can admit our mistakes, even though this is several generations late.”³⁰⁷ Republican co-sponsor George Allen condemned early twentieth-century senators: “They were clearly wrong. They turned their eyes. They turned their heads There was an acceptance and a condonation of vile, hate-filled activity.”³⁰⁸ At the same time, Allen underscored the separation between them and his generation of officials, between their America and ours: “Thankfully, justice in our Nation has moved forward and left such despicable acts to history.”³⁰⁹

To a degree, he is right. But the lesson of history is not that “we” are immune to “the confusions of our forebears,” but exactly the opposite: we are ourselves likely subject to “equally great confusions.” We don’t admit our mistakes unless and until, perhaps a century later, we come to see that they were clearly wrong. Where “they” felt fear, loathing, and legitimacy, “we” see hate and injustice. We criticize them for turning their eyes from themselves, but, by turning our eyes only on them, we are no differ-

³⁰² For more on this theme, see Hanson & Yosifon, *The Situation*, *supra* note 4, at 326–27.

³⁰³ ARTHUR FRANKLIN RAPER, *THE TRAGEDY OF LYNCHING* 1 (1933).

³⁰⁴ Avis Thomas-Lester, *A Senate Apology for History on Lynching: Vote Condemns Past Failure to Act*, WASH. POST, June 14, 2005, at A12.

³⁰⁵ S. Res. 39, 109th Cong. (2005) (enacted).

³⁰⁶ Senator Barack Obama (D-Ill.), among others, did highlight the need for “completing the unfinished work of the civil rights movement, and closing the gap that still exists in health care, education, and income. There are more ways to perpetrate violence than simply a lynching.” 151 CONG. REC. S6375 (daily ed. June 13, 2005) (statement of Sen. Obama).

³⁰⁸ 151 CONG. REC. S6375 (daily ed. June 13, 2005) (statement of Sen. Allen).

³⁰⁹ *Id.*

ent. Just because the frame has changed does not mean that “liberty and justice for all” is any less of an illusion.

Indeed, a key source of our problem may be that the repackaging has fooled us. We believe that injustice today must resemble the injustices of our forebears. We tell ourselves that only people with racist attitudes or intentions can contribute to racial injustice. We insist that if we focus on people’s character and not their color, then we cannot be racists.

Intentional oppression is, sadly, not a prerequisite for injustice. Racial oppression has long thrived in this country, *despite* claimed good intentions and justified attitudes, policies, and practices.

Believing that most promoters of racial injustice in America have not judged others by the “content of their character” is a fundamental mistake. Character judgments, in fact, have long served as a principal justification for oppression. Our mistake is, not in neglecting character, but in attributing to “character” what should be attributed to the victim’s situation and, in turn, to our system and ourselves. In other words, we have allowed ourselves to be deceived by blame frames—that is our *greatest* confusion.

Katrina helped many Americans glimpse what social science has made painfully clear. Blackness, badness, violence, and criminality are closely linked in the minds of most Americans.³¹⁰ The easy association usually operates outside our conscious awareness; our stereotypes and prejudices do not feel chosen. But the effects are real, and the absence of conscious “choice” does not imply an absence of responsibility. Our commitment, after all, is to freedom and justice for all, not to some illusion.

Racial injustice in America is today woven with exaggerated conceptions of individualism, freedom, autonomy, will, and choice. And like a world once afraid or unwilling to look carefully through the eye of Galileo’s telescope, we are the victims of our own ignorance. It is time to embrace self-doubt and humility and to examine our knack for self-deception; it is time to press the “reveal” button. Through the patterns of history, the insights of social science, and the eye of Katrina we can today look closely at what we have so long feared. Perhaps by clarifying our great confusions, we can discover a path to a world that conforms to our greater aspirations.

³¹⁰ See, e.g., Birt L. Duncan, *Differential Social Perception and Attribution of Inter-group Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 593–94 (1976); Jennifer L. Eberhardt, Phillip A. Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 PERSONALITY & SOC. PSYCHOL. 876 (2004); Jennifer L. Eberhardt, Nilanjana Dasgupta & Tracy L. Banaszynski, *Believing Is Seeing: The Effects of Racial Labels and Implicit Beliefs on Face Perception*, 29 J. PERSONALITY & SOC. PSYCHOL. BULL. 360 (2003).