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TOWARD A *SUI GENERIS* VIEW OF BLACK RIGHTS IN CANADA? OVERCOMING THE DIFFERENCE- DENIAL MODEL OF COUNTERING ANTI-BLACK RACISM

LOLITA BUCKNER INNIS*

INTRODUCTION

Canada is often viewed as a bastion of racial tolerance. Its anti-racism, enshrined even at the constitutional level, is part of the ethos of the Canadian people. Long celebrated as a haven for racial minorities of all kinds, Canada is often held up as a model multicultural society.¹ For some, Canadian multiculturalism is, in its best form, almost “post-racial”; that is, discussions of race are said to be practically unnecessary. Therefore explicit consideration of where racial difference may be the basis of disparate treatment is avoided on the assumption that merit and other neutral ways of distinguishing between and among individuals prevail in Canadian society.² The realities of Canadian

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1. For a further discussion of multiculturalism in Canada, and particularly critiques of what has been called the “multiculturalist origin myth” see RICHARD J.F. DAY, *MULTICULTURALISM AND THE HISTORY OF CANADIAN DIVERSITY* 26-32 (2000); JOHN PORTER, *THE VERTICAL MOSAIC: AN ANALYSIS OF SOCIAL CLASS AND POWER IN CANADA* 73-74 (1965). See generally REVA JOSHEE, *CANADIAN MULTICULTURALISM AS A CREATURE OF CONTRACTION AND EXPANSION* (1996); LEO DRIEDGER, *MULTI-ETHNIC CANADA: IDENTITIES AND INEQUALITIES* (1996); NEIL BISOONDATH, *SELLING ILLUSIONS: THE CULT OF MULTICULTURALISM IN CANADA* (1994); W. PETER WARD, *WHITE CANADA FOREVER, POPULAR ATTITUDES AND PUBLIC POLICY TOWARD ORIENTALS IN BRITISH COLUMBIA* (1978).

2. See, e.g., AUGIE FLERAS & JEAN LEONARD ELLIOTT, *UNEQUAL RELATIONS: AN INTRODUCTION TO RACE, ETHNIC AND ABORIGINAL DYNAMICS IN CANADA* 37 (1996); FRANCES HENRY, CAROL TATOR, WINSTON MATTIS, AND TIM REES, *THE COLOUR OF DEMOCRACY: RACISM IN CANADIAN SOCIETY* 25 (2000).

history, however, belie these claims of racial utopia, particularly as it concerns the rights of African-ancestored persons.³ While there is no doubt that Canada has offered sanctuary to many African-ancestored persons during times of trouble in their countries of origin, the welcome extended to African-ancestored persons has at times been spare and wanting, and they have always been, and to this day remain, outsiders without the full acceptance that defines civic membership in Canada.⁴

In the misguided belief that racial classifications themselves are the source of this historic and ongoing anti-black discrimination, many of those committed to overcoming anti-black racism rely upon what I have termed a “difference-denial” approach to combating this problem.⁵ However, it appears that this is, at best, a misguided attempt to remedy an anti-black discrimination that is deeply seated, long-held, and which, though significantly abated since the early years of blacks in Canada, continues presently. The difference-denial model of countering anti-black racism posits a goal of color-blindness, wherein all races are equal, and all people have access to the benefits of citizenship. The difference-denial model holds that there should be no anti-black racism because there is no difference between black people and people of other races, particularly those of primarily European ancestry. The problem with this view is that it ignores the past and present status of African-ancestored persons, and thus ultimately inheres to their continuing disadvantage.

I believe that there can only be significant progress in combating the

3. Throughout this paper, I will use the words “black” and “African-ancestored” interchangeably to refer to people who themselves originated in or whose ancestors in significant numbers originated from the continent of Africa. Just what to call such persons has been the subject of some debate. It has been suggested that the transition from Negro and colored to black and African-American or African-Canadian was as a result of the efforts by persons of African ancestry in the 1960’s to achieve a sense of racial pride. See, e.g., F. JAMES DAVIS, *WHO IS BLACK?* 145-46 (1991).

4. A recent survey conducted by the Association of Canadian Studies indicates that when a sampling of Canadians of all races were asked to identify those groups most discriminated against in Canadian society, blacks were typically listed as among the most frequent victims of racial discrimination. As to individual perceptions of racial discrimination by blacks themselves, blacks were the racial or ethnic group who most frequently reported that they had been discriminated against or treated unfairly by others because of their ethno-cultural characteristics. See Jack Jedwab, *Collective and Individual Perceptions of Discrimination in Canada*, Report of the Association for Canadian Studies, July 18, 2004, available at <http://www.acs-aec.ca/oldsite/Polls/collective.pdf>.

5. For further discussion of the effects of denying racial difference, see, e.g., George J. Sefa Dei, *The Denial of Difference: Reframing Anti-Racist Praxis*, 2 RACE, ETHNICITY AND EDUCATION 17 (1999). See also George J. Sefa Dei, *Recasting Anti-Racism and the Axis of Difference: Beyond the Question of Theory*, 7 RACE, GENDER & CLASS 38 (2000). See generally DONALD S. MOORE, *RACE, NATURE, AND THE POLITICS OF DIFFERENCE* (2003); JILL VICKERS, *GENDER, RACE AND NATION: A GLOBAL PERSPECTIVE* (2002); THOMAS R. WEST, *SIGNS OF STRUGGLE: RHETORICAL POLITICS OF CULTURAL DIFFERENCE* (2002); GARY GERSTLE, *AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY* (2001); ERIC KRAMER, *POSTMODERNISM AND RACE* (1997); MICHAEL AWKWARD, *NEGOTIATING DIFFERENCE: RACE, GENDER, AND THE POLITICS OF POSITIONALITY* (1995).

Canadian brand of anti-black racism if, rather than ignoring black difference, we embrace it and use it as the basis for making positive changes that address inequality. One method of directly confronting difference is suggested by a 1997 article by John Borrows and Leonard I. Rotman in which the authors explore the development of the term *sui generis* to describe Aboriginal legal rights.⁶ The *sui generis* model of Aboriginal rights posits an alternative legal model that bridges Aboriginal customs with common law customs and thereby recognizes the unique history of Aboriginal persons in Canada and their consequent legal position. Drawing from the work of Borrows and Rotman, in this paper I consider the implications of replacing the difference-denial approach with a *sui generis* model of black rights.⁷ I do this by first exploring the parameters and limitations of the difference-denial model for countering anti-black racism. I next discuss Borrows and Rotman's conception of the nature of *sui generis* Aboriginal rights. I then describe what *sui generis* black rights would entail and consider some possible critiques of *sui generis* black rights. Finally, I posit how a *sui generis* concept of black rights may help combat anti-black racism in Canada in a way that can not be accomplished using the difference-denial model.

I. THE PROBLEM OF THE DIFFERENCE-DENIAL MODEL OF COUNTERING ANTI-BLACK RACISM

The difference-denial model of countering discrimination posits that there should be no distinctions made between people because of nationality, gender, physical disability, language, gender, ethnicity, sexual orientation or race. As it relates to anti-black racism, the difference-denial model is a particularized expression of the notion of the color-blind ideal.⁸ Under this view, difference in

6. John Borrows and Leonard I. Rotman, *The Sui Generis Nature Of Aboriginal Rights: Does It Make A Difference?*, 36 ALBERTA L. REV. 9 (1997). A number of articles discuss the nature of *sui generis* rights. See generally Gordon Christie, *A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation*, 23 WINDSOR Y.B. ACCESS TO JUST. 17 (2005); Paul Joffe, *Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec*, 45 MCGILL L.J. 155 (2000); J.Y. Henderson, *Interpreting Sui generis Treaties*, 36 ALBERTA L. REV. 46 (1997).

7. Ian Haney Lopez has written of race as a *sui generis* social phenomenon. Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994). I speak not necessarily of the *sui generis* nature of blackness but of the *sui generis* nature of black rights.

8. The harms of the color blind ideal have been addressed in a plethora of articles. See, e.g., Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77 (2000) (arguing that color blind discourse acts as a semantic code, and that, while color blindness may disrupt racist practices, it often legitimizes them as it fails to take into account well-embedded legal and social stratification). *Id.* at 78. Siegel writes:

Color blindness discourse may offer symbolic or expressive testimony of this society's desire to achieve neutrality in matters of race relations, but, I argue, color blindness discourse cannot itself generate a positive account of what race-neutrality would look like in practice. The conviction that

the treatment of persons of African ancestry and those of other races is rejected on the premise that there is simply no difference among the races to justify any such disparate treatment. Indeed, at its extremes, the difference denial model of countering anti-black racism espouses an almost radical anti-determinist argument that since there is no race from a biological perspective and race is merely a social construct, it should therefore hold no sway over human interactions.⁹ Clearly, some oppose the notion that race exists on a biological level while still recognizing the very tangible reality of race that results from a historically race-based society and years of racial discrimination.¹⁰ Proponents of the difference denial model, however, follow a more pernicious line of thinking that reduces all racial classification to an arbitrary exercise that *causes* racist behavior, overlooking the necessity of current classification schemes that rationally account for the *result* of racist behavior. Hence, the difference denial model suggests that societal ills such as racial segregation, denial of employment based on race, or racial profiling can be instantly eliminated if distinctions between or among the races are simply ignored from here on out.

In its various incarnations, this difference denial model of anti-black racism permeates socio-legal scholarship. Race is understood in this context as simply “bad thinking”, which should hence be eliminated from public discourse.¹¹ In its place, many legal scholars call for a “uniracial” worldview that focuses on the intrinsic worth and human dignity of the individual.¹² In fact, the jurisprudence of jurists such as Justice Clarence Thomas and Justice Antonin Scalia of the United States Supreme Court, supports the idea that addressing past or present racial discrimination by noting the race of the oppressed and distributing benefits accordingly is to be eschewed because of the “the corrosive moral and practical effects of recognizing racial distinctions.”¹³ Moreover, some followers of this jurisprudence may even

color blindness discourse does offer such positive, practical guidance generally reflects views about the social nature of race that are entirely independent of the conceptual premises of color blindness discourse.

See also Tanya Kateri Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 CORNELL L. REV. 1093 (2002); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 11 (2000); Carrie Crenshaw, *Colorblind Rhetoric*, 63 SOUTHERN COMM’N JOURNAL 244 (1998); Bryan K. Fair, *The Acontextual Illusion of a Color-Blind Constitution*, 28 U.S.F. L. REV. 343 (1994).

9. See, e.g., JOCK COLLINS, *CONTEMPORARY RACISM IN AUSTRALIA, CANADA AND NEW ZEALAND* 3 (1995). See also ROBERT MILES, *RACISM AND MIGRANT LABOUR* 72-73 (1982).

10. See, e.g., Haney Lopez, *supra* note 8, at 4-20 (advocating for a model of race as a mostly social phenomenon).

11. Lewis Killian, *Black Power and White Reactions: The Revitalization of Race-Thinking in the United States*, 454 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 43 (1981).

12. See, e.g., Jonathan K. Stubbs, *Implications of a Uniracial Worldview: Race And Rights In A New Era*, 5 BARRY L. REV. 1 (2005).

13. John Marquez Lundin, *The Call for A Color-Blind Law*, 30 COLUM. J.L. & SOC. PROBS. 407, 428 (1997).

believe that race-based remedies to discrimination “encourage patronizing assumptions on the part of Caucasian policy makers”.¹⁴

There are several problems with this model. First, proponents of “e-racing,” or eliminating racial difference in either legal or social discourse, ignore that there are in fact multiple concepts wrapped up in what we refer to as race, and this becomes even more complex when the notion of blackness in Canada is explored. Next, the difference-denial model as it has developed in Canada appears to have been directed first and foremost at redressing the problems of linguistic minorities and therefore has had only limited and incidental utility in fighting anti-black racism. Moreover, even incorporation of the difference-denial norm as applied to blacks under the Charter of Rights and Freedoms appears to afford little protection from anti-black discrimination. Finally, the difference-denial model of countering anti-black racism has a frightening resemblance to difference-denial *racism*.

A. The Various Facets of Race and of Blackness in Canada Are Not Properly Incorporated Into the Difference Denial Model

Race has many meanings,¹⁵ and race in the Canadian perspective has a particular valence. It has been observed, for example, that throughout much of Canadian history race has had a more ethnological meaning and its use was often meant to encompass shared values and characteristics such as history, language, religion, and politics.¹⁶ Indeed, in the early Canadian context, race was frequently synonymous with “nation”.¹⁷ At other times, race has been associated with biology and Darwinism.¹⁸ It has been observed that the meanings attributed to race grow out of myriad and often diverse social, legal, and political discourses, and that given these multiple potential sources of conversation about race, no single definition of race would likely be the key to dismantling race-based harms.¹⁹ Instead, ending race-based discrimination, and particularly anti-black discrimination, requires continued efforts to understand all of these meanings of race and how they function and to incorporate this understanding into socio-legal discourse. The difference denial model focuses its conception of race far too narrowly to accomplish this goal.

The work of legal scholar Neil Gotanda has provided a potent tool for

14. *Id.*

15. See generally KENAN MALIK, *THE MEANING OF RACE: RACE, HISTORY AND CULTURE IN WESTERN SOCIETY* (1996); PETER JACKSON AND JAN PENROSE, *CONSTRUCTIONS OF RACE, PLACE AND NATION* (1993).

16. ROBERT CHARLES VIPOND, *LIBERTY AND COMMUNITY: CANADIAN FEDERALISM AND THE FAILURE OF THE CONSTITUTION* 92 (1991).

17. *Id.*

18. *Id.*

19. Cheryl I. Harris, *Equal Treatment And The Reproduction Of Inequality*, 69 *FORDHAM L. REV.* 1753, 1760 (2001).

analyzing the different facets of race by dividing the possible jurisprudential uses of race into four categories: status-race (which encompasses the notion of race as an indicator of social status), formal-race, historical-race (which focuses on the past legal treatment of blacks), and culture-race (which includes the customs, beliefs, and intellectual and artistic endeavors of blacks which are embodied in community consciousness).²⁰ More than any of the categories proposed by Gotanda, the formal-race ideal forms the basis of the difference denial approach to anti-discrimination. In assessing the legal rights of non-whites, for the most part, postmodern courts and legislatures following a difference denial model treat race solely as formal-race in which race is little more than a neutral descriptor and has almost no independent value outside of its role as a descriptor.²¹

Gotanda argues that properly remedying past and present black oppression, however, requires addressing status-race and historical-race instead.²² To apply these terms more specifically to the context at hand, I will refer to “status-blackness” and “historic-blackness.” Status-blackness includes ideas about the nature of blackness that the law typically relates to stereotypes, bias, or anti-black racism. It is thus status-blackness at work when blacks are discriminated against because of beliefs about their inherent inferiority. This has sometimes been referred to as “racial naturalism” and has formed much of the socio-legal landscape of decisions about black rights in both Canada and the United States throughout most of their histories.²³ Though racial naturalism was traditionally discredited as the product of a racist, pseudo-scientific past, the notion of the inherent inferiority of those of African ancestry has reared its ugly head frequently over the last several years. Indeed, some authors have unapologetically tried to make the case for the inherent nature of black intellectual or social inferiority.²⁴

Working in tandem with beliefs about black inferiority to form the contours of status-blackness are notions of black social or legal “immaturity”, or what has been called “racial historicism” —the argument that if blacks have been treated unfairly *via-à-vis* whites, and even if the mistreatment persists, it is because collectively blacks have not yet achieved the necessities for full social membership.²⁵ Racial historicism is usually couched in progressive terms

20. For a fuller discussion of these concepts, see Neil Gotanda, *A Critique of Our Constitution is Color-Blind*, 44 STAN. L. REV. 1, 4-7 (1991).

21. *Id.* at 4-7.

22. *Id.* at 7.

23. Kim Benita Furumoto and David Theo Goldberg, *Boundaries of The Racial State: Two Faces Of Racist Exclusion In United States Law*, 17 HARV. BLACKLETTER L.J. 85, 86 (2001).

24. See, e.g., R.J. HERNSTEIN AND CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994); PHILIPPE RUSHTON, *RACE, EVOLUTION, AND BEHAVIOR* (1995); SEYMOUR ITZKOFF, *THE DECLINE OF INTELLIGENCE IN AMERICA: A STRATEGY FOR NATIONAL RENEWAL* (1994).

25. Racial historicism itself has had varied bases and proponents. In this context, I speak of the racial historicism of the white majority and its beliefs in the social, civic, or legal immaturity

which seek to smooth over anti-black bias by asserting that such bias, while regrettable, is only a temporary ill which will disappear as blacks develop into "mature" members of the polity. Hence, an example of this developmentalist approach to status-blackness which is much in currency is the opposition to affirmative action programs that place blacks in elite educational institutions or jobs on the premise that blacks will "suffer" because of lack of readiness.²⁶

Historic-blackness, on the other hand, acknowledges past and continuing racial subordination. It is at the heart of differences in the social situation of racial groups or their individual members that are attributable to past or current discrimination. For many, the root of historic-blackness begins in the enslavement of African-ancestored persons by Europeans. This has resulted in what one scholar has called a "spoiled identity"—a stigmatization as a result of the historical taint of slavery.²⁷ This spoiled collective identity is unremitting, and undermines the possibilities for whites today to view blacks as individuals like themselves. Even if the basis of historic-blackness is past stigma, the past stigma is continually regenerative as blacks fall farther behind due to lack of access to social, political, economic and legal resources.²⁸

Rather than address these various facets of racial identity, the difference denial model often overlooks the complex meaning of racial classifications. One writer whose work suggests an adherence to the difference-denial model argues for the elimination of the word "race" as a classifier in legal discourse entirely, suggesting that it be replaced by more precise classification terms such as "color," "continent of origin," "national origin," and "descent from ancestors of a particular color, national origin, or religion."²⁹ Race is defined as "an

of blacks as a basis for black oppression. However, it has been argued that black leaders themselves have espoused racial historicist arguments that unwittingly maintained black subordination. *See, e.g.*, discussions of Marcus Garvey's racial historicism as evidenced by his creation of a pan-Africanist view that rejected of African indigeneity in PAGET HENRY, CALIBAN'S REASONING: INTRODUCING AFRO-CARIBBEAN PHILOSOPHY 208 (2000); *See also* BOOKER T. WASHINGTON, UP FROM SLAVERY 143-44 (1901) (encouraging the black man to "cast down [his] bucket" where he stood to labor among Negroes and thus dignify common labor, all while eschewing intellectual excesses).

26. *See* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371-72 (2004) (concluding that affirmative action admission of blacks to elite law schools has the effect of producing fewer black lawyers because blacks admitted to elite law schools are often unprepared and "struggle" more than their white counterparts), and Richard H. Sander, *Empirical Studies Of The Legal Profession: What Do We Know About Lawyers' Lives?: The Racial Paradox Of The Corporate Law Firm*, 84 N.C. L. REV. 1755, 1820 (2006) (arguing that "aggressive" racial preferences at the law school and law firm level hindered rather than helped the careers of young black attorneys and could be in part responsible for the continuing white dominance of large-firm partnerships).

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

28. For a discussion of the application of race to economic and social resources, *see, e.g.*, Glenn C. Loury, *A Dynamic Theory of Racial Income Differences*, in WOMEN, MINORITIES, AND EMPLOYMENT DISCRIMINATION (1977).

29. Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1100 (2004).

incoherent concept that adds nothing to our understanding of human biology or social order.”³⁰ Hence, “the law should discontinue its use of the term “race” because it is an unnecessary and potentially pernicious concept.”³¹ This scholar suggests that eliminating the word race may be useful in tailoring legislative schemes for redress more closely to reach only intended beneficiaries.³² By this means, one assumes, problems such as conflating all blacks with those who are economically disadvantaged, or with those who have more visible African ancestry and thus face greater discrimination, or with those whose immediate ancestry is not American/Canadian and who therefore have no historic claim for redress of race-based harms, may be avoided.³³ I believe, however, that eliminating the word race from legal discourse may just as easily have the opposite effect.

If, instead of using race in legal discourse, legislators used various other indicators, it would not likely lead to a winning situation for blacks and other racial minorities. This would be particularly true in the context of crafting legislative responses to racial discrimination. Eliminating race in favor of other social indicators would allow zealous legislators to divide persons into numerous “victim sub-groupings” based upon legislators’ own limited notions of the nature and scope of racial harms suffered by various persons, and thus ignore the very real, myriad and pernicious ways in which “race” impacts upon people both collectively and individually, without regard to their status as, for example, rich blacks, light-skinned blacks, or Latina persons of visible black ancestry.³⁴

30. *Id.* at 1098.

31. *Id.* at 1093.

32. *Id.* at 1157.

33. *Id.*

34. An interesting story about the extent to which race often “trumps” class is the case of three women, two of whom are African-ancestored, who were apparently barred from accessing town-controlled beaches in affluent Greenwich, Connecticut, where they were longtime residents. Although in periods of low usage, such as early morning hours when the women appeared, entry to the beach was typically not closely regulated, the group of women were challenged and then barred because they failed to produce beach cards proving their residency status. A town official acknowledged that racial discrimination had occurred in the treatment of the women, and offered tips to the white athletic trainer leading the group on how to be “discreet” when bringing blacks and thus avoid attracting the attention of beach workers who enforce usage rules. The two African-ancestored women in the group were Sheila Foster and Migdalia Bonilla, the affluent wives of former members of the New York Mets baseball team George Foster and Bobby Bonilla. See Alison Leigh Cowan, *Bias Seen in Expulsion at Greenwich Beach*, N. Y. TIMES, Dec. 15, 2005, at B4. Another incident in which race seemed to trump class was when black Toronto attorney Jason Bogle was accosted in his Lexus by Toronto police and accused of having guns and drugs by police on the lookout for the allegedly black killer of a young white woman on Boxing Day (December 26) 2005 in Toronto in the middle of a busy shopping thoroughfare. According to Bogle, the police desisted when he offered the names of high-ranking policemen that he knew, and stated that given the “current climate”, they had to perform their jobs in that manner. “Difference-deniers” would probably not believe that such matters occur at all, and when and if they do, would maintain that they are actually based on some other factor besides race.

B. Difference-Denial Anti-Discrimination in Canada is Aimed at Combating Oppression Against Linguistic Minorities and is Therefore of Limited and Merely Incidental Utility in Targeting Black Oppression

The birth of the difference-denial model of anti-racism is often associated with the Civil Rights era in Canada and the United States and its aftermath. After eliminating such clear cut examples of racial inequality as separate schools and other separate accommodations for blacks during the Civil Rights era of the 1940's, 50's and 60's, there was a self-congratulatory sense of relief among the North American white majority that all of the recent unpleasantness was in the past. Explicit laws on racially segregated schools were overturned in the provinces.³⁵ Progressive laws, chiefly in the form of human rights legislation barring certain forms of discrimination, were passed in all of the provinces and territories.³⁶ The Multiculturalism Act³⁷, the Federal Employment Equity Act³⁸ and the international human rights instruments to which Canada has acceded also provided legal bases for combating discrimination. However, after passage of these laws, anti-black racism in many places remained as virulent as ever. Notwithstanding the development of federal level and provincial human rights codes under which most private acts of discrimination are prosecuted and which have been held to be "semi-constitutional" in import,³⁹ a number of discriminatory acts against blacks have continued without significant abatement. This is because these difference denial model laws in Canada were drafted so that the real beneficiaries would be linguistic and cultural minorities, most typically the French-language minority.

Even under the Canadian Human Rights Act, which ostensibly offers blacks an avenue of recourse for any discrimination they encounter, in most provinces, there is no possibility of directly filing their complaints with a tribunal. Instead, complainants must first have their claims screened by a Human Rights Commission.⁴⁰ This "gatekeeper" function often disadvantages

35. However, even after these amendments, black children were routinely turned away from white schools, not on explicit racial grounds, but on claims such as "insufficient accommodation." CONSTANCE BACKHOUSE, *COLOUR-CODED: A LEGAL HISTORY OF RACISM IN CANADA 1900-1950*, 414 (1999) (citing *In re Hutchinson and School Trustees of St. Catharine's* (1871) 31 U.C.Q.B. 284 (Ont. Q.B.) [hereinafter *Colour-Coded*]). The Common School Act was officially repealed in 1964.

36. From the 1962 until 1977, both the federal government and all of the provinces adopted human rights legislation.

37. MULTICULTURALISM ACT, S.C. 1988, c. 31 (Can.).

38. FEDERAL EMPLOYMENT EQUITY ACT 1995 c.44 (Can.).

39. Ontario (Human Rights Comm.) and O'Malley v. Simpsons-Sears Ltd. (1985), 7 C.H.R.R. D/3102 (S.C.C.) (Can.); Winnipeg School Division No.1 v. Craton, [1985] 2 S.C.R. 150 (Can.).

40. Joanna Birenbaum & Bruce Porter, *Screening Rights: The Denial Of The Right To Adjudication Under The Canadian Human Rights Act And How To Remedy It*, available at http://www.law.utoronto.ca/documents/conferences/admin05_screening.doc.

those who should most be served by the Act, black claimants.⁴¹ One example of this dynamic is found in that blacks have little if any recourse to the racial discrimination in the provision of rental housing in Canada. While every provincial human rights code forbids such behavior by landlords or their agents, and further bars “indirect” discrimination such as setting income limits or refusing to rent to people on welfare, such refusals remain a common experience among prospective black tenants. There is evidence that provincial human rights commission employees themselves believe that such discrimination is permissible and thus take little action in response to complaints or even discourage complainants from filing.⁴² In this way, the safety provisions that Canadian law and policy purports to offer to blacks in danger of discrimination are in fact invalid in practice.

This is because blacks in Canada are only incidental beneficiaries of widespread anti-discrimination policy, which was actually designed with other groups in mind, despite the fact that anti-black discrimination is one of the most virulent forms of discrimination in Canada. Though the scourge of explicit racism in Canada has gradually given way to assertions of multiracial democracy wherein racial differences are moot in the shadow of this policy, it is not clear that this in any way reflects less dangerous treatment of blacks or other visible minorities. Blacks remain in need of legislation to address their unique experience, and yet this type of remedy has not been proposed as yet, nor is it on the horizon. As Derrick Bell has pointed out in his discussion of the United States Civil War⁴³ and the Emancipation Proclamation⁴⁴ which ended

41. See, e.g., Mark Hart & Geri Sanson, *Getting Rid of the “Gatekeeper”: A Practical Model for Human Rights Reform*, available at http://www.law.utoronto.ca/documents/conferences/admin05_hart.doc.

42. *Id.*

43. Between February and May 1861, eleven southern states seceded from the union of the United States and formed the Confederate States of America, responding mostly to election of Abraham Lincoln, who was known to oppose any expansion of slavery outside of already existing slave states. In April 1861, Confederate troops fired upon federal troops at Fort Sumter, South Carolina, hence beginning the Civil War. During the early part of the war, Lincoln was, for all intents and purposes, a moderate on the question of slavery, and emphasized preservation of the Union as the sole Union objective of the war. However, as the war pressed on, Lincoln adopted the abolition of slavery as a secondary goal. See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 4 (1980).

44. Proclamation of January 1, 1863 Number 17, 12 Stat. 1268 (1863). The Emancipation Proclamation was a declaration first promulgated by United States President Abraham Lincoln on September 22, 1862 and effective January 1, 1863. The proclamation provided that all slaves in Confederate territory still in rebellion would be freed. The goal of the proclamation was not so much to end black slavery as to disrupt the Southern economy and provide black recruits for the Union Army, thus leading to a faster resolution of the conflict. See generally DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY* (2001); MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* (2001); JOHN HOPE FRANKLIN, *THE EMANCIPATION PROCLAMATION* (1963). See also DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 4 (1980) (citing Dillard, *The Emancipation Proclamation in Perspective of Time*, 23 *LAW IN TRANSITION* 95 (1963)). As Bell point out, “as a legal matter, the

United States slavery in rebel Southern states during the Civil War, "blacks are more likely to obtain relief for even acknowledged racial injustice [only] when that relief also serves, directly or indirectly, to further the ends which policymakers perceive are in the best interests of the country."⁴⁵ In keeping with Bell's observations, it may be argued that the movement towards a multicultural model in Canada was not necessarily a reflection of greater respect and appreciation for others such as Aborigines, Asians, or African-ancestored persons, whose well-being has never been perceived as crucial to the best interest of the country. Rather, it was the burgeoning political power of Canada's French-language minority that resulted in significant broad based efforts to embrace cultural or ethnic difference. This is seen in the history of the concept of "minority" in Canada, in the attention given to the "Quebec Question" and relative inattention to the plight of blacks in Canada, and in the embrace of anti-racism as a means of articulating "Canadianness," not as a means of promoting the interest of blacks.

1. The Canadian Concept of Minority is Centered on Language Minorities Rather than Racial Minorities

The concept of "minority" in Canada has been best understood as a reference to language minorities; understanding minority to encompass visible minorities such as blacks is a relatively recent phenomenon.⁴⁶ As one observer has written: Although one may find references to cultural and visible minorities in recent normative discourse, the notion of minority in Canadian law has traditionally referred to Francophone and Anglophone identities, with their accompanying historic attachment to the Catholic and Protestant religions.⁴⁷ Indeed, as a general proposition, understanding the relationship between the majority and the minority is a relatively new concept in much of Western history and political discourse.⁴⁸ As one commentator has observed: "Let us first remember that even the very notion of minority is recent in political history and the question of the relationship between the majority and the

proclamation freed no slaves, its terms having been carefully limited to those areas still under the control of the Confederacy, and thus beyond the reach of federal law." Bell at 6. But see LA WANDA COX, LINCOLN AND BLACK FREEDOM: A STUDY IN PRESIDENTIAL LEADERSHIP (1981) (arguing that ending slavery was always a primary goal of Lincoln and that any hesitation in that regard was due to his implementation of a deliberate strategy for black freedom).

45. Bell, *supra* note 43, at 6.

46. See, e.g., Jean-Francois Gaudreault-Desbiens & Daniel Pinard, *Les Minorites En Droit Public Canadien*, 34 R.D.U.S. 197, 199 (2003).

47. *Id.* Although one may find references to cultural and visible minorities in recent normative discourse, the notion of minority in Canadian law has traditionally referred to francophone and Anglophone identities, with their accompanying historic attachment to the Catholic and Protestant religions.

48. Guy Rocher, *Droits Fondamentaux, Citoyens Minoritaires, Citoyens Majoritaires*, in DROITS FONDAMENTAUX ET CITOYENNETE: UNE CITOYENNETE FRAGMENTEE, LIMITEE, ILLUSOIRE? 25-33 (1998).

minority is barely more than a century old. The issue of minorities appeared only slowly across the western history of the last century, and was mostly seen in the last decades.”⁴⁹

Defining the concept of minority in political and juridical settings could only be slow, given the fact that the word encompassed numerous groups who had little in common such as religious minorities, linguistic minorities, ethnic and racial minorities.⁵⁰ In the taxonomy of minority status as it developed in Western political and legal theory, it became clear early on that rights of racial minorities were of little import to Western societies and had even less impact on Western thought until relatively recently.⁵¹ Hence, the development of norms addressing minority concerns appears to have been little directed at responding to collective or even individual black Canadian concerns. Rather, the term minority has for the most part in the Canadian context been focused on the Québécois, a group once polemically referred to as the “niggers” of Canada.⁵² Indeed, fears of social and political fragmentation of the Canadian nation-state along the lines of linguistic identity rather than racial identity have long been a major driver of Canadian law, politics and society.

2. Blacks in Canada Have Traditionally been Sacrificed in the Quest to Address the “Quebec Question”

It has been asserted that one reason for the idea of federalism expressed via the 1867 British North America Act⁵³ was an effort to address the long simmering “Quebec question”—the unique cultural, juridical, and linguistic norms of Quebec.⁵⁴ However, even the federalization wrought by the British North America Act did little to end the tensions of the Francophone minority and their concerns about social and legal isolation. It had become increasingly apparent by the early twentieth century that maintaining anything resembling an explicitly racist state could endanger the rights of minority French speakers. This began to be reflected in the discursive practices⁵⁵ of both jurists and

49. *Id.* Let us first remember that even the very notion of minority is recent in political history and the question of the relationship between the majority and the minority is barely more than a century old. The issue of minorities appeared only slowly across the western history of the last century, and was mostly seen in the last decades.

50. *Id.* at 32.

51. Joseph Heim, *The Demise of the Confessional State and the Rise of the Idea of Legitimate Minority*, in MAJORITIES AND MINORITIES 11-23 (1990).

52. See, e.g., PIERRE VALLIÈRES, *WHITE NIGGERS OF AMERICA: THE PRECOCIOUS AUTOBIOGRAPHY OF A QUEBEC “TERRORIST”* (1971) (discussing the subordinate position of French Canadians in Quebec and Quebec’s role as a colony of both Canada and the United States).

53. BRITISH NORTH AMERICA ACT, 30 & 31 Vict., c. 3 (Can.).

54. *Id.* at 200-03.

55. “Discursive practices” is a concept drawn from the work of Michel Foucault. See Michel Foucault, *History of Systems of Thought*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS BY MICHEL FOUCAULT 199, 200 (1977). Foucault applied the terms ‘discursive practices’ and ‘discursive formation’ to the analysis of particular institutions

legislators in cases involving claims of racial discrimination.

For example, in *Christie v. the York Corporation*,⁵⁶ plaintiff Fred Christie, a black man accompanied by another black man and a white man, was refused a beer by the employees of a tavern because they had been instructed not to serve black persons. All three of the men sued for \$200 in damages based on the humiliation they suffered at the refusal. Although Christie prevailed at the trial level in the Quebec Superior Court,⁵⁷ he lost on subsequent appeals to the King's Bench⁵⁸ and the Supreme Court of Canada.⁵⁹ The majority of the Supreme Court found that the case fell under the "general principle of the freedom of commerce"⁶⁰ and that the tavern was, when refusing to serve the appellant, "strictly within its rights."⁶¹ However, in a dissenting opinion at the intermediate level of appeal to the King's Bench, Judge Antonin Galipeault noted that if tavern owners could bar blacks, they could also deny entry to Jews, Syrians, the Chinese, and the Japanese. He reasoned then that religion or language might be the next grounds of exclusion, thus raising the specter of anti-Québécois bias.⁶² In this context, blacks become the miner's canary, unwitting victims whose mistreatment serves as the harbinger of ills that may ultimately harm members of other racial, ethnic, or cultural groups in Canada.⁶³

When not serving as bellwethers of social ills, blacks in Canada are frequently employed as the ballast that keeps political boats afloat, to be retained or jettisoned as the political fortunes of parties waxed or waned. A recent example of this phenomenon has been the inclusion of blacks in Quebec sovereignty political movements. The Parti Québécois, or Bloc Québécois as it is also known, has historically been an almost all white party, one of whose principal goals has been Quebec sovereignty.⁶⁴ Blacks, immigrants and others not of French Canadian heritage were not courted as members, and were often seen as a hindrance to Québécois goals. For instance, in 1995, when the Parti

and their ways of establishing delimitations for a field of objects and the definition of a legitimate perspective of an agent within a particular field of knowledge. *Id.* Discursive practices, however, "are not purely and simply ways of producing discourse. They are embodied in technical processes, in institutions, in patterns for general behavior, in forms for transmission and diffusion, and in pedagogical forms which, at once, impose and maintain them". *Id.* at 200.

56. *Christie v. York Corp.* (1937) 75 Que. S.S. 136 (Can.).

57. *Id.*

58. *Christie v. York Corp.* (1938) 65 Que. K.B. 104 (Can.).

59. (1940) S.C.R. 139 (Can.).

60. *Id.* at 140.

61. *Id.*

62. *York Corporation v. Christie* (1938) 65 Que. B.R. 104 (Que. K.B.).

63. For a discussion of the notion of blacks as an early warning system to protect against broader societal ills, see LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002) (arguing that ignoring racial differences has failed as a social policy and that continuing in this direction can only lead all citizens to peril).

64. See, e.g., DOROTHY WILLIAMS, *THE BLACKS OF MONTREAL, 1628-1986: ESSAY ON URBAN DEMOGRAPHY* (1998).

Québécois lost its electoral bid for sovereignty in a referendum,⁶⁵ the loss was blamed on “money and the ethnic vote.”⁶⁶ However, more recently, part of a clear strategy to overcome the strong showing of the Liberal Party in Quebec is to marshal the votes of Black Caribbeans, Africans, and other new Francophone immigrants.⁶⁷ This was seen in the unprecedented election of Maka Kotta, a Cameroonian by birth, to the House of Commons as a Parti Québécois representative. Maka Kotta is said to be the first African-Québécois to sit in the House of Commons. Moreover, the Bloc in 2005 nominated several candidates of African-ancestry for district elections in Quebec in 2006.⁶⁸ Once it appeared that Quebec blacks might be shifting political allegiance, at least one Liberal politician betrayed his anti-black bias. With the election of Maka Kotta in Quebec, a Liberal party worker, Jean-Paul Carrier could not restrain racist rhetoric, telling a reporter “Allez voir le negre que les gens viennent d’élir (Go see the negro that the people have just elected),” when asked about the Liberal party’s loss to the Bloc.⁶⁹

This attempt at outreach and inclusion of blacks in Quebec may be seen as a positive and hopeful sign of political maturity of the Bloc Québécois. A more cynical view suggests, however, that blacks are simply pawns in the political battle between the Liberals and the Bloc. Some of this might be seen in the furor surrounding the appointment by Queen Elizabeth II of Quebec resident Michaëlle Jean as Governor General in September 2005. Born in Haiti, Jean is Canada’s first black governor general, the representative of the British monarch in the Canadian commonwealth, and she is thus Canada’s *de facto* head of state. Some observers believed that then Prime Minister Paul Martin, a member of the Liberal Party, recommended Jean in an effort to win votes in Quebec, given the Liberal Party’s poor showing in the previous election.⁷⁰ Quebec sovereigntists, however, reacted with vitriol at Jean’s appointment.⁷¹ For them, the appointment of Jean as Governor General was evidence of her lack of

65. On October 30, 1995, the Parti Québécois, then comprising the Quebec government, held a referendum on sovereignty. The referendum failed by only a narrow margin, having been defeated by 50.6 percent to 49.4 percent. See VIVA ONA BARTKUS, *THE DYNAMIC OF SECESSION* 187-88 (1999).

66. This statement was made by Jacques Parizeau, a noted Quebec separatist who served as Premier of Quebec from 1994 to 1996, on referendum night in 1995. MICHAEL LANE BRUNER, *STRATEGIES OF REMEMBRANCE: THE RHETORICAL DIMENSIONS OF NATIONAL IDENTITY CONSTRUCTION* 68, 84 (2002).

67. See, e.g., Clifford Krauss, *Separatists in Quebec Seek Immigrant Votes*, N. Y. TIMES, Dec. 12, 2005, at A3.

68. *Id.*

69. *Liberals Can’t Count on Immigrants*, TORONTO STAR, July 24, 2005, at H2. Note that while the French “negre” was historically treated as the equivalent to the English “negro” and seen as a neutral referential for black or African-ancestored people, in recent decades negre has taken on a more pejorative meaning.

70. See, e.g., *A Gamble that May Pay off for Martin*, TORONTO STAR, Sept. 28, 2005, at A6.

71. Kathleen Harris, *Dad: She Has Never Been A Separatist, Never, Never, Never*, NEWS SERVICE, Sept. 28, 2005, at 5.

political integrity, as there were allegations that Jean and her French-national husband had been strong supporters of the Quebec sovereigntist movement.⁷² On this basis, sovereigntists were among the most vociferous opponents of Jean and they lambasted Jean publicly as a political turncoat.⁷³ As there was evidence suggesting that Jean and her husband may have had some association with sovereigntists, this reaction may have been warranted.⁷⁴ However, the almost violent reaction to Jean's appointment could equally as well have been evidence of a patriarchal attitude in which Francophone blacks and other new immigrants are viewed as not sufficiently Canadian and hence not permitted to exercise their own political wills.⁷⁵

3. Anti-Racism Movement in Canada is Not Truly Designed to Assist Blacks, but to Promote the Notion that Equality is Emblematic of Canadianess

Operating along with the growing political power of minority French speakers that led many to eschew explicitly discriminatory legal norms was a growing desire to articulate the meaning of "Canadianess." This entailed distinguishing Canada from its infamously and explicitly racist neighbor to the south, the United States, and required clear cut efforts to enunciate Canada's unique cultural and legal heritage of equality. Meanwhile, however, blacks in Canada were continually made the victims of discriminatory acts, and offered no relief in the courts.

What these cases suggest is that Canadian legal discourse, while arguably adhering to race-neutral policies promoting the freedom of the individual shopkeeper or proprietor, had the effect of promoting racist practices. Even if there were no official policies of de jure racism in Canada, it is the unofficial social and legal practices, the "soft law"⁷⁶ systems, which ultimately allowed anti-Black racism to have quite as much sting in Canada as it did in the United States.

72. Licia Corbella, *GG Selection An Affront; FLQ Victim Says Pm's Appointment Of Michaelle Jean Is An Insult To All Of Canada*, TORONTO SUN, at 19.

73. *Id.*

74. *Id.* Jean appeared in her husband Jean-Daniel Lafond's 1991 film, "La manière negre" along with members of the Front de Liberation de Quebec (FLQ), a radical Quebec separatist group, and in the film Jean makes comments that may be interpreted as indicating her support for Quebec independence.

75. See, e.g., Kathleen Harris, *New Vice-Regal Must Prove Herself, Critics Say*, LONDON FREE PRESS (Ontario), Sept. 25, 2005, at 14; *Memo to Mme Jean: "Get Out and See the Country"*, TORONTO STAR, Sept. 25, 2005, at H5.

76. Soft law consists of norms that lack the full "jurisdiction" or force of traditional "hard" law in that they are not necessarily created or enforced by legislatures or courts. Nonetheless, "soft law" may be equally as binding as hard law and offer the same normative content. I refer to the conclusions of the courts in these cases as soft law because notwithstanding the fact that the Canadian courts seem to eschew explicitly race-based legal norms, they achieve the same effect.

C. The Charter of Rights and Freedoms and Anti-Discrimination Norms Still do not Transform the Difference-Denial Model into a Useful Approach to Combating Anti-Black Discrimination

The Charter of Rights and Freedoms (*hereinafter* the Charter) is noteworthy for establishing anti-discrimination norms. Created by the Constitution Act of 1982, the Charter was part of a larger set of constitutional reforms that, among other things, adopted domestic amending powers and recognized Aboriginal rights.⁷⁷ With the advent of the Charter, difference-denial norms persisted in post-modern anti-discrimination discourse, as it seemingly forbade anti-black discrimination with its prohibitions on discrimination based on race or color.⁷⁸ Proponents of the Charter hailed its scope as going well beyond similar documents in other countries. With its component section on equality, section 15, the Charter contained not just an anti-discrimination provision, but it was a source of equality rights.⁷⁹ Moreover, section 15's articulation of specific grounds on which discrimination is prohibited effectively broadened the categories of claimants. Early Charter jurisprudence supported this notion by suggesting that grounds analogous to those which are expressly mentioned are also included, hence enabling courts to "read in" other grounds and thereby expand constitutional protection against discrimination in line with the spirit of the Charter. Despite the parameters of the Charter, it falls short as a source of broad anti-discrimination protection.

The Charter falls short on its state action requirement because the courts have not defined state action to include state sanctioning of conduct by private actors. Only discrimination practiced by public entities may be addressed under the Charter. The Charter does not address discrimination practiced by private actors, even those who invoke public entities to valorize or implement their acts. While the United States Constitution's anti-discrimination provisions, most notably the Fourteenth Amendment, also require "state action," a whole separate jurisprudence has developed in the United States that addresses "indirect" state action claims and permits Fourteenth Amendment claims where the primary actors are ostensibly private.⁸⁰ Without similar jurisprudence in Canada, the Charter remains too narrow to address a vast

77. PETER HOGG, CONSTITUTIONAL LAW OF CANADA, STUDENT EDITION, 66-7 (2004).

78. The guarantee of equality rights, found in Section 15 of the Charter, states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), schedule B of the Canada Act, 1982, ch. 15 sched. B (Eng.).

79. See Bruce Porter, *Twenty Years of Equality Rights: Reclaiming Expectations*, 23 WINDSOR Y.B. ACCESS JUST. 145, 152-53 (2005).

80. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that judicial enforcement of a private restrictive covenant constituted state action for purposes of the Fourteenth Amendment to the United States Constitution).

portion of the discriminatory harms that blacks actually suffer.

The Charter also falls short as a source of anti-discrimination protection current because of the mercurial understandings about the meaning of discrimination in the Canadian society, which has caused the interpretation of section 15 to vary significantly over the past several years. Until the late 1990s, it was sufficient to show a distinction based on a prohibited ground, to establish discrimination under the Charter. The burden then shifts to the government to justify the discrimination. Beyond the simple assertion of disparate treatment on forbidden grounds, more recent claimants under section 15 have been required to show that the government's law, policy, or practice has drawn a distinction on a ground that is either listed in section 15 or is similar and that the distinction constitutes a "violation of essential human dignity."⁸¹ This change in the Charter equality jurisprudence has meant that claimants were ultimately hindered in their efforts to bring claims. Indeed, constitutional scholar Peter Hogg has criticized the requirement as being "vague, confusing and burdensome to equality claimants."⁸²

Because the Constitution, in its effort to centralize power, limited certain provincial powers and, in particular, narrowed Quebec's power to put into place French language schools, there was significant Québécois discontent with the Charter, and the Quebec Premier was the only one of the eight provinces who rejected the reforms.⁸³ Subsequent efforts to address Quebec's concerns were the subject of the Meech Lake Accord of 1987 and the Charlottetown Accord of 1992, but neither of these succeeded in enacting the constitutional amendments that were acceptable to all of the provinces.⁸⁴ These failures have in part fueled the Quebec sovereignty movement.⁸⁵ The Charter's shortcomings do not render it hollow or useless. Other provisions, like sections 16, 16.1, 17-23, protect minority rights and reinforce anti-discrimination norms.

D. Difference-denial anti-racism: The Mirror Twin of Difference-Denial Racism?

A final problem with the difference-denial model of *anti-racism* is that it bears a frightening resemblance to what could be characterized as the

81. *Law v. Canada*, (1999) 1 S.C.R. 497, 502 (Can.).

82. PETER HOGG, *CONSTITUTIONAL LAW OF CANADA*, STUDENT EDITION § 57.2(b) 1101 (2004); Dean Patrick Monahan, *Equality Guarantee*, CANWEST NEWS SVC., Apr. 14, 2005, available at <http://osgoode.yorku.ca/media2.nsf/83303ffe5af03ed585256ae6005379c9/b6a7dfc63432050d85256fe3004e5fb6!OpenDocument>.

83. *Id.*

84. Subsequent efforts to address Quebec's concerns were the subject of the Meech Lake Constitutional Accord of 1987 and the Charlottetown Accord of 1992, but neither of these parleys succeeded reaching the goal of enacting constitutional amendments. See, e.g., Hogg, *supra* note 77, at 67-70.

85. *Id.*

difference-denial model of *racism*, which has been endemic to Canadian law and policy. Notwithstanding the long history of racism in Canada, surprisingly few examples of widespread, systemic racism were carried out under explicitly racist laws unlike the case in the United States. Instead, implicit racism and the denial of the role of race has historically taken the lead in the oppression of racial minorities.

For example, in Nova Scotia in the mid nineteenth century, segregation was often the norm in places of public accommodation even though there were no positive segregation laws. In the 1946, Viola Desmond, an African-ancestored woman, was prosecuted for failing to pay the appropriate tax on a cinema ticket. Desmond had attempted to purchase a ticket for the lower floor of the theater, apparently unaware that that section of the theater was reserved for whites only. When a theater worker sold her a ticket for the black designated balcony, she refused to go and seated herself on the main floor. She was subsequently arrested and convicted for the failure to pay the tax associated with the downstairs seat, which, because of its slightly higher price, had a higher tax. What was striking about the Desmond case was that the prosecution proceeded through the trial and the appeal as if race had played no part in the matter.⁸⁶

Anti-black immigration was another historic example of difference-denial racism. The government did not enact a law that explicitly barred black immigration or an anti-black head-tax, rather the laws barred blacks by silent reference.⁸⁷ Denial of racial difference, if not the reason for anti-black racism, has certainly been a mechanism for perpetuating it.

Given this background, the elimination of race in legal discourse, which would be the triumph of the difference-denial anti-racism norm, would mean not the end of racism but the end of all efforts to address racism.⁸⁸ This is because the difference-denial model of countering anti-black racism, like its senior sister, color-blind ideology, allows for an eyes-wide-shut approach to the realities of anti-black racism by adopting the norms and language of an abstract liberalism wherein the central themes are social justice via the abnegation of racial difference and the promotion of the individual apart from any group attributes.

86. See CONSTANCE BACKHOUSE, *COLOUR-CODED: A LEGAL HISTORY OF RACISM IN CANADA, 1900-1950*, 226-50 (1999).

87. *Id.*

88. See, e.g., EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 15-16 (2003) (addressing how color-blind ideology ultimately preserves racial inequality).

II. THE SUI GENERIS MODEL OF ABORIGINAL RIGHTS PROVIDES A GUIDELINE TO ANTI-RACIST JURISPRUDENCE

John Borrows and Leonard Rotman argue that in confronting Aboriginal rights, courts throughout the Anglo legal system have characterized those rights as *sui generis*.⁸⁹ They explain that *sui generis*, Latin for “of its own kind or class,” connotes uniqueness or clear difference.⁹⁰

A. The History of Aboriginal Sui Generis Rights in Canada

The concept of *sui generis* rights was seen early on in Canadian cases adjudicating Aboriginal rights to explain the way in which Aboriginal rights to land, referred to as “Indian title” or Aboriginal title, differed from common law real property rights. Citing *Guerin et al. v. The Queen*⁹¹ as the source of the phrase *sui generis*, the authors explain that the Supreme Court of Canada used the expression to encompass the notion that Aboriginal persons, because of their historic use of land and their relationship with the European sovereigns who held dominion over them, possessed interests in land that did not flow from and were independent of traditionally understood common law interests.⁹² This notion of Aboriginal real property rights as *sui generis* was later extended to hunting, fishing, and other usufructuary rights.⁹³ Later, there came a pivotal moment in Canadian jurisprudence when the phrase *sui generis* was used more broadly to describe all Aboriginal rights.⁹⁴ In *Delgamuukw v. British Columbia*,⁹⁵ Justice Lambert stated:

I am satisfied that a jurisprudential analysis of the concepts underlying “rights” in common law or western legal thought is of little or no help in understanding the rights now held by aboriginal peoples and now recognized and affirmed by the common law and by the Constitution... In short, it is not only aboriginal title to land that is *sui generis*, all aboriginal rights are *sui generis*.⁹⁶

Since *Delgamuukw*, “the *sui generis* appellation potentially turns negative characterizations of Aboriginal difference into positive points of protection.”⁹⁷ *Sui generis* Aboriginal rights stem from alternative sources of law that reflect the unique historical presence of Aboriginal peoples in North America.⁹⁸

89. John Borrows & Leonard I. Rotman, *The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?*, 36 ALBERTA. L. REV. 9 (1997).

90. *Id.*

91. 13 D.L. (1984) 2 S.C.R. (4th) 321 (Can.).

92. Borrows & Rotman, *supra* note 89, at 20.

93. *Id.*

94. *Delgamuukw v. British Columbia*, (1997) 3 S.C.R. 1010 (Can.).

95. *Id.*

96. *Id.* at 643-44.

97. Borrows & Rotman, *supra* note 89, 11.

98. *Id.* at 24-25.

Hence, one of the ways that *sui generis* Aboriginal rights differ from common law rights is that Aboriginal peoples had and continue to have their own system of law apart from the common law system.⁹⁹ This is not to indicate that *sui generis* Aboriginal rights are the only source of law for Aboriginal peoples. Rather, *sui generis* Aboriginal rights represent a bridging of Aboriginal and European legal customs.¹⁰⁰ This bridging is not without problems, and Borrows and Rotman identify two possible sources of challenge to their conception of *sui generis* rights, which they identify as external and internal.

The external challenge may be succinctly summed up as the “Audre Lord” query: can the master’s tools be used to dismantle the master’s house?¹⁰¹ In this context, the question is whether using common law norms can deliver justice to people who are outsiders to the system. Hence, while *sui generis* Aboriginal rights may help jurists to avoid “hammering the square pegs of indigenous laws into the round holes of conventional legal categories,”¹⁰² its use in conjunction with the common law may reinforce the larger common law system with all of its attendant ills.¹⁰³

The internal challenge concerns itself with whether the application of broad *sui generis* principles within or in conjunction with the common law may create disadvantages for Aboriginal people. As the authors duly note, this is a question that may be asked by any claimant under common law who seeks relief that is in some sense a confrontation to previously understood norms.¹⁰⁴ This may either be because of the identity of the claimant, the relief he is seeking, or both.

In the case of the *sui generis* doctrine, history has shown that it is easily susceptible to being used to diminish Aboriginal rights.¹⁰⁵ In addition, there has been very little judicial guidance to explain the full nature, scope, and application of *sui generis* Aboriginal rights. Most courts have confined themselves to assertions about the analogous nature of *sui generis* rights to common law and international law without clear statements as to the way in which such alternate norms are or are not compatible.¹⁰⁶ In practice, this means that judges attempting to apply the standard are left with a surfeit of discretion, leaving Aboriginal claimants to the mercy of jurists who may be entirely lacking in knowledge about Aboriginal customs or culture.¹⁰⁷ Hence, *sui*

99. *Id.*

100. *Id.*

101. *Id.* at 28 (citing M.E. Turpel, *Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences*, 6 CDN. HUM. RTS. Y.B. 3, 6 (1989)).

102. *Id.* at 28 (citing *Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?* 2 N.J.C.L. 163, 185 (1993)).

103. *Id.*

104. *Id.* at 26.

105. *Id.* at 32.

106. *Id.*

107. *Id.* at 32-33.

generis rights are “an empty box” which has yet to be filled with substantive procedures and protections.”¹⁰⁸ This of course leaves open the possibility that the *sui generis* doctrine will result in fewer rights for Aboriginal persons, or, no more rights than they now possess.¹⁰⁹

B. Despite the Challenges of the Sui Generis Rights Model, it Offers a Promising Alternative Jurisprudential Approach

While acknowledging the problems inherent in the *sui generis* model, Borrows and Rotman express confidence in the modern common law’s ability to embrace the history, value, and meaning of Aboriginal norms and incorporate them into the common law.¹¹⁰ The authors argue that the law alone will not guide the growth in Aboriginal rights. Rather, Aboriginal rights will be forged out of the broad confluence of “political pressure, economic development, social recovery and the grass-roots practices of Aboriginal rights.”¹¹¹

Borrows and Rotman argue that part of the problem stems from the Supreme Court’s focus on *who* holds the rights as opposed to *how* the rights have come to exist.¹¹² The answer seems to be that the Court must focus on grounding the *sui generis* rights of Aboriginal persons in their laws, traditions, and customs because to do otherwise would lead the Court to base Aboriginal rights on impermissible racialized stereotypes.¹¹³

III. THE SUI GENERIS MODEL OF BLACK RIGHTS IS A FAVORABLE ALTERNATIVE TO DIFFERENCE DISCOURSE

If *sui generis* Aboriginal rights are in part premised upon the existence of a separate Aboriginal legal system, this of course presents an immediate conundrum in arguing for the concept of *sui generis* black rights: if *sui generis* black rights are analogous to Aboriginal *sui generis* rights, must they have an independent source of law that governs them? Must blacks assert a claim of prior sovereignty? Having come to North America from many different African ethnic groups, at many different times, often with stops along the way, and lacking any specific pan-African legal culture or body of laws, what is the basis of a black claim to *sui generis* rights? In short, how is blackness translated into a concrete claim about rights?

Creating a functional model of black *sui generis* rights is a 5-step process.

108. *Id.* at 33.

109. *Id.* (citing W.I.C. Binnie, *The Sparrow Doctrine: Beginning of the End or End of the Beginning?* 15 QUEEN'S L.J. 217, 221-22 (1990)).

110. *Id.* at 27.

111. *Id.*

112. *Id.* at 36.

113. *Id.* at 36-37.

The first is to acknowledge and understand the history of black presence and black oppression in Canada. The second is to identify a source of *sui generis* black rights squarely located within this longstanding and continued oppression of blacks. Third is recognizing the opposing side of a history of black oppression in the creation of a legal culture of African-ancestored people that has, like the Aboriginal culture, been developed both in law and in societal law-like practices and has both internal and external components and is thus a second source for identifying *sui generis* black rights. Fourth, these sources must be utilized to locate the exact parameters of *sui generis* black rights. Fifth, the possible challenges and critiques of the model must be addressed so as to strengthen its viability as a jurisprudential approach.

A. The History of the Oppression of Blacks in Canada

The presence of blacks in Canada has been documented as early as 1608, when blacks first arrived as slaves.¹¹⁴ However, from their early history in Canada, blacks have been counted among the “non-canonical” people—those who were not part of the European-ancestored white majority.¹¹⁵ From their beginnings as slaves to their continuing residence in segregated, inadequate housing¹¹⁶ and attendance at failing, underserved and often segregated schools¹¹⁷ to their disparate treatment in employment¹¹⁸ and the criminal justice system,¹¹⁹ blacks have had a qualitatively worse experience in Canada than

114. COLIN A. THOMSON, *BLACKS IN DEEP SNOW: BLACK PIONEERS IN CANADA* 95 (1979).

115. RICHARD J.F. DAY, *MULTICULTURALISM AND THE HISTORY OF CANADIAN DIVERSITY* 30 (2000).

116. Visible-minority residents of large Canadian cities are increasingly concentrated in neighborhoods where many of the same ethno-racial group live, and this is particularly true of people of African ancestry. While those arriving recently are more likely to live in such neighborhoods than those arriving 10 or 20 years ago, the odds of living in such a neighborhood do not decline even after being in Canada for 10 to 20 years. However, because of relatively small numbers of blacks in Canada, black segregation does not approach the black/white segregation of many United States urban areas. See Feng Hou, *Recent Immigration and the Formation of Visible Minority Neighborhoods in Canada's Large Cities* (Statistics Canada, Analytical Studies Branch, Research Paper Series 2004), available at <http://www.statcan.ca/bsolc/english/bsolc?catno=11F0024M20040007442>.

117. CLAYTON JAMES MOSHER, *DISCRIMINATION AND DENIAL* 96-98 (1998).

118. According to the 2002 report of the African Canadian Legal Clinic, blacks in Canada were far less frequently employed in professional capacities than other visible minorities, and on the average earned at most only 80% of the income that white Canadians earned on the average. African Canadian Legal Clinic, *Anti-Black Racism in Canada: A report on the Canadian government's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (2002).

119. Despite their relatively small numbers in Canada, African-ancestored persons are vastly over-represented in police stops, arrests, and in criminal convictions. According to Corrections Canada, Blacks constitute 7% of inmates, while representing only 2% of the province's population. Shelley Trevethan & Christopher J. Rastin, *A Profile of Visible Minority Offenders in the Federal Canadian Correctional System*, Research Branch Correctional Service of Canada, June 2004, available at http://www.csc-scc.gc.ca/text/rsrch/reports/r144/r144_e.shtml#LinkTarget_24738. See, e.g., David M. Tanovich,

European-ancestored Canadians and often even worse than other racial minorities. What accounts for this treatment of blacks? Two frequently posited reasons are the fear and hatred of starkly visible racial difference between blacks and whites, and the white belief in black moral and intellectual inferiority.

While it is true that proximity to whites in North America had often resulted in creating a number of African-ancestored persons who assimilated European ways, such persons were by no means fully assimilated into white society. This is true notwithstanding the fact that throughout much of their early history in Canada, African-ancestored persons shared many of the cultural attributes of their white counterparts: they spoke English or French, they were Christians, they served as soldiers in every Canadian conflict, and they were not "exotic or inscrutable in their dress, diet or religion."¹²⁰ The only clear distinction between African-ancestored Canadians in the early years of the country and European-ancestored Canadians was color, and this color difference alone was often cited as the reason for white bias.¹²¹ While color prejudice was a basis for disparate treatment of blacks, there was also widespread belief in baneful stereotypes about blacks, and in the innate inferiority of blacks. Blacks were said to have "defects of character,"¹²² exemplary of which were their "animal passions,"¹²³ "inherent laziness,"¹²⁴ and "lack of willpower."¹²⁵ Moreover, blacks were held to be "deeply superstitious"¹²⁶ and possessed of "not keen imaginations",¹²⁷ with "no strict regard for the truth."¹²⁸ Finally, blacks were believed to be the source of mounting racial tension in the United States in the decades after the Civil War, and many Canadian whites believed that the way to avoid such problems in Canada was to adopt a policy of limiting black presence in Canada.¹²⁹ Such are only a few of the reasons that have been asserted over the years to justify anti-

Stop In The Name Of The Law: What Law? Racial Profiling And Police Practice In Canada: E-Racing Racial Profiling, 41 ALBERTA L. REV. 905 (2004); See also David M. Tanovich, *Using The Charter To Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention*, 40 OSGOODE L.J. 145 (2002).

120. JAMES W. ST. G. WALKER, RACE, RIGHTS, AND THE LAW IN THE SUPREME COURT OF CANADA 122 (1997).

121. *Id.*

122. *Id.*

123. *Id.* at 126.

124. *Id.*

125. NINETTE KELLEY & MICHAEL TREBILCOCK, THE MAKING OF THE MOSAIC: A HISTORY OF CANADIAN IMMIGRATION POLICY 154 (1998).

126. Mosher, *supra* note 117, at 87 (citing H.G. Delessier, *The West Indian Negro of Today*, CANADIAN MAGAZINE 15, 115-21 (1900).

127. *Id.*

128. *Id.*

129. HAROLD TROPER, ONLY FARMERS NEED APPLY: OFFICIAL CANADIAN GOVERNMENT ENCOURAGEMENT OF IMMIGRANTS FROM THE UNITED STATES 55 (1972); See also ROBIN WINKS, THE BLACKS IN CANADA: A HISTORY 298 (1971).

black racism, in Canada. As a result of such disdain for blacks, there were a number of measures put into place to keep their numbers in Canada low.

Though, in the immediate aftermath of the United States Civil War and in the decades that followed, over 30,000 blacks left Canada for the United States (reducing the black population of Canada from over 50,000 in 1860 to approximately 17,000 in 1911), and though only 444 blacks entered Canada from 1904-1910, there was evidence of vigorous opposition to further black immigration to Canada.¹³⁰ Beginning in the early 1800's, there were calls for restrictions on black immigration from the Maritime Provinces all the way to Vancouver.¹³¹ Blacks were frequently turned back at border crossings, and there was even talk of establishing a head tax on blacks (such as had been placed on Chinese entrants to Canada) or barring blacks from entering the country altogether.¹³²

In 1911, a federal act barring black immigration was, in fact, passed; however, this act was shortly thereafter repealed, apparently as a result of concerns that it was such an unambiguous statement of anti-black prejudice that it potentially harmed Canada's image within the international community as a haven for blacks, and upset a small but politically active group of black voters in Nova Scotia and Ontario.¹³³ In the end, black immigration continued to be limited by informal bars in the form of medical and character examinations at entry points.¹³⁴ In 1952, the Canadian Immigration Act explicitly reaffirmed that entrants to Canada could be barred from Canada because of their national or ethnic origins, habits, customs or "modes of life", and the immigrant's unsuitability with regard to Canada's climate or perceived inability to become readily assimilated into Canadian society.¹³⁵ It was not until the 1960's that African-ancestored persons once again began to enter Canada in significant numbers, as a result of the changes wrought by the Immigration Act of 1967.¹³⁶

130. Mosher, *supra* note 117, at 90.

131. *Id.* at 91-92.

132. *Id.* at 92-93.

133. *Id.*

134. COLIN A. THOMSON, *BLACKS IN DEEP SNOW: BLACK PIONEERS IN CANADA* 75 (1979); see also Stewart Grow, *The Blacks of Amber Valley: Negro Pioneering in Northern Alberta*, 6 CANADIAN ETHNIC STUDIES 17-38 (1974).

135. IMMIGRATION ACT, R.S.C. 1952, ch. 325 (Can.).

136. The 1967 policy amended the 1952 Immigration Act by establishing a "point system" for the selection of immigrants that ranked independent immigrants according to their age, educational attainment, employment skills, language skills and financial resources or social resources such as already present family members. The goal of the point system was to create a more equitable selection system that met the needs of the Canadian economy. See *THE WORLD IN A CITY* 396 (PAUL ANISEF & MICHAEL LANPHIER EDS., 2003); See also *DARKENING THE COMPLEXION OF CANADIAN SOCIETY: BLACK ACTIVISM, POLICY-MAKING AND BLACK IMMIGRATION FROM THE CARIBBEAN TO CANADA, 1940S-1960S* (1994).

B. Oppression as a Source of Sui Generis Black Rights

The proposal that the historic oppression of blacks is the first source of *sui generis* black rights may be described as just what conservative advocates of color-blind ideology eschew: a notion of rights founded on black victimhood status. Let us suppose for a moment that this is the essence of my proposal. First, it can be seen that this is not as distinct from the Aboriginal model of *sui generis* rights that Borrows and Rotman propose as it may appear. Next, whites themselves are not loath to claim rights, and especially property rights, in victimhood status. This is evident in much of the United States jurisprudence surrounding the so-called reverse discrimination cases, which accord rights to innocent white victims who decry what they believe are ill-founded redistributions of rights to which they themselves are entitled based on merit.¹³⁷ Generally speaking, affirmative action programs in Canada have a strong footing, principally because Canadian Courts have the constitutional authority to uphold such programs.¹³⁸ While Canadian equity jurisprudence thus far has not clearly recognized "reverse discrimination" claims unless litigants demonstrate a history of disadvantaged treatment,¹³⁹ there remains the possibility that they will do so.¹⁴⁰ Therefore, the groundwork already exists in Canadian jurisprudence to allow forms of victimhood status to provide the basis for legal rights.

While the *sui generis* rights discussed in the Borrows and Rotman article are said to lay partly in the proto-legal norms of the Aboriginal peoples of

137. One of the arguments that the United States Supreme Court has invoked as a reason to invalidate racial affirmative action programs is that such programs interfere with the individual rights of the whites who are burdened by affirmative action designed to help blacks or other racial minorities. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 256, 310 (1978) (opinion of Powell, J.); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84 (1986) (considering burden on innocent whites in equal protection context); *cf. United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979) (considering burden on innocent whites in Title VII context).

138. Section 15(2) of the CHARTER OF RIGHTS AND FREEDOMS protects programs that seek to address societal inequities caused by race prejudice or other impermissible discrimination from challenges brought under section 15(1) of the Charter. Section 15(2) provides: "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedom), Kathleen E. Mahoney, *The Constitutional Law of Equality in Canada* 44 ME. L. REV. 229 (1992); John Hucker, *Towards Equal Opportunity in Canada: A New Approaches, Mixed Results* 26 ST. MARY'S L.J. 841 (1995).

139. BRUCE ZIFF, UNFORESEEN LEGACIES: REUBEN WELLS LEONARD AND THE LEONARD FOUNDATION TRUST 156 (2000).

140. *See* Christopher D. Totten, *Constitutional Pre-commitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach*, 21 BERKELEY J. INT'L L. 27, 47 (2003). The author cites the case of *Law v. Canada*, (1999) S.C.R. 497, 540 (Can.) for an indication that the Canadian Supreme Court may yet recognize a "novel" discrimination claim or one growing out of discrimination against usually advantaged groups.

North America, it is important to acknowledge that the *sui generis* model of Aboriginal rights as it was earliest seen in Anglo jurisprudence (not by name but by effect) was based on an understanding of Aboriginal peoples as being inferior to whites and, hence, outside of English common law norms. Accordingly, Aboriginal rights, particularly Aboriginal real property rights, were of a lesser quantum than those normally accorded under the English common law. This was not necessarily because of differing Aboriginal legal understandings about the nature of land ownership. It has been frequently asserted that one of the decisive reasons for decisions like the one in the case of *Johnson v. M'Intosh* was that the Aboriginal people in question used the land "differently" than Europeans and did not make "full" claims to land as did Europeans under Western legal systems.¹⁴¹ However, it does not require a particularly close reading of the case of *Johnson v. M'Intosh* to understand that race was a salient factor in the decision.

While both the plaintiff and the defendant were white in *Johnson v. M'Intosh*, the problem with the plaintiff's claim was that his title had flowed from Aboriginal persons, and Aboriginal land use, because it was shared and/or transitory, could not be viewed as encompassing the same rights as common law land ownership. In fact, *Johnson v. M'Intosh* runs counter to common law norms by claiming to look at the subjective beliefs of the Indians regarding land use (assuming that this was in fact what the Indians believed) rather than relying upon the common law norm that would look to the objective manifestations of ownership to understand how to view the land claim.¹⁴² But that is just the point—the Aboriginals in *Johnson v. M'Intosh* had *sui generis* rights not because they had their own legal system or system of land ownership, but because their "savage" nature placed them outside the full contemplation of the English legal system. The Aboriginals in *Johnson v. M'Intosh* were "in a state of nature" and had never been "admitted into the general society of nations."¹⁴³ The Aboriginals did not create their "difference"—the whites did. So, if anything is now due to the Aboriginals under a positive view of *sui generis* rights, these claims lay as much, if not more, in the redress owed for years of oppression created by the sub-legal status engendered by white racism as they do in theories under some alternative legal system.

The notion of rights based on oppression rather than on the notion of prior occupancy or sovereignty has been discussed before, and even in the context of Aboriginal people. For example, one commentator has observed that the rationale of prior occupancy is often a proxy for historic wrongs, and, as such,

141. 21 U.S. 543 (1823) [hereinafter *Johnson*].

142. Generally, in common law regimes, property was defined objectively via judicial decisions or legislation. Herbert Hovenkamp, *Private Property and the State*, in *THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY* 109, 111 (2003).

143. *Johnson*, 21 U.S. at 567.

is a "crude marker" for addressing issues of individual or collective identity.¹⁴⁴ I would add that the prior occupancy and sovereignty rationales are equally as inadequate for addressing the legal rights of a collective group. Moreover, it has been pointed out that "sovereignty" has more than one meaning. References to Aboriginal prior sovereignty often hearken back to pre-European governmental institutions in the Americas, entities with presumably all of the rights and powers of independent nation states.¹⁴⁵ However, it is abundantly clear that, with regard to discussions of Aboriginal persons in the Americas, current notions of sovereignty refer to a less encompassing meaning. Sovereignty in the Aboriginal context has typically come to mean collective legal or political autonomy within a nation state.¹⁴⁶

Finally, while the court in *Johnson v. M'Intosh* acknowledged that the "Indian nations" had, in the instance of that case, conducted negotiations and made treaties with the British (and later with the United States), this was not cited as evidence of their existence as a sovereign nation. Rather, the negotiations and any treaties resulting from them were viewed as exemplary of their "dependent condition."¹⁴⁷ According to the court in *Johnson v. M'Intosh*, the acquisition of territory via treaty was not a transaction between equals. Such accords arguably had little legal status given that Aboriginal territory was considered *terra nullius*.¹⁴⁸ The British government (and its successors in interest in North America) laid claim to Aboriginal land by right of settlement of "an unoccupied territory lacking any other comparable political entity to contest the claim."¹⁴⁹ The notion of treaties as evidence of sovereign rights was effectively dashed in both Canada and in the United States by the abrupt end of land cession treaties with Aboriginals in both nations. In Canada, for example, while land cession treaties accounted for approximately one half of the national territory, the last territories added - British Columbia, Northwest Territories, Northern Quebec, and the Inuit and Yukon areas - were attained by Canada's unilateral action.¹⁵⁰

In applying these principles to a *sui generis* model of black rights in

144. Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1333-34 (1993).

145. *Id.* at 1346-47.

146. *Id.*

147. *Johnson*, 21 U.S. at 568.

148. *Terra nullius* is a Latin phrase deriving from Roman law meaning "empty land" or "no man's land." Modern applications of the term stem from pre-Enlightenment doctrines describing land that was unclaimed by a sovereign entity recognized by European sovereigns as land that was not owned at all. See, e.g., HENRY REYNOLDS, *ABORIGINAL SOVEREIGNTY: REFLECTIONS ON RACE STATE & NATION* 1-15 (1997).

149. Neal Ferris, *Between Colonial and Indigenous Archaeologies Legal and Extra-Legal Ownership of the Archaeological Past in North America*, available at http://www.adamsheritage.com/articles/ferris_2004.htm.

150. Siegfried Weissner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 66-67 (1999).

Canada, it is not an obstacle that black Canadians are a heterogeneous group, with no independent sovereignty prior to their Canadian citizenship. Instead, their mere history of oppression within Canada itself demonstrates that they have historically been treated differently by the legal system than other Canadian citizens. This disparate treatment, in and of itself, and the need to accord redress for its ill effects, can form the basis for *sui generis* black rights within contemporary jurisprudence.

C. The Sui Generis Legal Culture of African-Ancestored Persons

Historically, African-ancestored persons in Canada and indeed, in all of North America, have had no collective nationality nor any explicit territory upon which to base claims of sovereignty. A possible exception to this is what I will call “post-occupancy” territorial sovereignty claims. Dating from the United States Civil War, there were calls for African-ancestored persons to be given their own states; many blacks took up this cry.¹⁵¹ A number of sources have suggested that the Pacific Northwest of the United States and the Pacific regions of Canada were at one time envisioned as “white man’s country,” with sovereign claims based upon notions of white supremacy, and from which blacks, Asians, and Aboriginal people would be excluded.¹⁵² There were also efforts towards achieving territorial sovereignty for African-ancestored persons outside of North America.¹⁵³ From the 1700’s onward in both Canada and the United States there were various movements whose goal was to “repatriate” freed blacks and former slaves to communities in Africa. In Canada, a substantial number of the persons who went to Africa on such schemes were “black Loyalists,” early black inhabitants of Nova Scotia who sided with the British Crown in the American Revolution, moved to Canada after the American victory, and some years later joined the exodus to Africa.¹⁵⁴ However, blacks in Canada, like blacks in the United States, have nonetheless sought to form what has been called “a black nationality”: a pan-African identity that encompassed a sense of self-knowledge, autonomy, freedom and safety.¹⁵⁵ It is this positive identity of black Canadians as their own entity - the opposing side of their identity as defined through oppression - which forms the second ground for defining a *sui generis* model to black rights in Canada.

This is actually true for both Canada and the United States as it has become increasingly apparent that the rhetoric of liberty and inclusion at the heart of both nations’ founding was not meant to include African-ancestored

151. See, e.g., PHILIP F. RUBIO, A HISTORY OF AFFIRMATIVE ACTION 157 (2001).

152. PETER WARD, WHITE CANADA FOREVER: Popular Attitudes and Public Policy Toward Orientals in British Columbia (1990).

153. See, e.g., Walker, *supra* note 120.

154. *Id.*

155. FLOYD J. MILLER, THE SEARCH FOR A BLACK NATIONALITY: BLACK EMIGRATION AND COLONIZATION 1787–1863, 49-51 (1975)

persons. Because of relatively low numbers, the Canadian presence is particularly problematic, as blackness in Canada as a historical presence is a “threatening invasion into the national imagination.”¹⁵⁶ Canadian blacks “are an absent presence always under erasure... Canadian blackness is a bubbling brew of desires for elsewhere, disappointments in the nation and the pleasures of exile.”¹⁵⁷

D. What Would *Sui Generis* Black Rights Entail?

Characterizing black rights as *sui generis* would mean a number of things. First, it would clearly articulate the threat inherent for African-ancestored persons in the universalizing notions of the Canadian multiculturalist mantra. The universalizing norms of Canadian multiculturalism carry with them the threat of destruction for black identity, as the “universal” take on particularist and racist features empowers elites to selectively disseminate the norms of social and legal inclusion.¹⁵⁸ Next, it would call for an explicit recognition of the past and present oppression of blacks in Canada. Then, just as in the case of Aboriginal persons, it would mean recognizing that blacks in Canada, due to the burdens created by white racism, have always existed on the margins of society and have, in almost every case, received less of all of the good things that Canadian society has to offer. Since the arrival of blacks in Canada, the relationship between Canada’s blacks and the majority ruling class has been one where blacks are shuttled to the sidelines.

Finally, in counter-distinction to Aboriginal *sui generis* rights, *sui generis* black rights would grow, not from indigeneity, territoriality, and the nationhood that grows from them, but rather from the very unrelenting nature of black exogeneity. Blacks in Canada and in most of the Western world are permanent foreigners.¹⁵⁹ All of this would mediate for laws that take into account the meaning of blackness in Canada, for judicial processes and norms that are explicitly aware of the *sui generis* nature of black rights, and for a set of remedies that unflinchingly address black oppression.

E. Critiques of *Sui Generis* Black Rights: The Challenges

Like the *sui generis* Aboriginal rights as described by Borrows and Rotman, *sui generis* black rights are subject to a number of critiques. First

156. ERIN MANNING, EPHEMERAL TERRITORIES: REPRESENTING NATION, HOME, AND IDENTITY IN CANADA 68 (2003).

157. RINALDO WALCOTT, BLACK LIKE WHO? (1997).

158. Monique Guillory & Manthia Diawara, *From this Ivory Tower: Race as a Critical Paradigm in the Academy (A Discussion in Two Acts)*, in SOUL: BLACK POWER, POLITICS, AND PLEASURE 297 (1997).

159. See, e.g., Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85 (Fall 1999).

among the critiques is the difficulty of construing Canadian blacks as being possessed of some uniform identity that yields a separate, almost sovereign-like claim to autonomy or legal identity. Only once this is overcome can we reach the question of whether ceding to common law norms will undermine black rights. Are African-ancestored persons indeed so distinct from other racial groups that they can be said to merit the special consideration of altered common law norms? Moreover, if they are sufficiently different, does this apply to all African-ancestored persons? An additional concern is whether according such rights would “overprivilege” blacks, and defy general notions of fairness. Then, assuming that these challenges are met, there arises the matter of nationalism and the “Woman Question”: how would black *sui generis* rights take account of gender? The final challenge in this context resembles that raised to *sui generis* Aboriginal rights—the tainted history of *sui generis* black rights in North American jurisprudence.

1. Uniform Black Canadian Identity?

Is there a uniform black socio-legal identification across Canadian African-ancestored communities? One may well wonder, given the disparate background of such persons. There are estimates that of the over 600,000 blacks in Canada, seventy percent are of Caribbean or Bermudan ancestry, and over 200,000 alone are of Jamaican ancestry. Over forty percent of Canadians of African ancestry were born outside of Canada. In light of these demographic differences, it is tempting to diminish the potential for black solidarity with the claim that so many disparate cultures make black social, legal, or political kinship an unlikely event. However, this assumes that somehow “culture” is the deciding factor in assessing the existence of black communities, or that heterogeneous cultures cannot band together in exchange for more substantial civil rights for all black Canadians.

a. *Who is Black?*

Although the question of just *who* is black is complex, involving myriad political, sociological or cultural differences, ultimately the uniformity of black social identification throughout the black diaspora is by virtue of the fact that a black person is viewed as distinct because of appearance, ancestry, or both, and not because of any commonality in culture.”¹⁶⁰ Black ancestry as evidenced by appearance is at the heart of much of the disparate treatment of blacks, and hence, it is visible black ancestry that would be at the center of claims of *sui generis* black rights.

While the question of black identity was relatively easy to answer in the

160. Tanya K. Hernandez, “Multiracial” Discourse: Racial Classifications in An Era Of Color-Blind Jurisprudence, 57 MD. L. REV. 97, 111-12 (1998).

very early days of black presence in North America when there was little racial mixing, the question has become increasingly complex once mixed race children were born in unions between blacks and whites or Aboriginal persons and blacks. In the United States, one response to the dilemmas of black identity was the development of the “one-drop” rule—any known African ancestry in a person meant classification as a black person, regardless of appearance.¹⁶¹ The one-drop rule of black racial identity arose as early as the 1600s in the Chesapeake region of the United States in order to account for the offspring of black slaves and white indentured servants.¹⁶² At first, the idea was rejected both by popular culture and the law; in some places, persons with as much as one-fourth African ancestry were legally white.¹⁶³ However, as the 19th century was ending, the one-drop rule became increasingly accepted in the southern United States. By World War I the rule’s acceptance had spread throughout the United States, as it was made statutory and enforced in many states.¹⁶⁴

To some, the term is synonymous with the concept of “hypodescent,” meaning that Americans who look slightly African are considered Black, even if their African heritage is less than 50 percent.¹⁶⁵ The one-drop rule was codified in a number of state statutes that purported to define racial identity based on percentage of white, Native American, or African ancestry.¹⁶⁶ While there are few explicit articulations of the definition of blackness in Canada, the one drop rule seemed to be functionally the norm there as well.¹⁶⁷

Unlike the United States’ focus on genealogy, Canadian whites identified blackness primarily based on coloring. Arguably, this is the foundation of the designation “visible minority” for Canada’s non-white others.¹⁶⁸ White society defined blackness; only those blacks whose appearance least betrayed African heritage had a personal choice of racial designation. Those of African ancestry,

161. FRANK W. SWEET, *THE DESTRUCTION OF LOUISIANA CREOLES* (2000). The one drop rule may also have variant meanings. It sometimes refers to the United States folkloric belief that persons with even very small amounts of African ancestry are marked by some subtle yet tangible physical trait. This has been described as the “stain” of black ancestry.

162. *MULTICULTURALISM IN THE UNITED STATES: CURRENT ISSUES, CONTEMPORARY VOICES* 103 (Peter Kivisto & Georganne Rundblad, eds., 2000).

163. *Id.*

164. *Id.*

165. Marvin Harris, *Referential Ambiguity in the Calculus of Brazilian Racial Identity*, in *AFRO-AMERICAN ANTHROPOLOGY* 75-86 (1970); MARVIN HARRIS, *PATTERNS OF RACE IN THE AMERICAS* 37 (1964).

166. *Id.*

167. See also CONSTANCE BACKHOUSE, *COLOUR-CODED* (1999) (citing *Fourth Census of Canada*, 1901, Vol. 1): The whites are of course, the Caucasian race, the reds are the American Indian, the blacks are the African or Negro, and the yellows are the Mongolian (Japanese and Chinese) But only pure whites will be classed as whites; the children begotten of marriages between whites and any other races will be classed as red, black or yellow, as the case may be, irrespective of the degree of colour.

168. THE FEDERAL EMPLOYMENT EQUITY ACT, S.C. 1995, ch. 44 (Can.).

choosing whiteness often experienced the psychological pain of “passing” because, assuming a white social identity required forsaking all ties in the black community.¹⁶⁹

With the advent of the black civil rights movements in North America, formal race definitions vanished. Nonetheless, social and legal racial identities in the United States—and to a lesser extent in Canada—continued to rely upon variations of the one-drop rule. Within the last decade or so there has come a push for greater reliance on self-identity; emphasizing theories of racial identity that extend well beyond appearance. However, the very possibility of racial self selection illustrates the complexity and uniqueness of blackness, for it has been frequently observed that many other racial and ethnic groups require additional commonalities beyond self identification to determine group status.

Despite the majority’s reliance on arcane rules, black identity is often viewed as a function of culture and custom as well as of appearance. However, this has not meant that persons without an “authentic” claim to blackness may “adopt” black culture and become black. Nor has it meant that phenotypically black persons may opt out of black identity. Rather, the acknowledgement of cultural practices serves as a second-tier test to identify whether an individual follows expected norms. At the end of the day, being black in Canada, as in the United States and most Western countries, is about appearing black.

b. Essentialism and Black Exceptionalism when used strategically can be a source of strength, rather than weakness, for a sui generis model

Assuming that there is some unifying sense of black Canadianess necessarily entails confronting the problem of essentialism and black exceptionalism. I believe that neither problem need undermine black *sui generis* rights. This is because under a difference denial model, essentialism and exceptionalism are seen in only a very narrow light, which undermines black rights and racial equality. The *sui generis* model, however, turns these concepts around by strategically employing them as a prism for honestly identifying the concerns of the black community.

Essentialism, the belief that people or phenomena have properties that are essential to what they are, plays a prominent role in group identity, particularly when the organizing principle is race or gender.¹⁷⁰ Some writers have

169. It has been suggested that Viola Desmond, a heroine of Canadian black rights who brought suit when she was ejected from a theater because of race, did not set out to be a racial leader. Rather, it has been suggested, she was simply trying to “pass” as white when she asked for a ticket in the section of the theater typically accorded to whites. See Constance Backhouse, *The Historical Construction of Racial Identity and Implications for Racial Reconciliation*, Paper Commissioned by the Department of Canadian Heritage for the Ethnocultural, Racial, Religious and Linguistic Diversity and Identity Seminar (2001).

170. See, e.g., KATHY E. FERGUSON, *THE MAN QUESTION: VISIONS OF SUBJECTIVITY IN FEMINIST THEORY* 81 (1993) in which the author envisions essentialism as having multiple

suggested that essentialism, even that found in so-called empowerment movements such as pan-Africanism or Negritude, is a bow to oppressors in focusing on the minority group's oppressor as a negative point of comparison for the minority group. Therefore, essentialism may be rife with the danger of self-limitation and false self-concept rather than a purely liberating concept.¹⁷¹ While it is true that essentialist constructs may "mask relations of power", talking about race, culture or gender in an essentialist way may in fact be empowering.¹⁷² Use of essentialism in the cause of African-Canadianess may be an exercise in what has been called "strategic essentialism."¹⁷³ Strategic essentialism differs from regular essentialism in two important respects: first, definitions are generated internally and essential attributes are defined by the group itself, not by external hegemonic forces. Second, in strategic essentialism there is no denial that the essential attributes are in fact a construct. Rather, traditional signifiers of racialized identity are inverted and used to undermine discourses of oppression.¹⁷⁴ Moreover, members of the group maintain the power to decide when the attributes are essential and when they are not. In this way, strategic essentialism can be a powerful tool for shaping socio-legal identity.

Black exceptionalism refers to the notion that the black experience in the New World is inherently distinct from other racial groups in social, legal, political, cultural and economic factors.¹⁷⁵ Exceptionalism frequently posits that blacks are outside of the norm, and hence, are in need of specially tailored responses to their problems. In post-modern difference-denial discourse, such claims are anathema, and are frequently discounted as "playing the race card"—raising the issue of race, particularly the issue of blackness, in a context wherein it is irrelevant, unfair, or obfuscating in order to obtain some political or social advantage.¹⁷⁶ Black exceptionalism, being thus closely linked with playing the race card, has become discredited as a racial discourse. However, like black essentialism, black exceptionalism need not be crucified as a

components: one is essentialism per se, which "attributes women's psychological and social experiences to fixed and unchanging traits resident in women's physiology or in some larger order of things." *Id.* Another meaning of essentialism offered by Ferguson is a "universalizing move that takes patterns visible in one's own time and place to be accurate for all." *Id.* 81-82.

171. EDWARD SAID, *CULTURE AND IMPERIALISM* 16 (1994).

172. SHERENE H. RAZACK, *LOOKING WHITE PEOPLE IN THE EYE* 21 (1998).

173. GAYATRI CHAKRAVORTY SPIVAK, *IN OTHER WORLDS* 205 (1987).

174. LISA NAKAMURA, *CYBERTYPES: RACE, ETHNICITY, AND IDENTITY ON THE INTERNET* 128 (2002) (citing LISA LOWE, *Heterogeneity, Hybridity, Multiplicity: Marking Asian American Differences*, *Diaspora* Vol. 1, No. 1 39 (1991)).

175. See Leslie Espinoza & Angela P. Harris, *Embracing the Tar-Baby-LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1596 (1997) (wherein the authors originate the phrase "black exceptionalism").

176. See generally LINDA WILLIAMS, *PLAYING THE RACE CARD: MELODRAMAS OF BLACK AND WHITE FROM UNCLE TOM TO O.J. SIMPSON* (2001). For a discussion of playing the race card in the criminal law context in Canada, see AARON DOYLE, *ARRESTING IMAGES: CRIME AND POLICY IN FRONT OF THE TELEVISION CAMERA* 40-42 (2003).

dishonored dogma on the cross of neo-liberalism. What is needed is honest dialogue which centers on the predominant experience in North America that being black *is* different. In that view, black exceptionalism is not a variant of playing the race card. That card is already on the table in most games that matter.

2. The Risk of "Over-privileging" Blacks, and Other Aspects of "Fairness" Discourse

One of the concerns frequently raised when the notion of a clearly articulated set of specifically black rights are proposed is whether the existence of such rights "over-privileges" blacks at the expense of the white majority and even other oppressed people. This raises issues concerning what has been termed "fairness discourse."¹⁷⁷ Fairness discourse based purely on legitimacy assumes that *sui generis* black rights would mean the creation of new rights superseding the rights of others. However, the concept of black *sui generis* rights is about rights *recognition*, not rights *creation*, and therefore *sui generis* rights actually embody fairness and equality rather than undermine them.

The notion of fairness is generally seen as having two principal parts: legitimacy and distributive justice.¹⁷⁸ Legitimacy relates to formal equality and to procedural fairness. It assumes a broad neutrality under which all persons are similarly situated, and in doing so, states a preference for rules that are clear on their faces and easily administrable. In contrast, distributive justice is based on a norm of substantive equality. Distributive justice requires a knowledge of, and an active concern with, *de facto* civil rights rather than with abstract notions of fairness. It must be rooted in the relative social, legal, and economic positions of the actors in any particular society. While legitimacy and distributive justice are sometimes synonymous, they may also be contrary, particularly where there are wide gaps in the socioeconomic or status positions of the individuals who are governed by such rules. It has been asserted that in order for there to be an optimal fairness discourse, a society needs "an ascertainable community of persons self-consciously engaged in a common moral enterprise."¹⁷⁹ Given the vast discrepancies in the legal, social, economic and political positions of people in most societies, a significant objective of fairness discourse is to achieve a balance between legitimacy and distributive justice.

In a rights recognition regime, the legitimacy-based fairness discourse is exposed for what it frequently represents—a bad faith attempt to undermine black rights. The recurring debates surrounding affirmative action in the United

177. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 8-9 (1995).

178. *Id.*

179. Franck, *supra* note 177, at 10-11.

States and to a lesser extent in Canada, illustrate how legitimacy-based fairness discourse has permeated many attempts to address institutionalized racial inequalities. Cries of reverse discrimination have become the mantra of groups seeking to dismantle gains by blacks and other minorities, all while other forms of preferential treatment for those in the majority remain in place.¹⁸⁰ Consider for example the alumni admissions scheme that has long-existed at United States colleges and universities, particularly at elite institutions.¹⁸¹

Dispositions in which non-black persons are somehow disadvantaged are not necessarily unfair or exemplary of invidious racial discrimination. As the Supreme Court of Canada stated in upholding the decision of an African-Canadian female judge against claims of bias in favor of a black defendant, "not every favorable or unfavorable disposition attracts the label of bias or prejudice. For example, it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavorable disposition is objectively justifiable—in other words, it is not 'wrongful' or 'inappropriate'."¹⁸²

In addition, the legitimacy-based fairness question makes one of two unwarranted assumptions about the nature of rights. It assumes that societal rights exist in limited quantities and are chips in a zero sum game or slices in a pie of limited size. Therefore gains for individual black persons via recognition of their rights necessarily results in losses to individual white people or other racial groups. This assumption relies upon a belief that rights, both the chips and the pie of the metaphor, are vested in individual members of the white majority and cannot be involuntarily alienated via the assertion of a claim to black rights.

Both of these notions are unfounded, as they wrongly assume that rights are both fixed in quantity and finitely owned. Moreover, the zero sum view of rights assumes a welfare economics approach that views the individual as the basic unit of measurement. The better way of viewing the move to *sui generis* black rights is to take a social utilitarian approach that esteems the overall welfare of communities and societies.

IV. THE RELATIONSHIP OF SUI GENERIS BLACK RIGHTS TO NATIONALISM AND

180. Consider for example the "alumni admissions" scheme that has long-existed at United States colleges and universities, particularly at elite institutions. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998). Another example is job preferences given for persons with local residency in cases where there is a clear tie between wealth and mainstream racial membership and residence. See BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT LAW* 700 (1996).

181. Consider for example the "alumni admissions" scheme that has long-existed at United States colleges and universities, particularly at elite institutions. See, e.g., BOWEN & BOK, *supra* note 180.

182. *R. v. RDS* (1997) 3 S.C.R. 484 (Can.).

THE "BLACK WOMAN QUESTION"

Sui generis black rights are related to claims of black nationalism or pan-Africanism, but not in the sense that *sui generis* black rights may be seen as a claim of black statehood, or even as necessarily growing out of such claims. Rather, *sui generis* rights are the expression of recognized legal rights for black within white societies. However, to the extent that *sui generis* black rights may be seen as any way akin to a nationalist movement, one of the significant concerns is how these rights would affect black women.

A. The History of how Black Nationalism Affects the Black Woman Question

Nationalism is the belief that groups of people are bound together by territorial, cultural, racial or ethnic links. Although it is frequently associated with a particular nation state, throughout history a number of stateless or even rootless people have banded together to assert nationalist claims that are based more on group claims than individual claims. Frequently, nationalism was an ideological response to some of the social, economic and political uncertainties of the modern world and was often used by political activists to mobilize people against their oppressors.

Black nationalism has often been formed in the context of involuntary servitude and colonial oppression of blacks. Classical black nationalism was said to develop as early as the 1700's among blacks who sought freedom from slavery in the United States.¹⁸³ The goal of classical black nationalism was the creation of an autonomous black state and to help forge the ideological bases for forming such a state.¹⁸⁴ Other incarnations of Black nationalism have for the most part avoided claims of sovereign nation-statehood and instead focused on economic, cultural, and social autonomy within societies wherein they often form minorities.¹⁸⁵ To the extent that such sentiments of unity extended to African-ancestored people in other places, this brand of black nationalism was more akin to what has been called pan-Africanism.¹⁸⁶

Nationalism has often in history been a source of women's oppression, as male leaders of such movements sought to subjugate women's concerns to those of the larger movement. Although much of contemporary scholarship has ignored the extent to which there is a gendered dimension to nationalist politics and policies, there are multiple ways in which nationalist constructions present real and material consequences for women's lives globally.¹⁸⁷ When looking to

183. WILSON JEREMIAH MOSES, CLASSICAL BLACK NATIONALISM FROM THE AMERICAN REVOLUTION TO MARCUS GARVEY, 1 (1996).

184. *Id.* at 2.

185. *Id.* at 14-16.

186. *Id.* at 2.

187. *Gender and Nationalism: Moving Beyond Fragmented Conversations*, in WOMEN, STATES, AND NATIONALISM: AT HOME IN THE NATION 3 (2000).

the nation as a source of identity, there are significant consequences for women's particularized claims of agency and identity within the racial or cultural communities to which they belong.¹⁸⁸ Nonetheless, gender has frequently been cited by classical nationalist writers as the attribute least likely to produce the collective mobilization needed to spur nationalist movements, as gender is rarely considered to be the stuff of stable collective identities.¹⁸⁹ However, the nation as a source of identity is especially problematic for black women in black nationalist movements because women are asked to align themselves with various, and potentially conflicting, contingencies.

B. The "Black Woman Question"

The "Woman Question," as it was called in nineteenth century Britain and the United States, focused attention on men and male social roles, asking questions about the nature and function of gender, and whether gender should be a factor in granting or limiting rights such as voting. The central questions were often similarly political and legal, social and economic, and involved men's queries about how to respond to women's claims for social inclusion. The growth of feminism in the last century has, however, resulted in women scholars claiming the "woman question" as part of their own discourse and re-defining it to mean giving voice to women's particular concerns.¹⁹⁰ Black women have a unique standpoint on society, grounded in their position as victims of multiple forms of oppression.¹⁹¹ This multiplicity of oppressions is the essence of the "black woman question."¹⁹² In the case of *sui generis* black

188. Sita Ranchod-Nilsson, *Gender Struggles for the Nation: Power, Agency, and Representation in Zimbabwe*, in WOMEN, STATES, AND NATIONALISM: AT HOME IN THE NATION, 164-80 (2000).

189. In the simplest and earliest societies, the number and scale of such identities were relatively limited; but as populations organized themselves into more complex agrarian societies in a variety of political formations, the number and scale of such identifications multiplied. Where once gender, age, clan and tribe had provided the chief units of identity, now there were also village communities, regions, city-states, religious communities and even empires. With the growing stratification of such societies, classes and status groups (castes, estates, ethnic communities) also took on vital roles as focuses of identification in many societies. In the modern era of industrial capitalism and bureaucracy, the number and in particular the scale of possible cultural identities have increased yet again. Gender and age retain their vitality; class and religious loyalties continue to exercise their influence; but today, professional, civic and ethnic allegiances have proliferated, involving ever larger populations across the globe. Above all, *national* identification has become the cultural and political norm, transcending other loyalties in scope and power. ANTHONY D. SMITH, NATIONAL IDENTITY AND THE IDEA OF EUROPEAN UNITY 55, 58 (1992).

190. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations On A Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

191. See PATRICIA HILL COLLINS, FIGHTING WORDS: BLACK WOMEN AND THE SEARCH FOR JUSTICE [hereinafter *Fighting Words*] 58-59 (1998).

192. See, e.g., JERRY GAFIO WATTS & AMIRI BARAKA, THE POLITICS AND ART OF A BLACK INTELLECTUAL 346 (2001).

rights, one significant potential problem is that in addressing the rights deficit suffered by blacks in Canadian society, the problems specific to black women will be ignored, or worse, exacerbated. As one scholar has written, "dismantling any one form of subordination is impossible without dismantling every other."¹⁹³ Hence, it becomes crucial to query the extent to which black women and black men are separate political actors, and if they are, to ask how they might come together to co-produce *sui generis* black rights.

Black women's oppression in Canada and the United States is often determined by the intersection of a number of structures. These structures include white supremacy or the belief in white superiority and black inferiority and the corresponding institutional discrimination, patriarchy and sexism, and homophobia and heterosexism. These ideological and structural forms of oppression have often come together to disadvantage black women more than their black male counterparts. This is seen, for example, in the fact that work, both paid and unpaid, is both "raced" and "gendered." Highly educated upper middle and middle class black women are often employed in lower status jobs than their black or white male peers of similar educational and skill levels.¹⁹⁴ Both historically and in more contemporary times, those black women holding professional jobs were usually employed in jobs that have evolved as "women's work", and which required nurturing, caring, or other "womanly" skills, such as teaching or nursing.¹⁹⁵ Poor and working class black women with less education and fewer skills are often relegated to low paying jobs, or excluded from the paid job market altogether. Black women's net societal disadvantage is also seen in the implementation of the "war on drugs". Since the mid-1980s, Black women's drug offense incarceration rate has risen over 800 percent, as they frequently became frontline casualties in the war on drugs.¹⁹⁶

Black women also frequently face domestic violence and sexual abuse that is informed and shaped by class and patriarchal structures. For example, poor women in general, and particularly poor black women, are significantly more likely to be victims of sexual violence than white women.¹⁹⁷ Because

193. Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991).

194. See, e.g., Deborah J. Merritt and Barbara F. Reskin, *The Double Minority: Empirical Evidence Of A Double Standard In Law School Hiring Of Minority Women*, 65 S. CALIF. L. REV. 2299 (1992) (discussing the sex-based disadvantage of minority women law faculty as seen for example in their disproportionate employment in lower-tiered schools than white and male colleagues with the same or lesser credentials).

195. Linda Carty, *African-Canadian Women and the State*, in PEGGY BRISTOL ET. AL ED. WE'RE ROOTED HERE AND THEY CAN'T PULL US UP: ESSAYS IN AFRICAN CANADIAN WOMEN'S HISTORY 205 (1994).

196. See generally Sonia N. Lawrence & Toni Williams, *Drug Couriers at the Borders of Canadian Sentencing* 56 UNIV. TORONTO L. REV. 285 (2007).

197. TRACI C. WEST, *WOUNDS OF THE SPIRIT: BLACK WOMEN, VIOLENCE, AND RESISTANCE ETHICS* (1999).

black women are often seen as sexually promiscuous, this stereotype has often served to justify sexual violence against them and has played a negative role in how black women are treated within health facilities and by the courts.¹⁹⁸ Additionally, Black women often face dramatically worse health issues than white women or males of any race, and are frequently among the most educationally disadvantaged in society.¹⁹⁹

Part of what is troubling to claims of black collective rights such as *sui generis* black rights is that black women's oppression sometimes comes from within their own communities. Black men are sometimes complicit in or even authors of black women's oppression.²⁰⁰ This has been true despite black men demanding from black women racial solidarity in the face of white oppression,²⁰¹ and active service as workers for "racial uplift."²⁰² As one scholar has suggested, in order to achieve racial progress for blacks, many in the black community thought it was important to overcome stereotypes of the highly sexualized black woman to demonstrate that black women were the moral and maternal equals of white women.²⁰³ This "racial uplift rhetoric" often promoted the concept of "universal womanhood", ignoring the differences in the experiences of black and white, women, and the differences in black men and women, all while urging black singularity.²⁰⁴

Moreover, asking the "black woman question" in such a context raises not only concerns about the rights of black women, but about the rights of black men, since the black woman question implicates more generally the notion of gendered racism. Gendered racism, or the racism structured by racist designations of gender roles, exists not only as an outgrowth of feminism.²⁰⁵ Rather, gendered racism is equally tied to an understanding of comparative racism across cultures, through colonialism and neocolonialism.²⁰⁶ Because of this multi-focal approach, gendered racism affects black men's identities as much as black women's identities.

Because of the peculiar interactions of gender and race in Canada and the United States, black men are frequently constructed as violence prone citizens, absentee fathers, and criminals.²⁰⁷ As one scholar writes, these negative stereotypes have functioned since the nineteenth century and continue to

198. *Id.*

199. *Id.*

200. Evelyn M. Hammonds, *Toward a Genealogy of Black Female Sexuality*, in *FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES* 170, 176 (1996).

201. Collins, *supra* note 191, at 25.

202. See, e.g., Karen Adler, *Always Leading Our Men in Service and Sacrifice: Amy Garvey, Feminist Black Nationalist*, 6 *GENDER & SOCIETY* 346 (1992).

203. ALISON BERG, *MOTHERING THE RACE* 44 (2002).

204. *Id.*

205. VANAJA DHURUVARAJAN & JILL VICKERS, *GENDER, RACE, AND NATION* 63 (2002).

206. PHILOMENA ESSED, *UNDERSTANDING EVERYDAY RACISM* 31 (1991).

207. *Id.*

“overdetermine” the identities that black males are permitted to create for themselves,²⁰⁸ as black men fall victim to societal notions by adopting many of the pernicious behaviors attributed to them. Just as these negative stereotypes may result in pernicious behaviors, efforts to counter the stereotypes may equally shape black male behaviors. Black men who are viewed as successful in familiar contexts, that is, those who are depicted in both fictional and nonfiction public discourses as meeting broad white approval, often do so by not just embracing the norms of patriarchy seen in white communities by taking one of two routes: becoming a “super-patriarch”—embodying the ideal of a controlling, oppressive father and husband via an uncritical embrace of patriarchy,²⁰⁹ or becoming an “emasculated, buffoon-like *hausfrau*,”²¹⁰ who submits meekly to the demands of a supercharged Sapphire-like²¹¹ wife.²¹² As one scholar has noted, gendered racism is a subset of a larger set of racial codes most Whites use, often in the form of a complex and nuanced racial-gender discourse, all in the service of oppressive racist practices that subjugate both black men and women.²¹³

C. Womanist Thought as a Remedy for the “Black Woman’s Question and Gendered Oppression

Given the multiple forms of black women’s oppression and the operation of gendered racism that effects and distorts the roles of both black men and women within the black community, the co-production of *sui generis* black rights becomes reliant upon a harmonization of black normativity.

In response to the multiple forms of oppression that plagued black

208. BELL HOOKS, *WE REAL COOL: BLACK MEN AND MASCULINITY*, xii (2003).

209. *Id.* at 55.

210. ELIZABETH ALEXANDER, *REPRESENTING BLACK MEN* 160 (1995).

211. Marilyn Yarbrough & Crystal Bennett, *The Peculiar Treatment of African American Women in the Myth of Women as Liars*, J. GENDER RACE & JUST. 626 (2000) the authors describe the Sapphire as follows:

In the stereotype of Sapphire, African American women are portrayed as evil, bitchy, stubborn and hateful. In other words, Sapphire is everything that Mammy is not. “The Sapphire image has no specific physical features other than the fact that her complexion is usually brown or dark brown.” Unlike other images that symbolize African American women, Sapphire necessitates the presence of an African American male. The African American male and female are engaged in an ongoing verbal duel. Sapphire was created to battle the corrupt African American male whose “lack of integrity, and use of cunning and trickery provides her with an opportunity to emasculate him through her use of verbal put-downs.”

Ernestine Ward popularized the Sapphire image in the Amos and Andy television series. Ward played a character known as Sapphire, and her husband, Kingfish, was played by Tim Moore. Sapphire’s spiteful personality was primarily used to create sympathy in viewers for Kingfish specifically and African American males in general. As a result, many African American women suppress these feelings of bitterness and rage for fear of being regarded as a Sapphire. *Id.* at 638.

212. Alexander, *supra* note 210, at 160.

213. YANICK ST. JEAN, *DOUBLE BURDEN: BLACK WOMEN AND EVERYDAY RACISM* 17 (1998).

women, womanist theories and philosophies have been formed. Womanist thought is an expression of black feminism that is both race and gender conscious.²¹⁴ While womanist thought grows out of the black female experience, it does not exclude black men or women of other races.²¹⁵ Rather, a womanist view is "committed to survival and wholeness of entire people, male and female."²¹⁶ Hence, a significant concern of womanist beliefs would be the extent to which *sui generis* black rights would ensure rights not just for black men but for black women as well since any such movement, to be an authentic and full expression of black collective consciousness, would have to take into account the struggles particular to both genders.

The concept of black citizens being outside judicial norms was a well established attribute of the common law. In the American and Canadian colonies, it was common to bar blacks, either slave or free, from bringing suits in court or testifying. There are consequently, few instances of blacks in early Anglo-Canadian and Anglo-American jurisprudence appearing as parties, claimants, or predecessors in interest in cases. Generally, before United States slavery ended, blacks were seen in court only as the subjects of lawsuits: as property subject to ownership.²¹⁷ After slavery ended, there was hope that blacks would finally have access to the courts as litigants vindicating their rights to equal treatment. *Plessy vs. Ferguson*²¹⁸ crushed those hopes. There is no doubt that *Plessy* heralded in a period when the law served as the willing tool of United States racists.²¹⁹

Ironically, however, *Plessy* might also be viewed as the harbinger of positive black difference as much as it might be read as the death knell for post Civil War black civic equality. In such a perspective, while mandatory segregation clearly undermined black access to social and economic goods, it also promoted black autonomy and collective self-help. A large body of scholarship has, in recent years, begun to re-think what has been characterized as assimilationist thinking in order to consider the phenomenon of black reliance on black resources, rather than white benevolence to construct the foundations of free black life in the United States.²²⁰ More than just the response of being excluded from white establishments, blacks sought a unique

214. The term womanist was coined by writer Alice Walker. See ALICE WALKER, IN SEARCH OF OUR MOTHERS' GARDENS: WOMANIST PROSE (1983).

215. MICHAEL AWKWARD, NEGOTIATING DIFFERENCE: RACE, GENDER, AND THE POLITICS OF POSITIONALITY (1995).

216. *Id.*

217. DERRICK BELL, RACE, RACISM AND AMERICA LAW 11 (1980) (citing H. CATERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, VOLS. I-V (1936)).

218. 163 U.S. 537 (1896).

219. The period following *Plessy* has been called the "nadir" of black life in America. See RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON 52 (1997).

220. For a discussion of the historic formation of black nationality in the United States, see K. KOMOZI WOODARD, A NATION WITHIN A NATION 1-23 (1999).

sense of freedom premised on self-esteem and citizenship within the community, a freedom that was no less valuable despite its illegitimate birth as the child of racist-imposed segregation.

CONCLUSION

In the aftermath of *de jure* segregation and of the most virulent anti-black racism, many scholars have observed that the organizing principles of black uniqueness, self-worth and esteem have fallen away, seen as so-much detritus to be washed away in the post-racial deluge. Embracing black difference via black *sui generis* rights is the only way to reverse this trend.