Critical Race Theory

THE KEY WRITINGS
That Formed the Movement

Edited by

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WHITENESS AS PROPERTY

Cheryl I. Harris

she walked into forbidden worlds
impaled on the weapon of her own pale skin
she was a sentinel
at impromptu planning sessions
of her own destruction. . . .

—Cheryl I. Harris, "Poem for Alma"

[P]etitioner was a citizen of the United States and a resident of the state of Louisiana of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws . . . and thereupon entered a passenger train and took possession of a vacant seat in a coach where passengers of the white race were accommodated.

—*Plessy v. Ferguson*[1]

I. Introduction

IN the thirties, some years after my mother's family became part of the great river of black migration that flowed north, my Mississippi-born grandmother was confronted with the harsh matter of economic survival for herself and her two daughters. Having separated from my grandfather, who himself was trapped on the fringes of economic marginality, she took one long hard look at her choices and presented herself for employment at a major retail store in Chicago's central business district. This decision would have been unremarkable for a white woman in similar circumstances, but for my grandmother it was an act of both great daring and self-denial—for in so doing she was presenting herself as a white woman. In the parlance of racist America, she was "passing."

Her fair skin, straight hair, and aquiline features had not spared her from the life of sharecropping into which she had been born in anywhere/nowhere, Mississippi—the outskirts of Yazoo City. In the burgeoning landscape of urban America, though, anonymity was possible for a black person with "white" features. She was transgressing boundaries, crossing borders, spinning on margins, traveling between dualities of Manichean space, rigidly bifurcated into light/dark, good/bad, white/black. No longer immediately identifiable as "Lula's daughter," she could thus enter the white world, albeit on a false passport, not merely passing but trespassing.

Every day my grandmother rose from her bed in her house in a black enclave on the south side of Chicago, sent her children off to a black school, boarded a bus full of black passengers, and rode to work. No one at her job ever asked if she was black; the question was unthinkable. By virtue of the employment practices of the "fine establishment" in which she worked, she could not have been. Catering to the upper middle class, understated tastes required that blacks not be allowed.

She quietly went about her clerical tasks, not once revealing her true identity. She listened to the women with whom she worked discuss their worries—their children's illnesses, their husband's disappointments, their boyfriends' infidelities—all of the mundane yet critical things that made up their lives. She came to know them but they did not know her, for my grandmother occupied a completely different place. That place—where white supremacy and economic domination meet—was unknown turf to her white co-workers. They remained oblivious to the worlds within worlds that existed just beyond the edge of their awareness and yet were present in their very midst.

Each evening, my grandmother, tired and worn, retraced her steps home, laid aside her mask, and reentered herself. Day in and day out, she made herself invisible, then visible again, for a price too inconsequential to do more than barely sustain her family and at a cost too precious to conceive. She left the job some years later, finding the strain too much to bear.

From time to time, as I later sat with her, she would recollect that period, and the cloud of some painful memory would pass across her face. Her voice would remain subdued, as if to contain the still-remembered tension. On rare occasions, she would wince, recalling some particularly racist comment made in her presence because of her presumed shared group affiliation. Whatever retort might have been called for had been suppressed long before it reached her lips, for the price of her family's well-being was her silence. Accepting the risk of self-annihilation was the only way to survive.

Although she never would have stated it this way, the clear and ringing denunciations of racism she delivered from her chair when advanced arthritis had rendered her unable to work were informed by those experiences. The fact that self-denial had been a logical choice and had made her complicit in her own oppression at times fed the fire in her eyes when she confronted some daily outrage inflicted on black people. Later, these painful memories forged her total identification with the civil rights movement. Learning about the world at her knee as I did, these experiences also came to inform my outlook and my understanding of the world.

My grandmother's story is far from unique. Indeed, there are many who crossed the color line never to return. Passing is well known among black people in the United States; it is a feature of race subordination in all societies structured on white supremacy. Notwithstanding the purported benefits of black heritage in an era of affirmative action, passing is not an obsolete phenomenon that has slipped into history.

The persistence of passing is related to the historical and continuing pattern of white racial domination and economic exploitation, which has invested passing with a certain economic logic. It was a given for my grandmother that being white automatically ensured higher economic returns in the short term and greater economic, political, and social security in the long run. Becoming white meant gaining access to a whole set of public and private privileges that materially and permanently guaranteed basic subsistence needs and, therefore, survival. Becoming white increased the possibility of controlling critical aspects of one's life rather than being the object of others' domination.

My grandmother's story illustrates the valorization of whiteness as treasured property in a society structured on racial caste. In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset—one that whites sought to protect and those who passed sought to attain, by fraud if necessary. Whites have come to expect and rely on these benefits, and over time these expectations have been affirmed, legitimated, and protected by the law. Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privilege, American law has recognized a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated.

This article investigates the relationships between concepts of race and property, and it reflects on how rights in property are contingent on, intertwined with, and conflated with race. Through this entangled relationship between race and property, historical forms of domination have evolved to reproduce subordination in the present. [. . .]

II. The Construction of Race and the Emergence of Whiteness as Property

THE racialization of identity and the racial subordination of blacks and Native Americans provided the ideological basis for slavery and conquest. Although the systems of oppression of blacks and Native Americans differed in form—the former involving the seizure and appropriation of labor, the latter entailing the seizure and appropriation of land—undergirding both was a racialized conception of property implemented by force and ratified by law.

The origins of property rights in the United States are rooted in racial domination. Even in the early years of the country, it was not the concept of race alone that operated to oppress blacks and Indians; rather, it was the interaction between conceptions of race and property which played a critical role in establishing and maintaining racial and economic subordination.

The hyperexploitation of black labor was accomplished by treating black people themselves as objects of property. Race and property were thus conflated by establishing a form of property contingent on race: only blacks were subjugated as slaves and treated as property. Similarly, the conquest, removal, and extermination of Native American life and culture were ratified by conferring and acknowledging the property rights of whites in Native American land. Only white possession and occupation of land was validated and therefore privileged as a basis for property rights. These distinct forms of exploitation each contributed in varying ways to the construction of whiteness as property.

A. Forms of Racialized Property: Relationships Between Slavery, Race, and Property

1. THE CONVERGENCE OF RACIAL AND LEGAL STATUS

Although the early colonists were cognizant of race, racial lines were neither consistently nor sharply delineated among or within all social groups. Captured Africans sold in the Americas were distinguished from the population of indentured or bond servants—"unfree" white labor—but it was not an irrebuttable presumption that all Africans were "slaves," or that slavery was the only appropriate status for them. The distinction between African and white indentured labor grew, however, as decreasing terms of service were introduced for white bond servants. Simultaneously, the demand for labor intensified, resulting in a greater reliance on African labor and a rapid increase in the number of Africans imported to the colonies.

The construction of white identity and the ideology of racial hierarchy were intimately tied to the evolution and expansion of the system of chattel slavery. The further entrenchment of plantation slavery was in part an answer to a social crisis produced by the eroding capacity of the landed class to control the white labor population. The dominant paradigm of social relations, however, was that while not all Africans were slaves, virtually all slaves were not white. It was their racial Otherness that came to justify the subordinated status of blacks. The result was a classification system that "key[ed] official rules of descent to national origin" so that "[m]embership in the new social category of 'Negro' became itself sufficient justification for enslaveability."[2] Although the cause of the increasing gap between the status of African and white labor is contested by historians, it is clear that "[t]he economic and political interests defending Black slavery were far more powerful than those defending indentured servitude."[3]

By the 1660s, the especially degraded status of blacks as chattel slaves was recognized by law. Between 1680 and 1682, the first slave codes appeared, enshrining the extreme deprivations of liberty already existing in social practice. Many laws parceled out differential treatment based on racial categories: blacks were not permitted to travel without permits, to own property, to assemble publicly, or to own weapons—nor were they to be educated. Racial identity was further merged with stratified social and legal status: "black" racial identity marked who was subject to enslavement, whereas "white" racial identity marked who was "free" or, at minimum, not a slave. The ideological and rhetorical move from "slave" and "free" to "black" and "white" as polar constructs marked an important step in the social construction of race.

2. IMPLICATIONS FOR PROPERTY

The social relations that produced racial identity as a justification for slavery also had implications for the conceptualization of property. This result was predictable, as the institution of slavery, lying at the very core of economic relations, was bound up with the idea of property. Through slavery, race and economic domination were fused.[4]

Slavery produced a peculiar, mixed category of property and humanity—a hybrid with inherent instabilities that were reflected in its treatment and ratification by the law. The dual and contradictory character of slaves as property and persons was exemplified in the Representation Clause of the Constitution. Representation in the House of Representatives was apportioned on the basis of population computed by counting all persons and "three-fifths of all other persons"—slaves. Gouveneur Morris's remarks

before the Constitutional Convention posed the essential question: "Upon what principle is it that slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote? Are they property? Why then is no other property included?"[5]

The cruel tension between property and humanity was also reflected in the law's legitimation of the use of blackwomen's bodies as a means of increasing property.[6] In 1662, the Virginia colonial assembly provided that "[c]hildren got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother. . . ."[7] In reversing the usual common law presumption that the status of the child was determined by the father, the rule facilitated the reproduction of one's own labor force. Because the children of blackwomen assumed the status of their mother, slaves were bred through blackwomen's bodies. The economic significance of this form of exploitation of female slaves should not be underestimated. Despite Thomas Jefferson's belief that slavery should be abolished, like other slaveholders, he viewed slaves as economic assets, noting that their value could be realized more efficiently from breeding than from labor. A letter he wrote in 1805 stated, "I consider the labor of a breeding woman as no object, and that a child raised every 2 years is of more profit than the crop of the best laboring man."[8]

Even though there was some unease in slave law, reflective of the mixed status of slaves as humans and property, the critical nature of social relations under slavery was the commodification of human beings. Productive relations in early American society included varying forms of sale of labor capacity, many of which were highly oppressive; but slavery was distinguished from other forms of labor servitude by its permanency and the total commodification attendant to the status of the slave. Slavery as a legal institution treated slaves as property that could be transferred, assigned, inherited, or posted as collateral.[9] For example, in *Johnson v. Butler*,[10] the plaintiff sued the defendant for failing to pay a debt of $496 on a specified date; because the covenant had called for payment of the debt in "money or negroes," the plaintiff contended that the defendant's tender of one negro only, although valued by the parties at an amount equivalent to the debt, could not discharge the debt. The court agreed with the plaintiff. This use of Africans as a stand-in for actual currency highlights the degree to which slavery "propertized" human life.

Because the "presumption of freedom [arose] from color [white]" and the "black color of the race [raised] the presumption of slavery," whiteness became a shield from slavery, a highly volatile and unstable form of property. In the form adopted in the United States, slavery made human beings market-alienable and in so doing, subjected human life and personhood—that which is most valuable—to the ultimate devaluation. Because whites could not be enslaved or held as slaves, the racial line between white and black was extremely critical; it became a line of protection and demarcation from the potential threat of commodification, and it determined the allocation of the benefits and burdens of this form of property. White identity and whiteness were sources of privilege and protection; their absence meant being the object of property.

Slavery as a system of property facilitated the merger of white identity and property. Because the system of slavery was contingent on and conflated with racial identity, it became crucial to be "white," to be identified as white, to have the property of being white. Whiteness was the characteristic, the attribute, the property of free human beings. . . .

B. Critical Characteristics of Property and Whiteness

1. WHITENESS AS A TRADITIONAL FORM OF PROPERTY

Whiteness fits the broad historical concept of property described by classical theorists. In James Madison's view, for example, property "embraces every thing to which a man may attach a value and have a right," referring to all of a person's legal rights. Property as conceived in the founding era included not only external objects and people's relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human

well-being, including freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal opportunities to use personal faculties.

Whiteness defined the legal status of a person as slave or free. White identity conferred tangible and economically valuable benefits, and it was jealously guarded as a valued possession, allowed only to those who met a strict standard of proof. Whiteness—the right to white identity as embraced by the law—is property if by "property" one means all of a person's legal rights.

Other traditional theories of property emphasize that the "natural" character of property is derivative of custom, contrary to the notion that property is the product of a delegation of sovereign power. This "bottom-up" theory holds that the law of property merely codifies existing customs and social relations. Under that view, government-created rights such as social welfare payments cannot constitute legitimate property interests because they are positivistic in nature. Other theorists have challenged this conception, and argued that even the most basic of "customary" property rights—the rule of first possession, for example—is dependent on its acceptance or rejection in particular instances by the government. Citing custom as a source of property law begs the central question: Whose custom?

Rather than remaining within the bipolar confines of custom or command, it is crucial to recognize the dynamic and multifaceted relationship among custom, command, and law, as well as the extent to which positionality determines how each may be experienced and understood. Indian custom was obliterated by force and replaced with the regimes of common law which embodied the customs of the conquerors. The assumption of American law as it related to Native Americans was that conquest did give rise to sovereignty. Indians experienced the property laws of the colonizers and the emergent American nation as acts of violence perpetuated by the exercise of power and ratified through the rule of law. At the same time, these laws were perceived as custom and "common sense" by the colonizers. The founders, for instance, so thoroughly embraced Lockean labor theory as the basis for a right of acquisition because it affirmed the right of the New World settlers to settle on and acquire the frontier. It confirmed and ratified their experience.

The law's interpretation of those encounters between whites and Native Americans not only inflicted vastly different results on them but also established a pattern—a custom—of valorizing whiteness. As the forms of racialized property were perfected, the value and protection extended to whiteness increased. Regardless of which theory of property one adopts, the concept of whiteness—established by centuries of custom (illegitimate custom, but custom nonetheless) and codified by law—may be understood as a property interest.

2. PROPERTY AND EXPECTATIONS

"Property is nothing but the basis of expectation," according to Jeremy Bentham, "consist[ing] in an established expectation, in the persuasion of being able to draw such and such advantage from the thing possessed."[11] The relationship between expectations and property remains highly significant, as the law "has recognized and protected even the expectation of rights as actual legal property."[12] This theory does not suggest that all values or all expectations give rise to property, but those expectations in tangible or intangible things which are valued and protected by the law are property.

In fact, the difficulty lies not in identifying expectations as a part of property but, rather, in distinguishing which expectations are reasonable and therefore merit the protection of the law as property. Although the existence of certain property rights may seem self-evident, and the protection of certain expectations may seem essential for social stability, property is a legal construct by which selected private interests are protected and upheld. In creating property "rights," the law draws boundaries and enforces or reorders existing regimes of power. The inequalities that are produced and reproduced are not givens or inevitabilities; rather, they are conscious selections regarding the structuring of social relations. In this sense, it is contended

that property rights and interests are not "natural" but "creation[s] of law." In a society structured on racial subordination, white privilege became an expectation and, to apply Margaret Radin's concept, whiteness became the quintessential property for personhood. The law constructed "whiteness" as an objective fact, although in reality it is an ideological proposition imposed through subordination. This move is the central feature of "reification": "Its basis is that a relation between people takes on the character of a thing and thus acquires a 'phantom objectivity,' an autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature: the relation between people."[13] Whiteness was an "object" over which continued control was—and is—expected. . . .

Because the law recognized and protected expectations grounded in white privilege (albeit not explicitly in all instances), these expectations became tantamount to property that could not permissibly be intruded upon without consent. As the law explicitly ratified those expectations in continued privilege or extended ongoing protection to those illegitimate expectations by failing to expose or to disturb them radically, the dominant and subordinate positions within the racial hierarchy were reified in law. When the law recognizes, either implicitly or explicitly, the settled expectations of whites built on the privileges and benefits produced by white supremacy, it acknowledges and reinforces a property interest in whiteness that reproduces black subordination.

3. THE PROPERTY FUNCTIONS OF WHITENESS

In addition to the theoretical descriptions of property, whiteness also meets the functional criteria of property. Specifically, the law has accorded "holders" of whiteness the same privileges and benefits accorded holders of other types of property. The liberal view of property is that it includes the exclusive rights of possession, use, and disposition. Its attributes are the right to transfer or alienability, the right to use and enjoyment, and the right to exclude others. Even when examined against this limited view, whiteness conforms to the general contours of property. It may be a "bad" form of property, but it is property nonetheless.

a. Rights of disposition Property rights are traditionally described as fully alienable. Because fundamental personal rights are commonly understood to be inalienable, it is problematic to view them as property interests. However, as Margaret Radin notes, "inalienability" is not a transparent term; it has multiple meanings that refer to interests that are nonsalable, nontransferable, or non-market-alienable. The common core of inalienability is the negation of the possibility of separation of an entitlement, right, or attribute from its holder.

Classical theories of property identified alienability as a requisite aspect of property; thus, that which is inalienable cannot be property. As the major exponent of this view, John Stuart Mill argued that public offices, monopoly privileges, and human beings—all of which were or should have been inalienable—should not be considered property at all. Under this account, if inalienability inheres in the concept of property, then whiteness, incapable of being transferred or alienated either inside or outside the market, would fail to meet a criterion of property.

As Radin notes, however, even under the classical view, alienability of certain property was limited. Mill also advocated certain restraints on alienation in connection with property rights in land and, probably, other natural resources. In fact, the law has recognized various kinds of inalienable property. For example, entitlements of the regulatory and welfare states, such as transfer payments and government licenses, are inalienable; yet they have been conceptualized and treated as property by law. Although this "new property" has been criticized as being improper—that is, not appropriately cast as property—the principal objection has been based on its alleged lack of productive capacity, not on its inalienability.

The law has also acknowledged forms of inalienable property derived from nongovernmental sources. In the context of divorce, courts have held that professional degrees or licenses

held by one party and financed by the labor of the other is marital property whose value is subject to allocation by the court. A medical or law degree is not alienable either in the market or by voluntary transfer. Nevertheless, it is included as property when dissolving a legal relationship.

Indeed, Radin argues that as a deterrent to the dehumanization of universal commodification, market-inalienability may be justified to protect property important to the person and to safeguard human flourishing. She suggests that noncommodification or market-inalienability of personal property or those things essential to human flourishing is necessary to guard against the objectification of human beings. To avoid that danger, "we must cease thinking that market alienability is inherent in the concept of property." Following this logic, then, the inalienability of whiteness should not preclude the consideration of whiteness as property. Paradoxically, its inalienability may be more indicative of its perceived enhanced value rather than of its disqualification as property.

b. Right to use and enjoyment Possession of property includes the rights of use and enjoyment. If these rights are essential aspects of property, it is because "the problem of property in political philosophy dissolves into . . . questions of the will and the way in which we use the things of this world."[14] As whiteness is simultaneously an aspect of identity and a property interest, it is something that can both be experienced and deployed as a resource. Whiteness can move from being a passive characteristic as an aspect of identity to an active entity that—like other types of property—is used to fulfill the will and to exercise power. The state's official recognition both of a racial identity that subordinated blacks and of privileged rights in property based on race, elevated whiteness from a passive attribute to an object of law and a resource deployable at the social, political, and institutional level to maintain control. Thus, a white person "used and enjoyed" whiteness whenever she took advantage of the privileges accorded white people simply by virtue of their whiteness—when she exercised any number of rights reserved for the holders of whiteness. Whiteness as the embodiment of white privilege transcended mere belief or preference; it became usable property, the subject of the law's regard and protection. In this respect, whiteness, as an active property, has been used and enjoyed.

c. . . . The conception of reputation as property found its origins in early concepts of property which encompassed things (such as land and personalty), income (such as revenues from leases, mortgages, and patent monopolies), and one's life, liberty, and labor. . . . The idea of self-ownership, then, was particularly fertile ground for the idea that reputation, as an aspect of identity earned through effort, was similarly property. Moreover, the loss of reputation was capable of being valued in the market.

The direct manifestation of the law's legitimation of whiteness as reputation is revealed in the well-established doctrine that to call a white person "black" is to defame her.[15] Although many of the cases were decided in an era when the social and legal stratification of whites and blacks was more absolute, as late as 1957 the principle was reaffirmed, notwithstanding significant changes in the legal and political status of blacks. As one court noted, "there is still to be considered the social distinction existing between the races," and the allegation was likely to cause injury.[16] A black person, however, could not sue for defamation if she was called "white." Because the law expressed and reinforced the social hierarchy as it existed, it was presumed that no harm could flow from such a reversal.

Private identity based on racial hierarchy was legitimated as public identity in law, even after the end of slavery and the formal end of legal race segregation. Whiteness as interpersonal hierarchy was recognized externally as race reputation. Thus, whiteness as public reputation and personal property was affirmed.

d. The absolute right to exclude Many theorists have traditionally conceptualized property as including the exclusive rights of use, disposition, and possession, with possession embracing the absolute right to exclude. The right to exclude was the central principle, too, of whiteness as identity, for whiteness in large part has been characterized not by an inherent unifying characteristic but by the exclusion of others deemed to be "not white." The possessors of whiteness were granted the legal right to exclude others from the privileges inhering in whiteness; whiteness became an exclusive club whose membership was closely and grudgingly guarded. The courts played an active role in enforcing this right to exclude—determining who was or was not white enough to enjoy the privileges accompanying whiteness. In that sense, the courts protected whiteness as they did any other form of property.

Moreover, as it emerged, the concept of whiteness was premised on white supremacy rather than on mere difference. "White" was defined and constructed in ways that increased its value by reinforcing its exclusivity. Indeed, just as whiteness as property embraced the right to exclude, whiteness as a theoretical construct evolved for the very purpose of racial exclusion. Thus, the concept of whiteness is built on exclusion and racial subjugation. This fact was particularly evident during the period of the most rigid racial exclusion, for whiteness signified racial privilege and took the form of status property.

At the individual level, recognizing oneself as "white" necessarily assumes premises based on white supremacy: it assumes that black ancestry in any degree, extending to generations far removed, automatically disqualifies claims to white identity, thereby privileging "white" as unadulterated, exclusive, and rare. Inherent in the concept of "being white" was the right to own or hold whiteness to the exclusion and subordination of blacks. Because "[i]dentity is . . . continuously being constituted through social interactions,"[17] the assigned political, economic, and social inferiority of blacks necessarily shaped white identity. In the commonly held popular view, the presence of black "blood"—including the infamous "one-drop"—consigned a person to being "black" and evoked the "metaphor . . . of purity and contamination" in which black blood is a contaminant and white racial identity is pure. Recognizing or identifying oneself as white is thus a claim of racial purity, an assertion that one is free of any taint of black blood. The law has played a critical role in legitimating this claim.

C. White Legal Identity: The Law's Acceptance and Legitimation of Whiteness as Property

The law assumed the crucial task of racial classification, and accepted and embraced the then-current theories of race as biological fact. This core precept of race as a physically defined reality allowed the law to fulfill an essential function—to "parcel out social standing according to race" and to facilitate systematic discrimination by articulating "seemingly precise definitions of racial group membership." This allocation of race and rights continued a century after the abolition of slavery.

The law relied on bounded, objective, and scientific definitions of race—what Neil Gotanda has called "historical-race"[18]—to construct whiteness as not merely race, but race plus privilege. By making race determinant and the product of rationality and science, dominant and subordinate positions within the racial hierarchy were disguised as the product of natural law and biology rather than as naked preferences. Whiteness as racialized privilege was then legitimated by science and was embraced in legal doctrine as "objective fact."

Case law that attempted to define race frequently struggled over the precise fractional amount of black "blood"—traceable black ancestry—that would defeat a claim to whiteness. Although the courts applied varying fractional formulas in different jurisdictions to define "black" or, in the terms of the day, "negro" or "colored," the law uniformly accepted the rule of hypodescent[19]—racial identity was governed by blood, and white was preferred.

This legal assumption of race as blood-borne was predicated on the pseudo-sciences of eugenics and craniology, which saw their major development during the eighteenth and nineteenth centuries. The legal definition of race

was the "objective" test propounded by racist theorists of the day, who described race to be immutable, scientific, biologically determined—an unsullied fact of the blood rather than a volatile and violently imposed regime of racial hierarchy.

In adjudicating who was "white," courts sometimes noted that, by physical characteristics, the individual whose racial identity was at issue appeared to be white and, in fact, had been regarded as white in the community. Yet if an individual's blood was tainted, she could not claim to be "white" as the law understood, regardless of the fact that phenotypically she may have been completely indistinguishable from a white person, may have lived as a white person, and may have descended from a family that lived as whites. Although socially accepted as white, she could not legally be white. Blood as "objective fact" predominated over appearance and social acceptance, which were socially fluid and subjective measures.

In fact, though, "blood" was no more objective than that which the law dismissed as subjective and unreliable. The acceptance of the fiction that the racial ancestry could be determined with the degree of precision called for by the relevant standards or definitions rested on false assumptions that racial categories of prior ancestors had been accurately reported, that those reporting in the past shared the definitions currently in use, and that racial purity actually existed in the United States.[20] Ignoring these considerations, the law established rules that extended equal treatment to those of the "same blood," albeit of different complexions, because it was acknowledged that, "[t]here are white men as dark as mulattoes, and there are pure-blooded albino Africans as white as the whitest Saxons."[21]

The standards were designed to accomplish what mere observation could not: "That even Blacks who did not look Black were kept in their place."[22] Although the line of demarcation between black and white varied from rules that classified as black a person containing "any drop of Black blood" to more liberal rules that defined persons with a preponderance of white blood to be white,[23] the courts universally accepted the notion that white status was something of value that could be accorded only to those persons whose proofs established their whiteness as defined by the law.[24] Because legal recognition of a person as white carried material benefits, "false" or inadequately supported claims were denied like any other unsubstantiated claim to a property interest. Only those who could lay "legitimate" claims to whiteness could be legally recognized as white, because allowing physical attributes, social acceptance, or self-identification to determine whiteness would diminish its value and destroy the underlying presumption of exclusivity. In effect, the courts erected legal "no trespassing" signs.

In the realm of social relations, racial recognition in the United States is thus an act of race subordination. In the realm of legal relations, judicial definition of racial identity based on white supremacy reproduced that race subordination at the institutional level. In transforming white to whiteness, the law masked the ideological content of racial definition and the exercise of power required to maintain it: "It convert[ed an] abstract concept into [an] entity."[25]

2. WHITENESS AS RACIALIZED PRIVILEGE

The material benefits of racial exclusion and subjugation functioned, in the labor context, to stifle class tensions among whites. White workers perceived that they had more in common with the bourgeoisie than with fellow workers who were black. Thus, W. E. B. Du Bois's classic historical study of race and class, *Black Reconstruction*,[26] noted that, for the evolving white working class, race identification became crucial to the ways that it thought of itself and conceived its interests. There were, he suggested, obvious material benefits, at least in the short term, to the decision of white workers to define themselves by their whiteness: their wages far exceeded those of blacks and were high even in comparison with world standards. Moreover, even when the white working class did not collect increased pay as part of white privilege, there were real advantages not paid in direct income: whiteness still yielded what Du Bois termed a "public and psychological wage" vital to white workers.[27] Thus, Du Bois noted that whites

> were given public deference . . . because they were white. They were admitted freely with all classes of white people, to public functions, to public parks. . . . The police were drawn from their ranks, and the courts, dependent on their votes, treated them with . . . leniency. . . . Their vote selected public officials, and while this had small effect upon the economic situation, it had great effect on their personal treatment. . . . White schoolhouses were the best in the community, and conspicuously placed, and they cost anywhere from twice to ten times as much per capita as the colored schools.[28]

The central feature of the convergence of "white" and "worker" lay in the fact that racial status and privilege could ameliorate and assist in "evad[ing] rather than confront[ing class] exploitation."[29] Although not accorded the privileges of the ruling class, in both the North and South, white workers could accept their lower class position in the hierarchy "by fashioning identities as 'not slaves' and as 'not Blacks.' "[30] Whiteness produced—and was reproduced by—the social advantage that accompanied it.

Whiteness was also central to national identity and to the republican project. The amalgamation of various European strains into an American identity was facilitated by an oppositional definition of black as Other. As Andrew Hacker suggests, fundamentally, the question was not so much "who is white" but, rather, "who may be considered white," for the historical pattern was that various immigrant groups of different ethnic origins were accepted into a white identity shaped around Anglo-American norms. Current members then "ponder[ed] whether they want[ed] or need[ed] new members as well as the proper pace of new admissions into this exclusive club."[31] Through minstrel shows in which white actors masquerading in blackface played out racist stereotypes, the popular culture put the black at " 'solo spot centerstage, providing a relational model in contrast to which masses of Americans could establish a positive and superior sense of identity,' . . [one] . . . established by an infinitely manipulable negation comparing whites with a construct of a socially defenseless group."[32]

It is important to note the effect of this hypervaluation of whiteness. Owning white identity as property affirmed the self-identity and liberty of whites and, conversely, denied the self-identity and liberty of blacks. The attempts to lay claim to whiteness through "passing" painfully illustrate the effects of the law's recognition of whiteness. The embrace of a lie, undertaken by my grandmother and the thousands like her, could occur only when oppression makes self-denial and the obliteration of identity rational and, in significant measure, beneficial. The economic coercion of white supremacy on self-definition nullifies any suggestion that passing is a logical exercise of liberty or self-identity. The decision to pass as white was not a choice, if by that word one means voluntariness or lack of compulsion. The fact of race subordination was coercive, and it circumscribed the liberty to define oneself. Self-determination of identity was not a right for all people but a privilege accorded on the basis of race. The effect of protecting whiteness at law was to devalue those who were not white by coercing them to deny their identity in order to survive.

1. WHITENESS, RIGHTS, AND NATIONAL IDENTITY

The concept of whiteness was carefully protected because so much was contingent upon it. Whiteness conferred on its owners aspects of citizenship which were all the more valued because they were denied to others. Indeed, the very fact of citizenship itself was linked to white racial identity. The Naturalization Act of 1790 restricted citizenship to persons who resided in the United States for two years, who could establish their good character in court, and who were "white." Moreover, the trajectory of expanding democratic rights for whites was accompanied by the contraction of the rights of blacks in an ever-deepening cycle of oppression. The franchise, for example, was broadened to extend voting rights to unpropertied white men

at the same time that black voters were specifically disenfranchised, arguably shifting the property required for voting from land to whiteness. This racialized version of republicanism—this *Herrenvolk* republicanism—constrained any vision of democracy from addressing the class hierarchies adverse to many who considered themselves white.

The inherent contradiction between the bondage of blacks and republican rhetoric that championed the freedom of "all" men was resolved by positing that blacks were different. The laws did not mandate that blacks be accorded equality under the law because nature—not man, not power, not violence—had determined their degraded status. Rights were for those who had the capacity to exercise them, a capacity denoted by racial identity. This conception of rights was contingent on race, on whether one could claim whiteness—a form of property. This articulation of rights that were contingent on property ownership was a familiar paradigm, as similar requirements had been imposed on the franchise in the early part of the Republic. For the first two hundred years of the country's existence, the system of racialized privilege in the public and private spheres carried through this linkage of rights and inequality, of rights and property. Whiteness as property was the critical core of a system that affirmed the hierarchical relations between white and black. . . .

III. The Persistence of Whiteness as Property

A. The Persistence of Whiteness as Valued Social Identity

Even as the capacity of whiteness to deliver is arguably diminished by the elimination of rigid racial stratifications, whiteness continues to be perceived as materially significant. Because real power and wealth never have been accessible to more than a narrowly defined ruling elite, for many whites the benefits of whiteness as property, in the absence of legislated privilege, may have been reduced to a claim of relative privilege only in comparison to people of color. Nevertheless, whiteness retains its value as a "consolation prize": it does not mean that all whites will win, but simply that they will not lose, if losing is defined as being on the bottom of the social and economic hierarchy—the position to which blacks have been consigned.

Andrew Hacker, in his 1992 book *Two Nations*,[33] recounts the results of a recent exercise that probed the value of whiteness according to the perceptions of whites. The study asked a group of white students how much money they would seek if they were changed from white to black. "Most seemed to feel that it would not be out of place to ask for $50 million, or $1 million for each coming black year." Whether this figure represents an accurate amortization of the societal cost of being black in the United States, it is clear that whiteness is still perceived to be valuable. The wages of whiteness are available to all whites, regardless of class position—even to those whites who are without power, money, or influence. Whiteness, the characteristic that distinguishes them from blacks, serves as compensation even to those who lack material wealth. It is the relative political advantages extended to whites, rather than actual economic gains, that are crucial to white workers. Thus, as Kimberlé Crenshaw points out, whites have an actual stake in racism.[34] Because blacks are held to be inferior, although no longer on the basis of science as antecedent determinant but, rather, by virtue of their position at the bottom, it allows whites—all whites—to "include themselves in the dominant circle. [Although most whites] hold no real power, [all can claim] their privileged racial identity."[35]

White workers often identify themselves primarily as white rather than as workers because it is through their whiteness that they are afforded access to a host of public, private, and psychological benefits. It is through the concept of whiteness that class-consciousness among white workers is subordinated and attention is diverted from class oppression.

Although dominant societal norms have embraced the ideas of fairness and nondiscrimination, removal of privilege and antisubordination principles are actively rejected or at best ambiguously received, because expectations of white

privilege are bound up with what is considered essential for self-realization. Among whites, the idea persists that their whiteness is meaningful. Whiteness is an aspect of racial identity surely, but it is much more; it remains a concept based on relations of power, a social construct predicated on white dominance and black subordination.

B. Subordination through Denial of Group Identity

Whiteness as property is also constituted through the reification of expectations in the continued right of white-dominated institutions to control the legal meaning of group identity. This reification manifests itself in the law's dialectical misuse of the concept of group identity as it pertains to racially subordinated peoples. The law has recognized and codified racial group identity as an instrument of exclusion and exploitation; however, it has refused to recognize group identity when asserted by racially oppressed groups as a basis for affirming or claiming rights. The law's approach to group identity reproduces subordination, in the past through "race-ing" a group—that is, by assigning a racial identity that equated with inferior status and, in the present, by erasing racial group identity.

In part, the law's denial of the existence of racial groups is not only predicated on the rejection of the ongoing presence of the past, but it is also grounded on a basic tenet of liberalism—that constitutional protections inhere in individuals, not in groups. As informed by the Lockean notion of the social contract, the autonomous, free will of the individual is central; indeed, it is the individual who, in concert with other individuals, elects to enter into political society and to form a state of limited powers. This philosophical view of society is closely aligned with the antidiscrimination principle—the idea being that equality mandates only the equal treatment of individuals under the law. Within this framework, the idea of the social group has no place.

Although the law's determination of any "fact," including that of group identity, is not infinitely flexible, its studied ignorance of the issue of racial group identity ensures wrong results by assuming a pseudo-objective posture that does not permit it to hear the complex dialogue concerning identity questions, particularly as they pertain to historically dominated groups.

Instead, the law holds to the basic premise that definition from above can be fair to those below, that beneficiaries of racially conferred privilege have the right to establish norms for those who have historically been oppressed pursuant to those norms, and that race is not historically contingent. Although the substance of race definitions has changed, what persists is the expectation of white-controlled institutions in the continued right to determine meaning—the reified privilege of power—that reconstitutes the property interest in whiteness in contemporary form.

. . .

IV. Delegitimating the Property Interest in Whiteness through Affirmative Action

WITHIN the worlds of de jure and de facto segregation, whiteness has value, whiteness is valued, and whiteness is expected to be valued in law. The legal affirmation of whiteness and white privilege allowed expectations that originated in injustice to be naturalized and legitimated. The relative economic, political, and social advantages dispensed to whites under systematic white supremacy in the United States were reinforced through patterns of oppression of blacks and Native Americans. Materially, these advantages became institutionalized privileges; ideologically, they became part of the settled expectations of whites—a product of the unalterable original bargain. The law masks as natural what is chosen; it obscures the consequences of social selection as inevitable. The result is that the distortions in social relations are immunized from truly effective intervention, because the existing inequities are obscured and rendered nearly invisible. The existing state of affairs is considered neutral and fair, however unequal and unjust it is in substance. Although the existing state of inequitable distribution is the product of insti-

tutionalized white supremacy and economic exploitation, it is seen by whites as part of the natural order of things, something that cannot legitimately be disturbed. Through legal doctrine, expectation of continued privilege based on white domination was reified; whiteness as property was reaffirmed.

The property interest in whiteness has proven to be resilient and adaptive to new conditions. Over time it has changed in form but it has retained its essential exclusionary character and continued to distort outcomes of legal disputes by favoring and protecting settled expectations of white privilege. The law expresses the dominant conception of constructs such as "rights," "equality," "property," "neutrality," and "power": rights mean shields from interference; equality means formal equality; property means the settled expectations that are to be protected; neutrality means the existing distribution, which is natural; and power is the mechanism for guarding all of this. . . .

Affirmative action begins the essential work of rethinking rights, power, equality, race, and property from the perspective of those whose access to each of these has been limited by their oppression. [. . .] From this perspective, affirmative action is required on moral and legal grounds to delegitimate the property interest in whiteness—to dismantle the actual and expected privilege that has attended "white" skin since the founding of the country. Like "passing," affirmative action undermines the property interest in whiteness. Unlike passing, which seeks the shelter of an assumed whiteness as a means of extending protection at the margins of racial boundaries, affirmative action denies the privileges of whiteness and seeks to remove the legal protections of the existing hierarchy spawned by race oppression. What passing attempts to circumvent, affirmative action moves to challenge.

Rereading affirmative action to delegitimate the property interest in whiteness suggests that if, historically, the law has legitimated and protected the settled whites' expectations in white privilege, delegitimation should be accomplished not merely by implementing equal treatment but also by equalizing treatment among the groups that have been illegitimately privileged or unfairly subordinated by racial stratification. Obviously, the meaning of equalizing treatment would vary, because the extent of privilege and subordination is not constant with reference to all societal goods. In some instances, the advantage of race privilege to poorer whites may be materially insignificant when compared to their class disadvantage against more privileged whites. But exposing the critical core of whiteness as property—the unconstrained right to exclude—directs attention toward questions of redistribution and property that are crucial under both race and class analysis. The conceptions of rights, race, property, and affirmative action as currently understood are unsatisfactory and insufficient to facilitate the self-realization of oppressed people. . . .

A. Affirmative Action: A New Form of Status Property?

If whiteness as property is the reification, in law, of expectations of white privilege, then according privilege to blacks through systems of affirmative action might be challenged as performing the same ideological function, but on the other side of the racial line. As evidence of a property interest in blackness, some might point out that, recently, some whites have sought to characterize themselves as belonging to a racial minority. Equating affirmative action with whiteness as property, however, is false and can only be maintained if history is ignored or inverted while the premises inherent in the existing racial hierarchy are retained. Whiteness as property is derived from the deep historical roots of systematic white supremacy which have given rise to definitions of group identity predicated on the racial subordination of the Other, and have reified expectations of continued white privilege. This reification differs in crucial ways from the premises, intent, and objectives of affirmative action.

Fundamentally, affirmative action does not reestablish a property interest in blackness, because black identity is not the functional opposite of whiteness. Even today, whiteness is still

intertwined with the degradation of blacks and is still valued because "the artifact of 'whiteness'. . . sets a floor on how far [whites] can fall." Acknowledging black identity does not involve the systematic subordination of whites, nor does it even set up a danger of doing so. Affirmative action is based on principles of antisubordination, not principles of black superiority.

The removal of white privilege pursuant to a program of affirmative action would not be implemented under an ideology of subordination, nor would it be situated in the context of the historical or present exploitation of whites. It is thus not a matter of implementing systematic disadvantage to whites or installing mechanisms of group exploitation. Whites are not an oppressed people and are not at risk of becoming so. Those whites who are disadvantaged in society suffer not because of their race but in spite of it. Refusing to implement affirmative action as a remedy for racial subordination will not alleviate the class oppression of poor whites; indeed, failing to do so will reinforce the existing regime of race and class domination which leaves lower-class whites more vulnerable to class exploitation. Affirmative action does not institute a regime of racialized hierarchy in which all whites, because they are white, are deprived of economic, social, and political benefits. It does not reverse the hierarchy; rather, it levels the racial privilege.

Even if one rejects the notion that properly constructed affirmative action policies cause whites no injustice, affirmative action does not implement a set of permanent, never-ending privileges for blacks. Affirmative action does not distort black expectations because it does not naturalize these expectations. Affirmative action can only be implemented through conscious intervention, and it requires constant monitoring and reevaluation—so it does not function behind a mask of neutrality in the realm beyond scrutiny. Affirmative action for blacks does not reify existing patterns of privilege, nor does it produce subordination of whites as a group. If anything, it might fairly be said that affirmative action creates a property interest in true equal opportunity—opportunity and means that are equalized.

B. What Affirmative Action Has Been; What Affirmative Action Might Become

The truncated application of affirmative action as a policy has obscured affirmative action as a concept. The ferocious and unending debate on affirmative action cannot be understood unless the concept of affirmative action is considered and conceptually disengaged from its application in the United States.

As policy, affirmative action does not have a clearly identifiable pedigree; rather, it was one of the limited concessions offered in official response to demands for justice pressed by black constituencies. Despite uneven implementation in the areas of public employment, higher education, and government contracts, it translated into the attainment by blacks of jobs, admissions to universities, and contractual opportunities. Affirmative action programs did not, however, stem the tide of growing structural unemployment and underemployment among black workers, nor did it prevent the decline in material conditions for blacks as a whole. Such programs did not change the subordinated status of blacks, in part because of structural changes in the economy, and in part because the programs were not designed to do so.

However, affirmative action is more than a program: it is a principle, internationally recognized, based on a theory of rights and equality. Formal equality overlooks structural disadvantage and requires mere nondiscrimination or "equal treatment"; by contrast, affirmative action calls for equalizing treatment by redistributing power and resources in order to rectify inequities and to achieve real equality. The current polarized debate on affirmative action and the intense political and judicial opposition to the concept is thus grounded in the fact that, in its requirement of equalizing treatment, affirmative action implicitly challenges the sanctity of the original and derivative present distribution of property, resources, and entitlements, and it directly confronts the notion that there is a protectable property interest in "whiteness." If

affirmative action doctrine were freed from the constraint of protecting the property interest in whiteness—if, indeed, it were conceptualized from the perspective of those on the bottom—it might assist in moving away from a vision of affirmative action as an uncompensated taking and inspire a new perspective on identity as well. The fundamental precept of whiteness, the core of its value, is its exclusivity; but exclusivity is predicated not on any intrinsic characteristic, but on the existence of the symbolic Other, which functions to "create an illusion of unity" among whites. Affirmative action might challenge the notion of property and identity as the unrestricted right to exclude. In challenging the property interest in whiteness, affirmative action could facilitate the destruction of the false premises of legitimacy and exclusivity inherent in whiteness and break the distorting link between white identity and property.

Affirmative action in the South African context offers a point of comparison. It has emerged as one of the democratic movement's central demands, appearing in both the constitutional guidelines and draft Bill of Rights issued by the African National Congress. These documents simultaneously denounce all forms of discrimination and embrace affirmative action as a mechanism for rectifying the gross inequities in South African society.

The South African conception of affirmative action expands the application of affirmative action to a much broader domain than has typically been envisioned in the United States. That is, South Africans consider affirmative action a strategic measure to address directly the distribution of property and power, with particular regard to the maldistribution of land and the need for housing. This policy has not yet been clearly defined, but what is implied by this conception of affirmative action is that existing distributions of property will be modified by rectifying unjust loss and inequality. Property rights will then be respected, but they will not be absolute; rather, they will be considered against a societal requirement of affirmative action. In essence, this conception of affirmative action is moving toward the reallocation of power and the right to have a say. This conception is in fact consistent with the fundamental principle of affirmative action and effectively removes the constraint imposed in the American model, which strangles affirmative action principles by protecting the property interest in whiteness.

V. Conclusion

WHITENESS as property has carried and produced a heavy legacy. It is a ghost that has haunted the political and legal domains in which claims for justice have been inadequately addressed for far too long. Only rarely declaring its presence, it has warped efforts to remediate racial exploitation. It has blinded society to the systems of domination that work against so many by retaining an unvarying focus on vestiges of systemic racialized privilege which subordinates those perceived as a particularized few—the Others. It has thwarted not only conceptions of racial justice but also conceptions of property which embrace more equitable possibilities. In protecting the property interest in whiteness, property is assumed to be no more than the right to prohibit infringement on settled expectations, ignoring countervailing equitable claims predicated on a right to inclusion. It is long past time to put the property interest in whiteness to rest. Affirmative action can assist in that task. If properly conceived and implemented, it is not only consistent with norms of equality but also essential to shedding the legacy of oppression.

NOTES

1. 163 U.S. 537, 538 (1896).

2. N. Gotanda, "A Critique of 'Our Constitution is ColorBlind,'" 44 *Stan L. Rev,*. 1, 34 (1991) [the essay is included in this volume—ED.].

3. D. Roediger, *The Wages of Whiteness,* at 32 (1991).

4. The system of racial oppression grounded in slavery was driven in large measure (although by no means exclusively) by economic concerns. . . .

5. M. Farrand, ed., 2 *The Records of the Federal Convention of 1787,* at 222 (1911).

6. My use of the term "blackwomen" is an effort to use language that more clearly reflects the unity of identity as "black" and "woman," with neither aspect primary or subordinate to the other. It is an attempt to realize in practice what has been identified in theory—that, as Kimberlé Crenshaw notes, blackwomen exist "at the crossroads of gender and race hierarchies"; K. Crenshaw, "Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill," in Toni Morrison, ed., *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality,* 402, 403 (1992). [. . .]

7. A. L. Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process,* at 43 (1978). [. . .]

8. Letter from Thomas Jefferson to John Jordan (Dec. 21, 1805), cited in R. Takaki, *Iron Cages: Race and Culture in Nineteenth-Century America,* at 44 (1990).

9. By 1705, Virginia had classified slaves as real property; see Higginbotham, *supra* note 7, at 52. In Massachusetts and South Carolina, slaves were identified as chattel; *id.* at 78, 211.

10. 4 Ky. (1 Bibb) 97 (1815).

11. Jeremy Bentham, "Security and Equality in Property," in C. B. Macpherson, ed., *Property: Mainstream and Critical Positions,* at 51–52 (1978). [. . .]

12. *Id.* at 366.

13. G. Lukacs, *History and Class Consciousness,* 83, trans. R. Livingstone (1971).

14. K. R. Minogue, "The Concept of Property and Its Contemporary Significance," in J. R. Pennock and J. W. Chapman, eds., *Nomos XXII: Property,* at 15 (1980).

15. See J. H. Crabb, "Annotation, Libel and Slander: Statements Respecting Race, Color, or Nationality as Actionable," 46 *A. L. R.*, 2d 1287, 1289 (1956) ("The bulk of the cases have arisen from situations in which it was stated erroneously that a white person was a Negro. According to the majority rule, this is libelous per se"). [. . .]

16. *Bowen v. Independent Publishing Co.*, 96 S.E.2d 564, 565 (S.C. 1957).

17. R. C. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution," 74 *Cal. L. Rev.*, 691, 709 (1986). . . .

18. Gotanda defines "historical-race" as socially constructed formal categories predicated on race subordination that included presumed substantive characteristics relating to "ability, disadvantage, or moral culpability" [the essay is included in this volume—ED.].

19. "Hypodescent" is the term used by anthropologist Marvin Harris to describe the American system of racial classification in which the subordinate classification is assigned to the offspring if there is one "superordinate" and one "subordinate" parent. Under this system, the child of a black parent and a white parent is black; M. Harris, *Patterns of Race in the Americas,* 37, 56 (1964).

20. It is not at all clear that even the slaves imported from abroad represented "pure negro races." As Gunner Myrdal noted, many of the tribes imported from Africa had intermingled with peoples of the Mediterranean, among them Portuguese slave traders. Other slaves brought to the United States came via the West Indies, where some Africans had been brought directly, but still others had been brought via Spain and Portugal, countries in which extensive interracial sexual relations had occurred. By the mid-nineteenth century it was, therefore, a virtual fiction to speak of "pure blood" as it relates to racial identification in the United States; see G. Myrdal, *An American Dilemma,* at 123 (1944).

21. *People v. Dean,* 14 Mich. 406, 422 (1866).

22. R. T. Diamond and R. J. Cottrol, "Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment," 29 *Loy. L. Rev.*, 255, 281 (1983).

23. See, for example, *Gray v. Ohio,* 4 Ohio 353, 355 (1831).

24. The courts adopted this standard even as they critiqued the legitimacy of such rules and definitions. For example, in *People v. Dean,* 14 Mich. 406 (1886), the court, in interpreting the meaning of the word "white" for the purpose of determining whether the defendant had voted illegally, criticized as "absurd" the notion that "a preponderance of mixed blood, on one side or the other of any given standard, has the remotest bearing upon personal fitness or unfitness to possess political privileges"; *id.* at 417. Yet it held that the electorate that had voted for racial exclusion had the right to determine voting privileges; see *id.* at 416.

25. S. J. Gould, *The Mismeasure of Man,* 24 (1981).

26. W. E. B. Du Bois, *Black Reconstruction* (1976) [1935].

27. *Id.* at 700.

28. *Id.* at 700-01.

29. Roediger, *supra* note 3, at 13. [. . .]

30. *Id.* at 13.

31. *Id.* at 9.

32. *Id.* at 118 (quoting Alan W. C. Green, " 'Jim Crow,' 'Zip Coon': The Northern Origin of Negro Minstrelsy," 11 *Mass. Rev.*, 385, 395 (1970)).

33. A. Hacker, *Two Nations,* 155 (1992).

34. See K. W. Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," 101 *Harv. L. Rev.*, 1331, 1381 (1988) [the essay is included in this volume—ED.].

35. Roediger, *supra note* 3, at 5.

Seven

RACE AND POSTMODERNISM

The essays in this concluding chapter are linked by a shared, explicit engagement with strands of the intellectual movement commonly called "postmodernism." One of the important characteristics of postmodern thought has been its emphasis on the contingent, indeterminate, and socially constructed nature of the categories with which we perceive and converse about the world. Jayne Chong-Soo Lee's essay "Navigating the Topology of Race" is built around such a sensibility. Her essay challenges the argument of Anthony Appiah that the concept of race, of racial difference, has no ground to give it meaning except in racist motivation. Lee counters that Appiah himself has essentialized the idea of race; like all linguistic constructs, race has no fixed meaning but instead meaning changes with social context. She argues for progressive, antiracist deployments of the idea of race rather than its abolition.

In "The Boundaries of Race: Political Geography in Legal Analysis," Richard Ford uses similar critical tools in service of his argument for a form of cultural pluralism that would focus on the character of the space that we occupy socially. Ford deconstructs the conventional understandings of local government and racial justice; in each discussion, Ford shows the seemingly stable dominant forms of thought actually rests on contradictory premises. In each context, Ford argues for a way out of the contradictions through a new cultural pluralist paradigm for understanding political space and racial justice, a political and social framework built upon the acknowledgement that communities are never homogenous and readymade but, rather, always in the process of being created.

We close the chapter and this collection with Kendall Thomas's "A Popular History of the Angelo Herndon Case." Thomas's essay reflects many of the main Critical Race Theory themes in the context of a close and careful study of Angelo Herndon, a black communist who was convicted in the 1930s of inciting insurrection against the state. As Thomas demonstrates, the dominant legal and historical discourse has reduced the complex story of Herndon's engagement with the legal system to a few abstract and formal legal doctrines. Thomas proposes to recover the neglected cultural history of the case through what he calls "popular memory," a critical historical method that would recover the social, cultural, and ideological struggle suppressed by the dominant focus in legal scholarship on institutional concerns. He then demonstrates these theoretical and methodological convictions through his own, alternative reading of the Herndon case and recovery of the suppressed story of his struggle.

Part Seven

RACE AND POSTMODERNISM

NAVIGATING THE TOPOLOGY OF RACE

Jayne Chong-Soon Lee

[. . .]

A. Appiah's Motifs

Kwame Anthony Appiah is a prominent participant in the debate over the definitions of race and the significance of racial difference. A professor of African-American studies and philosophy at Harvard University, Appiah has written extensively on African and African-American literary criticism. In a recent collection of his essays, *In My Father's House,* Appiah addresses the construction and mapping of race.[1] in his usual comprehensive and controversial manner. For the first time, Appiah gathers several themes that have suffused his writings and presents them as a collection. Layered upon each other, the essays reveal an even greater intricacy than each demonstrates individually. Appiah's discussion of the ontology of race, when considered with his analysis of the universal/particular dichotomy, evolves into a rich argument about the politics of racial particularity.[2] Similarly, his discussion of the legacy of racism and racialism develops an added urgency when seen together with his critique of the premises of the African Nativist movement.[3]

Often brilliant, sometimes contentious, but always absorbing, Appiah's book elevates the dialogue on race to a new level. Appiah departs from the familiar landscape of statistical and empirical accounts of racial discrimination, and of historical[4] and economic accounts of racial ideology, to probe the very definitions of race itself. He bypasses the empirical question of whether racism exists to ask the theoretical question of what race and racism are. Similarly, he avoids the historical question of who did what, preferring to ask how the "who" and the "what" are constituted. By circumventing the typical questions we ask about race, Appiah opens up the impasses that currently constrain the dialogue. By analyzing how racial difference is constructed, he charts the ways in which certain groups are designated as racially distinct. And by asking how racial identity is constructed, Appiah investigates the relationship between racial category and racial subjectivity.

Taken as a whole, Appiah's argument does not threaten the possibility of African-American identity, as some commentators have argued.[5] Rather, he questions the uncritical use of biological and essential conceptions of race as premises of antiracist struggles.[6] His point is that we cannot analyze racial difference from within frameworks that already assume biological difference. These efforts fail to question the naturalized frameworks or to consider alternatives (for example, the potential of cultural identities). Further, these attempts fail to take seriously the legacy of racist domination. The term "race" may be so historically and socially overdetermined that it is beyond rehabilitation. Rather than presume biological and essential definitions of race to be solutions to racism, Appiah suggests that we approach these presumptions as problems for antiracism. He thereby challenges the fundamental tenets of current antiracist practice.

. . .

II. The (Im)Possibility of Racial Resistance

A. Race versus Culture

Not only does Appiah conclude that biological and essential conceptions of race are falsehoods, but he also determines that they are useless at best and dangerous at worst:

> The truth is that there are no races: there is nothing in the world that can do all we ask race to do for us. As we have seen, even the biologist's notion has only limited uses, and the notion that [W. E. B.] Du Bois required, and that underlies the more hateful racisms of the modern era, refers to nothing in the world at all. The evil that is done is done by the concept, and by easy—yet impossible—assumptions as to its application.[7]

Appiah asserts that "[t]alk of 'race' is particularly distressing for 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 succeeds only "as an attempt at metonym for culture, and it does so only at the price of biologizing what is culture, ideology."[8] In other words, any conception of race that is significant is really just culture in disguise.

Just what is this culture that Appiah urges us to substitute for race? It is "[w]hat exists 'out there' in the world—communities of meaning, shading variously into each other in the rich structure of the social world. . . ."[9] One of Appiah's earlier essays suggests that these "communities of meaning" are groups of people anchored by ethnic identities. Appiah maintains that in a truly nonracist world, ethnic identities based on racial differences would "entirely wither away."[10] On the other hand, ethnic identities described as "something an African-American identity could become" seem to Appiah "likely to persist."[11] In an ideal world, what we now call a racial identity would become an ethnic identity. Appiah suggests that this notion of ethnic or cultural identity already underlies a progressive view of ostensibly "racial" identity. He points out, for example, that for those who identify themselves as African-American, "what matters . . . is almost always not the unqualified fact of that descent, but rather something that they suppose to go with it: the experience of a life as a member of a group of people who experience themselves as—and are held by others to be—a community in virtue of their mutual recognition—and their recognition by others—as people of a common descent."[12] Since any meaningful notion of racial community is really one of cultural community, Appiah believes that culture can and should substitute for race.

The benefits of substituting the notions of an ethnic or cultural identity for a racial one are many. First, we can move away from the notion that race is a biological attribute possessed only by people of color. Second, we can undermine the racialist premise that moral and intellectual characteristics, like physical traits, are inherited. Third, we can counter the belief that nature, not effort, binds together members of a race. Fourth, we can rebut the idea that the ways in which we act, think, and play are inherited, rather than learned. As Henry Louis Gates, Jr., has instructed us, "[o]ne must learn to be 'black' in this society, precisely because 'blackness' is a socially produced category."[13]

However, the problem with this ethnic or cultural identity is precisely what Appiah cites as its advantage—its independence from race. As Michael Omi and Howard Winant have noted, theories that reduce racial identities to ethnic ones fail to account for the centrality of race in the histories of oppressed groups. Such theories also underestimate the degree to which traditional notions of race have shaped, and continue to shape, the societies in which we live. In doing so, these reconceptualizations of race as ethnicity may actually hinder our ability to resist entrenched forms of racism.[14] Although this criticism of ethnicity may apply more to the particularities of American society, it is also pertinent to African societies: after all, the history of colonialism in Africa cannot be mapped simply through cultural identities. We need race to fully understand what happened. Racial domination, not simply cultural oppression, explains imperialism.

Returning to the American context, when race becomes just another ethnic identity, and African-Americans, Latinos, Asian-Americans, and Native Americans become ethnic groups, there is a real danger that the oppression faced historically by these groups will not be fully understood or appreciated. The racial experience is not just quantitatively different from the ethnic one, as Ronald Takaki explains; the racial experience is qualitatively different.[15] For example, the "immigration experience" was dramatically distinct for white ethnics and African-Americans: the majority of the latter group were brought to this country in chains and enslaved for two hundred years. Analogously, during World War II, German-Americans and Italian-Americans were not interned, as were Japanese-Americans. To the extent that ethnicity models take the white ethnic experience as the norm, these theories "blame the victim" when they fail to measure up to this norm.[16] For example, conservative observers wonder why African-Americans have not progressed socially and economically in the United States as have "similarly situated" white ethnic groups, such as Italians and Irish.[17] Most seriously, ethnicity theories fail to account for the ways in which race has already been formalized in our institutions, particularly the law.

B. Races

The most important weakness of Appiah's dismissal of race is that in declaring biological and essential conceptions of race useless and dangerous, he fails to recognize that race is defined not by its inherent content, but by the social relations that construct it. If race is always dangerous, regardless of its meaning within a specific historical and social context, the result is an abstract and unitary conception of race. Basically, Appiah's conception of race fails to acknowledge that meanings change dramatically with social context. For Appiah, once a conception of race is constructed, the possibility of contesting, redefining, and reappropriating it is limited. Because the meaning of race is so constrained, resistance on racial terms becomes difficult. Our best hope is to abandon "race" for "culture."

Whether extrinsic or intrinsic, to Appiah these attitudes are both labeled "racism." In designating all uses of race variants of racism, rather than recognizing their potential to be altogether different phenomena, Appiah may presuppose his conclusion—that all uses of race are hazardous. Paradoxically, by casting both uses of race as racisms, Appiah's conception of race fails to reflect the changing social contexts that produce race, and through which race can be redeployed as a tool of antiracist struggle. While whites have historically used conceptions of "race" to subordinate people of color, some communities of color have successfully reappropriated the categorizations and united around them. They have redeployed "race" as an affirmative category around which people have organized to assert the power of their group and its identity. To deny the term "race" any content, as Appiah would have it, is to deny a powerful metaphor to "racial" groups and to preclude valuable modes of resistance.

Focusing on the different ways in which race is defined is more fruitful than concentrating on the common ways in which race is used. Since the meaning of race depends on the specific social contexts in which it is embedded, we will find as many definitions of race as there are social contexts.[18] With this in mind, we can navigate among different definitions of race simultaneously: biological, social, cultural, essential, and political.[19] Rather than determining whether a definition is oppressive based solely on its content, we can instead examine its effects. In perhaps the most penetrating account of the history of race, Michael Omi and Howard Winant explore the construction of racial identities, and trace how race has changed over time. They investigate the ways in which the sign of race has been appropriated and reappropriated, and how contests over definitions of race have shaped, and been shaped by, American social life and history. Omi and Winant argue that we should stop thinking of race "as an essence, as something fixed, concrete and objective."[20] They suggest that we instead think of "race as an unstable and 'decentered' complex of social meanings constantly being transformed by political struggle."[21] They highlight the contingent and changing nature of race and racism while recognizing its pervasive and systematic effect on our history. They trace the historical

development of the category of race, labeling this process "racialization" to signify "the extension of racial meaning to a previously racially unclassified relationship, social practice or group."[22] Similarly, they discuss "racial formation," or "the process by which social, economic and political forces determine the content and importance of racial categories, and by which they are in turn shaped by racial meanings."[23] This theory of racial formation captures the concept of race both as a means of analyzing and ordering the world and as a process of historical and social transformation. In this way, Omi and Winant acknowledge that many definitions of race are possible, and acknowledge heterogeneous terrains of the racial landscape.

However, current discursive frameworks for analyzing race constrain us to either/or binary structures. We are forced to select biological or social conceptions of race; between supporting all versions of race or no versions of race; between implementing race-neutral or race-specific policies. If, like Appiah, we argue that race is socially constructed, then we often lose any chance to account for biology in defining race. While the argument that physical differences alone do not define race is vitally important, it should not preclude us from investigating how race has morphological features. We can explore how racial categories are created and organized around physical characteristics; how biology and the social contexts interrelate to give meaning to these physical traits.[24] In short, race can explain why, in the real world, differences of "color, hair, and bone" still matter.

III. The Legal Context

A. Judicial Constructions of Race

Racial characterization in the law demonstrates the dangers of continuing to examine solely the content of race, and to endorse unitary definitions of race. In legal discourse, singular notions of race and an either/or binary framework seriously limit the potential of antiracist struggles, exposing them to racist appropriation. The need to stress how race is constructed in social contexts, and how race has a multiplicity of meanings, is urgent for two reasons. First, courts construct definitions of race and racial difference every day, even as they claim to merely reflect preexisting scientific and social facts; second, legal discourse tends to formalize definitions within the framework of the law, magnifying their effect. Criteria that we use loosely in daily life can become rigid tests in the courtroom. A recent controversial Supreme Court decision that interpreted racial definitions demonstrates these tendencies. In *Shaw v. Reno,*[25] the court applied strict scrutiny in evaluating the constitutionality of an electoral reapportionment plan. *Shaw* marked the first time that the court chose to apply identical legal tests to government action designed to benefit historically disadvantaged racial groups and to measures designed to burden these groups in the voting rights arena. The decision, along with an earlier case striking down an affirmative action program,[26] has stirred considerable criticism.[27]

Appiah's critique of the use of unquestioned racial assumptions aptly applies to the Supreme Court's decisions involving racial issues.[28] Despite the frequency of Supreme Court cases dealing with race, the court has not precisely identified the role of race in its decisions. The court purports merely to recognize, not to construct, definitions of race.[29] It has shifted between biological and social definitions of race. In *Shaw,* the court described race in physical terms such as skin color; in other cases, it has characterized race as a social construct, the product of past and present racial discrimination.[30] A survey of the court's varying definitions of race, however, reveals that focus on content, unitary definitions, and either/or frameworks prevail in judicial attempts to determine the significance of racial difference. This singular framework of these definitions has facilitated the court's invalidation of remedial programs vital to antiracist efforts.

B. Shaw v. Reno: *Manipulating the Biological and the Racial*

In *Shaw,* five white voters in North Carolina brought a constitutional challenge to a state-enacted reapportionment plan, alleging that the plan was an unconstitutional racial gerrymander.[31] The court held that the plaintiffs could make a cognizable claim under the equal protection clause of the Fourteenth Amendment "by alleging that the legislation, although race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race."[32] The level of review on remand was to be strict scrutiny; the lower court was instructed to determine "whether the North Carolina plan is narrowly tailored to further a compelling governmental interest."[33]

Writing for the majority, Justice Sandra Day O'Connor constructs a biological conception of race. She points out that the main purpose of the equal protection clause is to prevent states "from purposefully discriminating between individuals on the basis of race,"[34] and that "the individual is important, not his race, his creed, or his color."[35] While these references to race do not embody a specific definition, when Justice O'Connor says "race," she clearly means "skin color": "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin";[36] a "reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."[37]

In defining race, however, Justice O'Connor exploits the rhetorical power of unitary definitions of race and an either/or binary framework of biological and social definitions of race. She depends on a biological notion of race to argue that the law should not recognize race. Tautologically, she defines race as skin color in order to prove that we should not recognize race, since it means nothing more than skin color. For Justice O'Connor, to acknowledge the significance of "skin color" is to attribute an array of character traits on the basis of physical features that bear no relevance to those traits. In the *Shaw* majority's conception, recognizing the relevance of mere "skin color" is as irrational and insidious as assuming that all members of a racial group share certain moral and cultural traits. For the majority, skin color represents racial essence and negative stereotypes, the racist's assertion that the races possess different natures and moral characteristics and therefore should be valued differently. In its critique of biological race, the majority legitimately objects to the notion that our skin color predicts who we are and what we can be.

The problem, however, is that the court does not simply reject this narrowly biological notion of race as a basis for disparate treatment; rather, it assumes that the invalidity of race so characterized leaves no alternative but to reject the political significance of race altogether:

> Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility. ("[E]ven in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race-consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs.")[38]

The court limits race to a biological definition and evokes the opposition between the biological and the social to undermine the validity of race-consciousness, and thus of race-conscious remedies. It accomplishes this by recognizing that biological definitions of race lead to racism; acknowledging only a unitary definition of race, it then concludes that recognizing race leads to racism. While I agree with the assertion that recognizing skin color has in some contexts caused stigmatic harm, I cannot agree with the conclusion that recognizing race must also cause injury.

The majority's argument that all racial classifications cause harm depends on the conflation of biology and race, as well as the use of only one definition of race; further, it invites us to view every acknowledgment of race as racism.

One way to undercut this presumption is to assert, as Appiah has done, that race is not simply biology. The two concepts are analytically unconnected and unconnectable. We might also argue that the attribution of race to skin color is always an act of interpretation. Skin color does not "equal" race unless society recognizes that it does. For example, in *Dry-longso: A Self-Portrait of Black America,* John Langston Gwaltney's collection of African-American narratives, Jackson Jordan, Jr., a ninety-year-old African-American man, discusses how people are identified as black:

> Now, you must understand that this is just a name we have. I am not black and you are not black either, if you go by the evidence of your eyes. . . . Anyway, black people are all colors. White people don't all look the same way, but there are many more different kinds of us than there are of them. Then too, there is a certain stage at which you cannot tell who is white and who is black. Many of the people I see who are thought of as black could just as well be white in their appearance. Many of the white people I see are black as far as I can tell by the way they look.[39]

Race cannot be self-evident on the basis of skin color, for skin color alone has no inherent meaning.

Shaw epitomizes the gap between the court's professed "color-blindness" and its undeniable role in the construction of race. The opinion seems to rebuke the district court for taking judicial notice of the appellants' white race, "a fact omitted from [their] complaint,"[40] and emphasizes that the appellants "did not even claim to be white" in their pleading.[41] Even in disclaiming the significance of race, however, the majority writes its biologistic conception of race into the law. Because it does not recognize the nonbiological dimensions of race, the majority must reject the possibility of a nonstigmatic use of "race." Ironically, by doing this, the court adopts a stigmatic biologistic definition of race and does not see its own power to recast the meaning of race into an affirmative use. The court fails to recognize that it does—hence, how it can—shape the terrain of racial difference.

. . .

Shaw makes clear the inadequacy of unitary and either/or binary models of racial difference, and it suggests their potential to cause affirmative harm. Race and racism are fluid: in contrast to the sixties, the concept of liberal "color-blindness" now undermines antiracist efforts. Therefore, rejecting all conceptions of biological race and embracing those of social race leaves open the possibility of racist appropriation and precludes the potential for antiracist struggle. Similarly, rejecting all notions of essential race may dismantle the grounds for affirmative racial solidarity. Because the meaning of race is constructed by the social contexts in which it is located, there can be no consistent content to race. It can always be defined in many different ways, often simultaneously. Because we cannot predict a racist practice from its definition of race, we can never determine beforehand whether a practice will be racist or antiracist solely from its content. We can only examine the way race is being used and what it is being used to say. Only after examining the context and the effect can we determine whether the practice is racist or antiracist. If the practice reinforces the subordination of a historically oppressed group, we can label that practice racist. In *Shaw,* the notion of color-blindness was used to undermine an electoral plan designed to benefit a racial group that had historically been deprived of their right to vote. On the other hand, if the practice alleviates subordination, we can label that practice antiracist. The constantly shifting topology of race requires us to acknowledge that "race" can be defined in many different ways, and that all of these ways—even biological and essential conceptions of race—have their place in antiracist struggles. The best that we can do is to navigate this terrain.

IV. Conclusion

RETURNING to the themes that motivated this review, I pose the following questions again: How can we recognize racial difference without reinscribing racial stereotypes and subordination? How can we trace the historical construction of race without denying groups the power to define themselves racially? How can we critique dominant norms for excluding racial experiences, without ghettoizing people of color by the very particularity that we have invoked? I argue that we can start by recognizing that race is always defined by its social context, and never solely by its content. Additionally, we can recognize that race is always multiplicitous because social contexts are multiplicitous. The use of race to stereotype and discriminate against people differs from the use of race as a basis for racial solidarity. Finally, we can refuse to adhere to the unitary, either/or framework that has constrained race discourse. We can have both biological and social definitions of race, we can have both essential and historical notions of race, we can have both race-neutral and race-conscious remedies, we can have both race and culture. Abandoning one set of definitions entirely may deprive us of useful tools in the struggle against racism.

. . .

Imagine a physical landscape with various distinguishable features—trees, mountains, valleys, and quicksand. An observer on a satellite can see the people below but not the features of the terrain. When she sees people climbing over hills, moving around obstacles, or diving into tunnels, the observer might assume that certain people's "attitudes" prompt certain kinds of actions, while others might have attitudes that encourage other types of movements. However, if the observer were to move closer, she would be able to see that understanding the people's actions entails analyzing the terrain. And the observer would realize that changing people's behavior would entail contouring the terrain differently. By analogy, race continues to exist as it does because we create and recreate it to fit our own social terrain, even as it becomes a part of that terrain.

I end with this image to suggest that the notion of race is not so overdetermined by past and current racial domination that we cannot revive it. Instead of abandoning a terrain twisted by oppression and discrimination, we can try to reshape it with other tools. Instead of referring to a single definition of race, we can refer to multiple definitions of race; instead of talking about racism, we can talk about racisms. Instead of abandoning certain definitions of race, we can employ each of them when necessary. Biological and essential definitions of race may have their place in this topography. Perhaps Appiah's greatest insight is that we must always self-consciously analyze the tools that we use. Whether these tools harm or heal depends on what we do with them. The choice is always ours.

NOTES

1. Kwame Anthony Appiah, *In My Father's House: Africa in the Philosophy of Culture* (1992). Although Appiah's book addresses an array of questions and issues, I will focus on these two specific topics of construction and mapping. I primarily concentrate on two chapters, "The Invention of Africa," and "Illusions of Race."

2. *Id.* at 28–72.

3. *Id.* at 3–27, 47–72.

4. See, for example, George M. Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817–1914* (1971); E. D. Genovese, *Roll, Jordan, Roll: The World The Slaves Made* (1974); T. F. Gossett, *Race: The History of An Idea in America* (1963); R. Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* (1981); W. D. Jordon, *White Over Black: American Attitudes Toward The Negro, 1550–1812* (1968); A. Saxton, *The Rise and Fall of the White Republic: Class Politics and Mass Culture in Nineteenth-Century America* (1990); A. A. Smedley, *Race in North America: Origin and Evolution of a Worldview* (1993).

5. See, for example, H. A. Baker, Jr., "Caliban's Triple Play," in H. L. Gates, ed., *Race, Writing, and Difference,* at 381, 385 (1986) (arguing that Appiah believes that once science shows that race is not biologically determined, "all talk of 'race' must cease"); J. A. Joyce, "Who the Cap Fit: Unconsciousness and Unconscionableness in the Criticism of Houghton A. Baker, Jr., and Henry Louis Gates, Jr." 18 *New Literary Hist,* at 378–81 (stating that Appiah's argument attacks the very possibility of African-American identity).

6. I suggest that Appiah's work is greatly misunderstood because analytically he separates theory from politics. However, racial theory and racial politics have become so entwined that when he questions the former he inevitably appears to question the latter.

7. Cornell West, "Black Leadership and the Pitfalls of Racial Reasoning," in Toni Morrison, ed., *Race-ing Justice, Engendering Power,* at 45 (1992).

8. *Id.*

9. *Id.*

10. A. Appiah, " 'But Would That Still Be Me?': Notes On Gender, 'Race', Ethnicity, as Sources of 'Identity,' " 87 *J. Phil.,* 493, 499 (1990).

11. *Id.*

12. *Id.* at 497.

13. H. Gates, Jr., *Loose Canons: Notes on the Culture Wars,* at 101 (1992).

14. M. Omi and H. Winant, *Racial Formation in the United States: From the 1960s to the 1980s,* 11, at 10, 21–24 (1986).

15. R. Takaki, "Reflections on Racial Patterns in America," in R. Takaki, ed., *From Different Shores: Perspectives on Race and Ethnicity in America,* 29 (1987).

16. Omi and Winant, *supra* note 14, at 21.

17. *Id.* at 21–24.

18. David Theo Goldberg points out that "[u]nderlying the views both of those who might openly or privately have found racist views compelling and those who clearly considered them troubling was the assumption that racism is singular and monolithic, simply the same attitude manifested in varying circumstances"; D. T. Goldberg, "Introduction," in D. T. Goldberg, ed., *Anatomy of Racism,* at xi (1990).

19. Unlike Appiah, who separates race and culture, Neil Gotanda joins race and culture in what he calls "culture-race"—"all aspects of culture, community, and consciousness"; Gotanda, "A Critique of 'Our Constitution Is Color-Blind,'" 44 *Stan. L. Rev.,* at 56 [the essay is included in this volume-Ed.]. On African-Americans, Gotanda writes, "[c]ulture refers to broadly shared beliefs and social practices; community refers to both the physical and spiritual senses of the term; and African-American consciousness refers to Black Nationalist and other traditions of self-awareness and to action based on that self-awareness"; *id.* at 4. Gotanda's article is an excellent example of a more complex and politically empowering theory of race. Recognizing that race takes on many distinct meanings depending on social context, he identifies four ways that the Supreme Court has constructed race: status-race, formal-race, historical-race, and culture-race; *id.*

20. Omi and Winant, *supra* note 14, at 68.

21. *Id.*

22. *Id.* at 64.

23. *Id.* at 61.

24. Paul Gilroy argues that morphology is important to our understanding of race: "[B]iology cannot be wholly dismissed as a factor in the formation and reproduction of 'race.' It is better to confine phenotypes to a relatively autonomous realm of biological determinations which can ascribe a variety of social effects. Accepting that skin 'colour,' however meaningless we know it to be, has a strictly limited material basis in biology, opens up the possibility of engaging with theories of signification which can highlight the elasticity and the emptiness of 'racial' signifiers as well as the ideological work which has to be done in order to turn them into signifiers in the first place"; P. Gilroy, *"There Ain't No Black in the Union Jack": The Cultural Politics of Race and Nation,* 38–39 (1987).

25. 113 S. Ct. 2816 (1993).

26. *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469 (1989).

27. See, for example, Lynne Duke, "Advocates Say Justices Muddy Voting Rights; Decision in North Carolina Congressional Redistricting Case Criticized as 'Utopianism,'" *Washington Post* (June 30, 1993), A8; see also K. M. Sullivan, "*City of Richmond v. J. A. Croson Co.*: The Backlash against Affirmative Action," 64 *Tul. L. Rev.,* 1609 (1990).

28. I include cases in which race has been addressed directly or in dicta.

29. See text accompanying note 25 *supra.* See generally Jacques Derrida, *Writing and Difference* (Alan Bass trans., 1978) (explaining how discourse determines "reality"); H. L. Gates, *Loose Canons: Notes on the Culture Wars* 37 (1992).

30. See, for example, *Brown v. Board of Education.,* 347 U.S. 483 (1954).

31. 113 S. Ct. at 2819–20.

32. *Id.* at 2828.

33. *Id.* at 2832. According to the court, a districting plan triggers strict scrutiny when a district is "so extremely irregular on its face" that it unequivocally reflects an effort to separate citizens on the basis of race; *id.* at 2824. In *Shaw,* the triggering factors were: (1) that one district was "somewhat hook shaped," tapering to "a narrow band," with "finger-like extensions," resembling a "bug splattered on a windshield," and (2) that the second district wound "in snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods,'" becoming so narrow in parts that "[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district"; *id.* at 2820–21 (quoting state representative Mickey Michaux, in John Biskupic, "N.C. Case to Pose Test of Racial Redistricting," *Washington Post* (Apr. 20, 1993), A4).

34. *Id.* at 2824.

35. *Id.* at 2827 (quoting *Wright v. Rockefeller,* 376 U.S. 52, 66 (1964) (Douglas, J., dissenting)).

36. *Id.* at 2832.

37. *Id.* at 2827.

38. *Id.* at 2824 (quoting *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943)); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 173 (1977) (citations omitted).

39. J. Langston Gwaltney, *Drylongso: A Self-Portrait of Black America,* 96 (1980).

40. 113 S. Ct. at 2822.

41. *Id.* at 2824.

42. Barbara Jeanne Fields, "Slavery, Race, and Ideology in The United States of America", 181 *New Life Rev.* 113–14 (1990).

43. *Id.* at 114.

THE BOUNDARIES OF RACE: POLITICAL GEOGRAPHY IN LEGAL ANALYSIS

Richard Thompson Ford

DURING the seventies and eighties a word disappeared from the American vocabulary—the word was "segregation." It is now passé to speak of racial segregation. In an America that is facing the identity crisis of multiculturalism, where racial diversity seems to challenge the norms and values of the nation's most fundamental institutions, to speak of segregation seems almost quaint. The physical segregation of the races would seem to be a relatively simple matter to address; indeed, many believe it has already been addressed. Discrimination in housing, in the workplace, and in schools is illegal. Thus, it is perhaps understandable that we have turned our attention to other problems, on the assumption that any segregation that remains is either vestigial or freely chosen. However, even as racial segregation has fallen from the national agenda, it has persisted. Even as racial segregation is described as a natural expression of racial and cultural solidarity, a chosen and desirable condition for which government is not responsible and one that government should not oppose, segregation continues to play the same role it always has in American race relations—to isolate, disempower, and oppress.

Segregation is oppressive and disempowering rather than desirable or inconsequential because it involves more than simply the relationship of individuals to other individuals; it also involves the relationship of groups of individuals to political influence and economic resources. Residence is more than a personal choice; it is also a primary source of political identity and economic security.[1] Likewise, residential segregation is more than a matter of social distance; it is a matter of political fragmentation and economic stratification along racial lines, enforced by public policy and the rule of law.

Segregated minority communities have been historically impoverished and politically powerless. Today's laws and institutions need not be explicitly racist to ensure that this state of affairs

Part Six

THE INTERSECTION OF RACE AND GENDER

MAPPING THE MARGINS: INTERSECTIONALITY, IDENTITY POLITICS, AND VIOLENCE AGAINST WOMEN OF COLOR

Kimberlé Williams Crenshaw

Introduction

OVER the last two decades, women have organized against the almost routine violence that shapes their lives.[1] Drawing from the strength of shared experience, women have recognized that the political demands of millions speak more powerfully than do the pleas of a few isolated voices. This politicization in turn has transformed the way we understand violence against women. For example, battering and rape, once seen as private (family matters) and aberrational (errant sexual aggression), are now largely recognized as part of a broad-scale system of domination that affects women as a class.[2] This process of recognizing as social and systemic what was formerly perceived as isolated and individual has also characterized the identity politics of African-Americans, other people of color, and gays and lesbians, among others. For all these groups, identity-based politics has been a source of strength, community, and intellectual development.

The embrace of identity politics, however, has been in tension with dominant conceptions of social justice. Race, gender, and other identity categories are most often treated in mainstream liberal discourse as vestiges of bias or domination—that is, as intrinsically negative frameworks in which social power works to exclude or marginalize those who are different. According to this understanding, our liberatory objective should be to empty such categories of any social significance. Yet implicit in certain strands of feminist and racial liberation movements, for example, is the view that the social power in delineating difference need not be the power of domination; it can instead be the source of social empowerment and reconstruction.

The problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite—that it frequently conflates or ignores intragroup differences. In the context of violence against women, this elision of difference in identity politics is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities, such as race and class. Moreover, ignoring difference *within* groups contributes to tension *among* groups, another problem of identity politics which bears on efforts to politicize violence against women. Feminist efforts to politicize experiences of women and antiracist efforts to politicize experiences of people of color have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains. Although racism and sexism readily intersect in the lives of real people, they seldom do in feminist and antiracist practices. Thus, when the practices expound identity as "woman" *or* "person of color" as an either/or proposition, they relegate the identity of women of color to a location that resists telling.

My objective in this article is to advance the telling of that location by exploring the race and gender dimensions of violence against women of color. Contemporary feminist and antiracist

discourses have failed to consider intersectional identities such as women of color.[3] Focusing on two dimensions of male violence against women—battering and rape—I consider how the experiences of women of color are frequently the product of intersecting patterns of racism and sexism,[4] and how these experiences tend not to be represented within the discourses either of feminism or of antiracism. Because of their intersectional identity as both women *and* of color within discourses shaped to respond to one *or* the other, women of color are marginalized within both.

In an earlier article, I used the concept of intersectionality to denote the various ways in which race and gender interact to shape the multiple dimensions of black women's employment experiences.[5] My objective there was to illustrate that many of the experiences black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into black women's lives in ways that cannot be captured wholly by looking separately at the race or gender dimensions of those experiences. I build on those observations here by exploring the various ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color.[6]

I should say at the outset that intersectionality is not being offered here as some new, totalizing theory of identity. Nor do I mean to suggest that violence against women of color can be explained only through the specific frameworks of race and gender considered here.[7] Indeed, factors I address only in part or not at all, such as class or sexuality, are often as critical in shaping the experiences of women of color. My focus on the intersections of race and gender only highlights the need to account for multiple grounds of identity when considering how the social world is constructed.

I have divided the issues presented in this article into three categories. In Part I, I discuss structural intersectionality, the ways in which the location of women of color at the intersection of race and gender makes our actual experience of domestic violence, rape, and remedial reform qualitatively different from that of white women. I shift the focus in Part II to political intersectionality, where I analyze how feminist and antiracist politics have both, paradoxically, often helped to marginalize the issue of violence against women of color. Finally, I address the implications of the intersectional approach within the broader scope of contemporary identity politics.

I. Structural Intersectionality

A. Structural Intersectionality and Battering

I observed the dynamics of structural intersectionality during a brief field study of battered women's shelters located in minority communities in Los Angeles. In most cases, the physical assault that leads women to these shelters is merely the most immediate manifestation of the subordination they experience. Many women who seek protection are unemployed or underemployed, and a good number of them are poor. Shelters serving these women cannot afford to address only the violence inflicted by the batterer; they must also confront the other multilayered and routinized forms of domination that often converge in these women's lives, hindering their ability to create alternatives to the abusive relationships that brought them to shelters in the first place. Many women of color, for example, are burdened by poverty, child care responsibilities, and the lack of job skills. These burdens, largely the consequence of gender and class oppression, are then compounded by the racially discriminatory employment and housing practices often faced by women of color, as well as by the disproportionately high unemployment among people of color that makes battered women of color less able to depend on the support of friends and relatives for temporary shelter.

Where systems of race, gender, and class domination converge, as they do in the experiences of battered women of color, intervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who face different obstacles because of race and class. Such was the case in 1990 when Congress amended the marriage fraud provisions of the Immigration and Nationality Act to protect immigrant women who were battered or exposed to extreme cruelty by the U.S. citizens or permanent residents these women immigrated to the United States to marry. Under the marriage fraud provisions of the act, a person who immigrated to the United States in order to marry a U.S. citizen or permanent resident had to remain "properly" married for two years before even applying for permanent resident status,[8] at which time applications for the immigrant's permanent status were required of both spouses.[9] Predictably, under these circumstances, many immigrant women were reluctant to leave even the most abusive of partners for fear of being deported. When faced with the choice between protection from their batterers and protection against deportation, many immigrant women chose the latter. Reports of the tragic consequences of this double subordination put pressure on Congress to include in the Immigration Act of 1990 a provision amending the marriage fraud rules to allow for an explicit waiver for hardship caused by domestic violence.[10] Yet many immigrant women, particularly immigrant women of color, have remained vulnerable to battering because they are unable to meet the conditions established for a waiver. The evidence required to support a waiver "can include, but is not limited to, reports and affidavits from police, medical personnel, psychologists, school officials, and social service agencies."[11] For many immigrant women, limited access to these resources can make it difficult for them to obtain the evidence needed for a waiver. Cultural barriers, too, often further discourage immigrant women from reporting or escaping battering situations. Tina Shum, a family counselor at a social service agency, points out that "[t]his law sounds so easy to apply, but there are cultural complications in the Asian community that make even these requirements difficult. . . . Just to find the opportunity and courage to call us is an accomplishment for many."[12] The typical immigrant spouse, she suggests, may live "[i]n an extended family where several generations live together, there may be no privacy on the telephone, no opportunity to leave the house and no understanding of public phones."[13] As a consequence, many immigrant women are wholly dependent on their husbands as their link to the world outside their homes.

Immigrant women are also vulnerable to spousal violence because so many of them depend on their husbands for information regarding their legal status. Many women who are now permanent residents continue to suffer abuse under threats of deportation by their husbands. Even if the threats are unfounded, women who have no independent access to information will still be intimidated by such threats. Further, even though the domestic violence waiver focuses on immigrant women whose husbands are U.S. citizens or permanent residents, there are countless women married to undocumented workers (or are themselves undocumented) who suffer in silence for fear that the security of their entire families will be jeopardized should they seek help or otherwise call attention to themselves.

Language barriers present another structural problem that often limits opportunities of non-English-speaking women to take advantage of existing support services. Such barriers limit access not only to information about shelters but also to the security that shelters provide. Some shelters turn non-English-speaking women away for lack of bilingual personnel and resources.

These examples illustrate how patterns of subordination intersect in women's experience of domestic violence. Intersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden interacting with preexisting vulnerabilities to create yet another dimension of disempowerment. In the case of the marriage fraud provisions of the Immigration and Nationality Act, the imposition of a policy specifically designed to burden one class—immigrant spouses seeking permanent resident status—exacerbated the disempowerment of those already subordinated by other structures of domination. By failing to take into account immigrant spouses' vulnerability to domestic violence, Congress positioned these

women to absorb the simultaneous impact of its anti-immigration policy and their spouses' abuse.

The enactment of the domestic violence waiver of the marriage fraud provisions similarly illustrates how modest attempts to respond to certain problems can be ineffective when the intersectional location of women of color is not considered in fashioning the remedy. Cultural identity and class both affect the likelihood that a battered spouse could take advantage of the waiver. Although the waiver is formally available to all women, the terms of the waiver make it inaccessible to some. Immigrant women who are socially, culturally, or economically privileged are more likely to be able to marshall the resources needed to satisfy the waiver requirements. Those immigrant women who are least able to take advantage of the waiver—women who are socially or economically the most marginal—are the ones most likely to be women of color.

II. Political Intersectionality

THE concept of political intersectionality highlights the fact that women of color are situated within at least two subordinated groups that frequently pursue conflicting political agendas. The need to split one's political energies between two sometimes-opposing groups is a dimension of intersectional disempowerment which men of color and white women seldom confront. Indeed, their specific raced *and* gendered experiences, although intersectional, often define as well as confine the interests of the entire group. For example, racism as experienced by people of color who are of a particular gender—male—tends to determine the parameters of antiracist strategies, just as sexism as experienced by women who are of a particular race—white—tends to ground the women's movement. The problem is not simply that both discourses fail women of color by not acknowledging the "additional" issue of race or of patriarchy but, rather, that the discourses are often inadequate even to the discrete tasks of articulating the full dimensions of racism and sexism. Because women of color experience racism in ways not always the same as those experienced by men of color and sexism in ways not always parallel to experiences of white women, antiracism and feminism are limited, even on their own terms.

Among the most troubling political consequences of the failure of antiracist and feminist discourses to address the intersections of race and gender is the fact that, to the extent that they can forward the interest of "people of color" and "women," respectively, one analysis often implicitly denies the validity of the other. The failure of feminism to interrogate race means that feminism's resistance strategies will often replicate and reinforce the subordination of people of color; likewise, the failure of antiracism to interrogate patriarchy means that antiracism will frequently reproduce the subordination of women. These mutual elisions present a particularly difficult political dilemma for women of color. Adopting either analysis constitutes a denial of a fundamental dimension of our subordination and precludes the development of a political discourse that more fully empowers women of color.

A. The Politicization of Domestic Violence

That the political interests of women of color are obscured and sometimes jeopardized by political strategies that ignore or suppress intersectional issues is illustrated by my experiences in gathering information for this article. I attempted to review Los Angeles Police Department statistics reflecting the rate of domestic violence interventions by precinct, because such statistics can provide a rough picture of arrests by racial group, given the degree of racial segregation in Los Angeles.[14] The LAPD, however, would not release the statistics. A representative explained that the statistics were not released, in part, because domestic violence activists—both within and outside the LAPD—feared that statistics reflecting the extent of domestic violence in minority communities might be selectively interpreted and publicized in ways that would undermine long-term efforts to force the LAPD to address domestic violence as a serious problem. Activists were worried that the statistics might permit opponents to dismiss domestic violence as a minority problem and, therefore, not deserving of aggressive action.

The informant also claimed that representatives from various minority communities opposed the release of these statistics. They were concerned, apparently, that the data would unfairly represent black and brown communities as unusually violent, potentially reinforcing stereotypes that might be used in attempts to justify oppressive police tactics and other discriminatory practices. These misgivings are based on the familiar and not-unfounded premise that certain minority groups—especially black men—have already been stereotyped as uncontrollably violent. Some worry that attempts to make domestic violence an object of political action may only serve to confirm such stereotypes and undermine efforts to combat negative beliefs about the black community.

This account sharply illustrates how women of color can be erased by the strategic silences of antiracism and feminism. The political priorities of both have been defined in ways that suppress information that could facilitate attempts to confront the problem of domestic violence in communities of color.

1. Domestic Violence and Antiracist Politics

Within communities of color, efforts to stem the politicization of domestic violence are often grounded in attempts to maintain the integrity of the community. The articulation of this perspective takes different forms. Some critics allege that feminism has no place within communities of color, that the issues are internally divisive, and that they represent the migration of white women's concerns into a context in which they are not merely irrelevant but harmful. At its most extreme, this rhetoric denies that gender violence is a problem in the community and characterizes any effort to politicize gender subordination as itself a community problem. This is the position taken by Shahrazad Ali in her controversial book, *The Blackman's Guide to Understanding the Blackwoman.*[15] In this stridently antifeminist tract, Ali draws a positive correlation between domestic violence and the liberation of African-Americans. Ali blames the deteriorating conditions within the black community on the insubordination of black women and on the failure of black men to control them.[16] She goes so far as to advise black men to physically chastise black women when they are "disrespectful."[17] While she cautions that black men must use moderation in disciplining "their" women, she argues that they must sometimes resort to physical force to reestablish the authority over black women that racism has disrupted.

Ali's premise is that patriarchy is beneficial for the black community, and that it must be strengthened through coercive means if necessary.[18] Yet the violence that accompanies this will to control is devastating, not just for the black women who are victimized but for the entire black community.[19] The recourse to violence to resolve conflicts establishes a dangerous pattern for children raised in such environments and contributes to many other pressing problems.[20] It has been estimated that nearly 40 percent of all homeless women and children have fled violence in the home,[21] and an estimated 63 percent of young men between the ages of eleven and twenty who are imprisoned for homicide have killed their mothers' batterers.[22] Moreover, while gang violence, homicide, and other forms of black-on-black crime have increasingly been discussed within African-American politics, patriarchal ideas about gender and power preclude the recognition of domestic violence as yet another compelling form of black-on-black crime.

Efforts such as Ali's to justify violence against women in the name of black liberation are indeed extreme.[23] The more common problem is that the political or cultural interests of the community are interpreted in a way that precludes full public recognition of the problem of domestic violence. While it would be misleading to suggest that white Americans have come to terms with the degree of violence in their own homes, it is nonetheless the case that race adds yet another dimension to sources of suppression of the problem of domestic violence within nonwhite communities. People of color often must weigh their interests in avoiding issues that might reinforce distorted public perceptions against the need to acknowledge and address intracommunity problems. Yet the cost of suppression is seldom recognized, in part because the failure to discuss the issue shapes

perceptions of how serious the problem is in the first place.

The controversy over Alice Walker's novel *The Color Purple* can be understood as an intracommunity debate about the political costs of exposing gender violence within the black community. Some critics chastised Walker for portraying black men as violent brutes. One critic lambasted Walker's portrayal of Celie, the emotionally and physically abused protagonist who finally triumphs in the end; the critic contended that Walker had created in Celie a black woman whom she couldn't imagine existing in any black community she knew or could conceive of.[24]

The claim that Celie was somehow an inauthentic character might be read as a consequence of silencing discussion of intracommunity violence. Celie may be *unlike* any black woman we know because the real terror experienced daily by minority women is routinely concealed in a misguided (though perhaps understandable) attempt to forestall racial stereotyping. Of course, it is true that representations of black violence—whether statistical or fictional—are often written into a larger script that consistently portrays black and other minority communities as pathologically violent. The problem, however, is not so much the portrayal of violence itself as it is the absence of other narratives and images portraying a fuller range of black experience. Suppression of some of these issues in the name of antiracism imposes real costs: where information about violence in minority communities is not available, domestic violence is unlikely to be addressed as a serious issue.

The political imperatives of a narrowly focused antiracist strategy support other practices that isolate women of color. For example, activists who have attempted to provide support services to Asian- and African-American women report intense resistance from those communities. At other times, cultural and social factors contribute to suppression. Nilda Remonte, director of Everywoman's Shelter in Los Angeles, points out that in the Asian community, saving the honor of the family from shame is a priority. Unfortunately, this priority tends to be interpreted as obliging women not to scream rather than obliging men not to hit.

Race and culture contribute to the suppression of domestic violence in other ways as well. Women of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile. There is also a more generalized community ethic against public intervention, the product of a desire to create a private world free from the diverse assaults on the public lives of racially subordinated people. The home is not simply a man's castle in the patriarchal sense: it may also function as a safe haven from the indignities of life in a racist society. However, but for this "safe haven" in many cases, women of color victimized by violence might otherwise seek help.

There is also a general tendency within antiracist discourse to regard the problem of violence against women of color as just another manifestation of racism. In this sense, the relevance of gender domination within the community is reconfigured as a consequence of discrimination against men. Of course, it is probably true that racism contributes to the cycle of violence, given the stress that men of color experience in dominant society; it is therefore more than reasonable to explore the links between racism and domestic violence. Yet the chain of violence is more complex and extends beyond this single link. Racism is linked to patriarchy to the extent that racism denies men of color the power and privilege that dominant men enjoy. When violence is understood as an acting-out of being denied male power in other spheres, it seems counterproductive to embrace constructs that implicitly link the solution to domestic violence to the acquisition of greater male power. The more promising political imperative is to challenge the legitimacy of such power expectations by exposing their dysfunctional and debilitating effect on families and communities of color. Moreover, while understanding links between racism and domestic violence is an important component of any effective intervention strategy, it is also clear that women of color need not await the ultimate triumph over racism before they can expect to live violence-free lives.

2. RACE AND THE DOMESTIC VIOLENCE LOBBY

Not only do race-based priorities function to obscure the problem of violence suffered by women of color; feminist concerns often suppress minority experiences as well. Strategies for increasing awareness of domestic violence within the white community tend to begin by citing the commonly shared assumption that battering is a minority problem. The strategy then focuses on demolishing this straw man, stressing that spousal abuse also occurs in the white community. Countless first-person stories begin with a statement like, "I was not supposed to be a battered wife." That battering occurs in families of all races and all classes seems to be an ever-present theme of antiabuse campaigns. First-person anecdotes and studies, for example, consistently assert that battering cuts across racial, ethnic, economic, educational, and religious lines. Such disclaimers seem relevant only in the presence of an initial, widely held belief that domestic violence occurs primarily in minority or poor families. Indeed, some authorities explicitly renounce the "stereotypical myths" about battered women; a few commentators have even transformed the message that battering is not *exclusively* a problem of the poor or minority communities into a claim that it *equally* affects all races and classes. Yet these comments seem less concerned with exploring domestic abuse within "stereotyped" communities than with removing the stereotype as an obstacle to exposing battering within white middle- and upper-class communities.[25]

Efforts to politicize the issue of violence against women challenge beliefs that violence occurs only in homes of Others. While it is unlikely that advocates and others who adopt this rhetorical strategy intend to exclude or ignore the needs of poor and colored women, the underlying premise of this seemingly universalistic appeal is to keep the sensibilities of dominant social groups focused on the experiences of those groups. Indeed, as subtly suggested by the opening comments of Senator David Boren (Dem.-Okla.) in support of the Violence Against Women Act of 1991, the displacement of the Other as the presumed victim of domestic violence works primarily as a political appeal to rally white elites. Boren said: "Violent crimes against women are not limited to the streets of the inner cities, but also occur in homes in the urban and rural areas across the country. Violence against women affects not only those who are actually beaten and brutalized, but indirectly affects all women. Today, our wives, mothers, daughters, sisters, and colleagues are held captive by fear generated from these violent crimes—held captive not for what they do or who they are, but solely because of gender."[26] Rather than focusing on and illuminating how violence is disregarded when the home is somehow Other, the strategy implicit in Senator Boren's remarks functions instead to politicize the problem only within the dominant community. This strategy permits white women victims to come into focus, but it does little to disrupt the patterns of neglect that permitted the problem to continue as long as it was imagined to be a minority problem. Minority women's experience of violence is ignored, except to the extent that it gains white support for domestic violence programs in the white community.

Senator Boren and his colleagues no doubt believe that they have provided legislation and resources that will address the problems of all women victimized by domestic violence. Yet despite their universalizing rhetoric of "all" women, they were able to empathize with female victims of domestic violence only by looking past the plight of Other women and by recognizing the familiar faces of their own. The strength of the appeal to "protect our women" must be its race and class specificity. After all, it has always been someone's wife, mother, sister, or daughter who has been abused, even when the violence was stereotypically black or brown, and poor. The point here is not that the Violence Against Women Act is particularistic on its own terms, but that unless the senators and other policymakers ask why violence remained insignificant as long as it was understood as a minority problem, it is unlikely that

women of color will share equally in the distribution of resources and concern. It is even more unlikely, however, that those in power will be forced to confront this issue. As long as attempts to politicize domestic violence focus on convincing whites that this is not a "minority" problem but *their* problem, any authentic and sensitive attention to the experiences of black and other minority women probably will continue to be regarded as jeopardizing the movement.

While Senator Boren's statement reflects a self-consciously political presentation of domestic violence, an episode of the CBS news program *48 Hours* shows how similar patterns of othering nonwhite women are apparent in journalistic accounts of domestic violence as well.[27] The program presented seven women who were victims of abuse. Six were interviewed at some length along with their family members, friends, supporters, and even detractors. The viewer got to know something about each of these women. These victims were humanized. Yet the seventh woman, the only nonwhite one, never came into focus. She was literally unrecognizable throughout the segment, first introduced by photographs showing her face badly beaten and later shown with her face electronically altered in the videotape of a hearing at which she was forced to testify. Other images associated with this woman included shots of a bloodstained room and blood-soaked pillows. Her boyfriend was pictured handcuffed while the camera zoomed in for a close-up of his bloodied sneakers. Of all the presentations in the episode, hers was the most graphic and impersonal. The overall point of the segment "featuring" this woman was that battering might not escalate into homicide if battered women would only cooperate with prosecutors. However, in focusing on its own agenda and failing to explore why this woman refused to cooperate, the program diminished this woman, communicating, however subtly, that she was responsible for her own victimization.

Unlike the other women, all of whom, again, were white, this black woman had no name, no family, no context. The viewer sees her only as victimized and uncooperative. She cries when shown pictures; she pleads not to be forced to view the bloodstained room and her disfigured face. The program does not help the viewer to understand her predicament. The possible reasons she did not want to testify—fear, love, or possibly both—are never suggested. Most unfortunately, she, unlike the other six, is given no epilogue. While the fates of the other women are revealed at the end of the episode, we discover nothing about the black woman. She, like the Others she represents, is simply left to herself and soon forgotten.

I offer this description to suggest that Other women are silenced as much by being relegated to the margin of experience as by total exclusion. Tokenistic, objectifying, voyeuristic inclusion is at least as disempowering as complete exclusion. The effort to politicize violence against women will do little to address black and other minority women if their images are retained simply to magnify the problem rather than to humanize their experiences. Similarly, the antiracist agenda will not be advanced significantly by forcibly suppressing the reality of battering in minority communities. As the *48 Hours* episode makes clear, the images and stereotypes we fear are indeed readily available, and they are frequently deployed in ways that do not generate sensitive understanding of the nature of domestic violence in minority communities

3. RACE AND DOMESTIC VIOLENCE SUPPORT SERVICES

Women working in the field of domestic violence have sometimes reproduced the subordination and marginalization of women of color by adopting policies, priorities, or strategies of empowerment that either elide or wholly disregard the particular intersectional needs of women of color. While gender, race, and class intersect to create the particular context in which women of color experience violence, certain choices made by "allies" can reproduce intersectional subordination within the very resistance strategies developed to respond to the problem.

This problem is starkly illustrated by the inaccessibility of domestic violence support services for many non-English-speaking women. In a letter written to the deputy commissioner of the New York State Department of Social Services, Diana Campos, director of Human Services for Programas de Ocupaciones y Desarrollo Económico Real, Inc. (PODER), detailed the case of a Latina in crisis who was repeatedly denied accommodation at a shelter because she could not prove that she was English-proficient. The woman had fled her home with her teenaged son, believing her husband's threats to kill them both. She called the domestic violence hotline administered by PODER, seeking shelter for herself and her son. However, because most shelters would not accommodate the woman with her son, they were forced to live on the streets for two days. The hotline counselor was finally able to find an agency that would take both the mother and her son, but when the counselor told the intake coordinator at the shelter that the woman spoke limited English, the coordinator told her that they could not take anyone who was not English-proficient. When the woman in crisis called back and was told of the shelter's "rule," she replied that she could understand English if spoken to her slowly. As Campos explains, Mildred, the hotline counselor, told Wendy, the intake coordinator

> that the woman said that she could communicate a little in English. Wendy told Mildred that they could not provide services to this woman because they have house rules that the woman must agree to follow. Mildred asked her, "What if the woman agrees to follow your rules? Will you still not take her?" Wendy responded that all of the women at the shelter are required to attend [a] support group and they would not be able to have her in the group if she could not communicate. Mildred mentioned the severity of this woman's case. She told Wendy that the woman had been wandering the streets at night while her husband is home, and she had been mugged twice. She also reiterated the fact that this woman was in danger of being killed by either her husband or a mugger. Mildred expressed that the woman's safety was a priority at this point, and that once in a safe place, receiving counseling in a support group could be dealt with.[28]

The intake coordinator restated the shelter's policy of taking only English-speaking women, and stated further that the woman would have to call the shelter herself for screening. If the woman could communicate with them in English, she might be accepted. When the woman called the PODER hotline later that day, she was in such a state of fear that the hotline counselor who had been working with her had difficulty understanding her in Spanish. The woman had been slipping back into her home during the day when her husband was at work. She remained in a heightened state of anxiety because he was returning shortly, and she would be forced to go back out into the streets for yet another night. Campos directly intervened at this point, calling the executive director of the shelter. A counselor called back from the shelter. As Campos reports, the counselor told her that

> they did not want to take the woman in the shelter because they felt that the woman would feel isolated. I explained that the son agreed to translate for his mother during the intake process. Furthermore, that we would assist them in locating a Spanish-speaking battered women's advocate to assist in counseling her. Marie stated that utilizing the son was not an acceptable means of communication for them, *since it further victimized the victim.* In addition, she stated that they had similar experiences with women who were non-English-speaking, and that the women eventually just left because they were not able to communicate with anyone. I expressed my extreme concern for her safety and reiterated that we would assist them in providing her with the necessary services until we could get her placed someplace where they had bilingual staff.[29]

After several more calls, the shelter finally agreed to take the woman. The woman called once more during the negotiation; however, once a plan was in place, the woman never called back. Said Campos, "After so many calls, we are now left to wonder if she is alive and well, and if she will ever have enough faith in our ability to help her to call us again the next time she is in crisis."[30]

Despite this woman's desperate need, she was unable to receive the protection afforded English-speaking women, due to the shelter's rigid commitment to exclusionary policies. Perhaps even more troubling than the shelter's lack of bilingual resources was its refusal to allow a

friend or relative to translate for the woman. This story illustrates the absurdity of a feminist approach that makes the ability to attend a support group without a translator a more significant consideration in the distribution of resources than the risk of physical harm on the street. The point is not that the shelter's image of empowerment is empty but, rather, that it was imposed without regard to the disempowering consequences for women who didn't match the kind of client the shelter's administrators imagined. Thus, they failed to accomplish the basic priority of the shelter movement—to get the woman out of danger.

Here the woman in crisis was made to bear the burden of the shelter's refusal to anticipate and provide for the needs of non-English-speaking women. Said Campos, "It is unfair to impose more stress on victims by placing them in the position of having to demonstrate their proficiency in English in order to receive services that are readily available to other battered women."[31] The problem is not easily dismissed as one of well-intentioned ignorance. The specific issue of monolingualism and the monistic view of women's experience that set the stage for this tragedy were not new issues in New York. Indeed, several women of color have reported that they had repeatedly struggled with the New York State Coalition Against Domestic Violence over language exclusion and other practices that marginalized the interests of women of color.[32] Yet despite repeated lobbying, the coalition did not act to incorporate the specific needs of nonwhite women into its central organizing vision.

Some critics have linked the coalition's failure to address these issues to the narrow vision of coalition that animated its interaction with women of color in the first place. The very location of the coalition's headquarters in Woodstock, New York—an area where few people of color live—seemed to guarantee that women of color would play a limited role in formulating policy. Moreover, efforts to include women of color came, it seems, as something of an afterthought. Many were invited to participate only after the coalition was awarded a grant by the state to recruit women of color. However, as one "recruit" said, "they were not really prepared to deal with us or our issues. They thought that they could simply incorporate us into their organization without rethinking any of their beliefs or priorities and that we would be happy."[33] Even the most formal gestures of inclusion were not to be taken for granted. On one occasion when several women of color attended a meeting to discuss a special task force on women of color, the group debated all day over including the issue on the agenda.[34]

The relationship between the white women and the women of color on the board was a rocky one from beginning to end. Other conflicts developed over differing definitions of feminism. For example, the board decided to hire a Latina staffperson to manage outreach programs to the Latino community, but the white members of the hiring committee rejected candidates favored by Latina committee members who did not have recognized feminist credentials. As Campos pointed out, by measuring Latinas against their own biographies, the white members of the board failed to recognize the different circumstances under which feminist consciousness develops and manifests itself within minority communities. Many of the women who interviewed for the position were established activists and leaders within their own community, a fact in itself suggesting that these women were probably familiar with the specific gender dynamics in their communities and were accordingly better qualified to handle outreach than were other candidates with more conventional feminist credentials.[35]

The coalition ended a few months later, when the women of color walked out.[36] Many of these women returned to community-based organizations, preferring to struggle over women's issues within their communities rather than struggle over race and class issues with white middle-class women. Yet as illustrated by the case of the Latina who could find no shelter, the dominance of a particular perspective and set of priorities within the shelter community continues to marginalize the needs of women of color.

The struggle over which differences matter and which do not is neither abstract nor insignificant. Indeed, these conflicts are about more than difference as such; they raise critical issues of power. The problem is not simply that women who dominate the antiviolence movement are different from women of color but, rather, that they frequently have the power to determine, either through material resources or rhetorical resources, whether the intersectional differences of women of color will be incorporated at all into the basic formulation of policy. Thus, the struggle over incorporating these differences is not a petty or superficial conflict about who gets to sit at the head of the table. In the context of violence, it is sometimes a deadly serious matter of who will survive—and who will not.[37]

B. Political Intersectionalities in Rape

In the previous sections, I have used intersectionality to describe or frame various relationships between race and gender. I have used it as a way to articulate the interaction of racism and patriarchy generally. I have also used intersectionality to describe the location of women of color both within overlapping systems of subordination and at the margins of feminism and antiracism. When race and gender factors are examined in the context of rape, intersectionality can be used to map the ways in which racism and patriarchy have shaped conceptualizations of rape, to describe the unique vulnerability of women of color to these converging systems of domination, and to track the marginalization of women of color within antiracist and antirape discourses.[38]

1. RACISM AND SEXISM IN DOMINANT CONCEPTUALIZATIONS OF RAPE

Generations of critics and activists have criticized dominant conceptualizations of rape as racist and sexist. These efforts have been important in revealing the way in which representations of rape both reflect and reproduce race and gender hierarchies in American society. Black women, at once women and people of color, are situated within both groups, each of which has benefited from challenges to sexism and racism, respectively; yet the particular dynamics of gender and race relating to the rape of black women have received scant attention. Although antiracist and antisexist assaults on rape have been politically useful to black women, at some level, the monofocal antiracist and feminist critiques have also produced a political discourse that disserves black women.

Historically, the dominant conceptualization of rape as quintessentially involving a black offender and a white victim has left black men subject to legal and extralegal violence. The use of rape to legitimize efforts to control and discipline the black community is well established, and the casting of all black men as potential threats to the sanctity of white womanhood is a familiar construct that antiracists confronted and attempted to dispel over a century ago.

Feminists have attacked other dominant, essentially patriarchal, conceptions of rape, particularly as represented through law. The early emphasis of rape law on the propertylike aspect of women's chastity resulted in less solicitude for rape victims whose chastity had been in some way devalued. Some of the most insidious assumptions were written into the law, including the early common law notion that a woman alleging rape must be able to show that she resisted to the utmost in order to prove that she was raped rather than seduced. Women themselves were put on trial, as judge and jury scrutinized their lives to determine whether they were innocent victims or women who essentially got what they were asking for. Legal rules thus functioned to legitimize a good/bad woman dichotomy, and women who led sexually autonomous lives were usually the least likely to be vindicated if they were raped.

Today, long after the most egregious discriminatory laws have been eradicated, constructions of rape in popular discourse and in criminal law continue to manifest vestiges of these racist and sexist themes. As Valerie Smith notes, "a variety of cultural narratives that historically have linked sexual violence with racial oppression continue to determine the nature of public response" to interracial rapes.[39] Smith reviews the well-publicized case of a jogger who was raped in New York's Central Park to expose how the public discourse on the assault "made the story

of sexual victimization inseparable from the rhetoric of racism."[40] Smith contends that in dehumanizing the rapists as "savages," "wolves," and "beasts," the press "shaped the discourse around the event in ways that inflamed pervasive fears about black men."[41] Given the chilling parallels between the media representations of the Central Park rape and the sensationalized coverage of similar allegations that in the past frequently culminated in lynchings, one could hardly be surprised when Donald Trump took out a full-page ad in four New York newspapers demanding that New York "Bring Back the Death Penalty, Bring Back Our Police."[42]

Other media spectacles suggest that traditional gender-based stereotypes that oppress women continue to figure in the popular construction of rape. In Florida, for example, a controversy was sparked by a jury's acquittal of a man accused of a brutal rape because, in the jurors' view, the woman's attire suggested that she was asking for sex. Even the press coverage of William Kennedy Smith's rape trial involved a considerable degree of speculation regarding the sexual history of his accuser.

The racism and sexism written into the social construction of rape are merely contemporary manifestations of rape narratives emanating from a historical period when race and sex hierarchies were more explicitly policed. Yet another is the devaluation of black women and the marginalization of their sexual victimizations. This was dramatically shown in the special attention given to the rape of the Central Park jogger during a week in which twenty-eight other cases of first-degree rape or attempted rape were reported in New York. Many of these rapes were as horrific as the rape in Central Park, yet all were virtually ignored by the media. Some were gang rapes, and in a case that prosecutors described as "one of the most brutal in recent years," a woman was raped, sodomized, and thrown fifty feet off the top of a four-story building in Brooklyn. Witnesses testified that the victim "screamed as she plunged down the air shaft. . . . She suffered fractures of both ankles and legs, her pelvis was shattered and she suffered extensive internal injuries."[43] This rape survivor, like most of the other forgotten victims that week, was a woman of color.

In short, during the period when the Central Park jogger dominated the headlines, many equally horrifying rapes occurred. None, however, elicited the public expressions of horror and outrage that attended the Central Park rape. To account for these different responses, Smith suggests a sexual hierarchy in operation that holds certain female bodies in higher regard than others.[44] Statistics from prosecution of rape cases suggest that this hierarchy is at least one significant, albeit often-overlooked, factor in evaluating attitudes toward rape.[45] A study of rape dispositions in Dallas, for example, showed that the average prison term for a man convicted of raping a black woman was two years,[46] as compared to five years for the rape of a Latina and ten years for the rape of a white woman.[47] A related issue is the fact that African-American victims of rape are the least likely to be believed.[48] The Dallas study and others like it also point to a more subtle problem: neither the antirape nor the antiracist political agenda has focused on the black rape victim. This inattention stems from the way the problem of rape is conceptualized within antiracist and antirape reform discourses. Although the rhetoric of both agendas formally includes black women, racism is generally not problematized in feminism, and sexism is not problematized in antiracist discourses. Consequently, the plight of black women is relegated to a secondary importance: the primary beneficiaries of policies supported by feminists and others concerned about rape tend to be white women, and the primary beneficiaries of the black community's concern over racism and rape tend to be black men. Ultimately, the reformist and rhetorical strategies that have grown out of antiracist and feminist rape reform movements have been ineffective in politicizing the treatment of black women.

2. RACE AND THE ANTIRAPE LOBBY

Feminist critiques of rape have focused on the way that rape law has reflected dominant rules and expectations that tightly regulate the sexuality of women. In the context of the rape trial, the formal definition of rape as well as the evidentiary rules applicable in a rape trial discriminate against women by measuring the rape victim against a narrow norm of acceptable sexual conduct for women. Deviation from that norm tends to turn women into illegitimate rape victims, leading to rejection of their claims.

Historically, legal rules dictated, for example, that rape victims must have resisted their assailants in order for their claims to be accepted. Any abatement of struggle was interpreted as the woman's consent to the intercourse, under the logic that a real rape victim would protect her honor virtually to the death. While utmost resistance is not formally required anymore, rape law continues to weigh the credibility of women against narrow normative standards of female behavior. A woman's sexual history, for example, is frequently explored by defense attorneys as a way of suggesting that a woman who consented to sex on other occasions was likely to have consented in the case at issue. Past sexual conduct as well as the specific circumstances leading up to the rape are often used to distinguish the moral character of the "legitimate" rape victim from women who are regarded as morally debased or in some other way "responsible" for their own victimization.

This type of feminist critique of rape law has informed many of the fundamental reform measures enacted in antirape legislation, including increased penalties for convicted rapists and changes in evidentiary rules to preclude attacks on the woman's moral character. These reforms limit the tactics attorneys might use to tarnish the image of the rape victim, but they operate within preexisting social constructs that distinguish victims from nonvictims on the basis of their sexual character. Thus, these reforms, while beneficial, do not challenge the background cultural narratives that undermine the credibility of black women.

Because black women face subordination based on both race and gender, reforms of rape law and judicial procedures which are premised on narrow conceptions of gender subordination may not address the devaluation of black women. Much of the problem results from the way that certain gender expectations for women intersect with certain sexualized notions of race—notions that are deeply entrenched in American culture. Sexualized images of African-Americans go all the way back to Europeans' first engagement with Africans. Blacks have long been portrayed as more sexual, more earthy, more gratification-oriented; these sexualized images of race intersect with norms of women's sexuality, norms that are used to distinguish good women from bad, madonnas from whores. Thus, black women are essentially prepackaged as bad women in cultural narratives about good women who can be raped and bad women who cannot. The discrediting of black women's claims is the consequence of a complex intersection of a gendered sexual system, one that constructs rules appropriate for good and bad women, and a race code that provides images defining the allegedly essential nature of black women. If these sexual images form even part of the cultural imagery of black women, then the very representation of a black female body at least suggests certain narratives that may make black women's rape either less believable or less important. These narratives may explain why rapes of black women are less likely to result in convictions and long prison terms than are rapes of white women.

Rape law reform measures that do not in some way engage and challenge the narratives that are read onto black women's bodies are unlikely to affect the way that cultural beliefs oppress black women in rape trials. While the degree to which legal reform can directly challenge cultural beliefs that shape rape trials is limited, the very effort to mobilize political resources toward addressing the sexual oppression of black women can be an important first step in drawing greater attention to the problem. One obstacle to such an effort has been the failure of most antirape activists to analyze specifically the consequences of racism in the context of rape. In the absence of a direct attempt to address the racial dimensions of rape, black women are simply presumed to

be represented in and benefited by prevailing feminist critiques.

3. ANTIRACISM AND RAPE

Antiracist critiques of rape law focus on how the law operates primarily to condemn rapes of white women by black men. While the heightened concern with protecting white women against black men has been primarily criticized as a form of discrimination against black men, it just as surely reflects devaluation of black women; this disregard for black women results from an exclusive focus on the consequences of the problem for black men.[49] Of course, rape accusations historically have provided a justification for white terrorism against the black community, generating a legitimating power of such strength that it created a veil virtually impenetrable to appeals based on either humanity or fact. Ironically, while the fear of the black rapist was exploited to legitimate the practice of lynching, rape was not even alleged in most cases. The well-developed fear of black sexuality served primarily to increase white tolerance for racial terrorism as a prophylactic measure to keep blacks under control. Within the African-American community, cases involving race-based accusations against black men have stood as hallmarks of racial injustice. The prosecution of the Scottsboro boys and the Emmett Till tragedy, for example, triggered African-American resistance to the rigid social codes of white supremacy. To the extent that rape of black women is thought to dramatize racism, it is usually cast as an assault on black manhood, demonstrating his inability to protect black women. The direct assault on black womanhood is less frequently seen as an assault on the black community.

The sexual politics that this limited reading of racism and rape engenders continues to play out today, as illustrated by the Mike Tyson rape trial. The use of antiracist rhetoric to mobilize support for Tyson represented an ongoing practice of viewing with considerable suspicion rape accusations against black men and interpreting sexual racism through a male-centered frame. The historical experience of black men has so completely occupied the dominant conceptions of racism and rape that there is little room to squeeze in the experiences of black women. Consequently, racial solidarity was continually raised as a rallying point on behalf of Tyson, but never on behalf of Desiree Washington, Tyson's black accuser. Leaders ranging from Benjamin Hooks to Louis Farrakhan expressed their support for Tyson, yet no established black leader voiced any concern for Washington. Thus, the fact that black men have often been falsely accused of raping white women underlies the antiracist defense of black men accused of rape even when the accuser herself is a black woman.

As a result of this continual emphasis on black male sexuality as the core issue in antiracist critiques of rape, black women who raise claims of rape against black men are not only disregarded but also sometimes vilified within the African-American community. One can only imagine the alienation experienced by a black rape survivor such as Desiree Washington when the accused rapist is embraced and defended as a victim of racism while she is, at best, disregarded and, at worst, ostracized and ridiculed. In contrast, Tyson was the beneficiary of the long-standing practice of using antiracist rhetoric to deflect the injury suffered by black women victimized by black men. Some defended the support given to Tyson on the ground that all African-Americans can readily imagine their sons, fathers, brothers, or uncles being wrongly accused of rape; yet daughters, mothers, sisters, and aunts also deserve at least a similar concern, since statistics show that black women are more likely to be raped than black men are to be falsely accused of it. Given the magnitude of black women's vulnerability to sexual violence, it is not unreasonable to expect as much concern for black women who are raped as is expressed for the men who are accused of raping them.

Black leaders are not alone in their failure to empathize with or rally around black rape victims. Indeed, some black women were among Tyson's staunchest supporters and Washington's harshest critics.[50] The media widely noted

the lack of sympathy black women had for Washington; Barbara Walters used the observation as a way of challenging Washington's credibility, going so far as to press her for a reaction.[51] The most troubling revelation was that many of the women who did not support Washington also doubted Tyson's story. These women did not sympathize with Washington because they believed that she had no business being in Tyson's hotel room at 2:00 A.M. A typical response was offered by one young black woman who stated, "She asked for it, she got it, it's not fair to cry rape."

Indeed, some of the women who expressed their disdain for Washington acknowledged that they encountered the threat of sexual assault almost daily.[52] Yet it may be precisely this threat—along with the relative absence of rhetorical strategies challenging the sexual subordination of black women—that animated their harsh criticism. In this regard, black women who condemned Washington were quite like all other women who seek to distance themselves from rape victims as a way of denying their own vulnerability. Prosecutors who handle sexual assault cases acknowledge that they often exclude women as potential jurors because women tend to empathize least with the victim.[53] To identify too closely with victimization may reveal their own vulnerability.[54] Consequently, women often look for evidence that the victim brought the rape on herself, usually by breaking social rules that are generally held applicable only to women. And when the rules classify women as dumb, loose, or weak, on the one hand, and smart, discriminating, and strong, on the other, it is not surprising that women who cannot step outside the rules to critique them would attempt to validate themselves within them. The position of most black women on this issue is particularly problematic, first, because of the extent to which they are consistently reminded that they are the group most vulnerable to sexual victimization, and, second, because most black women share the African-American community's general resistance to explicitly feminist analysis when it appears to run up against long-standing narratives that construct black men as the primary victims of sexual racism.

C. Rape and Intersectionality in Social Science

The marginalization of black women's experiences within the antiracist and feminist critiques of rape law are facilitated by social science studies that fail to examine the ways in which racism and sexism converge. Gary LaFree's *Rape and Criminal Justice: The Social Construction of Sexual Assault* is a classic example.[55] Through a study of rape prosecutions in Minneapolis, LaFree attempts to determine the validity of two prevailing claims regarding rape prosecutions. The first claim is that black defendants face significant racial discrimination;[56] the second is that rape laws serve to regulate the sexual conduct of women by withholding from rape victims the ability to invoke sexual assault law when they have engaged in nontraditional behavior.[57] LaFree's compelling study concludes that law constructs rape in ways that continue to manifest both racial and gender domination.[58] Although black women are positioned as victims of both the racism and the sexism that LaFree so persuasively details, his analysis is less illuminating than might be expected, because black women fall through the cracks of his dichotomized theoretical framework.

1. RACIAL DOMINATION AND RAPE

LaFree confirms the findings of earlier studies which show that race is a significant determinant in the ultimate disposition of rape cases. He finds that black men accused of raping white women were treated most harshly, while black offenders accused of raping black women were treated most leniently.[59] These effects held true even after controlling for other factors such as injury to the victim and acquaintance between victim and assailant: "Compared to other defendants, blacks who were suspected of assaulting white women received more serious charges, were more likely to have their cases filed as felonies, were more likely to receive prison sentences if convicted, were more likely to be incarcerated in the state penitentiary (as op-

posed to a jail or minimum-security facility), and received longer sentences on the average."[60]

LaFree's conclusions that black men are differentially punished depending on the race of the victim do not, however, contribute much to understanding the plight of black rape victims. Part of the problem lies in the author's use of "sexual stratification" theory, which posits both that women are differently valued according to their race and that there are certain "rules of sexual access" governing who may have sexual contact with whom in this sexually stratified market.[61] According to the theory, black men are discriminated against in that their forced "access" to white women is more harshly penalized than their forced "access" to black women.[62] LaFree's analysis focuses on the harsh regulation of access by black men to white women, but is silent about the relative subordination of black women to white women. The emphasis on differential access to women is consistent with analytical perspectives that view racism primarily in terms of the inequality between men. From this prevailing viewpoint, the problem of discrimination is that white men can rape black women with relative impunity while black men cannot do the same with white women.[63] Black women are considered victims of discrimination only to the extent that white men can rape them without fear of significant punishment. Rather than being viewed as victims of discrimination in their own right, they become merely the means by which discrimination against black men can be recognized. The inevitable result of this orientation is that efforts to fight discrimination tend to ignore the particularly vulnerable position of black women, who must both confront racial bias *and* challenge their status as instruments, rather than beneficiaries, of the civil rights struggle.

Where racial discrimination is framed by LaFree primarily in terms of a contest between black and white men over women, the racism experienced by black women will only be seen in terms of white male access to them. When rape of black women by white men is eliminated as a factor in the analysis, whether for statistical or other reasons, racial discrimination against black women no longer matters, since LaFree's analysis involves comparing the "access" of white and black men to white women. Yet discrimination against black women does not result simply from white men raping them with little sanction and being punished less than black men who rape white women, nor from white men raping them but not being punished as white men who rape white women would be. Black women are also discriminated against because intraracial rape of white women is treated more seriously than is intraracial rape of black women. However, the differential protection that black and white women receive against intraracial rape is not seen as racist because intraracial rape does not involve a contest between black and white men. In other words, the way the criminal justice system treats rapes of black women by black men and rapes of white women by white men is not seen as raising issues of racism, because black and white men are not involved with each other's women.

In sum, black women who are raped are racially discriminated against because their rapists, whether black or white, are less likely to be charged with rape; and, when charged and convicted, their rapists are less likely to receive significant jail time than are the rapists of white women. While sexual stratification theory does posit that women are stratified sexually by race, most applications of the theory focus on the inequality of male agents of rape rather than on the inequality of rape victims, thus marginalizing the racist treatment of black women by consistently portraying racism in terms of the relative power of black and white men.

In order to understand and treat the victimization of black women as a consequence of racism and of sexism, it is necessary to shift the analysis away from the differential access of men, and more toward the differential protection of women. Throughout his analysis, LaFree fails to do so. His sexual stratification thesis—in particular, its focus on the comparative power of male agents of rape—illustrates how the marginalization of black women in antiracist politics is replicated in social science research. Indeed, the thesis leaves unproblematized the racist subordination of less valuable objects (black women) to more valuable objects (white women), and it perpetuates the sexist treatment of women as property extensions of "their" men.

2. RAPE AND GENDER SUBORDINATION

Although LaFree does attempt to address gender-related concerns of women in his discussion of rape and the social control of women, his theory of sexual stratification fails to focus sufficiently on the effects of stratification on women.[64] LaFree quite explicitly uses a framework that treats race and gender as separate categories, but he gives no indication that he understands how black women may fall between categories, or within both. The problem with LaFree's analysis lies not in its individual observations, which can be insightful and accurate, but rather in his failure to connect them and to develop a broader, deeper perspective. His two-track framework makes for a narrow interpretation of the data because it leaves untouched the possibility that these two tracks may intersect. Further, it is those who exist at the intersection of gender and race discrimination—black women—who suffer from this fundamental oversight.

LaFree attempts to test the feminist hypothesis that "the application of law to nonconformist women in rape cases may serve to control the behavior of all women."[65] This inquiry is important, he explains, because "if women who violate traditional sex roles and are raped are unable to obtain justice through the legal system, then the law may be interpreted as an institutional arrangement for reinforcing women's gender-role conformity."[66] He finds that "acquittals were more common and final sentences were shorter when nontraditional victim behavior was alleged."[67] Thus, LaFree concludes, the victim's moral character was more important than victim injury—indeed, was second only to the defendant's character. Overall, 82.3 percent of the traditional victim cases resulted in convictions and average sentences of 43.38 months; only 50 percent of nontraditional victim cases led to convictions, with an average term of 27.83 months. The effects of traditional and nontraditional behavior by black women are difficult to determine from the information given and must be inferred from LaFree's passing comments. For example, he notes that black victims were evenly divided between traditional and nontraditional gender roles. This observation, together with the lower rate of conviction for men accused of raping blacks, suggests that gender-role behavior was not as significant in determining case disposition as it was in cases involving white victims. Indeed, LaFree explicitly notes that "the victim's *race* was . . . [a]n important predictor of jurors' case evaluations."[68]

> Jurors were less likely to believe in a defendant's guilt when the victim was black. Our interviews with jurors suggested that part of the explanation for this effect was that jurors . . . [w]ere influenced by stereotypes of black women as more likely to consent to sex or as more sexually experienced and hence less harmed by the assault. In a case involving the rape of a young black girl, one juror argued for acquittal on the grounds that a girl her age from "that kind of neighborhood" probably wasn't a virgin anyway.[69]

LaFree also notes that "[o]ther jurors were simply less willing to believe the testimony of black complainants."[70] One white juror is quoted as saying: "Negroes have a way of not telling the truth. They've a knack for coloring the story. So you know you can't believe everything they say."[71]

Despite explicit evidence that the race of the victim is significant in determining the disposition of rape cases, LaFree concludes that rape law functions to penalize nontraditional behavior in women. LaFree fails to note that racial identification may in some cases serve as a proxy for nontraditional behavior. That is, rape law serves not only to penalize actual examples of nontraditional behavior but also to diminish and devalue women who belong to groups in which nontraditional behavior is perceived as common. For the black rape victim, the disposition of her case may often turn less on her behavior than on her identity. LaFree misses the point that although white and black women have shared interests in resisting the madonna/whore dichotomy altogether, they nevertheless experience its oppressive power differently. Black women continue to be judged by who they are, not by what they do.

3. COMPOUNDING THE MARGINALIZATIONS OF RAPE

LaFree offers clear evidence that racial and sexual hierarchies subordinate black women to white women, as well as to men—both black and white. However, the different effects of rape law on black women are scarcely mentioned in LaFree's conclusions. In a final section, LaFree treats the devaluation of black women as an aside—one without apparent ramifications for rape law. He concludes: "The more severe treatment of black offenders who rape white women (*or, for that matter, the milder treatment of black offenders who rape black women*) is probably best explained in terms of racial discrimination within a broader context of continuing social and physical segregation between blacks and whites."[72] Implicit throughout LaFree's study is the assumption that blacks who are subjected to social control are black *men*. Moreover, the social control to which he refers is limited to securing the boundaries between black males and white females. His conclusion that race differentials are best understood within the context of social segregation as well as his emphasis on the interracial implications of boundary enforcement overlook the intraracial dynamics of race and gender subordination. When black men are leniently punished for raping black women, the problem is *not* "best explained" in terms of social segregation, but in terms of both the race- and gender-based devaluation of black women. By failing to examine the sexist roots of such lenient punishment, LaFree and other writers sensitive to racism ironically repeat the mistakes of those who ignore race as a factor in such cases. Both groups fail to consider directly the situation of black women.

Studies like LaFree's do little to illuminate how the interaction of race, class, and nontraditional behavior affects the disposition of rape cases involving black women. Such an oversight is especially troubling given evidence that many cases involving black women are dismissed outright. Over 20 percent of rape complaints were recently dismissed as "unfounded" by the Oakland Police Department, which did not even interview many, if not most, of the women involved.[73] Not coincidentally, the vast majority of the complainants were black and poor; many of them were substance abusers or prostitutes. Explaining their failure to pursue these complaints, the police remarked that "those cases were hopelessly tainted by women who are transient, uncooperative, untruthful or not credible as witnesses in court."[74]

The effort to politicize violence against women will do little to address the experiences of black and other nonwhite women until the ramifications of racial stratification among women are acknowledged. At the same time, the antiracist agenda will not be furthered by suppressing the reality of intraracial violence against women of color. The effect of both these marginalizations is that women of color have no ready means to link their experiences with those of other women. This sense of isolation compounds efforts to politicize sexual violence within communities of color and perpetuates the deadly silence surrounding these issues.

D. Implications

With respect to the rape of black women, race and gender converge in ways that are only vaguely understood. Unfortunately, the analytical frameworks that have traditionally informed both antirape and antiracist agendas tend to focus only on single issues. They are thus incapable of developing solutions to the compound marginalization of black women victims, who, yet again, fall into the void between concerns about women's issues and concerns about racism. This dilemma is complicated by the role that cultural images play in the treatment of black women victims. That is, the most critical aspects of these problems may revolve less around the political agendas of separate race- and gender-sensitive groups, and more around the social and cultural devaluation of women of color. The stories our culture tells about the experience of women of color present another challenge—and a further opportunity—to apply and evaluate the usefulness of the intersectional critique.

III. CONCLUSION

THIS article has presented intersectionality as a way of framing the various interactions of race and gender in the context of violence against women of color. Yet intersectionality might be more broadly useful as a way of mediating the tension between assertions of multiple identity and the ongoing necessity of group politics. It is helpful in this regard to distinguish intersectionality from the closely related perspective of antiessentialism, from which women of color have critically engaged white feminism for the absence of women of color, on the one hand, and for speaking for women of color, on the other. One rendition of this antiessentialist critique—that feminism essentializes the category "woman"—owes a great deal to the postmodernist idea that categories we consider natural or merely representational are actually socially constructed in a linguistic economy of difference. While the descriptive project of postmodernism—questioning the ways in which meaning is socially constructed—is generally sound, this critique sometimes misreads the meaning of social construction and distorts its political relevance.

One version of antiessentialism, embodying what might be called the vulgarized social construction thesis, is that since all categories are socially constructed, there is no such thing as, say, blacks or women, and thus it makes no sense to continue reproducing those categories by organizing around them.[75] Even the Supreme Court has gotten into this act. In *Metro Broadcasting, Inc. v. FCC*,[76] the court conservatives, in rhetoric that oozes vulgar constructionist smugness, proclaimed that any set-aside designed to increase the voices of minorities on the airwaves was itself based on a racist assumption that skin color is in some way connected to the likely content of one's broadcast.[77]

To say that a category such as race or gender is socially constructed is not to say that that category has no significance in our world. On the contrary, a large and continuing project for subordinated people—and indeed, one of the projects for which postmodern theories have been very helpful—is thinking about the way in which power has clustered around certain categories and is exercised against others. This project attempts to unveil the processes of subordination and the various ways in which those processes are experienced by people who are subordinated and people who are privileged by them. It is, then, a project that presumes that categories have meaning and consequences. This project's most pressing problem, in many if not most cases, is not the existence of the categories but, rather, the particular values attached to them and the way those values foster and create social hierarchies.

This is not to deny that the process of categorization is itself an exercise of power; the story is much more complicated and nuanced than that. First, the process of categorizing—or, in identity terms, naming—is not unilateral. Subordinated people can and do participate, sometimes even subverting the naming process in empowering ways. One need only think about the historical subversion of the category "black" or the current transformation of "queer" to understand that categorization is not a one-way street. Clearly, there is unequal power, but there is nonetheless some degree of agency that people can and do exert in the politics of naming. Moreover, it is important to note that identity continues to be a site of resistance for members of different subordinated groups. We all can recognize the distinction between the claims "I am black" and the claim "I am a person who happens to be black." "I am black" takes the socially imposed identity and empowers it as an anchor of subjectivity; "I am black" becomes not simply a statement of resistance but also a positive discourse of self-identification, intimately linked to celebratory statements like the black nationalist "black is beautiful." "I am a person who happens to be black," on the other hand, achieves self-identification by straining for a certain universality (in effect, "I am first a person") and for a concomitant dismissal of the imposed category ("black") as contingent, circumstantial, nondeterminant. There is truth in both characterizations, of course, but they function quite differently, depending on the political context. At this point in history, a strong case can be made that the most critical resistance strategy for disempowered groups is to occupy and defend a politics of social location rather than to vacate and destroy it.

Vulgar constructionism thus distorts the possibilities for meaningful identity politics by conflating at least two separate but closely linked manifestations of power. One is the power exer-

cised simply through the process of categorization; the other, the power to cause that categorization to have social and material consequences. While the former power facilitates the latter, the political implications of challenging one over the other matter greatly. We can look at debates over racial subordination throughout history and see that, in each instance, there was a possibility of challenging either the construction of identity or the system of subordination based on that identity. Consider, for example, the segregation system in *Plessy v. Ferguson.*[78] At issue were multiple dimensions of domination, including categorization, the sign of race, and the subordination of those so labeled. There were at least two targets for Plessy to challenge: the construction of identity ("What is a black?"), and the system of subordination based on that identity ("Can blacks and whites sit together on a train?"). Plessy actually made both arguments, one against the coherence of race as a category, the other against the subordination of those deemed to be black. In his attack on the former, Plessy argued that the segregation statute's application to him, given his mixed race status, was inappropriate. The court refused to see this as an attack on the coherence of the race system and instead responded in a way that simply reproduced the black/white dichotomy that Plessy was challenging. As we know, Plessy's challenge to the segregation system was not successful either. In evaluating various resistance strategies today, it is useful to ask which of Plessy's challenges would have been best for him to have won—the challenge against the coherence of the racial categorization system or the challenge to the practice of segregation?

The same question can be posed for *Brown v. Board of Education.*[79] Which of two possible arguments was politically more empowering—that segregation was unconstitutional because the racial categorization system on which it was based was incoherent, or that segregation was unconstitutional because it was injurious to black children and oppressive to their communities? While it might strike some as a difficult question, for the most part, the dimension of racial domination that has been most vexing to African-Americans has not been the social categorization as such but, rather, the myriad ways in which those of us so defined have been systematically subordinated. With particular regard to problems confronting women of color, when identity politics fail us, as they frequently do, it is not primarily because those politics take as natural certain categories that are socially constructed—instead, it is because the descriptive content of those categories and the narratives on which they are based have privileged some experiences and excluded others.

Along these lines, consider the controversy involving Clarence Thomas and Anita Hill. During the Senate hearings for the confirmation of Clarence Thomas to the Supreme Court, Anita Hill, in bringing allegations of sexual harassment against Thomas, was rhetorically disempowered in part because she fell between the dominant interpretations of feminism and antiracism. Caught between the competing narrative tropes of rape (advanced by feminists), on the one hand, and lynching (advanced by Thomas and his antiracist supporters), on the other, the race and gender dimensions of her position could not be told. This dilemma could be described as the consequence of antiracism's having essentialized blackness and feminism's having essentialized womanhood. However, recognizing as much does not take us far enough, for the problem is not simply linguistic or philosophical in nature; rather, it is specifically political: the narratives of gender are based on the experience of white, middle-class women, and the narratives of race are based on the experience of black men. The solution does not merely entail arguing for the multiplicity of identities or challenging essentialism generally. Instead, in Hill's case, for example, it would have been necessary to assert those crucial aspects of her location which were erased, even by many of her advocates—that is, to state what difference her difference made.

If, as this analysis asserts, history and context determine the utility of identity politics, how then do we understand identity politics today, especially in light of our recognition of multiple dimensions of identity? More specifically, what does it mean to argue that gender identities have been obscured in antiracist discourses, just as race identities have been obscured in feminist discourses? Does that mean we cannot talk about identity? Or instead, that any discourse about identity has to acknowledge how our identities are constructed through the intersection of multiple dimensions? A beginning response to these questions requires us first to recognize that the organized identity groups in which we find ourselves are in fact coalitions, or at least potential coalitions waiting to be formed.

In the context of antiracism, recognizing the ways in which the intersectional experiences of women of color are marginalized in prevailing conceptions of identity politics does not require that we give up attempts to organize as communities of color. Rather, intersectionality provides a basis for reconceptualizing race as a coalition between men and women of color. For example, in the area of rape, intersectionality provides a way of explaining why women of color must abandon the general argument that the interests of the community require the suppression of any confrontation around intraracial rape. Intersectionality may provide the means for dealing with other marginalizations as well. For example, race can also be a coalition of straight and gay people of color, and thus serve as a basis for critique of churches and other cultural institutions that reproduce heterosexism.

With identity thus reconceptualized, it may be easier to understand the need for—and to summon—the courage to challenge groups that are after all, in one sense, "home" to us, in the name of the parts of us that are not made at home. This takes a great deal of energy and arouses intense anxiety. The most one could expect is that we will dare to speak against internal exclusions and marginalizations, that we might call attention to how the identity of "the group" has been centered on the intersectional identities of a few. Recognizing that identity politics takes place at the site where categories intersect thus seems more fruitful than challenging the possibility of talking about categories at all. Through an awareness of intersectionality, we can better acknowledge and ground the differences among us and negotiate the means by which these differences will find expression in constructing group politics.

NOTES

1. Feminist academics and activists have played a central role in forwarding an ideological and institutional challenge to the practices that condone and perpetuate violence against women. See generally S. Brownmiller, *Against Our Will: Men, Women and Rape* (1975); L. M. G. Clark and D. J. Lewis, *Rape: The Price of Coercive Sexuality* (1977); R. E. Dobash and R. Dobash, *Violence against Wives: A Case against the Patriarchy* (1979); N. Gager and C. Schurr, *Sexual Assault: Confronting Rape in America* (1976); D. E. H. Russell, *The Politics of Rape: The Victim's Perspective* (1974); E. A. Stanko, *Intimate Intrusions: Women's Experience of Male Violence* (1985); L. E. Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (1989); L. E. Walker, *The Battered Woman Syndrome* (1984); L. E. Walker, *The Battered Woman* (1979).

2. See, for example, S. Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (1982) (arguing that battering is a means of maintaining women's subordinate position); S. Brownmiller, *supra* note 1 (arguing that rape is a patriarchal practice that subordinates women to men); E. Schneider, "The Violence of Privacy," 23 *Conn. L. Rev.*, 973, 974 (1991) (discussing how "concepts of privacy permit, encourage and reinforce violence against women"); S. Estrich, "Rape," 95 *Yale L. J.* 1087 (1986) (analyzing rape law as one illustration of sexism in criminal law); see also C. A. Mackinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination,* 143–213 (1979) (arguing that sexual harassment should be redefined as sexual discrimination actionable under Title VII, rather than viewed as misplaced sexuality in the workplace).

3. Although the objective of this article is to describe the intersectional location of women of color and their marginalization within dominant resistance discourses, I do not mean to imply that the disempowerment of women of color is singularly or even primarily caused by feminist and antiracist theorists or activists. Indeed, I hope to dispel any such simplistic interpretations by capturing, at least in part, the way that prevailing structures of domination shape various discourses of resistance. As I have noted elsewhere, "People can only demand change in ways that reflect the logic of the institutions they are challenging. Demands for change that do not reflect . . . dominant ideology . . . will probably be ineffective"; Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* at 1367. Although there are significant political and conceptual obstacles to moving against structures of domination with an intersectional sensibility, my point is that the effort to do so should be a central theoretical and political objective of both antiracism and feminism.

4. Although this article deals with violent assault perpetrated by men against women, women are also subject to violent assault by women. Violence among lesbians is a hidden but significant problem. One expert reported in a study of 90 lesbian couples that roughly 46 percent of

lesbians have been physically abused by their partners; J. Garcia, "The Cost of Escaping Domestic Violence: Fear of Treatment in a Largely Homophobic Society May Keep Lesbian Abuse Victims from Calling for Help," *Los Angeles Times* (May 6, 1991), 2; see also K. Lobel, ed., *Naming the Violence: Speaking Out about Lesbian Battering* (1986); R. Robson, "Lavender Bruises: Intralesbian Violence, Law and Lesbian Legal Theory," 20 *Golden Gate U. L. Rev.*, 567 (1990). There are clear parallels between violence against women in the lesbian community and violence against women in communities of color. Lesbian violence is often shrouded in secrecy for reasons similar to those which have suppressed the exposure of heterosexual violence in communities of color—fear of embarrassing other members of the community, which is already stereotyped as deviant, and fear of being ostracized from the community. Despite these similarities, there are nonetheless distinctions between male abuse of women and female abuse of women that, in the context of patriarchy, racism, and homophobia, warrant more focused analysis than is possible here.

5. K. Crenshaw, "Demarginalizing the Intersection of Race and Sex," *U. Chi. Legal F.*, 139 (1989).

6. I explicitly adopt a black feminist stance in this survey of violence against women of color. I do this cognizant of several tensions that such a position entails. The most significant one stems from the criticism that while feminism purports to speak for women of color through its invocation of the term "woman," the feminist perspective excludes women of color because it is based upon the experiences and interests of a certain subset of women. On the other hand, when white feminists attempt to include other women, they often add our experiences into an otherwise unaltered framework. It is important to name the perspective from which one constructs her analysis; and for me, that is as a black feminist. Moreover, it is important to acknowledge that the materials that I incorporate in my analysis are drawn heavily from research on black women. On the other hand, I see my own work as part of a broader collective effort among feminists of color to expand feminism to include analyses of race and other factors such as class, sexuality, and age. I have attempted therefore to offer my sense of the tentative connections between my analysis of the intersectional experiences of black women and the intersectional experiences of other women of color. I stress that this analysis is not intended to include falsely nor to exclude unnecessarily other women of color.

7. I consider intersectionality a provisional concept linking contemporary politics with postmodern theory. In mapping the intersections of race and gender, the concept does engage dominant assumptions that race and gender are essentially separate categories. By tracing the categories to their intersections, I hope to suggest a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable. While the primary intersections that I explore here are between race and gender, the concept can and should be expanded by factoring in issues such as class, sexual orientation, age, and color.

8. 8 U.S.C. § 1186a (1988). The marriage fraud amendments provide that an alien spouse "shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section"; § 1186a(a)(1). An alien spouse with permanent resident status under this conditional basis may have her status terminated if the attorney general finds that the marriage was "improper" (§ 1186a(b)(1)), or if she fails to file a petition or fails to appear at the personal interview (§ 1186a(c)(2)(A)).

9. The marriage fraud amendments provided that for the conditional resident status to be removed "the alien spouse and the petitioning spouse (if not deceased) *jointly* must submit to the Attorney General . . . a petition which requests the removal of such conditional basis and which states, under penalty of perjury, the facts and information"; § 1186a(b)(1)(A) (emphasis added). The amendments provided for a waiver, at the attorney general's discretion, if the alien spouse was able to demonstrate that deportation would result in extreme hardship, or that the qualifying marriage was terminated for good cause; § 1186a(c)(4). However, the terms of this hardship waiver have not adequately protected battered spouses. For example, the requirement that the marriage be terminated for good cause may be difficult to satisfy in states with no-fault divorces; E. P. Lynsky, "Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part," 41 *U. Miami L. Rev.*, 1087, 1095 n. 47 (1987) (student author) (citing J. B. Ingber and R. L. Prischet, "The Marriage Fraud Amendments," in S. Mailman, ed., *The New Simpson-Rodino Immigration Law of 1986*, 564–65 (1986).

10. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. The act, introduced by Rep. Louise Slaughter (Dem.–N.Y.), provides that a battered spouse who has conditional permanent resident status can be granted a waiver for failure to meet the requirements if she can show that "the marriage was entered into in good faith and that after the marriage the alien spouse was battered by or was subjected to extreme mental cruelty by the U.S. citizen or permanent resident spouse"; H.R. Rep. No. 723(I), 101st Cong., 2d Sess. 78 (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6758; see also 8 C.F.R. § 216.5(3) (1992) (regulations for application for waiver based on claim of having been battered or subjected to extreme mental cruelty).

11. H.R. Rep. No. 723(I), *supra* note 10, at 79, reprinted in 1990 U.S.C.C.A.N. 6710, 6759.

12. D. Hodgin, " 'Mail-Order' Brides Marry Pain to Get Green Cards," *Washington Post*, October 16, 1990, at E5.

13. *Id.*

14. Most crime statistics are classified by sex or race but none are classified by sex and race. Because we know that most rape victims are women, the racial breakdown reveals, at best, rape rates for black women. Yet even given this head start, rates for other nonwhite women are difficult to collect. While there are some statistics for Latinas, statistics for Asian and Native American women are virtually nonexistent; cf. G. Chezia Carraway, "Violence Against Women of Color," 43 *Stan. L. Rev.*, 1301 (1993).

15. S. Ali, *The Blackman's Guide to Understanding the Blackwoman* (1989). Ali's book sold quite well for an independently published title, an accomplishment no doubt due in part to her appearances on the Phil Donahue, Oprah Winfrey, and Sally Jesse Raphael television talk shows. For public and press reaction, see D. Gillism, "Sick, Distorted Thinking," *Washington Post*, (Oct. 11, 1990), D3; L. Williams, "Black Woman's Book Starts a Predictable Storm," *New York Times* (Oct. 2, 1990), C11; see also P. Cleacue, *Mad at Miles: A Black Woman's Guide to Truth* (1990). The title clearly styled after Ali's, *Mad at Miles* responds not only to issues raised by Ali's book, but also to Miles Davis's admission in his autobiography, *Miles: The Autobiography* (1989), that he had physically abused, among other women, his former wife, actress Cicely Tyson.

16. Ali suggests that the Blackwoman "certainly does not believe that her disrespect for the Blackman is destructive, nor that her opposition to him has deteriorated the Black nation"; S. Ali, *supra* note 15, at viii. Blaming the problems of the community on the failure of the black woman to accept her "real definition," Ali explains that "[n]o nation can rise when the natural order of the behavior of the male and the female have been altered against their wishes by force. No species can survive if the female of the genus disturbs the balance of her nature by acting other than herself"; *id.* at 76.

17. Ali advises the Blackman to hit the Blackwoman in the mouth, "[b]ecause it is from that hole, in the lower part of her face, that all her rebellion culminates into words. Her unbridled tongue is a main reason she cannot get along with the Blackman. She often needs a reminder"; *id.* at 161. Ali warns that "if [the Blackwoman] ignores the authority and superiority of the Blackman, there is a penalty. When she crosses this line and becomes viciously insulting it is time for the Blackman to soundly slap her in the mouth"; *id.*

18. In this regard, Ali's arguments bear much in common with those of neoconservatives who attribute many of the social ills plaguing black America to the breakdown of patriarchal family values; see, for example, W. Raspberry, "If We Are to Rescue American Families, We Have to Save the Boys," *Chicago Tribune* (July 19, 1989), C15; G. F. Will, "Voting Rights Won't Fix It," *Washington Post* (Jan. 23, 1986), A23; G. F. Will, " 'White Racism' Doesn't Make Blacks Mere Victims of Fate," *Milwaukee Journal* (Feb. 21, 1986), 9. Ali's argument shares remarkable similarities to the controversial "Moynihan Report" on the black family, so called because its principal author was now-Senator Daniel P. Moynihan (Dem.–N.Y.). In the infamous chapter entitled "The Tangle of Pathology," Moynihan argued that "the Negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male and, in consequence, on a great many Negro women as well"; Office of Policy Planning and Research, U.S. Department of Labor, *The Negro Family: The Case for National Action*, 29 (1965), reprinted in L. Rainwater and W. L. Yancey, *The Moynihan Report and the Politics of Controversy* 75 (1967). A storm of controversy developed over the book, although few commentators challenged the patriarchal discourse embedded in the analysis. Bill Moyers, then a young minister and speechwriter for President Lyndon B. Johnson, firmly believed that the criticism directed at Moynihan was unfair. Some twenty years later, Moyers resurrected the Moynihan thesis in a special television program, *The Vanishing Family: Crisis in Black America* (CBS television broadcast, Jan. 25, 1986). The show first aired in January 1986 and featured several African-American men and women who had become parents but were unwilling to marry. See A. Linger, "Hardhitting Special About Black Families," *Christian Science Monitor* (Jan. 23, 1986), 23. Many saw the Moyers show as a vindication of Moynihan. President Reagan took the opportunity to introduce an initiative to revamp the welfare system a week after the program aired; M. Barone, "Poor Children and Politics," *Washington Post* (Feb. 10, 1986), A1. Said one official, "Bill Moyers has made it safe for people to talk about this issue, the disintegrating black family structure"; R. Pear, "President Reported Ready to Propose Overhaul of Social Welfare System," *New York Times* (Feb. 1, 1986), A12. Critics of the Moynihan/Moyers thesis have argued that it scapegoats the black family generally and black women in particular. For a series of responses, see "Scapegoating the Black Family," *The Nation* (July 24, 1989) (special issue, edited by Jewell Handy Gresham and Margaret B. Wilkerson, with contributions from Margaret Burnham, Constance Clayton, Dorothy Height, Faye Wattleton, and Marian Wright Edelman). For an analysis of the media's endorsement of the Moynihan/Moyers thesis, see C. Ginsburg, *Race and Media: The Enduring Life of the Moynihan Report* (1989).

19. Domestic violence relates directly to issues that even those who subscribe to Ali's position must also be concerned about. The socioeconomic condition of black males has been one such central concern. Recent statistics estimate that 25 percent of black males in their twenties are involved in the criminal justice systems; see D. G. Savage, "Young Black Males in Jail or in Court Control Study Says," *Los Angeles Times* (Feb. 27, 1990), A1; *Newsday* (Feb. 27, 1990), 15; "Study Shows Racial Imbalance in Penal System," *New York Times* (Feb. 27, 1990), A18. One would think that the linkages between violence in the home and the violence on the streets would alone persuade those like Ali to conclude that the African-American community cannot afford domestic violence and the patriarchal values that support it.

20. A pressing problem is the way domestic violence reproduces itself in subsequent generations. It is estimated that boys who witness violence against women are ten times more likely to batter female partners as adults; *Women and Violence: Hearings before the Senate Comm. on the Judiciary on Legislation to Reduce the Growing Problem of Violent Crime against Women*, 101st Cong., 2d Sess., pt. 2, at 89

(1991) (testimony of Charlotte Fedders). Other associated problems for boys who witness violence against women include higher rates of suicide, violent assault, sexual assault, and alcohol and drug use; *id.*, pt. 2, at 131 (statement of Sarah M. Buel, assistant district attorney, Massachusetts, and supervisor, Harvard Law School Battered Women's Advocacy Project).

21. *Id.* at 142 (statement of Susan Kelly-Dreiss, discussing several studies in Pennsylvania linking homelessness to domestic violence).

22. *Id.* at 143 (statement of Susan Kelly-Dreiss).

23. Another historical example includes Eldridge Cleaver, who argued that he raped white women as an assault upon the white community. Cleaver "practiced" on black women first; E. Cleaver, *Soul on Ice,* 14–15 (1968). Despite the appearance of misogyny in both works, each professes to worship black women as "queens" of the black community. This "queenly subservience" parallels closely the image of the "woman on a pedestal" against which white feminists have railed. Because black women have been denied pedestal status within dominant society, the image of the African queen has some appeal to many African-American women. Although it is not a feminist position, there are significant ways in which the promulgation of the image directly counters the intersectional effects of racism and sexism that have denied African-American women a perch in the "gilded cage."

24. T. Harris, "On *The Color Purple*, Stereotypes, and Silence," 18 *Black Am. Lit. F.*, 155, (1984).

25. On January 14, 1991, Sen. Joseph Biden (Dem.–Del.) introduced Senate Bill 15, the Violence Against Women Act of 1991, comprehensive legislation addressing violent crime confronting women; S. 15, 102d Cong., 1st Sess. (1991). The bill consists of several measures designed to create safe streets, safe homes, and safe campuses for women. More specifically, Title III of the bill creates a civil rights remedy for crimes of violence motivated by the victim's gender; *id.* § 01. Among the findings supporting the bill were "(1) crimes motivated by the victim's gender constitute bias crimes in violation of the victim's right to be free from discrimination on the basis of gender," and "(2) current law [does not provide a civil rights remedy] for gender crimes committed on the street or in the home"; S. Rep. No. 197, 102d Cong., 1st Sess. 27 (1991).

26. 137 Cong. Rec. S611 (daily ed. Jan. 14, 1991) (statement of Senator Boren). Sen. William Cohen (Dem.–Me.) followed with a similar statement, noting "that rapes and domestic assaults are not limited to the streets of our inner cities or to those few highly publicized cases that we read about in the newspapers or see on the evening news. Women throughout the country, in our nation's urban areas and rural communities, are being beaten and brutalized in the streets and in their homes. It is our mothers, wives, daughters, sisters, friends, neighbors, and coworkers who are being victimized; and in many cases, they are being victimized by family members, friends, and acquaintances"; *id.* (statement of Senator Cohen).

27. *48 Hours,* "Till Death Do Us Part" (CBS television broadcast, Feb. 6, 1991).

28. Letter of Diana M. Campos, director of Human Services, PODER, to Joseph Semidei, deputy commissioner, New York State Department of Social Services (Mar. 26, 1992).

29. *Id.* (emphasis added).

30. *Id.*

31. *Id.*

32. Roundtable Discussion on Racism and the Domestic Violence Movement (April 2, 1992) (transcript on file with the *Stanford Law Review*). The participants in the discussion—Diana Campos, director, Bilingual Outreach Project of the New York State Coalition Against Domestic Violence; Elsa A. Rios, project director, Victim Intervention Project (a community-based project in East Harlem, New York, serving battered women); and Haydee Rosario, a social worker with the East Harlem Council for Human Services and a Victim Intervention Project volunteer—recounted conflicts relating to race and culture during their association with the New York State Coalition Against Domestic Violence, a state oversight group that distributed resources to battered women's shelters throughout the state and generally set policy priorities for the shelters that were part of the coalition.

33. *Id.*

34. *Id.*

35. *Id.*

36. Ironically, the specific dispute that led to the walkout concerned the housing of the Spanish-language domestic violence hotline. The hotline was initially housed at the coalition's headquarters, but languished after a succession of coordinators left the organization. Latinas on the coalition board argued that the hotline should be housed at one of the community service agencies, while the board insisted on maintaining control of it. The hotline is now housed at PODER; *id.*

37. Said Campos, "It would be a shame that in New York state a battered woman's life or death were dependent upon her English language skills"; D. M. Campos, *supra* note 28.

38. The discussion in the following section focuses rather narrowly on the dynamics of a black-white sexual hierarchy. I specify African-Americans in part because, given the centrality of sexuality as a site of racial domination of African-Americans, any generalizations that might be drawn from this history seem least applicable to other racial groups. To be sure, the specific dynamics of racial oppression experienced by other racial groups are likely to have a sexual component as well. Indeed, the repertoire of racist imagery that is commonly associated with different racial groups each contain a sexual stereotype as well. These images probably influence the way that rapes involving other minority groups are perceived both internally and in society at large, but they are likely to function in different ways.

39. V. Smith, "Split Affinities: The Case of Interracial Rape," in M. Hirsch and E. F. Keller, eds., *Conflicts in Feminism,* 271, 274 (1990).

40. *Id.* at 276–78.

41. Smith cites the use of animal images to characterize the accused black rapists, including descriptions such as: " 'a wolfpack of more than a dozen young teenagers' and '[t]here was a full moon Wednesday night. A suitable backdrop for the howling of wolves. A vicious pack ran rampant through Central Park. . . . This was bestial brutality.' " An editorial in the *New York Times* was entitled "The Jogger and the Wolf Pack"; *id.* at 277 (citations omitted).

Evidence of the ongoing link between rape and racism in American culture is by no means unique to media coverage of the Central Park jogger case. In December 1990, the George Washington University student newspaper, *The Hatchet,* printed a story in which a white student alleged that she had been raped at knifepoint by two black men on or near the campus; the story caused considerable racial tension. Shortly after the report appeared, the woman's attorney informed the campus police that his client had fabricated the attack. After the hoax was uncovered, the woman said that she hoped the story "would highlight the problems of safety for women"; F. Banger, "False Rape Report Upsetting Campus," *New York Times* (Dec. 12, 1990), A2; see also L. Payne, "A Rape Hoax Stirs Up Hate," *New York Newsday* (Dec. 16, 1990), 6.

42. W. C. Troft, "Deadly Donald," UP (Apr. 30 1989). Donald Trump explained that he spent $85,000 to take out these ads because "I want to hate these muggers and murderers. They should be forced to suffer and, when they kill, they should be executed for their crimes"; "Trump Calls for Death to Muggers," *Los Angeles Times* (May 1, 1989), A2. But cf. "Leaders Fear 'Lynch' Hysteria in Response to Trump Ads," UPI (May 6, 1989) (community leaders feared that Trump's ads would fan "the flames of racial polarization and hatred"); C. Fuchs Epstein, "Cost of Full Page Ad Could Help Fight Causes of Urban Violence," *New York Times* (May 15, 1989), A18 ("Mr. Trump's proposal could well lead to further violence").

43. R. D. McFadden, "2 Men Get 6 to 18 Years for Rape in Brooklyn," *New York Times* (Oct. 2, 1990), B2. The woman "lay half naked, moaning and crying for help until a neighbor heard her" in the air shaft; "Community Rallies to Support Victim of Brutal Brooklyn Rape," *New York Daily News* (June 26, 1989), 6. The victim "suffered such extensive injuries that she had to learn to walk again. . . . She faces years of psychological counseling"; McFadden, *supra.*

44. Smith points out that "[t]he relative invisibility of black women victims of rape also reflects the differential value of women's bodies in capitalist societies. To the extent that rape is constructed as a crime against the property of privileged white men, crimes against less valuable women—women of color, working-class women, and lesbians, for example—mean less or mean differently than those against white women from the middle and upper classes"; Smith, *supra* note 39, at 275–76.

45. "Cases involving black offenders and black victims were treated the least seriously"; G. D. LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* (1989). LaFree also notes, however, that "the race composition of the victim-offender dyad" was not the only predictor of case dispositions; *id.* at 219–20.

46. "Race Tilts the Scales of Justice. Study: Dallas Punishes Attacks on Whites More Harshly," *Dallas Times Herald* (Aug. 19, 1990), A1. A study of 1988 cases in Dallas County's criminal justice system concluded that rapists whose victims were white were punished more severely than those whose victims were black or Hispanic. The *Dallas Times Herald,* which had commissioned the study, reported that "[t]he punishment almost doubled when the attacker and victim were of different races. Except for such interracial crime, sentencing disparities were much less pronounced"; *id.*

47. *Id.* Two criminal law experts, Iowa law professor David Baldus and Carnegie-Mellon University professor Alfred Blumstein "said that the racial inequities might be even worse than the figures suggest"; *id.*

48. *See* G. LaFree, *supra* note 45, at 219–20 (quoting jurors who doubted the credibility of black rape survivors); see also H. Field and L. Bienen, *Jurors and Rape: A Study in Psychology and Law 141* (1980), at 117–18.

49. The statistic that 89 percent of all men executed for rape in this country were black is a familiar one. *Furman v. Georgia,* 408 U.S. 238, 364 (1972) (Marshall, J., concurring). Unfortunately, the dominant analysis of racial discrimination in rape prosecutions generally does not discuss whether any of the rape *victims* in these cases were black; see J. Wriggins, "Rape, Racism, and the Law," 6 *Harv. Women's L. J.,* 103, 113 (1983) (student author).

50. See M. Rosenfeld, "After the Verdict, the Doubts: Black Women Show Little Sympathy for Tyson's Accuser," *Washington Post* (Feb. 13, 1992), D1; A. Johnson, "Tyson Rape Case Strikes a Nerve Among Blacks," *Chicago Tribune* (Mar. 29, 1992), C1; S. P. Kelly, "Black Women Wrestle with Abuse Issue: Many Say Choosing Racial over Gender Loyalty Is Too Great a Sacrifice," *Chicago Star Tribune* (Feb. 18, 1992), A1.

51. *20/20* (ABC television broadcast, Feb. 21, 1992).

52. According to a study by the Bureau of Justice, black women are significantly more likely to be raped than white women, and women in the 16–24 age group are two to three times more likely to be victims of rape or attempted rape than women in any other age group; see R. J. Ostrow, "Typical Rape Victim Called Poor, Young," *Los Angeles Times* (Mar. 25, 1985), 8.

53. See P. Tyre, "What Experts Say About Rape Jurors," *New York Newsday* (May 19, 1991), 10 (reporting that "researchers had determined that jurors in criminal trials side with the complainant or defendant whose ethnic, economic and religious background most closely resembles their own.

The exception to the rule . . . is the way women jurors judge victims of rape and sexual assault"). Linda Fairstein, a Manhattan prosecutor, states, "too often women tend to be very critical of the conduct of other women, and they often are not good jurors in acquaintance-rape cases"; M. Carlson, "The Trials of Convicting Rapists," *Time* (Oct. 14, 1991), 11.

54. As sex crimes prosecutor Barbara Eganhauser notes, even young women with contemporary lifestyles often reject a woman's rape accusation out of fear. "To call another woman the victim of rape is to acknowledge the vulnerability in yourself. They go out at night, they date, they go to bars, and walk alone. To deny it is to say at the trial that women are not victims"; Tyre, *supra* note 53.

55. G. LaFree, *supra* note 45.

56. *Id.* at 49–50.

57. *Id.* at 50–51.

58. *Id.* at 237–40.

59. LaFree concludes that recent studies finding no discriminatory effect were inconclusive because they analyzed the effects of the defendant's race independently of the race of victim. The differential race effects in sentencing are often concealed by combining the harsher sentences given to black men accused of raping white women with the more lenient treatment of black men accused of raping black women; *id.* at 117, 140. Similar results were found in another study: see A. Walsh, "The Sexual Stratification Hypothesis and Sexual Assault in Light of the Changing Conceptions of Race," 25 *Criminology*, 153, 170 (1987) ("sentence severity mean for blacks who assaulted whites, which was significantly in excess of mean for whites who assaulted whites, was masked by the lenient sentence severity mean for blacks who assaulted blacks").

60. G. LaFree, *supra* note 45, at 139–40.

61. Sexual stratification, according to LaFree, refers to the differential valuation of women according to their race and to the creation of "rules of sexual access" governing who may have contact with whom. Sexual stratification also dictates what the penalty will be for breaking these rules: the rape of a white woman by a black man is seen as a trespass on the valuable property rights of white men and is punished most severely; *id.* at 48–49. The fundamental propositions of the sexual stratification thesis have been summarized as follows: (1) Women are viewed as the valued and scarce property of the men of their own race. (2) White women, by virtue of membership in the dominant race, are more valuable than black women. (3) The sexual assault of a white by a black threatens both the white man's "property rights" and his dominant social position. This dual threat accounts for the strength of the taboo attached to interracial sexual assault. (4) A sexual assault by a male of any race upon members of the less valued black race is perceived as nonthreatening to the status quo and therefore less serious. (5) White men predominate as agents of social control. Therefore, they have the power to sanction differentially according to the perceived threat to their favored social position; Walsh, *supra* note 59, at 155.

62. I use the term "access" guardedly because it is an inapt euphemism for rape. On the other hand, rape is conceptualized differently depending on whether certain race-specific rules of sexual access are violated. Although violence is not explicitly written into the sexual stratification theory, it does work itself into the rules, in that sexual intercourse which violates the racial access rules is presumed to be coercive rather than voluntary; see, for example, *Sims v. Balkam*, 136 S.E. 2d 766, 769 (Ga. 1964) (describing the rape of a white woman by a black man as "a crime more horrible than death"); *Story v. State*, 59 So. 480 (Ala. 1912) ("The consensus of public opinion, unrestricted to either race, is that a white woman prostitute is yet, though lost of virtue, above the even greater sacrifice of the voluntary submission of her person to the embraces of the other race"); Wriggins, *supra* note 49, at 125, 127.

63. This traditional approach places black women in a position of denying their own victimization, requiring them to argue that it is racist to punish black men more harshly for raping white women than for raping black women. However, in the wake of the Mike Tyson trial, it seems that many black women are prepared to do just that; see notes 50–52 *supra* and accompanying text.

64. G. LaFree, *supra* note 45, at 148. LaFree's transition between race and gender suggests that the shift might not loosen the frame enough to permit discussion of the combined effects of race and gender subordination on black women. LaFree repeatedly separates race from gender, treating them as wholly distinguishable issues; see, for example, *id.* at 147.

65. *Id.*

66. *Id.* at 151. LaFree interprets nontraditional behavior to include drinking, drug use, extramarital sex, illegitimate children, and "having a reputation as a 'partier,' a 'pleasure seeker' or someone who stays out late at night"; *id.* at 201.

67. *Id.* at 204.

68. *Id.* at 219 (emphasis added). While there is little direct evidence that prosecutors are influenced by the race of the victim, it is not unreasonable to assume that since race is an important predictor of conviction, prosecutors determined to maintain a high conviction rate might be less likely to pursue a case involving a black victim than a white one. This calculus is probably reinforced when juries fail to convict in strong cases involving black victims. For example, the acquittal of three white St. John's University athletes for the gang rape of a Jamaican schoolmate was interpreted by many as racially influenced. Witnesses testified that the woman was incapacitated during much of the ordeal, having ingested a mixture of alcohol given to her by a classmate who subsequently initiated the assault. The jurors insisted that race played no role in their decision to acquit. "There was no race, we all agreed to it," said one juror; "They were trying to make it racial but it wasn't," said another; "Jurors:

'It Wasn't Racial,'" *New York Newsday* (July 25, 1991), at 4. Yet it is possible that race did influence on some level their belief that the woman consented to what by all accounts, amounted to dehumanizing conduct; see, for example, C. Agus, "Whatever Happened to 'The Rules,'" *New York Newsday* (July 28, 1991), 11 (citing testimony that at least two of the assailants hit the victim in the head with their penises). The jury nonetheless thought, in the words of its foreman, that the defendants' behavior was "obnoxious" but not criminal; see S. H. Schanberg, "Those 'Obnoxious' St. John's Athletes," *New York Newsday* (July 30, 1991), 79. One can imagine a different outcome had the races of the parties only been reversed. Rep. Charles Rangel (Dem.–N.Y.) called the verdict "a rerun of what used to happen in the South"; J. M. Brodie, "The St. John's Rape Acquittal: Old Wounds That Just Won't Go Away," *Black Issues in Higher Educ.* (Aug. 15, 1991), 18. Denise Snyder, executive director of the D.C. Rape Crisis Center, commented: "It's a historical precedent that white men can assault black women and get away with it. Woe be to the black man who assaults white women. All the prejudices that existed a hundred years ago are dormant and not so dormant, and they rear their ugly heads in situations like this. Contrast this with the Central Park jogger who was an upper-class white woman"; J. Mann, "New Age, Old Myths," *Washington Post* (July 26, 1991) C3 (quoting Snyder); see K. Bumiller, "Rape as a Legal Symbol: An Essay on Sexual Violence and Racism," 42 *U. Miami L. Rev.*, 75, 88 ("The cultural meaning of rape is rooted in a symbiosis of racism and sexism that has tolerated the acting out of male aggression against women and, in particular, black women").

69. *Id.* at 219–20 (citations omitted). Anecdotal evidence suggests that this attitude exists among some who are responsible for processing rape cases. Fran Weinman, a student in my seminar on race, gender, and the law, conducted a field study at the Rosa Parks Rape Crisis Center. During her study, she counseled and accompanied a twelve-year-old black rape survivor who became pregnant as a result of the rape. The girl was afraid to tell her parents, who discovered the rape after she became depressed and began to slip in school. Police were initially reluctant to interview the girl. Only after the girl's father threatened to take matters into his own hands did the police department send an investigator to the girl's house. The city prosecutor indicated that the case wasn't a serious one, and was reluctant to prosecute the defendant for statutory rape even though the girl was underage; the prosecutor reasoned, "After all, she looks sixteen." After many frustrations, the girl's family ultimately decided not to pressure the prosecutor any further and the case was dropped; see F. Weinman, "Racism and the Enforcement of Rape Law," 13–30 (1990) (unpublished manuscript) (on file with the *Stanford Law Review*).

70. G. LaFree, *supra* note 45, at 220.

71. *Id.*

72. *Id.* at 239 (emphasis added). The lower conviction rates for those who rape black women may be analogous to the low conviction rates for acquaintance rape. The central issue in many rape cases is proving that the victim did not consent. The basic presumption in the absence of explicit evidence of lack of consent is that consent exists. Certain evidence is sufficient to disprove that presumption, and the quantum of evidence necessary to prove nonconsent increases as the presumptions warranting an inference of consent increases. Some women—based on their character, identity, or dress—are viewed as more likely to consent than other women. Perhaps it is the combination of the sexual stereotypes about black people along with the greater degree of familiarity presumed to exist between black men and black women that leads to the conceptualization of such rapes as existing somewhere between acquaintance rape and stranger rape.

73. C. Cooper, Nowhere to Turn for Rape Victims: High Proportion of Cases Tossed Aside by Oakland Police, *S. F. Examiner*, Sept. 16, 1990, at A10.

74. *Id.* Advocates point out that because investigators work from a profile of the kind of case likely to get a conviction, people left out of that profile are people of color, prostitutes, drug users, and people raped by acquaintances. This exclusion results in "a whole class of women . . . systematically being denied justice. Poor women suffer the most"; *id.*

75. I do not mean to imply that all theorists who have made antiessentialist critiques have lapsed into vulgar constructionism. Indeed, antiessentialists avoid making these troubling moves and would no doubt be receptive to much of the critique set forth herein. I use the phrase "vulgar constructionism" to distinguish between those antiessentialist critiques that leave room for identity politics and those that do not.

76. 110 S. Ct. 2997 (1990).

77. The FCC's choice to employ a racial criterion embodies the related notions that a particular and distinct viewpoint inheres in certain racial groups and that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because the applicant is "likely to provide [that] distinct perspective." The policies directly equate race with belief and behavior, for they establish race as a necessary and sufficient condition of securing the preference. . . . The policies impermissibly value individuals because they presume that persons think in a manner associated with their race; *id.* at 3037 (O'Connor, J., joined by Rehnquist, C. J., and Scalia and Kennedy, J. J., dissenting) (internal citations omitted).

78. 163 U.S. 537 (1896).

79. 397 U.S. 483 (1954).