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A Tale of Two Cultures: Or Making the Proper Connections Between Law, Social History and the Political Economy of Despair

ROBERT J. COTTROL*

Professor Brooks has performed a valuable service. No issue troubles those with personal and professional interests in the fortunes of Afro-Americans more than the question of why, a generation after the successful struggles of the Civil Rights movement, so much remains unaccomplished. If black success in the post-Civil Rights era, and there has been much,¹ is a source of pride for blacks, and indeed many other Americans as well, then continued black disadvantage is, or should be, a source of discomfort, if not shame, for the nation as a whole. Roy Brooks' article, *Racial Subordination Through Formal*

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1. Economists James P. Smith and Finis Welch discuss black economic gains between 1940 and 1980. In their study they note that substantial gains were made in relative income between employed blacks and employed whites in the period under discussion. They also note the significant expansion of the middle and upper classes in the black population in the four decades under consideration. Their study also indicates that this record of progress has been marred by recent decreases in the rate of reduction of black poverty due to the withdrawal of large segments of the black community from the labor market, essentially the underclass problem which is the central concern of this article. See Smith & Welch, *Race and Poverty: A Forty Year Record*, in 77 AMERICAN ECONOMIC REVIEW: PAPERS AND PROCEEDINGS 152 (1987) [hereinafter *Race and Poverty*].

*Equal Opportunity*² places the central issue in sharp relief, particularly for lawyers and those with a faith in law's ability to influence social change. The formal legal aims of the traditional Civil Rights movement met with overwhelming success by the 1960s.³ That movement, after a struggle at least as old as the Republic,⁴ managed to eradicate discriminatory law, a system of formal, legally mandated racial subordination known in its twentieth century southern manifestation as Jim Crow.⁵ The Civil Rights movement's success went beyond the mere overturning of discriminatory statutes⁶ or the reversal of court precedents that sanctioned discrimination.⁷ By the 1960s, for the second time in American history,⁸ the Civil Rights movement inspired federal legislation forbidding private discrimination.⁹ A dream that had begun in the minds of a tiny number of freedmen in the late eighteenth century had finally triumphed.¹⁰

Yet, as Professor Brooks' research reminds us, the legal realities have changed, but many social realities have not. Indeed, for an important portion of the black population much has gotten worse — significantly worse. For many, life's prospects have dimmed despite significant legal change and despite a significant diminution of ra-

2. Brooks, *Racial Subordination Through Formal Equal Opportunity*, 25 SAN DIEGO L. REV. 879 (1988).

3. By the 1960s, Civil Rights activists had managed, among other accomplishments, to overturn the *separate but equal* doctrine that had dominated 14th amendment jurisprudence for most of the century, and to overturn state anti-miscegenation legislation. *See, e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967). Civil Rights activists were also successful in having federal legislation passed that overturned both private and public patterns of discrimination. *See, e.g.*, Civil Rights Act of 1964, ch. 20, 78 Stat. 241 (codified as amended at 42 U.S.C. § 1971 to 2000h-6 (1982)); Voting Rights Act of 1965, ch. 20, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971-73 (1982)); Fair Housing Act of 1968 (Title VIII), ch. 45, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3604-06 (1982)).

4. Immediately after the American Revolution, free blacks and white supporters of equal rights pressed to remove existing and proposed legal disabilities that would have created a legally inferior status for free Negroes in a number of northern states. That effort was most successful in the late eighteenth century in securing, at least for a time, voting rights for free black men that were the equal of those enjoyed by whites. *See Cottrol, Law, Politics and Race in Urban America: Towards a New Synthesis*, 17 RUTGERS L.J. 483, 504-505 (1986) [hereinafter *Law, Politics and Race*].

5. For a good examination of the origins of Jim Crow, see C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3rd ed. 1974).

6. *See supra* note 3.

7. *See supra* note 3.

8. It should be stressed that much of what the Civil Rights movement achieved, at least in the realm of law, after the Second World War had been achieved and lost during Reconstruction and its aftermath. In one area, access to public accommodations, nineteenth century legislation achieved results that would not be equaled until the mid 1960s. The Civil Rights Act of 1875 provided broad federal protection for the rights of blacks to enjoy access to public facilities. That act was invalidated by the Supreme Court in 1883. *See Civil Rights Cases*, 109 U.S. 3 (1883).

9. *See supra* note 3.

10. *See supra* note 4.

cism on the part of many whites. Crime,¹¹ unemployment,¹² single parent households,¹³ and in some instances, downward trends in educational achievement¹⁴ provide vivid evidence of the growth of a black underclass; an underclass radically divorced from mainstream American culture, black and white. Also, blacks who are clearly not members of the underclass still suffer from racism and discrimination despite laws prohibiting discrimination and, indeed, even in the face of government policies encouraging or mandating affirmative action.¹⁵ The legal triumphs of the sixties notwithstanding, it is still so dysfunctional to be black in contemporary American society that some individuals will still actively fight not to be so labelled.¹⁶ The question of where do we go from here, and perhaps more particularly, whether law has a continuing role to play in resolving this "American dilemma," remains a vital one.

*Racial Subordination Through Formal Equal Opportunity*¹⁷ performs what is at once a valuable and yet troubling service by bringing the issue of black culture, or more accurately black underclass culture, to its rightful place: center stage, in the debate on law, social policy and race. The idea that some elements of contemporary black urban culture are dysfunctional at best and self-destructive at worst is troubling for friends of racial equality. It smacks of "blaming the victim." The idea can and does provide ammunition for those who would urge the curtailment of ameliorative efforts. For these

11. See, e.g., Palley & Robinson, *Black on Black Crime*, 25:5 TRANSACTION: SOC. SCI. & MOD. SOC'Y 59 (July/August 1988); C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 160-61 (1978) [hereinafter CRIMINAL VIOLENCE, CRIMINAL JUSTICE]; Kennedy, *McCleskey v. Kemp: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

12. See *Race and Poverty*, supra note 1, at 156-57.

13. One of the primary indicators of the growth of an urban black underclass has been the significant expansion of female headed households in black communities since the Second World War. In 1940 such families represented less than eighteen percent of all black families. By 1975, over thirty-five percent of black families fell into that category. See BUREAU OF THE CENSUS, UNITED STATES DEP'T OF COMMERCE, SER. P-23 NO. 80, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1970-1978 103 (1978) [hereinafter BLACK POPULATION].

14. C. MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980, 98-100, 108 (1984) [hereinafter LOSING GROUND].

15. Exec. Order No. 11246, 42 U.S.C. § 2000e (1976), amended Exec. Order No. 12086, 43 Fed. Reg. 46,501 (1978).

16. For a discussion of a recent case concerning a person who went to court to contest the action of a state government that labelled her black, see Diamond & Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255 (1983).

17. See supra note 2.

reasons, cultural explanations for urban black poverty should be offered with great caution. Ideological and disciplinary biases have also kept the cultural component of black disadvantage from its rightful place in the discussion.¹⁸ All too often, forthright explorations of the cultural component of black disadvantage have been replaced with macroeconomic and sociological explanations that have suggested that social policies could be developed to ameliorate the lingering disabilities of many black Americans without taking into account cultural disabilities that have developed in many segments of black society.¹⁹ In part, this tendency has occurred because of the vigorous rejection of various culture-of-poverty theories discussed in the sixties, most prominent among them Daniel Patrick Moynihan's *The Negro Family The Case for National Action*.²⁰ There has been another reason for this neglect of the cultural question. This reason is of special importance for lawyers. Our legal norms emphasize individual rights and equal treatment before the law. These translate into demands for color blind treatment by governmental agencies, part of what Roy Brooks terms "formal equal opportunity."²¹ Such norms, when taken to their logical conclusion, cast grave constitutional suspicion on efforts to legally take into account cultural differ-

18. Two works that demonstrate the tendency of both conservative and liberal scholars to subordinate cultural explanations for the growth of the underclass to macrosocial and macroeconomic explanations are LOSING GROUND, *supra* note 14, and W. WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* (1978) [hereinafter *THE DECLINING SIGNIFICANCE OF RACE*]. Although both authors are aware of cultural dimension in the growth of underclass culture in urban America, both see cultural dimension as somewhat less important than other factors. In Murray's analysis, the misapplication of social welfare measures, especially since the advent of Great Society programs in the sixties and in Wilson's structural changes in American industry, have made it difficult for inner city residents to secure high paying industrial jobs that were once available to urban residents.

Probably the best example of a school of analysis that ignores the influence of culture on underclass characteristics can be found in the work of economists. The economists are largely, although not exclusively, political conservatives who attribute black youth unemployment to increases in the minimum wage. Economists who have offered this line of analysis have tended to treat the problem as a simple matter of decreasing demand; employers have been less willing to hire low wage workers with the increase in minimum wage, causing an increase in unemployment among low skilled black youth. Their analyses have generally not addressed the supply question; that is, many unemployed black youth are willing to work at existing minimum wage levels, partly a cultural question, or at some hypothetical level below existing minimum wages. This line of analysis has also not addressed the question of whether a segment of the low skilled black youth population unlikely to be hired at any wage either racial prejudice or because of cultural characteristics that make them unattractive to potential employers. For a discussion of this issue and a subminimum wage experiment that failed, see K. AULETTA, *THE UNDERCLASS* 278-79 (1982) [hereinafter *THE UNDERCLASS*].

19. See *supra* note 18.

20. OFFICE OF POLICY PLANNING & RESEARCH, DEP'T OF LABOR, *THE NEGRO FAMILY THE CASE FOR NATIONAL ACTION* (1965) (D.P. Moynihan is commonly attributed authorship of this publication while he held office as Assistant Secretary of Labor) [hereinafter *THE NEGRO FAMILY*].

21. See Brooks, *supra* note 2, at 879.

ences among ethnic or racial groups and fashion legal doctrine or government policy accordingly. This is a significant part of the long-standing debate over affirmative action and other remedial efforts.²²

Let me, near the outset, attempt to define which cultural characteristics are important for purposes of this discussion. There has been a longstanding debate among historians and social scientists concerning the extent to which significant cultural differences do or do not exist between Afro- and Euro-Americans.²³ Participants in this de-

22. For one work that takes issue with a number of race-specific remedial measures, see N. GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* (1975).

23. Anthropologist Melville Herskovits did pioneering work on the survival of African culture in New World societies. Although his strongest evidence for the survival of African culture in the Americas came from Latin American and Caribbean examples, Herskovits contended that there were also significant survivals of African culture among blacks in the United States. See M. HERSKOVITS, *THE MYTH OF THE NEGRO PAST* (1941). John W. Blassingame and Peter H. Wood, two recent historians of slavery, have reiterated Herskovits' view that African culture was strong enough to survive the crucible of the slave plantation, albeit in somewhat altered form. See J. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 1-40 (1972); and P. WOOD, *BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION* (1974). Herskovits and subsequent investigators believed that significant degrees of African culture has survived in the United States. This view, sometimes referred to as the "Afro-American ethnomethodological school," has been challenged by other social scientists and historians. Chief among these was sociologist E. Franklin Frazier who argues that African culture had essentially been destroyed in slavery and that the culture of black and white Americans were essentially similar. See E. F. FRAZIER, *BLACK BOURGEOISE: THE RISE OF A NEW MIDDLE CLASS IN THE UNITED STATES* (1957); E. F. FRAZIER, *THE NEGRO CHURCH IN AMERICA* (1963); E. F. FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (rev. abr. 1966) [hereinafter *THE NEGRO FAMILY IN THE UNITED STATES*]. One historian of slavery, Kenneth Stampp, also seems to have vigorously rejected the view of an African culture derived, or an otherwise black culture within the American context. His statement, "Negroes are, after all, only white men with black skins, nothing more, nothing less" is a succinct statement of this view. See K. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* 303 (1956) [hereinafter *SLAVERY IN THE ANTEBELLUM SOUTH*].

It should be noted that this debate over the survival of African culture and the existence of a separate black culture has taken place on two levels, the methodological and to some extent the ideological. Methodologically, anthropologists and historians employing anthropological methods have been more likely to note the survival of African culture among blacks in the United States. Their doing so can perhaps be attributed to anthropology's emphasis on such small, often overlooked aspects of culture such as minor linguistic patterns, use of tools, and patterns of food consumption. In this respect, anthropologists and anthropologically trained historians often look at patterns of day-to-day living in ways very different from sociologists and social historians. From an ideological point of view, it is fair to say that investigators who have argued the existence of significant survivals of African culture among Afro-Americans, have done so partly to emphasize the strength of African culture. A possible reason is to make the point that African culture was not so weak, and by implication inferior, and that it was swept away upon contact with Euro-American culture. Conversely, social scientists and historians who have argued the essential cultural similarity between black and white Americans

bate have explored the extent to which African culture has either survived or been lost among the descendants of African Slaves in the United States.²⁴ Part of this debate is also concerned with the extent to which a separate Afro-American culture, whether derived from Africa or elsewhere, can be found in considerations such as religion, family life, social attitudes, and linguistic patterns. We might call this set of considerations ethnographic. Here we are concerned with the extent to which an ethnographer might find significant differences in day to day living patterns between black and white Americans. Some elements of this ethnographic debate are of profound interest. Some, in my opinion, place too much emphasis on minor cultural differences.²⁵ Some can be characterized as trivial or even silly.²⁶

My own view is that much of this ethnographic debate has little to tell us about either the development of the black underclass or proper legal and policy remedies for that group or other segments of black society. On the whole, the cultural differences between black and white Americans are less sharp than the cultural differences between white Americans and a number of immigrant groups who have managed to avoid the urban underclass existence that has trapped all too many black Americans.²⁷ This statement is true not only for white immigrants and their descendants, but also more recently for immigrants of color, including black immigrants from the Caribbean and Africa.²⁸ The ethnographic contrasts between members of these groups and white Americans are far sharper than the

presented their arguments as part of the brief against racial discrimination and for integration. Their argument in part said that racial discrimination could not be justified on the grounds of alleged cultural differences because of the similarities between black and white cultures in America.

24. See *supra* note 23.

25. One example of this can be seen in the debate over cultural bias in standardized testing. In this debate, differences, often minor ones between the cultures of black and white Americans, are seen as key variables in explaining differences in standardized test scores. The research of economist Thomas Sowell on race, ethnicity and I.Q. testing suggests that neither this cultural view, nor the countervailing genetic view, accounts for the differentials found in standardized testing. Instead, his research suggests that factors as social class, student interest in and expectations of school, empathy between test-givers and test-takers, and size of families and resulting degree of parental attention play decisive roles in the differences in I.Q. test scores. See Sowell, *Race and I.Q. Reconsidered* in *ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS* 203-238 (T. Sowell ed. 1978) [hereinafter *AMERICAN ETHNIC GROUPS*].

26. For an interesting discussion of some of the extreme positions that were taken in the early seventies regarding black-white cultural differences and their impact on education program for blacks, see Hoover, *The Politics of Education: Illiteracy and Test Bias*, 10 *NAT'L BLACK L.J.* 64, 66-67 (1987).

27. See, e.g., Sowell, *Three Black Histories* in *ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS* 41-49 (T. Sowell ed. 1978) [hereinafter *Three Black Histories*]; *THE UNDERCLASS*, *supra* note 18, at 251.

28. *Three Black Histories*, *supra* note 27, at 41-49; *THE UNDERCLASS*, *supra* note 18, at 251.

differences between Afro- and Euro-Americans.²⁹ If differences in language, religion, familial patterns and the like should create significant social dysfunctions leading to underclass behavior and status, members of these immigrant groups should be more susceptible than black Americans. They have not proven to be more susceptible.³⁰

While ethnographic differences do not seem to have played a decisive role in disadvantaging a large segment of black American society, another set of cultural differences has been significant. This set of differences is related to attitudes and to values. Particularly, attitudes that touch on such hard to measure characteristics as optimism and self-esteem. Self-confidence and optimism have long been noted as elements in American culture and as part of what has been termed "American national character."³¹ These values have also long formed a significant part of Afro-American culture. During Reconstruction, these values motivated attempts by freedmen to reconstitute families separated during slavery.³² This faith in the future also motivated ex-slaves to attend schools run by the Freedman's Bureau after backbreaking work during the day; this work was often done in the fields of their former masters.³³ It was this optimism that propelled the children and grandchildren of slaves to come to the cities of the North and West in search of better lives.³⁴ Too often this optimism was met with frustrations which differed significantly from those encountered by other groups, even nonwhite immigrant groups. These frustrations helped create, among a significant minority of black Americans, a pessimistic culture strikingly at odds with widespread American cultural norms.³⁵ This culture of pessimism directly relates to the problem of the underclass and must be addressed if our law and our public policy is to complete the unfinished work of the Civil Rights Revolution.

29. *Three Black Histories*, *supra* note 27, at 41-49; *THE UNDERCLASS*, *supra* note 18, at 251.

30. *Three Black Histories*, *supra* note 27, at 41-49; *THE UNDERCLASS*, *supra* note 18, at 251.

31. *See, e.g.*, D. POTTER, *PEOPLE OF PLENTY* (1954).

32. E. FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* 82-88 (1988) [hereinafter *RECONSTRUCTION*]; H. GUTTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925* 363-431 (1976) [hereinafter *THE BLACK FAMILY IN SLAVERY AND FREEDOM*].

33. *RECONSTRUCTION*, *supra* note 32, at 96-102; J. FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* 108-09 (1961).

34. For a good discussion of the great migration and some of the motivation behind it see K. KUSMER, *A GHETTO TAKES SHAPE: BLACK CLEVELAND, 1870-1930* 157-73 (1976) [hereinafter *BLACK CLEVELAND*].

35. *See supra* note 31.

This article seeks to address those legal and cultural issues. Although Professor Brooks' study examines black people across class lines, this essay is concerned with the underclass.³⁶ It offers a theory on the development of black underclass culture in urban America. This article argues that the development of that culture, although relatively recent, is the result of long-term historical trends, the results of which came to fruition after the Second World War. Ironically, these trends had their most profound effect in producing dysfunctional cultural attitudes at the same time that formal, legal barriers to black participation in American society were being eliminated. My approach suggests that if we are to truly understand the often devastating effects that the history of racial discrimination has had on the cultural values of many black Americans, we must shift our focus both geographically and, to some extent, temporarily from our familiar histories of southern slavery and Jim Crow, to an examination of the histories of race relations in northern cities. This article will also demonstrate that the experiences and sensibilities of the first urban black generation, those born after the Second World War, black "baby boomers" if you will, and their children are critical to any understanding of the growth of the underclass.

36. Here I think definitions should be discussed. Professor Brooks offers an essentially economic definition of the underclass. See Brooks, *supra* note 2, at 960-63. His definition encompasses the working poor, those temporarily on some form of public assistance, the retired and those permanently dependent on welfare. It also includes two-parent families, female headed households and single individuals. I would argue that his definition is too broad. What is striking about today's urban black underclass is not simply poverty. Historically, a significant segment of the black population has been poor. Instead, what is significant are the cultural values and social outlook of a large segment of the black urban poor. These values and that outlook contribute to family instability, high crime rates and, in many cases, high rates of long-term unemployment. These characteristics of underclass culture often stand in marked contrast to the culture of working poor families who despite similar economic circumstances may have radically different sets of social and cultural values.

An approach that I think has better values for those concerned with law, policy and the underclass is to recognize the existence of three distinct groups. Two are clearly part of the underclass and the third must be addressed as part of any effort to ameliorate the problems of the underclass. Of the first two categories — which I would classify as part of the underclass — one consists of the working age dependent poor, those who are long-term, sometimes multigenerational recipients of public assistance. This group consists of people able to enter the work force who fail to do so partly because of family circumstances and partly because they believe that doing so will not result in significant social and economic improvement for their families and themselves. A large proportion of this group are members of female headed families. The second group, also part of the underclass, are those caught up in regular patterns of criminal behavior. The third group consists of the working poor and those employed in low wage jobs. They are not really part of the underclass. Although they often live in the same neighborhoods, they are little better off, if at all, than members of the underclass because they often manage to maintain the work ethic and a relative degree of family stability despite strong contrary social pressures. However, they often live in the same neighborhoods and are little better off than members of the underclass. For a discussion of how these distinctions can make differences in terms of law and public policy, see *infra* notes 202-205 and accompanying text.

This article is also concerned with the law of race. It argues that to understand the law of race, particularly in looking at the legal history of race in northern cities, we must look beyond formal equality under law and instead examine how formally egalitarian legal doctrine was applied in actual practice. This is a continuation of an examination that I have begun elsewhere.³⁷ This study is also concerned with how courts and legislatures can take into account the culture of despair that pervades many urban black communities and reconcile remedial law making with American legal norms that emphasize individual rights and color-blind justice.

This article is divided into three parts: The first argues that new focuses in Afro-American history and the history of race relations and American law are needed if we are to understand the growth of a culture of despair in many black communities. The second part proposes a generational hypothesis, the idea that the culmination of number of forces in Afro-American history came to fruition after the Second World War with a devastating impact on a significant percentage of blacks born in the post-war era. The article ends with a brief outline of the role law can play in future amelioration of these conditions. The conclusion includes a discussion of the extent to which racially tailored ameliorative efforts can be constitutionally viable given the American legal emphasis on color-blind law and individual rights. The third part discusses legislation with the potential to help transform underclass culture.

I. RACE AND LAW: A HISTORY REEXAMINED

By the late fifties, mainstream American scholars were beginning to examine social conditions in northern urban black communities with a renewed vigor.³⁸ This examination represented something of a

37. See *Law, Politics and Race*, *supra* note 4.

38. The beginnings of that new scrutiny actually started in the 1940s when social scientists armed with modern research techniques and sufficient grant money to hire research assistants began to examine emerging social patterns in black ghettos. The pioneering work in this area was first published in 1945: St. Clair Drake's and Horace Cayton's study of black life in Chicago. See 1 & 2 H. CAYTON & S. C. DRAKE, *BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY* (1970) [hereinafter *BLACK METROPOLIS*]. Also significant is Gunnar Myrdal's study of American race relations, first published in 1944. Myrdal also harnessed modern social science methodology with funds that permitted large scale in-depth research. His study was significant for viewing the problem of race as a nationwide problem, devoting significant attention to the question of race in northern cities. See 1 & 2 G. MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (Vol. 1:1944, Vol. 2:1962) [hereinafter *AN AMERICAN DILEMMA*].

break from an American scholarly tradition that tended to view the problem of race as largely a southern phenomenon.³⁹ While it was, of course, long known that there were black ghettos in northern cities and while black scholars and a few whites had done important work detailing life in northern Afro-American communities,⁴⁰ the prevailing view had been that the question of race in America was essentially a southern question.⁴¹ That view, was of course, understandable. The South historically had the vast majority of the black population.⁴² That region also had a tragic and dramatic racial history. The South had a legally mandated system of apartheid: Jim Crow, the separation of black and white in virtually every observable form of public life.⁴³ Furthermore the South had the history of slavery, a history cut short only by cataclysmic conflict: the Civil War, the nation's bloodiest conflict.⁴⁴ Southern racial practice was radically at odds with the nation's norms, it was at the heart of Myrdal's "American dilemma."⁴⁵ The case for the traditional scholarly focus on the South, like the case for the traditional Civil Rights movement's focus on legally mandated segregation, was compelling.

But by the late 1950s, those concerned with race in American society saw a need for a renewed emphasis on black life in northern

39. See *Law, Politics and Race*, *supra* note 4, at 491-92.

40. The study of black life in northern cities has had a long history. Professional scholarship in this field had its beginnings in the nineteenth century with W.E.B. Dubois' pioneering study, written in 1899 on black life in Philadelphia. See W.E.B. DUBOIS, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY* (2d ed. 1967). Dubois' work, a social history, pioneered in the use of census tracts and local vital statistics records and helped set the stage, methodologically and thematically, for social historians and sociologists who would later examine black urban life. Among the important works on black urban life that were authored before the fifties were M. W. OVERTON, *HALF A MAN: THE STATUS OF THE NEGRO IN NEW YORK* (1911); R. A. WARNER, *NEW HAVEN NEGROES: A SOCIAL HISTORY* (1940); S. C. DRAKE & H. CAYTON, *BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY* (1970); J. JOHNSON, *BLACK MANHATTAN* (1930). Although these and other studies provided often valuable insights concerning black life in northern cities, their insights were rarely incorporated into larger discussions of the problem of race in America.

41. See *Law, Politics and Race*, *supra* note 4, at 491-92.

42. Between 1790 and 1910, approximately ninety percent of the black population of the United States lived in the South. In 1940, over seventy-five percent of the black population lived in the Southern states. It should also be noted that it was not until 1950 that the census recorded a majority of black population as living in urban areas. See *BLACK POPULATION*, *supra* note 13, at 13-14.

43. The best account of the origins of Jim Crow, and particularly the role of law in starting and perpetuating that system of American apartheid, remains C. Vann Woodward's study. See C. V. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3rd ed. 1974).

44. Combined, the Union and Confederate armies suffered 498,332 dead in the Civil War. In the nation's second bloodiest conflict, World War II, the armed forces of the United States had 407,316 fatalities. See *THE WORLD ALMANAC BOOK OF FACTS* 338 (1988).

45. See generally 1 & 2 G. MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

cities. By the fifties, for the first time in American history, the black population was more urban than rural and equally divided between North and South.⁴⁶ Demographic change was not the exclusive reason for the new concerns. Dramatic patterns of social disorganization began to appear in northern ghettos. Growing crime rates, high percentages of single parent families headed by women, high rates of poverty and unemployment all compelled this new scrutiny.⁴⁷

At first the explanations for these patterns seemed at once simple and commonsensical. These patterns were the legacy of a debilitating southern heritage. Slavery, the argument ran, destroyed the black family.⁴⁸ The breakup of families that occurred as a result of the interregional slave trade,⁴⁹ the inability of black men in slavery to act as responsible adults, to lead, even to maintain their familial norms.⁵⁰ That coupled with a deminimus work ethic, the natural result of being enslaved, destroyed the normal impulse and ability to raise and provide for a family.⁵¹ One historian, Stanley Elkins, whose theory, explicitly or implicitly had a tremendous impact on social scientists and policy analysts of the era,⁵² even suggested that the slave experience produced an infantilization, a child-like dependency on the part of black adults.⁵³ It was also regularly noted that antebellum southern legislation prohibiting the teaching of blacks to read⁵⁴ which contributed to an undervaluing of education on the part of many blacks. Also, the argument went, whatever slavery may have begun in the way of cultural destruction, the postbellum southern heritage of Jim Crow finished.⁵⁵ Finally, it was

46. See BLACK POPULATION, *supra* note 13, at 13-14. By 1960, sixty percent of the black population lived in the South, forty percent outside of the South.

47. See *supra* notes 11-14 and accompanying text.

48. THE BLACK FAMILY IN SLAVERY AND FREEDOM, *supra* note 32, at xvii-xviii.

49. *Id.* S. ELKINS, SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE 53-55 (rev. 3d ed. 1976) [hereinafter SLAVERY]; SLAVERY IN THE ANTEBELLUM SOUTH, *supra* note 23, at 256-59, 266-67, 344-45; THE NEGRO FAMILY IN THE UNITED STATES, *supra* note 23, at 43-44; N. GLAZER & D. MOYNIHAN, BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS AND IRISH OF NEW YORK CITY 49-53 (2d ed. 1970) [hereinafter BEYOND THE MELTING POT]; HARWOOD, *Urbanism As A Negro Way of Life*, in W. MCCORD, J. HOWARD, B. FRIEDBERG & E. HARWOOD, LIFE STYLES IN THE BLACK GHETTO 22-23 (1969).

50. See *supra* note 49.

51. See *supra* note 49.

52. See generally SLAVERY, *supra* note 49. Much of Elkin's view was incorporated in Daniel Patrick Moynihan's policy study on the black family. See THE NEGRO FAMILY, *supra* note 20.

53. See SLAVERY, *supra* note 49, at 81-139.

54. *Three Black Histories*, *supra* note 27, at 25-26.

55. *Id.* at 29-31; J. WILLIAMSON, A RAGE FOR ORDER: BLACK/WHITE RELA-

asserted that in addition to the destructive southern legacy, blacks as recent migrants to the cities also faced the kinds of social disintegrations and disorganizations common to rural peoples transplanted to urban areas.⁵⁶ It was argued that this was similar to patterns faced by European immigrants earlier in the century.⁵⁷ Blacks in northern cities were "the last of the immigrants."⁵⁸ These patterns of social disorganization were other manifestations of what sociologists have termed the folk-urban continuum.⁵⁹

That set of views prevailed throughout the sixties. It was the perspective that informed many of the key architects of the War on Poverty⁶⁰ and it is still a perspective that informs many policy advocates and shapes much of the debate on law and racial remedy.⁶¹ It is that perspective that underlies much of the debate in law and politics on the question of affirmative action.⁶² The notion that black disadvantage, including dysfunctions in black culture, is largely the legacy of a nineteenth century history of southern slavery and an early twentieth century history of southern Jim Crow raises the question of the appropriateness of some remedial measures. The argument against affirmative action has often been framed with this historical perspective in mind. According to one view, affirmative action disadvantages whites, often whites who are the descendants of relatively recent immigrants who can claim, with historical accuracy, that neither they nor their ancestors participated in slavery or Jim Crow, the historical circumstances that produced black disadvantage.⁶³ The traditional, southern-centered focus on the history of American race relations raises hard questions concerning our abilities to fashion equitable, national remedies to ameliorate black cul-

TIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION (1986); Lemann, *The Origins of the Underclass: Part I. Free Fall*, *The Atlantic Monthly* 31, 41-42 (June 1986), [hereinafter *The Origins of the Underclass*]. For a Marxist economic study that in part attributes black poverty to general underdevelopment in the South, see J. MANDLE, *THE ROOTS OF BLACK POVERTY: THE SOUTHERN PLANTATION ECONOMY AFTER THE CIVIL WAR* (1978).

56. See generally *BEYOND THE MELTING POT*, *supra* note 49, and O. HANDLIN, *THE NEWCOMERS: NEGROES AND PUERTO RICANS IN A CHANGING METROPOLIS* (1959).

57. See generally *BEYOND THE MELTING POT*, *supra* note 49.

58. See generally *BEYOND THE MELTING POT*, *supra* note 49.

59. *THE NEGRO FAMILY IN THE UNITED STATES*, *supra* note 23, at 362-63.

60. See *supra* notes 11-14, 52 and accompanying text.

61. *Law, Politics and Race*, *supra* note 4, at 483-84, 499-500.

62. *Id.*

63. *Id.*; N. GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 201 (1975) [hereinafter *AFFIRMATIVE DISCRIMINATION*]; Brief of the Polish American Congress, The National Advocates Society and the National Medical and Dental Association as Amici Curiae in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), in 100 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1977 TERM SUPPLEMENT* 515 (P. Kurland & G. Casper eds.).

tural disadvantage.

But by the 1970s, new research on the part of historians and social scientists tended to indicate that the problem was more complex than had previously been realized. The simple history of psychological damage, beginning with southern slavery, amplified by Jim Crow and finally resulting in the social disorganization which took root in the black ghettos that expanded after the Second World War, ran up against hard contrary evidence. The most prominent of these bits of contrary evidence came about with a re-examination of the history of black family life, pioneered by the late social historian Herbert Guttman.⁶⁴ This re-examination indicated that whatever the frequency of family separation during slavery,⁶⁵ the impulse to maintain a stable, monogamous family life survived the demise of that peculiar institution.⁶⁶ Two parent families were the predominant cultural norm among freedmen in the immediate aftermath of slavery and remained overwhelmingly so through at least the 1940s.⁶⁷ Patterns of disintegration among black families, including the growth of female-headed families, developed in post World War II American society,⁶⁸ a strong indication that the patterns were less related to the southern history of slavery and Jim Crow and more related to events that happened in cities, more often than not northern cities, in relatively recent times.

Two Histories

Our traditional picture of Afro-American history, focusing as it does almost exclusively on the historical experiences of blacks in the American South, gives us an inadequate picture of the development

64. See generally THE BLACK FAMILY IN SLAVERY AND FREEDOM, *supra* note 32.

65. The actual extent of family separation during slavery has been the subject of much historiographical debate. Economic historians Robert W. Fogel and Stanley L. Engerman have argued that slave sales families tended to be stable and that the sale of slave families as a unit and not the breakup of such families during slave trading tended to be the norm. See R. FOGEL & S. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY 5, 52, 84-85, 127-28, 142-43 (1974). These conclusions have been criticized by a number of economic and social historians. See, e.g., Guttman and Sutch, *The Slave Family: Protected Agent of Capitalist Masters or Victim of the Slave Trade* in P. DAVID, H. GUTTMAN, R. SUTCH, P. TEMIN, & G. WRIGHT, RECKONING WITH SLAVERY: A CRITICAL STUDY IN THE QUANTITATIVE HISTORY OF AMERICAN NEGRO SLAVERY 94-133 (1976).

66. See generally THE BLACK FAMILY IN SLAVERY AND FREEDOM, *supra* note 32.

67. See *supra* note 13.

68. See *supra* note 13.

of both racial sentiment and racial structure in American society. While our traditional focus on southern slavery, Reconstruction, Jim-Crow and the ultimate triumph of the Civil Rights movement still has much to tell us about race relations (a people's survival amidst adversity and the role of law in influencing societal attitudes) history cannot provide a complete explanation for black, urban disadvantage in late twentieth century America. The theories that were offered a generation ago emphasizing the lingering cultural disadvantages that were the legacies of the black southern heritage have run up against hard contrary evidence. The increases in dysfunctional behavior that have occurred since the Second World War serve as an important reminder that something more than a lingering vestige of slavery must be offered to explain underclass culture. And, as Professor Brooks and other have noted, the relative success of certain Third World immigrant groups, including a fair number of black immigrants, when contrasted with many black Americans, should cause us to look for explanations that go beyond either simple racism or a cultural lack of familiarity with urban life, as reason for the lack of success of a significant segment of black American society.⁶⁹

There have been many black experiences in American history. For our purposes, two have been most important in shaping Afro-American perceptions of the world. The first is the racial attitudes of white Americans and the structures, including law, that have governed racial interaction in American society. This has been the southern experience which, until well into the twentieth century, was *the* Afro-American experience for over ninety percent of the black people of America.⁷⁰ It is the black experience most Americans are familiar with. It is that history that informs the understanding of most lawyers when they think of the law of race, whether they contemplate compromises in the original constitution that sanctioned slavery;⁷¹ the *Dred Scott* decision that extended the "peculiar institution's" reach;⁷² the Civil War Amendments that overturned human bondage and produced at least formal de jure equality under the American Constitution;⁷³ the Reconstruction era Civil Rights statutes whose promise of equality under law was cut short quickly after their enactment;⁷⁴ *Plessy v. Ferguson* that established the doctrine of "sepa-

69. See *supra* note 27.

70. See *supra* note 42.

71. See U.S. CONST. art. I, § 3 (apportioning representation by slave or free status); art. 1, § 9, cl. 1 (forbidding Congress from abolishing the slave trade until 1808); art. IV, § 2, cl. 3 (requiring states to surrender fugitive slaves).

72. 60 U.S. (19 How.) 393 (1857).

73. U.S. CONST. amend. XIII-XV.

74. *Civil Rights Cases*, 109 U.S. 3 (1883).

rate but equal" as a national constitutional norm;⁷⁵ *Brown v. Board of Education*, that overturned that doctrine;⁷⁶ or modern Civil Rights legislation, the basis of much contemporary civil rights litigation.⁷⁷ That history is generally known, at least in outline form, to lawyers and laymen, even to those who would claim little in the way of historical expertise or interest.

Another, somewhat more complex history also exists. It is less well known than the southern experience. Indeed, despite nearly a century of scholarship in the area, this history has scarcely been incorporated into our national discussion on race and remedy; instead it remains the concern of a relatively small group of specialists. This area is the history of blacks living in northern cities before the great migrations of the twentieth century.⁷⁸ It is a history as old as the more familiar southern story⁷⁹ and is critical to our understanding of contemporary black urban life. Also, it is a history that we must understand if we are to fashion intelligent remedies to the problem of black disadvantage.

Briefly stated, blacks are not newcomers to the cities of the North. African slavery began in the settlements that were to become the cities of the North at the same time it began in what would become the plantation South.⁸⁰ Largely for climatic reasons, northern slavery remained a small-scale, though not necessarily unprofitable, enterprise.⁸¹ Northern slavery survived for over a century and a half, from the beginning of the seventeenth century until the early nineteenth century.⁸² The enlightened sentiment that prevailed immediately after the American Revolution caused northern state governments⁸³ to abolish slavery either through legislative enactments or judicial decisions. These legal developments produced the northern free Negro class. By the nineteenth century, northern law and custom became radically different than that of the South: a black individual was presumed free.⁸⁴

75. 163 U.S. 537 (1895).

76. 347 U.S. 483 (1954).

77. See *supra* note 3.

78. See *Law, Politics and Race*, *supra* note 4, at 490 n. 29.

79. *Id.* at 499-503.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 503-04.

84. For a good overview of the legal status of free blacks in the antebellum North, see Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 *RUTGERS L.J.* 415 (1986) [hereinafter *Fourteenth Amendment*].

With the end of northern slavery came the struggle for citizenship and equal rights, a struggle that was visible as early as the 1780s.⁸⁵ The North made a promising beginning in that regard. Early state constitutions and statutes, drafted immediately after the Revolution, made surprisingly little distinction between black and white in the exercise of civil rights. Voting, for example, was open to free men, black as well as white, who met the requisite property requirements.⁸⁶ The decision to do so was deliberate. Legal measures that would have restricted this badge of citizenship to white men were considered and rejected.⁸⁷ Northern states in the late eighteenth century appeared to be choosing a racially egalitarian path, at least in the area of formal law.⁸⁸

After the War of 1812 conditions changed, for the worse. The egalitarian spirit that brought about the end of northern slavery and the extension of formal equal rights for the freedman was replaced by strident anti-black sentiment. That new sentiment was reflected in law. In a number of northern states black men were disenfranchised.⁸⁹ Even in those states where black suffrage survived there were often attempts at disenfranchisement.⁹⁰ In almost every state where there were significant concentrations of blacks in cities, racial tensions increased. The 1820s and 1830s were times of vicious anti-black riots in many northern cities.⁹¹ Blacks were legally barred from or segregated in new public institutions that developed in the nineteenth century. Most northern states when they developed public schools, barred black children from the common schools restricting them to separate schools. Blacks were consigned to Jim Crow facilities in public transportation and were generally excluded from restaurants, theaters and other public facilities.⁹² Black workers could

A general study that also provides a good legal history of the rights of free blacks in the antebellum North is L. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860* (1961).

85. One of the earliest examples of organized civil rights activity in the United States was the effort to secure the right to vote for free black men immediately after the Revolution. See *Law, Politics and Race*, *supra* note 4, at 516-17.

86. *Id.* at 504-05.

87. *Id.*

88. *Id.*

89. *Id.* at 508-09.

90. The efforts to disenfranchise blacks were resisted by blacks and by white egalitarians, usually without success. In two states, Maine and New York, supporters of equal rights were successful in resisting disenfranchisement. In New York, supporters of equal rights were partially successful in that they were able to preserve the franchise for black men who owned \$250 worth of real property. See, Fox, *The Negro Vote in Old New York*, 32 *POL. SCI. Q.* 252 (1917). In Maine, supporters of equal voting rights were able to beat back a disenfranchisement measure in the legislature. See Adams, *Disenfranchisement of Negroes in New England*, 30 *AM. HIST. REV.* 543 (1925).

91. L. CURRY, *THE FREE BLACK IN URBAN AMERICA, 1800-1850: THE SHADOW OF THE DREAM* 96-111 (1981) [hereinafter *THE FREE BLACK IN URBAN AMERICA*].

92. Maltz, *"Separate But Equal" And The Law Of Common Carriers In The*

not find employment in the new factories that were developing in northern towns and cities and were usually barred from all but the most menial employment.⁹³ The law reflected these developments. Indeed it is ironic, in light of subsequent history, that the "separate but equal" doctrine had its origins in northern, not southern, jurisprudence.⁹⁴

These events would be but another chapter in the often unfortunate history of American race relations except for the fact that there is a political sociology that helps explain the retreat from post-Revolutionary egalitarianism in the North and raises enduring questions about patterns of race relations in northern cities that persist to this day. The increase in discrimination that began to develop in northern cities after the War of 1812 represented more than a simple increase in racial tension. It reflected a growing tension between blacks and working class whites and perhaps more importantly for our purposes, a growing tension between blacks and those urban institutions that would play a major part in bettering the conditions of urban working class whites.

The most important of these institutions was the Democratic Party. By the 1810s Democrats were visibly and viciously anti-black. The Democratic Party was the principal force behind black disenfranchisement efforts.⁹⁵ Democrats pushed the cause of black disenfranchisement even as they argued for the elimination of property qualifications for white voters.⁹⁶ Democrats were hostile to northern free Negro equality for a number of reasons, the most important of which was simple partisan politics. The first black voters supported Federalist candidates, reflecting patron-client ties between upper class whites and northern freedmen and relatively enlightened Federalist attitudes towards slavery.⁹⁷

The national debate over slavery also helped sharpen tensions be-

Era Of The Fourteenth Amendment, 17 RUTGERS L. REV. 553, 554-58 (1986); *Fourteenth Amendment*, *supra* note 84, at 471-76; THE FREE BLACK IN URBAN AMERICA, *supra* note 91, at 161-67.

93. THE FREE BLACK IN URBAN AMERICA, *supra* note 91, at 15-36.

94. See the Massachusetts school desegregation case *Roberts v. City of Boston*, 59 Mass. (5 Cushing) 198, 199 (1849). Massachusetts Chief Justice Lemuel Shaw's opinion would later be cited by Justice Brown in the majority decision in *Plessy v. Ferguson*, 163 U.S. 537, 544-45 (1896) to bolster his view that separate facilities could be provided consistent with the fourteenth amendment's mandate of equal treatment under law.

95. *Law, Politics and Race*, *supra* note 4, at 508-12.

96. *Id.*

97. *Id.* at 505-07.

tween blacks and Democrats. The rise of the nineteenth century cotton kingdom, helped by the invention of the cotton gin, the opening of new lands in the West suited to plantation agriculture and the development of new strains of cotton that facilitated large scale production of the plant, helped create a new pro-slavery militancy.⁹⁸ In the post-Revolutionary era, slavery was widely acknowledged, even in the South, to be at variance with the nation's liberal ideals.⁹⁹ Apologists for the institution tended to justify its continuance primarily on pragmatic grounds and not on racial or idealistic grounds.¹⁰⁰ With the new economic developments attitudes changed. By the nineteenth century apologists for slavery had developed full-blown racial justifications for the institution.¹⁰¹ Slavery, it was argued, was not only desirable because of the economic and social benefits it conferred upon whites, but also necessary because of black inferiority, an inferiority that made blacks ill-suited for freedom.¹⁰²

With this new, explicitly racial justification for slavery came in increased hostility towards free blacks. Where the development of a free Negro population and the extension to that population of nearly equal rights had been encouraged in the South, as well as the North immediately after the Revolution,¹⁰³ those liberal policies were reversed in the nineteenth century. Free Negro success, indeed even Negro survival contradicted the new rationale for slavery. Southern states passed legislation restricting the rights of free blacks.¹⁰⁴ Free Negroes were the object of constant vilification by pro-slavery essayists.¹⁰⁵ Emigration of free Negroes to Africa was encouraged.¹⁰⁶ And the Democratic Party with its strong ties to the slaveholding South reflected that region's antipathy to blacks who were not enslaved. The rise of the cotton kingdom, as well as the domestic politics of northern cities, contributed to strident hostilities between blacks in northern cities and the Democratic Party.

These developments helped create a formal, legislated, second class status for northern free Negroes in all but an arguable handful of states before the Civil War.¹⁰⁷ That was important. It represented

98. Cottrol, *Liberalism and Paternalism: Ideology, Economic Interest and the Business Law of Slavery*, 31 AM. J. OF LEGAL HIST. 359, 363-65 (1987).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. I. BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 91 (1974); E. GENOVESE, *ROLL JORDAN ROLL: THE WORLD THE SLAVES MADE* 401-02 (1974).

104. I. BERLIN, *supra* note 103, at 91; E. GENOVESE, *supra* note 103, at 401-04.

105. *See supra* note 98.

106. *THE FREE BLACK IN URBAN AMERICA*, *supra* note 91, at 232-36.

107. That handful essentially was in New England, the region that came closest to granting de jure equality to free blacks in the antebellum era. *See Fourteenth Amend-*

a significant reversal of the eighteenth century preference for formal legal equality between black and white. It represented a worsening of conditions for thousands of blacks who lived in northern cities in the nineteenth century. But as important as these changes were, their long range significance is unclear. Few blacks in antebellum America were northern, urban free Negroes.¹⁰⁸ Thus, the loss of formal equal rights granted in the eighteenth century affected only a small percentage of the black population. but the new restrictions still met with the disapproval for northern blacks and quite a few whites as well.¹⁰⁹ The effort to reverse these new legislated badges of inferiority ultimately met with success in the northern states. In New England, blacks along with a significant minority of anti-slavery whites who also supported equal rights, managed to reverse discriminatory legislation and establish formal de jure equality between black and white even before the Civil War.¹¹⁰ After the War, a northern pro-civil rights coalition, aided by the fourteenth and fifteenth amendments and the post war strength of the Republican Party, succeeded in eliminating most formal legal disabilities suffered by blacks.¹¹¹ In the late nineteenth century blacks and their white Republican allies were even successful in passing state legislation that outlawed school segregation and discrimination in public accommodations.¹¹² It can be safely said that in many northern states the battle for formal de jure equality was essentially won by the end of the nineteenth century and won before large numbers of southern blacks began to move North.¹¹³

Yet, that history is more than just a simple chronicle of formal legal rights granted, lost and ultimately recovered. Properly read, that history can tell us much about enduring patterns of racial conflict and exclusion in northern cities. Those patterns, already visible in the antebellum era, are a vital part of black underclass development in northern cities during the latter half of the twentieth cen-

ment, *supra* note 84, at 425 (Table II).

108. In 1860, the census recorded the United States as having a black population of a little over four million. Of these, 230,000, or just under six percent, of the black population consisted of free persons who lived in the North and West. *See* BLACK POPULATION, *supra* note 13, at 11.

109. *See supra* note 92.

110. *See Law, Politics and Race, supra* note 4, at 514-27; R. COTTRILL, *THE AFRO-YANKEES: PROVIDENCE'S BLACK COMMUNITY IN THE ANTEBELLUM ERA* 67-112 (1982).

111. *Law, Politics and Race, supra* note 4, at 528-29.

112. *Id.*

113. *Id.*

tury. Among other things, that history reveals the often strong tensions that existed between urban working class blacks and their white working class counterparts. More importantly, that history also shows that by the early nineteenth century, blacks in northern cities were frequently excluded from or regarded with hostility by institutions that would generally play a role in bettering the conditions of urban working class people. That pattern was certainly reflected in the nineteenth century struggle for equal rights. The Democratic Party, which was instrumental in expanding the suffrage for white men and supporting other measures that benefited working class white people, had an almost unrelieved hostility towards black rights throughout the nineteenth century.¹¹⁴ Labor organizations displayed strong anti-black antipathies in the nineteenth century, antipathies insuring that few blacks would gain work as skilled artisans or find employment in the emerging industrial economy.¹¹⁵ Even the Catholic Church, which would play an important role as a mutual aid society for European immigrants in the twentieth century, often tended to view the cause of equal rights for blacks with suspicion.¹¹⁶ That suspicion was doubtless heightened by the often strident conflict between northern blacks and Irish immigrants.

In short, blacks were able to win the legal battle for formal equal rights in northern states in the nineteenth century. They did so through alliances with whites who were Republican, Protestant and middle class. Significant as that nineteenth century victory was, it presaged difficulties for blacks in northern cities in the twentieth century. In the twentieth century, the political, social, and to an important extent, economic life of northern cities would come to be dominated by the descendants of the social classes and institution that had often vigorously opposed formal legal equality for blacks in the nineteenth century. Large scale European immigration in the nineteenth and early part of the twentieth century increased the power of the Democratic Party, particularly in municipal politics.¹¹⁷ Increased industrialization made factory work and union acceptance even more important to the economic well being of urban workers. The Catholic Church's ability to act as a mutual aid society was enhanced as Catholic immigrants and their children played increas-

114. G. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914* 90-91, 189-191 (1971) [hereinafter *THE BLACK IMAGE IN THE WHITE MIND*]; G. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* 261, 277-80 (1981).

115. H. HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK AND THE LAW* 15-21 (1977) [hereinafter *BLACK LABOR*].

116. *Law, Politics and Race*, *supra* note 4, at 512-13 n. 205.

117. J. HIGHAM, *SEND THESE TO ME: JEWS AND OTHER IMMIGRANTS IN URBAN AMERICA* 25, 48 (1975).

ingly important roles at City Hall and in determining who could become union members.¹¹⁸

By the twentieth century, the cities of the industrial North were places prepared to vindicate the hope and optimism that brought many European immigrants to the United States. Life was often harsh and discrimination prevalent, particularly for first generation immigrants.¹¹⁹ But despite these difficulties, significant political and social institutions stood ready to aid the white immigrant in the quest for a better life. Municipal politics helped by easing white immigrants into government employment and by providing needed social services.¹²⁰ Local political connections also assisted the second or third generation immigrant entrepreneur in gaining the necessary licenses and government contracts that helped struggling businesses to get started and survive.¹²¹ Unions helped by providing sometimes protected access to skilled labor and steady factory employment.¹²² For some groups the Catholic Church acted as an informal mediator in the new land, making necessary contacts between employers, municipal agencies and their parishioners.¹²³

If the urban experience was prepared to vindicate the optimism of European newcomers, it was also prepared to dash the hopes of black newcomers. The strong racial tensions that had existed in the nineteenth century persisted into the twentieth. These tensions were exacerbated by the national retreat from equal rights in the early twentieth century¹²⁴ and the increased number of blacks who migrated to northern cities after the start of the First World War.¹²⁵ Unlike his European counterpart, the twentieth century black migrant came to cities with long traditions of anti-black hostility. And unlike immigrants, blacks migrated to cities where important urban institutions were less willing to assist black newcomers in their quest for a better life.

This can probably best be seen in the area of municipal politics.

118. M. KARSON, *AMERICAN LABOR UNIONS AND POLITICS, 1900-1918* 221-224 (1958).

119. T. GOSSETT, *RACE, THE HISTORY OF AN IDEA IN AMERICA* 287-309 (1963).

120. *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 18, at 78-82.

121. *Law, Politics and Race*, *supra* note 4, at 532.

122. *BLACK LABOR*, *supra* note 115, at 29.

123. *See THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 18, at 78-82.

124. Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835 (1982); *THE BLACK IMAGE IN THE WHITE MIND*, *supra* note 114, at 275-82.

125. *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 18, at 65-68.

The historic enmity between blacks and the Democratic Party prevented blacks from translating the formal legal rights gained in the nineteenth century into substantive equality. If the northern law of race, by the beginning of the twentieth century, was formally egalitarian, the behavior of law was often quite different. With the growth in power of Democratic political machines in northern cities, increasingly the enforcement of egalitarian state statutes fell into the hands of urban, working class Democrats, those who had long harbored historic tensions with blacks. If the black newcomer looked for vindication of his legal rights at the hands of the police, trial courts or school boards he often found those agencies staffed by people hostile to black rights.¹²⁶ If that newcomer looked towards civil service as a source of steady employment, he often found a less than enthusiastic reception.¹²⁷

Even in those cities where Republicans dominated, blacks often enjoyed little ability to translate their formal rights into substantive equality. The culture of working class hostility towards blacks on the local level, coupled with the national Republican Party's virtual abandonment of the cause of Civil Rights by the early twentieth century¹²⁸ caused northern Republican politicians not to press the cause of equal rights too vigorously. Republicans competed for the white working-class, particularly the immigrant vote and a too vigorous championing of black rights would have insured Democratic Party victories.¹²⁹ And, as has often been the case in American politics, black voters were locked in a pattern of one party politics. If the Republicans were not as vigorous as black voters would have liked in pushing the cause of racial justice, they were nonetheless preferable to the Democrats who had within their ranks a long tradition of harboring people who were actively hostile to black aspirations.¹³⁰ Republican politicians could satisfy black voters with much less in the way of substantive rewards than was required to win over the white electorate.¹³¹ Thus, because of these strong patterns of political hos-

126. *Id.* at 78-82; BLACK CLEVELAND, *supra* note 34, at 177-81.

127. BLACK CLEVELAND, *supra* note 34, at 79-80; 1 BLACK METROPOLIS, *supra* note 38, at 290, 292-95.

128. N. WEISS, FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR 4-6 (1983).

129. THE DECLINING SIGNIFICANCE OF RACE, *supra* note 18, at 78-82.

130. Kenneth Kusmer informs us that the nineteenth century Democratic tradition of race baiting, or using blacks as a negative reference group or scapegoat, was alive and well in early twentieth century Cleveland. See BLACK CLEVELAND, *supra* note 34, at 176-77. St. Clair Drake and Horace R. Cayton discuss black allegiance to the Republican party and reaction to Democratic party race baiting in Chicago in the 1920s. They estimate that in the 1932 election, Roosevelt won only twenty-three percent of the black vote in Chicago running against incumbent President Herbert Hoover. See 1 BLACK METROPOLIS, *supra* note 38, at 346-53.

131. See *supra* note 130; THE DECLINING SIGNIFICANCE OF RACE, *supra* note 18, at 85-86.

tility, black voters had less ability to use urban politics as a means to better their lives. This remained true even after the New Deal brought large numbers of blacks, often for the first time, into the Democratic Party in northern cities. As latecomers to a Democratic Party with strong anti-black traditions, black voters were still less able to translate their new political loyalties into positive gains the way working class whites could.¹³²

If blacks found a marginal position within the world of municipal politics, that marginal position was even sharper in the work-place. The nineteenth century pattern of exclusion from skilled labor and factory employment carried over into the twentieth century. Unions continued the nineteenth century pattern of excluding blacks from employment as skilled artisans.¹³³ In the twentieth century blacks made a belated entry into the industrial work force, initially as temporary strike breakers, later to fill high wartime demands for labor.¹³⁴ This entrance was often grudgingly accepted.¹³⁵ Usually it had to be made despite union hostility and the strong culture of anti-black sentiment that had long existed among working class whites in northern cities.¹³⁶ Even after blacks had secured employment in factories, skilled employment was often reserved for whites; blacks frequently enjoyed only a tenuous hold on the less desirable jobs.¹³⁷

In short, patterns of racial conflict and exclusion that had developed in nineteenth century northern cities insured a marginal position for twentieth century black migrants to the urban North. Those institutions that played an important role in ameliorating the harshness of urban life early in the twentieth century for European newcomers and that ultimately played a critical role in providing avenues of upward mobility for the children of those newcomers were far less willing to play those roles for black newcomers from the American South. Black and white newcomers had radically different political, economic and social experiences in northern cities despite the law's formally egalitarian posture. For some, the industrial cities of the North offered hope; for others it increased despair.

It was into these cities that millions of southern migrants came, starting during the First World War. Pushed by southern oppression

132. See *supra* note 130; THE DECLINING SIGNIFICANCE OF RACE, *supra* note 18, at 85-86.

133. *Id.* at 70-76.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

and poverty and pulled by the prospect of better lives in the more prosperous and less oppressive North, they came to cities whose social structure and racial values were all too ready to dash their hopes.

II. BLACK BABY BOOMERS IN THE PROMISED LAND

Northern cities often dashed the hopes of migrating southern blacks. It is accurate to note, as Professor Brooks and others have done, that what are now decayed and decaying inner city neighborhoods were two generations ago vibrant communities with black doctors and teachers in addition to poor black people.¹³⁸ the existence of these role models and their importance should not be underestimated. Nor should the existence of other more negative role models. All too many of the residents of the ghettos that emerged in the twentieth century were denied stable employment, even in jobs for which they were clearly qualified.¹³⁹ To take but one example, not until the forties in a number of northern cities were blacks permitted to work in municipal; transportation as bus drivers, subway token collectors and similar positions.¹⁴⁰ These prohibitions existed although municipal transportation was a governmental or quasi-governmental function and although the existence of anti-discrimination statutes in the northern states were involved.¹⁴¹ In addition, blacks were often excluded, formally and informally, from a range of urban

138. *The Origins of the Underclass*, *supra* note 55, at 31-35. See also Brooks, *supra* note 2, at 979-80.

139. See *infra* notes 149-58 and accompanying text.

140. See Herbert Hill's discussion of The Philadelphia transit strike of 1944. That strike came about because of an order by the Federal Fair Employment Practice Commission (FEPC). During the Second World War, the FEPC investigated discrimination in municipal transportation systems. That investigation demonstrated the existence of pervasive patterns of discrimination, almost total exclusion, that effectively prevented black workers from securing employment in any capacity above porter or maintenance worker in municipal transportation systems. The FEPC ordered that black workers be hired as streetcar conductors, operators and bus drivers. In reaction to this order, white employees of the Philadelphia Transit Company went on strike. President Roosevelt had to call in the Army to maintain order and to restore the transit system to a functioning status. Labor difficulties also occurred in a number of other northern cities when the municipal transportation systems were ordered to hire black workers in nontraditional jobs. One aspect of this should be noted. Traditional explanations for conflict between working class whites and blacks usually involve some variant of the view that such conflict is the result of economic competition, the fear on the part of white workers that black workers represent a threat to their livelihoods. This does not appear to be the case in the conflict over black employment rights in urban transit companies. These cases occurred during World War II, a time of intense labor shortage throughout the United States. Instead, these cases seemed to involve almost exclusively questions of status: whether or not the better jobs in municipal transportation would be reserved for white men or whether the distinction between "white jobs" and "black jobs" would be preserved. Similar conflicts also arose in wartime defense plants which had heavy demands for labor at the time. See BLACK LABOR, *supra* note 116, at 274-08.

141. *Id.*

employment opportunities, municipal, industrial, and retail.¹⁴² These exclusions helped to contribute often to radical differences in outlook between working class blacks and working class whites.

These patterns of exclusion began to have their most telling impact in the decades after the Second World War. Ironically the development of a prosperous post war economy, an economy that brought prosperity, rising living standards and relatively stable employment to large numbers of Americans, served to emphasize the degraded circumstances of many urban blacks.¹⁴³ the patterns of exclusion that existed in northern cities by the post war era, more than a century old, insured that large numbers of blacks were unable to participate in the new prosperity. Consider but three areas where these patterns were significant: employment, housing and crime. Despite improvements in post war employment patterns, black workers in the forties and fifties did not share proportionately in the expansion of employment opportunities that occurred in post war America. Blacks did not share in the post war prosperity despite an economic expansion, in part because of American industrial preeminence in the post war world economy,¹⁴⁴ and in part due to a build-up of urban and transportation infrastructure nationwide.¹⁴⁵ Still, despite the existence of expanded opportunities, union often denied blacks membership and hence the ability to work in the skilled labor market.¹⁴⁶ Municipal civil service, despite some improvements, still discriminated against black applicants.¹⁴⁷ Factories were still reluctant to hire black workers on a steady basis or to promote black workers to skilled or supervisory positions.¹⁴⁸

These conditions had, of course, long existed in northern industrial cities. But two sets of circumstances made these conditions particularly unbearable in postwar America. First, the general growth in prosperity and the mass media's role in detailing and publicizing that prosperity stood in stark contrast to the inability of many blacks

142. 1 BLACK METROPOLIS, *supra* note 38, at 287-311; BLACK CLEVELAND, *supra* note 34, at 196-98.

143. R. GRAY & J. PETERSON, ECONOMIC DEVELOPMENT OF THE UNITED STATES 449-51 (1974).

144. *Id.*

145. *Id.*

146. See generally BLACK LABOR, *supra* note 115.

147. *Law, Politics and Race*, *supra* note 4, at 534; K. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER 137 (1967) [hereinafter DARK GHETTO].

148. R. Olson, *Employment Discrimination Litigation: New Priorities in the Struggle for Black Equality*, 6 HARV. C.R.-C.L. L. REV. 20, 23 (1970) [hereinafter *Employment Discrimination Litigation*].

to attain a better life.¹⁴⁹ Second, it was often abundantly clear that many of the jobs and economic opportunities from which a large segment of the urban black population was excluded were jobs which they were clearly qualified for, indeed jobs which they had already performed. Consider a black adult city-dweller in the late forties and early fifties. This individual may be a first generation city dweller, recently arrived from the rural South, or a descendant of a family that had long term urban experience. In either event, that individual had often gained, by virtue of World War II, skills that should have enabled him or her to participate in the postwar economic expansion. During the war, the Army, which took in the bulk of black servicemembers, disproportionately assigned black soldiers to engineer and quartermaster trucking units.¹⁵⁰ Both sorts of military experience provided what should have been good vocational training for the post war economy. The post war construction boom that created suburban housing as well as urban construction should have provided stable long-term employment for the men who turned Pacific jungles into airfields or who built bridges across the Rhine. All too often that experience failed to do so.¹⁵¹ The patterns of exclusion that had long existed in northern cities again thwarted black progress. Unions that controlled entry into the construction trades insured that skilled crafts in construction were closed to blacks.¹⁵² Frequently only unskilled construction trades were open, and those often only sporadically.¹⁵³ Similarly, the 3rd Army veteran who drove a gasoline truck to keep Patton's tanks refueled¹⁵⁴ came home to a nation with an expanding interstate highway system.¹⁵⁵ He too found, unlike his white counterpart, that he could not translate his military experience

149. Social scientists have long noted that the frustration of strongly sanctioned societal goals can play a significant role in increasing deviant behavior. R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 185-248, 200-01 (1968) [hereinafter *SOCIAL THEORY AND SOCIAL STRUCTURE*].

150. M. MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES, 1940-1965* 24, 33-34 (1981); R. SPECTOR, *EAGLE AGAINST THE SUN: THE AMERICAN WAR WITH JAPAN* 386-88 (1985).

151. *See infra* notes 152-58.

152. *Employment Discrimination Litigation, supra* note 148 at 48-51; *DARK GHETTO, supra* note 147, at 37.

153. *Employment Discrimination Litigation, supra* note 148, at 48-51; *DARK GHETTO, supra* note 147, at 37.

154. Black soldiers were overrepresented in the famous "Red Ball Express," a group of quartermaster trucking companies that kept General George S. Patton Jr.'s 3rd Army supplied on its drive across France. For an account of one soldier's experiences with one company in the "Red Ball Express" see *Driving the Red Ball Express* in *THE INVISIBLE SOLDIER: THE EXPERIENCE OF THE BLACK SOLDIER, WORLD WAR II* 185-93 (M.P. Motley ed. 1975).

155. R. ROBERTSON & G. WALTON, *HISTORY OF THE AMERICAN ECONOMY* 506-08 (4th ed. 1979) [hereinafter *HISTORY OF THE AMERICAN ECONOMY*]; *BLACK LABOR, supra* note 115, at 248-59.

into civilian employment.¹⁵⁶ The demand for interstate truckers increased, but all too often the teamster's union restricted the black driver to the less well-paying routes, when he was permitted to work at all.¹⁵⁷ Similar frustrations occurred among blacks who had gained valuable industrial experience working in wartime defense industries.¹⁵⁸

These circumstances contributed to a growing sense of frustration, a frustration made sharper in the urban environment because of greater awareness of the disparities between black and white. The frustration also grew because the northern city was a Mecca which had, as was the case with other groups, attracted a large number of ambitious black southerners anxious to move to a place where they could better their condition.¹⁵⁹ The all too frequent dashing of these hopes increased the sense of frustration, hopelessness and despair. Other circumstances aided in this growth of what sociologist Robert Merton has termed a "retreatist" outlook or culture.¹⁶⁰ The expansion in housing, the development of new suburbs aided by the burgeoning post war economy and funding made available by the GI Bill¹⁶¹ helped in turning large segments of the northern white working class into a blue collar middle class.¹⁶² This development helped blacks to a much less significant degree because of often virulent residential discrimination, which persisted often in the face of state fair housing statutes.¹⁶³ Blacks instead became increasingly concentrated in central cities, often made even less livable because of sheer density, the result of increased migration and limited housing options for blacks.¹⁶⁴ Crime increased in black neighborhoods¹⁶⁵ due to his-

156. HISTORY OF THE AMERICAN ECONOMY, *supra* note 155, at 506-08; BLACK LABOR, *supra* note 115, at 248-59.

157. *Id.*

158. *Id.* at 260-73.

159. *See supra* note 34.

160. SOCIAL THEORY AND SOCIAL STRUCTURE, *supra* note 149, at 207-09.

161. Servicemen's Readjustment Act of 1944, ch. 268, §§ 500-01, 58 Stat. 284, 291 (codified at 38 U.S.C. §§ 1801-19 (1982)).

162. This was also aided by significant gains in the productivity of industrial sectors and by the growth in power of labor unions. *See* S. RATNER, J. SOLTOW & R. SYLLA, THE EVOLUTION OF THE AMERICAN ECONOMY: GROWTH, WELFARE AND DECISIONMAKING 481 (1979).

163. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 46a-63 to 46a-64 (West 1958); MASS. GEN. LAWS ANN. ch 151 B §§ 1, 2, 3-B (West 1982 & Supp. 1989); N. J. STAT. ANN. §§ 55:14A1 to 55:14A-7.5 (West 1983); N. Y. PUB. HOUS. LAW § 223 (McKinney 1955); N. Y. CIVIL RIGHTS LAW §§ 18a to 19-b (McKinney 1976); N. Y. EXEC. LAW § 290-296 (McKinney 1982); 43 PA. CONS. STAT. ANN. §§ 951-55, (Purdon 1964 & Supp. 1988).

164. *Employment Discrimination Litigation*, *supra* 148, at 29-32.

165. E. CURRIE, CONFRONTING CRIME: AN AMERICAN CHALLENGE 163-65 (1985);

toric tendencies to concentrate vice in neighborhoods where blacks lived and to ignore black on black crime.¹⁶⁶ A significant increase occurred due partly to increased migration and partly to deliberate decisions to allow the growing post war narcotics traffic to proliferate in black communities.¹⁶⁷ This increase reflected the relative powerlessness of blacks before municipal governments.

All of this helped form, for the post World War II generation, cultural attitudes inimical to upward mobility in American society. Attitudes towards education is one example. For many it came to be perceived not as a vehicle for advancement, but in all too many cases as another opportunity for greater frustration.¹⁶⁸ Historical research indicates that in northern cities, for most of the twentieth century, black groups failed to attain the occupational status and financial reward of white groups with lower educational attainments.¹⁶⁹ Indeed it was not until the sixties that blacks with college educations began to earn the same income levels as white high school drop-outs.¹⁷⁰ Professor Brooks and others have correctly noted that a generation or two ago poor black neighborhoods had positive role models for children, the black doctor, teacher, nurse, lawyer, or other professional. What has been poorly commented on has been that such neighborhoods were also the home of black people who were relatively well-educated and also underemployed.¹⁷¹ Examples include the high school graduate who could find employment only as an elevator operator,¹⁷² or the individual who had some college education, indeed even a fair number who were college graduates who were underemployed or whose education brought only limited financial reward.¹⁷³ The frequency of such occurrences is less important than the pronounced demonstration effect such examples would have on a people already accustomed to failure and limited return on hard work. These too were role models for black children born in post war urban America.

The attitudes of those children, the black baby boomers, whose

CRIMINAL VIOLENCE, CRIMINAL JUSTICE, *supra* note 11, at 449, 453-55.

166. CRIMINAL VIOLENCE, CRIMINAL JUSTICE, *supra* note 11, at 449, 453-55; *Law, Politics and Race*, *supra* note 4, at 534.

167. 2 AN AMERICAN DILEMMA, *supra* note 38, at 977.

168. *See infra* notes 169-72.

169. *See, e.g.*, Stephan Thernstrom's discussion of this within the context of twentieth century Boston. S. THERNSTROM, *THE OTHER BOSTONIANS: POVERTY AND PROGRESS IN THE AMERICAN METROPOLIS, 1880-1970* 204-05 (1973) [hereinafter *THE OTHER BOSTONIANS*].

170. D. BELL, *RACE, RACISM AND AMERICAN LAW* § 91.1.2 at 591-92 (2d ed. 1980); *Employment Discrimination Litigation*, *supra* note 148, at 24-29; *DARK GHETTO*, *supra* note 147, at 35.

171. *DARK GHETTO*, *supra* note 147, at 35; *THE OTHER BOSTONIANS*, *supra* note 169, at 206-07; 1 *BLACK METROPOLIS*, *supra* note 38, at 239-40, 259.

172. Or as a railroad porter, see 1 *BLACK METROPOLIS*, *supra* note 38, at 239-40.

173. *See supra* note 171.

experience and whose reaction to the social history that I have just outlined must be considered if we are come to grips with the question of the underclass and the role of law in remedying that condition. While underclass behavior had long characterized a segment of the urban black population,¹⁷⁴ it is really the urban black baby boomer that has provided the incredible growth in the underclass population. That generation and increasingly that generation's children played the major role in the exponential growth in crime, drug abuse, teenage pregnancies and unemployment that is at the heart of our concern over the underclass.¹⁷⁵

The generation that was born and came of age in the post war northern cities was heir to an over century old pattern of northern exclusion, a pattern that helped create what sociologists have termed "the culture of poverty."¹⁷⁶ Among the key elements of that culture have been a devaluing of the work ethic and a significant loss of faith in the possibility that education and "playing by the rules" would result in individual betterment. These attitudes, born out by often bitter experiences in the early childhood of the post war generation persisted even after conditions changed.

If long-standing patterns of exclusion helped in the formation of underclass culture, the operation of the welfare system served to exacerbate the problem. One need not accept the view, currently fashionable among many conservative scholars and commentators, that attributes the rise of the underclass almost exclusively to the expansion of the welfare state¹⁷⁷ to recognize that many welfare policies mandated by statute¹⁷⁸ or administrative¹⁷⁹ regulation have contributed to an increase in family dissolution and diminution of the work ethic. For example, economists have long noted that the Aid to Families With Dependent Children (AFDC) program has exacted a steep tax, or benefit reduction rate, on families who have attempted to reduce welfare dependency through working.¹⁸⁰ Until 1967 the tax rate WAS 100%, i.e., for every dollar a family on the AFDC program

174. For a discussion of underclass behavior patterns among blacks in antebellum American cities, see *THE FREE BLACK IN URBAN AMERICA*, *supra* note 91, at 112-19.

175. *See generally* *THE UNDERCLASS*, *supra* note 18, at 20-50.

176. *See, e.g.*, O. LEWIS, *LA VIDA: A PUERTO RICAN FAMILY IN THE CULTURE OF POVERTY: SAN JUAN AND NEW YORK XLII-LII* (1966).

177. *See generally* *LOSING GROUND*, *supra* note 14.

178. *See infra* notes 181-84 and 204.

179. *Id.*

180. Moffitt, *Work Incentives in the AFDC System: An Analysis of the 1981 Reforms*, 76 *AM. ECON. REV.* 219 (1986).

earned, benefits were reduced by one dollar.¹⁸¹ AFDC policies in the post war era helped contribute to the development of underclass culture in two significant ways. First, requirements that virtually precluded AFDC assistance to families where able-bodied adult men were present helped contribute to family breakup.¹⁸² Second, eligibility requirements that prevented those with low wage jobs from receiving AFDC and ancillary benefits made the effort to break the cycle of poverty and dependency even harder.¹⁸³ Post war welfare policies, in effect, penalized the working poor contributing to a further diminishing of the work ethic. Faced with strong patterns of exclusion from desirable employment, a welfare system that encouraged dependency and proliferating patterns of crime, violence and familial dissolution, many born after the Second World War succumbed to despair.

A combination of historical forces hit the generation of black people who were born after the Second World War and who came of age in the 1960s. Historical patterns of exclusion from institutions that played a significant role in fostering upward mobility for working class whites combined with a welfare system that despite good intentions fostered dependency and penalized the work ethic. These forces were added to the bitter southern legacy that had long been part of the folk-memory of black Americans. The knowledge that, for many, the cities of the North, that had once held great promise for black migrants, would still not bring deserved rewards contributed to a sense of hopelessness, the despair that characterizes underclass culture. That despair was sharpened by the obvious abundance of postwar America, an abundance made clearer by the mass media. It was a despair that the legally egalitarian goals of the Civil Rights movement would not change. That despair became a cultural value transmitted by baby boomers to their children in the 1970s and 1980s.¹⁸⁴

So the law changed. The Civil Rights movement achieved great success in eradicating the de jure discrimination that characterized the South and much of the nation before the 1960s. The Civil Rights movement did more; formal equal opportunity was achieved. Doors did open. And even affirmative action won a grudging and still precarious legal acceptance.¹⁸⁵ For that majority of the baby boom generation that had not succumbed to despair, and perhaps many that were poised between despair and hope, those changes made a

181. *Id.* at 219.

182. *Id.*; THE UNDERCLASS, *supra* note 18, at 306-07.

183. *See supra* notes 177-79 and accompanying text.

184. Page & Washington, *Family Provers and Value Transmissions of Single Black Mothers*, 127 J. SOC. PSYCHOLOGY 49 (1987).

185. *See infra* notes 190-99.

profound difference, an opportunity to lead lives, however tinged by racism, that their parents and grand-parents would not have dared to dream.¹⁸⁶ But for others, the changes that occurred, occurred too late. The culture of despair would persist despite the changes. That persistence leaves the question of whether law can play a further role in resolving the dilemma of race in American life.

III. LAW AND REMEDY: POSSIBLE EXPLORATIONS

In a very important sense, the history of blacks in northern cities is a history that details the failure of formally egalitarian doctrine. The statutes, the Court decisions, the formal legal instruments by which northern states in the nineteenth and twentieth centuries proclaimed their devotion to egalitarian principles proved inadequate to the task establishing a truly egalitarian society. The lofty pronouncements that black and white were equal before the law proved inadequate to overcome strong social realities that dictated a marginal position for blacks in northern cities. That inability to translate egalitarian doctrine into social reality did much to help produce the cultural devastation that is the contemporary urban underclass. Much of this is, of course, the stuff of social, economic and political history involving nonlegal considerations. But this history involves a set of nonlegal considerations of interest to the legal historian and practicing lawyer. First, this history can give us a clue as to why the traditional civil rights movement, despite its great success, failed to alleviate the plight of poor blacks in inner cities. Second, this history can point to new ways of looking at race and law, new emphases that might help finish the unfinished business of the civil rights movement.

The contribution of law, in addition to other political, economic and social influences, in helping to create the underclass dilemma is relatively clear. The ability of law to remedy this American urban tragedy is less so. Cultural values can take on stubborn lives of their own, tenaciously surviving long after the circumstances which brought them into being have changed. This can be especially true when the new or altered circumstances seem very similar or produce essentially the same results as the old ones. For the majority of black Americans, the doctrinal changes, and the legislative, judicial and administrative efforts to implement those changes, brought about by the civil rights movement have transformed American society. For

186. Poussaint, *The Price of Success*, 42 EBONY MAG. 76 (1987).

members of the underclass these changes have often had little effect. Trapped by inadequate education,¹⁸⁷ behavior patterns that frequently cause fear on the part of employers, educators or others that might offer a way out,¹⁸⁸ and by a pessimism, born of hard experience, the underclass grows, seemingly impervious to legal change. Neither the "formal equal opportunity" that Professor Brooks examines¹⁸⁹ nor even the limited forms of preferential treatment that have been attempted over the past generation appear to offer much prospect for amelioration. Members of the underclass experience failure when they try to get ahead in ways approved of by the larger society. This tendency confirms the view that little has changed, that the old patterns of exclusion are still operating. The culture of pessimism and despair continues despite significant legal and societal change. Law's ability to change these patterns and, most importantly, to alter this culture is limited.

Limited, but not nonexistent. This history can cause us to reexamine existing legal strategies and controversies from new perspectives. It should cause us to revisit certain judicial doctrines, legislative proposals and administrative practices. One example of how this history can shed new light on a contemporary doctrinal dispute can be seen in the national debate over affirmative action. At first glance, as many critics have charged, affirmative action, defined for these purposes as some form of preferential consideration,¹⁹⁰ appears to contradict the core goals and values of the traditional civil rights movement.¹⁹¹ For most of its history, that movement sought to eradicate legal distinctions based on race. Critics of affirmative action have charged that such practices constitute a repudiation of the doctrinal goals of the civil rights movement.¹⁹² What is more such critics have charged, in both commentary and court briefs, that affirmative action is at variance with the constitutional and statutory provisions that the civil rights movement managed to achieve.¹⁹³ The issue has been a perennial one before the courts and the bar of public opinion for the better part of the last two decades.¹⁹⁴

187. C. SILBERMAN, *CRISIS IN BLACK AND WHITE* 40-42 (1964).

188. *Id.* at 46-47.

189. *See* Brooks, *supra* note 2, at 885-98.

190. *See, e.g.,* *City of Richmond V. Croson*, 109 S. Ct. 706 (1989) in which the United States Supreme Court struck down the City of Richmond's set aside scheme for minority contractors as repugnant to the fourteenth amendment's equal protection clause.

191. *See, e.g.,* Brief of the Anti-Defamation League of B'Nai B'rith Amicus Curiae in *DeFunis v. Odegaard*, 416 U.S. 312 (1974) in 80 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 263-64 (1974) [hereinafter *LANDMARK BRIEFS*].

192. *Id.*

193. *Id.*

194. *See, e.g.,* *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Regents of the Univ. of*

And much in American legal culture supports the critical view. Strong biases exist in American law against concepts of group rights.¹⁹⁵ Rights are seen as belonging to individuals, not groups or communities.¹⁹⁶ This individualistic approach cannot be lightly set aside without doing violence to much of American constitutional doctrine, doctrine that has been painfully achieved over the course of two centuries. And yet, a too rigid adherence to this individualistic model will leave American government and society with little ability to deal with the cultural devastation that has occurred in America's inner cities. Courts presented with this question seem to have a Hobson's choice of either permitting what appears to be an assault on the concept of individual rights or precluding measures that can break down long-term cycles of exclusion.

In my view, the social history previously outlined can help courts through this dilemma. First, this history can cause us to realize that a search for isolated and particular villains in the history of American race relations is not a fruitful one.¹⁹⁷ Of course, villains can be

Cal. v. Bakke, 438 U.S. 265 (1978); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Kreps*, 448 U.S. 448 (1980); *City of Richmond v. Croson*, 109 S. Ct. 706 (1989).

195. Brief of Amici Curiae: American Jewish Committee, American Jewish Congress, Hellenic Bar Association of Illinois, Italian-American Foundation, Polish American Affairs Council, Polish American Educators Association, Ukrainian Congress Committee of America (Chicago Division) and Unico National in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), in 99 LANDMARK BRIEFS at 495, 499-500, 534-35; J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 93 (1980).

196. See *supra* note 195.

197. The limits of that kind of particularized approach can be seen in the Supreme Court's latest pronouncement on affirmative action, see *City of Richmond v. Croson*, 109 S. Ct. 706 (1989). In that decision, the Court upheld a decision by the United States Court of Appeals for the Fourth Circuit that struck down as repugnant to the fourteenth amendment's equal protection clause a plan adopted by the City of Richmond that required prime contractors awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to one more minority business enterprises. For purposes of the plan, a minority business enterprise was defined as a business from anywhere in the nation that was at least fifty-one percent owned and controlled by a citizen who was black, Spanish-speaking, Oriental, Indian, Eskimo or Aleut. *Croson*, 109 S. Ct. at 713.

Justice O'Connor's majority opinion in *Croson* illustrates how a narrow search for villains and victims can thwart efforts to develop remedial measures that take into account long-term nationwide patterns of exclusion. Justice O'Connor, applying the strict scrutiny standard, argued that the City of Richmond failed to demonstrate a compelling governmental interest that would justify the differential racial treatment. Under the O'Connor opinion, a state or locality that sought to justify a set aside program would only be able to satisfy the compelling governmental interest test if that entity had demonstrated specific discrimination in the particular industry under consideration, in that state or locality's jurisdiction. *Croson*, 109 S. Ct. at 724. Thus, according to the O'Connor opinion, past discrimination in societal, educational and economic opportunities in general would

found, as can heroes. But the tragedy of racial exclusion in America cannot be limited to a particular set of villains, safely locatable in the American South. Instead, nationwide political and social dynamics served to create patterns of exclusion that robbed a significant percentage of the black population of both self-esteem and the belief in individual progress. These characteristics have become and have shown strong potential for remaining self-perpetuating without significant governmental intervention. All of this can recast the balance between government interest in overcoming the legacy of America's racial history and our traditional focus on rights as individual rights in a new light. Viewed in this new light, the governmental interest in preferential remedial measures becomes compelling, indeed overwhelming. Such measures become a way to redress wholesale patterns of exclusion fostered by American society at large and not just a small number of bad actors. From this viewpoint, affirmative action becomes a way of reversing a cultural pattern that the whole society has helped to create, a way of paying a societal debt, in so

not provide a compelling state interest that would permit a racial set aside program. Justice O'Connor also noted that evidence of a nationwide pattern of discrimination in a particular industry, in this case the construction industry, would not be sufficient to permit a municipality to develop a set aside program, instead a municipality would have to prove discrimination in local industry. *Id.* at 726-27. Justice O'Connor also vigorously rejected the idea offered by Justice Marshall in his dissenting opinion that discrimination in other jurisdictions could provide justification for race-based remedial measures on the part of municipalities. As part of this approach, Justice O'Connor noted that there was "**ABSOLUTELY NO EVIDENCE** of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo or Aleut persons in any aspect of Richmond's construction industry" *Croson*, 109 S. Ct. at 727-28 (emphasis in original), further indicating that even if a group had been generally disadvantaged by patterns of discrimination in American society generally a particular locality would not have a sufficient interest to justify a race-based remedial measure absent a specific finding of discrimination in that locality.

In his concurring opinion in *Croson*, Justice Scalia argued for an even narrower approach arguing that the only justification for a state or locality's authorization of race based measures would be to eliminate its own maintenance of an unlawful system of race based classification. *Croson*, 109 S. Ct. at 727 (Scalia, J., concurring).

At this stage it is premature to speculate on how far reaching the effect that *Croson* will have on affirmative action programs generally. While Justice O'Connor's opinion places strict limitations on state and local measures designed to remedy the effects of past racial discrimination, her opinion also indicates, inter alia, that Congress may have more flexibility in this area because of its mandate to enforce the dictates of the fourteenth amendment as indicated in section 5 of the amendment. *Croson*, 109 S. Ct. at 719-20.

Whatever the ultimate impact of the decision in *Croson*, the majority's narrow reading of what constitutes compelling governmental interest on the part of state and local governments severely limits the ability of such entities to take into account pervasive patterns of discrimination that have occurred nationwide and throughout the nation's history. Such a view ignores the interest of states and localities, like the nation as a whole in playing a part in a national effort to remedy the economic and social effects of past discrimination, a troubling legacy in which the whole nation shares. This approach stands in marked contrast to the approach of the court in another area, veterans preference, discussed *infra* note 199.

far as it can be paid.¹⁹⁸ This can create a new way of viewing the equities in such cases. It can broaden the inquiry beyond considerations of whether individual white claimants have participated or personally benefitted from racial discrimination, or whether business, unions or educational institutions have histories of discriminatory practices or even whether it can be demonstrated that black individuals benefitting from preferential programs can be shown to have personally been victims of provable discrimination.¹⁹⁹

As important as affirmative action is, it has only a limited ability to reverse the climate of despair prevalent in much of ghetto culture. Affirmative action measures have helped remedy the disadvantages suffered by the black middle class and the black working class.²⁰⁰ These measures have provided badly needed avenues of upward mobility that had long been denied to many blacks.²⁰¹ Such measures have doubtlessly helped some who might have succumbed to underclass culture without the boost that affirmative action represented.²⁰² But for those most caught up in the underclass culture of despair, such measures alone have meant little.²⁰³ For such people, the role of law in undoing the culture of despair is even less clear. Here the legal battle will not be fought on the doctrinal level, as it was with the traditional civil rights movement or as it has been with the con-

198. The approach of the Court in *Croson*, 109 S. Ct. at 706, stands in marked contrast to the approach the Court has taken in the area of veterans preference. In the case of *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979) the Court upheld a Massachusetts veterans preference scheme against charges of gender discrimination. Although the comparison is necessarily inexact for a number of reasons, including the lesser degree of scrutiny with which the courts have viewed gender discrimination, nonetheless interesting comparisons can be drawn. The Court in *Feeney* did not question Massachusetts' interest in compensating veterans and helping them to reintegrate into civilian life. Instead, it assumed that these were state interests even though it is of course the Federal and not the state government that wages war and maintains armed forces. Also the Court did not require that Massachusetts demonstrate that a particular veteran was disadvantaged by his military experience. In *Feeney*, the Court recognized that the nation as a whole had incurred a societal debt to veterans as a group and allowed a state civil service preference scheme, a form of affirmative action, as one way to compensate that group as a whole. Had the narrow logic of *Croson* been employed by the *Feeney* Court, Massachusetts' veterans preference scheme might have been limited to veterans who could have demonstrated disadvantage as a result of their service and might have been limited to those who entered military service through the Massachusetts National Guard, or individuals who had been Massachusetts residents at the time of their induction.

199. See *supra* notes 198-99.

200. THE DECLINING SIGNIFICANCE OF RACE, *supra* note 18, at 16, 19, 100, 110-111, 121.

201. *Id.*

202. *Id.*

203. *Id.*

troversty over affirmative action. Instead law here will be concerned with the business of undoing a culture and supplanting the discarded culture with a new one, social engineering in short. And here the legal burden must be borne primarily by legislative and administrative bodies.

One such area where law has potential to make a significant cultural difference is in the area of social welfare. One need not accept conservative critiques of the expanded welfare state to recognize that the way we as a society have undertaken the business of allocating governmental aid to the poor has helped exacerbate the culture of despair brought about by patterns of racial exclusion. Welfare regulations that mandate high or total tax or benefit reduction rates for those dependent on welfare programs who attempt to better their circumstances by taking low wage jobs virtually assure the continuation of existing patterns.²⁰⁴ This system of essentially negative incentives both unfairly disadvantages the working poor and prevents those caught up in cycles of dependency from breaking those cycles and taking the long, often painful steps into the ranks of the employed with the possibilities of mobility that such steps represent.²⁰⁵ Furthermore, current welfare policies often serve to limit the ability of the working poor to serve as positive role models for the dependent poor in ghetto neighborhoods because of the very real economic costs those policies bring to those who try to break patterns of dependency. Those concerned with questions of law, race and the underclass need to heed the virtually unanimous opinion of economists, left, right and center, that our current system of welfare law should be replaced with legislation that reduces the high tax rate on the working poor.²⁰⁶

And it is perhaps the realization that despite the familiar history of slavery and Jim Crow in the South, or the history of exclusion

204. See *supra* notes 180-81 and accompanying text. Economists Frank S. Levy and Richard C. Michel indicate that one result of the effects of welfare's discrimination against the working poor is to reduce the pool of poor black men who might be suitable marriage partners for poor black women, thus contributing to the increase in female-headed households. According to their research, in 1960, roughly thirty-one percent of black men ages twenty to twenty-four had incomes below the average AFDC benefit of \$1,269. By 1970, according to their research, forty-six percent of black men in the same age group had incomes below the combined AFDC and food stamp benefit level of \$2,880. This study also indicated that in 1970, seventeen percent of black men aged twenty-five to thirty-four earned below the combined AFDC and food stamp benefit level. Because of the high tax or benefit reduction rate that a woman dependent on AFDC would experience if she married an individual earning less than the benefits, AFDC clearly provided a disincentive to marry under such circumstances. This pattern, of course, helps to perpetuate cycles of poverty and dependence across generational lines. See Levy & Michel, *Government Policy and Poverty, Work for Welfare: How Much Good Will It Do?*, 76 AM. ECON. REV. 339, 402-03 (1986).

205. *Id.*

206. THE UNDERCLASS, *supra* note 18, at 278.

from avenues of working class mobility in the North, that I have outlined in this essay, that many, perhaps a majority of poor blacks in inner cities still, despite the odds, struggle to earn a living, maintain their families and hope for better futures for their children that should inform our legal thinking. When we debate whether affirmative action can be found consonant with long held notions of individual right and equal protection, or when we consider if the welfare system can be restructured to enable the dependent poor to help break cycles of dependency, or when we consider such essentially administrative decisions as the allocation of police resources to reduce crime in inner city neighborhoods or the allocation of resources to reduce educational deficiencies, we should keep in mind those who have not succumbed to despair, despite historical burdens and steep odds. Doing so might help those who have kept faith with a society and a set of values that have often not rewarded black optimism and self-confidence. Doing so might help restore those traits to others. It will be a long process, but a necessary one that might help finish the unfinished business of the civil rights movement and allow us, as a nation, to move from egalitarian law towards an egalitarian society.

