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# The Virulence of Blackthink™ and How Its Threat of Ostracism Shackles Those Deemed Not Black Enough

Kimberly Jade Norwood  
*Washington University*

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# The Virulence of *Blackthink*<sup>TM</sup> and How Its Threat of Ostracism Shackles Those Deemed Not *Black Enough*

BY KIMBERLY JADE NORWOOD\*

*Nowadays, if you know the color of somebody's skin, you know what the person values (or should value), what causes the person supports (or should support), and how he or she thinks (or should think). Skin color, it seems, is a perfectly acceptable proxy for lots of others things—but principally for holding, or being willing to espouse, the right views.*<sup>1</sup>

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<sup>1</sup> STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 30 (1991).

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## I. INTRODUCTION

... Well, I'm not saying you're not Black but I guess I can see how someone would come to that conclusion.<sup>2</sup>

In the spring of 2003, I learned that a colleague was putting together a group of faculty to discuss critical race and feminist jurisprudence. The group was not chosen on the basis of who taught or wrote in these areas, nor was the selection based on friendship. Rather, the group was chosen with one primary criterion in mind: topic interest.

I thought I was a person who might be approached to participate. I was a friend of some members of the group, and friendly with all. I also am a friend of the critical race movement. Moreover, I am interested in legal doctrines affecting the Black race,<sup>3</sup> I dedicate many hours of

<sup>2</sup> This excerpt will be explored *infra* at text accompanying notes 3–8.

<sup>3</sup> Biologists and others have mounting evidence that there is only one race, the human race. See, e.g., Jefferson M. Fish, *The Myth of Race*, in RACE AND INTELLIGENCE: SEPARATING SCIENCE FROM MYTH 114 (Jefferson M. Fish ed., 2002) (“The fact that Americans believe that Asians, blacks, Hispanics, and whites constitute biological entities called races is a matter of cultural interest rather than scientific substance. . . . Race is a myth.”); Alan R. Templeton, *The Genetic and Evolutionary Significance of Human Race*, in RACE AND INTELLIGENCE, *supra*, at 51 (“[A]ll of the genetic evidence shows that there never was a split or separation of the ‘races.’”). Rather than being a biological fact, evidence suggests that race is a social construct. See generally Ian Haney Lopez, *The Social Construction of Race*, 29 HARV. C.R.–C.L. L. REV. 1 (1994); Reginald Leamon Robinson, *The Shifting Race–Conscious Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. THIRD WORLD L.J. 231, 232–33 (2000) (“[R]ace is not biologically factual. It is not real. . . . Race exists, if ever, in our individual and cultural consciousness.”); Sharon Begley, *Three is Not Enough: Surprising New Lessons from the Controversial Science of Race*, NEWSWEEK, Feb. 13, 1995, at 67–69. The United States Supreme Court agrees:

The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the “average” individuals of different races. These observations and others have led some, but not all, scientists to conclude that

service to my University in matters affecting Black students, and as the only potential Black<sup>4</sup> American female member of this group, I believed that I could share some life experiences that would enrich the planned

racial classifications are for the most part sociopolitical, rather than biological, in nature.

Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987); *see also* McClesky v. Kemp, 481 U.S. 279, 316 n.39 (1987) (“[I]n our heterogeneous society the lower courts have found the boundaries of race and ethnicity increasingly difficult to determine.”).

In spite of these things, it remains the social norm to speak in terms of “race.” I use the term race throughout this Article with the understanding that, from a scientific perspective, there is no such thing. But since it is common to speak of “race” in a sociopolitical manner, that is the way the term is used here. It also should be noted that although there is only one race, genealogy, physical characteristics and traits remain important for a host of reasons. *See* Anil Ananthaswamy, *Under the Skin: Our DNA Says There’s No Such Thing as Race. So Why Do Doctors Still Think It Matters?* NEW SCIENTIST, Apr. 20, 2002, at 34.

<sup>4</sup> “Black” has also been described as Colored, Negro, Afro–American, person of color, and the latest term of art: African–American. *See, e.g.,* Isabel Wilkerson, “African–American” Favored by Many of America’s Blacks, N.Y. TIMES, Jan. 31, 1989, at A1 (describing reactions in the Black community to the adoption of the term “African–American”). I do not like using the term African–American to describe myself. After having met African–Americans who are White and having met Black Africans who now live in the United States and consider themselves African–Americans, I believe that the term African–American does not accurately describe me and the millions of other Black people who were born and raised in the United States and as products of the American heritage and experience. One of my favorite artists agrees:

I love being Black. I love being called Black. I love being an American.

I love being a Black American, but as a Black man in this country I think it’s a shame

That every few years we get a change of name.

....

And, if you go to Africa in search of your race,  
You’ll find out quick you’re not an African American,  
You’re just a Black American in Africa takin’ up space.

....

Your heritage is right here now, no matter what you call yourself or what you say

And a lot of people died to make it that way.

....

God knows we’ve earned the right to be called American Americans and be free at last.

And rather than you movin’ forward progress, you dwelling in the past.

We’ve struggled too long; we’ve come too far.

Instead of focusing on who we were, let’s be proud of who we are.

We are the only people whose name is always a trend.

When is this shit gonna end?

William “Smokey” Robinson, *The Black American* (on file with author); *see also* SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 47 (1990) (describing the term “African–American” as “a euphemistic name that hides us even from ourselves”) [hereinafter STEELE, CONTENT OF OUR CHARACTER].

dialogues in both the critical race and the critical feminist areas. Yet, I was not invited to participate.

I called the group organizer. I was interested in the member selection criteria, and ultimately, why I had not been considered as a possible participant. During that telephone conversation, I quickly got to the what-about-me question. My colleague's answer was surprising:

I didn't think you were interested. . . . Well, Kim, let's be honest. You don't teach anything related to race, you don't write or talk about race, you haven't attended any critical race conferences. *Frankly there is nothing about you that would have led me to believe that you would be interested in these issues.*<sup>5</sup>

My next question quickly followed: "Are you saying that I'm not Black?" Her answer: "Well, I'm not saying that you're not Black but I guess I can see how someone could come to that conclusion."

In my mind this statement was a subtle questioning of my blackness.<sup>6</sup> Later conversations with my colleague confirmed what I suspected: my

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<sup>5</sup> Like a majority of the group members, I did not teach race-based courses, and I had not written in the area of race. And while I, unlike most of the members, had attended few critical race conferences, I also happen to be a very active member, current vice president, and board member of the Midwestern People of Color Legal Scholarship Conference, Inc. This organization is the oldest minority law professor legal scholarship organization in the country. It was co-founded by Professor Norman C. Amaker (1935–2000) and Professor Linda S. Greene. In my fourteen-year association with this organization many of the annual conferences explored critical race jurisprudence. For a history of this organization's impact on the critical race movement and the development of People of Color Legal Scholarship Conferences nationwide, see Linda S. Greene, *From Sea to Shining Sea: The Midwestern Origins of the First National Meeting of the Regional People of Color Legal Scholarship Conferences*, 20 B.C. THIRD WORLD L.J. 29 (2000); Linda S. Greene, *From Tokenism to Emancipatory Politics: The Conferences and Meetings of Law Professors of Color*, 5 MICH. J. RACE & L. 161 (1999). Additionally, I believe it impossible to be around me for any length of time and conclude that there is *nothing about me* that would lead one to believe that I was interested in race and race-related issues.

<sup>6</sup> Admittedly, what the listener hears is not always what the speaker intends, but intent is overrated. Indeed, intent is not a prerequisite to discrimination and/or stereotyping, the Supreme Court's assertions to the contrary. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."). Much of this occurs on an unconscious level. People discriminate and stereotype *unintentionally* every day. An entire conference, sponsored by the Equal Justice Society ("EJS"), was devoted to this very phenomenon: *Protecting Equally: Dismantling The Intent Doctrine/Healing Racial Wounds*. For more information about either the conference or this fascinating area, visit [www.equaljusticesociety.org](http://www.equaljusticesociety.org).

blackness was questioned based upon opinions I held (or was suspected of holding). As this article explains, some segments of society believe that “real” Black people hold certain views. Because I was perceived as one who might not hold the views of “real” Black people, my blackness was questioned.<sup>7</sup> The dichotomy was interesting: a White lesbian who advocates diversity, tolerance, and inclusion, seemed to be telling me that because I did not think a certain way, I was not *really* Black.<sup>8</sup>

This experience with my colleague caused me to have an epiphany. I felt the weight and the irony of a phenomenon I call *Blackthink*. *Blackthink* is a form of prejudice. It assumes and demands that all Black people think a certain way. It presumes that all Blacks are unquestionably liberal, pro-affirmative action, pro-choice, pro-gay rights, pro-welfare, and most definitely anti-Republican. Some segments of our society not only harbor this presumption but go a step further: they will devalue and marginalize those who fail to comply with *Blackthink*. These segments of society are the self-appointed guardians of blackness, the “Soul Patrol.”<sup>9</sup> Although originally composed exclusively of Black people, the Patrol now includes non-Blacks as well. The Soul Patrol, like Orwellian thought police, monitors and attempts to regulate the thoughts and beliefs of Black Americans. Autonomy and difference are stifled; acquiescence is embraced and rewarded. The price for failing to succumb is high. The dissenter, whom I call the “target,” is *de-blackened* by members of the Patrol. “De-blackening” is an attempt to strip the target of his or her racial identity. Based on criteria the Patrol deems determinative, the Patrol tries to decide who is Black and who is not. De-blackening of Blacks by Blacks is a problem within Black America and it has now spread to de-blackening of Blacks by *non*-Blacks as well. De-

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<sup>7</sup> Apparently, I was not the outspoken supporter of liberal views on the proper paths to the advancement of minorities that some of my liberal colleagues hoped I would be. See, e.g., *infra* note 27 and accompanying text. As such, I was, to borrow a phrase from law professor Keith Hylton, “taking up a minority slot and . . . not using my job as a soapbox.” Bob Sexter, *Black Prof Fails Political Test; NU Refuses Tenured Position; ‘Progressive’ Stance Lacking*, CHI. SUN-TIMES, Dec. 11, 1994, at 3.

<sup>8</sup> The ultimate irony is that we *all* may “*really*” be Black, in the broad sense that all of mankind originated in Africa. See THE JOURNEY OF MAN: THE STORY OF THE HUMAN SPECIES (PBS); see also Michael D. Lemonick and Andrea Dorfman, *The 160,000-Year-Old Man; New Fossils Prove that the First Homo Sapiens Looked like Us, Walked like Us and in Some Ways Acted like Us as Well*, TIME, June 23, 2003, at 56; Douglas Wallace, *The Search for Adam and Eve*, NEWSWEEK, Jan. 11, 1988, at 46–52.

<sup>9</sup> “Soul Patrol” (“Patrol”) is a phrase first coined by news writer John Blake to refer to “the legions of black people who impose their definition of blackness on other black people. They scorn and reject those who don’t act ‘black enough.’” John Blake, *The Soul Patrol Demanding Conformity, It Scorns Blacks Who Don’t Act ‘Black Enough,’* ATLANTA JOURNAL-CONST., March 15, 1992, at D1. Although initially composed of Black members, the Patrol is no longer so limited.

blacking occurs in many environments, including the legal academy. De-blackening is not a scientific phenomenon but a cultural stamp or label that the target does not want to be Black and does not identify with Black people, causes, or culture. Not only is blackness, if you will, of the target questioned, but the target is also determined to *really want to be White*. Indeed, the names used by the Soul Patrol to describe the de-blackened are telling: Oreos and Uncle Toms,<sup>10</sup> Bananas,<sup>11</sup> House Niggers,<sup>12</sup> and recently, Rent-a-Negros<sup>13</sup> and White House Negros.<sup>14</sup>

<sup>10</sup> Oreos, Uncle Toms, and Sell-outs are names used to describe Blacks who the labelers believe do not act Black, do not support "Black" issues, and, more importantly, *really* want to be White. An Oreo, as the name clearly denotes, is Black on the outside and White on the inside. The name "Uncle Tom" comes from the slave at the center of the Harriett Beecher Stowe classic UNCLE TOM'S CABIN (Oxford 1998) (1852). Although Uncle Tom was a hardworking, spiritual man who was faithful to his God and his family and sacrificed his life instead of "selling out" his co-slaves at the command of their owner, the current euphemism highlights Uncle Tom's complaisance. Today, "Uncle Tom" is defined as "a Black person who is regarded as being humiliatingly subservient or deferential to White people." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000); *see also* SHELBY STEELE, A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA 7 (1998) [hereinafter STEELE, A DREAM DEFERRED] ("An Uncle Tom is someone whose failure to love his own people makes him an accessory to their oppression."); Gady A. Epstein, *Power Structure Challenge to Blacks*, TAMPA TRIB., Jan. 28, 1998, at 1 (detailing an incident involving University of Florida President John Lombardi, a white male, calling his boss, the newly appointed Chancellor Adam Herbert, a Black man, an "Oreo" at a dinner party at Lombardi's home); Commentary, *The O-Word*, TAMPA TRIB., Jan. 25, 1998, at 6 (same).

<sup>11</sup> Light-skinned Black people who are accused of not being Black enough are called "bananas," the pale color of the banana reflecting their lighter skin tone. *See* ONE DROP RULE (Elixer Productions 2001) (on file with the Washington University School of Law Library) [hereinafter ONE DROP FILM]. The term "banana" also is used to label Asian-Americans who are yellow on the outside, white on the inside. Deborah Work, Commentary, *Herbert Defenders Crumble Oreo Label*, SUN-SENTINEL CO. (Fort Lauderdale), Jan. 19, 1998, at 1B. Hispanics who are labeled as not *really* Hispanic are labeled "coconuts"; allegedly unauthentic Native Americans are called "apples." *Id.*

<sup>12</sup> During slavery in America, White slave owners divided their slaves into two groups: slaves who worked in the fields, and slaves who worked inside the slave master's home. It seems clear that the house slaves were treated somewhat better by the slave masters than field slaves. This difference in treatment not only caused some house slaves to think they were "better than" field slaves, but also caused the field slaves to label the house slaves as the kind of people who would do anything or say anything to stay in the house. Contemporary analogies are made today. Consider the following:

Is Colin Powell Black enough? Strip away the verbiage, and that's essentially the question Harry Belafonte raised in his recent controversial interview with a San Diego radio station. It is the question that has long lurked in the subtext for African-Americans suspicious of a black man too beloved by the GOP faithful. For those who missed it: The singer and activist, who is at odds with the Bush Administration over its push toward war with Iraq and its dubious record on civil liberties, accused the Secretary of State of being scared to confront his boss on these and other issues. Specifically, Belafonte likened Powell to a

De-blackening is both dehumanizing and offensive because it attacks the target's very existence. It attempts to deny the target's racial identity and cultural heritage. This phenomenon is in stark contrast to what happens in other *seemingly* similar contexts. For example, if a particular woman believes that women are not equal to men and that a woman's place is to be barefoot and pregnant at home, that woman may rightly be questioned and challenged for those views by other women. But she is not accused of not *really* being a woman, or of *really* being a man. The same analogy can be made with the homosexual community. If a homosexual individual takes positions which are detrimental to the homosexual rights movement, no one says that the dissenter is not *really* homosexual or that the person is *really* a heterosexual. This is not the case for Blacks in a de-blackening regime. Holding opinions or views deemed to be against Black advancement or interests gets one labeled as not *really* Black.

There are a myriad of ways a person can be de-blackened. Proxies used to de-black can be based on skin color, hair texture, wealth, academic success, where the target lives, how the target speaks, or the target's music preferences. However, the main focus of this article is de-blackening that arises from how the target thinks.

Part I shares some of my experiences in the *Blackthink* evolution. Here, I show how *Blackthink* manifests itself on a personal level and how

house Negro, those "yassuh-boss" toadies who kissed up to the master and sometimes betrayed their fellow slaves in hopes of being allowed to live and work in the comfort of the master's home.

Leonard Pitts, Commentary, *Daring to Challenge Groupthink Rules*, CHI. TRIB., Oct. 22, 2002, at 23 [hereinafter Pitts, *Groupthink*].

Belafonte's charge was quite ironic. He and Powell share ethnic and cultural similarities; both have a Jamaican ancestry and are native New Yorkers. See Belafonte Bio, at <http://www.sbgmusic.com/html/teacher/reference/performers/belafonte-p.html> (last visited Sept. 8, 2004); Powell Bio, at <http://www.whitehouse.gov/government/powell-bio.html> (last visited Sept. 8, 2004). In addition, Belafonte also was once accused of not being Black enough. Leonard Pitts writes: "I'm no fan of the administration Powell serves. But he is no more a racial traitor for that service than Belafonte was for divorcing a Black woman to marry a White one back in 1957. Some people suggested that he, too, was not Black enough." Pitts, *Groupthink*, *supra*.

<sup>13</sup> In the summer of 2003, Reverend Al Sharpton labeled Black dissenters who disagreed with the perceived masses on what was in the best interest of Black children attending St. Louis, Missouri Public Schools, calling them "sell-outs" and "rent-a-negros." See *News Broadcast* (KTVI Sept. 8, 2003) [hereinafter Sharpton Film] (on file with author). For further explanation of the issues involved in the 2003 St. Louis Public School protests, see *infra* notes 153–66 and accompanying text.

<sup>14</sup> During a recent lecture at the University of Missouri–St. Louis, University of Pennsylvania Professor Michael Eric Dyson referred to Condoleezza Rice and Colin Powell as the "White House Negros." See Tavia Evans, *Hip Hop Prof Raps to Crowd at UMSL*, ST. LOUIS AM., Feb. 12, 2004, at A3.



it has been fostered in the legal academy. Part II establishes a starting point from which all de-blackening occurs by attempting to define who is Black. Although I admit it is almost impossible to define who is and is not Black, a starting point is established for purposes of this article so that de-blackening can be explored. Part III discusses generally the ways in which a target can be de-blackened, and examines the tools used to accomplish this, including the practice of *Blackthink*. Part IV critiques the application of *Blackthink* and criticizes its use. The costs of ostracism are high and, given the diversity within the Black community, I question the notion that only a single voice—whether liberal or conservative—deserves to be paraded as *the* Black voice.

There are very pragmatic solutions to these problems. First, every Black person should be allowed to live the Black experience the way he or she defines it.<sup>15</sup> This requires the recognition that Black people are complex human beings and, while comforting, it is impossible to treat us as a monolith. Individuals often do not think alike, and that failure to speak in unison must be acknowledged as a reality. Second, most Americans, indeed, maybe most people, appreciate and value the right to

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<sup>15</sup> Ethnic authenticity has been questioned among other ethnic groups. For example, at a September 2002 hearing before the Senate Judiciary Committee regarding the nomination of Miguel Estrada to a federal appeals court position, Mr. Estrada testified that a meeting he had with the Congressional Hispanic Caucus turned hostile after some members of the group expressed the following views: “No. 1, you were nominated because you’re Hispanic; No. 2, that makes it fair game for us to decide if you’re really Hispanic; and No. 3, we have been involved in Hispanic bar activities lo these many years and are in a position to decide that you are not sufficiently Hispanic.” Neil A. Lewis, *Impasse on Judicial Pick Defies Quick Resolution*, N.Y. TIMES, March 30, 2003, at A16; see also Jim Chen, *Untoing*, 80 IOWA L. REV. 145, 155 (1994) (decrying the “[p]redominant legal thinking on race” that assumes that “[e]thnicity is destiny”); Brett Sokol, *A Plunge into the Mainstream: Jimmy Morales Carefully Navigates His Way to the Mayor’s Office*, MIAMI NEW TIMES, Aug. 28, 2003 (describing mayoral candidate Jimmy Morales as not Cuban enough for Cubans and too Cuban for Anglo voters). A former law school friend and current lawyer, Lisette Reid, a Trinidadian, tells of her experiences with challenges to her ethnic authenticity:

I moved to Missouri when I was six years old. My parents came to America to get an education and made education a priority in their lives and in their children’s lives. Good grades were simply expected because that was what we came here for. On the other hand, this made me very different from the other Black children growing up in Columbia and Warrensburg, Missouri. They easily came to the conclusion that I was not Black. On the other hand, the White children could clearly see that I was not White. And, when I returned to Trinidad to visit my relatives, because I had grown up in America and had not attended school and other activities with them over the years, I was not a Trinidadian.

E-mail from Lisette Reid to author (Apr. 5, 2004, 03:19:15 CST) (on file with author). For a similar story by a Jamaican native, see Camille Nelson, *Carriers of Globalization: Loss of Home and Self Within the African Diaspora*, 55 FLA. L. REV. 539 (2003).

disagree and to advocate the views, opinions, and beliefs of their persuasion. There is nothing wrong with that. There is something wrong, however, when the disagreement or challenge reverts to name-calling and attacks on the ethnic or racial identity of the dissenter. Finally, the practice of *Blackthink* has no place in the legal academy, where freedom of thought is celebrated. Law professors owe it to society at large, and to our students in particular, to be leaders in eliminating demeaning stereotypes and prejudice. Otherwise, not only do we dehumanize the dissenters but, in a twisted irony reminiscent of slavery and Jim Crow, we oppress them by stifling individuality and the right to think for oneself. “And that’s not freedom. It’s just a different set of chains.”<sup>16</sup>

## II. MY PERSONAL EXPERIENCES WITH *BLACKTHINK*

I would describe myself as Black. My genealogy, my phenotype, and my culture solidify this conclusion.<sup>17</sup> Yet, I am no stranger to de-blackening encounters. Although my blackness initially was challenged because of my academic success,<sup>18</sup> it now is occasionally challenged based on *Blackthink*.

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<sup>16</sup> Pitts, *Groupthink*, *supra* note 12; see also La Shawn Barber, *Plantation Politics Is Alive and Well and Fostered by Liberals*, ST. LOUIS POST-DISPATCH, Oct. 30, 2003, at B7.

<sup>17</sup> I am the biological product of two Black parents. My physical features and skin tone clearly are Black. Thus, both my genealogy and my phenotype, as developed *infra*, are enough to qualify me as Black. In addition I live a life and practice a culture filled with the riches of being Black in America. I speak in and with a Black vernacular and inflection. I was born and raised by a single mother in Harlem, New York, and attended inner city public schools there. A quarter of my youth was spent as an active member in the Honorable Elijah Muhammad’s Black Muslims in America. I pledged the first Black sorority in this country, Alpha Kappa Alpha, and currently maintain memberships in a number of national, regional, and local organizations dedicated to the advancement of Black Americans. I am a strong advocate and financial supporter of Black-owned businesses, including artists, authors, carpenters, landscapers, child care providers, electricians, plumbers, physicians, real estate brokers, painters, and insurance agents. I spend an enormous amount of time mentoring the Black students at my law school. I am married to a Black man (who is also the biological product of two Black parents). I wear dreadlocks. I love R & B and jazz, and I am a very respectable soul food gourmet and chef. But as presented *infra*, none of these ‘authenticators’ would matter if I were to violate the rules of *Blackthink*.

<sup>18</sup> See *infra* notes 19–20 and accompanying text for a further elaboration of how academic success has and continues to be inextricably tied to whiteness.

### A. *The Beginning*

In my family, education was viewed as the key to success. As the oldest grandchild on either side, I was expected to become the family's first college graduate. Although I worked hard, by middle school I realized that academic success was equated with "trying to be White."<sup>19</sup> For years I walked a tight rope: I tried to satisfy teachers and family on the one hand and my schoolyard friends on the other. Satisfying the latter meant academic *un*success.

Despite various hurdles and internal struggles, I ultimately graduated from college. But that accomplishment came at a painful price—I lost my best friend. During our high school years, this friend periodically made derogatory comments to me about being a "wanna-be White girl" because I performed well in school. This episodic ridicule turned into hate when I started college and the friendship didn't survive. The irony, of course, is that I was the same person; the only difference was that I was in college. For my friend, that was reason enough to de-black me.<sup>20</sup>

### B. *The Legal Academy: As Law Student and Law Professor*

Beginning law school was exciting for me for a number of reasons, but primarily because I believed it was the first time I would be

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<sup>19</sup> Trying to act White meant that you did not want to be Black, which, in turn, made you unacceptable to other Blacks. Unacceptability meant teasing, taunting, and sometimes ostracism.

<sup>20</sup> In 2003, I conducted a survey of Black law students at Washington University in connection with my research for this article. All students were asked if they were ever accused of not being Black enough. The survey results revealed that many of these students, all of whom did very well in their secondary and undergraduate educational experiences, also were taunted, teased, and accused of wanting to be White by Black friends, classmates, and family members because they did well in school. This is the Black/education link I refer to above, or what Professor John McWhorter calls "the cult of anti-intellectualism." See JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* 82–163 (2000) [hereinafter MCWHORTER, *LOSING THE RACE*]. The interesting thing about this shared experience is the twenty-year span between my nearly identical experience and those of my students. This span reflects the reality that this is a continuing problem. As McWhorter puts it, "in telling [my experiences] I join legions of other Black people who have reported in myriad articles and books that they were teased for being 'smart.'" Reports of young African-Americans' strong tendency to discourage one another from doing well in school are numbingly common both on paper and in oral anecdotes from Blacks." *Id.* at 122–23; see also *Tony Brown's Journal: Can Black Athletes Score in the Classroom?* (PBS television broadcast, May 9, 2004) (interview with Dr. Leonard Moore, Director of African and African-American Studies at Louisiana State University).

completely surrounded by people who desired and strived for academic success. It was surprising, then, when I experienced some challenges to my blackness based on my tenacious study habits. Blackness, or lack thereof, was again tied to academic achievement.

By the end of my first year in law school, I was introduced to a slightly different version of *Blackthink*. I was the first Black person to become a member of my law school's law review.<sup>21</sup> Newspaper articles were written about this accomplishment. In connection with one of the stories, a Black reporter interviewed me. After getting preliminary background information, the interviewer wanted to talk about why it took over one hundred years for a Black person to make the law review. Her message to me was clear: White racism at the law school was solely to blame for Black student underachievement there.

I did not feel comfortable putting *all* of the blame for Black students' underachievement on the school and its professors. True, the school had a history of racism,<sup>22</sup> and indeed even during my tenure there clearly were race-related issues at the school.<sup>23</sup> Moreover, I was perfectly willing to acknowledge the role that racism played in the institution's history vis-a-vis its Black students. That was not the issue; nor was it enough for my reporter. The problem was that I was not prepared or willing to identify *all* of the academic achievement problems faced by the Black students as being caused by racism. Quite a bit, true, but not all. For me, personal responsibility had to be explored also. A heated debate between me and the reporter ensued. I learned then another powerful *Blackthink* lesson: the authenticity of my blackness would be

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<sup>21</sup> I attended the University of Missouri–Columbia School of Law from 1982–1985. I ranked twelfth in the class at the end of my first year. That entitled me to automatic admission onto the Missouri Law Review in 1983; it was the first time a Black student had been accepted.

<sup>22</sup> See, e.g., Lucile H. Bluford, *The Lloyd Gaines Story*, 32 J. EDUC. SOC. 242 (1959) (describing the desegregation of the University of Missouri–Columbia School of Law).

<sup>23</sup> Two examples should suffice: 1) Every student in my first-year class, except the Black students, were assigned to take a full course load, including "Property." When it became clear to me that Property was missing from the schedules of *all* the Black students in my class, I visited the Registrar's office to find out why. I was told that Property was a difficult course, and it was *in my best interest* that I not take it. I vehemently protested. By the time I left that office Property was added to my course package. I would go on to receive an "A" in Property that semester. 2) There was a school-wide refusal to call on Black students in my class. At the time, I thought that not being called on in class was a good thing, but later I came to appreciate the value of being forced to articulate one's views in front of others and realized what I had missed.

challenged if I refused to buy into the white-man-is-the-cause-of-all-the-ills-of-Black-society line of reasoning.<sup>24</sup>

I became a law professor in 1990. Until drafts of this article began to circulate, no one on my faculty ever asked me if I am a Democrat (or more importantly, an anti-Republican), or if I support affirmative action, welfare, or gay rights. It is clear, however, that people from all sides—conservatives, liberals, Whites, Blacks, females, males, young, old, law students, and law professors alike—expect that I support all of these things without having first asked my opinion.<sup>25</sup> Assumptions often are made about what I believe, what I think,<sup>26</sup> and even what I want to teach and write.<sup>27</sup>

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<sup>24</sup> I would have a nearly identical experience as a law professor over a decade later. I was unwilling to buy into the notion that, whenever a Black law professor is not considered for a faculty appointment, such rejection is unquestionably due to racism. My stance resulted in a painful ostracism. Bill Cosby would experience something similar after a May 17, 2004, speech he gave at a celebration of the 50th anniversary of *Brown v. Bd. of Education*, 347 U.S. 483 (1954). See *infra* notes 115–121 and accompanying text.

<sup>25</sup> Several law students, sent me an e-mail asking if I would speak at a gay rights forum without having first spoken with me about my position in this area. As it turned out, because I am a gay rights supporter, I was happy to do so. But two questions arise: 1) Did they assume that I supported gay rights because I was Black? 2) What if I were not a supporter? It is my belief that I, again, would have been ostracized by the marginalized.

<sup>26</sup> Stephen Carter writes:

A single example of my frustration is found regularly in my mailbox. Because teachers at American law schools are racially identifiable (we are listed that way in an official guidebook), I frequently receive letters from a variety of organizations that begin with something like “Dear Minority Colleague” and go on to treat me as though I already agree with the organization’s goals and strategies. And each time I receive such a letter, I begin reading in anger and end in sadness, for while it is true that I sometimes agree, no one, least of all other people of color, ought to assume they know my positions when all they really know is the color of my skin . . . . The labelers know nothing of me and what I think or believe or want or hope. I am not, for them, a human being, a free thinker with ideas of his own. I am a name on a list, a ‘minority’ law professor, and therefore presumptively in agreement with an entire strategy for solving the ‘special problems’ that I and people like me (that is, people of like color) are said to face.

CARTER, *supra* note 1, at 239–40.

<sup>27</sup> After I received tenure in the late fall of 1995, the first call of congratulations I received came from one of my strongest supporters, a White colleague. The message on my voicemail said something like: “Congratulations! I’m so happy for you. You should be so proud of yourself. Now you can write and teach in the areas you *really* care about!” The writings I submitted for my tenure review were in the area of civil procedure. This colleague and I had never discussed what I *really* cared about intellectually prior to when this message was left. Clearly, the assumption was that it was not civil procedure.

Indeed, based on my skin color, it was early assumed that I would vocally support a “minority/liberal” agenda. While some worried that after obtaining tenure I would become a Black militant, others warmly awaited such an event.<sup>28</sup> I disappointed both sides by failing to step up to the “minority soapbox.” I felt revered by some colleagues, but marginalized as a disappointing non-voice by others.

To be clear, I should state that I do happen to be a Democrat. I am not, however, a happy one or a completely loyal one. I long for something more fulfilling. Similarly, while I am the proud product of successful affirmative action programs and continue to support them, I reject the notion that they, or any other program deemed beneficial to Blacks, should be defended unquestionably at all costs, particularly when that unquestionable support means that I don’t get to talk about the sometimes separate matter of personal responsibility and accountability. And herein is the rub. As a Black person, and particularly a Black law professor, unquestioned allegiance is expected and demanded for all causes deemed to benefit Black America, even at the cost of legitimate debate. “[A]n honest exchange of ideas [is] discouraged in the name of something called unity. Public disagreements have been perceived as providing ammunition to ‘the enemy,’ that amorphous white ‘they’ that works with a relentlessly evil intent against blacks.”<sup>29</sup> Breaking ranks or, as in my case, remaining silent in lieu of living the lie of an unflinching

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<sup>28</sup> For example, many students hold me in contempt for views they assume I possess, while others, based on identical unverified evidence, look upon me with hope and favor. I am too friendly with Black students for some and too friendly with White students for others.

<sup>29</sup> Julius Lester, *What Price Unity?*, VILLAGE VOICE, (New York) Sept. 17, 1991, at 39. Of course, this is a double-sided coin. Many Blacks only want to focus on racism, and many Whites only want to focus on Black dysfunction. As Columnist Leonard Pitts recently noted:

African-Americans seldom publicly concede that some of the dysfunction suffered by the black underclass is self-inflicted for fear of giving aid and comfort to bigotry. So when analyzing racial progress or the lack thereof, black folk tend to emphasize racism.

Whites, on the other hand, are often loath to concede that racism remains the great ball and chain of African-American life for fear the admission will besmirch their benign self-image or be used to make them feel guilty. So they tend to emphasize dysfunction instead.

Blacks and whites have a way of talking past each other.

[P]ublicly, we—black and white—prefer to stick to the script that . . . demands the least from us.

Leonard Pitts, Commentary, *Cosby Gave Rare Voice to a Hard Issue for Blacks*, MIAMI HERALD, May 24, 2004 [hereinafter Pitts, *Cosby*].

support of *Blackthink*, ended up becoming fodder for an inquiry into my blackness.<sup>30</sup>

### III. WHO IS BLACK, AND HOW ARE BLACKS STEREOTYPED?

My personal evolution highlights some de-blackening episodes in my life, but the practice of de-blackening is much larger than what I have experienced. I only share my experiences to give a sense of how I got where I am today while struggling within a *Blackthink* strait jacket. I now move to the ways in which a person can be de-blackened. Interestingly, one can only be de-blackened if he or she is Black. Who, then, is Black?

#### A. *Bio 101*

Blackness in America was once determined by the ability of the slave masters to trace Black African blood in one's veins. This test was dubbed the "one drop" rule.<sup>31</sup>

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<sup>30</sup> Maybe I was 'passing' too, "hoping [by my silence] to be mistaken for something I [occasionally] was not." Glenn C. Loury, *Free at Last? A Personal Perspective on Race and Identity in America*, in LURE AND LOATHING: ESSAYS ON RACE, IDENTITY, AND THE AMBIVALENCE OF ASSIMILATION 5 (Gerald Early ed., 1993). Passing is a phenomenon explored briefly at *infra* note 94 and accompanying text.

<sup>31</sup> See F. JAMES DAVIS, WHO IS BLACK 4-5, 31-50 (1991); BEVERLY DANIEL TATUM, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? AND OTHER CONVERSATIONS ABOUT RACE 168-72 (1997) ("In both legal and social practice, anyone with any known African ancestry (no matter how far back the family lineage) was considered Black, while only those without any trace of known African ancestry were called Whites. Known as the 'one-drop rule,' this practice solidified the boundary between Black and White."); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1163 (1997) ("For generations, the boundaries of the African-American race have been formed by a rule, informally known as the 'one drop rule,' which, in its colloquial definition, provides that one drop of Black blood makes a person Black."); A. Leon Higginbotham, Jr. & F. Michael Higginbotham, "Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia, 68 N.Y.U. L. REV. 1213, 1243 nn.163-64 (1993); Major W. Cox, *One-Drop Rule Still Haunts Us*, Montgomery Advertiser (Ala.), Apr. 22, 1998, available at <http://www.majorcox.com/columns/onedrop.htm> (describing how the one-drop rule came into play in recent litigation surrounding a high school homecoming queen nomination dispute); Lawrence Wright, *One Drop of Blood*, NEW YORKER, July 24, 1994, at 48 ("Henceforth anyone with any black ancestry at all would be counted simply as black.").

[This] peculiarly American institution . . . define[d] as black a person with as little as a single drop of ‘black blood.’ This notion derives from a long discredited belief that each race had its own blood type, which was correlated with physical appearance and social behavior. The antebellum South promoted the rule as a way of enlarging the slave population with the children of slave holders.<sup>32</sup>

In addition to its effect of increasing the enslaved population and the plantation owner’s property,<sup>33</sup> the rule was designed to ensure the purity of the White gene pool.<sup>34</sup> No matter how White or racially mixed the target appeared, the finding of a Black ancestor in the target’s ancestry assured a Black classification.<sup>35</sup>

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<sup>32</sup> Wright, *supra* note 31, at 48; *see also* SCOTT L. MALCOMSON, *ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE* 356 (2000) (“The one-drop rule made whiteness imaginary . . . . It took a crucial social fact of your life and made it a legacy bequeathed by ghosts—all in the form of a fine legal distinction meant to clarify a permanent system of racial separation.”). For additional historical perspectives, *see* Higginbotham & Higginbotham, *supra* note 31, at 1243 n.163.

<sup>33</sup> *See* Hickman, *supra* note 31, at 1175–76 (describing the “economic benefits for white settlers” created by the rule).

<sup>34</sup> KATHY RUSSELL ET AL., *THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS* 14 (1992).

<sup>35</sup> *See id.*; *see also* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954). *Plessy* is a classic case to support this concept. Plessy had seven-eighths White blood running through his veins; the remaining eighth was Black blood; but his mixed heritage was not visibly discernable. *See id.* at 538. The Court rejected Plessy’s argument that his majority White blood line entitled him to the rights, privileges, and immunities of *authentic* White people. *See id.* at 552.

Interestingly, some whites are now interested in retreating from the one drop rule. I remember listening to a radio program the morning after Halle Berry won an academy award for best actress in *Monster’s Ball*. Many of the White people who called in to the program didn’t understand why Ms. Berry was considered the first Black woman to win the award when, given a White birth mom, she *clearly* is not Black. Similarly, journalist Clarence Page shares the following:

Some people, particularly those who are tone deaf to the ironies of life, have a problem with Barack Obama’s race. They have a hard time deciding what it is.

Ever since the Illinois Democratic nominee for the U.S. Senate burst onto the national stage with a riveting keynote address at the Democratic National Convention, I have been hearing from readers who question why the media, including me, insist on referring to him as “black” or “African–American” when he is “really” biracial.

Are we trying to render his white Kansas mother irrelevant? No, I say, we’re just recognizing that the realities of race have more to do with psychology, sociology and politics than actual science.

The perspective of my questioners was well–expressed by one of my favorite political writers, William Saletan, in his coverage of the convention for Slate.com’s Web site:



Today the one-drop rule does not definitively determine who is Black and who is not,<sup>36</sup> but it still creates occasional mischief.<sup>37</sup>

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“Obama isn’t really black,” he wrote. “His mother is white and came from Kansas. His father came from Kenya. Obama is, in short, African-American—a term that [Rev. Jesse] Jackson Sr. has too casually applied to people many generations removed from Africa, often through other continents. Obama’s [late] father went back to Africa years ago, but that doesn’t change the hue of his son’s skin or remove his African name, Barack. So the son embraces his blackness.”

True enough, but I was jerked alert by the curious declaration that “Obama isn’t exactly black.” It made me wonder: How long does one have to be in America, by Saletan’s standards, before one is “exactly black.”

Clarence Page, *A Man for All Racial Reasons*, CHI. TRIB., Aug. 22, 2004, at C9.

<sup>36</sup> Cf. *Perkins v. Lake County Dept. of Util.*, 860 F. Supp. 1262, 1271 (N.D. Ohio 1994). *Perkins* involved a claim by a Native American that his employer was discriminating against him, on the basis of his race, in violation of Title VII. *See id.* at 1263–64. Although the plaintiff’s ancestors were variably labeled as White or Mulatto, depending on the census definitions governing at the time, his employer admitted that plaintiff was at least 1/16th—one drop—Native American. *See id.* at 1276. Still, the employer argued, one drop was not enough; plaintiff *really* was White, and therefore could not take advantage of Title VII protections. The employer’s motion for summary judgments was denied. *See id.* at 1278. Insightfully, the court noted:

On the present record it appears to be unquestioned that the Plaintiff’s physical appearance could be considered that of a Native American, that he believed himself and held himself out to be a Native American, and, *most importantly, that he was considered by his employer and his co-workers to be Native American.* Upon these facts, and under the law considered herein, for purposes of entitlement to relief under Title VII this Court deems it unnecessary, and indeed inappropriate, to attempt to measure Plaintiff’s percentage of Indian blood or to examine his documentable connection to recognized existing tribes. Employers do not discriminate on the basis of such factors. *Objective appearance and employer perception are the basis for discrimination* and, in the opinion of this Court, the key factors relevant to enforcing rights granted members of a protected class.

*Id.* (emphasis added).

<sup>37</sup> *See, e.g., Godby v. Montgomery County Bd. of Educ.*, 996 F. Supp. 1390 (M.D. Ala. 1998). In *Godby*, a biracial thirteen year old (father is White, mother is Black) wished to enter the school’s homecoming queen contest as both a White *and* a Black candidate. *Id.* at 1396–97. The school had a policy of nominating White candidates separately from Black candidates. Plaintiff’s request was rejected by the school, and she sued the district for various civil rights violations. *Id.* at 1396. The defendant’s motion for summary judgment was dismissed, and the case then settled. Thus, the court was saved from a face-to-face confrontation with the one drop rule.

A related issue is how minority status should be determined. My current law school, Washington University School of Law, for example, participates in a summer program called the Minority Clerkship Program. The program was initially created by the Black Law Students Association to address the dearth of Black lawyers in all types of legal employment in the St. Louis Metropolitan area. For some discussion of this issue, see *The Minority Report Card*, published by Minorities in the Legal Profession, a committee of the Bar Association of Metropolitan St. Louis (“BAMSL”) in April, 2003, and Hope

Ironically, it is currently warmly embraced by many in the Black community. “Today the rule is staunchly defended by most members of the Black community. By definition, the one-drop rule unites all those with Black ancestry. It enables the Black community to draw on the leadership of its light-skinned members, who often have more credibility with Whites. It creates a sense of racial loyalty that discourages members

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Whitehead, *Why Minorities Are Still in the Minority at Majority Law Firms*, St. Louis Lawyer, Feb. 4, 2004, at 13. See also e-mail from Chris Orlet, Director of Communications and Law-Related Education, BAMSL, to author (April 19, 2004, 03:33:49 CST) (on file with author). Although the program was created by and for Black law students, it currently embraces Hispanic, Latino, Native American, and Asian students as well.

As chair of my school’s committee, it is not uncommon for students and lawyers alike to question me about the authenticity of a particular candidate’s claim to minority status. In many cases the answer is not visibly discernable. Peter Kirsanow, President George W. Bush’s controversial Commissioner to the United States Commission on Civil Rights, recently worried about a similar matter:

Who does a college consider to be Black, Hispanic, or Native American?

Is an applicant of Moroccan descent an African American entitled to a plus—or is he an Arab American, who gets none? Does an ethnic German applicant recently emigrated from Peru get a Hispanic plus? Does a White applicant with a Black great-grandfather get an African-American plus? And why doesn’t a native Hawaiian get a Native-American plus, as do Alaskan natives?

Admissions officers will be pleased to know that plenty of guidance is available to answer some of these questions. (The 1910 Louisiana case of *State v. Treadaway*, 126 La. 300, 52 So. 500 is a handy guide.)

There are scores of court decisions interpreting state laws regarding racial identity and school admissions. Prior to the 1950s, most states had statutes defining “Blacks,” “Negroes,” “mulattos,” and “coloreds.” Those designated as such were excluded from White schools. Some states employed the “one drop” rule—any Black ancestor, however remote, rendered one Black. Alabama held that anyone at least 1/32 Black—i.e., who had at least one Black great-great-grandparent—was to be excluded from White schools. North Carolina, on the other hand, only went back four generations. The most common racial-identity statute considered anyone with at least one Black great grandparent to be Black. (Unfortunately for admissions officers, the law provides scant guidance as to who is a Native American or Hispanic, although a recent case in Seattle suggests that anyone with at least one Native-American great-great-grandparent qualifies as Native American.)

But what about Michigan? An old Michigan constitutional provision pertaining to “colored” school admissions provides little guidance. However, an 1880s Michigan marriage statute defines a “colored” person as anyone who is “wholly or in part of African descent.” (Some anthropologists would point out that we’re all, in part, of African descent. Arguably, then, everyone’s entitled to a plus.)

Peter Kirsanow, *Black Like Me: Winks and Nods as Admissions Policy*, Guest Comment on NRO, at <http://www.nationalreview.com/comment/comment-kirsanow072803.asp> (July 28, 2003).

from passing as White or marrying outside the race."<sup>38</sup> The rule, then, initially used to enslave Blacks, has now become a unifier of Black people.<sup>39</sup>

While a Black ancestry or bloodline helps determine whether a person is Black, I do not think they are conclusive when trying to establish a construct from which de-blackening can occur. In addition, it is important that the person judging blackness be able to look at the target and tell, or at least suspect,<sup>40</sup> that the target is Black.<sup>41</sup> Thus, phenotype and other visual indicia are crucial to whether the target will be treated as Black. Therefore, I use a combination of bloodline/ancestry and phenotype/perception as the starting point for determining who is Black.

I realize that there are problems with this method. Some might argue that Black blood alone makes a person Black, but sole reliance on the one-drop rule is troubling given the reason for the rule's creation. And while others believe that being Black is a way of life, a culture, and an

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<sup>38</sup> See RUSSELL ET AL., *supra* note 34, at 74; see also DAVIS, *supra* note 31, at 168: Although Whites invented and have determinedly enforced the one-drop rule, both by custom and by law, the rule is now strongly reinforced by social controls within the Black community. Informal but powerful social pressures deter those who could pass from doing so, and punish those who marry Whites. The rule has come to be considered essential to maintaining pride in the Black ethnic identity.

<sup>39</sup> See, e.g., Hickman, *supra* note 31, at 1166 ("The Devil fashioned [the one drop rule] out of racism, malice, greed, lust, and ignorance, but in doing so he also accomplished good: his rule created the African-American race as we know it today . . . and while . . . its members can look very different from one another, over the centuries the . . . rule united this race as a people in the fight against slavery, segregation, and racial injustice.").

<sup>40</sup> Cf. LAWRENCE OTIS GRAHAM, *INSIDE AMERICA'S BLACK UPPER CLASS, OUR KIND OF PEOPLE 376-77* (1999) [hereinafter GRAHAM, *INSIDE*]. Graham recalls how, during his law school days, he and several other Black students tried to determine whether a particular student was Black. This was not an issue of whether this Black-looking student was really White. Rather, it was whether this White-looking student, despite his claims to the contrary, was really Black.

<sup>41</sup> Indeed, as one court has stated, "subjective perception of an individual's race clearly plays an important role in racial classification where discrimination is involved. This Court has never encountered an instance in which an employer admittedly first checked the pedigree of an employee before engaging in discriminatory conduct." *Perkins v. Lake County Dept. of Util.*, 860 F. Supp. 1262, 1273 (N.D. Ohio 1994). The *Perkins* court ultimately was persuaded by how plaintiff classified himself, his physical characteristics, and how others, including defendant employer, perceived him. See *id.* at 1276. For a similar case involving a Hispanic plaintiff, see *Bennun v. Rutgers State University*, 941 F.2d 154 (3d Cir. 1991). For a general discussion, also see Craig LeMoult, *Skin tones influences perceptions of blacks, study finds*, TUFTS JOURNAL, May 2002, available at <http://tuftsjournal.tufts.edu/archive/2002/may/features/skin.html>, and the study to which it refers, Keith Maddox, *Cognitive Representations of Black Americans: Re-exploring the Role of Skin Tone*, 28 PERSONALITY AND SOCIAL PSYCHOL. BULL. 250, 250-51 (2002).

attitude,<sup>42</sup> it is clearly more than that. Indeed, no matter how much of a Black culture, style, or way of life or thinking one adopts, if the genealogy/ancestry and/or phenotype/visual perception indicia are lacking, the target will not be recognized as Black, will not be treated as Black, and therefore cannot be de-Blackened. For example, other than the honorary “soul brother” status occasionally bestowed on some White people who are believed to support “Black” views and/or Black culture, mere support or desire, no matter how vociferous, is never enough to turn that White person into a Black person without the requisite biological bloodline.<sup>43</sup> Moreover, unless a person believes or suspects that the target

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<sup>42</sup> See, e.g., STEVE BIKO, *I WRITE WHAT I LIKE, A SELECTION OF HIS WRITINGS* 48 (1996) (“Being black is not a matter of pigmentation—being black is a reflection of mental attitude.”); CORNEL WEST, *RACE MATTERS* 39 (1993) (“[B]lackness is a political and ethical construct.”).

<sup>43</sup> Many in the Black community embraced former President Bill Clinton as an honorary soul brother. See DEWAYNE WICKMAN, *BILL CLINTON AND BLACK AMERICA* (2002); Interview by Tavis Smiley with Bill Clinton, National Public Radio (Jan. 7, 2003). Not all White people who support positions of interest to many in Black communities receive this distinction. Several years ago, White lawyer Jack Greenberg was similarly rejected. Mr. Greenberg litigated *Brown v. Board of Education*, 347 U.S. 483 (1954), on behalf of the NAACP Legal Defense Fund, and later succeeded the late Justice Thurgood Marshall as head of that group. His rejection by a certain Black constituency, i.e., Black law students at Harvard, was captured by Professor Carter:

The proposition that a White person cannot possibly represent the true perspective of the people helps explain the ruckus in the early 1980s when the Harvard Law School hired Jack Greenberg, the longtime head of the NAACP Legal Defense Fund, to teach a course on law and race. Greenberg, to his apparent discredit, is White, and his invitation sparked a student boycott of his course. The protesters, while too savvy actually to insist that his White skin disqualified him from teaching the course, argued that the course should have been ‘taught by an instructor who can identify and empathize with the social, cultural, economic, and political experiences of the third World communities’—as a White person, evidently, cannot. Thus, they concluded, the course should be ‘taught in its entirety by a minority professor, most preferably a full-time professor.’

CARTER, *supra* note 1, at 41–42 (footnotes omitted); see also Ian Haney Lopez, *Community Ties, Race, and Faculty Hiring: The Case for Professors Who Don’t Think White*, 3 RECONSTRUCTION 46, 60 (1991). Finally, consider White hip hop rapper Eminem. Despite his embrace of Black hip hop culture, he is still White.

Of course the real problem is that the word “Black” is being used to define two different things. One can be *biologically* Black, i.e. have a traceable Black blood line, but not be *culturally* Black, i.e. have no cultural association with Blacks. This notion applies to other ethnicities as well. For example, being Jewish can be an ethnicity, a religion, or both. After all, there are biologically Black people who are Jewish. See, e.g., Debra Nussbaum Cohen, *Finding Their Voice: Jews of Color Are Slowly Putting Their Concerns on the Communal Agenda*, InterfaithFamily.com Network, at <http://www.interfaithfamily.com/article/issue105/cohen.html>. Similarly, the word “Indian” is used very broadly including, but not limited, to “biological descent, cultural

is Black, de-blackening is impossible. It can only happen if the target is perceived by others as Black.<sup>44</sup>

### B. Stereotypes Applied to Blacks

Assuming the target is Black—as defined above—that person is subjected to a barrage of assumptions every day. By simply observing the target, the observer automatically categorizes and labels the target. Truth is neither sought, nor is it relevant.<sup>45</sup> Some of the assumptions are positive, some negative and, in either case, they are imposed on Blacks by society because they are Black.<sup>46</sup> These assumptions fall into four groups.

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identity, and legal status.” *United States v. Washington*, 476 F. Supp. 1101, 1103 (W.D. Wash. 1979), *aff’d*, 641 F.2d 1368 (9th Cir. 1981).

<sup>44</sup> For example, consider one who, despite Black blood running through his veins, would not be perceived as Black unless he so revealed: Gregory Howard Williams, former dean of the Ohio State University Law School and current president of the City University of New York System. President Williams, author of *LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK* (1995), is the child of a White mother and a Black father. President Williams not only looks White, but he has no visible Black phenotype. Because he does not look Black, he is unlikely to be de-blackened unless he reveals his blackness. This is not to say, however, that President Williams *cannot* be de-blackened. Indeed, history records the experience of Walter White, president of the NAACP from 1931–1955. It was estimated that he was no more than one sixty-fourth African Black. Mr. White did not look Black; indeed, both he and his parents could “pass” for White. *See* DAVIS, *supra* note 31, at 7. White, refusing to “pass” and holding himself out as Black, fought racism and discrimination against Black Americans with everything he had. “[Y]et when he married a White woman the Black press erupted in outrage.” *Id.* at 125. He became a traitor to the race. *See id.* This clearly demonstrates that even people who do not look Black can be de-blackened. However, unless you are perceived as Black, a de-blackening will not occur.

<sup>45</sup> Even wealthy, successful Blacks are presumed to be criminal, unable to afford quality merchandise, or are otherwise negatively stereotyped. *See, e.g.*, LENA WILLIAMS, *IT’S THE LITTLE THINGS: THE EVERYDAY INTERACTIONS THAT GET UNDER THE SKIN OF BLACKS AND WHITES* 37 (2001) (describing how Oprah Winfrey and Debbie Allen have had difficulty getting into exclusive stores if the employees do not recognize them); Peter DeMarco, *Taxi Proposals Aim To Put Brakes On Bias*, *THE DAILY NEWS* (New York), Mar. 15, 2001, at 3 (recounting Danny Glover’s woes in trying to hail a taxicab in New York City); Dale Russakoff, *Lessons of Might and Right*, *WASH. POST*, Sept. 9, 2001, at W23 (describing how Condoleezza Rice is presumed to be unable to afford anything more than costume jewelry).

<sup>46</sup> *See* Diana Fishlock, *When Violence Hits Home: Community Seeks Solutions to Criminal*, *HARRISBURG PATRIOT*, July 9, 2002 (“The Rev. Jesse Jackson caused a furor in 1994 when he acknowledged the problem of black-on-black violence, saying: ‘There is nothing more painful to me at his stage in my life than to walk down the street and hear footsteps and start thinking about robbery then look around and see somebody white and feel relieved.’”).

The first group includes the stereotypes of Blacks as good athletes, musicians, singers, dancers, and cooks.<sup>47</sup>

The second group is much larger and more insidious. It is comprised of negative stereotypes that depict Blacks as poor, lazy, criminal, promiscuous, unintelligent, and/or incompetent.<sup>48</sup> These negative stereotypes are automatically imposed without an opportunity for rebuttal. So, for example, even today, people worry when I walk behind them or get close to their cars because they fear that I might be a criminal.<sup>49</sup> Department store employees either ignore me because they believe I cannot afford their merchandise, or they surreptitiously follow me because they believe that I will steal it.<sup>50</sup> It is not uncommon for me

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<sup>47</sup> Interestingly, while one might classify these stereotypes positively, they often do not have positive origins. Consider the following:

Jimmy “The Greek” Snyder became a famous proponent of a “breeding” theory of black athletic success when he made an ill-fated discourse in a Washington, D.C., restaurant on Jan. 15, 1988. The next day, he was fired from his job as a CBS-TV football analyst.

Snyder’s views were aired repeatedly, with relatively little serious analysis: Blacks, he said, “can jump higher and run faster because of their bigger thighs. . . . I’m telling you that the black is the better athlete and he practices to be the better athlete and he’s bred to be the better athlete because this goes all the way to the Civil War when, during the slave trading, the owner, the slave owner, would breed his big woman so that he would have a big black kid, you see.”

*Experts Dispute Greek’s Theory*, USA Today, Dec. 16, 1991, at 4C; see also Liza Simmons, *The Origins of Black Humor*, available at [http://www.chatham.edu/PTI/Comedy/Simmons\\_02.htm](http://www.chatham.edu/PTI/Comedy/Simmons_02.htm) (last visited Feb. 16, 2005) (essay on the slave origins of Black humor and minstrels as a form of entertainment).

<sup>48</sup> See generally JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM, THE HIDDEN COSTS OF BEING BLACK IN AMERICA (1997); bell hooks, WE REAL COOL: BLACK MEN AND MASCULINITY (2004); STEELE, CONTENT OF OUR CHARACTER, *supra* note 4, at 43; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 333 (1987).

<sup>49</sup> Even in my very pregnant days, I recall being perceived as a threat. The mere act of walking toward my parked car caused a White woman sitting in the passenger seat of the car next to mine to, after looking at me, immediately lock her door. It was clear that she did so simply because I was Black. It didn’t matter that I was very pregnant (and therefore, I would think, less of a “risk”), clean, and smartly dressed. The woman saw only my skin color. For more on the negative stereotypes in general, see ARMOUR, *supra* note 48, at 2–3, 76.

<sup>50</sup> For accounts of similar experiences, see ARMOUR, *supra* note 48, at 14; Gregory Freeman, *It’s Not Fair, It’s Not Right*, ST. LOUIS POST-DISPATCH, Oct. 13, 1995, at 4B (lamenting the embarrassment and humiliation Gerald Early, renowned author, Professor, and Director of the Center for the Humanities of the College of Arts and Sciences at The Washington University in St. Louis, felt when he was stopped and questioned by police officers one evening as he waited outside a store for his wife and children. The officers had received a tip from a store clerk that Professor Early was outside of the business

to receive slow or reluctant service at a restaurant because of the perception that Blacks, and therefore I, will not tip a waiter or waitress.<sup>51</sup> People assume they can tell me anything or otherwise devalue my dignity because it is presumed that I am not worthy of a respectful acknowledgment.<sup>52</sup> When I walk in public with my four children I receive the glares that people unabashedly bestow on persons presumed to receive welfare.<sup>53</sup> My dreadlocks, although clean and neat, are further proof to some that I am dirty and “stinky.”<sup>54</sup> Even my position on the

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“casing the joint.”); see also Tim O’Connell, *Retail Racism: Caught Red Handed*, SECURITY, Apr. 1, 2001, at 9, available at 2001 WL 11592781.

<sup>51</sup> Cf. LAWRENCE OTIS GRAHAM, MEMBERS OF THE CLUB 89–122 (1995) [hereinafter GRAHAM, MEMBERS] (describing an undercover investigation by the author showing that Black males received slow, poor, and in some cases no service at ten of the top restaurants in New York City); Ruben Castaneda, *Restaurant Sued Over Tip Dispute; 15% Was Added to Lunch Bill for Black Women*, WASH. POST., Apr. 13, 2000, at B3; Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, at <http://islandia.law.yale.edu/ayres/TippingPaper34.pdf>, (describing evidence that Blacks, generally, do not tip cab drivers at the same rate as Whites).

<sup>52</sup> As recently as a few months ago, a professional Black person looking at me assumed, solely based on my appearance—loosely arranged dreadlocks, an old t-shirt, biker shorts, socks, and running shoes—that I was not important enough to be heard on the matter at hand. In other words, Blacks can negatively stereotype Blacks as well. See also Fishlock, *supra* note 46.

Consider an experience shared by Maurice Ashley, the first and only Black International Grand Master of Chess. While in junior high school Ashley and other friends started a chess club called the Raging Rooks. The team participated in tournaments throughout the country and, in astoundingly short order, not only made it to the National Championships in 1991, and tied for first place. Mr. Ashley continues:

On April 26, 1991, the Raging Rooks made the cover of the *New York Times*. The headline read “Harlem Teenagers Checkmate a Stereotype.” It happens that on our team we had six African-American boys, one Latino, and one Asian boy. The mother of one of our boys put the *New York Times* photo in a store, and a black man walked in and looked at the photo. He saw Stephen, the Asian boy, and said, “So *this* is why they won. Now I *know* why they won.” The mother who had put up the picture was mortified. What was curious was that Stephen wasn’t on the first-string team; he was on our second-string team. It was the first-string team that won the championship.

HENRY LOUIS GATES, JR., *AMERICA BEHIND THE COLOR LINE* 69 (2004) (interview with Maurice Ashley).

<sup>53</sup> A media-fed perception is that welfare recipients are typically Black single mothers, or “welfare queens” as many have come to call them. See generally SANFORD F. SCHRAM, *PRAXIS FOR THE POOR: PIVEN AND CLOWARD AND THE FUTURE OF SOCIAL SCIENCE IN SOCIAL WELFARE* 171–79 (2002); Susan L. Thomas, *Race, Gender, and Welfare Reform: The Antinatalist Response*, 28 J. OF BLACK STUD. 419, 428–30 (1998); Holloway Sparks, *Queens, Teens, and Model Mothers: Race, Gender, and the Discourse of Welfare Reform*, in *RACE AND THE POLITICS OF WELFARE REFORM* 171–95 (Sanford F. Schram et al. eds., 2003).

<sup>54</sup> Some believe that people who wear dreadlocks don’t wash their hair. On May 17, 2003, the Cheshire Inn, a tavern in St. Louis, Missouri, refused to admit two well-

faculty of one of the best law schools in this country fails to immunize me from the negative stereotypical typecast of Black people by members of my own law school community.<sup>55</sup>

A third stereotype involves the assumption that all Black people think alike. This is a form of *Blackthink*. It differs from the main focus of this article in that failure to live up to the stereotype here does not *negatively ostracize* me from the Black race, but rather, it purports to *positively realign* me with a conservative group. Let me share an illustration:

On April 1, 2003, the President of BLSA at Washington University sent an e-mail to all law students reminding them that April 1 was the day that the Supreme Court of the United States was about to hear oral arguments in the *Gratz v. Bollinger* and *Grutter v. Bollinger* affirmative action cases. Her e-mail spoke of the importance of diversity and called on the readers to recognize that this was no ordinary day.<sup>56</sup> Because of intimate conversations on affirmative action between myself and this student, she knew I supported the defense position and was anxious about the impending Supreme Court cases. She therefore copied me on the e-mail she sent to the entire student body. Another student, a White male and a former Torts student of mine, sent a reply with a copy to me. He questioned whether the sender of the e-mail really believed in diversity. He argued that diversity meant more than just skin color and

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groomed, and appropriately dressed Black males because the men wore their hair in dreadlocks, in violation of the establishment's "no-dreadlocks" policy. See Elizabeth Holland, *Dreadlocks Don't Cut It at St. Louis Bar; Cheshire Inn Incident Split Up Wedding Party*, ST. LOUIS POST-DISPATCH, June 6, 2003, at A9. The then president of the corporation that operates the Cheshire Inn defended its policy as follows: "You can't wash that hair, and it stinks, and we're a crowded bar, and we don't want stinky people in the bar." *Id.*

<sup>55</sup> In December of 1993, I received a call at home from one of the Black law students. She was crying. I thought she had problems related to her final exams. She told me that she had just walked past my office. My office then, as it is now, was located within the school's library. Outside of my office there was a cork bulletin board against the wall, which I used to post notices to students, funny newspaper articles, and whatever else I wished to share. Although I rarely displayed pictures, many other faculty members used their cork boards to show pictures of their children. I had recently given birth to twins, so I posted one of my favorite pictures of my daughter with her new twin brothers. The student called to tell me that someone defaced the picture with the following words:

no daddy

Amos, Andy, Sarah on welfare

This incident occurred during a time when only law students or law faculty could gain access to the law library.

<sup>56</sup> E-mail from student to author (April 1, 2003, 09:20 CST) (on file with author).



ethnicity; it also included viewpoint.<sup>57</sup> I sent the following e-mail to my former Torts student:

Ben! I miss you! I am a person who believes in true diversity—including diversity of opinion—surprise, surprise! I would love to talk with you one day about an article I'm writing along these lines. Please keep me in mind and e-mail me when you can spare about an hour with me. Don't forget. Good luck on exams!<sup>58</sup>

The student's reply characterized me as "one of the most overtly progressive/liberal professors" that he had ever encountered.<sup>59</sup> Further, after ranting about "Ivory Tower" liberals, unfair educational slants, and the unfairness of affirmative action, his e-mail concluded as follows:

I believe many of the theories you believe in are wrong, short-sighted, and not in the spirit of true Liberty as the Constitution and Locke's Natural Law upon which [it] is based—but that is certainly just an opinion—and not said with any arrogance nor ill-will . . . .<sup>60</sup>

After assuring myself that my "beliefs" had neither been sought nor shared, I responded as follows:

I assume that when you say my views are wrong you are referring to my views on tort reform since we have never discussed my views on politics, abortion, civil rights, affirmative action, capitalism, or anything else. Is that a fair statement? I certainly hope so. It would be a shame if you looked at me and based on my appearance assigned to me an entire system of beliefs I have never been given the chance to espouse or not.<sup>61</sup>

Without a chance to defend myself, and based on nothing more than my skin color, an ideology was imposed upon me.<sup>62</sup> Had this student and I

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<sup>57</sup> E-mail from student to author (April 1, 2003, 12:41:31 CST) (on file with author).

<sup>58</sup> E-mail from author to student (April 1, 2003, 12:51 CST) (on file with author).

<sup>59</sup> E-mail from student to author (April 1, 2003, 05:25:12 CST) (on file with author).

<sup>60</sup> *Id.*

<sup>61</sup> E-mail from author to student (April 1, 2003, 5:42 CST) (on file with author).

<sup>62</sup> This student and I eventually did meet to discuss our differences. While we remain divided on many levels, we are closer in philosophy than he initially assumed.

A concept related to this third stereotype says all Black teachers want to teach, and are only qualified to teach, courses relating to Black issues. *See, e.g.,* Nell Irvin Painter, *Black Studies, Black Professors, and the Struggles of Perception*, CHRON. OF HIGHER EDUC., Dec. 15, 2000, at B7.

agreed on various political issues, he would not have viewed me with negativism or as a sell-out, or traitor to my race. Rather, he would have been more than happy to positively realign and embrace me in his “neoconservative/capitalist”<sup>63</sup> world order.

The fourth stereotype is the version of *Blackthink* that is the main focus of this article. It differs from the former versions only in effect, but the difference is material. While it also is based on the perception that I am Black (because of skin tone or other visual indicia) it expects that I succumb to *Blackthink*. If I do not, it attempts to de-black me.

#### IV. HOW THE *BLACKTHINK* STEREOTYPE IS USED TO DE-BLACK

##### A. *The Traditional Tools of Ostracism*

A variety of methods are employed to challenge a person’s blackness. Some methods rely on the existence of certain immutable qualities of the individual. Some analyze blackness from a more culturally based prism. Others rely on an evaluation of the target’s thoughts. Each of these tools will be explored in turn.

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A Washington University colleague shares a related story. Rafia Zafar, an Associate Professor of English and African and Afro-American Studies at Washington University in St. Louis, is the daughter of a Jewish mother and a Black father. Professor Zafar is very light-skinned, and has naturally straight, wavy hair. Based on her light skin color, hair texture, and facial features, some people do not immediately realized that she is partially Black. Shortly after her marriage, she had an interesting experience with some of her new in-laws:

[N]ow my husband Bill, you know, is of all white and Jewish extraction. After his brother’s funeral, not long after we were married, his aunt and uncle were driving us back to the airport. At one point his aunt asked me what I taught. I told her about my classes, including the great fun I was having with a Harlem renaissance course. She asked me how I got interested in the subject, and I spoke of New York as a mecca in the 1920s, the gathering of artists and writers, etc. She paused and then said, but I thought their people taught those courses. I stopped—almost laughed out loud (Bill got paler than usual)—and then said, in my best kingfish voice, “I am one of their people. I’m one of yo’ people too.”

E-mail from Rafia Zafar, Associate Professor, Washington University, to author (May 7, 2003, 10:46:06 CST) (on file with author). Not only do White people make assumptions about the color of people they expect to teach race-related courses, but Black people make those assumptions as well. See *supra* note 43 describing the rejection of White civil rights champion Jack Greenberg by Black law students.

<sup>63</sup> The phrase “neoconservative/capitalist” is one used by the student to identify himself and those with whom he shares political beliefs. See e-mail from student to author (April 1, 2003, 05:25:12 CST) (on file with author).

### 1. *Immutable Qualities: Skin Color, Hair Texture, and Facial Features*

As a result of the sexual intercourse between White Americans, Black Africans and others,<sup>64</sup> there is a wide spectrum of Black skin tones.<sup>65</sup> Early on, these offspring were called mulattos.<sup>66</sup> Mulattos typically were lighter in color, and naturally had other White features: smaller lips and noses, straighter and longer hair. In many cases, mulattos were more accepted by White society than their darker relatives.<sup>67</sup>

Ultimately, a deep wedge was driven between mulattos and their darker brethren.<sup>68</sup> This wedge was fed by three realities: 1) Lighter skin was perceived as better and more desirable than darker skin;<sup>69</sup> 2) Some

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<sup>64</sup> See Hickman, *supra* note 31, at 1171–73.

<sup>65</sup> The spectrum of color ranges from: former NAACP President Walter Williams, Langston Hughes, Lena Home, Adam Clayton Powell, Jr., and Thurgood Marshall to Nat King Cole, Gwendolyn Brooks, James Baldwin, Oprah Winfrey, Clarence Thomas, Whoopi Goldberg, Miles Davis, Cecily Tyson, and Grace Jones. See also *infra* note 74.

<sup>66</sup> The 1927 edition of the *Corpus Juris* defines “mulatto” as: “a word derived from the Latin word ‘mulus,’ defined as a person begotten between a White and Black; the offspring of a ngress by a White man, or of a White woman by a negro; the middle term between the extremes, or the offspring of a White and a Black. The term has been held to include a person having one fourth or more negro blood in his veins; every one who is not of White blood.” 42 C.J. 1411–12 (1927) (footnotes omitted); see also DAVIS, *supra* note 31, at 5. “Mulatto” presently is defined as “a person having one white and one Black parent [or] a person of mixed white and Black ancestry. THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002).

<sup>67</sup> See, e.g., RUSSELL ET AL., *supra* note 34, at 33–34 (describing the educational and economic benefits which are more available to light-skinned Blacks); Michael Hughes & Bradley R. Hertel, *The Significance of Color Remains: A Study of Life Chances, Mate Selection, and Ethnic Consciousness Among Black Americans*, 68 SOCIAL FORCES 1105–06 (June 1990) (finding that lighter skin among Blacks correlates with higher socioeconomic status); John Sanford, *Scholar Offers Provocative Hypothesis About Skin Color, Identity*, STANFORD REPORT, May 14, 2003, at 2.

<sup>68</sup> Sanford, *supra* note 67, at 2.

<sup>69</sup> Light-skinned peoples of any race or ethnicity are, by and large, more successful than their darker counterparts. In the United States in particular, “the darker a person’s skin color, the lower he or she is likely to be on any scale of whatever is broadly perceived to be desirable . . .” *Id.* Indeed, consider the following:

An array of Latin American terms have arisen to describe various racial combinations, with the most pejorative ones reserved for people of dark hue and pelo malo—or bad (meaning kinky) hair. Status in some Latin societies is so linked to color that *mejorando la raza*—bettering the race—is taken to mean marrying someone lighter in order to have whiter children. Uruguayan writer Eduardo Galeano observes: “In the Dominican Republic there are lot of black people, but you never see ‘black’ listed as skin color on their identity card . . . It would damage the possibilities for work, for a social life.”

fair-skinned Blacks believed they were “better” than their darker brethren *because* of their light skin color;<sup>70</sup> and 3) White features were more highly valued than non-White features.

Strong evidence confirms that this wedge still divides many in the Black community today.<sup>71</sup> Light skin, narrow noses, straight, long, and even blonde hair<sup>72</sup> all lead to greater chances of success in various facets of American life, including dating, romance,<sup>73</sup> entertainment,<sup>74</sup> the

Ellis Cose, *One Drop of Bloody History: Americans Have Always Defined Themselves on the Basis of Race*, NEWSWEEK, Feb. 13, 1995, at 70, 72 (emphasis added); see also Darryl Fears, *Skin Color Affects Latinos' Jobs, Report Says*, SEATTLE TIMES, July 21, 2003, [http://seattletimes.nwsourc.com/html/nationworld/135263831\\_hispanic14.html](http://seattletimes.nwsourc.com/html/nationworld/135263831_hispanic14.html).

Compare also the origins of the caste system in India, which was initially based on skin color. Darker-skinned people were the oppressed, and light-skinned were the oppressors. See, e.g., WILLIAM L. SHIRER, *GANDHI 114* (1979) (detailing the rise of the caste system in India); AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 49–76 (2003) (documenting color discrimination as practiced throughout Latin America); MARITA GOLDEN, *DON'T PLAY IN THE SUN: ONE WOMAN'S JOURNEY THROUGH THE COLOR COMPLEX* 164–80 (2004) (summarizing the oppression and subordination of “Black” Brazilians and Cubans by “White” Brazilians and Cubans).

<sup>70</sup> See, e.g., RUSSELL ET AL., *supra* note 34, at 2 (describing how “traditionally” light-skinned Blacks rejected Blacks who were darker). My interview of Washington University law student Meredith Killian in September of 2003 demonstrates that some of this remains alive and well today. Twenty-two-year-old Ms. Killian shared stories of being called a monkey and a tar baby by her fairer-skinned brethren while growing up in Chicago in the 1990s.

<sup>71</sup> See generally GOLDEN, *supra* note 69 (describing the “psychological fixation about color and features that Blacks use to discriminate against each other”); DEBRA DICKERSON, *THE END OF BLACKNESS* 139–41 (2004).

<sup>72</sup> See Audrey Edwards, *Colorstruck*, ESSENCE, May 2004, at 202 (Interview of Marita Golden, author of *DON'T PLAY IN THE SUN*, *supra* note 69). According to Golden:

Young girls want to look like Beyoncé or Eve. And the new way for these cultural icons to become global stars is to have not just lighter skin but also blond hair. Beyoncé's blond hair is not even about her politics; it's just a smart career move. The problem is, for an oppressed people, little Black girls who grow up seeing this end up having very ambivalent feelings about the value of who and what they are.

*Id.*

<sup>73</sup> See Carolyn Edgar, *Black and Blue*, 2 RECONSTRUCTION 13 (1994) (“In the midst of the Black Power Movement, many Black people in Detroit and elsewhere still placed a premium on light skin and curly hair.”). Edgar also noted that, at the time of her article, “the Black woman who gets the most attention from Black men is often the sister with light skin, long hair, and light eyes. No matter how well-educated and ‘down’ they supposedly are, Black men still go for light and long.” *Id.* at 16.

<sup>74</sup> Examples include Beyoncé, Janet Jackson, Ashanti, Alicia Keyes, Halle Berry, Jada Pinkett-Smith, Tisha Campbell, Mariah Carey, and most of the few Black Miss Americas, from the first, Vanessa Williams (1984), to the most recent, Ericka Dunlap (2004). Of course there are also quite successful, beautiful Black women closer to the chocolate variety. Consider, for example, Angela Bassett, Gabrielle Union, and Vivica

media, politics, and various professional careers.<sup>75</sup> Although skin color, facial features, and hair texture generally are immutable,<sup>76</sup> de-blackening still occurs. The name calling often follows. Light-skinned Blacks are often labeled as Oreos, Bananas, and Wanna-bes.<sup>77</sup>

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Fox. It remains a general proposition though, that lighter skin and other Caucasian features are more easily accepted in our society. But Black men in the entertainment world seem to escape such demands. Society has more easily accepted the darker, more "Mandingo-warrior" features possessed by men such as Michael Jordan, Denzel Washington, Michael Clark Duncan, Taye Diggs, and Morris Chestnut.

Long and straight wavy, *i.e.* good hair vs. short and nappy, *i.e.* bad hair, is another intriguing matter. Indeed, even for the darker-skinned women noted above, almost none also have short, nappy/kinky hair. Again, a couple exceptions come to mind: singers Lauryn Hill and India Arie. For a discussion of the "good hair" versus "bad hair" issue, see generally AYANA D. BYRD & LORI L. THARP, *HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA* (2001).

<sup>75</sup> See, *e.g.*, RUSSELL ET AL., *supra* note 34, at 38 (noting that, in 1990, "[f]or every 72 cents a dark-skinned Black made, a light-skinned Black earned a dollar"). W. E. B. DuBois' "Talented Tenth," who would serve and guide the masses, was composed—with one exception—of light-skinned mulattos. See *id.* at 31–32. We see the same results a century later. Light-skinned Blacks are better educated, earn more money, have better jobs and careers, and have greater opportunities for achievement and success than their darker brothers and sisters. See Hughes & Hertel, *supra* note 67, at 1110–16; see also GOLDEN *supra* note 69 at 55–56, 86, 104, 124–26 (discussing news anchors, soap opera actors and actresses, and music video extras).

<sup>76</sup> There are occasional attempts to change immutable characteristics. Consider the skin bleaching phenomenon that exists in the Black community. See RUSSELL ET AL., *supra* note 34, at 49–53. It is reported therein that in 1990, \$44 million dollars of skin-bleaching products were purchased. See *id.* at 51. Skin bleaching also is a big business in various parts of Africa. Author Marita Golden shares some of her experiences in this area from when she lived in Nigeria. She says that so many women bleached their skin that they were known as "the bleachers." GOLDEN, *supra* note 69, at 149–50. The bleaching creams are used in excessive amounts and have made the users more vulnerable to skin cancer, yet the women continue to use the products. See *id.* at 156. The reason behind this illness is found in the following observation by Kenyan cosmetologist and anti-bleaching activist Irene Njoroge:

Women in Africa are economically dependent on men. . . . Women need men in their lives to survive. If the general view is that light-skinned women are more attractive, then it's an investment to try to lighten one's skin. *They are not just buying cream. They are buying a dream of a better life.*

*Id.* at 155 (emphasis added). In addition to skin bleaching, some argue that chemically relaxing (or straightening) Black hair, or adding length to one's hair by the process of weaving, also reflect a yearning to absorb whiteness. See, *e.g.*, INGRID BANKS, *HAIR MATTERS: BEAUTY, POWER, AND BLACK WOMEN'S CONSCIOUSNESS* 43–44 (2000); BYRD & THARP, *supra* note 74, at 177–78; RUSSELL ET AL., *supra* note 34, at 161 (expressing anger at Michael Jackson's attempts to erase his blackness and replace it with whiteness).

<sup>77</sup> My interviews of several light-skinned Black law students at Washington University confirmed this. Students described all kinds of teasing and taunting because they were fair skinned. The taunts included being called hi-yella, banana, and half-breed. See also ONE DROP FILM, *supra* note 11. This film contains interviews of Blacks across the color spectrum. Every light-skinned Black interviewed for the piece tells horror

Many fair-skinned people continue to believe they are better than their darker brethren solely because of their White features.<sup>78</sup> Many dark-skinned people despise and envy their light-skinned brethren because a) the latter possess White features, and b) those White features often grant, whether actually accessed or not, the possessor an inroad to more privileges in life. This leads the darker brethren to discriminate against, and ultimately de-black, the lighter.<sup>79</sup> It is an immensely complex and complicated relationship.

## 2. *Various Cultural Tests*

Economic success often is closely correlated with whiteness. In other words, the higher the income of a given Black person—athletes and, to a

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stories of being accused of being White and being hated by their darker brothers and sisters solely because they had lighter skin. As one light-skinned woman recently said: “When you are light you have to defend yourself to your own people. . . . When you are light, people question your Afrocentricity. Some people say you’re trying to pass. . . . And don’t try to get a little education or there will be people who will say you are stuck up or conceited because you are also light-complexioned.” Sherry Stone, “*Black Is Beautiful*” – *But Which Shade of Black?*, PHILADELPHIA TRIB., Sept. 9, 1994, at A1. See also GOLDEN, *supra* note 69, at 65, 69, 114.

The irony is that, although darker-skinned Blacks may taunt and tease their lighter brothers and sisters, many of these people secretly covet the lighter skin, the long, straight hair, and the more angular noses of the people they ridicule. This almost can’t be helped:

[T]he media reinforces the idea that to be dark is to be unattractive and that “if you are White, you’re all right, if you’re brown, stick around, if you’re Black, get back.” It is reflected in the images we continue to see in broader society. . . . We continue to be exposed to role models in the media who have a fairer complexion. Whose hair is more indicative of the majority population rather than that which is associated with people of African descent[.]

Stone, *supra* (Interview with Dr. Kevin Favor, a psychologist at Lincoln University).

<sup>78</sup> See ONE DROP FILM, *supra* note 11 (concerning a dark-skinned hairdresser complaining that her lighter-skinned sisters believe they are better than she is because they are lighter, even though those lighter-skin sisters have never verbalized as much).

<sup>79</sup> See, e.g., RUSSELL ET AL., *supra* note 34, at 2 (describing discrimination among Blacks based on skin color); ONE DROP FILM, *supra* note 11.

I interviewed Washington University Law school graduate Lynne Perkins in May of 2003. Mr. Perkins is a light-skinned Black man. As a child, arguments with his sibling regularly included the sibling calling him a “honkey,” or teasing that because of his lighter skin, he was not really related to the rest of them. The name calling, he said, was based solely on the fact that he was the lightest member in his family. He also shared stories from experiences years later when he was in the Air Force. He described one argument with a darker-skinned Black male. This person challenged Mr. Perkins because “light skinned people like you always think you are better than dark skinned people like me.” E-mail from Lynn Perkins to author (May 8, 2003, 16:55:31 CST) (on file with author). Although the two eventually worked out their differences, the experience made Mr. Perkins wonder how often light-skinned people perceived themselves to be better because of their lightness. See *id.*

lesser extent, entertainers aside—the greater the likelihood that the person will be perceived as trying to be or wanting to be White. A sixteen-year-old Black female, interviewed by Professor Henry Louis Gates, Jr. in his PBS television series “America Behind the Color Line,” summed it up this way:

Some of the African-American kids in Summit make fun of me because I drive a Mercedes. It does make me feel bad, but I have a nice group of black friends too. It isn't my fault that my parents are successful. I'm proud of that. Do I have to go hiding the fact that I'm rich? No. It's not fair. Being black doesn't mean you have to be poor.<sup>80</sup>

A related issue is neighborhood choice. Blacks who leave the cities for the suburbs are, more frequently than not, accused of wanting to be White and “leaving behind” or “running away from” their people.<sup>81</sup>

Similarly, *how* one lives, becomes a test of blackness. One of my former Black students told me that, while growing up in predominantly White suburbia, he and his White friends would go to the shopping malls as a form of recreation. Later, when he began playing basketball with the Amateur Athletic Union team, he found himself surrounded by young Black teenagers like himself. But once his new Black friends found out he lived in a White community, he was teased for living there and for engaging in activities they perceived as White, like “hanging out at the mall.”<sup>82</sup>

As discussed above, academic success is also perceived as White.<sup>83</sup> Time after time, Black students are de-blackened for performing well in school.<sup>84</sup>

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<sup>80</sup> GATES, *supra* note 52, at 92 (Interview with Viola Irvin).

<sup>81</sup> This development is quite ironic given *Shelley v. Kraemer*, 334 U.S. 1 (1948). That case, involving the right of Black persons to buy property owned by Whites despite of restrictive covenants prohibiting Black ownership, was one of the many aspects of the civil rights movement. *See id.* at 11–12. Against this backdrop, how can it be *un-Black* to live where you want to live? Interestingly, to some extent it does matter who you are or what you do for a living before you can be ostracized because of success or for where you live. Accounts of Hollywood entertainers and professional athletes being de-blackened because of their economic success or where they live are rare.

<sup>82</sup> Interview with Anthony Jackson, Washington University Law School graduate, class of 2002 (May 14, 2003). The teasing disappeared, however, when the 6'7" Mr. Jackson demonstrated his excellent basketball skills. *Id.*

<sup>83</sup> I am not sure when this happened, although I believe it to be a post-1960s development. Prior to that time, there was a strong hope and clear expectation in many Black communities that Black children needed to be “twice as good” as White children in order to succeed. *See, e.g.,* hooks, *supra* note 48, at 43; GATES, *supra* note 52. While the origins of the cancerous idea that being smart is somehow *un-Black* remain untraceable, we are where we are. Given that, most would undoubtedly agree with the words of

Nerd. Geek. Brain. Those words sting. Oreo. White. Sellout. Those slurs cut to the bone. And many black students hear them during their academic careers. The words are reserved for students who . . . engage in intellectual activities—or even study. Some African–American youngsters dismiss those actions as being ‘white’ and therefore not something blacks do. ‘They call us sellouts and try to pull us down.’<sup>85</sup>

Speech is another litmus test. There are legions of stories involving Black people being ridiculed and accused of acting White because they did not use “Ebonics”<sup>86</sup> but instead used correct grammar, were

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newly–elected Senator Barack Obama: “Children can’t achieve unless we raise their expectations and turn off the television set and *eradicate the slander that says a black youth with a book is acting white.*” Senator Barack Obama, Speech delivered at the Democratic National Convention (July 27, 2004), *available at* <http://www.obamaforillinois.com> (emphasis added).

<sup>84</sup> Professor John McWhorter, in addition to sharing his own personal observations, *see* MCWHORTER, *supra* note 20, at 124, quotes similar observations made in 1986 by Signithia Fordham and John Ogbu:

One major reason Black students do poorly in school is that they experience inordinate ambivalence and affective dissonance in regard to academic effort and success. This problem arose partly because White Americans traditionally refused to acknowledge that Black Americans are capable of intellectual achievement, and partly because Black Americans subsequently began to doubt their own intellectual ability, began to define academic success as White people’s prerogative, and began to discourage their peers, perhaps unconsciously, from emulating White people in academic striving, *i.e.*, from ‘acting White.’

*Id.* at 12; *see also* GATES, *supra* note 52, at 48–49 (Interview of Franklin D. Raines, Chairman and CEO of Fannie Mae).

<sup>85</sup> Melanie Lewis, *School Jeers; Stidious Black Youths Cope with Taunts, Criticism, from Peers Who Accuse Them of Trying to Be White*, DALLAS MORNING NEWS, Feb. 21, 1993, at A1. *See also* JOHN U. OGBU, *BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT 198–215* (2003) (discussing peer pressure against academic achievement); Pam Belluck, *Reason Is Sought For Lag By Blacks in School Effort*, N.Y. TIMES, July 4, 1999, at A1 (suggesting reasons for the Black achievement gap).

<sup>86</sup> The word “Ebonics,” is derived from the words “ebony” and “phonics,” and is also referred to as “Black English.” *See* Peter Appelbome, *School District Elevates Status of Black English*, N.Y. TIMES, Dec. 20, 1996, at A18. For the complete text of the Oakland, California, board of education resolution (No. 9697–0063) adopted on December 18, 1996, regarding Ebonics, *see* Educational Cyber Playground, *Linguistics, Full Text of ‘Ebonics Resolution’ Adopted by Oakland Board*, at <http://www.educyberpg.com/Linguistics/ebresolution.html> (last visited July 25, 2003). After the Oakland school board issued its resolution, Richard W. Riley, the United States Secretary of Education under President Bill Clinton, issued a brief statement. He said Ebonics was an English dialect, as opposed to a distinct language, and therefore was ineligible for the federal funds allotted to bilingual education. *See* James Bennett, *Administration Rejects Black English as a Second Language*, N.Y. TIMES, December 25, 1996, at A22. For local



articulate, and spoke “properly.”<sup>87</sup> Some guardians of blackness also look at what kind of music the target listens to,<sup>88</sup> whether the target can dance, and whether the target “dresses Black.”<sup>89</sup>

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and national reactions to the Oakland resolution, see Don Knapp, *Oakland Schools Adopt ‘Black English’ Policy* (Dec. 19, 1996), at <http://www.cnn.com/US/9612/19/Black.english/index.html>; see also Steven A. Holmes, *Black Voice of the Streets Is Defended and Criticized*, N.Y. TIMES, December 30, 1996, at A5. On January 16, 1997, the Oakland board of education responded to the criticism by amending its resolution. For the complete text of the amended resolution, see *Amended Resolution of the Oakland Board of Education* (Jan. 16, 1997), at <http://www.cnn.com/US/9701/16/Black.english/ebonics.amend.html>.

<sup>87</sup> See Clarence Page, *Young Blacks and Acting White*, CHI. TRIB., June 28, 1987, at C3 (describing how Karen Russell, a Harvard Law School graduate and daughter of former basketball star Bill Russell, recalled in a recent essay how a young black secretary had remarked to another lawyer that Miss Russell’s speech was “more white than white people.”); E-mail from Kalin Walker to author (Mar. 19, 2003, 12:09:09 CST) (on file with author) (“I remember the anger that I felt toward those who treated me that way while I was in school. Not just because what they said was insulting, but it goes deeper than that. They associated being articulate with being white. The thirst for knowledge was associated with being white. I have often wondered what those girls are doing now.”); E-mail from Jennifer Tyus to author (Apr. 2, 2003, 10:35:04 CST) (on file with author) (“Whenever I asked someone why [they called me] a ‘White girl,’ the response was always, ‘you just are.’ I always assumed it was because I was in the advanced classes or because I talked ‘proper,’ but I talked that way because that was the way I was taught at school. My parents did not and still do not always speak ‘proper’ English but they always told me to do well in school. Doing well in English class required that I speak the way they told me to, right? I used to come home crying everyday from school because everyone was so mean to me.”); E-mail from Teresa Bryce to author (May 7, 2003, 17:50:26 CST) (on file with author) (“In high school, I was voted Chaplain of the student government for my sophomore year. As Chaplain, I did the morning and afternoon announcements over the PA system. I was told that some of the teachers who hadn’t met me were surprised to learn that I was Black because I didn’t sound Black.”); E-mail from Khara Coleman to author (May 9, 2003, 10:57:06 CST) (on file with author) (“Kids would ask me why I talked so white, or why I sounded like a white girl. . . . I figured that it was because I used such ‘proper’ english. . . . [I]t was all generally grammatically correct, and I never cursed or used slang.”); see generally MCWHORTER, *supra* note 20, at 184–211.

<sup>88</sup> See, e.g., e-mail from Tina Johnson to author (May 7, 2003, 12:35:47 CST) (on file with author) (describing being challenged as not being Black by White co-workers, who contended that real Black people would not listen to the kind of music Ms. Johnson did); see also Leona Smith, *Southern California Voices/A Forum For Community Issues; Youth Opinion, Heavy Metal Is Exactly Her Color; Music Shouldn’t Be Classified by Race, Writes a Student Who Has Been Criticized Just for Humming Something from Aerosmith*, L.A. TIMES, Oct. 12, 1996, at B7.

<sup>89</sup> See *Notes & Reviews, Dressing Black*, DESTINY, Feb. 1994, at 4 (“First, there was ‘dancing black,’ then there was ‘talking black,’ and even a ‘black walk.’ Now, there is the phenomenon of ‘dressing black.’”); STEELE, *CONTENT OF OUR CHARACTER*, *supra* note 4, at 63 (“At the large integrated high school I attended . . . one of the worst sins a black student could be guilty of was not dancing well.”).

De-blackening also occurs if a Black person decides to date or marry outside the race.<sup>90</sup> Although this standard has not been consistently applied,<sup>91</sup> it remains true today that dating or marrying a non-Black person (particularly a Black man marrying a White woman)<sup>92</sup> speaks

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<sup>90</sup> See DAVIS, *supra* note 31, at 7 (describing the ostracism of former NAACP President Walter White after his marriage to a white woman). See also George E. Curry, *The Question Sisters Ask About Gen. Brooks*, May 1, 2003, at <http://newyorkbeacon.com/News/article/article.asp?NewsID=2832&sID=3>, in which George E. Curry, editor-in-chief of the NNPA News Service and BlackPressUSA.com, stated:

Since I returned from Doha, Qatar, there is one question that every African-American woman inquiring about my trip asks. No, it's not whether Army Brig. Gen. Vincent Brooks' private persona is the same as is public demeanor. It's not about his intelligence. Come on, you know the question: Is he married to a sister? It's another twist on a problem Brooks has faced throughout life. Because of his success, some African-Americans are quick to question his Blackness. They ask: Is he a "real" brother? Unfortunately, it's a case of being presumed guilty until proven innocent, not vice versa . . .

"When some of our men gain success, the first thing they do is marry a White woman," one sister complained.

*Id.*

Remember, however, that having a Black mate does not necessarily "save" you from de-blackening. Former Secretary of State Colin Powell is married to a Black woman, but that has not stopped his detractors from challenging his blackness. See *supra* note 12. There are inconsistencies in this area, but the fact remains that dating or marrying outside of the race is a red flag.

<sup>91</sup> There are numerous examples of famous Black Americans who have married outside of their race. See GRAHAM, MEMBERS, *supra* note 51, at 39; see also Curry, *supra* note 90 (examples include Frederick Douglass, Paul Robeson, Marian Wright Edelman, former United States Senator Carol Moseley-Braun, James Earl Jones, Diana Ross, Charles Barkley, Quincy Jones, Julian Bond, Cuba Gooding Jr., Barry Bonds, Iman, Harry Belafonte, Sidney Poitier, Berry Gordy, Gregory Hines, Shelby Steele, Kobe Bryant, Police Chief Charles Moose, Harvard Professors Henry Louis Gates, Jr., William Julius Wilson, and Orlando Patterson); Chen, *supra* note 15, at 158 nn.86–87 (noting that Justice Thurgood Marshall's wife was of Filipino/Hawaiian ancestry, and both of his sons married White women).

It does seem clear though, that depending on *who* the perpetrator is, such a "violation" will be ignored and/or excused. Sometimes, the heritage of a Black person's spouse simply is not as important when compared to the other contributions that person has made to Black America. Examples include Justice Thurgood Marshall, Julian Bond, Frederick Douglass, Paul Robeson, and Marian Wright Edelman.

<sup>92</sup> Justice Clarence Thomas has had his share of attacks on this basis, as has Ward Connerly, the California Board of Regents member behind the creation and ultimate passage of California's Proposition 209. See LARRY ELDER, THE TEN THINGS YOU CAN'T SAY IN AMERICA 16 (2000) ("Black California state senator Diane Watson, a staunch proponent of affirmative action, viciously attacked Connerly, 'He's married a white woman. He wants to be white. . . . He doesn't want to be black.'"). Relationships between Black females and White males, however, are often viewed differently. See, e.g., Curry, *supra* note 90 ("[W]hen Black women . . . marry across racial lines, they are never viewed as race traitors.").

volumes to the Soul Patrol about the person's acceptance of a Black racial identity, or rather, the person's denial of such.<sup>93</sup>

Indeed, rejecting one's Black identity is yet another determining factor. Rejection can occur in two ways. In the first scenario, the target does not wish to be recognized as Black, preferring to be treated as White. Depending on the target's physical features and skin color, "passing" for a White person may not only be possible but may also be desired.<sup>94</sup> In the second scenario, the target does not wish to "pass" as either Black or White. A prominent example of this type is Tiger Woods. Tiger's father is Black and his mother is Thai. When Tiger refused to label himself as a Black person, he inflamed the ire of the Soul Patrol and was labeled a traitor and a sell-out.<sup>95</sup> Tiger's failure to embrace the

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<sup>93</sup> Even W.E.B. DuBois, himself a mulatto—see DAVIS, *supra* note 31, at 7; RUSSELL ET AL., *supra* note 34, at 32—talked about whether the "[negro's] adoption of American ideals meant that we would, among other things always, if possible, marry lighter-hued people so as to have children who are not identified with the Negro race, and thus solve our racial problem in America by committing racial suicide." W.E.B. DUBOIS, *Whither Now and Why*, in THE EDUCATION OF BLACK PEOPLE, TEN CRITIQUES, 1906–1960, 150 (Herbert Aptheker ed., 1973).

I must admit that, although I am challenging the legitimacy of de-blackening, I have de-blackened Black people before and still am not cured of it. I am a work in progress, as they say.

<sup>94</sup> Some very light-skinned Blacks might not be perceived as Black and, indeed, may even be perceived as White. Some Blacks have openly embraced this mistake because they simply do not want to be Black. See, e.g., RUSSELL ET AL., *supra* note 34, at 73–74. Consider also Shirlee Taylor Haizlip's FINDING GRACE: TWO SISTERS AND THE SEARCH FOR MEANING BEYOND THE COLOR LINE (2004), and THE SWEETER THE JUICE: A FAMILY MEMOIR IN BLACK AND WHITE (1995). In both works, Ms. Haizlip's search for a part of her family led to the discovery of a whole branch that is passing for White. These books document the author's search and explore her feelings about these revelations. Blacks, however, are not the only group that tries to pass as another:

[I]n Nazi Germany, Jews passed as Protestants; in today's army, gay men and women pass as straight; on job applications, older people try to pass as younger. In each case, the reason is traceable to some form of discrimination, be it on the basis of race, sexual orientation, or age.

RUSSELL ET AL., *supra* note 34, at 73. It must also be noted that Blacks did not always pass for negative reasons. Passing actually allowed many Black slaves to escape undetected to freedom. Thus, "[b]efore the Civil War, passing was understandable, as it enabled Blacks to escape slavery and brutal racism." *Id.*; see also GOLDEN, *supra* note 69, at 26 (describing passing as a way of avoiding the "rigid system of racial segregation").

<sup>95</sup> Tiger's father is Black. He also has Black facial characteristics and clearly is perceived as Black. See, e.g., Michael Bamberger, *Bowed But Not Broken, Still Scarred by His Famously Inept Remarks, Fuzzy Zoeller Aims for a Fresh Start on the Senior Tour*, SPORTS ILLUSTRATED, Nov. 26, 2001, at 10 (recalling that, shortly after Tiger Woods' 1997 win at the Masters, Fuzzy Zoeller referred to Mr. Woods as a "little boy" and asked that Woods not choose fried chicken and collard greens as his Champion dinner of choice). During his appearance on "Oprah" on April 24, 1997, Tiger Woods commented that he did not like being classified as a Black person. He explained that he is

one-drop rule, and his refusal to completely ignore the race and ethnicity of his own mother when asked to racially identify himself de-blackened him: Other children of multi-racial couples have also expressed the pain and agony of being forced to choose.<sup>96</sup>

As I have shown above, traditional criteria have been used to judge blackness. While these tools have a long history in this country, they no longer have the commanding power of exclusion that they used to. Granted, they are still alive and well today and there is much authority to support this conclusion. In many ways, however, the practice of exclusion and ostracism has evolved to a more sophisticated level. That brings us to today's primary barometers: thoughts, beliefs, opinions.

### *B. Today's Primary Tool: Thoughts and Beliefs*

A young Black lawyer recently shared the following observation:

If you don't blindly follow prominent black leaders, you aren't black enough. If you disagree with the black majority, you aren't black enough. If you don't feel oppressed, you aren't black enough. If you have issues with affirmative action programs, you aren't black enough. If you express an opinion or habits that are at odds with the rest of the black community, you will be ostracized.<sup>97</sup>

Today, the primary basis of exclusion is what the target thinks: the target's political paradigm. Is the target liberal or conservative? A Democrat or a Republican? An affirmative action supporter or a Ward Connerly?<sup>98</sup> These criteria play crucial roles in authenticating a person's blackness; to a large extent, all other cultural tests are meaningless.

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not Black, but rather "Cablinasian": one-eighth Caucasian, one-eighth American Indian, one-fourth Black, one-fourth Thai, and one-fourth Chinese. See Jack E. White, "I'm Just Who I Am"; *White Black Asian Other Race Is no Longer as Simple as Black or White. So, What Does This Mean For America?*, TIME, May 5, 1997, at 32, 34. Woods also was teased and ridiculed by many Black comedians. See DICKERSON, *supra* note 71, at 138.

<sup>96</sup> See Brian A. Courtney, *Freedom From Choice; Being Biracial Has Meant Denying Half of My Identity*, NEWSWEEK, Feb. 13, 1995, at 16 ("Why should I have to shun or hide my white heritage to enhance my ethnicity? Doesn't the fact that I have suffered the same prejudices as every other African-American—and then some—count for something?"); see also DAVIS, *supra* note 31, at 133–34.

<sup>97</sup> E-mail from Khara Coleman, *supra* note 87.

<sup>98</sup> Being a "Ward Connerly" has come to mean being a person who not only is against affirmative action, but does everything in his or her power to eradicate it. See TAMMY BRUCE, *THE NEW THOUGHT POLICE: INSIDE THE LEFT'S ASSAULT ON FREE SPEECH AND FREE MINDS* 112 (2001). The origins of this de-blackening of Connerly undoubtedly relate to his effort to dismantle affirmative action (or "race preferences" as he calls it).

I suspect that United States Supreme Court Justice Clarence Thomas is the best, most contemporary example of *Blackthink* and ostracism at work. From the time of his confirmation hearings<sup>99</sup> to the present,<sup>100</sup> Justice Thomas has been accused of not being Black, or not being Black *enough*. One fairly recent attack is illustrative:

The time has come to weed out those who may look like us but whose actions inflict more damage than anyone outside the race. Black faces in high places provide little comfort if they choose to sacrifice the futures of our children for their own advancement or to their own ignorance. We have no patience for Justice Thomas or any Blacks who pander to the very elements of our society who reminisce about Dixie and long for the day when Blacks had to seek permission to exist. This

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See WARD CONNERLY, CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES 137–58 (2002).

In 1993, Mr. Connerly was appointed to a twelve-year term on the University of California Board of Regents. On July 20, 1995, following Connerly's lead, a majority of the Regents voted to end the University's use of affirmative action in its admissions policy. He went on to advocate an end to affirmative action in California's government through Proposition 209. Proposition 209 (also known as the California Civil Rights Initiative (or CCRI) was subsequently enacted as CAL. CONST. art. I, § 31. Mr. Connerly was also behind a similar initiative in Michigan. See Editorial, *Drive to Ban Affirmative Action Reopens Wounds; Campaign to Amend Michigan's Constitution Is Divisive and Mires State in Racial Politics*, DETROIT NEWS, Jan. 13, 2004, at 8A. For the full text of the now-defunct Michigan Initiative, visit <http://www.michigancivilrights.org>.

<sup>99</sup> It is beyond the scope of this article to explore the reasons surrounding the de-blackening of Justice Thomas. Fortunately, it has been admirably recorded in many sources, including the following: CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS IN THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 218–36 (2004); John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to “The Law School Five,”* 46 HOW. L.J. 175 (2003); A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas From a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1991) [hereinafter Higginbotham, *Open Letter*]; A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405 (1994) [hereinafter Higginbotham, *Retrospect*]; Tony Mauro, *Thomas' Reputation as Lightning Rod Underscored by Professors' Boycott*, N.J. L.J., Mar. 18, 2002, at 6; Bill Maxwell, *Why Such Virulent Condemnation of Clarence Thomas?*, L.A. DAILY L.J., Feb. 20, 1997, at 6; Marianne Means, *A Colorless Voice: Blacks Are Legitimately Unhappy with Justice Thomas' 'Social Policy,'* L.A. DAILY L.J., Aug. 14, 1998, at 6; Stephen F. Smith, *The Truth About Clarence Thomas and the Need for New Black Leadership*, 12 REGENTS U. L. REV. 513 (2000); Cynthia Tucker, *Clarence Thomas Would Kick Away the Ladder He Climbed*, L.A. DAILY L.J., July 26, 1991; Jack E. White, *Uncle Tom Justice*, TIME, June 26, 1995, at 36.

<sup>100</sup> See, e.g., *Justice Clarence Thomas: Earns Buckwheat Award*, June 24, 2003, at <http://www.thenorthstarnetwork.com/news/opinion/182027-1.html> [hereinafter *Buckwheat*]. Buckwheat was the only Black child in the original cast of the old television series “The Little Rascals.” Buckwheat was a very dark-skinned child whose hair was never combed, whose clothes were always dirty and tattered, who spoke poor English, and who always did and said what others told him.

is a man who had he been alive when Lincoln signed the Emancipation Proclamation would have cried for his oppressor and admonished his fellow slaves over their failure to recognize the virtue of their captive state.

Clarence Thomas is deserving of our anger and contempt. His position on *Grutter* is so vile, so reprehensible that he has earned a special place in the annals of The NorthStar Network. For some time we have contemplated how best to call out “race traitors,” those Blacks who have shamelessly pawned our legacy, our history to curry favor with whites of privilege. We are not talking about Blacks who we may simply share a difference of opinion on matters of public policy or electoral politics. No, our disdain is reserved for those Blacks in positions of influence who have worked the hardest to put us back the furthest. For these folks we have reserved a special honor: The Buckwheat Award or “Bucky,” a special recognition for Blacks who excel in minstrelsy.<sup>101</sup>

Bloodline and phenotype confirm that Justice Thomas is Black. Moreover, both culturally and experientially, Justice Thomas identifies himself as Black,<sup>102</sup> However, while these things might be conclusive in a court of law,<sup>103</sup> they are not so conclusive outside of the courtroom.

*Blackthink* requires that because Justice Thomas is Black, that he support certain positions deemed beneficial to the Black community. However, because he often takes positions viewed as antithetical to Black advancement, he is de-blackened. Name-calling, belittling, and ridicule follow.<sup>104</sup>

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<sup>101</sup> *Id.*

<sup>102</sup> See Clarence Thomas, *I Am a Man, a Black Man, an American*, Remarks delivered to the National Bar Association in Memphis (July 29, 1998), available at [http://douglassarchives.org/thom\\_b30.htm](http://douglassarchives.org/thom_b30.htm) [hereinafter Thomas Speech].

<sup>103</sup> See, e.g., *Bennun v. Rutgers State Univ.*, 941 F.2d 154 (3d Cir. 1991); *Perkins v. Lake County Dept. of Util.*, 860 F. Supp. 1262, 1276–78 (N.D. Ohio 1994) (basing the determination of whether a plaintiff in a Title VII case is Black on whether the plaintiff “appear[s]” to be African-American).

<sup>104</sup> See, e.g., *supra* notes 100–101 and accompanying text. Justice Thomas is not alone. A similar fate recently befell federal appellate court nominee Janice Rodgers Brown. See *Judicial Nominee Makes Her Case Before Senate Committee*, ST. LOUIS POST-DISPATCH, Oct. 23, 2003, at A7 (describing “an Internet cartoon depicting Bush calling Brown ‘Clarence’ as he introduces her to Supreme Court Justice Clarence Thomas, [then] Secretary of State Colin Powell, and [then] National Security Adviser Condoleezza Rice”).

## V. A CRITIQUE

A. *The Cost of Exercising Choice*

There is a sense in much of Black America that all Blacks should be united. The failure to unite, to stand together, to support what is deemed to be in the common good, to speak in one voice, can lead to ostracism. Unity is demanded; it is required; it is expected. As will be discussed *infra*, legitimate questions have been raised about whether unity, given the vast diversity among Black Americans, can ever be achieved.<sup>105</sup> Moreover, assuming unity at some basic level is possible, how much are we, as a society, willing to pay to achieve it? How much must be sacrificed to attain it?<sup>106</sup> What should a Black person do if he or she doesn't believe in welfare? What if he or she questions, or even wants to abandon, affirmative action? What if he or she wants to vote Republican?<sup>107</sup> What if he or she does not accept racism as the sole reason for the economic and/or academic dysfunction of many Blacks? What should be done with or to Black people with such views? Should they be consulted and invited to a discussion on the various ways to address social injustice,<sup>108</sup> should they be ignored, or should they be belittled and then ostracized.

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<sup>105</sup> This matter is terribly complex. Of course one wonders whether the Black community, as such, was ever really united. See *infra* note 143 and accompanying text. Indeed, even if one were to go back as far as the beginning of slavery in America, it is clear that there was a divide. Black slave masters, and there were some, had little common interest, for example, with their Black slaves.

<sup>106</sup> Under the guise of unity, and at the cost of free speech, dissent, and difference, black students at some college campuses "have been harassed and ostracized for having white friends. One was supposed to associate only with blacks, sit at the black tables in the dining halls, sit with other blacks in classes, and to present, always, a common front for a common cause—blackness." Lester, *supra* note 29.

<sup>107</sup> "Voting Republican can accomplish what blue eyes, blond hair, and three white grandparents cannot." DICKERSON, *supra* note 71, at 15.

<sup>108</sup> Of course, the ills facing Black America face White America as well. More importantly, there is no logical reason why Blacks, and Blacks alone, should be saddled with the burdens of solving systematic racism and/or oppression. As law professor Randall Kennedy has said elsewhere, "[t]he difficulties that disproportionately afflict black Americans are not 'black problems' whose solutions are the special responsibility of black people. They are *our* problems, and their solution or amelioration is the responsibility of us all, irrespective of race." Randall Kennedy, *My Race Problem and Ours*, ATLANTIC MONTHLY, May 1997, at 65, available at <http://www.theatlantic.com/issues/97may/kennedy/htm>. Consider a similar commentary in the sports context:

I . . . wonder[] why there's rarely a push for non-African-American athletes to develop an agenda that goes beyond on-field performance. Michael

Exercising choice is often painful, but it is much more so when it comes at the price of personal devaluation. Former Secretary of State Colin Powell is a good example of this phenomenon. Despite passing virtually all of the Soul Patrol's criteria—he has the requisite drops of blood, he fits the phenotype, he is married to a Black woman, he supports affirmative action,<sup>109</sup> he has lived a Black experience and embraces a Black culture—he is attacked as a “yassuh boss” and a disappointment to the Black race.<sup>110</sup> It appears irrelevant that he was the highest-ranking Black man in the history of the United States government. It appears irrelevant that he is, and indeed wants to be,<sup>111</sup> a role model for Black youth in economically depressed communities,<sup>112</sup> or that he wants to, and does, give back to those communities.<sup>113</sup> Instead, the focus is on his

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Jordan is vilified and deemed a coward for keeping his mouth shut on controversial social issues. I can't remember anyone wanting to probe Larry Bird's mind about anything more important than “tastes great” or “less filling.”

Look no further than the PGA Tour. We in the media want Tiger Woods to be a freedom fighter of Nelson Mandela proportions. Woods, who is only one-fourth African-American, is expected to speak out against racism, sexism, war and Phil Mickelson's refusal to wear a manbro. Meanwhile, the Tour's non-Cablanasian players need only worry about their games.

Is that fair? More important, is it counterproductive?

Shouldn't the majority community be pressured into having a collective social conscious? Do African-Americans own the moral high ground in America? Is that why the burden of a social conscious seems to fall in our laps?

Jason Whitlock, *What Would Larry Bird Say?* ESPN PAGE 2, at <http://espn.go.com/page2/s/whitlock/030529.html> (last visited Feb. 16, 2005).

<sup>109</sup> See Gary Younge, *A Supreme Show Down—In a Few Days, the U.S. Supreme Court Will Make a Momentous Decision*, THE GUARDIAN, June 21, 2003, at 32, available at 2003 WL 56685114:

Colin Powell, who as Secretary of State is the highest ranking black American in the country, openly disagreed [with the Bush administration's recent opposition to a consideration of race and related affirmative action matters]: “I am a strong proponent of affirmative action,” he said. “I believe race should be a factor [in college admissions]. I thought the University of Michigan had a strong case.”

*Id.*

<sup>110</sup> See, e.g., Pitts, *Groupthink*, *supra* note 12; see also Interview by Larry King with Harry Belafonte (Oct. 15, 2002) available at [http://www.blackcommentator.com/14\\_belafonte.html](http://www.blackcommentator.com/14_belafonte.html).

<sup>111</sup> Contrast this with the statement of former NBA star Charles Barkley, who proudly declared in a 1994 Nike commercial that he was *not* a role model for anyone's children. See David Shaw, *I Am Not a Role Model*, SPORTS UNABRIDGED, at <http://www.sportsunabridged.com/su/080902.htm> (last visited Sept. 8, 2004).

<sup>112</sup> GATES, *supra* note 52, at 20 (interview with Colin Powell).

<sup>113</sup> *Id.*



political affiliation,<sup>114</sup> and that he does not espouse with unquestioning devotion the opinions that the Soul Patrol deems crucial for Black advancement.

Similar attacks have recently been made against Mr. William Cosby. Mr. Cosby spoke at Washington's DAR Constitution Hall on the fiftieth anniversary of *Brown v. Board of Education*, the landmark Supreme Court decision desegregating public schools in the United States.<sup>115</sup> He was invited by the NAACP, the NAACP Legal Defense Fund, and Howard University, to be honored for his lifelong dedication to advancing the goals and realizing the potential of the *Brown* legacy.<sup>116</sup> During his acceptance, Mr. Cosby chastised "lower income" Blacks for improper parenting, not speaking proper English, buying their children \$500 sneakers instead of a \$200 Hooked on Phonics program, and giving their children "weird" names.<sup>117</sup> Instead of focusing on the substance of his commentary, he was "vilified, skewered, and all but thrown to the wolves."<sup>118</sup> Although the words "Oreo" and "Uncle Tom" were rarely used, the equally pungent synonym "race traitor" was.<sup>119</sup> Moreover, despite his proven dedication and millions of his own dollars given to encourage Black academic achievement, he was labeled as a "black elitist," a person with "classist, elitist viewpoints that are rooted in generational warfare," and as "ill-informed on the critical and complex issues that shape people's lives."<sup>120</sup>

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<sup>114</sup> It used to be that merely being a Black Republican was grounds for de-blackening. It became clear, though, that Black Republicans were not necessarily synonymous with staunch Conservatives. Some Black Republicans, like Colin Powell, support affirmative action. The Soul Patrol would say that while his support of affirmative action is good, his other Republican leanings nevertheless justify his exclusion.

<sup>115</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>116</sup> See Ta-Nehisi Coates, *Ebonics! Weird Names! \$500 Shoes!*, VILLAGE VOICE, May 26, 2004; Richard Leiby, *Reliable Source*, WASH. POST, May 19, 2004, at C3.

<sup>117</sup> See Leiby, *supra* note 116.

<sup>118</sup> Amy Alexander, *Reading Between the Lines: Kill Bill? Why Are People Piling on Cosby when Chris Rock and Others Say the Exact Same Things?*, at <http://www.africana.com/columns/Alexander/bw20040601cosby.asp>.

<sup>119</sup> See, e.g., Paula Zahn NOW, *Interview with Bill Cosby* (CNN television broadcast, Nov. 11, 2004), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/041111/pzn.01.html>.

<sup>120</sup> See Alexander, *supra* note 118 (quoting Professor Michael Eric Dyson); see also The Tavis Smiley Show, May 27, 2004, available at <http://www.npr.org/rundowns/segment.php?wflid=1912340> (quoting Dyson).

Fortunately, not all Black journalists and leaders berated Cosby. See, e.g., Alvin A. Reid, *Dr. Poussaint: 'It's Time to Take Better Care of Ourselves'*, ST. LOUIS AMERICAN, May 27, 2004, at 1 (reporting psychiatrist Dr. Alvin Poussaint's defense of Cosby); Pitts, *Cosby*, *supra* note 29; Interview by Tavis Smiley of Cornel West, Professor, Princeton University, May 26, 2004, at <http://www.pbs.org/kcet/tavissmiley/archive/200405/>

While the Cosby episode was a great example of *Blackthink*, or as journalist Clarence Page would say, “BPC” or “Black political correctness,”<sup>121</sup> at work, again it pales when compared to the treatment of Justice Clarence Thomas.<sup>122</sup>

Justice Thomas claims to be the target of “bilious and venomous assaults.”<sup>123</sup> In addition to the usual name calling, such as Oreo or Uncle Tom (or Uncle Thomas, as some have quipped), he is labeled as a puppet of his Supreme Court colleague, Justice Antonin Scalia.<sup>124</sup> Justice

20040526\_transcript.html [hereinafter Cornel West Interview]; Clarence Page, Commentary, *Cosby Sounds off over ‘Dirty Laundry,’* CHI. TRIB., May 23, 2004, at C9 (reporting that NAACP President Kweisi Mfume later said he “fully agreed with what Cosby was trying to say, even if he would have used different words to say it”).

<sup>121</sup> According to journalist Clarence Page, the only reason that Dr. Cosby’s comments were repeated, widely circulated, and severely attacked is

[b]ecause Mr. Cosby violated what I call “BPC,” black political correctness.

We should not hang our dirty laundry out in public, according to BPC, especially in front of white folks—as if white folks didn’t already know when our clothes are not clean. Instead of candidness in our public self-appraisals, BPC tells us to sound like President Bush does on Iraq: If we’ve made any mistakes, we can’t remember what they are.

Clarence Page, Commentary, *Getting It Right*, WASH. TIMES, May 25, 2004.

<sup>122</sup> Even some who questioned some of what Dr. Cosby said were quick to distinguish Dr. Cosby from Justice Thomas. Consider, for example, the following:

We know Bill Cosby’s not on the right wing. He’s not Clarence Thomas, he’s not Ward Connerly. We know him to be someone who, over 50 years, his 40 years in his artistic career, to be in deep solidarity with the black people’s struggle, and people’s struggle as a whole.

Cornel West Interview, *supra* note 120.

<sup>123</sup> Thomas Speech, *supra* note 102. See also *supra* notes 100–101 and accompanying text for some sources and examples of the nature of the attacks lodged against Justice Thomas.

<sup>124</sup> See, e.g., ELDER, *supra* note 92, at 17 (describing a cartoon of Justice Thomas shining the shoes of Justice Scalia). If statistics about the rate of unanimity among members of the Court are true, this criticism is hardly appropriate. Stephen Smith explains why this criticism is misguided:

In their crusade to discredit Justice Thomas, critics fail to mention two salient facts that refute their contention that Justice Thomas merely follows Justice Scalia. First, such high rates of agreement are commonplace on the Supreme Court. For example, during the same Term that Justices Thomas and Scalia agreed 93% of the time, President Clinton’s two appointees to the Court, Justices Ruth Bader Ginsburg and Stephen G. Breyer, agreed 86% of the time. Also, in Justice Anthony M. Kennedy’s first term on the Court, he voted with Chief Justice William H. Rehnquist 93% of the time. Curiously, however, Justices Breyer and Kennedy are not dismissed as mere ‘followers’ of Justice Ginsburg and the Chief Justice, respectively, despite their similarly high rates of agreement.

Smith, *supra* note 99, at 516–17 (footnotes omitted). Smith continues:

The selectivity with which that criticism is leveled is more than simply curious when placed in historical context. In fact, it could be argued that there is a hint

Thomas is treated differently than any other Justice on the Court.<sup>125</sup> According to him, Blacks discriminate against him *because* he is Black.<sup>126</sup> This de-blackening, Justice Thomas has shared, hurts: “[i]t pains

of racial prejudice lurking behind the criticism that Justice Thomas blindly follows Justice Scalia in deciding cases. Only two blacks have served on the Nation’s High Court—Justice Thomas and the late Justice Thurgood Marshall. Both Justices were men of great accomplishment and strong conviction, yet both have been dismissed as merely taking their lead from White colleagues on the Court. Justice Marshall, despite his many achievements, was privately referred to by law clerks at the Supreme Court “as ‘Mr. Justice Brennan–Marshall’ for his pattern of voting with [Justice] William Brennan.” Of course, in spite of their high rates of agreement with each other (which averaged 94.3% from 1980–1989 and stood at an incredible 100% during the 1984 and 1988 Terms), Justice Marshall was not a puppet of Justice Brennan.

*Id.*

<sup>125</sup> Recall that the NAACP opposed Justice Thomas’ nomination, but was not as vociferous when the more conservative Justice Scalia was being considered for the Court. *See, e.g.*, Editorial, *On Blacks v. Thomas . . . The NAACP’s Double Standard*, L.A. DAILY L.J., Aug. 12, 1991; *see also* ELDER, *supra* note 92, at 17 (“[M]any blacks simply cannot rationally discuss Clarence Thomas. Equally conservative Supreme Court Justice Antonin Scalia—no problem . . . . But Clarence Thomas?”).

Similarly in March of 2002, although the Black law professors at the University of North Carolina–Chapel Hill School of Law, boycotted a visit to the school by Justice Thomas, they did not similarly boycott an earlier visit by Justice Scalia. The distinction was explained as follows:

[T]he only black justice on the court has “lent cover” to his conservative colleagues by joining their “anti–progressive” decisions. “Since we are all black,” said [law professor Marilyn] Yarbrough, “we did not want to lend cover to him. We have welcomed justices we disagree with, such as Antonin Scalia and Sandra Day O’Connor.” However, joining Thomas, she explained, would have been seen as an endorsement, or at least a tacit approval, of his views.

Nat Hentoff, *Foes of Thomas Teach Students How to Duck the Issues*, MERCURY NEWS (San Jose), May 7, 2002.

Do not misunderstand me; I do not support the views of Justice Thomas. I relate to the frustration many Blacks have felt over the past decade in trying to understand the lens through which Justice Thomas sees America. *See, e.g.*, Calmore, *supra* note 99, at 180 (“Within significant segments of black America, [Justice Thomas] has been written off. . . . African–American contempt for Justice Thomas can be exceptionally harsh.”). *See* Kimberle Williams Crenshaw, *Toward a Race–Conscious Pedagogy in Legal Education*, NAT’L BLACK L.J. 1, 10–12 (1989). Indeed, I understand law professor Kimberle Crenshaw’s concerns with “perspectivelessness” with renewed awareness after reading Justice Thomas’ opinions. This Article in general, and this commentary on Justice Thomas in particular, are not attempts to stifle debate or criticism. Rather, I am attempting to convince the reader that the enforcement of *Blackthink* under the threat of de-blackening is useless, painful, dehumanizing, stifling, and does nothing to address the underlying social ills of the day.

<sup>126</sup> All of the Supreme Court Justices should be charged with the moral duty to assist any and all oppressed Americans. Being White does not provide a pass on the obligation to remedy societal oppressions. As former Secretary of State Colin Powell recently observed:

me deeply—or more deeply than any of you can imagine—to be perceived by so many members of my race as doing them harm.”<sup>127</sup>

Blacks who are Republican/Conservative/Neoconservative<sup>128</sup> or otherwise socially non-progressive,<sup>129</sup> who question welfare rights,

[T]hose of us who have been successful have an obligation to reach back to these youngsters and help them, more so than I think our white brothers. But I tell my white colleagues, you’ve got to reach down to the black community too.

You’ve got to reach down to any community in need.

GATES, *supra* note 52, at 22 (Interview with Secretary of State Colin Powell); *see also supra* note 109.

Note also that the difference in treatment between Black and White conservatives happens outside of the judicial context as well. Some of my own colleagues, for example, have vehemently protested the addition of a Black conservative faculty member. While it is clear that these colleagues would not quietly accept a White conservative candidate either, the protests against the latter are not nearly as vociferous and invective as they are when leveled against the former. *See also* CARTER, *supra* note 1, at 113 (describing how attacks on “black intellectuals who dissent from the orthodoxy . . . are generally far harsher than those launched on white opponents of the traditional civil rights agenda”).

<sup>127</sup> Thomas Speech, *supra* note 102; *see also* STEELE, *CONTENT OF OUR CHARACTER*, *supra* note 4, at 71 (describing de-blackening as one of the most “damning things” one can do to a Black person). The adage, “sticks and stones may break my bones but words will never hurt me,” simply is not true. Words can cause just as much pain and psychological damage, if not more, than the average stick or stone. As some prominent critical thinkers have noted in various contexts, words do wound. *See generally* MARI J. MATSUDA, CHARLES LAWRENCE III, RICHARD DELGADO & KIMBERLE WILLIAMS CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993); RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* (2002).

<sup>128</sup> Shelby Steele asks the question:

What, in fact, is a black conservative?

Well, he is not necessarily a Republican, or free-market libertarian, or religious fundamentalist, pro-lifer, trickle-down economist, or neocon. I have met blacks in all these categories who are not considered conservatives.

The liberal-conservative axis is a bit different for blacks than for Americans generally. Under his American identity a black Republican is conservative, but under his racial identity he may be quite liberal. Many black Republicans, for example, are intense supporters of preferential affirmative action and thus liberal in terms of their group identity. (Colin Powell is a case in point, as is Arthur Fletcher, a black Republican who helped President Nixon introduce America’s first racial preference in the famous “Philadelphia Plan.”) But the “new” black conservatives—the ones who have recently become so controversial—may even be liberal by their American identity but are definitely conservative by the terms of their group identity. It is their dissent from the explanation of black group authority that brings them the ‘black conservative’ imprimatur. Without this dissent we may have a black Republican but not a “black conservative,” as the term has come to be used.

STEELE, *A DREAM DEFERRED*, *supra* note 10, at 8.

<sup>129</sup> Consider also the story of Maria Hylton, a law professor who was attacked for not being black enough. There were two reasons. First, she did not have *enough* black

affirmative action, or racial preferences, and Blacks who do not accept victimization as a justification for the fate of Blacks, are attacked and pejoratively labeled.<sup>130</sup>

Rejection by the Soul Patrol often follows, and the alleged violator's racial kinship is questioned.<sup>131</sup>

blood running through her veins—"persons like Maria whose parents are White Australian and Black Cuban should not be considered a 'Black' candidate." Irene Sege, *Not Black Enough? Law professor heads to BU after furor at Northwestern over her racial identity*, BOSTON GLOBE, Feb. 9, 1995, at 63 (quoting Northwestern law Professor Joyce Hughes). Second, Professor Hylton's ideology was suspect:

If a law faculty has an ample number of minorities as professors, then conflicting viewpoints among them could be instructive. For example, if 10 faculty members are "minority," then it does not skew an instructional message if 5 are "liberal" and 5 are "conservative," to use convenient labels. But without sufficient representation, a distorted message is sent.

Sege, *supra* (excerpts from Professor Hughes' December 4, 1994 memorandum to the Northwestern University School of Law faculty); see also Secter, *supra* note 7 ("In a later [telephone] call . . . [Professor] Hughes told [Maria Hylton's husband, who was on the Northwestern faculty at the time.] . . . that she wouldn't support the appointment because "[Maria Hylton] was too conservative and [Professor Keith Hylton] was too conservative and she was only going to support people who were socially progressive.").

<sup>130</sup> Consider the following e-mail I received from John McWhorter, author of *LOSING THE RACE*, *supra* note 20, in connection with my attempt to get him to discuss his ideas at my law school:

You know, on the offer to speak there, the sad truth is that in real life, when people like me travel to college campuses, specifically, to "debate" these issues, the result is always that a certain posse come out taking the occasion as an opportunity to sling mud. These types refuse to even try to listen or understand, come to the "debate" with their minds made up, and often shepherd in undergraduates to "learn" from seeing the evil "black conservative" pilloried.

I have never experienced anything hideous in that vein — people rarely shout, are never violent, etc. But the overall tone of the event is tense and sour, and nothing well-intentioned conveners try to do to moderate the tone is effective. I find that these days, because *Losing the Race* has gotten so much attention, I appear to be the favorite whipping boy of the moment for these sorts.

....  
[S]adly, universities are the most intolerant settings in the country today when it comes to race ideology.

E-mail from John H. McWhorter to author (April 12, 2003, 15:03:53 CST) (on file with author) (emphasis added).

<sup>131</sup> Consider, for example, the disdain in which many Black conservatives are held. See e.g., Lee H. Walker, *Opening Minds to Black Conservatism*, NEW COALITION NEWS & VIEWS, Dec. 1, 2003, available at <http://www.heartland.org/Article.cfm?artId=13754> ("Conservative black academics and professionals are often maligned for their conservative views . . . . In the black community, the word 'conservative' almost uniformly calls up disparaging and negative stereotypes.").

Of course the irony is that as a group, although polls indicate that many Blacks do not like the word "Republican," many Blacks do, in fact, hold conservative views. See

So what does this mean? Is it the case that White Americans can be complex, multi-faceted human beings, tapping into all that America has to offer and fully exercising their constitutional rights, while the same complexities and exercises are unacceptable in Blacks?<sup>132</sup> Is it true that a narrower range of permissible thought is available to Blacks? Is it really the case that, as a Black American, “I have no right to think the way I do because I’m black[?]”<sup>133</sup> Because racism certainly exists within the larger society, does that mean Black thought and action must continually be dictated (and thus limited) by racism?<sup>134</sup> This conundrum can drive one insane. Indeed, as a self-proclaimed invisible man once noted:

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James L. Robinson, *On Becoming a Black Conservative*, NAT. MIN. POLITICS, Feb. 1995, at 37–38. Professor Robinson observes:

A series of *Washington Post* polls conducted in 1991 found that blacks rarely classified themselves as “conservative Republicans.” Among 445 Blacks surveyed, only 8 percent described themselves as such, but when the term “Republican” was taken out of the question, 35 percent identified themselves as ‘conservative’ or ‘very conservative.’ According to recent Gallup Polls nearly 60 percent of blacks favor the death penalty and 85 percent support school choice. Fifty-three percent of the black public disapprove of mandatory busing and 77 percent feel that minorities should not receive preferential treatment to make up for past discrimination (affirmative action).

*Id.*; see also STEELE, A DREAM DEFERRED, *supra* note 10, at 175–76 (describing how the NAACP agenda is out of touch with the priorities of the majority of Black Americans); Tamar Jacoby, *Life in Black and Right; Conservative, African American, Making Waves*, WASH. POST, Aug. 20, 1995, at C1. Blacks are all over the spectrum when the issue involves either equal rights for homosexuals or full acceptance of homosexuality. See e.g., Keith Boykin, *Why the Black Church Opposes Gay Marriage. Whose Dream?*, VILLAGE VOICE, May 24, 2004; Eric Deggans, *Similar Struggles? Gay Rights & Civil Rights*, ST. PETERSBURG TIMES, Jan. 18, 2004, at 1P (“Henry Louis Gates Jr.—one of the country’s leading scholars on race and civil rights as Chair of African and African American Studies at Harvard University [says] . . . The black community has traditionally been homophobic . . . [it’s] deeply rooted in our culture[.]”); Benoit Denizet-Lewis, *Double Lives on the Down Low*, N.Y. TIMES, Aug. 3, 2003, §6 (Magazine), at 28; Ryan Lee, *Blacks Divided over Gay Marriage, Church Leaders Outspoken in Favor of Ban; Lawmakers Oppose It*, N.Y. BLADE, May 28, 2004, at [www.nyblade.com/2004/5-28/news/national/church.cfm](http://www.nyblade.com/2004/5-28/news/national/church.cfm).

<sup>132</sup> Can Blacks, like Whites, surgically narrow their noses? Can Blacks wear blue or hazel-colored contact lenses? Can Blacks chemically “straighten” or relax their hair? Or do these things somehow make the Black person who partakes in these indulgences *less* Black? See GRAHAM, MEMBERS, *supra* note 51, at 228–31. The problem, of course, is that the fibers of the American fabric purport to be colorblind. Colorblindness, while a laudable goal, actually replaces colorism with a default; that default is White. American identity and culture, then, often means a *White* identity and culture.

<sup>133</sup> Thomas Speech, *supra* note 102.

<sup>134</sup> Consider, for example, the following:

Some blacks have recoiled from Cosby’s pointed remarks, not because they disagree, but because they don’t want to discuss certain ignominious truths in front of white folks. They fear such painful self-analysis will only provide

I was never more hated than when I tried to be honest. Or when, even as just now I've tried to articulate exactly what I felt to be the truth. No one was satisfied—not even I. On the other hand, I've never been more loved and appreciated than when I tried to 'justify' and affirm someone's mistaken beliefs; or when I've tried to give my friends the incorrect, absurd answers they wished to hear. In my presence they could talk and agree with themselves, the world was nailed down, and they loved it. They received a feeling of security. But here was the rub: Too often, in order to justify them, I had to take myself by the throat and choke myself until my eyes bulged and my tongue hung out and wagged like the door of an empty house in a high wind. Oh yes, it made them happy and it made me sick.<sup>135</sup>

### B. *The Myth of One Voice*

Just as Black people's skin color spans a spectrum of shades,<sup>136</sup> there is a spectrum in every other facet of our being. We range from the very poor<sup>137</sup> to the very wealthy,<sup>138</sup> from the well educated to the academically

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fodder to the race-baiters—the Neal Boortzes and Rush Limbaughs—who work hard at stoking a white backlash.

I'm sure Boortz and Limbaugh have already made ample use of Cosby's speech to stir up the racist rants among a certain segment of their listeners. So what? They'd look for excuses to poke the tender wounds of race no matter what Cosby had said.

It is more important that black Americans have a spirited debate about the challenges of the post-civil rights era . . .

Cynthia Tucker, *Bill Cosby's Speech: His Words Sting Because Truth Hurts*, ATLANTA JOURNAL-CONST., May 26, 2004, at A15.

<sup>135</sup> Ralph Ellison, *INVISIBLE MAN* 572–73 (Random House 1980) (1947); see generally CARTER, *supra* note 1, at 126 (“In order to avoid becoming an outcast, in order to gain what the dissenter not infrequently desires—the respect, the admiration, even the friendship of other Black people—the dissenter might well choose to remain silent, to bear stoically the insistence on a path he or she considers profoundly misguided. All too often, the alternative is to find oneself being accused of being only biologically black.”); JOHN H. MCWHORTER, *AUTHENTICALLY BLACK: ESSAYS FOR THE BLACK SILENT MAJORITY* (2003).

<sup>136</sup> See, e.g., *supra* notes 65 & 74.

<sup>137</sup> In 1995, the number of people in the United States living below the poverty level was 36.4 million, or 13.8 percent of the total population. Of that 36.4 million, there were 9.9 million Blacks, or 29.3 percent of the Black population. U.S. Census Bureau, *Frequently Asked Questions About Poverty and Health Statistics* (last revised on Aug. 22, 2002), available at <http://www.census.gov/hhes/poverty/povfaq.html>. The figures for Black Americans under 18 years old are no better. In 2003 the Children's Defense Fund reported that the number of Black Americans under 18 living in extreme poverty, i.e., after tax income of \$7100.00 or less for a family of three, reached almost one million in 2001. That figure was up from 686,000 in 2000.

disadvantaged. Some identify with conservatives, others with liberals.<sup>139</sup> Some support affirmative action, some do not.<sup>140</sup> A single Black voice is an oxymoron. One voice is a myth. The reality is that:

*We are, from the bottom to the top, as polymorphous as the dance of Shiva. We are not a race, not a culture, not a society, not a subgroup, not a "breeding group," or a cline, not even simply an agglomeration of individuals. We are, in my mind, a civilization, a collection of cultures, societies, nations, individuals, "races." We are ancient and new, Christian, Muslim, Jew, American, Trinidadian, Zimbabwean, female, and male, gay and straight, brilliant and stupid, wealthy and poor, mocha and almond and ripe olive. We are at times a "We" and a "Them," an "Us" and "The Other." Being a civilization does not mean we will always like one another, agree with one another, or even—though this is not wise—listen to one another. But I hope it means that my name will be written on this great palimpsest, my ideas, my contributions, my voice, right next to yours. Let all be included. Let none be cast aside.*<sup>141</sup>

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<sup>138</sup> According to *Forbes Magazine*, in 2003 Oprah Winfrey became the first Black female billionaire. Meg Richards, *Welcome to the Club; Oprah Joins Forbes' Billionaire List and Makes History*, Feb. 27, 2003, at [http://abcnews.go.com/sections/business/DailyNews/forbes\\_billionaireslist\\_2003.html](http://abcnews.go.com/sections/business/DailyNews/forbes_billionaireslist_2003.html). In 2001, Black Entertainment Television founder Robert Johnson became the first Black billionaire. *Id.*; Brett Pulley, *The Cable Capitalist*, *Forbes.com*, Oct. 8, 2001, at <http://www.forbes.com/global/2001/1008/022.html>.

<sup>139</sup> Consider, for example, Rev. Jesse Jackson's positions on affirmative action verses the politics Ward Connerly's politics. For a history of Black conservatism, see *BLACK CONSERVATISM: ESSAYS IN INTELLECTUAL AND POLITICAL HISTORY* (Peter Eisenstadt ed., 1999). For empirical data on Black viewpoints, opinions and political leanings, visit the website of the Joint Center for Political and Economic Studies at <http://www.jointcenter.org>. This center was created in the mid–1970s to “improve the socioeconomic status of black Americans and other minorities; expand their effective participation in the political and public policy arenas; and promote communications and relationships across racial and ethnic lines to strengthen the nation's pluralistic society.” *Id.*

<sup>140</sup> While Colin Powell and Condoleezza Rice are affirmative action supporters, other Blacks, including Ward Connerly and Justice Clarence Thomas, are not. The same divide exists in the Black community: some support affirmative action while others do not. For some startling numbers on the percentage of Blacks who voted in favor of Proposition 209, see *Under the Skin: Shelby Steele on Race in America, Interview by Peter Robinson*, aired on March 22, 2001, at <http://www.hoover.stanford.edu/publications/digest/013/steele.html>. See *supra* note 98 for an explanation of Proposition 209.

<sup>141</sup> Reginald McKnight, *Confessions of a Wannabe Negro*, in *LURE AND LOATHING: ESSAYS ON RACE, IDENTITY, AND THE AMBIVALENCE OF ASSIMILATION* 112 (Gerald Early ed., 1993).



I completely understand the desire for one voice and the benefits of such unity. I also understand what slavery has done to the mind and core of Black Americans, and that both America in general, and Black America in particular, is still in need of healing. But given the undeniable diversity in Black America today, doesn't it follow that a single voice does not exist? Indeed, who could possibly determine the makeup of that collective voice, or what it would say? Maybe we cannot speak in terms of the singular Black voice at all. Neither the Black liberal nor the Black conservative can be put forth as a single representative for "the race."<sup>142</sup> Race and/or skin color alone simply cannot cancel out all other differences. Yet de-blackening continues and it does not seem to be heading in a positive direction.

Aside from the vastly diverse Black communities of the twenty-first century, it is also worth remembering that the Black community *never* was a monolith. Black people in this country have always differed on the proper road to Black freedom and advancement. Indeed:

Dissent and disagreement have been the hallmark of black history. Though Booker T. Washington, the most politically powerful black in American history, sought to control the minds of black folks with that power, W.E.B. DuBois, the preeminent intellectual and founder of the NAACP, fought publicly with him over whether the minds and souls of black folks were better protected by protest and the vote or accommodationism and economic nationalism. Later, DuBois and Marcus Garvey, the ideological father of today's black separatists, would not even pretend that they liked or respected each other.<sup>143</sup>

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<sup>142</sup>A parallel notion is the need for a Black leader. The idea that one Black person can actually be expected to speak on behalf of millions of Black Americans (many of whom had no say in the choosing, *see* Robinson, *supra* note 4), is troubling. Moreover:

[W]ho leads whites? The need for a black leader was necessary during slavery. Some brave soul had to truck up to the master's house to voice complaints. Leaders were needed when blacks couldn't vote or when there were no black-owned media to voice outrage. Today, blacks are too diverse in opinion and economic status for any group to represent them singularly. Organizations may be needed to advocate causes but not to lead people.

Sylvester Brown, Jr., *Local Black "Leaders" Fall Victim to Outdated Notion*, ST. LOUIS POST-DISPATCH, July 27, 2003, at D2; *see also* ELDER, *supra* note 92, at 78:

Who is the Western European Caucasian leader? The Eastern European Caucasian leader? The Mexican-American leader? The Jewish-American leader?

How condescending for the media to constantly speak of a "black leader." The media apparently perceives other groups as smart enough, competent enough, and intelligent enough to somehow, some way, lead themselves. Not so for blacks.

Differences of opinion continue. Three fairly contemporary examples should suffice. The most recent example, of course, is the Cosby matter referred to earlier. Many people in Black America disagreed either with what Mr. Cosby said, why he said it, when he said it, and/or where he said it.<sup>144</sup> Many others embraced what Mr. Cosby had to say.<sup>145</sup> Clearly “Cosby and black ‘leadership’ [in this example, again] represent two long-standing differences about how to deal with the problems of the black community. The ‘leaders’ are concerned with protecting the image of blacks, while Cosby is trying to protect the future of blacks, especially those of the younger generation.”<sup>146</sup>

A second contemporary example is found in the school desegregation context. Professor Tomiko Brown-Nagin recently published an article examining an intraclass conflict in the Black

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<sup>143</sup> Lester, *supra* note 29. Consider, for example, the differing philosophies of W.E.B. DuBois on the one hand and Booker T. Washington on the other. Compare BOOKER T. WASHINGTON, *Up From Slavery*, in *THREE NEGRO CLASSICS* 23–205 (1965), and WILLIAM E. B. DUBOIS, *The Souls of Black Folks*, in *THREE NEGRO CLASSICS* 207–388 (1965). Add to this Marcus Garvey’s criticism of “those mulatto” Black leaders like W.E.B. DuBois and Booker T. Washington, see DAVIS, *supra* note 31, at 134; CARTER, *supra* note 1, at 122 (describing how DuBois felt about being an intellectual “in the era of Washington’s hegemony”). Consider also the division between Martin Luther King, Jr. and Malcolm X. See, e.g., JOHN J. ANSBRO, *MARTIN LUTHER KING, JR., NONVIOLENT STRATEGIES AND TACTICS FOR SOCIAL CHANGE* 202–24 (6th ed. 2000); MICHAEL ERIC DYSON, *I MAY NOT GET THERE WITH YOU* 110–11 (2001) (describing Malcolm X’s attacks on King); Smith, *supra* note 99, at 530–31 (detailing the “long tradition of dissent within the black community on civil rights”); Joseph Brown, *The “Other” Black History*, *DESTINY*, Feb. 1994, at 34 (discussing and recognizing the diverse viewpoints of many famous black heroes). *Citizen King: Three Perspectives*, (PBS television broadcast, Jan. 19, 2004) (Interview with Malcolm, calling King an “Uncle Tom”). Finally, for a contemporary illustration of dissent among Black intellectuals, recall the late Judge A. Leon Higginbotham, Jr.’s criticisms of Justice Thomas. See Higginbotham, *Retrospect*, *supra* note 99, at 1413–14; Higginbotham, *Open Letter*, *supra* note 99, at 1005.

<sup>144</sup> See *supra* notes 115–20 and accompanying text; see also Tucker, *Bill Cosby’s Speech*, *supra* note 134 and accompanying text (“Never mind Howard University. The administration of the Washington institution is apparently in a bit of a huff because Bill Cosby used its podium to criticize the failings of black America—especially its underclass. Howard’s leaders, who won’t release a transcript of Cosby’s speech, are still not prepared to have a public discussion of self-inflicted wounds.”).

<sup>145</sup> See, e.g., *supra* note 119; see also Tucker, *Bill Cosby’s Speech*, *supra* note 134 (“Perhaps Bill did us a favor,” says [former]NAACP President Kweisi Mfume, who attended the ceremony, “and more people will now be prepared to step forward. It’ll be a tough love conversation, whether or not people want to have it. And it will take opinion leaders to say those things that should be said.”).

<sup>146</sup> Thomas Sowell, Editorial, *Comedian’s Remarks No Laughing Matter*, *SOUTH FLA. SUN–SENTINEL*, May 28, 2004, at 25A.

community in two Atlanta school desegregation cases.<sup>147</sup> In her article, Professor Brown-Nagin chronicles the resistance and struggles facing the courts and the lawyer for the class action plaintiffs in these cases—the NAACP Legal Defense Fund. It addresses the reality that any given group of Black people, all having the same goals—in this case, equal public school education—can still hold divergent, and sometimes totally opposing, views on *how* to accomplish them. Individual class members in these cases, the plaintiff class members of *Calhoun v. Cook*,<sup>148</sup> and *Armour v. Nix*:<sup>149</sup>

[W]ere split into multiple opposing camps based on their divergent remedial preferences. Some, including a contingent of working-class and poor plaintiffs, favored using busing as a tool for achieving meaningful pupil integration. Others favored improved schools but did not express a strong or informed opinion about what kind of court order would achieve this goal. Still others, a small group of middle-class Black leaders who were supported by local White elites, demanded Black administrative control of the school system and a remedy that minimized pupil integration.<sup>150</sup>

There were clearly different paths of resolution, but at no time did the “presiding judges . . . meaningfully address the reality that poor Blacks had interests distinguishable from those of the middle-class Blacks who were the self-proclaimed leaders of the entire African American community.”<sup>151</sup> As a result, the perspective of the latter group prevailed.<sup>152</sup>

A third and final example is reflected in a debate involving the best interests of Black students in inner city public schools in St. Louis, Missouri. The St. Louis Public School system had the lowest test scores and highest dropout rates in the state, despite having spent more than

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<sup>147</sup> See Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intra-racial Conflict*, 151 U. PA. L. REV 1913 (2003).

<sup>148</sup> *Calhoun v. Cook*, 332 F. Supp. 804 (N.D. Ga. 1971) (per curiam), *aff'd*, 522 F.2d 717 (5th Cir. 1975).

<sup>149</sup> *Armour v. Nix*, Civ. No. 16708, 1979 U.S. Dist. LEXIS 9609 (N.D. Ga. Sept. 24, 1979).

<sup>150</sup> Brown-Nagin, *supra* note 147, at 1916.

<sup>151</sup> *Id.* Indeed, as Professor Brown-Nagin makes clear, “not only the courts but also plaintiffs’ own counsel largely ignored the intra-racial conflict that developed in the case . . .” *Id.* at 1974.

<sup>152</sup> *Id.* Despite loud, consistent opposition by some plaintiff class members, the Fifth Circuit fastidiously held on to the assumption “that a unity of interest flowed from racial sameness.” *Id.* at 1966, 1974.

\$10,000 per student, more than any of the suburban schools in the state.<sup>153</sup> This had an adverse impact upon Black students, who comprised at least 80% of the district's more than 40,000 students.<sup>154</sup> Community residents, Black leaders, business leaders, and the City's government all were concerned about this state of affairs.<sup>155</sup> A group of Blacks known as the St. Louis Black Leadership Roundtable, the Mayor's office, and others met to discuss how to improve the St. Louis public school system. This coalition eventually engineered the successful election of four new school board members.<sup>156</sup> The mission of this Board was:

[T]o go into the education budget and find \$40 million being used for noneducational purposes and shift that money into classroom instruction—more and better teachers, more tutors, more after-school classes, anything that went directly towards helping children learn better. That would mean cuts somewhere else and possibly layoffs, but if it improved education scores and closed the achievement gap, so be it. . . .<sup>157</sup>

The school board hired—to the tune of \$4.47 million—a management team to take control of the troubled district.<sup>158</sup> It then learned that the operating deficit was projected to be as high as \$90 million.<sup>159</sup> With the debt out of control and mounting, the school board closed sixteen schools, halted transportation routes, and laid off almost 1,400 employees.<sup>160</sup>

Many in Black communities, feeling outraged and betrayed, clamored loudly for the children to boycott the schools. Reverend Al

<sup>153</sup> See Jake Wagman, *Private Firm Faces Mess of Bureaucracy*, ST. LOUIS POST-DISPATCH, June 22, 2003, at B1 (describing the debate over whether St. Louis should turn the schools over to private management); see also Todd Frankel et al., *In the End, Kids Came to Learn; First-Day Attendance Is Up Despite Push To Boycott Schools*, ST. LOUIS POST-DISPATCH, Sept. 9, 2003, at A1.

<sup>154</sup> See Ron Harris, *Power, Race & Trust*, Series: Power, Race & Trust, Part 1 of 2, ST. LOUIS POST-DISPATCH, Sept. 7, 2003, at A1 [hereinafter Harris, Part 1].

<sup>155</sup> See *id.*; see also Ron Harris, *Lack of Trust Poisons School Debate; Many Blacks Who See Change Coming and Feel Left Out of the Decision-Making Process Still Nurse Bitterness from Decades-Old Political Battles with St. Louis' White Leaders*, Series: Power, Race & Trust, Part 2 of 2, ST. LOUIS POST-DISPATCH, Sept. 8, 2003, at A1 [hereinafter Harris, Part 2].

<sup>156</sup> For political reasons, the four new members were divided along racial lines: two were Black and two were White.

<sup>157</sup> Harris, Part 1, *supra* note 154.

<sup>158</sup> See Jake Wagman, *Private Management Company Will Take Over St. Louis Public Schools in "Turnaround" Plan*, ST. LOUIS POST-DISPATCH, May 31, 2003, at 7.

<sup>159</sup> See Harris, Part 2, *supra* note 155.

<sup>160</sup> See *id.*

Sharpton was brought in to add fuel the fire. The Black school board members who voted in favor of the cutbacks were called traitors to their race and pawns of a White mayor, "willing to sacrifice black schools in an effort to lure more whites back into the city,"<sup>161</sup> sell-outs (or "rent-a-negros" as the Reverend Al Sharpton put it),<sup>162</sup> and simply "[not] strong enough to do what is in the best interest of the black community. . . . White folks' money got them elected, so they feel compelled to do what they want them to do."<sup>163</sup> Not only were these Black school board members de-blackened, but every other Black person in the community who did not support the critics of the school board—and there were many—were similarly de-blackened.

As in the Atlanta school desegregation context, Black parents, residents, community members, leaders, and business people in St. Louis all were interested in the same goals but were divided over how to reach them. The racial identities of the dissenters were attacked. Indeed, by disagreeing with fellow Black Americans, the dissenters "upset the convention requiring minority groups to act as if all group members embrace a monolithic point of view. *This interpretative norm—which is a constituent element of constitutional law—devalues, even punishes, expressions of dissent.*"<sup>164</sup> The irony was clear: Black people often complain about the White societal tendency to treat all Black people alike and to, say that they all look alike and *think alike*. Yet many Blacks do the same despicable thing to each other. What should happen in the face of disagreement? Should dissent be stifled, or should it be aired and explored? Indeed, what about the growth that comes from full and open dialogue?<sup>165</sup> Isn't

this development—public discussion of divergent views by and among African Americans . . . *indicative of progress*. After all, the civil rights

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<sup>161</sup> Harris, Part 1, *supra* note 154.

<sup>162</sup> Sharpton Film, *supra* note 13.

<sup>163</sup> Harris, Part 2, *supra* note 155.

<sup>164</sup> Brown-Nagin, *supra* note 147, at 1974 (emphasis added).

<sup>165</sup> Michael Middleton is a former colleague of Justice Clarence Thomas at the Equal Employment Opportunity Office in St. Louis, Missouri. Mr. Middleton currently is a law professor and Deputy Chancellor at University of Missouri-Columbia. I spoke with Deputy Chancellor Middleton in April of 2004 and he said "while I disagree with most of Thomas' conclusions, we have agreed on more of the stuff that gets him there than most people would think. . . . That said, I think we need to engage with people like Clarence on an intellectual level if for no other reason than to test our own thinking." A current colleague recently told me that if he had to be stuck on an island with his choice of former presidential candidate Howard Dean or President George W. Bush, he would chose the person whose philosophy is the exact opposite of his own, as that would make his time on the island exciting and full of growth and challenge.

movement liberated blacks from the constraints imposed by Jim Crow, not the least of which were stereotypes that forced a race-based sociopolitical cohesion born of disenfranchisement and disempowerment. Such cohesion was improbable after the chains of de jure segregation no longer bound African Americans together and discrimination began to affect different segments of African Americans in distinct ways.<sup>166</sup>

What is the *real meaning* of choice?<sup>167</sup> A conundrum. My favorite word. Do *choices* really exist for Blacks? Is only one voice valid and deserving of being heard?<sup>168</sup>

## VI. CONCLUSION

Discrimination has been defined as “a reliance on immaterial outward appearances that stereotype an individual with imagined . . . characteristics thought to be common to members of the group . . . . It results in a stubborn refusal to judge a person on his merits as a human being.”<sup>169</sup> *Blackthink*, ironically, is quite similar to what I would call as a more traditional type of discrimination. It relies on outward appearances, and it requires that a person hold a certain set of beliefs based on race,

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<sup>166</sup> Brown–Nagin, *supra* note 147, at 1972 (emphasis added).

<sup>167</sup> Maya Angelou recently told the following story about choice and the different kind of criticism it brings:

Martin Luther King told a story that after the Montgomery bus boycott ended and the companies capitulated, a black woman got onto the bus and walked all the way back and sat in the back seat. A young man who had been so adamant about voter registration, so adamant, and about the boycotting, went back and he said, “Ma’am, excuse me, we have walked eighteen miles so that you don’t have to sit here.” And she said, “Son, I walked with you, but now that I can sit anywhere, I’m sitting in the back. It’s much more comfortable. I can relax, put my bags down, and stretch my legs out.” Then she smiled.

GATES, *supra* note 52, at 147–48 (Interview with Maya Angelou).

<sup>168</sup> As William Smokey Robinson once said in a related context:

How come I didn’t get the chance to vote on who I’d like to be?

Who gave you the right to make that decision for me?

I ain’t under your rule or in your dominion

And I am entitled to my own opinion

Robinson, *supra* note 4. Actually, some have surmised that it was “during the 1960s, when civil rights legislation was gaining traction that the black intelligentsia clamped down on any public acknowledgement of black dysfunction. Civil rights leaders believed any admission of black failure would damage the movement. A later generation of ‘black power’ activists denounced any black critic of black failure as a race traitor.” Cynthia Tucker, *The Cosby consensus*, BALT. SUN, Sept. 27, 2004, at 11A. Since those times, Black America has lived in that world, the world of “BPC,” *see supra* note 121 and accompanying text, and that world comes down hard on divergent views and the public airing of same.

<sup>169</sup> *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 173 (3d Cir. 1991).

ethnicity, and skin color. It wants all Black people to think alike. It forces compliance by refusing to recognize individuality and difference. It feeds the dehumanizing and stigmatizing stereotypes that the legal academy purports to eschew. The one-voice mentality perpetuates the myth of inferiority. A threat of ostracism replaces the physical chains of old with the mental chains of a new era.

Once in power, the formerly oppressed will become the new oppressors if they are not careful.<sup>170</sup> The practice of *Blackthink* by society at large and by legal academicians in particular<sup>171</sup> often crosses that line. Although I do not agree with any of Justice Thomas' Supreme Court opinions, criticism of those opinions can be pursued without challenging his racial identity or dehumanizing name-calling.<sup>172</sup>

Princeton Professor Cornel West once said that "[t]he hegemony of black liberalism<sup>173</sup>—especially among black academic and political elites . . . impose[s] restraints on the quality and scope of black intellectual exchange."<sup>174</sup> This is certainly true, but why? And more importantly, how does name-calling and devaluing others do anything to legitimately advance positive social change?<sup>175</sup> Not only do I support argument and debate, I also support dissent. But while attacking someone's politics on the merits is one thing, de-blackening the person is quite another. Indeed, as Colin Powell said of Harry Belafonte's "yassuh boss" verbal attack on him:

If Harry had wanted to attack my politics, that was fine. If he wanted to attack a particular position I hold, that was fine. But to use a slave

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<sup>170</sup> "We risk becoming tokens, and taking our meanings and identities from those who have let us in." Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 54 (1988) (citing Arif Dirlik, *Culturalism as Hegemonic Ideology and Liberating Practice*, 6 CULTURAL CRITIQUE 13, 48 (Spring 1987)).

<sup>171</sup> Aren't legal academics purported to be the protectors of tolerance, diversity and justice for all? Or have "the essential ingredients of social change—freedom of expression and personal liberty—. . . suffered extraordinary damage in the name of 'social equality,' 'feminism,' and 'civil rights[?]'?" BRUCE, *supra* note 98, at xiv.

<sup>172</sup> Black ACLU lawyer David Baugh once represented a grand imperial wizard of the Ku Klux Klan in a cross burning case. This is the *ultimate* belief in the right to freedom of expression. Baugh believes that the Constitution protects the right to burn a cross. And, as he further elaborated, "[t]he Klan is a hate organization and the people in it are evil. But I don't have the right to gag them." *The KKK Are Evil, but I Don't Have the Right to Gag Them*, EVENING STANDARD, Dec. 18, 1998, at 27, available at 1998 WL 23725593 (Dec. 18, 1998).

<sup>173</sup> And, quite frankly, White liberalism as well.

<sup>174</sup> WEST, *supra* note 42, at 75 (emphasis added).

<sup>175</sup> CARTER, *supra* note 1, at 139 ("[S]ilencing debate solves no problems; it simply limits the range of possible solutions.").

reference, I think, is unfortunate and is a throwback to another time and another place that I wish Harry had thought twice about using.<sup>176</sup>

Universities are environments for development of the mind. They also, quite frankly, tend to be places where liberalism proudly thrives. My view of liberalism requires a more embracing conception of tolerance and diversity. My view is often surrounded by a suffocating philosophy that says all Blacks should, and do, think a certain way. Sometimes the suffocation is consciously imposed, and at other times unconsciously so. In either case, breaths taken in an atmosphere of suffocation are labored. It is incredulous and stereotypical to *expect* all Black people to think a certain way. It is discriminatory and oppressive to *demand* such a thing.

In one of the late Justice Thurgood Marshall's last public speeches, he supported the concepts I advance here. He worshipped the right to speak freely.<sup>177</sup> He valued diversity and he worried about division. He enthusiastically advocated dissent. And he recognized that dissent naturally involves disagreement. Yet he charged us to "learn to appreciate what is different, and muster the courage to discover what is fundamentally the same."<sup>178</sup> If he could sit on the Supreme Court of the United States and vehemently disagree with his colleagues in an atmosphere of civility and mutual respect, why can't we?<sup>179</sup>

<sup>176</sup> Pitts, *Groupthink*, *supra* note 12.

<sup>177</sup> See THURGOOD MARSHALL, *SUPREME JUSTICE: SPEECHES AND WRITINGS* 311 (J. Clay Smith, Jr. ed., 2003) ("[I] relish[] the ability to do and say whatever I damn please, independence is a concept near and dear to me.").

<sup>178</sup> *Id.* at 314. Law professor Martha Minow has made a similar observation in the context of feminist jurisprudence:

Seeking out and promoting participation by voices typically unheard are also crucial if equality jurisprudence is to mean more than enshrining the point of view of those sitting on the bench. The concerted and persistent search for excluded points of view and the acceptance of their challenges are equally critical to feminist theory and practice. Otherwise, feminists will join the ranks of reformers who have failed to do more than impose their own point of view.

Minow, *supra* note 170, at 60.

<sup>179</sup> For example, consider the following:

Marshall wants it made clear, however, that any doubts about his political opponents do not extend to his treatments within the Supreme Court family. "Here in the building there has never been a problem. Ever. There have never been any racial feelings. Some of my best friends have been the people here in this Court. We've got an awfully close-knit group."

MARSHALL, *supra* note 177, at 307. Justice Thomas had a similar experience:

[T]he court is a model of civility. It's a wonderful place. Though there have been many contentious issues to come before the court during these initial years of my tenure, I have yet to hear the first unkind words exchanged among my



In my view, because the concept of a single, unifying Black voice is a myth, *Blackthink* serves only to further divide Black Americans and to polarize our nation. *Blackthink* stifles diverse thoughts, beliefs, and ideas. It is hypocritical for an individual to abhor discrimination and racism, but to use racism and, discrimination to bludgeon those deemed to be nonconformists. Such hypocrisy has no place within Black America; and it should be vehemently and vigorously opposed within the sacred and hallowed halls of academia. If the true purpose of the civil rights struggle is to achieve freedom and equality for all, there is no more important freedom than the freedom to think and to believe based upon personal conviction—no matter how unpopular that belief or conviction. Thinking Black should not take precedence over thinking critically, intelligently and honestly.<sup>180</sup> It is only through tolerance and encouragement of diverse opinions and beliefs that true freedom, true equality, and true unity can be achieved. Indeed:

Unity cannot be an end in itself. . . . Only the weak insist on being agreed with. Unity comes from respect for difference and love of dissent. Unity does not come from agreement on a racist principle (and blackness when put forward as the overriding moral principle is as racist as whiteness when put forward in the same way). Unity comes from a concern for and caring about the common good. And the common good must include those who do *not* belong to my group, racially or ideologically.<sup>181</sup>

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colleagues. And quite frankly, I think that such civility is the sine qua non of conducting the affairs of the court and the business of the country.

Thomas Speech, *supra* note 102.

I am reminded of a dinner I attended several years ago at the home of the chancellor of Washington University. The dinner was for law faculty and Justice Ginsburg. Justice Ginsburg revealed during that dinner that a person she vehemently disagrees with the most on that Court, Justice Scalia, is one of her closest friends.

<sup>180</sup> Lester, *supra* note 29 (describing the social pressures used to force Black students “to present, always, a common front for a common cause—blackness”).

<sup>181</sup> *Id.*