RACE, ECONOMIC CLASS, AND EMPLOYMENT OPPORTUNITY

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I

INTRODUCTION

Of the 146,047,000 civilians in the U.S. labor force in 2007, approximately 82% identified themselves as White, 11% as Black or African American, 14% as of Hispanic or Latino/a ethnicity, and 5% as Asian.[1] That year, the median household income for all racial groups was $50,233.[2] With a poverty threshold of $21,027 for a family of four,[3] the median income figure seems to suggest that many Americans, at least until the recent economic crisis,[4] were making do.[5] Yet a closer look at the data reveals a sobering reality, one of persistent economic inequality. In the United States, income distribution is highly concentrated at the top, with the top 1% of the population earning more than 20% of all income and the top 10% earning almost half of all income.[6] Moreover, notwithstanding

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1. Bureau of Labor Statistics, U.S. Dep't of Labor, Employed Persons by Occupation, Race, Hispanic or Latino Ethnicity, and Sex, http://www.bls.gov/cps/cpsaat10.pdf (last visited July 26, 2009). The sum of employees categorized by racial and ethnic group exceeds the total number of employees because the categories are not mutually exclusive. For example, some people who identify as Hispanic or Latino (an ethnic category) might also identify racially as White or Black.

2. Press Release, U.S. Census Bureau, Household Income Rises, Poverty Rate Unchanged, Number of Uninsured Down (Aug. 26, 2008), *available at* http://www.census.gov/Press-Release/www/releases/ archives/income_wealth/012528.html.

3. U.S. Census Bureau, Poverty Thresholds for 2007 by Size of Family and Number of Related Children Under 18 Years, http://www.census.gov/hhes/www/poverty/threshld/thresh07.html (last visited July 26, 2009).

4. *See, e.g.*, *America's Bank Bail-out: Dashed Expectations*, THE ECONOMIST, Feb. 19, 2009, at 83 (discussing the Obama Administration's efforts to bailout the banking industry); Sheryl Gay Stolberg, *Signing Stimulus, Obama Doesn't Rule Out More*, N.Y. TIMES, Feb. 17, 2009 (commenting on an economic stimulus bill to jump-start the ailing U.S. economy).

5. Of course, using the poverty threshold as a comparative basis for assessing how well Americans are faring is problematic because it is difficult to imagine a family of four living on $21,027 a year.

6. David Cay Johnston, *Income Gap is Widening, Data Shows*, N.Y. TIMES, Mar. 19, 2007, at C1 (reporting statistics based on data from 2005); *see also* JULIA ISAACS, ISABEL SAWHILL & RON HASKIN, GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 27–29, 47–57 (2008), *available at* http://economicmobility.org/assets/pdfs/PEW_EMP_GETTING_AHEAD.pdf [hereinafter Mobility Project] (reporting that income and wealth inequality has been increasing since

the rags-to-riches fairytales that have captured the imaginations of so many Americans,[7] the likelihood of moving from the bottom to the top is small.[8] The situation is worse for people of color. Despite measurable progress within some subgroups,[9] people of color still tend to earn significantly less than their White counterparts;[10] they tend to be segregated into lower-paying and lower-status occupations;[11] they tend to be unemployed at a substantially higher rate than Whites;[12] and they are twice as likely to be impoverished as Whites.[13]

These facts indicate that a sizable portion of the U.S. population exists in a state of frightening vulnerability, a condition that is no doubt heightened during times of economic transformation, downturn, or recession.[14] This paper explores

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the 1970s and noting that the concentration of assets at the top of the income distribution has been growing since at least 1989).

7. Some of these fairytales are fueled by fictional stories, and others are driven by real-life events. *See, e.g.*, Disney, Cinderella, http://disney.go.com/vault/archives/characters/cinderella/cinderella.html (last visited July 26, 2009) (describing the storybook tale of Cinderella); Todd Leopold, *'Slumdog' Makes History, Sweeps* Oscars, CNN, Feb. 23, 2009, http://www.cnn.com/2009/SHOWBIZ/Movies/02/23/oscar.night/ (reporting on the success of the film *Slumdog Millionaire*); People, Oprah Winfrey: Snapshot, http://www.people.com/people/oprah_winfrey (last visited July 26, 2009) (summarizing the life story of Oprah Winfrey).

8. *See* ISAACS ET AL., *supra* note 6, at 7.

9. *See* SAMUEL ESTREICHER & MICHAEL HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW 9–10 (2004) (describing "two Black Americas"—one that is on the path to economic prosperity and one that continues to face significant barriers to economic opportunity). *But see* MELVIN OLIVER & THOMAS SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 94–99 (2006) (describing the fragility and marginality of the Black middle class).

10. In 2007, Black households had the lowest median income of all races, which was 62% of the median for non-Hispanic White households. U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007 6 (2008), *available at* http://www.census.gov/prod/2008pubs/p60-235.pdf. Asian households had the highest median income of all races, which was about 120% of the median for non-Hispanic White households. *Id*. And the median income for Hispanic households was 70% of the median for non-Hispanic White households. *Id.* Of course, household income is influenced by the size of the household and the number of earners in it. This has led some commentators to observe that the number for Asian households is misleading because it fails to account for Asian American families' having more workers per household than White families. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1262–63 (1993). Use of national averages is also problematic with regard to the Asian American population because Asian Americans live in geographical areas that have higher incomes and higher costs of living. *Id*.

11. Bureau of Labor Statistics, U.S. DEP'T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES, EMPLOYED PERSONS BY DETAILED OCCUPATION, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY 212, *available at* http:// www.bls.gov/cps/cpsaat11.pdf.

12. In 2007, the unemployment rate was 4.1% for Whites, 8.3% for Blacks, 3.2% for Asians, and 5.6% for persons of Hispanic or Latino Ethnicity. Bureau of Labor Statistics, U.S. Dep't of Labor, Household Data Annual Averages, Employment Status of the Civilian Noninstitutional Population by Age, Sex, and Race, http://www.bls.gov/cps/tables.htm. (last visited July 26, 2009).

13. In 2007, the poverty rate was 8.2% for non-Hispanic Whites, 24.5% for Blacks, 10.2% for Asians, and 21.5% for Hispanics. U.S. Census Bureau, Current Population Reports, P60-235, Income, Poverty, and Health Insurance Coverage in the United States: 2007 12 (2008), http://www.census.gov/prod/2008pubs/p60-235.pdf.

14. Poor people, people of color, and young workers are often the hardest hit during economic slowdowns. Floyd Norris, *Younger Job-Seekers Have It Worse*, N.Y. TIMES, Dec. 13, 2008, at B3. The recent recession has significantly affected the administrative support, manufacturing, and construction

some of the factors contributing to this vulnerability by examining the interplay between race and class[15] in the employment setting. Part II considers historical and contemporary forces leading to workforce stratification in the United States and highlights some of the ways in which people of similar economic statuses have been differently situated due to their race and the ways in which racially similar people have been differently situated due to their economic class. Part III assesses existing challenges to socioeconomic mobility in the United States. Part IV explores the potential for labor law and antidiscrimination law to ameliorate existing disparities. Importantly, my goal in this paper is not to propose policy recommendations or a "new paradigm" for thinking about racism, classism, and hierarchy. My purpose is merely to examine contemporary employment problems through a broader historical lens as we collectively attempt to unravel (or at least to understand) more threads in the tapestry that is inequality in America.

II

U.S. WORKFORCE STRATIFICATION: A HISTORICAL PERSPECTIVE

Much of the socioeconomic stratification in the United States has historical roots. From its inception in the seventeenth century, the U.S. economy required laborers to work the fields of the South, to build the cities of the North, to facilitate western migration, and ultimately, to develop the West. Often where one wound up in the labor hierarchy was not a result of historical accident, but rather of design.[16] It is impossible to offer a nuanced account or to even summarize the entire history of labor in the United States in a few pages. Thus, this paper focuses on three aspects of that history—indentured servitude, slavery, and nineteenth-century Chinese and Japanese immigration—in an attempt to highlight the early interplay of race and class in determining access to opportunity and to suggest ways in which that early history may augment understanding of present conditions. The analysis is regrettably incomplete, for

industries, which tend to have more lower-wage workers. *Commissioner's Statement on the Employment Situation: Testimony Before J. Economic Comm.,* 111th Cong., 2 (Feb. 6, 2009) (statement of Keith Hall, Commissioner of Bureau of Labor Statistics), *available at* http://www.bls.gov/news.release/pdf/jec.pdf; *see also* BUREAU OF LABOR, U.S. DEP'T OF LABOR, DETAILED INDUSTRY EMPLOYMENT RANKED BY CHANGE BETWEEN FEBRUARY AND MARCH 2009 (2009), ftp://ftp.bls.gov/pub/suppl/empsit.tab2.txt (showing recent declines in employment by industry sector); U.S. Census Bureau, Poverty, Trends for Selected Groups, http://www.census.gov/hhes/www/poverty/trends.html (last visited July 26, 2009) ("In the past, the poverty rate and number of people in poverty have gone up during and slightly after a recession.").

15. Although race is increasingly being understood and accepted as a social construction, the definition of class is much less clear. *See* Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1493–97 (2000) (discussing race as a social construction). For various understandings of the meaning of class, see Deborah C. Malamud, "*Who They Are—Or Were": Middle-Class Welfare in the Early New Deal*, 151 U. PA. L. REV. 2019, 2019–26 (2003); Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 817 (2003); Deborah Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1852–93 (1996).

16. *See* discussion *infra* III and IV.

it does not explicitly consider the experiences of numerous groups (notably indigenous peoples,[17] Mexicans and Mexican Americans, and other Latino/a immigrant populations) whose stories form an essential part of the fabric of U.S. history and contemporary life.

A. Indentured Servitude

Demand for labor was high during the colonial era, and the nature of this demand varied depending upon location. In the Chesapeake and southern colonies, the market was dominated by tobacco and rice production.[18] In areas with harsher climates, such as the Northeast, cash crop production was not fruitful, and inhabitants relied upon traditional agriculture, fishing, and maritime trades.[19] The bulk of colonial labor needs, particularly in the South, were met by two sources: indentured servants and slaves.

At least one half of all immigrants during the colonial era were indentured servants.[20] Most were poor and emigrated from various European countries, including England, Scotland, and Ireland[21] to Pennsylvania, Maryland, and Virginia.[22] To finance their passage from Europe to North America, these individuals sold their labor through contract or indenture for a period of usually four to seven years.[23]

Scholars debate the extent to which living conditions were harsh for indentured servants in North America.[24] Although conditions likely varied from person to person, for the most part servants were treated as articles of

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17. For additional reading on the history of American Indians, see WARD CHURCHILL, STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE, AND COLONIZATION (2d rev. ed. 2002); WARD CHURCHILL, A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS 1492 TO THE PRESENT (1998); and materials collected in JUAN PEREA, RICHARD DELGADO, ANGELA P. HARRIS, JEAN STEFANCIC & STEPHANIE WILDMAN, RACE AND RACES: CASES AND MATERIALS FOR A DIVERSE AMERICA 179–84 (2d ed. 2007).

18. ERIC ARNESEN, ENCYCLOPEDIA OF U.S. LABOR AND WORKING CLASS HISTORY 281 (2007).

19. *Id.* at 282–83.

20. Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 752–53 (summarizing estimates of the size of the indentured servant population); Alfred Brophy, *Law and Indentured Servitude in Mid-Eighteenth Century Pennsylvania*, 28 WILLAMETTE L. REV. 69, 70 (1991).

21. Bilder, *supra* note 20, at 754–57.

22. *Id.* at 754 (reporting that eighty-eight percent of indentured servants went to Pennsylvania, Maryland and Virginia, around eight percent went to New York, and only a negligible percentage went to New England).

23. *Id.* at 755. These early White laborers can be divided into three categories: indentured servants (who were bound by indentures for a specific length of time in exchange for transport from Europe), redemptioners (those who migrated without paying some or all of their passage and who were given time after their arrival to pay the fare before being subject to an indenture), and transported convicts (whom the British government paid to have transported to the colonies). *Id.* at 754–56; Brophy, *supra* note 20, at 85–86. However, the "[l]egal regulation of the lives of indentured servants was remarkably similar despite variations in the time, place, and manner of entry. . . ." Bilder, *supra* note 20, at 757.

24. *See* Brophy, *supra* note 20, at 72–75 (summarizing the debate between social historians, who view indentured servitude as "a harsh institution that exploited the labor of immigrant servants," and economic historians, who view servitude as "a rational, essentially benign system that enabled immigrants to finance their voyage to the colonies").

commerce,[25] and their freedom was restricted during the terms of their indentures. For example, laws restricted trade with servants, barred servants from marrying and fornicating,[26] regulated their sale or transfer, and penalized runaway servants and anyone assisting them.[27]

The extent to which indentured servants were socially mobile after the expiration of their contracts is uncertain due in part to a dearth of historical records and a lack of clarity in those that do exist.[28] But North America in the seventeenth century was a region in transition, and European imperialism and expansion through, among other things, theft, genocide, and violence, presented opportunities for Whites to amass land and wealth. Undoubtedly some indentured servants benefitted in this moment of economic expansion.[29] It would be reasonable to conclude, however, that many, even among those who eventually prospered, were hampered by stereotypes associated with so-called "inferior classes"—for example, beliefs that they were lazy, dirty, of limited intelligence, and of questionable morality. In this sense, indentured servants were not as well positioned as those Whites who came to colonial America with money and skills, and for whom the American Dream was possible.

Although they were not as well situated as wealthy Whites, indentured servants were not in the same class as Black slaves. Indentured servants were, to be sure, limited by class differences and the practical and psychological consequences of those differences. But they remained empowered to some extent by White racial privilege. After their contracts expired, they were "free" with all the power that the distinction between "free" and "enslaved" entailed. They could marry, buy land, relocate geographically, and, without the visible marker of race, move freely among and establish connections with the broader White community. In addition, many indentures provided for skills training during their terms and for the payment of freedom dues (for example, an allotment of money or land) upon their expiration.[30] When these contractual provisions were honored, indentured servants emerged from their indentures

25. *See generally* Bilder, supra note 20.

26. Apparently, the prohibitions on fornication were to minimize the loss of female servants' time. *See* Brophy, *supra* note 20, at 80–81.

27. *See id.* at 77–82, 104–05 (examining the law of Pennsylvania).

28. *See id.* at 116–17 (noting problems with Pennsylvania records).

29. Indeed, Professor Brophy reports that in the seventeenth century, many ex-indentured servants went on to own land. However, they acquired significantly less property than the average free person, and opportunities to own land became more limited by the eighteenth century as wealth became less distributed across the population and more concentrated in the hands of a few. Even so, ex-indentured servants' opportunities to advance in the eighteenth century are subject to debate. According to Pennsylvania tax records, ex-servants rarely stayed in the same area for long, and many migrated from eastern to western Pennsylvania, where they obtained land and became quite successful. The mere fact they appeared on tax records indicates some degree of wealth. The stories of success are tempered, however, by stories of tragedy. Though able to find employment as unskilled laborers, some ex-servants were unable to pay their debts and wound up in prison. And servants who remained in eastern Pennsylvania struggled to obtain land due to stiff competition and were too poor to pay taxes. *Id.* at 115–22.

30. *Id.* at 76, 113.

with essential basics on which to build independent livelihoods. Thus, the distinction between White servitude and Black bondage was sizable. Indeed, this distinction, and the psychological benefits it afforded even the poorest Whites, may have impeded the development of cross-racial coalitions that could have significantly ameliorated the sharp effects of economic and racial dominance in seventeenth- and eighteenth-century America.[31] This distinction, and the salience given to it, may also explain, in part, why European commerce in Whites ended in 1819,[32] much earlier than the trans-Atlantic slave trade.[33]

This history not only shows that class hierarchy existed from the founding of this country, it also underscores that the White community has never been monolithic. Economic status differentiated members of this community from the beginning. Although most indentured servants were White and enjoyed some of the benefits typically afforded Whites, some were denied full access to White privilege because of their low economic status. In other words, their economic status muted the power and influence usually associated with their race.

The interplay between race and class in contemporary America is arguably similar:[34] many poor Whites[35]— who are unfortunately caricatured pejoratively as "poor White trash" (PWT), "trailer trash,"[36] "rednecks,"[37] and "crackers"[38]—

31. *See* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1741–44 (1993) ("[Historically,] White workers perceived that they had more in common with the bourgeoisie than with fellow workers who were Black.").

32. Bilder, *supra* note 20, at 754. Historian John Hope Franklin notes that indentured servants were never an ideal solution to colonial labor needs because, among other things their supply was inadequate, many ran away and could not be easily apprehended because their color did not distinguish them from other Europeans, and their limited terms of service meant that a master's labor supply would constantly fluctuate. JOHN HOPE FRANKLIN & ALFRED MOSS, JR., FROM SLAVERY TO FREEDOM 39 (8th ed. 2006).

33. The slave trade was supposed to end in the United States in 1807, but historians report that it continued well in to the mid-1800s. *See* FRANKLIN & MOSS, *supra* note 32, at 128–37.

34. I am not attempting to draw a causal connection between indentured servitude and the economic status of poor Whites in the United States today. Rather, I am merely using snapshots to show how the interaction of race and class can operate to situate subclasses.

35. In contemporary America, poor Whites are sometimes stereotyped as rural. James B. Wadley & Pamela Falk, *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land Is It Anyway?*, 19 WM. MITCHELL L. REV. 331, 338–39 (1993). Rural people are generally "considered to be less adept at dealing with the intricacies of modern life. Rural people are simple, uncultured, redneck, but certainly not urbane, or sophisticated. Rural people are also viewed as low key, laid back, and unmotivated." *Id.* John Hartigan notes that this stereotype traces back to colonial America, observing, "In colonial records and travelogues attention is given to a subgroup of Whites considered constitutionally distinct from the majority of colonists, either by their lack of hygiene or by their willingness to shed most remnants of European behavioral standards for being 'civilized.'" John Hartigan, Jr., *When Americans Are a Minority*, *in* CULTURAL DIVERSITY IN THE UNITED STATES 105–06 (Larry L. Naylor ed., 1997). Privileged Whites viewed these individuals with contempt and believed that they should be "discouraged or prevented from gaining access to social privileges." *Id.* at 106.

36. "White trash" is a "disparaging term for a poor white person or poor white people," particularly those "perceived as being lazy and ignorant." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1963 (4th ed. 2000).

37. "Redneck" is a "disparaging term for a member of the white rural laboring class, especially in the southern United States." *Id.* at 1464. For legal disputes involving the term, see Payton v. Kearse,

are denied the socioeconomic benefits afforded to other more prosperous members of the White race. Insofar as these poor Whites lack access to education, health care, jobs, and home-ownership, the fact that they are White—to the extent that Whiteness connotes status, influence, and economic power[39]—loses much of its force.[40]

B. Slavery

Like indentured servants, the first significant number of African slaves arrived in colonial America in the seventeenth century.[41] The two groups share some similarities. Both were poor and were treated as articles of commerce.

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329 S.C. 51, 56–57 (1998) (striking White juror because she was a "redneck" was not valid race-neutral reason on its face); Foxworthy v. Custom Tees, Inc., 879 F. Supp. 1200, 1209 (N.D. Ga. 1995) (holding a t-shirt manufacturer violated comedian's trademark rights in the phrase "you might be a redneck" and copyright rights in his redneck jokes).

38. "Cracker" is a "disparaging term for a poor white person of the rural, especially southeast United States." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 37, at 424. For a general discussion about stereotypes and these offensive terms, see Debra Lyn Bassett, *Distancing Rural Poverty*, 13 GEO. J. ON POVERTY L. & POL'Y 3 (2006), and Debra Lyn Bassett, *The Rural Venue*, 57 ALA. L. REV. 941 (2006); Hartigan, *supra* note 35, at 106.

39. On the privilege of Whiteness, see CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997). On the privilege of Whites not to see themselves in racial terms, see Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969–82 (1993).

40. To be sure, Whiteness is not rendered entirely impotent. When poor Whites encounter poor people of color, the former may still attempt to wield the psychological benefits of Whiteness. And as between the two, privileged Whites may still prefer poor Whites to poor Blacks. Yet, if economic status can so diminish the power of Whiteness, then one might legitimately ask are poor Whites still White or are they "operatively" or "functionally" Black? And similarly, are upper-class Blacks now operatively White because their wealth tempers negative stereotypes associated with Blackness? *See* Audrey G. McFarlane, Operatively White*?: Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness*; 72 LAW & CONTEMP. PROBS. 163 (Fall 2009). Although this idea is intellectually intriguing and engaging, it seems to minimize the psychological influence of race and to ignore the ways in which race has obstructed the formation of cross-racial coalitions among those who may have most benefited from them, poor Blacks and Whites. *See* john a. powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 417–19 (2007) (discussing the difficulties of building cross-racial coalitions, noting that "[s]olidaristic approaches are difficult because their long-run power is often insufficient to outweigh the advantages groups currently enjoy. Today, Whiteness and the tangible benefits of White space prevent working class Whites from allying themselves with poor and working-class Blacks who share common interests."); *see also* Mahoney, *supra* note 15, at 804 (discussing the paradox of "doing race" or "doing class" when the two in fact intersect); Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1741–44 (1993) (noting that historically "White workers perceived that they had more in common with the bourgeoisie than with fellow workers who were Black"). The idea also seems to conflate race and economic class and to reify a certain static conception of White racial identify and wealth as all powerful and Black racial identity and poverty as completely subordinate. Yet social constructions have never been, pardon the pun, this Black and White. Are wealthy Black men operatively White when they are unable to secure a taxicab on Pennsylvania Avenue at night or when they are profiled by the police in their fancy cars? Is President Obama operatively White?

41. FRANKLIN & MOSS, *supra* note 32, at 40–41, 65. Many historians note the arrival of a ship carrying twenty Black persons in Jamestown, Virginia in 1619. These individuals could have been slaves or indentured servants. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 20–21 (1980). Note that Africans were present in the Americas before this date. *See* FRANKLIN & MOSS, *supra* note 32, at 40–41.

Both were subject to violence and inhumane treatment at the hands of masters and employers.[42] Like indentured servants, early on some African slaves were able to limit their period of bondage, though their mechanism was religious conversion as opposed to expiration of an indenture.[43]

Notwithstanding these similarities, the experiences of African slaves and indentured servants differed in several key respects. First, African slaves were forcibly brought to American soil; they did not "choose" bondage.[44] Second, Africans were, with few exceptions, enslaved for life.[45] Third, as racial justifications for slavery developed, African slaves were subject to more expansive restrictions on their human rights and liberties than indentured servants. They were considered barbaric, intellectually limited, morally corrupt, oversexed, at times servile and at times savage, and untrustworthy.[46] Because they were perceived as genetically inferior human beings—if human beings at all—they were not entitled to marry, to contract, to obtain an education, to acquire and transfer property, to vote, or to serve on juries, among other things. These restrictions were not only more expansive in scope, but they applied for a longer period of time. Although indentured servitude ended in approximately 1819, de jure restrictions on African slaves and their progeny continued through slavery, the Jim Crow era, and into the civil rights movement of the 1950s and 1960s. Indeed, it was not until well after formal legal barriers were abolished that the United States began to witness a burgeoning Black middle class.[47]

Today, some Blacks have been able to escape the more pernicious effects of racism and are doing well.[48] However others continue to suffer from the vestiges of centuries of racial oppression. Indeed, poor Blacks are seemingly caught in a vicious cycle. Having been deliberately denied access to education and professional training, these individuals have been disproportionately tracked into unskilled, lower-paying, menial occupations. Because they are forced to work longer hours for less pay, they lack both time and resources to pursue

42. FRANKLIN & Moss, *supra* note 32, at 39, 138–58.

43. *Id.* at 65–66.

44. Although poverty and desperation can circumscribe "choice," the decision to enter into a contract to sell one's labor is fundamentally different from never having that choice at all. With chattel slavery, a critical component of agency, even compromised agency, is missing.

45. FRANKLIN & MOSS, *supra* note 32, at 91–93.

46. *See* George Fredrickson, *White Images of Black Slaves (Is What We See In Others Sometimes a Reflection of What We Find in Ourselves?)*, *in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 38, 38–45 (Richard Delgado & Jean Stefancic eds., 1997) (examining stereotypes of African slaves in the United States); N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1322–25 (2004) (discussing stereotypes of Black slaves).

47. OLIVER & SHAPIRO, *supra* note 9, at 23–25. Of course, segments of the African American community have thrived, though not necessarily to the same extent as Whites, at various points in U.S. history. *See, e.g.*, FRANKLIN & MOSS, *supra* note 32, at 264–71, 312–25 (describing African Americans who were elected to public office during Reconstruction and other African American achievements at the end of the nineteenth century).

48. OLIVER & SHAPIRO, *supra* note 9, at 23–25.

those educational and professional opportunities that may become available,[49] which means they are effectively trapped in low-status work. This cycle has played out over generations. Interestingly, as the United States has moved away from state-sanctioned discrimination, what began as systematic discrimination against a group has morphed into a belief that Blacks lack individual responsibility and are bearing the consequences of their individual choices. In other words, in the blame game, Blacks are deemed responsible for their plights because they are Black, not because of the myriad structural forces leading to inequality.

Importantly, race and class seem to interact differently with poor Blacks as compared to poor Whites.[50] Although poverty prevents poor Whites from fully accessing White privilege, their poverty is not attributed to their race. Instead, it is attributed to aspects of individual character or experience separate from race; no causal relationship is presumed between Whiteness and poverty. With poor Blacks, however, the opposite is true. Race or Black culture is often blamed for Black poverty.[51] One argument posits that racial defects supposedly inherent in Black people (or Black culture) prevent Blacks from pulling themselves up by their bootstraps and accessing the socioeconomic opportunities that are said to exist, at least until recently, for all Americans in this land of plenty. In other words, because Blacks are lazy, unintelligent parasites, they have not obtained the American Dream.[52] Somehow, in this deeply troubling and one-sided story, race and class become mutually reinforcing. Blacks are poor because they are Black *and* Blackness gets constructed as poor. That is, poverty becomes a constitutive element of Blackness. Blacks are not only lazy, intellectually and morally inferior, they are also poor.[53]

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49. *See generally* Gerald Torres, *The Elusive Goal of Equal Educational Opportunity*, *in* LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR 331 (Paul Carrington & Trina Jones eds., 2006) (describing how poverty decreases educational opportunity).

50. For analysis of the interaction between race and class with wealthy Blacks and Whites, see Trina Jones, *Foreword*, 72 LAW & CONTEMP. PROBS. i (Fall 2009).

51. To be sure, the causal relationship is between racism and poverty. *See* HARRELL R. RODGERS, JR., POVERTY AMID PLENTY: A POLITICAL AND ECONOMIC ANALYSIS 41–58 (1979) (including racism among the five leading causes of poverty); James W. Fox, Jr., *Citizenship, Poverty and Federalism: 1987–1882*, 60 U. PITT. L. REV. 421, 541 (1999) (exploring the historical relationship between race and poverty). The connection between race, culture, and poverty has sparked heated discussion in recent decades. *See* MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 16–43 (1990) (discussing the Moynihan Report and various culture of poverty theories).

52. Ironically, in this tale group characteristics account for individual failures, yet Blacks are individually to blame.

53. One must take heed of Ian Haney Lopez's observation that social constructions are constantly shifting and evolving. Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). Indeed, one might question whether the construction of Blackness is changing given the arrival of the Oprahs, LeBrons, Chenaults, and Obamas. Perhaps the presence of these individuals, and others like them, will challenge the contention that poverty is a constitutive element of Blackness and will cause Americans to believe—as they seem to believe of Whites—that poverty results from individual attributes, not inherent racial characteristics. It seems to me that the jury is still out on this issue. The Oprah cohort may be viewed as a form of Black exceptionalism. In other words, they may be seen as exceptions to traditional

Nowhere has this interaction between race and class been more evident than in the unfortunate caricature of the "Black welfare queen": the supposedly lazy woman of color "who breeds children to fatten her [public] allowance."[54] As one author has observed,

> The "welfare mother" is a deviant social creature. She is able-bodied, but unwilling to work at any of the thousands of jobs available to her; she is fundamentally lazy and civically irresponsible; she spends her days doing nothing but sponging off the government's largesse. Despite the societal pressure to be gainfully employed, she enjoys her status as a "dependent" on the state and seeks at all costs to prolong her dependency. Promiscuous and shortsighted, she is a woman who defiantly has children out of wedlock. Without morals of her own, she is unlikely to transmit good family values to her children. She lacks the educational skills to get ahead and the motivation to acquire them. Thus, she is the root of her own family's intergenerational poverty and related social ills. She is her own worse [sic] enemy. And she is Black.[55]

C. Nineteenth-Century Chinese and Japanese Immigrants[56]

The social and economic integration of Asian immigrants in the United States offers a counterpoint to the experiences of White indentured servants and Black slaves and illuminates the intricacies of race and class. Importantly, the histories, cultures, languages, and contemporary circumstances of Asian Americans vary dramatically. Because it is impossible to analyze all of the unique subgroups within this vastly diverse population of peoples, this paper examines a brief moment in the history of two groups whose experiences

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conceptions of Blackness rather than as challenges to them. Despite their visibility, the scope of their influence may be limited by the fact that these super-wealthy, super-famous individuals represent only a small percentage of African Americans. Alternatively, it could be that their presence will spark a reshaping of norms. It is too early to tell.

54. *See* Dorothy Roberts, *The Value of Black Mother's Work*, 26 CONN. L. REV. 871, 873 (1996); *see also* Catherine Albiston & Laura Bether Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 477 (1995) ("The facets of the 'welfare queen' image become fused together so that poor always means black, black always means poor, and these characteristics attached to 'woman' symbolize sexual irresponsibility, defective parenthood, and deviancy."). Although Blacks are overrepresented on welfare and AFDC relative to their numbers in the population, in absolute numbers there are many more Whites than Blacks on welfare. Yet in the 1980s the "Black welfare queen" became the poster child for failures of the U.S. social-welfare system. *See* Rose Ernst, *Localizing the "Welfare Queen" Ten Years Later: Race, Gender, Place, and Welfare Rights*, 11 J. GENDER RACE & JUST. 181 (2008) (examining the ways in which welfare has been racialized); Morgan Doran & Dorothy Roberts, *Symposium: Welfare Reform Ends in 2002: What's Ahead for Low-Income and No-Income Families? Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 402 (2002) (describing the effects of racial stereotypes on welfare policy and reform).

55. Nathalie A. Augustin, *Learnfare and Black Motherhood: The Social Construction of Deviance*, *in* CRITICAL RACE FEMINISM 144 (Adrien Wing ed., 1997); *see also* Naomi Cahn, *Representing Race: Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 993 (1997) ("[The 1996] welfare reforms would affect all poor women, Black and White, and . . . may not appear 'raced.' Because, however, images of black recipients of welfare seem to motivate welfare reform, and given the impact of welfare reform on the black community, a race-conscious lawyering strategy may be warranted.").

56. I was greatly assisted in this section by the excellent compilation of materials included in RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA. *See* PEREA ET AL., *supra* note 17, at 397–486.

demonstrate the ways in which race, class, and U.S. immigration policy have worked in tandem in structuring hierarchy.

1. Chinese Immigrants

Between 1849 and 1882, approximately 100,000 Chinese laborers immigrated to the United States.[57] They left China fleeing economic hardship and hoping to find greater economic prosperity mining California's gold fields, laying tracks for the transcontinental railroad, and working in other trades, including textile production, leather goods manufacturing, and perhaps most famously the laundry industry.[58] Most planned to work in the United States for only three to five years before returning to China.[59]

Initially, Americans welcomed these immigrant workers, who were seen as a form of cheap and relatively easily controlled labor.[60] As their numbers and prosperity increased, however, so too did hostility towards them.[61] Although Chinese immigrants were industrious and peaceful, their communities were insular and they preferred to trade with each other.[62] In addition, these immigrants maintained their own cultural traditions. As one scholar notes, "they worked too hard (often for less pay than others were willing to accept), saved too much, and spent too little. . . . [T]hey looked and behaved differently from the majority population."[63] These differences fueled fires of discontent, which found expression in local and national legislation[64] that subjected Chinese entrepreneurs and laborers to discriminatory taxes and other measures designed to close their businesses, to curtail their employment, and ultimately to end their migration to the United States.[65]

In some ways, Chinese immigrants were racialized similarly to Blacks and American Indians. For example, in *People v. Hall*, the California Supreme Court held that Chinese immigrants were prohibited from giving testimony in

57. RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 192–95 (1989).

58. *Id*.; *see also* CHARLES MCCLAIN, CHINESE IMMIGRANTS AND AMERICAN LAW vii (1994). The experience of Chinese persons with the laundry industry is widely known in part because of the U.S. Supreme Court's 1886 decision in *Yick Wo v. Hopkins*. 118 U.S. 356 (1886). In *Yick Wo*, the Court invalidated a San Francisco ordinance that prohibited the operation of laundries in wooden structures. *Id*. at 374. At the time, three-quarters of the city's laundries were owned by Chinese persons and ninety-five percent of these businesses were in wooden structures. MCCLAIN, *supra*, at 144–45.

59. TAKAKI, *supra* note 57, at 192–95.

60. *See* Charles McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 CAL. L. REV. 529, 534–35 (1984).

61. *Id*. at 535.

62. *Id*.; s*ee also* CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 10 (1994) ("As a class, [they] were harmless, peaceful and exceedingly industrious; but, as they were remarkably economical and spent little or none of their earnings except for the necessities of life and this chiefly to merchants of their own nationality, they soon began to provoke the prejudice and ill-will of those who could not see any value in their labor to the country." (quoting THEODORE HITTELL, HISTORY OF CALIFORNIA 99 (1898))).

63. MCCLAIN, *supra* note 62, at 10.

64. For an overview of these legislative efforts, see generally McClain, *supra* note 60.

65. *Id*. at 539–40.

cases in which Whites were parties.[66] The court, composed of White justices, characterized Chinese immigrants as

> a distinct people . . . whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and [Whites'] nature has placed an impassable difference . . . .[67]

Although like Blacks and American Indians, Chinese immigrants were considered morally and intellectually inferior to Whites, they posed an additional threat because they were also foreign.[68] By deeming Chinese immigrants ineligible for citizenship, immigration law became a primary vehicle through which to exclude them. Starting most notoriously in 1882 with the Chinese Exclusion Act,[69] the U.S. government passed a series of measures restricting access to the United States first by Chinese laborers and later by all Chinese persons.[70] These measures were effective at excluding Asian immigrants, including Chinese persons, until Congress reformed U.S. immigration laws in 1965.[71] However, as one scholar notes, although the 1965

66. 4 Cal. 399, 405 (1854).

67. *Id.* at 405.

68. Justice John Harlan mentioned this distinction in his famous dissent in *Plessy v. Ferguson*. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting). He pointed out that under the Court's majority opinion, Chinese immigrants would actually enjoy greater rights than Blacks in Louisiana—a result that existing norms would not support. *Id.* at 561. He noted,

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the Black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, . . . are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.

69. The Chinese Exclusion Act of 1882, 22 Stat. 58 (1882) (suspending the immigration of Chinese laborers to the United States). For additional analysis of the Chinese Exclusion Act and nineteenth-century restrictions on Chinese immigration, see MCCLAIN, *supra* note 62, at 147–72.

70. *See, e.g.*, The Scott Act, 25 Stat. 504 (1888) (permanently excluding Chinese laborers from the United States); The Geary Act, 27 Stat. 25 (1892) (extending immigration restrictions to all Chinese persons and persons of Chinese descent).

71. The Chinese Exclusion Act was upheld as constitutional in *Chae Chan Ping v. United States*, 130 U.S. 581, 611 (1889) and was enforced for more than sixty years until it was repealed in 1943. Act of Dec. 17, 1943, ch. 344, §1, 57 Stat. 600. But as the U.S. State Department notes on its website, "the repeal . . . was a decision almost wholly grounded in the exigencies of World War II, as Japanese propaganda made repeated reference to Chinese exclusion from the United States in order to weaken the ties between the United States and its ally, the Republic of China." *See* U.S. Department of State, Diplomacy in Action, Repeal of the Chinese Exclusion Act, 1943 *available at* http://www.state.gov/r/pa/ho/time/wwii/86552.htm. Few opposed repeal of the act as other measures were in place to limit the number of Chinese immigrants to the United States. For example, the Immigration Act of 1924, 43 Stat. 153, set an annual quota on the number of immigrants of Chinese ethnicity to the United States. Unlike European immigrants, who were limited by country of citizenship, the 1924 Act restricted Chinese immigration based on ethnicity. Thus, anyone of Chinese ancestry, regardless of whether they were Chinese nationals, was counted under the quota. *See* U.S. Department of State, Diplomacy in Action, Repeal of the Chinese Exclusion Act, 1943 *available at* http://www.state.gov/r/pa/ho/time/wwii/86552.htm. As the State Department website notes, "[c]reating

Act "reshaped the composition of Asian America . . . it did not prove to be a panacea" as Asian Americans were subject to many of the racially restrictive practices faced by African Americans.[72]

2. Japanese Immigrants

The Japanese immigrant story is similar to that of the Chinese. Immigrant laborers from Japan began arriving in the United States in 1885, when emigration became legal in Japan.[73] Between 1891 and 1924,[74] approximately 200,000 Japanese immigrants came to the United States[75] seeking higher wages.[76] Their labor was needed to fill the void caused by the exclusion of Chinese workers.[77] Most worked in agriculture as farmers and farm workers.[78] As Japanese immigrants became more successful and sought upward mobility, White workers began to view them as an economic threat that needed to be eliminated. As early as 1905, hate groups formed "seeking to shut out Japanese . . . laborers, to boycott Japanese businesses, to segregate Japanese from White children, and to focus national attention on the Japanese menace."[79] Laws soon followed. In 1907, Japan and the United States entered a gentlemen's agreement in which Japan agreed to deny passports to most persons of the laboring class in order to limit the emigration of Japanese laborers to the United States.[80] In addition, in the early part of the twentieth century, several western states passed alien land laws, designed to drive out Japanese farmers by prohibiting foreign ownership and leases of land.[81] Perhaps nothing demonstrates foreignness as a constitutive aspect of Asian racial identity more than the internment of thousands of Japanese nationals *and*

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this special, ethnic quota for the Chinese was a way for the United States to combat Japanese propaganda by proclaiming that Chinese were welcome, but at the same time, to ensure that only a limited number of Chinese actually entered the country." *Id.* In the Immigration Act of 1965, Congress ended quotas based on national origin and prohibited the use of race, national origin, sex, place of birth, or place of residence to determine immigration eligibility. *See* Act of October 3, 1965, P.L. 89–236, 79 Stat. 911.

72. Keith Aoki, *Asian Pacific American Electoral and Political Power: Panel 1: A Tale of Three Cities; Thoughts on Asian American Electoral and Political Power After 2000*, 8 UCLA ASIAN PAC. AM. L.J. 1, 7–8 (2002).

73. Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States*, *in* JAPANESE IMMIGRANTS AND AMERICAN LAW: THE ALIEN LAND LAWS AND OTHER ISSUES 25, 25–26 (Charles McClain ed., 1994).

74. The 1924 Immigration Act basically ended emigration from Japan. *Id.*

75. *Id.* at 26.

76. *Id*.

77. *Id.*

78. JAPANESE IMMIGRANTS AND AMERICAN LAW: THE ALIEN LAND LAWS AND OTHER ISSUES, *supra* note 73, at ix.

79. PEREA ET AL., *supra* note 17, at 428. For analysis of anti-Japanese sentiment, see generally Buell, *supra* note 73; Keith Aoki, *No Right to Own?: The Early Twentieth–Century "Alien Land Laws" As a Prelude to Internment*, 40 B.C. L. REV. 37, 44–63 (1998).

80. CHAN, *supra* note 71, at vii–viii.

81. Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States, in* JAPANESE IMMIGRANTS AND AMERICAN LAW: THE ALIEN LAND LAWS AND OTHER ISSUES, *supra* note 73, at 277, 277–78.

Japanese Americans following the bombing of Pearl Harbor.[82] The Supreme Court upheld the constitutionality of the internment, reasoning that

> the adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safely, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.[83]

As was true with indentured servants and African slaves, the historical interplay between race and class with Japanese and Chinese immigrants is fascinating. Japanese and Chinese immigrants initially prospered in the United States, and they benefited from racial constructs that are not usually associated with poverty. They were viewed as hard working, competitive, industrious, and thrifty. Indeed they were ideal workers—that is, until they became too successful. Interestingly, their economic prosperity, and the threat that this posed, contributed to their negative racialization, and "foreignness" was an essential element in this process. As they became more successful, instead of ideal workers, these immigrants were viewed as untrustworthy, secretive outsiders, out to steal American jobs and to harm American families.[84]

A similar dynamic exists today. In times of economic prosperity and labor shortages, Asian nationals and Asian Americans (many Americans do not distinguish between the two) are welcomed. They are seen as a model minority because of their professional success and are praised for being "hard working, industrious, thrifty, family-oriented, and[,] for women, seductively mysterious and exotic."[85] Yet, in times of economic hardship when Whites and other non-Asian Americans begin to worry about their jobs, the very success of Asian Americans becomes a negative.[86] In effect, as one scholar notes, the "model minority" becomes a "yellow peril" and "hardworking and industrious becomes unfairly competitive; family-oriented becomes clannish; mysterious becomes dangerously inscrutable."[87] In this climate, Asian Americans, regardless of their citizenship status, become undesirables who are vulnerable to violence and backlash. The situation is worse for Asian immigrants. If they are not U.S. citizens, they are potentially subject to greater exploitation, increased denials of legal protections, and heightened threats of exclusion and deportation.

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82. This history resulted in two of the most infamous cases in U.S. constitutional law: *Korematsu v. United States*, 323 U.S. 214 (1944), and *Hirabayashi v. United States*, 320 U.S. 81 (1943).

83. *Hirabayashi*, 320 U.S. at 101.

84. For discussion of early stereotypes of Chinese and Japanese immigrant workers, see Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1, 18–34 (1996).

85. Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 296 (1997).

86. PEREA ET AL., *supra* note 17, at 475–86.

87. Saito, *supra* note 85, at 297. Saito notes that "the yellow peril and the model minority are not poles, denoting opposite representations along a single line, but in fact form a circular relationship that moves in either direction." *Id.* at 296 (quoting GARY Y. OKIHIRO, MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE 141 (1994)).

As the above histories show, race and class interact in different ways depending upon context. While race and racial stereotyping can increase one's odds of success, they cannot ensure economic advancement. For example, White privilege did not insulate indentured servants from class-based discrimination. Race and racial stereotypes, however, can impede economic success. Japanese and Chinese immigrants were revered when their labor was most needed but shunned when Whites felt threatened by their prosperity. Race and class can also be mutually reinforcing in ways that heighten inequality. For more than 400 years, Blacks were denied access to both educational and occupational opportunities, due at least in part to an intermingling of racial and class stereotyping.

III

CHALLENGES TO ECONOMIC MOBILITY

Americans still believe in the American Dream—that each American controls his own destiny and that with hard work, discipline, and skill, economic prosperity lies just around the corner. Yet, as Part II demonstrates, economic stratification among workers has existed in the United States since the colonial era. Historical demands for labor and the way in which those demands were fulfilled created an economic hierarchy with Blacks, poor Whites, and immigrants of color at the bottom. Through no fault of their own, many in these groups were unable to achieve the dream. Of course, economic, social, and legal conditions have changed. The United States has experienced huge economic growth as it has shifted from an agrarian, to an industrial, and most recently to a service and technology-based economy. Immigration restrictions have relaxed (at least for some). The country has witnessed both the African-American movement for civil rights and a war on poverty. Indeed, the son of a poor White woman and a Black man is now President of the United States, and the descendent of slaves is First Lady. In light of these changes, some might question to what extent history continues to affect the social mobility of Americans today.

A 2008 study funded by the Pew Charitable Trusts examined the influence of family background on the overall distribution of income and wealth in the United States.[88] The researchers concluded that the "view that America is 'the land of opportunity' does not entirely square with the facts."[89] To be sure, for the most part, each successive generation of Americans has done better than the previous generation.[90] That is, over the course of U.S. history, the rising economic tide has tended to lift all boats. It is, also true, however, that income inequality has risen since the late 1960s.[91] There is more space between those at

88. *See generally* Mobility Project, *supra* note 6.
89. *Id*. at 4.
90. *Id.* at 27–32.
91. *Id.*

the top and those at the bottom, and people at the higher end of the economic hierarchy tend to improve their economic positions at a faster rate, and with greater success, than those at the lower end.[92] In other words, the tide has not lifted all boats equally.[93] In addition, although there is some opportunity for individuals to move up and down the economic ladder (including the ability to change one's position on the hierarchy), individual success is partly determined by the family into which one is born. For example, the researchers found that "42[%] of children born to parents in the bottom fifth of the income distribution remain in the bottom, while 39[%] born to parents in the top fifth remain in the top."[94] These figures are twice as high as would be expected by chance.[95] Insofar as "only 6[%] of children born to parents with family income at the very bottom move to the very top,"[96] it seems the rags-to-riches tale of economic prosperity that is so emblematic of the American Dream is for many quite illusive.

The situation is worse for African Americans. Researchers found that the "mobility prospects for poor black children are worse than the prospects for poor white children."[97] In addition, they determined that the "majority of black children born to middle-income parents in the late 1960s have less family income than their parents did. In short, they have been downwardly mobile."[98] The researchers concluded that the "failure of middle-income black families to pass their advantages on to their children does not suggest that racial economic gaps will close any time soon."[99]

Importantly, the researchers also confirmed the value of education to social mobility, noting that a "college degree is increasingly the ticket to improving or maintaining one's relative position in the economy."[100] Unfortunately, American schools do not adequately promote economic mobility among poor people and people of color. The researchers' examination of education in the United States revealed that "the average effect of education at all levels is to reinforce rather than compensate for the differences associated with family background and the many home-based advantages and disadvantages that children and adolescents bring with them into the classroom."[101] Again, the researcher's predictions were

92. *Id*. at 16.

93. This is important because if there were little income inequality in the United States, then where one stands in the economic hierarchy would be of little moment. But in times of high income inequality, where one stands in the hierarchy is tremendously important.

94. Mobility Project, *supra* note 6, at 4. The researchers also found that the stickiness at the top and bottom of the income distribution does not exist for children born into middle-income families, who "have roughly an equal shot at moving up or moving down and of ending up in a different income quintile than their parents." *Id.*

95. *Id.* at 4.

96. *Id.* at 7, 19.

97. *Id.* at 5; *see id.* at 71–79 (comparing economic mobility among Blacks and Whites).

98. *Id*.

99. *Id*. at 71–79.

100. *Id.* at 7; *see id.* at 91–104 (examining the impact of education on economic mobility).

101. *Id.* at 7.

grim: "There is no reason to expect change in the disappointing effects of education on economic mobility unless effective reforms are pursued at all levels."[102]

It might very well be impossible to track the intergenerational mobility of specific groups over the last four centuries or to know precisely to what extent the above outcomes result from historical forces. It would not be unreasonable, however, to conclude that history plays some role. As noted earlier, education, work, and poverty operate in a vicious cycle: lack of educational opportunity leads to lower status work;[103] lower status work leads to lower wages; lower wages lead to an inability due to time and resource restrictions to secure a better education.[104] To the extent that some groups' access to education has historically been limited by poverty or discrimination, absent some form of large-scale intervention, the cycle simply repeats itself. The question becomes to what extent, then, has the law served as a disruptive force?

IV

LEGAL INTERVENTION

Both employment discrimination law and labor law exist to protect workers. Employment discrimination law seeks to shield employees from the effects of arbitrary and harmful decisions based on status markers (for example, race, religion, national origin, sex, age, disability), whereas labor law—specifically its crown jewel, the National Labor Relations Act (NLRA)—aims "to create a system of industrial democracy to replace the master–servant relationship with a more egalitarian relationship between employers and employees."[105] Importantly, both labor and anti-discrimination laws are limited by the sociopolitical context in which they operate. In recent decades, unionization has declined as the United States has shifted from a manufacturing to a service economy.[106] Other macroeconomic forces like residential segregation, global competition, economic recession, and a failing system of public education also

102. *Id*.

103. *Id*.

104. *See* Gerald Torres, *supra* note 49, at 332–35 (examining the link between class status and educational opportunity).

105. Julius G. Getman, *Law at the Workplace: The Decline of Collective Bargaining*, *in* LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR, *supra* note 49, at 244.

106. In 2008, 12.4% of workers were union members. Bureau of Labor Statistics, U.S. Dep't of Labor, Economic News Release, Union Members Summary, Jan. 28, 2009, http://www.bls.gov/news.release/union2.nr0.htm. This is down from a rate of 20.1% in 1983, the first year in which comparable data are available. *Id.* The percentage of employees in the United States represented by unions has declined from a peak in the early 1950s of approximately 36% of the workforce. *See Right-to-Work Advocates Mark Labor Day with Calls for Repeal of National Labor Law*, Daily Lab. Rep. (BNA) No. 170, at A-11 (Sept. 2, 2005). For examination of the effects of global competition on unionization and domestic labor protections, see David M. Trubek & Lance Compa, *Trade Law, Labor, and Global Inequality*, *in* LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR, *supra* note 49, at 217, 220–22.

affect employment opportunity.[107] Yet neither traditional labor law nor employment discrimination law are designed to address these factors.

Labor and employment discrimination law are also limited by divisions within the populations they serve. Historically, organized labor has been notoriously hostile to immigrants, fearing that lower immigrant wages will drive down the wages of native workers.[108] In addition, some White workers have historically been resistant to the social and economic progress of Blacks.[109] These dynamics are important because they have likely impeded formation of the sort of broad-based coalitions for change that are necessary to protect the rights of all workers.

Although this larger context is crucial to the overall picture, the question examined in this Part is narrower: within the realms in which labor and employment discrimination law operate, have these laws failed poor workers generally, and Blacks and immigrants of color more specifically? The answer requires examining both labor law and antidiscrimination law.

A. Labor Law

1. Interpreting the NLRA

During the Great Depression, Congress passed the NLRA (also known as the Wagner Act).[110] Unlike other New Deal legislation,[111] the NLRA did not set forth substantive protections for workers. Rather, it envisioned a new process through which workers could use their collective strength to negotiate with employers for greater economic power and security.[112] The process, known as collective bargaining, worked for some time. Motivated by a desire to avoid strikes and time-consuming grievances, employers negotiated with unions to develop substantive rules to govern the employer-employee relationship. By the

107. For an overview of factors contributing to labor's decline, see CHARLES CRAVER, CAN UNIONS SURVIVE? 34–55 (1993); MICHAEL GOLDFRIED, THE DECLINE OF ORGANIZED LABOR IN THE U.S. 94–112 (1987).

108. *See* Catherine Fisk & Michael Wishnie, *The Story of* Hoffman Plastic Compounds, Inc. v. NLRB, *in* LABOR LAW STORIES 399, 401–02 (Laura Cooper & Catherine Fisk eds., 2005) (describing labor's attitudes toward immigrant workers); Jose Bracamonte, *The National Labor Relations Act and Undocumented Workers: The De-Alienation of American Labor*, 21 SAN DIEGO L. REV. 29, 32–35 (1983–84) (examining historical tensions between labor and immigrant workers); Jennifer Hill, *Binational Guestworker Unions: Moving Guestworkers Into the House of Labor*, 35 FORDHAM URB. L.J. 307, 308–09 (2008) (describing the historical resistance of unions to guest workers). This resistance, however, may be weakening. Fisk & Wishnie, *supra*, at 401; Hill, *supra*, at 309.

109. *See supra* note 40; *see also* Deborah C. Malamud, *The Story of* Steele v. Louisville & Nashville Railroad, *in* LABOR LAW STORIES, *supra* note 108, at 59 (describing White hostility toward Black workers in the railroad industry in the 1930s); Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211, 228–29 (2002) (arguing that organized labor's colorblind vision of organizing poorly serves immigrants and people of color).

110. National Labor Relations Act of 1935, 29 U.S.C. §§ 151–69 (2006).

111. *See, e.g.*, Social Security Act of 1935, Pub. L. No. 74-271 (codified as amended at 42 U.S.C. §§ 301–1397jj (2006); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2006).

112. 29 U.S.C. § 151 (2006).

1960s, unions were able to provide workers with greater protection from arbitrary terminations, mandatory overtime hours, and unfair job assignments, among other things.[113]

Yet, as numerous scholars have noted,[114] a process that looked encouraging for a time seems to be failing today.[115] Unionization in the United States has declined significantly in recent decades.[116] To be sure, outsourcing and global competition, among other things, are part of the challenge.[117] But the crisis with unionization is not due solely to such factors. Part of the problem is that the NLRA has been narrowly construed in ways that are adverse to workers. In a brief but insightful essay, Professor Julius Getman asserts that this is because judges charged with interpreting the statute "rarely came from the working class, and rarely understood union organizing, collective bargaining, grievance arbitration, or the dynamic of strikes."[118] As a result, they have decided a series of cases that "undervalue collective bargaining, . . . weaken the right to strike, and reflect a basic misunderstanding of the arbitration process."[119]

Getman cites three Supreme Court cases, which have also been widely criticized by other scholars,[120] to demonstrate his point: (1) *NLRB v. Gissel Packing Company*,[121] (2) *Lechmere v. NLRB*,[122] and (3) *NLRB v. Mackay Radio*.[123] In *Gissel Packing*, the Court held that even if an employer is aware that a majority of its employees support a union,[124] the employer can refuse to recognize the union until a formal election is held.[125] The campaign process leading up to an election, however, advantages employers due to their superior

113. Getman, *supra* note 105, at 244.

114. *See, e.g.*, Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1553–66 (1999) (arguing that denying gender and racial distinctions within worker ranks undermines organizing and coalition building); Cynthia Estlund, *Something Old, Something New: Governing the Workplace by Contract Again*, 28 COMP. LAB. L. & POL'Y 351, 353–57 (2007) (summarizing causes for labor's decline); Julie Rivchen, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397, 405–15 (2004) (proposing alternatives, including workers' centers, to traditional labor organizing).

115. *See* Getman, *supra* note 105.

116. *See supra* note 106.

117. *See supra* notes 106 and 107.

118. Getman, *supra* note 105, at 247.

119. *Id.*

120. *See, e.g.*, Terry Bethel & Catherine Melfi, *The Failure of Gissel Bargaining Orders*, 14 HOFSTRA LAB. L. J. 423 (1997); Laura Cooper, *Authorization Cards and Union Representation Election Outcomes: An Empirical Assessment of the Assumption Underlying the Supreme Court's* Gissel *Decision*, 79 NW. U. L. REV. 87 (1984); Cynthia Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305 (1994); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984).

121. 395 U.S. 575 (1969).

122. 502 U.S. 527 (1992).

123. 304 U.S. 333 (1938).

124. This can be accomplished through a card check (that is, by checking the number of employees who had signed union cards). *Gissel*, 395 U.S. at 595–610.

125. *Id*. at 609–10.

access to and power over employees.[126] Importantly, the NLRA does not require elections, and until *Gissel Packing* the general rule was that employers were obligated to negotiate with a union once a majority of employees had expressed support for the union.[127] The old rule equalized the playing field because unions could often demonstrate majority status after an initial organizing drive. Allowing employers to refuse union recognition and to insist upon a formal election, however, tilts the balance in favor of employers.[128] Instead of neutralizing this advantage by granting unions additional access to employees before elections are held, the NLRB and courts have chosen to intervene only after failed elections. The remedy in cases of employer abuse has been to set aside election results and hold new elections, an approach that is unsatisfactory from labor's viewpoint because "[it] almost always leaves the original result in place."[129]

In *Lechmere*, the Court held that the NLRA does not give union organizers the right to distribute literature on company property.[130] Getman argues that *Lechmere* illustrates the Court's tendency to prioritize the property rights of employers over the rights of employees to hear the case for unionization, a position that "reinforce[s] the employer's advantage by perpetuating the 'outsider' status of unions."[131] A consequence of *Lechmere* is that "employees will know the case against unionizing better than the case in favor because those not making the special effort to attend off-premises union rallies will have heard the employer's case more often and more recently than the union's."[132]

The third case, *MacKay Radio*, was perhaps one of the harshest blows the Court has delivered to unionization because it undermined the strike, the threat of which provided a powerful incentive for employers to engage in collective bargaining.[133] In *MacKay*, the Court stated in dicta that employers can

126. Getman, *supra* note 105, at 248–49.

127. Joy Silk Mills, 85 N.L.R.B. 1263, 1265–66 (1949).

128. Getman, *supra* note 105, at 248–49. Getman notes that an employer knows employee:

> addresses and their work stations. It designates their supervisors and controls their time. It can call the employees together whenever it wishes and explain why they should vote against unionization. And employees supporting union organization fear reprisals—a fear that almost always predates the campaign and can generally be strengthened by it. The employer has the advantage of being able to detect the basis for employee dissatisfaction and to suggest that it will respond positively if the employees vote against unionization.

Id. at 248.

129. *Id.* at 251.

130. Lechmere v. NLRB, 502 U.S. 527, 531–35, 539–41 (1992).

131. Getman, *supra* note 105, at 251.

132. *Id.*

133. *See* Julius Getman & Thomas Kohler, *The Story of* NLRB v. Mackay Radio & Telegraph Co.*: The High Cost of Solidarity*, in LABOR LAW STORIES, *supra* note 108, at 13, 13 ("After nearly seven decades, the [Mackay] doctrine continues to provide the notice and the nearly universal condemnation of scholars.").

permanently replace striking workers.[134] The opinion's significance was not felt for decades because employers were reluctant to use replacement workers.[135] In the 1980s, however, employers began to see that *MacKay* offered a mechanism for "taming or ridding themselves of troublesome unions,"[136] and they began using it to demand concessions in collective bargaining negotiations. After a series of strikes ended poorly for workers in the 1980s, unions came to fear the strike and, by the 1990s, use of this device had dropped to an all-time low.[137]

Getman's excellent article points to a number of other developments that have harmed labor and caused "unions and their supporters to see courts, the Board, and the national law as their implacable opponents."[138] He notes, for example, that the courts have placed certain types of employer decisions (such as those affecting changes in plant operations)[139] outside the scope of collective bargaining and in effect have limited employee input into decisions affecting their well-being. He also critiques the increased reliance on mandatory arbitration, which he argues favors employers when done outside the context of collective bargaining.[140] He concludes,

> It is ironic that those whom the Act was designed to protect—those with the least power in the employer-employee relationship—now carry the burden of protecting themselves. We have come full circle so that workers are in about the same position they occupied before the Act—perhaps worse—because today workers must circumvent barriers posed by the very law that was supposed to protect them.[141]

2. People of Color

Although the above analysis illustrates how labor law has failed workers across the board, additional concerns arise regarding people of color. For example, it is well known that union leaders have engaged in racially discriminatory conduct, and numerous cases have challenged this behavior.[142] It is also widely known that under the NLRA's exclusive-representation rule, once

134. 304 U.S. at 347; s*ee also* Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965) (holding that an employer can close down its business, including one part of a multi-location operation, to avoid unionization).

135. Getman, *supra* note 105, at 252.

136. *Id*.

137. *Id*. For additional analysis of *MacKay Radio*, see generally Getman & Kohler, *supra* note 133 (exploring the contemporary effects of permanent replacements on the collective bargaining rights of employees).

138. Getman, *supra* note 105, at 256. He notes that "the unions most active in organizing low-wage workers in the twenty-first century . . . have largely abandoned law and claims of legal rights in their organizing and in their collective bargaining. They rely instead on the use of raw economic power to force employers to grant recognition based on signed authorization cards."

139. *See, e.g.*, First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981) (holding that unions have no right to bargain about economically motivated decision to close part of employer's operation).

140. Getman, *supra* note 105, at 255–56.

141. *Id.* at 257.

142. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (challenging the racially discriminatory nature of the seniority system and the job assignment process included in a collective bargaining agreement); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) (challenging efforts of White unions to exclude Blacks from certain "White" jobs).

a union has been elected by a majority of workers, the union represents all employees in the bargaining unit (even those who opposed the union).[143] Two Supreme Court cases illustrate the nature of the problems that arise when racially discriminatory conduct collides with the exclusive-representation rule.

In *Steele v. Louisville and Nashville Railroad Company*,[144] Black railroad firemen sued their union, which was comprised mostly of Whites, for attempting to have the collective-bargaining agreement in effect between the railroad and the union amended to exclude Black firemen from service.[145] The Court held that unions have a duty to represent all of their members without discriminating on account of race.[146] This rule seemed fine, in fact laudable, at the time. The problem was: what were union members to do when unions failed to follow it?

The Supreme Court addressed this question some thirty-one years after *Steele* in *Emporium Capwell Company v. Western Addition Community Organization*.[147] In that case, a group of Black department store employees alleged that their employer was engaging in racial discrimination.[148] Instead of following the grievance procedures recommended by their union and incorporated in the collective bargaining agreement between the employer and the union, several employees decided to strike, an activity for which they were subsequently fired.[149] The issue before the Court was whether these employees could circumvent the union and negotiate directly with their employer outside of the collective bargaining process.[150] The Court, in an opinion authored by Justice Thurgood Marshall, said no.[151]

The *Emporium* decision and the exclusive-representation rule have spawned much scholarly debate.[152] On the one hand, some argue that the rule should be abolished because it harms people of color and women "by denying individuals the power of self-determination and requiring them to submit their individual interests to a collective decisionmaking process."[153] On the other hand, supporters of the rule contend that its elimination would harm women and

143. 29 U.S.C. § 159(a) (2006).

144. 323 U.S. 192 (1944).

145. *Id.* at 194–95.

146. *Id.* at 202–04. For additional analysis of this case, see Malamud, *supra* note 109, at 55–105.

147. 420 U.S. 50 (1975).

148. *Id.* at 53.

149. *Id.* at 53–56.

150. *Id.* at 61.

151. *Id.* at 60–70. For additional analysis, see generally Calvin Sharpe, Marion Crain & Reuel Schiller, *The Story of* Emporium Capwell*: Civil Rights, Collective Action, and the Constraints on Union Power*, *in* LABOR LAW STORIES, *supra* note 108, at 241.

152. *See, e.g.*, Sharpe, Crain & Schiller, *supra* note 151, at 267–69 (summarizing the scholarly debate); Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767 (2001) (arguing that incorporating racial, ethnic, and gender identity into labor union ideology would benefit union organization); George Schatzi, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897 (1975) (arguing that exclusive representation provision for union bargaining marginalizes minority interests).

153. Elizabeth Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395, 426 (1993).

people of color in a different way, by removing incentives to wide-scale, inclusive organizing.[154] Instead of abandoning the rule, supporters argue for reforms focused on encouraging more organization, perhaps by minorities, by formalizing "intraunion bargaining structures."[155]

The debate over organized labor's ability to protect the rights of people of color has been heightened by the U.S. Supreme Court's 2009 decision in *Penn Plaza v. Pyett*.[156] In *Penn Plaza*, the Court held that if a collective bargaining agreement provides for the arbitration of anti-discrimination claims provided by federal statutory law, then individual workers may not sue to redress alleged violations of that law.[157] These arbitration clauses are generally advantageous to employers because they limit the potential scope of an employer's liability. In a successful grievance arbitration, the usual remedies are reinstatement and backpay. Potential damage awards under federal statutory law, however, are broader. For example, under Title VII, in addition to reinstatement and backpay, a successful plaintiff may also receive compensatory and punitive damages in cases involving intentional discrimination.[158] Although employers have an incentive to negotiate arbitration agreements that include statutory claims, unions may not be similarly motivated because these claims are time-consuming, expensive to litigate, and difficult to win. In addition, unions may also think it in their members' best interests to be able to file suit in court where in addition to higher damage awards, there are greater procedural protections.[159] Oddly, *Penn Plaza* places unions negotiating collective bargaining agreements in an undesirable position, one where either a decision to include or a decision to exclude an arbitration clause can be used against it. As Professor Catherine Fisk notes,

> Imagine the new anti-union strategy at the organizing phase: An employer says to employees, "If you form a union, did you know that you will lose the right to file a suit under all the various state and federal laws that provide you individual rights?" Or, after a majority of employees vote to unionize and the employer continues to campaign against the union, hoping to persuade a majority of employees to vote to decertify it: "We want an agreement that protects you against discrimination, and

154. Ruben Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79, 139 (2002).

155. *Id.* at 140 (citing Dorothy Sue Cobble, *Making Postindustrial Unionism Possible*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 285, 302 (Sheldon Friedman et al. eds., 1994)).

156. 129 S. Ct. 1456 (2009). Although *Penn Plaza* was brought under the Age Discrimination in Employment Act, there is little reason to believe the Court's holding will not extend to other federal statutory claims like Title VII's prohibition against race discrimination, particularly since the majority in *Penn Plaza* read narrowly an earlier Title VII case that lower courts had interpreted to prevent union waiver of employee statutory rights. *Id.* at 1466–73 (commenting on Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)).

157. *Id.* at 1461, 1466.

158. Compensatory and punitive damage awards vary depending upon the size of the employer with a maximum award of $300,000 for employers with more than 500 employees. 42 U.S.C. § 1981a (2006).

159. Before *Penn Plaza*, Professors Marion Crain and Ken Matheny observed that labor unions "have a powerful disincentive to negotiate for antidiscrimination provisions in labor contracts because they risk waiving unit members' rights to proceed in court with statutory antidiscrimination claims." Crain & Matheny, *supra* note 152, at 1842. Now that waiver is assured, this disincentive is stronger.

> we're negotiating for that. Did you know that your union is negotiating to prevent you from arbitrating a claim alleging that someone sexually harassed you?"[160]

3. Immigrant People of Color

The connection between labor and immigration law dates back to colonial era rules regarding indentured servants. That connection continues today in immigration laws that, among other things, limit the ability of employers to hire undocumented persons[161] and in immigration reform proposals that highlight guest-worker programs[162] and legalization based upon work history.[163] Although labor and immigration law need not conflict,[164] they are often viewed that way, as a slim majority of the Supreme Court demonstrated in 2002 in *Hoffman Plastic Compounds v. NLRB*.[165] In *Hoffman*, the employer violated the NLRA by unlawfully discharging an employee for union organizing.[166] The Court held, however, that the employer was not liable for backpay because the employee was an unauthorized worker under U.S. immigration law and because the employer discovered this fact after the illegal discharge.[167] The Court reasoned that to award backpay to unauthorized workers would thwart the goals of immigration law by encouraging unlawful entry.[168]

The *Hoffman* decision has been extensively criticized,[169] and rightfully so. The decision furthers the goals of neither immigration law nor labor law.[170]

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160. Catherine Fisk, *"Penn" Is Mightier Than Decades of Precedent*, L.A. DAILY JOURNAL, Aug. 25, 2009, at 1, 4.

161. Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1324a–1324b (2006).

162. For examination of guestworker programs, see Jennifer Hill, *Binational Guestworker Unions: Moving Guestworkers into the House of Labor*, 35 FORDHAM URB. L.J. 307 (2008).

163. *See, e.g.*, Earned Legalization and Family Unification Act of 2003, H.R. 3271, 108th Cong. (2003), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h108-3271 (a failed bill which would have provided permanent residence status for long-term resident workers).

164. *See* Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003) (pointing to the need for integrated reform of both labor and immigration law).

165. 535 U.S. 137 (2002).

166. *Id*. at 140–41.

167. *Id*. at 152.

168. *Id*. at 151 ("[It would] encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration law, and encourage future violations.").

169. For an insightful overview of the case and the sociopolitical context in which it occurred, see Fisk & Wishnie, *supra* note 108, at 399–438.

170. In a weird assumption-of-risk type of argument, supporters of *Hoffman* often argue that if unauthorized immigrants did not come to the United States, then they will not be exploited by U.S. employers. They add that to award backpay to unauthorized workers will reward their violation of U.S. immigration law. Those who disagree with the opinion respond that if employers did not hire unauthorized workers, then they would stay away. Both camps ignore the way in which the U.S. economy is structurally dependent upon immigrant labor—and the fact that many immigrants are dependent on the U.S. dollar. In other words, employers will continue to hire immigrants and immigrants will continue to come. For additional analysis of the macro-forces driving immigration to the United States, see ALEJANDRO PORTES & RUBEN RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 351–58 (2006).

Instead, it gives employers an incentive to violate both.[171] Typically, when an employer violates the NLRA, damages may include injunctive relief, backpay, and reinstatement, among other things.[172] When the wronged employee is an unauthorized immigrant, however, *Hoffman* takes backpay off the table. This is not only a substantial reduction in an employer's sanction, it is also a powerful disincentive for harmed workers to pursue discrimination claims, for they personally stand to recover very little.[173] Because *Hoffman* renders employers practically immune from any real consequence of their actions, it encourages unscrupulous employers to hire unauthorized workers, to mistreat them (by paying ridiculously low wages and failing to provide safe working conditions), and to fire them if they engage in organizing or any other type of behavior to protect their rights. This set up not only harms the millions of struggling undocumented workers in this country, on whom many U.S. industries depend, it hurts all workers by stifling efforts to build broad and effective coalitions across immigrant and nonimmigrant populations. Instead of unifying and empowering workers through collective action, a dominant theory behind the NLRA, the decision fosters division and animus among workers by discouraging one segment from participating in protest activity and giving employers an incentive to replace with unauthorized workers (or to never hire) those who do or can protest.

Alas, history seems to be repeating itself. Immigrant workers flock to the United States to escape poverty at home and to satisfy industry's demand for cheap labor. Some U.S. employers hire and exploit these workers in blatant violation of U.S. labor law, and after *Hoffman* they do so without serious adverse consequence.[174] Low-wage U.S. workers are left disgruntled because, instead of them, U.S. employers appear to be choosing immigrant workers. Ironically, their anger is not directed at employers for diminishing the rights of all workers, but at immigrants.

B. Antidiscrimination Law

Title VII of the Civil Rights Act of 1964[175] and the Equal Protection Clause of the Fourteenth Amendment[176] are two principal sources of protection against

171. It is widely known that the government does not aggressively pursue employers who violate the Immigration Reform and Control Act of 1986 (IRCA), which renders illegal the hiring of undocumented persons. *See* Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1106–07, 1126–37 (2009).

172. Indeed, in *Hoffman*, the Court upheld the NLRB's imposition of cease and desist orders. 535 U.S. at 152.

173. For this reason, having an employer pay a fine instead of back pay is not an ideal solution. In addition, it is unclear to whom this fine would be paid.

174. As in the past, in some cases employers desire workers from different ethnic and national backgrounds because employers know of the difficulties these workers will encounter building coalitions with each other. *See, e.g.*, Saito, *supra* note 85, at 307–08.

175. 42 U.S.C. § 2000e (2006).

176. U.S. CONST. amend. XIV, § 1.

workplace discrimination provided by federal law.[177] Like labor law, anti-discrimination law has provided redress for certain subclasses of employees. But there are both practical and structural limits to what it can accomplish.

1. Access to Justice

For starters, the primary vehicle for vindicating rights through antidiscrimination law is litigation. Yet litigation is expensive and time-consuming, and poor workers rarely have the resources to hire lawyers.[178] Although the government can prosecute cases, it can handle only so many as a practical matter, and the number of prosecutions varies, depending upon whether a conservative or liberal administration controls the executive. Thus, just getting a case filed will pose an insurmountable challenge for many workers.

Even if resources are not an issue, workers might also be prevented from having their cases heard in court due to increased judicial tolerance of pre-dispute arbitration agreements. Historically, courts were reluctant to enforce these agreements in the employment context, due in part to the power differential between employer and employee and the importance of having a public forum for adjudication of federal statutory claims. But that hesitancy has all but disappeared. In the aftermath of *Circuit City Stores, Inc. v. Adams*, courts will readily enforce an employee's decision to waive judicial determination of her rights under federal antidiscrimination law—even though many employees are not adequately situated to negotiate the terms of these agreements and may not even know of their significance at the time of hire.[179] This unequal bargaining situation is regrettable because, although arbitration gives employees some access to dispute resolution (an important concern for poor workers), without appropriate safeguards it has the potential to favor employers who are often repeat players and who can ensure conditions beneficial to themselves.

2. Constitutional Challenges

In addition to these practical impediments, poor workers will have difficulty bringing antidiscrimination claims based on economic status. Poverty is not a

177. Section 1981 also provides coverage for claims of racial discrimination in employment. 42 U.S.C. § 1981 (2008). Because § 1981 tracks Title VII's proof structure for the most part, I will not examine it separately. Other key federal antidiscrimination laws, which are not pertinent to this analysis, are the Age Discrimination in Employment Act of 1967, 29 U.S.C. sec. 621, and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006).

178. *See* LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 4 (2005), *available at* http://www.lsc.gov/justicegap.pdf (noting that less than twenty percent of the legal needs of low-income Americans are being met); *see also* Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L. J. 1529, 1534–58 (1995) (describing the inadequate legal services poor people receive).

179. 532 U.S. 105 (2001) (compelling judicial enforcement of arbitration agreements in employment contracts); *see also* discussion of *Penn Plaza v. Pyett*, *supra* notes 160–65 and accompanying text.

suspect classification for purposes of equal protection analysis.[180] This means that class-based distinctions are subject only to rational basis review and are presumptively legitimate, with the result that one is unlikely to win a claim on this basis.[181]

Importantly, race *is* a suspect classification under equal protection analysis and is subject to strict scrutiny, the most exacting level of constitutional review. But this level of scrutiny has been more of a hindrance than a help in recent years. Since the mid-1970s, equal protection cases involving race, at least at the Supreme Court level, have not involved overt discrimination against people of color or the use of a racial classification with intent to harm a particular racial group. Rather, most cases have involved challenges to affirmative action measures designed to secure access for people of color to institutions from which they have historically been excluded and in which they are still underrepresented.[182] Because the Supreme Court has applied an increasingly demanding standard of review to these cases, generally these race-based measures have failed.[183] Indeed, until two recent cases involving admissions policies at the University of Michigan,[184] the application of strict scrutiny was generally understood to mean "strict in theory, but fatal in fact."[185] The Court's recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1*[186] may signal that the Michigan cases are anomalies and that with the Court's current composition, race-conscious measures are unlikely to succeed in the future. (Oddly enough, because they are subject to a lower level of review, *class*-based affirmative-action measures would likely survive constitutional scrutiny.)[187]

Even if race-conscious affirmative action measures were to pass constitutional muster, some evidence suggests they might not be helping the poorest people of color. One scholar has observed that in university admissions,

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180. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

181. There are three levels of constitutional review. Race-based classifications are tested under strict scrutiny, meaning that they receive the highest level of judicial review. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). To satisfy this standard, a racial classification must serve a compelling state interest and be narrowly tailored to that end. *Id.* at 237. In contrast, sex-based classifications are subject to intermediate scrutiny, meaning that a classification must further an important governmental objective and the means employed must be substantially related to achievement of that goal. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). And finally, class-based distinctions (as well as age, sexuality, and disability classifications) are subject to only rational-basis review, or minimal scrutiny. *Rodriguez*, 411 U.S. at 40.

182. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989); *Adarand Constructors, Inc.*, 515 U.S. 200; Grutter v. Bollinger, 539 U.S. 306 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

183. For a summary of the court's evolving review standard for race cases, see Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 171, 189–95 (2005).

184. *Grutter*, 539 U.S. 306; Gratz v. Bollinger, 539 U.S. 244 (2003).

185. *Grutter*, 539 U.S. at 326.

186. 551 U.S. 701 (2007) (rejecting plans that used race in an effort to further racial integration).

187. For additional analysis of this somewhat counterintuitive result, see Jones, *supra* note 183, at 205–06.

Blacks who are descendents of slaves do not fare as well as Blacks who are biracial or whose families recently immigrated to the United States.[188] Importantly, the latter two groups tend to be more economically well off than the former group, which may play a role in the outcome.[189] This is not to suggest that biracial persons or recent immigrants do not suffer from race discrimination or should not benefit from affirmative action; one cannot conflate race and class. It merely suggests that additional efforts need to be taken if affirmative action measures are to reach the poorest Blacks.

3. Federal Statutory Challenges

As with the Equal Protection Clause, the poor are not a protected class under federal statutory law; consequently, such law does not provide a basis for relief for claims of economic discrimination.[190] Although race and national origin are protected classifications under Title VII, for reasons set forth below, it is exceedingly difficult to win these types of claims.

a. Race. Under Title VII, litigants may prove their cases in one of two ways—through individual or systemic claims. Individual claims require that a plaintiff establish an employer's intent to discriminate.[191] Importantly, the plaintiff always bears the burden of persuasion on this issue.[192] Yet courts have demonstrated increasing hostility to employment discrimination claims,[193] and

188. Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1165–66 (2007).

189. *Id*. at 1154–56, 1165–68.

190. Title VII of the Civil Rights Act prohibits discrimination on the basis of only race, sex, religion, color, and national origin. 42 U.S.C. § 2000e (2006). The Americans with Disabilities Act (ADA) covers only disability discrimination. 42 U.S.C. §§ 12101–12213 (2006). The Age Discrimination in Employment Act of 1967 (ADEA) covers only age. 29 U.S.C. §§ 621–34 (2006).

191. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973).

192. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000).

193. Memorandum from Joe Cecil & George Cort, Federal Judicial Center, to Hon. Michael Baylson (rev. June 15, 2007), *available at* http://ftp.resource.org/courts.gov/fjc/sujufy06.pdf (showing that in 2006 the national average for summary judgment grants was seventy percent in civil-rights cases and seventy-three percent in employment-discrimination cases—the highest for federal civil cases); Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 54, 98–99 (2006) (detailing results of empirical study showing that plaintiffs in racial harassment cases fare worse than plaintiffs in sexual-harassment cases); Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 566 (2003) (showing that employment-discrimination plaintiffs fare poorly on appeal, with a seven percent reversal rate when defendants win at trial compared to a forty-two percent reversal rate when plaintiffs win at trial); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L. J. 239, 245 (2001) (finding that defendants are much more likely than plaintiffs to prevail in appellate litigation under the ADA and that plaintiffs in ADA cases tend to fare worse than Title VII litigants); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889 (2006) (showing that plaintiffs have most difficulty winning in race and national origin discrimination cases); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 557–61 (2001) (showing that compared to the average plaintiff, employment-discrimination plaintiffs win a lower proportion of their cases during pretrial and after trial).

this burden is not easily met in an era when much overt discrimination has gone underground, meaning smoking-gun evidence of unlawful motive is not readily found. The complicated burden-shifting minuet that litigants must follow has only aggravated the problem by making it unclear at times exactly what plaintiffs must do to prevail.[194] In effect, even if they are able to circumvent the access-to-justice issues, plaintiffs will have tremendous difficulty actually winning their cases.[195]

Systemic claims also involve significant challenges. In systemic cases, plaintiffs attempt to prove that either the employer engages in a pattern or practice of decision making that adversely affects people of color,[196] or that the employer uses a facially neutral criterion that has a disparate impact on people of color.[197] In both types of cases, plaintiffs must show a statistically significant disparity between the composition of the employer's workforce and the appropriate comparative labor market.[198] Because these claims rely upon huge amounts of statistical data and expert proof, they are tremendously expensive to litigate, which again presents access to justice difficulties for poor plaintiffs. In short, even though Title VII provides relief for claims of racial discrimination, plaintiffs will have a tough row to hoe in getting these cases to court and in ultimately prevailing on the merits.

b. Immigrants of color and national-origin discrimination. Although Title VII prohibits discrimination on the basis of national origin, there are again limits to this prohibition. First, the statute does not provide protection on the basis of alienage or citizenship.[199] Thus, employers can refuse to hire persons who are not U.S. citizens as long as they treat all noncitizens equally (that is, hiring practices cannot be country-specific). In addition, most national origin discrimination happens by proxy. For example, instead of discriminating against employees because of their country of origin, an employer may employ an

194. *Cf.* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 510–19 (1993) (applying *McDonnell Douglas* burden-shifting framework and leading some courts to conclude that evidence of pretext alone may be insufficient to establish an inference of discrimination); *Reeves*, 530 U.S. at 143 (examining the role of pretext in establishing intent); *see also* Desert Palace v. Costa, 539 U.S. 90, 98–102 (2003) (supposedly clarifying the applicable evidentiary requirements for mixed motive cases).

195. *See* Selmi, *supra* note 193, at 557–61.

196. *See, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–09 (1977) (holding that gross statistical disparities alone can constitute prima facie proof of a pattern or practice of discrimination).

197. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 426–28 (1971) (challenging employer's education and intelligence test requirements for perpetuating past discriminatory practices). Unlike pattern and practice cases and individual disparate treatment cases, disparate impact claims do not require proof of intent.

198. *Hazelwood*, 433 U.S. at 308–13 (explaining the use of statistics in pattern and practice cases); Dothard v. Rawlinson, 433 U.S. 321, 329–31 (1977) (explaining the use of statistics in disparate-impact cases).

199. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973) (rejecting claim that refusal to hire on the basis of citizenship violated Title VII).

English-only or English fluency requirement, which may have the same effect.[200] Yet litigants have encountered resistance when trying to challenge these practices, with courts concluding that accent discrimination and English-only rules are not facial discrimination and refusing to find that these rules provide circumstantial evidence of such discrimination.

There is, moreover, an open question about the effects of *Hoffman* on Title VII litigation brought by undocumented persons. *Hoffman*'s holding that an employer does not have to award backpay to an unauthorized worker illegally discharged for engaging in union activity has implications within the context of Title VII.[201] If an employer engages in unlawful racial or national origin discrimination against an unauthorized worker, can the employer escape liability for backpay damages based on the worker's unauthorized status? Some argue that to award backpay in these circumstances would in effect reward the worker's violation of federal immigration law.[202] Others argue that to look the other way would undermine the objective of ending workplace discrimination by employers.[203] Yet policy makers need not choose one course over the other. Both statutory regimes can be vindicated by awarding backpay while not requiring reinstatement of unauthorized workers. Thus, the employer is partially sanctioned for its discriminatory behavior (furthering the goals of antidiscrimination policy), and the employee is penalized for his unauthorized entry (furthering the goals of immigration policy). In the aftermath of *Hoffman*, however, it is unlikely that this approach will prevail—at least not in the short term.

4. Internalized Norms

As a final caution, all law, whether labor or anti-discrimination, must guard against norms that privilege middle- and upper-class workers. An obvious example of this is the Family and Medical Leave Act, which provides unpaid leave time for workers needing to care for a new child or an immediate-family

200. *See, e.g.*, Garcia v. Spun Steak Co., 998 F.2d 1480, 1490 (9th Cir. 1993) (finding the effect of an English-only rule on Latino employees insufficient to state a Title VII claim); Fragante v. City of Honolulu, 888 F.2d 591, 598–99 (9th Cir. 1989) (rejecting an accent-discrimination claim under Title VII).

201. *See supra* notes 165–74 and accompanying text.

202. *See, e.g.*, Ecobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 896–97 (S.D. Tex. 2003) (dismissing backpay claims under Title VII because plaintiff was an undocumented worker at the time of employment).

203. *See, e.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1067 (9th Cir. 2004) Distinguishing Title VII from the NLRA, the statute at issue in *Hoffman*, the Court noted,

> [I]n Title VII Congress has chosen to rely heavily on private actions that result in the imposition of severe remedies, including backpay, in order to deter future discrimination and vindicate national policy of the highest priority. It is far from evident to us that Congress intended to bar the use of one of the most critical of those remedies in the case of undocumented workers who are victims of invidious discrimination.

For further discussion of this debate, see Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1366–71 (2009).

member.[204] Although the motivation behind the statute is certainly praiseworthy, the Act potentially disadvantages poor workers[205] because its benefits are available only to workers who can afford to take time off without pay. As one scholar notes, "[S]ince the Act imposes some costs on employers, it probably reduces job opportunities. Therefore, the working poor may share in the cost of the Act, but they do not benefit because they cannot afford to take an unpaid leave."[206]

V

CONCLUSION

I have not sought here to propose solutions to workforce stratification in the United States. Rather, I have attempted merely to demonstrate, through snapshots, the ways in which race and class have interacted to produce and perpetuate socioeconomic hierarchy in this country. White workers, slaves, and immigrants of color were all, at various points, stymied in their quest for the American Dream. Yet their histories reveal that class functions differently depending upon a person's race and that race operates differently depending upon a person's class. Furthermore, the varying degrees of workplace segregation and lack of access to educational opportunity faced by these groups pose significant barriers to their social mobility. Although labor and antidiscrimination law have played and continue to play an important role in reducing some barriers to opportunity, they can do only so much, given decreased unionization and increased hostility to discrimination claims. Perhaps more critically, many of the problems discussed herein are systemic in nature and thus require systemic solutions. Reform in K-12 education is desperately needed so that people can obtain the skills required to move up professional ranks. Equally essential are affirmative measures to open previously closed employment arenas and to ensure that questions of disadvantage and privilege, and of discrimination and merit, are kept in the forefront of policy debates. And, as other papers in this collection demonstrate, the United States must simultaneously tackle a host of other issues, including health-care reform and local economic development. Importantly, as the United States moves into the future, Americans must continue to look to the past, for history reveals that inequality is a complex and evolving tapestry. Its constitutive threads—racism, sexism, classism, xenophobia, homophobia, religious intolerance—have been seamlessly woven together. To unravel one, we must unravel them all.

204. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2006).

205. Maria O'Brien Hylton, *"Parental" Leaves and Poor Women: Paying the Price for Time Off*, 52 U. PITT. L. REV. 475, 476–77 (1991).

206. Robert B. Moberly, *Labor-Management Relations During the Clinton Administration*, 24 HOFSTRA LAB. & EMP. L.J. 31, 36 (2006) (internal footnote omitted).