

WRITTEN TESTIMONY OF PROFESSOR KEVIN BROWN

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According to the 1960 census, White people constituted 88.8 percent of all Americans, with an additional 10.6 percent classified as Black people.¹ The 1960 census categorized Hispanics/Latinos based on their race, not their ethnicity;² thus, Blacks and Whites comprised 99.4 percent of the American population.³ Also, in 1960, interracial marriage between Black people and White people was still illegal in over twenty states.⁴ Of the nearly twelve million blacks over the age of fifteen,⁵ less than one half of one percent of them were married to whites.⁶ With regard to determining a person's racial classification, the Census Bureau and American society used the one-drop rule. Thus, the instructions for the 1960 census form continued the change originally adopted in 1930: "A person of mixed white and Negro blood was to be returned as Negro, no matter how small the percentage of Negro blood."⁷ In addition, census enumerators were still responsible for determining a person's racial classification based on phenotypical appearances.⁸ Because a person's physical appearance may not reveal the fact that they had a very small quantum of black blood, it was possible for some blacks to pass as white, despite the one-drop rule.⁹ Although the one-drop rule sought to support white privilege, the Black Community also appropriated this norm to promote community cohesion, strength, and pride, and readily accepted mixed-race blacks as members.¹⁰ Thus, the use of the one-drop rule and the dual-race nature of American society meant that Americans, in the overwhelming majority of cases, could determine a person's race based on their physical appearance. As the 1960s unfolded, race was not only a socially ascribed identity, but simply put, there was no such concept of a Black Multiracial person, only blacks who possessed lighter or darker complexions.

In addition to the dual-race nature of American society, dominant American cultural attitudes and social practices did not differentiate Black people who descended from those Africans brought to America in chains during the Transatlantic Slave Trade from those who were recent arrivals from the Caribbean or Africa. With some justification, Americans did not recognize the existence of "black ethnicity." In 1960, the 125,000 foreign-born blacks¹¹ in the United States comprised only 0.7 percent of the black population.¹²

In 1960, from the perspectives of both dominant American cultural attitudes and the Black Community, in terms of race, distinctions were not drawn between single-race blacks and Black Multiracials¹³ (for this statement the term "Black Multiracial" refers to those Black people with a non-black parent). Nor did dominant American cultural attitudes or the Black Community draw significant distinctions between native Black people and Black Immigrants (for this book the term "Black Immigrants" refers to those with at least one foreign-born Black parent). Today, however, things have changed drastically for Black people in the US. For purposes of determining black beneficiaries of reparations, I would suggest dividing Black people into 3 separate categories, Black Multiracials, Black Immigrants and Ascendant Blacks who are individuals with two American-born Black parents (as determined by the application of the one-drop rule). Others have referred to this racial/ethnic group of Black people as "third-generation" or "legacy" Blacks.¹⁴ I

prefer the term “Ascendant Blacks”¹⁵ to denote the historical connection between this racial/ethnic group of Black people and the history of the ascendancy of Black people out of slavery and segregation.

In 2014, I published a book entitled, *Because of Our Success: The Changing Racial and Ethnic Ancestry of Blacks on Affirmative Action*. In the book, I pointed out that studies show the more education a Black person receives or the higher their income, the more likely they are to marry outside of the race. As a result, Black Multiracials not only tend to grow up in households with parents who have more education and more income than other Black people, but also Black Multiracials obtain a higher degree of educational and economic success. In addition, native African Americans neither earn as much nor experience as much academic success as foreign born Black people. The children of foreign-born Black people are even more economically successful than their parents. Thus, the book detailed, in general, the socioeconomic advantages that Black Multiracials and Black Immigrants have over Ascendant Blacks.

I. ASCENDANT BLACKS SHOULD BENEFIT MORE FROM REPARATIONS THAN BLACK MULTIRACIALS OR BLACK IMMIGRANTS DUE TO THEIR GREATER ANCESTRAL CONNECTION TO AND EXPERIENCES OF RACIAL DISCRIMINATION IN THE US

The book went on to point out that Black Multiracials and Black Immigrants are overrepresented among Blacks who attend selective higher education institutions. In writing the book, I was not motivated out of a concern that Black Multiracials and Black Immigrants benefit from affirmative action. Rather my principal concern was the disappearance of Ascendant Blacks from the nation’s selective higher education programs including our law schools, medical schools, highly regarded MBA programs and undergraduate programs at elite colleges and universities. As should be obvious, there is a strong analogy to Black people who should benefit the most from affirmative action and those who should benefit the most from reparations for the legacy of race discrimination in the United States. Some of the reasons were put forth by Justice Sandra Day O’Connor’s in her opinion for the US Supreme Court in the 2003 case that upheld the use of race in the admissions program of the University of Michigan Law School, *Grutter v. Bollinger*.¹⁶

Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. . . . By virtue of our Nation’s struggle with racial inequality, such students are both likely to have *experiences* of particular importance to the Law School’s mission, *and less likely to be admitted in meaningful numbers on criteria that ignore those experiences*.¹⁷

As with affirmative action, the history of discrimination that justifies reparations is that which occurred in the United States, not the treatment of Blacks in the Caribbean, Africa, or the rest of the world. This seems obvious. The legacy of North American and European slavery and colonialism, as well as American foreign policy over the years, have had negative consequences for a number of countries where a majority of the population is Black.¹⁸ However, the rational

solution for those harms is not to create a brain drain by inviting the best and brightest from those affected countries to come and remain in the United States for the purpose of contributing to the economic development of this country. To do so simply does further damage to those countries. Rather, it would be some form of economic or educational development assistance in those countries.

To determine which Black people have experiences of being a member of a historically discriminated group in the United States, it is necessary to understand the historical experience of discrimination of the Black Community. The central feature in that experience is race; however, there are two different aspects. One aspect involves Black people being discriminated against and victimized because of their race. For much of America's history, dominant American society viewed Black people as inferior in some important way to Whites. This attitude helped to make the oppression of, and discrimination against, Black people appear to be part of the natural order of things. Thus, this aspect of the experience of historical discrimination for Black people is the experience of what it means to be "raced" or branded as inferior.¹⁹ This aspect of the black experience is readily recognized within mainstream American culture. However, against the background of racial domination in the United States, the descendants of the sons and daughters of the soil of Africa developed a counter discourse to how mainstream American society normally viewed and treated them. From the point of view of this counter discourse, race was also the central characteristic that united Black people, but this counter historical view of the experience of being Black understood them as oppressed, not inferior. As a result, it involved the active engagement in a collective struggle against white supremacy and black subjugation. So the experience of the history of discrimination against Black people in the United States is like a two-sided coin. On one side, race was, and is, the immutable characteristic that formed the basis of the belief that Black people were inferior. On the other side was the Black Community's (and others') resistance to racial oppression. Race was, and is, the immutable characteristic that bound Black people together in a constant struggle against their subjugation. Thus, Black people who should most benefit from reparations should be those steeped with sufficient experiences of both aspects of the experience of discrimination Black people have encountered in the United States and who have been most negatively impacted by that history. This would be Ascendant Blacks.

II. BLACK MULTIRACIALS AND BLACK IMMIGRANTS MAY NOT HAVE AS MANY EXPERIENCES OF BEING "RACED" AS ASCENDANT BLACKS

Since the 1980s, one of the consequences of the attenuation of racism in American society is that not all people with some African ancestry have sufficient experiences of *both* aspects of being Black in the United States. For example, in 1977, the federal government promulgated Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting (hereinafter, Directive 15).²⁰ For the next twenty years, Directive 15 was the principal document used for determining how the federal government would collect and report racial and ethnic statistics. It also significantly influenced the collection and reporting of this data by state and local governments and private industry. From 1993 to 1997, the federal government conducted a review of Directive 15 that culminated with the Office of Management and Budget (OMB) publishing revisions in 1997 (the 1997 Revisions).²¹ The 1997 Revisions changed the way that racial and ethnic data was collected and reported to the federal government.

One of the principal changes was that it allowed individuals to choose all of the racial and ethnic categories they identified with as opposed to a single category. One of the primary motivations for the adoption of the 1997 Revisions was the advocacy by multiracial groups that wanted to add a separate multiracial category to all local, state, and federal government forms that sought to collect racial and ethnic data, but especially the forms for the 2000 census.²² During those discussions, multiracial advocates generally argued that mixed-race individuals, including Black Multiracials, viewed themselves as multiracial rather than belonging to a single racial or ethnic group. A “multiracial” designation was, therefore, a better reflection of the true understanding of the multiracial person’s racial identity. They noted that the one-drop rule, used for so long to classify any person with any black blood as black, was inherently racist.²³ These advocates noted the psychological problems created for multiracial children who were forced to identify with one parent more than the other. The 1997 Revisions also made self-identification the preferred way to determine racial identity.

The ability of individuals to self-identify their racial classification means that many Black Multiracials may simply view themselves as multiracial and not as black. Experiences of what it means to be a member of a historically underrepresented group with a history of discrimination requires an identification with that group. Thus, many Black Multiracials do not encounter nearly as many experiences of being raced as Ascendant Blacks.

As for Black Immigrants, the ones who came to the United States as adults do not have the same set of extensive experiences of being raced in the United States that is so common to Ascendant Blacks. Some foreign-born Black people will attribute their encounters with racism in the United States to the fact that they are foreigners or to a reflection of the lack of knowledge of discriminators operating on the misperception that all blacks are alike, rather than to an attack upon their racial identity. Thus, many Black Immigrants may not have the same psychological, sociological, and philosophical reactions to racist encounters that Ascendant Blacks have. Although the foreign-born Blacks who come to the United States as children and the U.S.-born sons and daughters of foreign-born Blacks are likely to have more encounters with what it means to be raced than their parent(s), their parent(s)’ influence will also reduce the number and impact of their perceptions of these encounters, thereby reducing their experiences of being raced. Many Black Immigrants, therefore, do not identify with the historical experience of discrimination encountered by African Americans in the United States. Speaking with the knowledge of one who travelled extensively through South Africa after majority rule was established,²⁴ I understand these sentiments of Black Immigrants.

In South Africa, I was the Black Immigrant in a country with a history of racial discrimination. Even though many native South Africans (black, white, South Asian, and colored) mistook me for a black South African, and I was subjected to many forms of discriminatory treatment that black South Africans encounter, those experiences never altered my self-identified racial/ethnic identity. I was an African American, not a black South African, Ndebele, Xhosa, or Zulu. When I was victimized by racism, I attributed it to the lack of knowledge on the part of the perpetrator about my background and not as an attack on me or my heritage. Nor did my encounters with South African racism move me to embrace the collective fight against racial oppression of Black South Africans as my own. Simply put, the history of racism that Black South Africans suffered was different from that of my racial/ethnic group, those who victimized them were

different, and the ways in which they were victimized were different. Many Black Immigrants will have similar feelings in the United States to those I had while in South Africa and, thus, will not strongly identify with the historical experience of blacks in the United States.

III. BLACK MULTIRACIALS AND BLACK IMMIGRANTS MAY NOT EXPERIENCE THE NEED TO ENGAGE IN THE COLLECTIVE STRUGGLE AGAINST RACIAL OPPRESSION IN THE US AS MUCH AS ASCENDANT BLACKS

Beyond the historical aspect of the Black experience that deals with being raced, many Black Multiracials and Black Immigrants may not experience the need to engage in the collective historical struggle against the racial oppression of Black people in the United States. Viewing themselves as multiracial and not Black, many Black Multiracials may not view this historic struggle as one that involves them. They, rightly so, will also be concerned about their family and friends on both sides of their family tree, including their nonblack relatives. Thus, the natural affinities of family will mean that many Black Multiracials will have less experience with the need to struggle against racial oppression of Blacks as Ascendant Blacks. As for Black Immigrants, the ones who come to the United States as adults will clearly have less experience fighting against the racial oppression of Blacks in the United States than Ascendant Blacks brought up here. Understandably, many of these foreign-born Blacks are more concerned about the conditions of their relatives, friends, and other people in the countries that they left than the conditions of Black people in the US. Thus, they may be more interested in assisting those they care about in their countries of origin, rather than participating in the collective historic struggle waged by Black people against racial oppression in the United States.²⁵ There is ample proof of this concern on the part of foreign-born blacks. Remittances received by relatives and friends from natives living abroad are a major source of income for many developing nations in Africa and the Caribbean.²⁶ The attitudes of the foreign-born parents are also likely to influence their children who immigrate to the United States while young, as well as their American-born children. Thus, like many Black Multiracials, Black Immigrants are also less likely than Ascendant Blacks to have as many experiences with the aspect of the history of racial discrimination against Black people that deals with the collective historical struggle against racial oppression.

IV. ASCENDANT BLACKS HAVE A GREATER ANCESTRAL CONNECTION TO THE HISTORY OF RACIAL DISCRIMINATION IN THE US THAN BLACK MULTIRACIALS AND BLACK IMMIGRANTS

Even if Black Multiracials and Black Immigrants identify with both aspects of the history of discrimination of Black people in the United States, in general, their experiences will not be nearly as numerous or abiding as they are for Ascendant Blacks. What differentiates Ascendant Blacks from Black Multiracials and Black Immigrants is that both of their parents are descendants of the ancestral lines of Blacks that endured the experiences of a historically discriminated group in the United States. The vast majority of Ascendant Blacks come from ancestral lines that extend to the time of chattel slavery in the United States. In addition, the ancestors of Ascendant Blacks, on both sides, lived through the period of time when segregation and conscious racial

discrimination formed part of customary American business, educational, political, and social practices. Thus, when discussions about the victimization of Black people throughout America's history of racial discrimination occur, for Ascendant Blacks these are not abstract discussions about disconnected individuals from a long ago past. Rather, they are discussions about their mothers and fathers, as well as their aunts, uncles, grandparents, great grandparents, great aunts, great uncles, and their earlier ancestors on both sides. Therefore, for Ascendant Blacks, the history of discrimination in the United States suffered by blacks is the history of their family tree.

CONCLUSION

In conclusion, I urge you to ensure that Ascendant Blacks receive a disproportionately large percentage of the benefits that come from reparations. This is the racial/ethnic group of Black people in the United States that has a greater ancestral connection to the historic struggle against racial oppression in the United States. In addition, they will also have more negative experiences derived from the history of racial oppression in the United States than Black Multiracials or Black Immigrants. Part of this reality is manifested in lower socio-economic statistics for Ascendant Blacks when compared to Black Multiracials or Black Immigrants.

¹ See Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States*, at tbl.1 (United States Census Bureau, Working Paper Series No. 56, 2002).

² See *id.* The author further wants to note that the usage of Hispanic/Latino is intended to track the usage of these terms by the US Census Bureau. "Latino" has its translation in the Spanish language and is masculine in gender and the feminine gender translation is "Latina." English language nouns, however, do not have gender. Thus, for the English language Latino refers to both males and females while Spanish language data collection should use the masculine ("Latino") and feminine ("Latina") nomenclature, such as "Latino/a."

³ See *id.*

⁴ "Twenty-two states, including many Northern states, still had anti-miscegenation laws in the early 1960s." F. JAMES DAVIS, *WHO IS BLACK?: ONE NATION'S DEFINITION* 68 (1991).

⁵ BUREAU OF THE CENSUS, *THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790-1978: CURRENT POPULATION REPORTS, SPECIAL STUDIES, SERIES P-23, No. 80* 16 tbl.10 (showing of the 18,849,000 blacks in 1960, 37 percent were under the age of fifteen, thus there were approximately 11,875,000 blacks over the age of 15 (63 percent x 18,849,000)) (1979).

⁶ G. REGINALD DANIEL, *MORE THAN BLACK?: MULTIRACIAL IDENTITY AND THE NEW RACIAL ORDER* 98 (2001).

⁷ C. Matthew Snipp, *Racial Measurement in the American Census: Past Practices and Implications for the Future*, 29 ANN. REV. SOC. 563, 568 (2003).

⁸ The Census Bureau sent advanced copies of the 1960 census form to over 80 percent of American households who filled them out and then gave them to census enumerators when they showed up. See *id.* The 1970 census form was the first designed to be completed by respondents alone without any assistance from census enumerators. See Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Inter-marriage*, POPULATION BULL., June 2005, at 9.

⁹ Light skinned blacks had long been passing as white in the United States. For example, a conservative estimate put the number of blacks who were able to successfully pass as white between 1880 and 1925 at approximately 90,000 people. F. JAMES DAVIS, *supra* note 6, at 56.

¹⁰ See F. JAMES DAVIS, *supra* note 6, at 78 (1991).

¹¹ The term foreign-born refers to any United States resident who was born outside the United States or its territories, except for people who were born abroad to parents who were United States citizens. Mary Mederios Kent, *Immigration and America's Black Population*, 62 POPULATION BULL. 5 Box 1 (December 2007).

¹² See Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850-1990*, at tbl.8 (U.S. Census Bureau, Working Paper Series No. 29, 1999).

¹³ There are different ways to define "Black Multiracials." One can follow self-identification or can determine who is multiracial based on the race of their parents. The problem with self-identification in the context of applying for benefits derived from reparations is the possibility that individuals will choose their racial identification for strategic purposes as opposed to how they truly self-identify. Since the primary concern about reparations is to ensure the fair treatment of Ascendant Blacks, Black Multiracials in this statement refers to those with one black and one non-black parent.

¹⁴ I wish to also specifically acknowledge the insightful article written by Angela Onwuachi-Willig. See Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1149 n.27 (2007). She and the late Professor Derrick Bell of New York University School of Law and others use the terms "descendants" and "legacy Blacks" to denote these blacks to make the connection between their ancestral lineage as descended from blacks who were enslaved and segregated. *Id.* at 1149 n.27.

¹⁵ The term "Ascendants" is also used by African Americans who left America to repatriate in the Republic of Ghana. This term was first mentioned to me in the summer of 2007 by Seestah Imaakus and Brother El Shabazz, the owners and operators of Hotel One Africa located in the city of Cape Coast, Ghana. One Africa is a facility located between Cape Coast Castle (the main British administrative castle during the Trans-Atlantic Slave Trade) and Elmina Castle (the first permanent European structure built in Africa) on the Ghanaian coast. Their lifelong mission is to assist Ascendant Blacks as they go through the experience of going through those castles.

¹⁶ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁷ *Id.* at 333, 338 (emphasis added).

¹⁸ See Lewis Gordon, *Thinking through Identities: Black Peoples, Race Labels, and Ethnic Consciousness*, in THE OTHER AFRICAN AMERICANS: CONTEMPORARY AFRICAN AND CARIBBEAN IMMIGRANTS IN THE UNITED STATES 83 (Yoku Shaw-Taylor & Steven A. Tuch, eds., 2007) (arguing that concern about the underrepresentation of Ascendant Blacks benefitting from affirmative action is xenophobic and under appreciates the impact of the legacy of slavery on other blacks and how American foreign policy has harmed the development of Caribbean countries). See also Leonard M. Baynes, *Who Is Black Enough for You: The Story of One Black Man and His Family's Pursuit of the American Dream*, 11 GEO. IMMIGR. L.J. 97, 128 (1996) ("The only difference is that our [black West Indians'] slavery did not occur in the United States."); Camille A. Nelson, *Carriers of Globalization: Loss of Home and Self Within the African Diaspora*, 55 FLA. L. REV. 539, 573-74 (2003) (noting the slavery in colonial Jamaica); cf. Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/National Black Women in the United States*, 76 OR. L. REV. 567, 619 (1997) ("The impact of that history, along with the related histories of global imperialism and neo-colonialism, continues to plague modern-day Blacks whether they are descended from slaves in the United States, Latin America, or the Caribbean. . .").

¹⁹ See, e.g., Kendall Thomas, *Comments at Frontiers of Legal Thought Conference* (Jan. 26, 1990), quoted in Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431, in MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ W. CRENSHAW, WORDS THAT WOUND 53, 61 (1993); see also D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L. J. 437 (1993) (arguing that racial categories are neither objective nor natural, but ideological and constructed. In these terms race is not so much a category but a practice: people are raced).

²⁰ DIRECTIVE NO. 15 RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (as adopted on May 12, 1977) .

²¹ OFFICE OF MANAGEMENT AND BUDGET: Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity *Federal Register* Notice October 30, 1997.

²² For an excellent book discussing the adoption of the 1997 Final Regulations see Kim M. Williams, *Mark One or More: Civil Rights in Multiracial America* (2006).

²³ KERRY ANN ROCKQUEMORE & DAVID BRUNSMAN, BEYOND BLACK: BIRACIAL IDENTITY IN AMERICA 1-17 (2002).

²⁴ In the summer of 1997, I spent seven weeks traveling through South Africa. In the summer of 1998, I spent three weeks with the Law Faculty of the University of Witwatersrand and four weeks with the Law Faculty of the

University of Capetown. In the summer of 1999 and 2000, I spent ten days on each visit, mostly in Johannesburg and Soweto.

²⁵ John C. Duncan, Jr. *Two "Wrongs" Do/Can Make A Right: Remembering Mathematics, Physics, & Various Legal Analogies (Two Negatives Make A Positive; Are Remedies Wrong?) The Law Has Made Him Equal, But Man Has Not*, 43 BRANDEIS L.J. 511, 517 n.18 (2005).

²⁶ See generally Devesh Kapur & John McHale, *Globalization at Work: Migration's New Payoff*, 139 FOREIGN POL'Y 48 (2003). In Jamaica, for example, migrants, who primarily live in the US, send an average of \$640 per year back to families in Jamaica. This represents a substantial percentage of household income. See Alex Glennie and Laura Chappell, *Jamaica: From Diverse Beginning to Diaspora in the Developed World* (2010) (published by Migration Policy Institute).