Defining Ourselves for Ourselves

Jacquelyn L. Bridgeman[*]

If there were no white people could there be black people and if so, how would they be defined?

I.   INTRODUCTION

It is May 2003. I am a new law professor attending my first ever LatCrit conference. It is the morning of the first day of the New Teachers portion of the program. We are seated around a table having a discussion about the regional people of color conferences. Someone poses the question, "Why is it that more people from LatCrit don't attend the people of color conferences?" Part of the answer supplied, "Clarence Thomas would probably be welcome at the regional people of color conference, but not at LatCrit." I find this answer quite intriguing, if for no other reason than I am not entirely sure that Clarence Thomas would be welcome at the people of color conferences either.[1] At least most of the people of color I know are not fans of Clarence Thomas. Some would even go so far as to assert that although he may have black skin, he is not really a person of color.[2]

Fast forward one year to May 2004. I am once again at the

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[1] *See* John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks— From Clarence Thomas to "The Law School Five"*, 46 HOW. L.J. 175 (2003) (detailing protest of Clarence Thomas visit by five African-American professors at University of North Carolina at Chapel Hill); Kevin Merida & Michael A. Fletcher, *Supreme Discomfort; More Than a Decade After His Bitter Confirmation Battle, African-Americans Are Still Judging Clarence Thomas Guilty. Is that Justice?*, WASH. POST, Aug. 4, 2002, at W8 (describing how two African-American members of Hawaii's ACLU resigned in protest over an invitation for Thomas to speak).

[2] *See, e.g.*, Stephen F. Smith, *The Truth About Clarence Thomas and the Need for New Black Leadership*, 12 REGENT U. L. REV. 513, 528–29 (1999-2000) ("The most disturbing charge against Justice Thomas is a racist one—that he holds views that no 'true' black person could hold. . . . that Justice Thomas is not really black . . . .").

annual LatCrit conference and once again the subject of Clarence Thomas arises, this time in the context of a panel presentation by Angela Onwuachi-Willig. Professor Onwuachi-Willig's discussion centers around her forthcoming article which explains that when viewed in the context of black conservatism, Justice Thomas' jurisprudence has a coherency and consistency that is distinctly black and is informed by his lived experience as a self-identified black man.[3] As Professor Onwuachi-Willig elegantly articulates, although Thomas' intellectual ability has been called into question by those both inside and outside of the black community,[4] when viewed in the context of his black conservative framework, Justice Thomas' jurisprudence is not merely white conservatism in black face, or a reiteration of that put forth by his fellow justices on the Supreme Court;[5] rather, it is something uniquely his own, informed by his experience as a black man in America. I am struck by this, not so much because of the fact that Justice Thomas has his own jurisprudence that is distinctly African-American, but because he could have a jurisprudence informed by a distinctly black perspective, and could have achieved a prominent place in American society yet still be soundly rejected by such a large portion of the black community.[6]

As the Ninth Annual LatCrit conference came to an end and I was on the airplane on my way home to Wyoming, thoughts of Clarence Thomas and the discussion around Professor Onwuachi-Willig's work lingered in my mind. Although I do not personally align myself with the black conservatives, and I am hard pressed to think of a controversial Thomas opinion with which I agree, I found that I was bothered by the fact that Clarence Thomas and others within the black community who hold similar views are so soundly

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[3] Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. (forthcoming May 2005) (ms. at 9–10, 67–68, on file with author). Indeed, despite accusations to the contrary, Clarence Thomas does and continues to identify himself as a black man. Clarence Thomas, *I Am a Man, a Black Man, an American*, WASH. TIMES, July 31, 1998, at A21.

[4] Onwuachi-Willig, *supra* note 3, ms. at 8.

[5] *Id.*; Smith, *supra* note 2, at 516–17; *see also* Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 HOW. L.J. 323, 330–31 (2004) (describing four themes running through Justice Thomas' opinions on education and how those themes embody strands of black nationalism).

[6] *See* Calmore, *supra* note 1, at 180; Merida & Fletcher, *supra* note 1, at W8; *see also* Neil A. Lewis, *Justice Thomas Raises Issue of Cultural Intimidation*, N.Y. TIMES, Feb. 14, 2001, at A28 (noting how Thomas has been "the object of withering criticism for his conservative views that are at odds with the views of most other black Americans").

rejected by so many within the community. African Americans as a group have struggled for years in this country, trying to break out from under the oppressiveness of subordination. Although we have had some success as of late, many discussions at this year's LatCrit conference and elsewhere demonstrate that there is still a ways to go.[7] More importantly, such conversations show that new strategies or approaches may be needed to address the chronic American problem of subordination of a wide range of groups.[8] As I soared over the earth at 35,000 feet, I found myself wondering if we do not hinder our ability to see problems in new ways or seek innovative solutions when we summarily reject and ostracize those within our communities who do not appear to share our views.[9] Perhaps more bothersome, I wondered if we do not duplicate some of the patterns of silencing and marginalization that we ourselves constantly struggle against, when we refuse to take seriously those within our communities who view the world differently.[10]

The goal of this Essay is to look more closely at the process of ostracism and policing of "black" norms within the African-American community.[11] In so doing, this Essay argues that part of what fuels

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[7] *Cf., e.g.*, Derrick Bell, *The Permanence of Racism*, 22 Sw. U. L. Rev. 1103, 1104 (1993) (discussing the continued elusiveness of equality for African Americans and even stating the thesis that "[b]lack people will never gain full equality in this country") (quoting Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism 12 (1992)).

[8] *Id.* at 1105–06; Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363, 377–78 (1992).

[9] I am by no means advocating that LatCrit take on a conservative or non-critical bent or seek to recruit or embrace those who are not committed to the substantive transformation of our society. Rather, I am suggesting that there may be value in looking seriously at what those we tend to ignore might have to say, which may help us gain insight or a new perspective on the work that we endeavor to do. For example, there is a difference between dismissing what Clarence Thomas has to say because he is married to a white woman and a member of the Republican Party and disagreeing with what he views as best for the black community based on the substance of those views. The debate over the merits of Clarence Thomas' jurisprudence takes on a different light when viewed in the context of black conservatism. In that context one can see black conservatism as a coherent thought process unto itself that is separate and different in kind from white conservatism. The fact of this difference is not insignificant, but is missed or ignored when people such as Clarence Thomas are dismissed out-of-hand for other reasons. *See* Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 Cal. L. Rev. 683 (2004) (illustrating how principles underlying conservative opposition to affirmative action actually support an argument for America's responsibility for societal discrimination against blacks).

[10] Peter C. Alexander, *Silent Screams from Within the Academy: Let My People Grow*, 59 Ohio St. L.J. 1311 (1998) (describing the way minority law professors are silenced in a myriad of ways within the academy).

[11] Leonard M. Baynes, *Who Is Black Enough for You? An Analysis of Northwestern*

this policing of norms is ironically the progress that blacks have made in American society over the last few decades. As African Americans become more integrated into mainstream society and are deemed to fit within those mainstream norms, there is a fear and a risk of losing oneself, and in losing one's race and culture.[12] Throughout American history what it means to be black has largely been defined in opposition to what it means to be white.[13] This Essay argues that despite the negative qualities and attributes that have been ascribed to African Americans as a result of this oppositional defining, a lot of that definition still determines for many what it means to be black. If we are successful in our quest to become equal members of this society, so that such oppositional defining loses its force or becomes obsolete, the question becomes who will black people be then, or perhaps more disconcerting, will there still be black people? I am of the opinion that there will still be black people but our notion of who they are and what that means will necessarily have to change. In fact for many, that notion has already begun to change, or at least to broaden.

Part II of this Essay explores the concepts of "sell-out," "Uncle Tom" and other such words used to policy a perceived "authentic blackness." This part of the Essay explains how such terms are used to police certain norms and what the policing of those norms says about how African Americans see themselves. Part III discusses why the self-definition embodied in the use of those terms is problematic, and Part IV concludes with a call for African Americans to take

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University Law School's Struggle over Minority Faculty Hiring, 2 MICH. J. RACE & L. 205, 216 (1997). Please note, I focus on the black community throughout this Essay because it is the community with which I identify, the one I know and the one within which for me this discussion has the most salience. In so focusing this discussion I do not mean to ignore or discount the experiences of others that may be similar or could be mentioned here. Additionally, in my mind both the terms "black" and "African American" denote the group of people living in the United States or other parts of the Americas who, through the experience of having a shared ancestry in this part of the world, also share similar social, cultural, subordinating, and other experiences that bond them and demark them as a unique group. Because I find both terms equally descriptive and in some ways equally problematic, and use both African American and black to describe myself, I will use those terms interchangeably throughout this Essay.

[12] SHELBY STEELE, THE CONTENT OF OUR CHARACTER 106 (1990); Reginald Leamon Robinson, *Race Consciousness: A Mere Means of Preventing Escapes from the Control of Her White Masters?*, 15 TOURO L. REV. 401, 437 (1999).

[13] Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 700–01(1996); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 10 LA RAZA L.J. 499, 511–12 (1998); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 10 LA RAZA L.J. 127 (1998).

advantage of the present opportunity to define ourselves in more positive and productive ways.

II.   SELL-OUTS, UNCLE TOMS, OREOS, AND INCOGNEGROS: WHAT THESE TERMS TELL US ABOUT HOW AFRICAN AMERICANS SEE OURSELVES

"Sell-out,"[14] "Uncle Tom,"[15] "Oreo,"[16] "Incognegro,"[17] "Traitor to the Race,"[18] are all terms with which those who have grown up in the black community are familiar. They are terms used within the black community to identify and disparage those who are not deemed to fit the prevailing conception of blackness. Many famous and not so famous members of the African-American community have earned themselves these labels at one point or another. Two that come readily to mind are Clarence Thomas for his aforementioned conservative views, which are perceived by many within the black community to be detrimental to the community,[19] and Christopher Darden for his prosecution of O.J. Simpson.[20] Both Justice Thomas and Christopher Darden are accomplished and successful by mainstream standards, but both are ostracized by and alienated from large portions of the black community.[21]

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[14]   "'[S]ell-out'—one who allow[s] himself to be used to further white interests for personal gain at the expense of the broader African-American community." Kenneth B. Nunn, *The "Darden Dilemma": Should African-Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1473 (2000).

[15]   The term "Uncle Tom" is derived from Harriet Beecher Stowe's nineteenth century novel. *See* UNCLE TOM'S CABIN (Philip Van Doren Stern ed., Paul S. Eriksson, Inc. 1964) (1852). It refers to the character that stayed a slave rather than running from slavery. Merida & Fletcher, *supra* note 1, at W8.

[16]   *See infra* discussion following note 46.

[17]   *See infra* discussion accompanying notes 47–48.

[18]   *See, e.g.*, Smith, *supra* note 2, at 528–29 (describing how Justice Thomas has been referred to as a "Traitor to his Race"); Onwuachi-Willig, *supra* note 3, ms. at 66.

[19]   *See, e.g.*, Calmore, *supra* note 1, at 226 ("Justice Thomas is not just another Supreme Court justice with whom we disagree. Rather, as a justice, he not only engages in acts that harm other African Americans like himself, but also gives aid, comfort, and racial legitimacy to acts and doctrines of others that harm African Americans   unlike himself . . . ."); A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1418–24 (1994) (describing the increased harm caused when those of a subordinated group who occupy positions of power aid in and give legitimacy to their subordination).

[20]   *See* CHRISTOPHER A. DARDEN & JESS WALTER, IN CONTEMPT (1996) (describing throughout the treatment the author received as a result of prosecuting the O.J. Simpson case).

[21]   *Id.* at 210 ("The Times story was keyed to Martin Luther King, Jr. Day, which was the next day. That was the perfect day to announce to Southern California that I was reviled in the black community, that I was an Uncle Tom."); Calmore, *supra* note

As I continued my journey home from the 2004 LatCrit conference, miles above the earth at breakneck speeds, I contemplated the idea of sell-outs, Oreos and race traitors. I found myself wondering why it is that people like Clarence Thomas elicit such a visceral reaction from so many within the African-American community.[22] Why is there such apparent fear and widespread denunciation of people who appear, at least to some, as not being "black enough," whatever being "black enough" might actually mean? As I contemplated this, I realized I had never heard those terms used to describe drug dealers, gang-bangers, or high school drop outs, although I find it hard to believe that the effects of such people on the black community are any less detrimental than anything Clarence Thomas has done. In fact, in my experience, the "privilege" of receiving one or more of those labels is reserved either for those who appear (in varying degrees) to have achieved or to be working toward some kind of mainstream success or achievement,[23] or those who like Clarence Thomas express views that stray far from those perceived to be held by the vast majority of the black community.[24]

The remainder of this Part of the Essay explores why such terms might be used to police a definition of blackness that can be so negative and exclusionary. It begins by explaining how such terms are used to demark and define a "sphere of blackness" that is based on more than one's physical features and is characterized by an anti-conservative bent, an opposition to whiteness, and an urban flavor. It then posits an explanation for why many within the African-American community would embrace a self-view that is not entirely of our making and is in large part negative and self-defeating.

As mentioned, "Sell-out," "Uncle Tom," "Oreo," "Incognegro," and "Traitor to the Race," are a sampling of some of the terms used

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1, at 179–81; Lewis, *supra* note 6, at A28; Merida & Fletcher, *supra* note 1, at W8; Smith, *supra* note 2, at 513–14.

[22] Joan Biskupic, *Thomas Caught Up in Conflict; Jurist's Court Rulings, Life Experience Are at Odds, Many Blacks Say,* WASH. POST, June 7, 1996, at A20 (quoting Stephen L. Carter regarding the visceral reaction Justice Thomas sometimes elicits); Maureen Dowd, *Liberties; Black and White,* N.Y. TIMES, Feb. 14, 2001 at A31 (mentioning how many blacks in Harlem cannot stand Justice Thomas); Robinson, *supra* note 12, at 428 (describing the late A. Leon Higginbotham, Jr., as holding rank in the "mob . . . seek[ing] to lynch Justice Thomas"); *see also* A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas From a Federal Judicial Colleague,* 140 U. PA. L. REV. 1005 (1992).

[23] *See* Baynes, *supra* note 11, at 216–17; Eleanor Brown, *Black Like Me? "Gangsta" Culture, Clarence Thomas, and Afrocentric Academies,* 75 N.Y.U. L. REV. 308, 321–22 (2000); Signithia Fordham & John U. Ogbu, *Black Students' School Success: Coping with the "Burden of 'Acting White'",* 18 URBAN REV. 176, 186 (1986).

[24] Smith, *supra* note 2, at 528–30.

within the black community to identify and disparage those who are not deemed to fit the prevailing conception of blackness.[25] For those to whom these terms are not familiar, these are derogatory terms. They are terms used to identify, label or "call out" and ostracize those who might otherwise be presumed to be part of the black community, but who have in some way violated the norms of the community.[26] They serve a policing function within the black community in that they help to set what the norms of blackness will be and to punish effectively those who fail to exhibit those norms.[27] The act of labeling with such words serves to establish the norms of blackness, because such words are used to demark what lies within the "zone of blackness" and what does not. For example, if members of the black community call Justice Thomas a "Sell-out" or "Uncle Tom" because of his conservative views, what those members are essentially doing is signaling that such views (and presumably those who hold them) lie outside the zone of blackness.[28] In contrast, the opposite of such views lies within the zone of blackness.[29] Thus, while there may not be a universal definition of blackness that all of us can point to, the use of these labels for some people who espouse certain ideas, or engage in certain behaviors, does let us know that those ideas and behaviors are not acceptable as part of what it means to be black. Accordingly, the use of these labels helps the community police and define its appropriate norms of blackness.

In addition to establishing the norms of blackness in this way, such labeling also serves to punish effectively those who do not adhere to the established norms. To be branded with one of these labels is to be singled out, ostracized, and marginalized from the greater community. For example, in his book *In Contempt*, Christopher Darden describes the effects he suffered when being considered an Uncle Tom and traitor for his work as a prosecutor on the O.J. Simpson case:

> And then I broke down. I gave in to the hollowness inside me. Like a man standing for hours in a strong current, I gave up and allowed myself to be swept away by my own sorrow and sacrifice. I

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[25] *See supra* notes 14–21 and accompanying text.

[26] Baynes, *supra* note 11, at 216 ("So many times in the African American community a person is ostracized for not being 'Black' enough.") (footnote omitted).

[27] *Id.*; Fordham & Ogbu, *supra* note 23, at 185 (describing how "black people have a tendency to negatively sanction behaviors and attitudes they consider to be at variance with their group identity symbols and criteria of membership").

[28] Fordham & Ogbu, *supra* note 23, at 181; Smith, *supra* note 2, at 528–29.

[29] Fordham & Ogbu, *supra* note 23, at 181.

> had taken this case because I believed that my duty was to seek justice, no matter how famous, rich, and black the defendant. I had naively believed my presence would, in some way, embolden my black brothers and sisters, show them that this was their system as well, that we were making *progress.* I had believed that African-Americans were the most just people on the planet and that they would convict a black icon when they saw the butcher, the pattern of abuse, and the overwhelming evidence.
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>   Instead, I was branded an Uncle Tom, a traitor used by The Man. I received death threats and racist letters from blacks and whites alike. . . .
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>   . . . .
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>   My law career was over. . . .   I was alone, isolated from a community I had served so honestly for the last fourteen years.[30]

Thus, for those who wish to be part of the African-American community, such labeling effectively works as a punishment, and perhaps as a deterrent from openly engaging in such behavior or espousing such ideas in the future.[31]

If such labeling involves a demarcation of what is not "black enough," then it would seem that the use of such labels is informed by a notion of what is "black enough." In other words, what norms must a person who considers herself to be a member of the black community have to embody in order to escape being addressed by such derogatory labels? It becomes apparent, when one reviews the different situations and people to which such labels are applied, that there is no consensus within the black community as to who is or is not black.[32] Just as there does not appear to be a consensus as to what kinds of behavior or traits a person must exhibit before having one of those labels ascribed to him or her, whether or not a person earns such a label also appears to be at least somewhat contingent on who

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[30] DARDEN & WALTER, *supra* note 20, at 11–12.

[31] If the effect of not following the norms is to be ostracized, then it would follow that in order to escape such ostracism, one would at least outwardly conform to such norms. STEELE, *supra* note 12, at 101–02, 106; Fordham & Ogbu, *supra* note 23, at 193–97 (describing the way high achieving African-American students who might otherwise be labeled as "acting white," and therefore be ostracized by their peers, engage in various behaviors such as "clown[ing]" and skipping class to mask their achievement, conform to community norms, and therefore escape stigma and labeling).

[32] A good example of this is Bill Cosby and *The Cosby Show* (which aired on NBC from 1984 to 1992). While some viewed the show as a much needed and refreshing depiction of black American life, others viewed the show as pandering to white audiences and questioned the degree to which it portrayed an "authentically black" experience. *See* MICHAEL ERIC DYSON, REFLECTING BLACK: AFRICAN-AMERICAN CULTURAL CRITICISM, 78–84 (1993).

the person in question is. For example, in a speech marking the fiftieth anniversary of *Brown v. Board of Education*[33] made at an NAACP dinner in May 2004,[34] and again about a month later at the annual Rainbow/PUSH conference,[35] comedian and entertainer Bill Cosby expressed many views regarding the African-American community usually attributed to black conservatives.[36] Particularly, he challenged African Americans to "turn the mirror around"[37] and took blacks to task for lacking in educational priorities, for poor parenting, and for criminal activity.[38] While some criticized Cosby for what were seen as elitist and oversimplified remarks,[39] many within the black community applauded his statements.[40] Even if not applauded everywhere, Cosby has yet to receive the type of condemnation and alienation directed at Thomas, and others considered to be black conservatives, for similar remarks.

Although a discussion of what could be the cause of the different reactions to Cosby on the one hand, and Thomas and other black conservatives in the African-American community on the other is beyond the scope of this Essay, the difference does illustrate that what is "black enough" and what causes one to be labeled "sell-out" is contingent and contextual. However, while there may not be a consensus regarding the exact definition of blackness and all of its nuances and contours, there are some general aspects of that definition that one can identify.

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[33]   347 U.S. 483 (1954).

[34]   Bo Emerson, *Cosby Says Tough Words Needed to Right Wrongs*, ATLANTA J.-CONST., May 22, 2004, at D1; Clarence Page, *What Bill Cosby Meant to Say*, CHI. TRIB., May 30, 2004, at C11; George Rush et al., *Cos Gives 'Em Pause—Comic Vents, NAACP Gasps*, N.Y. DAILY NEWS, May 20, 2004, at 28.

[35]   Hamil R. Harris & Paul Farhi, *Debate Continues as Cosby Again Criticizes Black Youths*, WASH. POST, July 3, 2004, at A1; Cheryl V. Jackson, *Education Tops Sports, Cosby Tells Parents*, CHI. SUN-TIMES, Jul. 2, 2004, at 6; Jamal Watson, *Cosby Brings His Frank Talk to Town; Actor Stands by Earlier Remarks*, CHI. TRIB., July 2, 2004 at NS1.

[36]   *See generally* JOHN H. MCWHORTER, LOSING THE RACE (2000) (discussing throughout aspects of black-American culture and self-identity, such as "anti-intellectualism," that he finds problematic); SHELBY STEELE, A DREAM DEFERRED 3–5 (1998) (describing how he was labeled a black conservative and shamed by others in the black community for not embracing and speaking out against a view of black identity that is "victim-focused").

[37]   Jackson, *supra* note 35, at 6.

[38]   *See supra* notes 34–35; *Politically Incorrect Cosby Shocks Crowd*, UPI, May 21, 2004.

[39]   Brian DeBose, *Black Leaders Back Cosby's Straight Talk; Entertainer's Call for More Personal Responsibility Is Said to Be "Filling a Void"*, WASH. TIMES, July 4, 2004, at A1; Tony Norman, *An Icon's Classism Disappointing*, PITTSBURG POST-GAZETTE, May 25, 2004, at A-8.

[40]   DeBose, *supra* note 39, at A1; *America's Favorite Dad Knows Best*, N.Y. DAILY NEWS, July 3, 2004, at 24.

First, it is obvious from the use of such labels that the definition of blackness that underlies these terms refers to more than just skin color, hair texture, or facial features.[41] As mentioned above, many black conservatives, such as Clarence Thomas, have earned such labels.   However, there is no question that based on skin color, features, and hair, Thomas is considered by everyone to be black.[42] Thus, having certain physical features and considering oneself and having others consider one to be black, is apparently not enough to fit the underlying definition.[43] In fact, it would appear that what merely having such discernable features does is make one susceptible to being branded with such labels. After all, if members of the black community have no reason to think a person is black, there is no basis for thinking that person is a sell-out, Oreo, or traitor to one's race. Thus, the social construction of "black" that underlies the use of these labels goes far beyond physical features.[44]

Second, it would appear that "authentic blackness" has an anti-conservative political element. While perhaps not clearly articulated, this is evidenced by the nearly universal way in which black conservatives, like Clarence Thomas, have been broadly rejected by large parts of the African-American community.[45]

Third, the underlying definition appears to be one of opposition.[46] Specifically, what constitutes blackness, at least in large part, appears to be the opposite of what is considered to be "white." For example, when someone calls a person an "Oreo," what that person is literally saying is that the person to whom he or she is referring is black on the outside, but white on the inside. In other words, while the person may physically appear to be black, that person embodies what is considered to be white. The derogatory meaning of this term derives from the presumed "whiteness" within.

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[41] Fordham & Ogbu, *supra* note 23, at 184.

[42] Thomas, *supra* note 3, at A21.

[43] Indeed there are some who exhibit little to no physical characteristics that would suggest African ancestry who, nonetheless due to background, association with other blacks, speech patterns, and other characteristics, are sometimes considered authentic members of the black community. *See, e.g.*, Dowd, *supra* note 22, at A31 (explaining how many blacks regard former President Bill Clinton "as one of their own").

[44] *See* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27–28 (explaining the way in which race is not a function of biological characteristics but rather a social construction that is part of a greater social fabric).

[45] Robinson, *supra* note 12, at 424 (predicting how blacks will reject the author as a black conservative for expressing certain views); STEELE, *supra* note 36, at 3–5; J.C. WATTS, WHAT COLOR IS A CONSERVATIVE? 3 (2002).

[46] Forde-Mazrui, *supra* note 9, at 728; Fordham & Ogbu, *supra* note 23, at 180–83.

The appropriate black person must be black through and through, or in other words, not white. Similarly, a person is considered "incognegro" when he or she appears to prefer to live or exist within the white world or is not deemed to sufficiently acknowledge his or her blackness.[47] I first became acquainted with this term my freshman year of college. There was an outwardly appearing African-American student in the dormatory adjacent to mine. He was thought by many within the black community to be black because of his darker skin, facial features, and coarse hair which he wore in short dreadlocks. While the community presumed he was of African descent, he did not attend any of the noted black community functions, he was not known to have black friends, and he rushed and was accepted into a white fraternity. It was in reference to him that I first heard the term "incognegro." The perception in the black student community was that he denied his blackness and hid in the white world—he was incognegro. Similarly, one of the ways a person can be considered a "sell-out" is to be perceived as allowing himself "to be used to further white interests for personal gain at the expense of the broader African American community."[48]

Thus, it would appear that a large part of what is considered authentic blackness is a negation of, or at least a strong resistance to, what is perceived to be white.[49] It is worth examining, however, just what types of traits are often considered to be white, such that a person earns the dubious distinction of one of these labels. Among these "white accoutrements" are success in school,[50] speaking Standard English,[51] attending predominantly white institutions, working in predominantly white workplaces, and working in higher level jobs that blacks and people of color have traditionally not engaged in.[52] It also sometimes includes subscribing to positions or

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[47] Debra Dickerson, *Bill Cosby—America's Granddad Gets Ornery, at http://slate.msn.com/id/2103794* (July 13, 2004) (explaining that Bill Cosby's critics are wrong to say that he is "incognegro").

[48] Nunn, *supra* note 14, at 1473. In fact, it is precisely this perception of Thomas within the black community that has led to much of his condemnation. Merida & Fletcher, *supra* note 1, at W8.

[49] Fordham & Ogbu, *supra* note 23, at 181–83.

[50] *See* Brown, *supra* note 23, at 321–22; Forde-Mazrui, *supra* note 9, at 728; Fordham & Ogbu, *supra* note 23, at 186; MCWHORTER, *supra* note 36, at 83.

[51] Baynes, *supra* note 11, at 216; Fordham & Ogbu, *supra* note 23, at 186. I refer to this only as an example of what sometimes leads to a person being referred to as a sell-out. I do not intend to comment on the debates over language and the question of whether African Americans have a unique form of speech that should be valued and preserved.

[52] Fordham & Ogbu, *supra* note 23, at 182.

views not deemed to be held by a majority of the black community.[53]

If such things are considered to be white, and what is white and what is black are in opposition, then it follows that the opposite of the aforementioned things are at least part of the definition of blackness that informs the use of such terms. Thus, poor performance in school, working at low-level jobs, poor grammar, and poverty, among other negative traits, have become part of what it means to be black.[54] In other words, part of the definition of blackness that such terms are used to police involves the embodiment and acceptance of some of the most negative stereotypes that have been directed at black people over time.[55]

In addition to the above, the definition of blackness that underlies such terms also appears to have a distinctly urban flavor. While living in the suburbs or rural areas may not automatically brand one a sell-out, blacks who live in these areas do not appear to conform to the underlying norm of blackness either.[56] In addition to an urban bias, this underlying definition is arguably distinctly male and heterosexual as well.[57]

Consequently, the view of the black community, presupposed by the use of terms like sell-out, Uncle Tom, and Oreo, is a rather narrow one. It is not a view that readily accepts differing perceptions among the African-American community, and it is not a view that takes into consideration the wide range of experiences of those who consider themselves to be black. In addition to being narrow, such a view also accepts and embodies some of the most derogatory stereotypes of black people. Given this, one must necessarily ask why so many within the black community would police norms to protect such a self-definition.

I posit that much of the reason for such policing is fear. Records from the year 1619 contain one of the earliest references to Africans

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[53] Smith, *supra* note 2, at 528.

[54] Brown, *supra* note 23, at 334–38; Fordham & Ogbu, *supra* note 23, at 180–83.

[55] *See* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992), *reprinted in* CRITICAL RACE THEORY, at 225 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (describing some of the stereotypes ascribed to African Americans and other "outsiders" throughout American history).

[56] *See* JOHN MCWHORTER, AUTHENTICALLY BLACK: ESSAYS FOR THE BLACK SILENT MAJORITY 13–14 (2003).

[57] Devon W. Carbado, *Men in Black*, 3 J. GENDER RACE & JUST., 427, 427–29, 435 (2000); Fordham & Ogbu, *supra* note 23, at 194 (relaying student stories describing how deviation from perceived oppositional norms (like achieving in school) calls into question one's "manhood" based on the perception that "males who do not make good grades are less likely to be gay").

having been brought to America, viewed by some as the genesis of the chattel slave system in this country.[58] Over time, the legitimation and perpetuation of the American system of chattel slavery was dependent on perpetuating belief in the inferiority of blacks and the superiority of whites and keeping blacks as a group separate and distinct from whites.[59] By the same token, part of the process of becoming a slave involved stripping the newly arrived Africans of their culture and heritage and the sense of identity that comes with that kind of self-knowledge.[60] Although some aspects of African culture survived, most of it was lost. Thus, the Africans who were brought here as slaves and their descendants were left to form a new definition of themselves in a society that defined them as inferior and more particularly as the opposite of white.[61] Not only did this society define them as inferior and in opposition to whiteness, it also established barriers at every turn to prevent their participation as equal and valued members of the society.[62]

Out of the crucible of the experience of the Africans that were brought to America as slaves, and their descendants, there has emerged a unique and culturally distinct group of people that is neither entirely African nor an assimilated part of the mainstream American culture.[63] Part of what defines this group as a unique and separate group within American society is the fact that it is not white. And while, as demonstrated above, such an oppositional definition involves many negative traits which are inaccurate with respect to most of the black community, such an oppositional definition still embodies, at least in part, what it means to be black. We know we are

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[58] *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 20–21 (1978).

[59] In few places is this view articulated better than in Chief Justice Taney's opinion in *Dred Scott v. Sandford*, 60 U.S. 393, 409 (1857) ("They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings . . . . And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.").

[60] PETER HOGG, SLAVERY: THE AFRO-AMERICAN EXPERIENCE 33–34 (1979) (describing the "seasoning" and forced name change of slaves).

[61] Brown, *supra* note 23, at 338; *see supra* note 13 and accompanying text.

[62] *Dred Scott*, 60 U.S. at 409; HIGGINBOTHAM, *supra* note 58; C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 11 (1974); DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (5th ed. 2004) (describing throughout the barriers established to deny African Americans full participation in American society).

[63] W.E.B. DuBois, *The Souls of Black Folk*, *in* THREE NEGRO CLASSICS 207, 213–15 (1965); DARDEN & WALTER, *supra* note 20, at 382.

black, because we are not white. Therefore, the question becomes, if we become more white, or start embodying what it means to be white, will we still be black? Put another way, if we all become like Clarence Thomas, what is going to happen to black folks? If a large part of the way we see and define ourselves is in opposition to whiteness and more of us become "whitelike," does that mean we will no longer exist, at least as a separate and unique group? We as a people may not particularly care for the often negative and oppositional way in which we are defined, but if part of how we see ourselves does in fact involve that definition and we lose that definition, then to some extent we arguably have lost our identity. Thus, one could argue that part of why we police these norms, as negative as they may be, is due to the fear of losing that hard fought-for sense of identity and sense of self.[64] In other words, it is better to exist as a negative than to not exist at all.

Despite how important it may be for us to define ourselves, and to have a unique sense of our black identity, the perception of ourselves that underlies the use of such terms as Uncle Tom and Oreo is problematic for a number of reasons.

III. The Problem with the Idea of Sell-outs, Uncle Toms, Oreos, and Incognegros

A. *The Oppositional Identity Problem*

As explained in Part II, part of the view of authentic blackness that underlies the use of such terms as "sell-out" involves an acceptance and embodiment of many of the negative stereotypes against which blacks have fought for centuries.[65] So why, one might ask, did such concepts become part of how at least some of us view ourselves? I think part of the answer to that question lies in the fact that since the beginning of the history of this country blacks have been defined by someone other than themselves and have largely been rejected by those doing the defining.[66] Thus, apart from the fact that defining oneself in opposition to whites may mean accepting the negatives about one's self which that entails, on another level it

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[64] Robinson, *supra* note 12, at 437; Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. Third World L.J. 231, 260–61 (2000) [hereinafter Robinson, *Matrix*].

[65] *See supra* notes 46–55 and accompanying text.

[66] Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 Vill. L. Rev. 767, 767 (1988); Brown, *supra* note 23, at 338; Darden & Walter, *supra* note 20; DuBois, *supra* note 63; Robinson, *supra* note 12, at 431–34.

makes sense to resist the culture and views of those who have subordinated African Americans as a group. Thus, such a definition is not so much an ascription of negative views to oneself, as it is a rejection of those who have treated and continue to treat one badly.[67]

While the impetus to reject what may be perceived by some to be mainstream culture is understandable, it is problematic because if the definition of everything white in this society is necessarily good and positive, and one defines oneself in opposition to that, then the inevitable result of one's self-definition is going to be an embracing of the bad and negative. Not only that, if one defines oneself in opposition to standards that one does not set, is that really self-definition? In other words, perhaps rather than defining ourselves, all we have done is embrace the way mainstream culture has defined us. The negative attributes that have been ascribed to blacks throughout American history are legion and well known and need not be reiterated in detail here. But if whites are viewed as rich, industrious, intelligent, well-educated, and articulate, then the oppositional definition of blacks sees authentic blackness as poor, lazy, stupid, uneducated, and inarticulate.[68]

For centuries, blacks have fought to become equal and valued members of this society, to be able to take advantage in full measure of all the things that this society has to offer. In other words, to have the opportunity to be rich, well-educated, and valued for one's intelligence and other positive attributes that one has to offer the greater whole. How can it then be that one cannot be rich, intelligent, well-educated, articulate, and black? Obviously, one can be all of these things, and then some, and black at the same time. Yet, as demonstrated above, part of the definition of blackness that we police with such words as "sell-out" and "Uncle Tom" indicates that this is not so. If we cannot be both authentically black and achieve mainstream success, or authentically black and hold a variety of views, or authentically black while at the same time living and participating in all facets of this society, what kind of self-defeating dichotomy have we established for ourselves?[69] If the ultimate goal is to become full members of this society while remaining true to ourselves and our black identity, then we must be able to do both at the same time.

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[67]   Fordham & Ogbu, *supra* note 23, at 181.

[68]   *Id.*

[69]   *See, e.g.*, Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 773–74 (1997) (describing the way such false dichotomies limit the options of black attorneys).

Let me make clear that I am in no way endorsing assimilation in the sense of negating and eliminating black culture. In fact I am advocating the opposite. What I propose is a self-definition that originates from within the black community, but one that is constructive in its explanation of what it means to be black rather than oppositional and negative.[70]

## B.	*The Exclusion of Certain Views Problem*

As mentioned above, persons with views like those espoused by Clarence Thomas and others like him are viewed by many as not being authentically black.[71] But as Professor Onwuachi-Willig explains in her article, there may actually be a coherency to Justice Thomas' jurisprudence which, although different from the views of some within the black community, does embody a black perspective.[72] While progress has certainly been made with respect to race relations in this country over the last several decades, we still have a ways to go.[73] The view among some is that continuing to work for progress within the frameworks we have thus far used will not cause us to realize any more substantial gains.[74] If in fact what we are doing is not working, or is not producing the results we would like, then perhaps one strategy is to look for other ways of thinking about and doing things. When we reject and/or marginalize someone out-of-hand under the rubric of "sell-out" without actually listening to what they have to say, we run the risk of missing potentially valuable contributions to the discussion that may help us continue our struggle in more productive ways.

Perhaps more importantly, when we refuse to take seriously the contributions of those who do not apparently think like ourselves, we run the risk of replicating the acts of silencing and marginalization that are hallmarks of systems of subordination.[75] There is a significant difference between disagreeing with Justice Thomas' views on the merits and writing him off as Justice Scalia's puppet, assuming he has no thought process of his own just because he happens to be a

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[70] Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207, 208–09 (1996) (describing W.E.B. DuBois' attempt at the turn of the 20th century to "take the concept of 'race' away from white folks: to transform it from an alibi for subordination").

[71] *See supra* notes 1–2 and accompanying text.

[72] *See supra* notes 3–5 and accompanying text.

[73] *See supra* note 7.

[74] *See* sources cited *supra* notes 7–8.

[75] *See supra* notes 9–10 and accompanying text.

black conservative.[76]

C.   The Under-inclusiveness Problem

As mentioned above, the definition of blackness underlying the use of words like sell-out has a distinctly urban, inner-city flavor.[77] To some extent this is understandable, as a good number of African Americans do in fact live in urban areas and within the inner city.[78] However, there is a substantial number who do not, and presumably a wealth of black experience that does not fit this norm. While as of 2002 only 12.5% of the African-American population did not live in a metropolitan area, this still accounts for over four million blacks who do not live in the city, hardly an unsubstantial number.[79] When the definition of what it means to be black is primarily based on one aspect of lived experience, the definition essentially privileges a segment of the total experience. If the quintessential definition of blackness is based on the lived experience of those in the inner city, does that mean that there is no space for blacks without that experience to become authentically black?[80] Certainly it does not, but if it does not, then how else is such authenticity to be defined, and who is going to make that determination?[81]

I have spent the vast majority of my life in the Mountain West and in particular in the state of Wyoming. One of the positively defining moments of my life was when the owner of the Black Cowboys museum in Denver, Colorado came to speak to my third-grade class. Although I had spent most of my life among cowboys and through school had been steeped in the history of my home state, it was not until that presentation that I realized that that history included people a lot like me. It was not until then that I learned

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[76]   Onwuachi-Willig, *supra* note 3, ms. at 7–8 n.20.

[77]   *See supra* note 56 and accompanying text.

[78]   U.S. Census Bureau, U.S. Dep't of Commerce, *The Black Population in the United States: March 2002*, *available at* http://www.census.gov/prod/2003pubs/p20-541.pdf (Apr. 2003) (estimating that approximately 51.5% of the black population lives within the inner city, and another 36% lives within metropolitan areas, although outside of the inner city).

[79]   *Id.*

[80]   Please note that I am not trying to disparage or take away from the salience of that experience. Rather I am trying to highlight the fact that, while important, it is one of many types of lived experiences within the black community and it is not clear why it should hold a dominant place within the definition of black that underlies the use of such terms as "sell-out."

[81]   Harris, *supra* note 70, at 212 (noting that "in a world where identities are always fluid, dynamic, and multiple, the question must always be 'who is defining, how is the definition constructed, and why is the definition being propounded.'") (internal citations omitted).

that one could be both black and a cowboy.[82]

We already live in a society that degrades and negates our existence and legitimacy of being at every turn. When our vision of ourselves omits the variety of our experience, those that are omitted find they have no place in either mainstream culture or black culture. Thus, a truer and more productive definition of ourselves would wholly embrace the wealth of our experiences.

D.   The "It's Not Our Culture" Problem

As discussed, part of what fuels the policing of "authentic blackness" within the black community is a fear of losing one's self if one were to adopt aspects of what is considered the majority culture.[83] It may be that such fear is misplaced. This fear appears to be premised on at least two assumptions that may be false. One, that blacks will never be able to fully assimilate into the majority United States culture in the first place, and two, that there is a majority United States culture to assimilate into that is separate and apart from black culture and black experience. Focusing on the second aspect, there appears to be an implicit assumption that the majority has not been influenced by or contains no aspect of black culture. However, one need not look very closely to see the widespread influence of blacks on all aspects of American culture. From music, to clothing, to language, from food, to television, to movies, since this country's inception blacks have had a tremendous impact on the way American culture has developed.[84]

Accordingly, when one accuses someone of adopting or succumbing to "white or mainstream culture" it may not be as clear as it would first seem what that person is referring to. Put another way, I would posit that "white culture" largely is and has been a myth in this country, at least to the extent one would like to think of it as a culture completely devoid of influence from those that are thought to sit largely on the outside of that culture.[85] However, what is not a myth is the oppression and discrimination suffered throughout the history of this country by those that do sit on the outside, and how this society, whether overtly or covertly, has worked to keep those groups on the outside.

In adopting the negative aspects perpetuated by the larger

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[82]   WILLIAM LOREN KATZ, THE BLACK WEST 143–60 (3d ed. 1987).

[83]   *See supra* notes 63–64 and accompanying text.

[84]   RALPH ELLISON, *What America Would Be Like Without Blacks, in* GOING TO THE TERRITORY 104 (1986).

[85]   *Id.*

society as part of our self-definition, we implicitly accept the view that sees us as outsiders, as others; we concede that we have no place in this country that we have helped to build from the ground up. This country is no less ours than it is anyone else's, and although the prevailing perception is often to the contrary, mainstream American culture is no less ours as well. Therefore, the underlying view of ourselves and our place in this society that helps us define who we are should not be so quick to concede that we are not entitled to a legitimate place within that society.

IV. CONCLUSION

Over the last several decades, the demographics of the United States have changed substantially.[86] Whereas African Americans used to be the largest minority group, that is no longer the case.[87] Whereas the framework for viewing race relations in the United States was largely through the black/white dichotomy, that has also begun to change.[88] In my view, these types of changes are good because they help upset the status quo and give us an opportunity to reinvent ourselves.[89] As the black/white duality dissipates, the country becomes more diverse, and African Americans become more equal and valued participants in American society, the old markers by which we have defined ourselves are fading and will necessarily need to change. Rather than clinging to these old markers and continuing to engage in a discourse that serves to marginalize and silence members of the community, while protecting norms that are negative and harmful, we should take these changes as an opportunity to redefine ourselves—an opportunity to redefine ourselves in a way that not only rejects the negatives projected on us by the greater society, but refuses to let such views occupy a central place in how we

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[86] Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 865–66 (1993); john a. powell, *A Minority–Majority Nation: Racing the Population in the Twenty-First Century*, 29 FORDHAM URB. L.J. 1395, 1395–97 (2002).

[87] U.S. Census Bureau, U.S. Dep't of Commerce, Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000 (Apr. 2, 2001), *available at* http://www.census.gov/population/cen2000/phc-t1/tab01.pdf (indicating the total number of Hispanics or Latinos as slightly larger than that of blacks or African Americans); *cf.* powell, *supra* note 86, at 1398–1405 (describing the contested and contingent way census categories have been defined over time and how that has contributed to white dominance).

[88] *See* CRITICAL RACE THEORY, supra note 55, at 343–84; sources cited *supra* note 13.

[89] Robinson, *Matrix, supra* note 64, at 261–64.

see and define ourselves. Such a definition would recognize and accept our differences of opinion and lived experience and proclaim that there is value in the variety of ways there are to be black.[90] If there were no white people would there be black people? I think there would be, but maybe for once, how those people are defined would be solely up to us.

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[90] *See generally* Madhavi Sunder, *Cultural Dissent,* 54 STAN. L. REV. 495, 500–01 (2001) (advocating a "cultural dissent" approach—one that views identity as pluralistic and fluid, and such that individuals within an identity-group can choose among many ways of living within a culture—instead of a "cultural survival" approach that reinforces old notions of imposed identity).