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Reflections on Ferguson: What's Wrong with Black People?

Chuck Henson*

INTRODUCTION

After Officer Darren Wilson shot and killed Michael Brown on August 9, 2014, it seemed as if it was the summer of 1967 again. The same series of events that happened in Newark and Detroit in 1967 happened in Ferguson, Missouri, in 2014. A white man shot and killed a black man. The predominantly black population protested, rioted, and looted. The predominantly white police force was overwhelmed. The governor called out the National Guard and imposed a curfew. When these things happened in the summer of 1967, President Lyndon B. Johnson, by Executive Order 11365, established what would become known as the Kerner Commission to find out what happened and why it happened.¹ To paraphrase, President Johnson, like much of white America, wanted to know: What's wrong with black people?² The Kerner Commission's answer was: "Our nation is moving toward two societies, one black, one white – separate and unequal."³

What's wrong with black people? Just like 1967, this question lies at the core of much of the response to events in Ferguson and other cities where

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1. Exec. Order No. 11,365, 32 Fed. Reg. 11,111 (July 29, 1967). The official name of the commission was the National Advisory Commission on Civil Disorders. *Id.* It became known as the "Kerner Commission" because its chair was Illinois Governor Otto Kerner. Jamie L. Wacks, *A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories*, 7 VA. J. SOC. POL'Y & L. 195, 237 (2000).

2. *See id.* ("SEC 2. *Functions of the Commission.* (a) The Commission shall investigate and make recommendations with respect to: (1) The origins of the recent major civil disorders in our cities, including the basic causes and factors leading to such disorders and the influence, if any, of organizations or individuals dedicated to the incitement or encouragement of violence.").

3. Nat'l Advisory Comm'n on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 1 (1968) [hereinafter Kerner Comm'n Report], <http://www.eisenhowerfoundation.org/docs/kerner.pdf>.

the killing of an unarmed black man touched off violent protests.⁴ Just like 1967, framing the issue as “What’s wrong with black people?” states a value judgment. Today, the question still reflects a viewpoint that there could not possibly be anything wrong enough to justify the response sparked by Michael Brown’s death and the killings of other unarmed black men by white police officers. Just like 1967, the question assumes that an escalation from legal peaceful protest to illegal violent protest runs counter to a shared set of cultural norms. Similar to the Kerner Commission’s findings in 1967, today, white people believe there is still one society and our nation is still moving toward two separate societies. White society still reflects our nation’s values.⁵ Black society still does not. If that is the case, it is no wonder that white people still want to know “What’s wrong with black people?”⁶

4. Historians have noted that whites largely responded to the inner city riots of the late 1960s with shock because the riots happened so quickly after whites finally gave blacks the civil rights laws the whites thought the blacks wanted. *See* C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 191, 209 (3d rev. ed. 1974); HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY 1954–1992*, at 191, 210 (Eric Foner consulting ed., rev. ed. 1993). In short, the white mindset was: we gave them what they wanted, what’s wrong with them?

5. Take, for example, how federal employment discrimination law, Title VII, treats race based workplace harassment. 42 U.S.C. § 2000e-2 (2012). Liability rests largely on whether an objective “reasonable person” would have felt harassed. *See* *Page v. City of Pittsburgh*, 114 F. App’x 52, 54 (3d Cir. 2004). The “reasonable person” is the politically correct version of the “reasonable man” standard for determining tort liability in a number of circumstances. *See generally* RESTATEMENT (SECOND) OF TORTS § 500 (1965). The “reasonable man” is a creature of a time when the only reasonable men were the ones who could serve on juries and declare the cultural norm of what was reasonable in rendering a verdict: white men. *See generally* James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 *YALE L.J.* 895 (2004). Given the fact that most Title VII race discrimination cases are decided at summary judgment by judges, the modern “reasonable person” remains largely a “reasonable [white] person.” *See* RUSSELL WHEELER, *GOVERNANCE STUDIES AT BROOKINGS, THE CHANGING FACE OF THE FEDERAL JUDICIARY* 1 (Aug. 2009) (eighty-five percent of the federal judiciary is white), http://www.brookings.edu/~media/research/files/papers/2009/8/federal-judiciary-wheeler/08_federal_judiciary_wheeler.pdf. And in most cases, the standard applied at summary judgment is largely the original “reasonable [white] man” because about seventy percent of the federal judiciary is composed of white men. *Id.* A more recent study concluded that the federal judiciary is about sixty-seven percent white men. Jonathan K. Stubbs, *A Demographic Snapshot of America’s Federal Judiciary: A Prima Facie Case for Change*, *U. RICHMOND SCH. L.* 9 (Feb. 2011), <http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1074&context=law-faculty-publications>. The standard the judiciary applies, the filter for understanding the facts, is one of the factors that could explain the empirical data for the failure of race discrimination claims at summary judgment in federal courts. *See* Wendy Parker, *Lessons In Losing: Race Discrimination In Employment*, 81 *NOTRE DAME L. REV.* 889 (2006). Professor Parker concludes that plaintiffs are treated worse than defendants “for reasons that don’t appear to be race neutral.” *Id.* at 893 n.15. Profes-

There is good reason to doubt the Kerner Commission's basic assumption that one society ever existed in America in the sense that the overriding cultural norm was that personal value and worth arose solely from the content of one's character rather than one's skin color and social status.⁷ If it did, John F. Kennedy would not have needed to go on national television in 1963

sor Parker argues that there is judicial agreement *ab initio* with the employer defendants' position that plaintiffs' cases are meritless. *Id.* at 934. Courts proceed "from a perception that discredits the likelihood of plaintiffs' claims and validates the defendants' story." *Id.* See also Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 83 (2006) (noting the practical significance of the choice of perspective between "reasonable person" and "reasonable black person" on the outcome in harassment cases because of the asymmetrical perceptions of whether harassment happened and whether harassment happened because of race).

6. Some black people also seem to be asking the same question with the same implicit judgment that black people are behaving inappropriately in responding to what was ultimately determined to be a systematic, partially race-based deprivation of their constitution rights. According to Dr. Ben Carson, black Republican 2016 presidential candidate, the Black Lives Matter movement is a statement that other lives do not matter and is harmful to black people. Ben Carson, *#BlackLivesMatter Misfire*, USA TODAY (Sept. 3, 2015, 10:02 PM), <http://www.usatoday.com/story/opinion/2015/08/24/blacklivesmatter-sanders-clinton-anger-column/32055507/>. According to Pharrell Williams, Raven-Symone, and Common, who espouse the "new black" philosophy, blacks are over-attached to the history of racism and should not blame other races for their problems. See Priya Elan, *Why Pharrell Williams Believes In 'The New Black'*, GUARDIAN (Apr. 22, 2014, 1:07 PM), <http://www.theguardian.com/music/shortcuts/2014/apr/22/trouble-with-pharrell-williams-new-black-theory>; Stereo Williams, *Common, Pharrell, and 'The New Black': An Ignorant Mentality That Undermines the Black Experience*, DAILY BEAST (Mar. 19, 2015, 5:15 AM), <http://www.thedailybeast.com/articles/2015/03/19/common-pharrell-and-the-new-black-an-ignorant-mentality-that-undermines-the-black-experience.html>.

7. What W.E.B. Du Bois wrote of the duality of the experience of life for blacks in America in 1903 is worth recalling:

It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness, – an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 8–9 (Library of America ed. 1990). The persistence of "two-ness" for blacks and "one-ness" for whites is supported by social science research studying the differences in the perceptions of discrimination in the workplace. See Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 59 (2006); see generally SAMUEL ROUNDFIELD LUCAS, *THEORIZING DISCRIMINATION IN AN ERA OF CONTESTED PREJUDICE* (2008); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

to declare that we would become a color-blind society.⁸ If it did, Martin Luther King would not have needed to write his letter from the Birmingham jail.⁹ If there was one society, all of the blood spilled over the difference between black and white from 1789 until today would never have been shed. On the other hand, if white and black people never shared one society, rather than ask “What’s wrong with black people?”, ask “Why don’t I understand what’s wrong with black people?” Or, even better, “Why don’t I understand the black experience in America?”

Seeking an understanding of the black experience in America is a new aspiration.¹⁰ If we frame the issue as a desire to understand someone’s experience, the declaration of a desire to comprehend jettisons pre-judgment and candidly declares a void of knowledge. Woven deep into the fabric of the black experience is a steady diet of negation and brutality.¹¹ Woven equally deep into the white experience is a steady diet of hatred and contempt for black people. This fabric is the one society we share.¹² To deny the history of the black experience is to deny the white experience as well. When a white person seeks a better understanding of the black experience, he or she seeks a better understanding of his or her own experience. The purpose of this Article is to partially illuminate one aspect of our common experience: the deep and abiding knowledge that, historically, black life does not matter as much as white life.¹³ It is not as valuable in terms of the ability to earn a wage.¹⁴ It is shorter.¹⁵ It is harsher.¹⁶ It is not free.¹⁷

8. See President John F. Kennedy, Report to the American People on Civil Rights (June 11, 1963) [hereinafter *Kennedy Report*], http://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6Ro1yEm74Ng.aspx.

9. MARTIN LUTHER KING, JR., WHY WE CAN’T WAIT 84 (1964).

10. The effort to provide the information that might lead to an understanding is not new. See DU BOIS, *supra* note 7.

11. See KERNER COMM’N REPORT, *supra* note 3, at 1.

12. Martin Luther King, Jr., Commencement Address for Oberlin College: Remain Awake Through a Great Revolution (June 1965), <http://www.oberlin.edu/external/EOG/BlackHistoryMonth/MLK/CommAddress.html> (“All I’m saying is simply this: that all mankind is tied together; all life is interrelated, and we are all caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. For some strange reason I can never be what I ought to be until you are what you ought to be. And you can never be what you ought to be until I am what I ought to be – this is the interrelated structure of reality.”).

13. See, e.g., *Kennedy Report*, *supra* note 8 (“The Negro baby born in America today, regardless of the section of the Nation in which he is born, has about one-half as much chance of completing a high school as a white baby born in the same place on the same day, one-third as much chance of completing college, one-third as much chance of becoming a professional man, twice as much chance of becoming unemployed, about one-seventh as much chance of earning \$10,000 a year, a life expectancy which is 7 years shorter, and the prospects of earning only half as much.”).

14. Historically, black unemployment rates have continued to be twice as high as white unemployment rates. See *Data Retrieval: Labor Force Statistics (CPS)*,

I assume that almost no one reading this Article has ever asked him or herself: “I wonder what my life would be like if I were black?”¹⁸ I base that

BUREAU LAB. STAT., <http://www.bls.gov/webapps/legacy/cpsatab2.htm> (last modified July 8, 2015).

15. According to a study of U.S. Life Tables for 2009 published by the Centers for Disease Control and Prevention on January 6, 2014, black life expectancy is 4.3 years shorter than white life expectancy. Elizabeth Arias, *United States Life Tables, 2009*, 62 NAT'L VITAL STAT. REP. 1, 3 (Jan. 6, 2014), http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_07.pdf. If one factors in education, whites with sixteen or more years of education by age twenty-five live an average of 12.25 years longer than blacks with less than twelve years of education by age twenty-five. See S. Jay Olshansky et al., *Differences in Life Expectancy Due to Race and Educational Differences Are Widening, and Many May Not Catch Up*, 31 HEALTH AFF. 1803, 1805 (2012).

16. The poverty threshold for a family of four in America is about \$24,000. *Poverty Thresholds By Size of Family And Number of Children*, U.S. CENSUS BUREAU, <https://www.census.gov/hhes/www/poverty/data/threshld/> (last visited Nov. 13, 2015). A study of census data from 2007–2011 determined that 25.8% of black Americans live below the poverty threshold. SUZANNE MACARTNEY ET AL., *POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007–2011* (Feb. 2013), <https://www.census.gov/prod/2013pubs/acsbr11-17.pdf>. In 2013, the poverty rate for blacks increased to 27.2%. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, *INCOME AND POVERTY IN THE UNITED STATES: 2013* 12 (Sept. 2014), <https://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf>. In 2013, 65.1% of black households had income of \$49,999 or less compared to 43.2% of white households; 23% of black households earned between \$50,000 and \$99,999 compared to 31.3% of white households; 10.1% of black households earned between \$100,000 and \$199,999 compared to 19.8% of white households; and 1.8% of black households earned \$200,000 or more compared to 5.7% of white households. See *id.* at 25–26.

17. If freedom is defined as personal liberty, one in three black men and one in eighteen black women are likely to be imprisoned in their lifetimes. *Racial Disparity: Lifetime Likelihood of Imprisonment*, SENT'G PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited Oct. 24, 2015). If freedom is defined as the right to vote, one in thirteen black Americans has been disenfranchised because of a felony conviction. *Felony Disenfranchisement*, SENT'G PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=133> (last visited Oct. 24, 2015). See generally BRYAN STEVENSON, *JUST MERCY* (2014); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

18. It may be that this is an unfair assumption. Nevertheless, consider the contrast between the events that shocked the nation into action in the 1960s and events that take place today. Part, perhaps a decisive part, of the support for national civil rights legislation was the ability of white America to see what was going on in the south on the television for the first time. Watching the police dogs attack black children, watching a fire hose blast down protesters, and watching as the police attacked

assumption on the further assumption that almost no one who reads law journals is black because journal articles are largely written by legal academics and there are very few black legal academics.¹⁹ Based on my compounded

peaceful black protesters with night-sticks brought home the reality of open racial hatred in the south. SITKOFF, *supra* note 4, at 193. In that era, it is easy to imagine a white person, if not saying to themselves, “I wonder what it’s like to be black,” voicing the question as a statement: “Thank God that’s not what my life’s like.” It was that kind of reaction that spurred President Kennedy, who had no interest in dealing with the “Negro problem,” to act in favor of civil rights. *See id.* at 95–96. Once national civil rights legislation passed and the images of peaceful blacks being terrorized by white civil authority were replaced by images of blacks rioting in Watts, Newark, and Detroit, white people started to ask: “What’s wrong with black people?” *Id.* at 193–94, 210 (“The fiery riots had rationalized [white] expressions of hostility toward blacks.”). The question then, as now, describes a position that since white American granted black Americans the Civil Rights Act of 1964 and the Voting Rights Act of 1965, and since America has been declared a colorblind meritocracy, what do you black people have to complain about? *Id.* at 210 (“As the sixties ended . . . white backlash ruled the roost.”). Having elected the first black President of the United States, twice, the conviction that there is nothing for blacks to complain about seems insurmountable. And, there is no reason to ask, “I wonder what it’s like being black?”, because the belief among whites and some prominent blacks is that we actually live in a colorblind meritocracy. *See* SAMUEL ROUNDFIELD LUCAS, *THEORIZING DISCRIMINATION IN AN ERA OF CONTESTED PREJUDICE* 23–52 (2008) (highlighting the asymmetry of views on the continued existence of racial discrimination). White people’s stated prejudice is declining while black people’s stated experiences of discrimination and probability of encountering discrimination, in the form of doubting blacks’ abilities or will power, remains the same. *See id.* at 8–9.

19. I could not locate a central repository for data on the number of black law professors in the United States. While a survey conducted by the ABA in 2002–2003 found that there are approximately 300 black tenured law professors in the United States, or 7.14%, this figure does not represent the total number of black professors who teach at a law school. ABA, *AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE UNITED STATES* 15 (2011), http://www.americanbarfoundation.org/uploads/cms/documents/after_tenure_report_final_abf_4.1.pdf. According to the ABA’s lawyer demographics data, there were 1,245,205 licensed lawyers in the U.S. in 2011, of whom approximately 59,770 or 4.8% were black. *See Lawyer Demographics*, A.B.A. (2012), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf. According to the same source about 1% of lawyers claimed “Education” as their practice setting. If one assumes uniform access to and choices of practice setting, approximately 598 black lawyers had “Education” as their practice setting as compared to 10,970 white licensed lawyers who had “Education” as their practice setting. *See id.* This assumption probably significantly overestimates the population of black law professors given that the 2014–2015 American Association of Law Schools’s *Directory of Law Teachers* lists 610 as the approximate number of all minority law teachers. *Id.* at 1660–66. With this data and the following caveats: that the practice setting “Education” does not necessarily mean teaching law at a law school; that being a licensed attorney is not a requirement for teaching law; the proportion of lawyers to the general popula-

assumptions, I ask you to imagine that you are a black American. Imagine that when you woke up today and went about your morning ritual, you saw yourself in a mirror and the face looking back at you was my face.²⁰ When you saw your new face, you felt no panic or fear.²¹ You knew the face and realized you were looking at yourself. As we all do, looking in the mirror, you reflected about your life, your prospects, your possibilities, your ancestors, and your children. You began a review of some of the things you know about the value of black life in America.

I. HATRED: THE GREAT EQUALIZER

One of the most bitter things you realize as you look in the mirror is this country's long history of hatred for the face you are looking at. Not hatred for something you or any distant ancestor had done, but hatred for the purpose of political control of the class of rich whites over poor whites. Alt-

tion; and the proportion of lawyers in legal education, I feel secure in my assumption about the likelihood that any reader has asked him or herself "I wonder what it's like being black in America."

20. If you visit my academic profile, you will see who you are looking at in the mirror. *Chuck Henson*, U. MO. SCH. L., <http://law.missouri.edu/about/people/henson/> (last visited Oct. 24, 2015).

21. In his 1970 film, *Watermelon Man*, director Melvin Van Peebles has a black actor, Godfrey Cambridge, who opened the film portraying a bigoted white salesman, wake up to his great horror as a black man. *WATERMELON MAN* (Columbia Pictures 1970). I assume no bigotry on the part of any reader nor any reason for fear at this imaginary transmogrification. I merely wish my reader to experience what I often experience when I see a great western or action film. I see myself as Yul Brenner's character Chris in *The Magnificent Seven* or as Daniel Craig portraying 007. *THE MAGNIFICENT SEVEN* (The Mirisch Company 1960); *SKYFALL* (MGM & Columbia Pictures 2012). I do this because of the limited opportunities to see someone who looks like me in a heroic role in a movie. It is related to an experience that many black people share at some point because mainstream media largely excludes black protagonists. See STEPHANIE GRECO LARSON, *MEDIA & MINORITIES: THE POLITICS OF RACE IN NEWS AND ENTERTAINMENT* 13–21 (2006). It is a relatively recent phenomenon that I can see myself as Denzel Washington portraying an enlisted man in the 54th Massachusetts infantry or as Morgan Freeman portraying a President of the United States. See *GLORY* (Freddie Fields Productions 1989); *DEEP IMPACT* (Paramount Pictures 1998). Although there is a great distance between imagining that I am James Bond as part of enjoying a movie and literally trying to be white, there have been times over the course of this country's history where it was useful to literally become white. As Langston Hughes described in his short story *Passing*, the object of passing for white was literally a better, safer life. LANGSTON HUGHES, *Passing*, in *THE WAYS OF WHITE FOLKS* 49–53 (Vantage Books ed. 1971). Eddie Murphy's *White Like Me* mockumentary from his time on Saturday Night Live, which first aired on December 15, 1984, was intended to make fun of white people, but like the character in Hughes's story, Murphy's character sees how much better white people live in the privacy of their whiteness. See *Saturday Night Live: White Like Me* (NBC television broadcast Dec. 15, 1984).

though your people likely came here as slaves, your initial status was similar to the white indentured servant. As demographics, economics, and political power changed in the colonial era, the time came when the formerly indentured whites became a danger to the white master class. Because of that danger, as Edmund S. Morgan explained in *American Slavery American Freedom*, although blacks had value as slave labor, those who enslaved blacks taught themselves that black lives did not matter.²² According to Morgan, in the mid-1600s, colonial American slave society began to recognize the need to devalue black people as living beings.²³ Devaluing black lives gave poor, un-propertied whites social status.²⁴ Devaluing black lives also made the work of driving slaves easier on the masters.²⁵ Morgan explains that inculcating white people with racial hatred for black was a key element of the devaluation of black life.²⁶

According to Morgan, once African slavery dealt with the issue of labor scarcity, white freedmen formed the majority of the voting population in Virginia.²⁷ It was, however, a potentially dangerous political majority because those in power wished to remain in power.²⁸ Moreover, the large numbers of slaves represented the danger of servile insurrection.²⁹ Sensitive to the possibility of rebellion from whites and blacks, the ruling class acted to create a social link between propertied and property-less whites.³⁰ Forging this link relied on making heretofore absent racial contempt the cultural norm.³¹

22. Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* 316–37 (Francis Parkman Prize ed. 1975).

23. *Id.* at 328.

24. *Id.* at 327–33.

25. *Id.* at 330–31.

26. *Id.* at 331.

27. *Id.* at 346.

28. *Id.* at 328, 344. Black social and political rights seem to be a constant bargaining chip in the largely hidden game between powerful and powerless whites for political and economic supremacy. Discussing the status of blacks after federal troops withdrew from the South in 1877, Professor C. Vann Woodward concluded that “[t]he determination of the Negro’s ‘place’ took shape gradually under the influence of economic and political conflicts among divided white people—conflicts that were eventually resolved in part at the expense of the Negro.” WOODWARD, *supra* note 4, at 6. More recently, the work of Professors Daniel B. Rodriguez and Barry R. Weingast described the same phenomenon of conflict and resolution in their study of the legislative history of the Civil Rights Act of 1964. Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act And Its Interpretation*, 151 U. PA. L. REV. 1417 (2003). Professors Rodriguez and Weingast concluded that the pivotal legislators sacrificed black interests by blunting the impact of Title VII in the north where their white constituencies dominated job opportunity, both as management and labor, and discrimination was *de facto* rather than *de jure*. *Id.* at 1471–72.

29. MORGAN, *supra* note 22, at 344.

30. *Id.* In Professor Woodward’s description of the white backlash of the late 1960s and early 1970s, one sees the fruit of the contempt planted in the late seven-

Contempt for servants was not new.³² Contempt for servants, the poor and idle white freedmen, was part of English culture.³³ What was new was the transference of the contempt from social status to color.³⁴ In Virginia, the contempt focused on both black slaves and Native Americans.³⁵ Racism became a formal matter of policy: “By a series of acts, the assembly deliberately did what it could to foster the contempt of whites for blacks and Indians.”³⁶ In 1670, the legislature made it illegal for free blacks or Native Americans to own white servants.³⁷ In 1680, the legislature made it a crime for any black person or any slave to raise his hand in opposition to any white person.³⁸ “This was a particularly effective provision in that it allowed servants [white by definition] to bully slaves without fear of retaliation, thus placing them psychologically on par with masters.”³⁹ In 1705, when the lawmakers authorized the punishment of unruly slaves by dismemberment, it forbade the whipping of servants while naked without an order from the justice of the peace.⁴⁰ Lawmakers also acted to punish interracial sexual relationships.⁴¹ Whites who married blacks of any shade or Native Americans were subject to banishment from the colony.⁴² The penalties against interracial relationships and the fruit of such relationships when the father was other than white describe a conscious focus by those in power to prevent the blurring of the distinction between whites and non-whites and the political value of whiteness.⁴³

With about 100 years of practicing racial contempt and the hardening belief that black slaves literally were not people, there should be little wonder that slavery survived the American Revolution and became embedded in the Constitution as a symbol of the limited value of black lives in contrast with

teenth century. WOODWARD, *supra* note 4, at 209–10. According to Woodward, the Civil Rights Era contained a group of alienated lower-class whites who “resented such advances as blacks made, opposed government and philanthropic measures in their behalf, and denounced the tactics and especially the violence of the black movement.” *Id.* at 209. Conservative white politicians like Governor George C. Wallace, Richard M. Nixon, Barry Goldwater, and Ronald Reagan took advantage of the political link of whiteness and what Professor Woodward called the “thoroughly racist” outlook of alienated whites to gain political control of the country. *Id.* at 209–14. See also SITKOFF, *supra* note 4, at 210–35.

31. MORGAN, *supra* note 22, at 316.

32. *Id.* at 321, 323.

33. *Id.* at 319.

34. *Id.* at 328.

35. *Id.* at 328–31.

36. *Id.* at 331.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 333–35.

42. *Id.* at 335.

43. *Id.* at 335–36.

white lives.⁴⁴ One well-known and documented reason for the exclusion of blacks from the benefits of full citizenship was the Founding Fathers' belief that servitude and dependence naturally disqualified anyone from participation in political life.⁴⁵ Accordingly, blacks, indentured servants, and women did not possess the capacity to properly exercise the right to vote.⁴⁶ Of this group of potential citizens, however, only blacks were robbed of their humanity by a century of racial hatred. When the time came for bargaining over the contents of the Constitution, blacks became discounted bargaining tokens for the promise of the southern states to accept membership in the United States. North and south, a white man counted as a whole person for purposes of determining representation in the House of Representatives. North and south, black slaves balanced the disproportion in white demographics. North and south, black slaves were worth three-fifths of a white man.⁴⁷

44. So as to avoid using the words "slave" or "slavery," which would "contaminate the glorious fabric of American liberty" for the purpose of the Three-Fifths Clause, the Founding Fathers described slaves as "all other Persons." ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 35–36 (1998) (discussing U.S. CONST. art I, § 2, cl. 3).

45. *Id.* at 9 ("Thomas Jefferson insisted that dependence [defined as lack of property or owing the fruits of one's labor to a master, father, or husband] 'begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition.'"). Jefferson might be said to have had a program of racial purity for America based on what he, among others, believed to be inherent intellectual inferiority among blacks which, unlike the slaves of the ancient Romans, would stain the blood of the master race by its admixture. See THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA: ILLUSTRATED WITH A MAP, INCLUDING THE STATES OF VIRGINIA, MARYLAND, DELAWARE AND PENNSYLVANIA* 148–52, 155 (1853). Jefferson was an early proponent of isolating blacks to the slave states, prohibiting their westward migration, and the colonization of free blacks so that ultimately a white only America would arise. See *id.*; MICHAEL LIND, *WHAT LINCOLN BELIEVED: THE VALUES AND CONVICTIONS OF AMERICA'S GREATEST PRESIDENT* 84–85 (2004).

46. FONER, *supra* note 44, at 9 ("[I]t was an axiom of political thought that dependents lacked a will of their own and thus were incapable of participating in public affairs.").

47. *But see* JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 73–77 (1997) ("As much credence as this clause ultimately lent to abolitionist criticism of the Constitution, the concerns that drove southern delegates to insist upon constitutional rules for both a census and reapportionment had avowedly liberal aspects and consequences, if only because trusting to legislative discretion would have established no binding rule at all.").

II. WORTH LESS

Having considered the historical basis for the hatred of your face, as you continue to look into the mirror, it occurs to you that despite the country's hatred of you, your forefathers answered the call to arms in the Civil War.⁴⁸ Over the course of the Civil War, 200,000 blacks gave service to the Union.⁴⁹ Despite the long history of blacks bearing arms for the United States, at the beginning of the war, blacks were so despised that leaders in the north, including Abraham Lincoln, could not fathom enlisting blacks as soldiers.⁵⁰ Sixteen months into the war, however, the federal government allowed for the enlistment of black combat troops.⁵¹ Bowing to pressures for reinforcements and temporarily setting fear aside to allow black enlistment, however, was not an acknowledgement of equality.⁵² For most of the war, black private soldiers earned less than half the pay of white private soldiers.⁵³ The life of a black soldier was literally worth less than a white soldier.

The Militia Act of July 17, 1862 authorized the raising of black combat units. It also set the pay of black soldiers at \$10.00 per month, less \$3.00 for uniforms for a net monthly pay of \$7.00 per month.⁵⁴ This rate equated black soldiers the same value as black laborers in federal service who received the same pay.⁵⁵ White soldiers, in contrast, earned \$13.00 per month, plus a uniform allowance of \$3.50 per month for a net monthly income of \$16.50 per month.⁵⁶ Not surprisingly, efforts to equalize pay for combat soldiers regard-

48. DUDLEY TAYLOR CORNISH, *THE SABLE ARM: BLACK TROOPS IN THE UNION ARMY, 1861–1865*, at xii–iii (1987) (“Now, Negroes had fought in nearly every American war before the outbreak of the Civil War. They had fought in the colonial wars, in the Revolution, and in the War of 1812.”).

49. James M. McPherson, *The Negro's Civil War: How American Negroes Felt and Acted During the War for the Union* ix (1982).

50. LINCOLN ON RACE AND SLAVERY xxxvii (Henry Louis Gates, Jr. & Donald Yacovone eds., 2009) (Lincoln felt worried by the prospect of enlisting black combat troops because “such a decision would so fundamentally alter the public definition of what a ‘negro’ was and what the freed slaves could possibly become in all areas of American society . . .”).

51. Noah Andre Trudeau, *Like Men of War: Black Troops in the Civil War 1862–1865*, at 91 (1998).

52. Manisha Sinha, *Allies for Emancipation?: Lincoln and Black Abolitionists*, in *OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD* 189 (Eric Foner ed., 2008) [hereinafter *OUR LINCOLN*]; LINCOLN ON RACE AND SLAVERY, *supra* note 50, at xxxviii–ix.

53. See *Teaching With Documents: The Fight for Equal Rights: Black Soldiers in the Civil War*, NAT'L ARCHIVES, <https://www.archives.gov/education/lessons/blacks-civil-war/> (last visited Oct. 24, 2015).

54. JOSEPH T. GLATTHAAR, *FORGED IN BATTLE: THE CIVIL WAR ALLIANCE OF BLACK SOLDIERS AND WHITE OFFICERS* 170 (1990); TRUDEAU, *supra* note 51, at 91.

55. GLATTHAAR, *supra* note 54, at 170.

56. MCPHERSON, *supra* note 49 196 (“The most galling discrimination against colored troops was in the matter of pay.”).

less of race did not readily succeed.⁵⁷ It took almost the duration of the Civil War for pay equality among combat troops.⁵⁸

The long delay in remedying the pay disparity must be credited to the symbolic step that equal pay represented. According to opponents of equal pay, to pay black soldiers the same as whites credited blacks and whites with equal value. In the legislative chambers, “Democrats argued that to pay Negroes the same wages as white soldiers would degrade the white man.”⁵⁹ Meanwhile, the press declared that “it is unjust in every way to the white soldier to put him on a level with the black.”⁶⁰ Notably, the debate over the meaning of equal pay extended beyond granting black combat troops the same status as white combat troops. Equal pay from the white perspective symbolized not only parity in value as soldiers, but also an intolerable challenge to well-established *de facto* and *de jure* white social supremacy. As Frederick Douglass later recalled, Abraham Lincoln’s position on the matter reflected the same prejudices and fears that pushing for equal pay would only accomplish a backlash because of what equal pay symbolized.⁶¹ As Douglass remembered it, Lincoln felt it was better for blacks to accept less for the benefit of having anything.⁶²

The struggle for equal combatant pay reflected the symbolic value of equal pay not only to lift the black soldier to the level of the white, but also to lower the value of being white. The need to retain the value of whiteness, therefore, required that blackness have less value. Only near the end of the war, after black troops proved their value as soldiers, did Congress remedy what had become the smaller issue of actually equalizing the pay of all combat troops.⁶³ Equality of pay became a marginal issue because the war was literally over, and the period of white devaluation was measured by weeks. Moreover, the issue of equal pay between soldiers representing broad equality between the races was overshadowed by Lincoln’s homily on the meaning of the Civil War. Lincoln’s Second Inaugural Address gave blacks no value in the American future.⁶⁴

57. Sinha, *supra* note 52, at 189.

58. GLATTHAAR, *supra* note 54, at 175; Sinha, *supra* note 52, at 190; LINCOLN ON RACE AND SLAVERY, *supra* note 50, at xli.

59. MCPHERSON, *supra* note 49, at 199.

60. *Id.* (quoting N.Y. WORLD, Dec. 13, 1863).

61. *Id.* at 197 (citing FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 386–87 (1882)).

62. *Id.*

63. TRUDEAU, *supra* note 51, at 254–55.

64. Lincoln’s ultimate position on race and the future of blacks in post-bellum America is not settled. GEORGE M. FREDRICKSON, BIG ENOUGH TO BE INCONSISTENT: ABRAHAM LINCOLN CONFRONTS SLAVERY AND RACE 117–18 (2008). I rely heavily in this Part on Michael Lind’s book *What Lincoln Believed*. LIND, *supra* note 45. Lind’s analysis of Lincoln’s views on race is controversial in that Lind does not agree that in the last two years of the Civil War Lincoln underwent a fundamental change in his views on race and the need for an all-white America. *Id.* at 114. Lind’s argu-

On March 4, 1865, Abraham Lincoln addressed his fellow countrymen on the occasion of his second inauguration.⁶⁵ Lincoln explained the four years of conflict as payment in blood for a national sin of biblical proportion.⁶⁶ Having quoted scripture on the reaping of offense, Lincoln proposed:

If we shall suppose that American Slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives both to North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to him? Fondly do we hope – fervently do we pray – that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bondman’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said “the judgments of the Lord, are true and righteous altogether.”⁶⁷

ments are compelling given their focus on Lincoln’s anti-black statements, Lincoln’s free soil, free labor, free white men ideology, and Lincoln’s advocacy for laws in Illinois and the new territories to prohibit blacks from immigrating to those areas. *Id.* at 108–15. Where other historians explain away Lincoln’s words as unrepresentative of his final position on race, Lind takes Lincoln’s statements on racial inequality at face value. *Compare id.*, with FREDRICKSON, *supra*, at 113 (noting that Lincoln may have dropped his colonization project (discussed further *infra* note 73) because of “a transformation in Lincoln’s basic attitude toward blacks and his conception of their future in American society”); Sinha, *supra* note 52, at 196 (concluding that Lincoln “had come around to the[] ideas” of “immediate, uncompensated emancipation and black rights”) The legacy Lincoln created for his own posterity by his words and actions remained largely consistent. *See also* James Oakes, *Natural Rights, Citizenship Rights, States’ Rights, and Black Rights: Another Look at Lincoln and Race*, in OUR LINCOLN, *supra* note 52, at 129–30 (discussing Lincoln’s views that blacks should not have the right to vote, sit on juries, hold elective office, or intermarry with whites and the fact that states had the right to discriminate against blacks by prohibiting them from having these political and social rights, as well as the right of states to exclude blacks, but not white European immigrants). For a discussion of the conflicting views of Lincoln’s stance on race and the future for blacks in America, see GEORGE M. FREDRICKSON, *BIG ENOUGH TO BE INCONSISTENT: ABRAHAM LINCOLN CONFRONTS SLAVERY AND RACE* 11–41 (2008).

65. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in LINCOLN: SPEECHES AND WRITINGS: 1859–1865, at 687 (1989).

66. *Id.* at 686–87.

67. *Id.* at 687.

If this statement amounts to Lincoln's allocating the blame for slavery to the entire nation, the nation he addressed did not include black people.⁶⁸ Blacks are absent because they were not a valuable part of the dialogue Lincoln wished to establish for the imminent reconstruction. The final paragraph of the Address begins: "With malice toward none" and ends with a request that "we" "do all which may achieve and cherish a just, and a lasting peace, among ourselves"⁶⁹ Given that Lincoln blamed the war on the slave-owning south and their accomplices in the north, the charitable ending he craved to the conflict was an event shared only between northern and southern whites; they should forgive each other.⁷⁰

Lincoln never apologized for slavery.⁷¹ Although he is famous for his belief that no one should own anyone else, Lincoln did not believe blacks should remain in America.⁷² Lincoln believed that blacks should be excluded from American society.⁷³ As an Illinois politician, he supported the state's

68. LINCOLN ON RACE AND SLAVERY, *supra* note 50, at 310 ("He blamed the South for destroying the Union and so many lives, but with Calvinist resignation also explained that the whole nation should bear responsibility for the war's singular cause.").

69. Lincoln, *supra* note 65, at 687.

70. Employing religious ideas to tap into the belief systems of powerful mainstream Union churches, Lincoln designed the Second Inaugural Address to "prepare Union loyalists for an inclusive, nonpunitive plan of presidential reconstruction of the South." Richard Carwardine, *Lincoln's Religion*, in OUR LINCOLN, *supra* note 52, at 239.

71. The United States has never apologized for slavery. On June 18, 2009, the U.S. Senate, but not the House of Representatives, passed a concurrent resolution apologizing "to African-Americans on behalf of the people of the United States, for the wrongs committed against them and their ancestors who suffered under slavery and Jim Crow laws." 155 CONG. REC. 15,548 (2009).

72. LIND, *supra* note 45, at 100–14.

73. Lincoln, like Jefferson, believed that there was no place in America for blacks, free or slave. *Id.* at 102–04. Although slavery was evil, the cure was to gradually emancipate and then export the freed slaves elsewhere. *Id.* As to free blacks, Lincoln was an early supporter of the colonization of free blacks, and in 1857, he became one of the managers of the Illinois State Colonization Society. *Id.* at 106; *see also* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 269 (1995) ("At the root of all colonization plans, including the Republican one, was the assumption that the United States was, or should be, a nation of white men."). As to black participation in political society specifically, Lincoln denied any interest in black political equality with whites. In 1859 Lincoln declared "I am not, nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office" President Abraham Lincoln, Speech at Columbus, Ohio (Sept. 16, 1859), in LINCOLN: SPEECHES AND WRITINGS: 1859–1865, *supra* note 65, at 32. Only at the end of the Civil War did Lincoln consider the issue of allowing blacks the right to vote. President Abraham Lincoln, Letter to Michael Hahn (Mar. 13, 1864), in LINCOLN: SPEECHES AND WRITINGS: 1859–1865, *supra* note 65, at 579. In a congratulatory letter to the new Governor, Michael Hahn, Lincoln asked that Hahn consider, as "a

law that prohibited black immigration.⁷⁴ He also advocated for black exclusion from the new territories.⁷⁵ The need to remove blacks from the United States was so potent for Lincoln, that as President, he met with a group of black leaders in Washington, D.C., to convince them that blacks should voluntarily leave America.⁷⁶ In the end, Lincoln saw no real future for blacks in America.⁷⁷ He shared the Founding Fathers' belief that slavery made the

suggestion, not to the public, but to you alone," allowing some blacks the elective franchise, "for instance, the very intelligent, and especially those who have fought gallantly in our ranks." *Id.* If there was a transformation in Lincoln's attitude about the capacity of blacks to participate in white political society, it was to a limited few who proved themselves in the Civil War. *See id.* Historian Henry Louis Gates, Jr., has written that in attempting to understand how Lincoln actually felt about blacks, "we can . . . make the case that for him the colored troops were the Noble Negroes, a precursor to W.E.B. Du Bois's 'talented tenth,' though Lincoln would come to include that unspecified number of 'very intelligent negroes' in this group as well." LINCOLN ON RACE AND SLAVERY, *supra* note 50, at xlv. In contrast, Michael Lind concluded that Lincoln's carve-out for this limited groups of blacks did not signal a fundamental change. Lincoln believed blacks mentally inferior in general. LIND, *supra* note 45, at 112. Allowing only the few "very intelligent" blacks voting rights, for Lind, followed the same logic behind "later 'literacy tests' used to disenfranchise Southern black voters; only a few blacks were assumed to be as capable as even the least educated whites." *Id.* at 112.

74. LIND, *supra* note 45, at 107, 111–12, 128–30.

75. *Id.* at 133–34 ("Lincoln . . . wanted a white-only West.").

76. LINCOLN ON RACE AND SLAVERY, *supra* note 50, at 235–41. Exportation of the "Negro Problem" remains a consistent theme in American history. For Lincoln and others, sending blacks away was the best method to achieve the homogenous society. *See id.* Sending blacks away continued to be a go-to option during the rise of Jim Crow segregation. WOODWARD, *supra* note 4, at 96. As Professor Woodward noted in the early 1900s, hatred of the presence of blacks became so strong that segregation seemed insufficient: "Mass deportation was the remedy." *Id.* Mass deportation did not occur. What happened and continues to happen is that whites overcame the physical proximity of blacks, first by adopting laws that prohibited blacks from living near whites, then by racially restrictive covenants, and then by moving away from blacks to places where blacks could not afford to follow; the well-known "white flight" that turned places like Ferguson, Missouri, into Ferguson, Missouri. Rigel C. Oliveri, *Setting the Stage for Ferguson: Housing Discrimination and Segregation in St. Louis*, 80 MO. L. REV. 1053 (2015).

77. Lind argues that Lincoln's annual message to Congress of December 1, 1862, shows that Lincoln had a plan to remove blacks from the North, while isolating enslaved blacks in the South until they too could be exported. LIND, *supra* note 45, at 205. Addressing the fear in the North of a mass immigration of newly freed slaves, Lincoln explained to Congress, "cannot the [N]orth decide for itself, whether to receive [the newly freed slaves]?" *Id.* For Lind, this language meant that Lincoln believed that the Northern states had the power to exclude blacks in the same way that Lincoln had supported their exclusion under Illinois' Black Laws. *Id.*

slave an unsuitable object for participation in the nation's political life as a citizen. Thus, Lincoln had no plan for universal black citizenship.⁷⁸

III. WORTH LESS AND LESS

After the Civil War, through Reconstruction and what the white south called and still calls Redemption, and for the better part of the twentieth century, black lives could be and were taken with impunity.⁷⁹ Between 1895 and 1968, the United States saw almost 3500 black men and women lynched.⁸⁰ At a certain point, lynching became such a cultural norm that the activity made its way into popular song and literature.⁸¹ Lynching has been described as being “as American as apple pie.”⁸² The point of lynching was to suppress and deny the value of black lives. As summarized by Derrick Bell, after the Civil War, “[e]conomic and political suppression [of blacks] would have been ineffective had it not been for the wholesale and brutal violence that rendered thousands of ex-slaves literally unable to know on which side of emancipation they had fared worst [sic].”⁸³

78. *Id.* at 222 (“There is no evidence that [Lincoln] ever changed his mind about black social or political equality. Lincoln envisioned something like the black codes in the form of ‘apprenticeship,’ which his own Secretary of the Treasury denounced . . . as ‘qualified involuntary servitude.’ Most blacks in the United States would exist in a condition above slavery but below full citizenship with property rights and basic civil rights but not the right to vote.”). The counter argument has been made that Lincoln’s later statements about voting rights for black soldiers and the handful of very intelligent blacks represents evidence that Lincoln did change his mind about civil and political rights for blacks. Sinha, *supra* note 52, at 188. Perhaps one can conclude that Lincoln was in the process of reconsidering his earlier positions, but there is no evidence that Lincoln had a plan for social and political rights for all blacks.

79. Professor Woodward explained that the “permission-to-hate” blacks came from a variety of sources:

These ‘permissions-to-hate’ came from sources that had formerly denied such permission. They came from the federal courts in numerous opinions, from Northern liberals eager to conciliate the South, from Southern conservatives who had abandoned their race policy of moderation in their struggle against the Populists, from the Populists in their mood of disillusionment with their former Negro allies, and from a national temper suddenly expressed by imperialistic adventures and aggressions against colored peoples in distant lands.

WOODWARD, *supra* note 4, at 81–82.

80. Sherrilyn A. Ifill, Creating a Truth and Reconciliation Commission for Lynching, 21 *LAW & INEQ.* 263, 264 (2003).

81. BILLIE HOLIDAY, *Strange Fruit*, on *LADY SINGS THE BLUES* (Clef Records 1956); *Home*, in HUGHES, *supra* note 21.

82. Frank Shay, Judge Lynch: His First Hundred Years 99 (1969).

83. Derrick Bell, Race, Racism, and American Law 44 (5th ed. 2004).

Open violence against blacks had at least two points: to convince blacks to stay in their place and to maintain the value of whiteness, particularly the purity of the white race.⁸⁴ These dual purposes prevented the passage of federal anti-lynching legislation throughout the twentieth century.⁸⁵ The first federal anti-lynching bill was proposed in 1882.⁸⁶ Between 1882 and 1951, Congress failed to pass over one hundred anti-lynching proposals.⁸⁷ In 1922, 1937, and 1940, anti-lynching bills succeeded in the House only to die in the Senate.⁸⁸ One scholar observed that it was the 1922 effort, known as the Dyer Bill, that stood the best chance of success because the Democrats, particularly southern Democrats, did not yet control Congress.⁸⁹ Be that as it may, the Dyer Bill did not become law.

84. Ifill, *supra* note 80, at 276; Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 48 (1996); THEODORE BILBO, TAKE YOUR CHOICE: SEPARATION OR MONGRELIZATION 57–58 (1947) (lynching as a penalty for black men having sex with white women justified by the fact that white women having sex with only white men “preserved the integrity of their race”).

85. A substantial body of scholarship argues that federalism caused the failure of federal anti-lynching legislation. Holden-Smith, *supra* note 84, at 32 n.7. When the Dyer Bill was first proposed in 1918, the NAACP, on the advice of counsel, did not support it because of concerns over the Dyer Bill’s constitutionality. *NAACP History: Anti-Lynching Bill*, NAACP, <http://www.naacp.org/pages/naacp-history-anti-lynching-bill> (last visited Oct. 24, 2015). In the context of federal employment discrimination law, I have elsewhere argued that the Lochner Era limits on substantive due process imposed on efforts to legislate in the private sphere masked racial and social prejudices in the guise of freedom of contract. Chuck Henson, *In Defense of McDonnell Douglas: The Domination of Title VII by the At-Will Employment Doctrine*, 89 ST. JOHN’S L. REV. (forthcoming 2016). Lochner Era Constitutional restraints on regulating private conduct therefore favored white moneyed society. *Id.* In the context of anti-lynching legislation, police power limitations necessarily favored all whites because of the specific focus on anti-lynching legislation on the protection of black lives. *Id.* Although the 1922 Dyer Bill did not specifically mention blacks, the Bill was understood as a specific response to the lynching of blacks in the south; thus, the singularly southern opposition to its passage. Holden-Smith, *supra* note 84, at 54–59. See also WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 151 (1964) (“[I]f in the United States one disapproves of racism, one should disapprove of federalism.”). Professor Riker concluded that the main, although not sole, beneficiaries of American Federalism were southern whites. *Id.* The normative question on the value of American federalism for Professor Riker was “a judgment on the values of segregation and racial oppression.” *Id.* at 153. Accordingly, in the era of the Dyer Bill and conceivably to the present day, the use of states’ rights as a roadblock to federal remedial social legislation continues to bear the mark of racism.

86. Holden-Smith, *supra* note 84, at 44.

87. *Id.*

88. *Id.*

89. *Id.*

The debate over the passage of the Dyer Bill revealed two judgments about black people, particularly black men. First, black men were not fully human. Second, it revealed that granting protections from lynching by federal law would dangerously encourage black people to value themselves as equal citizens. As to the first judgment, the debate is littered with references to blacks as “brutes”⁹⁰ and “fiends”⁹¹ infected with “criminal sensualities,”⁹² which incite black men to the “diabolical crime of rape upon the white women.”⁹³ The removal of lynching would literally unleash blacks to the “reckless indulgence of physical appetites and passions” to which they were genetically predisposed.⁹⁴ As to the second judgment, that blacks should not be allowed to consider themselves equal, the bill’s opponents declared that “good” “contented docile blacks [would become] uncontrollable brutes filled with demands for the social equality long promised them by ignorant northern do-gooders.”⁹⁵ Black social equality would only arrive in the south when “the stars . . . cease to shine and the heavens . . . roll[] up as a scroll.”⁹⁶

After the Dyer Bill, Congress again saw efforts to pass anti-lynching legislation between 1933 and 1935. In November 1933, the lynching of two white men in California and the lynching of a black man by a mob in St. Joseph, Missouri, later that month, triggered the NAACP and Senators Costigan and Wagner to action.⁹⁷ The Costigan-Wagner bill was actually entitled “A Bill to Assure to Persons Within the Jurisdiction of Every State the Equal Protection of the Laws, and to Punish the Crime of Lynching.”⁹⁸ The Roosevelt administration did not fully support the bill and it died without reaching the floor of the Senate in 1934.⁹⁹ Although Costigan-Wagner bill supporters continued to work on getting Congress to support anti-lynching legislation in 1935, the effort died because the south did not want it and because Roosevelt did not want to risk his 1935 New Deal Program.¹⁰⁰ Ultimately, the very fact

90. *Id.* at 47 (quoting 62 CONG. REC. 1,721 (1922)).

91. *Id.* at 55 (quoting 62 CONG. REC. 1,721).

92. *Id.* (quoting 62 CONG. REC. 468).

93. *Id.* (quoting 62 CONG. REC. 468).

94. *Id.* at 56 (quoting 62 CONG. REC. 1,713); *id.* at 57 (quoting 62 CONG. REC. 1,788) (“[Y]ou must recollect that there is an element of barbarism in the black man, and the people around where he lives recognize that fact.”).

95. *Id.* at 58.

96. *Id.* (quoting 62 CONG. REC. 1,703).

97. HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE 211 (30th Anniversary ed. 2009). It has been observed with irony that President Roosevelt’s lukewarm support for the Costigan-Wagner anti-lynching law, like Lyndon Johnson’s support for the 1965 Voting Rights Act, came only after the loss of white lives. Peter Irons, *Politics and Principle: An Assessment of the Roosevelt Record on Civil Rights and Liberties*, 59 WASH. L. REV. 693, 699 n.24 (1984).

98. Punishment for the Crime of Lynching: Hearing on S. 1978 before the Subcomm. of the S. Comm. on the Judiciary, 73d Cong. 2 (1934).

99. SITKOFF, *supra* note 97, at 212–14.

100. *Id.* at 216.

that anti-lynching legislation was intended specifically to protect blacks led proponents of such laws to redirect their efforts to potentially more fruitful efforts. Thus, in the 1940s, the NAACP and others shifted away from the anti-lynching law that was meant to give value to black lives toward fighting the poll tax because it was not exclusively a black issue.¹⁰¹ Congress never passed anti-lynching legislation.¹⁰²

III. STILL WORTH LESS

Killing blacks with impunity under the color of state law continued well into the 1960s and, even today, the homegrown terror of unannounced arbitrary violence remains a part of black life.¹⁰³ If you are still looking in the mirror, reflecting on the value of your life as a black American, you know that you might be stopped at any time for the offense of DWB, driving while black. You also know that a Dylann Roof could easily appear in your church and kill you. Although being stopped for DWB is much more likely than being killed by a white supremacist, you still wonder what we have achieved as a nation to create a society that cannot and will not move beyond race.

101. Jeffery A. Jenkins & Justin Peck, Building Toward Major Policy Change: Congressional Action on Civil Rights 1941–1950, 31 *LAW & HIST. REV.* 139, 146–47 (2013).

102. Holden-Smith, *supra* note 84, at 44. On June 18, 2009, the U.S. Senate issued a resolution apologizing to the descendants of lynching victims for the failure to pass anti-lynching legislation. 155 *CONG. REC.* 15,548 (2009).

103. On the evening of June 17, 2015, Dylann Roof, a white twenty-one-year-old man murdered nine black people in their church, Emanuel African Methodist Episcopal Church in downtown Charleston, South Carolina. Ralph Ellis et al., *Shooting Suspect in Custody After Charleston Church Massacre*, CNN (June 18, 2015, 11:50 PM), <http://www.cnn.com/2015/06/18/us/charleston-south-carolina-shooting/>. If Roof's "manifesto" is anything to go by, he took those nine lives out of racial hatred:

I have no choice. I am not in the position to, alone, go into the ghetto and fight. I chose Charleston because it is most historic city in my state, and at one time had the highest ratio of blacks to Whites in the country. We have no skinheads, no real KKK, no one doing anything but talking on the [I]nternet. Well someone has to have the bravery to take it to the real world, and I guess that has to be me.

Brendan O'Connor, *Here Is What Appears to Be Dylann Roof's Racist Manifesto*, GAWKER (June 20, 2015, 10:55 AM), <http://gawker.com/here-is-what-appears-to-be-dylann-roofs-racist-manifest-1712767241>. The white supremacist groups Roof credited with awakening his racial hatred denied any culpability, but one, the Northwest Front, of Seattle, Washington, warned that Roof's work was "a preview of coming attractions." Sam Thielman, *White Supremacist calls Charleston 'a preview of coming attractions.'* GUARDIAN (June 28, 2015), <http://www.theguardian.com/us-news/2015/jun/28/harold-covington-northwest-front-dylann-roof-manifesto-charleston-shooting>.

At least on its face, the point of the Civil Rights Era was to move out of a time where the value of black life was literally and figuratively worthless to a time where black lives and white lives held equal value. For example, “It has been said that within Title VII of the Civil Rights Act of 1964, Congress gave the moral principle of “equality” a foundation in national law.”¹⁰⁴ Yet despite Title VII and the recognition that gainful employment by blacks was the only road to full enjoyment of the equal protection of the law,¹⁰⁵ black unemployment has been at least twice as high as white unemployment since before 1964.¹⁰⁶

Because Congress chose equality rather than equity as the goal of civil rights legislation, it is not a surprise that a sense of value from equal protection of the law is not really part of the black experience in America to this

104. Henson, *supra* note 85 (citing Anne McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 210 (1993)) (“In passing Title VII of the Civil Rights Act, Congress stressed that equal employment opportunity is a basic right in this country. The legislature noted that the other civil rights the Act guaranteed would be meaningless without the right to ‘gain the economic wherewithal to enjoy or properly utilize them.’”); Robert Brookins, *Hicks, Lies, and Ideology: The Wages of Sin is Now Exculpation*, 28 CREIGHTON L. REV. 939, 940 (1995) (“Title VII molded the basic moral principle of equal treatment into a national policy to eliminate employment discrimination.”).

105. Referring to the proposed Title VII of the Civil Rights Act, key legislators recognized that voting rights, school desegregation, and the desegregation of public accommodations had little meaning in the absence of jobs:

The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one’s pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen.

H.R. REP. NO. 88-914, pt. 2, at 26 (1963). Unemployment, employment by occupation, and wage statistics showed nonwhite unemployment at more than twice the rate of white unemployment. *Id.* at 27–28.

106. For example, in 1979, the continuing employment disparity led the Supreme Court to describe the purpose of Title VII as opening to blacks previously foreclosed employment opportunities as a foundation to the Court’s decision to permit short-term private affirmative action in *United Steelworkers of America v. Weber*. 443 U.S. 193, 194 (1979). The *Weber* Court specifically noted that the unemployment rates had not changed since Title VII became law in 1964: “The problem that Congress addressed in 1964 remains with us. In 1962, the nonwhite unemployment rate was 124% higher than the white rate.” *Id.* at 204 n.4. “In 1978, the black unemployment rate was 129% higher.” *Id.* Historically, black unemployment rates have continued to be twice as high as white unemployment rates. See *Data Retrieval: Labor Force Statistics (CPS)*, *supra* note 14 (this data can be obtained by checking the box for “Unemployment rate” under both “White” and “Black or African American,” and then clicking the “Retrieve data” button at the bottom of the webpage).

day. Equality in civil rights law has been about equal access. Equity is a concept where more goes to those who need it most. Equal access has had no impact on black joblessness in comparison to white joblessness. Black life continues to be shorter, harsher, and less free.¹⁰⁷ The impact of “equality” has been the reinforcement of the truth of the entire black experience in America – a denial of value and a deprivation of rights.

What the death of Michael Brown gave us was a validation of what many black Americans know about being black in America. When the U.S. Justice Department (“DOJ”) published its Investigation of the Ferguson Police Department on March 4, 2015, the DOJ’s conclusions were not a surprise. The DOJ reported, “This investigation has revealed a pattern or practice of unlawful conduct within the Ferguson Police Department that violates the First, Fourth, and Fourteenth Amendments to the United States Constitution, and federal statutory law.”¹⁰⁸ In short, the predominately white Ferguson Police Department, in concert with the entirely white municipal judiciary, worked to deprive the predominantly black population of their right to equal treatment under the law, at least in part because the victims of the deprivation were black.¹⁰⁹

What the DOJ found to be intentional discrimination in Ferguson, some law enforcement officers acknowledge as pervasive and unintentional discrimination as a result of implicit bias against blacks.¹¹⁰ At the same time, the same members of law enforcement excuse disparate treatment because it comes from a lazy mental shortcut based on the experience of regularly arresting black men.¹¹¹ In other words, because the police expect to arrest black men, expect to be arrested, black man.

107. See *supra* notes 15–17 and accompanying text.

108. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

109. *Id.* at 62–70. According to the DOJ, “Ferguson’s police and municipal court practices disproportionately harm African Americans. Further, our investigation found substantial evidence that this harm stems in part from intentional discrimination in violation of the Constitution.” *Id.* at 62. “[W]e have found that Ferguson’s law enforcement activities stem in part from a discriminatory purpose and thus deny African Americans equal protection of the laws in violation of the Constitution.” *Id.* at 63.

110. James B. Comey, Dir., FBI, Remarks at Georgetown University: *Hard Truths: Law Enforcement and Race* (Feb. 12, 2015), <http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race> (“A second hard truth: Much research points to the widespread existence of unconscious bias. Many people in our white-majority culture have unconscious racial biases and react differently to a white face than a black face.”).

111. *Id.* (“A mental shortcut becomes almost irresistible and maybe even rational by some lights. The two young black men on one side of the street look like so many others the officer has locked up. Two white men on the other side of the street—even in the same clothes—do not. The officer does not make the same association about

CONCLUSION

And now the face in the mirror is yours again. And now you have had a glimpse of what you might think about from time to time if you were black. And now you know something more about your own experience in America, some of the reasons you ask yourself from time to time: “What’s wrong with black people?” Now, ask yourself whether you are making a judgment about conformity to what you believe to be the cultural norms, or whether you are asking what it is like to walk a mile in another person’s shoes.

No one can deny that America has changed. The whites and colored only signs are gone.¹¹² We remain, however, largely segregated.¹¹³ We remain fearful of our history.¹¹⁴ We excuse racism whether or not it is implicit.¹¹⁵ The reality of our experience is that little of true substance has changed when we look at the elements of life long thought to define value in this country.¹¹⁶

the two white guys, whether that officer is white or black. And that drives different behavior. The officer turns toward one side of the street and not the other. We need to come to grips with the fact that this behavior complicates the relationship between police and the communities they serve.”). Milwaukee Police Chief Ed Flynn made similar remarks about the inevitability of callous policing. *Cops See It Differently, Part One*, THIS AM. LIFE (Feb. 6, 2015), <http://www.thisamericanlife.org/radio-archives/episode/547/cops-see-it-differently-part-one>.

112. See Hannah Baldwin, *Journey for Justice Runs into Hostile Counter-Protest, Keeps Marching*, COLUMBIA MISSOURIAN (Dec. 14, 2014), http://www.columbiamissourian.com/news/local/journey-for-justice-runs-into-hostile-counter-protest-keeps-marching/article_48bf1d3c-512e-568b-917f-a6156341316d.html.

113. See *supra* notes 13–17 and accompanying text.

114. See, e.g., Rachel L. Swarns, *Meet Your Cousin, the First Lady: A Family Story, Long Hidden*, N.Y. TIMES (June 16, 2012), http://www.nytimes.com/2012/06/17/us/dna-gives-new-insights-into-michelle-obamas-roots.html?_r=0; see also, Richard Webner, *Descendant of MU Founder Atones for Family’s Slave-Owning Past*, COLUMBIA MISSOURIAN (Jan 20, 2014), http://www.columbiamissourian.com/news/descendant-of-mu-founder-atoness-for-family-s-slave-owning/article_bc8748b0-af1b-5bb3-acd0-64607b7b9a01.html (discussing the creation of the James S. Rollins Slavery Atonement Endowment to fund research in the University of Missouri’s Black Studies Department).

115. See, e.g., Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 150 (2012); see also Bernice B. Donald, & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 762 (2013) (discussing the effect of implicit bias in judicial reasoning of discrimination cases); Angela Mae Kupenda, *Challenging Presumed (Im)morality: A Personal Narrative*, 29 BERKELEY J. GENDER L. & JUST. 295, 295 (2014) (discussing excused misdeeds due to racial privilege).

116. Compare *Kennedy Report*, *supra* note 8 (discussing 1973 demographics), with *supra* notes 13–17 and accompanying text (discussing current demographics).

It is not difficult to see in the protests Michael Brown's death ignited what the Kerner Commission saw in the riots of the summer of 1967. There remains "a reservoir of underlying grievances" in communities where blacks are grossly underrepresented in local government.¹¹⁷ The most intensely held of these grievances are police practices and underemployment or unemployment.¹¹⁸ Realists also see that one of "the most fundamental [reasons for civil disorder] is the racial attitude and behavior of white Americans toward black Americans."¹¹⁹

To prevent it from happening again, the Kerner Commission effectively recommended equity.¹²⁰ What the Commission recognized in the causes of the protest riots of the summer of 1967 was that it was too late for equality to work if there was ever to be a true solution.¹²¹ Equity, in the sense of granting more to those who need the most, was the Kerner Commission's cure.¹²² The major wealth reallocation the Kerner Commission advocated never happened.¹²³ Instead, society remained and remains trapped, unapologetically, in a repeating pattern.¹²⁴ It took until 2009 for the Senate to pass a concurrent resolution, which the House of Representatives did not join, to apologize for the enslavement and racial segregation of blacks with the caveat that the apology was not an admission of liability for slavery or Jim Crow laws.¹²⁵

It is as if the lessons of hatred were so well taught in the colonial era that they became ingrained in this country's social DNA.¹²⁶ Equality for blacks continues to represent an insult to whites. If the response to #BlackLivesMatter is anything to go by, we might as well be debating the meaning of paying black union soldiers as much as white union soldiers. Perhaps we are. Perhaps that is why a protest that black lives matter must necessarily mean that other lives, white lives, do not matter. Because to say aloud that black lives matter calls forth the hatred that was created to keep us separate.¹²⁷ We remain blind to the fact that "[f]or some strange reason I can never be what I ought to be until you are what you ought to be. And you can never be what you ought to be until I am what I ought to be – this is the inter-

117. See KERNER COMM'N REPORT, *supra* note 3, at 3.

118. *Id.* at 4.

119. *Id.* at 5.

120. See *id.* at 13.

121. See *id.*

122. *Id.* at 11 ("Only a commitment to national action on an unprecedented scale can shape a future compatible with the historic ideals of American society."). The Commission's unprecedented proposal required major wealth reallocation; "the will to tax ourselves to the extent necessary to meet the vital needs of the Nation." *Id.*

123. John Charles Boger, Race and the American City: The Kerner Commission in Retrospect-an Introduction, 71 N.C. L. REV. 1289, 1292-93 (1993).

124. See *id.*

125. 155 CONG. REC. 15,548 (2009).

126. MORGAN, *supra* note 22, at 387.

127. See *id.*

related structure of reality.”¹²⁸ The hatred comes despite the fact that from time to time some voice of wisdom warns against the harm the infection of hatred will do to future generations.¹²⁹ If history is a guide, however, there is little hope. The contempt appears to be indelible.

In the final paragraph of *American Slavery – American Freedom*, Edmund Morgan asked two rhetorical questions: “Was the vision of a nation of equals flawed at the source by contempt for both the poor and the black? Is America still colonial Virginia writ large?”¹³⁰ The answer seems to be: Yes. The contempt is less often overt now. It has become disguised as implicit bias; a lazy mental shortcut that assures that we will continue to be two societies, separate and unequal.

128. King, *supra* note 12.

129. As Senator Robert F. Wagner told a subcommittee of the Senate Judiciary Committee on February 20, 1934:

The poisonous effects of the crime [of lynching] reach further still. It would be futile to attempt to measure its effects upon those who instigate or lead a mad-dened mob. But there are thousands of people, swept into the current by the frenzy of the moment, who suffer a moral relapse from which recovery is almost impossible. Children present at a lynching, as is frequently the case, or even living in an environment where a lynching is the chief topic of public interest, are inoculated with a virus that may course through their veins as long as they remain on earth.

Punishment for the Crime of Lynching, *supra* note 98, at 3–4. See King, *supra* note 12.

130. MORGAN, *supra* note 22, at 387.