

# THE TURNER THESIS, BLACK MIGRATION, AND THE (MISAPPLIED) IMMIGRANT EXPLANATION OF BLACK INEQUALITY

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## I. THE IMMIGRANT TALE AND RACIAL INEQUALITY

Underlying most debates of racial inequality is the tacit reference to the Immigrant Tale,<sup>1</sup> a story of “natural” class ascension of immigrant groups in the “land of opportunity.” This tale is affirming, celebrating the assimilation of ethnic immigrants in the American “melting pot.”<sup>2</sup> It is also optimistic, implying social integration and economic parity of currently dissipated immigrant communities. “Its thrust is to defend the individualistic view of the American system because it portrays the system as open to those who are willing to work hard and pull themselves over barriers of poverty and discrimination.”<sup>3</sup>

But there is an unsavory element of the immigrant tale: its use as a sword in the battle against the civil rights era quest to promote racial equality through

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<sup>1</sup> Jennifer Russell has characterized the immigrant tale as that which “defines the quintessential American character.” Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L. J. 1353, 1408 (1995). She describes the immigrant tale as that of the immigrant European laborer whose emigration coincided with the economic and social transformations of the nineteenth century. The story of the European immigrant highlights arrival to America with neither social status nor honor, and with few, or no, possessions of value. The burgeoning political economy of the late nineteenth through early twentieth centuries presented untold opportunities for personal advancement. Thus, the European immigrant conquered poverty and discrimination, and secured a better life for future generations. *Id.* at 1408. See generally, RICHARD D. ALBA, *ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA* (1990).

<sup>2</sup> “The tale of the European immigrant is transethnic in the sense that it is told by Americans of various European ancestries (i.e., Irish, Italian, English, Dutch). As such, the tale unites European Americans.” Russell, *supra* note 1, at 1408.

<sup>3</sup> *Id.*

law.<sup>4</sup> In its most recent versions, the immigrant tale is employed in arguments against affirmative action or, more aggressively, against governmental efforts to enforce anti-discrimination laws.<sup>5</sup> In this version the immigrant tale contests the notion – assumed to underlie the civil rights approach – that racial discrimination is unique.<sup>6</sup> In this context, racial discrimination is said to be properly characterized as a version of ethnic prejudice that is in part irrational, in part rational – but which, in any event, dissipates as the group proves its worth, acquires prerequisite skills and education, and as the group assimilates.

As Nathan Glazer put it in 1971, “It is possible to see the position of blacks in northern cities in ethnic terms, that is, to see them as the last of the major groups, badly off at present, but due to rise in time to larger shares of wealth and power and influence.”<sup>7</sup> Following Glazer, a backlash against the 1960s and its explanations of inequality would come to dominate scholarship on inequality.<sup>8</sup> Since the 1980s, this view has been dominant, associated with various conservative movements and found in (formerly) liberal scholars’ assessments of race and poverty.<sup>9</sup> “No longer would the focus of attacks be on the social structure that engender and maintain glaring racial inequality. Once again, the blame for the tangle of problems that beset black America would be placed on blacks themselves.”<sup>10</sup>

Underlying the immigrant tale is a related explanation of social inequality rooted in the “culture of poverty” explanations of inequality advanced in the early 20th Century by advocates of the “Chicago school” of sociology. “The Chicago school’s fundamental framework emphasized social interactions as a dynamic process – a cycle of assimilation. The cycle involved a number of stages, including contact, competition, accommodation, and ultimately assimilation and amalgamation.”<sup>11</sup> The Chicago school directed analysis of social inequality around the process of assimilation and the impediments to assimilation, prominent of which were the “cultural” patterns of the group.<sup>12</sup> Failed

<sup>4</sup> “The tale of European immigration – embodying the powerful concepts of freedom, independence and self-sufficiency though wage work, as they have been reinterpreted since the nineteenth century – provides a dominant ‘text’ against which social and political claims are made and measured in the twentieth century.” *Id.* at 1409.

<sup>5</sup> See, e.g., *EEOC v. Consolidated Servs. Sys.*, 989 F. 2d 233, 235-36 (7th Cir. 1993) (arguing that efficiency and ease of hiring fellow Koreans undercut proof that hiring only Koreans was motivated by discriminatory intent).

<sup>6</sup> This is most famously articulated in Nathan Glazer’s 1971 essay, *Blacks and Ethnic Groups: The Difference and the Political Difference it Makes* in NATHAN GLAZER, *ETHNIC DILEMMAS* (1983).

<sup>7</sup> *Id.* at 92-93.

<sup>8</sup> See discussion of this trend in STEPHEN STEINBERG, *TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLITICS* (1995).

<sup>9</sup> This view is especially associated with “Black Conservatives,” see Martin Kilson, *Anatomy of Black Conservatism*, 59 *TRANSITION* 4 (1993), and ANGELA D. DILLARD, *GUESS WHO’S COMING TO DINNER NOW? Multicultural Conservatism in America* 56-98 (2001), and is, among (former) liberals critical of liberal policies on racial inequality, prominent in the works of Stephen and Abigail Thernstrom, see *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* (1997), and Jim Sleeper, see *LIBERAL RACISM* (1997).

<sup>10</sup> STEINBERG, *supra* note 8, at 93.

<sup>11</sup> DEAN ROBINSON, *BLACK NATIONALISM IN AMERICAN POLITICS AND THOUGHT* 107 (2001).

<sup>12</sup> See *id.* at 108.

assimilation was said to produce severe problems of "disorganization" and "demoralization" which famous mid-Century black sociologist E. Franklin Frazier applied to black migrants to urban centers, arguing that the erosion of folk culture during these migrations had produced high rates of illegitimacy, family desertion and juvenile delinquency, among other social problems.<sup>13</sup> The Chicago school framework produced a lively debate over whether black Americans in the immediate, pre-civil rights era should have been regarded as assimilated. However, the more important consequence of the Chicago school approach for black Americans was its "tendency to draw analogies between European peasants and rural blacks,"<sup>14</sup> a move which "minimized the particular patterns of discrimination that blacks faced"<sup>15</sup> and "obscured the formal and informal processes by which 'whiteness' was extended to initially 'nonwhite' European populations."<sup>16</sup>

These theories, revived during the height of the civil rights movement in answer to urban black protesters' complaints over ghettoization and lack of opportunity, explained inequality of urbanized black Americans on their lack of tools for social advancement.<sup>17</sup> As originally applied to European immigrants in the late 19th Century, this theory was built on the immigrant tale. It held that immigrants from foreign lands without language and educational assets were limited to urban ghettos as they acquired such abilities over generations. This often painful process required abandonment of certain folkways as one became more American. It also emphasized the acquisition of language skills and education as prerequisites to social and economic opportunity.

Significantly, Glazer and Moynihan abandoned the Chicago school view that complete assimilation occurred, thus raising the prospect that success of identifiable ethnic groups might turn on differences between ethnic cultures as opposed to the completeness of assimilation away from ethnic culture.<sup>18</sup> Thus establishing the quality of culture as the key determinant of group success, Glazer and Moynihan magnified the Chicago school's de-emphasis of the role of segregation and discrimination and defined inequality as a product of a permanent version of "disorganization." Some immigrant groups succeeded because they had a "culture" that emphasized hard work, industriousness, and self-reliance that operated in the context of stable families, deep religious beliefs, and an attendant cohesive community ethos. Unsuccessful groups lacked these attributes; rather, these groups possessed a culture of poverty marked by familial disorganization, vice, and permissiveness. Indeed, this type of culture of poverty argument had long underlay old fashioned racist theories that had invoked notions of supposed community disorganization to exclude Irish, Italian, and Jewish communities from "whiteness."<sup>19</sup>

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<sup>13</sup> See *id.*

<sup>14</sup> *Id.* at 108.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT* (1963). These sentiments are especially prominent in the MOYNIHAN REPORT, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965).

<sup>18</sup> GLAZER & MOYNIHAN, *supra* note 17, at 13-16.

<sup>19</sup> Robinson explains the full extent of Glazer & Moynihan's approach, and its unsavory ethnic stereotyping now familiar in social capital theorizing:

As applied to racial inequality during the 1960s, the culture of poverty aspects of the immigrant tale emphasized the link between black inequality and the deficits in educational attainment, lack of industrial skills, and social disorganization. Set out in the controversial Moynihan Report, black Americans' relative inequality was said to derive from single parent families, social disorganization, and lack of a work ethic. Glazer and Moynihan's construction was the fundamental premise of the Moynihan Report. Building on Frazier's earlier conclusions about disorganization in black urban communities, Moynihan found in disproportionate matriarchy in black communities the basis for social disorganization and inequality quite apart from discrimination and prejudice, allowing him to declare that "the present tangle of pathology is capable of perpetuating itself without assistance from the white world."<sup>20</sup>

Racial inequality came to be conceived as the consequence of black migration to Northern cities without the employment skills or educational abilities to take advantage of the opportunities of the modern industrial metropolis. When riots broke out in Northern and Western cities during the civil rights movement, the government's official report on the causes of the riots, the *Kerner Report* (1968), focused, astonishingly, not on the frustrations of exclusion of black workers from the labor markets, but on the social disorganization in the black communities.<sup>21</sup> Perhaps more surprisingly, Robinson's authoritative study of black nationalism shows that this view was adopted and became the cornerstone of black nationalists' explanations of black urban poverty during

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. . . Glazer and Moynihan's study didn't explain only how and why ethnic identified failed to melt. These authors also attempted to explain social mobility and political power as functions of cultural traits and familial patterns. The Irish had not prospered as much as, say the Jews, because of their propensity toward alcoholism. Catholicism explained both Irish success in the political process and Irish failure to achieve the same sort of socioeconomic mobility that Jewish Americans had acquired. Moreover, the form of "individuality and ambition" characteristic of Protestant and Anglo-Saxon culture was absent among Italian Americans. Jews prospered partly because of their thirst for education. Marital breakup was less common among Jews, and Jewish parents' control of their children resulted in significant "neurosis" but "less psychosis."

Blacks, by contrast, had been crippled by slavery. The peculiar institution had weakened black family structure, and that weakness had important effects. One was that blacks lacked the clanishness that other ethnic groups had used to create and sustain separate economic markets and clientele. The relatively large number of female headed households also increased the chance of psychological difficulties among black boys.

ROBINSON, *supra* note 11, at 112-13. These views complemented eugenicist theories prominent at the beginning of the twentieth century. Though culture of poverty theories focused on "culture" it could be said to be the generalization of eugenics, transferring those views from individuals to groups.

<sup>20</sup> Daniel P. Moynihan, *The Negro Family in SLAVERY AND ITS AFTERMATH* 389, 412 (Peter Rose, ed., 1970).

<sup>21</sup> "'Cultural factors . . . make it easier for the immigrants to escape from poverty.' Their 'families were large, and . . . patriarchal . . . . So men found satisfactions in family life that helped compensate for the bad jobs they had to take and the hard work they had to endure.' Blacks, by contrast, 'came to the city under quite different circumstances.' Because of slavery and unemployment, 'the Negro family structure had become matriarchal,' thus providing fewer 'cultural and psychological rewards' to the black man." *The Kerner Report: The 1968 Report of the National Advisory Commission on Civil Disorders* 280 (1968) as quoted in ROBINSON, *supra* note 11, at 113.

the 1960s and the starting point for black nationalist advocacy for responses to black poverty and ghettoization.<sup>22</sup>

The influence of this explanation of black poverty took on additional significance as controversies over affirmative action as a response to that inequality erupted in the 1970s. The immigrant tale and its culture of poverty components came to imply that affirmative action and any legal tools beyond simple anti-discrimination laws were unwarranted, as inequality was, in a way, natural.<sup>23</sup> If black Americans were more industrious, they would, over time, advance economically and then, with more time, socially.<sup>24</sup> That is, black inequality was more the product of natural processes connected to their large scale migration to urban centers than prejudice, discrimination, or societal discrimination. While the immigrant tale did not repudiate discrimination, it did cast discrimination as a normal experience for immigrant groups.

As the debate over affirmative action heated up, it became commonplace to point to the "success" of various ethnic immigrant groups in an intensified criticism of black people for their own inequality.<sup>25</sup> Indeed, by the 1980s the existence of pathological cultures of poverty among the "underclass" became the standard description of black urban existence.<sup>26</sup> By the 1990s affirmative action, along with other social programs, were being criticized as promoting those pathologies – that is, they were said to discourage the kind of social investment in education and individual industry<sup>27</sup> that would "naturally" solve black inequality over time.

Related to the immigrant tale, and influenced by it, is a body of scholarship that seeks to explain social inequality of groups on the basis of their accumulation of social capital – that is, inequality of groups is a function of differentials among the groups' members of valuable skills such as education,

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<sup>22</sup> ROBINSON, *supra* note 11, at 110-117.

<sup>23</sup> See Nathan Glazer's three chapters on affirmative action. NATHAN GLAZER, *ETHNIC DILEMMAS* (1983). They in turn, distinguish between anti-discrimination and affirmative action, rejecting the latter and its justifications imply that the basis for affirmative action, disproportionate inequality and the absence of certain groups from job categories, is explained by group choice and qualification, and argue that the "equality of results" view that affirmative action represents is at odds with American values and the ethnic group freedom, *Id.* at 159-81, 192-208, 209-29.

<sup>24</sup> Of course, this view is prominent among black Americans as well, dating famously to Booker T. Washington. See BOOKER T. WASHINGTON, *THE FUTURE OF THE AMERICAN NEGRO* 65-66 (1899). "Like the Jew, the Negro would secure recognition when he had 'entwined himself about America in a business and industrial sense.'" LEON W. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* 354 (1998) (quoting WASHINGTON, *THE FUTURE OF THE AMERICAN NEGRO*). Glazer argues that the opening of opportunity for black social advancement had *already* happened as a consequence of the newly imposed anti-discrimination regime by the end of the 1960s. GLAZER, *supra* note 23, at 174.

<sup>25</sup> See GLAZER, *supra* note 23, at 174. See also ROBERT G. LEE, *ORIENTALS: ASIAN AMERICANS IN POPULAR CULTURE* 149-153 (1999).

<sup>26</sup> See WILLIAM J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (1978).

<sup>27</sup> This kind of critique is ubiquitous, underlying the likes of Peter Schuck's rejection of affirmative action policy. See Peter Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1 (2002). This type of argument is undoubtedly what underlies Justice Powell's rejection of affirmative action as a response to "societal discrimination" in *Bakke*. See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

traditions of success and deferred gratification, and structures of community stability.<sup>28</sup> These social capital theories judge black Americans (and the African diaspora)<sup>29</sup> harshly.<sup>30</sup> Though these theories reject by their terms racialized understandings of the world over cultural and social group explanations, their outcomes tend to reflect racial hierarchies familiar to explicitly racist writers of the nineteenth century. At bottom they judge black Americans severely for failure to build stable social structures in the aftermath of slavery and Jim Crow.<sup>31</sup> Complimenting the immigrant tale, these social capital theories offer an explanation of the failings of black migrants to show significant social and economic progress in the several generations since Jim Crow ended, and the more than eight decades since black migrants began to relocate to urban centers in the North. Black Americans, according to these theories, simply have not accumulated the social capital – primarily education, social stability, and family structures – to record substantial advancement relative to other groups.

This application of the immigrant tale is similar to the emergence of what Paul Gilroy and others have called the New Racism.<sup>32</sup> New Racism is a vision of group superiority that is rooted in supposed cultural traits as opposed to

<sup>28</sup> See, e.g., *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* (Lawrence E. Harrison & Samuel P. Huntington eds., 2000); see also, DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS: WHY SOME ARE SO RICH AND SOME SO POOR* (1998); FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995).

<sup>29</sup> See Daniel Etounga-Manguelle, *Does Africa Need A Cultural Adjustment Program?* in *CULTURE MATTERS*, *supra* note 28, at 65.

<sup>30</sup> See, e.g., Orlando Patterson, *Taking Culture Seriously: A Framework and an Afro-American Illustration*, in *CULTURE MATTERS*, *supra* note 28, at 203. Patterson's well known position is that slavery destroyed black family bonds, the effects of which are the explanation of disproportionate black inequality today. In this essay he argues that, while the small urban black middle and working classes of the Jim Crow period were able to develop traditional family structures in the context of fundamentalist religion, the sharecropping system produced opposite effects for the mass of the black population. *Id.* at 213. That system reinforced, for Patterson, two traits from slavery: first the system of "unsecured paternity" in which men did not have to "take account of resources before having children," and, the tendency of black men to measure their manhood only in the number of children they sired. *Id.* at 214. Thus for Patterson, the existence of mostly two parent families among black sharecroppers is to be mostly ignored as a farce, since the sharecropping system reproduced slave system family structures that persist into the modern period. Though Patterson specifically rejects the culture of poverty notion that poverty produces counterproductive cultural practices, his social capital leanings (what he calls the "transmitted culture model") amounts to much the same thing. *Id.* at 215.

<sup>31</sup> See Patterson, *supra* note 30.

<sup>32</sup> See, PAUL GILROY, *AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE* (2000). See also, MARTIN BARKER, *THE NEW RACISM* (1980); AMY ELIZABETH ANSELL, *NEW RACISM: RACE AND REACTION IN THE UNITED STATES AND BRITAIN* (1998). Reviewing Ansell's book, Jerome Hemmilstein describes the new racism in this way:

Disavowing any racist intent, the new right has developed two types of discourse for addressing race related issues in nonracial language. The first, an individualist discourse, argues than individuals, not groups, possess rights. As a consequence, government policies should be color blind, pursuing equal opportunity for individuals, not equal results for groups. . . .

The second new racialized discourse, in contrast, emphasizes collective identity and culture: it seeks to defend an American or British "way of life," an implicitly white culture under attack from a growing minority underclass, an invasion of nonwhite immigrants, and liberal policies from welfare and affirmative action to multiculturalism and bilingualism that sustain alien minority identities and cultures.

biological ones. The New Racism and similar visions of group difference tend to identify traits among groups that explain the extant racial hierarchy without much modification of the explanations offered by "old racists." Consonant with the immigrant tale, some groups are more effective at taking advantage of social opportunities because they possess better cultures. Though the use of culture has become a slippery term, the New Racism also implies that social and economic inequality among black Americans derives mostly from deficiencies in black cultural development.

The influence of the immigrant tale in debates over race-related social policy cannot be underestimated. Reviewing the Supreme Court's affirmative action decisions, one finds the Court predominantly concerned with the effects of such programs on non-party intended beneficiaries, discussing almost not at all the effects of the programs on those claiming they are discriminatory.<sup>33</sup> Among social critics, there has been a curious insistence that those who argue there are continuing effects of the sixty year system of official Jim Crow that followed several centuries of racial slavery must bear the burden of proving such continuations.<sup>34</sup> One might have thought the burden would be reversed, but the naturalistic implications of the immigrant tale are predominant.

The immigrant tale draws substantial support from the context of much black migration, the imagery of which seems to confirm many aspects of the immigrant tale. Prominent among these images is that of Delta bluesmen hitchhiking or jumping a train to Chicago where they are discovered by music producers – veritable rural savants wandering out of the wilderness. Notwithstanding the particular distortions of this image, if our vision of black urban migrants is modeled on Howling Wolf – who goes from sharecropping to blues stardom in several years<sup>35</sup> – then the job opportunities of black urban migrants might seem "naturally" limited.

Conceiving of black Americans as immigrants is inherently awkward. As historian Nell Irving Painter asks:

Were Africans who had been forcibly transported from Africa to the Americas immigrants? Making historical comparison with immigrant Europeans to a land already populated by Native Americans, the historian is tempted to answer in the affirmative . . . . [But] to use the word "immigrant" for Africans, as well as for voluntary immigrants, strips language of symbolic meaning.

Although we do not use the word "immigrant" for the people who, in the late 19th and early 20th Centuries, left the Southern countryside for Northern and Southern cities, they . . . deserve the term.<sup>36</sup>

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Jerome Himmelstein, *Review of New Racism: Race and Reaction in the United States and Britain* (1998) (by Amy Elizabeth Ansell), 104 AM. J. SOCIOLOGY 1550-51 (1999).

<sup>33</sup> Consider the extended discussion in *Grutter* on the unsavory effects of affirmative action on the non-party, program beneficiaries. *Grutter v. Bollinger*, 539 U.S. 306 (2003). See also, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002). This is the main argument of John Valery White, *What is Affirmative Action?*, 78 TUL. L. REV. 2117 (2004).

<sup>34</sup> See, e.g., THERNSTROM & THERNSTROM, *supra* note 9.

<sup>35</sup> Howling Wolf, one Chester Burnett, farmed on several plantations in the Mississippi Delta and Southeastern Arkansas, singing on the side, until, at age 38, he sang on a Memphis radio show and, within a year was a hit recording artist, settling in Chicago once signing with the Chess recording label. See MIKE ROWE, *CHICAGO BREAKDOWN* 135-37 (1975).

<sup>36</sup> Nell Irving Painter, *Foreword*, in *THE GREAT MIGRATION IN HISTORICAL PERSPECTIVE: NEW DIMENSIONS OF RACE, CLASS AND GENDER* (Joe W. Trotter, Jr. ed., 1991).

If black migrants are immigrants, poor, rural black migrants to American cities seem hardly distinguishable from the poor, rural immigrants from Southern and Eastern Europe who made their way to American cities. Both groups seem deprived of the skills and social tools needed to excel in modern industrial cities.

Support for this sort of vision of black internal migrants can be derived from the gross data on black and white educational attainment in the South and North. Black migrants escaping Southern states, where median black educational attainment in 1940 was three or four years, hardly seemed prepared for social and economic advancement in states where the median educational attainment levels were at least twice as high. In Louisiana, for example, the 1940 median educational attainment for black people twenty-five years and older was 3.9 years.<sup>37</sup> This compares dis-favorably with the general population of Northern states where the median educational attainment was nowhere below eight years in 1940.<sup>38</sup> Nicholas Lemann's study of migration from the Delta region of Mississippi to Chicago reinforces this view.<sup>39</sup> Focusing on the migration of particular subjects, Lemann paints a portrait of social disorganization rooted in slavery and tenancy in the South, removed to the ghettos of the industrial Northeast, and which persists today in an "underclass" culture. The view also underlies the more popularly disseminated recent visions of Baltimore from David Simon and Edward Burns, the authors of *The Corner*, in their popular television and cable series *Homicide* and *The Wire*.

These stories allow adherents of the immigrant tale to object to discrimination and lament the horrors of Jim Crow, without viewing the history of the Jim Crow South and industrial North and West as necessitating any contemporary remedies. Neither does Jim Crow have any ongoing effects under this view; nor does its existence in the past demand contemporary remedy. The inequality that exists, the argument goes, is the (natural) product of migration to the North, the lack of skills extant among black migrants, the social pathologies that have short circuited the process of educational and skill accumulation of which immigrant groups availed themselves, and the general underemphasis on individual industry and education.

These arguments are likely to seem strange to some who are familiar with the fetishization of education in many black communities, or who hear in these arguments echoes of the post-slavery apologias for the terrorism aimed at ending Reconstruction or for the indignities of Jim Crow.<sup>40</sup> Indeed, this portrait of black migrants is unfamiliar to many black migrant families who moved North

<sup>37</sup> 1940 Census of Population, Characteristics of Population, Louisiana, Table 13: Persons 25 Years Old and Over, by Years of School Completed, Race, and Sex, for the State, Urban and Rural: 1940. The median educational attainment of urban black Louisianans was only marginally better at 5.2 years. *Id.*

<sup>38</sup> 1940 Census of Population, Characteristics of Population, United States Summary, Table 31: Persons 25 Years Old and Over, By Years of School Completed, By Divisions and States (1940). The Pacific States, to which most black migrants to the West would immigrate, had median educational attainment in excess of 9.1 years of school. In California, the median was 9.9 years. *Id.*

<sup>39</sup> NICHOLAS LEMANN, *THE PROMISED LAND* (1990).

<sup>40</sup> See IDA B. WELLS, *A RED RECORD* (1895).



only after acquiring skills, education, or status in the South's urban centers.<sup>41</sup> But in the face of the South's general neglect of education and the widespread exclusion of black workers from industrial and craft training during Jim Crow and after, the argument that black migrants were undereducated and deficient in job skills seems difficult to refute. The focus of debates over the proper responses to racial inequality has shifted to how best to respond to the pathologies that exist in urban ghettos. On these grounds, the culture of poverty advocates eventually rule the day.<sup>42</sup>

Part of the problem with meeting the Lemann view of black migration is the lack of a test case to establish the role of prejudice, discrimination, and structural inequality in the formation of the urban ghetto which might distinguish the experience of black migrants from that of white ethnic groups who were undeniably subject to discrimination. The problem has been the lack of a context to discuss the black experience in 20th Century America that avoids silly arguments about whose experience of discrimination was greater. If one is to identify the particular operation of America's system of racial inequality, one needs to control for the ordinary experiences migrants face when coming to a new land and appearing in large numbers among a population unfamiliar with the folkways of the people.

For black Americans, that place is the West.<sup>43</sup> And recent historical scholarship has finally painted a clear enough picture of the experiences of black migrants to the West to suggest quite a different story of racial inequality. This Article seeks, on the basis of this scholarship, to tell a story of the resiliency of racial subordination during the War years. This story severely undercuts the power and appeal of the immigrant tale as applied to black inequality; it casts doubts on social capital explanations of group success; and it exposes the insidiousness of the New Racism that has emerged alongside such theories. Perhaps most important, the following discussion will show how the immigrant tale operated to undercut efforts to combat the rise of segregation in the Bay Area and completely undercut any effective remedies to the discrimination suffered by black migrants. Indeed, the immigrant tale operated to deny the very presence of discrimination that was both widespread and obvious.

Part II, below, describes the tremendous opportunity present in the Bay Area during the War, the character of the black migration to the Bay Area, and the instant segregation system that was erected to exclude black workers from jobs and housing. Part II concludes by arguing that the loss suffered by black migrants were much greater than might have appeared, as the black migrants

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<sup>41</sup> See, e.g., Kimberly L. Phillips' detailed discussion of this trend among pre-World War II migrants to Cleveland, Ohio. in KIMBERLY L. PHILLIPS, ALABAMA NORTH: AFRICAN AMERICAN MIGRANTS, COMMUNITY, AND WORKING CLASS ACTIVISM IN CLEVELAND, 1915-45, 30-56 (1999).

<sup>42</sup> For a popular account in these terms, see Nicholas Lemann, *The Origins of the Underclass, Parts I and II*, ATLANTIC MONTHLY 31-55 (June 1986) and 54-68 (July 1986). Of course by now, culture of poverty rhetoric is so ubiquitous as to be largely invisible.

<sup>43</sup> Charles Wilkerson defines the West conventionally as the "area west of the 100th meridian." Charles F. Wilkerson, *The Law of the American West: A Critical Bibliography on Non-Legal Sources*, 85 MICH. L. REV. 953, 956 (1987). This article will focus on one aspect of the West at one moment in time: the San Francisco Bay Area during and just after World War II.

were young, well educated, from urban areas where many had acquired advanced educational and industrial skill, and had migrated to the Bay Area in stable, intact families. These "model immigrants," who were, after all "Americans" with American values and who spoke the language, were nevertheless relegated to menial and transitory employment, effectively squandering their "social capital," to employ the troublesome concept.

Part III briefly discusses the emergence, under the auspices of the federal government's "Executive Order" system, of an anti-discrimination regime on which would be modeled the Title VII employment discrimination regime. That anti-discrimination approach, while a significant development that was widely welcomed by the black migrants, proved ineffective at stopping the widespread discrimination, much less remedying it.

Finally, Part VI discusses *Hughes v. Superior Court* in which the California Supreme Court and, ultimately the U.S. Supreme Court, ignored the widespread discrimination of which it was on notice in undercutting self-help efforts of black migrants to open employment opportunities in the Bay Area. Driving the courts' decisions was the immigrant tale in the form of an assumption that black workers were competitors seeking an advantage in the presumptively fair competition for jobs. In the often ignored *Hughes* case, the Supreme Court set the grounds for the demise of the yet to emerge civil rights movement by casting racial justice as equal treatment and ignoring black workers' demands for increased employment opportunities.

## II. BLACK MIGRATION TO THE WEST: A NEW TURNER THESIS

The Turner Thesis is a fundamental tenant of the story of the West and, indeed, of many prominent conceptions of what is America.<sup>44</sup> It maintains that in the frontier, the rugged individual of the American ethos was born.<sup>45</sup> It is the closing of the frontier that prompts Jackson Turner to articulate the theory as a lament.<sup>46</sup> No longer, for Turner, was there a situs for the defining Ameri-

<sup>44</sup> See, e.g., FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1921). For a critical view of, see TURNER AND THE SOCIOLOGY OF THE FRONTIER (Richard Hofstadter & Seymour Martin Lipset eds., 1968).

In many respects, Turner's was an early "social capital" theory in its thoroughgoing ethnocentricity and ethnic boosterism. Robert Clinton's characterization is revealing:

The Turner thesis suggested that American values and its unique democratic institutions and traditions of individualism were forged in the libertarian world of the western frontier at farthest reach of Euro-American settlement of the Americas. Thus, according to the Turner thesis, to understand American history one studies and celebrates the westward push of Euro-American settlement, rather than the patterns of interactive cultural exchange and exploitation that occurred as the indigenous civilizations of the Americas and the Euro-American settlers contended with each other over resources, culture, and power.

Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 80-81 (1993).

<sup>45</sup> See Morton J. Horwitz, *Progressive Legal Histography*, 63 OR. L. REV. 679, 679 (1984).

<sup>46</sup> "For the first time in the Nation's history no discernable frontier line existed in the United States, the [1890] census noted, and Turner suggested in 1893 that the passing of the frontier meant America was entering a new and dangerous age." Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 1994 (2003).

can individual to "make" himself.<sup>47</sup> Properly criticized as the story of white male conquest,<sup>48</sup> Turner's announcement that the frontier was closed still generated much grief among those who saw the frontier (and conquest) as defining features of American-ness.<sup>49</sup>

Turner "saw the European expansion westward across the United States as a social process that stripped away European culture as settlers encountered nature. On this frontier, according to Turner, emerged the essential American individual, freed from his European past and dedicated to individualism, democracy, and equality."<sup>50</sup> But Turner's thesis has been recast by historians who "understand the West not as a process but as a place inhabited by people from a rich array of ethnic backgrounds. They recast the image of the rugged individualism of white European males to reveal themes of success and failure, heroism and betrayal, economic development and labor exploitation"<sup>51</sup>

Still, the Turner thesis' conception of American manhood would continue to dominate popular visions of American-ness. In popular culture, westerns would convey a vision of Americans as cowboys and gunslingers that urban (white) Americans would embrace as their own, while conceiving as inevitably non-American the minstrel show characters the only slightly less black-faced

<sup>47</sup> Consider this Turner-like statement:

For an American, insofar as he is new and different at all, is a civilized man who has renewed himself in the wild. The American experience has been the confrontation of old peoples and cultures by a world as new as if it had just arisen from the sea. That gave us our hope and our excitement . . . .

Wallace Stegner, *The Meaning of the Wilderness for American Civilization*, in AMERICAN ENVIRONMENT: READINGS IN THE HISTORY OF CONSERVATION 194 (1st ed. 1968), quoted in R. McGregor Cawley, *Still Beyond the Hundredth Meridia: Some Thoughts on Hope, Progress, and Politics*, 23 J. LAND RESOURCES & ENVTL. L. 1, 6 (2003).

<sup>48</sup> Patricia Nelson Limerick, in THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST (1987), can be said to have replaced Turner's tale of innocence with one of conquest, re-framing and reviving interest in Western history. See Richard P. Cole & Gabriel J. Chin, *Emerging From the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 LAW & HIST. REV. 325, 357 (1999).

Robert Clinton is succinct in pointing to the effects of the Turner thesis on Indian Law:

Under the Turner thesis, which has dominated the thinking and teaching of American history for most of the twentieth century, the Indian civilizations on the other side of the frontier line of settlement were simply ignored – marginalized peoples inevitably swept away by the march of Western civilization. Under this view of history, the nations' aboriginal occupants almost literally disappeared from the story of westernization of the Americas – an echo of Cooper's great literary icon, the vanishing Indian. While modern western historians increasingly reject the Turner thesis and portray American history, in part, as a clash of two civilizations competing for the same resources and power, the traditional view spawned by the Turner thesis lingers. Confronting the contributions of American law to the expropriation of Indian lands, the forced assimilationist attack on Indian landholding patterns and Indian culture, and the destruction so of the Indian economies in ways that precluded distinct evolution to successful new forms consistent with tribal desires represents a sobering reality. This reality is one which few non-Indian scholars are prepared to confront as it is inconsistent with the American ideal.

Clinton, *supra* note 44, at 81.

<sup>49</sup> The idea of the frontier is among the many aspects of Turner's thesis that has been strongly criticized, even rejected. See Richard P. Cole, *Law and Community in the New Nation: Three Visions for Michigan, 1788-1893*, 4 S. CAL. INTERDISC. L. J. 161, 167 n. 16.

<sup>50</sup> Robert Jerome Glennon, *Federalism as a Regional Issue: "Get Out! And Give Us More Money,"* 38 ARIZ. L. REV. 829, 836 (1996).

<sup>51</sup> *Id.*

Native, Chinese, and Mexican Americans residing in the background of westerns.<sup>52</sup> Foreign policy would be in competing parts expansionist and isolationist, reflecting a cowboy-like notion of being left alone – on the land of manifest destiny. And domestic policy would be structured, as is currently en vogue, around a suspicion of the same government, usually voiced by beneficiaries of expensive government initiatives aimed at “opening the frontier.” The demise of Turner’s “open” frontier made twentieth century Americans nostalgic over a lost America even as the notion of America was still being formed.

Alas, there was suddenly a new frontier in the 1940s. The urban frontier of the industrial West during World War II<sup>53</sup> presented yet another chance for individual displays of initiative, self-reliance, and ambition to be related to social advancement and personal success. Though this new context (industrial labor and shipworks) resembled more the epitome of collective action than the isolation of the lone homesteader on the range, it was, in its capacity to free the individual and his family from the land (and subsistence agriculture), a frontier of opportunity. Inasmuch as it made post-War heads of households into free agent consumers, it resembled the earlier frontier. Just as the previous frontier would reverberate for years in the American imagination in dime novels, songs, and westerns, so would this new frontier shape the imagination of the West and America well after it had closed. Each became in their time sites where an individual could rise from poverty to stable working class existence, largely unfettered by others and under the mostly false impression that one’s success was earned free of government assistance or the kindness of (corporate) strangers. With this new frontier, California at war had developed its contemporary ethos even before there ever existed a suburban shopping mall.

Of course, both frontiers were “opened” by the wartime powers of the federal government, refuting any notion that individual effort alone produced this wave of social advancement and wealth. And, in many ways, this new frontier was, like the old, unsavory. It was very much a male affair and in different ways the site of conquest. Though wartime employment would create substantial opportunities for women workers, at the top of the employment hierarchy remained men. Moreover, when the war ended, the mythology of this new frontier expelled women from the workplace as a show of the powers of their middle class patriarchs. Similarly, while the demands of wartime production opened industrial work to previously excluded populations, notably black workers, it occurred in the context of the internment of a significant minority of the pre-war population of the West – nearly all of the nation’s approximately 100,000 Japanese citizens. Black opportunity, along with that of other people of color, opened in a stratified way that permitted opportunity only as a last resort and, then, mostly in menial jobs.

As with Turner’s nineteenth century frontier, black Americans sought to participate. Where post-slavery migration to the West was driven by the desire for independent homesteads on which black people could fulfill the promises of the free labor ideology that had, in part, driven the movement for their free-

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<sup>52</sup> For a thorough treatment of Asian Americans in popular culture, see LEE, *supra* note 25.

<sup>53</sup> See GERALD NASH, *THE AMERICAN WEST TRANSFORMED: THE IMPACT OF THE SECOND WORLD WAR* (1985).

dom,<sup>54</sup> black wartime migrants escaped the Jim Crow South, wagering all they had – and all their families had invested in them over several decades of struggle – to access industrial work, educational opportunity, and improved housing. In a way similar to the eventual curtailment of black migration in the nineteenth century, the contemporary migration produced disappointing returns. Black migrants would find the new frontier structured by the old with a Jim Crow system hastily erected to relegate them to second class citizenship.

This Article is about one part of this story – how the large numbers of black migrants with generally comparable education and training were singled out among migrants to the West and their relative educational advantage over the black population they had left (and compatibility with the larger migrant community of which they were a part), was destroyed. In the background is the tale of Black families investing decades of struggle to educate their children in the hopes that education would be the key to social mobility. In the foreground is the story of the Supreme Court's jaundiced view of that episode, informed as it was by the immigrant tale. In between, it is a story about how, after acquiring skills and education they hoped to parlay into economic opportunity in the West, black migrants and the generations of freedmen who sacrificed to put them in that position were cheated. In this high stakes game, black migrants lost their shirts.

Recent scholarship on black migrants to the West has offered a new vision of black migration, urbanization, and the black experience during the Jim Crow era. Central to that notion is the widely shared view of California especially as a place of opportunity and freedom. In these respects Turner's thesis that the frontier was closed proved misplaced. Rather, the West was, during World War II and for several decades afterwards, a new frontier for the several million Americans who moved there. Also prominent in this view of the West was the notion that the West presented a particular kind of racial frontier. Compared to the South, the West was definitely a land of reduced social and economic restrictions; but this would not alone distinguish the West from the North. Rather, the West was regarded as a place where social life was considerably less determined by one's race.<sup>55</sup> Though this notion proved to be a major exaggeration, its force persisted. Even today, California is seen as a particularly more hospitable social environment for black Americans and especially for mixed race couples.<sup>56</sup> This notion of a social frontier made the West a different kind of place in the black migrant's mind. One might move to California

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<sup>54</sup> See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1995).

<sup>55</sup> This view was especially associated with Los Angeles. W. E. B. Du Bois said of Los Angeles in 1913: "Los Angeles is wonderful. Nowhere in the U.S. is the Negro so well and beautifully housed . . . Out here in the matchless Southern California there would seem to be no limit to your opportunities, your possibilities." W. E. B. DU BOIS, *THE CRISIS* (1913) as quoted in LYNELL GEORGE, *NO CRYSTAL STAIR: AFRICAN AMERICANS IN THE CITY OF ANGELS* 17 (1992).

<sup>56</sup> In 1948 California's Supreme Court invalidated the state's anti-miscegenation law, making it one of the first states to do so. *Perez v. Sharp*, 32 Cal. 2d 711 (1948). This early precedent is consistent with the persistent reputation of the state as especially socially progressive.

because of the economic opportunity, but one also expected, or at least hoped for, a social El Dorado.

In many respects, the migration of black Americans to the West can be seen as the final great effort of black Americans to achieve social advancement under the strictures of Jim Crow. Moving to places where economic opportunity was combined with the hope of a less virulent version of social and economic segregation, black Americans in the two decades beginning with the War strove to pull themselves up, generation by generation.<sup>57</sup> "In urban African American communities nationwide, . . . a great deal was at stake in the 1940s. The war brought racial liberalism from the margins of political discourse to the center of the nation's wartime anti-fascism."<sup>58</sup> This effort was perhaps the manifestation of a particular type of hope that black Americans could follow the piecemeal social ascendance of white immigrants associated by some with post-War racial liberalism.

Racial liberalism held that American democracy was incomplete so long as Jim Crow laws separated the races in the South and a combination of legal restrictions and common practice kept black people from jobs and neighborhoods in the North. Racial liberals at mid century . . . believed that new laws (prohibiting lynching and police brutality and guaranteeing equal employment and housing opportunity), along with appeals to the hearts and minds of whites, would ultimately ensure African Americans' full integration into American life. Their model was European immigrants, whose acceptance into mainstream culture was widely celebrated in the 1940s . . . . In the "Double V for Victory" campaign, black communities across the nation called for victory over racism in Europe and victory over racism at home.<sup>59</sup>

Such as there was any investment in the immigrant tale, it would prove misplaced. The experience of black migrants to Northern California demonstrated the unique nature of the American system of racialism to transcend even other systems of subordination and discrimination as well as the models of assimilation created by those systems.

This opportunity, however, was a rare one that once lost cannot be reclaimed. Even as World War II provided unprecedented opportunity for entry into the industrial workforce, it also triggered suburbanization and marked the beginning of the long process of deindustrialization that would further burden those future generations who missed out on the wartime largess. That is, the War presented profound opportunities for poor workers to move into the rapidly growing middle class. For those who missed or were denied that opportunity, there would not again be a period where social class advance-

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<sup>57</sup> Soon this aspiration would be redirected into combating Jim Crow's excessive strictures and eventually the whole system. See, e.g., Adam Fairclough, *The Origins and Early Years of the Southern Christian Leadership Conference, 1955-1959*, 52 J. SOUTHERN HIST. 403 (1986) (discussing the origins of the civil rights movement in, among other things, the return of veterans to Southern cities).

<sup>58</sup> Robert O. Self, "Negro Leadership and Negro Money": African American Political Organizing in Oakland Before the Panthers, 98-99, in *FREEDOM NORTH: BLACK FREEDOM STRUGGLES OUTSIDE THE SOUTH, 1940-1980* (Jeanne F. Theoharis & Komozi Woodard eds., 2003).

<sup>59</sup> *Id.* The classic articulation of this view is GUNNER MYRDAL, *AN AMERICAN DILEMMA* (1948). For a critique of this view, see STEPHEN STEINBERG, *TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY* (1995).

ment could be had. This moment was especially problematic for black migrants to California since they represented the better skilled and educated elements of the black population who were, in moving to the West, wagering their education on the ability to access the mechanisms of social advancement there.

#### A. Northern California's Importance to Testing the Immigrant Tale

If the hegemony of Nicholas Lemman's vision of poor blacks migrating to industrial centers without education, skills, family structure, and a stable work ethic is to be refuted, it is necessary to isolate a black migrant population that possessed those attributes and track how they fared in their new homes. The available data has made this difficult, but recent historical scholarship on Northern California during the 1940s and 1950s has provided just such a test case. Though the data leaves something to be desired,<sup>60</sup> the exhaustive study of the available materials and one recent history based on accounts of aged former migrants<sup>61</sup> reveal a sad and instructive story about the virulence of America's Jim Crow system. The story is can be summarized succinctly.

As word of employment opportunities in the industrial plants of wartime manufactures<sup>62</sup> of the West Coast reached black residents around the country, many joined a massive migration to the Pacific Coast. These migrants, who came predominantly from Arkansas, Louisiana, Oklahoma, and Texas,<sup>63</sup> but also from industrial centers in the Midwest and East, brought with them a higher degree of education and skills training than black Americans generally

<sup>60</sup> Two contemporaneous studies exist, but one examines too small a sample (50 unemployed shipyard workers). See Cy W. Record, "Characteristics of Some Unemployed Negro Shipyard Workers in Richmond California" (unpublished monograph, Library of Economic Research, University of California, September 1947), cited in Shirley Ann Moore, *Getting There, Being There: African-American Migration to Richmond, California, 1910-1945*, 106, 125, n.21 in *THE GREAT MIGRATION IN HISTORICAL PERSPECTIVE: NEW DIMENSIONS OF RACE, CLASS AND GENDER* (Joe W. Trotter, Jr. 1991). The other is powerful but leaves open many questions we would today like answered. See CHARLES S. JOHNSON, *THE NEGRO WORKER IN SAN FRANCISCO: A LOCAL SELF STUDY* (1944).

<sup>61</sup> Gretchen Lemke-Santangelo, *Deindustrialization, Urban Poverty, and African American Community Mobilization in Oakland, 1948 through the 1990s*, in *SEEKING EL DORADO: AFRICAN AMERICANS IN CALIFORNIA* 343 (Lawrence B. De Graaf, Kevin Mulroy & Quintard Taylor eds., 2001).

<sup>62</sup> Speaking of the first wave of black migration from 1916 to 1930, Peter Gottlieb emphasizes the importance of industrial labor to igniting and maintaining the great migration. "Behind this sudden increase [in migration along Northern migration streams] were material and social forces that simultaneously encouraged blacks to leave their rural homes and attracted them to the northern destinations. Finally, two results of the wartime migration have seemed most salient: the entry of black migrants to industrial jobs previously closed to them; and the elan of the migrants themselves . . ." Peter Gottlieb, *Rethinking the Great Migration: A Perspective from Pittsburgh*, in *THE GREAT MIGRATION IN HISTORICAL PERSPECTIVE: NEW DIMENSIONS OF RACE, CLASS AND GENDER* 68-82 (Joe W. Trotter, Jr. ed., 1991).

<sup>63</sup> This is the so-called, "third lane of the Great Migration [which] took blacks largely from Texas, Louisiana, and Arkansas to America along the Pacific slope and particularly California." BLACK EXODUS: THE GREAT MIGRATION FROM THE AMERICAN SOUTH xvii (Alferdteen Harris, ed., 1991). "During the 'Great Migration,' 1915 to 1960, about five million rural Southern African Americans migrated to the northern industrialized cities of America." *Id.* at vii.

and black Americans in both their home and new states. They sought to parlay these skills into social advancement in a place regarded as more open socially than either the South or the Northeast. These places, particularly the Bay Area around San Francisco and Oakland, had very small black populations that had lived mostly mixed with other racial and ethnic groups and had a reputation for racial liberalism (even if undeserved, given the treatment of Chinese and Japanese Americans). In short order a version of Jim Crow was established in Northern California that rapidly devalued the accumulated educational and skills advantages of the black migrant population and quickly relegated that population and their progeny to segregated, economically deprived ghettos. As Nell Irving Painter noted, "the Great Migration of the early twentieth century represents for African Americans both immigration and freedom. These were voluntary movements, initiated by the individual or family, in pursuit of what they saw as their own best interests."<sup>64</sup> Though the move to California proved to be individually advantageous for many black migrants, the judgment on the case for the whole is unfavorable.

During World War II, perhaps as many as 300,000 black Americans moved to California. This migration was a part of a larger migration of black Southerners out of the South.<sup>65</sup> These new migrants constituted almost sixty-eight percent of the total black population in California in 1950.<sup>66</sup> Indeed, before the War, almost all of the approximately 87,000 black Californians lived in Los Angeles.<sup>67</sup> In Northern California, the black population of only about 19,000 – more than half of whom lived in Oakland – was an insignificant proportion of the San Francisco Bay Area population.<sup>68</sup> As substantial as the influx of black Americans was during 1940s California, the stream of black migrants to California remained surprisingly steady as more than 250,000 black people moved to the state in each of the next two decades.<sup>69</sup> The scope of the change is captured by Wilson Record:

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<sup>64</sup> Painter, *supra* note 36, at ix. Characteristically, this migration took place in stages. Speaking of the pre-World War I migration to Northern California, Shirley Ann Moore says: "Like many blacks who left the South during that period, some early black Richmonditers accomplished their migration in stages, leaving the rural South, settling in southern cities, moving to the North or Midwest, and finally striking out for California." Moore, *supra* note 60, at 107.

<sup>65</sup> Denoral Davis, *Toward a Socio-Historical and Demographic Portrait of Twentieth Century African Americans*, in *BLACK EXODUS*, *supra* note 63, at 11. "In the 1940s, the South suffered a loss of 1.5 million of its African American residents, which represents a 1.5% drop in the region's Black populace. It was the most substantial net migration loss for any single decade ever. Nevertheless, during that decade the South's Black population increased by 6 % and 543,000 in absolute numbers." *Id.*

<sup>66</sup> U.S. BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, BICENTENNIAL EDITION, PART 21* at 85-96 (1975) [hereinafter "HISTORICAL STATISTICS"].

<sup>67</sup> See, e.g., Lemke-Santangelo, *supra* note 61.

<sup>68</sup> *Id.*

<sup>69</sup> Davis, *supra* note 65, at 11-12. Black migration out of the South peaked in the 1950s and had reversed, slightly, in the 1970s. "The volume and pace of the exodus was basically reached in the 1950s, when another 1.5 million black southerners absconded the region [over the 1.5 million who left in the 1940s.] The South's black population again showed a net increase [of] 3 percent and 320,000 . . . [I]n the 1960s nearly a hundred thousand fewer



Between 1940 and 1960 the total population of the six Bay Area counties almost doubled, from 1,461,804 to 2,783,359. In startling contrast, the growth of the Negro population was more than twelvefold. In 1940 there were only 19,759 Negroes, two-thirds of which lived in Alameda County, primarily in Oakland. By 1960 the number had jumped to 238,754.<sup>70</sup>

Black migration to the Bay Area in particular was dramatic during World War II. The contemporaneous chronicler "McEntire estimated that the six Bay Area counties reported an increase of 324,000 black residents in 1943 from their 1940 figures."<sup>71</sup> This estimate seems high, but it is clear that the numbers were great nonetheless: "From 1942 to 1945, 340,000 black people poured into California from all over the United States, with the largest number coming from Louisiana, Mississippi, Texas, Oklahoma, and Arkansas. Approximately 125,000 moved to the San Francisco Bay Area."<sup>72</sup> "[T]he wartime black migration pushed [San Francisco's] black population far ahead of the Chinese, Japanese, and other non-white races in absolute numbers."<sup>73</sup> An increase of 27,155 blacks pushed San Francisco's black population to 32,000 by the end of the war. Oakland added 37,327 black citizens during the war, and Richmond, CA, the home of shipbuilding operations, exploded from fewer than 300 black citizens to nearly 14,000.<sup>74</sup> Outside the Bay Area, black migration to the West was similarly large; the Los Angeles population of 63,774 black residents increased 108.7% during this period.<sup>75</sup>

These numbers suggest that the influx of black Americans to places like the Bay Area might have reasonably constituted a shock to the established order of things there. However, black migration, though large, was always a very small percentage of overall migration to California. "[In the decade of the 1940s] California received 3.5 million new residents, swelling the population from 6,907,000 in 1940 to 10,586,000 in 1950."<sup>76</sup> Over 2.6 million white peo-

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blacks forsook the South . . . [and] by the early 1970s there was emerging evidence of a black remigration to the South." *Id.*

<sup>70</sup> WILSON RECORD, MINORITY GROUPS AND INTERGROUP RELATIONS IN THE SAN FRANCISCO BAY AREA 4, 6 (1963).

<sup>71</sup> ALBERT S. BROUSSARD, BLACK SAN FRANCISCO: THE STRUGGLE FOR RACIAL EQUALITY IN THE WEST, 1900-1954 2, 134 (1993). ("This number is unlikely, though plausible. It is questionable since it is about equal to the net gain of black migrants in all of California during the 1940s. Its plausibility, however slight, derives from the large numbers of migrants that anecdote holds left California when the war boom crashed. Still, it is hard to believe that, even counting the spouses of servicemen who joined their husbands at nearby military facilities, the number could be so large and then recede to a figure of only about one half of McEntire's estimate.")

<sup>72</sup> MOORE, *supra* note 60, at 111.

<sup>73</sup> BROUSSARD, *supra* note 71, at 135; *see also*, MARILYN JOHNSON, THE SECOND GOLD RUSH: OAKLAND AND THE EAST BAY IN WORLD WAR II 8, 51-53 (1993); *see also* RECORD, *supra* note 70, at 8. Record puts the total "other race" population of the six counties of the Bay Area in 1960 at 107,000. This number included Chinese, Japanese, and Filipino Americans, Native Americans, South Asians, and Southeast Asian peoples. In 1960 only in San Francisco and San Mateo counties did the "other race" population approach the black population (with approximately 6:7 and 4:5 ratios). Though more difficult to estimate, the Mexican American Population in the Bay Area is set by Record at 177,239 in 1960. *Id.*

<sup>74</sup> RECORD, *supra* note 70, at 8.

<sup>75</sup> BROUSSARD, *supra* note 71, at 136.

<sup>76</sup> MOORE, *supra* note 60, at 112.

ple, American and foreign born, migrated to California in the 1940s alone. In the 1950s, more than 3 million white migrants arrived. Only in the 1960s, when the white migration to California dropped to approximately 1.5 million, did the black migrant population constitute more than eleven percent of the total.<sup>77</sup>

Like black migrants, white migrants came to discover "El Dorado," in the form of employment opportunities that would allow them to achieve substantial social advancement. Unlike black migrants, who would encounter significant barriers to employment, advancement and housing, white migrants experienced what Gerald Nash has called a "great transformation."<sup>78</sup> However, the Bay area proved to be a closed frontier for black migrants, despite the images that region had projected.

Many Blacks who left the Southern states in quest of greater freedom and social equality chose to move to Los Angeles or other California Cities. Neither Los Angeles nor San Francisco had widespread reputations for residential segregation until the end of the 1940s. Nor had these cities experienced anti-black riots of the magnitude that struck Chicago or Detroit during World War II. Other Blacks, especially those in professional or middle income jobs moved from the South to Los Angeles to provide equal education opportunity for their children. Most of them remained in spite of the greater difficulty they faced in entering a profession or securing a position in business.<sup>79</sup>

San Francisco, in particular, had a mystique as racially tolerant beyond other California cities – "few white San Franciscans admitted that any form of racial discrimination existed in their city before 1940."<sup>80</sup> San Francisco did not restrict black people to a "well defined community, as did many cities including Los Angeles."<sup>81</sup> Schools and public accommodations were integrated, there had been no recorded lynching of black San Franciscans (though there had been lynchings of Chinese Americans<sup>82</sup>), and there had been no race riots before 1960.<sup>83</sup> While conditions in Richmond and Oakland were not so idyllic, the restrictions were relatively mild compared to the South. For example, West Oakland, where nearly all black residents of Oakland lived in 1940, was only about a third black. Mary Ann Moore reports the case of Louis Bonaparte, Sr., a Pullman porter who "first came to Richmond on a vacation pass in the 1920s. Impressed with the 'freedom that colored' people seemed to enjoy in California, he decided to make Richmond his permanent home."<sup>84</sup>

Prior to 1940, the large, mostly Chinese, Asian population altered the dynamic of race relations in San Francisco. "The Chinese served as a buffer between the white and black communities, for they, rather than Blacks were perceived by white workers as a threat to their wages and working condi-

<sup>77</sup> Author's calculations based on HISTORICAL STATISTICS, *supra* note 66.

<sup>78</sup> See NASH, *supra* note 53.

<sup>79</sup> KEITH COLLINS, BLACK LA: THE MATURITY OF THE GHETTO, 1940-1950 25 (1980).

<sup>80</sup> BROUSSARD, *supra* note 71, at 2.

<sup>81</sup> *Id.* Los Angeles had a black ghetto as early as 1930 but it also had nearly as many black residents at that time as all other Western cities combined (1940 black population, 63,744). *Id.* at 5.

<sup>82</sup> See *id.* at 5-6.

<sup>83</sup> *Id.*

<sup>84</sup> MOORE, *supra* note 60, at 108.

tions.”<sup>85</sup> The situation was complex, however. While Chinese education, housing, and health care suffered, black economic progress still lagged behind that of the much larger population of Chinese.<sup>86</sup>

“The racial and national complexity of the West – where Americans and immigrants of Mexican, Chinese, Japanese, and Filipino backgrounds lived and worked alongside European immigrants and native born Euro-Americans – made California’s color line variegated.”<sup>87</sup> In this context, the immigrant tale’s vision of intergroup competition rather than “discrimination” resonates. Black migrants could be seen as having to tough it out in competition with other groups with varying skills and interests. The Bay Area in the 1940s, a precursor to today’s “diverse” world, could be viewed in contradistinction to the bipolar racial society associated with the Jim Crow South. In fact, however, the Bay Area produced an effective system of Jim Crow with relative ease. This historical fact stands against the immigrant tale, proving that the notions of inter-group competition on which the tale is based obscure the overarching resilience of America’s system of racial organization. That system was, fundamentally, about white supremacy, not ethnic competition, making efforts to force the black experience into the immigrant framework especially distorting.

### *B. The Instant Jim Crow of the Wartime Bay Area*

Given the image of Northern California as less harsh than the Jim Crow South, it was as though an instant Jim Crow had magically emerged during World War II. This curious riddle is explained in 1963 by Wilson Record.

When Negroes began moving to Bay Area cities on a large scale in the early 1940s, white residents were not without local precedent to guide their reactions. After all, frightened whites had almost unanimously endorsed the drastic uprooting of . . . the Japanese, from the very areas into which Negroes were pouring. Although the Bay Area cities . . . had no elaborately detailed system of sanctions and prohibitions governing all aspects of Negro-white relations, there was enough in the way of rough custom to indicate what could be done. The Bay Area had for guidance a long experience, reaching back a hundred years, with the Indians, Chinese, Japanese, Mexicans, Filipinos, and other dark skinned people. That experience consisted largely of systematic exclusion of minorities from full participation in the life of the community, exclusion supported not only by white public opinion, but also, in time by statutory law, court decisions, and the apparatus of local community power.<sup>88</sup>

Though black migrants often earned salaries many times what they earned in the South, this was mostly the extent of the advantage of the Bay Area. Housing segregation, prejudice, and perhaps most importantly, relegation to menial and insecure employment through widespread employment discrimination limited the advantages of migration.

Mass migration of black and white alike had created a crisis in housing.<sup>89</sup> This crisis was especially felt by black migrants who faced severe segregation, even after restrictive covenants were invalidated by the United States Supreme

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<sup>85</sup> BROUSSARD, *supra* note 71, at 5-6.

<sup>86</sup> *Id.* at 6.

<sup>87</sup> Self, *supra* note 58, at 103.

<sup>88</sup> RECORD, *supra* note 70, at 4.

<sup>89</sup> JOHNSON, *supra* note 73, at 83-112.

Court.<sup>90</sup> In San Francisco, black migrants crowded into the homes of interned Japanese.<sup>91</sup> In smaller cities experiencing rapid growth like Richmond, black migrants were limited to newly segregated public housing and to segregated neighborhoods created by white flight to the newly established suburban developments spurred by the War demands for new housing.<sup>92</sup>

Albert Broussard notes that the rise of discriminatory behavior was linked to the growth of the black population in the Bay Area:

As the black population increased dramatically between 1940 and 1954, white prejudices became even more virulent. During the 1940s and 1950s, many blacks still found it difficult to rent or purchase decent housing in integrated communities and find employment other than unskilled, menial jobs. This racist caste system dictated . . . that blacks and whites irrespective of class or qualifications, rarely interacted on an equal footing. This was true both socially and politically but was especially evident in the employment sector. Black San Franciscans were generally denied access to trade unions before 1945 and barred from many skilled, white collar, and professional jobs . . . . Black women fared even worse . . . overwhelmingly relegated to domestic and personal service jobs or "black women's" work.<sup>93</sup>

The isolation of black populations was fueled by and fed into the stigma of blackness, allowing black migrants, beyond their white counterparts, to be blamed for the shocks of World War II migration.

Recent working class migrants, black and white, tended to live in monoracial worlds. Despite the reality of racial separation, many in Oakland's white community perceived black migrants as intruding on what one local observer called "the old and peaceful understanding between the Negro and the white in Oakland." The dramatic wartime expansion of West Oakland's African American community disrupted the mind-set of many people in Oakland's established white working- and middle-class districts and set the stage for a series of conflicts in the late 1940s and 1950s over jobs, neighborhoods, and public space.<sup>94</sup>

Rapidly, a system of Jim Crow was established, punishing black migrants and long term black residents alike.<sup>95</sup> While white migrants encountered difficulties, their freedom from the burdens of racial stigmatization meant they were able to quickly assimilate into middle class society on the strength of wartime expansion.<sup>96</sup> In the Bay Area, black social capital would be lost to a rapidly emerging system of social and economic segregation. This event suggested

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<sup>90</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>91</sup> See BROUSSARD, *supra* note 71.

<sup>92</sup> See DELORES NASON McBROOME, *PARALLEL COMMUNITIES: AFRICAN AMERICANS IN CALIFORNIA'S EAST BAY, 1850-1963* 91-100 (1993); *see also*, Johnson, *supra* note 73, at 104-108.

<sup>93</sup> BROUSSARD, *supra* note 71, at 6-7.

<sup>94</sup> Self, *supra* note 58, at 101.

<sup>95</sup> RECORD, *supra* note 70, at 3. Record noted that "patterns of Negro-white interaction [were] virtual duplicates of patterns in other large urban communities to which large numbers of Negroes have migrated. By substituting a few names and figures in accounts of Negro-white relations in New York or Chicago one can produce a strikingly accurate picture of San Francisco, Oakland, or Berkeley." *Id.*

<sup>96</sup> See NASH, *supra* note 53.

that those who, after *Brown*, claimed that the case disrupted the eventual erosion of Jim Crow practices were at least overly optimistic in their assessment.<sup>97</sup>

Overall, California was a mixed blessing for black migrants. In 1963, Wilson Record could remark that "an identifiable colored middle class ha[d] emerged with shared backgrounds, values, and goals. Its members ha[d] good, steady incomes from respectable occupations."<sup>98</sup> Their emergence during the years just after the War "might lead one to suppose that their primary identity ha[d] shifted from race to class."<sup>99</sup> But for Record, this was not the case.<sup>100</sup> As Gretchen Lempke-Santangelo has observed:

During the war years, the East Bay's defense-driven economy provided most [black] migrants with a fleeting taste of the good life. Although they filled the lowest rungs of the occupational ladder and were the "last hired and first fired," migrants relished the fact that they were, in the words of one newcomer, "at least getting paid to put up with it . . . ."<sup>101</sup>

More generally, the black middle class after the war was "so small and precariously situated that it [could] not foster widespread civil sensibilities and pride among Negroes generally."<sup>102</sup> Despite the tremendous opportunities present during the War, the condition of the black Bay Area community could not be described in glowing terms.

The Bay Area color line might have been different from the South's but it surely existed.

The variegated nature of the color line of the multi-cultural West was of little consolation to black migrants, however, who found that segregation in the Golden State rivaled that anywhere in the country. "There's very little difference between the segregation here in California and the blatant things that go on in the South," Oakland fireman Author Patterson told an interviewer. Robert Edwards, a dining car waiter working out of Oakland in the forties and fifties recalled the work environment being "highly Jim Crowed. They just did not believe in promoting blacks to any positions of authority. [And] they had special places for black passengers to eat. They were always served behind the curtain."<sup>103</sup>

Of course, precursors of these Jim Crow-like practices were in some ways well-established even before the great influx of black workers during and after World War II. In Richmond, California, despite the absence of de jure segrega-

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<sup>97</sup> Indeed, the situation described here casts serious doubts on criticisms of *Brown* and the Civil Rights Movement as disrupting a "natural" phasing out of Jim Crow under the leadership of "moderate" white politicians; see Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 116 (1994) (noting that President Eisenhower privately expressed this view, as did Justice Black, Klarman articulates a sophisticated version of this theory, arguing that *Brown* triggered massive resistance that guaranteed a violent response to civil rights protesters and thereby mobilized support for the civil rights acts of the 1960s. This theory is compelling, but rests uncomfortably on the implication that without *Brown*, Jim Crow would have faded away. This article suggests that Jim Crow was resilient, created and enforced more or less whenever black workers were threats for job competition with white workers).

<sup>98</sup> RECORD, *supra* note 70, at 18.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Lemke-Santangelo, *supra* note 61, at 345.

<sup>102</sup> RECORD, *supra* note 70, at 18.

<sup>103</sup> Self, *supra* note 58, at 103.

tion, "black children were assigned to predominantly black schools; black families were confronted with 'restrictive covenants' which barred them from buying property or living in certain neighborhoods; blacks were refused service in public accommodations; and black job seekers were denied employment outside the 'traditional' spheres of service, domestic and unskilled labor."<sup>104</sup> Before and after the war, these restrictions greatly compromised black opportunity by reinforcing racial stigma. "Black urban industrial workers encountered 'negative stereotypes' which branded them as 'inefficient, unsuitable and unstable,' and made factory owners reluctant to 'take a chance' on hiring them."<sup>105</sup> These conditions combined in the post-War period to undercut black opportunity. In particular, black workers with skills and education were rejected for the opportunities for which they presumably qualified. Richmond, California, resident Irene Malbrough Batchan is reported as saying "if you were just brute strength, they could hire you for lifting pieces of steel but if you had a little bit of education, [they would not hire you]."<sup>106</sup>

The experience of black migrants to the Bay Area would foreshadow the post-Jim Crow world. Neither the "back of the bus" nor separate water fountains were necessary to establish a caste system that relegated black migrants to inferior social and economic status. Albert Broussard states:

Understanding the texture of this racial caste system is crucial to understanding why blacks made so little progress in areas like employment and housing, despite the absence of segregation laws. Many whites resented the *presence* of blacks unless they occupied subservient or menial roles. Yet white San Franciscans . . . were civil in their contacts with blacks, irrespective of their personal prejudices, and displayed . . . [a] "polite racism." Yet civility only masked the antipathy, disdain, and hostility that many whites felt toward black San Franciscans.<sup>107</sup>

### C. *Employment Discrimination and the Circumscribed Frontier*

The nature of pre-War life for black Bay Area residents would be profoundly changed during the War and after. "[The war] changed economic and social relationships, increased racial segregation, forged an uneasy alliance between black oldtimers and newcomers, and expanded the black urban industrial workforce."<sup>108</sup> On the one hand, the significant demographic changes strained the soft segregation system, solidifying it in important respects. On the other hand, the increased opportunity in the War-time industrial workplace created real economic gains for black Californians, migrants and long-term residents alike. In any case, "World War II changed the assumptions of gradualism for blacks and whites throughout the United States . . ."<sup>109</sup>

The first year of World War II produced few alterations in employment opportunities for Bay Area blacks. McEntire noted the precarious nature of black employment throughout much of California industry when he wrote:

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<sup>104</sup> MOORE, *supra* note 60, at 109.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> BROUSSARD, *supra* note 71, at 7.

<sup>108</sup> MOORE, *supra* note 60, at 111.

<sup>109</sup> *Id.*

Industrial opportunities for Negroes [in 1941] are extremely limited, being confined almost exclusively to custodial and heavy labor jobs with little prospect of advancement . . . ." [The CIO Minorities Committee, organized to monitor black employment in the defense industry] concluded what many black leaders had suspected: "Minority groups were being effectively kept out of industry and that America's vast labor force was far from being integrated."<sup>110</sup>

A segregation era description of the exclusion of black workers from wartime employment is telling, reflecting the standard explanation of black exclusion:

The delay in employing Negroes in the expanding war industries was due to numerous factors, among which were the large number of white workers available in the initial stages, the lack of training on the part of Negro workers, the opposition of trade unions, the prejudice of employers and their inexperience with Negro workers, and the white worker's fear of the colored worker as an economic competitor. In short, . . . the tenacity with which America clung to its established color-caste system in occupations delayed the use of our total manpower for three long years, though the nation was at war.<sup>111</sup>

Davie's description is built on the assumption that white workers *ought* be preferred in employment. He also repeats the typical view that black workers were comparatively unqualified for the opportunities presented. While this might have been true in parts of the country, it was not the case in Northern California or the West generally. Indeed, the depth of white resistance to black wartime employment is a better explanation, as throughout the country the opening of employment opportunities to black workers led to strikes and riots by white workers. On this Davie is perfectly candid:

The employment and particularly the upgrading of Negroes brought "hate strikes" and riots in dozens of centers as, for example, in Detroit where the upgrading of Negroes [at military industrial plants] was met with hate strikes by white fellow workers; in Lockland, Ohio, where *12,000 workers in the Wright Aeronautical plant walked out – on D Day!* – because seven Negroes were transferred to a "white" department; and in Mobile, Alabama, where a riot occurred following the promotion of a small group of Negroes to posts as welders at the Alabama Drydock and Shipbuilding Company.<sup>112</sup>

Nevertheless, black workers eventually gained a foothold in wartime employment as a consequence of severe labor shortages and President Truman's Executive Orders.<sup>113</sup> Bay Area shipyards hired black workers in large numbers.<sup>114</sup> From 1940 to 1943, the number of black workers had gone from 56 (of 38,454) to 15,000 (of 192,000).<sup>115</sup> But the "fortunate conditions in the shipyards dominate the picture and camouflage less favorable attitudes and policies toward minorities characteristic of other industries."<sup>116</sup> Discrimination remained pervasive. "Nearly half of the 100 leading San Francisco industries

<sup>110</sup> BROUSSARD, *supra* note 71, at 144.

<sup>111</sup> MAURICE R. DAVIE, *NEGROES IN AMERICAN SOCIETY* 97 (1949).

<sup>112</sup> *Id.* (emphasis added).

<sup>113</sup> See Executive Order 8802 and Executive Order 9346.

<sup>114</sup> BROUSSARD, *supra* note 71, at 146.

<sup>115</sup> *Id.* at 145.

<sup>116</sup> *Id.* at 146.

did not employ a single black worker in 1944. Ninety percent of black workers were employed by 10 percent of all industries.”<sup>117</sup>

Black women found employment opportunities especially limited.<sup>118</sup> Broussard’s discussion of complaints filed with the Federal Employment Practices Committee (FEPC), created pursuant to Roosevelt’s Executive Orders 8802 and 9346, relates numerous cases where black women were denied office work and, instead, were offered jobs as janitors or refused work altogether.<sup>119</sup> The FEPC regional commissioner was led to complain about Pacific Telephone and Telegraph, which employed only 35 black employees of 17,000 and had never employed a black operator.<sup>120</sup> The Commissioner was driven to conclude that “the company’s policy [of refusing to hire black women as operators] has resulted in the employment of Negroes as janitors only or menial jobs.”<sup>121</sup>

In addition to discrimination in hiring, black migrants faced severe limitations on upward mobility. “The typical black worker could expect only a minimum of advancement beyond the entry level, and supervisory positions were virtually impossible for blacks to obtain.”<sup>122</sup>

California’s version of segregation meant that African American workers in nearly every sector of the local economy faced job ceilings. Census figures suggest that WWII offered African American migrants only a tenuous foothold on the local job market, with most finding postwar work in semi-skilled and unskilled jobs in the service sector.<sup>123</sup>

Moreover, “[j]ust as black people began to settle into California’s urban centers, municipalities from Los Angeles to San Francisco responded to their influx by establishing more stringent social, political, and economic restraints on all black residents, newcomers and longtime residents alike.”<sup>124</sup> Longtime black residents suffered a sharp shift in their life expectations as:

the influx of black migrants to [Bay Area Cities] resulted in white residents labeling all blacks as ignorant, ‘pushy’ nuisances who no longer knew their ‘place.’ Black newcomers and longtime residents alike quickly saw that white migrants found it easier to assimilate into the [Richmond’s] economic and social mainstream . . . few compulsory obstacles to employment and advancement stood in the way of their transition.<sup>125</sup>

In any case, “the war boom did not last.”<sup>126</sup> As Lemke-Santangelo emphatically argues:

[B]lack migrants faced increasing marginalization within the [Bay Area’s] inner cities. Following the war, the economic vitality of East Bay migrant communities was severely undermined by poorly planned redevelopment and transportation projects, chronic capital flight, and persistent patterns of residential segregation and employment discrimination. In the East Bay . . . the postwar black ghetto began to take

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<sup>117</sup> *Id.* at 150.

<sup>118</sup> *Id.* at 150-51.

<sup>119</sup> *Id.* at 150-152.

<sup>120</sup> *Id.* at 151.

<sup>121</sup> *Id.* at 152.

<sup>122</sup> *Id.* at 157.

<sup>123</sup> Self, *supra* note 58, at 100.

<sup>124</sup> MOORE, *supra* note 60, at 116.

<sup>125</sup> *Id.* at 116-17.

<sup>126</sup> Lemke-Santangelo, *supra* note 61, at 345.



shape, characterized by overcrowded, substandard housing, declining employment opportunities, and a sharp rise in poverty among former migrants and their children.<sup>127</sup>

In the post-war context black workers were also the first fired, eroding the economic gains made during the war.<sup>128</sup> "By 1950, following five years of demobilization, unemployment among Oakland's nonwhite residents stood at . . . more than double that of the city's white population."<sup>129</sup> These problems were exacerbated by persistent housing discrimination, the effects of which Lemke-Santangelo illustrates with this telling story:

The link between jobs and housing was dramatically exposed in 1955 when Ford moved its plant from Richmond to Milpitas. The company's black workers, residing in Oakland and Richmond, retained seniority in the new location but faced a long commute because "under traditional real estate practice, they probably would not be admitted to new housing developments unless these were intended especially for Negro occupancy." In contrast, Ford's white workforce — a majority of whom were wartime or Depression era migrants, had less than a high school education, and filled semiskilled jobs at the plant — moved into suburban housing tracts and quickly entered the ranks of the middle class.<sup>130</sup>

Workplace segregation provided the most obvious example of regional Jim Crow practices [in Northern California], but a more general, widely observed, social separation of the races defined a variety of settings. Signs announcing "We Refuse Service to Negroes" sat in the windows of many hotels, bars, and restaurants, particularly in areas of downtown closest to West Oakland and in cities like Albany and San Leandro, which remained closed to African Americans.<sup>131</sup>

The consequences of these transformations would reflect the sense that black migrants had of lost opportunity. Black migrants and their children were, by the early 1960s, impatient and disgusted. Record's description in 1963 is both sobering and saddening.

One must be exposed to the unhappy, the sometimes bitter and despairing moods of Negro communities in order to comprehend the depth of discontent among Bay Area Negroes. One must appreciate the many indirect ways in which resentment is expressed as well as the indirect means of applying pressures against the white community. Formal Negro protest and betterment organizations . . . are only a small part—a small part, really—of the instruments through which Negroes prosecute their festering grievances against the "okay" society and fight back at "the man" rather than run from him.<sup>132</sup>

Record's dispatch to the white world was a sound warning about a frustration born in foiled opportunity. Black migrants came to California to transform their lives; the barriers that prevented their success would constitute a substantial destruction and waste of the many generations of accumulated educational attainment of black families. It might not be too much to say that Bay Area migration constituted a black social catastrophe, the extent of which can only

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 347.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 350-51.

<sup>131</sup> *Self*, *supra* note 58, at 100-01.

<sup>132</sup> *RECORD*, *supra* note 70, at 36.

be understood in context of the major demographic findings of recent historians on that migration.

#### D. *The West and the Destruction of Black Social Capital*

Recent historians of the black migration to the Bay Area broadly agree that black migrants to the region during the War and after were young, very well-educated, often skilled, and part of stable family units. That is, they were precisely the migrant group that one would have expected to thrive in Northern California's rapidly expanding wartime economy. The version of Jim Crow rapidly established upon their arrival had broader effects than simply erecting barriers to individual success. The barriers erected in the Bay Area dissipated the concentration of black educational and social achievement among the migrant population, destroying educational gains hard won in the seventy-five years after slavery and achieved under the severe strictures of Southern Jim Crow.

Since the early 1990s, historians writing about black migration to the Bay Area have been unanimous in their portrait of the wartime black migrant. Broussard's history of Black San Francisco, which dedicates fully half of an excellent book to the period from 1940 to 1954, describes black Bay Area migrants as coming in family units,<sup>133</sup> as young and ambitious,<sup>134</sup> and as well educated.<sup>135</sup> Marilyn S. Johnson's 1993 study of Oakland and the East Bay during World War II describes "black arrivals" as "relatively advantaged compared with their southern counterparts."<sup>136</sup> And, Shirley Ann Moore's 1991 essay on the history of Richmond, California's black population concludes that black migrants "represented the middle stratum of their southern communities."<sup>137</sup>

But it is Gretchen Lemke-Santangelo's 1996 study, based on interviews with surviving migrant women, that paints the most moving portrait of the migrants. Lemke-Santangelo's subjects are shown to have been mostly in their twenties during the war,<sup>138</sup> predominantly raised in cities and towns,<sup>139</sup> from a significant percentage of families headed by a skilled, professional, or semiprofessional parent,<sup>140</sup> raised in two parent families,<sup>141</sup> and had completed

<sup>133</sup> BROUSSARD, *supra* note 71, at 136, 138. (citing to both McEntire's study and Johnson's Study, respectively).

<sup>134</sup> *Id.* at 138. "The majority of black migrants were ambitious, enterprising, and industrious young men and women in the prime of life." *Id.*

<sup>135</sup> *Id.* at 139-140. "The average level of education for black migrants, 8.6 years, compared favorably with the educational level of nonmigrant blacks . . . [This] led Charles S. Johnson to conclude that the 'grade achievement of the San Francisco Negro migrant population, as revealed in our sample, reflects a relatively high degree of formal education.'" *Id.*

<sup>136</sup> JOHNSON, *supra* note 73, at 53.

<sup>137</sup> MOORE, *supra* note 60, at 112-13.

<sup>138</sup> GRETCHEN LEMKE-SANTANGELO, *ABIDING COURAGE: AFRICAN AMERICAN MIGRANT WOMEN AND THE EAST BAY COMMUNITY* 34 (1996) (66% of her sample were born between 1912 and 1923).

<sup>139</sup> *Id.* (38% in cities, 34% in towns).

<sup>140</sup> *Id.* (42%). The other 58% worked in domestic service or as laborers. *Id.*

<sup>141</sup> *Id.* at 34-35.

a high degree of education.<sup>142</sup> These conclusions are based on and supplement the sketchy and largely inaccessible contemporaneous studies of the black migrants done by McEntire, Charles S. Johnson, The CIO Minorities Committee, and Cy W. Record, all of which Broussard discusses and cites.

It is fair to say that migrants to Northern California were, according to the findings of these and the wartime studies, "predominantly urban, relatively well-educated, and highly skilled members of an expanding black southern working class."<sup>143</sup> In her moving portrait of black migrant women workers in the East Bay, Lemke-Santangelo summarizes her subjects by emphasizing the gulf between East Bay migrants and the image of black migrants conveyed by advocates of culture of poverty theories and, ultimately, advocates of the immigrant analogy:

The women whose lives are told in these pages tell a [story different from Nicholas Lemann's thesis - that the contemporary black underclass shares an ethic of dependency fostered by the southern sharecropping system and transplanted to urban areas by migrants from the south]. Whether raised on farms or in the urban South, all came from poor or working class families that shared a common regard for economic autonomy, hard work, education, worship, family ties, charity, and independent self-help institutions. When they left the South, motivated by self determination rather than dependency, women drew on these values to establish new communities and resist the prejudice and discrimination that greeted them.<sup>144</sup>

Lemke-Santangelo continues, "Most of the women in my sample came from deeply religious, two-parent, working class families."<sup>145</sup> Broussard's portrait of black migrants to San Francisco is similar:

The majority of black migrants were ambitious, enterprising, and industrious young men and women in the prime of life. These young adults, who were, on the average, twenty-three years old (compared to twenty-six years for the total black population), worked in one of the principal Bay Area industries . . . .

. . . . In addition to being young and ambitious, black migrants were almost as well-educated as San Francisco's established black residents. The average level of education for black migrants, 8.6 years, compared favorably with the educational level of nonmigrant blacks. Although a higher number of migrants had completed only the lower grades, the proportion of high school, college, and professional students in both groups was roughly equal. These findings, among others, led Charles S. Johnson to conclude that the "grade achievement of the San Francisco migrant population . . . reflects a high degree of formal education."<sup>146</sup>

In stark contrast to popular impressions of black urban migrants, migrants to California were typified by the migrants to Richmond who pursued the opportunities created by the shipyards. "On average . . . black migrants were

<sup>142</sup> Some 25% had attended some college and 41% had completed high school. See *id.* at 44-46. As hers is a sample of women, Lemke-Santangelo recognizes that these numbers might have been higher than for men whose labor at a young age was more valuable to their families. *Id.* at 44-45.

<sup>143</sup> *Id.* at 4.

<sup>144</sup> *Id.* at 3.

<sup>145</sup> *Id.* at 4.

<sup>146</sup> BROUSSARD, *supra* note 71, at 138-40 (discussing and quoting from CHARLES S. JOHNSON, *THE NEGRO WAR WORKER IN SAN FRANCISCO* (1944)).

young (23.13 years); more females (53%) than males (47%) made the journey; and most black migrants were married."<sup>147</sup>

Blacks who came to Richmond represented the middle stratum of their Southern communities . . . . It appears that black migration to Richmond during World War II fits the pattern of migration suggested by historian Clyde Kiser in which Southern-born blacks gradually expanded their employment parameters in ever widening circles of secondary migration. This process saw black people move from the rural South to Southern urban centers, to the cities of the North, and finally to the urban West.<sup>148</sup>

The contemporaneous study of a small sample of unemployed black shipyard workers supports these findings. Cy W. Record's "Characteristics of Some Unemployed Negro Shipyard Workers in Richmond California" "suggests that a number of black migrants had acquired professional and industrial training and a degree of urban sophistication from living and working in the urban South. Southern cities . . . provided these migrants with their first encounters with life in a non-agricultural work environment."<sup>149</sup> Record's subjects "had previously held occupations such as carpenter, compress machine operator, stonecutter, welder, truck driver, clerk, sheet metal worker, cement handler, and stationary fireman. In addition, a few black newcomers had earned their livings as school teachers and principals in Southern schools."<sup>150</sup> However, as Lemke-Santangelo notes, "Despite their relatively high levels of skill and education, roughly comparable to those of white migrants, black newcomers were among the first to lose their jobs as the war industries closed altogether or retooled for peacetime production."<sup>151</sup> In this context some black migrants experienced *downward* social mobility, despite the generous salaries and greater opportunities in Northern California relative to the South.<sup>152</sup> Because black workers were largely limited to work in the wartime industrial plants, most accepted the well paying jobs even where they were "definitely a step down."<sup>153</sup>

By the end of World War II, seventy-five to eighty percent of Oakland's black residents were recent migrants, men and women who had actively sought a better life by transplanting their families from places like Texas, Louisiana, Mississippi, and Arkansas to the East Bay. This generation, with skill and education comparable to those of white migrants who came during the same period, arrived with a common regard for economic autonomy, hard work, education, worship, family ties, cooperation, and independent, self-help organizations – the very values and institutions that enabled them to survive the hardships and humiliations of Jim Crow. Instead of transplanting an ethic of dependency, they came with the skills and determination to establish new communities and resist the prejudice and discrimination that greeted them.<sup>154</sup>

<sup>147</sup> MOORE, *supra* note 60, at 112

<sup>148</sup> *Id.* at 112-113.

<sup>149</sup> *Id.* at 117.

<sup>150</sup> *Id.*

<sup>151</sup> Lemke-Santangelo, *Deindustrialization*, *supra* note 61, at 347.

<sup>152</sup> MOORE, *supra* note 60, at 117 ("Some nonagricultural black workers . . . suffered a 'downward thrust into unskilled labor' upon entering Richmond's workforce.").

<sup>153</sup> *Id.* at 118.

<sup>154</sup> Lemke-Santangelo, *Deindustrialization*, *supra* note 61, at 359.

Comprehending the true extent of the tragedy involved requires remembering that in the Southern states from which many of the migrants came, there were very few high schools for black residents.<sup>155</sup> It was not uncommon for a rural family to ship off a promising kid to the nearest city so the child could obtain a high school, and hopefully, college education. These efforts required tremendous sacrifice for the families involved.<sup>156</sup> And, in all cases, the hope was that these children would be able to achieve substantial social advancement. That migrants arrived in Northern California with advanced educational achievement represented a collective investment, the loss of which resonated broadly among the relatives and friends who had supported that achievement.

The nature of the black migrant population was, however, summarized in the midst of the migration by sociologist Charles Spurgeon Johnson. In a report financed by the San Francisco YWCA and a San Francisco citizen, Johnson surveyed 1171 black San Franciscans, from which he estimated that, in 1944 more than sixty percent of the San Francisco population consisted of migrants (who had moved there since 1940).<sup>157</sup> Johnson found that the migrant population was quite young, with an average age of 23.13 years.<sup>158</sup> "The large proportion of married persons in the migrant population" far exceeded that of the longer term residents, leading Johnson to suggest "a relatively high degree of stability among the new people."<sup>159</sup> Johnson did wonder if exposure to "city life" would upset the relative advantage among black migrants. However, he clearly judged the migrant population as an attractive one.<sup>160</sup> Most significantly, Johnson saw "little difference between the educational preparedness of the new and old Negro residents from the standpoint of grades completed."<sup>161</sup> Black migrants and long term black residents groups had educational attainment levels of 8.64,<sup>162</sup> well above the general educational attainment of the

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<sup>155</sup> The extent of the accomplishments of Lemke-Santangelo's subjects is captured in James Anderson's description of the context of black high school education in the decade before World War II:

The most oppressive feature of black secondary education [in the South] was that southern local and state governments, though maintaining and expanding the benefits of secondary education for white children, refused to provide public high school facilities for black children. Almost all of the southern rural communities with significantly large Afro-American populations and more than half of the major southern cities failed to provide any public high schools for black youth. The virtual absence of black public high schools reflected the opposition of the vast majority of white southerners, particularly in the rural communities and small towns, to black secondary education. Blacks in the rural South were excluded from the revolution in public secondary education that characterized the nation and the region during the period 1880-1935.

JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935*, 186 (1988).

In Lemke-Santangelo's sample group, the most frequently cited reason for not completing high school was that there was no nearby black high school. LEMKE-SANTANGELO, *ABIDING COURAGE*, *supra* note 138, at 45. In fact, her subjects who did complete high school also confirm this well known pre-*Brown* circumstance, as "16 percent boarded out with other families" for high school. *Id.*

<sup>156</sup> "Working-class parents made great sacrifices to educate their children . . ." *Id.* at 44.

<sup>157</sup> JOHNSON, *supra* note 73, at 4.

<sup>158</sup> *Id.* at 5.

<sup>159</sup> *Id.* at 7.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

black population nationally, and many times that of the Southern states from which the largest number of migrants had come, Texas and Louisiana.<sup>163</sup> And, while a larger percentage of migrants had achieved only an elementary school education compared with longer term black residents, the percentages of migrants who had graduated high school or who possessed college and professional training was almost identical to the percentage of long-term black residents with such achievement.<sup>164</sup> "In general it may be said that the grade achievement of the San Francisco migrant population . . . reflect[ed] a relative high degree of formal education."<sup>165</sup>

It is true that Johnson questioned the quality of the educational attainment of migrants, coming as they did from poorly supported, segregated Southern schools,<sup>166</sup> but this observation only qualifies his conclusion that black migrants were well prepared to take advantage of the industrial opportunities available in the Bay Area. Similarly, Johnson expressed concerns about the adjustments that black migrants from rural areas would face adapting to city life,<sup>167</sup> but this adjustment would also have to be made by white migrants who consistently outnumbered black migrants.

In the end, it is apparent that during perhaps the last great boom that would allow workers without specialized training to make significant class advances, black workers would be widely denied access to these opportunities. These were workers who were at least well enough qualified for such jobs, comparably as qualified as white migrants, and not much less-qualified than white long-term residents. Yet, they encountered segregation and discrimination that locked them out of the bounty of the time, rendering their educational advantages mostly meaningless.

### III. THE COURTS: *MARINSHIP* AND THE INADEQUATE RESPONSE OF THE EMERGENT ANTI-DISCRIMINATION PRINCIPLE

In the late 1940s the California Supreme Court distinguished itself as a leader in race relations by developing a strongly articulated anti-discrimination regime. That mostly well-earned reputation is evidenced by two decisions. In the 1948 decision, *Perez v. Sharp*, the court invalidated the state's anti-miscegenation law, calling the prohibition on interracial marriages "odious to a free people."<sup>168</sup> Similarly in *James v. Marinship*,<sup>169</sup> the court invalidated union practices that worked to exclude black workers from wartime employment. By barring black workers from joining a union that had a closed shop relationship with the employer, Marinship Co., the union had constrained black employment at the Marinship shipyards. The California Supreme Court ruled that a

<sup>163</sup> Texas and Louisiana's black populations had median educational attainment for black residents of 6.1 and 3.9, respectively. See 1940 CENSUS OF POPULATION, CHARACTERISTICS OF POPULATION TABLES. Indeed, the overall median education attainment in Texas and Louisiana in 1940 was only 8.5 and 6.1 years.

<sup>164</sup> JOHNSON, *supra* note 73, at 7.

<sup>165</sup> *Id.* at 8.

<sup>166</sup> *Id.* at 38.

<sup>167</sup> *Id.* at 75.

<sup>168</sup> 32 Cal. 2d 711, 715 (1948) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

<sup>169</sup> 25 Cal. 2d 721 (1944).

union with a closed shop relationship with an employer could not exclude black members or force them into segregated auxiliaries, preventing the employer from freely hiring black workers.<sup>170</sup>

*Marinship*, following President Roosevelt's Executive Order No. 8608, combined with the Order to open wartime industrial work to black workers. Supplementing the extensive administrative apparatus established pursuant to the Executive Order – which included the establishment of the Federal Employment Practices Commission (FEPC), an administrative agency responsible for investigating charges of discrimination, – the *Marinship* opinion would create a model on which Title VII of the Civil Rights Act of 1964 would be built. That system focused on administrative investigation and adjudication of claims of discrimination followed by litigation to eliminate barriers to employment. Even at this early date, however, the experience of Bay Area immigrants showed the limitations of the approach on which Title VII of the 1964 Civil Rights Act would be modeled. In particular, the large number of cases overwhelmed the FEPC system, as there was no effective way to encourage large scale desegregation of employment. Moreover, the FEPC could never truly remedy the harm to migrants denied opportunities once those opportunities disappeared with the end of the War.

Still, *Marinship* is rightfully celebrated as a major success in civil rights advocacy in the literature. Unfortunately, that literature usually does not discuss the less satisfactory litigation that is characteristic of the period, such as *Hughes v. Superior Court*. However, discussion of that opinion, demonstrating the underlying influence of the immigrant tale on circumscribing the effectiveness of the anti-discrimination approach, is left to the next Part. First, it is important to examine just how *Marinship* and the FEPC opened opportunities for black workers.

#### A. *Executive Orders and the Opening of Wartime Employment Opportunities*

Employment opportunities for black migrants were only grudgingly opened during the war. Broussard quotes McEntire as concluding that “[i]ndustrial opportunities for Negroes [in 1941 were] extremely limited, being confined almost exclusively to custodial and heavy labor jobs with little prospect of advancement.”<sup>171</sup> By 1943, this circumstance had changed, as wartime demand for labor created “unprecedented employment opportunities” for black workers.<sup>172</sup> Most of this employment was in wartime manufacturing, and by 1943 more black workers were employed than lived in San Francisco and Oakland before the war.<sup>173</sup> Nevertheless, black workers still comprised a very small fraction of shipyard workers, totaling only 15,000 of the more than

<sup>170</sup> *Id.* at 731-32.

<sup>171</sup> BROUSSARD, *supra* note 71, at 144, (quoting McEntire, “The Negro Problem in California,” Supplement 2, Commonwealth Club of California, Homeland Ministries Archives).

<sup>172</sup> BROUSSARD, *supra* note 71, at 145. See also, “Summary of Minorities Committee Survey on Union Membership and Employment of Minorities in California,” California CIO Minorities Committee [hereinafter “CIO Minorities Survey”].

<sup>173</sup> See BROUSSARD, *supra* note 71, at 145. Fifteen to sixteen thousand black workers were estimated to be employed in the Bay Area shipyards. *Id.*

192,000 shipyard workers in 1943.<sup>174</sup> Moreover, this otherwise unsurprising arrangement was aggravated by the fact that black workers were virtually absent from other segments of the Bay Area workforce.<sup>175</sup>

Much of the economic progress black migrants experienced was attributable to the demands of the wartime economy, but Executive Order 8802 issued by President Roosevelt was crucial to opening those opportunities to black migrants.<sup>176</sup> The Order banned discrimination in employment by federal government contractors and created the FEPC to monitor employment discrimination. Later, the FEPC was expanded by Executive Order 9346 to receive complaints alleging discrimination by employers and federal government departments.

The FEPC's work in Northern California's region twelve was active and effective under the leadership of Harry Kingman.<sup>177</sup>

With Kingman at the helm and a shoestring staff . . . the FEPC's West Coast Regional Office was one of the most successful in the nation. Kingman and his staff spent most of their time investigating complaints of discrimination by blacks and other racial minorities . . . . The investigation generally involved a meeting between the company in question and a member of the FEPC Regional Office staff. The FEPC officer would summarize the charges as they had been presented, and the company would be informed that Executive Order 8802 prohibited discrimination in defense industries. If an employer agreed to stop the alleged discriminatory practice, the FEPC staff would test "actual compliance by subsequent checks" and "provide expert advice and counsel on techniques for integrating minority workers."<sup>178</sup>

The FEPC was empowered to recommend cancellation of the defense contract, but this step was never taken.<sup>179</sup> Over 80 percent of the complaints to the FEPC were by black workers and few Bay Area employers were spared charges, revealing that black migrants had come to the Bay Area intent on being integrated into the lucrative workforce.<sup>180</sup>

The FEPC would be a major innovation, a precursor to the EEOC that demonstrated the effectiveness of a clearly articulated federal principle of fair employment and the importance of enforcement procedures. With Kingman's aggressive leadership, significant gains were made in integrating the military industrial workforce. But "Kingman and his staff achieved mixed results in their quest to integrate other areas of the private sector" and especially poor results in opening opportunities for black women.<sup>181</sup> For all its success, the FEPC was a limited tool in opening job opportunities and combating the rapidly emerging regime of Jim Crow. Supplementing this approach, black

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<sup>174</sup> *Id.*

<sup>175</sup> "Even the laudatory CIO minorities committee report conceded that 'fortunate conditions in the shipyards dominate the picture and camouflage less favorable attitudes and policies toward racial minorities characteristic of other industries.'" *Id.*, at 146 (quoting CIO Minorities Survey).

<sup>176</sup> Broussard emphasizes the importance of the Executive Orders in opening military industrial employment to black migrants. *Id.* at 146-58.

<sup>177</sup> *Id.* at 147.

<sup>178</sup> BROUSSARD, *supra* note 71, at 148.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 149.

<sup>181</sup> *Id.* at 150-53.



activist pursued a litigation strategy, especially aimed at combating discrimination by the AFL affiliated shipyard unions that created an impediment to black employment and relegated black employees to more menial, segregated work within the shipyard. The main case was Joseph James' suit against Marinship Co., and the Boilermakers Union.

"James organized a broad coalition of interracial opposition against the [segregated] auxiliary . . . . He also spearheaded an interracial committee of black shipyard workers and civic leaders to protest the segregated auxiliary union directly."<sup>182</sup> These and other organizing efforts created a groundswell of opposition to the auxiliaries that ultimately lead to successful litigation declaring the segregated auxiliaries illegal. James won at every level of the litigation.

### *B. James v. Marinship and the Anti-discrimination Approach*

In *James v. Marinship*, the California Supreme Court held that a union that has a closed shop agreement with an employer cannot exclude black applicants. "In *Marinship*, a union which had entered into a closed shop contract with Marinship Corporation refused to permit any black workers to join its Local No. 6 which negotiated contracts, handled grievances and dispatched workers to their jobs."<sup>183</sup> Joseph James was a skilled black worker who had been denied membership in Local No. 6. He brought suit on behalf of himself and similarly situated black workers against both the union and the employer, seeking to enjoin the union's discriminatory practices and to prohibit the employer from giving effect to such discrimination. James won an injunction that was upheld by the California Supreme Court prohibiting the union from "preventing the employment at Marinship of . . . Negro" workers and also enjoining the employer "from directly or indirectly discharging or refusing to employ or re-employ plaintiff and other Negro workers similarly situated."<sup>184</sup> The *Marinship* court based its decision on the monopoly power of the union under these circumstances.<sup>185</sup> However, it emphasized that the grounds for exclusion were arbitrary: "in our opinion, an arbitrarily closed or partially closed union is incompatible with a closed shop."<sup>186</sup> In so doing, the court established a strong precedent against discrimination.

*Marinship* was extended two years later in *Williams v. International Brotherhood of Boilermakers*<sup>187</sup> and *Thompson v. Moore Drydock Co.*<sup>188</sup> Wil-

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<sup>182</sup> *Id.* at 160.

<sup>183</sup> *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 481 (1979).

<sup>184</sup> *Marinship*, 25 Cal. 2d, at 731.

<sup>185</sup> "Where a union has, as in this case, attained a monopoly of the supply of labor . . . such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living." *Id.*

<sup>186</sup> *Id.* The court noted that the union's practices were inimical to substantial public policy against discrimination on the basis of race, citing to the duty of fair representation opinion, *Steele v. Louisville & Nashville R. R. Co.*, 65 S. Ct. 226 (1944), then just decided by the Supreme Court, and inconsistent with Constitutional and other policies. *See id.* at 739-41.

<sup>187</sup> 27 Cal. 2d 586 (1946).

<sup>188</sup> 27 Cal. 2d 595 (1946).

*liams* and *Thompson* presented factual circumstances substantially similar to *Marinship*, suggesting that the decision had not, by the end of the War, really softened union resistance to black employment. Nevertheless, the three main grounds on which *Williams* rested represented the extension of *Marinship* into a strong anti-discrimination opinion. First, *Williams* held that the union's segregation efforts were arbitrary, "directed, not toward advancing the legitimate interests of a labor union, but rather against other workers solely on the basis of their race and color."<sup>189</sup> Second, *Williams* rejected the union's argument that black workers were denied neither the ability to work for the employer, Kaiser Shipyard, nor membership in the union, despite being forced into the auxiliary union. The court emphasized that "Negroes were denied union membership on terms of equality with other workers, the effect was the same as wholly denying them membership."<sup>190</sup> Third, the court noted that the employer's threat to enforce the closed shop contract if black workers did not join the auxiliary "subjecting them to discriminatory and unequal union rules" on the same basis as in *Marinship*.<sup>191</sup>

Though the *Marinship/Williams/Thompson* trilogy seemed to establish a strong precedent for anti-discrimination law,<sup>192</sup> the California Supreme Court would substantially undercut this reading by eventually transforming *Marinship* into a fair employment decision.

Since *Marinship*, California courts, in a variety of circumstances, have recognized the effect which exclusion from membership in a private organization exerts upon a person's right to pursue a particular profession or calling. Thus, subsequent California decisions have not only expanded judicial review of labor union membership policies. . . , but also have applied the *Marinship* principle to the admission practices of professional societies, membership in which is a practical prerequisite to pursuit of a medical or dental specialty . . . , and to access by practicing physicians to staff privileges in private hospitals.

Exclusion from such groups has been deemed "arbitrary" when it is substantively unreasonable, internally irregular, or . . . procedurally unfair. [T]he common law right to a "fair procedure" includes "adequate notice of the 'charges' . . . and a reasonable opportunity to respond."<sup>193</sup>

<sup>189</sup> *Williams*, 27 Cal. 2d at 591.

<sup>190</sup> *Id.* at 593.

<sup>191</sup> *Id.* at 594. In *Thompson* the court rejected several equitable arguments said to bar an injunction against the union aimed at the auxiliary union system.

<sup>192</sup> The centrality of discrimination was emphasized when the court refused to extend *Marinship* to a case which did not involve racial exclusion:

[In] *James v. Marinship Corp* . . . the Negro workers were arbitrarily excluded from full union membership because of their color - an inherent attribute which they are powerless to alter, even should they wish to do so, and one which bears no reasonable relevancy to maintenance or advancement of the interests of labor generally - while here plaintiffs were denied union membership on the sole ground that they "were independent peddler distributors," i. e., were engaged in a type of activity which justifiably may be considered by labor as a whole as inimical to its own economic interests.

*Bautista v. Jones*, 25 Cal. 2d 746, 771 (1944).

<sup>193</sup> *Ezekial v. Winkley*, 20 Cal. 3d 267, 271-272 (1977) (citations omitted). This approach to *Marinship* was strongly criticized recently by the dissent in *Povin v. Metropolitan Life*:

*Marinship* did not involve the common law right of fair procedure . . . . In *Marinship*, a union with a closed shop agreement discriminated against applicants on the basis of race. This court did not say that such discrimination was unobjectionable so long as the union gave applicants notice

This transformation would quickly be reflected in the tension between *Marinship* and *Hughes v. Superior Court*. In *Hughes* the court would contradict its own dicta in *Marinship* about the freedom to picket and invoke *Marinship* to restrict black workers efforts to open employment opportunities.

Still, *Marinship* has been regarded as a triumph for black workers in the Bay Area. The significance of a judicial invalidation of employment discrimination in the Jim Crow era workplace ought not be underestimated. However, the scope of that success is less certain.

The institutional demands of an anti-discrimination approach reduced the effectiveness of *Marinship*. As experience under the FETC system revealed, the wide scope of discriminatory behavior made it unlikely that a litigation approach would be able to transcend serious opposition. This is hinted at, somewhat, by the fact that two years later, *Williams* and *Thompson* were still addressing practices virtually identical to those found in *Marinship*. Even the alternative of administrative processing of discrimination complaints proved limited as the FETC system was overwhelmed by the size of its caseload.

Perhaps most importantly, the extended period of litigation necessary to open the workplace and the relegation of many black workers to menial, non-essential jobs throughout this period meant that the window for black migrants to receive the full benefits of the War boom closed before the anti-discrimination approach could have any lasting effects. Under the system of last hired, first fired which employers and unions followed, the exclusion of black workers and the resistance to hiring them, ensured that they would be the first let go when the plants began to decommission. Moreover, as most employment opportunities outside wartime production remained closed to black workers, they bore disproportionately the burden of unemployment when wartime industries began closing and relocating.

Prejudice and discrimination, so deep seeded that, like desert vegetation, it sprouted full bloom as soon as the rains of job competition presented themselves, could not be "remedied" by the timid development of fair treatment statutes. The presumption of black inferiority made widespread black underemployment seem reasonable, validating the immigrant thesis and creating a vicious cycle around a supposedly natural pecking order of preferred workers.

The *Marinship* system was uncategorically inadequate to deal with the lost opportunities of black migrants. The system could be adequate only on the

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and an opportunity to respond to the "charge" of belonging to a racial minority. Rather, we held that "an arbitrarily closed or partially closed union is incompatible with a closed shop" (*Marinship, supra*, 25 Cal. 2d at p. 731), with the result that "Negroes must be admitted to membership under the same terms and conditions applicable to non-Negroes unless the union and the employer refrain from enforcing the closed shop agreement against them." (*Id.* at p. 745.)

The common law right extended in *Marinship*, therefore, was not the right to fair procedure, but *the right to service*. "It was well established at common law that innkeepers and common carriers were under a duty to furnish accommodations to all persons, in absence of some reasonable ground [citations], and if colored persons are furnished separate accommodations they must be equally safe, commodious and comfortable [citations]. The analogy of the public service cases not only demonstrates a public policy against racial discrimination but also refutes defendants' contention that a statute is necessary to enforce such a policy where private rather than public action is involved." (*Marinship, supra*, 25 Cal. 2d at 740).

Potvin v. Metropolitan Life Ins. Co., 22 Cal. 4th 1060, 1074-1075 (2000).

assumption, implicit in the immigrant tale, that black workers were mostly unqualified for the positions. According to such a view, the elimination of barriers would allow black workers entry to the employment world when they acquired the necessary skills. Yet, those black migrants who came to the Bay Area with such skills were simply ignored in a system informed by the immigrant tale. Moreover, this system, based on the presumption that sanctionable discrimination was the exception, not the rule, could never deal with the underlying problem of racial stigma. The system of anti-discrimination was designed to permit a "natural" ordering of the workforce without ever recognizing that the "natural" order, such as it was, was of consistent and widespread discrimination against black workers who were *assumed* to be unqualified for most employment. These limitations would be magnified by the California and United States Supreme Courts' approach in *Hughes*, which read *Marinship* to curtail black self-help aimed at supplementing the limited transformative power of the *Marinship* regime. That is, *Marinship* was turned into the ceiling on employment opportunity efforts, rather than a starting point; it was the end rather than the beginning of the efforts to address black migrants' displacement in the labor markets.

## VI. AGAINST THE IMMIGRANT'S TALE

The Bay Area during and immediately after World War II demonstrated the resiliency of American segregation. Segregation, occupational and residential, was fashioned where little existed before. Black families who moved to the West to try their hand in the vibrant war economy found their opportunities severely circumscribed, despite their relatively high education and skill levels. What was also new, though little discussed, was the complicity of the law in permitting this new segregation. That inglorious role, demonstrated in *Hughes v. Superior Court*, was firmly rooted in the immigrant tale presumptions about the basis for limited black opportunity. The facts of *Hughes* are telling in this regard.

In late 1946, officials of the Richmond, California, area civic organization, the Knights' Political League, met with representatives of the Lucky Food Stores, Inc., demanding that Lucky begin hiring black workers.<sup>194</sup> Lucky subsequently hired two black employees when openings became available.<sup>195</sup> In late April of 1947, the apprehension of a black shoplifter under disputed circumstances<sup>196</sup> prompted members of the Knights, at least two chapters of the

<sup>194</sup> See Respondent's Petition For a Hearing by the Supreme Court, *Hughes v. Superior Court*, 186 P.2d 756 (Cal. Dist. Ct. App. 1947) (No. 13535), Supreme Court Record 52, 53 [hereinafter, *Hughes Record*].

<sup>195</sup> *Id.* Lucky Stores Vice President Otto Mayer confirmed that two black employees were hired "as a consequence" of the meeting with the Knights' Political League. See Affidavit of Otto Mayer, *Hughes Record* at 47.

<sup>196</sup> It appears that one McKinley Jackson was tackled as he fled the premises of the Canal Street Lucky Store. While being led back to the Store to await the police, Jackson escaped and, to frighten him, a detective hired by Lucky fired a pistol into the ground. Jackson was recaptured and taken to the store to await the police. See *id.* at 54. Earlier filings by the Petitioners before the United States Supreme Court pointed to allegations that, while restrained, Jackson was beaten. See Affidavit of John Hughes, *Hughes Record* at 27. The

Progressive Citizens of America, and the Richmond Area Branch of the NAACP<sup>197</sup> to meet again with Lucky officials. This time they asked that the employees involved in the shoplifting incident be fired and that the store undertake a program of hiring black employees until the proportion of its workforce resembled the racial composition of its clientele, which was approximately 50% black.<sup>198</sup> When Lucky refused to discuss the proposals, the members of the organization began to picket the stores.<sup>199</sup> The pickets began on May 19, 1947; Lucky responded with an action to enjoin the pickets the next day. The pickets, which were always peaceful and never consisted of more than six picketers, ended on the third day.<sup>200</sup>

On May 26, 1947, the Superior Court for Contra Costa County issued a temporary restraining order which was made permanent on June 5th. On June 21, 1947, two members, John Hughes and Louis Richardson, the local NAACP president, picketed the Canal Street Lucky store with signs reading: "Lucky won't hire Negro Clerks in proportion to Negro trade, don't patronize." For this they were cited and eventually held in contempt. Hughes and Richardson then challenged the contempt citation on the ground that the injunction violated their constitutional right to free speech.

These inauspicious circumstances reveal a legal regime all too familiar to us today. The proceedings in the California courts featured judicial officials willing to turn a blind eye to the widespread discrimination against black workers while chastising the employment opportunity activists in *Hughes* for demanding a *racially discriminatory regime* even though racial discrimination was legal, if not moral, at the time and widely practiced against these same activists.

#### A. *Hughes Below: Or, How To Justify Silencing Anti-Discrimination Protest*

In its quest to enjoin the pickets, Lucky Stores posited two curious arguments, both of which seemed persuasive to the Superior Court. First, they argued that the pickets violated their collective bargaining agreement with a local union.<sup>201</sup> Although the picketers were neither employees nor union members, Lucky pressed that the collective bargaining agreement limited the grounds for pickets against the store to wage demands and that there had been no violation of the agreement by the Store. It is not clear that the court was completely persuaded by this argument, though it is mentioned in the court's memorandum.<sup>202</sup> Second, Lucky Stores asserted that the pickets violated its

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Respondents denied this allegation. See Affidavit of Benjamin W. Linsner, Hughes Record at 50. In any event, by the time the case reached the California Supreme Court, the aspects of the case related to Jackson had been dropped.

<sup>197</sup> *Id.*

<sup>198</sup> See Hughes Record at 65.

<sup>199</sup> See *id.* at 65-66.

<sup>200</sup> See *id.* at 66.

<sup>201</sup> See Petition, paragraph V, Hughes Record at 4-5.

<sup>202</sup> See Memorandum of Points and Authorities, May 26, 1947, Hughes Record at 32-33.

right to do business because the underlying reason for the pickets was either fraudulent or untruthful or that they were conducted in an unlawful manner.<sup>203</sup>

Underlying these arguments were the dual demands of the picketers: that black workers be hired until they constituted half of the workforce; and that the employees involved in the Jackson incident be released. The Superior Court's injunction specifically barred the picketers from picketing for *either* of these specific purposes.<sup>204</sup> This order remained shrouded in mystery for the appellate courts because Lucky Stores attached no affidavits to their petition, because the answer and affidavits of the picketers were aimed at responding to the collective bargaining agreement arguments of Lucky Stores, and because the Superior Court was, typically, brief in its order. In any event, Lucky would come to view the two as connected, arguing before the appellate courts that the picketers sought to compel it to fire white workers for the purposes of hiring more black workers.

Having violated the injunction and been fined, Hughes and Richardson appealed the injunction and the contempt sanctions. For the first time, Lucky Stores sought to supplement the record with affidavits from its Vice President and two employees. At root, the affidavits sought to establish that Lucky did not discriminate on the basis of race. The store employed this as a means of characterizing the picketers' demands as discriminatory. Whether Lucky Stores discriminated on the basis of race and whether its recent hiring of two black employees cured any past discrimination or showed that Lucky was now operating a non-discriminatory operation were debated in the documents presented to the District Court of Appeals. Similarly, the parties debated whether Lucky was a closed shop, requiring future hires to be made from existing union members or whether it was only a union shop, requiring new employees to join the union.

These debates exposed what was really at stake in *Hughes*. It was 1947 and the decommissioning of wartime industry had left large numbers of workers unemployed. The unemployment among black workers exceeded that of white workers, but the unemployment rate was high for all segments of the population. Lucky's claim was therefore twofold: First, it argued that it hired based on "qualifications" rather than race and it insisted that it would hire "qualified" black workers; second, it argued that the closed shop explained why there were so few black workers—the store had an employment list from which it was compelled to hire.<sup>205</sup> Hughes and Richardson vigorously contested these claims, arguing that:

E. The City of Richmond, County of Contra Costa, State of California, has a large and growing Negro population in excess of ten thousand persons; unemployment among this Negro population is greatly disproportionate to the unemployment of white persons in Richmond; traditionally many industries and occupations are closed to Negroes and will remain closed unless the Negro people can make effective their

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<sup>203</sup> *Id.*

<sup>204</sup> See Order Granting Preliminary Injunction, Hughes Record at 34-35.

<sup>205</sup> See Affidavit of Albert West, Hughes Record at 48-49.

demand to obtain equality of opportunity for employment and to prevent economic discrimination against Negroes.<sup>206</sup>

Interestingly, the Lucky Stores objected to this characterization of Richmond,<sup>207</sup> and affirmatively denied that "Lucky has discriminated against the Negro race and allege[d] that its policy throughout has been to hire employees on their individual merit and capacity."<sup>208</sup>

These already complex factual disputes were further complicated by the appellate court's ruling that Lucky's affidavits, submitted only in the appellate proceedings, could not be admitted or relied upon. In any case, the appellate court decided for Hughes and Richardson, finding that their pickets were neither inducement for breach of the collective bargaining agreement, nor were they demands that Lucky fire white employees so that black workers could be hired.<sup>209</sup> Any claim of inducement to breach of contract, the court argued, could be justified in any case.<sup>210</sup> Such arguments were privileged because they were in opposition to discrimination:

The economic interest of negroes in securing employment for members of their race, and in attempting to alleviate the results of discriminatory employment policy, are of sufficient social importance to justify the interference with the type of contract here involved.<sup>211</sup>

The court then dismissed the apparent grounds for the Superior Court's injunction as against sound public policy and because the picketing here was not related to a labor dispute which would implicate the collective bargaining agreement.<sup>212</sup>

Crucial to the District Court of Appeal's opinion was its willingness to be receptive to the unique situation faced by black workers in the Bay Area. Speaking specifically to the case before it, the court stated:

We are here faced with a situation where the employment policy of Lucky Stores, and of other employers, some of whom appear here as amici curiae, has resulted in discrimination in the hiring of negroes. Not only are they the last to be hired and the first to be fired, but many of the group can secure employment in only the most menial positions. Thus white workers operating in negro districts, economically exploiting this group, making their profits from it, cannot urge that the negroes should not be permitted to picket for the purpose of securing economic equality and fairness in employment, because, forsooth, such a dispute is not a "labor dispute," but a "racial" dispute.<sup>213</sup>

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<sup>206</sup> Petition For Writ of Certiorari to the District Court of Appeal, First Appellate District, paragraph IV. E., Hughes Record at 39.

<sup>207</sup> See Answer and Return to Writ of Certiorari, paragraph IV, Hughes Record at 44.

<sup>208</sup> *Id.*

<sup>209</sup> Opinion of District Court of Appeal as Appendix to Respondent's Application for Writ of Certiorari to Supreme Court of California, Hughes Record at 68-69.

<sup>210</sup> *Id.* at 69-70.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 70. See also *id.* at 75: "The courts of this state have unequivocally determined that picketing is justified even though the relationship of employer-employee does not exist and where no dispute at all exists between the employer and employee."

<sup>213</sup> *Id.* at 76.

Putting the case in broader context, the Court of Appeal referred to the views of a conservative commentator on the right to picket who, nevertheless, recognized the unique situation of black workers:

Even Mr. [Ludwig] Teller, who is the most articulate champion of the limited view of the nature of the right to picket as set forth in the Restatement [of Torts], has stated: "Aggravating circumstances surrounding the negro's search for work reflect the proximate connection between the negro's demands and the labor contract . . . Insecure, dispossessed, intensely exploited, the American Negro worker clings to the crags of life in the face of overwhelming countervailing forces. Abolition of slavery has not meant emancipation of the negro . . . Within the framework of the labor contract, therefore, and as limited by the subject matter of employment conditions, race, color, and creed ought to be accorded the privilege of picketing upon the reasonable assumption that its benefit to the individuals involved is worth more than its cost to society." (1 Teller, *Labor Disputes and Collective Bargaining*, § 136, at p. 427.)<sup>214</sup>

The Court of Appeals' construction is not without problems. Among other things, it is firmly rooted in a version of segregation that assumes that black citizens ought control "their" districts. It is perhaps best understood, however, as an alternative vision of the segregated world of the 1940s. Rather than conceiving of black citizens as helpless victims of segregation, the court seeks to recognize the agency of black people to organize and achieve economic or social progress *despite* the general legality of discrimination by private employers at the time. This highlights the importance of the unaddressed question throughout the litigation: was Lucky an employer who discriminated on the basis of race? The Court of Appeals seems to assume it did, but without a thorough examination of the question, it is difficult to truly assess the propriety of the protests.

In its appeal to the California Supreme Court, Lucky would insist that it did not discriminate on the basis of race, but the picketers were unpersuaded.

Assuming, *arguendo*, that Lucky had in fact hired two Negro clerks, this is surely not adequate proof of a non-discriminatory policy. Before any such inference could be drawn, other facts would be needed. How many white clerks in addition to the two Negroes does Lucky employ at its many stores? How many Negroes have applied for jobs? How many vacancies have been filled with white persons during the time the two Negroes were hired? What instructions, if any, has Lucky given the clerks union or to its personnel department, relating to the color of prospective employees? These questions should be answered, before the conclusion could follow that the "token" hiring of two Negroes establishes a non-discriminatory policy on the part of Lucky.<sup>215</sup>

These arguments, however, would fall on deaf ears at the California Supreme Court, which looked at the stated goal of the picketers' action and took Lucky's claim to have not discriminated at face value. Indeed, that Court noted the dispute between the parties over whether Lucky discriminated and stated that, if discrimination did take place, the picketers could protest it.<sup>216</sup>

<sup>214</sup> *Id.* at 81.

<sup>215</sup> Petitioner's Answer to Petition for Hearing by the Supreme Court, Hughes Record at 87-88.

<sup>216</sup> *Hughes v. Superior Court*, 198 P.2d 885, 888 (Cal. 1948).



However, no such broad purpose is shown to have motivated the activities here and the judgment of contempt is not affected by such proposition. Petitioners themselves specifically allege that their activities were "to secure a change of employment policy and working conditions of Lucky . . . by seeking to have Lucky . . . hire at its Canal Store . . . a number of Negro clerks proportionate to the number of Negro customers of said Canal Store . . . ." <sup>217</sup>

That is, the court accepted Lucky's claim that it did not discriminate and that the "change" the petitioners desired was a change away from a non-discriminatory policy.

The California Supreme Court's argument was distorted in two ways. First, it fell short of establishing a true non-discriminatory policy that would bind Lucky to non-discriminatory hiring. The court correctly referred to *Marinship* as establishing a nondiscriminatory principle, but failed to note that the *Marinship* ruling turned on the closed shop nature of the union's relationship with the employer. Lucky, a private employer in the Jim Crow period, was not clearly bound by *Marinship*; it could permissibly and apparently did discriminate against black employees. Second, the Court completely ignored that, until six months prior to the pickets, Lucky had hired *no* black clerks. Presumably, the court believed that this was the result of "merit" hiring, an unbelievable proposition, at least in retrospect.

The court sought to skirt these troublesome implications by focusing on the narrow nature of the injunction prohibiting the picketers from complaining about Lucky's refusal to do what the court says it was free not to do.

The fact that the hiring by Lucky of a small proportion of Negro employees might tend to show discrimination against Negroes is beside the point; likewise it is immaterial here that Lucky denied any such discrimination. The controlling points are that the injunction is limited to prohibiting picketing for a specific unlawful purpose and that the evidence justified the trial court in finding that such narrow prohibition was deliberately violated. <sup>218</sup>

But this is a troubling construction. The picketers' claims were not, after all, inaccurate. It is as though one accused Wal-Mart of paying low wages; if it is permitted to and does pay low wages, peaceful, non-obstructive pickets protesting its wage policy constitute pure speech – the articulation of a true fact. In any event, the construction effectively embraces Lucky's claim of non-discrimination by focusing the inquiry only on the sliver of time when the injunction was requested. Unlike the appellate court below, the California Supreme Court refused to put the claim in context even as it unconvincingly sought to imply that protests against discrimination were permissible.

The determinative factor for the court was its view of *Marinship*'s prohibition on a "racial closed shop."

If Lucky had yielded to the demands of petitioners, its resultant hiring policy would have constituted, as to a proportion of its employees, the equivalent of both a closed shop and a closed union in favor of the Negro race. It would have had no choice but

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 888.

to employ only members of the Negro race in a fixed number of clerical positions, thus effectuating a closed Negro shop as to those positions.<sup>219</sup>

By ignoring Lucky's prior discrimination, the court was permitted to posit an open, free competition for labor between individuals and presumptive open competition between groups.<sup>220</sup> Lucky was therefore upheld as an exemplar of equal rights. Petitioners would, the Court insisted:

... make the right to work for Lucky dependent not on fitness for the work nor on an equal right for all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis.<sup>221</sup>

While this language might resonate today, it must be remembered that this was a segregation era court limiting the right to protest discrimination that actually occurred and that was legal at the time.

The dissent of Judge Traynor emphasizes that:

The picketing . . . is directed at persuading Lucky to take action that it may lawfully take on its own initiative. No law prohibits Lucky from discriminating in favor of or against Negroes . . . . The picketing confronts Lucky with the choice of adopting a policy that is not illegal in itself or risking the loss of patronage that may result from the picketing. Had California adopted a fair employment practices act that prohibited consideration of the race of applicants for jobs, it might be said that the demand for proportional hiring would be a demand that Lucky violate the law. Neither the Legislature nor the people have adopted such a statute, and I find no implication in the majority opinion that its equivalent exists under the common law of this state.<sup>222</sup>

Judge Traynor reveals the transitory nature of the principles in *Hughes*. The emerging anti-discrimination principle is not yet useful for opening employment opportunities for black workers. Yet, it is invoked by the court to limit black workers' efforts to use self-help to achieve that goal. That is, black workers are held to high moral principles while Lucky Stores, dirty hands and all, appeals to the equity power to legitimize its past discrimination and to

<sup>219</sup> *Id.* at 889. The dissent of Justice Traynor sees the majority as applying an unrealistic abstraction to the dispute in the case:

Those racial groups against whom discrimination is practiced may seek economic equality either by demanding that hiring be done without reference to race or color, or by demanding a certain number of jobs for members in their group [before *Brown*]. The majority [rejects the] second method if picketing is adopted as the means of attaining that objective. In the absence of a statute protecting them from discrimination it is not unreasonable for Negroes to seek economic equality by asking those in sympathy with their aims to help them secure jobs that may be opened to them by the enlistment of such aid. In their struggle for equality the only effective economic weapon Negroes have is the purchasing power they are able to mobilize to induce employers to open jobs to them.

*Id.* at 895-96 (Traynor, J., dissenting).

<sup>220</sup> The dissent captures the maddening aspects of the majority's assumptions:

"There are so few neighborhoods where Negroes can make effective appeals against discrimination that they may reasonably regard the seeking of jobs in neighborhoods where their appeal may be effective the only practical means of combating discrimination against them. In arbitrating the conflicting interests of different groups in society courts should not impose ideal standards on one side when they are powerless to impose similar standards upon the other.

*Id.* at 896 (emphasis added) (Traynor, J., dissenting).

<sup>221</sup> *Id.* at 889.

<sup>222</sup> *Id.* at 896 (Traynor, J., dissenting).

uphold token hiring as the model of anti-discrimination. "The decision virtually outlaws all picketing by Negroes or other minority groups to secure employment in businesses such as the large retail chains, from which they, except in menial capacities, have been systematically excluded."<sup>223</sup>

In the California courts, the basic parameters of the *Hughes* precedent are established. Northern California is conceived as a non-discriminatory place. In the face of the ample evidence of widespread discrimination against black workers, the reputation for openness in Northern California is invoked, as the assumption of non-discrimination is invoked today, to flatten the terrain on which the courts analyze discrimination claims: Lucky is *assumed* to be non-discriminatory – its recent hiring of a few black workers *confirming* this assumption despite its apparent lack of black employees before 1946; on this assumption Hughes and Richardson are denied the ability to demand more open employment opportunities for black workers, though the law at the time does not prohibit their demand. Consequently, *black workers* are made to bear the full cost of the slow transformation of California from a closed to an open employment market with no accompanying employment benefits in the deal.

These characteristics are bound to one another. If Lucky's practices are analyzed only in the present time and judged only against a non-discriminatory policy it is assumed to employ, it could be said to be irresponsible, even discriminatory, to demand it adopt a policy that might exclude some potential employees on the basis of their race. But if the focus is on Lucky's broader policies or on the practices of the community, a different light is cast on the protesters' demands; "[p]etitioners are seeking by reasonable methods to discourage discrimination against them."<sup>224</sup>

These aspects of *Hughes* are, however, not the most troubling facets of the decision. Tacit in the discussion of the court is the immigrant tale. Throughout, the court's opinion turns on the view that the pickets demanded unfair advantage for black workers in the open competition between races assumed to control access to opportunities. That there is little support for this notion of openness in the record of the case or in the experience of black Bay Area workers is ignored in favor of a rarified notion of ethnic ascendance in America's melting pot. This view would become explicit when the United States Supreme Court upheld the California Supreme Court decision.

### *B. Hughes and the Insidious Influence of the Immigrant Tale*

In *Hughes v. Superior Court*, Justice Frankfurter explicitly employs the immigrant tale to affirm the California Supreme Court's reasoning. Frankfurter abstracts blackness into ethnicity and builds a parallel between the situation of black East Bay migrants and that "of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, or of Mexicans in San Antonio, of the numerous minority Groups in New York, and so on through the whole gamut of racial and religious concentrations in various cit-

<sup>223</sup> Petitioners Petition for Rehearing before California Supreme Court (Nov. 16, 1948), *Hughes Record* at 112.

<sup>224</sup> *Hughes*, 198 P.2d at 895 (Traynor, J., dissenting).

ies.”<sup>225</sup> In his view their situations were comparable, even though he makes no findings about the context under which any of these groups live. This immigrant tale abstraction is the key to Frankfurter’s decision since, quite apart from the disapproval of “quotas” which he famously articulates in *Hughes*, it is not clear why the black picketers should be subject to injunction. That is, two distinct questions, whether it would be legal for Lucky Stores to adopt the “quota” advocated by the protesters and whether the picketers can advocate for that position, are merged by the force of the immigrant tale. The consequence is that Frankfurter upholds limitations on what the picketers could request because he thinks they are requesting an unfair advantage, apart from whether Lucky could adopt their requests. It turns out that Lucky could, and continued to enjoy the privilege of discriminating on the basis of race in large part because Frankfurter would not articulate a principle of non-discrimination applicable to Lucky Stores.

The protesters’ means are subjected to prohibition in *Hughes* because the protests themselves are perceived as granting one abstracted ethnic group advantages over others in a supposedly fair competition for job opportunities and access to middle class stature. Indeed, Frankfurter notes that discrimination against black migrants “raises *sociological problems* which in some aspects and within limits have received legal solutions.”<sup>226</sup> This characterization reflects a view that ethnic group competition is a “sociological,” that is, non-legal, affair in which the Court should be reticent to intervene. Importantly, Frankfurter notes that the California courts had intervened in *James v. Marinship*<sup>227</sup> on behalf of black workers.<sup>228</sup>

This reflects two separate but overlapping conclusions about the role of courts. First, it can be taken as judicial notice that the courts have already intervened on behalf of black workers, thus upsetting Frankfurter’s *laissez-faire* presumptions about inter-ethnic competition. Read broadly, black Americans had *already been advantaged* in the ethnic competition for jobs.

Perhaps this reading is insufficiently generous to Frankfurter. However, even if it is, the second implication of the Justice’s opinion is sufficiently problematic to justify a critical assessment of *Hughes*. Frankfurter’s argument implies that, unless states had given the Court grounds to think they were untrustworthy, state court decisions ought be given deference. That is, he seems to draw a distinction between “good” governments and “bad,” the former of which should enjoy deference on race matters. Frankfurter says the California Supreme Court’s “background . . . legal policy is relevant to the conviction of its court that it would encourage discriminatory hiring to give constitutional protection to petitioners’ efforts to subject the opportunity of getting a job to a quota system.”<sup>229</sup> Generally speaking, deference to state courts is the core of

<sup>225</sup> *Hughes v. Superior Court*, 339 U.S. 460, 464 (1950).

<sup>226</sup> *Id.* at 463 (emphasis added).

<sup>227</sup> 2155 P.2d 329 (1944).

<sup>228</sup> *Hughes*, 339 U.S. at 463. “California has been sensitive to these problems [discrimination against Negroes in employment] and decisions of its Supreme Court have been hostile to discrimination on the basis of color.” *Id.*

<sup>229</sup> *Id.*

what Justice Black would call "Our Federalism."<sup>230</sup> But in the specific context of the widespread Jim Crow-style discrimination, Frankfurter's deference to states reflects the Court's view that remedies to discrimination ought be granted only when outrageous abuses of power by states are directed at their citizens. Indeed, this standard is the basis for recovery in the pre-*Plessey* case of *Yick Wo v. Hopkins*. In *Yick Wo*, the Court found that a neutral law can be discriminatory if applied in a prejudicial way (with an "evil eye") to cause harm (affect "material rights").<sup>231</sup> Thus, *discrimination* followed from the singling out of Chinese laundries and prohibiting their operation. Similarly, the Court is forced in the outrageous case of *Korematsu* to strain to dismiss the strong evi-

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<sup>230</sup> *Younger v. Harris*, 401 U.S. 37 (1971). A third possible explanation exists. I am grateful to Professor William Woodward of Temple for pointing out that the Court might have been motivated by a desire to protect the courts' authority, given that the litigation comes to the Supreme Court as an appeal from a criminal contempt sanction. Famously, in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), the Supreme Court upheld contempt sanctions against a group of civil rights activists led by Martin Luther King, Jr., despite the argument that the injunction they violated was unconstitutional on its face. Although the Court would eventually invalidate the statute on which the injunction was based, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), the Court upheld contempt sanctions. Justice Stewart, noting that "this is not a case where the injunction is transparently invalid or had only a frivolous pretense to validity" held that the asserted unconstitutionality of the injunction was no defense. The Court seemed influenced by the fact that the defendants had made no efforts to appeal or challenge the injunction itself before they marched. Justice Stewart noted that "[t]his case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims."

This is an important and compelling explanation of the Court's possible motivation and is supported by parts of the California Supreme Court's opinion in *Hughes*. Arguing that Lucky's discriminatory behavior (or lack thereof) were irrelevant, the California Supreme Court noted that "The controlling points are that the injunction is limited to prohibiting picketing for a specific, unlawful purpose and that the evidence justified the trial court in finding that such a narrow prohibition was deliberately violated." *Hughes*, 198 P.2d at 888. It is, however, of limited import in this context for three reasons. First *Hughes* is decided well before the Supreme Court "revived" 42 U.S.C. § 1983 and before a clear mechanism for challenging illegal but constitutional behavior had emerged. It is possible that the only sure means of challenging the injunction on picketing, absent a constitutional argument on its invalidity, was to violate it first. This argument is not the easiest to assess, but the other two render it less important. The second limitation on the argument is found in the words of the California Supreme Court: if "the controlling points" include the "specific, unlawful purpose" of the picket, its unlawfulness is directly in question and supersedes the issue of the violation of the injunction, for if the injunction were not limited to unlawful behavior its violation is not necessarily problematic. Finally, it matters significantly that United States Supreme Court chose to frame their opinion around the immigrant tale, whatever other motives it may have had for upholding the contempt sanction. Indeed, the Court seems to embrace the California Supreme Court view that the picketers' protest was motivated by illegal goals. So while *Walker* might stand for the notion that illegal motives by the protesters are not necessary to support contempt sanctions for violating an injunction against the protest, *Hughes* seems to stand for the proposition that such motivation is adequate to uphold a contempt sanction.

<sup>231</sup> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

dence that, in part, malicious animus motivated the decision to intern Japanese Americans.<sup>232</sup>

So in *Hughes*, the Court pretends that the discrimination of which it was on notice from *Marinship* was not especially relevant to its examination of the picketers' behavior. That is, the question of whether they should be allowed to picket, even if the Court thought quotas were illegal, turned in large part on whether the Court thought their picketing was in response to a valid grievance. The decision in *Hughes* either assumes there was no discrimination (against all reason) or, more likely, finds that discrimination to be *natural* discrimination, insufficiently outrageous to necessitate a questioning of the policy of deference to states.

This approach turns the question of picketing in *Hughes* on its head. While the Court might reasonably have questioned the propriety of pickets that take violent form *or* are triggered by insubstantial reasons, the Court's focus on the expressed goals of the pickets implied without saying, that the underlying reasons were insubstantial – that whatever exclusion of black workers from Lucky's which may have existed was justifiable because they were (presumably) unqualified, or, that as a group, black workers were unprepared to move up to that sector of the economy.

If this sounds familiar, it is because much of the rhetoric of Frankfurter's opinion is found in affirmative action jurisprudence. It is today reflected in the Court's flippant dismissal of the relevance of societal discrimination and its assumption in most cases that the affirmative action plaintiffs' suits actually establish "discrimination." Affirmative action jurisprudence proves time and again to be most heavily focused on black recipients of affirmative action benefits who are often not even parties to the litigation. Indeed, the Court's affirmative action jurisprudence generally fails to examine the "qualifications" in question in the cases, treating them as genuine and legitimate. In many cases those selection standards turn out to be under-determinative of the "merit" question. In many others they reflect no more than pool-reduction strategies, rather than determining "merit" in any sense of the term.<sup>233</sup>

### C. *The Importance of Hughes*

*Hughes* is about memory and purpose. Its meaning is lost on the Supreme Court in *California Brewers Association v. Bryant*,<sup>234</sup> which in 1980 would read Title VII's seniority system exception to include a convoluted "permanent worker" scheme that was nothing if not one of the *Hughes*-era devices to

<sup>232</sup> *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944):

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders - as inevitably it must - determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short.

<sup>233</sup> See John Valery White, *supra* note 34.

<sup>234</sup> 444 U.S. 598 (1980).

exclude black workers. Justice Marshall in dissent did not forget because he was part of the *Hughes* litigation team and had visited the Bay Area in preparation of the litigation. His dissent in *California Brewers* is surely influenced by his experience in *Hughes* as reflected in his reminder to the Court that, "[a]ccording to respondent's complaint, no Negro has ever attained permanent employee status in the California brewing industry."<sup>235</sup> Just as the Court forgot about the discrimination that informed *Marinship* in its analysis of *Hughes*, the *California Brewers* Court seems to have no memory of the lengths to which some unions in California went to exclude black workers.

*Hughes* is also about purpose – the purpose of goals of black activism before and during the civil rights movement. It is convenient today for advocates of color-blindness and similar principles to ascribe to black workers high sounding principles that, like those invoked in *Hughes*, make black workers bearers of the burdens of both Jim Crow and the efforts to eliminate the vestiges of that system. As Garrett Epps shows, this is precisely what Andrew Krull does in *The Color Blind Constitution* (1992).<sup>236</sup> Lost is the singular purpose with which black Americans sought improvements in employment opportunities.<sup>237</sup> Consider the 1944 publication *What the Negro Wants*<sup>238</sup> in which a wide array of black commentators, conservative and liberal, are in unison in their view that opened job opportunities were what black workers sought. Black families fought to attain education for their children, not to drink from fountains – though the indignities of the South were significant elements of their concern. They sought primarily access to opportunities for social advancement and independence related to improved employment prospects. *Hughes* denied them the voice to press these demands while refusing to extend any other tool for opening job opportunities.

Moreover, *Hughes* is important because it shows the significance of insisting that Jim Crow segregation was a unique Southern institution. *Hughes* proceeds from the assumption that California (and presumably the North) operated on a different system of *normal* ethnic prejudice where the court had only a limited role in response. Though *Hughes* is a pre-*Brown* version of this view, it foreshadows the Court's intuition about the prevalence of discrimination in the North and West in the post-*Brown* world, and the approach years later when the vestiges of Jim Crow are assumed by the Court and commentators to have passed—that is, the Court in *Hughes* prefigured contemporary courts' disposition to apply the immigrant tale to explain continuing inequality and dismiss actionable discrimination.

But Northern California during World War II and immediately after shows that such assumptions have always been in error. Whatever *normal* discrimination is, Northern California erected a fully functioning Jim Crow system during the war, distinguishable only in that the war forced defense contractors to employ black workers in industrial jobs. Even this distinction, however, should be understood in light of the modern reading of Jim Crow which explodes the

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<sup>235</sup> *Id.* at 611.

<sup>236</sup> Garrett Epps, *Of Constitutional Seances and Color-Blind Ghosts*, 72 N.C. L. REV. 401, 435-440 (1994).

<sup>237</sup> *See id.*

<sup>238</sup> WHAT THE NEGRO WANTS (Rayford W. Logan ed., 1944).

view that there were rigid racial job classifications along which black workers in the Jim Crow South were divided. In the urban Jim Crow South, black workers were relegated only to the unwanted jobs, jobs which varied significantly from city to city.<sup>239</sup> While black workers could not be brick masons in Birmingham, for example, black New Orleanians have had a long tradition in that trade.<sup>240</sup>

Indeed, California's Jim Crow system, though new, proved to be every bit as effective at relegating black migrants to subordinate lives and throttling their social and economic advancement. Black workers were able to sit in the front of the bus, but increasingly after the War, they had no jobs to ride to. By the 1960s the educational and skills advantages, the tight, stable familial networks had been ignored and black workers were left in isolated communities with few job opportunities and a heightened degree of frustration that would birth the West Coast civil rights movement.<sup>241</sup>

In a broader sense, the story of Northern California during these years represents the United States' reaction to black efforts during the last days of Jim Crow to play by the rules underlying the immigrant tale. As such, it illustrates the power of racial stigma and the consequent way that white Americans responded to black industry, innovation, and hard work. Building on the stigmatization of "blackness," Bay Area employers simply ignored black education and skill levels. They refused to hire black workers for anything but menial tasks, explained their decision on questionable claims about qualifications, and then resisted black protest efforts on the ground that they were innocent – that is, they practiced non-discrimination. This formula would become the basis for post-Jim Crow treatment of black workers. Employment for black people would come to be dependent on indicia of exceptionalism, producing token black employment, hyper-reliance on questionable indicators of qualification,<sup>242</sup> and keen competition among employers for black workers who meet those indicators as a means of proving an employer non-discriminatory. In the meantime, the allegiance to these forms of self-reproducing "qualification" permit challengers to those systems to be characterized, as in *Hughes*, as discriminatory.

## V. CONCLUSIONS

The story of the Bay Area during and immediately after the war years illustrates the mixed blessing of the anti-discrimination approach to economic and social discrimination. The system created under *Marinship* and Executive Order 8806 was an important victory in the effort to protect black workers from

<sup>239</sup> JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935*, 229 (1988). Philanthropists seeking to promote "industrial education" of black southerners found resistance from white southerners in part because, while they sought to accommodate Jim Crow by training black southerners only for "Negro jobs," they discovered "that there were no "Negro jobs" in the urban South, no racially hierarchical economy in which each constituent class held fixed occupational slots. Rather, "Negro jobs" were mostly those jobs left over after whites achieved full employment." See general discussion, *id.* at 214-37.

<sup>240</sup> See *id.*

<sup>241</sup> See Self, *supra* note 58; Lemke-Santangelo, *Deindustrialization*, *supra* note 61.

<sup>242</sup> See White, *supra* note 233.



severe discrimination that seemed to follow them wherever they moved. However, that system proved totally inadequate to repair the discrimination suffered during the period. While *Marinship* and the Executive Order system would protect those black workers who had secured employment from being singled out for layoffs after the war, it did nothing for those who became the first fired as a consequence of decisions to preference white workers.

Moreover, the system did nothing to deal with the rampant housing discrimination that concentrated black migrants and long term black citizens alike in small areas with substandard housing. In fact, despite the 1948 decision in *Shelley v. Kramer* baring the enforcement of restrictive covenants, California residents continued to discriminate in housing, necessitating in 1963 a state fair housing act.<sup>243</sup>

Perhaps as importantly, the anti-discrimination system that emerged in California was one premised on immigrant tale presumptions. These presumptions meant that the regime would be dedicated only to eliminating overt barriers to entry and would be used as a shield by the likes of Lucky Food Stores to prevent full integration of their workforce. Arguments that today raise questionable presumptions were successful then to stymie the serious integration of black workers. Then, as now, the justification for these practices was the presumption that black workers were not qualified for employment. The immigrant tale implies that this racial stigma was the cause of discrimination, and like the clergy who asked Martin Luther King to call off protests in Birmingham, counseled for black workers to be patient and wait for opportunities to open up. This advice and the presumptions on which they were based appear to have been incorrect.

On one level this Article surveys the data demonstrating that black migrants to the Bay Area during and after the war were well qualified for the expanded opportunities available then. But even if that is not believed, it is clear that, contrary to the typical pejorative visions of black people extant then and now, black migrants to the Bay Area were precisely the families that the immigrant tale claims would progress despite "natural" prejudices. This, however, was not the case. The Article shows, at a minimum, that the loose system of discrimination that existed in Northern California was quickly transformed into a system of economic and social Jim Crow, selecting out black people and denying them the benefits of the massive wartime expansion.

Social capital theories remain unpersuasive in their fundamental claim that successful "cultures" exist that transcend the particular circumstances of populations in various parts of the world. As shown in the intriguing *Lost White Tribes*,<sup>244</sup> isolated white populations in Sri Lanka, Haiti, Jamaica, Brazil and elsewhere have suffered the economic success and failures of their fellow citizens, even in circumstances where the former colonial systems to which they were connected granted them tremendous advantages. Similarly, black Americans, Americans indeed, share most of the same attributes of their fellows. When denied access to economic opportunity and relegated to ghetto housing,

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<sup>243</sup> See discussion of passage of California's Fair Housing Act, AB 1240, July 18, 1963, in MCBROOME, *supra* note 92, at 146-47.

<sup>244</sup> RICCARDO ORIZIO, *LOST WHITE TRIBES: THE END OF PRIVILEGE AND THE LAST COLONIALS IN SRI LANKA, JAMAICA, BRAZIL, HAITI, NAMIBIA, AND GUADELOUPE* (2001).

they are fully capable of losing advantages. This Article does not mean to imply that the wrong inflicted on black migrants was the destruction of "social capital." Rather, it seeks to make the simpler, more powerful, and more tragic point that accumulating social and economic skills, wealth, and access to education and jobs, while difficult, was made more difficult by early twentieth century Jim Crow, and was subject to loss when invested in accessing closed economic opportunity.

Racist explanations of society are remarkably persistent, especially in their transformed cultural versions. The notion that black migrants were uneducated, unskilled, country rubes was a convenient excuse for excluding them from the opportunities of the wartime economy. The persistence of these views, despite their apparent falsity in application to the wartime Bay Area, attests to the power of racial stereotypes in the mid-twentieth century. The story of black migrants in the wartime Bay Area should be a cautionary tale for us today when we uncritically accept employers' arguments about unqualified workers, poor work habits, and the deplorable state of education of segments of the workforce. Perhaps as importantly, it should cause one to wonder about the propriety of theories of employment discrimination law that argue that interests in efficient hiring practices support loosening employment discrimination restrictions to permit tactics like nepotism or explain adverse employment discrimination as the product of non-racial prejudices.

In the end, we should be most suspicious of the immigrant tale as a meta narrative of migration and equality. As the country has inaugurated a new period of migration that promises to substantially transform the demographic face of the country, it will be more important than ever to confront these myths which still determine so much of our social policy. If the life chances of a white foreign born immigrant's family to the Bay Area during the war and that of a black migrant from Texas then depended less on their qualifications and work ethic than their race (however defined), we ought expunge from our collective story the myths underlying the immigrant tale. For when we write the story of twenty-first century migrants and immigrants in America, we can only hope that the story will not be one of discrimination and exclusion if we cease justifying inequality on the grounds of the immigrant tale.

Admittedly, this is not an uplifting tale, but the life of black migrants, rooted in optimism, can best be characterized by disappointment. In California, decades of black people's struggles to develop educational capital was lost in a crucible of racial discrimination, illustrating that a despised community can position itself for success and still be relegated to a subordinate position. At the root is racial stigma, abundantly on display in the California case, where black people were summarily regarded as unqualified for employment, especially as supervisors over white workers (evidence to the contrary notwithstanding).

This case, of California's Bay Area during and after the war, should sadden us because it is the most instructive historical lesson on our contemporary dynamics. California's supposed racial utopia had foreshadowed not a land of openness and opportunity but the resiliency of race inequality in the last days of Jim Crow and, indeed, in the post-Jim Crow world. Of course, the legality of discrimination during Jim Crow surely made this case worse than parallel situa-

tions in the post-Jim Crow world, as it narrowed the opportunity available to individuals to fulfill their unique life plans. In the aftermath of Jim Crow, life for black people is tremendously better, as California life was uncategorically better for black migrants than life in the Jim Crow South. That life, however, is still rife with limitations for those, black people and others, marked by a stigma of inferiority. No amount of denial of racist thinking can soften this effect.