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## Response to Sanford Levinson: Who Counts?—The Politics of Racial Membership and Excommunication

Randall Kennedy  
*Harvard Law School*, rkennedy@law.harvard.edu

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**RESPONSE TO SANFORD LEVINSON: WHO COUNTS?—THE  
POLITICS OF RACIAL MEMBERSHIP AND EXCOMMUNICATION**

RANDALL KENNEDY\*

I had occasion recently to describe Sanford Levinson as “the most adventurous, independent, and wide-ranging intellectual in the American legal academy.”<sup>1</sup> His Childress Lecture supports my claim. Its breadth, candor, incisiveness, suggestiveness, and passion is definitely Levinsonian. He begins by asking “who counts” as part of “we” the American people. He muses about possible indicia of Americanness and which people or what institutions determine and should determine who is inside and who is outside of the American political family. From there he proceeds to explore boundary-setting controversies that have embroiled other collectives—religious groups (i.e., who is a Catholic or a Jew), tribal groups (i.e., who is Cherokee or Pueblo), and even gender groups (who is a woman or a man).

Inspired by Levinson, I want to explore certain boundary-setting controversies that have attended competing conceptions of what it means to be “black” in America. Using the Levinsonian idiom, I ask, “who counts” as black and “sez who”—who does and should do the counting?

Within the African-American intelligentsia, issues of racial identity, authenticity, and obligation have elicited much attention. A provocative addition to this discussion is *Who’s Afraid of Post-Blackness: What It Means to Be Black Now*, by Touré (Neblett). Touré assails “self-appointed identity cops” who write “Authenticity Violations as if they were working for Internal Affairs making sure everyone does Blackness in the right way.”<sup>2</sup> His aim is to “destroy the idea that there is a correct or legitimate way of doing Blackness,” maintaining that “[i]f there’s a right way then there must be a wrong way, and that [that] kind of thinking cuts us off from exploring the full potential of Black humanity.”<sup>3</sup> Touré claims that he wants African-Americans to have the freedom to be black in whatever ways they choose and that he aspires “to

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\* Michael R. Klein Professor of Law, Harvard Law School.

1. RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW, at In Praise of Eric Foner and Sanford Levinson (2013).

2. TOURÉ, WHO’S AFRAID OF POST-BLACKNESS?: WHAT IT MEANS TO BE BLACK NOW 7 (2011).

3. *Id.* at 11.

banish from the collective mind the bankrupt, fraudulent concept of ‘authentic’ Blackness.”<sup>4</sup>

“Post-Blackness” is the label Touré deploys to describe the sensibility he champions, a “modern individualistic Blackness” that enthusiastically endorses novelty and diversity, fluidity and experimentation.<sup>5</sup> Post-Black, he insists, “is not a box, it’s an unbox. It opens the door to everything. It’s open-ended and open-source and endlessly customizable. It’s whatever you want it to be.”<sup>6</sup>

Touré is right to be concerned about fears of racial disloyalty and their sequelae. The specter of defection and subversion occupies a salient place in the African-American mind and soul.<sup>7</sup> It figures in novels (for example, Ralph Ellison’s *Invisible Man*<sup>8</sup>), in films (for example, Spike Lee’s *Bamboozled*<sup>9</sup>), and in hip-hop (for example, the Geto Boys’ *No Sellout*<sup>10</sup>). It prompts such questions as whether blacks have an obligation to reside in “the hood,” marry within the race, or decline certain roles such as being a prosecutor. These fears are echoed in incantations such as, “Don’t forget where you come from,” and, “Stay black.” They are glimpsed in obsessive scrutiny of prominent blacks for evidence of inadequate commitment to black solidarity. These fears prompt blacks, especially those in elite, predominantly white settings, to signal conspicuously their allegiance to Blackness. This angst contributes to the rise of what journalist John Blake terms the “Soul Patrol,” a clique of black folk “who impose their definition of blackness on other black people.”<sup>11</sup> The Soul Patrol, Blake complains, is not content with choosing your friends.<sup>12</sup> “They want to tell you how to think, where to live, whom to love, how to do your job.”<sup>13</sup>

Touré writes metaphorically of “identity cops” who “mak[e] sure everyone does Blackness in the right way.”<sup>14</sup> There is, however, an actual book self-consciously devoted to this mission. It is a remarkable, albeit obscure, volume entitled *The American Directory of Certified Uncle Toms: Being a Review of the History, Antics, and Attitudes of Handkerchief Heads, Aunt Jemimas, Head Negroes in Charge, and House Negroes Against the Freedom Aims of the*

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4. *Id.*

5. *Id.* at 12.

6. *Id.*

7. See RANDALL KENNEDY, *SELLOUT: THE POLITICS OF RACIAL BETRAYAL* (2008).

8. RALPH ELLISON, *INVISIBLE MAN* (1952).

9. *BAMBOOZLED* (New Line Cinema 2000).

10. GETO BOYS, *No Sellout*, on *GRIP IT! ON THAT OTHER LEVEL* (Rap-A-Lot Records 1989).

11. John Blake, *The Soul Patrol*, ATLANTA J.-CONST., Mar. 15, 1992, at D1.

12. *Id.*

13. *Id.*

14. TOURÉ, *supra* note 2.

*Black Race*.<sup>15</sup> The collective that compiled this Directory calls itself the “Council on Black Internal Affairs.”<sup>16</sup> It was formed “as a result of the Million Man March to monitor the progress of the Black race.”<sup>17</sup> According to the Council, nothing more impedes this progress than Uncle Toms (and the female equivalent, Aunt Jemimas).<sup>18</sup> The Uncle Tom, the Council asserts, “repudiates strong Black leadership,” and, for this service to the white power structure, “is anointed as a ‘responsible leader’ and praised as ‘one of the good ones.’”<sup>19</sup> The Council contends, however, that the Uncle Toms’ immunity is ending. According to the Council, Uncle Toms—“non-practicing Black[s]”—will increasingly face sanctions from “practicing Black[s]” who conscientiously fulfill the responsibilities of racial citizenship.<sup>20</sup>

The Council’s list of Uncle Toms and Aunt Jemimas is long and varied. It includes Julian Bond and John Lewis (too close to white benefactors of civil rights initiatives), Colin Powell and Clarence Thomas (too close to white Republicans), Mary Frances Berry and Vernon Jordan (too close to white Democrats), Harry Belafonte and Henry Louis Gates, Jr. (too close to white women), and Oprah Winfrey and Maya Angelou (too close to white audiences).<sup>21</sup> Given what the Council demands in order to be considered a practicing black in good standing—isolation from the perceived contamination of influential whites—updated editions of the Directory will likely list—black list—many of today’s leading African-American public figures, including President Barack Obama.

Touré rightly assails principles, strategies, or tactics that impose *wrongful* constraints. He rightly opposes the dogmatism, authoritarianism, and hankering for marginality that blights the thinking of all narrow ideologues found in far-flung precincts in Black America—the sort who habitually challenge the racial bona fides of practically any Negro who wins trans-racial acclaim.<sup>22</sup> Touré errs, however, when he adopts a stance of libertarian absolutism according to which it is always wrong for one black person to question another black person’s fidelity to Black America.<sup>23</sup> This is the stance taken by Professor Stephen L. Carter in *Reflections of an Affirmative Action Baby*, where he

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15. COUNCIL ON BLACK INTERNAL AFFAIRS, THE AMERICAN DIRECTORY OF CERTIFIED UNCLE TOMS: BEING A REVIEW OF THE HISTORY, ANTICS, AND ATTITUDES OF HANDKERCHIEF HEADS, AUNT JEMIMAS, HEAD NEGROES IN CHARGE, AND HOUSE NEGROES AGAINST THE FREEDOM AIMS OF THE BLACK RACE (2002) [hereinafter DIRECTORY].

16. *Id.*

17. *Id.*

18. *Id.* at 12.

19. *Id.* at 13.

20. DIRECTORY, *supra* note 15, at 32–33.

21. *Id.* at 9–10.

22. TOURÉ, *supra* note 2, at 12.

23. *Id.* at 7.

writes that “[l]oving our people and loving our culture does not require any restriction on what black people can think or say or do or be.”<sup>24</sup>

No restriction? Consider the case of William Hannibal Thomas, a black man born free in Ohio in 1843, who wrote *The American Negro: What He Was, What He Is, and What He May Become: A Critical and Practical Discussion*.<sup>25</sup> This was one of the most Negrophobic diatribes ever published, a tract in which Thomas wrote that “negro intelligence is both superficial and delusive”; that the Negro “lives wholly in his passions, and is never so happy as when enveloped in the glitter and gloss of shams”; that the Negro “represents an intrinsically inferior type of humanity”; that Negroes “have not learned the elementary principles of moral conduct”; and that Negro men “have an inordinate craving for carnal knowledge of white women.”<sup>26</sup> He recommended that Blacks be whipped as punishment for minor crimes and defended Jim Crow segregation.<sup>27</sup> Demanding “the utter extermination, root and branch, of all negroid beliefs and practices,” he suggested that an optimal way of handling the “negro problem” would be to remove black children from their parents and place them in orphanages in which they could be raised by white guardians.<sup>28</sup>

With virtual unanimity, blacks excoriated *The American Negro* and shunned its author.<sup>29</sup> Blacks in Memphis, Tennessee, living under the threat of lynchings that Thomas implicitly justified, held “an indignation meeting” at which they warned Thomas that he risked physical assault if he ever dared set foot in their city.<sup>30</sup> Charles W. Chesnutt compared Thomas’s “traitorous blow” unfavorably to the infamies of Judas and Benedict Arnold.<sup>31</sup>

Booker T. Washington concluded his negative review of *The American Negro* by remarking: “It is sad to think of a man without a country. It is sadder to think of a man without a race.”<sup>32</sup> J. Max Barber, the editor of *The Voice of the Negro*, declared, “Negro children ought to be taught to spit upon

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24. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 239 (1991).

25. WILLIAM HANNIBAL THOMAS, *THE AMERICAN NEGRO: WHAT HE WAS, WHAT HE IS, AND WHAT HE MAY BECOME: A CRITICAL AND PRACTICAL DISCUSSION* (1901).

26. *Id.* at 111, 139, 177, 223.

27. *Id.* at 222–23.

28. *Id.* at 373, 386, 407.

29. See JOHN DAVID SMITH, *BLACK JUDAS: WILLIAM HANNIBAL THOMAS AND THE AMERICAN NEGRO* (2000).

30. *Id.* at 200.

31. Charles W. Chesnutt, *A Defamer of His Race*, 38 *CRITIC* 350, 351 (1901).

32. SMITH, *supra* note 29, at 209.

[Thomas's] name."<sup>33</sup> A minister urged Thomas to "go off and hang thyself,"<sup>34</sup> while another critic insisted that "death is too good for him."<sup>35</sup>

Was this outraged response wrong? Was this reaction "political correctness" run amok? Should African-Americans have accepted Thomas's ranting as just another flavor of Blackness—a mere voicing of opinion that must, as a matter of principle, be left alone to rise or fall depending upon its performance in the marketplace of ideas? No. No. And no. Some ideas ought to be stifled. Determining what ideas should meet that fate under what circumstances and by what means are large, complex, daunting questions that warrant the most careful attention. The world is awash with destructive censorship. And the cultural freedom that has been painstakingly won in the United States is a treasure for which Americans should be willing to fight. At the same time, it bears repeating that, under some circumstances, people behaving in certain ways, including the expression of certain ideas, ought to be repressed.

In an article revealingly titled *The Virulence of Blackthink and How Its Threat of Ostracism Shackles Those Deemed Not Black Enough*, Washington University Law Professor Kimberly Jade Norwood asserts that "there is no more important freedom than the freedom to think and to believe based upon personal conviction—no matter how unpopular that belief or conviction."<sup>36</sup> This boundless libertarian claim appears to be sound, even noble, until put under pressure. Does one *really* want to embrace *unconditionally* the proposition Professor Norwood advances? What about the personal conviction that slavery or extermination is the proper destiny for certain peoples? I am willing to permit room for such thoughts—so long as I am confident that circumstances doom them to irrelevance. But, if a belief in the rightness of slavery or genocide had any plausible chance of growing, gaining adherents, and rising to power, I would favor immediately suppressing it. One can be against the imposition of "Blackthink" and other obnoxious herd mentalities without embracing the proposition that *any* expression, no matter how dangerous, should, in principle, be immune from suppression. Not all blacklists or other modes of censorship are bad.

One should be appalled by the pettiness, narrowness, bigotry, and dictatorial character of those, like the Council on Black Internal Affairs, who have intermittently afflicted Negroes with destructive bouts of internecine tyranny. Often those who have been most militant in insisting upon black unity are those who have been most cruel and thoughtless in thrusting perceived

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33. *Id.* at 232.

34. *Id.* at 221.

35. *Id.* at 231.

36. Kimberly Jade Norwood, *The Virulence of Blackthink™ and How Its Threat of Ostracism Shackles Those Deemed Not Black Enough*, 93 KY. L.J. 143, 198 (2004–2005).

apostates outside the fold. I think here of the purgings committed by proponents of Marcus Garvey's Universal Negro Improvement Association, Elijah Muhammad's Nation of Islam, and H. Rap Brown's Student Non-Violent Coordinating Committee.<sup>37</sup> "We've all heard and felt," Touré observes, "the Blackness police among us judging and convicting and sentencing and verbally or mentally casting people out of the race for large and small offenses."<sup>38</sup>

Touré's response is to so broaden the boundaries of Blackness that no black person can properly be "convicted" of straying outside. In this post-Black era, Touré writes, "the number of ways of being Black is infinite. . . . [T]he possibilities for an authentic Black identity are boundless."<sup>39</sup> According to Touré, "Blackness is not a club you can be expelled from."<sup>40</sup>

There are several problems with this position. First, Touré himself does not fully believe in the unbounded conceptions of Blackness or post-Blackness that he sometimes seems to propound. "Our community," he writes, "is too diverse, complex, imaginative, dynamic, fluid, creative, and beautiful to impose restraints on Blackness."<sup>41</sup> To what, however, does he refer to when he says "our"? For "our" to have meaning it must have some boundary that separates "us" from "them." If post-Black opens the door to everything, does that mean that *anyone* can rightly be deemed "Black"? Just suppose Glenn Beck and Bill O'Reilly, as a joke, declared themselves to be Black. If there really are *no* restraints on Blackness, *no* boundaries distinguishing "Blacks" from "non-Blacks," then it follows that there would be no basis on which to deny their claim. That, in my view, would be unsatisfactory—an indication that the thinking in question is flawed.

Touré and his allies seek to escape fundamental aspects of any community and coordinated collective action: boundaries and discipline. What Professor Levinson's endlessly fascinating catalogue of disputations indicates, however, is that every community—be it a family, firm, tribe, denomination, or nation-state—necessarily has boundaries that distinguish members from non-members.<sup>42</sup>

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37. See Lawrence W. Levine, *Marcus Garvey and the Politics of Revitalization*, in *BLACK LEADERS OF THE TWENTIETH CENTURY* 105, 110 (John Hope Franklin & August Meier eds., 1982); Peter Goldman, *Malcolm X: Witness for the Prosecution*, in *BLACK LEADERS OF THE TWENTIETH CENTURY*, *supra* at 305, 307–08; David Levering Lewis, *Martin Luther King, Jr., and the Promise of Nonviolent Populism*, in *BLACK LEADERS OF THE TWENTIETH CENTURY*, *supra* at 277, 300.

38. TOURÉ, *supra* note 2, at 23.

39. *Id.* at 20.

40. *Id.* at 24.

41. *Id.* at 12.

42. Sanford Levinson, "Who Counts?" "Sez Who?", 58 ST. LOUIS U. L.J. 937, 938 (2014).

One could opt to end “Blackness” by eschewing racial categories. One could reject affiliations that are organized around racial identity. William Whipper (1804–1876) urged African-Americans to reject any racial labels that set them apart from other Americans.<sup>43</sup> At the national black convention of 1835, he proposed a resolution (that passed), which urged Negroes to abandon the use of the word “colored” or “African” when describing themselves.<sup>44</sup> Presumably, had he thought of it, Whipper would also have urged dispensing with “Black.” According to Whipper, “We have too long witnessed the baneful effects of distinctions founded in hatred and prejudice, to advocate the insertion of either the word ‘white’ or ‘colored.’”<sup>45</sup> He maintained that the label “oppressed Americans” was a better tool of self-perception and public presentation than any expressly racial label.<sup>46</sup>

Whipper’s tradition lives. One sees it in the efforts of Ward Connerly and others to scrap racial affirmative action, to do away with racial labels, and to stop collecting data categorized by race.<sup>47</sup>

Touré, however, does not affiliate himself with this tradition. He is a race man who lauds inter-racial openness as, among other things, a means of getting ahead. Hence, he praises “Black people who can make the leap to loving and trusting white people” because these African-Americans “have far more ability [than others] to climb the ladders of power.”<sup>48</sup>

Aware that some African-Americans will see in his belief an ugly ethic of racial brownnosing, Touré seeks a general truce whereby blacks forgo judging the racial politics of one another. But that aim is futile; judgment is inevitable. Touré claims to accept as equally “Black” all beliefs advanced by African-Americans.<sup>49</sup> But he himself does not really believe this. He insists repeatedly, for instance, that he is no “oreo”—an inauthentic Negro, black on the outside, but white on the inside.<sup>50</sup> In saying that he is not an “oreo,” however, Touré concedes that someone is. Despite occasional feints to the contrary, he does not repudiate the idea of the “oreo” per se; he simply maintains that *he* should not be seen as one.

*Improper* policing is indeed an evil to avoid. But policing, per se, is part of the unavoidable cost of maintaining a group. That is why all nations have criminal laws, including prohibitions against treason. To the extent that one wants to perpetuate black communities but eschew racial policing, one seeks a

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43. PATRICK RAE, BLACK IDENTITY & BLACK PROTEST IN THE ANTEBELLUM NORTH 108 (2002).

44. *Id.*

45. *Id.*

46. *Id.* at 109.

47. WARD CONNERLY, CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES (2000).

48. TOURÉ, *supra* note 2, at 178.

49. *Id.* at 12.

50. *Id.* at 97.

sociological impossibility. The erection of boundaries and the threat of expulsion are inescapable, albeit dangerous, aspects of any collective enterprise.

That danger becomes more evident when one moves from generality to the particularity of a named individual. Consider the case of Justice Clarence Thomas—the most vilified Black official in American history, a jurist whose very name has become synonymous with selling out.<sup>51</sup>

Is it right for Blacks to cast Thomas from their communion? Is it appropriate to indict him for betrayal? These questions have arisen on numerous occasions over the past several decades. In confronting them now, I conclude that I have erred in the past. Previously, I have criticized Thomas's performance as a jurist—his acceptance of, or contribution to, policies or decisions that unjustly harm racial minorities, gays and lesbians, and others tragically vulnerable to ingrained prejudices.<sup>52</sup> But I have also chastised those who sought to make him *persona non grata* in any gathering of Black folk. In 1998, for example, Judge A. Leon Higginbotham, Jr., petitioned the National Bar Association (the black analogue to the American Bar Association) to rescind an invitation for Thomas to speak that had been extended by one of its officials.<sup>53</sup> Judge Higginbotham argued that in light of the harm being done by Thomas to Black America, it was wrong to honor him with a platform that would further legitimate and amplify his opinions.<sup>54</sup> The NBA rejected Higginbotham's counsel and allowed Thomas to speak—a decision I defended at the time.<sup>55</sup> Alienated by the rhetoric of some of his detractors—for instance, publicly expressed wishes for his early death<sup>56</sup>—I joined those who maintained that granting a podium to Thomas would contribute to public understanding and perhaps elicit from him a more respectful attentiveness to opposing views. I also joined those who contended that it was wrong to question Thomas's racial bona fides.

I was a sap.

The notion that Clarence Thomas is seriously interested in debate is laughable. He seeks monologues, not dialogues. He seeks legitimacy-enhancing stages and props—preferably star-struck black children—not open forums that facilitate candid and informed exchange. Most importantly, Justice Thomas consistently votes in ways that are profoundly detrimental to the

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51. KENNEDY, *supra* note 7, at 87–88.

52. *Id.* at 139–43.

53. *Id.* at 128.

54. Clarence Page, *Extending an Olive Branch (with Pits) to Justice Thomas*, CHI. TRIB. (June 3, 1998), [http://articles.chicagotribune.com/1998-06-03/news/9806030003\\_1\\_national-bar-association-justice-thomas-thomas-conservative-views](http://articles.chicagotribune.com/1998-06-03/news/9806030003_1_national-bar-association-justice-thomas-thomas-conservative-views).

55. *See* KENNEDY, *supra* note 7, at 128–29.

56. *Id.* at 87.

interests of Black America. Professor Levinson rightly castigates the Supreme Court majority for “relentless[ly] assault[ing]” the Voting Rights Act of 1965.<sup>57</sup> Thomas is in the forefront of that assault, as well as others that target hard-won achievements of the Second Reconstruction and subsequent mobilizations. For that egregious wrongheadedness, Thomas ought to be penalized harshly. African-Americans en masse should put him outside of respectful affiliation with Black folk.

Many blacks reject the idea that an African-American can ever properly be dismissed from the race—“de-blackened” to use the memorable term coined by Professor Norwood.<sup>58</sup> How one stands on this matter depends on how one conceptualizes racial membership. Some view racial membership as an immutable status—you are born black and that is it. I do not. I view choice as an integral element of membership. In my view, a person (or at least an adult person) should be Black by choice, with a recognized right of resignation. Carrying through with that contractualist conception, I also believe that a Black should have no immunity from being de-Blackened. Any Negro should be subject to having his or her membership in Blackness revoked if he or she pursues a course of conduct that convincingly demonstrates the absence of even a minimal communal allegiance.

Touré declares, “Blackness is not a club you can be expelled from.”<sup>59</sup> But why should that be so? Religions impose excommunication. Nations revoke citizenship. Parents disown children. Why, as a matter of principle, should Blacks be disallowed from casting from their community those adjudged to be enemies of it? The power of expulsion is so weighty that prudence should demand extraordinary care in exercising it. Still, the power to exclude and expel is, and should be, part of what constitutes Black America.

Unlike the United States, Black America lacks mechanisms of sovereignty—courts, for example—that can provide centralized, authoritative, and enforceable judgments regarding membership. In Black America, only an amorphous public opinion adjudicates such matters, generating inconclusive results. Nonetheless, Black public opinion should and does exercise some control over Black America’s communal boundary, determining in the process a person’s standing as member, guest, or enemy.

Racial solidarity will always depend to some extent on self-appointed monitors of racial virtue. Touré himself is a monitor. His chiding of Black political correctness is itself a variant of Black political correctness. Those who want to maintain Black community while condemning the peer pressure that makes collective action possible must recognize that solidarity always poses a

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57. Levinson, *supra* note 42, at 952.

58. Norwood, *supra* note 36, at 147.

59. TOURÉ, *supra* note 2, at 24.

problem of tension between unity and freedom. Professor Levinson's Childress Lecture memorably reveals the ubiquity and insolubility of this dilemma.