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Post Racialism?

*andré douglas pond cummings**†

I. INTRODUCTION

The 2008 election of President Barack Obama represents a halcyon moment in U.S. history. President Obama's election begs a critical question: whether his nationwide landslide victory catapulted the United States, with its sordid racial past, into a truly post-racial place as many claim.¹ While Obama's election was possible due to important changes that have taken place in the United States in the past fifty years, the reality is that profound disparities continue to exist between minority and white Americans that show no sign of dissipating during this Obama presidency.² Of these profound disparities, some of the most striking include those in the United States prison population, where 55% of all federal prisoners are African American while only 13% of the U.S. population is black.³ Further, the academic achievement gap between blacks and whites persists even for the black middle class,⁴ continuing to fuel theories of white supremacy and black inferiority.⁵ In a society where 74% of black Americans have personally experienced racial discrimination⁶ and where 76% of African

* Professor of Law, West Virginia University College of Law; J.D., Howard University School of Law. I am grateful for the excellent research assistance provided by Devin Daines, West Virginia University College of Law, class of 2011 and Sarah Tofflemire, University of Iowa College of Law, class of 2011. For comments to early draft portions of this piece, I express appreciation to Professors Aya Gruber, Peggie Smith, Timothy Canova, Deirdre Bowen, Steven Ramirez, and Kristin Johnson. Of course, as usual, the politics and errata of this Essay belong exclusively to me.

† A portion of this Article will appear in *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. ____ (2011).

1. See John McWhorter, *Racism in America is Over*, FORBES, Dec. 30, 2008, http://www.forbes.com/2008/12/30/end-of-racism-oped-cx_jm_1230mcwhorter.html.

2. See Huma Khan & Michele McPhee, *Obama Defends Criticism of Cambridge Police in Arrest of Gates*, ABC NEWS (July 23, 2009), <http://abcnews.go.com/Politics/Story?id=8153681&page=1>.

3. *Id.*

4. See generally U.S. DEP'T OF EDUC. NAT'L ASSESSMENT OF EDUC. PROGRESS, ACHIEVEMENT GAPS: STATISTICAL ANALYSIS REPORT (2009), available at <http://nces.ed.gov/nationsreportcard/pdf/studies/2009455.pdf>.

5. See Khan & McPhee, *supra* note 2.

6. See *Fewer Call Racism a Major Problem Though Discrimination Remains*, ABC NEWS (Jan. 19, 2009), <http://abcnews.go.com/images/PollingUnit/1085a2RaceRelations.pdf>.

Americans believe that they do not receive equal treatment from the police, the claim of post-racialism rings hollow.⁷ In arguing that much hard work remains before Americans can authentically claim a post-racial arrival, this Essay examines the recent 2008 financial market crisis as well as several recent isolated instances of American racial disharmony in order to lay bare any post-racial claim.

The financial market crisis of 2008 continues to plague the United States and countries around the world.⁸ The underlying causes of the 2008 collapse are numerous, intricate, and complex. Academic scholars, investigative reporters, and leading economists are now deconstructing the multiplicity of failures that enabled the breathtaking meltdown that nearly collapsed the global economy.⁹ As this thoughtful deconstruction emerges, a disturbing trend has forcefully surfaced, wherein dozens of writers, scholars, and thinkers, motivated by politics, limelight, and self-indulgence, attempt to fix a singular or foundational cause as “the” reason for the market crisis of 2008. In an American political environment that favors scapegoating and simple explanations for complex problems, a certain noxious danger exists

7. *Id.*

8. See *Foreclosure Rate Up 30% From Last February*, CBS NEWS (Mar. 12, 2009), <http://www.cbsnews.com/stories/2009/03/12/national/main4861033.shtml>; Alan Zibel, *Foreclosure Rates Up by Smallest Amount in 4 Years*, USA TODAY.COM (Mar. 11, 2010), http://www.usatoday.com/money/economy/housing/2010-03-11-foreclosures_N.htm (“Banks repossessed nearly 79,000 homes last month, down 10% from January but still up 6% from February 2009.”).

9. See JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS AND THE SINKING OF THE WORLD ECONOMY* 12–18 (2010); SIMON JOHNSON & JAMES KWAK, *13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN* 3–13 (2010); ANDREW ROSS SORKIN, *TOO BIG TO FAIL* (2009); ROGER LOWENSTEIN, *THE END OF WALL STREET* (2010); ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* 3–28 (2009); SCOTT PATTERSON, *THE QUANTS* 3, 11–12 (2010); GARY B. GORTON, *SLAPPED BY THE INVISIBLE HAND: THE PANIC OF 2007* (2010); STEVEN RAMIREZ, *REIMAGINING CAPITALISM* (NYU Press forthcoming 2011) (manuscript on file with author); THOMAS SOWELL, *THE HOUSING BOOM AND BUST* (2009); Lucian A. Bebchuk, *The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000–2008*, 27 *YALE J. ON REG.* 257 (2010); Steven L. Schwarcz, *Protecting Financial Markets: Lessons from the Subprime Mortgage Meltdown*, 93 *MINN. L. REV.* 373 (2008); Steven L. Schwarcz, *Markets, Systemic Risk, and The Subprime Mortgage Crisis*, 61 *SMU L. REV.* 209 (2008); William K. Black, *The Disastrous Unexpected Consequences of Private Compensation Reforms—Testimony to the House Committee on Oversight and Government Reform Hearing: ‘Executive Compensation: How Much is Too Much?’*, (Oct. 28, 2009) (Working Paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536513; William K. Black, *Those Who Forget the Regulatory Successes of the Past Are Condemned to Failure*, *ECON. & POL. WKLY.*, Mar. 28, 2009, at 80; Steven Ramirez, *Subprime Bailouts and the Predator State*, 35 *DAYTON L. REV.* 81 (2009); Timothy A. Canova, *Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model*, 3 *HARV. L. & POL’Y REV.* 369, 370 (2009); Joseph Grant, *What the Financial Services Industry Puts Together Let No Person Put Asunder: How the Financial Services Modernization Act of 1999—The Gramm-Leach-Bliley Act—Contributed to the 2008–2009 American Capital Markets Crisis*, 73 *ALB. L. REV.* 317 (2010); Kristin Johnson, *Things Fall Apart – The Case of the Credit Commons and Credit Default Swaps*, 82 *COLO. L. REV.* 167 (2011); Joseph Bunn, *A Justified Assault upon the Citadel of Privity and the First Amendment: A Theory of Liability for Investors Seeking Recovery from Credit Rating Agencies*, 2 *U. P.R. Bus. L.J.* (forthcoming 2011) (manuscript at 9–13) (on file with The Journal of Gender, Race & Justice).

when society fixes singular blame to deeply complicated failures in order to pander to those in an electorate that depend upon sound bites and embrace minimalist explanations.¹⁰

The magnitude of the collapse and its debilitating consequences,¹¹ many of which continue unrequited,¹² requires a vigilant and systematic review of causes, impacts, economic failures, and breakdowns.¹³ The

10. See *The Financial Crisis and the Role of Federal Regulators: Hearing Before the House Committee on Oversight and Government Reform*, 110th Cong. 17 (2008) (statement of Alan Greenspan, former Chairman of the Federal Reserve) (“It was the failure to properly price such risk assets [subprime securities] that precipitated the crisis.”); Peter J. Wallison, *Barney Frank, Predatory Lender*, WALL ST. J., Oct. 16, 2009, at A19 (blaming Democrats, Fannie Mae, and Freddie Mac for the market crisis).

11. See Edmund L. Andrews, *Economic Activity Is Slowing Across Many Areas, Fed Chairman Says*, N.Y. TIMES, Sept. 25, 2008, at C13 (“Mr. Bernanke said Main Street was already beginning to reel from the crisis on Wall Street. . . . Consumer spending, adjusted for inflation, declined in both June and July and probably in August as well. The country lost 100,000 jobs in August and has lost 770,000 since November. . . . ‘This is the most significant financial crisis of the postwar period,’ Mr. Bernanke said. . . . ‘I see the financial markets as already quite fragile. The credit markets aren’t working. Corporations aren’t able to finance themselves through commercial paper.”); Carl Hulse & David Herszenhorn, *Behind Closed Doors, Warnings of Calamity*, N.Y. TIMES, Sept. 20, 2008, at C5 (“Gathered in the conference room just off House Speaker Nancy Pelosi’s personal suite on the second floor of the Capitol, the congressional leadership had just received the sobering news Thursday night that America’s economy remained in peril despite a series of sudden interventions by the Federal Reserve. . . . In telephone briefings with lawmakers, Mr. Paulson and the Fed chairman, Ben S. Bernanke, sought to make it clear that the price of doing nothing could be calamitous. ‘If we don’t get this, it will be nothing short of a disaster for our markets,’ Mr. Bernanke told House Republicans in a conference call Friday.”); Sudeep Reddy, *The Financial Crisis—The Outlook: Fed Could Suffer if New Role Clashes with Policy-Setting*, WALL ST. J., Sept. 22, 2008, at A8 (referring to the current economic state as “the nation’s worst financial crisis since the Great Depression”); Michael R. Crittenden & Patrick Yoest, *The Financial Crisis: AIG at Risk: Resolution Trust Plan is Floated*, WALL ST. J., Sept. 17, 2008, at A12 (“Staring down the worst financial crisis in decades, U.S. lawmakers are strongly considering whether they need to dust off a 1980s-era plan to help save the banking industry and stabilize the economy more broadly.”).

12. See Peter S. Goodman, *Despite Signs of Recovery, Chronic Joblessness Rises*, N.Y. TIMES, Feb. 21, 2010, at A1 (“Even as the American economy shows tentative signs of a rebound, the human toll of the recession continues to mount, with millions of Americans remaining out of work, out of savings and nearing the end of their unemployment benefits.”); Economic News Release, U.S. Bureau of Labor Statistics, *Economic Situation News Release* (Feb. 5, 2010), available at <http://www.bls.gov/news.release/empisit.nr0.htm> (Unemployment for January 2010 is at 9.7% nationally with an estimated 14.8 million people unemployed.); *Failed Bank List*, FDIC, <http://www.fdic.gov/bank/individual/failed/banklist.html> (last visited Jan. 11, 2011) (one hundred sixty-three banks have failed since the beginning of 2010, as of January 11, 2011); *The Cost of the Financial Meltdown: Deficits and Spending*, BBC NEWS, <http://news.bbc.co.uk/2/hi/business/8214272.stm> (last visited Jan. 11, 2011); Economic News Release, U.S. Bureau of Labor Statistics, *Employment Situation Summary* (Mar. 5, 2010), http://www.bls.gov/news.release/archives/empisit_03052010.htm (“Nonfarm payroll employment was little changed (-36,000) in February, and the unemployment rate held at 9.7 percent, the U.S. Bureau of Labor Statistics reported today.”).

13. See Elliot Spitzer, Frank Partnoy & William Black, *Show Us the E-Mail*, N.Y. TIMES, Dec. 20, 2009, at WK9 (“The three of us, as experienced investigators and prosecutors of financial fraud, cannot answer those questions now. But we know where the answers are. They are in the trove of e-mail messages still backed up on A.I.G. servers, as well as in the key internal accounting documents

foundational causes of the meltdown are abundant. Despite evidence that literally dozens of failures¹⁴ precipitated the “Great Recession,”¹⁵ many now point to a particularly nefarious singular cause for the economic crisis: minority borrowers.¹⁶ Any honest commentator, academic, pundit, or politician will concede the depth of the failures, the breadth of the recklessness and ignorance, and the audacity of the avarice and greed that

and financial models generated by A.I.G. during the past decade. Before releasing its regulatory clutches, the government should insist that the company immediately make these materials public. By putting the evidence online, the government could establish a new form of “open source: investigation.”); Brady Dennis, *The AIG E-Mail Trail: Behind the Public Declarations of Optimism in 2007, Months of Internal Discord and Doubt*, WASH. POST, Dec. 30, 2009, at A01 (“While the e-mails offer the most revealing look yet at AIG’s inner struggles, they also underscore the main obstacle to federal prosecutors assessing individual culpability for the financial crisis. In a Wall Street culture defined by salesmanship and secrecy, divining the difference between optimism and deceit can be a legal morass—especially when it comes to convincing a jury that the line has been crossed. . . . The e-mails, many consumed with technical details of the firm’s deals, reflect an ongoing internal debate about how best to characterize the company’s subprime exposure.”); Sewell Chan, *A First Step on Fannie and Freddie*, N.Y. TIMES, Mar. 23, 2010, http://www.nytimes.com/2010/03/24/business/24regulate.html?_r=1&dbk (“Despite growing pressure from Congress to act quickly, the Obama administration is moving tentatively to develop a plan to reshape Fannie Mae and Freddie Mac . . . Timothy F. Geithner, said the administration would ‘take a fresh, cold hard look at the core problems’ in housing finance.”); Benjamin M. Friedman, *The Failure of the Economy and the Economists*, 56 N.Y. REV. BOOKS 9 (2009).

14. See andré douglas pond cummings, *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. (forthcoming 2011).

15. See PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008*, at 194 (2009); STIGLITZ, *supra* note 9, at xi; Niall Ferguson, *When Will the Recession Be Over?: Our Great Recession*, NY TIMES, Mar. 1, 2009, at WK 12; David Leonhardt, *Casualties of the Recession*, N.Y. TIMES, Mar. 4, 2009, at B1; Don Lee, *Unemployment Rate Falls to 9.7%: The Drop is Tempered by Data Showing the U.S. Lost 8.4 Million Jobs in the Last Two Years*, L.A. TIMES, Feb. 6, 2010, at A1.

16. See Daniel Gross, *Subprime Suspects: The Right Blames the Credit Crisis on Poor Minority Homeowners—This is Not Merely Offensive, But Entirely Wrong*, SLATE (Oct. 7, 2008), <http://www.slate.com/id/2201641>; Susan Schmidt & Maurice Tamman, *Housing Push for Hispanics Spawns Wave of Foreclosures*, WALL ST. J., Jan. 5, 2009, <http://online.wsj.com/article/SB123111072368352309.html>; Andy Birkey, *Against All Reason, Bachmann and Others Blame 1977 Fair-Lending Law for Adding to Economic Crisis*, INDEPENDENT, Sept. 24, 2008, <http://minnesota.independent.com/10179/against-all-reason-bachmann-and-others-blame>; Thomas B. Edsall, *Conservatives Seek to Shift Blame for Crisis Onto Minority Housing Law*, HUFFINGTON POST (Oct. 1, 2008), http://www.huffingtonpost.com/2008/10/01/conservatives-seek-to-shi_n_1310_20.html; Gary Lapon, *Blaming the Victims of the Crisis*, SOCIALISTWORKER.ORG (Oct. 1, 2008), <http://socialistworker.org/2008/10/21/blaming-victims-of-the-crisis> (last visited Jan. 9, 2009); Zenitha Price, *Conservatives Blame People of Color for Wall Street Meltdown*, NEW AM. MEDIA, (Oct. 3, 2008), http://news.newamericamedia.org/news/view_article.html?article_id=1b740_2095164d593deaf2c111517ce69; Fox News, *Coulter on Bailout Lies—“Social Justice” Obamination*, YOUTUBE, <http://www.youtube.com/watch?v=awNeOKvx5zo> (last visited Apr. 30, 2011); Peter J. Wallison, *Barney Frank, Predatory Lender*, WALL ST. J., Oct. 16, 2009, at A19; Stephen Gandel, *Did Foreigners Cause America’s Financial Crisis?* TIME (Jan. 15, 2010), <http://www.time.com/time/business/article/0,8599,1954240,00.html> (““There is no doubt that the pressure on the U.S. financial system [that led to the financial crisis] came from abroad,” says Caballero, who is head of MIT’s economics department. ‘Foreign investors created a demand for assets that was difficult for the U.S. financial sector to produce. All they wanted were safe assets, and [their ensuing purchases] made the U.S. unsafe.’”).

nearly collapsed the global marketplace.¹⁷ Still, many analysts continue to try to “expose” the singular reason that the economy collapsed.

This Essay will seek to challenge the most reprehensible of the simple explanations that emerged with shocking force just minutes into the frantic days of September 2008. Challenging the most nefarious of the causation explanations for the financial crisis, this piece will interrogate post-racialism in America and will confront the “dirty little myth” of minority borrower culpability that emerged immediately upon notification that the global economy faced certain collapse.

In the early rush by commentators to evaluate the financial market crisis, several startling explanations emerged, primarily from those seeking to assign simple extrapolations. Perhaps the most startling “cause” of the near global meltdown is the “minority borrower” myth that emerged in the very first moments of the September 2008 frenzy that accompanied the Troubled Asset Relief Program (TARP) debates. During the tensest moments surrounding the mortgage crisis in September and October 2008, as TARP was furiously debated on Capitol Hill with politicians and the media delivering doomsday messages daily, many pundits on the right named “minorities” and lending to “poor minorities” as a foundational cause for the market collapse.¹⁸ This dirty little myth played on loop at Fox News and on the Rush Limbaugh radio program for weeks and months, resonating with those Americans who receive their politics and views from such sources.¹⁹

In an ultimate irony, at precisely the same moment that commentators saddled minority borrowers with the responsibility for crashing a global economy, the United States citizenry was preparing to send a minority politician to the White House to take the most powerful seat in the world. During the September 2008 firestorm that threatened imminent financial Armageddon, the United States was simultaneously deeply engaged in a historic election cycle. As then Senator Barack Obama and Senator John McCain battled for the votes of this country, the campaign was blindsided by the economic crisis. In the weeks leading up to the November 2008 election, the financial market crisis played a critical role in the campaigns as both Obama and McCain worked hard to convince the voting public that each was the man best qualified to lead the country forward.²⁰ Most agree that

17. See generally *Timeline: A Year of Financial Crisis*, NPR (Sept. 5, 2009), <http://www.npr.org/templates/story/story.php?storyId=112538025> (detailing the depth and breadth of the financial market crisis through a timeline description).

18. See *infra* Part II.A.

19. See *infra* notes 45–72 and accompanying text.

20. See JOHN HEILEMANN & MARK HALPERIN, *GAME CHANGE: OBAMA AND THE CLINTONS, MCCAIN AND PALIN, AND THE RACE OF A LIFETIME* 425 (2010) (noting Obama’s criticism of McCain for claiming in September 2008 that “the fundamentals of our economy are strong.”).

Barack Obama was more convincing in that role, and Professor Derrick Bell posits that absent the market crisis, Obama would not have secured the presidency.²¹

With the financial market crisis as backdrop, President Obama overwhelmingly won the election. Dozens of commentators and millions of Americans then argued that, with the election of Barack Obama as President, the United States officially entered a post-racial era.²² Post-racialism, in averring that the election of an African American President formally moves the nation past its racial problems, essentially maintains that an honest and open interrogation of racism and discrimination in the United States is no longer necessary.²³ According to post-racialists, America has truly arrived at our colorblind ideal. Racism is a relic of a checkered past that it has affirmatively overcome.²⁴

Notwithstanding the attractiveness of the post-racial ideology, citizens made these arguments at the very same time people who were hailing a new post-racial America floated and adopted a simmering racist myth. While markets were roiling in September and October 2008,²⁵ with financial Armageddon at the nation's doorstep²⁶ and two presidential candidates

21. See Derrick Bell, *On Celebrating an Election as Racial Progress*, 36 HUM. RTS. 4 (2009) ("Barack Obama's election was a dramatic example of Interest Convergence. . . . Facing lost jobs and foreclosed homes, they [voters] had to ask themselves if they wanted a really smart young black guy, or a stodgy old white guy from the same crowd who put them in this hole."); see generally HEILEMANN & HALPERIN, *supra* note 20 (describing the financial market crisis as a game changer in the 2008 election indicating that most Americans were persuaded that Obama would handle the crisis much better than would McCain).

22. See, e.g., McWhorter, *supra* note 1; Daniel Schorr, *A New, 'Post-Racial' Political Era in America*, NPR (Jan. 28, 2008), <http://www.npr.org/templates/story/story.php?storyId=18489466> (audio and transcript available); cf. Shelby Steele, *Obama Seduced Whites with a Vision of Their Racial Innocence Precisely to Coerce Them into Acting Out of a Racial Motivation*, L.A. TIMES, Nov. 5, 2008, at A31; *Race and Ethnicity: ABC News/Washington Post Poll*, Race and Obama Poll, POLLINGREPORT.COM (Jan. 12–15, 2010), available at <http://www.pollingreport.com/race.htm> (finding that 71% of white Americans believe that with the election of Barack Obama that African Americans have achieved or will soon achieve racial equality); Mark Dolliver, *How Close is Post Racial America?*, ADWEEK, Feb. 4, 2010, http://www.adweek.com/aw/content_display/news/e314b406c00b9c5b2653a13b5e8fed89d25 (citing a January 2009 ABCNews Poll indicating that more than 75% of black Americans believed that the election of Barack Obama would improve race relations in the United States).

23. See *infra* Part III.

24. See Schorr, *supra* note 22.

25. See Gary Duncan, *Lehman Brothers Collapse Sends Shockwave Round World*, THE TIMES ONLINE, (Sept. 16, 2008), http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article4761892.ece; Michael J. de la Merced & Andrew Ross Sorkin, *Report Details How Lehman Hid Its Woes*, N.Y. TIMES, Mar. 12, 2010, at A1; Justin Fox, *Three Lessons of the Lehman Brothers Collapse*, TIME, Sept. 15, 2009, <http://www.time.com/time/business/article/0,8599,1923197,00.html>.

26. See Anthony Reuben, *What Would Financial Armageddon Look Like?*, BBC NEWS (Sept. 23, 2008), <http://news.bbc.co.uk/2/hi/business/7631281.stm> (discounting sources that compare the

debating the possible effects and solutions,²⁷ the right created and peddled a simple message to the consuming American public as the primary reason for the collapse of the global markets: minorities. Right wing commentators and politicians served up African American and Latino borrowers as the scapegoat to explain why the global economy was failing.²⁸ The dirty little myth maintains that because of governmental intrusion into the home lending industry through the Community Reinvestment Act of 1977, the government forced lenders to provide loans to extremely risky minority borrowers, who themselves were overreaching by trying to purchase homes that they had no business buying.²⁹ Because lenders had no choice but to provide loans to risky minority borrowers, subprime loans became the avenue of choice for lenders, and it was the current failure of black and brown homeowners to pay their mortgages that caused the subprime mortgage industry to collapse. Thus, as the myth purports, the financial market crisis is ultimately traceable to minority Americans and governmental social welfare.³⁰

With precious little evidence to support this scapegoating, many U.S. citizens have embraced the dirty little myth with vigor.³¹ And this percolating resonance continues to survive as myth proponents today include

financial crisis to the Great Depression or a financial Armageddon).

27. See HEILEMANN & HALPERIN, *supra* note 20, at 382–93 (2010).

28. See Schorr, *supra* note 22.

29. See Thomas Sowell, *The Housing Boom and Bust*, NAT'L REV. ONLINE (May 11, 2009), <http://www.nationalreview.com/articles/227468/housing-boom-and-bust/thomas-sewell>; *Discussing Financial Crisis, Buchanan Baselessly Blamed Lending in "Minority Communities,"* MEDIAMATTERS FOR AM. (Feb. 20, 2009), <http://mediamatters.org/print/research/200902200006> (detailing former Republican Presidential Candidate Patrick Buchanan blaming minorities and the Community Reinvestment Act for the financial market meltdown); *Cavuto Suggests Congress Should Have Warned that "Lending to Minorities and Risky Folks is a Disaster"*, MEDIAMATTERS FOR AM. (Sept. 19, 2008), <http://mediamatters.org/mmtv/200809190021> (describing Fox News reporter Neil Cavuto claiming that minority borrowers are foundationally responsible for financial crisis).

30. See *supra* notes 28–29 and accompanying text.

31. See Jeff Davis, *Minority Subprime Mortgages Have Caused the Financial Crisis*, ALTERMEDIA.INFO (Sept. 23, 2008), http://us.altermedia.info/news-of-interest-to-white-people/minority-mortgages-brought-financial-market-to-its-knees_3693.html ("I think everyone can see the desire to give more mortgages to minorities loosened standards and caused the subprime crisis. Banks and mortgage companies were giving home loans to every Tyrone, Jose and Roberto in order to get a commission and generate worthless paper for the lender to use as collateral on loans from the bigger fish."); Larry Keller, *Minority Meltdown: Immigrants Blamed for Mortgage Crisis*, S. POVERTY L. CENTER., Spring 2009, <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2009/spring/minority-meltdown> (describing the massive viral spreading and popularity of the immigrant/minority trope for causing the mortgage crisis). According to the SPLC, "The CRA falsehood easily jumped from the far-right fringe to more mainstream, presumably more credible conservative media outlets, illustrating how sloppy fact-checking or no fact-checking at all have become increasingly common in the midst of fierce competition among speed-obsessed media." *Id.*

economists,³² conservative think tank employees,³³ Wall Street insiders,³⁴ mutual fund presidents,³⁵ pundits,³⁶ and average citizens.³⁷ That the dirty

32. See Stan Liebowitz, *The Real Scandal: How Feds Invited the Mortgage Mess*, N.Y. POST (Feb. 5, 2008), http://www.nypost.com/p/news/opinion/opedcolumnists/item_Qj108vDbysbe6LWDxcq03Jj;jsessionid=C550FA8EE0F00E742C3F94D176B35970; Sowell, *supra* note 29.

33. See Peter J. Wallison, *The True Origins of This Financial Crisis*, AM. ENTERPRISE INST. FOR PUB. POL'Y RES. (Feb. 19, 2009), <http://www.aei.org/issue/100001>; John Derbyshire, *PC, Not "Predatory Lenders"*, NAT'L REV. ONLINE: CORNER (Feb. 5, 2008), <http://corner.nationalreview.com/post/?q=ZGZjYjM2ZjdjZGE2MwJhNzQ4MjhiOTY1NTU1M2M0OWU=>; Adam Weinstein, *Study: Brokers, Minority Borrowers to Blame for Most Mortgage Delinquencies*, DSNEWS.COM (Sept. 2, 2009), <http://www.dsnews.com/articles/study-brokers-minority-borrowers-to-blame-for-most-mortgage-delinquencies-2009-09-02>.

34. See John Carney, *Here's How The Community Reinvestment Act Led to the Housing Bubble's Lax Lending*, BUS. INSIDER (June 27, 2009), <http://www.businessinsider.com/the-cra-debate-a-users-guide-2009-6>; Edward Pinto, *Acorn and the Housing Bubble*, WALL ST. J. (Nov. 12, 2009), <http://online.wsj.com/article/SB10001424052748703298004574459763052141456.html>; *Squawk Box* (CNBC television broadcast Apr. 4, 2008 5:41 AM ET), available at <http://www.cnb.com/id/15840232?video=702180420&play=1>. ("The original sub-prime loan, with no money down, no FICA scorekeeping, all that came out of the Community Reinvestment Act and that ought to be repealed or substantially altered") (hosted by Larry Kudlow, CNBC, with guest David Walker, Peter G. Peterson Foundation president/CEO).

35. See andré douglas pond cummings, Visiting Professor of Law, University of Iowa College of Law, Post Racialism and the Financial Market Crisis, Panel Presentation titled "Discriminatory Lending in a Bear Market: Who Gets Money and Why?" for *The Journal of Gender, Race, and Justice* Symposium, Race, Gender, and Class at a Crossroad: A Survey of Their Intersection in Employment, Economics, and the Law, (Feb. 26, 2010), available at <http://podcast.uiowa.edu/law/grj/JGRJ%202010%20Levitt.mov> [hereinafter cummings, Panel Presentation] (describing mutual fund presidents that blame the Community Reinvestment Act and minority borrowers for the poor performance of their mutual funds); andré douglas pond cummings, *Recovery?*, CORP. J. BLOG, (Feb. 27, 2010, 2:19 P.M.), <http://corporatejusticeblog.blogspot.com/2010/02/recovery.html> [hereinafter cummings, *Recover?*] (describing board meeting wherein Mutual Fund representatives blamed the Community Reinvestment Act for the financial market crisis).

36. See Ann Coulter, *Dems Affirmative-Action Time Bomb Has Detonated*, ST. J.-REGISTER, Sept. 26, 2008, <http://www.sj-r.com/opinions/x1070363616/Ann-Coulter-Dems-affirmative-action-time-bomb-has-detonated> (arguing that absent affirmative action for minority borrowers the financial market crisis of 2008 would have been averted); Limbaugh's "Colorblind" History of Racially Charged Comments, MEDIAMATTERS FOR AM. (Oct. 13, 2009), <http://mediamatters.org/research/200910130049> (quoting Rush Limbaugh blaming illegal immigrants and the Community Reinvestment Act for the financial meltdown); Jeff Davis, *Minority Subprime Mortgages Have Caused the Financial Crisis*, ALTERMEDIA.INFO (Sept. 23, 2008), http://us.altermedia.info/news-of-interest-to-white-people/minority-mortgages-brought-financial-market-to-its-knees_3693.html.

37. Examples of average Americans that blame minorities for the financial market crisis abound on Web 2.0 avenues including YouTube. See generally Obamaunderground, *Obama Responsible for Economic Crisis Black Caucus Fraud*, YOUTUBE (Oct. 1, 2008), <http://www.youtube.com/watch?v=bh-wwZwpm8U> (blaming Barack Obama and the Congressional Black Caucus for the financial market crisis); Biukucanoe, *Burning Down the House: What Cause our Economic Crisis?*, YOUTUBE (Sept. 26, 2008), <http://www.youtube.com/watch?v=TxxSubmiGt8> (blaming the Community Reinvestment Act and Fannie Mae and Freddie Mac for the financial market meltdown); NakedEmperorNews, *The Democrats and Obama Caused the Financial Crisis of 08 by Supporting Fannie Mae and Freddie Mac and Covering Up Their Bad Books*, YOUTUBE (Sept. 23, 2008) <http://www.youtube.com/watch?v=UvVvZEkauZy> (blaming Fannie Mae and Freddie Mac for the financial market crisis).

little myth would spring up at the onset of this generation's greatest economic ordeal is disappointing. That so many would embrace the dirty little myth with so little to support it, with scant questioning or thought is demoralizing. The myth is particularly mystifying in an era where many post-racialist Americans are determined to believe that with the election of African American President Obama our nation has crossed over into a colorblind space.³⁸ Critical Race Theory, however, provides insight into how a twenty-first century dirty little myth can still find traction in the United States.

The powerful continuing dynamism of entrenched traditional American racism persists in our newly acclaimed "post-racial" United States.³⁹ This static feature—relentless U.S. racial discrimination—simply evolves, and as the laws change to outlaw various manifestations of overt racism, it merely mutates into new and sophisticated, complex manifestations of race hatred.⁴⁰ This mutation involves racist embrace of any available mechanism or adjacent expression to subordinate the interests of minorities in the United States and oft-times seeks to attach liability in careless ways to any available minority scapegoat.⁴¹

The dynamism and continuing intensity of American racism is clearly evident in the financial market crisis of 2008. Intense and complex economic

38. See andré douglas pond cummings, Comment, *The Associated Dangers of "Brilliant Disguises," Colorblind Constitutionalism and Postracial Rhetoric*, 85 IND. L.J. 1277 (2010) (reciting the positions of many Americans believing that the nation has entered a post-racial place); WARD CONNERLY, *CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES* (2000); Ward Connerly, *Welcome to the American Civil Rights Institute: Message from the President of ACRI*, AM. CIV. RTS. INST., <http://www.acri.org/message2011.html> (last visited Jan. 12, 2011) ("Race has no place in American life or law."); Shelby Steele, *Obama's Post Racial Promise*, L.A. TIMES, Nov. 5, 2008, http://www.latimes.com/news/opinion/opinionla/la-oe-steele5-2008nov05_0,6049031.story.

39. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains: Book Review*, 37 HARV. C. R.-C.L. L. REV. 369 (2002); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Adrien Katherine Wing, *Space Traders for the Twenty-First Century*, 11 BERKELEY J. AFR.-AM. L. & POL'Y REP. 49 (2009).

40. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317, 335–36 (1987) ("But how is the unconscious involved when racial prejudice is less apparent—when racial bias is hidden from the prejudiced individual as well as from others? Increasingly, as our culture has rejected racism as immoral and unproductive, this hidden prejudice has become the more prevalent form of racism. The individual's Ego must adapt to a cultural order that views overtly racist attitudes and behavior as unsophisticated, uninformed, and immoral. It must repress or disguise racist ideas when they seek expression."). For contemporary examples see John Meacham, *Southern Discomfort*, N.Y. TIMES, Apr. 11, 2010, <http://www.nytimes.com/2010/04/11/opinion/11meacham.html>, and Spencer S. Hsu, *Miss. County Schools Ordered to Comply with Desegregation Order*, WASH. POST, Apr. 13, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/13/AR2010041302867.html>.

41. See BELL, *supra* note 39; DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 5–8 (1989).

forces and failures caused the market collapse—not minority borrowers.⁴² Further, claims of post-racial arrival are belied by continuing occurrences of U.S. racial dissonance that refuses to fade. The Henry Louis Gates debacle,⁴³ the Shirley Sherrod firing,⁴⁴ and the Jordan Miles police beating⁴⁵ clearly indicate that claims of American post-racial harmony are not just premature, but evidence a subtle, if not outright, racism in those determined to make that claim.

This Essay begins in Part II by evaluating, and then discrediting, the dirty little myth that emerged in the early days of the financial market crisis. Part III considers the impact of three emblematic racial episodes in the recent past in light of post-racial predictions, including the police harassment of Harvard Professor Henry Louis Gates, the Agriculture Department's termination of Shirley Sherrod, and the Pittsburgh Police Department's brutalization of African American honors student Jordan Miles. Part IV interrogates post-racialism in light of the dirty little myth and the relentless nature of American racism represented by the Gates/Sherrod/Miles affairs. Part V concludes the Essay.

II. FINANCIAL MARKET CRISIS MYTH

The financial market crisis of 2008 has at its root the failure of dozens of mechanisms, laws, individuals, and decisions.⁴⁶ Still, despite overwhelming evidence that a mostly white male Congress, mostly white male Wall Street insiders, and mostly white male securities speculators perpetrated nearly every one of the spectacular failures that precipitated the crisis, the dynamic and relentless nature of American racism still emerged in a startling way. As described by Critical Race Theory, institutional and structural racism has never been appropriately dealt with or eliminated in the United States, and because it has not, continuing manifestations of race hatred simply mutate and find expression in ways that serve to further the interests of the majority.⁴⁷ This mutation was on clear display in the days, weeks, and months following the financial market meltdown of 2008, as the dirty little myth spread like a virus throughout the nation.

42. See *infra* Part II.B.

43. See *infra* Part III.A.

44. See *infra* Part III.B.

45. See *infra* Part III.C.

46. See Cummings, *supra* note 14.

47. See André Douglas Pond Cummings, *A Furious Kinship: Critical Race Theory and the Hip Hop Nation*, 48 LOUISVILLE L. REV. 499, 500–07 (2010) (describing the roots and evolution of Critical Race Theory).

A. The Dirty Little Myth

In the days following the collapse of Lehman Brothers and as Congress was intensely debating and posturing in connection with whether to pass TARP, a stunning message began to seep out from Fox News, conservative commentators, and Web 2.0.⁴⁸ These sources began peddling a nefarious tale that essentially blamed the failure of the U.S. capital markets on minority borrowers who were now defaulting on their subprime mortgages, which was the primary factor leading to the collapse of the global economy.⁴⁹ Through federal governmental intervention, in the form of the Community Reinvestment Act of 1977 and the securitized subprime loan purchasing activity of Fannie Mae and Freddie Mac, lenders were “forced” to provide undeserving minorities with mortgage loans they never should have written. Subprime mortgage loans were required to be written, according to the dirty little myth, against the will of the lenders.⁵⁰

In September 2008, when Senator Chris Dodd and Representative Barney Frank emerged from an emergency closed door meeting with then Treasury Secretary Henry Paulson and Federal Reserve Chair Ben Bernanke, both Dodd and Frank were stunned, ashen faced, sobered, and visibly shaken.⁵¹ Congressional leadership had just learned that if Congress did not immediately approve a \$700 billion bailout of the U.S. financial system, financial Armageddon would ensue.⁵² Thereafter, a strange dance materialized where a failed Republican presidential administration in lock step with Democratic congressional leadership rushed through legislation that eventually committed \$850 billion of taxpayer money to save the U.S.

48. See Thomas Edsall, *Conservatives Seek to Shift Blame for Crisis Onto Minority Housing Law*, HUFFINGTON POST (Oct. 1, 2008), http://www.huffingtonpost.com/2008/10/01/conservatives-seek-to-shi_n_131020.html; Fox News, *Coulter on Bailout Lies—“Social Justice” Obomination*, *supra* note 16; Lapon, *supra* note 16; The Young Turks, *Fox News Blames Black People for the Financial Meltdown*, YOUTUBE (Sept. 22, 2008), <http://www.youtube.com/watch?v=q9O1hpeO-qQ&feature=related>.

49. See *id.*

50. See Patrick Buchanan, *Morning Joe* (MSNBC television broadcast Feb. 20, 2009), available at <http://mediamatters.org/research/200902200006>; Joe Scarborough, *Morning Joe* (MSNBC television broadcast Feb. 20, 2009), <http://mediamatters.org/research/200902200006>; Birkey, *supra* note 16.

51. See Jeanne Sahadi, ‘Sobering Moment’, CNNMONEY.COM (Sept. 20, 2008), http://money.cnn.com/2008/09/19/news/economy/what_lawmakers_heard/index.htm?postversion=2008091922; David M. Herszenhorn, *Congressional Leaders Stunned by Warnings*, N.Y. TIMES, Sept. 19, 2008, <http://www.nytimes.com/2008/09/20/washington/19cnd-cong.html>.

52. Sahadi, *supra* note 51; Herszenhorn, *supra* note 51; Jeannine Aversa, *Dire Warnings Fail to Sway Senators on Big Bailout*, HUFFINGTON POST (Sept. 23, 2008), http://www.huffingtonpost.com/2008/09/23/bush-team-congress-haggle_n_128501.html; see generally HENRY M. PAULSON, JR., *ON THE BRINK: INSIDE THE RACE TO STOP THE COLLAPSE OF THE GLOBAL FINANCIAL SYSTEM* (2010) (describing the precipice that he believed the global economy to be teetering on in September 2008).

economy by bailing out those Wall Street financial institutions whose leadership had driven them to the point of utter collapse.⁵³

When the dirty little myth began to emerge, it did so with force. Financial Armageddon as the fault of minority borrowers in urban centers around the country who took out loans they could not possibly re-pay⁵⁴—all made possible by the Community Reinvestment Act, Fannie Mae, and Freddie Mac—seemed absurd to many, but it found undeniable traction.⁵⁵ Neil Cavuto on Fox News stated, “Loaning to minorities and risky folks is a disaster.”⁵⁶ An article by Ann Coulter trumpeted the headline “They Gave Your Mortgage to a Less Qualified Minority.”⁵⁷ Congressperson Michelle Bachman, a Republican from Minnesota, on the House floor and later on Larry King Live said, “Look at the housing crisis. Government has to take its share of the blame. After all, government was goading these mortgage lenders [saying] ‘if you don’t give loans out to marginally credit worthy people, we’re going to come after you.’”⁵⁸ In fact, according to the myth, the overzealous enforcement by the government of the Community Reinvestment Act forced quotas on banks to encourage diversity in the housing market by lending solely “on the basis of race.”⁵⁹ This is simply false.⁶⁰

53. See John Gress, *Obama Looking at \$850 Billion Jolt to the Economy*, USA TODAY, Dec. 17, 2008, http://www.usatoday.com/news/washington/2008-12-17-stimulus_N.htm; see generally JOHNSON & KWAK, *supra* note 9 (describing the bailout of Wall Street banks as a clear bowing to the interests of big bank executives rather than efforts toward the best interests of main street Americans).

54. See Edsall, *supra* note 48; Gross, *supra* note 16.

55. “The Community Reinvestment Act (CRA), enacted by Congress in 1977 (12 U.S.C. 2901) and implemented by Regulations 12 CFR parts 25, 228, 345, and 563e, is intended to encourage depository institutions to help meet the credit needs of the communities in which they operate.” See *Community Reinvestment Act*, FED. FIN. INST. EXAMINATION COUNCIL, <http://www.ffiec.gov/cra/> (last visited Jan. 12, 2011).

56. See Lapon, *supra* note 48; The Young Turks, *supra* note 48.

57. Thomas Edsall, *supra* note 48; Coulter on Bailout Lies—“Social Justice” Obomination, *supra* note 16.

58. See Birkey, *supra* note 16; Avidor, *Bachmann: a Game of Risk with the American Taxpayer*, YOUTUBE (Sept. 18, 2008), <http://www.youtube.com/watch?v=strazks9sP8>; <http://www.youtube.com/watch?v=4DHuxHyafyM>.

59. Lapon, *supra* note 48.

60. See Interview with Pam Hennes, Compliance Director and Operations Manager, Deerwood Bank, Baxter, MN (Mar. 27, 2010) (describing the requirements of the Community Investment Act and affirmatively disavowing that the CRA mandates any quotas or forces any lending to minority borrowers); Robert Gordon, *Did Liberals Cause the Sub-Prime Crisis?: Conservatives Blame the Housing Crisis on a 1977 Law That Helps Low Income People Get Mortgages—It’s a Useful Story for Them, but It Isn’t True*, AM. PROSPECT, Apr. 7, 2008, http://www.prospect.org/cs/articles?article=did_liberals_cause_the_subprime_crisis; Aaron Pressman, *Community Reinvestment Act Had Nothing to Do with Subprime Crisis*, BUS. WK., Sept. 29, 2008, http://www.businessweek.com/investing/insights/blog/archives/2008/09/community_reinv.html.

On MSNBC's *Morning Joe*, former Republican presidential candidate Pat Buchanan stated flatly that "the Feds leaned on banks and threatened some of these banks [saying] 'you've got to make more loans,' and pushed them out . . . frankly, in minority communities. And they pushed them out and the guys put nothing down . . . and then the banks sell the loans off to Fannie and Freddie."⁶¹ Joe Scarborough responded, "And that's what happened. Banks made bad loans. They sold it to Fannie and Freddie."⁶² While many reputable sources were quick to denounce Buchanan, Scarborough, Cavuto, and Coulter,⁶³ they had unleashed the myth, and it began to creep into households and mindsets across the country.⁶⁴ Politicians, pundits, and economists serve up minority borrowers and governmental social steering as the primary cause of a near global meltdown.

Of course, driving the myth firmly into the households and minds of a willing undercurrent of Americans was Rush Limbaugh, who spun out his own particular mischaracterization for the financial market crisis: illegal Latino immigrants.⁶⁵ Together with blaming Latino illegal aliens for entering into home mortgages that they could not afford (and had no legal right to enter), Limbaugh also placed blame squarely upon Fannie Mae and Freddie Mac for their role in buying up subprime mortgage-backed

61. *Discussing Financial Crisis, Buchanan Blamed Lending in "Minority Communities"*, MEDIAMATTERS FOR AM. (Feb. 20, 2009), <http://mediamatters.org/research/200902200006>.

62. *Id.*

63. See Letter from Ben Bernanke, Chairman of the Board of Governors of the Federal Reserve System, to Robert Menendez, United States Senator for New Jersey (Nov. 25, 2008), available at <http://menendez.senate.gov/pdf/112508ResponsefromBernankeonCRA.pdf>; Lapon, *supra* note 48; Edsall, *supra* note 48.

64. See Megan Carpentier, *More Than Half of Republicans Don't Believe Banks Are to Blame for the Financial Crisis*, WASH. INDEP. (Mar. 22, 2010), <http://washingtonindependent.com/80022/more-than-half-of-republicans-dont-believe-banks-are-to-blame-for-the-financial-crisis> (describing an ABCNews Poll where less than 50% of Republicans polled do not believe that Wall Street banks were the cause of the financial market crisis); *ABC World News Poll: The Banks, Three-Quarters Say the Banks Still Need to Make Amends*, ABCNEWS (Mar. 22, 2010), <http://abcnews.go.com/images/PollingUnit/1106a2The%20Banks.pdf> ("There also are partisan gaps in criticism of the banks more broadly—nearly two-thirds of Democrats and independents alike assign them significant blame for the recession, but just under half of Republicans agree. And there's a similar gap in views of whether banks and related institutions have a responsibility to help Americans who are still struggling with the economy. Seventy-nine percent of Democrats say they do, and again nearly as many independents, 72 percent, agree. It's also a majority among Republicans, but a much smaller one, 54 percent.").

65. See Larry Keller, *Minority Meltdown: Immigrants Blamed for Mortgage Crisis*, S. POVERTY L. CENTER (2009), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2009/spring/minority-meltdown> ("Rush Limbaugh stated on his radio program that HUD was 'admitting 5 million illegal aliens were given mortgages . . . with fake Social Security numbers and so forth to go out and purchase homes that they didn't have to pay back.'").

securities.⁶⁶ Despite overwhelming evidence that the private sector's profligate behavior was at the root of the subprime securitization frenzy,⁶⁷ Limbaugh suspended the truth to perpetuate his own peculiar mythmaking.

The dirty little myth has since evolved into a flowing characterization that the federal government used its powers to force the expansion of homeownership to people who had been shut out for economic reasons or because of racial and ethnic discrimination.⁶⁸ The myth suggests that these loan recipients—primarily minorities, and typically poor—must now shoulder the blame for the failing global financial markets because they were ultimately unqualified for their loans, were overreaching in seeking homeownership, and were now defaulting on their subprime mortgages. In addition, the myth contends that the federal government must accept responsibility for the failure of private market discipline because it was policy-driven social engineering by government officials that forced banks to lend to unworthy minority borrowers in the first instance.

While the myth was pervasive and dirty in the panic-stricken period that gripped Congress and the nation in September and October 2008,⁶⁹ it found traction at America's dinner tables and boardrooms and now continues to rear its head in unsettling settings today.⁷⁰ The dirty little myth has transmogrified slightly and now attaches full market crisis fault to minority borrowers, the Community Reinvestment Act, and the federal government (through the quasi-governmental agencies Fannie Mae and Freddie Mac).⁷¹ No longer is it just Representative Bachmann, pundits, and talk radio agitators that push the dirty little myth,⁷² but it continues to exist and persist

66. See Rush Limbaugh, *There's a Big Idea at Stake in the Democrat-Caused Financial Crisis*, RUSH LIMBAUGH SHOW (Sept. 22, 2008), http://www.rushlimbaugh.com/home/daily/site_092208/content/01125108.guest.html.

67. See cummings, *supra* note 14, at 44–60.

68. See Gross, *supra* note 16.

69. See PAULSON, JR., *supra* note 52, at 250–77 (detailing the initiation of TARP).

70. See cummings, *Recover?*, *supra* note 35; Carpentier, *supra* note 64; Aaron Pressman, *Community Reinvestment Act Had Nothing to do With Subprime Crisis*, BUS. WK., Sept. 29, 2008, available at http://www.businessweek.com/investing/insights/blog/archives/2008/09/community_reinv.html (reviewing the more than two hundred comments to this piece reveals the vitriol that hundreds of commentators have toward the Community Reinvestment Act and how they blame it (and minorities) for causing the financial crisis); cummings, Panel Presentation, *supra* note 35.

71. See Peter Schweizer, *A Poisonous Cocktail*, FORBES.COM (Oct. 10, 2009), <http://www.forbes.com/2009/10/03/community-reinvestment-act-mortgages-housing-opinions-contributors-peter-schweizer.html> (“The CRA is not about community development; it is, essentially, affirmative action in lending. . . . This is precisely what we need to get away from. Drinking this potent cocktail would be dangerous to our financial health.”).

72. See *Right-Wing Media Criticize Financial Reform with Regurgitated Myth that Affordable Housing Caused Financial Crisis*, MEDIAMATTERS FOR AM. (Apr. 21, 2010), <http://mediamatters.org/research/201004210051> (showing Rush Limbaugh's radio program where he blames the Community Redevelopment Act and Fannie Mae and Freddie Mac for the financial crisis, and

as economists,⁷³ think tank employees,⁷⁴ bloggers and reporters,⁷⁵ and family reunion attendees continue to peddle it.

Economist Thomas Sowell argues that the Community Reinvestment Act was a primary progenitor of the financial market crisis because it required banks to carefully track the loans it was extending to borrowers, including memorializing race, gender, and age.⁷⁶ To Sowell and many others, this act of tracing lending according to race, gender, and age allowed federal government regulators to exert enormous pressure on banks that did not appear to lend equally to all potential borrowers.⁷⁷ According to Sowell, pressuring banks to loan to all community borrowers where the banks did business had the effect of forcing or mandating that banks lower lending standards in order to increase its lending to minority and low-income borrowers.⁷⁸ Government policy, since George H.W. Bush, strongly promoted home ownership, and the Community Reinvestment Act tracked lending statistics, making banks develop lax lending standards in order to meet governmental policy initiatives and thus allowing the banks greater ability to gain regulatory approval of various activities that were unavailable if the government deemed the bank discriminatory in its lending practices.⁷⁹

absolves Wall Street of any responsibility for the meltdown); *Quick Fact: Hannity Falsely Suggests Community Reinvestment Act Caused Financial Crisis*, MEDIAMATTERS FOR AM. (Apr. 20, 2010), <http://mediamatters.org/research/201004200058> (showing Sean Hannity's Fox News program where he blames the Community Reinvestment Act and the "notion that everybody in America had a right to a house" as the primary cause of the financial market crisis).

73. See Thomas J. DiLorenzo, *The Government-Created Subprime Mortgage Meltdown*, LEWROCKWELL (Sept. 6, 2007), <http://www.lewrockwell.com/dilorenzo/dilorenzo125.html>; SOWELL, *supra* note 9; Thomas J. DiLorenzo, *The CRA Scam and Its Defenders*, LUDWIG VON MISES INSTITUTE (Apr. 30, 2008), <http://mises.org/daily/2963>; Howard Husock, *Housing Goals We Can't Afford*, N.Y. TIMES, Dec. 10, 2008, <http://www.nytimes.com/2008/12/11/opinion/11husock.html>; Stan Liebowitz, *The Real Scandal: How Feds Invited the Mortgage Mess*, N.Y. POST, Feb. 5, 2008, http://www.nypost.com/p/news/opinion/opedcolumnists/item_Qj108vDbysbe6LWDxcq03Jjjsessionid=C550FA8EE0F00E742C3F94D176B35970; Stan Liebowitz, *Anatomy of a Train Wreck: Causes of the Mortgage Meltdown*, INDEP. INST (Oct. 3, 2008), http://www.independent.org/publications/policy_reports/detail.asp?type=full&id=30.

74. See Wallison, *supra* note 33; Derbyshire, *supra* note 33; Weinstein, *supra* note 33.

75. See Noel Sheppard, *IBD: Carter More to Blame for Financial Crisis Than Bush or McCain*, NEWSBUSTERS (Sept. 20, 2008), <http://www.newsbusters.org/blogs/noel-sheppard/2008/09/20/ibd-carter-more-blame-financial-crisis-bush-or-mccain>; Jeff Jacoby, *Frank's Fingerprints are all Over the Financial Fiasco*, BOSTON GLOBE, Sept. 28, 2008, http://www.boston.com/boston_globe/editorial_opinion/oped/articles/2008/09/28/franks_fingerprints_are_all_over_the_financial_fiasco/.

76. See generally SOWELL, *supra* note 9 (describing the role that he believes the Community Reinvestment Act and governmental intrusion played in the financial market crisis and mortgage market collapse); Hoover Institution, *Thomas Sowell on the Housing Boom and Bust*, YOUTUBE, at 5:45 (July 2, 2009), available at <http://www.youtube.com/watch?v=5GoAGuT1bVY>.

77. See generally SOWELL, *supra* note 9.

78. See generally *id.*

79. See *id.*; Thomas Sowell on the Housing Boom and Bust, *supra* note 76.

Thus, according to Sowell, banks began devising crafty and mischievous lending devices like adjustable-rate, interest-only, negative-amortization, no-down-payment, and stated income mortgages in order to lend to minorities and low-income borrowers. Accordingly, the Community Reinvestment Act and social welfare governmental intrusion represent the true roots of the financial market fiasco.⁸⁰

Based primarily on Sowell's interpretation of the meltdown and the role played by government, in particular the Community Reinvestment Act, and the activity of Fannie Mae and Freddie Mac, most of the media and pundits that gravitate toward such messaging have seized upon this narrow line of reasoning and distilled it down to a single explosive message: minority borrowers caused the financial market crisis because the government, through the Community Reinvestment Act, forced banks to adopt quotas by requiring them to loan to poor borrowers of color—affirmative action in lending.

From this massive mutation, the dirty little myth has grown, appeared on headline news programs, and dominated dinner table discussions.⁸¹ That news agencies, financial institutions, and corporate America had the audacity to point a singular market failure finger at minority “subprime” mortgage recipients and governmental intrusion, rather than to accept responsibility for a failure that market discipline, responsibility, and regulation, rather than voracity and greed, could have avoided, demonstrates the depth of the mutation and the distortion of those that should accept responsibility (the list is lengthy) but still unfailingly refuse.⁸²

B. Nevermind the Truth

The dynamism of American racism has never allowed the truth to impede the desired scapegoating result. As described above, the mutation of reality in connection with the financial market crisis borders on the absurd. Still, gathering forces attempt to pin the blame for the financial market crisis on minority borrowers and governmental intrusion. Is it true that lenders provided minority borrowers with subprime loans because of forced lender activity based on the Community Reinvestment Act? Did minority borrowers defaulting on these subprime loans cause the collapse of the financial markets?

Responding to the immediate dirty little mythmakers who, in the days

80. See generally SOWELL, *supra* note 9.

81. See *supra* notes 48–75 and accompanying text.

82. See Frank Rich, *No One Is to Blame for Anything*, N.Y. TIMES, Apr. 11, 2010, <http://www.nytimes.com/2010/04/11/opinion/11rich.html> (“[Greenspan] was eager to portray himself as an innocent bystander to forces beyond his control. In his rewriting of history, his clout in Washington was so slight that he was ineffectual at ‘influencing the Congress.’”).

following the near collapse of the financial markets, blamed the Community Reinvestment Act as perpetuating the collapse, Federal Reserve chair Ben Bernanke, in a November 25, 2008, letter to Senator Robert Menendez stated:

Our own experience with CRA over more than 30 years and recent analysis of available data, including data on subprime loan performance, runs counter to the charge that CRA was at the root of, or otherwise contributed in any substantive way to, the current mortgage difficulties The available evidence to date . . . does not lend support to the argument that CRA is to blame for causing the subprime loan crisis.⁸³

Further, President of the Federal Reserve Bank of San Francisco Janet Yellen, stated in a March 2008 speech that “studies have shown that the CRA has increased the volume of responsible lending to low- and moderate-income households.”⁸⁴ In truth, with the imposed guidelines of the Community Reinvestment Act, efforts to open the mortgage pipeline to minority groups have proved successful.⁸⁵ Prior to the 1977 Community Reinvestment Act, a persistent practice called “red-lining” literally blocked minority borrowers who applied for mortgage loans from being approved.⁸⁶ When “red-lining,” lenders would refuse to write mortgages within particular geographical areas, often on the basis of race.⁸⁷ Studies show that the Community Reinvestment Act inspired responsible lending and opened homeownership to American citizens previously shut out, and loans that borrowers receive through the Community Reinvestment Act default significantly less often than peer loan vehicles and those loans that independent mortgage companies write.⁸⁸

83. Letter from Ben Bernanke to Robert Menendez, *supra* note 63.

84. Janet Yellen, President and CEO, Federal Reserve Bank of San Francisco, Opening Remarks to the 2008 National Interagency Community Reinvestment Conference (Mar. 31, 2008), available at <http://www.frbsf.org/news/speeches/2008/0331.html>.

85. See Susan Schmidt & Maurice Tamman, *Housing Push for Hispanics Spawns Wave of Foreclosures*, WALL ST. J., Jan. 5, 2009, <http://online.wsj.com/article/SB123111072368352309.html>.

86. *Id.*

87. *Id.*

88. See Roberto Quercia, Janneke Ratcliffe & Michael A. Stegman, *The Community Reinvestment Act: Outstanding, and Needs to Improve*, in REVISITING THE CRA: PERSPECTIVES ON THE FUTURE OF THE COMMUNITY REINVESTMENT ACT 47 (Prabal Chakrabarti et al. eds., 2009), available at www.frbsf.org/publications/community/cra/revisiting_cra.pdf; Lei Ding et al., *Risky Borrowers or Risky Mortgages* (2009) (Working Paper), available at <http://www.ccc.unc.edu/documents/Risky.Disaggreg.11.09.Final.pdf>; Memorandum from Glenn Canner & Neil Bhutta, Board of Governors of the Federal Reserve System, Division of Research and Statistics, to Sandra Braunstein, Dir., Consumer & Cmty. Affairs Div. (Nov. 21, 2008), available at http://www.federalreserve.gov/newsevents/speech/20081203_analysis.pdf; Jim Dwyer, *In a Sea of*

Despite the cry that the CRA forced lenders to extend subprime mortgages to unqualified minority borrowers,⁸⁹ the truth is that Congress enacted the CRA more than thirty years ago, so its blameworthy impact must have lain dormant for more than twenty-five of those years. The CRA requires no quotas or mandatory lending and instead specifies that lenders extend loans in a fair, sound, reasonable, and principled fashion.⁹⁰ Additionally, more than 50% of the lenders extending subprime loans during the run-up to the crisis were finance companies that were not required to comply with the CRA.⁹¹ In reality, less than 20% of lenders extending subprime loans were subject to the provisions of the CRA,⁹² with some estimates indicating that lenders beholden to the CRA extended just 6–7% of the subprime loans subject to default risk during the crisis.⁹³

While Thomas Sowell is careful to cabin his criticism of the Community Reinvestment Act by claiming that it only allowed the government to “pressure” banks to loan to poor minorities, many that subscribe to his economic theorizing use his language to argue that the CRA “forced” or “required” banks to write subprime loans to minorities.⁹⁴ This is simply not true. That said, Sowell cherry picks historical facts to support his own ends in describing the CRA’s role in the financial market crisis. When Sowell blames the government for forcing lax lending standards, he does not mention the persistent and gnawing discrimination that led to the adoption of the CRA in 1977. Forcing banks to track lending statistics by race, gender, and age allowed bank regulators to determine which banks were continuing to discriminate against minority borrowers in their lending practices.

Foreclosures, an Island of Calm, N.Y. TIMES, Sep. 26, 2008, http://www.nytimes.com/2008/09/27/nyregion/27about.html?_r=1&scp=2&sq=%2522brooklyn%2522%20and%20%2522foreclosures%2522&st=cse&oref=slogin.

89. See *supra* Part II.A.

90. See Interview with Hennes, *supra* note 60 (describing the requirements of the Community Investment Act and affirmatively disavowing that the CRA mandates any quotas or forces any lending to minority borrowers); Elizabeth Laderman & Carolina Reid, *CRA Lending During the Subprime Meltdown*, in REVISITING THE CRA: PERSPECTIVES ON THE FUTURE OF THE COMMUNITY REINVESTMENT ACT 115, 124 (Prabal Chakrabarti et al. eds., 2009), available at www.frbsf.org/publications/community/cra/revisiting_cra.pdf (concluding from their empirical study that Community Reinvestment Act loans were significantly less likely to be in foreclosure than loans originated by Independent Mortgage Companies, and finding that CRA standards and localized lending led to lower cost loans and significantly fewer defaults).

91. Edsall, *supra* note 48; Gordon, *supra* note 60; Pressman, *supra* note 60.

92. Edsall, *supra* note 48 (citing University of Oregon economist Marc Thoma who noted in addition that “subprime loans grew twice as fast in institutions that did not have to meet the conditions of the CRA”).

93. See Neil Bhutta & Glenn B. Canner, *Did the CRA Cause the Mortgage Market Meltdown?*, COMMUNITY DIVIDEND (Mar. 2009), http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4136.

94. See *supra* notes 76–82 and accompanying text.

Further, Sowell ignores the private market entry into the subprime mortgage market, together with independent and unregulated mortgage brokers who had nothing to do with the CRA but were insistent on writing subprime loans for profiteering purposes. While banks unquestionably have had defaulted CRA loans on their books during the market crisis, suggesting that some lenders extended loans they should not have, the truth is that their default rates and percentages are significantly lower than the subprime loans of independent mortgage companies and are in line with typical default percentages expected with CRA subprime loans.

Thus, not only did the CRA play little to no role in the subprime loan abuse, but often predatory lending practices targeted minority communities.⁹⁵ In 2006, 55% of loans to African Americans were subprime, despite the fact that many of those borrowers qualified for prime loans.⁹⁶ Additionally, statistics indicate that 40% of loans to Latinos were subprime, 35% of loans to American Indians were subprime, and just 23% of loans to whites were subprime.⁹⁷ Women also received less favorable loan terms across equal presentations of credit worthiness.⁹⁸ Studies indicate that lenders purposely steered minority borrowers into risky and expensive subprime loans even when they qualified for better terms.⁹⁹ Those lenders that steered minority borrowers into subprime loans were often mortgage brokers that were eager to make a significantly larger profit.¹⁰⁰

“In two audit studies in which creditworthy testers approached subprime lenders, whites were more likely to be referred to the lenders’ prime borrowing division than were similar black applicants. Further, subprime lenders quoted the black applicants very high rates, fees, and closing costs that were not correlated with risk.”¹⁰¹

A classic discrimination study by the reinvestment coalition found that black and Hispanic people who posed as borrowers received significantly worse treatment and were offered costlier, less-attractive loans more often than whites—even though minority

95. See Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL’Y 165, 176–82 (2010).

96. See Editorial, *Mortgages and Minorities*, N.Y. TIMES, Dec. 9, 2008, <http://www.nytimes.com/2008/12/09/opinion/09tue1.html> [hereinafter *Mortgages and Minorities*].

97. See *id.*

98. *Id.*

99. See Johnson, *supra* note 95; *supra* Part II.B.2 (describing predatory lending as a major cause of the market meltdown).

100. See *Mortgages and Minorities*, *supra* note 96; see also Johnson, *supra* note 95.

101. Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*; 34 ANN. REV. SOC. 181, available at http://www.princeton.edu/~pager/annualreview_discrimination.pdf.

testers had been given more attractive financial profiles, including better credit standings and lengthier employment tenures.¹⁰²

“This study . . . rebuts mortgage companies’ claims that companies determine lending patterns only by examining risk characteristics.”¹⁰³ “John Taylor, the coalition’s president, told a Congressional hearing last year, that minority borrowers were paying a ‘race tax.’ While lenders are required to report to the federal government such things as race, gender, census tract, amount of loan and income, they omit credit score data.”¹⁰⁴ Therefore, in guarding the most important statistic used in making loans, mortgage lenders provide for themselves a ready shield against charges of discrimination and predatory lending.¹⁰⁵ To further debunk the myth that minority borrowers caused the market crisis and that the CRA was at the root of this failure, it is crucial to note that lenders extended nearly sixty percent of all subprime loans in the 2005–07 period to white borrowers and extended more than forty percent of all subprime loans to white borrowers that qualified as “affluent.”¹⁰⁶

While the right has recharacterized the mortgage crisis as the fault of minority borrowers and governmental intervention through the CRA and Fannie Mae and Freddie Mac,¹⁰⁷ the reality is just the opposite.¹⁰⁸ Predatory lending and subprime mortgage abuse is far more responsible for minority involvement in the subprime markets than the Community Reinvestment Act.¹⁰⁹ There are no facts that support the dirty little myth. It is just that—a myth. Minority borrowers are no more responsible for the financial market crisis than are Brazilian lawyers, Samoan football players, or Tokyo sushi chefs.

As one journalist stated, “[W]hat we’re witnessing is the disastrous

102. See *Mortgages and Minorities*, *supra* note 96.

103. *Id.*

104. *Id.*

105. *Id.*

106. Zenitha Price, *Conservatives Blame People of Color for Wall Street Meltdown*, NEW AM. MEDIA (Oct. 7, 2008), available at http://news.newamericamedia.org/news/view_article.html?article_id=1b7402095164d593deaf2c1115f7ce69.

107. See Phil Gramm, *Deregulation and the Financial Panic: Loose Money and Politicized Mortgages are the Real Villains*, WALL ST. J., Feb. 20, 2009, <http://online.wsj.com/article/SB123509667125829243.html>.

108. See JOHNSON & KWAK, *supra* note 9, at 144–46 (describing the very limited exposure to subprime loans Fannie and Freddie had on their books during the securitization bonanza years, based primarily on charter limitations and requirements that they purchase only “conforming loans,” by in large); STIGLITZ, *supra* note 9, at 10–12 (describing conservative blaming of Fannie, Freddie and the Community Reinvestment Act as “sheer nonsense”).

109. See JOHNSON & KWAK, *supra* note 9, at 144–46; STIGLITZ, *supra* note 9, at 10–12; Johnson, *supra* note 95; *Mortgages and Minorities*, *supra* note 96.

collision of greed, fear, and ignorance at the intersection of Wall Street and Main Street. Some banking kingpins got rich peddling junk.”¹¹⁰ The once staid mortgage-lending industry became the playground for reckless investment bankers who were not content to settle for modest profits.¹¹¹ Instead, they turned mortgage lending into a gambling scheme, introducing high risk and huge profits.¹¹² “The system became corrupted by high salaries and the need to sustain those high salaries, by shoddy lending practices, by self-dealing with the bond regulators.”¹¹³

The causation and failures that precipitated the financial meltdown were diverse and complex.¹¹⁴ The dirty little myth is unsupportable.¹¹⁵ So, why was the myth floated in the face of little evidentiary support? What motivated this blatant misrepresentation that continues to percolate?

The dynamism of American racism encourages mutations and distortions that serve to prop up white privilege and maintain status quo power. The historical fabric of the United States is interwoven with examples of racial myths floated and received, and blatant racial misrepresentations perpetrated to entrench power. To wit, recent events evince powerful support that U.S. racism continues unabated and that claims of post-racialism are wildly premature. Police harassment and racial profiling were on clear display in the 2009 Henry Louis Gates incident. Race baiting and flat racial misrepresentation were evident in the 2010 Shirley Sherrod affair. Police brutality and race hatred were framed in sharp relief by the 2010 Jordan Miles beating at the hands of the Pittsburgh Police

110. See Caitriona Palmer, *Greed That Led to Financial Meltdown*, INDEPENDENT, Mar. 22, 2008, <http://www.independent.ie/business/world/greed-that-led-to-financial-meltdown-1324810.html>.

111. *See id.*

112. *Id.*; see also Andy Serwer & Allan Sloan, *How Financial Madness Overtook Wall Street*, TIME, Sept. 18, 2008, <http://www.time.com/time/business/article/0,8599,1842123,00.html>.

113. *See Palmer, supra* note 110.

114. *See Serwer & Sloan, supra* note 112.

115. *See generally* TRAIGER & HINCKLEY LLP, THE COMMUNITY REINVESTMENT ACT OF 1977: NOT GUILTY, MORTGAGE DATA REFUTE CHARGE THAT THE CRA IS AT THE ROOT OF THE FINANCIAL CRISIS (Jan. 26, 2009), available at http://www.traigerlaw.com/publications/The_community_reinvestment_act_of_1977-not_guilty_1-26-09.pdf; David Goldstein & Kevin Hall, *Private Sector Loans, Not Fannie or Freddie Triggered Crisis*, MCCLATCHY NEWSPAPERS, Oct. 12, 2008, <http://www.mcclatchydc.com/2008/10/12/v-print/53802/private-sector-loans-not-fannie.html>; TRAIGER & HINCKLEY LLP, THE COMMUNITY REINVESTMENT ACT: A WELCOME ANOMALY IN THE FORECLOSURE CRISIS, INDICATIONS THAT THE CRA DETERRED IRRESPONSIBLE LENDING IN THE 15 MOST POPULOUS U.S. METROPOLITAN AREAS (Jan. 7, 2008), available at http://www.traigerlaw.com/publications/traiger_hinckley_llp_cra_foreclosure_study_1-7-08.pdf; Eric Alterman & George Zornick, *Think Again: Meltdown: The Blame Game*, CTR. FOR AM. PROGRESS (Oct. 16, 2008), http://www.americanprogress.org/issues/2008/10/thinkagain_fannie.html; Ellen Seidman, *Don't Blame the Community Reinvestment Act*, AM. PROSPECT (Aug. 7, 2009), available at http://www.prospect.org/cs/articles?article=dont_blame_the_community_reinvestment_act.

Department.

III. HENRY LOUIS GATES, SHIRLEY SHERROD, AND JORDAN MILES

Claims of entry into a post-racial era in the United States are contradicted by continuing instances of outright racism and race hatred that seemingly never ease.

A. Henry Louis Gates

When world renowned African American, public-intellectual, and Harvard University Professor Henry Louis Gates returned to his Cambridge, Massachusetts home from filming a documentary in China on July 16, 2009, he found his front door damaged and jammed.¹¹⁶ With the help of his driver, Gates set about forcing open his own front door, only to be startled and confronted, after successful entry into his home, by white, male, police officer Sergeant James Crowley.¹¹⁷ A neighbor had called 9-1-1 to report a potential burglary, though police records indicate that the caller left open the possibility that the intruders could also be the residents who were locked out; when pressed to provide racial identification, the neighbor indicated that the alleged intruders “might be Latino.”¹¹⁸ The interaction between Gates and Crowley, when the officer arrived upon the scene and found Gates within his own home, can only fairly be described as contentious.¹¹⁹ Crowley demanded that Gates identify himself and step outside of the home.¹²⁰ Gates retorted that he was a Harvard professor, that he lived in the house, and that Crowley was racially profiling him.¹²¹ Crowley refused to believe Gates, daring him to prove his residency and again demanding that Gates step out of the house.¹²²

Both sides dispute the details that occurred after Crowley followed Gates into the kitchen area of the home to see Gates’ driver’s license and

116. See Krissah Thompson, *Harvard Professor Arrested at Home*, WASH. POST, July 21, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/20/AR2009072001358.html>.

117. See Abby Goodnough, *Harvard Professor Jailed; Officer is Accused of Bias*, N.Y. TIMES, July 20, 2009, <http://www.nytimes.com/2009/07/21/us/21gates.html>.

118. See Charles Ogletree, *Lawyer’s Statement on the Arrest of Henry Louis Gates Jr.*, ROOT (July 20, 2009), <http://www.theroot.com/views/lawyers-statement-arrest-henry-louis-gates-jr> (Professor Ogletree served as Gates’s defense counsel.).

119. See andré douglas pond cummings, *Henry Louis Gates and Hip Hop*, HIP HOP L. (July 21, 2009), <http://hiphoplaw.blogspot.com/2009/07/henry-louis-gates-and-hip-hop.html>.

120. See Ogletree, *supra* note 118.

121. See *id.*

122. See *id.*

Harvard ID card, with the police report stating that Dr. Gates became belligerent, “exhibiting loud and tumultuous behavior,” accusing the officer of outright racist treatment, ultimately prompting the arrest of Gates, on his front porch, for disorderly conduct.¹²³ Per Gates, and in contrast to the police report, Crowley refused to provide Gates with his name, identification, and badge number, despite multiple requests from Gates, and officers baited Gates to exit the home onto his front porch so the officer could effectuate a “disorderly conduct” arrest, as such an arrest requires a public display of disorderliness, which could not be effectuated in the privacy of a home.¹²⁴ Following his arrest, the officers took Gates to the Cambridge Police Station, where he was processed before his release four hours later, immediately after authorities realized Gates’ identity.¹²⁵ Soon thereafter, they dropped all charges against Gates.¹²⁶

President Obama famously weighed in following the Gates arrest when he stated flatly that the Cambridge Police Department had “acted stupidly” in the circumstances leading up to the arrest of Henry Louis Gates.¹²⁷ Obama’s statement created a firestorm of controversy in which law enforcement agencies across the country condemned the President’s statement as uninformed and disrespectful.¹²⁸ While civil rights activists praised Obama’s forthright reaction to the racially-tinged incident, most were later disappointed as Obama’s racial teaching moment was lost during a “beer summit” between all parties involved at the White House.¹²⁹

123. See Thompson, *supra* note 116.

124. See Ogletree, *supra* note 118.

125. See Goodnough, *supra* note 117; Ogletree, *supra* note 118.

126. See *Charge Against Harvard Professor Dropped*, CNN.COM (July 21, 2009), <http://www.cnn.com/2009/CRIME/07/21/massachusetts.harvard.professor.arrested/>.

127. See Helene Cooper & Abby Goodnough, *Over Beers, No Apologies, but Plans to Have Lunch*, N.Y. TIMES, July 31, 2009, <http://www.nytimes.com/2009/07/31/us/politics/31obama.html> (reporting that President Obama went on record stating that the Cambridge Police “acted stupidly” in arresting Henry Louis Gates); *Obama Doesn’t Regret ‘Acted Stupidly’ Remark About Henry Gates, Jr. Arrest*, NYDAILYNEWS.COM (July 24, 2009), http://www.nydailynews.com/news/politics/2009/07/23/2009-07-23_obama_doesnt_regret_acted_stupidly_remark_compliments_sgt_james_crowley.html.

128. See Naftali Bendavid, *Obama Tries to Move Past Gates Furor*, WALL ST. J., July 27, 2009, at A3, available at <http://online.wsj.com/article/SB124865178752782423.html> (“The dispute sparked a national debate on racial profiling. Mr. Obama further inflamed the issue by saying at the news conference . . . that, while he did not have all the facts, the Cambridge Police had ‘acted stupidly.’”); Katharine Q. Seelye, *Obama Wades Into a Volatile Race Issue*, N.Y. TIMES, July 23, 2009, <http://www.nytimes.com/2009/07/23/us/23race.html> (“Wednesday night’s press conference seemed to be a different deal as the president leaped into a highly charged controversy that has ignited passions across talk radio, the blogosphere and the old-fashioned water cooler.”).

129. See *Gates’s Daughter: Beer Summit Made ‘Little Sense’*, WASH. POST BLOG 44 (Jul. 31, 2009, 6:39 PM), http://voices.washingtonpost.com/44/2009/07/31/gates_daughter_beer_summit_mad.html.

The Gates incident, occurring on the heels of Obama's taking office as President, provided an immediate opportunity to address the post-racial framework that so many imagined when Obama was elected. However, Obama and his administration retreated from any opportunity to act boldly or to use the incident as a racial teaching or healing moment. Instead, the incident starkly reminded all thoughtful observers of the pervasive disparate treatment that minority Americans face when confronted by the U.S. criminal justice system.¹³⁰ When the majority white law enforcement regime in the United States confronts a black man, the stubborn fact remains that authorities will treat him more harshly, with less respect, and ultimately with a contempt that belongs in a bygone era, not in a purported post-racial society.¹³¹ As one black professor at Harvard's medical school asked "[Would] this kind of egregious act . . . have happened had Professor Gates been a white professor[?]"¹³²

B. Shirley Sherrod

In July 2010, after NAACP Chairperson Benjamin Jealous accused the Tea Party of providing cover for racist elements in its membership,¹³³ white, right-wing blogger Andrew Breitbart retaliated by posting a grainy, edited clip of African American Rural Development Director for the U.S. Department of Agriculture Shirley Sherrod delivering what appeared to be an anti-white rant to an audience at an NAACP gathering.¹³⁴ Breitbart intended his post, styled "NAACP Bigotry in their Ranks,"¹³⁵ to contradict Jealous's statement regarding racism within the Tea Party by showing that

130. See Cummings, *supra* note 119.

131. See Lawrence Bobo, *What do you Call a Black Man with a Ph.D.?*, ROOT (July 21, 2009), <http://www.theroot.com/views/what-do-you-call-black-man-phd?hpId=artslot> ("Ain't nothing post racial about the United States of America.").

132. See Goodnough, *supra* note 117.

133. Shannon Travis, *NAACP Passes Resolution Blasting Tea Party 'Racism'*, CNN.COM (July 16, 2010), http://articles.cnn.com/2010-07-14/politics/naacp.tea.party_1_tea-party-hilary-shelton-rampant-racism?_s=PM:POLITICS (quoting NAACP President and CEO Benjamin Jealous: "We take no issue with the Tea Party. We believe in freedom of assembly and people raising their voices in democracy. We take issue with the Tea Party's continued tolerance for bigotry and bigoted statements. The time has come for them to accept the responsibility that comes with influence and make clear that there is no space for racism and anti-Semitism and other forms of bigotry in their movement.").

134. Sheryl Gay Stolberg, Shaila Dewan & Brian Stelter, *With Apology, Fired Official is Offered a New Job*, N.Y. TIMES, July 22, 2010, <http://www.nytimes.com/2010/07/22/us/politics/22sherrod.html>.

135. Andrew Breitbart, *Video Proof: The NAACP Awards Racism—2010*, BIGGOVERNMENT (July 19, 2010), <http://biggovernment.com/abreitbart/2010/07/19/video-proof-the-naacp-awards-racism2010/>.

the NAACP harbored racist attitudes within its ranks.¹³⁶ Breitbart's post went viral immediately and appeared on nationwide conservative news outlets. However, following the scrutiny of Sherrod's apparent rant, it was discovered that her speech had been egregiously manipulated and taken out of context by Breitbart as he cherry-picked two minutes of a forty-five minute narrative that ultimately included a message of racial healing, forgiveness, and admitted racial growth.¹³⁷ Sherrod had told the NAACP gathering that a white man had murdered her father—a man who went without punishment forty-five years earlier—and proceeded to tell of resisting the temptation to discriminate against a southern white farmer who had come to Sherrod in her capacity as a farm aid official.¹³⁸

Before it became clear that Sherrod had been ambushed, Tom Vilsack, the Secretary of the U.S. Department of Agriculture, demanded that Sherrod resign her position, while some Department officials pressured Sherrod to pull her automobile over to the side of the road in order to deliver her resignation via text.¹³⁹ Demands from the Obama Administration that Sherrod resign came before anyone had viewed the entire speech in context and even before Sherrod was able to deliver her side of the story or defend herself.¹⁴⁰ The NAACP also prematurely condemned Sherrod before checking Breitbart's facts and discovering that Fox News and Breitbart had "snookered" the NAACP and the American public.¹⁴¹ Following the embarrassing knee-jerk reactions by the NAACP and the Department of Agriculture, and after careful examination into Breitbart's manipulation, it finally came out not only that Sherrod was not a "racist element" within the NAACP, but also that she had been a champion of civil rights and the rights of the poor farmer, whatever race, in America throughout her career. In particular, Sherrod helped save the farm of Roger and Eloise Spooner when their farm was facing foreclosure, and it was this couple to whom Sherrod referred when honestly discussing the temptation she had faced down to not assist white farmers as zealously as she should.¹⁴² The Spooner's later reported that Sherrod had saved their farm decades before and that they were

136. Stolberg, Dewan & Stelter, *supra* note 134.

137. Peggy Noonan, *The Power of Redemption*, WALL ST. J., July 22, 2010, <http://online.wsj.com/article/SB10001424052748703467304575383731552735178.html>.

138. *Id.*

139. Stephanie Condon, *Shirley Sherrod: White House Forced My Resignation*, CBSNEWS.COM (July 20, 2010), http://www.cbsnews.com/8301-503544_162-20011099-503544.html.

140. *Id.*

141. Press Release, NAACP, NAACP Statement on the Resignation of Shirley Sherrod (July 20, 2010), *available at* <http://www.naacp.org/press/entry/naacp-statement-on-the-resignation-of-shirley-sherrod1/>.

142. Noonan, *supra* note 137.

grateful to her for her efforts.¹⁴³

The Sherrod affair clearly signals that the United States has not entered a post-racial positioning. It is clear that we have not overcome the problem of the color-line in the United States when racial opportunists continue to willingly score cheap, spurious points by exploiting innocent situations, when media outlets refuse to interrogate these exploitations but irresponsibly perpetuate them, and when administration leadership respond to these manipulations in a reckless manner.¹⁴⁴ The Sherrod affair proves Attorney General Eric Holder's 2009 statement: "Though this nation has proudly thought of itself as an ethnic melting pot, in things racial, we . . . continue to be in too many ways essentially a nation of cowards."¹⁴⁵

C. Jordan Miles

When young Jordan Miles, a highly accomplished African American teen violist enrolled at Pittsburgh's prestigious Creative and Performing Arts High School, stepped out of his mother's house on his way to visit his grandmother on the evening of January 12, 2010,¹⁴⁶ little did he realize that he was about to learn in no uncertain terms what it means to be a young black man in America.¹⁴⁷ Moments after he began the routine walk to his grandmother's home, Jordan, who stands 5'6" and weighs 150 pounds, was startled to see three white men, dressed in plain clothes, leap from a dark, unmarked car, and sprint toward him.¹⁴⁸ Jordan, in a panic and thinking the men were about to assault him, ran.¹⁴⁹ Without identifying themselves as undercover police officers, the three white men chased Jordan down, and when he fell on the icy sidewalk, they pounced upon the slight teenager,

143. *Id.*

144. W.E.B. DUBOIS, *Of the Dawn of Freedom, in THE SOULS OF BLACK FOLK* 10, 10 (Bantam Classic 2005) (1903) ("The problem of the Twentieth Century is the problem of the color-line . . .").

145. Ed Hornick, *Holder 'Nation of Cowards' Remarks Blasted, Praised*, CNN.COM (Feb. 19, 2009), http://articles.cnn.com/2009-02-19/politics/holder.folo_1_black-history-month-eric-holder-cowards?_s=PM:POLITICS (quoting Eric Holder).

146. *See Brutality Charged as Pittsburgh Police Defend 'Fist Strikes' on Teen*, CNN.COM (Jan. 22, 2010), <http://www.cnn.com/2010/CRIME/01/22/pennsylvania.arrest.dispute/index.html> [hereinafter *Brutality*].

147. *See cummings, A Furious Kinship, supra* note 47, at 562–64 (describing Talib Kweli's quandary at trying to teach his young son that as a black man in America, society will always view him as a threat and that his life, no matter how cleanly he lives it, will always be in danger at the hands of U.S. law enforcement).

148. *See Teen Violinist Says Police Beat Him and Tore Off Dreadlock*, NEWSONE FOR BLACK AM. (Jan. 22, 2010), <http://newsone.com/nation/associated-press/teen-violinist-says-police-beat-him-and-tore-off-dreadlock/>.

149. *See Brutality, supra* note 146.

tased him,¹⁵⁰ beat him with closed fists, kned him in the face, and tore several dreadlocks from his scalp.¹⁵¹ Fearing for his life, Jordan attempted to utter the Lord's Prayer during the beating, but the officers repeatedly told him to shut his mouth, shoved his face into the snow and ice on the sidewalk, and asked him over and over where he had stashed his gun, drugs, and money.¹⁵²

Jordan Miles' white assailants were undercover police officers Michael Saldutte, David Sisak, and Richard Ewing. These three men, following the brutal beatdown of Jordan, later stated in an affidavit that they believed Jordan was carrying a gun underneath his winter parka.¹⁵³ Jordan, with no criminal history and not a single arrest on his record, and who in fact lived a very carefully monitored and sheltered life that included daily viola practice, was carrying a Mountain Dew soda in his pocket, which the officers claimed they believed was a gun.¹⁵⁴ Jordan still suffers from facial nerve damage and night terrors, based on the profiling and savage beating officers Saldutte, Sisak, and Ewing administered.¹⁵⁵ The Pittsburgh Police Department demoted the three officers from undercover work and reassigned them to uniform desk jobs in the Pittsburgh Police Department, but this occurred only after public outcry and protests forced the hand of the Pittsburgh PD brass.¹⁵⁶

While post racialist's might argue that police brutality and racial profiling are relics of a distant past, the Jordan Miles' experience offers stark rebuttal. When law enforcement—charged with serving the public and protecting the innocents—see an innocent child, a young teenager with a quiet manner and a talent for orchestral instruments, solely as a gangster drug dealer, merely because of his race and class, then our nation's racial disconnect must be as chasm-like as it has ever been. Further, the savagery of the beating the officers inflicted upon young Jordan indicates a racial

150. See Christian Morrow, *B-PEP, CAPA Youths Rally for Jordan Miles*, NEW PITTSBURGH COURIER, Jan. 27, 2010, http://www.newpittsburghcourieronline.com/index.php?option=com_content&view=article&id=1319:b-pep-capa-youths-rally-for-jordan-miles&catid=38:metro&Itemid=27.

151. See *Brutality*, *supra* note 146.

152. See Paula Reed Ward & Sadie Gurman, *Teen Sues City, 3 Suspended Officers*, PITTSBURGH POST-GAZETTE, Aug. 31, 2010, <http://www.post-gazette.com/pg/10243/1083859-53.stm>.

153. See Ramit Plushnick-Masti, *Jordan Miles, Teen Violinist: Beat By Police Over Mt. Dew Bottle*, HUFFINGTON POST (Jan. 22, 2010), http://www.huffingtonpost.com/2010/01/24/jordan-miles-teen-violini_n_434772.html.

154. See *id.*

155. See Ward & Gurman, *supra* note 152.

156. See Sadie Gurman, *Pittsburgh Cops Put on Paid Leave During Beating Investigation*, PITTSBURGH POST-GAZETTE, Feb. 1, 2010, <http://www.post-gazette.com/pg/10032/1032662-100.stm>.

hatred that continues to permeate law enforcement in the United States.¹⁵⁷ When three large, white men easily subdue a 5'6" boy, with a Mountain Dew in his pocket, but the boy shows up at the police station having been tasered, kned in the face, beaten with closed fists repeatedly, and with dreadlocks ripped from his scalp, this signals more than simply subduing a suspected criminal. This represents a deep-seated animosity that belies the most avid post racial sensibility.

IV. POST RACIALISM?

When the United States capital markets nearly collapsed in 2008 and came close to causing a global financial meltdown, it is incredibly revealing that a stunning portion of the nation's citizenry pointed the finger of blame at minority Americans.¹⁵⁸ While at first astonished by this audacious misdirection, the blaming has now settled into a familiar trope that must necessarily be recognized and challenged.

As if existing in parallel universes at the darkest moments of the near global meltdown, the United States was preparing to elect its first non-white male President of the United States. In near lockstep, fear of potential economic failure paralyzed the country, yet an African American stood poised to become the most powerful individual in the world. In a truly schizophrenic moment, millions of Americans denigrated minority borrowers as the cause of the financial market crisis while millions of Americans flocked to their election precincts to vote for a candidate who held promise to ring in a post-racial America.¹⁵⁹ The irony of this dual, simultaneous construction cannot be ignored.

To many, the election of Barack Obama as President signaled a new era for American politics and symbolically represented a coming of age for a

157. See generally andré douglas pond cummings, Comment, *Just Another Gang: "When the Cops Are Crooks Who Can You Trust?"* 41 HOW. L.J. 383 (1998) (describing the "siege mentality" that infects many major metropolitan police forces).

158. See *supra* Part II.

159. See Senator Barack Obama, *A More Perfect Union* (Mar. 18, 2008), available at <http://my.barackobama.com/page/content/hisownwords>; Daniel Schorr, *A New, 'Post Racial' Political Era in America*, NATIONAL PUBLIC RADIO (Jan. 28, 2008), <http://www.npr.org/templates/story/story.php?storyId=18489466>; Shelby Steele, *Obama's Post-Racial Promise: Obama Seduced Whites with a Vision of Their Racial Innocence Precisely to Coerce Them into Acting Out of a Racial Motivation*, L.A. TIMES, Nov. 5, 2008, <http://articles.latimes.com/2008/nov/05/opinion/oe-steele5>; Courtney E. Martin, *The Power of the "Post-Racial" Narrative*, THE AMERICAN PROSPECT, Feb. 2, 2010, http://www.prospect.org/cs/articles?article=the_power_of_the_postracial_narrative; John McWhorter, *Racism in America Is Over*, FORBES, Dec. 30 2008, http://www.forbes.com/2008/12/30/end-of-racism-oped-cx_jm_1230mcwhorter.html. Barack Obama himself campaigned in a post-racial fashion, positioning himself as a product of a different era, apart from the civil rights battles of old. Martin, *supra* note 159.

country with a tortured racial history.¹⁶⁰ At the very moment that our nation was touted as “coming of age,” we regressed into our familiar historical hostility toward our minority citizenry.¹⁶¹ For a nation that has purportedly progressed to a post-racial place, the dirty little myth smacks of the racial hatred and propaganda that marks so many chapters of our nation’s history.¹⁶² Can we as a country make a legitimate claim of true racial progress, racial healing, and post-racial understanding if we continue to condemn the least powerful and those least responsible for the ills that beset our nation?

Many now argue that the financial market crisis owes its entire genesis to the Community Reinvestment Act and the quasi-governmental GSEs, Fannie Mae, and Freddie Mac. Perhaps recognizing the political inexpediency of blaming “minorities,” the dirty little myth has now morphed into a more insidious characterization of minority blaming in code. Thoughtful observers easily dismiss Fox News pundits and politicians Coulter, Glenn Beck, Cavuto, Bachmann, Buchanan, and Limbaugh while maintaining powerful sway over a certain segment of the U.S. population. This group was explicit in its condemnation of minority Americans and undocumented immigrants as the cause of our nation’s subprime sickness.¹⁶³ The absurdity of the dirty little myth can be easily swept aside as mere talk radio or Fox News spin and only housed in the far right reaches of the Tea-Party political spectrum.

But what has dangerously evolved from the early Buchanan, Coulter, Limbaugh, Bachmann screeds against “minority” borrowers and “affirmative action” for homeowners is now a fairly consistent drumbeat from economists, think tanks, bloggers, market insiders, and citizen commentators that articulate as the true downfall of the economy the Community Reinvestment Act and the pre-meltdown activities of Fannie Mae and Freddie Mac. This blaming of governmental welfare, while not expressly racial, is simply traditional coding for race.¹⁶⁴ Using the Community Reinvestment Act, Fannie, and Freddie as the primary agents of the economic collapse simply names in code minority Americans and “welfare” affirmative action as the prime progenitor of the global

160. See Ian F. Haney-Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Hua Hsu, *The End of White America?* ATLANTIC, Jan.–Feb. 2009, <http://www.theatlantic.com/magazine/archive/2009/01/the-end-of-white-america/7208/>; Tim Rutten, *The Good Generation Gap*, L.A. TIMES, Feb. 6, 2008, at 31; Peter J. Boyer, *The Political Scene: The Color of Politics*, NEW YORKER, Feb. 4, 2008, at 38.

161. See *supra* Part II.A.

162. See *Plessy v. Ferguson*, 163 U.S. 537 (1896); see also *Dred Scott v. Sandford*, 60 U.S. 393 (1856); *Korematsu v. United States*, 323 U.S. 214 (1944).

163. See *supra* notes 48–75 and accompanying text.

164. See *cummings*, *supra* note 14, at 75–80.

meltdown.¹⁶⁵ And this coding persists with remarkable intensity amongst a wide swath of Americans.¹⁶⁶

Post-racialism is a deeply loaded term. Taken lightly, post-racialism can mean simply that our nation has transcended the “color line”¹⁶⁷ and that truly all people are created equal and treated fairly in this country. Surely, if an African American can become President, race is no longer an issue worthy of discussion. On a much deeper level, society can use post-racialism as a tool to perpetuate white privilege and lend additional power to entrenched elites.

Professor Sumi Cho describes one outcome or effect of post-racialism as a “result of adoption of a post-racial construct ‘whether intended or not, [it] is the ultimate redemption of whiteness: a sociocultural process by which whiteness is restored to its full pre-civil-rights value.’”¹⁶⁸ In embracing a post-racial conceptualization, Professor Cho argues that the full value of white privilege is captured for whites as unjust enrichment and disaggregated from racist complicity based on the occurrence of the “big event” of racial transcendence.¹⁶⁹ The election of Barack Obama as President fully realizes the equality dream for minority citizens and returns whiteness to its comfortable place of dominance and privilege. Racial remedies and racial discourse are off the table in a post-racial world, and those that engage in continuing racial discussion are agitators seeking to place race where it no longer belongs.¹⁷⁰ The nation has rebooted. Equal opportunity is freely available, and as a consequence, white privilege reigns supreme.

The irony of the survival of the dirty little myth in a purported post-racial nation is that the myth of minority fault for economic collapse serves as subterfuge for the deeply cynical purpose of maintaining “capitalism” and American corporatocracy as a wealthy white tradition. Surely scapegoating minority borrowers as guilty for bringing the global financial markets down is reprehensible, but when done to prop up the very systems that actually

165. *Id.*

166. See *supra* notes 54–75 and accompanying text; Aaron Pressman, *Community Reinvestment Act Had Nothing to do With Subprime Crisis*, BUS. WK., Sept. 29, 2008, http://www.businessweek.com/investing/insights/blog/archives/2008/09/community_reinv.html (reviewing the more than 400 comments to this piece that reveals the vitriol that dozens of commentators have toward the Community Reinvestment Act and how they blame it (and minorities) for causing the financial crisis).

167. See DUBOIS, *supra* note 144 (“The problem of the Twentieth Century is the problem of the color-line.”).

168. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1596 (2009).

169. See *id.*

170. See *id.*; see generally Nancy-Lopez, *supra* note 160; Jeffrey J. Rachlinski & Gregory Scott Parks, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659 (2010).

failed the nation, simply because those systems are the playground of the white privileged and powerful, is truly diabolical.

The financial market crisis can teach us many lessons. One of the most poignant is that post-racialism is a dream—a worthy dream, but still a distant one. Predatory lenders targeted African American and Latino borrowers at alarming rates. Lenders steered minority borrowers into riskier and costlier loans despite credit scores that situated them comfortably within prime loan territory and were eligible for far less costly and risky mortgages. Once the subprime mortgage market collapsed, dozens of commentators and now millions of Americans, including economists, legislators, think tank employees, citizens, and neighbors, place the blame for the financial market crisis squarely at the feet of African American and Latino homeowners. In a dreadful distortion, millions of Americans now blame minority borrowers, and through racial coding, the Community Reinvestment Act, Fannie, and Freddie as the literal crisis scapegoats. If we had truly arrived at a post-racial, colorblind place, then this dirty little myth could not exist and spread like a racist virus.

The financial market crisis has laid bare our true place, and it is not post-racial. The dirty little myth indicates that we are truly far away from a post-racial America.

V. CONCLUSION

The financial market crisis of 2008 invites interrogation of sacred economic traditions in the United States. A near total collapse of the global capital markets signals genuine problems with American capitalism and the neoclassical economics modeling so prevalent today. Yet, we are largely failing the invitation to critically examine the underlying economic principles upon which our markets are currently based. One reason that we are failing the invitation to challenge our classic capitalist underpinnings is because many of the entrenched elite in the United States have misdirected our attention. When a massive failure in the private markets nearly collapses the economy, one simmering reason the entrenched have offered up for the underlying cause is minority borrowers in many of our city's urban centers. A wide section of citizens in this country have fully embraced this classic racist misdirection.

The reasons and causes of the financial market crisis are complex, difficult, and wide-ranging. Very few market players are innocent when it comes to the subprime mortgage industry collapse. Society must hold individuals and corporations responsible for their roles, including Wall Street, commercial banks, investment banks, corporate executives, CEOs, regulators, legislators, individual borrowers, lenders, mortgage brokers, credit rating agencies, and governmental entities. Each must recognize its role in the meltdown and honestly explore how it needs to change to better protect U.S. shareholders and investors. The parties least culpable for the

near global meltdown and least in need of absolution are minority borrowers—in particular, minority borrowers that took out loans through the Community Reinvestment Act. We must summarily reject this classical racial scapegoating if we ever hope to reach the two goals of genuinely safeguarding our nation's capital markets and arriving at a truly post-racial positioning in America.