PHILOSOPHICAL ANTHROPOLOGY, RACE, AND THE POLITICAL ECONOMY OF DISENFRANCHISEMENT

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INTRODUCTION

It has been the practice in recent, mainstream American political theory to appeal to notions of facts from which to draw on the values of American society and to formulate, from such facts, Americans' unique notions of justice and freedom. This approach rests upon an obvious suspension of notions of value that transcend sociological and psychological factors, the culmination of which is the almost slogan-like formulation by its most eminent proponent, John Rawls, of his theory of justice being "political, not metaphysical."

Yet such theorists are neither anthropologists nor sociologists, nor for that matter, are they critical theorists, so the assessments they make of "our values" are ultimately either pseudo-social scientific or ultimately a priori notions of what, given our considered judgments, we may believe in spite of facts. G.A. Cohen has offered such a challenge when he argues that it is not ultimately "facts" to which Rawls and his followers appeal but other principles that support the interpretation of such facts. Such principles include, I would add,
disciplinary etiquette, wherein certain subjects that may influence the reading of such facts are barred from discussion at the outset.

John Rawls, for instance, has written much on American society, without at all dealing with its actual history and most pressing topics; his classic, *A Theory of Justice*, is silent with respect to topics such as racialized slavery and racial violence. Slavery in antiquity, particularly Athens, seems to be more valuable for consideration by Rawls (and many other liberal political theorists) than is its modern American incarnation, though he claims to be building from the American experience. Worse than the meager treatment of American slavery in Rawls' work is the absence of a topic—race—whose impact on the nation has been so divisive that it took nearly 100 years to bring opposing groups in the Civil War to the table to create, at the very least, a major federal statute barring racial discrimination in interstate commerce.

Added to this consideration is the question of race, whose standpoint often reveals two Americas—one that is neat, sanguine, and consistent with its humanistic avowals of freedom and equality; the other, sloppy, inhumane, and inconsistent with practices of freedom, especially along racial lines, and, as is increasingly clear

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analysis at the point of simply stating it as factual. Consider economics. There, principles function well if they are consistent and predictable. Human systems also have normative characteristics, which means that prediction may not be the aim, but, rather, evaluation. The question of values raises questions of future-oriented behavior, not simply verification of principles. This means that the philosophical anthropology that grounds the human must be an open-ended affair, one that can identify the complex division between how something appears and what that thing is. For a similar critique, see Douglas Ficek, *Rawls, Race, and Reparations*, 5 Radical Phil. Rev. 1 (2002).

In the phenomenological tradition, there is a more pressing problem in appealing to facts on a philosophical matter. Facts are relative to particular systems of interpretation. They are not absolute. Thus, appealing to facts to settle a problem of values begs the question of the relativism of those values. For discussion, see Edmund Husserl, *Philosophy as Rigorous Science*, in Phenomenology and the Crisis of Philosophy 71 (Quentin Lauer trans., Harper & Row 1965) (1911).


these days, those of poverty. From the outset, there is ignored protest from voices both black and white as witnessed through Benjamin Bannecker and Thomas Paine at the country’s founding and, in the next century, through William Lloyd Garrison and Frederick Douglass. These critics lamented the abandonment of the project of making the United States a republic in fact instead of merely in name.

A republic, in its best form, is a domination-free society, a society whose aim is the concrete manifestation of freedom. Aiming for such a society involves addressing the historical contradictions in American claims of freedom. Such contradictions of freedom include the preservation of legalized slavery and its subsequent effects. From a republican point of view, the political dualisms at the heart of American society suggest an abandonment of freedom that requires a transformed understanding of what “our values” are. It was W.E.B. Du Bois, however, who brought forth the dynamics of this dual

5. See, e.g., Herbert J. Gans, The War Against the Poor (1995) (describing mainstream America’s desire to distinguish and label the poor, identifying them with negative qualities).

6. For a discussion of limited conceptions of freedom and various compromises, see B. Anthony Bogues, Black Heretics, Black Prophets (2003).

7. Liberalism requires a subject more conducive to the decline of freedom for the sake of liberty. See Philip Pettit, Republicanism: A Theory of Freedom and Government (1997) (arguing that states should be guided by a republican conception of freedom, which consists in freedom from domination rather than freedom from interference); Maurizio Viroli, Republicanism (Anthony Shugaar trans., 2002) (examining the values of republicanism, classically represented by Machiavelli, and arguing that people should incorporate them in modern democracies). In other words, instead of a domination-free republicanism of subjects constructing a social world through which life can achieve much meaning, we find, as in Thomas Hobbes’s Leviathan, a minefield of brutes constantly on the brink of crossing boundaries, the significance of which is the violation of liberty. Thomas Hobbes, Leviathan 94 (A.P. Martinich ed., Broadview Literary Texts 2002) (1651). See my discussion on the distinction between liberty and freedom, infra Part II. Rawls eventually makes the effort to offer emendations to his brand of liberalism that he thinks can address such challenges. See John Rawls, Society of Liberal Peoples: Its Public Reason, in The Law of Peoples 54, 54–57 (1999). The collection even includes a discussion of the Lincoln-Douglas debates. John Rawls, The Law of Peoples 174 (1999) [hereinafter Rawls, Law]. For an effort to resuscitate liberalism by arguing for a form of social contractarianism that incorporates its limits on race and gender, see Charles Mills, From Class to Race (2004); Charles Mills, The Racial Contract (1997). See also Bernard Boxill, Blacks and Social Justice 52-73 (rev. ed. 1992) (discussing the capacities of liberal political theory to address antiblack racism).
reality, both by naming it and exploring the type of consciousness it initiates. He referred to it as “twoness” and “double-consciousness.” The twoness involves the contradiction of black Americans being citizens without the full rights accorded to citizens. The double-consciousness is the lived reality of such a contradiction, a lived reality in which truth is known but constantly ignored by the wider (and whiter) public. Maintaining the contradictions of American society often requires distorting social reality to maintain the nation’s false identity. This practice of social distortion continues through ignoring the complexity both of the “facts” that constitute American history and the “principles” that constitute the logic of the social practices of American society.9

I will explore two forces that come into play in the development of epistemic and legal practices of exclusion: (1) invisibility conditioned by criminalization and (2) its disenfranchising effect.

I. A THEODICY OF PROBLEM PEOPLE

These practices of exclusion are connected to larger political and legal effects that result in a form of exclusionary normativity of certain groups of people—in this case, specifically blacks, but a similar history pertained to Native Americans as well in the radical diminution of their populations to the abominable figure of four to five percent of their former size by 1900.10 One way of claiming


consistency between American values of freedom and racial bondage, criticized by W.E.B. Du Bois, is by trying to make contradictions extraneous to the system. Du Bois formulates it thus in *The Souls of Black Folk*:

> Between me and the other world there is ever an unasked question: unasked by some through feelings of delicacy; by others through the difficulty of rightly framing it. All, nevertheless, flutter round it. They approach me in a half-hesitant sort of way, eye me curiously or compassionately, and then, instead of saying directly, How does it feel to be a problem? they say, I know an excellent colored man in my town; or, I fought at Mechanicsville; or, Do not these Southern outrages make your blood boil? At these I smile, or am interested, or reduce the boiling to a simmer, as the occasion may require. To the real question, How does it feel to be a problem? I answer seldom a word.\(^\text{11}\)

In spite of his closing comment, Du Bois has answered with many words.\(^\text{12}\)

This notion of being a problem leads to the creation of "contradictory people."\(^\text{13}\) What is it—metaphysical or epistemological; social or political—that these people contradict? To answer such a question, we need to segue to a premodern concept that has enduring normative force—namely, *theodicy*. The etymology of the word reveals much about the concept. A conjunction of the Greek words *theos* (in other formulations, *Zdeus* or *deus*), meaning "god," and *diké*, meaning "justice," the word connotes *God's justice*. It is a response to

\(\text{11. Du Bois, Souls, supra note 8, at 43-44.}\)


\(\text{13. For a discussion of this concept, see Lewis R. Gordon, Existentia Africana 62-95 (2000).}\)
a problem that emerges in all theistic systems wherein there is an all-knowing (omniscient), all-powerful (omnipotent), and good (benevolent) God. If God is all-knowing, all-powerful (which also means all-capable), and good, why does God not do something about the existence of evil or injustice? This was a thorny problem for the most influential medieval philosopher, St. Augustine, whose response was twofold. First, God cannot be responsible for the presence of evil since the latter is a function of turning away from God and the ability to do so is a consequence of human beings (and angels) having free will. Second, God, unlike human beings, is omniscient. What we see as unjust may not be so in the larger scheme of God's plan, which is, ultimately, beyond our epistemological capabilities. Put differently, God's justice is not necessarily identical with ours.

For our purposes, what is important is that in both instances, God does not receive blame for the existence of evil. In the first instance, human beings are to be blamed; in the second, evil is in effect wiped out of the universe. The problem of theodicy took a marked shift, however, in the age of natural science and secularism. Although discussions of God continued, the legitimating practice of thought became naturalistic explanations. The absence of an


16. I leave aside here discussion of the obvious contradictions of this position; for example, would not the very act of committing evil contradict the claim of being made by a perfect being? For a detailed discussion and an excellent intellectual history and philosophical treatment of this subject, see John Hick, Evil and the God of Love (1978).

17. The metaphysical implications of omniscience were the interest of the second greatest figure in the subject of theodicy, Godfried Leibniz. See Godfried Leibniz, Theodicy, (Austin Farrer ed. & E.M. Huggard trans., Open Court 1985) (1710). For a critical discussion, see Hick, supra note 16.

18. See, e.g., Hans Blumenberg, The Legitimacy of the Modern Age (Robert M. Wallace trans., MIT Press 1985) (1966) (arguing for an idea of progress as the consequence of man's control over his own fate rather than as a result of God's intervention in and control over human history). See also Lewis R. Gordon, Some Thoughts on Philosophy and Scripture in an Age of Secularism, 1 J. Phil. & Scripture 3 (Fall 2003), at http://www.philosophyandscripture.org/Archives/Issue1-1/Lewis_Gordon/lewis_gordon.html (discussing the current state of the philosophy of religion as having been pushed to the periphery of modernist organizations of knowledge).
omniscient, omnipotent, and benevolent being as an explanatory force did not, however, lead to a completely new grammar of explanation. Processes of justification remained, as Max Weber observed, through anxieties over the absence of predictability in social life. Although Weber focused on the Calvinists, the implications of his argument apply well to Modern Europeans and their New World's instantiations. Facing the absence of an "outer" argument for the inevitability of their achievements, they forged an "inner" one through the notion of "inner necessity." They sought, in other words, something in themselves that would necessitate their advantages in the world. The result became a form of (paradoxically) secular theodicy—a theodicy of the system that benefited such groups. We could call this a form of systems-diké. Here, the twofold appeals of theodicy become (1) the existence of evil or unjust beings and (2) the ultimate, complete justice in and of the system. The "problem" to which Du Bois referred can be understood in this context as being the contradiction of the system. In this case, the system is the United States of America.

The United States of America raises a theodicean-like problem, a systems-diké, because of the legitimating claims at the outset of its Constitution—"We the People." The crucial problem is the "we" whose scope was only limitedly inclusive. An unlimited meaning of "we" would cross borders to be a global meaning, which would contradict, at least, the provision of boundaries and geographical scope of jurisdiction in all modern states. Yet, the term reveals severe limits even within American borders, as is well known, because the history of the United States since 1789 has been a constant struggle for the inclusion of certain members of the population, many of whose ancestors fought in the American Revolutionary War. Those groups, who demanded full membership and recognition as human beings under the laws of the land, were rejected by the group of white male property owners who met in Philadelphia on that historic occasion. That group of white landowners and businessmen, in effect, took the idea of a republic and transformed it into a liberal, Lockean state governed by a propertied class.

We should bear in mind the difference between republicanism and liberalism. To see the difference, think of racialized slavery. Republicanism's call for a domination-free society is incompatible with slavery. Philosophical liberalism, which rejects a common good that transcends the dictates of what a majority of representatives or citizens may vote for, is compatible with slavery. It is so because its majoritarianism leads to arguments for a democratic state. Although today we think of democracy as incompatible with slavery (and, for that matter, racism), it is not logically the case that it must be so, and this has been borne out in historical practice. Whenever a majority of the population supports slavery or any other iniquity, it is consistent with liberalism so long as majoritarianism functions as the legitimating force. Thus, republicanism and democracy are also different since the latter is consistent with slavery, which is a form of domination. Although an obvious response is that the United States has never followed de facto majority rule in certain places (for example, the South, where blacks and Native Americans comprised the majority of the human population), the ongoing fact of there being more white Americans than black Americans meant that white supremacist notions prevailed as the expression of American democracy.

21. Contemporary liberal political theorists would, of course, like to think their position is incompatible with slavery. In *A Theory of Justice*, Rawls attempted to provide a guarantee against this conclusion by advancing his difference principle, which calls for society to be organized in such a way that it benefits its least advantaged members, and who are lesser advantaged than racialized slaves? Rawls, *supra* note 3, at 75. The obvious reply is twofold: (1) for the argument to work, the slaves would have to be recognized as members of society in the first place, and they were not; and (2) Rawls argues that his first principle ultimately trumps his second one, which means that the liberty of those who count in society will prevail. In *The Law of Peoples*, Rawls takes on the question of slavery not with an appeal to the second principle but to another kind of value. Slavery is, he argues, "indecent." Rawls, *Law*, *supra* note 7, at 65.

22. Think, for example, of Native American genocide, racialized slavery, and Jim Crow.


Had American politics focused solely on being democratic, there would not be much of a problem in the public sphere regarding its many injustices since in the end, they would simply need to be hashed out in conflicts of swaying public opinion during which new majorities would wipe out the injustices of old ones. But the United States also lays claim to a public discourse of freedom, and, in fact, the rhetoric often involves collapsing the nation into freedom itself. The problem is that freedom is incompatible with most of American civil society, its legal history before Reconstruction, the horrible reversion to the past in the form of Jim Crow, and the subsequent conflicts after 1964.25 Had the claim simply been that the United States is a liberal state, then liberty would be the prevailing model over freedom.

II. LIBERTY AND FREEDOM

The difference between liberty and freedom is as follows. Liberty is simply a model of non-interference and the absence of constraints. Libertarian principles are of the form: One may do X so long as one does not violate another's liberty or life in doing so.26 We could call this “negative liberty” since it demonstrates what one can do by focusing on what one should not do. Although Sir Isaiah Berlin later explored the question of positive liberty—what one ought to do to facilitate, say, a better quality of life for oneself and others—it is clear in his formulation that “interference” was the prevailing source of apprehension, which supported the primacy of negative liberty.27

Freedom, however, is stronger than both negative and positive conceptions of liberty. It is about living in a social world in which certain values, such as respect, responsibility, and the right to appear in public without being abused, are maintained. Here, the

25. For a history of the struggle of black Americans to obtain civil rights during the time period between the abolishment of slavery and 1965 see 2 Colin A. Palmer, Passageways: An Interpretive History of Black America (1988).


classic discussion goes back to Jean-Jacques Rousseau, but its roots can also be found in the thought of Niccolò Machiavelli.\textsuperscript{28} Rousseau argues that living in modern society can be rendered legitimate if a better system of rules is a consequence of doing so. If we live by rules that are a consequence of the will in general, then we have mere majoritarianism of interests. But if we live by what he calls the general will, by what everyone can understand as the right values by which to live, then we would truly be free.\textsuperscript{29} The notion of freedom as rightful living took form in the thought of Immanuel Kant as the Law of Freedom. For Kant, such laws are categorical (absolute), which means they should be practiced without exception. Because of this, they exemplify the rational ability to formulate or to legislate an act that prevails \textit{even against inclinations}, which make them objective manifestations of freedom.\textsuperscript{30} Kant argued further that the rejection of exceptionalism that comes along with such a law means that no rational being can assert its superiority over other rational beings.\textsuperscript{31} Thus, freedom, morality, and dignity converge in Kant's thought as absolute imperatives.

G.W.F. Hegel took this position a step further and argued that "objectivity" here requires a social world of institutions or estates through which freedom "appears."\textsuperscript{32} A human being cannot live a meaningful life in isolation. The notion of a free life as a meaningless one is, for Hegel, not rational. Thus, freedom becomes the objective practices of living as a human being, which, for Hegel, requires the recognition and community involvement created by other human beings. The line of reasoning continues through to Karl Marx, who argued that our social institutions cannot facilitate

\textsuperscript{28} See Viroli's discussion of Niccolò Machiavelli's thought in \textit{Republicanism}. Viroli, \textit{supra} note 7, at 4-7. See also Niccolò Machiavelli, Discourses on Livy (Harvey C. Mansfield & Nathan Tarcov trans., Univ. Chi. Press 1996) (1531) (arguing that republics are the best way to pursue the common good, avoid corruption, and preserve liberty).


\textsuperscript{30} See Immanuel Kant, \textit{Critique of Practical Reason} 46-60 (Werner S. Pluhar trans., Hackett Publ'g Co. 2002) (1788).

\textsuperscript{31} \textit{Id.} at 112.

freedom when they are designed to create gross inequalities and dependency among the lower classes for the sake of their survival.\(^3\) That our discussion of freedom has already pushed us into a discussion of Marx, whose thought has been vehemently opposed in American thought, reveals the basic point: The American appeal to freedom as one of its values contradicts its actual practice. Returning to the opening reflection on the “facts” of “our values” then, we could easily see that the dominant presumption in American political thought, that liberalism alone constitutes such values, is false.

The appeal to freedom makes American society either hypocritical or contradictory at a level of achieved self-deception. The charge of hypocrisy makes sense to the extent to which Americans lay claim to republican values. Yet such a charge is rendered complicated by the impact of normative forces on the perception of many white Americans, especially with regard to how they negotiate public spaces. A white American believes “public space” belongs to her, which means movement is a nearly unbound reality. It is so because white Americans are compatible with the system of values that constitute the United States. From this discussion, that actual set of values is liberal democracy and white supremacy. Should a white American face a theodicean-like problem, it will be about her individual inner necessity, why she “must” have achieved or “will” achieve whatever good things await her so long as there is no interference from outside forces. The ability “to see,” then, the presence of the system as an underlying mechanism of support in such people’s lives is near nil, which, of course, means that they do not see the extent to which it plays a central role in limiting the options available for other groups. Such people would agree that a republic is a free society, and they would rationalize that the United States is such a society by claiming that those who think otherwise are the source of their own misery. Thus, returning to Du Bois’s observation, blacks, being such people, become problem people.\(^4\)

A consequence of such a development is its impact on the social world and the dynamics of “appearance.” As Du Bois and many subsequent social critics and social scientists have shown, black people “appear” in American society as problems precisely because


\(^4\) Du Bois, Souls, supra note 8, at 44.
blacks are invisible as human beings and are regarded as extraneous to society. The dominant three categories of problematic appearance are (1) intellectual deficiency, (2) criminality, and (3) disease. Since the focus of this paper is on the kinds of invisibility conditioned by criminality and their effect of disenfranchisement, we must leave (1) and (3) for another time.

III. CRIMINALIZATION OF BLACKS

Du Bois made a prescient observation a century ago when he wrote:

... The appearance of the Negro criminal was a phenomenon to be awaited; and while it causes anxiety, it should not occasion surprise.

Here again the hope for the future depended peculiarly on careful and delicate dealing with these criminals. Their offenses at first were those of laziness, carelessness, and impulse, rather than of malignity or ungoverned viciousness. Such misdemeanors needed discriminating treatment, firm but reformatory, with no hint of injustice, and full proof of guilt. For such dealing with criminals, white or black, the South had no machinery, no adequate jails or reformatories; its police system was arranged to deal with blacks alone, and tacitly assumed that every white man was ipso facto a member of that police. Thus grew up a double system of justice, which erred on the white side by undue leniency and the practical immunity of red-handed criminals, and erred on the black side by undue severity, injustice, and lack of discrimination. For, as I have

35. The impact of these three pathologies is well-known in American racism. See, e.g., A Common Destiny: Blacks and American Society (Gerald Jaynes & Robin Williams eds., 1989) (arguing that African-Americans still face inequality and separation from mainstream society regarding many issues, from political participation to family life, in the years following 1940); Feagin, supra note 24 (arguing that white Americans perceive black Americans as welfare recipients, criminals, and drug users); Douglas S. Massey & Nancy A. Denton, American Apartheid (1993) (arguing that the spatial isolation of African-Americans that has resulted from their segregation from mainstream American society has led to very negative consequences). For an example of these three tropes of racist discourse against blacks, see J. Philippe Rushton, Faculty Profile: Recent Publications, Psychology Dep't, Univ. of W. Ont., at http://www.ssc.uwo.ca/psychology/faculty/rushton_pubs.htm (last visited July 20, 2004).
said, the police system of the South was originally designed to keep track of all Negroes, not simply of criminals; and when the Negroes were freed and the whole South was convinced of the impossibility of free Negro labor, the first and almost universal device was to use the courts as a means of reënslaving the blacks. It was not then a question of crime, but rather one of color, that settled a man's conviction on almost any charge. Thus Negroes came to look upon courts as instruments of injustice and oppression, and upon those convicted in them as martyrs and victims.\textsuperscript{36}

The justice system Du Bois describes seems eerily like the system of today.\textsuperscript{37} The incarceration rate of blacks has continued to

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\textsuperscript{36} Du Bois, Souls, \textit{supra} note 8, at 200–01. For a similar analysis but with a focus on gender, see Angela Y. Davis, \textit{Women, Race, and Class} (1983).

\textsuperscript{37} Examples of discriminatory treatment by police and courts abound in the social scientific literature. \textit{See, e.g.}, Feagin, \textit{supra} note 24, 145–50 (discussing generally racial discrimination by police and courts); Joe R. Feagin \& Hernán Vera, \textit{White Racism} (1995) (discussing the Charles Stuart and Rodney King cases as examples of racial discrimination and police brutality); Massey \& Denton, \textit{supra} note 35 (arguing that racial segregation, institutionalized through the black ghetto, is the structural factor most responsible for black poverty in the United States); \textit{States of Confinement} (Joy James ed., 2000) (collecting essays on racial, sexual, and class inequalities in policing, prosecution, and punishment of crimes in the United States). Specifically relating to voting disenfranchisement, \textit{see}, for example, the article by former Florida state senator Daryl Jones. Daryl L. Jones \& Robert L. Moore, \textit{In Florida, Who Has the Right to Vote?}, Orlando Sentinel, June 14, 2003, at A23 (arguing that Florida’s refusal to restore voting rights to former felons disproportionately affects the poor—who generally vote Democratic—as they often cannot afford adequate defense counsel, and that Republican leadership has exacerbated the problem by (1) transforming many misdemeanor offenses into felonies; and (2) making the conditions for clemency so severe that most are not able to satisfy them).

The War on Drugs also reveals the continued relevance of Du Bois’s discussion. Although demographic evidence reveals that whites are the primary drug users and the larger-scale drug traffickers, the laws have been structured such that, as Earl Ofari Hutchinson points out, drug patterns that pertain to blacks receive punishment while those pertaining to whites rarely do. \textit{See} Earl Ofari Hutchinson, \textit{Victory in Tulia, But Not in Drug War}, AlterNet (June 20, 2003), \textit{at} \url{http://www.alternet.org/story.html?StoryID=16216} (last visited November 3, 2004). The consequences in such cases include disenfranchisement of former felons in this “war” in ten states. Given the racial background of those disenfranchised, it should be clear that there are violations of the Equal Protection Clause. U.S. Const. amend. XIV. This is exactly what was concluded in \textit{Hunter v. Underwood}, 471 U.S. 222, 223 (1985), where the Supreme Court held that even though poor whites were affected by Alabama’s disenfranchisement of persons convicted of crimes involving “moral turpitude,” the intent of the
be a tragically mundane feature of American life. Coupled with police forces and social scientific agencies that monitor the movements of blacks, it is difficult to avoid the conclusion that blacks continue to stand “outside” of American society, which continues to be presumed, by the institutional practices of exclusion, to be white.

This outsider status of blacks leads to an internal contradiction with regard to whites, wherein whites do not ultimately appear as criminals because of their capacity to stand, as we have seen, in an ultimately internal relation to society. They can, in other words, always be “re-absorbed.” This means that even white individuals do not appear as criminals when they commit crime; some other “mark” is needed to stimulate such appearance. Such designated whites are peculiarly “nonwhite whites” at the moment of offense, which means that a process of reclaimed whiteness, their link to normativity, offers salvation for those who are willing to take it.38 Those who lose their status fall into the oblivion of relative social data. Thus, even though those whites fall under the category “white criminal,” the absence of conditions that enable such data to “appear” in the social world renders such an event inconsequential in the large maintenance of white normativity. Put differently, the white criminal has achieved a status of the white “primitive”; he or she exemplifies an inner-contradiction that necessitates the complex of natural forces—think of Tarzan, the primitive who is a Lord; the Western outlaw or the gangster, the lawbreaker who is ultimately the embodiment of individualist rebellion; the Action Hero, who is often a mass murderer.

A feature of Du Bois’s analysis of the black criminal worthy of additional attention is his claim that such a figure was a phenomenon to be “awaited” in American society. Du Bois suggests

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that there is a social grammar of black criminality in American society that makes concrete, historical black individuals into semantic fillers, beings filling vacuums in the system. What this argument suggests is that if enough blacks were not available, the United States would have made some. The history of using European immigrants with shakable identities to reinvigorate white numerical majority is attested to through their past designation as “temporary blacks” or “blacklike.” This phenomenon of becoming white is discussed in the spate of “how [this or that European group] became white” books that came to print in the 1990s.

To understand how such outcomes can emerge, we need to make clear our understanding of how human systems function. That the system under discussion—American society—functions with much fallacious reasoning should be obvious by virtue of the circular logic of black inferiority: one is inferior because black and black because inferior. The circular logic here is a consequence of what Sylvia Wynter describes as a move from theodicy to biodicy, where the rationalization of one form of life is held over others. It is the reassertion of social Darwinism but with a contemporary focus on life itself—those who are superior are those who live on. Recognition that there are social forces undergirding such notions, indeed stacking the decks in favor of some groups in such formulations, is put aside in an appeal to a so-called naturalism or fusion with market forces. Think of the amount of government resources devoted to the management and defense of the so-called “free market.” At the heart of this naturalism is the heavily-laden notion of “survivorship.” Tacked on to human communities is a conception of conflict, including racial conflict, in which there will only be one surviving group. Since survival requires the death of others, legitimating assertions unfold

40. See Sylvia Wynter, On How We Mistook the Map for the Territory, and Re-Imprisoned Ourselves in Our Unbearable Wrongness of Being, of Desère: Black Studies Toward the Human Project, in A Companion to African-American Studies, supra note 9 (manuscript at 25, on file with authors).
41. Michel Foucault identifies this theme in his Collège de France lectures. Michel Foucault, “Society Must Be Defended”: Lectures at the Collège de France 1975-1976 89-99 (Mauro Bertani et al. eds. & David Macey trans., Picador 2003) (1997) (arguing that although racism preceded the modern age, the notion of the state as a site in which racial conflicts wage war is a peculiarly modern phenomenon).
for dynamics that would insure the survival of the dominating group over others.

Implicit in the construction of black people as pathological is the notion that blacks have a forfeited claim to exist and to survive. How is this possible? The answer requires an excursion into the construction of social reality.

IV. APPEARANCE AND SOCIAL REALITY

In *Black Skin, White Masks*, Frantz Fanon argued that racial identities and the distribution of consequences of those identities are a function of the social world.42 He outlined there a position held by most contemporary theorists of racial formations.43 Fanon added, however, that we should bear in mind that “society, unlike biochemical processes, cannot escape human influences.”44 Societies, in other words, cannot exist without people going through the forms of actions that maintain and transform them through each generation. Fanon was aware of the danger of forgetting, in our analyses of something so vast and often so overwhelming as society, that its institutions and day-to-day situational activities require minds with purpose and agency. We bring meaning to our institutions. And more, the social world is the place of “publicity,” where things are laid out for assessments in ways that constitute norms and evidence. Norms pertain to rules, and evidence pertains to how things and events appear. It is what is always left behind or an indication of what is not immediately seen that makes evidence an appearance that stimulates consciousness of something before it appears in perception.

The ordinary logic of social appearance is marked by the emergence of anonymous social actors. This emergence is called “anonymity.” We often meet other human beings in an encounter conditioned by indirect pronouns. We meet “a man,” “a woman,” “a

42. *See* Frantz Fanon, *Black Skin, White Masks* 11 (1967).
43. The most influential in the American context being Michael Omi & Howard Winant, *Racial Formation in the United States* (2nd ed. 1994) (offering a definition of racial formation as “the socio-historical process by which racial categories are created, inhabited, transformed, and destroyed... From a racial formation perspective, race is both a matter of social structure and of cultural representation.” *Id.* at 55–56.)
44. Fanon, *supra* note 42, at 11.
student," "a taxi driver," "a passerby," etc. Such encounters are instances of "ordinary anonymity." It is the set of individuals met through their social roles—which means they could be anybody—but they are met with the understanding of limited knowledge on the inquirer's part. To know more requires interrogation: "Excuse me, what is your name?"; "Are you on break?"; "Are you a student at NYU?" Such ordinary anonymous relations can, however, become troubled relations through the eradication of interrogatives and uncertainty. This second type of anonymity is a function of presumed knowledge of individuals who occupy not only certain social roles but also social identities. This form of anonymity leads the inquirer to cease being an inquirer and to take on an attitude of epistemic closure—the closing off of practices of learning and understanding. Such a spectator concludes, literally, that there is no more to know and, consequently, no more to learn about individuals in such roles. Their external markers become "evidence" of nothing more to know, which makes them cease to function as symbols of the social world and collapse into the being or essence of the individuals themselves. In its most extreme form, this phenomenon affects processes of rationality and reasoning by becoming a form of rationality that results, as Fanon observed, in reason walking out the door whenever the black enters: "Reason was confident of victory on every level...; it made a fool of me. As the other put it, when I was present, it was not; when it was there, I was no longer."45

A term for individuals closed off by such markers, which means they cease to be individuals properly because there would then be no difference between all people with such markers, is overdetermination.46 Such people live in a social world so overdetermined that it functions as fixed instead of dynamic and changing. For them, that world might as well be a brick wall.

Although there is another group whose lives are without limits to the point of their being normative, it is not always clear what that normativity means. Since norms refer to rules, it at first means that members of the unlimited group count as the exemplars, as the rule instead of its exceptions. They live in a world of many

45. Id. at 119-20.

46. For more discussion of overdetermination, see Fanon, supra note 42; Jean-Paul Sartre, Anti-Semite and Jew 59-141 (George J. Becker trans., Schocken Books 1995) (1948). Although he discusses the issue, Sartre does not specifically use the term "overdetermination."
options because they are the options themselves. They literally can, for the most part, be what they want to be. Since, however, the other groups are not the rule or the norm, they are, from the outset, living in a world short of at least one option—being the norm. What this means is that they cannot be all they may want to be. We could express this comparison using the language of choices and options. Human beings are able to make choices, but their choices are not always proportionate to the options available. The social world in which they live may offer limited options to them. When no more options are available, the effect is tantamount to living in a prison. They choose to go beyond the limits available to them, but actually doing so is not an option.

Other groups may, however, have more options available before coming upon an impasse. For such groups, those with limited options simply are limited people instead of people facing a social world with imposed limitations. Members of the first group, however, experience a strange phenomenon. Once their outward-directed choices that are isomorphic with the options available are exhausted, they begin to make adverbial choices on the limited set of choices available. Thus, they continue to do what they have already done, but they do so enthusiastically, reluctantly, passionately, indifferently, and so on. They begin to make choices to "fix" themselves. Their choices are soon exhausted and they begin to live, as John Dewey observed more than a half century ago in his classic Democracy and Education, a life of inward delusions. As their choices become more inward-directed, such individuals begin to "implode"; they begin to collapse into themselves. Here is how Dewey describes it in the context of class limitations:

Men's fundamental attitudes toward the world are fixed by the scope and qualities of the activities in which they partake. The ideal of interest is exemplified in the artistic attitude. Art is neither merely internal nor merely external; merely mental nor merely physical. Like every mode of action, it brings about changes in the world. The changes made by some actions (those which by contrast may be called mechanical) are external; they are shifting things about. No ideal reward, no enrichment of emotion and intellect, accompanies them. Others contribute to the maintenance of life, and to its external adornment and display. Many of our existing social activities, industrial and political, fall in these two classes. Neither the people who engage in them, nor those who are directly affected by
them, are capable of full and free interest in their work. Because of the lack of any purpose in the work for the one doing it, or because of the restricted character of its aim, intelligence is not adequately engaged. The same conditions force many people back upon themselves. They take refuge in an inner play of sentiment and fancies. They are aesthetic but not artistic, since their feelings and ideas are turned upon themselves, instead of being methods in acts which modify conditions. Their mental life is sentimental; an enjoyment of an inner landscape. Even the pursuit of science may become an asylum of refuge from the hard conditions of life—not a temporary retreat for the sake of recuperation and clarification in future dealings with the world. The very word art may become associated not with specific transformation of things, making them more significant for mind, but with stimulations of eccentric fancy and with emotional indulgences. The separation and mutual contempt of the “practical” man and the man of theory or culture, the divorce of fine and industrial arts, are indications of this situation. Thus interest and mind are either narrowed, or else made perverse.47

A remedy for this collapse is the increase in options available for human beings to make outward-directed choices that are consequential. Such an ability I call power. Power is the unfolding series of effects on the social world in which one lives. Powerful people affect and are able to affect more than those who are not powerful, and their reach, both geographical and political, could appear without limits. The other extreme, social impotence, locks individuals into their body, which closes them off from activities not dependent on force. Power is most effective where force is most absent, yet the two cannot entirely be eliminated since they are functions of what it means to be physical beings who occupy spaces over time, the consequence of which is the existential phenomenological or lived-reality of experiencing a “here” and a “there.” The powerful is most effective there, which includes other people’s here. That is why many powerful people often turn out to be physically weak, although this is not always so.

The less powerful have a “here,” but their “there” is always beyond their own reach. Similarly, the less powerful often focus on

physical strength and the reach/limits of their bodies. Although it is fashionable today, following Michel Foucault, to reject theories of power that focus on a distinction between the powerful and the powerless (since, presumably everyone is in a power relation with others), the realities of the world we live in do not seem to bear out such views. It is not only incorrect to argue, for instance, that the President of the United States is no more powerful than an African-American custodial worker; it is also ridiculous. The confusion rests on collapsing some power (after all, the custodial worker is in power relations with a variety of people within physical reach and can receive an effective response from a variety of institutions—for example, a union, a parent-teachers association, a lodge) with all power. It is true that the relation is not between power and no power, but it is false to assume that the consequence is not more power versus less. The same applies to social groups.

There are at least two consequences of such dynamics of limited options and the social manifestations of power. As lived by those who lack the categories of recognition that lead to an unfolding of the mechanisms of the social world, such limitations constitute "oppression." It is the suffered invisibility of being locked in a world conditioned by force and the limits of one's body. Such an experience of limitation often takes on a sense of intense suffering and a desire for escape. (I say "often" because it is not necessary for suffering to occur for our analysis to work. Some people do not test the limits or the boundaries in which their lives are circumscribed.) The suffering itself often manifests a variety of health problems, many of which are well documented. Alvin Poussaint and Amy Alexander, for instance,

48. Michel Foucault's most influential statement is in his classic Discipline and Punish: The Birth of the Prison (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978) (showing the shift from a sovereign power at whom the subjects look, to centers of power looking at, studying, and disciplining subjects in newly distributed micro-relations of power in the modern age). These ideas are elaborated and refined in Michel Foucault, Power/Knowledge (Colin Gordon ed. & Colin Gordon et al. trans., 1980); Foucault, supra note 41.

49. See the work of Purdue University psychologists David Rollock and Scott Vrana, who study the impact of racism and interracial interactions on participants' bodies; University of Michigan medical sociologist David Williams, who looks at the impact of racism on African Americans' physical and mental health; and the ongoing work of Alvin Poussaint, who has studied black rage, black child development, and suicide patterns of African Americans. See, e.g., Scott R. Vrana & David Rollock, Physiological Response to a Minimal Social Encounter: Effects of Gender, Ethnicity, and Social Context, 35 Psychophysiology
have recently written on the forms of attack on the self that implosivity manifests over a period of time—namely, slow but certain acts of suicide. The limited social options that squeeze many blacks into such behaviors (a form of giving up) often lead to the downward spiral of a body gone out of control.

One of the greatest portraits of such a phenomenon is Richard Wright's *Native Son*, where he shows, through the rebellious and caged character Bigger Thomas, some of the forms of life that are native to America's very limited social world. Some of his reflections from his extraordinary introduction, "How 'Bigger' Was Born" are worth a long quotation:

> But keeping the ballot from the Negro was not enough to hold him in check; disfranchisement had to be supplemented by a whole panoply of rules, taboos, and penalties designed not only to insure peace (complete submission), but to guarantee that no real threat would ever arise.... The white neighbor decided to limit the amount of education his black neighbor could receive; decided to keep him off the police force and out of the local national guards; to segregate him residentially; to Jim Crow him in public spaces; to restrict his participation in

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51. Some critics of this assessment advance Caribbean immigrants as a contradiction to its claims, but the evidence points to the contrary. Percy C. Hintzen, for example, has identified this phenomenon among black Caribbean immigrants. See Percy C. Hintzen, *West Indian in the West* 95–98, 130–31 (2001).
the professions and jobs; and to build up a vast, dense ideology of racial superiority that would justify any act of violence taken against him to defend white dominance; and further, to condition him to hope for little and to receive that little without rebelling.

But, because the blacks were so close to the very civilization which sought to keep them out, because they could not help but react in some way to its incentives and prizes, and because the very tissue of their consciousness received its tone and timbre from the strivings of that dominant civilization, oppression spawned among them a myriad variety of reactions, reaching from outright blind rebellion to a sweet, other-worldly submissiveness.

The waves of recurring crime, the silly fads and crazes, the quicksilver changes in public taste, the hysteria and fears—all of these had long been mysteries to me. But now I looked back of them and felt the pinch and pressure of the environment that gave them their pitch and peculiar kind of being. I began to feel with my mind the inner tensions of the people I met. I don't mean to say that I think that environment makes consciousness (I suppose God makes that, if there is a God), but I do say that I felt and still feel that the environment supplies the instrumentalities through which the organism expresses itself, and if the environment is warped or tranquil, the mode and manner of behavior will be affected toward deadlocking tensions or orderly fulfillment and satisfaction.52

We see here the limitations imposed on being what Fanon called actional.53 To be actional involves outward-directed activity in order to be effective in the social world.

A strange political economy of distributing achievements and failures emerges. That whites are normative leads to an existential problem in which their existence does not require justification. Implosivity results for nonwhites because their existence always requires justification.54 Human beings cannot, however, justify their

53. Fanon, supra note 42, at 222.
54. However, the realities for indigenous Americans and blacks are different from those of many other groups of people of color. Indigenous Americans were marked for genocide, and although they still exist, the success of the nation as a completion of conquest requires their absence in the future. Thus they are
right to exist without falling prey to a standard beyond themselves, which means that they cannot serve as their own justification. They have lost the argument for their right to exist before even beginning it. Yet this theme of justified existence has been a feature of race politics since the days of racialized slavery. Blacks have had a standard imposed upon them that they could not possibly meet: justifying themselves without using themselves as a standard. To be black in this sense literally means to be outside the standards and rules of American society. With such a social identity, they become "criminal," both in origin and in consequence. Since their origins are presumed illegitimate and unfounded, so too is, presumably, their continued existence. They become, as Fanon observed, phobogenic objects; that is, they stimulate phobias, anxieties, problems, or disruptions in normative visual fields and they are blamed for such disruptions.55

The political economy that results is one in which blacks are always "seen" as outlawed existents, as what Fanon called "the negation of values,"56 and as not deserving of the rights of a civilized society. This form of "seeing" is paradoxically the ground of black invisibility, a form of hypervisibility in which blacks are invisible by virtue of being overseen or seen too seriously.57

V. TWO PORTRAITS OF THE STRUCTURE OF DISENFRANCIEMENT

To illustrate my argument, consider the following portrait advanced by Jane Anna Gordon in her study, Why They Couldn't Wait.58 The black and Latino communities in New York City had a constructed and treated as though they "haunt" the present. Blacks, although also considered for genocide, embody "plenitude." In the national consciousness, there are always too many blacks, however small their number may be in a particular context. For discussion, see Gordon, supra note 13, at 160–63.

55. See Fanon, supra note 42, at 151 (arguing that modern Western society has no coherent conception of a "normal" black person and that the psychology of blacks is limited as psychopathology).


57. This accounts for the poignancy of Ralph Ellison's treatment of invisibility in Invisible Man. By saying that his invisibility is an effect of the eyes of the white world, he lets us know that he has to be looked at in order not to be seen. See Ralph Ellison, Invisible Man 3-5 (Vintage Books 1990) (1952).

problem with the public school system that they tried to rectify at the end of the 1960s. Their children went through the public schools but were not being admitted to the tuition-free City University of New York. Students from more affluent school systems were being admitted on the grounds that they had received better educations and that their grade-point averages were supposedly “real.” Although there were whites and people of color whose taxes provided the revenue for the New York City public school and public university systems, the tax laws were such (as they continue to be) that affluent whites and white professionals received greater tax rebates than lower-class whites and people of color.59 People of color in the cities collectively paid more taxes. The problem, then, was that the situation amounted to mostly the parents of color paying for a school system that was nearly closing off admission to their children. They were, in effect, supporting affluent whites’ participation in a tuition-free public university. It was this realization that led to the struggle of parents of color for open admissions, which allowed their children to attend the City University of New York (which their tax dollars paid for) and to receive remedial training when needed. One could easily apply this analysis to many of the social services in the nation’s urban centers and rural black belts.

Consider the following. It is possible for most affluent whites not to pay taxes or to pay a smaller amount of taxes than do poorer employed populations or unemployed ones with limited taxable property by virtue of the structures of the federal and state tax laws, both of which are designed to benefit white normative behavior. Yet a constant complaint by many affluent whites against public resources—systematic responsibility—is that it is they who provide the sources of revenue. That more or a disproportionate amount of taxes are paid by people in the lower income brackets—by virtue of

59. Think, for instance, of white accountants and lawyers who pay no taxes, save social security, not even property taxes because everything they use is tax deductible or built into their employment. For a profile on the taxes not paid by the affluent and their consultants, see David Cay Johnston, Perfectly Legal: The Covert Campaign to Rig Our Tax System to Benefit the Super Rich—And Cheat Everybody Else (2003). By “everybody else,” Johnston means primarily wage laborers. I am suggesting in my argument, however, that because of the structural disparities between blacks and whites, even white wage laborers benefit more from and small-business entrepreneurs contribute less to the national revenue than their black counterparts. If we add in services to which whites have more access than blacks, the economic outcome amounts to blacks paying more for the services they use since their revenue dollars count for less.
their not having, for example, the professional exemptions needed for a full tax return—means that the lower classes, especially those of color, have an immediate retort to mainstream complaints about supporting social services for the poor with their tax money: many affluent whites do not pay taxes but, nevertheless, reap many of the social services to which taxes are devoted. Structuring services to benefit mostly white populations while revenue comes from mostly nonwhite groups is clearly a form of disenfranchisement of the access of nonwhite groups to those services. Recalling our observations on liberal democratic politics, how could such a consequence be remedied politically without proportional government representation? What, perhaps, would happen to the level of service alienation if the tax laws and processes of access were premised upon sociological practices that were not based on white normativity?

Another consideration is petty crimes, such as driving violations. Profiling—another form of epistemic closure—leads to a situation in which the revenue from traffic violations comes directly to white neighborhoods through processes of keeping blacks out. Take, for example, the suburbs that surround the northern area of Philadelphia, Pennsylvania. Like the police in most American suburbs, traffic cops in that area stop many black drivers passing through (and some living in) those suburbs in the familiar process now known as “racial profiling.” There is, however, an added dimension to the indignities and double standards that often emerge in such encounters. The fine for a violation such as turning right on red when there is a “No Right on Red” sign is $25.00. The motorist, however, receives a ticket for $109.00 or more because added onto the ticket are taxes for a variety of services such as ambulances and sanitation in that suburban municipality. Since many of the accused violators were simply passing through and may in some cases not be able to afford taking time off from work to argue the injustice of their being ticketed, they often simply pay the fine or pay it so late that the final payment is substantially higher. The effect is that blacks accused of such traffic violations become sources of revenue for services in majority-white, affluent neighborhoods—neighborhoods in which non-resident black drivers do not receive the benefits of such services and where black residents end up paying more for their services than their white neighbors because they are pulled over disproportionately by the local police. Although not as graphic as losing the vote and property, the gap between providing revenue and receiving services suggests a form of injustice that may be the tip of
the iceberg of what we may call the American political economy of distributive injustice.

The next level of disenfranchisement is, of course, participation in the determination of government representation, which includes voting. The philosophical anthropology that undergirds this analysis suggests that to be human is to face possibilities, especially where the human being is the subject of discourses of “freedom.” The imposition of law-like generalizations to human behavior emerges where social options limit the scope of outward-directed choice. Eliminating the voting rights of convicts and felons who have served their time contributes to the process of limiting options that contradict claims not only of rehabilitation, but also of basic functioning outside the confines of prison. The analysis throughout this paper suggests that the prevailing rules across many states lead to the systemic criminalization of black people. The “criminal” should be an exception in a society, not a rule. That the well-known figures on black incarceration are so high suggests that this society has undermined that rule and has made criminality the rule instead of the exception for black people.

It defies probability, however, that so many people could be born criminals, that “criminality” is an essential feature of their being. There must, in other words, be a social mechanism limiting the options available for blacks to appear in the social world as law-abiding citizens. The practice of taking away the vote limits the options available for political expression, and the many other options that disappear after conviction and release suggest that the elimination of crime is not the goal of the system. Given the high profits in crime for a mostly white economic elite—not only by way of the crimes they commit and often get away with, but also through the business some of them gain from building prisons in a country of very frightened people—there is clearly a systemic investment in the production of black criminals. The evidence suggests that where such people are disenfranchised of the vote, there is a spilling-over effect of wider disenfranchisement of their group, which secures a hegemonic place for the political parties and representatives whose success depends on a decline in the numbers of such voters.60

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60. This is certainly the argument of Daryl L. Jones and Robert L. Moore. Jones & Moore, supra note 37.
CONCLUSION

Slavery is the absolute alienation of one’s labor by another or others. Although the Thirteenth Amendment rendered slavery illegal in the United States,61 the project of maintaining as many vestiges of slavery as possible has continued through efforts not only to disenfranchise blacks of their rights in the United States, but also to maintain a system in which revenue gained from the labor of blacks is used for the interests of whites, particularly those of a higher socioeconomic stratum.

Today such dynamics have been expanded as the reach of American power has become global. This globalization carries with it economic and cultural mandates that are increasing American-style constructions of criminality worldwide.62 Against that trend are growing bands of localisms and alternative globalisms. By localisms, I mean small, community-based grassroots initiatives, and by globalisms, I mean alternative ways of organizing the planet’s political, economic, and natural resources. I do not see how localisms can work against such an imperial and powerful force as the United States government in world affairs today, unless they federate into an equally competitive force. Other globalisms bring with them humanistic conceptions of organizing world affairs along the lines of, for instance, transportation, food, healthcare, and education. In each instance, cultural symbols will be at work that set the conditions by which individuals will appear in many instances and, given conditions of vulnerability, disappear in others.63 In the global conflict, the “price,” so to speak, of life has fallen.64

Returning to the United States, then, the question of understanding and combating the kind of society in which certain practices of oppression and disenfranchisement are hegemonic takes

61. U.S. Const. amend. XIII.
62. One need simply examine the literature on the International Monetary Fund and the World Bank to see this effort of neoliberal globalization. For a critical discussion of this phenomenon, see Amartya Sen, Development as Freedom (1999).
63. See, e.g., Kevin Bales, Disposable People (1999) (arguing that the various forms of modern-day slave labor in five countries are a function of economic vulnerability rather than race).
64. Bales has argued, for instance, that slaves are cheaper today than they have been in other periods of recent history. See id. at 1–33.
on a renewed sense of urgency. Ironically, the democratic appeal is the tactical hope through which the question of freedom might stand a chance, especially given the legislative zeal behind so many efforts to limit the options by which subjugated populations could be actional. A focused political path of increasing the options by which and through which people can act powerfully can affect a series of social relations that constitute new relations of power. Who but the young Du Bois, that dreamer and lover of humanity from a hundred years past, should we now ask to close these explorations with characteristic hope and irony?

Let the ears of a guilty people tingle with truth, and seventy millions sigh for the righteousness which exalteth nations, in this drear day when human brotherhood is mockery and a snare. Thus in Thy good time [O God] may infinite reason turn the tangle straight, and these crooked marks on a fragile leaf be not indeed THE END.65

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65. This is, of course, the final page of The Souls of Black Folk. Du Bois, Souls, supra note 8, at 278.