

7-1-2011

New Century Freedom for the Freedmen

Danné L. Johnson

Follow this and additional works at: <http://repository.law.miami.edu/umrsjlr>



Part of the [Civil Rights and Discrimination Commons](#), and the [Law and Race Commons](#)

Recommended Citation

Danné L. Johnson, *New Century Freedom for the Freedmen*, 1 U. Miami Race & Soc. Just. L. Rev. 77 (2011)

Available at: <http://repository.law.miami.edu/umrsjlr/vol1/iss1/5>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Race & Social Justice Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

New Century Freedom for the Freedmen

DANNÉ L. JOHNSON**

INTRODUCTION	78
I. THE BUREAU OF REFUGEES, FREEDMEN AND ABANDONED LANDS	79
A. URGENT ASSISTANCE TO THE NEGRO	81
B. NEGRO EDUCATION UNDER THE BUREAU	83
C. OTHER BUREAU EFFORTS.....	85
1. Land Ownership.....	85
2. Legal Matters	86
D. THE FREEDMEN’S BUREAU’S END.....	87
II. THE STATE OF BLACK AMERICA	89
A. GENERAL.....	89
B. EDUCATION	89
1. History.....	89
2. Current State	92
C. HEALTHCARE.....	93
1. History.....	93
2. Current State	93
D. WEALTH	95
1. History.....	95
2. Current State	95
E. INCARCERATION	97
1. History.....	97
2. Current State.....	97
III. MAKING THE NEGRO PROBLEM MATTER	98
A. RACE IS A LEGITIMATE FACTOR IN CONSIDERING SOCIAL	

** Professor of Law, Oklahoma City University School of Law. The author wishes to thank Oklahoma City University for support during the writing process, Oklahoma City University Professor Lee Peoples, the Oklahoma City University library staff, research assistants, Oklahoma City University students, Tiece Dempsey and Brett Stingley, and Dawn Grooms for her proofreading prowess. Copyright © 2011, Danné L. Johnson.

JUSTICE AND FAIRNESS	99
B. SOCIETY BENEFITS FROM DIVERSITY IN TERMS OF EDUCATION AND ECONOMICS	102
C. GREATER EQUALITY CAN ENHANCE NATIONAL WELL BEING	103
IV. REFORMING THE BUREAU AND MAKING IT WORK	104
CONCLUSION	106

INTRODUCTION

The Bureau of Refugees, Freedmen, and Abandoned Lands (“Freedmen’s Bureau” or “Bureau”) was tasked with providing a pathway for former slaves to achieve equality and coexist in the United States with their former owners.¹ The Bureau would provide and in some cases ensure educational opportunities, equal treatment and protection under the law, freedom from harassment, payment for labor, and the distribution of land to accomplish the goal of Negro equality. The Bureau was by every estimation underfunded, under-staffed, and dismantled before its work was completed. One hundred fifty years later, the Negro² problem still persists.

For African Americans, the badges of equality remain elusive. African Americans are recipients of inferior educational opportunities, victims of discrimination under facially neutral laws, targets of hate crimes and stereotyping, and receive lower wages for equal work. They have poorer health, shorter life expectancy, and less access to land and other measures of wealth. Since the dismantling of the Bureau, the South has lagged behind the United States in terms of African American equality.

In this Article, I suggest that a revived Freedmen’s Bureau is

1. *See* Freedmen’s Bureau Act of 1865, ch.90, 13 Stat. 507 (1865). The Bureau of Refugees, Freedmen, and Abandon Lands was also tasked with assisting refugees from the South. Those seeking to argue against the Bureau would not support an agency which only provided assistance to one race of peoples, namely the Negro. Refugees were Southerners fleeing from harsh conditions, Southerners who were northern sympathizers who left the South to aid the north and those who were persecuted in the South for their beliefs, and Southern Blacks whose freedom predated emancipation.

2. The words Negro, Black, and African American will be used interchangeably. Each term refers to United States citizens who were former slaves or the descendants of former United States slaves.

necessary to guide America toward Negro equality in order for each citizen to be a stakeholder in society. Part I examines the creation, successes, and failures of the Bureau of Refugees, Freedmen, and Abandoned Lands. Part II explores the state of African Americans in the United States and the racial inequality gap. Part III presents the threshold question of whether the racial inequality gap is relevant. Part IV provides a framework for confronting and closing the racial inequality gap.

I. THE BUREAU OF REFUGEES, FREEDMEN AND ABANDONED LANDS

The United States Civil War resulted in the liberation of nearly 4 million slaves.³ Recognizing the vulnerability of the newly emancipated slaves, Congress and President Lincoln, over opposition from congressional democrats, enacted The Bureau of Refugees, Freedmen, and Abandoned Lands on March 3, 1865.⁴ The 1865 Act contained three substantive goals: to furnish “provisions, clothing, and fuel” for “destitute and suffering refugees and freedmen;” to oversee

3. Abraham Lincoln’s Emancipation Proclamation did not free approximately 800,000 slaves who were not in the “rebellious states” but in border states. *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 198-219* (Jane E. Vaicunas et al. eds., 8th ed. 2000).

4. CONG. GLOBE, 38TH CONG., 1ST SESS. 2798 (1864) (Senate version of the bill). The initial legislation addressing the needs of the Freedmen was introduced in 1863. CONG. GLOBE, 38TH CONG., 1ST SESS. 19 (1863). The bill proposed the creation of a new agency to provide special assistance and protection for Negroes by ensuring the equitable enforcement of all laws regarding Freedmen, aiding the Freedmen in creating and enforcing leases and labor contracts, participating in litigation as next friends of the Freedmen, and renting to the Freedmen “abandoned Confederate real estate that came into the possession of the United States.” CONG. GLOBE, 38TH CONG., 1ST SESS. 2798 (1864) (Senate version of the bill). Opponents of the bill expressed concern that the legislation favored Negroes and feared that enactment of the bill would lead to a comprehensive social welfare scheme. The opposition “contended that such social legislation was traditionally the exclusive concern of the states and therefore should be left to them.” Proponents stressed the importance of the bill, explaining that the legislation was needed to overcome the effects of past mistreatment of Negroes. The bill passed both Houses of Congress but was allowed to languish in conference committee. During the next session of Congress, the House passed the measure but the Senate rejected it as being a new bill all together. Ultimately, because the need for federal aid was urgent, a limited bill was passed in 1863 creating the Bureau of Refugees, Freedmen and Abandoned Lands. Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 756-60 (1985).

and administer lands abandoned in favor of the freedmen, and “the control of all subjects relating to refugees and freedmen.”⁵ The legislation, while not very specific in terms of goals or methods, clearly stated that the Bureau would be under the Department of War and would only last one year after the end of the War.⁶

General Otis Howard, appointed Commissioner of the Bureau on May 19, 1865, issued circulars establishing the broad principles of his administration. The circulars stated, “The ex-slaves must be secure in their freedom, . . . but ‘on no account, if able to work should [they] harbor the thought that the Government will support [them] in idleness.’”⁷ The Bureau focused on several areas to secure the freedom of the Negro in the South⁸ —providing food, shelter, and medical care were of primary importance. The other goals of the Bureau included providing educational opportunities, a pathway to land ownership, employment, and protection under the law.

5. Freedmen’s Bureau Act of 1865, ch.90, 13 Stat. 507, §§ 1-3 (1865). The measures and proposals culminating in the creation of the Bureau are reviewed in GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN’S BUREAU* 16-49 (1955). The statute was limited to freedmen or refugees ‘from the rebel states.’ Act of March 3, 1865, ch. 90, 13 Stat. 507 (1865). Historians of this period have not regarded the inclusion of white refugees as a significant impetus in the adoption of the Act. *See, e.g.,* PAUL SKEELS PEIRCE, *THE FREEDMEN’S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION* 42-45 (1904). Rebel states were Southern states that succeeded from the Union between 1860 and 1861 and included—South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, Texas, Virginia, Arkansas, Tennessee, and North Carolina. John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 380-82 (2001).

6. PAUL A. CIMBALA, *THE FREEDMEN’S BUREAU: RECONSTRUCTING THE AMERICAN SOUTH AFTER THE CIVIL WAR* 8 (2005). The Bill establishing the Freedmen’s Bureau specifically called for the termination of the agency one year after the war. The war ended on April 7, 1865 without a legal announcement marking the end. Some proponents of the Bureau suggested that the Bureau’s work should legally continue without further legislation for one year after such declaration by the President or Congress. PEIRCE, *supra* note 5, at 55.

7. CIMBALA, *supra* note 6, at 11.

8. Proposals to relocate the Freedmen to the North were widely discouraged. HERMAN BELZ, *A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN’S RIGHTS, 1861 TO 1866*, at 83 (Fordham Univ. Press 2000) (1976).

A. Urgent Assistance to the Negro

The Bureau was tasked with providing temporary relief and aid to the Freedmen and refugees.⁹ The Freedmen and refugees were often placed in military encampments and had no food or money to acquire provisions. One of the Bureau's main concerns was alleviating the Freedmen's destitute living conditions.¹⁰ Bureau assistance attempted to meet the basic needs of the destitute, Freedmen and refugees alike, by providing food rations,¹¹ clothing, shelter, and medical care.¹²

The Freedmen's Bureau assumed operation of military hospitals established during the war to alleviate the physical suffering of the Freedmen.¹³ The health conditions of the Freedmen after the War could

9. Commissioner Howard recognized the temporary life of the Bureau and insisted that local governments and philanthropy organizations step in and provide needed relief aid to those destitute. The Bureau adopted a policy of "only doing what was necessary and no more." JOHN A. CARPENTER, *SWORD AND OLIVE BRANCH: OLIVER OTIS HOWARD* 104 (1999).

10. Immediately following the war and emancipation, Freedmen were herded into military contraband camps where the living conditions were dire and atrocious. W. E. B. DuBois, *The Freedmen's Bureau*, 87 *ATLANTIC MONTHLY* 354, 354-65 (1901). The initial Freedmen's Act of 1865 provided no funding for relief work, but the subsequent enactment of 1866 granted appropriations to the Bureau to assist the Freedmen and refugees. Specifically the Bureau was appropriated a \$4.7 million for relief supplies and medical aid and \$1.3 million for transportation of Freedmen and whites, in addition to education and overhead expenses. *Id.* The Bureau's budget would have been equivalent to \$97.9 million, per the consumer price index, in 2008. See Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a US Dollar Amount, 1774 to Present*, MEASURING WORTH (April 2010), www.measuringworth.com/uscompare/.

11. It is estimated that the Bureau provided between 15 and 20 million rations. A ration was defined as enough corn meal, flour, and sugar sufficient to feed a person for one week. William Troost, *The Freedmen's Bureau*, *EH.NET ENCYCLOPEDIA* (June 5, 2008), <http://eh.net/encyclopedia/article/troost.Freedmens.bureau>. The aid given to refugees is not to be minimized. Often, the federal government gave a majority of the rations to white refugees:

To prevent widespread starvation and destitution in Arkansas and Missouri, the Freedmen's Bureau issued some 1,705,055 rations to both blacks and whites from June 1865 to September 1866. In May 1865, prior to the Bureau's relief efforts in the Arkansas district, the Federal Government had issued 75,097 rations to refugees and 46,845 to destitute freedmen.

U.S. CONG. & NAT'L ARCHIVES & RECORDS ADMIN., *RECORDS OF THE FIELD OFFICES FOR THE STATE OF ARKANSAS, BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, 1865-1872*, at 2 (2002).

12. PEIRCE, *supra* note 5, at 87.

13. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-*

only be described as atrocious.¹⁴ Acknowledging that Freedmen lacked the financial resources to avail themselves of private health care, the Bureau set up medical dispensaries in the South to provide basic medical care and combat diseases from ravaging Freedmen communities.¹⁵ Additionally, Commissioner Howard insisted that local authorities and governments provide necessary medical care to the Freedmen and other citizens in need; including the insane, blind, deaf and dumb.¹⁶

The Bureau transported white refugees, displaced by the War, and the Freedmen, gathered in cities where the labor supply outweighed demand, to cities where labor was needed.¹⁷ This effort helped the Freedmen become self-supporting and reduced starvation and destitute living conditions. Transporting Freedmen to locations where the demand for labor was high provided lucrative opportunities for the employing landowners and decreased the demands on the Bureau for relief aid. However, Commissioner Howard expressed concern for the Freedmen's safety in relocating them to places where the Bureau's presence was insufficient or absent.¹⁸

The Bureau encouraged a free labor system for the Freedmen by establishing labor policy, disseminating form contracts, and providing a judicial forum for enforcement of the contracts.¹⁹ The policies specifically stated, "Negros must be free to choose their own employers and be paid for their labor."²⁰ Commissioner Howard reported, "'in a single state not less than fifty thousand, such (labor) contracts were drawn in duplicate and filed with the names of the parties.' The total for all the states must have reached several hundred

1877, at 151 (1988). Some accounts document as many as one million people who received medical aid. As a result, death rates were drastically reduced among the Freedmen. PEIRCE, *supra* note 5, at 93.

14. Troost, *supra* note 11.

15. *Id.* These diseases included smallpox, yellow fever, and cholera. FONER, *supra* note 13, at 151.

16. FONER, *supra* note 13, at 151.

17. PEIRCE, *supra* note 5, at 100.

18. Increased production of cotton and sugar in Texas created a high demand for labor to work the fields in the Southwest. WILLIAM S. McFEELY, *YANKEE STEPFATHER: GENERAL O.O. HOWARD AND THE FREEDMEN* 260 (1968).

19. PEIRCE, *supra* note 5, at 137-43; Darrell A. H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 *FORDHAM L. REV.* 999, 1026 (2008).

20. PEIRCE, *supra* note 5, at 137.

thousand.”²¹ Considering the circumstances, the Bureau was not perfect but achieved more than imaginable while acting as a vast department of labor.²²

B. Negro Education Under the Bureau

The Bureau made strides toward Negro education in spite of the initial absence of congressional appropriations.²³ Commissioner Howard recognized the importance of supporting and encouraging efforts of private charities to educate the Freedmen. In an annual report, Commissioner Howard indicated that the Bureau was able to give material aid to those engaged in educational work. The Commissioner emphasized to his assistants the importance of supporting and aiding organizations in their efforts to educate the Freedmen and observed that “education is absolutely essential to the freedmen to fit them for their new duties and responsibilities.”²⁴ Additionally, the Bureau transformed government buildings that were no longer needed for military purposes into school houses, provided transportation to teachers, and provided books and school furniture.²⁵

The Freedmen’s Bureau Act of 1866 gave the Bureau its final form and enlarged the Bureau’s educational powers.²⁶ Commissioner

21. *Id.* at 142.

22. *See* DuBois, *supra* note 10, at 87.

23. *See* CIMBALA, *supra* note 6, at 77-86.

24. PEIRCE, *supra* note 6, at 75; 39th Cong., 1st Sess. 761 n.47 (1866) (citing H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. 33 (1865)).

25. PEIRCE, *supra* note 5, at 75.

26. Civil Rights Act of 1866, ch. 31, 14 Stat. 27. After consulting at length with Commissioner Howard, Senator Lyman Trumbull, Republican from Illinois, introduced a new Freedmen’s Bureau Bill S.60 as a companion to the Civil Rights Act of 1866 that expanded operations of the Bureau. S.60, 39th Cong. (1866). Bill S.60 proposed to continue the operations of the Bureau until otherwise provided by law and to extend the Bureau’s jurisdiction to refugees and Freedmen in all parts of the United States. CONG. GLOBE, 39TH CONG., 1ST SESS. 209 (1866). Other particulars of the bill included setting up an extensive administrative apparatus, authorizing Congress to appropriate funds for the purchase of school buildings and empowering the President to reserve up to three million acres of good public land to be rented and ultimately sold to Freedmen and refugees in parcels not exceeding forty acres. *Id.* at 209-10. The bill also prohibited discrimination against Freedmen and refugees in the administration of criminal or civil law. *Id.* Opponents in the Senate and the House of Representatives voiced their objections to a bill that exclusively provided for Blacks and omitted whites from being allowed to receive assistance. The bill was “denounced as a piece of class legislation, unconstitutional, unnecessary, expensive, [and] fatal to republican government.” PEIRCE, *supra* note 6, at 61. Supporters of the bill emphasized the special

Howard gave several recommendations as to how the work of the Bureau should cease. First, when the Bureau is terminated, the work of Negro education should be continued. Second, the educational work and the funds should be transferred to the Department of Education, or another United States Agency with ample power to extend the school system. Third, that title to school buildings owned by the U.S. government be transferred to the learning institutions housed in those buildings.²⁷

From 1866 to 1870, the Bureau used additional congressional funding and resources from private charities to educate approximately 100,000 students each year.²⁸ In November 1867, General Howard stated that Bureau schools had reached “the remotest counties of each of the confederate states.”²⁹ According to W. E. B. Dubois, “The greatest success of the Bureau lay in the planting of the free school among Negroes, and the idea of free elementary education among all classes in the South.”³⁰ During the short life of the Bureau it

needs of Blacks pointing out that, “assistance to this disadvantaged minority would be in the best interest of the country as whole.” Schnapper, *supra* note 4, at 767. The bill passed both the House of Representatives and the Senate. President Johnson vetoed the Bill and voiced his objections. He questioned the necessity of the bill and the wisdom of creating a permanent institution. He preferred that the states be left to address the problems that might exist. Schnapper, *supra* note 4, at 769. H.R. Bill 613 was introduced in the House of Representatives by the House Committee on Freedmen. H.R. 613, 39th Cong. (1866). This bill was limited in scope and lacked objectionable provisions of Bill S.60 including the indefinite extension of the Bureau, increasing the size of the Bureau, and allocating land for the Freedmen. The Senate and House of Representatives were able to secure the necessary two-thirds votes to enact the legislation, despite a Presidential veto. H.R. Bill 613 was known as the Freedmen’s Bureau Act of 1866. CONG. GLOBE, 39TH CONG., 1ST SESS. 2743 (1866).

27. PEIRCE, *supra* note 5, at 69.

28. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 371 (2006).

29. PEIRCE, *supra* note 5, at 77-78. This includes Howard University, which is named after Commissioner Howard and was incorporated March 2, 1867. Howard, among other colleges and universities, still remains today and showcases efforts of the Bureau and other philanthropic organizations in educating the Freedmen. *Id.* at 78-79.

30. “The opposition to Negro education was bitter in the South, for the South believed an educated Negro to be a dangerous Negro.” DuBois, *supra* note 10. As a result of these bitter attitudes, some states made no effort to educate Freedmen, and provisions were inadequate for states where education efforts were made. PEIRCE, *supra* note 6, at 83. Other violent instances of educational oppression of the Freedmen included whites disturbing school sessions, harassing teachers and students, burning down schoolhouses, and chasing away Yankee teachers. CIMBALA, *supra* note 6, at 89.

established or supported 4,300 schools to educate Blacks.³¹

C. Other Bureau Efforts

The success of the Bureau was limited in many of its efforts that went beyond providing food, hospitals, education, and labor contracts. These limitations resulted from efforts of recalcitrant Southerners, the work of President Johnson, and limited training and expertise within the Bureau.

1. Land Ownership

The Bureau was least successful in increasing Negro land ownership. The initial Freedmen's Bureau Act authorized the Bureau to take control of abandoned or confiscated Confederate property and allot it to the refugees and Freedmen as homesteads.³² On July 18, 1865, Commissioner Howard issued his Circular No. 13, ordering the selection and setting apart of such confiscated and abandoned lands and property as may be deemed necessary for the immediate use of refugees and Freedmen.³³ However, a dissatisfied President Johnson ordered Howard to retract Circular No. 13. On September 12, 1865, Commissioner Howard issued Circular No. 15, per President Johnson, defining the actual meaning of "confiscated property as legally condemned property."³⁴ Property not identified as legally condemned was to be returned to its original owners whom President Johnson pardoned.³⁵ This clarification defeated the intention of the Act's land provision measure and radically changed the character of the Bureau.³⁶

31. JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM* 202, 308 (1947); W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 638, 648 (1998).

32. PEIRCE, *supra* note 5, at 129. Specifically the Act stated, "That the commissioner, under the direction of the President, shall have authority to set apart, for the use of loyal refugees and Freedmen, such tracts of land within the insurrectionary states as shall have been abandoned, or to which the United States shall have acquired title by confiscation or sale, or otherwise, and to every male citizen, whether refugee or Freedmen, as aforesaid, there shall be assigned not more than forty acres of such land." Freedmen's Bureau Act of 1865, ch. 90 § 4, 13 Stat. 507, 508.

33. CIMBALA, *supra* note 6, at 53.

34. *THE FREEDMEN'S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS* 33 (Paul A. Cimbala & Randall M. Miller eds., 1999).

35. *Id.* The Presidential pardons had a devastating effect on the Bureau's efforts to provide land to the Freedmen. Many Freedmen were evicted from lands they had occupied and improved. Troost, *supra* note 11.

36. The statute authorized the commissioner to set aside lands for lease to the

2. Legal Matters

Another important role of the Bureau was to provide legal protection for the Freedmen. These protections theoretically guaranteed Negroes equal rights and safety from white violence.³⁷ The South resisted the Bureau's efforts through affirmative state action and by failing to enforce seemingly applicable laws that would ensure fairness for the Freedmen. The widespread state adoption of laws targeted at controlling Freedmen and returning them to their former status, known as Black Codes, disrupted Bureau efforts.³⁸ These regulations were designed to replicate the oppressive social and economic systems of the plantation society.³⁹ Essentially, any distasteful or bold act of a Negro could be categorized as a misdemeanor or felony and carry fines which could lead to imprisonment if unpaid. States' inaction was just as harmful to the Freedmen. Many states were unwilling to enforce laws designed to protect Freedmen, whether those laws came from Congress or any other government entity.⁴⁰

Acknowledging the states' unwillingness to treat Freedmen fairly,

Freedmen at a term of three years with the option to purchase the land at anytime during the term or end of the lease. Freedmen's Bureau Act of 1865, ch. 90 § 4, 13 Stat. 504, 508.

37. DONALD G. NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868*, at ix (1979).

38. Black Codes thrived in the Southern states during Reconstruction exemplified efforts to retain control over the Freedmen in spite of emancipation rendering the movement from slave to freedman as nominal. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 199-201 (1988); WILLIAM COHEN, *NEGRO INVOLUNTARY SERVITUDE IN THE SOUTH, 1865-1940: A PRELIMINARY ANALYSIS*, in 4 *RACE, LAW AND AMERICAN HISTORY, 1700-1990*, at 13, 29 (Paul Finkelman ed., 1992). Du Bois, *supra* note 31 at 167. For a recounting of the black community's reactions. See Steven F. Miller et al., *Between Emancipation and Enfranchisement: Law and the Political Mobilization of Black Southerners During Presidential Reconstruction, 1865-1867*, 70 *CHI.-KENT L. REV.* 1059 (1995). Mississippi, South Carolina, Alabama, and Louisiana passed Black Codes in 1865. FONER, *supra* at 71-80. In early 1866, Florida, Virginia, Georgia, North Carolina, Texas, Tennessee, and Arkansas adopted similar Black Codes. *Id.* at 95-115.

39. Miller, *supra* note 19, at 1026. Most of the Black Code legislation was designed to keep Blacks and whites separate. These laws prohibited interracial marriages, ensured separate education and transportation of Blacks, and limited civil and legal rights of Blacks. Blacks were restricted from sitting on juries, providing testimony, and practicing law. FRANKLIN JOHNSON, *THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO 8-22* (1918).

40. See Miller, *supra* note 19, at 1026 ; JOHNSON, *supra* note 39, at 8-22.

the Bureau worked to protect and maintain the complete civil liberty of the Freedmen.⁴¹ The Bureau sought to protect Freedmen by exercising jurisdiction and adjudicating minor civil and criminal claims brought by and against the Freedmen. Commissioner Howard authorized his agents to, “handle cases involving freedpeople where ‘there [was] an interruption of civil law, or in which local courts, by reason of old codes, [violated] the freedom guaranteed by the proclamation of the President and laws of Congress’”⁴² Bureau agents handled cases in which testimony was denied to Freedmen in state courts by either adjudicating cases themselves, or by sending the cases to military tribunals or the United States Federal Courts.

The Bureau lacked an organized plan of judicial authority in its efforts to adjudicate claims of Freedmen. As a result, most Bureau adjudications lacked procedural sophistication.⁴³ The inability to acquire judges and magistrates to preside over these claims left the Bureau agents deciding the cases with their own notions of equity and justice. In most cases, the Bureau agents favored the Negro litigants, which led to injustice and Southern insult.⁴⁴ The Bureau began to withdraw from direct involvement in exercising judicial functions as states began to pass laws that appeared to give Freedmen equal access to the judicial system.⁴⁵ The assumption that Freedmen would receive fair treatment in state courts was inaccurate.

D. The Freedmen’s Bureau’s End

In March of 1867, Congress passed the Military Reconstruction Act (“Act”), which divided the rebel states into military districts.⁴⁶ This Act was the beginning of the end for the Freedmen’s Bureau. According to the Act, Congress would grant restoration as soon as a state’s convention drafted a constitution that enfranchised Negroes. A majority of registered voters ratified the new constitution, and the state ratified the Fourteenth Amendment.⁴⁷ The Bureau agents welcomed the

41. PEIRCE, *supra* note 5, at 143.

42. CIMBALA, *supra* note 6, at 94.

43. NIEMAN, *supra* note 37, at 9.

44. DuBois, *supra* note 10.

45. CIMBALA, *supra* note 6, at 94.

46. Tennessee was one of eleven Confederate states that was not divided since it had already ratified the Fourteenth Amendment. FONER, *supra* note 13, at 276.

47. NIEMAN, *supra* note 37, at 199; CARPENTER, *supra* note 9, at 139.

military presence because it helped put force behind their efforts to protect the Freedmen. While occupying the Southern states during the reconstruction efforts, military commanders intervened to secure and protect the rights of the Freedmen. This intervention included providing the Bureau with authority to seize property in contract disputes, secure the Freedmen's unpaid wages, and force civil authorities to expand the jury selection lists to include Freedmen.⁴⁸ However, the military presence in the South was temporary and these efforts had limited success.

Once the rebel states gained restoration, military authority in the South would cease and Negroes would have to protect themselves with the ballot.⁴⁹ With restoration of state governments and sovereignty in the South, the Bureau's role in offering Freedmen protection ended, although obstacles to equality, violence, and injustice continued.⁵⁰ The Freedmen's Bureau was officially abolished on June 30, 1872.⁵¹

The Freedmen used their talents and resources to engage in Southern political life, create communities, and begin their journey toward literacy and equality. The period of reconstruction was a dynamic period in United States history. The relationship between the federal government and states changed through constitutional amendments; and the relationship between the races also changed through new-found freedom and rights, including the right to vote. This period of progress ended almost as quickly as it had started.⁵²

48. CIMBALA, *supra* note 6, at 103.

49. NIEMAN, *supra* note 37, at 199.

50. CIMBALA & MILLER, *supra* note 34, at 23.

51. Congress abolished the Bureau by discontinuing funds. 17 Stat.366; Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 459 n.118 (1998). The military as a whole retreated from the South completely as a result of the Compromise of 1877. The South conceded the presidential election to Rutherford B. Hayes in exchange Hayes adopted a new "Southern Policy" effectively ending Congressional Reconstruction. FONER, *supra* note 13, at 581.

52. See Patrick Riddleberger, *The Radicals' Abandonment of the Negro During Reconstruction*, 45 J. NEGRO HIST. 88, 93 (1960); See also BOOKER T. WASHINGTON, *FREDERICK DOUGLASS* 230-232 (1907).

II. THE STATE OF BLACK AMERICA

A. General

*For this much all men know: despite compromise, war, and struggle, the Negro is not free. In the backwoods of the Gulf states, for miles and miles, he may not leave the plantation of his birth; in well-nigh the whole rural South the black farmers are peons, bound by law and custom to an economic slavery, from which the only escape is death or the penitentiary.*⁵³

An examination of African American progress—from slavery to the present—is not as would be expected given that 150 years has passed. Startling inequalities exist between Blacks and whites in numerous areas, including but not limited to, academic achievement, access to healthcare, health, educational attainment, wealth, and engagement with the legal system.

These inequalities compound over time and erode the fabric of the United States' society, making attainment of the American dream impossible for African Americans. The problems facing African Americans are overwhelming, and growing.

B. Education

1. History

The history of Black education in the United States has dubious roots. Educating slaves was illegal; blocking access to education was a key component in keeping Blacks in a state of oppression.⁵⁴ By 1865,

53. DuBois, *supra* note 10, at 354-365.

54. In one of his autobiographies, Frederick Douglass described the “philosophy of the slave system” regarding education of slaves through the words of his former master:

If [a slave] learns to read the Bible it will forever unfit him to be a slave. He should know nothing but the will of his master, and learn to obey it. As to himself, learning will do him no good, but a great deal of harm, making him disconsolate and unhappy.

FREDERICK DOUGLASS, *THE LIFE AND TIMES OF FREDERICK DOUGLASS* 97 (1882). DuBois echoed this philosophy: “The opposition to Negro education in the South was at first bitter, and showed itself in ashes, insult, and blood; for the South believed an educated Negro to be a dangerous Negro.” W.E.B. DUBOIS, *THE SOULS OF BLACK*

the United States' Negro population was in desperate need of education: 95% of Negroes were illiterate, and newly emancipated slaves had no communities, property, or capital.⁵⁵ Given this starting point, Negroes would logically need significantly more aid than whites to achieve equality through education. However, this aid was not forthcoming. After the Civil War, Black educational institutions were starkly unequal at best, and used as vehicles of oppression at worst.

Blacks have struggled to obtain higher education at American colleges and universities. A limited number of Blacks have been able to succeed at historically Black colleges like Fisk, Howard, and Wilberforce. However, since the Morrill Act of 1862,⁵⁶ higher education in the United States has been largely impacted by the rise of public, land-grant universities. The Morrill Acts, which granted federal land or funds to states to establish universities, created a vehicle through which generations of United States students have reached professional goals. The Morrill Act of 1890,⁵⁷ unlike its 1862 predecessor, granted funds to former confederate states, and prohibited racial discrimination in admissions to these land-grant universities unless the state chose to create a separate, equally funded school for Blacks.⁵⁸ Despite the condition of equal financing Black public universities were severely underfunded. Although Black schools were entitled to a proportion of the Morrill-Nelson funds, the majority of funding for land-grant institutions came from state appropriations.⁵⁹ However, state legislatures were unwilling adequately to fund Black institutions.⁶⁰ The anemic state funding for Black public institutions coupled with the short supply of Black professors ensured that the vast majority of Black graduates were not trained as professionals or academics, but as skilled laborers.

The separate and unequal theme that characterizes the history of Black public higher education also dominates the history of Black elementary and secondary education before 1954—the year the

FOLK: ESSAYS AND SKETCHES 32 (3rd ed. 1903).

55. ALLEN B. BALLARD, *THE EDUCATION OF BLACK FOLK: THE AFRO-AMERICAN STRUGGLE FOR KNOWLEDGE IN WHITE AMERICA* 9-10 (1973).

56. 7 U.S.C. § 307 (2006).

57. 7 U.S.C. § 321 (2006).

58. 7 U.S.C. § 323 (2006).

59. Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 47-48 (1987).

60. *Id.* at 48.

Supreme Court decided *Brown v. Board of Education*.⁶¹ Before *Brown*, states were free to segregate Blacks in “separate but equal” public facilities including schools.⁶² Although *Brown* is celebrated for its message of equality, the Supreme Court left implementation open.⁶³ In fact, very little changes in school integration followed in the decade after *Brown*.⁶⁴ State legislatures could still demarcate school districts, restrictive racial covenants on homes in all -white neighborhoods were still legal, and school officials still had discretion to expel students for minor infractions.

In 1976, the National Urban League decried the anti-busing⁶⁵ sentiment in the United States, the drop in appropriations to the Elementary and Secondary Education Act,⁶⁶ and the lack of Black professionals in the United States.⁶⁷ In 1983 and 1986, the National Urban League called for better schools that prepared Blacks for higher education, and ultimately, high-skilled careers.⁶⁸ The failure of the

61. 347 U.S. 483 (1954).

62. See *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483.

63. The Court allowed district courts to adjudicate disputes over *Brown*'s implementation; the standard was that school districts had to integrate schools with “all deliberate speed.” *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

64. See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10 (1994). For instance, less than 2% of Black schoolchildren in Virginia and North Carolina attended integrated schools before the Civil Rights Act of 1964 reinforced the *Brown* decision. *Id.*

65. In an effort to counter *de facto* segregation after *Brown*, plaintiffs argued for busing programs that transported Black students from urban neighborhoods to predominately white schools; the Court initially approved these programs. See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 29-30 (1971) (unanimous decision) (opinion of the Court by Burger, C.J.). However, the Court limited *Swann* by not allowing busing across district lines unless actual evidence shows that multiple districts had engaged in segregation. *Milliken v. Bradley*, 418 U.S. 717 (1974) (5-4 decision) (opinion of the Court by Burger, C.J.).

66. 20 U.S.C. §§ 6301-6514 (2006).

67. See NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA* 11-12 (1976).

68. In 1983, the National Urban League noted that the unemployment rate hovers around 20% and the “want ads are full of jobs for machine installers and repairmen, computer programmers and engineers.” James D. McGhee, *The Changing Demographics in Black America*, in NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA* 15 (1983). In 1986, the National Urban League concluded that Blacks needed to demand schools that offered several new programs including: advanced curricula like computer literacy; internships, apprenticeships, and networking opportunities; and availability of entrepreneurship opportunities. See Charles D. Moody Sr., *Equity and*

United States' public school system to respond to this problem continues to impede the ability of Blacks to achieve their goals through quality education.

2. Current State

Individual educational attainment is the best indicator of future employment.⁶⁹ Urban schools are notoriously overcrowded, underfunded, and violent. A study of graduation rates in 2002 and 2003 found that 14 urban school districts had timely graduation rates of less than 50%, compared to 70% nationally.⁷⁰ In general, urban schools have less experienced teachers and underprepared students.⁷¹ This results in lower college enrollment for African Americans who recently graduated from high school.⁷² Additionally, African Americans enrolled as freshmen in NCAA Division I schools are 20% less likely than whites to graduate within six years.⁷³

A rising high school drop-out rate followed by a larger unemployment rate will only deepen the problems in the urban areas. Furthermore, lower numbers of African Americans with college

Excellence: An Educational Imperative, in NAT'L URBAN LEAGUE, THE STATE OF BLACK AMERICA 36-37 (1986). The fact that these recommendations went unrealized is evinced by subsequent reports of the National Urban League. See John M. Jeffries & Richard L. Schaffer, *Changes in the Economy and Labor Market Status of Black Americans*, in NATIONAL URBAN LEAGUE, THE STATE OF BLACK AMERICA 13 (1996) ("The restructuring of the American Economy from goods to services continues to have a significant impact on economic opportunity and labor market outcomes for Black Americans."); Bernard E. Anderson, *Lessons Learned from the Economic Crisis: Job Creation and Economic Recovery*, in NAT'L URBAN LEAGUE, STATE OF BLACK AMERICA 2010 JOBS: RESPONDING TO THE CRISIS 65 (2010) (industries like healthcare, telecommunications, financial services, education, biotechnology, and energy will emerge as growing sectors of the economy after the recession of 2007).

69. Norman A. Newberg, *Where Inner-City Students Live Versus How They Learn*, 143 U. PA. L. REV. 1415, 1421 (1995).

70. Greg Toppo, *Big-City Schools Struggle with Graduation Rates*, USA TODAY (June 6, 2006), http://www.usatoday.com/news/education/2006-06-20-dropout-rates_x.htm.

71. Significantly lower percentages of Black students compared with white students take courses in physics, calculus, and English honors. NAT'L URBAN LEAGUE, STATE OF BLACK AMERICA 2010: JOBS: RESPONDING TO THE CRISIS 23 (2010) [hereinafter NAT'L URBAN LEAGUE, 2010].

72. In 2008, only 35.9% of Blacks were enrolled in college, as opposed to 55% of whites. *Id.* at 25.

73. *Id.* at 23.

degrees exacerbates the unemployment problem.

C. Healthcare

1. History

The history of Black health in the United States shows a clear disparity that has, at times, been endorsed by the government. Before emancipation, slave owners provided healthcare to slaves as an economic investment.⁷⁴ Although some slaves received treatment from physicians and some even had retirement benefits, the system was in place to serve the interests of the master.⁷⁵ Free Negroes were in a worse position because they were stranded in the marketplace to provide for their own healthcare—suffering a mortality rate that almost doubled that of Whites.⁷⁶ When slavery ended so did the healthcare benefits, and newly freed Negroes received whatever healthcare they could afford. By 1900, the average life expectancy at birth of Negroes was 30 to 35 years.⁷⁷ Even when Negroes could afford treatment, they encountered racism in hospitals. A survey conducted in 1956 found that only 5.8% of hospitals in the South were integrated.⁷⁸ When Blacks were admitted to hospitals, they were often used as training aides for interns and residents.⁷⁹ Government programs like Social Security, Medicare, and Medicaid offered modest victories for equality in healthcare, but unequal treatment persisted.

2. Current State

Today, African Americans still suffer disproportionately from poorer health and earlier death than whites. African American mortality rates are significantly higher in seven of the ten leading causes of death.⁸⁰ African Americans also suffer disproportionately from heart disease, stroke, cancer, and diabetes.⁸¹ A partial explanation

74. Kevin Outterson, *Tragedy and Remedy: Reparations for Disparities in Black Health*, 9 DEPAUL J. HEALTH CARE L. 735, 751 (2005).

75. *Id.*

76. *Id.*

77. *Id.* at 752.

78. *Id.* at 757-58.

79. *Id.* at 758.

80. *Id.* at 741.

81. NAT'L URBAN LEAGUE, 2010, *supra* note 71, at 20-21.

for the dismal state of African American health is the lack of quality healthcare received by Blacks. African Americans are almost twice as likely as whites to be without health insurance.⁸² A smaller percentage of the African American population is covered by private insurance as compared to with the white population, and 27.3% of African Americans under the age of 65 are covered by Medicaid, compared to only 8.5% of whites.⁸³ African Americans also have less access to primary care physicians.⁸⁴ Doctors and medical students eschew practicing in poverty-stricken areas because of the lack of disposable income and the prevalence of Medicare, which yields lower payments and requires high administrative costs.⁸⁵ As a result, African Americans receive less preventative care and counseling and fewer early diagnoses.

Several studies demonstrate doctor bias: doctors are more likely to refer whites for cardiac catheterization, African Americans also receive less surgery during early stages of lung cancer, and African American women are less likely to undergo genetic testing for increased risk of breast and ovarian cancer.⁸⁶ Socio-economic factors and genetic differences also contribute to the disparity, but studies show that these factors fail to fully quantify the problem.⁸⁷ The natural conclusion is that African Americans do not receive the same healthcare treatment as whites.⁸⁸

82. *Id.* at 22.

83. *Id.*

84. See Karen Pallarito, *Health Care Reform: Is There a Doctor in the House?*, BLOOMBERG BUSINESSWEEK (Sep. 8, 2010), available at <http://www.businessweek.com/lifestyle/content/healthday/642163.html>. Primary care physicians, or doctors who practice “family medicine,” provide general and preventative health care to patients. The United States is experiencing a shortage in this area of medicine: PCPs only make up 35% of the total physician workforce and less than 20% of medical students are choosing to practice family medicine. *Id.*

85. Robyn Whipple Diaz, *Unequal Access: The Crisis of Health Care Inequality for Low-Income African-American Residents of the District of Columbia*, 7 J. HEALTH CARE L. & POL’Y 120, 126 (2004); Marsha Lillie-Blanton et al., *Site of Medical Care: Do Racial and Ethnic Differences Persist?*, 1 YALE J. HEALTH POL’Y L. & ETHICS 15, 18 (2001) (physicians cite low payment rates and “bureaucratic hassles” as reasons for not accepting Medicare patients).

86. Barbara A. Noah, *A Prescription for Racial Equality in Medicine*, 40 CONN. L. REV. 675, 685-88 (2008) (discussing the racial disparities evidenced by various medical studies).

87. *Id.* at 685.

88. *Id.*

D. Wealth

1. History

The struggle of Blacks obtaining wealth⁸⁹ in the United States begins in the days of slavery, when the vast majority of Blacks were forbidden to own property. The family home has been one of the most effective tools in keeping Blacks in a state of poverty and segregated from society by restricting access to select neighborhoods through zoning, racially restrictive covenants and other forms of discrimination.⁹⁰ Since World War II, Black homeownership has hovered around the 43% mark, while white homeownership is usually over 20% higher.⁹¹ In 1976, the National Urban League stated that the recession of 1975 virtually wiped out gains in Black homeownership in the 1960s.⁹² The report also cites a 1975 report by the U.S. Commission on Civil Rights, which criticizes the federal government's abandonment of housing programs and characterizes racial discrimination in the housing market as a "fundamental operating principle."⁹³

2. Current State

In 2002, the median net worth of African Americans was more than \$80,000 less than that of whites.⁹⁴ Taking away top income

89. For purposes of this section, wealth is defined as an individual's income, net worth, savings, and status as a homeowner.

90. See John O. Calmore, *National Housing Policies and Black America: Trends, Issues, and Implications*, in NAT'L URBAN LEAGUE, THE STATE OF BLACK AMERICA 115 (1986) ("The disadvantageous distinction of being [B]lack in America probably presents its most diverse, complex, and intractable problems in our attempts to secure viable property rights and housing opportunities") (internal quotation omitted).

91. See Lance Freeman, *Black Homeownership: A Dream No Longer Deferred?*, NAT'L URBAN LEAGUE, THE STATE OF BLACK AMERICA 63-64 (2006); NAT'L URBAN LEAGUE, THE STATE OF BLACK AMERICA 7-8 (1976) (Black homeownership rose during the '60s from 38% to 42%); NAT'L URBAN LEAGUE, 2010, *supra* note 69, at 19 (In 2008, the Black homeownership rate was 47% and the white homeownership rate was 75%).

92. The homeownership rate peaked at 42% in the 1960's. NAT'L URBAN LEAGUE, THE STATE OF BLACK AMERICA 7-8 (1976).

93. U.S. COMMISSION ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 2 (1975); NAT'L URBAN LEAGUE, THE STATE OF BLACK AMERICA 8-9 (1976).

94. ALFRED O. GOTTSCHALCK, U.S. CENSUS BUREAU, NET WORTH AND ASSET

earners, the gap in net worth between middle class African Americans and whites is still stark. African American households in the second and third quintiles⁹⁵ of monthly income have a median net worth of \$4,348 and \$13,026 respectively.⁹⁶ White households in the same quintiles have a median net worth of \$55,892 and \$67,392.⁹⁷ In 2008, less than half of African Americans were homeowners, compared to a 75% homeownership rate for whites.⁹⁸ When African Americans do own homes, the average equity in those homes is half of the white average.⁹⁹

Discrimination in the housing market persists. A report by the NAACP indicated that mortgage lenders discriminate against African American applicants who have income and credit risk equal to that of white applicants.¹⁰⁰ African Americans are more likely than whites to receive higher interest rates and prepayment penalties on their mortgages.¹⁰¹ The report also alleges that mortgage companies regularly gave Blacks subprime mortgages even though they qualified for lower-cost prime loans.¹⁰²

OWNERSHIP OF HOUSEHOLDS: 2002, at 14 (2008),
<http://www.census.gov/prod/2008pubs/p70-115.pdf>.

95. A quintile represents 20% of all households; The U.S. Census Bureau tiers households by monthly incomes in 5 quintiles. The upper-limits of the second quintile monthly income is \$2,555, and the third quintile is \$4,040. GOTTSCHALCK, *supra* note 92, at 14.

96. *Id.*

97. *Id.*

98. NAT'L URBAN LEAGUE 2010, *supra* note 69, at 19.

99. *Id.* at 20.

100. Monique W. Morris, NAACP, *A Summary of the Disparate Impact of Subprime Mortgage Lending on African Americans* 2-3 (2009),
http://naacp.3cdn.net/4ca760b774f81317c4_klm6i6yxg.pdf.

101. *Id.*

102. *Id.* at 2.

E. Incarceration

1. History

The United States has distinguished itself from all other nations as the leading incarcerator of its population.¹⁰³ The harsh consequences of this trend of mass imprisonment disproportionately impacts Black communities. A 1997 report by the U.S. Department of Justice states that 28.5% of Black males will go to prison at some point in their lives, as compared to 4.4% of white males and 5.1% of the total population.¹⁰⁴ This is mainly attributable to the War on Drugs campaign, which championed aggressive enforcement of drug laws and longer mandatory sentences. The effects of these sentences continue to disproportionately impact Blacks today even though a majority of drug users are white.¹⁰⁵

2. Current State

California passed a \$7.4 billion spending bill in 2007, which created 53,000 new beds in the state correctional system.¹⁰⁶ In 2008, the African American male incarceration rate (prisoners per 100,000 people) was 3,161,¹⁰⁷ while the white male incarceration rate was 487.¹⁰⁸ Statistics regarding the United States death row population and execution are troubling as they reflect a disproportionate impact on African Americans who are only 12% of the population. As of January 1, 2009, there were a total of 3,297 death row inmates in United States prisons—42% of these inmates were African American, 41% were white, and 11% were Latino.¹⁰⁹ Since reinstatement of the death

103. The U.S. prison rate has increased five-fold since 1972, a growth that has “no parallel in western societies.” Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004).

104. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 1 (1997), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/Llgsfp.pdf>.

105. Roberts, *supra* note 103, at 1275.

106. Jennifer Warren, *Prison Plan Ignores Major Issues*, L.A. TIMES (Apr. 27, 2007), <http://articles.latimes.com/2007/apr/27/local/me-prisons27>.

107. NAT’L URBAN LEAGUE 2010, *supra* note 71, at 27.

108. The African American female incarceration rate was three times higher than the white female incarceration rate. *Id.*

109. NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW U.S.A.: WINTER 2009, at 1 (2009).

penalty in 1976, state and federal governments have executed 1,136 inmates; 35% of which were African American, 48% were white, and 7% were Latino.¹¹⁰ Defendant-victim racial combinations further illuminate racial disparities in the system. Since 1976, 236 executions involved an African American defendant and a white victim, while 15 involved a white defendant and an African American victim.¹¹¹

As state legislatures allocate billions to build new prisons, the causes of high African American male imprisonment and the struggle of the parolee are largely ignored. African American children become more likely to grow up without a second parent in the home, which may leave them unsupervised or misguided. Furthermore, African American parolees are less likely to obtain gainful employment, and are forced into idleness or crime to support their families.

W.E.B. DuBois' description of the status and the future of the Negro is as true today as it was when originally penned in 1901. Perhaps if writing in 2011, DuBois would have said: All men know despite civil rights, patriotism, and hard work, African Americans are not equal in society. All men can observe that African Americans are concentrated in ghettos and the urban centers. Nationwide African Americans are peons—bound by the law and custom of Blacks and Whites—to an educational, economic, and mental slavery, from which the most prevalent escape is premature death or incarceration.

III. MAKING THE NEGRO PROBLEM MATTER

While statistics about racial inequality in the United States and around the world can be assembled and discussed, these figures do not amount to a call to action. Assuming the statistical data accurately

110. As of Jan. 1, 2009. *Id.* at 9.

111. *Id.* In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court addressed a constitutional attack on racial disparities in capital sentencing. The principle evidence was a study by Professor David Baldus (the Baldus study) that examined 2,000 murder cases in Georgia during the 1970's. *Id.* at 286. The study found that defendants charged with killing a white victim received the death sentence in 11% of cases, while defendants charged with killing a Black victim received the death sentence in 1% of cases. *Id.* Further, Georgia imposed the death sentence in 22% of cases involving a Black defendant and white victim, while only 3% of cases involving white defendants and Black victims had capital sentences. *Id.* Homicide statistics during the period of the Baldus study show that only 9.2% of homicides involved Black defendants and white victims, and 60.7% of all homicides had Black victims. *Id.* at 327 (Brennan, J., dissenting).

reflects a pervasive and negative racial inequality gap, a compelling case for the eradication of this gap must be made to convince scholars and policy makers to take action. These actors must be given the answer to the rather simple question: Why should we care about racial inequality?

The discussion about racial inequality is not to be conceptualized in terms of group equality.¹¹² The goal is not to make the groups equal, rather the goal is to eradicate obstacles in terms of race, which prevent group members from expressing their desires, working to their full potential, and being presented with opportunities as they experience life. There are moral, ethical, social justice, economic, and historical arguments favoring the eradication of racial inequality.

A. Race is a Legitimate Factor in Considering Social Justice and Fairness

Racial inequality is a “problem because of the hurt, pain, anger, and suffering it causes to individual human beings.”¹¹³ The United States is known for its abundance of economic opportunity, but achieving success is not easy. To be a motivated, successful individual requires a sense of self-respect. If a person—especially of low economic status—has self-respect, then she has the belief that she can achieve a higher status, and that she deserves a higher status. The social science is well-settled that institutions such as segregation create internal conflicts for Black people that harm their ability to achieve equal status.¹¹⁴ Although segregation is no longer sanctioned by law, inequality and discrimination persist today.¹¹⁵ Social justice and notions of fairness should compel action to erase these racial inequalities.

In concluding that segregation was harmful to Blacks in *Brown*,

112. Arguments for group equality fail to credit individual choice models, beliefs, values, and interests. These same discussions might over-weight oppression as an explanation of choice. These discussions also fail to explore the existence of factors as an explanation of in group inequalities such as class.

113. Carmen Van Kerckhove, *What Is the Human Cost of Racism?*, TPM (April 3, 2008, 1:37PM), http://tpmcafe.talkingpointsmemo.com/2008/04/03/what_is_the_human_cost_of_raci/.

114. *See Brown*, 347 U.S. at 494 (the principle that segregation handicaps the educational and mental development of African Americans is “amply supported by modern authority”).

115. *See* discussion *supra* Part II.

the Supreme Court cited the work of Dr. Kenneth Clark.¹¹⁶ Dr. Clark studied the effects of discrimination on the self-image and development of children.¹¹⁷ The studies gauged the children's concept of race by having them choose dolls of different races or by having them color a picture with a crayon of their preference.¹¹⁸ The studies concluded that Black children, by the age of five, were aware that dark skin color is a mark of inferior status in American society.¹¹⁹ As a result, Black children develop feelings of self-hatred, confusion about self-worth, and a general sense of inferiority.¹²⁰ Although *Brown* concluded that segregation was unconstitutional, its implementation was slow¹²¹ and *de facto* segregation continued through other means.¹²² The legacy of slavery and segregation continues to stigmatize Blacks, and that stigma is a factor in the present inequality of Blacks and whites.¹²³

The anxiety and self-conflict created by a societal mark of inferiority is supported by studies on the caste system in India. The caste system is a historical practice that places individuals in a permanent social status.¹²⁴ The caste system is similar to segregation and slavery because both involve stark historical deprivation and current discrimination.¹²⁵ Also, although both systems are illegal, they continue to stigmatize new generations. A study on the caste system revealed that members of a lower caste performed equally with

116. *Brown*, 347 U.S. at 494 (citing K.B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (1950)).

117. See generally Kenneth B. Clark & Mamie P. Clark, *Emotional Factors in Racial Identification and Preference in Negro Children*, 19 J. NEGRO EDUC. 341 (1950).

118. *Id.*

119. *Id.* at 350.

120. Appendix to Appellant's Briefs at 4, *Brown*, 347 U.S. 483 (No. 1).

121. See *supra* text accompanying note 64.

122. See discussion *supra* Part II.

123. See generally GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (Harvard U. Press 2002).

124. The caste system is only followed in rural India (about 27% of the population), and the Indian Constitution outlaws discrimination based on an individual's caste.

125. ASHWINI DESHPANDE, *Affirmative Action in India and the United States* 5 (World Bank 2005),

http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Affirmative_Action_India_Ashwini.pdf (comparing racism in the United States and the Indian caste system and arguing for affirmative action programs in both countries).

members of a higher caste on a series of puzzles.¹²⁶ However, when the caste affiliations of the group members were announced prior to the puzzle exercise, members of the lower caste underperformed by 23%.¹²⁷ The study hypothesizes that the drop in performance could be attributed to expectations of discrimination.¹²⁸ A society with pervasive unequal treatment primes its lower members to have little or no expectation to be rewarded for hard work. Therefore, discrimination hampers motivation to employ the diligence and dedication needed for success.

Another explanation for underperformance of a stigmatized group is the effect of stereotyping. Studies show that members of a stigmatized group experience great anxiety when they are at risk of being judged or stereotyped in accordance with that group.¹²⁹ A study of Black Stanford University students revealed lower test scores when told that they were being tested on their personal ability.¹³⁰ Accordingly, the scores were higher when their own abilities were not being evaluated.¹³¹ The study showed no similar disparity in white students' test scores.¹³² This shows that historical prejudices have negative effects on performance, and even those who have achieved success are not immune. The anxiety felt by Blacks of being judged harshly for a slight misstep could be applicable to the workplace or public arena.

126. KARLA HOFF & PRIYANKA PANDEY, *Belief Systems and Durable Inequalities: An Experimental Investigation of Indian Caste 1-3* (World Bank 2004), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/07/22/000112742_20040722150100/Rendered/PDF/wps3351.pdf.

127. *Id.* at 3.

128. *Id.* at 17.

129. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in *THE BLACK-WHITE TEST SCORE GAP 403* (Christopher Jencks & Meredith Phillips eds., 1998).

130. *Id.* at 407.

131. *Id.* at 403.

132. *Id.*

B. Society Benefits from Diversity in Terms of Education and Economics

The utility of diversity in the classroom and in business settings has been publically debated and, to a large extent, accepted. Justice Sandra Day O'Connor aptly stated that “the greatest possible variety of backgrounds” leads to “livelier, more spirited, and simply more enlightening and interesting” discussions.¹³³ Inclusion of diverse peoples into society can begin to breakdown racial stereotypes and promote understanding among and between peoples.¹³⁴

Leaders in both the private and public workforce have expressed the need for greater diversity within the business communities.¹³⁵ Sixty-five leading United States businesses highlighted this point in their *amicus curiae* brief to the Supreme Court in *Grutter v. Bollinger*.¹³⁶ Among other things, the businesses stated that diversity was “essential” for competing in today’s global marketplace and in an increasingly diverse nation.¹³⁷ Specifically, the economy benefits from diversity because employees at every level must have the ability and the understanding to work effectively with all peoples, including those who are different from themselves.¹³⁸

Diversity also results in greater creativity, which often presents more unique and effective solutions to the new problems that arise in a quickly growing marketplace.¹³⁹ People who have different life experiences often have different approaches, perspectives, and insights which, if used in collaborative environments, could be valuable. Diverse individuals are better able to work with business partners, employees, and clientele of diverse backgrounds.¹⁴⁰ Erasing racial inequality would allow the United States to utilize all of its human capital in the marketplace in lieu of importing trained and trainable

133. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (quoting App. to Pet. for Cert. at 246a, 244a).

134. *Id.*

135. *See Id.* at 334 (upholding the University of Michigan Law School’s affirmative action program, which included diversity as one of many factors in admission; the Court found that diversity was a valuable asset to both law schools and employers).

136. *See* Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241).

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.*

workers from abroad.

C. Greater Equality Can Enhance National Well Being

Racial inequality is viewed by some as an affliction which impacts the well-being of all citizens, not just African Americans or other minorities.¹⁴¹ Inequality has been tied to decreased life expectancy and health, and increased pathological and social problems across the population.¹⁴² More equality makes happier and healthier people, irrespective of economic class.¹⁴³ Income inequalities are associated with poor health for all members of a society, not just the poor or minorities, being used as a proxy for poor people. Social scientists and medical researchers studying the health of populations report that it is not the richest countries which have the best health, but those with the smallest inequalities between the rich and the poor.¹⁴⁴ Even within a country, such as the United States, people living in states with lower levels of income inequality are healthier than those in states with higher levels of income inequality.¹⁴⁵ And it is not simply the poor who have poorer health when income disparities are pronounced. In less equal societies the middle class is less healthy than the middle class in more equal societies.¹⁴⁶ In a society with high levels of

141. *See generally* RICHARD WILKINSON, UNHEALTHY SOCIETIES: THE AFFLICTIONS OF INEQUALITY (2001) (connecting health inequalities with social and economic inequalities) [hereinafter WILKINSON, UNHEALTHY SOCIETIES].

142. *See generally* RICHARD WILKINSON, MIND THE GAP: HIERARCHIES, HEALTH AND HUMAN EVOLUTION 11 (2001) (arguing that greater equality in society is positively correlated with longer life expectancy rates and overall better health); RICHARD WILKINSON & KATE PICKET, THE SPIRIT LEVEL: WHY MORE EQUAL SOCIETIES ALMOST ALWAYS DO BETTER 181, 213 (2009) (noting that greater inequality in a society increases the prevalence of mental illness, death rates, discrimination, and other harmful effects, not just within disadvantaged groups, but across the population).

143. *See* Steve Bachmann, *Lawyers, Law, and Social Change—Update Year 2010*, 34 N.Y.U. REV. L. & SOC. CHANGE 499 (2010); *see also* TONY JUDT, ILL FARES THE LAND 5 (2010) (“Inequality, then, is not just unattractive in itself; it clearly corresponds to pathological social problems that we cannot hope to address unless we attend to their underlying cause.”).

144. *See* WILKINSON, UNHEALTHY SOCIETIES, *supra* note 141, at 78-79; RICHARD G. WILKINSON, PUTTING THE PICTURE TOGETHER: PROSPERITY, REDISTRIBUTION, HEALTH, AND WELFARE, IN SOCIAL DETERMINANTS OF HEALTH 256, 258-59 (Michael Marmot & Richard G. Wilkinson eds., 1999) [hereinafter WILKINSON, SOCIAL DETERMINANTS].

145. *See generally* WILKINSON, UNHEALTHY SOCIETIES, *supra* note 141, at 78-79; WILKINSON, SOCIAL DETERMINANTS, *supra* note 144, at 256, 258-59.

146. *See* NORMAN DANIELS ET AL., JUSTICE IS GOOD FOR OUR HEALTH, IN IS

disparities, all members experience social, psychological, and economic stress.

Once scholars and policy makers accept that racial inequality matters because of the harm to African Americans, the economy, and general society, the next step is to agree on a way to eradicate the racial inequality gap. This is the harder question, where many voices are silenced and thinkers leave the room. Caring about racial inequality requires the work necessary to eradicate it even if such eradication has a negative impact on others.

IV. REFORMING THE BUREAU AND MAKING IT WORK

Closing the racial inequality gap will require a departure from a free market system of society where members are told to work hard and they will reap the reward. This societal *laissez-faire* attitude has not worked.¹⁴⁷ Without intervention, race-based discrimination will likely continue unabated. As with all systems, the present is inextricably linked to the past. The moral imperative should be to decouple slave ancestry and oppression in the form of resources, opportunity, and freedom. A new Freedmen's Bureau can accomplish this goal.

This new agency would be organized as a commission with a term of 80 years and funding in the amount of \$2.188 trillion excluding administration costs for staff, office space, and supplies.¹⁴⁸ The New

INEQUALITY BAD FOR OUR HEALTH 3, 9-11 (Norman Daniels et al. eds., 2000) (once per capita gross domestic product reaches a minimum level of \$8,000 to \$10,000).

147. Prior attempts to close the racial inequality gap have been unsuccessful. Over the years the United States has had the civil right movements, integration, busing, minority set-asides, head start programs, model communities, mixed income housing developments, charter schools, and affirmative action plans. A government agency committed to erasing the racial inequality gap is an imperative.

148. This number can be debated and refined. This figure is the number of Freedmen and slaves at the time of the emancipation, 4.8 million, multiplied by \$378 the average annual wage for unskilled labor according to the 1870 census on manufacturing, equals \$18.144 billion and then the figure is converted to 2009 dollars, resulting in a total of \$2.188 trillion. The principal of the Commission can be funded by \$313 billion for seven years and would be regarded on the President's budget submission as a mandatory spending item as would the administrative costs of the Commission itself. Reductions in 2009 Department of Defense funding on excesses can be directed to this line item. This amount is less than half of the line budget item for defense for 2009. See Gerald K. Moore, *The 1860 Census of Manufacturing*, U.S. GENEALOGY NETWORK, INC. (2002), <http://www.tngenweb.org/wayne/1860mfgcensus.htm> <http://www.nber.org/books/long60-1>; Williamson, *supra* note 10. This is distinct from

Century Freedmen's Commission ("NCFC") would be led by nine Presidentially appointed Commissioners from varying political parties. The NCFC would be organized into 13 geographic regions similar to the Federal Court system.¹⁴⁹

The mission of the NCFC would be to eradicate the racial inequality gaps that persist for American descendants of United States slaves, American descendants of slaves from U.S. held territories or protectorates, and other Blacks who claim citizenship through their parents who are United States citizens by birth.¹⁵⁰

The NCFC must be tasked with serving the target population as it finds it. In some instances this would mean conducting trainings in prisons, at churches, or at community centers. The NCFC will be divided into the following six divisions: the Division of Education; the Division of Health and Wellness; the Division of Labor and Job Readiness; the Division of the General Counsel and Legal Aid; the Division of Community Unification, Building, and Reclamation; and the Division of Policy, Research, and Development. Each division would handle a different programmatic thrust and each led by experts in the field.

During the first year the NCFC would hire staff and supervisors, conduct trainings, and design and provide a needs assessment of the target population. The assessment panel will be staffed with leading experts from appropriate fields chosen by the commissioners. All panels and committees of the NCFC should seek to have broad and diverse participation from scholars, as well as practitioners, such as

a reparations argument as compensation for past labor, pain, suffering and bondage. The argument is more closely tied to inequality gap not essential to a reparation argument.

149. These are 13 judicial districts. Eleven of the judicial districts are arranged based on geographical location established by the Judiciary Act of 1802. The remaining two judicial districts included the Court of Appeals for the District of Columbia, established in 1893, and U.S. Court of Appeals for the Federal Circuit, established in 1982, which combines the jurisdictions of the U.S. Court of Customs and Patent Appeals and the U.S. Court of Claims. Bruce A. Ragsdale, *History of the Federal Judiciary*. <http://www.fjc.gov>.

150. This mission omits other minorities, including Caribbean and African peoples, who also suffer racism. This mission attempts to eradicate racial inequality gaps which might exist as a result or as a part of a continuum of historical oppression and slavery. The mission acknowledges that the history and present condition of Blacks in America are unique. No other racial or ethnic group has suffered chattel slavery, bondage, and Jim Crow.

community leaders and thinkers.¹⁵¹

The NCFD Divisions would operate through regional offices, and would eradicate the racial inequality gap by using methodologies and delivery mechanisms that are to be developed.

CONCLUSION

For too long African Americans have been told to compete in a race while being weighed down by slavery, oppression, poverty, Black Codes, and Jim Crow laws. The U.S. has allowed these disadvantages to persist since emancipation, and has failed to take steps to “level” the playing field. The establishment and funding of a commission to eradicate the racial inequality gap is an institution that is long overdue. The health and economy of the nation lie in the balance.

151. A sample of candidates include: Vice Admiral Regina Benjamin (current Surgeon General of the United States), Carol Moseley Braun (former United States Senator from Illinois), Geoffery Canada (President and CEO of the Harlem Children’s Zone), U.S. Representative André D. Carson (of Indiana), Mos Def (rapper and actor), Dr. Michael Eric Dyson (Professor of Sociology at Georgetown University), Dr. Joycelyn Elders (15th Surgeon General of the United States), U.S. Representative Marcia Fudge (of Ohio), Professor Lani Guinier (first African-American woman tenured professor at Harvard Law School), John H. Jackson (Schott Foundation for Public Education President and CEO), U.S. Representative John R. Lewis (of Georgia), Kweisi Mfume (former congressman from Maryland and former President and CEO of the NAACP), Dr. Alvin Poussaint (Professor of Psychiatry at Harvard Medical School), Dr. David Satcher (16th Surgeon General of the United States), Tavis Smiley (television host, advocate and philanthropist), Dr. Cornel West (Princeton professor, author and civil rights activist), and U.S. Representative Frederica Wilson (of Florida).