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TRICKY MAGIC: BLACKS AS IMMIGRANTS AND THE PARADOX OF FOREIGNNESS

*Lolita K. Buckner Inniss**

I. INTRODUCTION

Since the beginning of the nation, white Americans have suffered from a deep inner uncertainty as to who they really are. One of the ways that has been used to simplify the answer has been to seize upon the presence of black Americans and use them as a marker, a symbol of limits, a metaphor for the "outsider." Many whites could look at the social position of blacks and feel that color formed an easy and reliable gauge for determining to what extent one was or was not American. Perhaps that is why one of the first epithets that many European immigrants learned when they got off the boat was the term "nigger"—it made them feel instantly American. But this is tricky magic. Despite his racial difference and social status, something indisputably American about Negroes not only raised doubts about the white man's value system but aroused the troubling suspicion that whatever else the true American is, he is also somehow black.¹

The black American experience is an immigrant experience. This is true, I submit, whether we speak of native or foreign-born blacks, poor or middleclass blacks. It has been suggested that all nonwhite people are foreigners or "others" vis-a-vis "real" or white Americans.² However, the situation in which black Americans find themselves is different. The general failure of assimilation has made the black American experience unique among immigrant experiences in that it

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1. Ralph Ellison, *What America Would Be Like Without Blacks*, in *THE COLLECTED ESSAYS OF RALPH ELLISON* 577, 582-83 (John F. Callahan ed., 1995). This quote also serves as the introduction to Cornel West's *Race Matters*, a treatise in which West seeks to describe the role and functioning of race in today's society. CORNEL WEST, *RACE MATTERS* 1 (1993).

2. See, e.g., Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference Race Critique*, forthcoming 1999 U. ILL. L. REV.; see also Neil Gotanda, *Other Nonwhites In American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186 (1985); Victor C. Romero, *Broadening Our World: Citizens and Immigrants of Color in America*, 27 CAP. U. L. REV. 13, 28-32 (1998).

is an *unremitting* immigrant experience—an experience of continued exclusion. Blacks are part of a de facto permanent immigrant class.

I address my thesis by exploring three topics. The first is the inherent paradox of being a “native” black American, and the slave experience as part of the immigrant experience.³ Of all of the immigrant groups, blacks have achieved the least assimilation.⁴ Blacks are “foreigners” on their very faces—that is, they serve as very visible emblems of what is different. Yet paradoxically, America has in many respects created the black image. The Negro “authentic”⁵ is something of an Ur-man⁶ in the American scene, one who embodies the American dream of pulling oneself up by the bootstraps, moving from the “heathen jungles” of Africa, and rising up from the yoke of slavery. This is said of blacks even though many blacks suffer such dire social and economic ills that they are said to be wearing no boots all, either figuratively or literally.⁷ Nonetheless, blacks appear to be perpetually moving upward or forward, for they have always come from so very far behind. Blacks can rarely say that things are not better than they used to be.⁸ The black authentic is full of “*joie de vivre*” and music. Blacks are the embodiment of the sort of romantic racial-

3. I eschew the more current expression “African-American” in favor of “black.”

4. According to Gunnar Myrdal, “[c]onsiderable efforts are directed towards ‘Americanizing’ all groups of alien origin. But in regard to colored peoples, the American policy is in reverse. They are excluded from assimilation.” GUNNAR MYRDAL, *THE AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 54 (1944).

5. Cornel West speaks of racial authenticity in describing the background of Supreme Court Justice Clarence Thomas: “his birth in Jim Crow Georgia, his childhood as the grandson of a black sharecropper, his undeniably black phenotype degraded by racist ideals of beauty, and his gallant black struggle for achievement in racist America.” WEST, *supra* note 1, at 24. West goes on to say that such claims of racial authenticity presuppose “elaborate conceptions of political and ethical relations of interests, individuals, and communities.” *Id.* at 26. See Christine Stansell, *White Feminists and Black Realities: The Politics of Authenticity*, in RACE-ING JUSTICE, ENGENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 251-67 (Toni Morrison ed., 1992).

6. I use “ur” in the German sense, meaning primordial or original.

7. I am reminded here of an unrelated irony in the pejorative term for blacks in the South: “boot.” This term is said to derive from the fact that blacks were said to be blacker than boots, and from that fact they often served as boot blacks (shoe shiners). See, e.g., RICHARD A. SPEARS, *SLANG AND EUPHEMISM* 41 (1981).

8. “Progress” for blacks is relative. This is seen in the comments of Supreme Court Justice Thurgood Marshall:

Today we have reached the point where people say, “We’ve come a long way.” But so have other people come a long way . . . Has the gap gotten smaller? It’s getting bigger . . . People say we are better off today.
Better than what?

I am amazed at people who say that, “The poorest Negro kid in the South was better off than the kid in South Africa.” So what! We are not in South Africa. We are here. “You ought to go around the country and show yourself to Negroes; and give them inspiration.” For what? Negro kids are not fools. They know when you tell them there

ism essential to American cultural and spiritual heritage. They existed as “anti-Caucasian” to balance the American equation, but also as a kind, loyal, docile, and affectionate pre-species from which the American type could take his kinder and more compassionate impulses.⁹ Indeed, the black American as a symbol of glorified oppression is often seen beyond our American shores.¹⁰ Undoubtedly, the notion that the American ideal is in some way black is the source of some discomfort for whites. If blacks are the ultimate American, are we not all somehow black?¹¹

The second topic I explore is the image of blacks as foreigners and the phenomenon of blacks as hyphenated Americans. Because the black person is to a great degree an American construct, can there be any such thing as a black foreigner? Moreover, because it is arguable that even so-called native blacks themselves have never been fully as-

is a possibility that someday you'll have a chance to be the o-n-l-y Negro on the Supreme Court, those odds aren't too good.

Speech of Justice Thurgood Marshall, *reprinted in* THE BARRISTER, Jan. 15, 1979, at 2.

9. In his book, George Fredrickson describes the mid-nineteenth century American movement of romantic racialism in which some writers attempted a racialist explanation of society and culture. GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914*, 97-102 (1971). This movement was at once ethnically chauvinistic and cosmopolitan. Some writers sought to celebrate the genius of a few races versus the relative inferiority of other races while other writers sought a more impartial view of the various races. *Id.* Fredrickson states that in the United States this racial romanticism often celebrated the Anglo-Saxon character: superior intelligence and initiative, and the innate, blood-borne love of liberty. *Id.* at 99. This heightened sense of supposed white racial characteristics caused many to accept the stereotypes of Negroes as “anti-Caucasians” not possessing the higher abilities and traits of whites. *Id.* at 100. This attitude, however, existed concurrently with, or later developed into, a belief that the supposed relative simplicity, docility, and other “undesirable” traits of the Negro were actually evidence of Christian virtue and amiability-traits at the heart of all America. *Id.* at 102-10. Blacks were considered the “more feminine and tender-minded” race, possessing some of the strange moral, instinctive insight that more belongs to women than men, as opposed to the more virile and masculine Anglo-Saxon. *Id.* at 114-15.

10. There is ample evidence that the blacks in America are seen as the symbol not just of suffering and misfortune, but also as a symbol of the pride which accompanies oppression. For example, in the film *The Commitments*, the characters are dispossessed white youth in Dublin, Ireland who create a band which imitates the soul sound of 1960s black America. *THE COMMITMENTS* (Fox Video, 1992). In explaining their choice of repertoire, one character indicates that “[t]he Irish are the blacks of Europe,” and that “Dubliners are the blacks of Ireland.” *Id.* This phenomenon is also seen in the popularity of black American “hiphop” culture in racially homogeneous countries such as Japan. See *Mercury Forms 2 Japense Labels*, BILLBOARD MAG., Aug. 5, 1995 (citing *The Population of Hip Hop Music*); see also *In Japan, “Exporting” an Adopted Art*, CHRISTIAN SCI. MONITOR, May 5, 1999.

11. Ellison, *supra* note 1, at 1. This may be more true than many realize. Recently, genealogists theorized that black Americans have 25% white genes, and that white Americans have 5% black genes. *Witness Says All American Whites 5 Percent Black*, U.P.I., Sept. 14, 1982 (referencing the testimony of anthropologist Munro Edmonson, who testified as an expert in *Doe v. Louisiana*).

simulated in American society,¹² culture, or economy, how could there, in fact, be any black more “foreign” than a native black? Despite this seeming paradox, there has been some acknowledgment since early times that there constantly loomed the possibility of black population growth in America by the entry of those not born in the country.¹³ For example, the Act of 1790, sometimes called the earliest immigration legislation, limited naturalization to white people.¹⁴ There was the fear inspired by the 1803 revolt of Haiti’s black slaves and the subsequent declaration of an independent black republic.¹⁵ Might not those altogether too alien dark faces demand entry¹⁶ to the nearby shores of the United States, demanding equality, and worse, encouraging “native” blacks to do the same? Those relatively few non-native blacks who have nonetheless made their way into this country, over the years, have been greeted by a curious mixture of fear and admiration, distaste and awe.

Finally, this paper addresses the position of both foreign and native blacks in today’s debate over whether to continue to try to address inequities in black attainment through affirmative action or other government remedies.¹⁷ Many have argued that recent black entrants are not due any redress because they and their ancestors have not exper-

12. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 3 (1965) (stating that in America, whites and emancipated blacks observed each other like “two foreign peoples on the same soil”). W.E.B. Du Bois also observed that blacks were strangers in a strange land.

Here, then, is the dilemma, and it is a puzzling one, I admit. No Negro who has given earnest thought to the situation of his people in America has failed, at some time in life, to find himself at these cross-roads; has failed to ask himself at sometime: What, after all, am I? Am I an American or am I a Negro? Can I be both? Or is it my duty to cease to be a Negro as soon as possible and be an American? If I strive as a Negro, am I not perpetuating the very cleft that threatens and separates Black and White America?

W.E.B. DU BOIS, *The Conservation of the Races*, in W.E.B. DU BOIS, *A READER* 24 (David Levering Lewis ed., 1995).

13. See, e.g., LEONARD P. CURRY, *THE FREE BLACKS IN URBAN AMERICA 1800-1850*, 5-6 (1981).

14. Act of March 26, 1790, 1 Stat. 103.

15. See LESTER D. LANGLEY, *THE AMERICAS IN THE AGE OF REVOLUTION 1750-1850*, 122-44 (1996).

16. See SELDEN RODMAN, *HAITI: THE BLACK REPUBLIC* (1954).

17. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY* (1999) (concluding from a study of admissions data from elite colleges that affirmative action works for individual blacks and society). I note however that Bowen and Bok, like many arguing in favor of affirmative action, seem to presuppose a social utility-based rationale for affirmative action, and they set out to quantify that utility. Such a rationale, however, does not fully address the issue, as it “avoid[s] the unpleasantness of coming to terms with oppression, guilt, and reparations.” Paul Brent & Miranda Oshige, *Race and Remedy in a Multiracial Society: Affirmative Action for Whom?*, 47 *STAN. L. REV.* 855, 864 (1995).

experienced the full measure of American white racism.¹⁸ Others have argued that even so-called “native blacks” should no longer be the subject of programs designed to address or redress their ills because blatant racism is no longer a feature of American life and many blacks have already achieved middle-class status.¹⁹ This view, however, is myopic at best. Here, on the eve of the millennium, the legal, political, and social status of blacks remains stagnant. Acknowledging the immigrant status of all blacks can lend clarity to both the historical treatment of American blacks and more recent black immigrants. Further, such a perspective may suggest remedies for some of black America’s present-day woes.

II. THE “NATIVE” BLACK AND SLAVERY AS AN IMMIGRANT EXPERIENCE

A. *Slavery as Immigration*

Immigration has been defined as the moving across national frontiers, as opposed to moving within borders.²⁰ Immigration has also been defined as a history of alienation and its consequences—“broken homes, interruptions of a familiar life, separation from known surroundings, the becoming a foreigner and ceasing to belong.”²¹ These definitions have traditionally been applied to entrants from Europe and later, Asia.²² Blacks were often either explicitly or implicitly excluded from definitions of immigration, dismissed as being merely “imported slaves” whose movement lacked the complexity of later immigration to the Americas,²³ or deemed unwilling victims of conquerors.²⁴ Notwithstanding these pronouncements, black arrivals to the Americas had all the attributes of immigrants. In fact, they created the immigrant paradigm: arrivals with alien languages, cultures and customs, who enter at the bottom-most social and economic levels and labor tirelessly.

The importation of blacks into the Americas began rather slowly at first, as the colonists, and later the newly-created country considered

18. See, e.g., Brent & Oshige, *supra* note 17, at 866 (considering the problem of using corrective justice as a basis of affirmative action); see also Kathleen M. Sullivan, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 79, 82 (1986).

19. See, e.g., DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 24, 289-336 (1995) (arguing that racism is no longer the main reason for black failure).

20. ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* 3 (1990).

21. OSCAR HANDLIN, *THE UPROOTED* 4 (1951).

22. *Id.* at 7.

23. *Id.* at 5.

24. *Id.*

what form of labor would best suit its needs. As it became increasingly clear that white laborers would not fulfill labor needs for long, the importation of blacks escalated. From the mid-fifteenth century until 1870, it is estimated that approximately 10 million blacks were imported from the African continent.²⁵ All but approximately 350,000 of them were for sale in the Americas.²⁶ It is also estimated that of the total number of slaves coming to the Americas, only 4.5% came to what is now the United States, with the rest going to the Caribbean or Latin America.²⁷ What this means, one commentator suggests, is that the vast number of imported slaves died in other parts of the Americas without issue, unlike the slaves in the United States.²⁸ This does not necessarily mean that slavery in the United States was less harsh than in other parts of the Americas, or that slave holders in the United States were more moral. Rather, the decision to allow slaves to propagate was perhaps an unintended consequence of both various state laws which forbade additional slave migration, and the Migration and Importation Clause, which forbade the importation of slaves after 1808.²⁹ Although the Migration and Importation Clause did not explicitly mention slavery, the legislative history of the clause is clear.³⁰ Commentators have argued at various times that this clause was general in scope, granting Congress power over other sorts of alien admissions; however, this notion has generally been rejected.³¹

A significant number of Africans imported to the Americas died during travel in what is known as the Middle Passage, the harrowing journey between continents.³² Estimates are that anywhere from 1.25 million to 3.15 million Africans died in transit.³³ Those Africans who were transported represented many of the diverse peoples of Africa, from areas in the east, to the central region, to the western coast of the continent, where the sea voyage to the Americas originated.³⁴ Numerous linguistic groups were represented. Very often, those who had

25. DANIELS, *supra* note 20, at 61.

26. *Id.*

27. *Id.*

28. *Id.*

29. U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . .").

30. 35 ANNALS OF CONG. 138-39 (1820).

31. In the *Passenger Cases*, the Justices disagreed about whether the Migration and Importation Clause applied only to the migration of slaves, or whether it could be applied to immigrants as well. 48 U.S. 283, 572-73 (1849). They ultimately rejected the latter interpretation. *Id.*

32. DANIELS, *supra* note 20, at 63.

33. *Id.*

34. *Id.*

no ability to communicate at the start of a journey developed rudimentary forms of communication which were an amalgam of African languages combined with the English of their captors.³⁵

Although the prototypical slave holder is often thought to be a Southerner, in the earliest years of slavery, those from northern and middle American colonies were well represented among slave holders.³⁶ With the spread of slavery throughout the colonies came an ever-diminishing acceptance of the rights and even basic humanity of blacks. Blacks were increasingly brought from Africa, "seasoned" in the brutal absentee-owner plantation system of the islands, and ultimately, assuming their survival to that point, exported to the continental United States for further servitude.³⁷

Thus, early black arrivals to the United States were certainly immigrants in the sense that they arrived from the foreign shores of Africa or the Caribbean, often without knowledge of the language and customs. Their primarily involuntary arrival and their intended fate of occupation of the lowest tier of society further supports a classification as immigrants.³⁸ Indeed, arrival under such adverse circumstances fulfills the ultimate immigrant paradigm: the image of the downtrodden foreigner who through hard work and determination can rise, is prefaced in some respect on the black slave who has nowhere to go *except* up.

Blacks who succeeded in extricating themselves from bondage, or who were ultimately emancipated, faced long odds of integration into

35. See GRAHAM W. IRWIN, *AFRICANS ABROAD: A DOCUMENTARY HISTORY OF THE BLACK DIASPORA IN ASIA, LATIN AMERICA, AND THE CARRIBEAN DURING THE AGE OF SLAVERY* (1977) (detailing the importation of slaves to Asia, Latin America, and the Carribean); see also IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 101-05 (1998).

36. JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 63-67 (1974). In New York, slavery increased dramatically after 1664 when the English took over New Netherlands from the Dutch. *Id.* at 63. Legislation aimed at forbidding the free movement of blacks and at preventing the escape of slaves to Canada became commonplace. *Id.* In New Jersey and Pennsylvania, the growth of slavery was also rapid following the entry of the English. *Id.* at 64. This growth was somewhat limited in Pennsylvania by the presence of significant numbers of Quakers with anti-slavery sentiment; however, even such Quaker leaders as William Penn advocated the use of slave labor. *Id.* at 64-65. In the New England colonies, slavery, though less visible than in the middle and southern colonies, was well-entrenched in the culture and customs. *Id.* at 65-67. As early as 1660, there was colonial legislation in New England which recognized the institution of slavery and limited the free movement of blacks. *Id.* at 66.

37. IRWIN, *supra* note 35, at 186-96.

38. See, e.g., BERLIN, *supra* note 35, at 103-04 ("The survivors [of transatlantic slave ships] arrived in the New World physically depleted and psychologically disoriented. They were in a far poorer position to address the anarchic effects of long distance migration than any other people who made the transatlantic journey.").

American society.³⁹ Still, many eked out a marginal existence, and some even flourished.⁴⁰ Those whose freedom came as a result of the Civil War and the ensuing constitutional amendments faced an even greater journey. They were societal misfits, much as slaves had been.

*B. Early Notions of White Citizenship Versus Black
“Anti-Citizenship”*

It has been suggested that the hesitance to promulgate widespread declarations of citizenship after the American Revolution was not an omission, but rather, deliberate.⁴¹ One reason posited for this was a desire to avoid making any clear pronouncement regarding slaves.⁴² After the Declaration of Independence, each inhabitant who did not affirmatively declare British nationality became a citizen of the state in which he resided.⁴³ Later, after ratification of the Constitution, “the citizens of the individual states all became citizens of the United States.”⁴⁴ However, there was no constitutional provision indicating the fate of those born in the United States after the ratification.⁴⁵ The Act of 1790, usually described as the first federal pronouncement on immigration, was equally unclear as to the fate of such after-born persons.

At the time of this nation’s founding, blacks made up approximately 20% of the residents of what then comprised the United States.⁴⁶ The effort to fence out this substantial number of blacks in the United States is perhaps also borne out by the terms of the 1790 Act. That Act allowed the admission to citizenship of free *white* persons only.⁴⁷ One could reasonably infer that this was a reference to the practical reality that the greatest majority of free persons at the time of the act

39. IRWIN, *supra* note 35, at 105.

40. KENT ANDERSON LESLIE, *WOMAN OF COLOR, DAUGHTER OF PRIVILEGE: AMANDA AMERICA DICKSON, 1849-1893*, 13-14 (1995) (giving accounts of a mulatto woman who inherited a substantial portion of the wealth of her white father in Georgia). Leslie cites to several other historical accounts of freed blacks, including: ADELE LOGAN ALEXANDER, *AMBIGUOUS LIVES: FREE WOMEN OF COLOR IN RURAL GEORGIA, 1789-1879* (1991); THOMAS O. MADDEN, JR. & ANNE MILLER, *WE WERE ALWAYS FREE: THE MADDENS OF CULPEPER COUNTY, VIRGINIA, A TWO HUNDRED YEAR FAMILY HISTORY* (1992); KATHRYN L. MORGAN, *CHILDREN OF STRANGERS: THE STORIES OF A BLACK FAMILY* (1980).

41. STEPHEN LEGOMSKY, *IMMIGRATION LAW AND POLICY* 1029 (1991).

42. *Id.*

43. *Id.* at 1028.

44. *Id.*

45. *Id.* at 1029.

46. See DANIELS, *supra* note 20, at 55; see also FRANKLIN, *supra* note 36, at 102-10.

47. FRANKLIN, *supra* note 36, at 102-10.

were in fact white.⁴⁸ However, there were undoubtedly free persons of color, yet they were very clearly excluded by this provision.⁴⁹ But why did the notion of blacks as “anti-citizens” develop?

Blacks who inhabited the early English settlements were often accorded the same rights as their white counterparts, free or indentured.⁵⁰ As further testament to the relatively equal status which blacks were accorded, there were very often liaisons and marriages among the lower classes of blacks and whites.⁵¹ In Virginia, for example, there were several types of servitude: indentured white servants, white servants without indenture, Christian black servants, Indian servants, mulatto servants, Indian slaves, and black slaves.⁵²

The notion of blacks as distinctly separate from other members of the serving class developed because whites who entered as indentures could, by virtue of their ability to blend in with the general population, easily shed their bond.⁵³ Blacks, on the other hand, were easily distinguishable from the general population. It also became clear that there was a continuing need for inexpensive labor to fuel the growth of the colonies, a need that could not be addressed via the mechanism of indentures.⁵⁴ Thus, a movement of blacks into permanent slavery developed. In 1661, slavery was first recognized by statute in Virginia with an enactment which penalized whites who, already obliged to serve for life, could not satisfy the requirement of serving additional time for running away.⁵⁵

Towards the middle to late 1700s, as the colonists began to bridle under the weight of English rule, some thinkers of the period were struck by the paradox between the desires of colonists for greater individual rights, political and religious freedom, and the existence of the institution of slavery.⁵⁶ For some, the paradox was too striking to ig-

48. Free white persons numbered 3,172,100 in the 1790 census, while free blacks totaled 59,511. See First Census of the United States, Population of the United States as Returned at the First Census, 1790 (1791).

49. According to the 1790 census, there were 59,511 free blacks in the United States and its territories, 697,697 slaves, and a total of 3,929,326 total persons, excluding indigenous persons. See *id.*

50. See CURRY, *supra* note 13, at 15-18 (discussing the relatively few prohibitions on black employment in the cities in the early 1800s).

51. EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 329-37 (1995).

52. LESLIE, *supra* note 40, at 5.

53. FRANKLIN, *supra* note 36, at 35-36.

54. *Id.*

55. *Id.* at 57.

56. See DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823, 165-212 (1975).

nore, and there were calls for the abolition of slavery.⁵⁷ Some colonies were successful in advancing a general anti-slavery agenda.⁵⁸ They succeeded in preventing the further importation of slaves into those colonies as early as 1774.⁵⁹ This was not, however, necessarily an anti-slavery measure, because the action taken was primarily to retaliate against England.⁶⁰ In colonies where there was success in eradicating slavery, there tended to be more acceptance of liberated or already-free blacks who took residence therein.⁶¹ In New York, for example, there was a long-established colony of freed blacks who were accorded the right to own property and other rights indicative of membership in the community.⁶²

When relations with England reached breakpoint, and hostilities erupted in the Revolutionary War, blacks, though at first rejected, were permitted to fight in the War.⁶³ The first person to be killed in the opening salvos of the War was Crispus Attucks, an escaped slave from Massachusetts.⁶⁴ The decision to include blacks in the war, to a great degree, was spurred by the fact that the English, in an effort to cause black defections from the side of the colonies, offered freedom to slaves who would run away and fight on their side.⁶⁵ At the War's conclusion, some of the slaves were rewarded with freedom.⁶⁶ Many of these freed slaves formed associations whose initial goals were to secure greater freedom for blacks.⁶⁷

The founding fathers appeared to have envisioned the formation of an exclusively white polity even at this early time.⁶⁸ During the colonial period, many "friends of the black" envisioned a return to Africa as the highest and best destiny for free blacks.⁶⁹ Groups such as the

57. *Id.*

58. BERLIN, *supra* note 35, at 233-35. For example, Vermont emancipated slaves via an amendment to the state constitution. *Id.* By 1805, Massachusetts, New Hampshire, Connecticut, and Rhode Island had ended slavery, or had instituted gradual emancipation. *Id.* New York, Pennsylvania, and New Jersey had legislated gradual emancipation. *Id.*

59. FRANKLIN, *supra* note 36, at 85.

60. *Id.* at 87.

61. G. James Fleming, *The Negro in American Politics: The Past*, in THE AMERICAN NEGRO REFERENCE BOOK 414-15 (John P. Davis ed., 1966).

62. *Id.*

63. FRANKLIN, *supra* note 36, at 86.

64. *Id.* at 86-87.

65. *Id.* at 91.

66. *Id.* at 96.

67. P. OLISANWUCHE ESEDEBE, PAN-AFRICANISM: THE IDEA AND MOVEMENT, 1776-1963, 8-9 (1982).

68. DAVIS, *supra* note 56, at 165-212.

69. See generally EARLY LEE FOX, THE AMERICAN COLONIZATION SOCIETY 1817-1840 (1917) (discussing the vision of the American Colonization Society).

American Colonization Society and others made the return of the freed blacks to Africa their mandate, reasoning that blacks could never really be fully assimilated into American society.⁷⁰ The Colonization Society was based upon religious appeal, as the group claimed to be a missionary enterprise that would aid in the "redemption" of Africa.⁷¹ Return of free blacks to Africa, the group maintained, would aid in the conversion of the natives. Additionally, and perhaps more importantly, the removal of free blacks would eliminate an "inadequately controlled and unpredictable element in a social situation that seemed to offer many threats to order, stability, and hierarchy."⁷² Some blacks also took up the cry for emigration, as it became clear that the newly found liberty of white patriots would not be extended to them.⁷³ This "redemption" and "repatriation" plan for free blacks is perhaps best viewed as a way of deporting an alien class. Thus, while blacks were the possessors of some limited rights early in the colonial period, these rights gradually diminished as it became economically feasible and socially practicable to reduce them to a slave class. Blacks in the colonies, and later fledgling states, were seen as having no other destiny but that of permanent servitude.⁷⁴

C. *Free Blacks as Societal Misfits and the Continuing Immigrant Status*

The 1863 Emancipation Proclamation is usually considered the end of slavery in the United States.⁷⁵ By this Proclamation, President Abraham Lincoln declared free all slaves residing in the territories that were in rebellion against the federal government.⁷⁶ However, those slaves in border states which sided with the Union were not freed by the proclamation, nor were slaves in southern areas which had already been captured by Union forces.⁷⁷ Nonetheless, many slaves in unaffected areas, hearing word of the Proclamation, began slipping away.⁷⁸ Many others were allowed to enlist in the Union army as a result of the Proclamation.⁷⁹ Slavery's official end through-

70. FREDRICKSON, *supra* note 9, at 6.

71. *Id.*

72. *Id.* at 8.

73. ESEDEBE, *supra* note 67, at 9-11.

74. See MORGAN, *supra* note 51, at 337.

75. Proclamation of Jan. 1, 1863, no. 17, 12 Stat. 1268.

76. *Id.*

77. *Id.*

78. DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 56 (1980).

79. *Id.*

out the United States, however, came with the Thirteenth Amendment to the Constitution in 1865.⁸⁰

Whether the end of slavery in the United States occurred in 1863 or 1865, it was substantially later than slavery's demise in most other Western Hemisphere countries.⁸¹ Many reasons can be posited for the delayed emancipation of blacks in the United States relative to most other New World countries: economics, regional labor needs, culture, and custom.⁸² However, one significant factor that prevented the earlier emancipation of blacks in the United States was the attitude of slave holders towards the institution.⁸³ According to historian John Hope Franklin, "[o]nly in the United States were slave holders convinced that the difference between blacks and whites was so fundamental that Negroes could never be regarded as anything except slaves."⁸⁴

Although there were free blacks in the United States prior to the general emancipation in 1863, they were the exception to the rule. As the *Dred Scot*⁸⁵ decision confirmed, the status of a black individual in the United States was presumptively that of a bondsman.⁸⁶ From the earliest American period, there had been free blacks. Some reaped

80. U.S. CONST. amend. XIII. The Thirteenth Amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

Id.

81. See FRANKLIN, *supra* note 36, at 79-83. In 1803, the blacks of Haiti declared themselves free after years of fighting against the French. *Id.* at 80. In 1824, slavery was ended by proclamation in the Federal Republic of Central America, then composed of El Salvador, Guatemala, Honduras, Nicaragua, and Costa Rica. *Id.* at 81-82. Mexico decreed the end of slavery in 1829, with Bolivia following suit in 1831. *Id.* at 82. Slavery ended in the British West Indies in 1838. *Id.* at 81. Uruguay emancipated its slaves in 1842. *Id.* at 82. Colombia emancipated its slaves in 1851, followed by Argentina in 1853, Venezuela in 1854, and Peru in 1855. *Id.* Those countries that ended slavery later than the United States were Cuba in 1886 and Brazil in 1888. *Id.* at 83. See also IRWIN, *supra* note 35, at 223.

82. FRANKLIN, *supra* note 36, at 83-84.

83. *Id.*

84. *Id.* at 84.

85. *Dred Scot v. Sanford*, 60 U.S. 393 (1857).

86. *Id.* at 394-98. *Dred Scot* was a slave who undertook an eleven-year legal battle to secure his freedom. His claim was based on the fact that he was held on more than one occasion as a slave in a free state or territory. *Id.* *Scot's* suit was brought under Missouri law, which held that slaves taken to reside in states or territories where slavery was prohibited were emancipated. *Id.* Ultimately, the Supreme Court declared that *Dred Scot* had no claim to freedom as he was not a citizen of Missouri within the meaning of the Constitution. *Id.* As such, he was not entitled to sue in United States' courts. In reaching this conclusion, Chief Justice Taney concluded that persons of African descent, whether slave or free, had no claim to state, and consequently federal, citizenship because they were not among those individuals considered as persons under the

the benefits of freedom via manumission of their masters. Other slaves purchased their freedom by saving money.⁸⁷ Still others were born free, since some free black women did give birth, and the condition of the child followed that of the mother.⁸⁸

Fearful of the effect of freed blacks upon the enslaved, some states acted to limit or forbid the manumission of slaves by their masters.⁸⁹ Some jurisdictions required free blacks to leave the territory.⁹⁰ In other areas, freed slaves were subject to capture and resale.⁹¹ Such was the case in 1797, when four blacks petitioned the United States House of Representatives for federal protection of manumitted slaves in the South.⁹² The four men, Jacob Nicholson, Jupiter Nicholson, Job Albert, and Thomas Pritchett averred in their petition that they were all North Carolinians who had been set free by their masters, that they were pursued in order that they might be resold into slavery, and that while they and some of their family members had escaped, others had not.⁹³ The men sought federal intervention to free their captured kinsmen and to prevent the repetition of such actions.⁹⁴ Their petition, however, was rejected by the House.

Despite the precarious position of freed blacks before the later general emancipation, the numbers of free blacks did gradually increase from the colonial period.⁹⁵ At the 1790 census, there were 59,000 free blacks in the United States. By 1830, there were 319,000 free blacks, and by 1860, there were almost a half million such persons.⁹⁶ Most of these persons were concentrated in the North, with the rest in the South Atlantic states.⁹⁷

After the general emancipation of slaves, the already uneasy relations between blacks and the rest of American society grew more strained. Whereas before free blacks had been seen as unwanted nuisances of a limited number living in circumscribed areas, the general

Constitution. See DON E. FEHRENBACHER, *SLAVERY, LAW AND POLITICS: THE DRED SCOT CASE IN HISTORICAL PERSPECTIVE* (1981).

87. FRANKLIN, *supra* note 36, at 165.

88. *Id.* Franklin notes that just like in the colonial period, additions to the group of free blacks came not only from the birth of children to free black women, but also from the birth of mulatto children to white women. *Id.*

89. WINTHROP D. JORDAN, *WHITE OVER BLACK* 122-23 (1968).

90. *Id.*

91. *Id.*

92. *AFRO-AMERICAN HISTORY: PRIMARY SOURCES 27-31* (Thomas R. Frazier ed., 1971) (citing *ANNALS OF CONG.* 2015-18 (1796-1797)).

93. *Id.*

94. *Id.*

95. *Id.*

96. FRANKLIN, *supra* note 36, at 165-67.

97. *Id.*

emancipation produced masses of freed blacks throughout the South.⁹⁸ Although many blacks found their way to the North and West, a significant number remained on the plantations where they had been held as slaves, performing substantially the same work for little or no wages.⁹⁹ Still others flocked to southern urban centers and to nearby rural areas which offered more job opportunities.¹⁰⁰

Some unfortunate freed blacks were retaken and sold as slaves to Brazil and Cuba, two nations that retained slavery after the United States.¹⁰¹ Others flocked to Washington D.C., which had abolished slavery in 1862.¹⁰² Under the terms of the 1862 Act, President Lincoln was authorized to make provision for the "transportation, colonization, and settlement, in some tropical country beyond the limits of the United States, of such persons of the African race."¹⁰³ Again, this is much akin to a system of deportation for a group seen as alien. Such colonization schemes, which had existed since early times, did not gain widespread acceptance after the Civil War, however.¹⁰⁴ Blacks were needed as laborers, and by 1864 all laws regarding black colonization were repealed.¹⁰⁵

98. *Id.*

99. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 188 (1962).

100. *Id.* Du Bois also states that:

Slavery was not abolished even after the Thirteenth Amendment. There were four million freedmen and most of them on the same plantation, doing the same work that they did before emancipation, except as their work had been interrupted and changed by the upheaval of war. Moreover, they were getting about the same wages and apparently were going to be subject to slave codes modified only in name. There were among them thousands of fugitives in the camps of the soldiers or on the streets of the cities, homeless, sick and impoverished. They had been freed practically with no land nor money, and, save in exceptional cases, without legal status, and without protection.

Id. at 188.

101. The "official" end of slavery in Brazil came in 1888. See FRANKLIN, *supra* note 36, at 79. In *Black Reconstruction*, Du Bois quotes Charles Sumner, a Senator from Massachusetts as reporting:

Another big trade is going on; that of running Negroes to Cuba and Brazil. They are running through the country dressed in Yankee clothes, hiring men, giving them any price they ask, to make turpentine on the bay, sometimes on the rivers, sometimes to make sugar. They get them on the cars. Of course the Negro don't know where he is going. They get him to the bay and tell him to go on the steamer. To go around the coast, and away goes poor Cuffie to Slavery again.

Du Bois, *supra* note 99, at 188.

102. FRANKLIN, *supra* note 36, at 147. The Act of April 16, 1862 abolished slavery in the District of Columbia, and made provisions for appropriations for the voluntary black emigrants in the amount of \$100,000. *Id.*

103. Act of April 16, 1862.

104. Du Bois, *supra* note 99, at 147.

105. *Id.* at 149.

Once the matter of whether blacks would remain in the country after slavery was settled, it remained to be seen what rights, if any, they would have. As Professor Derrick Bell noted, the Thirteenth Amendment ended the Constitution's protection of slavery, but did not resolve the issue of the newly freed slaves' political status.¹⁰⁶ The Civil Rights Act of 1866 was enacted to protect freed slaves from state and private infringements of their rights.¹⁰⁷ However, just as the post-civil war legislation and amendments were getting underway, they were countered by the enactment of "Black Codes" by the states.¹⁰⁸ These were laws which severely restricted the rights of blacks to freely seek work, to have access to court as a means of redressing wrongs, to obtain land, or to bear arms.¹⁰⁹ Some states, such as South Carolina, passed laws forbidding blacks to migrate into the state without posting bond.¹¹⁰ Other states, such as Florida, severely restricted the social and business contact between blacks and whites.¹¹¹ Several states enacted "vagrancy" statutes which forbade blacks from "wandering or strolling about in idleness without work," and often provided that conviction of such a crime would lead to assignment to "public works projects."¹¹²

In an attempt to bring an end to these injustices, the Fourteenth Amendment was enacted in 1865, and ultimately ratified in 1868.¹¹³ This Amendment reinforced the promises of the Civil Rights Act of 1866 by stating that all persons born in the United States were citizens.¹¹⁴ It also provided that no state "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

106. BELL, *supra* note 78, at 57.

107. *Id.* at 198. Bell cites the Civil Rights Act of 1866, which provides in part:

That all persons born in the United States and are not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery of involuntary servitude . . . shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey, real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.

Id.

108. Eight states enacted Black Codes: Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia. See 2 CHARLES FAIRMAN, *THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-1888*, 110 (1971).

109. DU BOIS, *supra* note 99, at 166-67.

110. *Id.* at 167-68.

111. *Id.* at 172.

112. *Id.* at 174.

113. *Id.*

114. *Id.*

United States.”¹¹⁵ As Professor Bell pointed out, however, the Fourteenth Amendment negatively stated deprivations of rights of citizenship rather than reiterating the positive statement of citizenship rights seen in the Civil Rights Act of 1866.¹¹⁶ Later, the Fifteenth Amendment was passed to insure the franchise of freed slaves.¹¹⁷ As Professor Bell noted, however, this Amendment was “effectively not enforced for almost a century.”¹¹⁸

What we then had, upon the termination of slavery was a mass of quasi-alien persons who somehow needed to be absorbed into the economic and social fabric of the country. To address the plight of the newly freed slaves, the Freedmen’s Bureau was created by the Act of March 3, 1865.¹¹⁹ The bill provided for the creation of a bureau under the auspices of the War Department, which was initially to last only for the duration of the war and for a year thereafter, and whose goal was to assist both freed slaves and, to some extent, displaced whites.¹²⁰ It was headed by a commissioner appointed by the President and directed by up to ten commissioners who would be appointed to each of the ten rebel states.¹²¹ The Bureau provided needed supplies to freed slaves, and was empowered to set aside up to forty acres of land for leasing and subsequent purchase by each freed man or refugee.¹²² This lease-purchase scheme was criticized at the time, as few freed men possessed the resources to enter into such commitments.¹²³

115. U.S. CONST. amend. XIV, §1.

116. BELL, *supra* note 78, at 32 n.7.

117. U.S. CONST. amend. XV.

118. See BELL, *supra* note 78, at 33; see also *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Cruikshank*, 92 U.S. 542 (1876). In both cases, the Supreme Court held that the Fifteenth Amendment did not give former slaves any positive right to the franchise. Rather, it prohibited the states from denying blacks the right to vote because of race, color, and previous condition of servitude. *Reese*, 92 U.S. at 215; *Cruikshank*, 92 U.S. at 545. Rights of suffrage were not “a necessary attribute of national citizenship,” and the right to vote, inasmuch as it was a positive right that flowed from the states. *Cruikshank*, 92 U.S. at 555. In 1883, the Supreme Court declared the 1875 Civil Rights Bill unconstitutional because it attempted to redress grievances against private individuals. *Civil Rights Cases*, 109 U.S. 3 (1883). The Court held that such acts were private wrongs, and that civil rights guaranteed by the Constitution could not be imposed by individuals. *Id.* at 17. The cases before the court involved individuals who attempted to deprive blacks of access to hotel accommodations, theaters, and railways. *Cruikshank*, 92 U.S. at 542-43; *Reese*, 92 U.S. at 214-16.

119. Act of March 3, 1865, 13 Stat. 511.

120. *Id.*

121. DU BOIS, *supra* note 99, at 221.

122. *Id.*

123. See CARL R. OSTHAUS, *FREEDMEN, PHILANTHROPY AND FRAUD: A HISTORY OF THE FREEDMEN’S SAVINGS BANK 4* (1976).

There had been pressures for outright land grants, but these failed.¹²⁴ This land arrangement was the source of the infamous “40 acres and a mule” which was to be delivered to freed blacks, but which never quite materialized due to the opposition of both Northerners and Southerners.¹²⁵ Ultimately, land in the South was reclaimed, and given back to former owners.¹²⁶ Chief among the opponents was President Andrew Johnson, who believed that freed blacks should, “by their own efforts, establish for themselves a condition of responsibility and prosperity.”¹²⁷ Johnson in fact vetoed the permanent establishment of the Freedmen’s Bureau throughout the United States.¹²⁸

The Freedmen’s Bureau was ultimately extended through 1869, with some of its work continuing until 1872.¹²⁹ Much of its work consisted of supporting broad social needs such as healthcare and education.¹³⁰ The Bureau also attempted to safeguard black rights by ensuring access to judicial proceedings, and by assisting in labor and property contracts.¹³¹ Although the Freedmen’s Bureau undoubtedly provided great benefits to many former slaves, W.E.B. Du Bois argued that its principal flaw was its refusal to deliver land to slaves.¹³² Another of its failures was the great debacle of the Freedmen’s Savings and Trust Company, which was created by legislation on March 3, 1865 to assist freed slaves in amassing capital.¹³³ Deposits to the Freedman’s Savings and Trust Company were limited to blacks, and at least two-thirds of the deposits were required to be invested in United

124. See DU BOIS, *supra* note 99, at 220-21; see also Thaddeus Stevens, *Southern Land Should Be Given to the Slaves*, in RECONSTRUCTION: OPPOSING VIEWPOINTS 149-54 (Brenda Staleup ed., 1995).

125. BORIS I. BITKER, *THE CASE FOR BLACK REPARATIONS* 8-29 (1973). Bitker outlines the case for compensation to blacks for slavery. *Id.* He points out that while slavery is at the heart of blacks’ compensation claims, focusing on slavery exclusively understates the breadth and depth of the wrongs done to them. *Id.* at 10-11. Events dating from slavery, and the maintenance of inferior caste status for blacks, are more compelling reasons to support reparations. *Id.* at 12. Slavery, says Bitker, “was followed not by a century of equality but by a mere decade of faltering progress, repeatedly checked by violence.” *Id.*

126. BELL, *supra* note 78, at 34; DU BOIS, *supra* note 99, at 221.

127. DU BOIS, *supra* note 99, at 276.

128. *Id.* at 273-77. Du Bois indicates that in opposing the delivery of land to former slaves who had worked without wages on the very same lands for hundreds of years, Johnson applied the “American Assumption,” which was “the possibility of labor’s achieving wealth.” *Id.* at 277. This assumption was “applied with a vengeance to landless slaves under caste conditions. The very strength of its logic was the weakness of its common sense.” *Id.*

129. *Id.* at 224.

130. *Id.* at 226.

131. *Id.*

132. *Id.* at 227-28.

133. See WALTER L. FLEMING, *THE FREEDMEN’S SAVINGS BANK: A CHAPTER IN THE ECONOMIC HISTORY OF THE NEGRO RACE* 25-26 (1927); OSTHAUS, *supra* note 123, at 4.

States securities.¹³⁴ Former slaves made deposits into the new institution, which resulted in as much as 57 million dollars at one point.¹³⁵ The institution came crashing down, however, after an amendment to the charter in 1870 allowed investment in notes and bonds secured by real estate mortgages.¹³⁶ In a scandal that in some ways resembled the savings and loan crisis of the 1980s, the notes and mortgages were often worthless, having been based on wildly inflated land values.¹³⁷ Unlike the modern day savings and loan crisis, however, there was no federal insurance to replace the depleted funds.¹³⁸ Much of the black laborers' money was lost.¹³⁹ Although a total of 62% of deposits was ultimately paid out, many depositors received little or nothing.¹⁴⁰ What was intended to be a method to aid in the "Americanization" of freed slaves served to lessen even further the trust that many slaves had in the government.¹⁴¹

This sort of devastating financial loss resulting from chimerical monetary schemes is common to many immigrant groups who lack the knowledge and sophistication to evaluate whether a plan for financial advancement is sound. For example, in the Ponzi scandals of the 1920s and 1930's, many Italian and other immigrants were defrauded of several million dollars.¹⁴² Fraudulent monetary schemes remain a feature of modern immigrant life, and correspondingly, of modern black life.¹⁴³

134. OSTHAUS, *supra* note 123, at 4.

135. *Id.*

136. *Id.*

137. *Id.*

138. See DAVITA SILFEN GLASBERG & DAN SKIDMORE, CORPORATE WELFARE POLICY AND THE WELFARE STATE: BANK DEREGULATION AND THE SAVINGS AND LOAN BAILOUT (1997).

139. FLEMING, *supra* note 133, at 25-26.

140. OSTHAUS, *supra* note 123, at 211-215.

141. "The symbols of freedom had become the symbols of bank safety." *Id.* at 55.

142. Charles (Carlo) Ponzi was an Italian immigrant who created a Boston-based fraudulent investment scheme in the 1920s. *Cunningham v. Brown*, 265 U.S. 1, 7-10 (1924). Ponzi convinced thousands of his fellow immigrants to invest in a plan to buy postal coupons that could then be resold at huge profits, allowing him to repay loans at between 50% and 100% of their value. *Id.* There were no profits; rather, investors were paid in a repayment scheme, resembling a pyramid, with the receipts of new investors (those at the bottom of the pyramid) being used to pay old investors (those at the top of the pyramid). See *id.*

143. See, e.g., *SEC v. Int'l Loan Network, Inc.*, 770 F. Supp. 678, 686 (D.D.C. 1991). In that case, primarily black investors were led to believe that they were joining an "investment club" which was, in actuality, similar to a pyramid scheme. *Id.* Investors lost substantial sums of money, and millions of dollars went unaccounted for. *Id.* In ruling against the defendants, the court stated:

With respect to whether misrepresentations have been made concerning ILN's [International Loan Network's] programs, the evidence is clear that ILN is nothing more than a glorified chain letter, destined to collapse of its own weight. Despite the inevitability of this outcome, potential investors were, until the issuance of the temporary

For the brief years after the passage of the Fourteenth and Fifteenth Amendments, blacks participated in civic life—voting, and even holding office.¹⁴⁴ In some cases, laws against interracial marriage, even in the deep South, had been eased, allowing marriages across the color line in some states.¹⁴⁵ Blacks were newly enfranchised under the rewritten constitutions of Southern states because of mandates of Reconstruction.¹⁴⁶

Notwithstanding what appeared to be tremendous progress, towards the end of the 1870s, Reconstruction seemed to slow to a crawl as the federal government withdrew from the South, and Southern whites set out to redress their wounded pride with a vengeance.¹⁴⁷ The first step for Southern whites was to recover political power from the Republicans by retaking local elective offices.¹⁴⁸ By 1874, “only South Carolina, Florida, Louisiana, and Mississippi were still in the Republican column.”¹⁴⁹ White Democrats coalesced to capture votes, often using violence to silence the black population and recalcitrant whites.¹⁵⁰ Through such means and subtle use of intimidation, white Democrats caused a white exodus from the Republican to the Democratic Party.¹⁵¹ After whites reclaimed elective power, blacks were

restraining order in this case, continuing to be promised great wealth through their participation in the ILN. The pyramid nature of the organization was never fully revealed to them.

Id. at 694. See also SEC v. Gulati, SEC Litigation Release No. 13,320 (S.D.N.Y. 1992) (alleging that an investment advisor and broker-dealer allegedly sold unregistered securities-2% notes claimed to be backed by collateral and insured-to at least one hundred Indian and Pakistani immigrant investors, raising \$ 2.3 million through the use of a “Ponzi” scheme); PHILIP KASINITZ, CARIBBEAN NEW YORK: BLACK IMMIGRANTS AND THE POLITICS OF RACE (1992) (discussing West Indian pyramid schemes).

One reporter described the resurgence of modern Ponzi schemes, and discussed the concept of “affinity fraud” wherein investors of a particular ethnic group, like Ponzi or those in *International Loan Network*, defraud members of their own ethnic or racial community. David Segal, *Money for Nothing; Forget the Work Ethic; Mr. Ponzi Showed Us the Real American Dream*, WASH. POST, June 2, 1996, at C01.

144. LERONE BENNETT, BEFORE THE MAYFLOWER: HISTORY OF THE NEGRO IN AMERICA 1619-1964, 199 (1970). Two of the best known participants were P.B.S. Pinchback of Louisiana and Robert Brown Elliot of South Carolina. *Id.* Elliot, it may be noted, was the son of West Indian immigrants, and undoubtedly there were comparisons between the “superior” black immigrant and the “native” black. *Id.* at 207.

145. FRANKLIN, *supra* note 36, at 236-59, 272-75.

146. *Id.* at 252-53.

147. *Id.* at 272-76.

148. *Id.*

149. BENNETT, *supra* note 144, at 213.

150. *Id.* at 216.

151. *Id.* Bennett notes that pressure was applied to whites to encourage them to change political affiliation. Such party-switching conversions were called “crossing Jordan.” *Id.* This was apparently a sardonic reference to baptism as the symbolic “crossing of the river Jordan,” allowing an individual to gain redemption.

subjected to the worst repression since before the Civil War.¹⁵² In what has come to be known as the "Hayes Compromise," in 1877, Representative Rutherford B. Hayes, the Republican candidate for president, agreed that if elected, he would withdraw all federal troops from the South, turn it back over to Southern Democrats, and make a pact of non-interference.¹⁵³ He and members of his party also pledged to induce then President Grant to join in the agreement.¹⁵⁴ The pact was sealed, and the Democrats reassumed power in the South.¹⁵⁵ By the late 1890s, several steps had been taken to excise the provisions enfranchising blacks from their rewritten state constitutions.¹⁵⁶

Although some blacks continued to hold political power near the turn of the century, it was, as Du Bois indicated, "a losing battle, with public opinion, industry, wealth, and religion against them."¹⁵⁷ States enacted "Jim Crow" laws to keep blacks "in their places," stripped of all rights.¹⁵⁸ These laws, named after a verse made famous by a white minstrel man in black face, enforced a rigid system of segregation.¹⁵⁹ Blacks were required to occupy separate railway cars, use separate public facilities, and were banned from many restaurants and hotels.¹⁶⁰ These laws began in earnest in the 1880s and were increasingly enacted into the twentieth century.¹⁶¹ In 1896, the creation of two Americas, one white, one black, was firmly nailed into place by *Plessy v. Ferguson*.¹⁶²

Plessy involved the travails of Homer Plessy, a Louisiana man of mixed black and white heritage, who demanded the right to sit in a railroad car reserved for whites after having paid for first class pas-

152. See John Mercer Langston, *The Compromise of 1877 Will Help Reconstruction*, in RECONSTRUCTION: OPPOSING VIEWPOINTS 199-205 (Brenda Staleup ed., 1995).

153. *Id.* See STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 29-31 (1997).

154. DU BOIS, *supra* note 99, at 691-92.

155. *Id.*

156. FRANKLIN, *supra* note 36, at 273.

157. DU BOIS, *supra* note 99, at 692.

158. *Id.*

159. See SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA 7 (Jannette L. Dates & William Barlow eds., 1990). The verse states:

Wheel about and turn about

And do just so

Every time I wheel about

I jump Jim Crow

BENNETT, *supra* note 144, at 220. See also C. VAN WOODWARD, THE STRANGE HISTORY OF JIM CROW (1955).

160. See VAN WOODWARD, *supra* note 159.

161. *Id.*

162. 163 U.S. 537 (1896).

sage. After being seized and arrested, Plessy sued, arguing that the provisions of Louisiana state law calling for separate seating for blacks and whites violated the Thirteenth and Fourteenth Amendments. The Supreme Court held that the Thirteenth Amendment was clearly not implicated, in that

a statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.¹⁶³

163. *Id.* at 543. Also as to his color, it is to be noted that in his petition, Plessy asserted that he was “of mixed descent, in the proportion of seven eighths Caucasian blood and one eighth African blood, that the mixture of colored blood was not discernible in him.” *Id.* Whether it was through the ordering of the Court’s drafting or that of Plessy’s petition, this fact is put forward first in summarizing his claim in the prior history section of the case. *Id.* at 537. This may suggest an operative belief, either on the part of Plessy, the Court, or both, that the post-war amendments notwithstanding, people who are white-looking should have the rights of white people, or at least a colorable (the pun was irresistible!) claim to those rights. See generally Cheryl H. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1745-50 (1993) (stating that the Plessy court did not consider any definition of race, yet maintained the property interest in whiteness).

The “white skin privilege” claim often motivated some of those with abolitionist leanings, even prior to the Civil War. The heroine of Harriet Beecher Stowe’s *Uncle Tom’s Cabin*, for example, was described as a near-white mulatto, and evoked widespread sympathy from whites who shuddered at the thought of persons who looked like themselves being subjected to the rigors of slavery. HARRIET BEACHER STOWE, *UNCLE TOM’S CABIN, OR LIFE AMONG THE LOWLY* (1981). At times the evocation of near-white persons being enslaved was used to show the absurdities of a system of bondage based on even remote black lineage, or to show the immorality of slave holders sometimes enslaving person who were their own offspring. See HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* 1-16 (1988) (describing the authors travails as the child of “intellegent,” “skillfull,” “mulatto” parents who were “a light shade of brownish yellow.”). The image of the “white” negro was also used in anti-slavery tracts to imply that such persons were better than “common” blacks and more deserving. Freedom was seen as the right of the white, but the privilege of the black. *Plessy*, 163 U.S. at 541-43.

Professor Derrick Bell notes that the act of classifying persons as black or white for purposes of enforcing racial separation was an act fraught with the peril of misidentification. See BELL, *supra* note 78, at 84 n.3. Bell describes a suit brought by a white woman who was directed to the colored section of a segregated train, where she had to ride approximately three miles in fifteen minutes. *Id.* (citing *Chicago R.I.&P. v. Allison*, 120 Ark. 54 (1915)). Though the \$875 awarded to her was deemed excessive, the court held that in estimating the damage to the woman the jury was allowed to consider several factors, among them the woman’s “degree of refinement,” her “mortification and humiliation, if any” and her “fear and shock.” *Id.* at 84 n.3.

Such cases are not necessarily relics of the distant past. In 1986, the Supreme Court refused to review the case of Susie Guillory Phipps, a Louisiana woman who wanted the racial classification on her birth certificate to be changed from black to white. *Doe v. Louisiana*, 479 So. 2d 369, 372 (La. App. 1985). Though her great-great-great-great-great grandmother was black, Phipps argued that she had been “raised white.” *Id.* at 371. Phipps’ reaction to being considered black was not unlike that imagined by earlier courts: Phipps related in news articles that she was “shocked” and “sick for three days” upon learning that she had a black ancestor and had been

As for the Fourteenth Amendment, while its clear intent was to “enforce the absolute equality of the two races before the law,”¹⁶⁴ the Court found that “in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the races unsatisfactory to either.”¹⁶⁵ *Plessy* was a resounding blow to black hopes of joining the American polity, and it marked a period of downward spiral in the struggle for black rights.¹⁶⁶ The immigrant slave remained the immigrant freed man, ever outside the mainstream. Thus were some of the misbegotten attempts at bringing freed blacks into the national polity.

As blacks suffered further retrenchment through the rule of law, the system of organized oppression spread to other races, and native whites began to look with disfavor upon the immigrants who had been brought into the country, in large measure, to serve as an alternate to black labor.¹⁶⁷ The Chinese, for example, had been encouraged to enter the country in large numbers since 1850, when the California gold rush and rapid western economic expansion made it necessary to seek a source of cheap labor.¹⁶⁸ This need for labor, combined with the desires of Chinese immigrants to seek their fortunes and escape political difficulties in China commencing with the Tai Peng Rebellion, caused the numbers of Chinese entrants to swell in the late 1800s.¹⁶⁹

California had already shown that, as a state, it was disinclined to welcome foreigners, especially “colored” foreigners of any description.¹⁷⁰ This attitude was intensified by the presence of white

designated as black. Calvin Trillin, *American Chronicles: Black or White*, NEW YORKER, Apr. 14, 1986, at 62.

In *Doe*, Phipps and her siblings challenged Louisiana’s refusal to alter her birth certificate to show her race as black instead of white. *Id.* at 371. A 1970 Louisiana statute, La. R.S. 42:267, in effect at the start of Phipps’ case classified anyone having at least one thirty-second black blood as black. *Id.* The statute was intended to reform the previous state court practice of defining as black anyone with a “traceable” amount of black blood as black. *Id.* Such matters were usually resolved by the “common repute” of the birth parents in a particular vicinity. See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 35 (1991). It was also at times determined by reference to lists of surnames “known” to be associated with black families. Clerks making references to these lists sometimes changed the reported race of children unilaterally. *Id.*

164. *Plessy*, 163 U.S. at 543.

165. *Id.*

166. JOHN R. SQUIBB, *ROADS TO PLESSY* 261-62 (1992).

167. *Id.*

168. LEGOMSKY, *supra* note 41, at 12.

169. FRANK CHUMAN, *THE BAMBOO PEOPLE* 3 (1976).

170. MARY ROBERTS COOLIDGE, *CHINESE IMMIGRATION* 29 (1909).

Southerners.¹⁷¹ However, as the Chinese continued to multiply, whites railed against “foreign devils,” and through the systematic enactment of first local, and later, state and federal laws, these groups were shunted aside.¹⁷² In 1875, limits were imposed on Chinese immigration to the United States,¹⁷³ and ultimately, an outright bar to entry was imposed.¹⁷⁴

In some respects, the Chinese were at an even greater legal disadvantage than the newly-freed blacks, as some Supreme Court cases concluded that the Chinese were not entitled to the protections of the post-war legislation. A particularly striking example of this is Justice John Marshall Harlan’s dissent in *Plessy*. There, Justice Harlan suggested that the Fourteenth Amendment should protect freed slaves from discrimination, but the Chinese, who were not apparently the subjects of the Jim Crow laws in question, should reasonably have been, as they were persons who were so “different” from whites that they had been excluded from citizenship.¹⁷⁵

The negative sentiment towards the Chinese broadened to include the Japanese as well, for they had also begun to populate the western United States.¹⁷⁶ Though Americans had, in general, been anxious to import cheap foreign labor, often in lieu of black labor, emotions escalated as the immigrants were increasingly non-English speaking persons, often of darker skin tones and differing religious and social customs.¹⁷⁷ The “hyphenated” American, thus, became a reality.

The post-Civil War period did see gradual broadening of American society. Groups which had earlier been excluded, such as the Irish and Italians, became part of the monolithic white group.¹⁷⁸ The Japanese and Chinese became “model minorities.”¹⁷⁹ In fact, the rate of interracial-marriage between whites and Hispanics and whites and

171. *Id.*

172. A number of measures were undertaken to strike down the efforts of the Chinese to prosper, such as the Foreign Miners Tax License Law of 1850. Act of Apr. 26, 1862, ch. 339, 1862 Cal. Stat. 462. This measure provided that all non-native citizens of the United States (California Indians excepted) or who had not become citizens under the treaty of Guadalupe Hidalgo, must take out a license to mine at \$20 per month. *Id.* See *Baldwin v. Franks*, 120 U.S. 678 (1887); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

173. Ch. 141, 18 Stat. 477 (1875).

174. Ch. 126, 22 Stat. 58 (1882).

175. *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896). See Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 156 (1996).

176. See Lolita Buckner Inniss, *Dutch Uncle Sam, Immigration Reform and Notions of Family*, 36 BRANDEIS J. FAM. L. 177, 187-89 (1997-1998).

177. *Id.*

178. *Id.*

179. *Id.*

Asians has risen dramatically in the last three decades.¹⁸⁰ The melting pot is finally melting, with the exception of blacks as they remain outside the stew.

D. *Post Civil War Rights and the Myth of Color-Blindness*

While the paradigm of the melting pot still controls the rhetoric of political and social discourse in this country, it seems very clear that there is no place in this discourse for blacks. While many suggest that the United States is fast becoming a color-blind society, it is still evident that black remains a color ever visible to the national eye. Blacks are simultaneously as familiar as Aunt Jemima on the box of pancake mix,¹⁸¹ and as alien as the distant shores of Africa.

III. THE HYPHENATION OF AMERICA AND THE STATUS OF BLACKS

The following is a true story.¹⁸²

Recently I went to a dinner party at the home of Jewish-American intellectuals, one of whom was a scientist for a major corporation (the wife), the other, an academic at a respected, if not prestigious university. One

180. *Id.*

181. The fictitious "Aunt Jemima" has for many years graced the boxes of the eponomously named pancake mix. Early on, she appeared as a dark-skinned black woman with a toothy grin and red bandana. In recent years, Aunt Jemima has removed her kerchief to reveal straightened hair, has paled in skin tone, and a smooth gracious smile suggestive of dental bonding. See DIANE ROBERTS, *THE MYTH OF AUNT JEMIMA* (1994); see also Brent Staples, *Aunt Jemima Gets A Makeover*, N.Y. TIMES, Oct. 19, 1994, at A22.

182. Apologies to those who believe that legal scholarship may not be valid if based upon stories which are uniquely personal to the author and reflective of the unconventional view and alternate "truth" of the narrator, rather than being based on a more objective or "standard truth" wherein a third person who had observed the situation would have seen it exactly as the author relates it. As Professors Farber and Sherry point out, one drawback of the story telling genre is that such stories cannot be substantiated through the usual references to cases, scholarly treatises, or social science data. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN L. REV. 807, 831 (1993). Nor, say the authors, do the writers of such stories explain the source of, or indeed prove the existence of, the "voice" of women or people of color. *Id.* I have a solution for the first dilemma which was suggested to me by a letter in the *New York Times* in response to an article on the demise of footnotes. The writer of that letter, Susan Llewellyn, suggested that we might easily eliminate the need for all substantiation by affixing the imprimatur of a hand upraised with the author's signature written across it. *Footnotes Remain a Part of Scholarly Life; "Honest Eyes" Letter to the Editor*, N.Y. TIMES, Aug. 19, 1996, at A12. The symbol would communicate the sentiment "Honest, I did my homework," thus providing substantiation for the material contained in the text. In this case, my hand is upraised and I can say for all the world, "Honest, my story is true." As to the second concern about the lack of proofs as to the existence of a particular "voice" of women or oppressed persons, I offer a paraphrasing of Descartes' first principle in response. Whereas Descartes wrote "I think therefore I am," I postulate, "I think, and I speak, therefore I am."

of them was, in fact, an Israeli-American. The party was held in honor of a young student who worked with the scientist hostess, and who having recently completed an internship, was scheduled to begin graduate school. The student intern, a Chinese-American woman was, like many of the guests, a product of an Ivy-League school. A neighboring couple also attended the party. The neighbors were French academics from the Alsace region of France who studied in the United States each summer. My husband, a Caribbean-American, and I, a black American, were the only blacks at the party. The only invited guest who did not attend was a young man who worked at the same corporation as the hostess. He was a relatively new employee who had migrated to the Northeast from the American South after graduate school. The hostess, one of the young man's supervisors at work, expressed surprise that the young man did not appear after having accepted the invitation, as he had always been so punctual and well mannered.

During the party, some guests became aware that I am law trained, and the subject turned to the O.J. Simpson trial. This happens often when I interact with non-black persons not trained in the law, as they apparently want very much to hear the "black view" on the matter, from a legal perspective, of course.¹⁸³ I do not mind, and in fact, consider it a pleasure to serve as a spokesperson for the nation's twenty million black residents. Naturally, I cannot speak for them all. Sensibly, in this instance, I did not try. I turned instead to the French couple and began conversing in French. They were mightily surprised and impressed that a black American had such a command of a foreign language. Was I, they wondered, Haitian, or perhaps Martiniquean? No, I calmly assured them, I was simply an American.

What this anecdote illustrates is the hyphenated nature of even the most mundane events. There is the ever-present shadow of race, ethnicity, class, gender, and alienage.¹⁸⁴ Now it could be that such events are carefully constructed as tableaux for those who see beauty

183. Exposition on the "black view" is common on the campuses of predominantly white colleges and in white intellectual society. See JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLECLASS EXPERIENCE* 107-08 (1994).

184. See W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 45 (1995). Du Bois explained this twoness in describing the two alternate realities for blacks, one "behind the veil" of race, the other outside of the veil:

One ever feels his twoness,-an American, a Negro; two souls, two thoughts, two unrec-
onciled strivings; two warring ideals in one dark body, whose dogged strength alone
keeps it from being torn asunder.

The history of the American Negro is the history of this strife,-this longing to attain
self-conscious manhood, to merge his double self into a better and truer self.

Id.

in the well-crafted social mosaic of a dinner party. Or, it could be that in today's post-ethnic¹⁸⁵ America my description of the racial or ethnic background of the party guests or allusions to their conjunctive "otherness"—that which is outside of their basic humanity—is merely an example of my own parochialism. This anecdote, however, helps to fix the focus of this paper, for it is race, specifically blackness, which informs many of the discussions of otherness. If the passage were stripped of adjectives that reveal the otherness of the party guests, what we would have is a run-of-the-mill party with "regular" guests—plain, non-ethnic, white, American guests.

You may have noticed that only one actor in the anecdote, the missing young man, has no "otherness," such as ethnicity or race.¹⁸⁶ He is, of course, white, and of generic European Protestant background—the norm upon which all other descriptions of this kind depend. Very often it is the case that news reports tell us that a missing child is "three-years old, has blue eyes and was wearing a green jumper," or that a new employee is "tall, slightly built, and drives a Dodge Neon." The race of any individual is presumptively white.¹⁸⁷ Unless, some

185. "Post-ethnic" describes a perspective that "favors voluntary over involuntary affiliations, balances an appreciation for communities of descent with a determination to make room for new communities, and promotes solidarities of wide scope that incorporate people with different ethnic and racial backgrounds." DAVID HOLLINGER, *POST-ETHNIC AMERICA* 3 (1995). Post-ethnicity would seem to be a cognate of the notion of cosmopolitanism, which has been described by Stalinists as "servility before Western bourgeois culture." See Enrique Carrasco, *The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 *Geo. L.J.* 1521, 1528 n.64 (1986) (citing D. MACKENZIE & M. CURRAN, *A HISTORY OF RUSSIA AND THE SOVIET UNION* 550-51 (rev. ed. 1982)). It has also been described as an antidote to identity politics. See Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 *U. MICH. J.L. REF.* 751, 788-92 (1992). Richard Delgado and Jean Stefancic offer a middle-ground definition. Richard Delgado & Jean Stefancic, *Cosmopolitanism Inside Out: International Norms and the Struggle for Civil Rights and Local Justice*, 27 *CONN. L. REV.* 773, 778 (1995) (noting that cosmopolitanism is a neutral principle which helps us to focus on our common humanity and forestall the encroachment of narrow nationalism).

186. I treat Jews here as an ethnic group, thus the appellation "Jewish-American." The Israeli-American refers to a subset of the Jewish-American group; however, his national origin is distinct in that he is a relatively recent immigrant from Israel. American Jews "hold ambivalent attitudes" towards Israeli emigrants to America, at best and that at worst American Jews share the Israeli view of Jews leaving Israel, considering such individuals as "nonpersons" and as "the fallen among the weaklings." CHAIM WAXMAN, *AMERICAN'S JEWS IN TRANSITION* 198 (1983). Waxman suggests that this attitude may be based upon "ideological-Zionist" and "pragmatic-democratic" reasons on the part of Israel. *Id.* Where Americans are concerned, Israeli immigrants are seen as "challenges to American-Jewish fantasies about Israel." In short, it appears that the Israeli-American could well be considered a sub-minority group member in view of Louis Wirth's definition of "minority." *Id.*

187. See IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 22-24 (1996). Professor Lopez describes a phenomenon which has been termed "transparency, the tendency of whites not to think about whiteness, or about norms, behaviours, experiences, or perspectives that are white-specific." *Id.* at 22 (citing Barbara J. Flagg, "Was Blind But Now I

blacks say in frustration, the actor is on welfare, or accused of committing a crime.¹⁸⁸ Deviant behaviors like criminality and poverty (which is very much seen as a *behavior* by some) apparently have a color in the American media, and that color is black.¹⁸⁹ One might argue that because the young man in the story is said to be from the South, this constitutes his “otherness.” A significant part of the body of American lore and literature is devoted to the droll, misunderstood, melancholy, and even bizarre Southerner.¹⁹⁰ I would argue to the contrary, that being a Southern white man, he is an Ur-white man,¹⁹¹ a veritable OWM-Original White Male.¹⁹² He functions as

See: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993)). Race consciousness most often means the conscious recognition of *black* difference, not white difference. *Id.* at 22-23.

188. *See* WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* 161 (1996); *see also* Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories and Realities*, 46 ALA. L. REV. 375, 377 n.6 (1995) (indicating that according to a survey of the University of Chicago's National Opinion Research Center in 1990, 78% of whites believed that blacks preferred welfare over work.).

189. WILSON, *supra* note 188, at 171. Wilson states: “[w]hen many people think of welfare, they think of young, unmarried black mothers having babies.” *Id.* This image persists even though almost as many whites as blacks were A.F.D.C. recipients in 1995, and [Aid to Families with Dependent Children, a federally funded program which provides cash grants to indigent families with children], there were a good number of Hispanics on the welfare rolls.” *Id.* Notwithstanding this perhaps unfair stereotype, blacks are, Wilson notes, disproportionately represented on welfare. *Id.* at 167. Wilson's statistics indicate that in 1995 blacks made up 12.4% of the United States population, representing 39.2% of AFDC recipients. *Id.*

190. *See* THE HISTORY OF SOUTHERN LITERATURE (Louis D. Rubin, Jr. ed., 1985); *see also* LOUIS D. RUBIN, JR. THE LITERARY SOUTH (1979). Writers William Faulkner and Tennessee Williams have written works detailing the weird underside of southern upperclass life. WILLIAM FAULKNER, *SANCTUARY* (1932); TENNESSEE WILLIAMS, *SUDDENLY LAST SUMMER* (1931). This is, however, a rare image of the southerner, as most accounts are more likely to poke fun at the “redneck” or the “hillbilly,” “those at the lower end of the economic spectrum.” But as Walt Harrington says, “redneck” is not really pejorative, it is almost tantamount to a sign of respect. WALT HARRINGTON, *CROSSINGS: A WHITE MAN'S JOURNEY INTO BLACK AMERICA* (1994). Hillbillies are almost folkloric in nature. It is only with the recent attention to rural poverty as a contrast to urban poverty (“urban” in this context often being a code word for the black and brown people who most often populate the cities) that most mainstream Americans could point to Appalachians as being an existing people more than a concept. Thomas A. Hirschl & David L. Brown, *The Determinants of Rural and Urban Poverty*, in *THE CHANGING AMERICAN COUNTRYSIDE: RURAL PEOPLE AND PLACES* 229-46 (Emery N. Castle ed., 1995).

191. *See supra* note 6.

192. I create here this term “Original White Male” as a conflation of two disparate expressions from popular culture: “dead white males” and “O.G.’s” (“Original Gangsters”). “Dead white males” is an irreverent reference to the “fathers” of Western culture and literature. “O.G.” is a reference to individuals, usually black males, who have been “gang-banging,” participating in gang activity, since long before it became fashionable or a subject of any popular notice. *See, e.g.*, *ORIGINAL GANGSTERS* (Orion 1996) (detailing the return of several middle-aged former gang members to avenge innocent deaths and clean up the streets).

Because white exists in opposition to black, in its very distance from that which is black, it is my claim that a Southern white man, existing in a region which shaped and defined to a great extent the divide between white and black, is indeed an Original White Man—one who has been

the baseline against which all other guests must draw their identities.¹⁹³

Although the United States has always been a country of immigrants, immigration increased dramatically just as the country reached the sectional crisis of the Civil War, and skyrocketed thereafter into the early 1900s.¹⁹⁴ The chief impetus for this influx was economic, as labor needs increased with the growth of industry.¹⁹⁵ At the same time, the erosion of peasant economies in Eastern Europe and some of the Slavic countries caused many at the lowest echelons of those societies to look westward for opportunity.¹⁹⁶ Italy, too, faced massive upheavals, causing a large movement of Italians into the United States near the turn of the century.¹⁹⁷ The Irish, one of the largest immigrant groups, began coming in large numbers in response to the Irish potato famine of 1845. Their numbers remained large. As conditions worsened at home, they were able to find systems of support with already-arrived relatives.¹⁹⁸ Sympathy for the new arrivals was little. Some social commentators embraced the popular notion that newcomers would become part of the great "melting pot" of America, with the superficial trappings of language, culture, and custom rendered away into one homogenous American mass.¹⁹⁹ However, the rise in immigration during the late 1800s caused many to look towards

"white" since long before race became a clear concept in the nation's consciousness. Moreover, the term "WASP" (White Anglo-Saxon Protestant) "could easily appear to have been coined to describe specifically the white Southerner." LEWIS KILLIAN, *WHITE SOUTHERNERS* 3 (1985). Killian's thesis is that white Southerners have achieved sociological minority status in their role as the essential WASP's. *Id.* (using Louis Wirth's definition of a minority from his essay: "A group of people who, because of their physical or cultural characteristics, are singled out from others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination").

193. And perhaps how fitting for the metaphor that he was absent. It is often the case that the "Others" in society measure themselves against normative models which are ultimately intangible and incorporeal, and thus unobtainable.

194. GEORGE M. STEPHENSON, *A HISTORY OF AMERICAN IMMIGRATION* 87-94 (1964).

195. *Id.* at 93.

196. See STEPHAN THERNSTROM, *POVERTY, PROGRESS, AND SOCIAL MOBILITY IN THE NINETEENTH CENTURY* 17-20 (1977). See generally STEPHENSON, *supra* note 194, at 87-94. For example, in a letter to the editor in a Chicago Polish newspaper, a Polish hotel worker wrote, "I receive 18 dollars a month, and that is very good." *Id.* at 93.

197. OSCAR HANDLIN, *IMMIGRATION: AS A FACTOR IN AMERICAN HISTORY* 30 (1959).

198. See, e.g., THERNSTROM, *supra* note 196, at 25-26 (describing family hardships in the 1850s).

199. The term "melting pot" appears to come into popular use around the late 1800s. HANDLIN, *supra* note 197, at 147. It was, for example, the name of a forward-looking play by immigrant Israel Zangwill in 1909. However, the concept appears to be much older. *Id.* Handlin refers to the writings of Michel Guillaume St. Jean de Crevecoeur, a colonial writer of French origins who advocated the notion of the melting pot in 1720 in his book *Letters from an American Farmer*. *Id.*

the cultural pluralism model, in the belief that newer immigrants were so numerous, and so different, that it would be impracticable and undesirable to incorporate them into the American populace.²⁰⁰ One such observer, sociologist Richard Mayo-Smith, conceded that through intermarriage there might be an amalgamation of the many peoples in the United States, but deemed it unlikely given the ethnic enclaves in which most immigrants lived.²⁰¹ Even to the extent that Mayo-Smith believed that such a mixing of peoples could take place, he was very clear that the melting pot would not be able to reduce what he believed to be an irreducible element: blacks.

There is one other way in which the foreign elements might amalgamate with each other and with the native, so as in the course of time to form one homogenous people,—that is by intermarriage. In the case of the blacks there is the insuperable color obstacle in the way of their fusion with the whites. But in the case of the immigrants, this does not exist, and the impediments of difference in language, customs, and even religion may gradually be removed.²⁰²

There were broad-based pronouncements on the unassimilability of any of the “darker” peoples of the world.

Experience shows that the yellow, brown, and black races are unassimilable, at any rate by us, and the United States would only be inviting trouble and adding to her already large and serious race problems by admitting members of such races. This exclusion is indispensable to the welfare of the United States.²⁰³

The supposed “hyphenation” of America based on national origins was thus considered to be an inevitable fact where non-white peoples were concerned.²⁰⁴ Blacks were arguably the model for American cultural pluralism, existing as an indigestible mass. But if blacks exemplify the hyphenated American, that raises another issue: how does one hyphenate an entire continent?

200. Cultural pluralism is seen by some as the precursor of the more modern concept of multiculturalism. STEPHEN STEINBERG, *THE ETHNIC MYTH* 4-5 (1981). Steinberg states that pluralism has an essentially negative basis and has gained only “a belated legitimacy.” Pluralism “has its origins in conquest, slavery, and exploitation of foreign labor.” *Id.* John O’Sullivan calls multiculturalism and its forebear cultural pluralism “a theory of American nationality” which “accepts the central tenet of the dominant liberal theory of American nationality—namely that America is a set of political, constitutional and legal principles” which protect ethnic groups and ethnic identities without uniting them. John O’Sullivan, *Nationhood: An American Affinity*, 46 *NAT’L REV.* 36 (1994).

201. HANDLIN, *supra* note 197, at 158-63 (citing RICHARD MAYO-SMITH, *EMIGRATION AND IMMIGRATION, A STUDY IN SOCIAL SCIENCE* 62-64, 71-76, 77-78 (1904)).

202. *Id.*

203. MAURICE R. DAVIE, *WORLD IMMIGRATION* 368 (1936).

204. Martin Bronfenbrenner, *Hyphenated Americans—Economic Aspects*, in *U.S. IMMIGRATION POLICY* 9-10 (Richard R. Hofstetter ed., 1984).

The considered unfitness of blacks for inclusion in the American mix was often inculcated beginning in the early years of children's socialization. As an example, a common text of the nineteenth-century American schoolroom was Olney's *Modern Geography*, which was a primer on geography written in the form of a catechism.²⁰⁵ Each section of the world was treated, along with a description of the character of the inhabitants of each region.²⁰⁶ Young Americans of the period were taught that "the United States are the most interesting and important division of the western continent; and are distinguished for the excellence of their government, the rapid increase of the population, and for the intelligence, industry, and enterprise of the inhabitants."²⁰⁷ Europe enjoyed a similarly positive report, being "distinguished for science, excellence in the useful and elegant arts, and for the intelligence, refinement, activity, and enterprise of its inhabitants."²⁰⁸ Africa was described as "the least known, least civilized, and the least important of the five grand divisions of the world."²⁰⁹

In Olney's primer, character flaws appeared to be most prominent in those inhabiting the southern most regions of the world and in those not practicing Protestantism.²¹⁰ According to Olney, the English were "intelligent, brave, industrious, and enterprising" "but possessing great national pride,"²¹¹ and Scots were "temperate, industrious, hardy, and enterprising," as well as "distinguished for their general education and morality."²¹² Italians were "affable and polite" but "effeminate, superstitious, slavish, and revengeful,"²¹³ while the Irish were "quick of apprehension," but "passionate, ignorant, vain, and superstitious."²¹⁴ Arabs were "ignorant, rapacious and cruel," and have long been noted for their piracies and political debasement,²¹⁵ Africans from the south of the continent of Africa, the "least important continent,"²¹⁶ were "ignorant, superstitious, indolent and acquainted with few of the arts of civilized life."²¹⁷

205. JESSE OLNEY, A PRACTICAL SYSTEM OF MODERN GEOGRAPHY: A VIEW OF THE PRESENT STATE OF THE WORLD SIMPLIFIED AND ADAPTED TO THE CAPACITIES OF YOUTH (1833).

206. *Id.*

207. *Id.* at 51.

208. *Id.* at 154.

209. *Id.* at 226-27.

210. *Id.*

211. OLNEY, *supra* note 205, at 179.

212. *Id.* at 181. The Scots seem to rate highest in Olney's opinion. *Id.*

213. *Id.*

214. *Id.* at 183.

215. *Id.* at 233.

216. *Id.* at 233, 237.

217. OLNEY, *supra* note 205, at 233, 237.

Modern writers are equally convinced of the unassimilability of blacks, though the reasons are often couched in latter day surrogates for color prejudice: fear of supposed black crime and other black social pathologies which undermine American (read: white) values.²¹⁸ Refuge is often taken in statistics which point to the number of blacks incarcerated and the number incarcerated at any one time in the United States.²¹⁹ However, what these statistics fail to take into account is the often race-based nature of arrests and stops leading to arrests in the United States.²²⁰ Nor do such statistics look at the difference in the severity of charges lodged against blacks and the disparate rate of convictions for whites and blacks charged with the same crimes.²²¹ There are even instances in which blacks and whites committing analogous crimes are treated in a disparate manner, with blacks being treated more severely.²²² Criminality and other social ills do exist; however, they cannot be relied upon to understand black

218. See O'Sullivan, *supra* note 200, at 36.

If we are honest, we are probably thinking of the black-white divide when we find it difficult to imagine a future American ethnicity in which racial differences play no great obstructive role. But why? I suspect that our lack of imagination here has little to do with race or ethnicity as such, and everything to do with such social problems as the collapse of the black family, the extent of black crime, and the seemingly intractable problem of the underclass. These problems create social distrust, which artificially sustains racial and ethnic division and a white racism that would otherwise shrivel—but there is nothing inevitable about them.

Id. With all due respect to Mr. O'Sullivan, if we are honest we must acknowledge that racial prejudice, often reducible to color prejudice interlaced with class fears, is at the heart of the difficulty in black assimilation. Professor William Wilson theorizes that American society has undergone three states of development in black-white development, with each state corresponding to racial arrangements structured by both the economy and the polity. WILLIAM J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 23 (1980). Though Wilson argues that race is no longer the basis of economic oppression of blacks in the United States, he clearly states that even if this is true, it does not mean that racial strife has disappeared or even been substantially reduced. *Id.* Indeed, his position on the class-based, as opposed to the race-based, nature of black oppression appears to shift somewhat in his more recent work. See WILSON, *supra* note 188, at 111-46. There, Wilson describes a study conducted in an inner-city black neighborhood on the nature of joblessness among its residents. In one chapter, apparently entitled as such in response and in opposition to his earlier work, Wilson describes how employers often manifested negative perceptions of the work ethics and qualifications of blacks. *Id.* While he states that it is difficult to ascribe these negative views solely to race, other studies indicate that where education, income, family background, and place of residence were taken into account, dark-skinned black men were still 52% less likely to be working than light-skinned black men, a finding which strongly suggests racial discrimination in the form of color prejudice. *Id.*

219. See MARVIN D. FREE JR., *AFRICAN AMERICANS AND THE CRIMINAL JUSTICE SYSTEM* 6-15 (1996).

220. *Id.* at 77-78.

221. *Id.* at 94-103.

222. *Id.* at 184-85.

exclusion from the latter day American melting pot—the American mainstream and the American polity.

While the arrivals from other countries had very distinct and clear nationalities, blacks who came to this country as slaves faced a rather droll reality: for the most part, they possessed no distinct nationality. They were persons of African heritage, Negro Americans, colored Americans, later black Americans, and Afro-Americans, even more recently African Americans.²²³ Without refuge in a distinct nationality, though, they were singularly adrift, as no other people were.²²⁴ This is a particularly ignominious position to occupy in a country that has no people of its own.²²⁵ With the exception of the American Indian,²²⁶ “the American people are not ethnically rooted on the American soil.”²²⁷ Early arrivals referred to themselves as “emigrants,” people coming from a place, not “immigrants,” people coming to a place.²²⁸ It was not until the late 1780s that newcomers in America “began to be identified with the country they entered than with the one they had left behind.”²²⁹ For indeed, how can one hyphenate a

223. Lawrence Fuchs points out that the trouble often lay not in what blacks choose to call themselves but what whites call them. LAWRENCE H. FUCHS, *THE AMERICAN KALEIDOSCOPE—RACE, ETHNICITY AND THE CIVIC CULTURE* 174 (1990). While blacks have long sought names which would imbue them with a sense of pride and identity, they often do so in the face of the emotionally charged ethnic slur created by whites: “nigger.” *Id.*

224. Jews arguably faced a similar dilemma in that they belonged not to any particular country (with the exception of modern Israel), but rather to a race or religious group long dispersed in a Diaspora. This is approximated to some degree by the black Diaspora resulting from black involuntary servitude. *See, e.g.*, ABRAHAM K. KORMAN, *THE OUTSIDERS: JEWS AND CORPORATE AMERICA* 1-7 (1988). Korman argues that because of historical anti-Semitism in Europe and the United States, Jews are “outsiders” in Western life, having been excluded and marginalized in many nations and frequently expelled. *Id.* He notes as examples the 1290 expulsion of Jews from England, two expulsions from France in 1306 and 1394, the Spanish expulsion of 1497, and the bar against Jewish entrants to Russia in place until 1772. *Id.* Others argue, however, that American Jews have a uniquely American identity, having separated “Jewishness” as ethnicity and culture from Judaism as a religion. *See, e.g.*, STUART ROSENBERG, *THE NEW JEWISH IDENTITY IN AMERICA* 63-72 (1985). American Jews, Rosenberg posits, have the benefit of “harmony between the forces of secularism and religion” in the United States, a harmony which for the most part exists nowhere else. *Id.*

See also T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1070 (1991). Professor Aleinikoff cites Frantz Fanon’s discussion of Jews and their lack of assimilation in French society. *Id.* Fanon points out that while the situation of blacks in white society in analogous to the situation of Jews, the situation of blacks is worse. *Id.*

225. STEINBERG, *supra* note 200, at 6.

226. I submit that this may not be an exception, since anthropologists theorize that these American aboriginal groups migrated from Asia. *See* JESSE D. JENNINGS, *ANCIENT NORTH AMERICANS* 25-29 (1978).

227. STEINBERG, *supra* note 200, at 6.

228. *Id.* at 6-7.

229. *Id.* at 7 (citing MARCUS LEE HANSEN, *THE IMMIGRANT IN AMERICAN HISTORY* 11 (1948); JOHN HIGHAM, *SEND THESE TO ME* 5-6 (1975)).

whole continent? To do so suggests a reductionism which is emblematic of the systematic degradation of blacks and all things African which has permeated the American political, social, and economic life.

This continental hyphenation provides a convenient reference for Americans of African descent who know only that their ancestors came from *somewhere* over there, with “there” being all of Africa.²³⁰ However, it allows for the obscuring of one of the great tragedies of slavery: it was forced not simply upon one nation of people, but upon *many* nations of people, speaking many languages, often possessing many cultural and religious differences. These group memberships, nationalities as it were, are forever forgotten for the vast majority of Americans of African heritage.²³¹

This problem of continental hyphenation is in some measure an aspect of the concept that has been described as “deindividualization.”²³² Deindividualization exists “where society attributes psychological characteristics to someone on the basis of their immutable and apparent physical characteristics.”²³³ There is in fact a culture of deindividualization which includes two subcultures, one beneficial, the other detrimental, each distinguished by the beneficial or detrimental effect exerted upon the individual by the categorization.²³⁴ Race is but one example of such a subculture, and black persons typically experience detrimental deindividualization, whereas white males typically experience beneficial deindividualization.²³⁵ Paradoxically, this process causes blacks to embrace a black subculture which has been thrust upon them and to seek affiliations based upon them in order to invest it with positive meaning.²³⁶ This extends, to the inclusion of, for example, all blacks in African-American culture, whether

230. That those of African heritage are from *somewhere* is an important aspect in black American self-concept. Even modern-day retrospectives of immigrant arrival to the American shores conveniently “forget” to include those coming from Africa. Americans of African descent are like the children referred to in the title of Luce Maire’s tract on unwanted children in French society, *Ces Enfants de Nulle Part* (1967) —“children from nowhere.”

231. Bennett writes that African slaves came mostly from a 3,000 mile stretch along the west African coast, and included varied tribal groups such as the Hausa, Mandingos, Yorubas, Ibos, Dahomeans, and Senegalese, among others. BENNETT, *supra* note 144, at 46.

232. Linz Audain, *Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness*, 70 IND. L.J. 709, 712 (1995).

233. *Id.*

234. *Id.*

235. *Id.* at 723 fig.1. Professor Audain acknowledges that there is undoubtedly some cross-over, blacks who have never experienced racism or white males who have never experienced group privileges or negative group assessments of being considered racist or sexist. *Id.* at 723 n.79. For the most part, however, any negative individualization “is outweighed . . . by the positive deindividualization associated” with being a white male. *Id.*

236. *Id.*

or not the individual knows anything about black Americans as a subgroup.²³⁷

Apparently, this also embraces persons who choose not to affiliate with blacks as a subculture, notwithstanding their African heritage or phenotypically "black" appearance. There has been, for example, a running debate between advocates of a new racial or ethnic category, "multiracial," and those who seek to label as black any person having known African heritage.²³⁸ Advocates of multiracialism say that offspring of parents of differing races are forced by rigid categorization to deny the heritage of one parent, in the case of black-white mixing, usually the white parent. Advocates of maintaining the black category for those of any known African descent argue that multiracialism is a pernicious attempt to reduce the number of blacks in the population by re-labeling persons previously identified as black, and is a tacit acknowledgment of the prevailing belief that it is better to be "anything else" except black.²³⁹ This debate, it would seem, is the ultimate of paradoxical deindividualization, regardless of which side one chooses. The multiculturalists, in arguing that without a new category they cannot acknowledge a white or other non-black forebear, giving credence to the "one drop" rule operative during much of American social history. The one drop rule states that even an infinitesimal amount of "black" blood renders a person black despite having a non-black parent and other ancestors.²⁴⁰ Those arguing for maintaining such persons in the black group also embrace the "one drop" rule by their stance: persons possessing black genes, however remote in their ancestry, are black.²⁴¹

While the urge towards a multicultural racial category is understandable, it becomes problematic after the first generation of multiracial offspring.²⁴² Do the descendants of the first such person remain multiracial? If they intermarry with a person designated as a monoracial member of one of the multiracial person's component races, do the children of such unions "rejoin" the monoracial group?²⁴³ Regardless of which model of American inclusion is opera-

237. *Id.* at 731.

238. See Kenneth E. Payson, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1241 (1996).

239. Deborah Waire Post, *Reflection on Identity, Diversity and Morality*, in CRITICAL RACE THEORY: THE CUTTING EDGE 419-20 (Richard Delgado ed., 1995).

240. See F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION 5 (1991); see also LISE FUNDERBURG, BLACK, WHITE, OTHER: BIRACIAL AMERICANS TALK ABOUT RACE AND IDENTITY 27, 48, 320, 341 (1994).

241. *Id.*

242. *Id.*

243. *Id.*

tive, be it the melting pot or cultural pluralism, blacks are left with a deficit. In the great fondue of the American melting pot, it would seem, blacks are for the most part indissoluble. In the affixing of nationality-based prefixes, blacks are equally at a disadvantage, claiming not individual country origins but rather the mega-status of continental membership. Thus, the role of the black foreigner becomes particularly acute, as America experiences, in greater numbers than before, blacks with other-nation status intervening in their African pasts.

IV. THE BLACK FOREIGNER

A. Blacks as Distinctly American Products—Is There Any Such Thing as a Black Foreigner?

Despite the distribution of blacks throughout most of the world, they have become identified as distinctly American products. From the earliest depiction of blacks in servitude that became popular in the Western world, to the black basketball player, who in modern times, graces television advertising worldwide, blacks are typically viewed as Americans. This may be due in large part to superior American marketing that sends all aspects of our culture into remote corners of the world. It may also be due to the relative void in identity that exists for blacks in other countries. From servitude, to fortitude, to jazz, from bright smiles and snappy dance steps, the principal black persona the world over is an American. It has been suggested that, aside from whites, the only really identifiable group of Americans is black.²⁴⁴

And yet, there are quite clearly blacks who are not of American origin. Those with African heritage, both discernible and not discernible, are scattered throughout the world in many countries and most continents.²⁴⁵ These persons, to the extent that they exist in the United States, become the focus of a very particularized xenophobia, and are objects of curiosity, awe, fear and distaste. One commentator

244. See Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness" and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 262 (1997) (quoting Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* in *ASIAN AMERICANS AND THE SUPREME COURT* 1087, 1096 (Hyung-Chan Kim ed., 1992)). Professor Saito argues that nonblack racial minorities such as Asians do not have the presumption of being considered American, and that this "racing" of Asian Americans reinforces the American racial hierarchy by creating a buffer zone between those identified as "black" and "white" and creating Asians Americans as false Americans. *Id.* at 263-64. While I would agree that all persons of color are in many respects "false" Americans, it is not so clear that blacks are considered more American than Asians. As I discuss in later sections of this paper, while blacks are certainly viewed in many respects as domestic "products," they are the ultimate inassimilable alien.

245. See, e.g., IRWIN, *supra* note 35 (detailing the presence of African peoples in ancient cultures of Greece and Rome, in Asia, and in the Americas).

has referred to this response to blacks as "afrophobia": a combination of avoidance, indifference, and contempt for African American people and African American issues.²⁴⁶ This state of mind is a product of the centuries of crimes that were perpetrated against African Americans in the perpetuation of white dominance.²⁴⁷

In the early history of the United States, the vast majority of black persons entering the country were destined for servitude. There were some exceptions, but for the most part, voluntary immigration and leisure travel were not within the purview of most blacks. Often, those foreigners having the misfortune of appearing to be of African origin suffered poor treatment at the hands of whites.

Significant amounts of voluntary black immigration began with the arrival of blacks from the Caribbean starting near the turn of the century.²⁴⁸ Of the over 45 million persons who entered the United States between 1820 and 1970, about 1 million of them were West Indians and over 76,000 of them were Africans.²⁴⁹ With the enactment of the first federal immigration laws in 1875 and 1882, blacks continued to enter the country without obstacle.²⁵⁰ The 1875 Immigration Act imposed some initial limits on Chinese immigration,²⁵¹ with an outright bar to Chinese immigration.²⁵² Black immigrants' escape from the fate of outright exclusion levied upon the Chinese can be attributed in part to the relative "invisibility" of blacks as immigrants, and to short-lived post-war sentiments which required at least a show of fairness to blacks.²⁵³

In 1908, as a result of concerns about Japanese immigration, an agreement was entered into between the Japanese and United States' governments that excluded the Japanese from permanent immigration to the United States.²⁵⁴ In 1917, a revised Immigration Act established an Asiatic barred zone, which excluded those from India and islands surrounding Asia.²⁵⁵ The 1917 Act also instituted a literacy

246. Saito, *supra* note 244, at 262.

247. See Frederick Dennis Greene, *Immigrants in Chains: Afrophobia in American Legal History -The Harlem Debates Part 3*, 76 OR. L. REV. 537, 541-42 (1997).

248. Roy Simon Bryce-Laporte, *Black Immigrants: The Experience of Invisibility and Inequality*, 3 J. BLACK STUD. 29, 33 (1972).

249. *Id.*

250. *Id.*

251. Ch. 141, 18 Stat. 477 (1875).

252. Ch. 126, 22 Stat. 58 (1882).

253. Blacks often experience the odd phenomenon of being at once visible, yet invisible. This is an essential aspect of the paradox of blacks as foreigners.

254. 43 Stat. 153 (1908).

255. 39 Stat. 874, 875 (1917). See IRA DE A. REID, *THE NEGRO IMMIGRANT: HIS BACKGROUND, CHARACTERISTICS AND SOCIAL ADJUSTMENTS, 1899-1937*, 34 (1970).

test which excluded all aliens over the age of 16 who could not read English or some other dialect, or language or, who were otherwise physically incapable of reading.²⁵⁶ This Act was followed by the Acts of 1921 and 1924 which, for the first time, instituted quotas based upon nationality for admission to the United States, and dramatically limited the number of non-white persons admitted.²⁵⁷ Still, blacks trickled in, never having been explicitly excluded.²⁵⁸ Blacks were chiefly able to enter the country via what one observer has called the open "side door" of immigration which remained accessible after the front door had been slammed shut.²⁵⁹ Immigration from the countries explicitly exempted from quota requirements included: Canada, Newfoundland, Mexico, Cuba, Haiti, the Dominican Republic, the Canal Zone, and the independent countries of Central and South America and the nearby islands.²⁶⁰ These immigrant blacks did not entirely escape notice, however. While the 1924 Act was under consideration, one commentator wrote:

There is need at the present time of excluding other dark skinned races, a need which will undoubtedly increase unless some action is taken. From 1899 to 1922 there were admitted to this country over one hundred and fifteen thousand African Blacks, and during the same period more than 25,000 West Indians other than Cubans. One would think that our Negro problem was already large enough without adding to it that way. The recently enacted 3 percent restriction law, to be sure, applies to Africa, and allows a yearly quota of only one hundred and twenty-two, so that now there is less danger from that source. But it would seem that since we have applied the principle of exclusion to such people as the Chinese and Japanese that we should go the whole way and exclude the black-immigrant aliens. The barred zone should be extended to Africa and also to the West Indies, especially to Jamaica and the Bahamas, to stop the coming of blacks from these quarters.²⁶¹

Despite their social and political invisibility, black foreigners were clearly a very worrisome new component in American life. But just who were they, in fact?

256. *Id.* at 877.

257. *See* 42 Stat. 5-7 (1921); 44 Stat. 812 (1924). *See also* DE A. REID, *supra* note 255, at 33.

258. DE A. REID, *supra* note 255, at 33-34.

259. *Id.* at 34.

260. *Id.* at 33.

261. *Id.* at 32 (quoting MAURICE R. DAVIE, A CONSTRUCTIVE IMMIGRATION POLICY 7 (1923)).

B. The Black Caribbeans

Caribbean immigration to the United States occurred in three distinct waves. The first occurred around the turn of the century and lasted until the early 1920s. The second spanned from the end of the Depression until the middle 1960s. The last has continued into the present.²⁶² The vast majority of these persons, from the area often alternatively termed the “West Indies,” were from the islands of the Greater Antilles, Cuba, Jamaica, Haiti, Puerto Rico and nearby islands, the Lesser Antilles, Guadeloupe, Dominica, Martinique, St. Lucia, Barbados, Trinidad and Tobago, and the Bahamas.²⁶³ Although for statistical purposes, a significant number of the immigrants from these islands were tallied as “blacks,” a sizeable number were, according to the customs of their islands, “coloreds”—persons of mixed racial background—or more specifically mulatto-persons of mixed black and white ancestry.²⁶⁴

While such racial admixtures held little sway in the United States due to the long standing “one drop” rule which provided that even small amounts of black heritage meant black racial classification,²⁶⁵ such divisions were often at the heart of West Indian social schemes.²⁶⁶ Conversely, some of the very same West Indian social settings admitted no prejudices and provided for upward mobility to even those with almost pure African blood.²⁶⁷ Mixed race and colored West Indians who arrived in the United States were often dismayed to find that for them there existed no exalted nether world between black and white. There was only black. For those West Indians with more African features, there was no access to the “whiten-

262. KASINITZ, *supra* note 143, at 23-24.

263. DE A. REID, *supra* note 255, at 45.

264. *Id.* at 45-52.

265. *See id.* at 38.

266. *Id.* at 54-58. *See*, MAGNUS MORNER, RACE MIXTURE IN THE HISTORY OF LATIN AMERICA 2-3, 56-60 (1967).

267. This attitude is succinctly summed up in the Caribbean expression “l’argent blanchit” or “money whitens.” *See, e.g.*, WINTHROP R. WRIGHT, CAFÉ CON LECHE 3-7 (1990); *see also* Kenneth R. Karst, *Out of Many, One*, 2 GLOBAL LEGAL STUD. 1 (1999), available in <www.law.indiana.edu/glsj/vol2/Karst.html>. Those blacks who managed to achieve economic success were often looked at in a favorable light much like that often accorded mulattos.

Fair-skinned girls who marry dark men are often ostracized by their families and given up as lost. There have been cases of women content to live with black men but would not marry them. Should the darker man have money or position of some kind, he may aspire, and it is not too much to say that in a West Indian colony, the surest sign of a man’s having arrived is the fact that he keeps company with people lighter in complexion than himself.

DE A. REID, *supra* note 255, at 58 (quoting W.E.B. Du Bois, *Inter-racial Implications of the Ethiopian Crisis*, FOREIGN AFF., Vol. 14, No. 1, Oct., 1935, at 82-93).

ing” power of money. While it was true that their money was as green as everyone else’s, their skin was black, and money was not a palliative to the condition.

1. *Notions of West Indian Supremacy*

Thousands of West Indians entered the United States imbued with hope for a better life.²⁶⁸ Because of the often non-racial barriers to success in their homelands, they often approached American life with a hopefulness not borne out by actual conditions.²⁶⁹ This hopefulness, however, fueled a move into the middle class by large numbers of West Indians, so much so that a significant number of the present class of black professionals are of West Indian heritage.²⁷⁰ Because of their relative success, many West Indians considered themselves superior to black Americans.²⁷¹ This thinking was in some part based on the West Indians’ belief that black Americans were of lower class status and lacked militancy.²⁷² Many American blacks, it was argued, were in fact victims of a psychologically induced inferiority resulting from membership in “a suppressed minority” and an “outcast group.”²⁷³ This view, whether based in fact or not, was sometimes espoused by whites who sought an explanation for the relative success of black newcomers.²⁷⁴

It is clear that American blacks who were the descendants of slaves and later West Indian immigrants developed an animosity for each other. The fact that both groups had race in common did little to eliminate the competition that developed surrounding jobs, housing,

268. DE A. REID, *supra* note 255, at 60.

269. *Id.*

270. *Id.*

Thus the Negro immigrant is at a disadvantage after a brief experience on the American racial front. He becomes sensitive to criticism, self-conscious and uncertain of himself and his values. He is conscious of opposition and of the persistent attempts to belittle his presence here. Yet, being ambitious and possessed of a desire to succeed, he tackles the problem and leaves as mute evidence a transfer of culture values that has made the Negro immigrant less foreign, and the American Negro less provincial in his approach to racial and economic problems.

Id.

271. *Id.* at 57. See, e.g., LEONARD STEINHORN AND BARBARA DIGGS-BROWN, *BY THE COLOR OF OUR SKIN* 19 (1999); see also Peter Olivera Nicks, *Leaders Call for Action on Plight of Latin American Blacks*, available in <www.latinolink.com/opinion/opinion97/0706H11E.HTM>.

272. See MELVIN B. RAHMING, *THE EVOLUTION OF THE WEST INDIAN’S IMAGE OF THE AFRO-AMERICAN NOVEL* 69 (1986) (citing ORDE COOMBS, *DO YOU SEE MY LOVE FOR YOU GROWING?* 110 (1970)). Coombs explores black American attitudes about West Indians by analyzing the writings of black American authors portraying West Indians in juxtaposition to black Americans. *Id.* at xiii.

273. *Id.* at 69 (citing CLAUDE MCKAY, *A LONG WAY FROM HOME* (1969)).

274. *Id.* at 70-71.

and other valuable benefits.²⁷⁵ This discord was exacerbated by the sense within both groups that each was superior to the other.²⁷⁶ If West Indians looked down on American blacks, American blacks returned the favor, often belittling West Indians with epithets such as "monkey chasers" and "Black Jews."²⁷⁷

It appears that, at least on the surface, there was, in the past, some basis for the West Indians' belief that they were economically superior to American blacks.²⁷⁸ Early West Indian entrants often established themselves as "ghetto entrepreneurs," for example being disproportionately represented among black businessmen in the New York area where they settled (and continue to settle) during the first wave of immigration.²⁷⁹ West Indians also served as doctors, lawyers, and teachers in the native black community.²⁸⁰

Caribbean success in American society has been attributed to a number of factors. The most cited are greater access to education for blacks living in the West Indies versus early opportunities for native blacks, and West Indian cultural values which emphasized education, hard work, savings, and investment.²⁸¹ By contrast, more recent Caribbean entrants have increasingly joined the lower echelons of the service sector, often taking jobs which neither the native white majority nor native blacks would accept. A significant number of West Indians work as domestics, gardeners, and lower level clerics.²⁸² Often, domestic positions are held by undocumented women who work for substandard wages and have no immediate hope of gaining legal immigration status. Many of these women have left various islands in the Caribbean, placing their children in the care of relatives for indefinite periods of time.²⁸³

275. *Id.* at 69.

276. *Id.*

277. RAHMING, *supra* note 272, at 69.

278. *Id.* at 69-70.

279. KASINITZ, *supra* note 143, at 23-24.

280. *Id.* at 95.

281. *Id.* at 91. Here Kasinitz cites to Thomas Sowell and his controversial statements on the superiority of West Indian culture ("ethos") in several of his works, including RACE AND ECONOMICS (1975) and THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE (1983).

282. KASINITZ, *supra* note 143, at 99-109.

283. The children of such women are sometimes known as "barrel children," the children of parents who have emigrated, leaving children in the care of relatives. See Brook Larmer & Knolly Moss, *The "Barrel Children,"* NEWSWEEK, Feb. 19, 1996, at 45. Periodically, such parents send to their children and relatives barrels of foodstuffs, clothing, and other items. *Id.* Though this phenomenon is seen in many countries where there is significant immigration, it is particularly acute in Jamaica and other Caribbean countries. *Id.*

2. *The Immigrant Dream Versus the Immigrant Nightmare—The Tale of Two Colins*

Caribbean blacks are often still viewed as more willing and diligent workers than native American blacks, and this has been seen as the source of their relative success.²⁸⁴ I refer to this view of the shining example of the Caribbean immigrant as the “Colin Powell Syndrome,” named for the retired general and former chairman of the Joint Chiefs of Staff of the military who so impressed Americans that they were willing to entertain the possibility that he could become the first black president.²⁸⁵ Colin Powell, the media constantly reminded us, was the child of Jamaican immigrants who, through hard work and determination, rose to middle class success.²⁸⁶ The message conveyed was that if other blacks did not succeed, it was because they lacked that drive of the Colin Powells of this country.

This immigrant dream, however, became an immigrant nightmare for some black immigrants who experienced middle and upper-middle class lifestyles in their home countries and thus had expectations of continued economic success in the United States.²⁸⁷ As some writers have expressed, many Caribbean blacks experience shock at seeing that a black of “good birth,” as it is defined in the home country, is forced in the United States to do manual labor unbecoming gentlemen and ladies.²⁸⁸ This is nowhere better illustrated than in the story of Colin Ferguson.

Ferguson was a Jamaican immigrant who came to the United States in order to pursue his education.²⁸⁹ He was a member of an upper-middle class Jamaican family, and lived in a large house complete with servants.²⁹⁰ He discovered once he reached the United States that the assured social status to which he had become accustomed was no more, and that he was subject to the same racial discrimination that any other black person was.²⁹¹ After a series of failures, some of which may have been attributable to racial discrimination, he responded by becoming angrier and angrier, until he was driven to shoot

284. DE A. REID, *supra* note 255, at 49-50.

285. See Henry Louis Gates, Jr., *Powell and the Black Elite*, NEW YORKER, Sept. 25, 1995, at 64-66, 69-70, 76-78; Orlando Patterson, *The Culture of Caution*, NEW REPUBLIC, Nov. 27, 1995, at 22.

286. Gates, Jr., *supra* note 285, at 64-66, 69-70, 76-78.

287. KASINITZ, *supra* note 143, at 21-25.

288. DE A. REID, *supra* note 255, at 37.

289. Sean M. Maher, *Remembering William Kunster*, 6 B.U. PUB. INT. L.J. 179, 180 (1996).

290. *Id.*

291. *Id.*

several commuters on a Long Island Railroad train.²⁹² William Kunstler, the late lawyer and social activist who served as one of Ferguson's counselors after he rejected direct legal defense and chose to conduct his own case, termed Ferguson's response as evidence of the "Black rage"²⁹³ defense, a defense which Ferguson rejected.²⁹⁴ This defense is based upon the notion that blacks in American society are subject to so much racial discrimination that the cumulative effects may cause irrational and violent behavior.²⁹⁵ In the Ferguson example, we see an explosion resulting from the collision of race and culture.

C. *The Black Latin Americans*

It has been said that "to the Latin mind, the word Negro means a full-blooded black."²⁹⁶ What this says is that in the Latin mind, and to some extent in the American mind as a result of adoptions of this thinking, there are not now, nor have there ever been, large numbers

292. *Id.*

293. This term was coined by William Grier and Price Cobbs. WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* (1968).

294. See *People v. Ferguson*, 670 N.Y.S.2d 327 (1998). "Black rage" is a form of cultural defense in which blacks develop "cultural paranoia" as a result of recurring ill treatment at the hands of white Americans. See, e.g., Ronald L. Kuby, *So Crazy He Thinks He Is Insane: The Colin Ferguson Trial and the Competency Standard*, CORNELL J.L. & PUB. POL'Y 19, 20 (1995). All whites become not only symbols of white oppression but actual oppressors who must be battled. See, e.g., Patricia J. Falk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 756-57 (1996). See also Kimberly M. Copp, *Black Rage: The Illegitimacy of a Criminal Defense*, 29 J. MARSHALL L. REV. 205, 207 n.13 (1995). Though some Black rage proponents use the language of justification, it is difficult to imagine "black rage" as part of, for example, a self defense without evidence that the defendant experienced some sort of actual or immediate threat, as opposed to a symbolic threat from the particular white person or persons in question. *Id.* at 209-10. It is perhaps more clearly useful as an insanity defense, or where it is offered in mitigation of certain types of crimes. *Id.* at 210-14. This is evident in cases where ethnicity or nationality has been used mitigate the defendant's sentence. See *State v. Curbello-Rodriguez*, 351 N.W.2d 758, 770 (1984) (Bablitch, J., concurring) (arguing for mitigation of defendant's sentence for rape on the basis that defendant was a recent Cuban immigrant who may have misread the victim's signals due to his lack of knowledge and experience with American women.) See also *State v. Rodriguez*, 204 A.2d 37, 37-38 (1964) (modifying the defendant's manslaughter sentence on the basis that his Puerto Rican heritage, which mandates that a male must never back away from an altercation or he is not considered "manly," led him to shoot another).

For an interesting twist on the cultural defense where defense counsel asserts a defendant's cultural difficulties to excuse counsel's failure to act, see *Virgin Islands v. Knight*, 989 F.2d 619, 628-29 (3rd Cir. 1992) (rejecting defense counsel's argument that his late filing of a notice of intent to assert the insanity defense was due to defendant's failure to inform counsel of his meetings with a psychiatrist, which resulted from the reluctance of West Indian males to discuss psychiatric counseling).

295. Falk, *supra* note 294, at 748.

296. DE A. REID, *supra* note 255, at 93.

of Negroes in Latin America. This is one of the odd paradoxes of how racial mixing plays out among Spanish speaking people of black ancestry. In many Latin countries, darker skinned, mixed race or mulatto persons often operated under the fiction of being "Indian."²⁹⁷ Nonetheless, African heritage can be a source of pride for some Latinos.²⁹⁸ Paradoxically, this thinking is found chiefly among those who appear the whitest.²⁹⁹

In point of fact, the process of *mestizaje* (race-mixing)³⁰⁰ is a significant part of the black Latin American experience.³⁰¹ It is thus by extension, a significant part of the experience of black Latinos who emigrated to America.³⁰² Like other immigrants of African ancestry, though, black Latinos are saddled with the "one drop" rule and its implications. Black Latinos themselves see blackness through a particular cultural prism.³⁰³ For black Latinos, there is no binary of a black and white: there is black, white, brown and several shades in between.³⁰⁴ Unlike parts of the francophone or anglophone Carib-

297. See PIRI THOMAS, *DOWN THESE MEAN STREETS* 142-45 (1997) (relating the author's life as the dark-skinned Puerto Rican son of a fair-skinned mother and a dark-skinned father, in a family of fair-skinned brothers and sisters). In recalling an argument with his brother José about the "Indian" blood in their family, Thomas writes:

"And James is *blanco* [white], too?" I asked quietly.

"You're damn right."

"And Poppa?"

[. . .]"Poppa's the same as you," he said, avoiding my eyes. "Indian."

"What kinda Indian?" I said bitterly. "Caribe? Or maybe Borinquén? Say, José, didn't you know the Negro made the scene in Puerto Rico way back? And when the Spanish spics ran outta Indian coolies, they brought them big blacks from you know where. Poppa's got *moyeto* [Negro] blood"

Id. at 145.

298. RICHARD L. JACKSON, *THE BLACK IMAGE IN LATIN AMERICAN LITERATURE* 8-9 (1976).

299. This paradox is described by Richard Jackson when he details a story told by an American black woman, Ann Cook, who traveled extensively in Latin America, and how she experienced the extreme color prejudice in Brazil, yet, paradoxically, a willingness to claim African ancestry which was inversely proportional to the degree to which one appeared to be of African ancestry. *Id.*

300. "Mestizaje" is just as often meant to convey the more pejorative "miscegenation." LOUIS A. ROBB, *DICCIONARIO DE TERMINOS LEGALES* 83 (1990). *But see* WRIGHT, *supra* note 267, at 1, 148-49 (1990) (defining "mestizaje" as "racial and cultural mixing," "acculturation in general," and as a word which appears in political rhetoric and literary prose but without concrete meaning").

301. JACKSON, *supra* note 298, at xv.

302. DAVIS, *supra* note 240, at 104.

303. *Id.* at 104-05. *See* WRIGHT, *supra* note 267, at 3-4; *see also* Matt Moffett, *A Racial Democracy Begins Painful Debate on Affirmative Action*, WALL ST. J., Aug. 6, 1996, at A1.

304. Several writers have commented recently on the inherent error in this binary thinking. *See generally* Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 696 (1996) (arguing the "Black/White paradigm reveals the paradigm as not only un-descriptive and inaccurate, but debilitating for legal analysis, as well as civil rights oriented organizations"); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical*

bean, in many Latin American countries, money emphatically does *not* whiten.³⁰⁵ Rather, an infusion of white genes that renders a white appearance whitens.³⁰⁶ Indeed, it was apparently an express goal of some Latin American countries early in their histories to achieve *blanqueamiento*, or whitening of the population.³⁰⁷

And yet, even given the various colors between black and white, Latinos in the United States rarely identify themselves as black or even as "other." It is estimated that only 3% of Latinos designated themselves as black; 95% designated themselves as white.³⁰⁸

The most numerous group of such Latinos of African ancestry come from Puerto Rico.³⁰⁹ Although Puerto Rico is geographically part of the Caribbean, it is by culture, custom, and language more akin to a Latin country.³¹⁰ However, a number of Puerto Ricans have significant black ancestry. It has been estimated that about 10% of the Pu-

Scholarship, and the Black-White Binary, 75 TEX. L. REV. 1181 (1997) (reviewing LOUIS ANN FISCH, ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE (1996)); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1219 (1997) (arguing that the Black/White binary paradigm "defines, but also limits, the set of problems that may be recognized in racial discourse").

305. A popular expression directed at those of African appearance who aspired to a higher class status in many Latin countries reaffirms this: *Mono aunque viste de seda, "mono se queda."* (A monkey, even dressed in silks, is still a monkey.) See JACKSON, *supra* note 298, at 13.

306. Jackson writes:

But whereas in the United States color or race prejudice is directed not only toward all obviously black people, but toward all people with "black" blood as well, regardless of skin shade, in Latin America we have a color spectrum, and racist attitudes there are directed largely toward those colored people closer to the black end of this spectrum This spectrum of racial color is a holdover from the colonial period's "pigmentocracy"—a social hierarchy based primarily on skin color. Since then many not-so-pure-blooded Africans have declared themselves "white."

Id. at 5.

307. Some observers have termed this process of whitening "ethnic lynching," as blacks were absorbed into the white populations of countries such as Argentina, Uruguay, and Chile, and partially absorbed into the white populations of places such as the Dominican Republic and Puerto Rico. See *id.* at 2-3.

308. See Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131, 147 (1997).

309. Although until recently Puerto Ricans have been the most numerous Latin group with significant black ancestry, the census counts of 1980 and 1990 have indicated that Dominicans are almost as numerous or more numerous than Puerto Ricans. Dominicans also have significant black ancestry; however, they, like some other Latin groups, are deeply ambivalent about their African heritage. Teresa A. Sullivan, *A Demographic Portrait*, in *HISPANICS IN THE UNITED STATES: A NEW SOCIAL AGENDA* 9-20 (Pastora San Juan Cafferty & William C. McCready eds., 1985); U.S. Bureau of the Census, *The Hispanic Population in the United States: March 1993, Current Population Reports 20-475* (1994).

310. NANCY MORRIS, *PUERTO RICO: CULTURE, POLITICS, AND IDENTITY* 103-113 (1995).

erto Ricans who (im)migrated³¹¹ to the continental United States in the last several decades are of unmixed African ancestry, and half or more have some African ancestry.³¹² Thus, the majority of these entrants are perceived as being black in United States, “while in Puerto Rico most were known as whites or by [some other] designation other than black.”³¹³ Indeed, in the United States, dark skinned persons are often seen as being phenotypically interchangeable with one another, with their actual racial or ethnic backgrounds as mere “technicalities” or minor details.³¹⁴

311. Entry from Puerto Rico is not, of course, immigration in its truest sense, as it involves movement from a United States possession to the United States itself, an intra-national move rather than an international one. However, because the language, culture, customs, and racial background of most of the people of Puerto Rico differ from those of the mainstream, United States mainlanders, movement to mainland United States is in almost every other respect like an international move. *But see* Enid Trucios-Gaynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of American National Identity*, 76 OR. L. REV 369, 414 (1997) (describing the sense of Americanness which some Puerto Ricans feel).

312. DAVIS, *supra* note 240, at 104.

313. *Id.*

314. *See* Williams v. Weldon, 826 F.2d 1018, 1021 (11th Cir. 1987). In *Weldon*, the appellant argued that he had been subjected to an impermissibly suggestive line-up procedure by Clayton County, Georgia police because he was the only black man in a group consisting of Mexicans, Puerto Ricans or other dark-skinned persons of differing ethnic and racial backgrounds. *Id.* The court found that this was not unduly suggestive because

[a]lthough Williams technically was [the court tells us in a footnote that the defendant is actually half black and half Puerto Rican, and therefore implicitly black according to American standards] the only black man in the lineup, the other members of the group all had similar skin tone and facial characteristics. The group was similar in appearance to the generally consistent descriptions of the robber given by the various witnesses, i.e., a Mexican, Puerto Rican, Hispanic, or light-complexioned black man.

Id. The court agreed with “the magistrate’s conclusion that simply being of a different race or ethnic group from others placed in a lineup does not necessarily make that lineup impermissibly suggestive, especially where, as here, the other individuals in the lineup had roughly the same characteristics and features as the accused.” *Id.* The court then cited to other cases in which persons of other ethnic or racial backgrounds were part of the same lineup, that similarly held that the lineup was not impermissibly suggestive. *Id.*

Oddly enough, the first case that the court referred to in support of its finding in *Weldon* was *United States v. Whitney*. 787 F.2d 457, 459 (8th Cir. 1986). *Whitney* is a case in which a photo display was found to be not overly suggestive even though defendant was the only light-complexioned black man in the display that included other darker-skinned black men. *Id.* Clearly, these courts have conflated the matter of race where “blackness” (being of black ancestry) is the issue with the matter of color where darkness of skin is the issue. It may be true that as long as persons of similar physical type are included in a lineup or photo spread, race of participants does not matter. However, being the only light-complexioned black man among other darker blacks surely *does* matter to the issue of suggestiveness, even if a court does not think so, and in any case, has little to do with the suggestiveness of a panel in which the participants at least bear a significant resemblance to one another, as was apparently the case in *Whitney*.

Puerto Ricans with visible African ancestry very clearly suffer from anti-black prejudice.³¹⁵ It has been seen, for example, that Puerto Ricans, more than other Latinos (except for Dominicans, who face a similar fate for similar reasons) live in segregated neighborhoods in underclass conditions, chiefly, it is believed, because of their more "black" phenotypes.³¹⁶ This racial polarity affects Puerto Rican (im)migrants in different ways. For some, it causes a greater reliance to and reliance upon a "Borinquén" or Puerto Rican ethos and a denial that race plays any part in its development.³¹⁷ There is a tendency among Puerto Ricans themselves and among others to maintain that "black" and "Puerto Rican" are in fact two distinct racial groupings.³¹⁸ For others, there is an acceptance of the duality of race in the United States, with whiter-looking Puerto Ricans seeking to deny their black ancestry and more African-looking Puerto Ricans coming to grips with their new racial categorization.³¹⁹ This process occurs apparently for other black Latinos as well.³²⁰

Cubans, like Puerto Ricans and other Latino groups, count among their numbers individuals who are "black", "white" and somewhere in

315. DAVIS, *supra* note 240, at 104. See NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT* 86-136 (2d ed. 1970); see also LINDA CHAVEZ, *OUT OF THE BARRIO* 139-59 (1991).

316. DOUGLAS S. MASSEY, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 12 (1993).

317. See THOMAS, *supra* note 297, at 145.

318. See *United States v. Alvarado*, 891 F.2d 439 (2d Cir. 1989). Here, the "half black and half Puerto Rican" defendant-appellant challenged whether the prosecutor improperly used peremptory challenges to strike jurors who were black or Hispanic. *Id.* at 441. The court of appeals rejected the government's argument that if race were the issue, Hispanics were not a cognizable group for assessing a claim of discrimination in the use of peremptory challenges. *Id.* at 443. However, the court rejected the defendant-appellant's claim that the prosecutor had stricken a disproportionate number of blacks and Hispanics, noting that while the rate of striking such persons was 57%, the final jury was composed of 25% blacks and Hispanics, approximating their number in the Eastern District of New York from which the pool was drawn. *Id.* at 445. It is interesting to postulate what would be the result of such a challenge where a multiracial, as opposed to a biracial, person argued that members of his various component ethnic groups are being improperly stricken and are therefore underrepresented on the jury panel.

319. See LUIS NIEVES FALCON, *DIAGNOSTICO DE PUERTO RICO* 276 (1972). See also *Zenon v. Restaurant Compostela, Inc.*, 790 F. Supp. 41, 43 (P.R. 1992) (describing a case in which Puerto Rican defendants charged that a restaurant had failed to seat them because of their "black" appearance). On this point, the court stated:

As a point of clarification, the Court takes judicial notice of the distinction between the plaintiffs' cultural ethnicity-Puerto Rican-and their race. In this Opinion, the term "Black" shall be used to describe Puerto Ricans who closely identify with their African ancestry.

See *id.* at n.1 (citing J. SUEDE BADILLO & LOPEZ CANTOS, *PUERTO RICAN NEGRO* (1986)).

320. See JACKSON, *supra* note 298, at 2-3.

between.³²¹ Earliest waves of Cubans were mostly white, and on the whole, more affluent and educated.³²² More recent arrivals, such as those who came via the Mariel boatlift, were more often black and poorly educated.³²³ Since 1980, a number of Cubans have arrived on boats and rafts, often being granted or denied admission into the United States based upon swings in U.S. policy.³²⁴

D. Black Africans

Blacks of African descent have come to the United States in significant numbers only since the changes wrought by the 1965 Immigration Act.³²⁵ Since then, black Africans have come into the United States to take advantage of educational opportunities, to utilize skills gained in African educational institutions, and to avoid economic and political problems in unstable home countries.³²⁶

Because few blacks of direct African origin came into the United States until relatively recently, those discrete few who did arrive were often seen as rarities and treated with friendly curiosity in the milieu that they inhabited.³²⁷ In pre-integration United States, this meant that arriving blacks, who even in the early part of the twentieth century, most often arrived as students, attended historically black colleges.³²⁸ In 1935, for example, Kwame Nkrumah came to the United States to study at Lincoln University in Pennsylvania, a small predominantly black institution.³²⁹ Nkrumah, who later became the president of Kenya, is said to have been well received in the United

321. See MARIA CRISTINA GARCIA, HAVANA USA 68 (1996); see also EARL SHORRIS, LATINOS 64 (1992).

322. RICHARD R. FAGAN ET AL., CUBANS IN EXILE: DISAFFECTION AND THE REVOLUTION 16-17 (1968).

323. In 1980, in what is generally known as the "Mariel boatlift," several Cubans were permitted to leave Cuba either voluntarily, or were forced to leave by the Cuban government. See Alejandro Portes & Alex Stepick, *Unwelcome Immigrants: The Labor Market Experiences of 1980: (Mariel) Cubans and Haitian Refugees in South Florida*, 50 AM. SOC. REV. 493 (1985).

324. In 1995, in an accord with Cuba, the United States agreed to issue 20,000 visas for Cubans to legally immigrate to the United States. Those picked up at sea would be repatriated, while those reaching the shore could claim political asylum. Luisa Yanez & Jay Weaver, *A Third Standoff; 16 Boaters Intercepted; U.S. To Return Them To Cuba*, SUN-SENTINEL, July 13, 1999, at 1A. In an interdiction effort on June 29, 1999, U.S. Coast Guard members used water hoses and pepper spray to prevent six Cubans in a boat from attaining land. *Id.*

325. KOFI K. APRAKU, AFRICAN ÉMIGRÉS IN THE UNITED STATES: A MISSING LINK IN AFRICA'S SOCIAL AND ECONOMIC DEVELOPMENT 11-13 (1991).

326. *Id.*

327. *Id.*

328. *Id.*

329. ROBERT G. WEISBORD, EBONY KINSHIP: AFRICA, AFRICANS, AND THE AFRO-AMERICAN 165-66 (1973).

States by both blacks and whites.³³⁰ However, other students from African nations reported that they chose to avoid American blacks either because they were treated as outsiders, or because they perceived that white Americans viewed black foreigners as superior and therefore did not wish to diminish this advantage by associating with American blacks.³³¹ Some American blacks responded to this apparent snub with bitterness.³³² Malcolm X mocked the bitter irony in the disparate treatment between "Africans" and "Negroes":

In fact, you'd get farther calling yourself African instead of Negro. Africans don't catch hell. You're the only one catching hell. They don't have to pass civil rights bills for Africans. An African can go any where he wants right now. All you've got to do is tie your head up. That's right, go anywhere you want. Just stop being a Negro. Change your name to Hoogagafooba.³³³

And yet, it is also the case that those from African countries suffer from negative stereotypes, often considered unpolished, lacking in social graces, or unsophisticated.³³⁴ These negative images are purveyed by American blacks no less than whites.³³⁵

V. BLACKS, BLACK FOREIGNERS, AND THE PROBLEM OF ADDRESSING PRESENT AND PAST RACIAL DISCRIMINATION: AFFIRMATIVE ACTION REDUX?

As we move towards an ever-broadening and diverse society, the question often arises: "why affirmative-action or other policies designed to help minorities?"³³⁶ In recent years, the case law governing affirmative action programs has altered the landscape, making racial preferences far more difficult to support.³³⁷ For blacks, both "native" blacks who are the descendants of slaves and more recent

330. *Id.*

331. *Id.* at 164-68.

332. JOSEPHINE MORAA MOIKOBU, BLOOD AND FLESH: BLACK AMERICAN AND AFRICAN IDENTIFICATION 127-28 (1981).

333. This quote is attributed to Malcolm X and is on file with the author.

334. *See, e.g.*, *United States v. Adegbite*, 846 F.2d 834, 836 (2d Cir. 1988). In this case, two D.E.A. agents claimed to have been able to identify Nigerian drug suspects as Africans because of their "'sloppy,' 'not well coordinated' dress and 'oily' skin." *Id.* at 836.

335. MOIKOBU, *supra* note 332, at 123-26.

336. *See* DINESH D'SOUZA, THE END OF RACISM 537-46 (1995).

337. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). In *Adarand*, the Court held that federal race-conscious decision making should be subject to strict scrutiny. *Id.* This standard requires that race-based affirmative action programs be narrowly tailored to serve a compelling government purpose. *Id.* at 235. While this did not necessarily mean that all such race-based programs could be invalidated, it did seem to sound the death knell for many such programs, since the practical application of such a standard could clearly mean the end of many such programs.

black entrants, the answer may lie in what I have described as the unremitting immigrant status of all blacks. One method of addressing this is to acknowledge that all blacks have been, and remain foreigners.³³⁸

In response to this notion that all blacks in the United States, native or otherwise, continue to occupy an immigrant status, some have asked, "Why would blacks in the United States want to be seen as foreigners? Isn't that a worse position than they already occupy?" My response to this query has been, "[i]t is not that blacks *choose* to be seen as foreigners or immigrants or that this notion represents some change to how blacks are perceived; blacks of all backgrounds are *already viewed* as foreigners." Because of the failure of the assimilationist model vis-a-vis blacks, they remain, thus far, outside of the political, economic, and social mainstream. Because citizenship is an integral part of the political and social identity of Americans, perpetual "outsider" status is a political and social handicap which may be insurmountable.³³⁹ In the case of the poorest of blacks who have been termed the "underclass,"³⁴⁰ this outsider status is quite graphically illustrated by the conditions of apartheid in which they live.³⁴¹ These blacks occupy the often decaying, desolate, and underserved inner cities of this country.³⁴² They live in, if not literally, then certainly figuratively, "another country."³⁴³ To reach these blacks, the approach must be one informed by our considerable history and experience in making foreigners one with the rest of the country.

This may mean, for example, designing economic and social outreach programs that acknowledge that blacks very often are not well-versed in the customs, the culture, or even the language of the white

338. In response to my assertion that blacks are foreigners, I have sometimes heard the vociferous response that blacks in the United States are "home" because there is no other home for the vast majority of American blacks. Blacks may look to, I have been told, the American South as a "Mother Country." I submit, however, that this black "homeland" is at best an example of internal colonialism—conquest and subjugation of a people and their physical removal to the ruling state. See WILLIAM K. TABB, *THE POLITICAL ECONOMY OF THE BLACK GHETTO* 21-34 (1970).

339. MICHAEL JONES-CORREA, *BETWEEN TWO NATIONS* 35 (1998).

340. "Underclass" is a term which "offers a convenient metaphor" because "it evokes three widely shared perceptions: novelty, complexity, and danger . . ." MICHAEL KATZ, *THE "UNDERCLASS" DEBATE* 3-4 (1993). The word "underclass" conjures up a mysterious wilderness in America's inner cities; a terrain of violence and despair, a collectivity outside of politics and social structure, beyond the usual language of class and stratum, unable to protest or revolt." *Id.*

341. DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 75-77 (1993).

342. *Id.*

343. This phrase is reminiscent of James Baldwin's novel, *Another Country*, which chronicles black urban alienation. JAMES A. BALDWIN, *ANOTHER COUNTRY* (1993).

mainstream. This is nowhere better demonstrated than in recent studies of the problems of unemployment among the black poor.³⁴⁴ In addition to dealing with problems of employer bias based only on race, such persons have to deal with what may be the more legitimate complaints of employers: that black inner city dwellers are not always "job ready."³⁴⁵ They do not, for example, always understand what it means to arrive at work on time, or to treat customers in a pleasant and professional manner.³⁴⁶ They may not speak "standard" English, or at least, an English understandable to members of the white middle class. Acknowledging the outsider, the foreigner status of blacks may greatly aid in the effort of designing programs to address social ills. We may at least succeed in bringing the most disadvantaged blacks up to the point where they possess a set of skills that would enable them to compete for jobs.³⁴⁷

Examples of programs that might be designed include language programs which address the unique lingual issues of some native blacks, particularly those marooned in the inner city. Many blacks speak a nonstandard variety of English which has been termed "Black English."³⁴⁸ Whether Black English is a dialect, or a language unto itself remains to be determined.³⁴⁹ One thing is certain, though: speakers of Black English are often unable to make themselves understood to speakers of standard American English.³⁵⁰ This often means that social, educational, and employment prospects are limited for these persons.³⁵¹ One way to address this is to treat certain black populations

344. See WILSON, *supra* note 188, at 167.

345. *Id.*

346. *Id.*

347. I am mindful of the fact that these suggestions may strike some as patronizing, particularly where the failure of some blacks to succeed has little to do with the notion of "job-readiness" or lack of standard English skills. Often, disparagement of speakers of "Black English" has merely been a proxy for racial discrimination. See *Hobson v. Hansen*, 269 F. Supp. 401, 480-81 (D.D.C. 1967) (explaining the environmental factors that affect black children in ghettos with particular emphasis on the communication gap between Black English and the standard English used in schools); *Martin Luther King Jr. Elementary Sch. Children v. Ann Arbor Sch. Dist. Bd.*, 473 F. Supp. 1371, 1382-83 (E.D. Mich. 1979) (holding that teachers may not denigrate the use of Black English by their students).

348. See J.L. DILLARD, *BLACK ENGLISH: ITS HISTORY AND USAGE IN THE UNITED STATES* 73-138 (1972).

349. *Id.* Dillard suggests that early forms of Black English indicated distinct language patterns which were part of the process of Creolization. *Id.* at 6. Creole languages developed when pidgin, or simplified second language forms were supplanted by a more complex, systematic form that became the first language of the descendants of pidgin speakers. *Id.* at 83.

350. *Id.* at 25.

351. If I doubted that Black English as it is commonly spoken often differs dramatically from standard English, an anecdotal experience cured me of this. In July of 1996, my husband and I hosted a black child from Brooklyn, New York in our suburban New Jersey home under the

as persons with lingual differences that require remediation. Many will take umbrage at this suggestion. There is nothing wrong with speaking in this way, say proponents of Black English.³⁵² The very suggestion, they say, smacks of cultural and lingual imperialism and outright racism.³⁵³ Moreover, say some, economic success often overcomes any mainstream squeamishness about Black English.³⁵⁴ To this I respond, no, there is nothing wrong with Black English. Speaking Black English is no more wrong than speaking Spanish, French, or any other tongue learned at home. Requiring persons to learn standard English in order to communicate in the dominant mode would simply seem to be good sense. Failure to teach schoolchildren to communicate in standard English when it is the dominant mode of discourse in this country would almost seem to be educational malpractice.³⁵⁵

auspices of the Fresh Air Fund, a charity dedicated to providing inner city children with an opportunity to have a summer vacation outside the city. The child that we hosted, Taiquan, spoke a variant of English which both my husband and I and our two sons had difficulty understanding. I found this baffling and disturbing; I grew up speaking what was then also called "Black English" in the 1960s and seventies. What Taiquan spoke, however, was yet, I believed, another version of Black English; a dialect *within* a dialect (or, a language within a language). His speech contained many slurred words and slang. When I spoke with his mother and siblings, as well as to other children in the Fresh Air Program, I found their speech to be similar. This may simply reflect a form of speech particular to New York ("Brooklynese"?). Or, it could simply be that there is a difference between simply substandard speech or street patois. See Sharon Keller, *Issues In School Choice: Something to Lose: The Black Community's Hard Choices About Educational Choice*, 24 J. LEGIS. 67, 85 (1998).

It may well be, however, that Black English is undergoing a transformation which renders it even more unlike standard English as a result of black isolation in inner city areas. See, e.g., DILLARD, *supra* note 348, at 6 (indicating that in its early development, there were varying forms of black English, due regional, racial, and class differences). Dillard writes that there were Black speakers of West African Pidgin English, Plantation Creole, and Standard English at fairly early times in the history of the colonies and Black bidialectal speakers of more than one of those varieties. *Id.* at 85-86.

352. DILLARD, *supra* note 348, at 85-86.

353. *Id.*

354. I am mindful of the words of A.D. Gadsen, reputed to be Alabama's first black millionaire: "It is better to say 'I is rich' than 'I am poor.'" Lecture on Business and Public Policy, *Can Business Save Education?; Strategies for 1990s*, HERITAGE FOUND. REP., Feb. 23, 1989, at 97, available in LEXIS.

355. Educational malpractice refers to a claim that is based upon the failure of an educator or school system to adequately educate students. See Theresa J. Bryant, *The Death Knell For School Expulsion: The 1997 Amendments to the Individuals with Disabilities Education Act*, 47 AM. U. L. REV. 487, 544-45 (1998); see also John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349 (1992); Catherine D. McBride, *Educational Malpractice: Judicial Recognition of a Limited Duty of Educators Toward Individual Students; A State Law Cause of Action for Educational Negligence*, 1990 UNIV. ILL. L. REV. 475, 479. Such claims are often raised in reference to children with education disabilities. See, e.g., *Sellers v. School Bd. of Monassas*, 141 F.2d 524, 526 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 168 (1998) (holding that a claim that defendant school board should have discovered a child's learning disabilities is subject to dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim).

Another area to be considered in addressing the unremitting immigrant status is the difference in custom and culture that sets blacks apart from the white mainstream. Again, here I do not suggest that blacks should discard their own cultures in order to embrace a white culture. Rather, we should acknowledge that for many blacks without several generations of middle class status, the symbols of the white middle class are completely alien.³⁵⁶ Even successful completion of higher education may not alter this essential unfamiliarity with mainstream cultural norms.

This approach to designing a model of assimilation via legislation may well address some underclass issues. But what of the middle and even upper-middle class black? Can it be fairly said that such persons are at any significant disadvantage that would require any sort of redress? My answer to this is an emphatic *yes*. The black middle classes are a clear presence in the mainstream. What is less clear, however, is whether they are assimilated or integrated.³⁵⁷ "Integrate," meaning to bring a smaller part into the whole, is typically viewed as the process of ending racial segregation and advocating equal membership in society.³⁵⁸ While some blacks are certainly present in the mainstream, it is far less certain that they have been "brought into equal membership." Middle class and educated blacks, while experiencing greater access to economic opportunities than in the past, are far from having achieved

Though courts have been hostile to the claim as a separate cause of action, it is slowly gaining currency. *Id.*

356. See, e.g., Pam Bellick, *Reason Is Sought For Lag By Blacks in School Effort*, N.Y. TIMES, July 4, 1999, at A1 (describing the gap in black-white school performance and positing as one reason, the "shallow roots" of the black middle and upper classes). I again refer to a personal anecdote to illustrate this: when my sons were in preschool and the early primary grades, they often did poorly on worksheets which required them to identify an object in a picture and write the beginning letter. This was true despite the fact that they were assisted by their lawyer mother and scientist father. My husband and I had no experience with many of the items depicted. One such example was a ball balanced on an elongated diamond shaped item, with an arrow pointing toward the diamond-shaped item. The object, we later determined, was a golf *tee* ("t" was the operative letter). We do not play golf; no one from among our immediate forebears played golf. Experientially, we were at a deficit.

357. ADAM CLAYTON POWELL, JR., *MARCHING BLACKS: AN INTERPRETIVE HISTORY OF THE RISE OF THE BLACK COMMON MAN* 63 (1945). Powell wrote:

The solution to the Negro problem can be roughly classified under six headings: eradication, isolation, deportation, separation, integration and assimilation. The white South leaned toward the first four but concentrated on the middle road—separation. Until the birth of the new Negro all six solutions were proposed by the blacks.

The Negro mass almost to a man insists today on integration. The white mass likewise is beginning to agree on integration as a solution.

Id. at 63-64.

358. *Id.*

a complete integration.³⁵⁹ Many of the most valuable benefits of our society are still transferred via informal networks of whites in informal settings—the old boy (and sometimes girl) network.³⁶⁰ When blacks are theoretically qualified for positions and opportunities, even if there is no blatant racism, the subtleties of postmodern white intra-group dealings continue to leave middle class blacks at a significant disadvantage.³⁶¹

So what can be done about this? Are government sponsored affirmative action programs able to address the lament of middle class blacks now that much of the traditional racist behavior has gone underground and become more insidious even while masquerading as something more innocuous?

VI. CONCLUSION

There is an intimate link between anti-immigrant sentiment and opposition to native black American progress. It is not coincidental that, for example, in California, Proposition 209, the anti-affirmative action initiative,³⁶² followed closely on the heels of Proposition 187, the anti-immigrant initiative.³⁶³ I believe that in order to address the present-day social and economic ills of native blacks, there must be an acknowledgement that native blacks are not assimilated because of their existence in a continuing immigrant status. Like other immigrant groups, the large majority of native blacks lives with a different culture, custom, and to some extent, a different language than the mainstream. The involuntary transportation of Africans to this country from various regions of Africa means that native blacks are bereft of two of the most important stimuli for immigrant progress: voluntary entry into the country because of a desire to build better lives, and the reference to the old country as a source of emotional grounding.

359. See generally LAWRENCE OTIS GRAHAM, *MEMBER OF THE CLUB* 1-26 (1995) (chronicling the author's experiences as an Ivy-League educated black man who worked undercover at a restricted country club).

360. See generally ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993) (detailing the frustrations which highly educated and more affluent blacks continue to endure).

361. See generally JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* (1994) (explaining how racism continues to diminish the quality of life that middle-class blacks experience).

362. See West's Ann. Cd. Const. Art. I, §31; see generally Girardeau A. Spann, *Proposition 209*, 47 *DUKE L.J.* 187 (1997).

363. See West's Ann. Cd. Const. Art. I, §113; Francisco Valdes, *Under Construction – LatCrit Consciousness, Community, and Theory*, 85 *CALIF. L. REV.* 1087, 1118 (1997).