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Black Protectionism as a Civil Rights Strategy¹

KATHERYN RUSSELL-BROWN†

“I AM A MAN”²

INTRODUCTION

“Aren’t things better today than they were fifty years ago?” This is a common rhetorical query posed by those who

1. This Article presents an expanded analysis of the chapter *Black Protectionism*, in KATHERYN RUSSELL-BROWN, UNDERGROUND CODES: RACE, CRIME, AND RELATED FIRES 72-96 (2004).

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2. This slogan appeared on sandwich board placards worn by on-strike Black workers in Memphis during the 1968 sanitation strike. The union workers, almost all of whom were Black, walked off their jobs after incidents involving disparate racial treatment. The mayor declared their strike illegal, and refused to negotiate. The strike lasted more than two months. The workers faced police beatings, mace spray, and arrests. On March 18, 1968, Dr. Martin Luther King, Jr. delivered a speech to 15,000 demonstrators, gathered in support of the striking workers. See DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 604-05 (1986); see also *I am a Man: An Exhibit Honoring the 1968 Memphis Sanitation Workers' Strike*, Walter P. Reuther Library, Wayne State University College of Urban Labor and Metropolitan Affairs, at <http://www.reuther.wayne.edu/man/1Intro.htm> (last visited Feb. 26, 2005) [hereinafter *Memphis Exhibit*].

have grown weary of race talk, particularly the argument that the fight for racial justice for Blacks is not over. It is assumed that the only answer is "No." The more accurate response, however, is "It depends." Public representations of Blackness have indeed changed over the past fifty years. Images of African-Americans in various media, including television, movies, newspapers, and magazines, are no longer limited to one-dimensional, negative stereotypes. In previous decades, the portrayals were stock ones: the happy, hymn-singing, hired help; the sexual predator; or the tap-dancing entertainer.³ Woefully absent were representations of Blacks as equal members of society, carrying their citizen weight, and gainfully and legally participating in their communities as workers, parents, and consumers.

Contemporary media images of African-Americans are much broader and more complex. Arguably, what is most striking today is the visibility of African-Americans. As real and fictional characters, Blacks are shown as having varied lots in life. They are portrayed as blue, pink,⁴ and white-collar workers. Blacks are entertainers, politicians, and athletes. They are also shown as social dregs: drug addicts, scofflaws, and hardened criminals.

Most salient, however, are representations at the extremes. Most images are ones of hyper-success or hyper-deviance.⁵ Blacks are both the embodiment of American

3. See generally *ETHNIC NOTIONS: BLACK IMAGES IN THE WHITE MIND* (Berkeley Art Center 1982) (text and documentary); *BLACK HISTORY: LOST, STOLEN OR STRAYED* (CBS 1968) (documentary); *A CENTURY OF BLACK CINEMA* (Passport Video 1997) (documentary); *BAMBOOZLED* (New Line Productions 2000) (movie). The works of Oscar Micheaux, Clarence Muse, and other pioneering Black filmmakers, present a more diverse and accurate portrait of Black life.

4. "Pink-collar" refers to clerical, service, and sales positions, which are typically held by women workers.

5. In some instances these overlap. Professional athletes and rappers embody the image of success and deviance. See generally *TODD BOYD, YOUNG, BLACK, RICH AND FAMOUS: THE RISE OF THE NBA, THE HIP HOP INVASION AND THE TRANSFORMATION OF AMERICAN CULTURE* (2003). For further discussion of the dual nature of images of Blackness, see *KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS 3-5* (1998).

success and the symbol of American deviance.⁶ Today's media portrayals of African-Americans are more varied and representative than those in prior decades. However, the prevailing image of Blackness as something loathsome, marginal, and deviant—*the criminalblackman*⁷—persists.

Media representations aside, in real life, African-Americans are experiencing the best of times and the worst of times. At the same time that approximately one-third of Blacks qualify as middle class,⁸ one-fourth live in poverty.⁹ At the same time that approximately seventeen percent of Blacks attend college,¹⁰ almost one-in-three young Black

6. Examples include Michael Jordan, Oprah Winfrey, Colin Powell, Bill Cosby, and Tiger Woods, who are routinely cited as among the most popular celebrities in the United States. Though Woods claims both his Thai and African-American heritage, many Blacks embrace him as one of their own—a contemporary example of the “one-drop rule.” For a definition and history of the one-drop rule, see F. JAMES DAVIS, *WHO IS BLACK?: ONE NATION'S DEFINITION* 5 (1991).

7. This term refers to the “onslaught of criminal images of Black men,” which causes many of us to conclude, incorrectly, that Black men and crime are intrinsically linked. RUSSELL, *supra* note 5, at 3.

8. See U.S. CENSUS BUREAU, *CURRENT POPULATION SURVEY* (2004), available at http://pubdb3.census.gov/macro/032004/hhinc/new02_006.htm (last visited Mar. 5, 2005) (showing that approximately 4,500 of the 13,629 Black households surveyed had an income between \$22,500 and \$52,499).

9. JESSE MCKINNON, U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, *THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002*, at 6 (2003) (stating that twenty-three percent of Blacks live in poverty, compared with a rate of twelve percent for the overall population).

10. U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, *High School Graduation Rates Reach All-Time High; Non-Hispanic White and Black Graduates at Record Levels* (June 29, 2004), available at <http://www.census.gov/PressRelease/www/releases/archives/education/001863.html> (last visited March 15, 2005). A 1996 report by the American Council on Education states that only thirty-five percent of the Black men who entered NCAA Division I colleges that year graduated within six years. This is the lowest percentage of any race and gender group. The percentage for White men is fifty-nine percent, for Hispanic men it is forty-six percent, and for American Indian men it is forty-one percent. The figure for Black women is forty-five percent. Karen W. Arenson, *Colleges Struggle to Help Black Men Stay Enrolled*, N.Y. TIMES, Dec. 30, 2003, at A1. A look at the percentage of Blacks who attend college is revealing as well. Seventeen percent of Blacks, age twenty-five years and older, have graduated from college. This compares with twenty-nine percent of Whites in the same age group. MCKINNON, *supra* note 9, at 4.

men is either in prison, in jail, on probation, or on parole.¹¹ Further, less than fifty percent of African-Americans own their own homes.¹² Structural indices of racial progress and racism, such as lawsuits alleging federal housing, employment, educational, and political discrimination remain disproportionately high for African-Americans.¹³

The degree of Black progress, then, is a matter of interpretation. By many measures, Blacks are doing better than they were fifty years ago. By many other measures, however, Blacks are not doing well, particularly when compared with Whites. For example, Blacks have grossly disproportionate rates of out-of-wedlock births,¹⁴ single-parent households,¹⁵ control rates,¹⁶ HIV/AIDS,¹⁷ high

11. Marc Mauer & Tracy Huling, *The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later* 1 (1995), available at <http://www.sentencingproject.org/pdfs/9070smy.pdf> (last visited Feb. 23, 2005). A 2002 report by the Justice Policy Institute stated that between 1999 and 2000 there were more Black men in prison or jail than there were enrolled in institutions of higher learning. Jason Ziedenberg & Vincent Schiraldi, Justice Policy Institute, *Cellblocks or Classrooms? The Funding of Higher Education and Corrections and Its Impact on African-American Men* (2002), available at <http://www.justicepolicy.org/article.php?list=type&type=20> (last visited Feb. 20, 2005) (on file with author).

12. U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000, at 43 tbl. 41 (2001) available at <http://www.census.gov/prod/2001pubs/statab/sec01.pdf> (indicating that in 1999, 45.5 percent of Blacks lived in "owner-occupied" property, while the figure for Whites was 70.3 percent).

13. See, e.g., Jennifer Hicks, *Number of Discrimination Suits Soar*, at http://www.imdiversity.com/Villages/Careers/articles/hicks_discrimination_suits_soar.asp (last visited Mar. 5, 2005).

14. JOYCE A. MARTIN ET AL., U.S. DEPT OF HEALTH & HUMAN SERVS., BIRTHS: FINAL DATA FOR 2002, 52 NATIONAL VITAL STATISTICS REPORTS NO. 10, at 49 tbl. 13 (Dec. 17, 2003) available at www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_10.pdf (reporting that 68.2 percent of Black babies are born to unmarried mothers, compared to 59.7 percent for American Indians, 28.5 percent for Whites, and 14.9 percent for Asian/Pacific Islanders).

15. U.S. CENSUS BUREAU, *supra* note 12 (indicating that in 1999, 32.5 percent of Black families were headed by a single parent, compared with 10.8 percent for White families).

16. "Control rates" include prison, jail, probation, and parole. Blacks comprise thirty-six percent of those under the control of the criminal justice system. For Whites, the figure is approximately forty-eight percent; for Hispanics the figure is approximately fifteen percent; and for American Indians and Asian Americans combined, the figure is under one percent. See RUSSELL-BROWN, *supra* note 1, at 136 tbl. 8-1.

school drop-outs,¹⁸ teen pregnancies,¹⁹ welfare,²⁰ and unemployment.²¹ In addition, Blacks fall far below Whites on income and wealth measures.²²

The present day conditions of African-Americans are directly connected to the group's history of enslavement in this country.²³ This history includes centuries of being denied basic human and civil rights. Beyond slavery, this history includes lynching, Jim Crow legislation, school

17. NATIONAL CENTER FOR HIV, STD AND TB PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., 14 HIV/AIDS PREVENTION SURVEILLANCE REPORT tbl. 10 (2003), *available at* <http://www.cdc.gov/hiv/stats/hasr1402/table10.htm> (indicating that for 2002, Blacks comprised approximately forty-two percent of persons living with AIDS; Whites comprised approximately thirty-six percent; and Hispanics comprised approximately twenty percent).

18. NATIONAL CENTER FOR EDUCATIONAL STATISTICS, U.S. DEPARTMENT OF EDUCATION, DROP OUT RATES IN THE UNITED STATES: 2000, at iii tbl. A (2001) *available at* <http://www.nces.ed.gov/pubs2002/2002114.pdf> (reporting that for the year 2000, 13.1 percent of dropouts, aged sixteen to twenty-four were Black, 6.9 percent were White, 27.8 percent were Hispanic, and 3.8 percent were Asian/Pacific Islander).

19. For 2002, 18 percent of all Black children were born to women under age twenty; 18.5 percent for American Indians; 9.8 percent for Whites; and 3.8 percent for Asian/Pacific Islanders (There was no separate data for Hispanics or Latinos). MARTIN, *supra* note 14.

20. U.S. DEP'T OF HEALTH & HUMAN SERVS., TANF ANNUAL REPORT TO CONGRESS, at X-207 tbl. 10:8 (indicating that between 2000 and 2001, thirty-nine percent of families on welfare were Black, compared to 30.1 percent for Whites, twenty-six percent for Hispanics, 2.1 percent for Asian-Americans, and 1.3 percent for American Indians).

21. Figures for March 2002 indicate that the unemployment rate for African-Americans (eleven percent) was more than twice the rate for Whites (five percent). MCKINNON, *supra*, note 9, at 5.

22. U.S. CENSUS BUREAU, *supra* note 12, at 436 tbl. 657-58 (indicating that in 2000 the annual median income for Blacks was \$34,192, while it was \$53,256 for Whites). The racial gap is greater for wealth, which includes property, stocks, and bonds. In 1995, the median family net worth for Blacks was \$7,073 and \$49,030 for Whites. MICHAEL E. DAVERN & PATRICIA J. FISHER, U.S. DEP'T OF COMMERCE, HOUSEHOLD NET WORTH AND ASSET OWNERSHIP 5 (2001), *available at* <http://www.census.gov/prod/2001pubs/p70-71.pdf>. *See generally* DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA (1999); MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1997).

23. *See generally* LERONE BENNETT, JR., BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA (1988); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (8th ed. 2000); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993).

desegregation, as well as struggles to grant fundamental constitutional rights, including citizenship and voting rights.

Thus, to answer the question of whether Blacks are better off today than they were fifty years ago, one must assess the lived experiences of African-Americans, not just the living circumstances of a select, elite group of visible African-Americans. Armed with historical facts about the Black experience in the United States, it is hard *not* to question the degree of Black racial progress.²⁴ Not surprisingly, African-Americans are acutely and intimately aware of this ugly history and its effect on current conditions. All of this is brought to bear when African-Americans evaluate social issues. In determining how African-Americans respond to criminal charges against high-profile community members, this history weighs particularly heavy.

The African-American community accords a unique status to those who have attained the American dream of riches and celebrity. Within the Black community²⁵ there is an almost palpable affinity for Blacks who have "made it." African-American success stories are closely watched and guarded.²⁶ Historically, few African-Americans achieved great material wealth and status. Those who have managed to obtain large-scale success, in spite of legal, political, economic, educational, and social barriers, are treated as racial

24. This sentiment is encapsulated in a comedy routine by Richard Pryor. Pryor, after discovering that the nation's prisons are overwhelmingly populated by Black men, comments "You go down there looking to find justice and that's what you find, 'just us.'" Richard Pryor, *Is it Something I Said* (Warner 1975).

25. For this Article, it is taken as a given that there is an identifiable "Black community" comprised of United States Blacks. Whether Blacks, who total approximately thirty-six million in the United States, are too large to be considered a cohesive community or political bloc is, of course, subject to debate. JESSE MCKINNON, U.S. DEP'T OF COMMERCE, *THE BLACK POPULATION: 2000 1* (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf> (noting that 36.4 million on the 2000 census reported Black or African-American).

26. *Ebony* and *Jet* are two well-known magazines that chronicle Black social, political, and economic successes. *Ebony*, with over a million subscribers, has one of the highest circulations for a Black magazine. See *Johnson Publ'g Co. v. Willitts Designs Int'l Inc.*, No. 98C-2653, 1998 WL 341618, at *1 (N.D. Ill. June 22, 1998) (noting that "*Ebony* magazine has an average paid circulation of approximately 1.8 million per month").

pioneers.²⁷ It is predictable, then, that Blacks would be suspicious of any criminal charges leveled against members of its protected class.

The term "Black protectionism,"²⁸ describes the cloak of racial support readily provided to prominent Blacks accused of wrongdoing. Although race-based group protectionism is not limited to Blacks,²⁹ this Article argues that the form of protectionism practiced by African-Americans is unique. Black protectionism expresses a basic sentiment. It says Blacks should be treated fairly and equitably, particularly by the justice system. This includes the presumption of innocence, the right to a fair trial, and the right to procedural and substantive due process. In sum, Black protectionism supports the notion that African-Americans deserve the same protections as everyone else, namely equality before the law. This desire for basic human rights was concisely stated on signs worn by striking Black sanitation workers in 1968: "I am a man."³⁰

This Article provides a detailed explication of Black protectionism. Part I highlights two contemporary case applications of Black protectionism: O.J. Simpson and Clarence Thomas. Part II examines the theoretical underpinnings of Black protectionism. Part III outlines the operating mechanisms of Black protectionism. Part IV discusses specific cases where Black protectionism was applied and others where it was not applied. Part V analyzes the

27. This appears to be a variant of W.E.B. DuBois's theory of the "talented tenth." In his 1903 essay, DuBois argued that it would be the educated, upwardly mobile Blacks who would lift up the race: "From the very first it has been the educated and intelligent of the Negro people that have led and elevated the mass. . . ." W.E.B. DuBois, *The Talented Tenth*, in HENRY LOUIS GATES, JR. & CORNEL WEST, *THE FUTURE OF THE RACE* 134 (1996). It is exceptional Black men who show the "capability of Negro blood, the promise of black men." *Id.* at 139.

28. See RUSSELL, *supra* note 5, at 56-65.

29. Racial and ethnic groups engage in protectionism. Protectionism is also utilized by groups in general. The blue wall of silence by police is an example of group-based protectionism. See, e.g., ANTHONY V. BOUZA, *THE POLICE MYSTIQUE: AN INSIDER'S LOOK AT COPS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM* (1990); JEROME H. SKOLNICK & DAVID H. BAYLEY, *NAT'L INST. OF JUSTICE, COMMUNITY POLICING: ISSUES AND PRACTICES AROUND THE WORLD* 49-52 (1988). Walls of silence have been noted in other professions as well (e.g., medical doctors and lawyers).

30. See GARROW, *supra* note 2; Memphis Exhibit, *supra* note 2.

costs and benefits of applying Black protectionism and Part VI sets forth a new model for how Black protectionism should be applied—critical Black protectionism—and used as an effective civil rights strategy.

I. TWO CASES: O.J. SIMPSON AND CLARENCE THOMAS³¹

As an introduction to the topic of Black protectionism, two contemporary cases, O.J. Simpson and Clarence Thomas, are offered to initiate the discussion. Throughout the O.J. Simpson case, polls indicated that African-Americans overwhelmingly believed that he was not guilty of murdering his ex-wife, Nicole Simpson and her friend, Ronald Goldman. A July 1995 Gallup poll reported that while seventy-five percent of Whites believed the murder charges against Simpson were “at least probably true,” only twenty-five of Blacks believed the charges.³² The racial divide was symbolically illustrated when the media showed images of elated Blacks celebrating the acquittal verdict and angry Whites denouncing the verdict.³³

In 1991, after Clarence Thomas was nominated to the United States Supreme Court, African-Americans stood firmly behind him during his Senate confirmation hearings. Black support ranged from fifty to sixty-eight percent. Between Thomas’s nomination and the Senate confirmation, the Black community’s support reached its zenith after he claimed he was the victim of a “high tech lynching.”³⁴

31. For a more thorough discussion of these cases, see *infra* notes 160-170.

32. Richard Price, *Racial Split Widens*, USA TODAY, July 25, 1995, at 3A..

33. See Toni Morrison, *Introduction* to BIRTH OF A NATION’HOOD: GAZE, SCRIPT, AND SPECTACLE IN THE O.J. SIMPSON CASE, at vii-xxvii (Toni Morrison & Claudia Brodsky Lacour eds., 1997) (offering an incisive critique of the “official narrative” in the *Simpson* case and the media’s racial representations during the criminal trial); RUSSELL, *supra* note 5, at 47-68.

34. Clarence Thomas’s full statement was:

From my standpoint as a black American, it is high tech lynching for uppity blacks who in a way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, that is what will happen to you. You will be lynched, destroyed, caricatured by a committee of the United States Senate rather than hung from a tree.

Excerpts From Senate’s Hearings on the Thomas Nomination, N.Y. TIMES, Oct. 12, 1991, at 12.

This was Thomas's response to Senate inquiry into the allegations of sexual assault by Anita Hill, a former employee. Thomas's historical allusion to the thousands of Blacks killed at the hands of racist Whites, including mobs, Klansmen, and state officials, was undeniably powerful. For many Blacks, the all-White and all-male Senate Judiciary Committee represented an eerily-familiar attempt to bring down another Black man. Both the Simpson and Thomas cases shed light on how crime and deviance by Blacks are labeled and represented, and how the Black community has responded.

While the Simpson and Thomas cases offer contemporary examples of Black protectionism, the phenomenon of Black community support for fallen heroes is not new. Historically, many of these cases have involved sporting events. The aftermath of the 1910 heavyweight fight between a Black man, Jack Johnson, and his White opponent, Jim Jeffries, offers a dramatic example. Jeffries, dubbed the "great White hope," was lured out of retirement to fight Johnson. After Johnson defeated Jeffries in a fifteen-round match, he became the first Black heavyweight boxing champion.³⁵ Johnson, who boasted of his pugilistic abilities and was often seen in the company of White women, was loathed by many Whites. White anger was so intense following Johnson's victory that riots erupted in cities across the country.³⁶ Numerous Blacks were killed by White mobs, scores were seriously injured, and the police made hundreds of arrests for disorderly conduct.³⁷ An official indication of the bitter White sentiment was swift passage of federal and local legislation that made it a crime to transport pictures

35. See, e.g., EDWIN BANCROFT HENDERSON, *THE NEGRO IN SPORTS* 26-30 (1939).

36. See, e.g., ARTHUR R. ASHE, JR. *A HARD ROAD TO GLORY: A HISTORY OF THE AFRICAN-AMERICAN ATHLETE, 1619-1918* 38 (1988) (quoting the July 5, 1910 *New York Times* headlines: "Three Killed in Vidalia [Georgia] . . . Omaha Negro Killed . . . Two Negroes Slain . . . Blacks Shoot Up Town . . . Houston Man Kills Negro"); Shirley Povich, *Nevada's Big Gamble on Boxing Has Paid Off Handsomely*, WASH. POST, Feb. 14, 1982, at D4 (citing an earlier *Washington Post* article that eight people had been killed in the post-fight riots); *A History of African-American Athletes*, PALM BEACH POST, Feb. 28, 1995, at 9D (providing a timeline of sporting events from 1875-1975 involving Black athletes; noting that following the Jackson-Jeffries match there were violent riots by Whites in twelve cities).

37. *Id.*

of the fight in interstate commerce.³⁸ Numerous other Black athletes have had to carry the race mantle—their athletic prowess serving as a proxy for the humanity of the Black race. Examples include Joe Louis, Jesse Owens, Jackie Robinson, and Muhammad Ali.³⁹ Today, the level of acceptance of Black athletes and entertainers is often used as a watermark, a measure of how race relations have advanced over time.

As the above discussion makes clear, members of the African-American community who have achieved notoriety and success have historically been treated as representatives or symbols of the community at large. This has been true particularly for Black athletes and entertainers. The next section presents the theoretical building blocks for Black protectionism.

II. SHARED HISTORY & SHARED SPACE, CONSPIRACIES, SOCIAL PROBLEMS, AND A SHARED SENSE OF FAIRNESS

A. *Sense of Fairness: A Look at Theory*

1. *Shared History and Shared Space.* The shared history of African-Americans and the tightly-bound geographical community it has forged underlie Black protectionism.⁴⁰

38. HENDERSON, *supra* note 35, at 29; ASHE, *supra* note 36, at 38 (noting that city councils in Washington, D.C., Atlanta, Baltimore, St. Louis, and Cincinnati banned films of the fight).

39. See HENDERSON, *supra* note 35, at 29; ASHE, *supra* note 36.

40. For some African-Americans, Black rage results from learning about the United States' violent history of oppression against Blacks. For some it is a fierce, non-abiding rage. At various points, this rage has boiled over (e.g., 1960's civil rights riots and the 1991 post-verdict uprisings in the Rodney King/LAPD case). See also WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* (1968) (written by two psychologists whose research is based on interviews with clients and analysis of problems faced by Blacks; authors conclude that Blacks face myriad barriers to economic success and psychological well-being due to how they are treated by Whites and society in general); STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* (1967) (arguing that Blacks must organize to effect social and political change); ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993) (documenting interviews with members of the Black middle-class who discuss the effect of race on their daily social interactions, including personal and business affairs).

This shared history includes slavery, lynching,⁴¹ and legally-sanctioned segregation in public spaces.⁴² Legislation, case law, and actions taken by the executive branch have played a fundamental role in fostering, reinforcing, and maintaining Black inequality. Antebellum-era cases, such as *Dred Scott v. Sandford*⁴³ and post-slavery cases including *Plessy v. Ferguson*,⁴⁴ upheld prevailing beliefs of Black racial inferiority.⁴⁵

Though racially discriminatory *de jure* laws are no longer constitutionally permissible, *de facto* laws still exist.

41. Federal data report that approximately 4,000 Blacks were lynched between 1882 and 1964 (the last time data were kept). U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, PART 1 422 (1975), available at <http://www2.census.gov/prod2/statcomp/documents/CT1970p1-01.pdf> (last visited Feb. 23, 2005). Nineteenth century lynching historian Ida B. Wells-Barnett places the figure closer to 10,000 people. IDA B. WELLS-BARNETT, ON LYNCHINGS (2002). For further discussion of the social, economic, and religious dimensions of lynchings, see generally JAMES ALLEN ET. AL, WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (2000); ORLANDO PATTERSON, RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES 169-232 (1998); STEWART E. TOLNAY & E. M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930 (1995).

42. See, e.g., RUSSELL, *supra* note 5, at 14-25.

43. 60 U.S. 393 (19 How.) (1857) (holding that a Black former slave was not a citizen and, therefore, he did not have a right to sue in federal court).

44. 163 U.S. 537 (1896) (holding that Louisiana statute requiring passenger separation in railway cars by race is constitutional under the Fourteenth Amendment; separate public accommodations may be equal).

45. For an analysis of "racial ranking" and social science research, see STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981). For a discussion of the effect of slavery on post-slavery society, see GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY (2002) (discussing "racial dishonor" as integral to the institution of slavery). Loury states: "In general, slaves are always profoundly dishonored persons. In the experience of the United States, slavery was a thoroughly racial institution. Therefore, the social meaning of race emergent in American political culture at mid-nineteenth century was closely connected with the slaves' dishonorable status." *Id.* at 69. Loury argues that this racial dishonor did not disappear with the abolition of slavery: "The racial dishonor of the former slaves and their descendants, historically engendered and culturally reinforced, would have also to be overcome. . . . [A]n honest assessment of current American politics—its debates about welfare, crime, schools, jobs, taxes, housing, test scores, diversity, urban policy . . . reveals the lingering effects of this historically engendered dishonor." *Id.* at 69-70.

These include anti-loitering laws,⁴⁶ felony disenfranchisement laws,⁴⁷ and drug sentencing laws.⁴⁸ As well, law enforcement policies and practices, such as racial profiling, have a disparate impact on African-Americans.⁴⁹ These laws, policies, and practices work in combination with microaggressions,⁵⁰ macroaggressions,⁵¹ and other penalties for “living while Black.”⁵²

Further, twentieth century policies and practices, such as housing restrictions in the form of restrictive covenants, redlining, and racial steering,⁵³ made it difficult for Blacks

46. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41 (1999) (striking down, as a violation of the Fourteenth Amendment’s due process clause, a Chicago ordinance that made it unlawful for one to loiter in a public place with a gang member). Over a three-year period, Chicago police had issued more than 89,000 “dispersal orders” and arrested more than 42,000 people for violating the ordinance. *Id.* at 49.

47. Forty-eight states have laws that temporarily, or in some cases permanently, disenfranchise citizens who commit felonies. Approximately thirteen percent of all Black men are disenfranchised in the United States. See, e.g., The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2003), available at <http://www.sentencingproject.org/pdfs/1046.pdf> (last visited Feb. 23, 2005); *Developments in the Law: The Law of Prisons*, 115 HARV. L. REV. 1838, 1939-63 (2002).

48. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., and 31 U.S.C.).

49. See, e.g., DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002); Kathryn K. Russell, *Racial Profiling: A Status Report of the Legal, Legislative, and Empirical Literature* 3 RUTGERS RACE & L. REV. 61 (2001).

50. Peggy Cooper Davis offers the following definition of microaggressions: “subtle, stunning, often automatic, and non-verbal exchanges which are ‘put downs’ of [B]lacks by [Whites].” *Law as Microaggression*, 98 YALE L. J. 1559, 1565 (1989) (quoting Chester M. Pierce, et al., *An Experiment in Racism: TV Commercials*, in TELEVISION AND EDUC. 62, 66 (Chester M. Pierce ed., 1978)).

51. RUSSELL, *supra* note 5, at 138-41 (discussing macroaggressions and microaggressions). Macroaggressions are “attacks insults, or pejorative statements made against Blacks by Whites.” *Id.* at 139.

52. See RUSSELL-BROWN, *supra* note 1, at 97-118 (discussing breathing, running, walking, shopping, and idling while Black in a chapter entitled *In the Crosshairs: Racial Profiling and Living While Black*).

53. See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 36-37, 51-52, 227-28 (1993); CONLEY, *supra* note 22, at 31-37 (including a review of how denial of access to social programs, including social security and the Home Owners’ Loan Corporation, negatively affected Black homeownership).

to improve their conditions. Until the 1960s, the Federal Housing Authority financed homes in White suburban areas but routinely denied loans in urban markets, home to the majority of Blacks.⁵⁴

A contemporary look at residential housing patterns dramatically illustrates the impact of these race-based policies and practices. In *American Apartheid*,⁵⁵ Douglas Massey and Nancy Denton use 1980 Census tract data to explore residential patterns by race.⁵⁶ Their research indicates that African-Americans are not only segregated, they are *hyper-segregated*: Most Blacks live in racially-isolated clusters, away from other racial groups.⁵⁷ These stark housing patterns were found in almost all major metropolitan centers, where more than eighty percent of Blacks live, including Atlanta, Baltimore, Chicago, Detroit, Los Angeles, New York, and Philadelphia.⁵⁸ Twenty years later, a study based on the 2000 Census reported similar findings.⁵⁹ Whites live in neighborhoods that are eighty percent White and Blacks live in neighborhoods that are seventy-five percent Black.⁶⁰ Cincinnati, Cleveland, Detroit, Miami, Newark, and New York are among the cities with the largest number of segregated neighborhoods.⁶¹

The density and shape of a racial group's residential community has implications for the social community. It determines whether the social community will be a tightly-knit one. People who live closer to one another are more likely to remain in closer contact. Further, the relatively small size of the Black community—thirteen percent of the

54. See CONLEY, *supra* note 22, at 37 (noting that between 1930 and 1960 “fewer than one percent of all mortgages in the nation were issued to African-Americans” and that the FHA “specifically prohibited lending in neighborhoods that were changing in racial or social composition”) (quoting D.L. KIRP, ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* 7 (1995)).

55. MASSEY & DENTON, *supra* note 53.

56. *Id.* at 74-75.

57. *Id.*

58. *Id.* at 75-78.

59. See, e.g., Eric Schmitt, *Analysis of Census Finds Segregation Along with Diversity*, N.Y. TIMES, Apr. 4, 2001, at A15.

60. MASSEY & DENTON, *supra* note 53, at 76 tbl. 3.4.

61. *Id.*

United States population—enhances its ability to remain close. Its shared history and space have helped to create a race-based community—one with its own identity. As a result, to some degree, individual identities are muted. Thus, an attack on one member of the group, especially a successful, high-profile one, may be interpreted as an attack upon the group itself. When one member of the group is under the public microscope, as O.J. Simpson was, that person becomes a stand-in for the entire community of Black people. In his discussion of the Simpson case, Harry Edwards supports a historical analysis:

[Black support of Simpson] has not been so much an act of undying loyalty as an act of self-defense, a collective, almost intuitive appreciation of the historical fact that the black community is inescapably bound to its members—for better and worse—impacted by their actions and outcomes irrespective of their disposition toward the [B]lack community. Black people's inordinate empathy with O.J. Simpson is, then, mostly an artifact of cultural memory.⁶²

One contemporary manifestation of African-American's cultural memory—symbolized by their shared history and shared space—is a deep distrust of the criminal justice system in particular.⁶³ The historical reality of an unjust legal system is combined with the contemporary reality of a system that produces, among other things, disproportionate arrests, sentences, and convictions of African-Americans.

The history and space shared by African-Americans shapes the community's view of its lawbreakers—a view different from those outside of the community. Regina Austin observes that whether the Black community defends those who break the law depends upon considerations that others outside the community may not take into account.⁶⁴

62. Harry Edwards, *We Must Let O.J. Go: Separating Fact from Image*, 86 *SPORT* 80 (1995).

63. See, e.g., Kathryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 *IND. L.J.* 593, 594 (1996) ("Study after study has shown that Blacks and Whites hold contrary views on the fairness of the criminal justice system's operation. Blacks tend to be more cautious in their praise and frequently view the system as unfair and racially biased.").

64. Paul Butler describes this as "knowing what you know." *Brotherman: Reflections of a Reformed Prosecutor*, in *THE DARDEN DILEMMA: 12 BLACK WRITERS ON JUSTICE, RACE, AND CONFLICTING LOYALTIES* 1, 14 (Ellis Cose ed.,

“The [B]lack community’ evaluates behavior in terms of its impact on the overall progress of the race. Black criminals are pitied, praised, protected, emulated, or embraced if their behavior has a positive impact on the social, political, and economic well-being of black communal life.”⁶⁵

2. *Conspiracies.* The literature on conspiracies offers additional insight into the processes that generate Black protectionism. In fact, there is an empirical relationship between conspiracy theories and Black protectionism. For many Blacks, racist conspiracies serve as tracking devices that locate and label White oppression. In *I Heard it Through the Grapevine*, Patricia Turner reviews some of the conspiracy theories operating within the Black community.⁶⁶ One of the more commonly-held beliefs is that there is a government plot to destroy the Black man. This view is evident in rumors that the government or large corporations have plans to poison, maim, or kill African-Americans (e.g., through imported drugs or tainted foods).⁶⁷ Turner identifies two kinds of drug-related conspiracies: malicious intent and benign neglect.⁶⁸ The former involves the belief that there is a specific plan in operation. An example of a malicious intent conspiracy is the belief that crack cocaine was intentionally planted in urban areas to decimate the Black community.⁶⁹ Benign neglect conspiracies are those that do not require intent to harm, rather the harm is caused by the government’s failure to protect members of

1997) (referring to “those beliefs, often emotional, that are at the core of one’s being and that precede or subvert education and other formal ways of knowing”).

65. Regina Austin, “The Black Community,” *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1772 (1992); see also Dorothy E. Roberts, *Deviance, Resistance, and Love*, 1994 UTAH L. REV. 179, 180 (observing that oppressed people “create their own concepts of justice, morality, and legality”).

66. PATRICIA A. TURNER, *I HEARD IT THROUGH THE GRAPEVINE: RUMOR IN AFRICAN-AMERICAN CULTURE* (1997).

67. For further discussion of the prevalence of conspiracies within African-American discourse and the role conspiracies play within the African-American community, see RUSSELL, *supra* note 5, at 145-46.

68. TURNER, *supra* note 66, at 189-90.

69. *Id.*

the African-American community.⁷⁰ Slow response times by the police who answer calls for service in Black neighborhoods, and the failure of the government to prevent the influx of drugs into urban areas, are examples of benign neglect conspiracies.

In one noteworthy study, Theodore Sasson conducted peer group sessions to empirically test the prevalence of Black conspiracy theories.⁷¹ In his 1995 research, based on small-group interviews with fifty-one adults,⁷² Sasson found that conspiracies serve two functions. First, they are used to make sense of disproportionately high rates of social dysfunction (e.g., arrest and conviction rates). Second, they promote in-group solidarity, by reinforcing a shared historical narrative. As well, Sasson found that conspiracies are typically expressed in vague terms.⁷³ The perceived conspirators are an interchangeable group of villains—including the police, the media, and White society in general. Sasson concludes that because there is little room in the public discourse for acknowledging the impact of White racism on Black life, many Blacks perceive that there is a wide and vast array of potential conspirators.⁷⁴

Regina Austin's work offers a theoretical elaboration of Sasson's research findings.⁷⁵ Austin argues that anti-Black conspiracy theories serve a functional purpose. They act as a critical response to the social and political marginalization of Blacks by mainstream institutions. Austin states:

[Anti-Black conspiracies] circulate . . . through available channels not controlled by the dominant white society. . . . Through theorizing, blacks express what they are concerned about in a way that is unmediated by the strictures of conventional reporting. . . . [T]he theories come close to being free, uncensored speech. There is a logic and a rationality to many antiblack conspiracy theories.

70. *Id.*

71. Theodore Sasson, *African American Conspiracy Theories and the Social Construction of Crime*, 65 *SOC. INQUIRY* 265 (1995).

72. *Id.*

73. *Id.*

74. *Id.*

75. Regina Austin, *Beyond Black Demons & White Devils: Antiblack Conspiracy Theorizing & the Black Public Sphere*, 22 *FLA. ST. U. L. REV.* 1021, 1032-33 (1995).

Although they sometimes have a fantastic quality, the theories offer explanations at a time when bad things are happening to blacks and no one is adequately explaining why.⁷⁶

Conspiracies represent a form of “deviant discourse.”⁷⁷ That is, they offer a parallel narrative, one that clearly rejects the mainstream presentation of idealized race relations. Conspiracies re-affirm the lived experiences of African-Americans and in this way they “create solidarity and facilitate mass mobilization.”⁷⁸ Thus, the creation of conspiracy theories is a predictable response and a useful instrument for historically-oppressed racial groups.⁷⁹

3. *Being Labeled a Social Problem.* The literature on social problems offers another theoretical base for understanding Black protectionism. This research explores how groups come to define a condition as a problem and how they take steps to solve the problem.⁸⁰ Juvenile delinquency, high crime rates, and prison overcrowding are examples of social problems. One way of thinking about Black protectionism is to see it as the Black community’s response to being labeled deviant.⁸¹ In other words, the Black community’s reaction to being labeled a social problem has been to label that very labeling a social problem. The belief of many African-Americans that they are viewed as a dysfunctional group is based upon many factors, including their experiences within the justice system.⁸² This perception is enhanced by myriad media portrayals of Blacks as deviant—images emphasizing disproportionate rates of arrest, conviction, and imprisonment and a laundry

76. *Id.*

77. *Id.* at 1032.

78. *Id.* at 1042.

79. Austin notes that, as a group, Blacks are particularly susceptible to believing anti-Black conspiracies. *Id.* at 1021.

80. See John I. Kitsuse & Malcolm Spector, *Toward a Sociology of Social Problems: Social Conditions, Value-Judgments, and Social Problems*, 20 SOC. PROBS. 407, 415 (1973).

81. LOURY, *supra* note 45, at 67 (referring to this as having a “spoiled collective identity”). Loury argues that a discussion of the social meaning of race requires a look at “the specific historical processes that conditioned our nation’s race-making.” *Id.*

82. See generally Russell, *supra* note 63.

list of other negative social indices, such as high rates of out-of-wedlock births, high school drop-outs, single-parent households, infant mortality, and unemployment.⁸³

In this view, the Black community's disproportionately high rate of social marginality is directly tied to America's history of racism. Black protectionism operates as a buffer to racial stereotyping and labeling. Thus, racial protectionism is a rational response to being saddled with a negative label.

4. *A Shared Sense of Fairness.* For African-Americans, a communal sense of fairness is directly tied to its shared history and shared space. The salience of fairness to Blacks is not only a statement that Blacks have rights, too, it also acknowledges that Blacks have and continue to be treated to a double standard of justice. African-Americans keenly observe not just the treatment they personally receive from the justice system but also the treatment other African-Americans receive—friends, family members, acquaintances, and strangers. The group's awareness is heightened by the fact that many Blacks stand within two degrees of someone—sibling, parent, child, cousin, or friend—who is tied to the justice system.⁸⁴ Further, the belief that Blacks are subject to race-based treatment is premised on the disparate fashion in which Black and White criminal and non-criminal cases are handled.⁸⁵

83. See *supra* notes 9-22.

84. This is not surprising when we consider that a disproportionately high number of Blacks are under the control of the justice system. One-in-three Black men between the ages of 20 and 29 are under justice system supervision. This compares with one-in-sixteen White men in the same age group. Mauer & Huling, *supra* note 11. Thus, Blacks, compared with Whites, are more likely to know someone in the justice system.

85. A comparison of two sets of national cases underscores this point.

First, Jessica Lynch and Shoshana Johnson. Jessica Lynch, a nineteen-year-old White female United States soldier from West Virginia received unprecedented attention following an attack on her unit in Iraq. Lynch, who sustained severe leg injuries when her vehicle overturned, has consistently said that she is "not a hero." In addition to having her biography published (RICK BRAGG, *I AM A SOLDIER, TOO: THE JESSICA LYNCH STORY* (2003)), her story was a made-for-television movie, she has appeared on the cover of *Time* magazine, and she has appeared on numerous television shows (e.g., the *Today Show* and *Late Night with David Letterman*). Upon discharge from the Army, Lynch will receive an eighty percent disability benefit. See, e.g., *Fairness to POW*

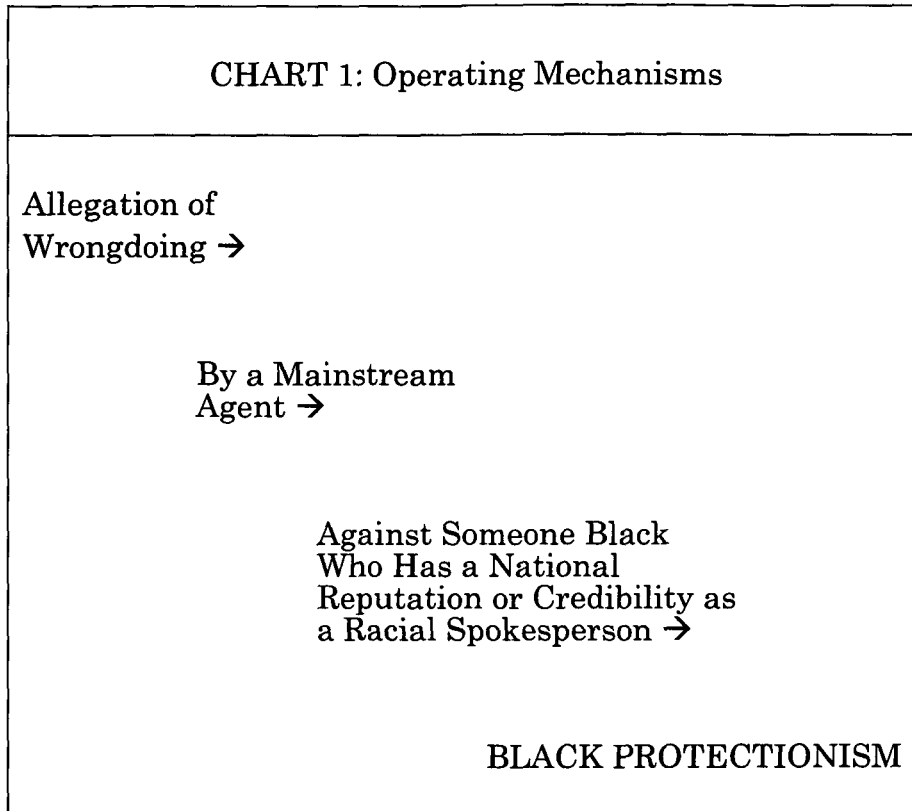
The discussion on shared history and space, conspiracies, social problems, and a shared sense of fairness, situates the development of Black protectionism within the theoretical and empirical literature. Based on this examination, Black protectionism appears to operate as a form of racial resistance. It shows the Black community—through communal will—as rejecting mainstream attempts to label African-American deviance. It is Black self-determination.⁸⁶ Now that a theoretical base for Black protectionism has been established, the next section explores the mechanics of its operation.

Questioned: Shoshana Johnson Deserves Benefits Comparable to Jessica Lynch's, Supporters Say, L.A. TIMES Oct. 25, 2003, at A21. Shoshana Johnson served in the same unit as Jessica Lynch. She was a POW for twenty-two days. Johnson, who is Black, was shot through both of her ankles. Some say that her story was overshadowed by Lynch's because Lynch is White and she is Black. Upon retiring, Johnson will receive thirty percent of her disability pension. See, e.g., Lee Hockstader, *Ex-POW's Family Accuses Army of Double Standard on Benefit*, WASH. POST, Oct. 24, 2003, at A3; *Ex-POW Johnson is Discharged by Army; Lynch Captured at Same Time*, WASH. POST, Dec. 12, 2003, at A4.

Second, Gary Ridgway, the "Green River Killer," and John Muhammad. Ridgway, who is White, confessed to murdering forty-eight women. He was allowed to plea bargain for a sentence of life without parole. John Muhammad, who is Black, was the person behind the fall 2002 Washington, D.C. sniper killings. He was charged and convicted of capital murder and sentenced to death for one of the murders. See, e.g., Earl Ofari Hutchinson, *The Green River Killer and the Absurdity of the Death Penalty*, (Nov. 27, 2003), at http://www.finalcall.com/artman.publish/article_1153.shtml (last visited Feb. 27, 2005).

86. See, e.g., V. P. FRANKLIN, *BLACK SELF-DETERMINATION: A CULTURAL HISTORY OF THE FAITH OF THE FATHERS* 3-9 (1992) (analyzing, from a historical perspective, the development of African-American cultural values). Franklin observes, "At the core of the racial consciousness that developed among Afro-Americans in the United States was the cultural objective of black self-determination, which operated in a dialectical relationship with white supremacy." *Id.* at 6.

III. OPERATING MECHANISMS AND POTENTIAL BENEFICIARIES
OF BLACK PROTECTIONISM



1. *Operating Mechanisms.* The four operating mechanisms for Black protectionism are identified in Chart 1. The first, an allegation of wrongdoing, can be established by either an allegation of criminal conduct or an allegation of unethical conduct. The second requirement is that the allegation of wrongdoing is made against someone Black. Here, the age-old “one-drop”⁸⁷ rule applies. Even people who identify themselves as only partly-Black (e.g., Tiger Woods)

87. See F. JAMES DAVIS, *supra* note 6.

and those who are “colorless” (e.g., O.J. Simpson⁸⁸) are eligible for Black protectionism. Third, the allegation of wrongdoing must come from a mainstream agent, outside of the Black community. Examples include a government official or government body, such as a district attorney, congressional committee, or the police. Finally, the person alleged to have engaged in misconduct must be someone with a national reputation or credibility as a racial spokesperson.⁸⁹ Black protectionism is available to well-known African-Americans, including celebrities, politicians, athletes, and businessmen. The bottom line is that the targeted person must have something valuable to lose.

88. Remarking on a racial incident, Simpson states:

I was at a wedding, my [first] wife and a few friends were the only Negroes there, and I overheard a lady at the next table say, “Look there’s O.J. Simpson and some niggers.” Isn’t that weird? That sort of thing hurts me, even though it’s what I strive for, to be a man first.

Meri Nana-Ama Danquah, *Why We Really Root for O.J.: The Superstar Suspect Embodies the Illusion of a Colorblind America*, WASH. POST, July 3, 1994, at C1. For further discussion of colorblindness and Black protectionism, see RUSSELL, *supra* note 5, at 56-60.

89. Black Protectionism also operates at the local level. See, e.g., Glenn Chapman, *Black Muslim Leader Pleads Innocent*, OAKLAND TRIB., Oct. 18, 2002 (discussing the local response (Oakland, CA) to a rape case against local Muslim leader, Yusef Bey).

TABLE 1: Trigger Questions for Black Protectionism	
<u>Whites</u>	<u>Blacks</u>
1. Did he commit the offense?	1. Did he commit the offense? 2. Even if he did, was he set up? 3. Would he risk everything he has (e.g., wealth, fame, material possessions) to commit an offense? 4. Is he the only person who has committed this offense? 5. Do Whites accused of the same offense receive the same scrutiny and treatment? 6. Is this accusation part of a government conspiracy to destroy the Black race?

Table 1 contrasts the various questions that Blacks ask when analyzing an allegation against a well-known Black person, with the single question that Whites ask when assessing an allegation. For Blacks, the answer to the first question, "Did he commit the offense?" is not determinative. Black protectionism may be granted whether the answer is yes or no. When the answer to the second question, "Is any indication that the person was set up?" is yes, Black protectionism may be triggered. The third question, "Would the person jeopardize his status by committing an offense?", is more rhetorical than substantive. The answer is usually negative. The fourth and fifth questions call for a comparison between how Blacks and Whites are treated by society.

If the answers to “Is he the only person who has committed the offense?” and “Do Whites who are accused of committing the same offense receive the same scrutiny and treatment?” are “no,” Black protectionism may be triggered. It is unlikely that there will be a definitive answer to the sixth question, “Is the accusation part of a conspiracy to destroy the Black race?”,⁹⁰ therefore, “maybe” is a sufficient response. If the answer is “yes” or “maybe,” Black protectionism may be applied. These six questions have consistently surfaced in discussions of the Black community’s response to criminal and ethical allegations against Black leaders and celebrities.

These race-laden queries indicate why Blacks are more likely to protect and defend members of their own racial group. Again, the history of racism against African-Americans—which includes government-sanctioned plots to silence Black leadership—has created a deep-rooted skepticism of government actions. The next section considers the pool of potential recipients and the actual beneficiaries of Black protectionism.

TABLE 2: Potential Recipients of Black Protectionism, 1994-2003		
NAME	ALLEGATION	POSITION
Marion Barry*	Drug Use	Mayor, Washington, D.C.
Kobe Bryant	Rape	NBA
Rae Carruth	Murder	NFL

90. For a discussion of the role conspiracies play in the Black community, see *supra* notes 66-79.

TABLE 2: Potential Recipients of Black Protectionism, 1994-2003		
NAME	ALLEGATION	POSITION
Ben Chavis	Fraud; Extra-marital affair	NAACP Executive
Sean "P. Diddy" Combs	Illegal Possession of a Firearm; Assault	Music Entrepreneur
Joycelyn Elders	Inappropriate Remarks	U.S. Surgeon General
Mike Espy	Bribery	Secretary of Agriculture
Lani Guinier	Inappropriate Writings	Law Professor
Alexis Herman	Bribery	Secretary of Labor
Allen Iverson	Assault	NBA
Jesse Jackson	Extra-marital affair; Embezzlement	Director, Rainbow/PUSH
Michael Jackson	Child Sexual Assault	Entertainer
R. Kelly	Sex with Minor; Child Pornography	Entertainer

TABLE 2: Potential Recipients of Black Protectionism, 1994-2003		
NAME	ALLEGATION	POSITION
Ray Lewis	Murder	NFL
Henry Lyons	Extra-Martial Affair; Corruption	Reverend, National Baptist Convention
Carol Moseley- Braun	Fraud	U.S. Congress
Hazel O'Leary	Excessive Speeding	Secretary of Energy
Melvin Reynolds	Sex with Minor; Child Pornography; Phone Sex	U.S. Congress
O. J. Simpson	Murder	NFL
John Street	Corruption	Mayor, Philadelphia
Clarence Thomas*	Sexual Harassment	Supreme Court nominee
Mike Tyson*	Rape	Boxer
Rasheed Wallace	Drugs	NBA

TABLE 2: Potential Recipients of Black Protectionism, 1994-2003		
NAME	ALLEGATION	POSITION
Chris Webber	Speeding; Marijuana Possession; Gambling	NBA
Jayson Williams	Manslaughter	NBA

*Pre-1994 cases

2. *Potential Recipients.* Table 2 lists some of the potential recipients of Black protectionism, highlighting cases from 1994 to 2003.⁹¹ The alleged crime or unethical conduct is also noted. These cases, spanning a ten-year period, received national attention. The list includes athletes, religious leaders, elected officials, entertainers, politicians, cabinet members, businessmen, and civil rights leaders. In most cases, the alleged criminal conduct involves white-collar crime, such as fraud, embezzlement, or bribery. Some cases involve violent crime, such as rape or homicide. A small number involve what some would label victimless crime, including drug use and gambling.

The analysis of Black protectionism is limited to incidents involving well-known Blacks. This facilitates an assessment of the Black community at large. Case information was gathered from various sources, including national newspapers, Black media sources, and national polls.

91. The list includes some pre-1994 cases, including Mike Tyson, Marion Barry, and Clarence Thomas.

3. *Beneficiaries.* Table 2 provides a list of representative names of African-Americans who were potential recipients of Black protectionism. As detailed below, whether a potential recipient actually received Black protectionism is determined by several factors. Trends, however, are clearly discernible. Using the above-stated parameters, the next section, through case-specific examples, analyzes who is eligible and who has received Black protectionism.

IV. WHO GETS IT?: PATTERNS AND PRACTICES

This section considers the range of cases involving Black protectionism. Categories include cases involving political officials, sexual assault, Black women, and athletes.⁹² For each case, the facts are provided. Where available, information is included on the case outcome, the position taken by Black leadership, and national poll data (on the prevalence of race-based viewpoints).⁹³

A. *Political Officials*

Historically, the African-American community has revered its political leadership, particularly its elected representatives. This reverence is partly a testament to historical and contemporary roadblocks placed in the path of would-be Black politicians and voters. Today, for example, national-level Black politicians face particular challenges.⁹⁴ Studies consistently indicate that Whites are less inclined to vote for Black politicians. Since 1965, when the Voting Rights Act was passed, Douglass Wilder has been the only African-American elected governor, and Barack Obama, Carol Moseley-Braun, and Edward Brooke the only

92. In some instances, cases could be placed into more than one category (e.g., one involving a politician accused of sexual assault (e.g., Melvin Reynolds) or an athlete charged with sexual assault (e.g., Mike Tyson)).

93. Black protectionism exists where at least one-half of the Blacks surveyed indicate that the person was innocent (or unfairly charged). Where over fifty percent of the Black community adopts a particular perspective, this indicates that the viewpoint is shared across economic lines—that Blacks who are both lower and middle class are included. Poll data and national media reports (television and newspaper coverage) were not available for all cases.

94. See, e.g., Kevin Sack, *Pressed Against a "Race Ceiling,"* N.Y. TIMES, Apr. 5, 2001, at A12.

elected Black senators. At the local level, however, there have been increases in the number of Black elected officials.⁹⁵ This section looks at how the Black community has responded to allegations made against some Black political leaders. The case of Adam Clayton Powell offers a history lesson and serves as a starting point for this discussion.

1. *Adam Clayton Powell*. With their entry into electoral politics, Blacks faced intense scrutiny and abuse.⁹⁶ This scrutiny is not new. In 1944, Adam Clayton Powell was elected as the congressional representative for Harlem.⁹⁷ A few years into his term, he came under attack because he did not support Adlai Stevenson, who was heading the Democrat's presidential ticket.⁹⁸ Stevenson had minimized the importance of a civil rights amendment and refused to meet with Powell and other congressmen to discuss his position.⁹⁹ In 1953, following the election of Dwight Eisenhower as President, Powell was charged with tax evasion. The government's three thousand dollar evasion claim against Powell was costly in both time and money.¹⁰⁰ Following his embrace of the Black power movement, Powell was removed from Congress in 1967 by a vote of 363 to 65.¹⁰¹ Powell's case went before the United States Supreme Court, which decided that he had been wrongly removed.¹⁰² Powell ran again for office, but lost to another Black politician, Charles Rangel.¹⁰³

95. Joe Davidson, *Targets for Scrutiny*, EMERGE, Oct. 1996, at 38, 40 (1996).

96. *See id.* (discussing charges against Harlem Congressman Adam Clayton Powell, Jr. and referencing a *Washington Post* study, which found that Blacks comprised fourteen percent of the 465 political corruption investigations launched from 1983 to 1988 although they constituted only three percent of the officeholders).

97. ADAM CLAYTON POWELL, JR., *MARCHING BLACKS: AN INTERPRETIVE HISTORY OF THE RISE OF THE BLACK COMMON MAN* 161-62 (1945); CHARLES V. HAMILTON, *ADAM CLAYTON POWELL, JR.: THE POLITICAL BIOGRAPHY OF AN AMERICAN DILEMMA* 272 (1991).

98. HAMILTON, *supra* note 97, at 270.

99. *Id.*

100. *Id.* at 315-25.

101. *See id.* at 20-21.

102. *See id.* at 469.

103. *Id.* at 478.

The Powell case provides a dramatic illustration of the difficulties faced by some Black politicians. The government has engaged in an intense and prolonged surveillance of progressive, grassroots, and radical organizations, including the Black Panther Party.¹⁰⁴ This reality partly explains the strong support that Black politicians receive from the Black community. With this history in mind, it is not surprising that Black politicians are generally granted Black protectionism.¹⁰⁵

2. *Marion Barry*. The case involving former Washington, D.C. mayor, Marion Barry offers an interesting application of Black protectionism. In January 1990, Barry was captured on videotape in a D.C. hotel room, with a woman who was not his wife, smoking a crack pipe. The F.B.I. used Barry's former girlfriend, Hazel Diane Rasheeda Moore, to lure him to the hotel suite.¹⁰⁶ Moore, who agreed to participate in the sting, was paid \$1,700 a month by the F.B.I.¹⁰⁷ The eighty-three minute videotape indicates that Barry was as interested in having sex, as he was in using drugs.¹⁰⁸ The fact that Barry's criminal conduct was captured on videotape sets his case apart from others: there is no dispute that Barry actually engaged in the criminal activity. Barry was convicted of misdemeanor drug possession, acquitted of one count of drug possession. There was a hung jury on several other counts.¹⁰⁹

104. See WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DOMESTIC DISSENT* 91-164 (1990).

105. See CORNEL WEST, *RACE MATTERS* 35-46 (1993). West contends that there is a gaping void in Black political leadership. One result of this "crisis" may be that the absence of leadership makes Blacks more susceptible to broad forms of racial allegiance, such as Black protectionism. That is, the absence of principled leadership to guide community responses may make community members more likely to adopt, uncritically, appeals to racial solidarity.

106. Tracy Thompson & Michael York, *Moore Says Barry Linked Contract, Sex: Outside Court, Mundy Calls Witness a Liar*, WASH. POST, July 4, 1990, at A1.

107. See *id.*

108. Tracy Thompson & Elsa Walsh, *Jurors View Videotape of Barry Drug Arrest*, WASH. POST, June 29, 1990, at A1.

109. Keith Harriston, *Reaction to Verdict is Another Hung Jury; Regional Response is Sharply Divided*, WASH. POST, Aug. 11, 1990, at A10.

As the trigger questions (Table 1) indicate, the racial target's guilt or innocence is not decisive in assessing whether Black protectionism applies. This is evident in the Black community's response to Barry's arrest and prosecution. Many Blacks opined that the mayor had gone to Moore's room for a sexual liaison, not to smoke crack cocaine. The central focus in Barry's case was not the first trigger question, but the second and sixth queries. Thus, the inquiry shifted from, "Did he commit the offense?" to "Even if he did, was he set up?" and "Is this accusation part of a government conspiracy to destroy the Black race?" The Barry case suggests that Black protectionism operates to mitigate charges that Blacks view as overreaching by the state.

3. *Melvin Reynolds*. In 1995, Representative Mel Reynolds, of Illinois, was charged with having sex with Beverly Heard, a minor.¹¹⁰ The sixteen-year-old Heard was a campaign volunteer. At that time, Reynolds was already under investigation for election campaign violations.¹¹¹ Though Reynolds denied any physical contact with Heard, he admitted to engaging her in "phone sex." A jury convicted the married congressman of criminal sexual assault, child pornography, obstruction of justice, and aggravated criminal sexual abuse.¹¹² In 1995, Reynolds, a Rhodes Scholar, was sentenced to six and a half years in federal prison.¹¹³

The reaction in this case mirrored, to a lesser degree, that in the Barry incident. Very few sought to justify Reynolds's actions. The focus shifted away from his involvement (first trigger question) to both the *actions* of the federal prosecutor's office against him and the *inactions* of the federal prosecutor's office against other (non-Black) elected

110. See Kate N. Grossman, *Reynolds Sprung, Thanks to Clinton; After five years, he's released to halfway house*, CHI. SUN-TIMES, Jan. 21, 2001, at 2A; Edward Walsh, *Reynolds Sentenced to 5 Years for Sex Offenses, Obstruction, Illinois Congressman Misused a "Job for Life," Judge Says*, WASH. POST, Sept. 29, 1995, at A2.

111. See Grossman, *supra* note 110.

112. Maurice Possley & Peter Kendall, *Reynolds Guilty on All Counts: Mandatory Prison Term Will Be At Least 4 Years*, CHI. TRIB., Aug. 23, 1995, at 1.

113. See Grossman, *supra* note 110, at 3A; Walsh *supra* note 110.

officials (fifth trigger question). For example, some described the prosecutors as overzealous in his case. Others offered the case of Oregon Senator Bob Packwood as proof that Reynolds was being held to a different, more punitive standard. Packwood had been accused of sexual assault on at least eighteen occasions.¹¹⁴ In 1995, Packwood resigned and faced no criminal charges.¹¹⁵

4. *Bill Clinton: The First "Black" President.* Arguably the most provocative and controversial recipient of Black protectionism has been former president, Bill Clinton.¹¹⁶ Within the Black community, Clinton has been, in many ways, referred to and treated as an African-American. Social commentators, from Nobel laureate Toni Morrison to comedian Chris Rock,¹¹⁷ have referenced Clinton's "Black" skin.¹¹⁸ In 1998, Morrison detailed the racialized treatment Clinton received by the mainstream press:

[W]hite skin notwithstanding, this is our first Black president. Blacker than any actual person who could be elected in our

114. Guy Gugliotta & John E. Yang, *Exhaustive, Damning Documents: Record Paints Conflicted Portrait*, WASH. POST, Sept. 8, 1995, at A1. After serving two-and-a-half years, Reynolds was released from prison. See Mike Dorning, *Clinton Grants Clemency, Frees Reynolds*, CHI. TRIB., Jan. 21, 2001, at 1.

115. See Gugliotta & Yang, *supra* note 114.

116. Bill Clinton is not the only White for whom Black protectionism might be available. Rapper Eminem, who has sold millions of records has been widely heralded and embraced by Black hip-hop fans. His racial credibility has been bolstered by the imprimatur of well-respected rapper/producer Dr. Dre. However, Eminem's Black embrace may be less secure as a result of his incendiary comments about Black women which appeared on an early recording—brought to light by editors of *The Source* magazine. See, e.g., Lola Ogunnaike, *Rivals Call Eminem Racist Over Lyrics From the Past*, N.Y. TIMES, Nov. 19, 2003, at B3. But see Renee Graham, *After tape's release, Eminem singing new tune: I'm sorry*, S. F. CHRON., Dec. 25, 2003, at E10. Graham argues that the motives for releasing the tape are questionable and "It's time to move on." *Id.*

117. David Kamp, *The Color of Truth*, VANITY FAIR, Aug. 1998, at 124, 167 (quoting Chris Rock's opinion of Clinton: "He's the most scrutinized man in history, just as a black person would be"); see also Jonathan Tilove, *Black Americans Behind Clinton: President's style called soulful*, NEW ORLEANS TIMES-PICAYUNE, Sept. 17, 1998, at A10.

118. See Deborah Mathis, *The Clinton Legacy & Black America*, SAVOY, Feb. 2001, at 70, 71 (featuring a computer-enhanced photograph of a "Black" Bill Clinton).

children's lifetime. . . . Clinton displays almost every trope of Blackness: single parent household, born poor, working-class, saxophone-playing, McDonald's-and-junk-food-loving boy from Arkansas.¹¹⁹

In addition to fitting these stereotypes, Clinton also had a Black best friend and appeared genuinely comfortable around working-class Black people. All of this set him apart from other presidents and from White politicians in general. As an honorary Black person, Clinton received Black protectionism's highest vote count. Following the allegations and admissions that the married president had had sexual relations with a 24-year-old White House intern,¹²⁰ poll data indicated that the overwhelming majority of Blacks stood behind him.¹²¹ His approval ratings peaked during his impeachment. In fact, the Black voting bloc consistently represented one of Clinton's strongest bases of support.

This well of Black support was again on display following Clinton's departure from the White House. After he faced heated criticism about his first choice in office space—a mid-town Manhattan office that rented for almost \$1 million annually—Clinton opted to move uptown, to Harlem.¹²² On the heels of this, his granting of an executive pardon and clemency in several controversial cases was heavily criticized.¹²³ As before, his Black support base remained steadfast. In a further twist, in October 2002, Clinton was inducted into the Arkansas Black Hall of Fame. Clinton was its first and only White inductee.¹²⁴

119. Toni Morrison, *The Talk of the Town*, THE NEW YORKER, Oct. 5, 1998, at 31, 32.

120. Peter Baker & John F. Harris, *Clinton Admits to Lewinsky Relationship, Challenges Starr to End Personal "Prying,"* WASH. POST, Aug. 18, 1998, at A1.

121. See Ceci Connolly & Robert E. Pierre, *Clinton's Strongest Constituency: To African Americans, President's Record Outweighs Personal Problems,* WASH. POST, Sept. 17, 1998, at A1.

122. John F. Harris, *Clinton Seeking Harlem Offices; Rent Flap Prompts A Shift Uptown,* WASH. POST, Feb. 13, 2001, at A1.

123. *Id.*

124. Darryl Fears, *Bill Clinton, Soul Brother? Honor Raises Some Eyebrows,* WASH. POST, Oct. 19, 2002, at C1.

5. *Jesse Jackson*. Reverend Jesse Jackson has been an active civil rights leader for more than four decades. He has held a variety of posts, including a brief term as shadow-senator in the District of Columbia,¹²⁵ peace-keeper, presidential advisor, hostage negotiator, corporate diversity broker, boycott leader, and head of Rainbow/PUSH and the Citizenship Education Fund (CEF). In January 2001, Jackson, a married father of five, admitted fathering a child with a mistress.¹²⁶ The story, which first appeared in the *National Enquirer*, was widely reported by the tabloids and mainstream press.¹²⁷ The mother of Jackson's two-year-old love child, Karin Stanford, had been a Rainbow/PUSH consultant and had authored a biography of Jackson.¹²⁸

The story triggered intense media interest. Jackson held press conferences to respond to the charges.¹²⁹ Based upon information that was subsequently released, the CEF's financial management became an issue. Stanford's receipt of \$40,000—to re-locate from Washington D.C. to California—was also criticized.¹³⁰ During this period, Jackson maintained a high profile within the Black community, including a well-timed, very late arrival to a nationally-televised panel on the State of Black America, hosted by Tavis Smiley. The crowd gave him a rousing, minutes-long, standing ovation. Polls indicate that support for Jackson remained strong within the Black community.¹³¹ This allegiance may be partly attributable to the timing of the press reports. On January 20, 2001, Jackson was sched-

125. George W. Grayson, *Casting D.C.'s Shadows: Statehood-Seeking "Senators" Are as Old as the Republic*, WASH. POST, Nov. 11, 1990, at B5.

126. See Press Release, Jesse Jackson, Statement of Rev. Jesse Jackson (Jan. 17, 2001), at <http://www.rainbowpush.org/pressreleases/2001/011701.htm> (last visited Feb. 28, 2005) (on file with author).

127. Patricia Sharp & Michael Hanrahan, *Jesse Jackson's Love Child*, NAT'L ENQUIRER, Jan. 30, 2001, at 17.

128. Hector Tobar & Eric Slater, *Sadness, Cries of Hypocrisy Greet Jackson's Disclosure About Child*, L. A. TIMES, Jan. 19, 2001, at A1.

129. See *id.*

130. *Id.*

131. A January 24-25, 2001 Fox News/Opinion Dynamics Poll reported that sixty-three percent of Blacks surveyed held a "favorable" opinion of Jesse Jackson, compared with twenty-four percent of Whites. See RUSSELL-BROWN, *supra* note 1, at 155 n. 13.

uled to lead a national rally in Tallahassee, Florida.¹³² The march was designed to draw attention to the 2000 Florida election scandal and to protest the presidential inauguration of George W. Bush.¹³³ Two days before the scheduled forum, the Jackson story broke.

In 2000, there was a noteworthy alliance between Reynolds, Clinton, and Jackson. Reynolds, who served two-and-a-half years of his sentence, was released in 2000, following a commutation by Bill Clinton.¹³⁴ Jackson's Rainbow/PUSH organization subsequently hired Reynolds as a consultant on prison reform.¹³⁵

6. *John Street*. On October 7, 2003, wiretap devices were found in the office of Philadelphia's mayor, John Street.¹³⁶ At this time, Street, a Democrat, was waging a re-election campaign against Tom Katz, a Republican. The Philadelphia police discovered them while conducting a routine electronic sweep of the Mayor's city hall office. Because the FBI was tight-lipped about the cause of the investigation, it was initially unclear whether Street, who is African-American, was the target of the probe. After almost two weeks of wide-spread speculation, a federal official indicated that Mayor Street was not the central focus of the search.¹³⁷ Specifically, the federal authorities were investigating municipal contracts.¹³⁸ The FBI stated that no

132. See Tobar & Slater, *supra* note 128.

133. See *Jesse Jackson Admits Affair, Illegitimate Child: Civil Rights Leader Acknowledges Fathering a Child Out of Wedlock*, ABC News (Jan. 18, 2001) available at <http://abcnews.go.com/Politics/story?id=122032&page=1> (last visited Feb. 28, 2005).

134. See Dorning, *supra* note 114.

135. See *Ex-Congressman Employed*, MILWAUKEE J. SENTINEL, Jan. 30, 2001, at 4A.

136. See *Philadelphia's Mayor's Records Subpoenaed*, N.Y. TIMES, Oct. 19, 2003, at A30.

137. Josh Getlin, *A Bug Worsens the Fever Pitch of Politics in Philadelphia*, L. A. TIMES, Oct. 12, 2003, at A20 (reporting that Street was a "subject" of the investigation but not a target).

138. See Lynette Clemetson, *Mayor Turns U.S. Inquiry to Campaign Advantage: Embattled Philadelphian Becomes Folk Hero*, N. Y. TIMES, Oct. 31, 2003, at A12.

incriminating evidence against Street was found in the undercover investigation.¹³⁹

In addition to the concerns raised about the wiretapping, the tactics used by Katz were also questioned by African-Americans.¹⁴⁰ Less than two weeks prior to the election, African-American support for the Philadelphia mayor rose from seventy percent to eighty-four percent.¹⁴¹ Ultimately, Street won re-election by a sixty-to-forty margin.

Notably, Street himself sounded the call for Black protectionism. He suggested that the FBI investigation was part of a racially-motivated plot to take down the Black mayor of a large city.¹⁴² Discussing the wiretaps, Street commented, "There are some people, particularly in the African American community, who believe that this is too much of a coincidence to be a coincidence."¹⁴³

Based on the above discussion, it appears that Black protectionism is readily granted to politicians. Each of the politicians, all men, benefited from racial protectionism.

139. *Id.* ("The federal authorities . . . have indicated that the listening device showed no incriminating evidence against Mr. Street."); see also Debbie Goldberg, *Corruption Probe Roils Philadelphia Election: Racial Focus of Mayoral Clash Sharpened*, WASH. POST, Oct. 25, 2003, at A3.

140. A campaign mailer sent by the Republican City Committee to voters in a conservative, mostly White neighborhood, urged them to "take back the city" from Mayor Street. Some suggested that this was a call to Whites to take back the mayor's office. See Tom Barnes, *Phil. Eyes a Bizarre Race*, PITTSBURGH POST-GAZETTE, Oct. 19, 2003, at C1. In response, one democratic insider asked, "Take it back from whom? From African-Americans, obviously." *Id.* At a debate between Mayor Street and Katz, some of Street's supporter carried a sign that read "Ku Klux Katz." Goldberg, *supra* note 139.

141. Goldberg, *supra* note 139. It is likely that the wiretapping of Street's office was not viewed as an isolated event. Wiretapping has been used in other instances to quell Black political voices—from FBI wiretaps of Martin Luther King to the sting operation against Marion Barry. See Christopher Grimes & Kamau High, *Wiretaps Stir Black Voters in Philadelphia Mayoral Poll*, FIN. TIMES, Nov. 4, 2003, at 2, available at <http://www.factiva.com>. This also ties to the history of silencing the Black vote, including the 2000 presidential election in which many Black votes were not counted. At an October 2003 fundraiser held for Mayor Street, Bill Cosby commented that the investigation was reminiscent of "what has been happening since Florida." Clemetson, *supra* note 138.

142. See Goldberg, *supra* note 139.

143. *Id.*

The next section, however, raises questions about whether Black protectionism applies to Black women.

B. *Black Women*

Only a handful of Black women have been eligible for Black protectionism. None have received it. This raises the question of whether Black protectionism is available to Black women or solely the province of Black men. The fact that few Black women have been eligible for its protection may simply mirror national trends, which indicate that women have relatively low rates of involvement in the criminal justice system. What follows is a discussion of four Black women who might have benefited from Black protectionism, Carol Moseley-Braun, Alexis Herman, Lani Guinier, and Joycelyn Elders.¹⁴⁴

1. *Carol Moseley-Braun*. In 1992, Moseley-Braun became the first elected Black woman senator. During her tenure, she faced allegations that she had used campaign funds for personal expenses, ignored claims that her campaign manager was mishandling affairs, and was criticized for maintaining an alliance with a Nigerian dictator, General Sani Abacha.¹⁴⁵ Ultimately, there was no finding of criminal wrongdoing against Moseley-Braun.¹⁴⁶ Ironically, Moseley-Braun, elected in the aftermath of the Clarence Thomas hearings, did not benefit from the same protectionism he had received. In 1998, she lost her re-election bid, in 1999 she was appointed United States Ambassador to Samoa and New Zealand, and in 2003 she entered the 2004 presidential race.

144. Hazel O'Leary, former Energy Secretary during the first Clinton administration, is not discussed separately here. The later case, involving Alexis Herman, another Cabinet official, raises similar concerns and was treated in a similar fashion.

145. See, e.g., Monica Davey, *In Seeking Presidency, Braun Could Win Back Reputation*, N.Y. TIMES, Dec. 18, 2003, at A40.

146. The Federal Election Commission conducted an audit on spending for her 1992 campaign. No fines, however, were assessed against Moseley-Braun. *Id.*

2. *Alexis Herman*. In 1998, Alexis Herman, Secretary of Labor, faced allegations of bribery. Specifically, she was accused of having accepted \$250,000 in illegal campaign contributions.¹⁴⁷ A special prosecutor was appointed and after a two-year investigation, Herman was cleared of all charges.¹⁴⁸ As was the case for Moseley-Braun, the Black community appeared to take little note of these charges—not enough to cause pollsters to track their reaction.

3. *Lani Guinier & Joycelyn Elders*. The incidents involving Lani Guinier and Joycelyn Elders are different from those involving Moseley-Braun and Herman. Neither case involved a charge of criminal or unethical conduct (Chart 1 above). These cases are noteworthy, however, because at the time of the charges, both women were in or nominated for high-profile posts and were accused of wrongdoing.

In 1993, Bill Clinton nominated Guinier to head the civil rights division of the United States Attorney General's office. Conservatives rallied to oppose her nomination. Guinier, then a University of Pennsylvania law professor, was portrayed as a left-wing kook, a quota queen with "a strange name, strange hair, and strange writings."¹⁴⁹ On the brink of her confirmation hearing, Clinton withdrew her name.¹⁵⁰ He said that after reviewing her legal scholarship he could not support her nomination.¹⁵¹ There was very little response from the Black community. Perhaps because the controversy involved legal analysis and because Guinier was accused not of a crime, but rather "inappropriate" writings, support for her was less than forthcoming. Guinier,

147. Robert Suro, *Reno Seeks Outside Prosecutor for Herman*, WASH. POST, May 12, 1998, at A1.

148. David A. Vise, *Labor Secretary Cleared*, WASH. POST, Apr. 6, 2000, at A1.

149. See, e.g., Kate Hann, *Three Penn experts explore the ways politics and the press affects each other*, Office of University Communications (Univ. of Penn.) (May 26, 1994), available at <http://www.upenn.edu/pennnews/current/features/1994/052694/press-forum.html> (last visited Mar. 5, 2005).

150. Lani Guinier, *Who's Afraid of Lani Guinier?*, N.Y. TIMES MAG., Feb. 27, 1994, at 40.

151. *Id.* at 43 (noting that Clinton refers to Guinier's ideas as "anti-democratic" and "difficult to defend").

who now teaches at Harvard, is the first woman of color to receive tenure at the law school.¹⁵²

Similarly, Joycelyn Elders's forced resignation from her post as United States Surgeon General did little to trigger Black interest or protest. Elders served as Surgeon General from 1993 to 1994.¹⁵³ During her tenure, she made several frank remarks indicating her support for needle exchange programs, equal access to abortion, and the legalization of drugs.¹⁵⁴ It was Elder's comments on sex education in grade school, however, that resulted in her dismissal. In response to a psychologist's question about whether she would promote masturbation to discourage school children from riskier forms of sexual activity, she stated, "I think that is something that is a part of human sexuality and a part of something that perhaps should be taught."¹⁵⁵ A few days later, Clinton asked for Elder's resignation.¹⁵⁶

As noted, there was relatively little public comment on the cases involving Moseley-Braun, Herman, Guinier, or Elders. This is especially noteworthy in Herman's case since she was charged with serious criminal conduct. Also, it is ironic that Elders received little vocal support from the African-American community, considering that the focus of her work was on reducing the Black community's high rates of sexually-transmitted diseases, particularly HIV/AIDS. Though neither the Guinier nor Elders cases involved a charge of misconduct—a common trigger for Black protectionism—both cases fell below the Black community's radar. In fact, there is no national poll information on the general public's reaction to any of these controversies. The muted community response to these four cases may be ex-

152. Ethan Bronner, *Lani Guinier Joins Faculty of Law School at Harvard*, N.Y. TIMES, Jan. 24, 1998, at A12.

153. Biography of M. Joycelyn Elders, U.S. Dept. of Health and Human Servs., at <http://www.surgeongeneral.gov/library/history/bioelders.htm> (last visited Mar. 5, 2005).

154. Douglas Jehl, *Surgeon General Forced to Resign by White House*, N.Y. TIMES, Dec. 10, 1994, at A1.

155. Leigh Hopper, *Can't Put the Genie Back: Past Controversies Don't Daunt Jocelyn Elders, Who Speaks Here Today*, HOUST. CHRON., Dec. 1, 2000, at A37.

156. Jehl, *supra* note 154.

plained by the fact that each of these was treated as dismissible political scandals.

There is another possible interpretation of the Black community's lack of interest in these cases, compared with its response to Jackson, Barry, Reynolds, and Clinton. It may be that in order to earn the cloak of Black protectionism you must pay your "race dues." When viewed along with the male politicians, Moseley-Braun, Herman, Guinier, and Elders, at the time they faced allegations of misconduct, had comparatively little name recognition. More to the point, they were not widely known as civil rights leaders. Though Guinier has a long history of legal activism in the struggle for civil rights, her work was not well known outside of legal circles. To test this "race dues" hypothesis, there would need to be a case involving a Black woman whose civil rights track record was known and respected, someone such as civil rights veteran and Congresswoman Maxine Waters. The Black community's response to a criminal charge against Waters would be an ideal test of the role of gender in the working of Black protectionism. If Black protectionism did not extend to someone such as Waters, sexism would be a plausible explanation and a limitation of Black protectionism.

Regarding Guinier and Elders, it is also possible that their cases involved a test of competing allegiances. Clinton, who arguably is viewed as an honorary Black by many African-Americans,¹⁵⁷ was the person responsible for Guinier's withdrawal and Elders's resignation. It may be that when forced to choose, Blacks extend protectionism to the person perceived as having the most racial seniority or recognition.

157. See generally *supra* notes 117-25.

C. *Sexual Assault Cases*¹⁵⁸

1. *Clarence Thomas & Anita Hill*.¹⁵⁹ In July 1991, President George H.W. Bush nominated Clarence Thomas to fill the vacancy on the United States Supreme Court created by Justice Thurgood Marshall's retirement.¹⁶⁰ Questions were raised within the civil rights and Black communities as to whether Thomas was a worthy choice to succeed Marshall, the first African-American Supreme Court Justice. The Black community was split in its response to the Thomas nomination. The N.A.A.C.P. waited one month before issuing a statement, saying that it was "with regret" that the organization could not support Thomas.¹⁶¹ The Congres-

158. For analyses of how Black women are treated following allegations of rape and sexual assault, see Marilyn Yarbrough, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625 (2000); Lisa A. Crooms, *Speaking Partial Truths and Preserving Power: Deconstructing White Supremacy, Patriarchy, and the Rape Corroboration Rule in the Interest of Black Liberation*, 40 HOW. L.J. 459 (1997).

159. See *supra* note 34 and accompanying text for additional discussion of the Thomas nomination and the Black reaction.

160. President George H.W. Bush nominated Thomas on July 1, 1991. Referring to Thomas, Bush said, "I believe he'll be a great justice . . . The fact that he is [B]lack and a minority has nothing to do with this in the sense that he is the best qualified at this time." John Mashek & Ethan Bronner, *Thomas a conservative, nominated to high court; Confirmation fight expected*, B. GLOBE, July 2, 1991, at 1.

161. COURT OF APPEAL: THE BLACK COMMUNITY SPEAKS OUT ON THE RACIAL AND SEXUAL POLITICS OF CLARENCE THOMAS VS. ANITA HILL 269 (Robert Chrisman & Robert L. Allen eds., 1992). On July 31, 1991, the N.A.A.C.P.'s Board of Directors voted 49-1 to oppose Thomas. In a prepared statement, then-Board Chairman William F. Gibson declared:

The nomination...brought with it a special set of problems related to his record in several government positions—most notably as Chairman of the [E.E.O.C.], and his reactionary philosophical approach to a number of critical issues, not the least of which is affirmative action. . . . Mr. Thomas is an African-American and that fact was not ignored in our deliberations. While we feel strongly the seat should go to an African-American, we looked beyond that factor. . . . In the final analysis . . . Thomas's judicial philosophy is simply inconsistent with the historical positions taken by the NAACP.

Id. at 270. The N.A.A.C.P.'s response to Ronald Reagan's nomination of Robert Bork to the Supreme Court provides a contrast to the Thomas case. The day following the nomination, Benjamin Hooks, N.A.A.C.P. Executive Director spoke out against Bork, stating that his nomination would "jeopardize the civil-

sional Black Caucus, in a symbolic action, voted 19-1 against the nomination.¹⁶² In contrast, the Urban League¹⁶³ and the Nation of Islam offered support for Thomas.¹⁶⁴

Among the Black grass roots, however, the Thomas nomination continued to gain momentum.¹⁶⁵ Support for Thomas rose dramatically once Anita Hill's allegation of sexual assault was made public.¹⁶⁶ In September of 1991,

rights achievements of the past 30 years." Lou Cannon & Edward Walsh, *Reagan Nominates Appeals Judge Bork to Supreme Court*, WASH. POST, July 2, 1987, at A1. William Coleman, former N.A.A.C.P. Board Chairman, wrote an editorial for the *New York Times* opposing Bork's nomination. William T. Coleman Jr., *Why Judge Bork is Unacceptable*, N.Y. TIMES, Sept. 15, 1987, at A35. In effect, the N.A.A.C.P.'s muted response to Thomas is an example of Black protectionism.

162. See, e.g., Richard L. Berke, *Black Caucus Votes to Oppose Thomas for High Court Seat*, N.Y. TIMES, July 12, 1991, at A1 (noting that the vote was "the first official act of opposition from a Black group," that House members do not have a vote in Supreme Court confirmation hearings, and that six members abstained).

163. COURT OF APPEAL, *supra* note 161, at 286 (reprinting a statement by the Urban League: "We are hopeful that Judge Thomas's background of poverty and minority status will lead him to greater identification with those in America who today are victimized by poverty and discrimination.").

164. See, e.g., WEST, *supra* note 105, at 27.

165. Notably, mainstream Black leadership was slow to take a public stand on the Thomas nomination. As noted, the first Black group to oppose Thomas (the Congressional Black Caucus) did not make its position known until two weeks after the nomination. See Berke, *supra* note 162. It is possible that an earlier, more vigorous opposition by Black groups might have tempered Black support for Thomas.

166. Gallup poll data taken between August and October of 1991 report the following race-based levels of support for Clarence Thomas's nomination to the United States Supreme Court:

	August 14, 1991	October 15, 1991*
Blacks	56%	69%
Whites	57%	57%

*Taken following disclosure of Anita Hill's allegations of sexual harassment.

GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1991*, at 170, 209 (1992); see also Louis Harris, *Thomas Tacks Work: Coalition of Blacks and Conservatives, Offsets Losses Among Women*, THE HARRIS POLL, Oct. 15, 1991

the press learned of her disclosures to the F.B.I. during its background check on Thomas. Hill, who had worked for Thomas twelve years earlier, alleged that he had routinely subjected her to crude, sexually-explicit remarks, and lewd behaviors. Hill was portrayed as a scorned woman, a woman in search of her fifteen minutes of fame on the back of a Black man, as a wild-eyed feminist suffering from delusional sexual fantasies ("erotomania"¹⁶⁷), and as a Black woman who was angry that her ex-lover, Thomas, had chosen to marry a White woman.¹⁶⁸ In October of 1991, Thomas was confirmed in a deeply divided Senate vote.¹⁶⁹

2. *Mike Tyson & Desiree Washington.* In 1992, Mike Tyson was charged with sexually assaulting Desiree Washington, an eighteen-year-old college student.¹⁷⁰ Tyson met Washington during rehearsals for a beauty pageant. Washington was a contestant, Tyson a judge. Tyson called her later that evening and they agreed to meet. Washington went to Tyson's hotel room after midnight and, according to

("By claiming that he was the victim of an organized effort to depict him as a stereotype of black male sexual excesses and that the hearings were directed at him because of his race, Thomas was able to increase black support for him from 58-34 to 65-32.").

167. The National Library of Medicine describes erotomania as "a rare disorder in which an individual has a delusional belief that a person of higher social status falls in love and makes amorous advances toward him [or] her." *Erotomania Revisited: Clinical Course and Treatment*, The National Library of Medicine, available at http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=pubmed&dopt=Abstract&list_uids=11788912 (last visited Mar. 5, 2005).

168. None of these theories has been established as fact in the fourteen years since the hearings. Interestingly, Thomas was also subject to a distinct, classical public framing. For an insightful analysis of how Clarence Thomas was presented to the public, see Toni Morrison, *Introduction: Friday on the Potomac in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* vii-xxx (Toni Morrison ed., 1992) (discussing how news reports and media discussions focused on Thomas's body and physicality).

169. The vote was fifty-two to forty-eight. For a thorough discussion and analysis of the Thomas case, see generally, *id.* at 305; see also JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 347-48 (1994).

170. E.R. Shipp, *Final Pleas, Then Sentencing for Tyson*, N.Y. TIMES, Mar. 26, 1992, at B18.

Washington, he raped her. Tyson was charged and convicted of rape and he served three years in prison.¹⁷¹

Throughout the case, the Black community roundly denounced Washington. She was either blamed for her extreme naïvete (e.g., “What, besides sex, would a grown man want from a woman in the middle of the night?”) or labeled a scheming gold-digger, who planned to lure the boxing champ into a sexual encounter, have sex, “cry rape,” and then cash in.¹⁷² Washington’s assertion that she had no ulterior motives, that she was thrilled to meet Tyson, who was one of her father’s sports heroes, fell on deaf ears.

As the trigger questions predict (Table 1), many Blacks considered whether Tyson faced a double standard. During the same period that Tyson was charged with rape, William Kennedy Smith was acquitted of rape.¹⁷³ Smith, the nephew of John F. Kennedy, to-the-manor-born, and White, stood in stark contrast to Tyson, who had no elite pedigree, was Black, and was convicted of rape. The din of support for Tyson all but drowned out voices of dissent. For example, following a “welcome home” parade for Tyson (after his release from prison) several Black community activists staged a counter protest.¹⁷⁴

In both the Thomas and Tyson cases, the Black woman accuser was not as well known as the Black man. Until the allegations surfaced, most people had heard of neither Washington nor Hill. Therefore, neither Washington nor Hill had a “national reputation or credibility as a racial spokesperson” (Chart 1). It is notable, however, that Thomas was not well-known at the time he was nominated to the Supreme Court. By the time Hill’s allegations surfaced, however, Thomas had a “national reputation,” suffi-

171. William Gildea, *Tyson is Released from Prison*, WASH. POST, Mar. 26, 1995, at D1.

172. See, e.g., *FALLEN CHAMP: THE UNTOLD STORY OF MIKE TYSON* (Columbia/Tristar Studios 1993) (documentary directed by Barbara Kopple). One scene shows Nation of Islam leader, Minister Louis Farrakhan, at a pro-Tyson rally. Alluding to Desiree Washington, he lectures women on the “damned deceitful games you play.” *Id.*

173. See David Margolick, *Smith Acquitted of Rape Charge After Brief Deliberation by Jury*, N.Y. TIMES, Dec. 12, 1991, at A1.

174. For a discussion of the Black community’s conflicted response to Tyson, see Clarence Page, *Hey Give Him a Break*, BALT. SUN, June 27, 1995, at 11A.

cient to trigger Black protectionism. It appears that whoever qualifies first for Black protectionism "wins." Thus, Thomas was the first to stake a claim to the Black community's loyalty, so even if it wanted to support Hill, the community had already committed to Thomas.

A second, more complicated issue raised by the Thomas and Tyson cases is whether race trumps gender. More to the point, a compelling case can be made that within the Black community issues of gender take a back seat to issues of race. For example, where a Black man faces allegations of wrongdoing, within-race gender issues are dismissed as trifling, inside skirmishes. Neither of these cases offers a complete test of the affect of gender on Black protectionism. It remains to be seen how the Black community would respond to a case involving a Black man who accuses a famous Black woman of criminal conduct, or one involving a famous Black woman who accuses a Black man with criminal conduct.¹⁷⁵

3. *R. Kelly*. The child pornography case involving hip-hop crooner R. Kelly raises some interesting issues about the application of Black protectionism. In 2002, Kelly faced a twenty-one-count criminal indictment.¹⁷⁶ One of the allegations was second degree rape, specifically, engaging in sexual intercourse with a girl under the age of fourteen. Kelly, a married thirty-four-year-old father of three, denied all charges.¹⁷⁷ The crown jewel of the prosecution's case was a thirty-minute videotape of the alleged unlawful sexual activity. Underground copies of the video were sold on the street and circulated over the Internet.

Three aspects of the Kelly case deserve mention. First, there was a videotape. In this way, the case is comparable

175. See *supra* notes 144-57 (discussing Black women and Black protectionism).

176. See Geoff Boucher, *Singer Kelly Arrested, Held on 21 Charges*, L.A. TIMES, June 6, 2002, at A13.

177. In response to the charges, Kelly released the song, *Heaven I Need a Hug*, which includes the following lyrics: "I gave 13 years of my life to this industry/ Hit song or not, I've given all of me/ You smile in my face and tell me you love me/ But then before you know the truth/ You're so quick to judge me/ Heaven I need a hug." Jenee Osterheldt, *Does Thug Deserve a Hug? R. Kelly Fans, Peers Unsure*, MILWAUKEE J. SENTINEL, July 28, 2002, at 8B.

to the Barry case. Relative to Marion Barry, Kelly received far less support from African-Americans.¹⁷⁸ There appeared to be a split in the Black community as to whether Kelly's personal issues should affect his career. What explains the apparently less-than-full cloak of protectionism? Many concluded that the government overreached in its attempt to bring him down. By contrast, in Kelly's case, there was no evidence or speculation that the government was "out to get him."

Second, it is likely that the two crimes involved are viewed in very different lights. Many may dismiss drug use as a "victimless" crime. However, sex between an adult and a minor is viewed by most as not only unlawful, but as immoral.

Third, unlike Barry and others who have benefited from Black protectionism, Kelly does not have the same public reservoir of good will. It is likely that what little the public knew about his personal life did not work in his favor. When Kelly was twenty-five, he married then fifteen-year-old singer Aaliyah. Also, throughout his career Kelly has faced allegations that he engaged in sex with underage girls.¹⁷⁹ And, his lust-laden lyrics themselves lend tacit support to the sex-related charges. However, in what could be viewed as two public votes of confidence, Kelly's album, "Chocolate Factory," released in 2003, debuted at number one on the Billboard Chart¹⁸⁰ and, in 2004, Kelly was nominated for an N.A.A.C.P. Image Award.¹⁸¹

4. *Kobe Bryant*. In July 2003, NBA superstar Kobe Bryant was charged with sexual assault. Bryant, who is Black, was accused of raping a nineteen-year-old White ho-

178. See *supra* notes 176-77.

179. Geoff Boucher, *supra* note 176.

180. *The Chart Toppers*, BILLBOARD, Dec. 27, 2003, at 47.

181. Amidst controversy over the nomination, the N.A.A.C.P. changed its nomination process to include a "morals clause" for future Image Award nominees. See *Black Conservatives Commend NAACP for Reversing Position and Considering Morals Clause for Future "Image Award" Nominees: Criticism of Controversial R. Kelly Nomination Catalyst for Positive Change*, Press Release, The National Leadership Network of Conservative African-Americans (Mar. 8, 2004), at <http://www.nationalcenter.org/P21PRNAACPIImage304.html> (last visited Mar. 5, 2005).

tel clerk, in Eagle County, Colorado. After initially denying any sexual contact with the woman, Bryant, who is married, admitted to having sex, saying it was consensual. Bryant, a beloved athlete, benefited from his image as a family man. Though both Blacks and Whites have voiced support for him, the Black community's support has been strongest. An August 2003 poll reported that two-thirds of the Blacks surveyed said they were "very" or "somewhat" sympathetic toward Bryant.¹⁸² This compares with forty percent of the Whites who participated in the survey. Both historical and case-related facts have placed the issue of race at the fore.¹⁸³ Some observers, for instance, have pointed to the history of false rape charges made against Black men by White women, including the Scottsboro Boys case and the Rosewood massacre.¹⁸⁴ Some have suggested that Bryant was "set up."¹⁸⁵ Adding to this mix, the National Alliance, a White supremacist group, distributed fliers warned, "Don't have sex with blacks."¹⁸⁶ And, the Eagle County Sheriff's Department ordered "anti-Kobe" t-shirts. One style of the shirt has a small hang man on the front and on the back, Bryant's jersey number and says "I'm not a rapist: I'm just a cheater."¹⁸⁷ Bryant played in the

182. Patrick O'Driscoll & Tom Kenworthy, *Whites, Blacks See Bryant Case Differently*, USA TODAY, Aug. 7, 2003, at 3A.

183. See, e.g., Deborah Kong, *Many see Bryant case through race filter*, ASSOCIATED PRESS, Aug. 30, 2003, available at <http://www.dfw.com/mld/dfw/news/nation/6657478.htm> (last visited Mar. 5, 2005).

184. See, e.g., RANDALL KENNEDY, RACE, CRIME, AND THE LAW, 100-04 (1997) (detailing the "Scottsboro Boys" case and the related United States Supreme Court case, *Powell v. Alabama*, 287 U.S. 45 (1932)). The 1923 racial massacre of the all-Black Rosewood, Florida town was sparked by a false allegation that a Black man had sexually assaulted a Black woman. *Id.*

185. See generally Ron Stodghill, *Crime, Punishment and Race*, SAVOY, Oct. 2003, at 16.

186. See, e.g., *Racist Fliers in Kobe Trial Town* (Aug. 13, 2003), available at www.cbsnews.com/stories/2003/07/30/national/main565762.shtml (last visited Mar. 5, 2005); Nancy Lofholm, *Colo. Sparks Racists' Interest*, DENV. POST, Nov. 3, 2003, at B1.

187. See *Kobe T-Shirts Cause Stink in Eagle County* (Nov. 5, 2003), at <http://www.foxnews.com/story/0,2933,102252,00.html> (last visited Mar. 5, 2005). The second style features a back which reads, "First Class Plane Ticket: \$600; Hotel room; \$5,000; Surgery: \$25,000; Not Bringing Your Wife to Colorado With You: Priceless." Craig Silverman, *Craig's Court: A Tale Of Two Shirts* (Dec. 8,

2003-2004 basketball season to crowd cheers and jeers. In January of 2004, McDonald's declined to renew Bryant's endorsement contract. In 2004, the criminal charges against Bryant were dropped after the victim declined to testify. The parties later agreed on a civil settlement.

5. *Michael Jackson*. In November 2003, news reports stated that there had been a seventy-person raid and search of Michael Jackson's home and an arrest warrant issued. Within days, Jackson arrived in Santa Barbara and was arrested; his bail was set at three million dollars. The forty-five-year-old star was charged with multiple counts of child molestation. Jackson's case went to trial in early 2005.

Jackson, who faced similar charges in 1993,¹⁸⁸ received wide-ranging support from the Black community.¹⁸⁹ A December 2003 poll indicates that fifty-four percent of Blacks who were surveyed had a "favorable" opinion of Jackson, compared with fourteen percent of Whites.¹⁹⁰ Black support mounted in his case as the prosecutors

2003), at <http://www.thedenverchannel.com/kobebryanttrial/2692570/detail.html> (last visited Mar. 5, 2005).

188. Jim Newton & Carla Hall, *Jackson Denies Molestation, Tells of "Horri-fying" Search*, L.A. TIMES, Dec. 23, 1993, at A1.

189. See, e.g., *Jackson Maintains Support of Black Fans* (Nov. 28, 2003), at <http://edition.cnn.com/2003/SHOWBIZ/Music/11/28/michaeljackson.blacks.ap> (last visited Mar. 5, 2005) (quoting Jesse Jackson as saying that the arrest was so "impeccably timed (it occurred the same week as the release of Jackson's new C.D.) that it leads to even more suspicions. . . . It seems aimed to destroy this media mogul"); Nekesa Mumbi Moody, *Despite Transformation, Jackson Has Black Support*, OAKLAND TRIB., Nov. 28, 2003, at A12 (quoting several African-Americans in support of Jackson); Corey Moss, *Alicia Keys, LL Cool J, Ludacris Denounce Treatment of Jackson* (Nov. 21, 2003), at http://www.vh1.com/news/articles/1480610/11212003/jackson_michael.jhtml (last visited Mar. 5, 2005) (quoting several Black celebrities who believe Jackson was treated unfairly). Rapper LL Cool J said "Until I see some evidence that says he's guilty, I support him publicly. . . . I don't think that plastic surgery means you're a pedophile"). *Id.* Some African-Americans, however, have been less sympathetic. See, e.g., Aaron McGruder, *Boondocks* (cartoon) OAKLAND TRIB., Dec. 13, 2003, at 9 (Panel 1: An old Black man watching television says "Oh, here we go again with these crazy Michael Jackson allegations—LEAVE MICHAEL ALONE; Panel 2: The old Black man continues to stare at the television set; Panel 3: Still staring at the television set, the old man says, "I mean, after you throw his crazy butt in jail, of course.").

190. Cesar G. Soriano, *Jackson Gets Boost in New Opinion Poll*, USA TODAY, Dec. 16, 2003, at 3D.

delayed filing formal charges against Jackson.¹⁹¹ As well, a February 2003 report by the Children and Family Services office indicated that child abuse charges were unfounded.¹⁹² Additionally, comparisons were made between the bail set for Jackson and the bail set for record producer Phil Spector, who had been charged with murder.¹⁹³

Jackson and his family denied the charges and claimed they were part of an extortion-revenge plot. In an interview with Barbara Walters, older brother Jermaine Jackson stated that race played a role in the charges: "They're a bunch of racist rednecks out there who don't care about people."¹⁹⁴ He also stressed the need to consider the history of how Blacks have been treated in this country.

D. Athletes

The way the Black community has responded to athletes in trouble presents a more complex application of Black protectionism. As noted above, athletes—such as O.J. Simpson, Kobe Bryant, and Mike Tyson—have received Black protectionism's shield.¹⁹⁵ Others, however, have elicited little more than a shrug. In recent years, there have been numerous criminal cases involving Black athletes. Few, however, have sparked national interest and a closing of Black ranks. It may be that, overall, there are low

191. John M. Broder, *Absence of Formal Charges Against Michael Jackson May Point to a Weakening of the Case*, N.Y. TIMES, Dec. 4, 2003, at A22. Charges were eventually filed on December 18, 2003.

192. A memo from the Los Angeles County Department of Children and Family Services indicated that a joint investigation with the L.A.P.D. found no proof of molestation. The investigation of the boy's relationship with Michael Jackson was conducted between February 14 and February 27, 2003. Child welfare officials said the allegations against Jackson were "unfounded." See, e.g., John M. Broder, *Jackson is Formally Charged With Child Molesting*, N.Y. TIMES, Dec. 19, 2003, at A24; Charlie LeDuff, *Official Memo on Jackson Casts Doubt on Charges*, N.Y. TIMES, Dec. 10, 2003, at A24.

193. In 2003, Phil Spector, a well-known White record producer, was charged with murder. His bail was set at one million dollars, while Michael Jackson's was set at three million dollars. See, e.g., *Jackson Maintains Support of Black Fans*, *supra* note 189.

194. *Jermaine Jackson: "This Is Extortion": King of Pop's Brother Says Jackson Family Is "Ready for War"* (Nov. 21, 2003), at <http://abcnews.go.com/2020/story?id=124358&page=1> (last visited Mar. 5, 2005).

195. See *supra* notes 91, 174, 182-83.

expectations for Black athletes. This may explain the muted response to homicide cases involving ex-NFL player Rae Carruth, formerly with the Carolina Panthers, NFL star Ray Lewis of the Baltimore Ravens, and Jayson Williams, formerly with the New Jersey Nets.¹⁹⁶ In these cases there was no knee-jerk Black protectionism; instead, the community took a wait-and-see response. These cases suggest that Black protectionism is available on a more tailored basis for athletes.¹⁹⁷

This section has considered the myriad applications of Black protectionism. The emerging picture shows that Black protectionism is a wide-ranging, dynamic phenomenon. Its availability and application suggest some themes. First, it is triggered typically to shield Black men. There have been no known instances of its application to a Black woman. Second, protectionism works in direct relation to how the Black person is treated in the press. It is invoked as a stop gap to avoid “piling on.” Once the media begin to circle their wagons around a well-known Black man, protectionism works to stem the allegations. Third, its protection embraces Blacks in various positions, though many are tied to the civil rights community. Fourth, the seriousness of the

196. See, e.g., Michael Powell, *Two Sides of Ex-NBA Star Clash in Shooting Death*, WASH. POST, Mar. 1, 2002, at A1. For a critique of Williams’s actions, see Roy S. Johnson, *When Good Men Go Bad*, SAVOY, Aug. 2002, at 18.

197. Some groups are unable to access the cloak of racial protectionism. For instance, Black protectionism does not appear to be available to rappers. Most rappers who have been charged with criminal offending do not meet the minimum requirements necessary for Black protectionism. First, very few have achieved national recognition—a requirement for Black protectionism. The list of rappers who have mass recognition is a short one. It includes Sean “P.Diddy” Combs and Jay-Z. Combs presents an interesting case in that he is, arguably, more than a “rapper.” Combs, who owns his own music label, clothing line, and restaurant chain and donates large sums of money to charity, could be said to transcend the rapper label. See, e.g., Lola Ogunnaike, *Sweeten the Image, Hold the Bling-Bling*, N.Y. TIMES, Jan. 12, 2004, at E1. Second, for various reasons, it appears that many people have low expectations for rappers. More to the point, the public is not surprised when they get into legal trouble. This may reflect the widespread perception of an association between rap music and crime. For a detailed discussion of the relationship between gangsta rap and crime, see RUSSELL-BROWN, *supra* note 1, at 35-54. The Black community appears less concerned when a rapper is charged with criminal conduct, than when other celebrity members of its community are charged with criminal conduct. Some segments within the Black community, notably young fans of hip-hop music, however, are likely to rally behind rappers who are charged with crime.

allegations does not appear to determine the availability of Black protectionism. It has been applied in cases involving murder, rape, and child sexual abuse. Fifth, it applies across the political spectrum—from Clarence Thomas to Jesse Jackson to circumstances where one's politics are unknown (e.g., O.J. Simpson). The next section considers the value and cost of Black protectionism.

V. A CRITIQUE OF BLACK PROTECTIONISM

What is left to assess is the value and cost of practicing Black protectionism. An evaluation of how it applies provides an indication of not only how it works but how it *should* work—and, ultimately, how it can be effectively used as a civil rights strategy. This section considers the effects of this racial protectionism, positive and negative.

A. *Benefits of Black Protectionism*

Black protectionism has three interrelated benefits. First, it reinforces group solidarity. When applied, it provides common ground upon which Blacks can stand. Black protectionism allows for a show of group strength and unity at a time when the group is increasingly viewed as politically and socially diverse and, therefore, marginal.

Second, it operates as a socio-political statement. It states that while conditions may have improved for Blacks, they have not improved *that* much. Specifically, racial protectionism serves as a reminder that historical forms of racial discrimination—e.g., slavery, slave codes, lynching, Black codes, and Jim Crow—have contemporary manifestations, such as racial profiling and police brutality. Thus, Black protectionism acts as a counter-narrative to mainstream assessments of racial progress. At a time when the Black community is routinely and rhetorically asked whether race relations are better today than they were fifty years ago, Black protectionism loudly responds by saying that race relations still have a long way to go. In this way, it serves as a history lesson. Each case of Black protectionism provides an opportunity to discuss America's long history of anti-Black racism. Opportunities for such a general, public discussion of this history are few and far between.

Third, Black protectionism allows African-Americans to weigh and balance several factors before determining whether to provide support to a prominent African-American. The community can compare the cost of an individual's moral lapse (e.g., adultery, drug use) with the benefit of an individual's "good acts." This allows African-Americans to distinguish between what someone does in his public life and what someone does in his private life. Other considerations include the history of race relations and how Blacks fare in society today compared with Whites. Perhaps this cost-benefit approach is the result of the relatively small number of Black politicians and celebrities. Black protectionism offers a way to resurrect some African-Americans who get into trouble—it allows the Black elite to maintain its exalted status within the community.

Combined, the benefits of Black protectionism operate as both an internal force within the Black community, fostering group solidarity, and as an external force, sending a message to outsiders. It acts as a race relations barometer, an index of where the Black community and the White community are on issues of race and racism. For example, the need for Black protectionism reinforces itself each time a prominent Black is accused of wrongdoing and the White mainstream is perceived as being overzealous in its reaction (e.g., O.J. Simpson case) or applying a guilty-until-proven-innocent analysis (e.g., Marion Barry case).

B. *Costs of Black Protectionism*

While there are obvious benefits, there are several problematic aspects of Black protectionism as it is currently applied. These interrelated concerns include the fact that protectionism does not punish wrongdoing and does not factor in the potential recipient's political allegiance to the Black community. Another troubling feature is that it promotes the idea that the Black community has a single viewpoint and as such it promotes the practice of blind racial loyalty.

1. *Absence of Sanction for Wrongdoing.* The grant of Black protectionism appears to be unaffected by culpability. Even in those cases where it is undisputed that the person accused of wrongdoing did engage in misconduct, Black

protectionism may still operate. The Jesse Jackson and Marion Barry incidents, discussed above, are cases-in-point. When allegations surfaced that Jackson had fathered a child with his mistress, he issued a straightforward acknowledgment of paternity.¹⁹⁸ In Barry's case, his drug use was captured on videotape and authenticated by his reaction after the police stormed his hotel room: "[The] bitch set me up."¹⁹⁹ Arguably, one of the costs of Black protectionism is its failure to differentiate between those who have engaged in misconduct and those who have not. This is a cost because it ignores the fact that Black protectionism developed in part as a response to the routinely *false* criminal charges leveled against Blacks. It is also a cost because some people outside of the Black community view protectionism as a double-standard and are less likely to believe Black claims of racial bias, dismissing them as "crying wolf." Overlooking culpability is problematic, especially when there is no sanction for wrongdoing.²⁰⁰

Even when the allegations that prompted Black protectionism prove true, the Black community does not seek to impose any sanction against the person who benefits from Black protectionism.²⁰¹ There are several possible explanations for this. First, for some African-Americans, the harsh actions of government officials, such as police officers or prosecutors, mitigate, or excuse the accused person's offense. Second, there is a strong belief that what a person does in his private life should not be used to evaluate or mitigate his professional capabilities. This viewpoint was evident during the Marion Barry, Bill Clinton, and Jesse Jackson scandals. Third, for some, a Black person being publicly shamed and processed through the justice system

198. See Press Release, Jesse Jackson, *supra* note 126.

199. See, e.g., Tracy Thompson & Elsa Walsh, *Jurors View Videotape of Barry Drug Arrest*, WASH. POST, June 29, 1990, at A1.

200. Notably, Black protectionism may be denied, or more accurately not invoked, in select instances. One example is where the person under media scrutiny is perceived to be a scofflaw or someone who is repeatedly in trouble with the law (e.g., Bobby Brown). There are other circumstances in which Black protectionism is not available. See *supra* note 197.

201. Jill Nelson, *We've Been Bill-boozled*, SAVOY, May 2001, at 45, 48 (describing Blacks as "the forgiving tribe" since African-Americans are likely to embrace prominent community members facing legal troubles).

is sanction enough. For many Blacks, any judgment, reprimand, or sanction should be left to a higher power. Fourth, some people believe that once an individual achieves certain material wealth and status—whether Black or White—he or she is no longer held to the same standard as everyone else.²⁰²

2. *Apolitical Black Protectionism.* African-Americans across the political spectrum have benefited from protectionism. The politically-neutral application of protectionism raises an important question: Is it beneficial to the Black community to rally behind someone who does not adopt a mainstream civil rights agenda?²⁰³ How, for example, did the Black community benefit from its support of Clarence Thomas or O.J. Simpson?²⁰⁴ It could be argued that in both cases Black protectionism did more harm than good. In his first decade on the United States Supreme Court, Thomas consistently voted against laws that protected hard-won civil rights and liberties.²⁰⁵

202. Though such sentiment is rarely expressed openly, it appears to be a logical deduction.

203. In discussing Black support for O.J. Simpson case, Michael Eric Dyson observes: "It can be viewed as the refusal of [B]lacks to play the racial authenticity game, which, in this instance, amounts to the belief that only 'real' blacks deserve support when racial difficulties arise. But [B]lack responses to O.J. can also be read less charitably. They can be seen as the automatic embrace of a fallen figure simply because he is [B]lack." MICHAEL ERIC DYSON, *RACE RULES: NAVIGATING THE COLOR LINE* 30 (1996).

204. In a comedy sketch on O.J. Simpson, Chris Rock questions why so many Black people were excited about the Simpson acquittal. "Black people too happy, White people too mad. White people are like, 'Man, this is bullshit.' I ain't seen White people that mad since they canceled M*A*S*H. Black people are like 'Yeah, we won!' What the fuck did we win? Everyday I look in my mailbox for my O.J. prize—nothin'!" Chris Rock, *Roll With the New* (Dreamworks Records 1997).

205. See, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (In concurring opinion, Thomas states that affirmative action is a form of state sanctioned discrimination, which is always wrong, regardless of purpose); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (In concurring opinion, Thomas argues that separate may be equal and also takes issue with social science data used in *Brown v. Bd. of Educ.*); *Holder v. Hall*, 512 U.S. 874 (1994) (In concurring opinion, Thomas argues that the 1965 Voting Rights Act was not intended to address racial issues such as districting and voter dilution); *Hudson v. McMillan*, 503 U.S. 1 (1992) (In dissent, Thomas argues that physical abuse by prison guards is not always unconstitutional). See generally CHRISTOPHER E.

Cornel West observes that Thomas's assertion of racial authenticity, the "closing-ranks mentality" of Blacks and the appeal of Black nationalism, resulted in the political hoodwinking of Black America. Closing ranks, West argues, results in race superseding gender: "The idea of black people closing ranks against hostile white Americans reinforces black male power exercised over black women."²⁰⁶ Black protectionism, therefore, obscures a more nuanced assessment. By applying a more thoughtful critique, West concludes, "both Thomas and Hill would be viewed as two black Republican conservative supporters of some of the most vicious policies to besiege black working and poor communities since Jim and Jane Crow segregation."²⁰⁷

Likewise, the communal embrace of O.J. Simpson yielded little tangible benefit to African-Americans as a group. In fact, it may have come at a high political price. Both cases demonstrate that knee-jerk protectionism may have long-term costs.

In addition to looking past one's political affiliations, Black protectionism also ignores one's degree of racial pride or identification with Blackness. Michael Jackson's case underscores this point. Through radical cosmetic surgery, Jackson—who was very attractive as a young man—has eliminated all traces of his former trademark African-American racial features—brown skin color and broad nose.²⁰⁸ And, through his music, he promotes colorlessness.²⁰⁹ These factors have had no effect on the application of Black protectionism. As noted earlier, the colorless and partly-colored alike, are shielded by Black protectionism's umbrella.

SMITH & JOYCE A. BAUGH, *THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY* (2000); Stephen J. Wermiel, *Clarence Thomas after Ten Years: Some Reflections*, 10 AM. U. J. GENDER SOC. POL'Y & L. 315 (2002).

206. See WEST, *supra* note 105, at 24.

207. *Id.* at 29.

208. Similarly, Jackson has fathered three children who do not appear to be African-American.

209. See, e.g., MICHAEL JACKSON, *Black or White*, on DANGEROUS (Epic Records 1991) (including the following lyrics: "See it's not about races/ Just places/ Faces/ Where your blood/ Comes from/ Is where your space is/ I've seen the bright/ Get duller/ I'm not going to spend/ My life being a color").

3. *The Black Monolith*. Another potential cost of Black protectionism is that it presents the African-American community as a monolith—one body, one voice. This raises two interrelated concerns. First, it presents a false reality. In truth, there are diverse viewpoints within the African-American community. The sweep of Black protectionism casts aside alternate viewpoints. In part, this occurs because the media reads the support of a large number as representative of the entire group. For example, in the Simpson case, the seventy percent of Blacks who believed Simpson was innocent were allowed to represent one-hundred percent of the Black community.²¹⁰ Second, within the Black community, protectionism not only masks alternative viewpoints, it discourages them. Little room is left for dissenters, who are perceived as airing dirty laundry. In fact, as currently practiced, Black protectionism facilitates non-critical perspectives.

4. *Blind Loyalty*. The African-American community's response to Bill Clinton offers an exemplar for assessing whether Black protectionism at times works against Black interests. A detailed critique of Clinton's record on race and the justice system reveals some startling findings. Most notably, it was during Clinton's presidency that the nation's most punitive crime bill was signed into law.²¹¹ In *The Debt*, Randall Robinson offers a critical analysis of the Black community's embrace of Bill Clinton. Robinson observes the Black community's apparent need to embrace leaders who appear outwardly friendly towards Blacks, but who do not have its best interests at heart.²¹²

After highlighting some of Clinton's accomplishments, including a harsh welfare reform bill, Robinson concludes

210. See RUSSELL-BROWN, *supra* note 1, at 95.

211. During Clinton's presidency, the incarceration rates rose to peak levels, leading some to refer to him as the "incarceration president." See Lisa Feldman et al., *Too Little Too Late: President Clinton's Prison Legacy*, JUSTICE POL'Y INST. (2000), at <http://www.cjcj.org/pubs/clinton/clinton.html> (last visited Mar. 5, 2005).

212. Robinson elaborates: "No segment of the national electorate has given more but demanded and received less from the Democratic Party nationally than African Americans. We [Blacks] don't take ourselves seriously, therefore no one else does. Our support can be won with gestures." RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 101 (2000).

that Blacks are satisfied with symbolic gestures. Accordingly, Clinton was able to tap into the Black well of support largely by having high visibility in Black churches, having Black friends, taking trips to Africa, and appointing a race relations panel.²¹³ A closer evaluation of Clinton's actions on crime and race argue for a more informed perspective and would have denied the application of Black protectionism.

The next section considers the strengths and limits of Black protectionism. Specifically, this section contemplates how Black protectionism might be reconstructed to make it a more effective and embraceable civil rights strategy.

VI. BLACK PROTECTIONISM AS A CIVIL RIGHTS STRATEGY: A CRITICAL APPLICATION

It is clear that Black protectionism has purpose and value. It is also clear that it must be critically applied. Its unbridled application undercuts its integrity and limits its effectiveness as a civil rights strategy. Without parameters, Black protectionism promotes a kind of anti-intellectualism—based simply on racial reductionism.²¹⁴ In its current form, Black protectionism is both a thoughtful and a thoughtless practice. On the one hand, it represents the Black community saying that it needs more facts before making a judgment. On the other hand, it is the Black

213. Some have questioned the sincerity of Clinton's affection for African-Americans. Dick Morris, a former Clinton advisor, stated that Clinton's embrace of the Black community was both sincere and opportunistic. According to Morris, Clinton knew that if he ever got into legal trouble that was prosecuted in court, the trial would be held in the District of Columbia. Given the city's racial composition (approximately sixty percent African-American), Clinton predicted that he would have at least one Black juror, and minimally get a hung jury. See *Judith Regan Tonight: Interview with Dick Morris* (Fox television broadcast, Apr. 3, 2000).

214. For example, Clarence Thomas's pre-Supreme Court tenure, including his record as a federal judge and his political affiliations, accurately predicted his voting record on the Court. Many Blacks were either not aware of his political history or surmised that once on the Supreme Court, he would remember his race and roots. See, e.g., Maya Angelou, Editorial, *Support Clarence Thomas and Hope That He Can Be Won Over*, ST. PETERSBURG TIMES, Aug. 27, 1991, at 9A ("Because Thomas has been poor, has been nearly suffocated by the acrid odor of racial discrimination, is intelligent, well-trained, black and young enough to be won over again, I support him.").

community saying that more facts are needed, but not *too* many²¹⁵—especially those that contradict the Black protectionism narrative that a prominent Black person has been unfairly singled out. This exceedingly low bar for application creates a class of “untouchables”—an elite group of Blacks who are judged by a separate standard and are not accountable to the Black community. The current approach supports a kind of race-based situational morality (e.g., “He is innocent because he is Black” or “He’s been set up because he is Black”), which diminishes the credibility of Blacks as a group.

As currently applied, Black protectionism represents an attempt to slow down the wheels of justice *in a particular case*. That is, it questions whether the Black person under scrutiny is receiving just treatment. Although it may highlight injustice in a select case, Black protectionism does nothing to effect change beyond the individual case under the media microscope. Therefore, in its present iteration, Black protectionism cannot have a mobilizing effect on the Black community or a transformative impact on the justice system. This is true because Black protectionism does not apply to the average Black person.

A. *Critical Black Protectionism*

If Black protectionism is to promote the goals of racial justice, it must be reformulated. It must be applied in an internally consistent manner. What is proposed is a critical application of Black protectionism. As Chart 2 indicates, Black protectionism reconstituted has three stages.

215. *See id.*

CHART 2: Critical Black Protectionism		
<u>Stage 1</u>	<u>Stage 2</u>	<u>Stage 3</u>
Prominent African-American charged with criminal or unethical conduct, or is a crime victim	I. Assertion of procedural rights II. Acknowledgement of wrongdoing (where appropriate)	Full-fledged support

1. *Stage One.* What occurs during the first stage is what triggers the application of Black protectionism. Critical Black protectionism applies where there is a charge, typically criminal, leveled against a prominent African-American. As well, it applies where the prominent person is a victim of crime. This is a marked expansion from the current application of Black protectionism, which is limited to charges made *against* a well-known African-American.²¹⁶

2. *Stage Two: Part I.* The second stage has two parts. The first part acts as a check on the justice system. Specifically, it uses the high profile case under scrutiny to point out the continuing racial disparities within the justice system. The case in the media spotlight provides a platform for discussing how African-Americans fare in the criminal justice system. Here the focus of Black protectionism is on the process not the person. Once a high-profile Black person is charged with criminal or unethical conduct, critical Black protectionism calls for fair treatment.

Because this part of the analysis focuses on process, its sweep is broad. Importantly, Black protectionism reconstituted does not favor the Black elite. Again, in its new form, it is instrumental—it demands fairness in high-profile cases

216. *See supra* Chart 1.

as a method of keeping the court system and the media honest. It lends its voice to demand a just process. This configuration eliminates the problem of competing racial allegiances.²¹⁷ Black protectionism reconfigured does not pit Mike Tyson against Desiree Washington, Clarence Thomas against Anita Hill, or Bill Clinton against Joycelyn Elders. It holds that Mike Tyson *and* Desiree Washington; Clarence Thomas *and* Anita Hill, and Bill Clinton *and* Joycelyn Elders deserve due process.

The African-American community cannot afford to overlook how victims are treated within the justice system.²¹⁸ The community is harmed when *any* member is mistreated. Further, this analysis allows Black protectionism to embrace women as well as men—an approach which is in the best interests of the community.

3. *Stage Two: Part II.* The second part of the second stage focuses on the conduct under scrutiny. Here the Black community shifts focus to consider the actions of the person under the media microscope. Verbal reprimands, for example, may be issued regarding drug use and infidelity. Critical Black protectionism does not give a pass to the Black person under scrutiny, the victim, or the government. It acknowledges wrongdoing and calls for sanctions where appropriate. This component enables Black protectionism to more accurately reflect the moral sensibilities of the African-American community.

Once the first part of stage two is incorporated into Black protectionism, the response of the Black community looks markedly different. Applied to the Kobe Bryant case, a critical Black protectionism approach would argue that Bryant should not be railroaded by the system, is entitled to confront his accuser, and is entitled to the presumption of

217. See *supra* Part V.B.3 (discussing criticism of Black protectionism as drowning out voices of dissent).

218. See, e.g., Callie Marie Rennison, *Hispanic Victims of Violent Crime, 1993-2000*, BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE (Apr. 2002) (reporting that Blacks are disproportionately more likely to be victims of violent crime than Whites). For Blacks the rate is 34.1 per 1,000 people in the population, compared with 26.5 for Whites. American Indians, however, are the racial group with the highest victimization rates—52.3 per 1,000 people in the population. *Id.* at 2. For a discussion of the relationship between race, crime, and justice, see generally RUSSELL-BROWN, *supra* note 1, at 72-96.

innocence.²¹⁹ It also says that Bryant, a married man, used poor judgment in inviting an unknown woman to his hotel room. It does *not* say that African-Americans should blindly support Bryant because he is Black.

Applied to the Marion Barry case, the first part of the second stage allows two claims to be made. One claim is that the government took unprecedented steps to catch Barry using drugs. The concern for a fair process may raise numerous issues (e.g., whether Barry was a target of selective prosecution and whether the government used as many resources to catch other politicians under scrutiny). A second claim is that smoking crack is wrong—by a Black politician or anyone else—and is not excused by questionable government tactics.

Thus, critical Black protectionism allows for a bifurcated response. The charges against Bryant and Barry, and others similarly situated, are used as an opportunity to spotlight racially-disparate treatment within the justice system. As well, the charges are used to assert the community's moral perspective (e.g., infidelity and drug use are not condoned).

Notably, Black protectionism reconfigured treats African-Americans in the same manner, regardless of their political affiliations. To the extent that critical Black protectionism is structured to promote procedural due process (Stage Two, Part I), all cases—from Jesse Jackson to Clarence Thomas—are treated the same. So, once sexual assault allegations were made against Thomas, for example, Black protectionism surfaces to ensure that the ensuing process was a fair one. The outstanding question, addressed in the next section, is what role political affiliation should play in determining whether the Black community should do more than argue for due process in a particular case.

4. *Stage Three.* The third stage is the action component. After there has been a check on procedural fairness, and comment on the wisdom of the person's actions, there must

219. One question raised by the discussion is whether critical Black protectionism should be extended to cover Whites (e.g., the White victim in the Kobe Bryant case). This is an important question for future discussion. As currently practiced and reconfigured Black protectionism applies solely to Blacks.

be a critical evaluation of whether further community action is warranted. Thus, as indicated by the dotted border, Stage Three will not always be triggered. The question becomes should the Black community expend additional racial capital to defend the person who has been charged? Specifically, what action, if any, is in the community's best interests? This requires a political assessment. With Clarence Thomas, for instance, which community interest was served by defending him? An internally consistent approach would criticize *any* Supreme Court nominee who is opposed to civil rights advances and struggles.

Critical Black protectionism demands political consistency. While it acknowledges varied political viewpoints within the Black community, it always supports views that are in the group's best interest. A critical application of Black protectionism does not automatically label and dismiss criminal charges against a well-known African-American as simply "a plot to destroy the Black man." Black protectionism reconstituted allows the African-American response to vary according to the circumstances of the case and the person under scrutiny. It is neither a blanket denial of offending nor a wholesale race embrace. Further, as reconfigured, it avoids the costs associated with the current application of Black protectionism.²²⁰ It does not excuse or minimize criminal behavior. As well, it offers a verbal sanction where appropriate. It avoids the pitfalls of an apolitical application by engaging in a political analysis of whether the Black community should openly support a particular person. This approach argues against blind race loyalty.

Critical Black protectionism is an affirmative action African-Americans can practice in response to race-based treatment.²²¹ Blacks, who have had a uniquely negative experience with the justice system and therefore hold a unique view of it, can institute a check on whether the rights of the Black elite have been respected. Critical Black

220. See *supra* notes 199-214.

221. It has been argued that more "affirmative race law" must be enacted to address continuing racial inequalities and "macroaggressions." See *supra* notes 200-14. Specifically, it posits that more laws are needed to balance out new and persistent forms of racial discrimination. See RUSSELL, *supra* note 5, at 130-48. Black protectionism is one response to society's failure to adopt adequate affirmative race laws.

protectionism is a widely-embraceable form of social protest.²²² It is a method of civil rights struggle in which the masses of African-Americans can engage. It also acts as a bold affront to the dismissive, routine, and rhetorical query regarding how much better things are today for African-Americans—a query which implies that Black racial progress somehow occurred in the absence of struggle. In this way, Black protectionism reconstituted offers a “political mechanism that can confront the *denial* of need.”²²³ In its best form, Black protectionism operates as both a call to action and a national history lesson.

CONCLUSION

This Article has identified and outlined the parameters of Black protectionism, a practice used by African-Americans to protect prominent community members who have been charged with criminal or unethical activity. This practice took root during slavery—during a time when a false or minor charge against one African-American could result in death or great bodily harm to him and scores of other African-Americans. History has cultivated a culture of Black mistrust of Whites in particular and mainstream society in general. This suspicion is reinforced with the continued disparate treatment of African-Americans within the criminal justice system. History and contemporary conditions explain why Black protectionism—akin to a vote of confidence—has been available to prominent Blacks without limitation (e.g., political affiliation). As practiced, Black protectionism is a community statement of protest against an oppressive justice system. An analysis of how it works,

222. Austin observes: “Although Blacks appear to be fairly quiescent and uninterested in mass political protest, there is a great deal of activity at the level of social discourse in the form of antiblack conspiracy theorizing.” Austin, *supra* note 75, at 1021.

223. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 152 (1991). In the context of analyzing “needs” versus “rights,” Williams evaluates the ways in which the discussion of needs has been racialized. For example, when Blacks argue that more must be done to address racial inequity, their claims are typically dismissed as self-serving. However, when Whites make the same arguments (that more must be done to ensure racial equality for Blacks), they are more likely to be treated as unbiased statements of fact. *See id.* at 151-53.

however, reveals that its overbreadth renders it ineffective as a strategy for Black racial justice.

This Article calls for an enlightened application of Black protectionism—*critical* Black protectionism. It can operate as an incisive, politically powerful civil rights strategy. Specifically, it can work to confront destructive representations of Blacks from outside the community—those that threaten the viability of Blacks as full citizens who are entitled to constitutional protections. Critical Black protectionism acts as a counter-narrative to centuries-old stereotypes of Black deviance. As detailed herein, a critical application of Black protectionism means that African-Americans use allegations made against high-profile community members to the group's advantage. Specifically, the group uses the accusations opportunistically—to demand justice and identify continuing inequities within the justice system. In its current form, Black protectionism has a fatal flaw: It makes few distinctions among Blacks and holds no one accountable. When applied critically, however, Black protectionism works in a manner that highlights, affirms, and reinforces hard fought and hard won civil rights for African-Americans. In this way critical Black protectionism may prove transformative—helping to smooth out this country's rough racial terrain.

Critical Black protectionism is a community expression of rights. It lets justice take its course. It says everyone, including African-Americans, is entitled to constitutional guarantees. At its core, Black protectionism is a history lesson. It keeps the past and present experiences of African-Americans within public view—where they cannot be ignored. Therefore, critical Black protectionism is a strategy that ensures that the reality of racism and its impact upon Black life are not ignored by mainstream society. In this way, it is an example of democratic citizenship. Good citizens do not just accept what they are told—in their search for the truth, they critically evaluate the “official” story. Thus, properly configured and applied, critical Black protectionism does what the best civil rights strategies do. It presents a compelling case. It involves the masses. It is logically consistent. It promotes social justice. Finally, it promotes the good of the group, and in so doing, it advances the whole society.

