

Citation: 29 Harv C.R.-C.L. L. Rev. 1994

Content downloaded/printed from HeinOnline (<http://heinonline.org>)  
Fri Jan 9 12:49:10 2009

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's  
Terms and Conditions of the license agreement available at:  
<http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline  
license, please use:

[https://www.copyright.com/ccc/basicSearch.do?operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=0017-8039](https://www.copyright.com/ccc/basicSearch.do?operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0017-8039)

# THE SOCIAL CONSTRUCTION OF RACE: SOME OBSERVATIONS ON ILLUSION, FABRICATION, AND CHOICE

Ian F. Haney López\*

Under the jurisprudence of slavery as it stood in 1806, one's status followed the maternal line. A person born to a slave woman was a slave, and a person born to a free woman was free. In that year, three generations of enslaved women sued for freedom in Virginia on the ground that they descended from a free maternal ancestor.<sup>1</sup> Yet, on the all-important issue of their descent, their faces and bodies provided the only evidence they or the owner who resisted their claims could bring before the court.

The appellees . . . asserted this right [to be free] as having been descended, in the maternal line, from a free Indian woman; but their genealogy was very imperfectly stated . . . . [T]he youngest . . . [had] the characteristic features, the complexion, the hair and eyes . . . the same with those of whites . . . . Hannah, [the mother] had long black hair, was of the right Indian copper colour, and was generally called an Indian by the neighbours . . . .<sup>2</sup>

Because grandmother, mother, and daughter could not prove they had a free maternal ancestor, nor could Hudgins show their descent from a female slave, the side charged with the burden of proof would lose.

---

\* Assistant Professor, University of Wisconsin Law School. B.A., M.A., Washington University, 1986; M.P.A., Princeton University, 1990; J.D., Harvard University, 1991. *Mil gracias* to Terrence Haney, Maria López de Haney, Deborah Drickersen Cortez, Rey Rodríguez, Juan Zúñiga, Marla Grossman, Richard Ford, Jayne Lee, Leon Trakman, Michael Morgalla, Ricardo Soto, and the participants at the Fifth Annual Critical Race Theory Workshop, in particular John Calmore, Jerome Culp, and Richard Delgado. *Dedico este ensayo a mi hermano, Garth Mark Haney.*

<sup>1</sup> *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134 (Sup. Ct. App. 1806), excerpted in PAUL FINKELMAN, *THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK* 22-24 (1986). Finkelman gives the following background to the case:

*Hudgins v. Wright* . . . involved alleged slaves of mixed ancestry. The heritage of the Wright family was predominantly Indian but also included Europeans and perhaps Africans. Hudgins planned to remove these slaves from Virginia when they sued for freedom before Chancellor George Wythe of the Richmond District Court of Chancery . . . . [Wythe] examined them and could find no visible Negro features in them. Thus, he felt they were presumptively free, and it was up to Hudgins to overcome this presumption, by proving that one of their female ancestors had been a slave. This Hudgins failed to do.

*Id.* at 22. In the case at hand, Hudgins appeals Wythe's decision to free the Wrights.

<sup>2</sup> *Hudgins*, 11 Va. (1 Hen. & M.) at 134.

Allocating that burden required the court to assign the plaintiffs a race. Under Virginia law, Blacks were presumably slaves and thus bore the burden of proving a free ancestor; Whites and Indians were presumably free and thus the burden of proving their descent fell on those alleging slave status. In order to determine whether the Wrights were Black and presumptively slaves or Indian and presumptively free, the court, in the person of Judge Tucker, devised a racial test:

Nature has stampt upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour either disappears or becomes doubtful; a flat nose and woolly head of hair. The latter of these disappears the last of all; and so strong an ingredient in the African constitution is this latter character, that it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or Indians . . . . So pointed is this distinction between the natives of Africa and the aborigines of America, that a man might as easily mistake the glossy, jetty clothing of an American bear for the wool of a black sheep, as the hair of an American Indian for that of an African, or the descendant of an African. Upon these distinctions as connected with our laws, the burden of proof depends.<sup>3</sup>

The fate of the women rode upon the complexion of their face, the texture of their hair, and the width of their nose. Each of these characteristics served to mark their race, and their race in the end determined whether they were free or enslaved. The court decided for freedom:

[T]he witnesses concur in assigning to the hair of Hannah . . . the long, straight, black hair of the native aborigines of this country . . . .

. . .  
[Verdict] pronouncing the appellees absolutely free . . . .<sup>4</sup>

After unknown lives lost in slavery, Judge Tucker freed three generations of women because Hannah's hair was long and straight.

---

<sup>3</sup> *Id.* at 139–40.

<sup>4</sup> *Id.* at 140–41.

## I. Introduction: The Confounding Problem of Race

I begin this Article with *Hudgins v. Wright* in part to emphasize the power of race in our society.<sup>5</sup> Human fate still rides upon ancestry and appearance. The characteristics of our hair, complexion, and facial features still influence whether we are figuratively free or enslaved. Race dominates our personal lives. It manifests itself in our speech, dance, neighbors, and friends—"our very ways of talking, walking, eating and dreaming are ineluctably shaped by notions of race."<sup>6</sup> Race determines our economic prospects. The race-conscious market screens and selects us for manual jobs and professional careers, red-lines financing for real estate, green-lines our access to insurance, and even raises the price of that car we need to buy.<sup>7</sup> Race permeates our politics. It alters electoral boundaries, shapes the disbursement of local, state, and federal funds, fuels the creation and collapse of political alliances, and twists the conduct of law enforcement.<sup>8</sup> In short, race mediates every aspect of our lives.

I also begin with *Hudgins v. Wright* in order to emphasize the role of law in reifying racial identities. By embalming in the form of legal presumptions and evidentiary burdens the prejudices society attached to vestiges of African ancestry, *Hudgins* demonstrates that the law serves not only to reflect but to solidify social prejudice, making law a prime instrument in the construction and reinforcement of racial subordination. Judges and legislators, in their role as arbiters and violent creators of the social order,<sup>9</sup> continue to concentrate and magnify the power of race in the field

---

<sup>5</sup> In this Article, I seek to avoid the voice from nowhere by often using inclusive pronouns like "our" and "we." Doing so creates some confusion because these terms could conceivably implicate many groups, not least Latinos, people of color, members of American society, the social elite, legal scholars, and so on. The reader must decide for herself whom the term in fact includes (though sometimes I make it clear in a footnote). Yet, I do not apologize for any resultant confusion, since the confusion serves a heuristic purpose: the anxiety induced by the indeterminacy of words like "we" and "our" demonstrates the complexity of socially mediated identities. This last is something I stress in writing about race. Cf. RENATO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* 183-84 (1989) (arguing that a "shifting use of pronouns" allows an author to indicate the "complexity of his identifications" and in turn forces new styles of reading.) Rosaldo writes, "[t]he attempts of a renewed social analysis to grasp the interplay of culture and power require not only experimentation in writing but also changes in the norms for reading. To maintain older habits of reading is willy-nilly to assimilate new forms of social analysis to the classic period's conventional wisdom." *Id.*

<sup>6</sup> MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1980s* 63 (1986).

<sup>7</sup> See Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

<sup>8</sup> See, e.g., *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988). The racialization of law enforcement has had devastating consequences for minority communities. See, e.g., *Understanding the Riots—Six Months Later*, L.A. TIMES, Nov. 16-19, 1992 (four-part series detailing aftermath of the verdict in the beating of Rodney King).

<sup>9</sup> I say "violent creators" to emphasize the coercive character of law and lawmaking.

of law. Race suffuses all bodies of law, not only obvious ones like civil rights,<sup>10</sup> immigration law,<sup>11</sup> and federal Indian law,<sup>12</sup> but also property law,<sup>13</sup> contracts law,<sup>14</sup> criminal law,<sup>15</sup> federal courts,<sup>16</sup> family law,<sup>17</sup> and even "the purest of corporate law questions within the most unquestionably Anglo scholarly paradigm."<sup>18</sup> I assert that no body of law exists untainted by the powerful astringent of race in our society.

In largest part, however, I begin with *Hudgins v. Wright* because the case provides an empirical definition of race. *Hudgins* tells us one is

Law as a locus of violence has received scant scholarly attention in the legal field, although an impressive exception lies in Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). Nevertheless, even Cover's work falls short in focusing on the application of force to individual persons (e.g., prisoners) rather than to peoples (e.g., Native Americans). Law's central role in social warfare is indisputable to any who take seriously the experience of minorities in the United States. See, e.g., Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986).

<sup>10</sup> Among others, Derrick Bell has written extensively on race and civil rights. See, e.g., DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (2d ed. 1980).

<sup>11</sup> Consider as one example of the racially charged nature of immigration law the effect of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 42 U.S.C. 7, 8, 18, 29) [hereinafter IRCA]. The Government Accounting Office (GAO) estimates that since 1986, as a result of IRCA, which mandates sanctions against employers of undocumented workers, 891,000 employers nationwide began discriminating against U.S. citizens who appear or are foreign-born, among whom Latinos and Asians number disproportionately. The GAO concluded that after the passage of IRCA "there was widespread discrimination. But was there discrimination as a result of IRCA? That is the key question Congress directed GAO to answer. GAO's answer is yes." UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESS: IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION, EXECUTIVE SUMMARY 3 (Mar. 1990).

<sup>12</sup> See, e.g., Strickland, *supra* note 9; Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

<sup>13</sup> See, e.g., Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1521-26 (1991).

<sup>14</sup> See, e.g., PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

<sup>15</sup> See, e.g., Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); *Developments in the Law, supra* note 8.

<sup>16</sup> See, e.g., Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

<sup>17</sup> See, e.g., Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PENN. L. REV. 1163 (1991); Twila Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51 (1990-91).

<sup>18</sup> Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 729 (citing Baeza, *Telecommunications Reregulation and Deregulation: The Impact on Opportunities for Minorities*, 2 HARV. BLACKLETTER J. 7 (1985)).

Black if one has a single African antecedent, or if one has a "flat nose" or a "woolly head of hair." I begin here because in the last two centuries our conception of race has not progressed much beyond the primitive view advanced by Judge Tucker.

Despite the pervasive influence of race in our lives and in U.S. law, a review of opinions and articles by judges and legal academics reveals a startling fact: few seem to know what race is and is not. Today most judges and scholars accept the common wisdom concerning race, without pausing to examine the fallacies and fictions on which ideas of race depend. In U.S. society, "a kind of 'racial etiquette' exists, a set of interpretive codes and racial meanings which operate in the interactions of daily life . . . . Race becomes 'common sense'—a way of comprehending, explaining and acting in the world."<sup>19</sup> This social etiquette of common ignorance is readily apparent in the legal discourse of race. Rehnquist-Court Justices take this approach, speaking disingenuously of the peril posed by racial remediation to "a society where race is irrelevant," while nevertheless failing to offer an account of race that would bear the weight of their cynical assertions.<sup>20</sup> Arguably, critical race theorists, those legal scholars whose work seems most closely bound together by their emphasis on the centrality of race, follow the same approach when they powerfully decry the permanence of racism and persuasively argue for race consciousness, yet do so without explicitly suggesting what race might be.<sup>21</sup> Race may be America's single most confounding prob-

---

<sup>19</sup> OMI & WINANT, *supra* note 6, at 62. For an extended discussion of "common sense" in the construction of racial identities, see Stuart Alan Clarke, *Fear of a Black Planet: Race, Identity Politics, and Common Sense*, 21 SOCIALIST REV. No. 3-4, 37 (1991).

<sup>20</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989). For a critique of Justice O'Connor's decision in *Croson*, see Patricia J. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989). Neil Gotanda undertakes an extensive review of the different conceptions of race employed by the Supreme Court, arguing that the Court's consistent misapprehension of race "fosters white racial domination." Neil Gotanda, *A Critique of 'Our Constitution is Color-blind'*, 44 STAN. L. REV. 1, 2 (1991). Similarly, some scholars believe that the Supreme Court's construction of race is not accident, but design undertaken to legitimate racial inequality and domination. See Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1393 (1991).

<sup>21</sup> See, e.g., BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 10. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758. To be clear, the approach of the critical race theorists resembles that of the Supreme Court only to the extent that both sets of their writings lack explicit definitions or investigations into the nature of race. Most critical race theory articles do not subscribe, as the Supreme Court seems to, to a vision of biologically determined races, but instead implicitly view race as a social product. John Calmore suggests that "[c]ritical race theory begins with a recognition that 'race' is not a fixed term. Instead, 'race' is a fluctuating, decentered complex of social meanings that are formed and transformed under the constant pressures of political struggle." John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992). Neil Gotanda's *A Critique of 'Our Constitution is Color-Blind'*, *supra* note 20, directly critiques

lem, but the confounding problem of race is that few people seem to know what race is.

Adopting an interdisciplinary/dedisciplinizing approach,<sup>22</sup> the first half of this essay critiques existing theories of race from venues into which legal scholars rarely venture, namely biology, sociology, and literature. The last half of this essay advances a new theory of race as a social complex of meanings we continually replicate in our daily lives.

Part II of this Article considers and rejects the most widely accepted understanding of race, which I term "biological race." By "biological race," I mean the view of race espoused by Judge Tucker, and still popular today, that there exist natural, physical divisions among humans that are hereditary, reflected in morphology, and roughly but correctly captured by terms like Black, White, and Asian (or Negroid, Caucasoid, and Mongoloid). Under this view, one's ancestors and epidermis ineluctably determine membership in a genetically defined racial group. The connection between human physiognomy and racial status is concrete; in Judge Tucker's words, every individual's race has been "stamp'd" by nature.<sup>23</sup> Part II explains that despite the prevalent belief in biological races, overwhelming evidence proves that race is not biological. Biological races like Negroid and Caucasoid simply do not exist.<sup>24</sup> Finally, Part II introduces the argument, newly popular among several scholars, that races are wholly illusory, whether as a biological or social concept.<sup>25</sup> Under this thinking, if there is no natural link between faces and races, then no connection exists.<sup>26</sup>

---

the various paradigms of race employed by the Supreme Court, but stops short of explicitly articulating a theory of race. For an annotated bibliography of critical race theory writings, see Richard Delgado and Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

<sup>22</sup> Cornel West, *Minority Discourse and the Pitfalls of Canon Formation*, 1 YALE J. CRITICISM 193, 200 (1987) ("The key here is not mere interdisciplinary work that traverses existing boundaries of disciplines but rather the more demanding efforts of pursuing dedisciplinizing modes of knowing that call into question the very boundaries of the disciplines themselves.").

<sup>23</sup> See *supra* note 3 and accompanying text. Note that a belief in biological races does not necessarily entail the racist conviction that some supposed races are inferior or superior. Nevertheless, as *Hudgins v. Wright* demonstrates, assertions of biologically distinct races often go hand in hand with such beliefs.

<sup>24</sup> Masatoshi Nei & Arun K. Roychoudhury, *Genetic Relationship and Evolution of Human Races*, in 14 EVOLUTIONARY BIOLOGY 1, 11 (1982).

<sup>25</sup> See, e.g., Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race* [hereinafter *Illusion*], in "RACE," WRITING, AND DIFFERENCE (Henry Louis Gates, Jr., ed., 1986) [hereinafter RACE].

<sup>26</sup> This repudiation of all notions of race can be understood as something of an over-reaction to the recognition of the falsity of biological race. "[T]here is a continuous temptation to think of race as an *essence*, as something fixed, concrete and objective . . . . And there is also an opposite temptation: to see it as a mere illusion, which an ideal social order would eliminate." OMI & WINANT, *supra* note 6, at 68.

Under the rubric of "social race," Part III criticizes the ethnicity, nationalist, and colonialist theories of race. All three theories repudiate the idea that race is a fixed essence and instead locate races within the cartography of other social constructions. These theories fall short of providing a comprehensive or sophisticated understanding of race because they each treat race as a facet of some larger social phenomenon whether that be ethnic identity, cultural struggle, or the dynamics of colonialist conquest and resistance. This section critiques these theories in order to elaborate on a theory of racial formation or, as I call it, racial fabrication. "Racial formation" refers to the process by which the social systems of meaning we know as race accrue to features and ancestry.<sup>27</sup>

In this Article, I define a "race" as a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry. I argue that race must be understood as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics. In other words, social meanings connect our faces to our souls. Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions. As used in this Article, the referents of terms like Black, White, Asian, and Latino are social groups, not genetically distinct branches of humankind.<sup>28</sup>

In Part IV, I expand upon the proffered definition of race by examining the deployment of race in our daily lives. Despite the role of history—that is, despite the actions and reactions of the preceding generations—race remains common sense today only to the extent we continue to invest our morphology with racial meaning.<sup>29</sup> The divisions we commonly discuss as Black, White, and so forth are relatively recent

---

<sup>27</sup> See OMI & WINANT, *supra* note 6, at 4 ("Our theory of *racial formation* emphasizes the social nature of race, the absence of any essential racial characteristics, the historical flexibility of racial meanings and categories, the conflictual character of race at both the 'micro-' and 'macro-social' levels, and the irreducible political aspect of racial dynamics.")

<sup>28</sup> Naming is a central human activity carrying with it powerful social meanings, among them connotations of inclusion or exclusion. Recently the custom has been to append the term "American" to the names of minority groups, for example as in "Asian-American," with the assertion that this signifies inclusion. However, my own sense is that the imperative to suffix "American" onto every minority's identity only adds to the sense of exclusion by generating an impression of domesticated foreignness. Because of its prevalence, I sometimes conform to this convention but often in this Article I do not. I will often refer here to minorities by names unencumbered by the word "American" because I believe the Americanness of people of color is, or should be, so evident as to need no explicit testimonial.

<sup>29</sup> See Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 95, 96 (1990).

inventions, dating back in their current incarnations no more than a couple of hundred years. These divisions remain subject to constant contestation and revision, with their continued existence dependent on our acquiescence and participation today and tomorrow. This section deconstructs the micromechanics of race, the way race shapes and is in turn shaped by individual lives. It does so in terms of chance, context, and choice, or roughly, appearance and ancestry, social setting, and personal action. I argue that to a limited but largely unrecognized extent we as individuals and communities choose our races.

Part V brings this Article full circle by examining the connection between race and personal identity. Racial groupings in our society have been built upon and in turn have built up the edifices of cultural groups, establishing a close, even inseparable, relationship between races and communities. As collections of individuals who share a common culture and a similar world-view, these communities provide the crucial bridge between race and identity.<sup>30</sup> In contact across the medium of communities, race and identity overlap and influence each other; each is both product and producer of the other. This last section completes the racial fabrication thesis by arguing for a connection not only between our face and our race, but for a link, however tenuous and at times obliterated, between our race and our soul.

Three brief points remain before I turn to the body of the Article. First, I write with progressive scholars in mind, particularly those who, in the words of Mari Matsuda, "are attempting to develop a jurisprudence that accounts for the role of racism in American law and that works toward the elimination of racism as part of a larger goal of eliminating all forms of subordination."<sup>31</sup> I believe that Matsuda's broad-based anti-subordination jurisprudence is not only desirable but necessary. Because race exists as an integral, structural component of social reality and human relations, racial remediation is impossible except in the company of wide-ranging social reform and human advancement. Those who challenge any pernicious social hierarchy, such as that of race, must also dedicate themselves to eliminating others, for instance those of gender, class, and sexual identity. Note that in writing for progressive scholars, I include Whites. I explicitly encourage Whites to critically attend to racial constructs. It is not only people of color who find their identities mediated by race, or who are implicated in the building and maintenance of racial constructs. White identity is just as much a racial fabrication, and Whites

---

<sup>30</sup> For a more thorough discussion of communities and races, see Ian Haney López, *Community Ties and Law School Faculty Hiring: The Case for Professors Who Don't Think White*, in *BEYOND A DREAM DEFERRED: MULTICULTURAL EDUCATION AND THE POLITICS OF EXCELLENCE* 100 (Becky W. Thompson & Sangeeta Tyagi eds., 1993).

<sup>31</sup> Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *YALE L.J.* 1329, 1331 n.7 (1991).

are equally, or even more highly, implicated in preserving the racially constructed status quo. Thus, Whites belong among those most deeply dedicated to fathoming the intricacies of race.

As a second caveat, I believe that one's race may heavily influence one's understanding of races, and similarly, I suspect that the reader's racial identity may affect the reception accorded this Article. More likely than not those whose identity is most often and most deeply conceived of in biologically racial terms—Blacks more than Latinos and Asians, and these more than Whites—will most strenuously object to the arguments that races exist only as a social, not a biological, reality.<sup>32</sup> It seems safe to say that African Americans constitute the group most rigorously defined along putatively biological lines, both externally through the powerful racial ideologies of our society, and internally via the advancement of a positive self-image tied to physical difference and ancestry.<sup>33</sup> Latinos and Asians, by comparison, reside in the United States with community identities not tied exclusively or even predominantly to a racial identity.<sup>34</sup> To generalize further, among Whites, with the obvious exception of racial supremacists, community identity is rarely conceptualized in racial terms. Because of the different potency morphology and ancestry possess for the various races, I suspect the arguments presented here are likely to encounter more resistance among Blacks than among Latinos and Asians. I also suspect that Whites will largely object not to the notion that they do not exist as a biological race, but to the notion that they are members of a social race.

---

<sup>32</sup>For a similar observation, see Anthony Appiah, *Are We Ethnic? The Theory and Practice of American Pluralism*, 20 BLACK AM. LIT. F. 209 (1986).

<sup>33</sup>Perhaps one illustration of the relative importance of ancestry and morphology among Blacks as compared to other people of color can be found in the differential rates at which children of mixed minority-White parentage are identified by their parents to census takers as being the same race as the minority parent. In the 1980 census, 66% of the children born to one Black and one White parent were listed as Black; only 35% of the children born to Asian and White couples were listed as Asian. Diane Crispell, *Interracial Children Pose Challenge for Classifiers*, WALL ST. J., Jan. 27, 1993, at B1. Interestingly, the figure for children born to Native American and White parents was 56%, suggesting not unconvincingly that race among Native Americans is more salient than among Asians though less pertinent than among African Americans. *See id.* No figures were given for Latinos, for whom the very issue of racial classification has traditionally raised vexing issues for the census takers. *See, e.g.*, U.S. BUREAU OF THE CENSUS, CONSISTENCY OF REPORTING OF ETHNIC ORIGIN IN THE CURRENT POPULATION SURVEY, TECHNICAL PAPER No. 31 (1974); Sharon M. Lee, *Racial Classifications in the U.S. Census: 1890-1990*, 16 ETHNIC & RACIAL STUD. 75 (1993). *See also* David Hayes-Bautista & Jorge Chapa, *Latino Terminology: Conceptual Bases for Standardized Terminology*, 77 AM. J. PUB. HEALTH 61 (1987).

<sup>34</sup>For example, among Latinos in Los Angeles, familial ties, ethnicity, religious affiliation, and Spanish-language ability all rank above race in the construction of social identity. DAVID HAYES-BAUTISTA, AIDA HURTADO, R. BURCIAGA VALDEZ, & ANTHONY HERNÁNDEZ, NO LONGER A MINORITY: LATINOS AND SOCIAL POLICY IN CALIFORNIA 34-35 (1992).

In this context, a last issue needs to be addressed: the epistemological significance of my own race and biography. I write as a Latino. The arguments I present no doubt reflect the less pronounced role physical features and ancestry play for my community as opposed to for Blacks, the group most often considered in the elaboration of racial theories.<sup>35</sup> Perhaps more importantly, I write from a perspective influenced by a unique biography. My older brother, Garth, and I are the only children of a fourth-generation Irish father, Terrence Eugene Haney, and a Salvadoran immigrant mother, Maria Daisy López de Haney. Sharing a similar morphology, Garth and I both have light but not white skin, dark brown hair and dark brown eyes. We were raised in Hawaii, far from either my father's roots in Spokane, Washington, or my mother's family in San Salvador, El Salvador. Interestingly, Garth and I conceive of ourselves in different racial terms. For the most part, he considers his race transparent, something of a non-issue in the way Whites do, and he relates most easily with the Anglo side of the family.<sup>36</sup> I, on the other hand, consider myself Latino and am in greatest contact with my maternal family. Perhaps presciently, my parents gave Garth my paternal grandfather's name, Mark, for a middle name, thus christening him Garth Mark Haney. They gave me my maternal father's name, Fidencio. Affiliating with the Latino side of the family, in my first year of graduate school I followed Latino custom by appending my mother's family name to my own, rendering my name Ian Fidencio Haney López.<sup>37</sup> No doubt influencing the theories of race I outline and subscribe to, in my experience race reveals itself as plastic, inconstant, and to some extent volitional. That is the thesis of this Article.

## II. Biological Race and Racial Illusions

Some of the most insightful and provocative analyses of race appear in literary criticism.<sup>38</sup> One critic who stands out is Anthony Appiah.<sup>39</sup> In

---

<sup>35</sup> I believe that the participation of scholars neither Black nor White in the debates on race will add new, productive dimensions to the discourse. Cf. Elizabeth Martínez, *Beyond Black/White: The Racisms of Our Time*, 20 *SOCIAL JUSTICE* 22 (1993) (urging that the study of racism move beyond a simple focus on "a single Black-white model").

<sup>36</sup> This is not to say that Garth considers himself White, but rather that he does not often think of himself in racial terms. I associate the lack of a self-consciously held racial identity with Whites. Garth's conception of himself as a racial minority may be increasing given his recent brushes with racism in an all-White work environment.

<sup>37</sup> For a discussion of this tradition in the context of U.S. custom and law, see Yvonne M. Chereña Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 *THURGOOD MARSHALL L. REV.* 1 (1992).

<sup>38</sup> See, e.g., the essays compiled in *RACE*, *supra* note 25.

<sup>39</sup> Appiah is professor of African American studies at Harvard University, with a background in philosophy. Nevertheless, I describe him here as a literary critic because the two articles of his on which I focus both fall within this genre, as evidenced by the

*The Uncompleted Argument: Du Bois and the Illusion of Race*,<sup>40</sup> Appiah agrees with Du Bois' argument that "we ought to speak of civilizations where we now speak of races," but suggests that Du Bois himself never managed fully to make the transition away from reductive notions of race.<sup>41</sup> In the process, Appiah powerfully repudiates the argument that races are biologically defined. He does so by bringing into the humanities the current scientific thought on the existence of races, providing his readers with an abbreviated discussion of *The Genetic Relationship and Evolution of Human Races*, by biologists Masatoshi Nei and Arun Roychoudhury.<sup>42</sup> Because the belief that races are biological is so prevalent and powerful as to seem both common sense and good science, it is necessary to review the evidence discrediting any biological foundation for races before discussing the total repudiation of race by Appiah and other scholars. These scientific falsehoods are worth exposing not only for general heuristic reasons but also because they easily take on legal form.<sup>43</sup> After showing that races do not have a biological basis, I will return to the thesis newly advanced by Appiah and others that races are wholly illusory.

### A. Biological Race

There are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites.<sup>44</sup> One's race is not determined by a single gene or gene cluster, as is, for example, sickle cell anemia. Nor are races marked by important differences in gene frequencies, the rates of appearance of certain gene types. The data compiled by various scientists demonstrates, contrary to popular opinion, that intra-group differences

---

sources of their publication. See Anthony Appiah, *Illusion*, *supra* note 25, in RACE, *supra* note 25; Anthony Appiah, *The Conservation of 'Race'*, 23 BLACK. AM. LIT. F. 37 (1989) [hereinafter *Conservation*]. I do not, however, attach any particular significance to the label "literary critic," except insofar as it connotes someone who takes seriously the exegesis of texts. Instead, to my mind, the intellectual mobility of Appiah is a hopeful harbinger of the impending demise of artificial but nonetheless solid disciplinary walls.

<sup>40</sup> *Illusion*, *supra* note 25.

<sup>41</sup> *Id.* at 35, 36.

<sup>42</sup> Nei & Roychoudhury, *supra* note 24. For Appiah's remarks on Nei & Roychoudhury, see *Illusion*, *supra* note 25 at 30-31.

<sup>43</sup> See, e.g., Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421 (1988) (documenting reliance by courts and legislatures on science to justify anti-miscegenation statute); see also *infra* note 132 and accompanying text (discussing the role of eugenics theory in immigration law).

<sup>44</sup> See generally L. KAMIN, R. LEWONTIN, & STEPHEN ROSE, NOT IN OUR GENES: BIOLOGY, IDEOLOGY, AND HUMAN NATURE (1984); Alan Almquist & John Cronin, *Fact, Fancy and Myth on Human Evolution*, 29 CURRENT ANTHROPOLOGY 520 (1988); and Bruce Bower, *Race Falls from Grace*, 140 SCI. NEWS 380 (1991).

exceed inter-group differences.<sup>45</sup> That is, greater genetic variation exists *within* the populations typically labeled Black and White than *between* these populations.<sup>46</sup> This finding refutes the supposition that racial divisions reflect fundamental genetic differences.

Notice this does not mean that individuals are genetically indistinguishable from each other, or even that small population groups cannot be genetically differentiated. Small populations, for example the Xhosa or the Basques, share similar gene frequencies. However, differentiation is a function of separation, usually geographic, and occurs in gradations rather than across fractures.<sup>47</sup> For this reason, there exists greater genetic distance between the Spaniard and the Swede than between the Spaniard and the North African. Genetic differences correlate to geography, not to notions of race. There are no sharp divisions between, for example, Blacks, Whites, and Asians, but only gradually shifting differences as one moves up the African continent and across the Eurasian land mass.<sup>48</sup> Thus,

---

<sup>45</sup> See Nei & Roychoudhury, *supra* note 24, at 11. Biogeneticists Nei and Roychoudhury explain: "It is of interest to see that the interracial genic variation (genetic distance) relative to the intraracial genic variation (average heterozygosity) is quite small. Namely, the genetic distance between Caucasoid and Negroid relative to the average heterozygosity for these two major races is 0.19 for protein loci (62 common loci) and 0.15 for blood group loci (23 common loci) . . . [T]he proportion of genic variation attributable to racial differences is only about 9-11%." *Id.*

<sup>46</sup> Nei and Roychoudhury are not the first to recognize the small proportion of genetic difference attributable to race. Richard Lewontin reached similar conclusions in 1972. See Richard C. Lewontin, *The Apportionment of Human Diversity*, 6 *EVOLUTIONARY BIOLOGY* 381, 397 (1972). See generally L.L. Cavalli-Sforza, *The Genetics of Human Populations*, 231 *SCI. AM.* 80 (Sept. 1974). Lewontin argued that biologists should abandon all talk of biological races. "Since such racial classification is now seen to be of virtually no genetic or taxonomic significance . . . no justification can be offered for its continuance." Lewontin, *supra* note 46, at 397. Nei and Roychoudhury agree that talk of biological races should be abandoned, but point out that there remain statistically significant differences between smaller population groups that justify the continued scientific division of humans by gene type. Nei & Roychoudhury, *supra* note 24, at 41.

<sup>47</sup>

The key prerequisite for differentiation of any animal population into races is some kind of separation of groups that prevents interbreeding. In man's development separation must have been achieved mainly by geography . . . Geographic distance favors local differentiation even where there are no major barriers to movement. Unless there are strict barriers of some kind, however, the differences are not sharp but gradual, continuous rather than discontinuous. This kind of gradation is characteristic of most human racial differentiation.

Cavalli-Sforza, *supra* note 46, at 87.

<sup>48</sup> In *Human Races*, Nei and Roychoudhury present their findings in dendrograms, horizontal branching trees that compare genetic variation among populations. The "Dendrogram for representative human populations of the world" demonstrates the gradual gene frequency shifts as one moves through the following groups: Lapp, English, Italian, Iranian, Northern Indian, Malay, Chinese, Japanese, Polynesian, Micronesian, South Amerind (American Indian), Eskimo, Alaskan Indian, Australian Aborigine, Papuan, Nigerian, Bantu, and Bushman (Khoi). Nei & Roychoudhury, *supra* note 24, at 38.

it may be that with a few cells in a petri dish, genetic testing could determine with significant accuracy which cells belong to someone Xhosa, someone Hmong, and someone Basque. Nevertheless, this would not be tantamount to the differentiation between a Black, an Asian, and a White. The experiment might accomplish the assignment of cells to a small population on the basis of genetics, but the assignment of that small population to a race would be done on the basis of social convention. The recognition that small populations possess unique genetic structures does not lend any evidence to support the argument that the vast populations commonly divided into Black, White, Red, Brown, and Yellow are genetically distinguishable.

The notion that humankind can be divided along White, Black, and Yellow lines reveals the social rather than the scientific origin of race. The idea that there exist three races, and that these races are "Caucasoid," "Negroid," and "Mongoloid," is rooted in the European imagination of the Middle Ages, which encompassed only Europe, Africa, and the Near East. This view, reflected in medieval art,<sup>49</sup> found its clearest modern expression in Count Arthur de Gobineau's *Essay on the Inequality of Races*, published in France in 1853–55.<sup>50</sup> The peoples of the American

---

Unfortunately, in presenting their evidence Nei and Roychoudhury seem to reinscribe racial hierarchies. They present nine separate dendrograms. Because the dendrogram is horizontal, the compared populations appear listed vertically at the ends of the branches. Of the nine dendrograms, eight roughly but unquestionably list the different populations in a literal hierarchy ranging downward from the most fair-skinned groups. For example, the hierarchy of African populations places Italians at the top of the tree, "as a reference population," and then starts down: North African, Beja, Sandawe, Bantu, Yoruba, Dama, Pygmy, Bushman, and Hottentot. *Id.* at 22. At the top are the Italians, followed by the North Africans, who are "Caucasoids," *id.* at 18, below them are the Beja, who "seem to have had gene admixture with eastern Mediterranean Caucasoids," *id.* at 19. Skipping the Sandawe, the next major group includes the Bantu, Yoruba, and Dama. The Bantu "are morphologically similar to the Yoruba;" the Yoruba "are classic Negroes"; and the Dama are similar to the Bantu and Yoruba. *Id.* Finally, the hierarchy reaches the pygmies (who call themselves Babinga), the Bushman (San), and the Hottentot (Khoi), all of whom are "short-statured" or "middle-sized." *Id.* This ordering is not dictated by geographic proximity, nor does it reflect a simple North-South bias. While the North African and Beja populations are from the North, the Sandawe from Tanzania are ranked above the Yoruba from Nigeria, and the Bantu and the Dama from South Africa are listed above the Babinga of Central Africa and the Khoi and San of Namibia. Nor is the ranking dictated by genetic closeness. Because a dendrogram measures genetic distance among populations, there is little scientific advantage to start with any one particular group. For examples of dendrograms that do not reflect racial hierarchies, see Cavalli-Sforza, *supra* note 46, at 87. Nei and Roychoudhury install Italians at the apex and arrange the ranking of African populations so that the fairest-skinned groups are at the top, and the "classic" African populations below, but still above—literally and figuratively—the shorter Babingas, San, and Khoi. Nei and Roychoudhury reflexively fall into the comfortable habit of White supremacy in science.

<sup>49</sup> See, e.g., Cavalli-Sforza, *supra* note 46, at 80–81 (reprinting Hieronymus Bosch painting depicting the "three wise men from the east" in the New Testament story as the rulers of the "three divisions of mankind: the Asians, the Africans, and the Europeans").

<sup>50</sup> THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* 342–47 (1975).

continents, the Indian subcontinent, East Asia, Southeast Asia, and Oceania—living outside the imagination of Europe and Count Gobineau—are excluded from the three major races for social and political reasons, not for scientific ones.<sup>51</sup> Nevertheless, the history of science has long been the history of failed efforts to justify these social beliefs.<sup>52</sup> Along the way, various minds tried to fashion practical human typologies along the following physical axes: skin color, hair texture, facial angle, jaw size; cranial capacity, brain mass, frontal lobe mass, brain surface fissures and convolutions, and even body lice.<sup>53</sup> As one scholar notes, “[t]he nineteenth century was a period of exhaustive and—as it turned out—futile search for criteria to define and describe race differences.”<sup>54</sup>

To appreciate the difficulties of constructing races solely by reference to physical characteristics, consider the attempt to define race by skin color. On the basis of white skin, for example, one can define a race that includes most of the peoples of Western Europe. However, this grouping is threatened by the subtle gradations of skin color as one moves south or east, and becomes untenable when the fair-skinned peoples of Northern China and Japan are considered. In 1922, in *Ozawa v. United States*,<sup>55</sup> the Supreme Court nicely explained this point. When Japanese-born Takao Ozawa applied for citizenship he asserted, as required by the Naturaliza-

---

<sup>51</sup> Unfortunately, Nei and Roychoudhury persist in using the term “race” in ways that demonstrate their continued reflexive belief in the existence of the biological races they set out to debunk. Though they claim to “use the words race and population interchangeably without any social implication,” Nei & Roychoudhury, *supra* note 24, at 4, in fact they tend to use “race” only when discussing large groups popularly considered races, and rarely when discussing smaller groups not popularly considered races. Thus, Nei and Roychoudhury talk of “the three major races: Caucasoid, Negroid, and Mongoloid,” but of “six European populations (Lapps, Finns, English, Germans, Italians, and Basques).” *Id.* at 13–14. Nei and Roychoudhury’s repeated reference to the “three major races of man” painfully reveals the lingering influence of social notions of race in science.

<sup>52</sup> See generally STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (1981); WILLIAM STANTON, *THE LEOPARD’S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA 1815–59* (1960); NANCY STEPAN, *THE IDEA OF RACE IN SCIENCE: GREAT BRITAIN, 1800–1960* (1982).

<sup>53</sup> GOSSETT, *supra* note 50, at 65–83. Charles Darwin proposed several of these axes, arguing at one point that “[w]ith civilized nations, the reduced size of the jaws from lessened use, the habitual play of different muscles serving to express different emotions, and the increased size of the brain from greater intellectual activity, have together produced a considerable effect on their general appearance in comparison with savages.” *Id.* at 78 (quoted without attribution to a specific source). Darwin also supposed that the body lice of some races could not live on the bodies of members of other races, thus prompting him to suggest that “a racial scale might be worked out by exposing doubtful cases to different varieties of lice.” *Id.* at 81. Leonardo Da Vinci is another icon of intellectual greatness guilty of harboring ridiculous ideas regarding race. Da Vinci attributed racial differences to the environment in a novel manner, arguing that those who lived in hotter climates worked at night and so absorbed dark pigments, while those in cooler climates were active during the day and correspondingly absorbed light pigments. *Id.* at 16.

<sup>54</sup> *Id.* at 69.

<sup>55</sup> 260 U.S. 178 (1922).

tion Act, that he was a “white person.”<sup>56</sup> Counsel for Ozawa pointedly argued that to reject Ozawa’s petition for naturalization would be “to exclude a Japanese who is ‘white’ in color.”<sup>57</sup> This argument did not persuade the Court:

Manifestly, the test [of race] afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races.<sup>58</sup>

In rejecting Ozawa’s petition for citizenship, the Court recognized that race is not a function of skin color alone. If it were, some now secure in their White status would have to be excluded, and others firmly characterized as non-Whites would need to be included.<sup>59</sup> As the *Ozawa* Court correctly tells us, “mere color of the skin” does not provide a means to racially divide people.

Attempts to define racial categories by physical attributes ultimately failed. By 1871, some leading intellectuals had recognized that even using the word “race” “was virtually a confession of ignorance or evil intent.”<sup>60</sup> The genetic studies of the last few decades have only added more nails to the coffin of biological race. Evidence shows that those features usually coded to race, for example, stature, skin color, hair texture, and facial structure, do not correlate strongly with genetic variation. Populations that resemble each other might be genetically quite distinct. Oceania has a number of population groups characterized by short stature, dark skin, and frizzy hair that resemble several of the short-statured populations of Southern and West Africa.<sup>61</sup> Yet “the Philippine or Malay Negritos are genetically quite different from the African Pygmies or Bushmen, though they have many common morphological features.”<sup>62</sup> Conversely, populations may be genetically quite similar yet morphologically distinct. “[T]he

---

<sup>56</sup> Rev. Stat. § 2169 (1878). Only “free white persons” could be naturalized under the 1790 Immigration Act. Act of March 26, 1790, ch. 3, 1 Stat. 103 (1790). Although Africans were specifically granted the right to naturalize in 1870, Act of July 14, 1870, ch. 254 § 7, 16 Stat. 256 (1870), Congress did not remove the “white person” restriction from the naturalization laws until 1952, Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952).

<sup>57</sup> *Ozawa*, 260 U.S. at 184.

<sup>58</sup> *Id.* at 197.

<sup>59</sup> The Court added, in what might be termed dicta, that “[o]f course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority.” *Id.* at 198.

<sup>60</sup> GOSSETT, *supra* note 50, at 94.

<sup>61</sup> See Nei & Roychoudhury, *supra* note 24, at 33, 41.

<sup>62</sup> *Id.* at 41.

Europeans and northern Indians are genetically close even though they have quite different morphological characters."<sup>63</sup> As biologists Nei and Roychoudhury conclude, "the genetic distance between populations is not always correlated with the morphological distance . . . . Evidently, the evolutions at the structural gene level and at the morphological level do not obey the same rule."<sup>64</sup> People who look alike do not necessarily share a common genetic heritage, and people who share a similar genetic background do not necessarily look alike.

The rejection of race in science is now almost complete.<sup>65</sup> In the end, we should embrace historian Barbara Fields's succinct conclusion with respect to the plausibility of biological races: "Anyone who continues to believe in race as a physical attribute of individuals, despite the now commonplace disclaimers of biologists and geneticists, might as well also believe that Santa Claus, the Easter Bunny and the tooth fairy are real, and that the earth stands still while the sun moves."<sup>66</sup>

### B. Racial Illusions

Unfortunately, few in this society seem prepared to fully relinquish their subscription to notions of biological race. This is, after all, Appiah's thesis with regard to Du Bois, but it is also true of Congress and the Supreme Court. Congress' anachronistic understanding of race is exemplified by a 1988 statute that explains that "the term 'racial group' means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent."<sup>67</sup> The Supreme Court, although purporting to sever race from biology, also seems incapable of doing so. In *Saint Francis College v. Al-Khazraji*,<sup>68</sup> the Court determined that an Arab could recover damages for racial discrimination under 42 U.S.C. § 1981. Writing for the Court, Justice White appeared to abandon

---

<sup>63</sup> *Id.* at 42.

<sup>64</sup> *Id.* at 41-42.

<sup>65</sup> As one example of this, mention of race as a valid tool for the description and measurement of human difference has all but disappeared from textbooks of physical anthropology. See Alice Littlefield, Leonard Lieberman, & Larry T. Reynolds, *Redefining Race: The Potential Demise of a Concept in Physical Anthropology*, 23 CURRENT ANTHROPOLOGY 641 (1982). However, the attempts to harness science to the service of racial ideology have not entirely ended. For example, some scientists continue to argue that races are biologically determined, not through the existence of genetic divisions, but instead as a function of supposedly instinctual grouping behaviors innate in humans. For a powerful critique of this most recent biological rationalization for racial mythology, see Martin Barker, *Biology and the New Racism*, in ANATOMY OF RACISM 18-37 (David Theo Goldberg ed., 1990).

<sup>66</sup> Fields, *supra* note 29, at 96.

<sup>67</sup> Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1093 (1988).

<sup>68</sup> 481 U.S. 604 (1987).

biological notions of race in favor of a sociopolitical conception, explaining:

It is said that genetically homogenous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.<sup>69</sup>

Despite this seeming rejection of biological race, Justice White continued: "The Court of Appeals was thus quite right in holding that § 1981, 'at a minimum,' reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*.'" <sup>70</sup> By adopting the lower court's language of genetics and distinctive subgroupings, Justice White demonstrates the Court's continued reliance on blood as a metonym for race. In *Metro-broadcasting v. FCC*, Justice Scalia again reveals the Court's understanding of race as a matter of blood. During oral argument, Scalia attacked the argument that granting minorities broadcasting licenses would enhance diversity by blasting "the policy as a matter of 'blood,' at one point charging that the policy reduced to a question of 'blood . . . blood, not background and environment.'" <sup>71</sup>

If an inability to fully free oneself of biologically tainted racial beliefs plagues most people, Appiah frees himself of this malaise by insistently proclaiming that "there are no races."<sup>72</sup> Subtitled his article "The Illusion of Race," Appiah's intention is to repudiate all notions of race, not just those based on biology. In this endeavor, he shares the company of Henry Louis Gates, whom he quotes with approval for the argument "that 'races,' put simply, do not exist, and that to claim that they

<sup>69</sup> *Id.* at 610, n.4.

<sup>70</sup> *Id.* at 613.

<sup>71</sup> Gotanda, *supra* note 20, at 32 (citing Ruth Marcus, *FCC Defends Minority License Policies: Case Before High Court Could Shape Future of Affirmative Action*, WASH. POST, Mar. 29, 1990, at A8). Neil Gotanda writes: "'Blood' is a rich metaphor and includes, in this context, the suggestion of biological lines of descent. Justice Scalia's implication is that race [is] a category of biology and science . . ." *Id.*

<sup>72</sup> *Illusion*, *supra* note 25, at 35.

do, for whatever misguided reason, is to stand on dangerous ground.”<sup>73</sup> Appiah also quotes Tzvetan Todorov, agreeing that “‘races’ do not exist.”<sup>74</sup>

Appiah advocates substituting notions of culture where we now talk of race. For him, “[w]hat exists ‘out there’ in the world [are] communities of meaning, shading variously into each other in the rich structure of the social world.”<sup>75</sup> He continues:

Talk of “race” is particularly distressing to those of us who take culture seriously. For, where race works—in places where “gross differences” of morphology are correlated with “subtle differences” of temperament, belief, and intention—it works as an attempt at a metonym for culture; and it does so at the price of biologizing what *is* culture, or ideology.<sup>76</sup>

I agree that there is a significant overlap between race and culture, or in my formulation, community.<sup>77</sup> Nevertheless, I am convinced that there is something else “out there,” some central dynamic of race that is not captured by notions of culture or community. Houston Baker is similarly convinced. He poignantly challenges Appiah to explain the everyday manifestations of race and racism:

Not long ago, my family and I were in a line of traffic moving along Chestnut Street in Philadelphia. On the corner, six or seven cars ahead of us, was a deranged, shabbily clad, fulminating white street person shouting obscenities at passengers and driv-

<sup>73</sup> Henry Louis Gates, Jr., *Talkin’ that Talk*, in *RACE*, *supra* note 25, at 403, *quoted in Conservation*, *supra* note 39, at 57, n.2. Gates clearly rejects the existence of biological races. In *Writing “Race” and the Difference It Makes*, in *RACE*, *supra* note 25 at 5, 6, Gates writes that “[r]ace, as a meaningful criterion within the biological sciences, has long been recognized to be a fiction.” However, despite Appiah’s citation, Gates’s position on whether races exist as a social phenomenon is less clear. For example, Gates has written that “[i]t’s important to remember that ‘race’ is *only* a sociopolitical category, nothing more.” HENRY LOUIS GATES, JR., *LOOSE CANONS: NOTES ON THE CULTURE WARS* 50 (1992).

<sup>74</sup> Tzvetan Todorov, *‘Race,’ Writing, and Culture*, in *RACE*, *supra* note 25, at 370, 371. Appiah favorably quotes Todorov. *See Conservation*, *supra* note 39, at 40.

<sup>75</sup> *Illusion*, *supra* note 25, at 36.

<sup>76</sup> *Id.* Appiah, himself African rather than African American, is more concerned with whether a Black race can be said to exist globally as opposed to solely within the United States. For Appiah, the issue is “how Afro-Americans are to conceive of their relation to other ‘Negro’ peoples, and, especially to Africans.” *Conservation*, *supra* note 39, at 41. Appiah’s international perspective no doubt greatly influences his rejection of any notion of a Black race, whether biological or sociohistorical. On this level, I am inclined to agree with Appiah, because of the absence of an international Black community. For a discussion of the importance of communities in establishing the link between what we look like and who we are, see *infra* notes 212–214 and accompanying text.

<sup>77</sup> I discuss this overlap later. *See infra* notes 204–213 and accompanying text.

ers. His vocabulary was the standard repertoire of SOB's and sons and mothers directed at the occupants of the cars ahead, but when we came in view (gross features and all), he produced the standard "Goddamned Niggers! Niggers! Niggers!" Now if even a mad white man in the City of Brotherly Love knows that race, defined as gross features, makes all the difference in this world, what is it that Professor Appiah and evolutionary biology have done?<sup>78</sup>

Baker poses the central intellectual challenge confronting those who recognize that races are not physical fact: If race is not biological, then what is it? Why do we easily recognize races when walking down the street if there is no morphological basis to race? Why does race seem obvious if it is only a fiction?

This Article responds by arguing that races exist as powerful social phenomena. Appiah rejects this position, suggesting that to subscribe to a sociohistorical view of race "is simply to bury the biological conception of race below the surface, not to transcend it."<sup>79</sup> Yet, a social conception of race need not rest on bad biology. After explaining in the next section my ideas regarding social race, I return to Appiah's criticisms.<sup>80</sup> Before turning to social race, however, let me address another criticism Appiah raises. He suggests that to talk of race after its clear biological death only allows the reinscription of racist generalizations about people. He writes: "[T]o maintain the terminology of difference is to make possible the continuance of . . . racism, which has usually been the basis for treating people worse than we otherwise might, for giving them less than their humanity entitles them to."<sup>81</sup> Appiah is not alone in sounding this warning.<sup>82</sup> To acknowledge race is to leave open the possibility—indeed the certainty—that this acknowledgment will at times be turned to racism's service. Irrespective of what one says on the subject of race, deep rooted racism ensures its quick harnessing to racist hierarchies, raising the specter that the arguments presented here will facilitate the efforts of bigots to stigmatize morphologies with social pathologies.

This certain misuse, however, cannot provide the reason for refusing to examine as honestly as possible the nature of race. Since racist manipulation of ideas can be counted as a constant in explorations of race, to avoid such usurpations would require that one deny the existence of races themselves. This strategy carries a very high political price, forcing, for example, the abandonment of calls for racial amelioration by disal-

<sup>78</sup> Houston A. Baker, Jr., *Caliban's Triple Play*, in *RACE*, *supra* note 25, at 381, 385.

<sup>79</sup> *Illusion*, *supra* note 25, at 34.

<sup>80</sup> See *infra* notes 144–149 and accompanying text.

<sup>81</sup> *Conservation*, *supra* note 39, at 48.

<sup>82</sup> Asian American legal scholar Jayne Lee has also raised this point. Cf. Donal E.

lowing reference to race. Lewis Killian provides evidence of exactly this danger.<sup>83</sup> Taking all too seriously the assertion that races are illusory,<sup>84</sup> Killian argues that the word "race" should be banished from our lexicon since it reflects "bad thinking."<sup>85</sup> More importantly, he argues that since races do not exist, neither should legal schemes of racial remediation, like affirmative action or employer set-asides.<sup>86</sup> Killian avoids debating the real merit of these efforts by seizing on the non-existence of race. Whatever one thinks about these programs, their demise should not come about because race is pronounced a non-word.

Moreover, denying the existence of race also carries a high personal price, necessitating the denial of major components of our experiences and identities. This, it seems to me, provides the heat that fires Baker's criticisms of Appiah's writings. To cease speaking of races in order to hide from the racists would hinder our understanding of the way people think about their daily lives and obfuscate the very real connection between who we are and what we look like. Nevertheless, we must prepare for the racist appropriation of our arguments. Accepting the risk that describing social race facilitates cultural racism does not absolve us from the responsibility of combating that usurpation. We best exercise this responsibility, I believe, in consciously and vociferously contesting the meaning of race and of the content of our characters.

### III. Social Race and Racial Formation

#### A. Ethnicity Theory

In the 1920s, as the scientific community increasingly appreciated that biological races did not exist, a new, predominantly social conception of race emerged. Under this new view, which I term "ethnicity theory,"

---

Muir, *Race: The Mythic Root of Racism*, 63 Soc. INQUIRY 339, 341 (1993) (describing as "the enabling belief of racism" the idea that races exist, and reserving the term "non-racist" only "for those who do not perceive themselves or others in racial terms (in many societies a category largely reserved to the very young)").

<sup>83</sup> Lewis Killian, *Black Power and White Reactions: The Revitalization of Race-Thinking in the United States*, 454 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 43 (1981).

<sup>84</sup> While Killian wrote before Appiah published *The Illusion of Race* and so did not rely on the arguments presented there, he demonstrates that arguments about the illusion of race can be distorted to support the New Right's assertion that rights attach to individuals and not to groups, and that public policy must be exercised without regard to race. Appiah recognized that some would misuse his arguments in *The Illusion of Race* to argue against race-based remedial schemes, but optimistically concluded that such a strategy could be "easily opposed." *Conservation, supra* note 39, at 40.

<sup>85</sup> Killian, *supra* note 83, at 43.

<sup>86</sup> *Id.* at 54.

race was but one component in the formation of ethnic groups. Rather than focus on race alone, these theorists emphasized the importance of ethnicity, which was understood as the result of a group formation process based on culture and descent. While still relying to some extent on biology by subscribing to the power of descent, ethnicity theory was at root "an insurgent theory which suggested that race was a *social* category."<sup>87</sup> In outlining and criticizing the major tenets of ethnicity theory, I use the present tense because this impoverished interpretation of race is enjoying a resurgent popularity, particularly among neo-conservatives.<sup>88</sup>

The ethnicity theorists make a crucial though unsurprising error in subsuming race under ethnicity: they equate the experiences endured by racial minority groups with those lived by European ethnic groups. For most ethnicity theorists, "there are no essential long-term differences—in relation to the larger society—between third world or racial minorities and the European ethnic groups."<sup>89</sup> Under this embarrassingly ahistorical comparison, which I call the immigrant analogy, racial minorities like Blacks or Asians are compared to European ethnics; they are latter-day Italians or Irish. Minorities and White ethnic groups are made fungible.<sup>90</sup>

---

<sup>87</sup> Nei & Roychoudhury, *supra* note 24, at 15.

<sup>88</sup> *Id.* at 109–35.

<sup>89</sup> *Id.* at 10 (citing ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA 2* (1972)) (emphasis omitted). Some recent works that continue the pattern of subsuming race under ethnicity nevertheless recognize the unique dynamics of race and the unfortunate role of racism in American society. See, e.g., BENJAMIN RINGER & ELINOR LAWLESS, *RACE-ETHNICITY AND SOCIETY* 3–5 (identifying "blood" and "race" as aspects of ethnic identity. But Ringer and Lawless also explicitly state "(1) that [the] treatment of racial minorities in America was qualitatively, not merely quantitatively, different from that experienced by white immigrants; [and] (2) that racism was not a mere aberration in the American society . . . but was instead built into the very foundations of the American society."). *Id.* at xiv–xv.

<sup>90</sup> For example, the fungibility of minorities with Whites appears in diverse discourses ranging from law to literature. The Supreme Court seems to equate the experiences of all racial and ethnic groups. Alan Freeman considers this a principal failing in the Court's antidiscrimination jurisprudence. See Alan Freeman, *Antidiscrimination Law: The View from 1989*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 121, 125 (D. Kairys ed., rev'd ed. 1990) (criticizing the Rehnquist Court's reliance on "ethnic fungibility" in its espousal of colorblind meritocracy). Similarly, literary critic Werner Sollors also advances an ethnic fungibility theory. See WERNER SOLLORS, *BEYOND ETHNICITY: CONSENT AND DISSENT IN AMERICAN CULTURE* (1986). Sollors argues that the effort of minorities to distinguish themselves from other groups in U.S. society is the same effort that marks each new group as typically American. He writes that "the very popularity of defiant ethnic revivalism and exclusivism in the United States suggests a widespread backdrop of assimilation against which it takes place." *Id.* at 13. For example, Sollors sees a similarity between the recent cultural nationalism of Native Americans and the first Puritans' definition of themselves as religious dissidents. Parroting and pursuing Sollors' logic in an anthology Sollors subsequently edited, Richard Rodríguez writes "I remain truest to Mexico, least the American, when I accept the inevitability of assimilation in my life." Richard Rodríguez, *An American Writer*, in *THE INVENTION OF ETHNICITY* 3, 10–11 (Werner Sollors ed., 1989). For a compelling critique of *BEYOND ETHNICITY*, see Appiah, *Are We Ethnic?*, *supra* note 32. For an equally compelling critique of Sollors' anthology,

Ethnicity theory blithely buries the tremendous differences in experience endured by the various peoples in the United States. The years of discovery and expansion enjoyed by the Puritans and the frontier farming and industrial employment encountered by the German and Scandinavian arrivals are made comparable to the genocide suffered by the Native Americans, the slavery and continued segregation and oppression inflicted upon Blacks, and the wars of conquest and subsequent economic exploitation that brought this country Latinos and Asians. This analogy triggers a cascade of errors.

Building upon the elision between the experiences of various ethnic groups in the United States, ethnicity theory posits that each group will follow the same trajectory of incorporation into American society. Under this view, each group in the United States confronts a similar social tableau. Ethnicity theorists explain discrepancies in the rates of integration in terms of the differences characterizing the groups themselves, not in society's treatment of the offending race. Thus, Nathan Glazer and Daniel Moynihan wrote that "[e]thnic groups bring different norms to bear on common circumstances with consequent different levels of success—hence *group* differences in status."<sup>91</sup> The argument that all minorities confront a similar environment and that group poverty reflects group failings reinscribes the myth of merit and earned access to material resources in the neutral pseudo-scientific language of ethnic assimilation. This argument thereby reinforces myths of White superiority and minority inferiority. It also provides a convenient means of setting the advances of some minorities against that of others, fueling for example the Asian-as-model-minority trope.<sup>92</sup> Ethnicity theory eliminates at the level of assump-

---

see Renato Rosaldo, *Others of Invention: Ethnicity and Its Discontents*, 35 VILLAGE VOICE Feb. 13, 1990, at 27.

<sup>91</sup> *Introduction*, ETHNICITY: THEORY AND EXPERIENCE 21 (Nathan Glazer & Daniel Moynihan eds., 1975), *quoted in* OMI & WINANT, *supra* note 6, at 21. *See generally* Daniel Moynihan, *The Negro Family: The Case for National Action*, in THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 41 (Lee Rainwater & William L. Yancey eds., 1967). Nathan Glazer elsewhere writes that "[n]o one has given a very convincing explanation of [the] tangle of pathology in the ghetto, but it is hard to believe it is anything so simple as lack of jobs or discrimination." NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY 72-73, *quoted in* Alexander Saxton, *Nathan Glazer, Daniel Moynihan, and the Cult of Ethnicity*, 4 AMERASIA J. 141, 148 (1977).

<sup>92</sup> For a powerful critique of the model minority line, see RONALD TAKAKI, IRON CAGES: RACE AND CULTURE IN 19TH CENTURY AMERICA 298-302 (1990). If Asians are held up to Blacks as indictments by comparison, then for Latinos, Cubans serve that role. Cubans, particularly those who arrived here prior to the 1981 Mariel exodus, are relatively prosperous, well-educated, and politically powerful. The success of Cubans as recent immigrants, therefore, is often brandished as evidence of community guilt or cultural shortcomings in debates on the economic plight of Chicanos, Puerto Ricans, and Central Americans. On occasion, those who tout Cuban success concede that as immigrants they often possessed considerable education, business experience, professional training, and wealth, prior to their arrival in the United States. Far less frequently mentioned is that the federal government, in its ideologically inspired desire to embarrass Fidel Castro,

tions disparate societal treatment of racial minorities, locating the blame for segregation and economic stagnation in the minority communities themselves.<sup>93</sup>

I suggested earlier that the key error in ethnicity theory, the equation of the experiences of racial minorities and European ethnics is not surprising. I did so because this error reflects two important realities: the biases of the predominantly White ethnicity theorists themselves, and the powerful rhetoric of the individual in Western social thought, which displaces groups as relevant units of analysis. The racial biases of the theorists reveal themselves in two ways. First, under the immigrant analogy, Whites are disaggregated and recognized as particular nationalities or groups—Anglo-Saxons, Italians, and Irish, to name a few. Racial minorities, however, “all look alike” to the ethnicity theorists, who lump Mexicans, Cubans, and Puerto Ricans together as Latinos; Japanese, Koreans, Chinese, and Vietnamese as Asians; and Northern, Southern, and Franco-phone Blacks together with Haitians and Jamaicans.<sup>94</sup> Second, ethnicity theory’s conflation of all group experiences reflects the manner in which the predominantly White theorists extrapolated outward from their own experience as European ethnics, converting the social reality confronted by Whites into the benchmark against which the varied experiences for all ethnic and racial communities in the United States are to be measured.

Ethnicity theory also rests on the assumption that the individual, not groups, constitutes the proper unit of analysis. Ethnicity theorists eschew the ethnic or racial group in favor of the atomistic individual.<sup>95</sup> Following

---

undertook to ensure the economic well-being of Cuba’s emigres by providing them with \$957 million in aid in the years between 1961 and 1974. See GASTON FERNÁNDEZ, BEVERLY NAGEL, & LEON NARVÁEZ, *HISPANIC MIGRATION TO THE UNITED STATES 80* (1987). See also Lisa Otero & Juan Zúñiga, *Latino Identity and Affirmative Action: Is There a Case for Hispanics* (1992) (unpublished manuscript, on file with author); see generally ELEANOR ROGG, *THE ASSIMILATION OF CUBAN EXILES: THE ROLE OF COMMUNITY AND CLASS* (1974). This aid took the form of resettlement assistance, job training, professional recertification, job search assistance, special research and teaching grants for Cuban scholars, funding for public school bilingual education programs, and assistance to the public schools for the extra costs incurred by the rapid influx of Cuban children. FERNÁNDEZ ET AL., *supra* note 92, at 80. See also Migration and Refugee Assistance Act, Pub. L. No. 87-510 (1962). I await, though in vain, a similar commitment to other Latinos, and all racial minorities generally.

<sup>93</sup> Only in this stilted context do the various “culture of poverty” theses ring true. See Maxine Baca Zinn, *Family, Race, and Poverty in the Eighties*, 14 *SIGNS: J. WOMEN IN CULTURE & Soc.* 856 (1989) (criticizing the revival of the 1960s “culture of poverty” arguments and reviewing the evidence attributing poverty among Blacks and Latinos to structural economic changes in the United States over the last three decades).

<sup>94</sup> See OMI & WINANT, *supra* note 6, at 23 (discerning in this pattern of recognizing (creating) nationality-based White groups and race-based minority groups a “subtly racist element”).

<sup>95</sup> The devaluation of groups as units of analysis often leads ethnicity theorists to argue that racial and ethnic groups are neither persistent nor central elements of modern society. After a period of acculturation in America’s melting pot, some versions of ethnicity theory

from this, they posit that racism arises from the prejudices and attitudes of individuals and wreaks its havoc on individual victims. Under this thinking, racism permeates U.S. society through individual antipathies and psychoses, and not because the institutions central to American life, such as the federal and state governments, the judiciary, the marketplace, and the media systematically create and perpetuate racist norms.<sup>96</sup> By focusing exclusively on the individual, ethnicity theory denies the structural and institutional components of race and racism. Under ethnicity theory, these disappear as independent causal factors.<sup>97</sup> Moreover, in consistently deemphasizing the structural component of race, ethnicity theory not only fails to challenge but reinforces a crucial cultural and political myth, that every element in U.S. society is committed to equality and social justice for racial minorities.

These glaring misconceptions—that race and racism are the product of individuals and that this society is fully committed to social justice for minorities—not only survive but for most people in America provide the very heart of their understanding of race. One suspects that ethnicity theorists err not through flawed analytical techniques but because of deeply held biases, and that ethnicity theory is popular not despite its errors but because of them. Ethnicity theory's errors remain of a sort that support the current racial hierarchy in this society.

### B. Nationalist and Colonialist Critiques

The assumptions underlying ethnicity theory were directly challenged in the late 1960s. By then, the integrationist spirit of the early civil rights movement, which unfortunately relied upon many of the assumptions associated with ethnicity theory,<sup>98</sup> gave way to political and cultural mili-

---

predict that minorities leave their group identity behind and blend into the larger society, leading to the disappearance of ethnic groups. For a critique of this unfortunately influential view, see Saxton, *supra* note 90.

<sup>96</sup> Many critical scholars have castigated the Supreme Court for its "color blind" rhetoric that acknowledges only individual victims and condemns only conspicuous individual perpetrators of racism. See, e.g., Gotanda, *supra* note 20. Few have made what is in essence the flip side of this critique: that the Supreme Court has *never* acknowledged its own role, as a powerful social institution in this country, in the creation and maintenance of races and the perpetration of racist harms. See, e.g., Ozawa v. United States, *supra* note 55, at 178.

<sup>97</sup> Consider, for example, this assessment: "A measurement of the rise of the whole black race averages two distinct subgroups: those Negroes who took full advantage of the expanded opportunities [of the 1960s] and those who, because of age, region, or family structure, found it difficult or impossible to do so." WILLIAM PETERSEN, CONCEPTS OF ETHNICITY 18 (1982). For Petersen, the economic situation of African-Americans is explained in terms of individual initiative or unfortunate personal circumstances, rather than as a function of the structural inequalities that are a legacy of racism's several-hundred-year reign in this country.

<sup>98</sup> For example, integrationists pictured racism as rooted in individual prejudice, and

tancy among many minorities. The racial militants powerfully denounced the structural and institutional roots of race and racism and convincingly challenged America's commitment to social justice. They did so, however, in terms that again subsumed race under other social phenomena, this time not ethnicity but nationalism and colonialism.

The racial militancy of the late 1960s was marked most noticeably by the emergence of cultural nationalism, which "underscored the centrality of cultural domination in the logic of racial oppression, and stressed the importance of 'cultures of resistance' in unifying and promoting collective identity among the oppressed."<sup>99</sup> Under various power slogans, organizations like the Black Panthers, the Brown Berets, and the American Indian Movement emerged in minority communities as apostles of a new creed of racial pride. Aspects of quotidian life, such as language, dress, dance, and art, were transformed into elements of cultural authenticity and weapons of cultural renewal. Drawing upon the new nationalist framework, the militants of the late 1960s also perceived aspects of colonial domination in U.S. race relations.<sup>100</sup> Often they condemned their conquest by military might, celebrated imagined homelands where they might live free, and, at least among Latinos and Native Americans, decried the continued occupation of geographically defined spaces.<sup>101</sup> The

---

believed the ideal was to treat "people as individuals, free from racial group identification." Peller, *supra* note 21, at 769. Consider Dr. Martin Luther King's evaluation of White antipathy to racial amelioration. "The outraged white citizen," King wrote, "had been sincere when he snatched the whips from the Southern sheriffs and forbade them more cruelties. But when this was to a degree accomplished, the emotions that had momentarily inflamed him melted away. White Americans left the Negro on the ground and in devastating numbers walked off with the aggressor." MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 3-4 (1968). In this passage, Dr. King speaks in terms of individual Whites, rather than in terms of racist institutions.

<sup>99</sup> OMI & WINANT, *supra* note 6, at 44.

<sup>100</sup> See, e.g., RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (3d ed. 1988); ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA* (1972).

<sup>101</sup> For example, the Chicanos resurrected the idea of Aztlán, the mythical original homeland of the Aztecs, as the new political homeland they would reconquer for themselves and their people.

In the spirit of a new people that is conscious not only of its proud historical heritage, but also of the brutal "Gringo" invasion of our territories: We, the Chicano inhabitants and civilizers of the northern land of Aztlán, from whence came our forefathers, reclaiming the land of their birth and consecrating the determination of our people of the sun, declare that the call of our blood is our power, our responsibility, and our inevitable destiny.

AZTLÁN: AN ANTHOLOGY OF MEXICAN AMERICAN LITERATURE 402-03 (Luís Valdez & Stan Steiner eds., 1973) (resolution adopted at Chicano Liberation Youth Conference). Aztlán continues to figure prominently in Chicano literature as a place of cultural renewal, a sort of lost paradise. See, e.g., RODOLFO A. ANAYA, *HEART OF AZTLÁN* (1976). For an exploration of the mythical origins of Aztlán, see Michael Pina, *The Archaic, Historical and Mythicized Dimensions of Aztlán*, in *AZTLÁN: ESSAYS ON THE CHICANO HOMELAND* 14 (Rodolfo A. Anaya & Francisco A. Lomelí eds., 1989).

radicals also protested what they saw as economic superexploitation, in which the majority society applied political force on minority communities in order to increase the amount of economic resources extracted from these sectors.<sup>102</sup>

The nationalist and colonialist analyses provide important insights into race even while widely missing the mark. The radical critics, like the ethnicity theorists, erred in reducing race to a product of other causal determinants and, as a result, oversimplified enormously complex phenomena. For example, the nationalist model, by positing a virtual war between cultures, fails entirely to grapple with the significant cultural interpenetration visible in the United States. The eclectic, polyglot culture of the United States behies a simple cultural war of total conquest and assimilation. Cultural nationalism cannot account for the way in which "we are all already contaminated by each other."<sup>103</sup> The colonialist model also suffers from oversimplification. Economic superexploitation does not account for the significant class mobility of some sectors within minority communities, for instance the emergence of Black and Latino upper

<sup>102</sup> Superexploitation can be likened to Barrington Moore's "labor-repressive system" in which "strong political methods [are used] to extract the surplus, keep the labor force in its place, and in general make the system work." BARRINGTON MOORE, JR., *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD* 434 (1967). Though Moore did not focus directly on race, Moore's emphasis on internal colonialism makes his description of a "labor-repressive system" relevant to the concept of superexploitation. A significant body of scholarship developed during this period that focused on the political economy of colonialism in the development of world capitalism. See, e.g., IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY* (1974). These works provided intellectual support for the colonialist theorists in their study of race. Wallerstein has recently linked the emergence of race to the dictates of the world capitalist system, arguing that "race categorization arose primarily as a mode of expressing and sustaining the core-periphery antimony." Immanuel Wallerstein, *The Construction of Peoplehood: Racism, Nationalism, Ethnicity*, SOC. F., vol. II, no. 2 373, 388 (1987), reprinted in Immanuel Wallerstein, *The Construction of Peoplehood: Racism, Nationalism, Ethnicity*, in RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 71, 82 (Etiene Balibar & Immanuel Wallerstein eds., Chris Turner trans., 1991) (1988).

By focusing on economic exploitation, colonialist theorists often incorporated large elements of marxist analysis into their framework. The marxist conception of race, which attributes the subordination of racial groups to the oppressive nature of capitalism, overlaps with the colonialist framework in so far as both theories emphasize structures of domination. For an example of scholarship combining marxist and colonialist theories, see MARIO BARRERA, *RACE AND CLASS IN THE SOUTHWEST* (1979). At least one critic regards RACE AND CLASS as "the best in a series of scholarly endeavors attempting to systematize and apply a concept of internal colonialism to minority politics in the United States . . ." Benjamin Márquez, *Race and Class in the Southwest* 10 THE INSURGENT SOCIOLOGIST 122 (Fall 1980) (book review). For a critique of the classic marxist take on race, see Lucius Outlaw, *Toward a Critical Theory of "Race"*, in ANATOMY OF RACISM, *supra* note 65, at 74-75.

<sup>103</sup> Anthony Appiah, *Is the Post- in Postmodernism the Post- in Postcolonial?*, 17 CRITICAL INQUIRY 336, 354 (Winter 1991). For a discussion of the imbrication of communities in the United States, see *infra* note 214 and accompanying text.

classes. Nor does it account for the economically non-productive marginalization and stagnation of even larger sections, for example in ghettos and barrios.<sup>104</sup> Moreover, notwithstanding the structural assertions of colonialist theory, there is no natural congruence between class and racial interests. At different times, class allegiances may follow or cut across race lines, and vice versa.<sup>105</sup>

The over-simplification of race by the radical critics should not come as a surprise. The colonialist and nationalist theorists, as front-line activists, often concerned themselves more with racism than with race. Race provided a proud badge of difference accepted by the militants as a biological fact and utilized in order to further define the oppressed communities they sought to represent. As a result, race *per se* received little critical analysis. Nevertheless, despite their shortcomings, the nationalist and colonialist critiques offer an indispensable insight into race: race, as a central and persistent element of American society, is constructed along cultural, political, and economic lines.

### C. Racial Formation

Race must be viewed as a social construction.<sup>106</sup> That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization. The process by which racial meanings arise has been labeled racial formation.<sup>107</sup> In this formulation,

<sup>104</sup> OMI & WINANT, *supra* note 6, at 50.

<sup>105</sup> As William Julius Wilson argues, class interests not only support racial alliances, for example between White planters and peasants in the antebellum South, but also fragment them. See WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* (1978). For a brief discussion of the complex interplay between class divisions and racial structures, see *infra* notes 123-124 and accompanying text.

<sup>106</sup> Much has been written generally on the constructed nature of human society. For an important work in this area, see PETER L. BERGER & THOMAS LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966).

<sup>107</sup> OMI & WINANT, *supra* note 6, at 61. RACIAL FORMATION, by advancing the argument that race is a social process rather than a biological given, provides a crucial break from past static notions of race. In this it is joined by a spate of recent sociological works. In the last few years, "[s]ociologists who study racial and ethnic identity [have come to] assume that race and ethnicity are not entirely inherent or natural traits although physical characteristics certainly have a lot to do with how people categorize members of racial and ethnic groups. Rather, researchers argue that racial and ethnic identities derive their meanings from social and historical circumstances, that they can vary over time, and that they can sometimes even be slipped on and off like a change of clothing." Ellen K. Coughlin, *Sociologists Examine the Complexities of Racial and Ethnic Identity in America*, CHRON. HIGHER ED., Mar. 24, 1993, at A7 (citing as examples of this new trend the following works, among others: OMI & WINANT, *RACIAL FORMATION*; YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES* (1992); FELIX M. PADILLA, *LATINO ETHNIC CONSCIOUSNESS: THE CASE OF MEXICAN AMERICANS AND PUERTO RICANS IN CHICAGO* (1985); STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* (1988); SUSAN OLZAK, *THE DYNAMICS OF*

race is not a determinant or a residue of some other social phenomenon, but rather stands on its own as an amalgamation of competing societal forces. Racial formation includes both the rise of racial groups and their constant reification in social thought.<sup>108</sup> I draw upon this theory, but use the term "racial fabrication" in order to highlight four important facets of the social construction of race. First, humans rather than abstract social forces produce races. Second, as human constructs, races constitute an integral part of a whole social fabric that includes gender and class relations. Third, the meaning-systems surrounding race change quickly rather than slowly. Finally, races are constructed relationally, against one another, rather than in isolation. Fabrication implies the workings of human hands, and suggests the possible intention to deceive. More than the industrial term "formation," which carries connotations of neutral constructions and processes indifferent to individual intervention, referring to the fabrication of races emphasizes the human element and evokes the plastic and inconstant character of race. An archaeological exploration of the racial identities of Mexicans and Whites will illustrate these four elements of race.<sup>109</sup>

In the early 1800s, people in the United States ascribed to Latin Americans nationalities and, separate from these, races. Thus, a Mexican might also be White, Indian, Black, or Asian. By the 1840s and 1850s, however, U.S. Anglos looked with distaste upon Mexicans in terms that conflated and stigmatized their race and nationality. This animus had its source in the Anglo-Mexican conflicts in the Southwest, particularly in Texas and California.<sup>110</sup> In the newly independent Texas, war propaganda from the 1830s and 1840s purporting to chronicle Mexican "atrocities" relied on racial disparagements.<sup>111</sup> Little time elapsed following the U.S.

ETHNIC COMPETITION AND CONFLICT (1992); RICHARD D. ALBA, *ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA* (1990); and MARY C. WATERS, *ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA* (1990)).

<sup>108</sup> PAUL GILROY, "THERE AIN'T NO BLACK IN THE UNION JACK: THE CULTURAL POLITICS OF RACE AND NATION 38 (1987) (Racial formation "refers both to the transformation of phenotypical variation into concrete systems of differentiation based on 'race' and colour and to the appeals to spurious biological theory which have been a feature of the history of 'races.'").

<sup>109</sup> See MICHEL FOUCAULT, *THE ORDER OF THINGS* xxi-xxii (1970) (describing an archaeological approach as "an inquiry whose aim is to rediscover . . . within what space of order knowledge was constituted; on the basis of what historical *a priori*, and in the element of what positivity, ideas could appear, sciences could be established, experience be reflected in philosophies, rationalities be formed, only, perhaps, to dissolve and vanish soon afterwards").

<sup>110</sup> For an analysis of the role of race in justifying westward expansion, see REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* (1981).

<sup>111</sup> AMÉRICO PAREDES, "WITH HIS PISTOL IN HIS HAND:" A BORDER BALLAD AND ITS HERO 16 (1958). For a description of Mexican resistance to Anglo conquest, see generally ROBERT J. ROSENBAUM, *MEXICANO RESISTANCE IN THE SOUTHWEST: "THE SACRED RIGHT OF SELF-PRESERVATION"* (1981).

annexation of Mexican territory in 1848 before laws began to reflect and reify Anglo racial prejudices.<sup>112</sup> Social prejudices quickly became legal ones, highlighting the close ties between race and law. In 1855, for example, the California Legislature targeted Mexicans as a racial group with the so-called "Greaser Act." Ostensibly designed to discourage vagrancy, the law specifically applied to "all persons who are commonly known as 'Greasers' or the issue of Spanish and Indian blood . . . and who go armed and are not peaceable and quiet persons."<sup>113</sup>

Typifying the arrogant belligerence of the times are the writings of T.J. Farnham:

No one acquainted with the indolent, mixed race of California, will ever believe that they will populate, much less, for any length of time, govern the country. The law of Nature which curses the mulatto here with a constitution less robust than that of either race from which he sprang, lays a similar penalty upon the mingling of the Indian and white races in California and Mexico. They must fade away; while the mixing of different branches of the Caucasian family in the States will continue to produce a race of men, who will enlarge from period to period the field of their industry and civil domination, until not only the Northern States of Mexico, but the Californias also, will open their glen to the pressure of its unconquered arm. The old Saxon blood must stride the continent, must command all its northern shores, must here press the grape and the olive, here eat the orange and the fig, and in their own unaided might, erect the altar of civil and religious freedom on the plains of the Californias.<sup>114</sup>

Immune to the bitter irony of his own words regarding unaided might and the altar of freedom, Farnham called for the conquest of California on the

---

<sup>112</sup> See generally Martha Menchaca, *Chicano Indianism: A Historical Account of Racial Repression in the United States*, 20 AM. ETHNOLOGIST 583 (1993).

<sup>113</sup> Cal. Stat. 175 (1855), excerpted in ROBERT F. HEIZER & ALAN J. ALMQUIST, *THE OTHER CALIFORNIANS: PREJUDICE AND DISCRIMINATION UNDER SPAIN, MEXICO, AND THE UNITED STATES TO 1920* 151 (1971). The recollections of "Dame Shirley," who resided in a California mining camp between 1851 and 1852, record efforts by the ascendant Anglos to racially denigrate Mexicans. "It is very common to hear vulgar Yankees say of the Spaniards, 'Oh, they are half-civilized black men!' These unjust expressions naturally irritate the latter, many of whom are highly educated gentlemen of the most refined and cultivated manner." L.A.K.S. CLAPPE, *THE SHIRLEY LETTERS FROM THE CALIFORNIA MINES, 1851-1852* 158 (1922), quoted in HEIZER & ALMQUIST, at 141. For a discussion of the negroization of other racial minorities, see *infra* notes 169-172 and accompanying text.

<sup>114</sup> T.J. FARNHAM, *LIFE, ADVENTURES, AND TRAVEL IN CALIFORNIA* 413 (1840), quoted in HEIZER & ALMQUIST, *supra* note 113, at 140.

grounds that "the Californians are an imbecile, pusillanimous race of men, and unfit to control the destinies of that beautiful country."<sup>115</sup>

Farnham's racist hubris illustrates the four important points about the nature of racial fabrication enumerated earlier. First, the transformation of "Mexican" from a nationality to a race came about through the dynamic interplay of myriad social forces. As the various strains in this passage indicate, Farnham's racialization of Mexicans did not occur in a vacuum, but in the context of a dominant ideology, perceived economic interests, and psychological necessity. In unabashedly proclaiming the virtue of raising industry and harnessing nature, Farnham trumpeted the dominant Lockean ideology of the time, an ideology that served to confirm the superiority of the industrialized Yankees and the inferiority of the pastoral Mexicans and Indians, and to justify the expropriation of their lands.<sup>116</sup> By lauding the commercial and economic interests of colonial expansion, Farnham also appealed to the free-booting capitalist spirit of America, recounting to his East Coast readers the riches that lay for their taking in a California populated only by mixed-breed Mexicans. Finally, Farnham's assertions regarding the racial character of these Mexicans reflected the psychological need to justify conquest: the people already in California, Farnham assured his readers, would "fade away" under Nature's curse, and in any event, were a race "unfit" to govern their own land. As suggested, racial fabrication must be viewed as a complex process subject to manifold social forces.<sup>117</sup>

Second, because races are constructed, ideas about race form part of a whole social fabric into which other relations, among them gender and class, are also woven. Farnham's choice of martial and masculine imagery

---

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

<sup>116</sup> Cf. JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 13 (1993) (citing Professor Robert A. Williams' THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST (1990), Singer writes that "John Locke's Second Treatise justifies the conquest and dispossession of American Indian nations on the grounds that American Indian land use patterns were not sufficient to vest property rights in Indian nations . . . . Locke noted that 'in the beginning, all the world was America.' He thereby equated American Indian cultures with the 'state of nature' before the coming of society and government and implied that the land occupied by Indian nations was vacant or unpossessed and therefore could be appropriated by cultivators."). On the role of Western ideology in justifying the usurpation of Indian lands, see generally Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. Rev. 219.

<sup>117</sup> See TAKAKI, IRON CAGES, *supra* note 92, at 11. In discussing early interaction between the English colonists and Blacks and Indians, Takaki wrote: "English definitions of Indians and blacks served as more than 'aids to navigation' for Englishmen in their venture into America. They also encouraged English immigrants to appropriate Indian land and black labor as they settled and set up production in the New World, and enabled white colonists to justify the actions they had committed against both peoples. This process of interaction among psychological needs, ideology, and economic interests functioned dynamically in the English settlement of America." *Id.* (reference deleted).

is not an accident but a reflection of the close symbiosis in the construction of racial and gender hierarchies during the nineteenth century.<sup>118</sup> This close symbiosis was reflected, for example, in distinct patterns of gender racialization during the era of frontier expansion—the native men of the Southwest were depicted as indolent, slothful, cruel and cowardly Mexicans, while the women were described as fair, virtuous, and lonely Spanish maidens. Consider the following leaden verse:

The Spanish maid, with eye of fire,  
At balmy evening turns her lyre  
And, looking to the Eastern sky,  
Awaits our Yankee chivalry  
Whose purer blood and valiant arms,  
Are fit to clasp her budding charms.

The *man*, her mate, is sunk in sloth—  
To love, his senseless heart is loth:  
The pipe and glass and tinkling lute,  
A sofa, and a dish of fruit;  
A nap, some dozen times by day;  
Somber and sad, and never gay.<sup>119</sup>

This doggerel depicted the Mexican women as Spanish, linking their European antecedents to their sexual desirability, and unfavorably compared the purportedly slothful Mexican men to the ostensibly virile Yankee.<sup>120</sup> Social renditions of masculinity and femininity are inseverably a

118

In the nineteenth century . . . gender was found to be remarkably analogous to race, such that the scientist could use racial difference to explain gender difference, and vice versa.

Thus it was claimed that women's low brain weights and deficient brain structures were analogous to those of lower races, and their inferior intellectuallities explained on this basis. Woman, it was observed, shared with Negroes a narrow, childlike, and delicate skull, so different from the more robust and rounded heads characteristic of males of 'superior' races. Similarly, women of higher races tended to have slightly protruding jaws, analogous to, if not as exaggerated as, the apelike jutting jaws of lower races. Women and lower races were called innately impulsive, emotional, imitative rather than original, and incapable of the abstract reasoning found in white men.

Nancy Leys Stepan, *Race and Gender: The Role of Analogy in Science*, in *ANATOMY OF RACISM*, *supra* note 65, at 38, 39–40 (notes omitted).

<sup>119</sup>HORSMAN, *RACE AND MANIFEST DESTINY*, *supra* note 110, at 233 (citation omitted).

<sup>120</sup>Notice that the racial and sexual construction of Mexican women as European, refined, and eligible for marriage differs markedly from the construction historically

part of racial constructs, just as racial stereotypes invariably embody some elements of sexual identity. The archaeology of race soon becomes the excavation of gender and sexual identity.<sup>121</sup>

Farnham's appeal to industry also reveals the close interconnection between racial and class structures. The observations of Arizona mine owner Sylvester Mowry reflect this linkage:

The question of labor is one which commends itself to the attention of the capitalist: cheap, and under proper management, efficient and permanent. My own experience has taught me that the lower class of Mexicans, with the Opata and Yaqui Indians, are docile, faithful, good servants, capable of strong attachments when firmly and kindly treated. They have been "peons" [servants] for generations. They will always remain so, as it is their natural condition.<sup>122</sup>

When Farnham wrote in 1840, before U.S. expansion into the Southwest, Yankee industry stood in counterpoint to Mexican indolence. When Mowry wrote in 1863, after fifteen years of U.S. regional control, Anglo capitalism stood in a fruitful managerial relationship to cheap, efficient Mexican labor. The nearly diametric change in Anglos' conception of Mexicans from indolent to industrious reflects the emergence of an Anglo economic elite in the Southwest and illustrates the close connection between class relations and ideas about race.<sup>123</sup> Mari Matsuda has suggested,

---

accorded Black women, which has emphasized sexual availability and condoned rape while stigmatizing marriage. It should be emphasized that this view of Mexican women applied only to some, in particular to those of the elite class with significant European antecedents, and began to wane towards the end of the 19th century as more Anglo women moved into the Southwest. Nevertheless, the different social-sexual-racial identity accorded Mexican and Black women at virtually the same historical and geographical moment is remarkable. This may reflect the absence of a rule of racial construction as applied to Mexicans similar to the one-drop rule prevalent in the reigning U.S. mythology concerning Blacks. See F. JAMES DAVIS, WHO IS BLACK: ONE NATION'S DEFINITION 168 (1991) (Davis argues, perhaps overbroadly, that "racially visible minority groups other than blacks in the United States . . . are not subject to a one-drop rule, and those persons whose ancestry is one-fourth or less from one of those groups are able to become fully assimilated by intermarrying with whites.").

<sup>121</sup> For insightful legal commentary on the conjunction of race and gender, see Regina Austin, *Sapphire Bound!*, 1989 Wis. L. Rev. 539; Kimberlé Williams Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 195 (David Kairys ed., 2d ed., 1990); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). A thoughtful consideration of the literary "ethnicizing of gender" can be found in Sau-ling Cynthia Wong, *Ethnicizing Gender: An Exploration of Sexuality as Sign in Chinese Immigrant Literature*, in *READING THE LITERATURES OF ASIAN AMERICA* 111 (Shirley Geok-lin Lim & Amy Ling eds., 1992).

<sup>122</sup> SYLVESTER MOWRY, *THE GEOGRAPHY AND RESOURCES OF ARIZONA AND SONORA* (1863), reprinted in TAKAKI, *supra* note 92, at 163.

<sup>123</sup> The literature on race and class is voluminous, including both non-marxist and

as noted at the beginning of this Article, that critical race theory should work towards the elimination of racism as part of a larger project aimed at eliminating all forms of subordination.<sup>124</sup> The syncretic nature of racial, gender, and class constructs suggests that this global approach to oppression is not only desirable but *necessary*, if the amelioration of these destructive social hierarchies is to be achieved.

Third, comparing the stereotypes of Mexicans propounded by Farnham and Lowry demonstrates the relatively rapid rate at which racial systems of meaning can change.<sup>125</sup> In 1821, when Mexico gained its independence, its residents were not generally considered a race. Yet about twenty years later, as our examples illustrate, Mexicans were denigrated in explicitly racial terms as indolent cowards, and twenty years after that, lauded as being naturally industrious and faithful. The rapid emergence of Mexicans as a race and the equally quick transformations of their perceived racial character exemplify the plasticity of race. Accretions of racial meaning are not sedimentary products that, once deposited, remain solid and unchanged, or subject only to a slow process of abrasion, erosion and build-up. Instead, the processes of racial fabrication continuously melt down, mold, twist, and recast races: races are not rocks, they are plastics.<sup>126</sup>

Despite their conflicting views on the work ethic of Mexicans, the fundamental message delivered by Farnham and Mowry was the same; though war, conquest, and expansion separate their writings, both tied race and class together in the exposition of Mexican inferiority and Anglo superiority. The inseparability of the denigration of Mexicans and the celebration of Anglos sparks the fourth and final point to be taken from Farnham: races are relationally constructed. To racially define the conquered, subjugated, or enslaved at the same time racially defines the conqueror, the subjugator, or the enslaver.<sup>127</sup> Ronald Takaki makes this

marxist analyses. For a non-marxist analysis of race and class, see, e.g., WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987). For a marxist-informed take on race, see, e.g., EUGENE GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1976). For an overview of the various marxist approaches to the issue of race, see John Solomos, *Varieties of Marxist Conceptions of 'Race', Class, and the State: A Critical Analysis*, in *THEORIES OF RACE AND ETHNIC RELATIONS* 84 (John Rex & David Mason eds., 1988).

<sup>124</sup> See *supra* note 31 and accompanying text.

<sup>125</sup> Equating races with "peoplehood," Immanuel Wallerstein suggests that "peoplehood is not merely a construct hut one which, in each particular instance, has constantly changing boundaries." Wallerstein, *The Construction of Peoplehood: Racism, Nationalism, Ethnicity*, *supra* note 102, at 77.

<sup>126</sup> Cf. OMI & WINANT, *supra* note 6, at 61 ("The meaning of race is defined and contested throughout society, in both collective action and personal practice. In the process, racial categories themselves are formed, transformed, destroyed, and re-formed.").

<sup>127</sup> See Satya P. Mohanty, *Drawing the Color Line: Kipling and the Culture of Colonial Rule*, in *THE BOUNDS OF RACE: PERSPECTIVES ON HEGEMONY AND RESISTANCE* 311, 314 (Dominick LaCapra ed., 1991) ("Racialization involves not just the denigration of 'black,'

point in assessing Richard Henry Dana's mid-nineteenth-century journal *Two Years Before the Mast*, which describes his voyage along the California coast. Noting Dana's perception that Mexicans possess a "dark and muddy" complexion and "an idle, thriftless" temperament, Takaki emphasizes not only the linkage of complexion and moral character, but the opposition that Dana draws between the Mexicans and the Yankees. Takaki writes: "What distinguished the Anglo-Americans from the inhabitants of California, in Dana's observations, were their white racial purity and their Yankeeism—their industry, frugality, sobriety, and enterprise."<sup>128</sup> For Dana, condemning Mexicans as idle served as a foil against which to cast Anglos as frugal and enterprising.<sup>129</sup>

Racial fabrication does not, however, implicate Whites only relationally. This process also directly sculpts the contours of the White race. For example, until well into this century, White in this country meant Anglo-Saxon and the color line explicitly excluded other European groups, including the Irish, the Jews, and all Southern and Eastern Europeans. Witness the warning sounded by Francis Walker, the president of the Massachusetts Institute of Technology, against European immigrants in the pages of the June 1896 issue of the *Atlantic Monthly*:

The entrance into our political, social, and industrial life, of such vast masses of peasantry, degraded below our utmost conceptions, is a matter which no intelligent patriot can look upon

---

then, but also in crucial ways a less obvious definition of 'white'; racialization narrates conditions of political and ethical possibility, defining and reshaping ideas, ideologies, and interests." See also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373 (1988) (providing a chart of oppositional characterizations of Whites and Blacks).

<sup>128</sup> TAKAKI, *supra* note 92, at 157.

<sup>129</sup> Because the identities of Whites and Blacks (and other minorities) are constructed in dualistic opposition to each other, the rehabilitation of minorities implies a more honest appraisal of the characteristics of Whites. More pointedly, challenging the stereotype that Blacks are evil challenges the myth that Whites are innocent.

[The] three unarmed Black men [who became lost in Howard Beach] threatened to undo the very concept of white that so occupies the imagination of Europe and America that it blots out everything else. The threat that the Black Other brings to white space is not that more houses will be robbed but that the crime rate will *not* rise with their presence—that they will actually come and go peacefully and without incident. This would be the greatest catastrophe because then it would be inescapably revealed that whites rob the homes of other whites, that white men rape white women, that the evils of white society are attributable to whites, and ultimately that whites do not exist because the defining characteristic of whiteness—innocence and purity—is a phantasm.

Richard Ford, *Urban Space and the Color Line: The Consequences of Demarcation and Disorientation in the Postmodern Metropolis*, 9 HARV. BLACKLETTER J. 117, 138 (1992) (citation omitted).

without the gravest apprehension and alarm. These people . . . have none of the inherited instincts and tendencies which make it comparatively easy to deal with the immigration of the olden time. They are beaten men from beaten races; representing the worst failures in the struggle for existence.<sup>130</sup>

The degree of degeneration supposedly marking the immigrant was on occasion accentuated by unflattering comparisons to Blacks. "An Irish Catholic," one New England commentator contended, "seldom attempts to rise to a higher condition than that in which he was placed, while the Negro often makes the attempt with success."<sup>131</sup> Like other racial beliefs before, views such as those expressed by Walker were quickly translated into exclusionary immigration laws, though in this instance those today securely established as White were the victims.<sup>132</sup>

The conflict over the color line among those now safely ensconced in their White status is exemplified in the reception accorded Armenians. In 1909, roughly 50,000 Armenians came to the United States fleeing genocide at the hands of the Turks. The federal government classified Armenians as "asiatics," relying on their origins east of the Bosphorus Strait. (The strait runs through Istanbul and officially divides Europe and Asia.) As a result, the new immigrants were denied naturalization, which was available only to "whites" and persons of African nativity, though explicitly not to the Chinese.<sup>133</sup> Four Armenians sued to establish their racial eligibility for citizenship. On appeal, the circuit court put the issue succinctly: "These petitioners are neither Chinamen nor Africans of any sort, and the court has here to decide whether they are white or not."<sup>134</sup>

---

<sup>130</sup>Francis A. Walker, *Restriction of Immigration*, ATLANTIC MONTHLY June 1896, at 828, quoted in GOSSETT, *supra* note 50, at 303.

<sup>131</sup>GOSSETT, *supra* note 50, at 288 (citation omitted).

<sup>132</sup>

In 1924 the Congress of the United States passed an immigration restriction act that weighted future immigration in the United States heavily against Eastern and Southern Europeans. Testimony before Congress by leaders of the American mental testing movement to the effect that Slavs, Jews, Italians, and others were mentally dull and that their dullness was racial, or at least constitutional, gave scientific legitimacy to the [restrictive immigration] law.

KAMIN ET AL., *supra* note 44, at 27 (citation omitted). See Immigration Act of 1924 §§ 31–32, 43 Stat. 190, 153–69 (1924). See also Lombardo, *supra* note 43, at 423 ("While Congress endorsed the eugenic motive for curbing immigration, the Virginia General Assembly followed similar arguments in passing . . . the Racial Integrity Act of 1924, [which] forbade miscegenation on the grounds that racial mixing was scientifically unsound and would 'pollute' America with mixed-blood offspring.") (notes omitted).

<sup>133</sup>Naturalization Act, Rev. Stat. § 2169 (1901). See *supra* note 56.

<sup>134</sup>*In re Halladjian*, 174 F. 836–37 (1909).

The court first addressed and rejected the government's argument that "whites" meant members of the "white race" or the "European race." Defining races as entailing "a common ancestry . . . necessarily remote, and beyond reach of ordinary genealogy,"<sup>135</sup> the court found it reasonable to speak of the "Anglo-saxon race," but also of "the Teutonic, the Celtic, the Slavonic, [and] the Caucasian" races.<sup>136</sup> The court continued: "Even if we grant for the sake of the argument that it is proper to speak of the British race, the Hungarian, and the Russian, even if these may be designated as European races, yet to classify them as belonging to a *single* race, called 'European or White,' is contrary to ordinary usage."<sup>137</sup> Though there were clearly races in 1909, one of them was not the White race as it is popularly conceived of today.

Abandoning the attempt to determine who was included in the term "white," the court set about specifying who was excluded. After examining statutes and census documents dating back to the original colonies, the court reached a startling conclusion. With an eye towards bright lines and a deaf ear to the "ordinary usage" earlier lauded, it stated that "the word 'white' has generally been used . . . to include *all persons* not otherwise classified."<sup>138</sup> In effect, the court held people were White until Congress said they were not. The court wrote: "The word 'white,' . . . though its meaning has been narrowed so as to exclude Chinese and Japanese in some instances, yet still includes Armenians. Congress may amend the statutes in this respect."<sup>139</sup> On this basis, Armenians became White and citizens.<sup>140</sup>

---

<sup>135</sup> *Id.* at 837.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 838 (emphasis added).

<sup>138</sup> *Id.* at 845 (emphasis added). The court summarized its analysis as follows:

From all of the illustrations, which have been taken almost at random, it appears that the word "white" has been used in colonial practice, in the federal statutes, and in the publications of the government to designate persons not otherwise classified. The census of 1900 makes this clear by its express mention of Africans, Indians, Chinese, and Japanese, leaving whites as a catch-all word to include everybody else. A similar use appears 130 years earlier from the provincial census of Massachusetts taken in 1768, where "French neutrals" are not reckoned as white persons, notwithstanding their white complexion. Negroes have never been reckoned as whites; Indians but seldom. At one time Chinese and Japanese were deemed white, but are not usually so reckoned today. In passing the act of 1790 [limiting naturalization to free whites] Congress did not concern itself particularly with Armenians, Turks, Hindoos, or Chinese. Very few of them were in the country, or were coming to it, yet the census taken in that year shows that everybody but a Negro or an Indian was classified as a white person.

*Id.* at 843.

<sup>139</sup> *Id.* at 845.

<sup>140</sup> For a brief discussion of this case and its significance for Armenians in California, where persons excluded from naturalization were prohibited from owning land, see

The persistent usage in social and legal contexts of the single term "white person" obscures a central truth: the referent of that term is an ill-defined social group subject to expansion and retrenchment.<sup>141</sup> The color line defining Whites was only moved outward to include all of Europe in the 1920s and 1930s. Widespread assimilation and increasing intermarriage among European ethnics, coupled with increasing Black northward migration, energized the redefinition of the White race in the United States.<sup>142</sup> Like every other group now racially defined, White identity is a product of social history, not science or biology.<sup>143</sup>

#### D. Appiah's Critique

Recall that the idea that races are sociohistorical products has been criticized by Anthony Appiah. Appiah rejects an argument similar to the one I make here regarding the historical racialization of Mexicans, criticizing the assertion by W.E.B. Du Bois that African Americans are bound together by the common disaster of slavery.<sup>144</sup> Appiah asserts that Du Bois merely substituted a sociohistorical conception of race for a biological one, which he claims "is simply to bury the biological conception of race below the surface, not to transcend it."<sup>145</sup> According to Appiah, a common history cannot define a group, because for the group to share a history, it must already have been independently defined as a group. In his words: "[S]haring a common group history cannot be a criterion for being members of the same group, for we would have to be able to identify the group in order to identify *its* history."<sup>146</sup>

---

RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 15 (1989).

<sup>141</sup>Even the Supreme Court recently recognized the plasticity of the White race. In considering the claim of an Arab under § 1981, which secures to all persons the privileges enjoyed by "white citizens," 42 U.S.C. § 1981 (1982), the Court embarked on an extensive foray into the intellectual history underlying the term "white," and in particular the term "Caucasian." *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610-12 (1987) (discussed more fully at *supra* notes 68-70 and accompanying text). The Court concluded in part: "Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law [1870]." *Id.* at 610.

<sup>142</sup>GOSSETT, *supra* note 50, at 444.

<sup>143</sup>Notions of who is White are not only temporally but geographically specific. For example, "[t]here is recent evidence that many caucasoid groups, including Turks, Iranians, Italians, and Arabs, are not perceived as white by students in Canadian schools." DAVIS, *supra* note 120, at 161 (citation omitted).

<sup>144</sup>Du Bois wrote: "[O]ne thing is sure and that is the fact that since the fifteenth century these ancestors of mine and their descendants have a common history; have suffered a common disaster and have one long memory . . . [T]he real essence of this kinship is its social heritage of slavery." W.E.B. DU BOIS, *THE DUSK OF DAWN: AN ESSAY TOWARD AN AUTOBIOGRAPHY OF A RACE CONCEPT* 137 (1975), *quoted in Illusion*, *supra* note 25, at 33.

<sup>145</sup>*Illusion*, *supra* note 25, at 34.

<sup>146</sup>*Id.* at 27.

Appiah correctly sees circularity in Du Bois' argument that African Americans are bound to their ancestors through the shared history of slavery, for this view presupposes the existence during that tragedy of an independently identifiable group. However, the argument presented here is different. I do not argue that races are peoples who *share* a history; I argue that races are peoples *created* by history. Before slavery Blacks did not exist as the race we recognize now in this country. Instead, slavery created a single group in North America defined by the common disaster that befell the disparate peoples of Africa brought to these shores. Slavery oppressed a group of people marked in comparison with their oppressors by a common morphology. African Americans remain linked by the legacy of that oppression and its current incarnation, which is the very systems of meaning that today attach to Black morphology and ancestry.<sup>147</sup> Similarly, Mexicans were arguably created as a race by U.S. expansion into Mexico and the subsequent fifteen decades of discrimination. Historical forces create races, groups defined by the social significance of their morphology and ancestry. To talk of social races does not require that one subscribe to bad biology.

Nevertheless, Appiah's criticism does force an important reiteration: if historical currents created races, races are no less subject to those same dynamics today. A race, once created, does not take on a life of its own independent from the surge of social forces. Race is not hereditary; our parents do not impart to us our race. Instead, society attaches specific significance to our ancestry and appearance, and in that system of meanings lie the origins of our race. "Simone de Beauvoir wrote that one is not born a woman," Henry Louis Gates notes, adding "no, and one is not born a Negro . . ." <sup>148</sup> To assert that race, once historically acquired, becomes hereditary, is, to paraphrase historian Barbara Fields, only a latter-day version of Lamarckism. "If race lives on today," Fields writes, "it does not live on because we have inherited it from our forbears of the seventeenth century or eighteenth or nineteenth, but because we continue to create it today."<sup>149</sup>

A theory of racial fabrication facilitates a sophisticated appreciation of the social nature of race, giving a plausible and nuanced explanation of what we see "out there." Race is revealed as historically contingent,

---

<sup>147</sup>Historian Barbara Fields locates the fabrication of the modern Black race in the United States in the slave epoch. See Fields, *supra* note 29, at 95. Fields explains the creation of a Black race in terms of the ideological need to explain "slavery to people whose terrain was a republic founded on radical doctrines of liberty and natural rights." *Id.* at 114. Fields argues that "[t]hose holding liberty to be inalienable and holding Afro-Americans as slaves were bound to end by holding race to be a self-evident truth." *Id.* at 101.

<sup>148</sup>GATES, LOOSE CANONS, *supra* note 73, at 36.

<sup>149</sup>Fields, *supra* note 29, at 117.

socially mediated systems of meaning that attach to elements of an individual's morphology and ancestry. Nevertheless, the focus on a meta-theory of racial formation leaves unexplored a key area of concern: the role of people in the micromechanics of race. Racial fabrication explains the creation and maintenance of races macroscopically, emphasizing the play of history and the surge of social forces but ignoring the dynamics of race in daily life. It does not by itself offer critical insight into how racial structures shape particular lives, or any sense of how the agency of individuals or communities alters the social forces of race. In the remainder of this essay I explore the way race is deployed in our everyday lives.

#### IV. The Mean Streets of Social Race

The literature of minority writers provides some of the most telling insights into, and some of the most confused explorations of, race in the United States.<sup>150</sup> Piri Thomas's quest for identity, recorded in *Down These Mean Streets*,<sup>151</sup> fits squarely within this tradition of insight and confusion. Thomas describes his racial transformation, which is both willed and yet not willed, from a Puerto Rican into someone Black.<sup>152</sup> Dissecting his harrowing experiences, piercing perceptions, and profound misapprehensions offers a way to disaggregate the daily technology of race. To facilitate this discussion, I employ the terms of chance, context, and choice: chance refers to morphology and ancestry, context to the contemporary social setting, and choice to the quotidian decisions of life. In the play of race, chance, context, and choice overlap and are inseparable. Nevertheless, I distinguish among these neologisms to focus on key aspects of how race is created, maintained, and experienced. Drawing upon these terms

---

<sup>150</sup>Black literature is replete with powerful examples. For two classic considerations of race by Black authors, see RALPH ELLISON, *INVISIBLE MAN* (1947) and JAMES WELDON JOHNSON, *AUTOBIOGRAPHY OF AN EX-COLORED MAN* (1960). For important explorations of race and identity by Asian authors, see, e.g., CARLOS BULOSAN, *AMERICA IS IN THE HEART* (1943); CYNTHIA KADOHATA, *THE FLOATING WORLD* (1989); and DAVID MURA, *TURNING JAPANESE: MEMOIRS OF A SANSEI* (1991). On Asian American literature, see generally *READING THE LITERATURES OF ASIAN AMERICA* (Shirley Geok-lin Lim & Amy Ling eds., 1992). For investigations of these same themes by Latino authors, see, e.g., JULIA ALVÁREZ, *HOW THE GARCÍA GIRLS LOST THEIR ACCENT* (1992); JOSÉ ANTONIO VILLAREAL, *CLEMENTE CHACÓN* (1984). For first-rate commentary on Chicano literature, see JUAN BRUCE-NOVOA, *RETROSPACE: COLLECTED ESSAYS ON CHICANO LITERATURE* (1990). For a Native American's literary reflections on identity in modern America, see JIM NORTHRUP, *WALKING THE REZ ROAD* (1993).

<sup>151</sup>PIRI THOMAS, *DOWN THESE MEAN STREETS* (1967).

<sup>152</sup>The reformulation of questions of identity into questions of race is a common theme in Latino literature, though often the conflict plays out in nationalistic terms. See, e.g., OSCAR ACOSTA, *THE AUTOBIOGRAPHY OF A BROWN BUFFALO* (2d ed. 1989) and *THE REVOLT OF THE COCKROACH PEOPLE* (2d ed. 1989) (author rejects an individually American or Mexican identity before embarking on a journey of self-creation as a Chicano).