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# IS THERE A PLACE FOR “RACE” AS A LEGAL CONCEPT?

Sharona Hoffman<sup>†</sup>

**ABSTRACT:** *What does “race” mean? The word “race” is omnipresent in American social, political, and legal discourse. The concept of “race” is central to contemporary debate about affirmative action, racial profiling, hate crimes, health inequities, and many other issues. Nevertheless, the best research in genetics, medicine, and the social sciences reveals that the concept of “race” is elusive and has no reliable definition.*

*This article argues that “race” is an unnecessary and potentially pernicious concept. As evidenced by the history of slavery, segregation, the Holocaust, and other human tragedies, the idea of “race” can perpetuate prejudices and misconceptions and serve as justification for systematic persecution. “Race” suggests that human beings can be divided into subspecies, some of which are morally and intellectually inferior to others. The law has important symbolic and expressive value and is often efficacious as a force that shapes public ideology. Consequently, it must undermine the notion that “race” is a legitimate mechanism by which to categorize human beings. Furthermore, the focus on rigid “racial” classifications obfuscates political discussion concerning affirmative action, scientific research, and social inequities. When we speak of “racial” diversity, discrimination, or inequality, it is unclear whether we are referring to color, socioeconomic status, continent of origin, or some other factor. Because the term “race” subsumes so many different ideas in people’s minds, it is not a useful platform for social discourse.*

*This article proposes that “race” be replaced in future statutory and jurisprudential texts by other, more precise terminology, including “color,” “continent of origin,” “national origin,” and “descent from ancestors of a*

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particular color, national origin, or religion.” Thus, legislators would engage in more careful statutory drafting and determine their legislative goals more precisely. In addition, the law would teach that at most, the attributes we have called “race” refer only to superficial characteristics such as skin color or birthplace of one’s ancestors, a lesson that could make a valuable contribution to social progress.

## I. INTRODUCTION

What does “race” mean? The word “race” is omnipresent in American social, political, and legal discourse. The concept of “race” is central to contemporary debate about affirmative action,<sup>1</sup> racial profiling,<sup>2</sup> hate crimes,<sup>3</sup> health inequities,<sup>4</sup> and many other issues. Nevertheless, the best research in genetics, medicine, and the social sciences reveals that the concept of “race” is elusive and has no reliable definition.<sup>5</sup> This article explores the question of whether “race” is of value as a legal concept and concludes that it should not be retained in the legal lexicon.

The origin of the word “race” is itself disputed, stemming perhaps from Arabic, Latin, or German sources.<sup>6</sup> According to one authority, in 1684 a French traveler and physician, Francois Bernier, was the first to use the term “race” to describe human beings by skin color and appearance.<sup>7</sup> According to another source, “race” was first utilized in natural history literature in 1749 by Georges Louis Leclerc, Comte de Buffon, to categorize groups of people.<sup>8</sup>

Until the Civil Rights era, “race,” in the United States, served as the basis for discrimination, exclusion, and persecution through anti-

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1. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

2. See William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004); Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 342 (2003).

3. Christopher Chorbha, Note, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319 (2001).

4. Esteban Gonzalez Burchard et al., *The Importance of Race and Ethnic Background in Biomedical Research and Clinical Practice*, 348 NEW ENG. J. MED. 1170, 1171 (2003).

5. See *infra* Part III.A-B.

6. MICHAEL BANTON & JONATHAN HARWOOD, *THE RACE CONCEPT* 13 (1975).

7. *Id.*

8. Linz Audain, *Critical Cultural Law and Economics, the Culture of Deindividuation, the Paradox of Blackness*, 70 IND. L.J. 709, 727 n.96 (1995); Ashley Montagu, *The Concept of Race in the Human Species in the Light of Genetics*, in *THE CONCEPT OF RACE* 1, 3 (Ashley Montagu ed., 1964).

miscegenation laws,<sup>9</sup> laws restricting citizenship and immigration rights,<sup>10</sup> policies seeking educational segregation,<sup>11</sup> restrictions on voting rights,<sup>12</sup> and other methods of marginalization. Notably, the label "race" was attached to a variety of groups that were deemed collectively inferior, some of which are not perceived as "races" today. For example, in his 1928 *A Panorama of the World's Legal Systems*,<sup>13</sup> the renowned legal scholar, John Henry Wigmore, wrote of the "Slavic race" to which he attributed a "racial tendency to egocentric unpractical dissension over ideals."<sup>14</sup>

The United States is not alone in persecuting "racial" minorities. In Africa, European colonizers viewed native populations as primitive, subhuman, and "racially" and morally inferior.<sup>15</sup> Consequently, they coerced them into forced labor, seized their property, and otherwise exploited them.<sup>16</sup> Until the 1970s, Australia implemented discriminatory immigration policies and forcibly removed Aboriginal children from their families in the hope of diluting Aboriginal communities.<sup>17</sup> In Nazi Germany,<sup>18</sup> Cambodia,<sup>19</sup> Turkey,<sup>20</sup> the former Yugoslavia, and other

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9. Judy Scales-Trent, *Racial Purity Laws in the United States and Nazi Germany: The Targeting Process*, 23 HUM. RTS. Q. 259, 283 (2001) (noting that anti-miscegenation laws prohibit marriage between members of different "races").

10. *Id.* at 287–91.

11. *Gong Lum v. Rice*, 275 U.S. 78, 87 (1927) (holding segregation in public education to be constitutional).

12. *Guinn v. United States*, 238 U.S. 347 (1915) (evaluating the constitutionality of Oklahoma's literacy tests for voting and its race-based exemption).

13. JOHN HENRY WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* VOLS. I–III (1928).

14. 2 JOHN HENRY WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* 735 (1928).

15. KURT JONASSOHN & KARIN SOLVEIG BJÖRNSON, *GENOCIDE AND GROSS HUMAN RIGHTS VIOLATIONS* 233 (1998).

16. FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE* 235 (1990) (stating that the Germans in Africa displayed a "blatantly racist attitude," describing the Africans "as baboons and treat[ing] them accordingly"); JONASSOHN & BJÖRNSON, *supra* note 15, at 242 (describing the French colonials' treatment of native Africans).

17. Martha Augoustinos et al., *Genocide or a Failure to Gel? Racism, History and Nationalism in Australian Talk*, 10 DISCOURSE & SOC'Y 351, 374 (1999).

18. WILLIAM H. TUCKER, *THE SCIENCE AND POLITICS OF RACIAL RESEARCH* 116–33 (1994).

19. See R.J. RUMMEL, *DEATH BY GOVERNMENT* 195–98 (1994) (stating that the Khmer Rouge were racists who "believed in the racial superiority of the dark-skinned Khmer over the Vietnamese, Chinese, Moslem Cham, and others" and who committed genocide against these minorities and against the Vietnamese in Vietnam after their incursion into that country).

20. See *id.* at 226–27 (describing the Turkish massacre of Armenians during World War I and stating that many young Turks at the time believed themselves to be a master "race," which "manifested all the Great Virtues").

countries,<sup>21</sup> notions of “racial” purity have constituted the basis for genocide and ethnic cleansing. “Race,” therefore, is not only of dubious meaning but is also a potentially dangerous concept that has been utilized to publicly validate the oppression and even mass murder of minority groups.

By contrast, in the contemporary American legal system, “race” appears primarily in the context of anti-discrimination laws, measures to promote diversity, and affirmative action policies.<sup>22</sup> The term is currently used to provide protection and benefits to those who are deemed to be minorities that have suffered a history of discrimination and political powerlessness.<sup>23</sup> Nevertheless, the concept of “race” remains problematic.

The debate about the meaning of the word “race” is not new. As early as the 1930s one eminent commentator wrote: “[a]mong the words that can be all things to all men, the word race has a fair claim to being the most common, the most ambiguous, and the most explosive.”<sup>24</sup> Because the concept of “race” is prominent in a large number of anti-discrimination and other statutes, its incoherence is particularly troubling in the legal context. “Race” has been defined as a biological feature;<sup>25</sup> a local geographic population;<sup>26</sup> a group linked by common descent or origin;<sup>27</sup> a population connected by a shared history, nationality, or geographic distribution;<sup>28</sup> a “subspecies”;<sup>29</sup> and a social and political construct.<sup>30</sup> The term “race” has

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21. Alain Destexhe, *From Solferino to Sarajevo*, in *HEALTH AND HUMAN RIGHTS: A READER* 75–82 (Jonathan M. Mann et al. eds., 1999).

22. See *infra* Part II.B–C; see also Luther Wright, Jr., Note, *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 533–35 (1995).

23. Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1235 (2003).

24. JACQUES BARZUN, *RACE: A STUDY IN MODERN SUPERSTITION* 3 (1937). Writing in the pre-World War II era, the author continues: “No one today would deny that it is one of the great catchwords about which ink and blood are everywhere spilled in reckless quantities. Yet no agreement seems to exist about what Race means.” *Id.*

25. JONATHAN MARKS, *HUMAN BIODIVERSITY: GENES, RACE, AND HISTORY* 108 (1995).

26. DVORA YANOW, *CONSTRUCTING “RACE” AND “ETHNICITY” IN AMERICA* 47 (2003) (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1488 (3d ed. 1992)).

27. *Id.* (citing THE OXFORD ENGLISH DICTIONARY 69 (1991)).

28. *Id.* (citing WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 968 (1984)).

29. Sandra Soo-Jin Lee et al., *The Meanings of “Race” in the New Genomics: Implications for Health Disparities Research*, 1 YALE J. HEALTH POL'Y, L. & ETHICS 33, 39 (2001).

30. Hiroshi Fukurai, *Social De-Construction of Race and Affirmative Action in Jury Selection*, 11 LA RAZA L.J. 17, 31 (1999); Miranda Oshige McGowan, *Diversity of What?*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 237, 238 (Robert Post & Michael Rogin eds., 1998). An article in *Nature Genetics* provided the following alternative definitions for the term “race”:

been used interchangeably with "ethnicity," "ancestry," "culture," "color," "national origin," and even "religion."<sup>31</sup>

Many argue that the growing population of people who are of mixed "racial" backgrounds makes "race" far less relevant in contemporary society.<sup>32</sup> Over six million individuals described themselves as members of two or more "races" in the 2000 U.S. census.<sup>33</sup>

The question of whether "race" is a meaningful or useful concept has long been disputed among scholars in a number of disciplines, including anthropology, sociology, psychology, epidemiology, and public health.<sup>34</sup>

- 
- A vague, unscientific term for a group of genetically related people who share certain physical characteristics
  - A distinct ethnic group characterized by traits that are transmitted through their offspring
  - Each of the major divisions of humankind, having distinct physical characteristics
  - A group of individuals who are more or less isolated geographically or culturally, who share a common gene pool, and whose allele frequencies at some loci differ from those of other populations[.]

Editorial, *Census, Race and Science*, 24 NATURE GENETICS 97, 98 (2000).

31. See *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 560 (E.D. Cal. 1982) (stating that "the notion of 'race' as contrasted with national origin is highly dubious"); ALAIN F. CORCOS, *THE MYTH OF HUMAN RACES* 10–11 (1997); Thuy N. Bui, *The Difference Between Race and Color: Implications for Changing the Racial Discourse*, 38 SANTA CLARA L. REV. 629, 631, 638 (1998); Fukurai, *supra* note 30, at 31; Atwood D. Gaines, *Race and Racism*, in *ENCYCLOPEDIA OF BIOETHICS* 2193–94 (Warren Thomas Reich ed., 1995); Soo-Jin Lee et al., *supra* note 29, at 54; Donal E. Muir, *Race: The Mythic Root of Racism*, in *THE CONCEPT OF "RACE" IN NATURAL AND SOCIAL SCIENCE* 93, 93–96 (E. Nathaniel Gates ed., 1997) [hereinafter *THE CONCEPT OF "RACE"*].

32. See Carrie Lynn H. Okizaki, Comment, "*What Are You?*": *Hapa-Girl and Multiracial Identity*, 71 U. COLO. L. REV. 463, 466 (2000) ("The growing number of multiracial people in the United States challenges the existing racial classification system, highlighting its inadequacies."); Paul Tough, *The Black White Supremacist*, N.Y. TIMES MAG., May 25, 2003, at 42, 56 ("Multiracial activism flourished during the 90's, with marches in Washington, magazines dedicated to interracial couples and a successful lobbying effort to include more complicated definitions of race on the 2000 Census form.").

33. See Sharon Begley, *Scientifically, Race Is Only Skin Deep and Not Very Useful*, WALL ST. J., Aug. 1, 2003, at B1.

34. See, e.g., AM. ANTHROPOLOGICAL ASS'N, RESPONSE TO OMB DIRECTIVE 15: RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (Sept. 1997), <http://www.aaanet.org/gvt/ombdraft.htm> [hereinafter AAA RESPONSE TO OMB DIRECTIVE 15]; AM. SOCIOLOGICAL ASS'N, THE IMPORTANCE OF COLLECTING DATA AND DOING SOCIAL SCIENTIFIC RESEARCH ON RACE (2003), [http://www.asanet.org/media/asa\\_race\\_statement.pdf](http://www.asanet.org/media/asa_race_statement.pdf); Richard Cooper & Richard David, *The Biological Concept of Race and Its Application to Public Health and Epidemiology*, in *THE CONCEPT OF "RACE," supra* note 31, at 127; Fatimah L. C. Jackson, *Anthropological Measurement: The Mismeasure of African Americans*, 568 ANNALS AM. ACAD. POL. & SOC. SCI. 154, 155 (2000); Soo-Jin Lee et al., *supra* note 29, at 68–69; Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3–9 (1994);

The debate about “race” has intensified in recent years in light of the Human Genome Project<sup>35</sup> and the findings it has generated. A report published in *Science* in December 2002 asserted that genetic samples from individuals from fifty-two populations clustered into five geographically based categories: Europe, Africa, East Asia, Oceania,<sup>36</sup> and the Americas.<sup>37</sup> To some, these findings confirmed the existence of “race” as a biological reality.<sup>38</sup> By contrast, an article published in March 2003 in the *New England Journal of Medicine* argued that “although everyone, from geneticists to laypersons, tends to use ‘race’ as if it were a scientific category, with rare exceptions, no one offers a quantifiable definition of what a race is in genetic terms.”<sup>39</sup> In the spring of 2003 a national television audience was exposed to the controversy when PBS aired a three-episode program entitled “*Race—The Power of an Illusion*.”<sup>40</sup>

This article demonstrates that “race” is an incoherent concept that adds nothing to our understanding of human biology or social order. Moreover, the article argues that the law should discontinue its use of the term “race” because it is an unnecessary and potentially pernicious concept. Two primary arguments justify abandonment of the term “race”: the expressive power of the law and the tangible harms caused by the concept of “race.”

First, the law has important symbolic value and often shapes public ideology through what scholars have called its expressive power.<sup>41</sup> As evidenced by the history of slavery, the Holocaust, segregation, and other human tragedies, the idea of “race” can perpetuate prejudices and

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J. Philippe Rushton, *Race is More than Just Skin Deep: A Psychologist's View*, 39 MANKIND Q. 231, 231–47 (1998); Sally Satel, *Medicine's Race Problem*, POL'Y REV. 49, 49–58 (2001); Wright, *supra* note 22, at 517–20.

35. The Human Genome Project was an international research effort that analyzed the structure of DNA and map all human genes. Mark A. Rothstein & Sharon Hoffman, *Genetic Testing, Genetic Medicine, and Managed Care*, 34 WAKE FOREST L. REV. 849, 849 (1999).

36. Oceania encompasses the islands in the South, West, and Central Pacific, including Australia and New Zealand. RIVERSIDE WEBSTER'S II NEW COLLEGE DICTIONARY 1434 (1995).

37. Noah A. Rosenberg et al., *Genetic Structure of Human Populations*, 298 SCI. 2381, 2381–84 (2002); see also David Rotman, *Genes, Medicine, and the New Race Debate*, TECH. REV., June 2003, at 41, 48, 50. For further discussion of this study see *infra* Part III.A.2.

38. Rotman, *supra* note 37, at 50.

39. Richard S. Cooper et al., *Race and Genomics*, 348 NEW ENG. J. MED. 1166, 1168 (2003); see also Rotman, *supra* note 37, at 50 (“[I]t is possible to detect very small genetic differences between different populations if you look closely enough. . . . ‘[b]ut that doesn’t support the idea of race.’”).

40. See Cal. Newsreel, *Race—The Power of an Illusion* (videotape review), at <http://www.newsreel.org/nav/title.asp?tc=CN0149> (last visited Feb. 21, 2005) (describing the program as a “provocative new” series that challenges one of our most fundamental beliefs: “that human beings can be bundled into three or four fundamentally different groups . . .”).

41. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996).

misconceptions and serve as justification for systematic persecution. The word "race" suggests that human beings can be divided into subspecies, some of which are morally, intellectually, and biologically inferior to others.<sup>42</sup> The law should avoid reinforcing such beliefs and should spearhead an effort to undermine the idea that "race" is a legitimate mechanism by which to categorize human beings.

While for the last forty years "race" has been utilized in the law in order to protect and benefit minority groups, there is no guarantee that American law will never again authorize the marginalization of certain segments of the population. The notion that distinct biological "races" exist, for example, reinforces pernicious beliefs that African-Americans are inherently less intelligent than Whites<sup>43</sup> or more prone to criminal activity and violence.<sup>44</sup> These, in turn, can lead to racial profiling,<sup>45</sup> employment discrimination, and other forms of intolerance and inequitable treatment.<sup>46</sup> If we do not formally reject the idea that differences in appearance translate into differences in biology, intellect, and moral orientation, it is plausible that we could see a return to the familiar, widespread, governmentally sanctioned practices of segregating and oppressing entire groups because of their perceived "racial" characteristics.

Second, the focus on rigid "racial" classifications results in significant tangible harms. It discounts the millions of Americans who are of "multiracial" origin<sup>47</sup> and, therefore, do not fit into any single "race" category.<sup>48</sup> Furthermore, it obfuscates political discussion concerning affirmative action, scientific research, and social inequities. When we speak of "racial" diversity, discrimination, or inequality, it is unclear whether we are referring to color, socioeconomic status, continent of origin, or some

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42. See discussion *infra* Parts III.B.2 and IV.A.1.

43. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 276-78 (1994).

44. MICHAEL LEVIN, *WHY RACE MATTERS: RACE DIFFERENCES AND WHAT THEY MEAN* 213, 322 (Seymour Itzkoff ed., 1997).

45. Carter, *supra* note 2, at 18, 24.

46. See Erik Lillquist & Charles A. Sullivan, *The Law and Genetics of Racial Profiling in Medicine*, 39 HARV. C.R.-C.L. L. REV. 391, 395 (2004) (expressing concern that the use of race as a basis for medical decisionmaking "may tend to validate the racism of others in society more generally").

47. See *infra* Part III.C.3 (discussing debates concerning how the 2000 census should address those of multiracial origins).

48. See Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 153 (1994) (discussing how common intermarriage has become in the United States and stating that within two decades, the frequency of interracial marriages in this country grew from 310,000 to 1.1 million); Begley, *supra* note 33, at B1 (stating that approximately six million Americans chose to identify themselves as members of two or more "races" in the 2000 census).



other factor.<sup>49</sup> When we detect “racial” differences in health status or the prevalence of certain diseases, it is dangerous to attribute them simply to biological differences and to ignore environmental, cultural, and economic factors.<sup>50</sup> Because the term “race” subsumes so many different ideas in people’s minds, it often is not a useful platform for social discourse. Because it is incoherent and imprecise, it also does not serve as a reliable foundation for medical and scientific advancement.

This article does not argue that individuals should no longer identify themselves as African-American, Hispanic, Jewish, etc.<sup>51</sup> These identities are central to many people’s understanding of themselves in a way that is meaningful and empowering. Rather, I assert only that we should call those identities something other than “race.” “Race” should be replaced in future statutory texts and jurisprudence by other, more precise terminology. The substitute wording can include “color,” “continent of origin,” “national origin,” and “descent from ancestors of a particular color, national origin, or religion.”<sup>52</sup> The appropriate language in each law would be chosen in accordance with the statutory purpose and the intended beneficiary class. Legislators would be induced to engage in more careful statutory drafting and to determine their legislative goals more precisely. In addition, the law would teach that at most, the attributes we have called “race” refer only to superficial characteristics such as skin color or birthplace of one’s ancestors, a lesson that could make a valuable contribution to social progress.

Part II reviews historical and contemporary U.S. statutes that have addressed “race” issues. Part III provides an overview of the controversy concerning the existence of “race” as an anthropological, sociological, psychological, and biological concept. It further analyzes the incoherent treatment of “race” in American law. Part IV argues that the law should reject use of the word “race” and offers specific recommendations for a methodology by which appropriate terminology can be substituted for “race” in particular legal contexts.

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49. For example, during the past decade some activists have argued that affirmative action programs should provide preferences based on economic disadvantage rather than purely “race.” See Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1913–14 (1996); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1847 (1996).

50. Jonathan Kahn, *Getting the Numbers Right: Statistical Mischief and Racial Profiling in Heart Failure Research*, 46 PERSP. BIOLOGY & MED. 473, 479 (2003).

51. This article also does not attempt to define or discern the boundaries of specific categories, such as African-American or Hispanic. The focus is merely on the term “race.”

52. See *infra* Part IV.C.

## II. THE LEGAL LANDSCAPE: HISTORICAL AND CONTEMPORARY USE OF THE CONCEPT OF "RACE"

Throughout American history, one's "racial" identity has been significant for purposes of determining one's social status and legal rights. For many decades legislators and the courts struggled to determine and define who was White and who was Black in this country in order to separate the privileged from those with limited or no privileges.<sup>53</sup> "Racial" categories are just as important today, though for different reasons. The law seeks "racial" identification not for purposes of intentional discrimination, but largely in order to ensure equal opportunity for and provide benefits to members of minority groups.<sup>54</sup> This part will review the use of the term "race" in the pre-Civil Rights era and the legal contexts in which the word is used in contemporary America.

### A. Brief Historical Overview

Most obviously, in the pre-Civil War era, "race" was linked with slavery.<sup>55</sup> In addition, during that era, free Blacks in Southern and some Northern States were prohibited from holding public office, from testifying in court, from assembling in groups of five or more, and from being out after nine at night without a lawful reason.<sup>56</sup> Numerous states prohibited marriages between Whites and Blacks<sup>57</sup> in statutes known as anti-miscegenation laws, which remained in force well into the twentieth century.<sup>58</sup> In 1790, Congress limited naturalization to "any alien, being a

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53. See *infra* Parts II.A, III.C.1-2.

54. See *infra* Part II.B.

55. *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134 (1806):

In the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom; but in the case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to shew that he is a slave.

*Id.* at 141; see also A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 61-150 (1980) (discussing slavery during the colonial period, including slavery in northern colonies such as New York and Massachusetts); Wright, *supra* note 22, at 522-24.

56. Wright, *supra* note 22, at 531-32.

57. For a discussion of how different states defined "White" and "Black," see *infra* Part III.C.1.

58. *State v. Treadaway*, 52 So. 500, 502-10 (La. 1910); Scales-Trent, *supra* note 9, at 283 (stating that in 1927, twenty-nine states had anti-miscegenation laws and listing the following as among those states: "Arizona, California, Colorado, Delaware, Idaho, Maryland, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming"); Wright, *supra* note 22, at 532; see also RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 18-

free white person, who shall have resided within the limits and under the jurisdiction of the United States for a term of two years.”<sup>59</sup> By 1860, no Southern State allowed the immigration of free Blacks.<sup>60</sup> In 1870, Congress extended the right of naturalization to “persons of African nativity,”<sup>61</sup> but until 1940 individuals of Asian descent and others who were not White or African-American could not become naturalized.<sup>62</sup> Throughout the early and middle decades of the twentieth century Southern States enacted and enforced Jim Crow laws that established separate facilities for Blacks and Whites in services ranging from schools, public transportation, and courtroom witness stands to restrooms and drinking fountains.<sup>63</sup>

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26 (2003) (stating that “[b]etween the 1660s and the 1960s, forty-one colonies or states enacted racial laws regulating sex or marriage” and discussing those laws).

59. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795); see also IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 42 (1996).

60. Wright, *supra* note 22, at 532.

61. Act of July 14, 1870, ch. 254, 16 Stat. 254, 256 amended by Act of Feb. 18, 1875, ch. 80, 18 Stat. 316, 318 (repealed 1952); see also HANEY LÓPEZ, *supra* note 59, at 44.

62. See HANEY LÓPEZ, *supra* note 59, at 44–45. In 1940, Nazi Germany was the only other country that had “race”-based restrictions on naturalization. *Id.*; see also Scales-Trent, *supra* note 9, at 289 (stating that, in 1945, “Nazi Germany and the United States had limited citizenship to members of ‘racial’ groups”).

63. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (reversing the “separate but equal” doctrine found in *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *Plessy*, 163 U.S. at 542 (upholding the constitutionality of a state statute requiring separate railway carriages for Whites and Blacks); PHILIP A. KLINDER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 106–35 (1999) (discussing the Jim Crow era, 1908–1938); Carl L. Livingston, Jr., *Affirmative Action on Trial: The Retraction of Affirmative Action and the Case for Its Retention*, 40 HOW. L.J. 145, 202 (1996) (stating that the Jim Crow era ended in 1970).

The United States is not the only Western country that marginalized and ostracized Black individuals. Australian Aborigines suffered a similar fate in past centuries. One source describes Australian policy as follows:

In the era of colonial and post-colonial government, access to basic human rights depended upon your race. If you were a “full blooded Aboriginal native . . . [or] any person apparently having an admixture of Aboriginal blood”, a half-caste being the “offspring of an Aboriginal mother and other than Aboriginal father” (but not of an Aboriginal father and other than Aboriginal mother), a “quadroon,” or had a “strain” of Aboriginal blood you were forced to live on Reserves or Missions, work for rations, given minimal education, and needed governmental approval to marry, visit relatives or use electrical appliances.

Loretta de Plevitz & Larry Croft, *Aboriginality Under the Microscope: The Biological Descent Test in Australian Law*, 3 QUEENSLAND U. TECH. L. & JUST. J. 104, 104 (2003) (alteration in original) (citations omitted), available at <http://www.law.qut.edu.au/about/ljj/editions/v3n1/pdf/deplev.pdf>.

The early 1960s saw a change in the American legal climate with the advent of the Civil Rights era.<sup>64</sup> Far from eliminating references to "race," however, contemporary legislatures have passed hundreds of laws that utilize the term "race," though by contrast to their predecessors, these are designed largely to protect and benefit minorities.

### *B. Contemporary Federal Legislation*

In federal law, very commonly, the term "race" is utilized in statutes that establish anti-discrimination mandates. "Race" appears only once in the Constitution, in the Fifteenth Amendment, which prohibits governmental authorities from denying individuals the right to vote because of their "race."<sup>65</sup>

The preeminent twentieth century anti-discrimination statute is the Civil Rights Act of 1964 ("CRA"),<sup>66</sup> which prohibits discrimination based on "race," color, religion, national origin, and sex. Title VII of the CRA ("Title VII"), for example, provides that it is unlawful for employers:

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>67</sup>

Title II of the CRA prohibits any discrimination or segregation that is established "by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof."<sup>68</sup> Other provisions of the CRA prohibit discrimination with respect to public accommodations<sup>69</sup> and federally assisted programs.<sup>70</sup>

64. KLINKER & SMITH, *supra* note 63, at 272-75 (discussing the Civil Rights Movement and the passage of the Civil Rights Act of 1964).

65. U.S. CONST. amend. XV, § 1.

66. 42 U.S.C. §§ 1971, 1975a-d, 2000a to h-6 (2000).

67. 42 U.S.C. § 2000e-2(a) (2000).

68. 42 U.S.C. § 2000a-1 (2000).

69. Title II of the CRA, 42 U.S.C. § 2000a(a) (2000). The text reads: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without

Beyond the CRA, numerous statutes establish additional anti-discrimination mandates. These apply to the following: housing,<sup>71</sup> interethnic adoptions,<sup>72</sup> programs and entities receiving federal funding,<sup>73</sup> personnel decisions made by governmental entities<sup>74</sup> and unions,<sup>75</sup> insurance

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discrimination or segregation on the ground of race, color, religion, or national origin." *Id.*; see also 42 U.S.C. § 2000a(b) (1994) (describing which entities constitute public accommodations).

70. Title VI of the CRA, 42 U.S.C. § 2000d (2000). Providing for the enjoyment of federal assistance to all individuals without regard to "race," the provision reads: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

71. 42 U.S.C. § 3604(a) (2000). The provision prohibits "refus[ing] to sell or rent after the making of a bona fide offer, or . . . refus[ing] to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." *Id.*

72. 42 U.S.C. § 1996b(1) (2000) (prohibiting the restriction of adoptions or foster care placements based on the "race," color, or national origin of the prospective parents or the child).

73. See, e.g., 42 U.S.C. § 611(a)(1) (2000) (state-run maternal and child health services); *id.* § 3789d(c)(1)-(2)(D)(iii) (state criminal justice systems); *id.* § 5057(a)(1) (volunteer coordination services); *id.* § 5309(a) (community development programs); *id.* § 5919(b) (alternative fuel developers); *id.* § 6727(a)(1) (public works programs); *id.* § 6870(a) (weatherization programs); *id.* § 8625(a) (low income energy assistance programs); *id.* § 9821(a) (community economic development programs); *id.* § 9849(a) (2000) (Head Start programs); *id.* § 9918(c)(1) (community services block grant programs); *id.* § 10406(a)(1) (family violence prevention and services programs); *id.* § 10504(a) (programs receiving federal funds through emergency federal law enforcement support); *id.* § 10604(e) (victim compensation and assistance programs); *id.* § 12635(a) (national and community service grant programs); *id.* § 12832 (affordable housing investment programs); *id.* § 13791(g)(3) (Community Schools Youth Services and Supervision grant programs); 43 U.S.C. § 1747(10) (2000) (mineral mining economic development and relief programs); 49 U.S.C. § 306(b) (2000) (programs receiving federal funds under the Regional Railroad Reorganization Act or Railroad Revitalization Reform Act); *id.* § 5332(b) (General and Intermodal Transportation programs); *id.* § 47123 (airport improvement programs).

74. 2 U.S.C. § 1311(a) (2000) (covering Congressional personnel); 3 U.S.C. § 411(a)(1) (2000) (addressing Executive Office personnel decisions); 5 U.S.C. § 2301(b)(2) (2000) (addressing merit-based personnel decisions); *id.* § 7201(b) (extending coverage to government employees in general); 14 U.S.C. § 182(a) (2000) (prohibiting racial discrimination in Coast Guard Academy appointments); 22 U.S.C. §§ 3901(b)(2), 3931(b)(1) (2000) (addressing equitable treatment in the foreign service); *id.* § 3905(b)(1), (e)(1) (covering the foreign service); *id.* §§ 6472(c)(1), (3), 6473(a) (concerning potential biases on the part of foreign refugee processors); 31 U.S.C.A. § 732(f)(1) (West Supp. 2003) (covering the General Accounting Office); 42 U.S.C. § 4728(g)(4) (2000) (prohibiting the federal government from requesting that local or state employees reveal their "race" identities); 47 U.S.C. §§ 398(b)(1), 554(b) (2000) (forbidding "racial" discrimination in the employment practices of the FCC); 50 U.S.C. app. § 455(a)(1) (2000) (prohibiting "race" and color-based discrimination in the hiring of persons for the Selective Service).

75. 5 U.S.C. § 7103(a)(4)(A) (2000) (defining "labor organizations" and stating that the definition does *not* include "an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital

providers offering policies to government employees,<sup>76</sup> state food stamp programs,<sup>77</sup> the granting of visas,<sup>78</sup> naturalization,<sup>79</sup> refugee assistance and services,<sup>80</sup> membership in veterans' associations and other organizations linked with the armed forces,<sup>81</sup> the Olympic Committee,<sup>82</sup> banking,<sup>83</sup> mortgages,<sup>84</sup> credit,<sup>85</sup> jury service,<sup>86</sup> criminal justice,<sup>87</sup> education,<sup>88</sup> foreign

status, or handicapping condition"); *see also id.* § 7116(b)(4) (asserting that it is an unfair labor practice for a labor organization to engage in "race" discrimination); 22 U.S.C. §§ 4102(11)(A), 4115(b)(4) (2000) (addressing discrimination in foreign service unions).

76. 5 U.S.C. § 8902(f) (2000) ("A contract may not be made or a plan approved which excludes an individual because of race, sex, health status, or, at the time of the first opportunity to enroll, because of age.").

77. 7 U.S.C. § 2020(c) (2000) ("In the certification of applicant households for the food stamp program, there shall be no discrimination by reason of race, sex, religious creed, national origin, or political beliefs.").

78. 8 U.S.C. § 1152(a)(1)(A) (2000) ("Except as specifically provided . . . no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."); *id.* § 1187(c)(6) (mandating that the government may not use "race" as a category in the calculation of visa refusal rates).

79. *Id.* § 1422 ("The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married.").

80. *Id.* § 1522 (a)(5) (domestic resettlement programs and refugee assistance).

81. 36 U.S.C. §§ 20204(b), 20205(c), 21003(a)(4), 21004(b), 21005(c), 21104(b), 21105(c), 22703(c), 22704(d), 40103(12), 60104(b), 60105(c), 70104(b), 70105(c), 80504(b), 80505(c), 140704(b), 140705(c), 152904(b), 152905(c), 154704(b), 154705(c), 170304(b), 170305(c), 170504(b), 170505(c), 190304(b), 190305(c), 210304(b), 210305(c), 230504(b), 230505(c) (2000).

82. *Id.* § 220522(a)(8)–(9) (prohibiting discrimination in the treatment of athletes and the selection of directors).

83. 12 U.S.C. §§ 1441a(a)(14)(B)(ix), 1821(d)(13)(E)(iv), 1823(d)(3)(D)(iv), 3106a(1)(B), 302 (2000).

84. *Id.* § 4545(1). This section requires the Secretary of Housing and Urban Development to implement regulations prohibiting:

each enterprise from discriminating in any manner in the purchase of any mortgage because of race, color, religion, sex, handicap, familial status, age, or national origin, including any consideration of the age or location of the dwelling or the age of the neighborhood or census tract where the dwelling is located in a manner that has a discriminatory effect.

*Id.*

85. 15 U.S.C. § 1691(a)(1) (2000) (prohibiting creditors from "racially" discriminating against credit applicants).

86. 18 U.S.C. § 243 (2000) ("No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude . . ."); *see also* 28 U.S.C. §§ 1862, 1867(e), 1869(h) (2000).

87. 18 U.S.C. app. §§ 2H1.1(4), 5H1.10 (2000) (instructing that "[R]ace, Sex, National Origin, Creed, Religion and Socioeconomic Status . . . [are] not relevant in the determination of a sentence"); *see also* 18 U.S.C. § 3593(f) (2000) (requiring the court to instruct the jury not to consider race in capital sentencing deliberations); 21 U.S.C. § 848(o)(1)–(2) (2000) (mandating that the "race" of an offender not be a factor in death sentencing); 28 U.S.C. § 994(d) (2000)

policy,<sup>89</sup> highway projects,<sup>90</sup> tax law,<sup>91</sup> local government programs,<sup>92</sup> public health policies,<sup>93</sup> voting rights,<sup>94</sup> disaster assistance,<sup>95</sup> aviation,<sup>96</sup> and other areas.<sup>97</sup>

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(requiring the United States Sentencing Commission to ensure that its guidelines are “race” neutral); 42 U.S.C. § 5633(a)(16) (2000) (requiring that states receiving grant money to fund juvenile justice programs must provide assurances that the juveniles to be served will not be subjected to “racial” discrimination); *id.* § 14171(d)(1) (establishing that drivers stopped as part of the automobile theft-prevention program may not be chosen on the basis of “race”); *id.* § 14193(7), (10) (requiring the National Commission on Crime Prevention and Control to determine the impact of crime on members of different “races” and to evaluate the government’s ability to administer criminal justice in a “race”-neutral fashion).

88. 20 U.S.C. § 1011(a) (2000) (prohibiting any institution of higher education receiving federal funds from using those funds in a study, project, or contract that bars individuals from participation based on their “race,” religion, sex, or national origin); *see also id.* § 1066c(d) (prohibiting loans to “racially” discriminatory educational institutions); *id.* §§ 1071(a)(2), 1078(c)(2)(F), 1087-1(e), 1087-2(b)(1), 1087-4, 1087tt(c) (addressing “race”-based discrimination on the part of various lenders); *id.* § 1228c (b)(1) (requiring educational institutions to place an anti-discrimination statement in all recruitment materials); *id.* §§ 1652(a), 1701(a), 1702(a)(1), 1703(a), (c)–(e), 1704–1705, 1713(c), 1715–1717, 1720(c) (addressing issues relating to the invalidity of segregation policies and the appropriateness of particular desegregation mechanisms); *id.* § 1756 (establishing that school district lines are valid only if they are not “racially” based); *id.* § 2501(3) (requiring schools with career planning and development funds to reassess stereotypically “racial” career opportunities); *id.* §§ 6102(a)(13), 6103(4)(C) (requiring career guidance and counseling services to help students overcome “racial” impediments and reach beyond “racially” stereotypical fields); 20 U.S.C.A. § 7231d(b)(2)(C) (West Supp. 2003) (prohibiting “race”-based discrimination on the part of vocational schools and agencies applying for magnet school funding); *id.* §§ 7283a(3), 7283b(b)(2)(A)(v), 7283d(b)(3)(E) (providing support and assistance for women suffering from “racial” discrimination).

89. 22 U.S.C. § 2304(a)(1) (2000) (supporting international human rights for all individuals regardless of “race”). The provision reads: “The United States shall . . . promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion.” *Id.*; *see also* 22 U.S.C.A. § 262p-4n (West Supp. 2003) (instructing the United States Executive Directors to multilateral development banks and the IMF to use their positions to promote non-“racially” discriminatory policies in the countries affiliated with the organizations); 22 U.S.C. §§ 2314(g)(2)(A)–(B), (4)(A)(i), 2755(b)(1) (2000) (mandating that agencies refuse to respect a foreign government’s “racially” discriminatory policies and to participate in contracts and transactions that require respecting a foreign government’s “racially” discriminatory policies); *id.* § 2426(b) (authorizing the President to withdraw economic development funds from any country that objects to the presence in its territory of a United States employee of a particular “race”); *id.* § 2504(a) (prohibiting discrimination in the Peace Corps) *id.* §§ 2661a(2) and 2755(a) (prohibiting the government from forming a contract with a foreign country that would require exclusion of a certain “race” from participation in the contract); *id.* § 3982(a)(2) (prohibiting “race”-based foreign service assignments); *id.* § 6401(a)(3) (stating that religious freedom is an international fundamental human right of every person regardless of “race”).

90. 23 U.S.C. § 140(a) (2000) (authorizing the Secretary of Labor, before approving highway projects, to require states to provide assurances of equal opportunity in employment and apprenticeship programs).

Federal laws other than those that establish anti-discrimination mandates also use the concept of "race." For record-keeping purposes and in order to promote diversity and equal opportunity, Congress requires a wide variety of entities to provide reports indicating the "races" of those participating in and benefiting from various programs.<sup>98</sup> Other provisions instruct

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91. 26 U.S.C. § 501(i) (2000) (denying tax exemption to organizations that adopt "racially" discriminatory policies).

92. 31 U.S.C. § 6711(a) (2000):

No person in the United States shall be excluded from participating in, be denied the benefits of, or be subject to discrimination under, a program or activity of a unit of general local government because of race, color, national origin, or sex if the government receives a payment under this chapter.

*Id.*; see also *id.* § 6720(a)(8)(A) (2000) (defining what constitutes local government discrimination); 42 U.S.C. § 671(a)(18)(A)–(B) (2000) (establishing the nondiscrimination obligations of state and local adoption and foster care programs).

93. 42 U.S.C. § 290ff-1(e)(2)(C) (2000) (requiring that children in need of substance abuse and mental health treatment be provided those services without discrimination "on the basis of race, religion, national origin, sex, disability, or age"); see also *id.* § 300b-8(b)(5) (providing funding for the screening and counseling of hereditary disease in children regardless of "race"); *id.* § 300w-7(a)(1) (addressing preventative health grants); *id.* § 300x-57(a)(1) (addressing mental health and substance abuse grants); *id.* § 11504(b) (prohibiting the Secretary of Housing and Urban Development or Agriculture from modifying enterprise development zones if doing so would circumvent a "racial" nondiscrimination law).

94. *Id.* § 1971(a)(1) ("All citizens of the United States who are otherwise qualified by law to vote . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude . . ."); see also *id.* §§ 1971(e), 1973, 1973a–d, 1973h, 1973k, 1973aa-5 (addressing the right to vote and "race" discrimination).

95. *Id.* § 5151(a) ("[T]he distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.").

96. 49 U.S.C. § 40127(a)–(b) (2000) (forbidding domestic and foreign air carriers as well as governmental entities operating airports to discriminate against individuals because of their "race," color, national origin, religion, sex, or ancestry).

97. See, e.g., 15 U.S.C. § 719o (2000) (requiring federal officers to prohibit "racial" discrimination in the assignment of Alaskan natural gas permits); 42 U.S.C. § 2000g-1 (2000) (detailing that Community Relations Service's objective to provide assistance to groups affected by forms of "racial" discrimination that abridge constitutional rights or interstate commerce); 43 U.S.C. § 1863 (2000) (stating that no person shall be denied access to outer continental shelf lands because of "race, creed, color, national origin, or sex"); 48 U.S.C. § 1421b(n) (2000) (prohibiting discrimination on the basis of "race, language, or religion" in Guam, including attempts to obstruct voting rights); *id.* § 1708 (prohibiting "racial" discrimination in conveyances of submerged lands); 50 U.S.C. app. § 2407(a)(1)(B) (2000) (prohibiting citizens from participating in foreign-based "racially" discriminatory interstate and foreign boycotts).

98. 7 U.S.C.A. § 2279-1(c)(2) (West Supp. 2003) (mandating that the Department of Agriculture report on participation in its program for "socially disadvantaged farmers and ranchers, according to 'race,' ethnicity, and gender" of participants); 7 U.S.C. § 5341(b)(4) (2000) (stating that "population subgroups" in dietary guideline reports include those based on "race"); 12 U.S.C.A. § 1441a(c)(15)(C)(iv)(I) (West Supp. 2003) (requiring banking



administrators to keep records of “race” data even if no formal reports are needed.<sup>99</sup> Furthermore, those applying for particular types of federal

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corporations to semi-annually report to Congress the “race” of each of their single-family residential property purchasers); 12 U.S.C. § 1456(e)(1)(A) (2000) (requiring reports concerning the “races” of mortgagors); *id.* § 1701z-11(l)(6); *id.* 1723a(m)(1)(A) (requiring reports concerning the “races” of mortgagors); *id.* § 4544(b)(3) (requiring the Secretary of Housing and Urban Development to report to Congress “racial” census data compared to economic and housing trends); *id.* § 4902(g)(4)(B)(i) (requiring reports concerning the “races” of mortgagors); 13 U.S.C. § 101(b) (2000) (requiring “race” data in the decennial delinquent, dependent, criminal, and defective class reports); 15 U.S.C. § 636(j)(16)(B)(iv) (2000) (requiring the administrator of the Small Business and Capital Ownership Program to report to Congress a “racial” breakdown of the program’s patrons); 16 U.S.C.A. § 590h(b)(5)(B)(iii)(V)(ff), (v)(II) (West Supp. 2003) (requiring data concerning the “races” of nominees to local Conservation and Environmental Assistance committees and the “races” of the patrons using the committees’ support); 20 U.S.C. §§ 1092(e)(1)(A)–(D), (F), 1226c(5) (2000); 20 U.S.C.A. § 6311(h)(1)(C)(i) (West Supp. 2003); 20 U.S.C. § 6471(a); 20 U.S.C.A. §§ 6534(f)(1)(D), 6535(f)(1)(D), 6561i(a)(1), 6577, 7221d(a)(2)(A), 9543(a)(3), 9622(b)(2)(G) (requiring information concerning the “racial” identities of those benefiting from a variety of educational programs); 28 U.S.C.A. § 994(w) (West Supp. 2003) (requiring each District Court’s Chief Justice to submit a report to the United States Sentencing Commission detailing the “race” of each individual sentenced); 29 U.S.C. §§ 721(a)(10)(E)(i)(I), 2935(d)(1)(A) (2000) (requiring “race” identity information concerning participants in vocational rehabilitation programs and Workforce Investment Systems); 38 U.S.C.A. § 7324(b)(1) (2003) (requiring the Secretary of Health and Human Services to submit a report to Congress providing the “racial” breakdown of nurses without a bachelor’s degree in nursing); 42 U.S.C. § 1437aaa-8(2) (2000) (requiring the Secretary of Housing and Urban Development to report to Congress the “race” of individuals living in federally-subsidized housing); *id.* § 1885d(b)(1) (requiring the National Science Foundation Director to submit a biennial report to Congress listing the “races” of individuals with science and engineering positions); *id.* § 3608(e)(6) (requiring the Secretary of Housing and Urban Development to annually report to Congress a list of its program participants identified by “race”); *id.* § 3796gg-3(b)(3) (requiring the Attorney General to submit to Congress a report indicating the “racial” identities of those utilizing programs to combat violence against women); *id.* § 5617(1)(B) (requiring the administrator of the Juvenile Justice and Delinquency Program to submit to the President and Congress an annual report detailing the “race” of the juveniles participating in the program); *id.* § 5780(2)(A) (requiring states to list the “race” of the child in each missing child report); *id.* § 12880(2) (requiring the Secretary of Housing and Urban Development to annually report to Congress a list of its program participants identified by “race”); *id.* § 13931(c) (requiring “race” information concerning crimes committed in the vicinity of public transportation facilities); 47 U.S.C. § 396(k)(11)(B) (2000) (requiring public broadcasting licensees to report the “race” of their employees to the Corporation for Public Broadcasting).

99. 8 U.S.C. § 1221(c) (2000) (authorizing the Attorney General to instruct immigration officers to record the “race” of each resident leaving the country through the Canadian or Mexican border for permanent residence outside the United States); 12 U.S.C. § 4714(b) (2000) (requiring community development financial institutions to record the “races” of their patrons); 20 U.S.C. §§ 6114(7), 6192(a)(2) (2000) (instructing the School-to-Work Opportunities program to record participation and outcome data of students in the program by “race”); 20 U.S.C.A. § 9533(c)(7) (2003) (seeking “race” information concerning participants in research conducted by the National Center for Education); 42 U.S.C. § 287d-1(a)(2) (2000) (creating a data system that lists the “races” of all subjects having undergone medical research related to

funding must indicate the targeted population of beneficiaries, including its "racial" composition.<sup>100</sup> The "racial" makeup of the community to be served is thus one of the factors considered in the award of these grants.<sup>101</sup> A handful of laws go as far as to explicitly mandate diversity in the composition of particular governmental bodies.<sup>102</sup>

A few other federal law provisions that focus on "race" are noteworthy. Native Americans and Native Hawaiians are granted special privileges in some circumstances, and to ensure appropriate application of the benefits, the law must define who fits these "racial" categories.<sup>103</sup> Reminiscent of their predecessors in the nineteenth century,<sup>104</sup> the laws define Native

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women's health); *id.* § 1397ii(b)(1) (requiring the Secretary of Commerce to collect information concerning the number and "racial" identities of children without health insurance); *id.* § 5119c(4) (requiring that child abuse crime information include data about the "races" of "persons arrested for or convicted of, a child abuse crime"); *id.* § 9858i(a)(1)(B)(iii) (requiring states to record the "race" of children receiving assistance).

100. 42 U.S.C. § 3796gg-1(d)(1)(D) (stating that applicants for grants to develop programs combating violence against women include "demographic characteristics of the populations to be served, including age, marital status, disability, race, ethnicity and language background"); *see also id.* § 12337(b)(2)(A) (requiring that grant applications for children's community programs include information concerning the "race" identities of those expected to utilize the programs); *id.* § 13704(a)(2)(A) (requiring states applying for truth-in-sentencing grants to report the "races" of all inmates who die during the incarceration process); *id.* § 13811(d)(1)(D) (requiring community organizations applying for crime prevention grants to note the "racial" composition of the communities to be served); *id.* § 15025(b)(1)(C) (requiring a state seeking funding for developmental disability programs to include in its application assurances that participants will reflect the "racial" composition of the state).

101. *Id.* § 12527(b)(3)(B) (articulating a preference in the award of service-learning program grants to programs that will serve a diverse student population).

102. 15 U.S.C. § 5611(e)(1)(C) (2000) (requiring Landsat managers to seek advice from sources that are "racially" diverse); 42 U.S.C.A. § 12527(d) (West Supp. 2003) (requiring the state's chief executive officer to ascertain that the membership of the State Commission on Community Service Programs is diverse); *id.* § 12651a(a)(2)(D) (requiring the President to appoint a "racially" diverse board of directors for the Corporation for National and Community Service); 42 U.S.C. § 15025(b)(1)(C) (2000) (requiring that membership on state developmental disability councils reflect the "racial" diversity of the state); 50 U.S.C. app. § 460(b)(3) (2000) (requiring that local selective service boards reflect the "racial" diversity of the registrants within their jurisdictions).

103. 8 U.S.C. § 1359 (2000) (granting individuals born in Canada, who have at least fifty percent American Indian blood, the right to pass through the Canadian border into the United States); 12 U.S.C. § 1715z-13b(l) (2000) (granting Native Hawaiians loan guarantees); 25 U.S.C. § 451 (2000) (authorizing the Secretary of the Interior to accept donations intended to advance the welfare of the American Indian "race").

104. *See infra* Part III.C.1 (discussing laws that established "racial" identity according to percentage of ancestry).

Americans and Native Hawaiians as individuals whose bloodlines are at least fifty percent attributable to those “races.”<sup>105</sup>

Concern about “race”-related mistreatment plays a significant role in the arena of amnesty law. To be eligible for asylum, refugees must prove that they did not practice “racial” persecution in their respective homelands.<sup>106</sup> At the same time, refugees who are innocent of wrongdoing are to be granted asylum if they are likely to suffer “racial” persecution in their home country after deportation.<sup>107</sup>

Finally, certain criminal provisions allow for enhanced sentences for those who commit crimes based on “racial” animus.<sup>108</sup> Judges have authority to deviate upwards from the federal sentencing guidelines in cases of “racially” motivated crimes.<sup>109</sup>

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105. 8 U.S.C. § 1359 (2000) (defining American Indians as “persons who possess at least 50 per centum of blood of the American Indian race”); 12 U.S.C. § 1715z-12(d)(1) (2000), 16 U.S.C. §§ 396a(b), 396d(e), 410jj-6 (2000) (stating that a Native Hawaiian is “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands before January 1, 1778”); *see also* *Rice v. Cayetano*, 528 U.S. 495, 514–17 (2000) (examining a provision of Hawaii’s Constitution under which only persons whose ancestry qualified them as “Hawaiian” or “native Hawaiian” could vote to elect trustees for the Office of Hawaiian Affairs and finding that it violated the Fifteenth Amendment).

106. 8 U.S.C. § 1101(a)(42) (2000) (defining a refugee as one who is unwilling to return to her home country due to a well-founded fear of persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion,” but excluding any person who participated in the persecution of others on any of the aforementioned grounds); *id.* §§ 1158(a)(2)(A), 1182(a)(3)(E)(i) (excluding aliens who participated in Nazi “racial” persecution); *id.* § 1182(e) (prohibiting the Attorney General from deporting an alien to a country where the alien would be subject to “racial” persecution except where the alien in question has taken part in past “racial” persecution); *id.* § 1255a(a)(4)(C) (requiring that aliens wishing to become citizens establish that they have not taken part in past “racial” persecution); 42 U.S.C. § 402(n)(3) (2000) (stripping aliens who have practiced past “racial” persecution of all governmental benefits).

107. 8 U.S.C. §§ 1158(a)(2)(A), 1182(a)(3)(E)(i) (2000); *see also id.* § 1182(e) (prohibiting the Attorney General from deporting an alien to a country where the alien would be subject to “racial” persecution except where the alien in question has taken part in past “racial” persecution); 22 U.S.C.A. § 2730(a)(1) (West Supp. 2003) (prohibiting the use of funding to deport an alien to a country in which she might suffer “racial” persecution).

108. 18 U.S.C. § 245(b)(2) (2000) (detailing the severe criminal penalties to be imposed upon individuals who, in the process of committing a “racially” motivated crime, physically injure or kill another person); 18 U.S.C.A. app. § 3A1.1(a) (West Supp. 2003) (instructing courts to raise a sentence by three levels if the crime was associated with the “race” of the victim); 28 U.S.C. § 994 note (2000) (establishing, in the “Hate Crimes Sentencing Enhancement Act,” enhanced penalties for hate crimes); *see also* 18 U.S.C. §§ 242, 245(b)(2) (2000) (addressing criminal penalties for those who, under color of law, deprive others of their civil rights because of their “race”).

109. *See supra* note 108.

### C. Contemporary State Legislation

The states generally have anti-discrimination statutes that parallel federal laws.<sup>110</sup> For example, most states have enacted employment discrimination statutes similar to Title VII.<sup>111</sup> Other state provisions, much like the federal Fair Housing Act,<sup>112</sup> prohibit housing discrimination.<sup>113</sup> Some states have also enacted laws that parallel the federal Multiethnic Placement Act.<sup>114</sup> These statutes prohibit the restriction of adoptions based on the "race," color, or national origin of a prospective parent or child.<sup>115</sup> In addition, some states prohibit discrimination in areas that are not addressed by federal statutes. Some, for example, proscribe color-based discrimination with respect to burial of the dead.<sup>116</sup>

In addition, many states have enacted laws that are more aggressive than federal laws in combating "race"-based inequities. Over forty states have hate crime statutes that specifically criminalized offenses that are motivated

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110. See, e.g., District of Columbia Human Rights Act, D.C. CODE ANN. §§ 1-2501 to 1-2557 (1999) (proscribing discrimination by employers, real estate brokers, public accommodations, and educational institutions); Minnesota Human Rights Act, MINN. STAT. §§ 363A.01-363A.15 (1991) (prohibiting discrimination with respect to employment, disclosure of medical records, property, public accommodations and services, educational institutions, and credit); Missouri Human Rights Act, MO. REV. STAT. §§ 213.010-213.137 (1996) (prohibiting discrimination with respect to housing, commercial real estate loans, employment, public accommodations, and other areas); New Jersey Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to 10:5-49 (West 2002) (forbidding discrimination in employment, housing, and other areas); New York Human Rights Law, N.Y. EXEC. LAW § 296 (McKinney Supp. 2003) (forbidding discrimination in employment, labor organizations, public accommodations, and other areas); see also Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 27-28 (2000) (noting that some state anti-discrimination mandates extend beyond those of federal law, for example, by prohibiting discrimination based on sexual preference).

111. Susan Elizabeth Powley, *Exploring a Second Level of Parity: Suggestions for Developing an Analytical Framework for Forum Selection in Employment Discrimination Litigation*, 44 VAND. L. REV. 641, 664 (1991); see, e.g., ALASKA STAT. § 18.80.300 (Michie 1986); D.C. CODE ANN. § 1-2512 (1999); HAW. REV. STAT. § 378-2 (1993); ME. REV. STAT. ANN. tit. 5, § 4572 (West 2002); MICH. COMP. LAWS ANN. § 37.2202 (West 1985); MINN. STAT. ANN. § 363A.03(1) (West 1991); MONT. CODE ANN. § 49-2-101(8) (1989). For the texts of all state statutes, see 8A & 8B Lab. Rel. Rep. (BNA) 453:1-457:3513 (1990).

112. 42 U.S.C. § 3604 (2000).

113. See, e.g., WASH. REV. CODE § 49.60.030(1)(a) (2001); *supra* note 110.

114. 42 U.S.C. § 1996b(1) (Supp. 2003).

115. See, e.g., ARIZ. REV. STAT. ANN. § 8-105.01 (West 1999); CAL. FAM. CODE § 8708(a)-(b) (West 2004); TEX. FAM. CODE ANN. § 162.308 (Vernon 2002); WASH. REV. CODE § 26.33.045 (2004).

116. DEL. CODE ANN. tit. 20, § 1204(c) (1995); FLA. STAT. ANN. § 497.341(1) (West 2002); N.J. STAT. ANN. § 10:1-9 (West 2002); OKLA. STAT. tit. 8, § 36 (1998).

by “racial” animosity.<sup>117</sup> A typical statute establishes that it is a crime to injure a person or damage her property because of the victim’s “actual or perceived race, color, religion, ancestry, or national origin.”<sup>118</sup> Several states have also passed laws that require local police departments to adopt policies proscribing racial profiling.<sup>119</sup> One such statute directs each law enforcement agency to develop a written policy “that prohibits the stopping, detention or search of any person when such action is solely motivated by considerations of race, color, ethnicity, age, gender or sexual orientation.”<sup>120</sup>

At the same time, however, two states have ended government-sponsored affirmative action programs.<sup>121</sup> In 1996, after voter approval of the well-known Proposition 209, California amended its constitution to prohibit “race” and gender-based preferences in public employment, contracting, and education.<sup>122</sup> In 1998, Washington state voters approved the very similar Initiative 200.<sup>123</sup>

117. See Gregory R. Nearpass, Comment, *The Overlooked Constitutional Objection and Practical Concerns to Penalty-Enhancement Provisions of Hate Crime Legislation*, 66 ALB. L. REV. 547, 547–48 (2003) (stating that “nearly every state has passed some form of hate crime legislation” and discussing constitutional challenges to hate crime laws); ANTI-DEFAMATION LEAGUE, HATE CRIMES LAWS, <http://www.adl.org/99hatecrime/print.asp?&MSHC=1252&L=10&W=LAWSA+laws+LAWSON+CRIM+crime+CRIMES+CRIMI+CRIMEIN+HATEIS+hate+HATEA+HATEBASED+HATED+HATEM+HATER+HATERS+HATES+&Pre=%3CFONT+STYLE%3D%22color%3A+%23000000%3B+background%2Dcolor%3A+%23FFFF00%22%3E&Post=%3C%2FFONT%3E> (last visited Feb. 21, 2005) (stating that forty-three states and the District of Columbia have enacted hate crime laws). Federal law also has penalty enhancement provisions, though there is no general federal hate crimes law that deems “racially” motivated offenses to be “hate crimes.” See *supra* note 108 and accompanying text.

118. COLO. REV. STAT. § 18-9-121(2) (2002).

119. See, e.g., CONN. GEN. STAT. ANN. § 54-1m (West 2001); KY. REV. STAT. ANN. § 15A.190(1) (Banks-Baldwin 2002); MO. REV. STAT. § 590.650.5 (1999); NEB. REV. STAT. § 20-504(1) (2002); OKLA. STAT. ANN. tit. 22, § 34.3 (West 2004); R.I. GEN. LAWS § 31-21.1-2 (2002). Other states require law enforcement agencies only to record and report the “races” of the individuals stopped for traffic violations. See COLO. REV. STAT. § 42-4-115 (2002); KAN. STAT. ANN. § 22-4604(a) (Supp. 2003); N.C. GEN. STAT. § 114-10(2)(a) (2002); WASH. REV. CODE § 43.43.480 (West 2004).

120. CONN. GEN. STAT. ANN. § 54-1m (West 2001) (establishing a January 1, 2000 deadline for the adoption of these policies). In June 2003, the U.S. Justice Department issued a directive that banned routine racial and ethnic profiling by all seventy federal law enforcement agencies. The directive, however, allows for exceptions in cases in which there is specific information that members of a specific group are planning a terrorist attack, are engaged in a particular crime, or are members of a criminal organization. Curt Anderson, *Race Profiling Banned for U.S. Law Agencies*, PLAIN DEALER, June 18, 2003 at A1, A3.

121. Jeffrey M. Hanson, Note, *Hanging by Yarns?: Deficiencies in Anecdotal Evidence Threaten the Survival of Race-Based Preference Programs for Public Contracting*, 88 CORNELL L. REV. 1433, 1435 (2003).

122. CAL. CONST. art. I, § 31. See *infra* Part IV.D.3 for a discussion of California’s Racial Privacy Initiative, a proposed constitutional amendment that would have prohibited the state

### III. DEFINING "RACE" IN THE MEDICAL SCIENCES, THE SOCIAL SCIENCES, AND THE LAW

The term "race" appears throughout American statutory codes in a variety of settings. As already discussed, some laws making reference to "race" establish anti-discrimination mandates, some proactively promote diversity, and others prohibit particular "race"-based conduct, including racial profiling, the commission of hate crimes, and even the implementation of affirmative action programs.<sup>124</sup> But what does "race" mean? How, if at all, is it different from other, related concepts such as color and national origin? This part will explore these questions by drawing upon a number of other disciplines, including physiology, genetics, anthropology, sociology, and psychology, that have grappled with the challenge of defining "race" and delineating "racial" categories. In addition, it will trace the convoluted history of the "race" concept in American legislation and jurisprudence.

#### A. *Is "Race" a Biological Concept?*

##### 1. Efforts To Classify "Races" Through Assessment of Physiological Characteristics

In the nineteenth century a number of scholars began deliberating the issue of "racial" differences, and some attempted to prove empirically the inferiority of the "Black race."<sup>125</sup> Thomas Jefferson's book, *Notes on the State of Virginia*, was published in 1829, suggesting that "blacks . . . are inferior to the whites in the endowments both of body and mind."<sup>126</sup> In this book, Jefferson described numerous ways in which African-Americans were different from Whites in their physical, mental, and emotional capacities.<sup>127</sup>

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from classifying individuals by "race" in most circumstances. The measure was defeated by voters in November 2003. *Californians Sink Racial Privacy Initiative*, at <http://www.foxnews.com/story/0,2933,99405,00.html> (last visited Feb. 21, 2005).

123. Hanson, *supra* note 121, at 1435.

124. See discussion *supra* Part II.B–C.

125. TUCKER, *supra* note 18, at 17.

126. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 150 (1829).

127. *Id.* at 145–46. For example, Jefferson wrote:

Besides those of colour, figure, and hair, there are other physical distinctions proving a difference of race. They have less hair on the face and body. They secrete less by the kidneys, and more by the glands of the skin, which gives them a very strong and disagreeable odour. . . . They seem to

Some theorists, known as “monogenists,” believed that all human beings originated from the same progenitors, as described in the Biblical account of Adam and Eve, and that the “races” resulted from different degrees of degeneration among human descendants.<sup>128</sup> Others, called “polygenists,” held that human “races” originated from different Adams and that Blacks were a distinct and inferior species.<sup>129</sup>

Among the foremost polygenists in the United States was the Swiss naturalist and Harvard professor, Louis Agassiz.<sup>130</sup> He urged researchers to settle the “relative rank among . . . races” because he believed that not all “races” had the same abilities, and thus they did not deserve equal positions in society.<sup>131</sup> Samuel Morton, a Philadelphia physician, heeded the call and collected over 800 skulls from around the world.<sup>132</sup> From these, he calculated the skull capacities of different “races,” finding Caucasians to rank highest, Native Americans to rank lower, and Blacks to be placed last.<sup>133</sup> Morton’s results have been discredited by contemporary scholars who have pointed out, for example, that skull size corresponds to body size, but there is no direct link between how large a person is and her level of intelligence.<sup>134</sup>

Researchers also explored the question of whether non-Blacks could be divided into “racial” categories. A German scientist, Hans Gunther, identified five “races” into which the European people could be divided:

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require less sleep. . . . They are more ardent after their female: but love seems with them to be more an eager desire, than a tender delicate mixture of sentiment and sensation. Their griefs are transient. . . . In general, their existence appears to participate more of sensation than reflection.

*Id.*

128. STEPHEN J. GOULD, *THE MISMEASURE OF MAN* 39 (1981).

129. *Id.* at 39–41.

130. *Id.* at 42–43.

131. TUCKER, *supra* note 18, at 18 (quoting Louis Agassiz, *The Diversity of Origin of the Human Races*, 49 CHRISTIAN EXAMINER 110, 142 (1850)).

132. *Id.*

133. *Id.* (citing SAMUEL MORTON, *CRANIA AMERICANA* (1839)). Morton attempted to develop a scientific method for his study. He filled the skull cavity with white pepper seeds that he then transferred to a tin cylinder from which he read the volume of seeds in cubic inches. *Id.* He also repeated the experiment with lead shot. *Id.*; see also Samuel Morton, *Observations on the Size of the Brain in Various Races and Families of Men*, 4 PROC. ACAD. NAT. SCI. PHILA. 221–24 (1849).

134. TUCKER, *supra* note 18, at 19–20. Stephen J. Gould reanalyzed Morton’s original measurements and, after finding many serious errors, miscalculations, and omissions, published his conclusions. GOULD, *supra* note 128, at 50–69; Stephen J. Gould, *Morton’s Ranking of Races by Cranial Capacity*, 200 SCI. 503, 503–09 (1978); see also JOSEPH L. GRAVES, JR., *THE EMPEROR’S NEW CLOTHES: BIOLOGICAL THEORIES OF RACE AT THE MILLENNIUM* 46–47 (2001).

Nordic, Mediterranean, Dinaric, Alpine, and East Baltic.<sup>135</sup> Providing numerous photographs and sketches as illustrations, he discussed extensively the skull measurements, physical characteristics, and mental attributes of each of the five "races."<sup>136</sup>

Jewish "racial" purity was of particular interest to nineteenth and early twentieth century researchers.<sup>137</sup> While the matter was debated in some circles, the Jews were perceived as a "racial" group by many authorities in Europe and the United States.<sup>138</sup> As in the case of other Caucasians, some scientists, basing their judgment on skull measurements and other physical characteristics, subdivided Jews into two or three "racial" types associated with their geographic origins.<sup>139</sup>

A centerpiece of the Nazi regime's philosophy was that Jews constituted a unique "race," of which the world must be purged.<sup>140</sup> In his notorious book, *Mein Kampf*, Hitler postulated that racialism was the essential principle of human existence, writing that "[t]he racial question gives the

135. HANS F. K. GUNTHER, *THE RACIAL ELEMENTS OF EUROPEAN HISTORY* 3-4 (G. C. Wheeler, trans., 1927). "Dinaric" refers to the Dinaric Alps, which constitute the southeastern range of the Alps, extending from the Adriatic coast through Slovenia, Croatia, Bosnia, and Herzegovina, and Serbia and Montenegro to northern Albania. *Id.* at 49; COLUMBIA ENCYCLOPEDIA (6th ed. 2001), available at <http://www.bartleby.com/65/>.

136. GUNTHER, *supra* note 135, at 10-63.

137. JOHN M. EFRON, *DEFENDERS OF THE RACE: JEWISH DOCTORS AND RACE SCIENCE* 22-24 (1994); GUNTHER, *supra* note 135, at 74.

138. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (noting that in the nineteenth century, when Section 1982 was passed, Jews were considered to be a distinct "race" and thus Congress intended to protect them against official and private "racially" discriminatory interference with property rights pursuant to the statutory mandate); *United States v. Nelson*, 277 F.3d 164, 176-78 (2d Cir. 2002) (explaining that the framers of the Thirteenth Amendment understood Jews to be a "race"); EFRON, *supra* note 137, at 20, 24-25 (stating that, by the end of the nineteenth century, some anthropologists began "to deny the Jews were a race at all, preferring to see them as a community of faith"); GUNTHER, *supra* note 135, at 74 ("There are a great many false ideas about the Jews. They are said, for instance, to belong to a 'Semitic race.' There is, however, no such race; there are only Semitic-speaking peoples, showing varying racial compositions."); Jay Weinstein & Nico Stehr, *The Power of Knowledge: Race Science, Race Policy, and the Holocaust*, 13 SOC. EPISTEMOLOGY 3, 5 (1999) ("By the early Weimar Republic, indeed not only in Germany but throughout the Christian world, it was not uncommon to define a Jew as anyone who belonged to the Jewish 'race . . . .").

139. EFRON, *supra* note 137, at 20-21, 24. Constantine Ikow, for example, divided Jews into the following groups: 1) those originating from Eastern and Southern Europe, the Balkans, Turkey, Algeria, Spain, Italy, and the Mediterranean region; 2) those from Western Europe, who had intermixed with non-Jews; and 3) Russian Jews, who exhibit no Semitic characteristics. *Id.*; see also GUNTHER, *supra* note 135, at 74 (asserting that Jews belong primarily to the Hither Asiatic and Oriental "races").

140. LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS: 1933-1945* xiii-xv, 18-20 (1975); MARTIN GILBERT, *THE HOLOCAUST: A HISTORY OF THE JEWS OF EUROPE DURING THE SECOND WORLD WAR* 26, 280-85 (1985).



key not only to world history, but to all human culture.”<sup>141</sup> Hitler insisted that there existed a Jewish “race,” the members of which were conspiring to dominate the world.<sup>142</sup> Accordingly, the Nazis designed the “Final Solution” by which they were to exterminate all Jews.<sup>143</sup> In order to effectuate this policy, the Nazis raised the science of “race” to new heights. They developed a methodology of identifying Jews and members of other “races” based on hair and eye color, the shape of nostrils, the skull, jaws, earlobes, posture, the position of feet at rest, and even gait.<sup>144</sup>

## 2. The Genetic Validity of “Racial” Categories

During the past two decades, the focus of the discussion has shifted from the measurement of physiological features to assessment of genetic factors. In recent years a vigorous debate has developed in the fields of medicine and genetics concerning the validity of “racial” categories.<sup>145</sup> Some have asserted that “race” is “biologically meaningless,”<sup>146</sup> while others have strongly supported the continued use of “race” for scientific purposes.<sup>147</sup> A review of the most current scientific findings will elucidate what, if anything, is known about the genetic validity of “race” and “racial” differences.

Scientists estimate that human beings share 98.56 percent of their genes with chimpanzees.<sup>148</sup> Human beings have approximately 30,000 to 35,000 genes,<sup>149</sup> and 99.9 percent of genes are identical for all human beings.<sup>150</sup> While there is variation in the remaining one tenth of a percent, ninety to

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141. ADOLF HITLER, MEIN KAMPF 339 (Ralph Manheim, trans., Houghton Mifflin 2001) (1925).

142. *Id.* at 651 (stating that “it is the inexorable Jew who struggles for his domination over the nations”).

143. *See* GILBERT, *supra* note 140, at 241–51.

144. Scales-Trent, *supra* note 9, at 279. During the Holocaust, the Nazis murdered six million Jews as well as “a quarter of a million Gypsies, tens of thousands of homosexuals, and tens of thousands of ‘mental defectives’ . . . [in addition to] several million Soviet prisoners-of-war” and other noncombatants. GILBERT, *supra* note 140, at 824.

145. Neil Risch et al., *Categorization of Humans in Biomedical Research: Genes, Race, and Disease*, 3 GENOME BIOLOGY 1, 1 (July 2002), available at <http://genomebiology.com/2002/3/7/comment/2007.3> (last visited Mar. 15, 2005).

146. Robert S. Schwartz, *Racial Profiling in Medical Research*, 344 NEW ENG. J. MED. 1392, 1392 (2001).

147. Burchard et al., *supra* note 4, at 1171; Risch et al., *supra* note 145, at 11.

148. J.W. Jamieson, *The Reality of Race: Contra Biondi and Rickards*, 42 MANKIND Q. 389, 399 (2002).

149. Alan E. Guttmacher & Francis S. Collins, *Genomic Medicine—A Primer*, 347 NEW ENG. J. MED. 1512, 1514 (2002).

150. Rotman, *supra* note 37, at 42.

ninety-five percent of variations, which are called alleles,<sup>151</sup> are found at equal rates in every population.<sup>152</sup> Consequently, only five to ten percent of all genetic variations (in the one-tenth of a percent of genes that actually vary) are distributed along geographical or continental lines.<sup>153</sup> Significantly, among the five to ten percent of variants in that tenth percent of variable genes that seem to be distributed differentially between geographical populations, there are no variants or alleles that are unique to one "race."<sup>154</sup>

In 2002, several researchers published an article in *Science* reporting data from a study using gene samples from 1056 individuals from fifty-two populations.<sup>155</sup> They were able to identify clusters of alleles that corresponded to five major geographic regions: Europe, Africa, East Asia, Oceania, and the Americas.<sup>156</sup> Thus, the frequencies of the alleles that fall into the five to ten percent of variants in the tenth of a percent of variable genes clustered differentially across continental lines.<sup>157</sup> The researchers also concluded that people's self-identification as members of particular "races" correlated strongly with the genetic findings.<sup>158</sup> A second study, published in the *American Journal of Human Genetics* confirmed that allele frequencies in genetic samples from individuals from sub-Saharan Africa, East Asia, and Europe could be clustered into categories that correspond to those continents.<sup>159</sup>

Nevertheless, many scientists still insist that the notion of "race" is fictitious. One commentator explains that genetic differences demonstrate only that there is a very small "geographical structure that is present in the genome," not that the concept of "race" is scientifically valid.<sup>160</sup> Experts emphasize that intragroup genetic variation is dramatically greater than

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151. An allele is an "alternative form of a gene." Guttmacher & Collins, *supra* note 149, at 1513.

152. Cooper et al., *supra* note 39, at 1167; Rosenberg et al., *supra* note 37, at 2381.

153. Michael J. Bamshad et al., *Human Population Genetic Structure and Inference of Group Membership*, 72 AM. J. HUM. GENETICS 578, 578 (2003).

154. Leda Cosmides et al., *Perceptions of Race*, 7 TRENDS IN COGNITIVE SCI. 173, 173 (2003).

155. Rosenberg et al., *supra* note 37, at 2381.

156. *Id.* at 2381-84; Rotman, *supra* note 37, at 50.

157. Rotman, *supra* note 37, at 50.

158. Rosenberg et al., *supra* note 37, at 2381; Rotman, *supra* note 37, at 50.

159. Bamshad et al., *supra* note 153, at 584.

160. Rotman, *supra* note 37, at 50 (quoting Kenneth Kidd, one of the authors of the study published in *Science*).

intergroup variation,<sup>161</sup> so that interest in an expressed-trait difference is a social decision rather than a biological structure.

Moreover, variation in genetic makeup and physical features is gradual and continuous, so it is impossible to demarcate where one “race” ends and another begins.<sup>162</sup> For example, skin color, produced by a pigment called melanin,<sup>163</sup> slowly changes from one region to another so that people whose global distance from one another is small look more alike than those living far apart.<sup>164</sup> In addition, individuals who share skin color often have very different ancestry, as is the case for sub-Saharan Africans, New Guinea highlanders, and Australian aborigines, so that skin color, as a proxy for “race,” is an unreliable indicator.<sup>165</sup>

To demonstrate how difficult it is to categorize individuals by “race,” one study analyzed the “racial” designations of infants who died in their first year of life. The study showed that 4.3% of babies categorized as Black at birth were deemed to be other than Black on their death certificates, and 37% of those categorized as Native American on their birth certificates were classified differently on their death certificates.<sup>166</sup> Other data shows that most Ethiopians are more genetically similar to Caucasians than to other Africans.<sup>167</sup> Thus, some scientists caution against “implying that every individual has a fixed, unchangeable racial/ethnic identity that can be easily

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161. Morris W. Foster & Richard R. Sharp, *Race, Ethnicity, and Genomics: Social Classifications as Proxies of Biological Heterogeneity*, 12 GENOME RES. 844, 848 (2002), available at [www.genome.org/cgi/doi/10.1101/gr.99202](http://www.genome.org/cgi/doi/10.1101/gr.99202) (last visited Nov. 11, 2004); Alan H. Goodman, *Why Genes Don't Count (for Racial Differences in Health)*, 90 AM. J. PUB. HEALTH 1699, 1700 (2000).

162. Seymour Garte, *The Racial Genetics Paradox in Biomedical Research and Public Health*, 117 PUB. HEALTH REP. 421, 421 (2002) (“On a genetic level, human variation is a smooth continuum with very little evidence for sharp racially defined heterogeneities.”); Goodman, *supra* note 161, at 1700.

163. Richard A. Sturm et al., *Human Pigmentation Genetics: The Difference Is Only Skin Deep*, 20 BIOESSAYS 712, 712 (1998); see also THE BANTAM MEDICAL DICTIONARY 262 (1990).

164. Goodman, *supra* note 161, at 1700; see also Bamshad et al., *supra* note 153, at 587 (“Our analysis is based on samples from regions of Africa, Asia, and Europe that are widely separated from one another. Accordingly, these samples also maximize the degree of genetic variation among populations.”).

165. Bamshad et al., *supra* note 153, at 587.

166. Robert A. Hahn et al., *Inconsistencies in Coding of Race and Ethnicity Between Birth and Death in US Infants: A New Look at Infant Mortality, 1983 through 1985*, 267 JAMA 259, 260–61 (1992).

167. James F. Wilson et al., *Population Genetic Structure of Variable Drug Response*, 29 NATURE GENETICS 265, 266 (2001) (“Notably, 62% of the Ethiopians fall in the first cluster, which encompasses the majority of the Jews, Norwegians and Armenians, indicating that placement of these individuals in a ‘Black’ cluster would be an inaccurate reflection of the genetic structure.”).

determined or that these identities sort themselves into mutually exclusive categories to which individuals can be validly and reliably assigned."<sup>168</sup>

Can any general conclusions be reached from recent genetic studies concerning "race"? It appears that analysis of genetic samples can most often provide information about an individual's ancestors' continent of origin.<sup>169</sup> One source explains this phenomenon by pointing out that the environment exerts strong selective pressures with respect to some genes, including those for skin color, eye shape, body dimensions, and facial structure.<sup>170</sup> In particular climates and surroundings, certain characteristics are advantageous, as is the case for "white skin in cold dark regions and black skin in hot sunny regions," and thus certain alleles are selected over others.<sup>171</sup> Similarly, genes controlling the metabolism, immune system, and other bodily functions may vary from place to place because of different infectious organisms, food, and other living conditions.<sup>172</sup> Consequently, based on genetics, the more accurate terminology might be "geographic origin" or "continent of origin" rather than "race."<sup>173</sup>

One might also ask whether "racial" categories are significant for scientific purposes. The issue is not merely one of satisfying human curiosity concerning biological phenomena. Since the nineteenth century, many have believed that "race" is at times associated with health outcomes. In 1896, the economist Frederick Hoffman published *Race Traits and Tendencies of the American Negro* in which he argued that the African-American "race" was experiencing a downward slide in health and mortality because of which its death rate would soon outpace its birth rate, and extinction would become inevitable.<sup>174</sup> Consequently, membership in the black "race" was allegedly associated with disease and early death.

Today it is believed that members of different populations have higher susceptibilities to different diseases and respond differently to certain treatments.<sup>175</sup> For example, "racial" differences have been demonstrated

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168. Judith B. Kaplan & Trude Bennett, *Use of Race and Ethnicity in Biomedical Publication*, 289 JAMA 2709, 2709 (2003). The authors explain that researchers, interviewers, medical personnel, and undertakers assign people to "racial" categories based on observations and assumptions concerning appearance, name, spoken language, and place of residence. These assumptions are not necessarily correct. *Id.* at 2710.

169. Bamshad et al., *supra* note 153, at 584; Rosenberg et al., *supra* note 37, at 2381.

170. Garte, *supra* note 162, at 422–23.

171. *Id.* at 423.

172. *Id.*

173. *Id.* at 424; Risch et al., *supra* note 145, at 3.

174. FREDERICK L. HOFFMAN, *RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO* 312 (1896).

175. Risch et al., *supra* note 145, at 4, 9–10.

with respect to diabetes complications,<sup>176</sup> and researchers have detected genetic differences among “racial” groups that relate to HIV, Crohn’s disease, and Alzheimer’s disease.<sup>177</sup> In addition, one controversial study found that black patients with chronic heart failure did not respond well to a commonly used drug, leading some doctors to stop providing the medication to African-American patients.<sup>178</sup>

Some scholars passionately decry the use of “racial” categories in medical and public health decisionmaking, fearing a return to the prejudices and bigotry of past centuries.<sup>179</sup> They assert that health status and treatment outcomes are influenced not by “race” per se, but by education, socioeconomic background, diet, and place of residence.<sup>180</sup> Accordingly, ignoring these social and environmental factors and focusing only on “race” can lead to ignorant and misconceived medical and health policy decisions. In addition, these scientists point out that even if disease susceptibility varies among populations, illnesses are not exclusive to a single “race.”<sup>181</sup> For example, sickle cell anemia affects not only those of African descent, but also people whose ancestors come from Greece, Sicily, and the Arabian Peninsula, and it is not prevalent among Black South Africans.<sup>182</sup> Likewise, Tay-Sachs, which is commonly associated with those of Eastern European

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176. *Id.* at 9–10 (thanking J. S. Kaufman & Richard Cooper, *Commentary: Considerations for Use of Racial/Ethnic Classification in Etiologic Research*, 154 AM. J. EPIDEMIOLOGY 291, 291–98 (2001)).

177. Burchard et al., *supra* note 4, 1172–73.

178. Derek V. Exner et al., *Lesser Response to Angiotensin-Converting-Enzyme Inhibitor Therapy in Black as Compared with White Patients with Left Ventricular Dysfunction*, 344 NEW ENG. J. MED. 1351, 1351 (2001) (explaining that Whites exhibited a “44% reduction . . . in the risk of hospitalization for heart failure” when taking the medication enalapril, while Blacks experienced no significant reduction); Frederick A. Masoudi & Edward P. Havranek, *Race and Responsiveness to Drugs for Heart Failure*, 345 NEW ENG. J. MED. 767 (2001). *But see* Kahn, *supra* note 50, at 473–74 (arguing that the alleged 2:1 Black:White mortality ratio for heart failure is a myth and that the actual ratio is approximately 1.1:1); Ashwini R. Sehgal, *Overlap Between Whites and Blacks in Response to Antihypertensive Drugs*, 43 HYPERTENSION 566, 566 (2004) (stating that “the majority of whites and blacks have similar responses to commonly used antihypertensive drugs”); Clyde W. Yancy et al., *Race and the Response to Adrenergic Blockade with Carvedilol in Patients with Chronic Heart Failure*, 344 NEW ENG. J. MED. 1358, 1358 (2001) (finding no “racial” difference in the response of patients to this drug).

179. Cooper et al., *supra* note 39, at 1169.

180. *Id.*; *see also* Kahn, *supra* note 50, at 480; Kaplan & Bennett, *supra* note 168, at 2712; Pamela Sankar et al., *Genetic Research and Health Disparities*, 291 JAMA 2985, 2987–88 (2004) (cautioning that an overemphasis on genetics might cause health care providers to overlook environmental factors that contribute to health disparities).

181. Cooper et al., *supra* note 39, at 1167.

182. Garte, *supra* note 162, at 423; Jonathan Kahn, *How a Drug Becomes “Ethnic”: Law, Commerce, and the Production of Racial Categories in Medicine*, 4 YALE J. HEALTH POL’Y, L. & ETHICS, 1, 39 (2004).

Jewish descent, affects French-Canadians and Cajuns at an equal rate and is also prevalent among individuals with Irish ancestry.<sup>183</sup> Finally, some caution against naïve reliance on studies suggesting genetic differences among racial groups because so many people are of mixed ancestry.<sup>184</sup>

Other experts, however, are just as insistent that "racial" categories are a valuable scientific tool. They argue that whether different continental populations respond similarly to particular drugs is an important question that can only be answered by focusing on these groups separately, and various environmental factors can be taken into account in carefully designed research projects.<sup>185</sup> In addition, knowledge of one's "racial" ancestry may expedite diagnosis because some tests are already tailored to screen for genetic abnormalities that are prevalent in specific populations.<sup>186</sup> Furthermore, even if "race" is only a social construct, racism and "racialized" social categories have real effects on health disparities between different social groups, and, therefore, it is scientifically useful to gather information based on these same "racial" categories in order to promote public health goals.<sup>187</sup> Finally, it is argued that "racial" identification of patients is significant for purposes of biomedical research so that investigators can be sure to include a diverse sample group in their clinical trials.<sup>188</sup> Without specific efforts to recruit minorities, many clinical trials

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183. National Tay-Sachs & Allied Diseases Association of Delaware Valley, *Tay-Sachs & Canavan Diseases: What is Tay-Sachs Disease?*, <http://www.tay-sachs.org/taysachs.php> (last visited Oct. 18, 2004).

184. Kaplan & Bennett, *supra* note 168, at 2712 ("Apparent genetic differences are difficult to interpret when the underlying populations have mixed geographic ancestries, as do the Asian, black, Native American, and white populations in the United States."); Begley, *supra* note 33, at B1 (urging that ancestry, rather than "race," be considered in assessing individuals' varying responses to drugs).

185. Burchard et al., *supra* note 4, at 1174; Risch et al., *supra* note 145, at 11. The science of attempting to individualize patient care by determining how patients might metabolize particular drugs based on their genetic makeup is called "pharmacogenetics." See Morris W. Foster et al., *Pharmacogenetics, Race, and Ethnicity: Social Identities and Individualized Medical Care*, 23 THERAPEUTIC DRUG MONITORING 232, 232 (2001).

186. Burchard et al., *supra* note 4, at 1174.

187. Interview with Dr. Eric T. Juengst, Associate Professor of Bioethics, Case Western Reserve University School of Medicine, in Cleveland, Ohio (Oct. 2, 2003).

188. Burchard et al., *supra* note 4, at 1174; see also The Minority Health and Health Disparities Research and Education Act of 2000, Pub. L. No. 106-525, 114 Stat. 2495 (codified in scattered sections of 42 U.S.C. § 287c-31 to -34 (2000)) (establishing the National Center on Minority Health and Health Disparities within the National Institutes of Health (NIH), the mandate of which is to conduct and support research, training, and educational initiatives concerning minority health conditions); Barbara A. Noah, *The Participation of Underrepresented Minorities in Clinical Research*, 29 AM. J.L. & MED. 221, 224 (2003) (stating "that racial and ethnic minorities have less opportunity to participate in potentially

would most likely include mostly if not exclusively white participants.<sup>189</sup> In the words of one commentator, “[i]gnoring our differences, even if with the best of intentions, will ultimately lead to the disservice of those who are in the minority.”<sup>190</sup>

Racial profiling in medicine will be analyzed below.<sup>191</sup> For now, suffice it to say that even if data about a patient’s color, national origin, or continent of origin is useful, its usefulness does not necessitate perpetuation of the “race” concept. While scientists might at times be justified in focusing their research on particular minority groups or in attempting to identify patients by specific appearance-related characteristics,<sup>192</sup> they need not rely on the incoherent concept of “race.” What scientists in fact are generally interested in is the individual’s color, national origin, continent of origin, or some combination of these. Clinical and research practices would actually benefit from greater precision if medical experts more clearly and explicitly articulated the identities upon which they are focusing.

In sum, contemporary science has discredited the notion of “race” as a biological or genetic category.<sup>193</sup> Many scholars believe that “linking illness—or any other trait, like intelligence or athletic skill—to appearance is a fundamental scientific error.”<sup>194</sup> While DNA samples might reveal information about an individual’s continent of origin,<sup>195</sup> intragroup genetic variation is far greater than intergroup variation,<sup>196</sup> and no variant is unique to one “race.”<sup>197</sup> The biological sciences, therefore, do not support perpetuation of the “race” concept.

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beneficial clinical research” and that they were “commonly excluded from clinical trials until the mid-1990s”).

189. Burchard et al., *supra* note 4, at 1174.

190. Risch et al., *supra* note 145, at 11.

191. See *infra* Part IV.A.2.

192. See Lillquist & Sullivan, *supra* note 46, at 395 (outlining the limited circumstances in which the authors believe that “racial profiling” in medicine is acceptable).

193. Kahn, *supra* note 182, at 33.

194. *Id.* at 34 (quoting Joseph Graves, an evolutionary biologist at Arizona State University); see also Lillquist & Sullivan, *supra* note 46, at 400 (stating that “there is no reason to believe that real differences in intelligence, or other general behavioral traits, exist between races”).

195. See *supra* note 169 and accompanying text.

196. See *supra* note 161 and accompanying text.

197. Cosmides et al., *supra* note 154, at 173.

B. "Race" in Anthropology, Sociology, and Psychology

The controversy concerning the existence of "race" has permeated other disciplines as well. This part will explore the issue of "racial" categorization in the fields of anthropology, sociology, and psychology.

1. Anthropology and Sociology

Serious disagreement exists among anthropologists as to the significance of "race."<sup>198</sup> Early in the twentieth century, Franz Boas, a prominent anthropologist who was a German immigrant to the United States, initiated an assault on the concept of scientific racism.<sup>199</sup> Boas demonstrated the fallibility of the widespread belief that measurable "race" differences exist in the areas of biological characteristics and behavioral patterns.<sup>200</sup>

Many contemporary anthropologists likewise question or even conclusively reject the concept of "race."<sup>201</sup> Several studies reveal that only half of physical anthropologists and less than one-third of cultural anthropologists maintain that homo sapiens can be categorized by biological "races."<sup>202</sup> An entry in a dictionary of anthropology explains that "race" has no validity as a scientific concept because human populations cannot be divided into "fixed or discrete racial groups."<sup>203</sup> However, it notes that the significance of "race" lies in that "[a]s a folk concept, race is employed to attribute not only physical characteristics but also psychological and moral ones to members of given categories, thus justifying or naturalizing a discriminatory social [sic] system."<sup>204</sup>

198. Matt Cartmill, *The Status of the Race Concept in Physical Anthropology*, 100 AM. ANTHROPOLOGIST 651, 652 (1999) (detailing the arguments of proponents and opponents of the "race" concept).

199. Gaines, *supra* note 31, at 2191-92.

200. See FRANZ BOAS, RACE, LANGUAGE, AND CULTURE 3-17 (1940).

201. Ryan A. Brown & George J. Armelagos, *Apportionment of Racial Diversity: A Review*, 10 EVOLUTIONARY ANTHROPOLOGY 34, 34 (2001); THE DICTIONARY OF ANTHROPOLOGY 392 (Thomas Barfield ed., Blackwell 1997) ("Since 1960, the concept has declined in anthropology because of its operational ambiguity, arbitrariness, artificiality, and erroneous and harmful assumptions concerning biological and social differences.").

202. Brown & Armelagos, *supra* note 201, at 34; Cartmill, *supra* note 198, at 652 (reporting on several studies that highlight the difference of opinion among physical anthropologists).

203. CHARLOTTE SEYMOUR-SMITH, DICTIONARY OF ANTHROPOLOGY 238 (1986); see also Gaines, *supra* note 31, at 2192 ("Throughout the last century and a half, enumerations of groups said to constitute races fluctuated from author to author" and that the number of so-called "racial groups is still changing.").

204. SEYMOUR-SMITH, *supra* note 203, at 238.



The American Anthropological Association (“AAA”) issued a 1997 statement urging the federal government to discontinue its use of the term “race” in the gathering of data, because “‘race’ has been scientifically proven to not be a real, natural phenomenon.”<sup>205</sup> This position was articulated even more strongly in 1998, when the AAA wrote that “[t]he ‘racial’ worldview was invented to assign some groups to perpetual low status, while others were permitted access to privilege, power, and wealth.”<sup>206</sup>

Recent years have ushered in a rekindling of interest in “race.”<sup>207</sup> Some anthropologists emphasize that the concept of “race” continues to be a powerful force that leads to divisions in the social fabric.<sup>208</sup> Recognition of the importance of “racial” groupings in American culture is thus arguably necessary for certain scientific studies, such as those relating to health risks faced by particular minority groups.<sup>209</sup> Forensic anthropologists also rely on “racial” classification, as they routinely categorize the remains of crime victims by “race.”<sup>210</sup>

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205. AAA RESPONSE TO OMB DIRECTIVE 15, *supra* note 34. The AAA suggested the substitution of inquiries concerning “ethnicity” or “ethnic group.” *Id.* For a discussion of the term “ethnicity,” *see infra* Part IV.B.2.

206. AM. ANTHROPOLOGICAL ASS’N, STATEMENT ON “RACE,” <http://www.aaanet.org/stmts/racepp.htm> (May 17, 1998). Turning to scientific evidence, the AAA explained:

With the vast expansion of scientific knowledge in this century . . . it has become clear that human populations are not unambiguous, clearly demarcated, biologically distinct groups. Evidence from the analysis of genetics (e.g., DNA) indicates that most physical variation, about 94%, lies *within* so-called racial groups. Conventional geographic “racial” groupings differ from one another only in about 6% of their genes. This means that there is greater variation within “racial” groups than between them. In neighboring populations there is much overlapping of genes and their phenotypic (physical) expressions. Throughout history whenever different groups have come into contact, they have interbred. The continued sharing of genetic materials has maintained all of humankind as a single species.

*Id.*

207. Faye V. Harrison, *Introduction: Expanding the Discourse on “Race,”* 100 AM. ANTHROPOLOGIST 609, 609 (1999) (stating that an increasing number of anthropologists are regaining their interest in the issues of “race and racism” after a long period of “indifference and inattention” to these matters).

208. THE DICTIONARY OF ANTHROPOLOGY, *supra* note 201, at 394; Harrison, *supra* note 207, at 610.

209. Cartmill, *supra* note 198, at 652.

210. *Id.*; Jamieson, *supra* note 148, at 396; M.L. Patriquin et al., *Metric Assessment of Race from the Pelvis in South Africans*, 127 FORENSIC SCI. INT’L. 104, 107 (2002) (finding statistically significant differences in the pelvis measurements of white and black males); J. Philippe Rushton, *Construct Validity, Censorship, and the Genetics of Race*, 50 AM. PSYCHOLOGIST, 40–41 (1995) (“[N]arrow nasal passages and a short distance between eye sockets mark a Caucasoid, distinct cheekbones identify a Mongoloid, and nasal openings shaped

Sociologists have similarly debated the validity of "racial" categorization. Some have suggested that the concept of "race" be eliminated; others have suggested that it be retained for record-keeping purposes; and still others have recommended that "race" be specifically defined and that "racial" classifications be precisely measurable and scientifically valid whenever they are used.<sup>211</sup>

In 2003, the American Sociological Association ("ASA"), like the AAA, issued a statement on "race."<sup>212</sup> The ASA noted the extensive evidence that indicates that "race" has a significant impact on individuals' educational opportunities, employment, health status, place of residence, and treatment within the social justice system.<sup>213</sup> Consequently, the organization urged the continued pursuit of scholarship concerning "race," emphatically asserting that "[r]efusing to acknowledge the fact of racial classification, feelings, and actions, and refusing to measure their consequences will not eliminate racial inequalities. At best, it will preserve the status quo."<sup>214</sup>

The proposal discussed in this article does not suggest that researchers stop conducting studies concerning the hardships faced by particular minority groups or the realities of being African-American, Hispanic, or another minority in the United States. My contention is only that theories and solutions concerning these issues can be formulated without use of the "race" concept. Researchers could identify subject populations as Black, White, Latino, etc. without categorizing them as "races." In fact, without the catchall term "race," social scientists might be able to better identify the real bases for discrimination and other inequities. Among these, in many cases, are color, national origin, continent of origin, and socioeconomic status, which are currently all subsumed under the misleading word "race." Abandonment of the "race" concept would not impede and could actually enhance the work of anthropologists and sociologists.

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like an upside down heart typify a Negroid . . . ."); David K. Whittaker & Marina M. Bakri, *Racial Variations in the Extent of Tooth Root Translucency in Ageing Individuals*, 41 ARCHIVES ORAL BIOLOGY 15, 18-19 (1996) (finding "racial" differences in the translucency of teeth of people from different populations). Investigators, however, could just as well identify bodies as Caucasian or African-American without utilizing the label of "racial identity."

211. Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. 7, 21-23 (1997).

212. AM. SOCIOLOGICAL ASS'N, *supra* note 34.

213. *Id.*

214. *Id.* at Executive Summary.

## 2. Psychology

Psychologists, like their counterparts in other disciplines, have long debated whether people's "racial" identities differentiate them in any measurable way from one another. The claim that markedly different intellectual capacities are associated with different "races" is by no means new.<sup>215</sup> However, the contention exploded into a national controversy at the end of the twentieth century with the publication of the book *The Bell Curve: Intelligence and Class Structure in American Life*.<sup>216</sup> Its authors, Richard Herrnstein and Charles Murray, analyzed the *National Longitudinal Survey of Labor Market Experience of Youth*, a survey that commenced in 1979 and followed over 12,000 Americans ages fourteen to twenty-two.<sup>217</sup> Herrnstein and Murray reported that the average IQ for African-Americans was lower than that of Hispanic, White, Asian, and Jewish Americans,<sup>218</sup> with African-Americans scoring on average fifteen to sixteen points lower than Whites on IQ tests.<sup>219</sup> The authors also concluded that in contemporary society, those with high IQs generally achieve positions of power, wealth, and prestige, while those with low IQs are relegated to poverty and sociopolitical impotence.<sup>220</sup> The authors believe that the ranks of the destitute, the criminal, the unemployed, those bearing children out of wedlock, and the socially maladjusted are populated by the unintelligent, and consequently, by a disproportionate number of African-Americans.<sup>221</sup> Herrnstein and Murray warn that America is moving towards a "caste society."<sup>222</sup> They provide a variety of recommendations, among which are a cessation of "subsidized" births for low income women, an increase in the accessibility of effective birth control methods, and changes in immigration policies to promote a merit-based system that facilitates the immigration of the most "worthy" foreigners.<sup>223</sup>

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215. GRAVES, *supra* note 134, at 157.

216. HERRNSTEIN & MURRAY, *supra* note 43.

217. *Id.* at 36, 118–20.

218. *Id.* at 272–80.

219. *Id.* at 276. Herrnstein and Murray were not the first to identify a performance gap between Blacks and Whites on IQ tests. In 1969, Arthur Jensen published an article in which he contended that the IQ scores of Blacks were fifteen points or one standard deviation lower than those of Whites and hypothesized that genetic factors partially accounted for this discrepancy. Arthur R. Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 HARV. EDUC. REV. 1, 81–82 (1969).

220. HERRNSTEIN & MURRAY, *supra* note 43, at 25–27, 63–64.

221. *Id.* at 127, 167, 191, 235, 253.

222. *Id.* at 509.

223. *Id.* at 548–49.

A second book written by Michael Levin, *Why Race Matters: Race Differences and What They Mean*, reiterated and expanded upon its predecessor's notorious conclusions.<sup>224</sup> The book declared that African-Americans are not only typically less intelligent than Whites, but also are disinclined to follow rules and are more aggressive, assertive, and impulsive than Caucasians.<sup>225</sup> Furthermore, according to the author, Blacks have a different moral orientation from Whites, are far more likely to commit violent and nonviolent crimes, suffer from an absence of "conscience" and inability to monitor their own behavior, and have less free will than Whites.<sup>226</sup>

This literature purports to establish comprehensive and reliable evidence for the existence of "racial" distinctions in terms of intelligence, behavior, and moral standards. Not surprisingly, the response was swift and powerful. The year 1995 saw the publication of *The Bell Curve Wars*, a collection of essays by twenty distinguished scholars.<sup>227</sup> The commentators criticized Herrnstein and Murray for engaging in distortion of data and political advocacy rather than objective, scientific analysis.<sup>228</sup> For example, there is no consensus among psychometricians that intelligence can be described by a single number known as a general intelligence factor, or "g."<sup>229</sup> In addition, according to studies, there is at most a twenty percent correlation between IQ level and socioeconomic status.<sup>230</sup> Thus, one's station in life is determined predominantly by factors such as birth, luck, practical skills and intuition, and other non-IQ factors.<sup>231</sup>

Many emphasize the shortcomings of IQ tests themselves: while they measure some language and math skills, they do not measure spatial, musical, or other types of intelligence that can be determinative of professional success.<sup>232</sup> Furthermore, some test takers who perform poorly

224. LEVIN, *supra* note 44.

225. *Id.* at 213.

226. *Id.* at 213, 322; *see also* Rushton, *supra* note 34, at 231, 242–47 (defending the concepts of "race" and "race" differences based on what the author finds to be reliable evidence of differences in "brain size, IQ, violent crime, testosterone, sexuality, and AIDS.").

227. THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA (Steven Fraser ed., 1995) [hereinafter THE BELL CURVE WARS].

228. Steven Jay Gould, *Curveball*, in THE BELL CURVE WARS, *supra* note 227, at 11, 20–21 (stating that the book is no more than a "manifesto of conservative ideology" and criticizing it for its "inadequate and biased treatment of data"); Richard Nisbett, *Race, IQ, and Scientism*, in THE BELL CURVE WARS, *supra* note 227, at 36, 53–54 (criticizing *The Bell Curve* for leaving out most of the relevant direct evidence for many of its conclusions).

229. Gould, *supra* note 228, at 16.

230. Howard Gardner, *Cracking Open the IQ Box*, in THE BELL CURVE WARS, *supra* note 227, at 23, 26–27.

231. *Id.* at 26–29.

232. *Id.* at 29.

on examinations can nonetheless attain high achievements in natural settings, and even those with average innate abilities can become expert performers with sufficient training and practice.<sup>233</sup>

The controversy concerning whether “racial” categories are meaningful and whether measurable differences exist among perceived “racial” groups thus extends to the field of psychology. The contention that distinct “races” exhibit significant variations in their intellectual capacities has been called the most “pernicious” idea “in the history of racial theory.”<sup>234</sup> The rekindling of the debate in the 1990s with the publication of *The Bell Curve* has made the effort to grapple with the meaning of the term “race” all the more necessary and urgent.

### C. *The Law’s Attempts To Define “Race” and Assign “Racial” Identities*

It is in the field of law that the concept of “race” has mattered most<sup>235</sup> and has been treated with the greatest confusion and inconsistency. One commentator recently argued that many historical legal actors have always considered “race” to be a social construct and legal fiction.<sup>236</sup> Nevertheless, throughout history, legislatures, courts, and administrative agencies have struggled to classify individuals by “race” and to establish bright-line “racial” categories.

#### 1. Legislative Efforts To Define “Race” and “Racial” Categories in United States Law

In 1662 Virginia became the first jurisdiction to address the complexities of “race” identity.<sup>237</sup> Faced with the dilemma of the uncertain status of children born to white slave owners and their black female slaves, the law declared that the child’s status would be determined by that of its mother.<sup>238</sup>

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233. *Id.*; see also Weinstein & Stehr, *supra* note 138, at 18 (“People learn to exercise the skills for which IQ tests reward points just as surely as they learn to read and write.”).

234. GRAVES, *supra* note 134, at 157.

235. See discussion *supra* Part II (describing past and present U.S. laws that address issues of “race”).

236. Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473, 1476 (2003).

237. Wright, *supra* note 22, at 522.

238. Act XII, 2 Laws of Va. 170 (Hening 1823) (enacted Dec. 1662). The text reads, in relevant part:

Whereas some doubts have arisen whether children got by an Englishman upon a negro woman should be slave or free [sic]; *Be it therefore enacted and declared by this present grand assembly*, that all children borne in this

During subsequent centuries, the determination of who belonged to each "racial" category remained an issue of state law, and the states implemented significantly different classification schemes.<sup>239</sup> Generally, in slave states, a presumption was created that individuals appearing to be Black were slaves, and those claiming to be free bore the burden of proving their entitlement to freedom.<sup>240</sup> The states determined whether or not an individual was Black either by visual indicators or by ancestry, that is, by the "fraction" of black blood found in one's bloodline.<sup>241</sup> In North Carolina, for a time, the standard was any visible admixture of black blood.<sup>242</sup> Many states classified as "Negro" those who were at least one-eighth Black or had at least one Black great-grandparent.<sup>243</sup> Other states considered only those who were one-fourth or more Black to be Negro,<sup>244</sup> and still others utilized one-sixteenth or one-thirty-second rules.<sup>245</sup> A person could, therefore, be considered White in one state and Black in another.<sup>246</sup> By 1920, for purposes of segregation, most Southern states adopted the "one-drop rule" under which

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country shalbe [sic] held bond or free only according to the condition of the mother . . . .

*Id.*

239. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

240. *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134, 141 (1806) ("In the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom . . .").

241. *See State v. Treadaway*, 52 So. 500, 501-08 (La. 1910).

242. *Id.* at 502.

243. *Id.* at 502-10; *Wright*, *supra* note 22, at 524. For example, South Carolina, Florida, Georgia, Mississippi, North Carolina, Kentucky, and Indiana, all had one-eighth rules. *Treadaway*, 52 So. at 503-07.

244. *Treadaway*, 52 So. at 504. Virginia and Nebraska had statutes featuring this definition. *Id.*

245. Okizaki, *supra* note 32, at 473; *Wright*, *supra* note 22, at 524; *see also* MELISSA NOBLES, *SHADES OF CITIZENSHIP* 70 (2000) (noting that the statutory definition of "White" did not change, if it existed at all, and generally required that a person have no trace of nonwhite blood). It is noteworthy that the Nazi regime used a similar approach in attempting to define who was a "Jew." The category of "full Jew" included those with at least three Jewish grandparents. A *Mischlinge* of the first degree was a person with one Jewish parent, and a *Mischlinge* of the second degree had a single Jewish grandparent. Patricia Szobar, *Telling Sexual Stories in the Nazi Courts of Law: Race Defilement in Germany, 1933 to 1945*, 11 J. HIST. SEXUALITY 131, 144 (2002). In addition, a person with two full Jewish grandparents would be deemed a Jew if he was a member of the Jewish religious community, married a Jew, or was the illegitimate son of a Jew. The Nuremberg Laws on Citizenship and Race, First Supplementary Decree of November 14, 1935, Article Five (Dec. 14, 1935), *available at* <http://www.mtsu.edu/~baustin/nurmlaw2.html> (last visited Nov. 12, 2004); *see also* Scales-Trent, *supra* note 9, at 265 (discussing changes over time in the laws defining "racial" status in Virginia and the Third Reich).

246. *See generally* STATES' LAWS ON RACE AND COLOR (Paul Murray ed. 1950) (detailing the laws of all the states, including their definitions of "Negro").

an individual with any black ancestry would be deemed Black.<sup>247</sup> The legislatures, consequently, provided notably different interpretations of what it meant to be Black, and some changed their “racial” definitions over time.<sup>248</sup>

## 2. Judicial Efforts To Define “Race”

Litigation arising from these laws required the courts to grapple with questions of “racial” definition. The courts were no more adept than the legislatures in developing a uniform, reliable approach to resolving “race” identity disputes. In *Hudgins v. Wright*,<sup>249</sup> a case in which several slaves sued for their freedom, claiming descent from a Native American woman, two judges disagreed as to the evidentiary value of physical appearance. Judge Tucker stated that even if one’s color is in doubt because of “racial” mingling, “a flat nose and woolly head of hair,” which disappear “the last of all,” can serve as reliable indicators of an individual’s status as “African.”<sup>250</sup> On the other hand, Judge Roane asserted that when “races” become mixed, “it is difficult, if not impossible, to say from inspection only, which race predominates in the offspring.”<sup>251</sup>

A fascinating study of sixty-eight nineteenth century cases that were appealed to Southern state supreme courts showed that “race” was often determined as much by individuals’ reputation and conduct as by appearance, “blood,” or other presumably scientific evidence.<sup>252</sup> Thus, courts often called for “reputation evidence,” asking witnesses about how an individual is received within different “racial” communities, who he associates with, and how he is perceived by his neighbors; that is, what he

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247. Okizaki, *supra* note 32, at 474; Wright, *supra* note 22, at 524.

248. See Peter Wallenstein, *Law and the Boundaries of Place and Race in Interracial Marriage: Interstate Comity, Racial Identity, and Miscegenation Laws in North Carolina, South Carolina, and Virginia, 1860s–1960s*, 32 AKRON L. REV. 557, 571–72 (1999) (discussing Virginia’s evolving definition of who was “White”); see generally de Plevitz & Croft, *supra* note 63 (comparing how Australian law defined Aboriginality).

249. 11 Va. (1 Hen. & M.) 134, 143 (1806) (holding that the appellees, who were of Native American descent, were entitled to freedom).

250. *Id.* at 139.

251. *Id.* at 141.

252. Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 120, 181–85 (1998). The cases involved criminal prosecutions, inheritance disputes, slaves suing for their freedom, slander claims, and slaveholders suing those who allegedly assisted runaway slaves passing as White. *Id.* at 120–21. In each case the “racial” identity of a person was disputed, and a determination of whether the person was White or Black was relevant to the outcome of the litigation. *Id.*

"passes" for.<sup>253</sup> In addition, courts often based their determinations on the extent to which a person "performed Whiteness."<sup>254</sup> Men were judged by their exercise of good citizenship, gentlemanlike behavior, and fulfillment of obligations in the public sphere, while women were judged by their apparent purity and moral virtue.<sup>255</sup>

Controversy concerning "racial" determinations continued into the twentieth century. In the early 1920s, at the height of the Jim Crow era, the Supreme Court decided two citizenship cases in which it reached inconsistent conclusions. In *Ozawa v. United States*<sup>256</sup> the Court denied citizenship to a Japanese applicant because he was not Caucasian,<sup>257</sup> and, at the time, naturalization rights were limited to Whites and persons of African nativity.<sup>258</sup> Several months later the Court was faced with a case brought by an Asian Indian, who argued that he was eligible for citizenship because he was Caucasian.<sup>259</sup> In response, the Court promptly revised its definition of "White person" to mean whatever is "the understanding of the common man."<sup>260</sup> The Court's inability to define "racial" status consistently in two

253. *Id.* at 147–51. The author cites *Boullemet v. Phillips*, No. 4219 (La. New Orleans Parish Ct. Feb. 1840), *rev'd*, 2 Rob. 365 (La. 1842), and *Hare v. Board of Education*, No. 17,552 (N.C. Gates Cty. Super. Ct. June 1893), as cases in which reputation evidence was sought. See also Wallenstein, *supra* note 248, at 570–71.

254. Gross, *supra* note 252, at 156–57.

255. *Id.*

256. 260 U.S. 178 (1922).

257. *Id.* at 197–98.

258. See *supra* note 61 and accompanying text.

259. *United States v. Thind*, 261 U.S. 204, 206–10 (1923). In his argument, Thind contended that residents of the north and northwest parts of India were members of the Aryan "race" because the Aryans conquered the aborigines of India around 2000 B.C.E. *Id.* at 209–10.

260. *Id.* at 214. To elucidate its standard, the Court suggested an "astonishment" test and an "assimilation" test. Scales-Trent, *supra* note 9, at 288–89. These are described in the following passages:

It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them to-day [sic] . . . . We venture to think that the average well-informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.

*Thind*, 261 U.S. at 209, 211.

The children of English, French, German, Italian, Scandinavian, and other Europe parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry . . . [and] the great body of our people instinctively recognize it and reject the thought of assimilation.

*Id.* at 215.



cases brought within a one year period highlights the difficulty of constructing “racial” categories within the law.

One commentator has argued that even at the height of the Jim Crow era, the legal community understood “race” to be a social construct.<sup>261</sup> Accordingly, “at the turn of the twentieth century, there was widespread discussion of the artificiality of the color line, in courtrooms, legal commentary, social science literature, journalism, and fiction.”<sup>262</sup> More recently, the Supreme Court and the lower courts have explicitly acknowledged the dubious nature of “racial” categories.<sup>263</sup> In attempting to determine who is White, who is Black, and who is otherwise non-White, both the legislatures and the courts have struggled with the fluidity of “racial” categories. Neither institution has succeeded in formulating a consistent and reliable methodology for determining “race” identity.

### 3. Data Collection and the Census

The dilemma of delineating “racial” classifications arises in a different context in contemporary times, namely, in the effort to collect certain types of statistical data. In 1977, the U.S. Office of Management and Budget (“OMB”) issued Statistical Directive No. 15, entitled “Race and Ethnic Standards for Federal Statistics and Administrative Reporting” (“Directive 15”).<sup>264</sup> Directive 15 lists the basic “racial” and ethnic categories that the federal government is to utilize for purposes of statistical, administrative, and civil rights compliance reports.<sup>265</sup> In 1977, the basic categories were: American Indian or Alaskan Native, Asian or Pacific Islander, Black, Hispanic, and White.<sup>266</sup> Directive 15 also allowed agencies to collect data

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261. Sharfstein, *supra* note 236, at 1476.

262. *Id.*

263. See *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987) (discussing scientific and anthropological authorities arguing that “race” is a social construct in a case holding that individuals of Arab ancestry are protected from “race” discrimination under 42 U.S.C.A. §1981 (West 2003)); *United States v. Nelson*, 277 F.3d 164, 176 n.12 (2d Cir. 2002) (stating that “the modern usage [of race] may well itself be a fiction, in the sense that it groups people into what are no more than socially constructed categories”); *Ho ex rel. Ho v. S.F. Unified Sch. Dist.*, 147 F.3d 854, 863 (9th Cir. 1998) (asserting that races are not biologically-defined groups and that “race is a social construct”).

264. Office of Management and Budget, *Statistical Directive No. 15* (May 12, 1977) [hereinafter *1977 Directive 15*], available at <http://aspe.hhs.gov/datacncl/RaceRpt/appende.htm> (last visited Nov. 12, 2004).

265. *Id.*; Omi, *supra* note 211, at 10.

266. *1977 Directive 15*, *supra* note 264. More specifically, the categories were defined as follows:

separately for "race" and "ethnicity"<sup>267</sup> if they preferred to do so, designating "Hispanic origin" and "not of Hispanic origin" as ethnic classifications and all other categories as "racial" ones.

Directive 15's classifications, however, were criticized as being severely flawed and inconsistent.<sup>268</sup> For example, "Black" was the only group defined by reference to "race," whereas "Hispanic" was defined by reference to national origin.<sup>269</sup> "Asian or Pacific Islander" and "White" were characterized by geographic origin, while categorization as "American Indian or Alaskan Native" was appropriate only for those who maintain cultural identification with the community.<sup>270</sup> In addition, some believed that the categories were unscientific and insufficiently comprehensive, since none covered groups such as the original South American Indian population or Australian Aborigines.<sup>271</sup>

In response to these criticisms, Directive 15 was amended in 1997, in advance of the 2000 census.<sup>272</sup> The categories were changed to the following: American Indian or Alaska Native, Asian, Black or African

a. American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.

b. Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.

c. Black. A person having origins in any of the black racial groups of Africa.

d. Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race.

e. White. A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

267. For a discussion of whether the two terms have different meanings and of how "ethnicity" might be defined, *see infra* Part IV.B.2.

268. Omi, *supra* note 211, at 12.

269. 1977 Directive 15, *supra* note 264.

270. *Id.*; Omi, *supra* note 211, at 11.

271. Office of Management and Budget, *Standards for the Classification of Federal Data on Race and Ethnicity* (June 9, 1994) [hereinafter *1994 Revisions to Directive 15*] (detailing various criticism and suggested changes for Directive 15), available at [www.whitehouse.gov/omb/fedreg/notice\\_15.html](http://www.whitehouse.gov/omb/fedreg/notice_15.html) (last visited Nov. 12, 2004). South American Indians are, by definition, excluded from the category of "American Indian or Alaskan Native." However, South American Indians also are not Asian or Pacific Islanders, Blacks, Hispanics, or Whites, as those terms are defined. Australian Aborigines are black in skin tone, but are not natives of Africa. *See de Plevitz & Croft, supra* note 63, at 109 (explaining that Aborigines descend from the earliest inhabitants of Australia).

272. Office of Management and Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782 (proposed Oct. 30, 1997) [hereinafter *1997 Revisions to Directive 15*], available at [www.whitehouse.gov/omb/fedreg/1997standards.html](http://www.whitehouse.gov/omb/fedreg/1997standards.html) (last visited Nov. 12, 2004).

American, Hispanic or Latino, Native Hawaiian or Other Pacific Islander, and White.<sup>273</sup>

The history of the census, which predates Directive 15 by almost two centuries,<sup>274</sup> provides a particularly stark illustration of the inconsistent and ever-evolving treatment of “racial” categories by American legal and public policy authorities.<sup>275</sup> Since 1900, at least twenty-six different “race”-related terms have been utilized to categorize the U.S. population.<sup>276</sup> The 1820 census was the first to utilize the word “color,” which referred to non-White slaves that had been freed.<sup>277</sup> In 1850, the term “color” was also applied to Whites.<sup>278</sup> The word “race” was introduced in 1870 with the choices of white, colored, Chinese, and Indian.<sup>279</sup> The next census added Japanese as a subcategory, while subsequent censuses shifted and interchanged the terms “color” and “race” as well as “Negro,” “colored,” “Black,” and

273. *Id.* The “Categories and Definitions” section currently reads:

-- American Indian or Alaska Native. A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.

-- Asian. A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

-- Black or African American. A person having origins in any of the black racial groups of Africa. Terms such as “Haitian” or “Negro” can be used in addition to “Black or African American.”

-- Hispanic or Latino. A person of Cuban, Mexican, Puerto Rican, Cuban [sic], South or Central American, or other Spanish culture or origin, regardless of race. The term, “Spanish origin,” can be used in addition to “Hispanic or Latino.”

-- Native Hawaiian or Other Pacific Islander. A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

-- White. A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

*Id.*

The 1997 *Revisions to Directive 15* still allow agencies to collect data separately for “ethnicity,” designating “Hispanic or Latino” and “Not Hispanic or Latino” as ethnic categories.

274. The first census was taken in 1790. YANOW, *supra* note 26, at 55. The census is now governed by 1977 *Directive 15*, but the Directive provides only minimum categories for data collection. 1997 *Directive 15*, *supra* note 272.

275. For a general history of the census, see MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* (1988) and *THE POLITICS OF NUMBERS* (William Alonso & Paul Starr eds., 1987). See also NOBLES, *supra* note 245, at 25–84. Nobles’s book argues that “census bureaus are political actors that help to make race a political reality and do not simply count by it.” *Id.* at 22.

276. AAA RESPONSE TO OMB DIRECTIVE 15, *supra* note 34.

277. YANOW, *supra* note 26, at 55.

278. *Id.*

279. *Id.* at 56.

"Mulatto."<sup>280</sup> In the twentieth century, new subcategories were added in rapid succession: Mexican and Philipino (1930); Hindu, Korean, and "all other" (1940); American Indian instead of Indian (1950); Hawaiian (1960); and Eskimo, Aleut, Asian Indian, Vietnamese, Samoan, and Guamanian (1980).<sup>281</sup> In 2000, respondents could choose from the following "racial" categories: "White," "Black, African Am., or Negro," "Asian Indian," "Chinese," "Filipino," "Japanese," "Korean," "Vietnamese," "Native Hawaiian," "Guamanian or Chamorro," "Samoan," "Other Pacific Islander," "Other Asian," and "Some other race."<sup>282</sup> Thus, since its inception, the census has utilized "racial" categories that have been based on an admixture of concepts including color (White or Black), national origin (e.g., Korean), state of origin (e.g., Hawaiian), and even religion (e.g., Hindu).

The characterization of certain subgroups within the population has been particularly challenging for those designing the census. One example is the treatment of Hispanic individuals.<sup>283</sup> "Hispanic" is not considered a "race" for purposes of the census,<sup>284</sup> so Hispanics must choose one of the "racial" categories listed above by which to identify themselves.<sup>285</sup> However, the census asks a separate question concerning Hispanic identity.<sup>286</sup> In 2000, respondents were asked if they are "Spanish/Hispanic/Latino" and then were required to answer whether they are Mexican, Mexican American, Chicano, Puerto Rican, Cuban, or members of some other Hispanic subgroup. Predictably, different terminology has been applied to the category of "Hispanic" in different decades. In 1950 and 1960, they were classified as "Persons of Spanish Mother Tongue"; in 1970, they were identified as those "of both Spanish Surname and Spanish Mother Tongue"; in 1980, they were listed as "Hispanics"; in 1990, they were classified as "of

280. *Id.* The 1890 census had the following "racial" categories: white, black, Mulatto, Quadroon, Octoroon, Chinese, Japanese, and Indian. In 1900, Mulatto, Quadroon, and Octoroon disappeared, but Mulatto was utilized again in 1910 and 1920. Fukurai, *supra* note 30, at 28.

281. Fukurai, *supra* note 30, at 27. Hindu and Korean were eliminated in 1950, but Korean returned in 1970. *Id.* at 27–28.

282. U.S. Census Bureau, *United States Census 2000*, available at <http://www.census.gov/main/www/cen2000.html> (last visited Nov. 12, 2004) [hereinafter *2000 Census*].

283. For a discussion of Hispanic ethnicity, see generally FRANK D. BEAN & MARTA TIENDA, *THE HISPANIC POPULATION OF THE UNITED STATES 7–35* (1987) (discussing the extremely varied demographic and socioeconomic characteristics of those with Spanish origin).

284. *2000 Census*, *supra* note 282; U.S. Census Bureau, *United States Census 1990 Form* [hereinafter *1990 Census Form*].

285. See Mireya Navarro, *Going Beyond Black and White, Hispanics in Census Pick 'Other,'* N.Y. TIMES, Nov. 9, 2003, at 1, 21 (reporting that in the 2000 census, forty-eight percent of Hispanics identified themselves as white, two percent chose Black, and forty-two percent marked "some other race" as their response).

286. *1990 Census Form*, *supra* note 284; *2000 Census*, *supra* note 282.

Spanish/Hispanic origin"; and the 2000 census added the term of "Latino."<sup>287</sup> These different designations indicate that over the years, Hispanics have been identified alternatively as a linguistic group, a national group, and a continental group.<sup>288</sup>

The categorization of people of mixed "race" has also been especially troubling for the Census Bureau. Until 1980, "multiracial" individuals were required to identify themselves by the "race" of their non-White parent.<sup>289</sup> In 1990, those who wrote "Black-White" in response to the inquiry about "race" were identified as Black, and those who wrote "White-Black" were classified as White.<sup>290</sup> The 2000 census finally included the option of self-identification by more than one "race"<sup>291</sup> and, therefore, belatedly abandoned the notion of "racial" purity and acknowledged the fungible nature of "racial" boundaries. Approximately six million Americans chose two or more "races" by which to describe themselves.<sup>292</sup>

The census has perpetually adjusted and reshuffled its "racial" categories, which have, at different times, encompassed identification according to color, national origin, continent of origin, and other designations. This phenomenon highlights the fact that the American legal system has no fixed, uniform definition of the term "race" or mechanisms by which to identify membership in particular "racial" groups.

#### IV. ABANDONING "RACE" AND REFORMING THE LAW

##### *A. Reasons for Discontinuing the Use of "Race" as a Legal Concept*

We return now to the question posed at the beginning of this article. As noted, the term "race" appears in hundreds of contemporary federal and

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287. YANOW, *supra* note 26, at 57; 1990 Census Form, *supra* note 284; 2000 Census, *supra* note 282.

288. For a discussion of Hispanics as a "racial" group, see Gaines, *supra* note 31, at 2193 (stating that Hispanics descend from western Europeans, Native Americans, and West Africans, and therefore they are not a biologically distinct "racial" group). The author states that the concept of a Hispanic "race" emerged only in the early 1980s. *Id.* at 2193.

289. Scales-Trent, *supra* note 9, at 285.

290. *Id.*

291. YANOW, *supra* note 26, at 72. Some advocates suggested that a "multiracial" category be added to the census. However, many civil rights organizations opposed the proposal because of concern that such a category would reduce the number of people considered to be members of particular "races" and because it might have generated controversy regarding the protected status of various groups. 1994 Revisions to Directive 15, *supra* note 271; Omi, *supra* note 211, at 18.

292. Begley, *supra* note 33, at B1.

state statutes,<sup>293</sup> sometimes alone<sup>294</sup> and sometimes juxtaposed to related terms, such as "color" and "national origin."<sup>295</sup> If the social sciences, medical sciences, and the law can offer no reliable definition of the word, what does "race" mean in the law? How does "race" differ from "color" and "national origin"? The answer is that the concept's meaning is entirely unclear.

"Race," however, is not merely vague or incoherent, but worse, is a pernicious concept. Notions of "race," reinforced by legal mandates, have historically engendered the belief that human beings are divided into well-defined subspecies, some of which are superior to others.<sup>296</sup> This misconception has led to the oppression, subjugation, and even extermination of millions of people.<sup>297</sup> This part will construct the argument that the law should discontinue use of the term "race" for a number of reasons. First, the law has an expressive function, a power to shape public perception and ideology,<sup>298</sup> and, therefore, it must not reinforce fallacies about human groups. Second, the use of "race" terminology and categorization results in a number of tangible harms.

It must be emphasized that this article does not argue that individuals should stop identifying themselves as African-American, Jewish, Hispanic, etc. On the contrary, these identities are often central to the self-understanding and self-image of many individuals.<sup>299</sup> They provide people with a sense of community, common experience, and "linked fate."<sup>300</sup> They can also inspire minority members to nurture their cultural heritage and to

293. See discussion *supra* Part II.B–C.

294. See, e.g., 20 U.S.C. § 1701(a) (2000) (stating that students are entitled to equal educational opportunities regardless of their "race"); 21 U.S.C. § 848(o)(1)–(2) (2000) (providing that the "race" of an offender not be a factor in death sentencing).

295. See, e.g., 15 U.S.C. § 1691(a)(1) (2000) (establishing that it is unlawful for creditors to discriminate against any applicant "on the basis of race, color, religion, national origin, sex or marital status, or age"); 42 U.S.C. § 2000e-2(a) (2000) (prohibiting employment discrimination based on "race," color, religion, sex, or national origin).

296. Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1461 (2002) (discussing the theory that "race consciousness breeds a culture of inferiority, victimization, and helplessness among persons of color"); Jayne Chong-Soon Lee, *Review Essay: Navigating the Topology of Race*, 46 STAN. L. REV. 747, 759 (1994) (noting that physical traits are often associated with moral characteristics).

297. AAA RESPONSE TO OMB DIRECTIVE 15, *supra* note 34 (referring to "the Holocaust, slavery, and the extirpation of American Indian populations").

298. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350–51, 394 (1997) (arguing that criminal laws express shared values and influence people's understanding of each other's beliefs).

299. López, *supra* note 34, at 61.

300. Rogers M. Smith, *Black and White After Brown: Constructions of Race in Modern Supreme Court Decisions*, 5 U. PA. J. CONST. L. 709, 711 (2003) (noting that "race" identity is also often the basis for cultural expression and political action).

galvanize support for political action to redress past wrongs.<sup>301</sup> I argue only that being African-American, White, Jewish, or Hispanic should be understood as something other than membership in a "race."

### 1. The Expressive Power of the Law

In addition to controlling human behavior through rules and sanctions, the law has symbolic meaning and conveys social messages.<sup>302</sup> Revisions in the law can induce people to change their fundamental beliefs, at least in part because human beings crave social approval and thus strive to conform to public norms.<sup>303</sup> The public statements made by the law can, therefore, be even more powerful than its threat of sanctions in influencing behavior.<sup>304</sup> Some scholars refer to this phenomenon as the "expressive" function or power of the law.<sup>305</sup>

Consequently, for example, environmental protection laws can mold human attitudes towards natural resources.<sup>306</sup> Laws that prohibit littering can shape human behavior even if they are not accompanied by vigorous enforcement activity.<sup>307</sup> Similarly, statutes governing cigarette smoking in public places, alcohol consumption by minors, and seatbelt use can shift societal norms and promote social advancement through their symbolic power.<sup>308</sup>

At the same time, governmental action can produce expressive harms, that is, injuries caused by the messages conveyed through governmental

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301. Lisa K. Pomeroy, *Restructuring Statistical Policy Directive No. 15: Controversy over Race Categorization and the 2000 Census*, 32 U. TOL. L. REV. 67, 81 (2000).

302. Sunstein, *supra* note 41, at 2024.

303. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340, 359, 369–71 (2000) (discussing incentives provided by the law that are associated with people's desire for social approval).

304. Dan M. Kahan, *Social Norms, Social Meaning, and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 615 (1998) ("That people care intensely about what laws express is confirmed by the tremendous political salience of capital punishment, flag desecration, and other criminal-law issues that have only trivial or ambiguous regulatory significance."); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 (2000) (stating "that law influences behavior independent of the sanctions it threatens to impose, that law works by what it says in addition to what it does").

305. See Kahan, *supra* note 304, at 615 (speaking of the "expressive rationality of criminal law"); Lillquist & Sullivan, *supra* note 46, at 399 (explaining the view that "laws and legal actors can send stigmatizing messages that result in concrete harms separate and apart from any denial of government benefits"); McAdams, *supra* note 304, at 1650 (stating that law has both a punitive and an "expressive" function).

306. Sunstein, *supra* note 41, at 2024.

307. *Id.* at 2032.

308. See *id.* at 2052.

actions. Such harms have been found to rise to the level of constitutional violations<sup>309</sup> even if no individual has suffered specific damages, and the harm is purely social.<sup>310</sup> Commentators point out, for example, that the First Amendment's ban of governmental "endorsement" of religion<sup>311</sup> is largely a prohibition of expressive harms.<sup>312</sup> According to Justice O'Connor, the wrong committed when a state endorses religion is that it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders. . . ."<sup>313</sup>

Within the last decade, the Supreme Court has signaled that expressive harms can also constitute Equal Protection violations. In *Shaw v. Reno*<sup>314</sup> and *Miller v. Johnson*,<sup>315</sup> the Court invalidated redistricting legislation in North Carolina and Georgia without finding that they resulted in vote dilution meant to minimize the voting power of minorities.<sup>316</sup> Rather, the plans were condemned because they reinforced "racial stereotypes" and communicated to "elected officials that they represent a particular racial group rather than their constituency as a whole."<sup>317</sup>

By extension, the terminology that the law utilizes in classifying particular populations can have significant implications. As previously discussed, notions of "race," reinforced by legal mandates, have historically engendered the belief that human beings are divided into subspecies, some of which are superior to others.<sup>318</sup> This misconception has led to countless human rights violations.<sup>319</sup> Still today some individuals are developing so-called "scientific" evidence concerning the moral and intellectual

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309. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993).

310. *Id.* at 507-08.

311. See *Edwards v. Aguillard*, 482 U.S. 578, 585-86 (1987).

312. Pildes & Niemi, *supra* note 309, at 512.

313. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).

314. 509 U.S. 630 (1993).

315. 515 U.S. 900 (1995).

316. *Miller*, 515 U.S. at 911; *Shaw*, 509 U.S. at 652.

317. *Shaw*, 509 U.S. at 650.

318. Hutchinson, *supra* note 296, at 1461 (discussing the theory that "race consciousness breeds a culture of inferiority, victimization, and helplessness among persons of color"); Chong-Soon Lee, *supra* note 296, at 759 (noting that physical traits are often associated with moral characteristics).

319. AAA RESPONSE TO OMB DIRECTIVE 15, *supra* note 34 (referring to "the Holocaust, slavery, and the extirpation of American Indian populations").



deficiencies of particular “racial” groups in order to advance political agendas.<sup>320</sup>

The law, particularly in the civil rights arena, where the term “race” is frequently used, should spearhead the effort to combat these fallacies. The law should not continue to reify “race” by giving it a legitimacy it does not otherwise have. By discontinuing utilization of the term, the law can make a powerful statement that the concept of “race” is a fiction and that there are no superior and inferior human subspecies. If the law limits its vocabulary to more precise terminology such as “color,” “national origin,” or “continent of origin,” it will teach that populations are distinguishable only in terms of superficial characteristics such as skin color or birthplace. It will further elucidate that those who discriminate rely only on these superficial attributes to identify their targets and that discrimination is not justified by any deeper, essentialist qualities that characterize members of particular “races.” Abandonment of the term “race,” therefore, would strike a blow against the ignorance that supports intolerance and prejudice.

While for the last forty years “race” has been used in the law in order to protect and benefit minority groups, there is no guarantee that American law will never again authorize the marginalization of certain segments of the population. The more progressive attitudes of today potentially could be a deviation from the norm rather than a lasting phenomenon.

Continued belief in “race” as biology will reinforce notions of particular groups as naturally less intelligent<sup>321</sup> or more prone to violence or criminal activity than others.<sup>322</sup> These beliefs can lead to various forms of discrimination in areas such as employment, insurance, and racial profiling.<sup>323</sup> If the law does not reject the notion that human beings can be

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320. See *supra* Part III.B.2 (discussing THE BELL CURVE WARS, *supra* note 227, and the theory that Blacks are intellectually and morally inferior to Whites).

321. See discussion *supra* Part III.B.2.

322. See Carter, *supra* note 2, at 18–19 (discussing the controversial nature of the contention that crime rates are “racially” disproportionate and evidence that drug use is not higher among African-Americans); see also Juan Williams, *The Survival of Racism Under the Constitution*, 34 WM. & MARY L. REV. 7, 16–17 (1992). The article reports the results of a 1990 survey conducted by the National Opinion Research Center at the University of Chicago, which included Whites, Blacks, Hispanics, and Asians, represented in proportion to their percentage of the American population. The survey respondents indicated that “62% thought blacks more likely to be lazy; 56% said blacks were more prone to violence; 53% said the black population is less intelligent” and 78% thought that African-Americans “are more likely than whites to ‘prefer to live off welfare.’” *Id.*

323. *Id.*; see also Bill Dedman, *Racial Profiling is Confirmed: Police Face New Rules on Stopping Motorists*, BOSTON GLOBE, May 4, 2004, at B1 (reporting the results of a study conducted by Northeastern University’s Institute on Race and Justice that found that in nearly three quarters of the communities tested in Massachusetts, the police departments were guilty of racial profiling against minority drivers).

classified by "races," it is not unfathomable that we would see a return to the familiar practices of governmentally sanctioned discrimination against particular minorities because of their imagined "racial" characteristics.

## 2. Other Tangible Harms

Admittedly, use of the term "race" does not commonly cause jurisprudential confusion or generate unjust case outcomes. Most often, "race" is linked in the public mind with obvious physical traits such as skin color, and thus, there is little controversy as to whether a civil rights litigant is a member of a particular "race" or whether "race" discrimination theory applies to a specific case. On rare occasions, however, the courts have had to grapple with the issue of whether minorities such as Jews or Arabs are "races" and thus protected against "race" discrimination.<sup>324</sup> These controversies would be eliminated if "race" were no longer the focus of legal inquiry.

In addition, the incoherence of the term "race" and the misconception that "race" is a biological category result in significant social harms. The growing population of individuals of mixed "racial" backgrounds makes the question of "race" identity in American society increasingly complex and the idea that there are fixed "racial" categories increasingly outdated.<sup>325</sup> Individuals of "multiracial" background may feel disenfranchised by the American focus on identifying people by "race" and focusing on "racial" diversity or discrimination.<sup>326</sup> Since these individuals have no single "race," it is particularly problematic to apply the term to them, and reference to their color, national origin, or continent of origin is far more sensible.

A shift away from the concept of "race" and a refocusing on more meaningful terms might also advance social, political, and scientific discourse in a variety of arenas. For example, in speaking of "racial" diversity for affirmative action and other purposes, it is often unclear what

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324. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987) (finding that Congress intended to protect Jews against official and private "racially" discriminatory interference with property rights pursuant to civil rights law); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding that those of Arab descent are protected against "racial" discrimination under civil rights law); *United States v. Nelson*, 277 F.3d 164, 176–79 (2d Cir. 2002) (discussing whether Jews constitute a "race" for purposes of Thirteenth Amendment jurisprudence).

325. See *supra* note 32 and accompanying text. According to the 1990 census, two million children younger than eighteen had parents who were of different "races." Omi, *supra* note 211, at 18. In addition, over six million individuals described themselves as members of two or more "races" in the 2000 census. Begley, *supra* note 33, at B1.

326. See *supra* Part III.C.3 (discussing debates concerning how the 2000 census should address individuals of multiracial background).

type of diversity is actually sought. Is it skin color diversity, viewpoint diversity, background diversity, economic status diversity, or something else?<sup>327</sup> Any one of these might be legitimate, but they are all subsumed and obfuscated by the term "race." The complexity of the diversity question was demonstrated by the nomination of Justice Clarence Thomas. Prior to his appointment, many agreed that an African-American should be selected to replace Justice Marshall.<sup>328</sup> However, some believed that Thomas would not contribute the appropriate "racial" diversity because of his conservative outlook.<sup>329</sup> "Racial" diversity was obviously not synonymous with color diversity for these advocates, but rather, seemed to be a veiled demand for the appointment of an African-American person with a particular political viewpoint. Abandoning the incoherent term "race" might force American decisionmakers to think more clearly about their goals and promote more explicit and candid public discussion.

To the extent that medical science is increasingly interested in "racially" tailored research and treatment,<sup>330</sup> it is important that scientists remain wary and cognizant of the dangers of focusing on "race" in the medical arena.<sup>331</sup> As previously discussed, "race" cannot be perceived as biology and cannot be linked too closely with health conditions.<sup>332</sup> In designing clinical trials

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327. See *supra* note 49; see also McGowan, *supra* note 30, at 245 (arguing that it is inappropriate for diversity programs to use "race or ethnicity as proxies for diversity of social experience and social affiliation").

328. Richard J. Cattani, *Diversity on the Supreme Court*, CHRISTIAN SCI. MONITOR, July 17, 1991, at 18.

329. A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1991) (discussing the author's concerns about Thomas's appointment to the Supreme Court); A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1407 (1994) (stating that the National Bar Association, an organization of African-American lawyers, voted to oppose Thomas's nomination, with 128 members opposing the nomination, 124 supporting it, and 31 taking no position); Cattani, *supra* note 328, at 18 (stating that some viewed Thomas as a "conservative Reagan/Bush white jurist in black skin"); Christopher Edley, Jr., *Straight Talk on the Quota Candidate . . . Neither Liberals nor Conservatives Can, in Good Conscience, Support Thomas*, ST. LOUIS POST-DISPATCH, July 14, 1991, at 3B (stating that opponents of affirmative action should oppose the Thomas nomination because his selection can be explained only by his color, and supporters of affirmative action should oppose him because of his political outlook); Rance Thomas, *A Step Backward on Civil Rights: Thomas' Record Shows Little Sympathy for Society's Disadvantaged*, ST. LOUIS POST-DISPATCH, Sept. 8, 1991, at 3G (arguing that President Bush should withdraw the nomination of Judge Thomas and, instead, "nominate an African-American who has demonstrated a strong commitment to civil, individual and women's rights").

330. See *supra* notes 175-178, 185-190 and accompanying text.

331. See Lillquist & Sullivan, *supra* note 46, at 395 (arguing that "racial profiling" should be allowed in medicine only under very limited circumstances).

332. See discussion *supra* Part III.A.2.

and treatments, medical professionals must remain mindful of the mixed "racial" origins of so many Americans and of the diverse populations affected by "racial" diseases such as Tay-Sachs and sickle cell anemia.<sup>333</sup> Incorrect correlation of illnesses with a single "race" could result in misdiagnoses by medical professionals.<sup>334</sup> Doctors may miss the presence of sickle cell anemia in individuals who are of mixed race because they do not look classically Black and are not perceived as candidates for the disease. Similarly, people of Greek, Italian, or Arab extraction, who are also vulnerable to sickle cell anemia, may receive erroneous diagnoses because they look White, and medical professionals do not think of testing them for this illness.

Racial profiling in medicine can also lead to employment discrimination, insurance discrimination, and other forms of discrimination by those who assume that members of a particular minority are more likely to become ill than others.<sup>335</sup> For example, genetic research concerning breast cancer and individuals of Ashkenazi Jewish descent has led to concerns about stigmatization of Jews as prone to develop cancer and a reinforcement of the idea that they are a "racially" distinct group.<sup>336</sup> Similarly, in several cases, African-American employees or military personnel have been singled out for sickle cell anemia testing even though no other at-risk groups were screened for that condition or for other diseases.<sup>337</sup>

Finally, an overemphasis on the biological components of health disparities rather than social and environmental factors can lead to a misallocation of resources. To illustrate, according to many experts, "racial" differences in hypertension are linked not necessarily to biological factors, but to diet, environment, exercise, and stress.<sup>338</sup> While developing "race-

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333. See *supra* notes 181–184 and accompanying text.

334. See Richard S. Garcia, *The Misuse of Race in Medical Diagnosis*, CHRON. HIGHER EDUC., May 9, 2003, at B15 (relating the story of an African-American girl whose cystic fibrosis was not diagnosed until she reached the age of eight because the disease is much more common among Whites than among Blacks and thus her doctors overlooked its possibility in her case).

335. See *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1272 (9th Cir. 1998) (finding that African-American employees could bring a cause of action under Title VII of the Civil Rights Act of 1964 against an employer who tested their blood samples for the sickle cell trait); Kahn, *supra* note 182, at 40.

336. Janet L. Dolgin, *Personhood, Discrimination, and the New Genetics*, 66 BROOK. L. REV. 755, 757 (2000) (discussing concerns that new genetic technology poses significant dangers of "discrimination and stigmatization" to Jewish communities and others); Kahn, *supra* note 50, at 479.

337. *Norman-Bloodsaw*, 135 F.3d at 1272; Kahn, *supra* note 182, at 41 (relating that the U.S. Air Force screened Blacks to determine if they were sickle cell carriers).

338. Kahn, *supra* note 50, at 480; see also *supra* notes 178–180 and accompanying text.

specific” drugs might be useful,<sup>339</sup> resources should not be shifted away from other initiatives aimed at diminishing socioeconomic injustices, since these could be even more effective in enhancing the health status of minorities.<sup>340</sup> An excessive reliance on “racial” categorization could thus compromise public health and welfare.

### B. Possible Approaches

Discrimination, unfortunately, is still a fact of life in American society.<sup>341</sup> Therefore, we cannot simply eradicate the term “race” from the legal lexicon by eliminating all anti-discrimination laws. To the contrary, we must continue to address problems of inequity and provide protection to vulnerable groups, but we must do so in a more sensitive way that undermines rather than reinforces prejudices and misconceptions. It is for this reason that we must substitute other terms for the word “race.”

Changes in legal and social terminology in the civil rights arena are not unprecedented. In a matter of decades, the American public has altered its vocabulary several times, switching from “Negro” to “Colored” to “Black” to “Afro-American” and finally, to “African-American.”<sup>342</sup> These changes from a “racial” term to a color term to a geographic origin term seem to acknowledge the power of language. An integral part of American society’s shift in consciousness and effort to promote the civil rights of this minority group has been a change in the word by which it is identified.

In a different statutory context, the Rehabilitation Act of 1973’s<sup>343</sup> anti-discrimination mandate originally referred to “handicapped person.”<sup>344</sup> By

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339. Kahn, *supra* note 50, at 474–75 (discussing the development of BiDil®, a drug designed specifically to treat African-Americans with heart failure).

340. Kahn, *supra* note 182, at 41–42; Sankar et al., *supra* note 180, at 2987–88 (discussing the pitfalls of focusing excessively on genetic factors as the cause of health disparities).

341. The Equal Employment Opportunity Commission (EEOC) reports that in fiscal year 2003 it received 28,526 charges of race discrimination in employment. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, RACE-BASED CHARGES: FY 1992–FY 2003, *available at* <http://www.eeoc.gov/stats/race.html> (last visited Oct. 14, 2004).

342. Kenneth Lasson, *Political Correctness Askew: Excesses in the Pursuit of Minds and Manners*, 63 TENN. L. REV. 689, 693 (1996) (noting that all these changes took place within less than fifty years).

343. 29 U.S.C. §§ 701–724 (1998).

344. See Timothy G. Church & James R. Neumeister, *University Control of Student-Athletes with Disabilities Under the Americans with Disabilities Act and the Rehabilitation Act*, 25 J.C. & U.L. 105, 117 n.80 (1998) (noting that, in 1992, Congress amended the Rehabilitation Act to substitute the word “disability” for the word “handicap” pursuant to Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102(p)(32), 106 Stat. 1992); Hoffman, *supra* note 23, at 1229 (discussing the Rehabilitation Act’s original definition of “handicapped individual”).

1990, however, it was felt that "individual with a disability" is the more sensitive and appropriate term, and thus, the Americans with Disabilities Act of 1990<sup>345</sup> adopted this new language,<sup>346</sup> and the Rehabilitation Act was also revised accordingly.<sup>347</sup> Decades earlier, Pennsylvania chose to eliminate the term "retarded child" from its statutes and replaced it with "exceptional child."<sup>348</sup>

Similarly, the legal community in particular and the public at large should abandon the term "race."<sup>349</sup> While legislatures may be loathe to revisit and amend hundreds of existing statutes solely for the purpose of redacting the word "race," doing so would not be impossible. As discussed above, statutory terminology has previously been changed in more limited contexts.<sup>350</sup> A recent development in Rwanda, a country historically plagued by ethnic hatred and massacres, is particularly powerful. In the spring of 2004, the New York Times reported that Rwanda has outlawed the concept of ethnicity.<sup>351</sup> Ethnicity is no longer mentioned in schoolbooks, the media, or government identity cards, and the new crime of "divisionism" includes speaking provocatively about ethnicity.<sup>352</sup>

Nevertheless, even if legislatures refuse to amend all federal and state statutes that currently feature the word "race,"<sup>353</sup> the proposal outlined

345. 42 U.S.C. § 12112(a) (2000).

346. Cheryl L. Anderson, "*Deserving Disabilities*": *Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83, 87–88 (2000) (stating that the new vocabulary reflects a change in attitude about people with disabilities); Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1342 n.2 (1993) (explaining that, within the disability community, "[t]he term 'disability' is preferred over the term 'handicap' because the community has developed a definitional distinction between the two words: a disability is a physical or mental condition of an individual, whereas a handicap is a restriction placed on one's ability to function in the external environment").

347. Church & Neumeister, *supra* note 344, at 117 n.80; *see also* 29 U.S.C. § 706(8)(C) (1998) (referring to the term "individual with a disability").

348. David T. Link, *Law Searching by Computer*, in AUTOMATED L. RES. 3, 5–6 (Ronald A. May ed., 1973).

349. This change is somewhat more conceptual than the examples provided above, but the shift from "Negro" to "African-American" and from "handicapped" to "individual with a disability" illustrate that the public mind can adapt to new terminology. Thus, there is hope that the American community can stop speaking of "race" and speak instead of "color," "national origin," etc.

350. *See* notes 343–348 and accompanying text.

351. Marc Lacey, *A Decade After Massacres, Rwanda Outlaws Ethnicity*, N.Y. TIMES, Apr. 9, 2004, at A3.

352. *Id.*

353. Whether or not this is done, the proposal would not require a constitutional amendment to revise the Fifteenth Amendment. Because of its historical context and value, this amendment could retain its existing language.

below should at least apply to future legislative drafting.<sup>354</sup> The task of determining which words are appropriate substitutes for “race,” however, is itself challenging. Several alternatives for legislative reform are considered and evaluated below.

### 1. Redaction of the Term “Race” from All Legislation Without Further Statutory Revision

For statutes that list “race” among several other protected classifications, one alternative is to eliminate the word “race” and retain only the more precise terms of “color” and “national origin.”<sup>355</sup> Thus, for example, Title VII would provide that it is unlawful for employers to engage in discrimination because of an “individual’s color, religion, sex, or national origin.”<sup>356</sup>

The shortcoming of this approach is that the terms “color” and “national origin” do not capture all aspects of “race” that are relevant for legislative purposes. The term “color” expresses most closely the obvious identifying trait of what we popularly think of as “race.” However, there may be individuals who look White but are subjected to discrimination because it is known that they have Black parents or grandparents. These individuals might suffer not because of their color, but because of their ancestry. In addition, a prohibition of color discrimination would not cover individuals of Hispanic or Jewish origin, who are often indistinguishable from non-Hispanics and non-Jews by the hue of their skin.<sup>357</sup>

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354. By “future legislative drafting,” I mean both the passage of new laws and amendment of existing statutes. If current laws are amended for any reason, “race” terminology could be revised in the process of making other changes.

If existing statutes are amended in the future to eliminate “race,” then “race” terminology in case law precedent would not correspond to the new wording of the law. Courts applying precedent that uses the “race” concept would have to substitute the new statutory terms, e.g., color, continent of origin, etc., when drafting their opinions. Similarly, if the law were to abandon the “race” concept, the Supreme Court would have to elucidate what is meant by “race” in Fourteenth Amendment jurisprudence since it would no longer be appropriate to speak of “race” discrimination in the equal protection context. Instead, cases would be brought for color discrimination, national origin discrimination, etc. To the extent it has not already sufficiently done so, the Court would have to determine whether and under what circumstances strict scrutiny should apply to classification by color, continent of origin, national origin, and other related categories.

355. For a discussion of contemporary federal and state statutes that address “race” issues, see *supra* Part II.B–C.

356. See 42 U.S.C. § 2000e-2(a)(1) (2000).

357. Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination under Title VII*, 35 WM. & MARY L. REV. 805, 839 (1994) (noting that “Jews are identical to non-Jews in virtually every physical aspect”).

"National origin" is defined as the nation or country of one's birth or the country of birth of one's ancestors.<sup>358</sup> The prohibition of national origin discrimination thus covers discrimination against individuals because they are Mexican, Cuban, or Italian. The courts have also extended the concept of "national origin" to apply to some populations, such as Gypsies and Acadians, who live in particular geographic regions but have no country of their own.<sup>359</sup>

Nevertheless, "national origin" does not extend to many other circumstances in which the country of one's origin is not at issue. For example, light skinned individuals who have an African-American ancestor or atheists who have Jewish ancestry are not covered by the "national origin" concept. In addition, they do not fall under the "color" or "religion" classifications, since they look White and are not subjected to discrimination because of their religious beliefs. Without additional terminology to expand the statutory scope, these individuals, therefore, would be vulnerable to discrimination as they would be excluded from all of Title VII's protected classes.

In addition, some people are denied opportunities for which they are qualified not because of their color or national origin per se, but because of expressions of their national or color identities.<sup>360</sup> For example, some African-Americans might wear dreadlocks<sup>361</sup> or speak Ebonics,<sup>362</sup> and Hispanics might speak English with a foreign accent.<sup>363</sup> To the extent that

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358. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 89 (1973) (quoting 110 CONG. REC. 2549 (1964) (recording Congressman Roosevelt's statement that national origin "means the country from which you or your forebears came. . . . You may come from Poland, Czechoslovakia, England, France or any other country")).

359. See *Janko v. Ill. State Toll Highway Auth.*, 704 F. Supp. 1531, 1531 (N.D. Ill. 1989); *Roach v. Dresser Indus. Valve & Instrument Div.*, 494 F. Supp. 215, 218 (W.D. La. 1980) (holding that Gypsies and Acadians, respectively, can claim protected status under Title VII's "national origin" classification).

360. See *Perea*, *supra* note 357, at 853 (stating that most discrimination against Hispanics "occurs because of ethnic traits" rather than national origin).

361. See *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232-33 (S.D.N.Y. 1981) (upholding the dismissal of a receptionist because she wore her hair in cornrows in violation of the airline's dress code).

362. Ebonics is also known as African-American Vernacular English. CENTER FOR APPLIED LINGUISTICS, CAL STATEMENT TO THE MEDIA ON EBONICS (1997), *available at* [www.cal.org/ebonics/ebcal.html](http://www.cal.org/ebonics/ebcal.html) (last visited Oct. 14, 2004).

363. The courts have issued inconsistent decisions concerning whether discrimination based on accent creates a cause of action for national origin discrimination. See *Carino v. Univ. of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (holding that an employer had violated Title VII by demoting an employee born in the Philippines because of his accent); *Xieng v. Peoples Nat'l Bank of Wash.*, 844 P.2d 389, 391-92 (Wash. 1993) (en banc) (finding that an employer engaged in national origin discrimination, in violation of state law, when it refused to promote an employee because of his accent, even though the accent did not interfere



we wish to proscribe such discrimination, we would fail to do so if statutes such as Title VII extended only to the categories of color and national origin.<sup>364</sup> Simply eliminating the term “race” from legislative texts without further statutory revision, therefore, is not an optimal response to the vagueness of the “race” concept.

## 2. Elimination of the Word “Race” and Consistent Substitution of Another Term in All Statutes

A second approach is to substitute another word for the term “race” in all statutory provisions addressing “race” issues. The challenge is to find a word that captures all legally relevant connotations of the word “race,” a task that is most probably impossible. The terms “color” and “national origin” have already been discussed above.<sup>365</sup> Several other candidates are analyzed below.

### a. *Ethnicity*

In searching for a fitting replacement for the word “race,” one might turn to “ethnicity.”<sup>366</sup> Unfortunately, “ethnicity,” like “race,” has no fixed meaning.<sup>367</sup> As discussed above, Directive 15 identifies “ethnicity” exclusively in terms of “Hispanic or Latino” and “not Hispanic or Latino.”<sup>368</sup> Ethnic groups have been described as populations “organized around an assumption of common cultural origin” or “bound together by common ties of race, language, nationality or culture.”<sup>369</sup> Even more

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with job performance). *But see* *Fragante v. City of Honolulu*, 888 F.2d 591, 598–99 (9th Cir. 1989) (ruling against an applicant who was denied employment because of his Filipino accent even though he had the highest score among 721 civil service exam takers), *cert. denied*, 494 U.S. 1081 (1990). It should be noted that most courts have found that Title VII is not violated when a bilingual employee is forbidden to speak a foreign language at work. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489–90 (9th Cir. 1993) (finding that an employer did not violate Title VII by subjecting bilingual employees to an English-only rule, but denying the employer’s summary judgment motion with respect to the rule’s application to those who spoke no English but could, nevertheless, perform their jobs); Perea, *supra* note 357, at 828.

364. A Hispanic person’s accent is not necessarily related to her specific country of birth (e.g., Mexico or Guatemala), but rather, stems from the fact that her mother tongue is Spanish.

365. *See supra* Part IV.B.1.

366. AAA RESPONSE TO OMB DIRECTIVE 15, *supra* note 34 (recommending that the term “race” be phased out and replaced by a more correct phrase such as “ethnic origin”).

367. Kaplan & Bennett, *supra* note 168, at 2710 (“Ethnicity means different things in different contexts.”); Perea, *supra* note 357, at 833 (noting that ethnicity is difficult to define because it represents “a varying mix of different traits”).

368. 1997 Revisions to Directive 15, *supra* note 272.

369. Editorial, *supra* note 30, at 98.

broadly, ethnicity is at times defined by reference to culture, heritage, religion, national origin, ancestry, shared symbols or values, and common language.<sup>370</sup> According to one source, "ethnicity" is a positive, complimentary designation that applies only to Whites, whereas minorities continue to be classified solely by "race," that is, by their visible physical characteristic.<sup>371</sup> Finally, in some minds, "ethnicity" is simply synonymous with "race."<sup>372</sup> While the word "ethnicity" arguably captures important aspects of group identity that are related to culture and heritage, it is not a satisfactory substitute for the word "race."

### b. Continent of Origin

Contemporary genetic findings might lead to the conclusion that "continent of origin" is the ideal replacement for "race."<sup>373</sup> However, this term alone is not appropriate in all circumstances. To illustrate, while Australian aborigines are Black in appearance, their continent of origin is Australia and not Africa.<sup>374</sup> If they are subjected to discrimination, it is unlikely to be because they are from the continent of Australia, but rather, because of their physical appearance. Hispanics, to the extent that they are

370. Martin Bernal, *Race in History*, in GLOBAL CONVULSIONS: RACE, ETHNICITY, AND NATIONALISM AT THE END OF THE TWENTIETH CENTURY 76 (Winston A. Van Horne ed., 1997); Kaplan & Bennett, *supra* note 168, at 2710; Perea, *supra* note 357, at 833. Another source quotes the following definitions of ethnicity, found in a variety of dictionaries:

1. Of or pertaining to a social group . . . on the basis of complex, often variable traits including religious, linguistic, ancestral, or *physical* characteristics. (American Heritage Dictionary 1975, p. 450)

1a. Of or pertaining to sizable groups of people sharing a common and distinctive *racial*, national, religious, linguistic, or cultural heritage. (American Heritage Dictionary 1992, p. 630)

2. Pertaining to *race*; peculiar to a *race* or nation; ethnological. (Oxford English Dictionary 1971, p. 313)

2a. Pertaining to *race*; peculiar to a *race* or nation; ethnological. Also, pertaining to or having common *racial*, cultural, religious, or linguistic characteristics . . . ; hence (U.S. colloq), foreign, exotic. (Oxford English Dictionary 1991, p. 423)

3. Of or relating to a religious, *racial*, national or cultural group. (Webster's II New Riverside University 1984, p. 445) . . .

YANOW, *supra* note 26, at 47.

371. Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 932-36 (1996).

372. Vilna Bashi, *Racial Categories Matter Because Racial Hierarchies Matter: A Commentary*, 21 ETHNIC & RACIAL STUD. 959, 961 (1998); Kaplan & Bennett, *supra* note 168, at 2710; *see also* definitions provided *supra* note 370 (defining ethnicity by reference to "race").

373. *See supra* notes 155-159 and accompanying text.

374. *See 1994 Revisions to Directive 15*, *supra* note 271 (noting that none of Directive 15's categories cover Australian aborigines).

considered a “racial” group, are often marginalized because of their specific national identity (e.g., Mexican), their accent, or their speaking Spanish, and not because they are of Latin American or European extraction.<sup>375</sup>

In the context of racial profiling and other types of appearance-based discrimination, one’s “continent of origin” is also irrelevant to the perpetrator of the wrong. For example, Blacks from Jamaica or Cuba are subjected to racial profiling and other discriminatory practices even though their immediate ancestors are not African.<sup>376</sup> It is awkward and senseless to prohibit “continent of origin profiling,” and instead, the focus needs to be on avoiding selection based solely on appearance. Likewise, mixed “race” individuals might be victimized because they do not look classically White,<sup>377</sup> but the wrongdoers might not know whether they are Latinos, African-American, or “multiracial,” and thus, could deny being motivated by the victims’ continental links. Prohibiting continent of origin-based discrimination alone would not, therefore, effectively combat discrimination in many cases.

Finally, the term “continent of origin” is problematic in light of ancient human history. Many scientists believe that human beings originated in Africa and that Caucasians are a subset of the population that left Africa and walked north, losing their skin pigmentation in order to adjust to colder, less sunny climates.<sup>378</sup> Aborigines migrated to Australia along the tropics and retained more of their physical characteristics.<sup>379</sup> Thus, in the most literal sense of the phrase, it may well be that the continent of origin of all humanity is Africa, and modern references to Africans or African-Americans necessarily ignore the early history of the human species.<sup>380</sup>

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375. See *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1483–84 (9th Cir. 1993) (bilingual employees disciplined because they spoke Spanish at work); *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 240–41 (5th Cir. 1993) (employee harassed because he was Mexican); *Fragante v. City of Honolulu*, 888 F.2d 591, 593–94 (9th Cir. 1989) (applicant denied position because of foreign accent); *1997 Revisions to Directive 15*, *supra* note 272 (defining “Hispanic or Latino” as a “person of Cuban, Mexican, Puerto Rican, . . . South or Central American, or other Spanish culture or origin”).

376. See Kevin R. Johnson, “*Melting Pot*” or “*Ring of Fire*”? *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1286–87 (1997) (stating that society treats dark skinned individuals as “Black” even if they are Latino).

377. Steven Greenhouse, *Going for the Look, but Risking Discrimination*, N.Y. TIMES, July 13, 2003, at A12 (describing a growing trend in American industry of hiring sales personnel based on their attractive physical appearance).

378. de Plevitz & Croft, *supra* note 63, at 115–16. But see JAMES SHREEVE, THE NEANDERTHAL ENIGMA 73 (1995) (discussing the theory that “the living races of humankind came not from Africa but from ancestors who lived in the same regions [as those in which they currently live] as much as a million years ago”).

379. de Plevitz & Croft, *supra* note 63, at 116.

380. *Id.* at 115; see *infra* Part IV.C.1 for further discussion.

*c. Ancestry or Descent*

Ancestry can be defined as "family descent or lineage."<sup>381</sup> The term "ancestry" was initially listed as a separate protected category in an early draft of Title VII but was ultimately deleted because it was understood to be synonymous with the term "national origin."<sup>382</sup> Nevertheless, the term "ancestry," read literally, is applicable to some circumstances that are not encompassed by the other concepts analyzed thus far.

For example, some light-skinned individuals might be subjected to discrimination because they have an African-American ancestor, even though they do not look Black. Discrimination against some people of Jewish lineage is another case in point. Judaism is a religion, and is generally covered under that term in anti-discrimination statutes.<sup>383</sup> However, historically, individuals of Jewish descent have been persecuted even if they did not identify with the Jewish faith or if they had only a single Jewish ancestor several generations in the past.<sup>384</sup> In their case, victimization is linked to their ancestry rather than to any other characteristic.<sup>385</sup>

However, by contrast to the other excessively narrow terms discussed in this article,<sup>386</sup> "ancestry" and "descent," standing alone, are overbroad. Prohibiting discrimination based on ancestry or descent could induce people to argue that they are entitled to statutory protection because they were born into poverty, were born in particular regions of the country, descended from leaders of a political party that is now out of favor, or are vulnerable for an infinite number of other reasons associated with their parentage. The terms "ancestry" or "descent," without further qualification, would not be satisfactory replacements for "race."

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381. Perea, *supra* note 357, at 832.

382. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 89 (1973) (citing H.R. 7152, 88th Cong. § 804 (1963) and H.R. REP. NO. 88-914, at 87 (1963)).

383. *See, e.g.*, Title VII of the CRA, 42 U.S.C. § 2000e-2(a) (2000) (prohibiting employment discrimination based on "race, color, religion, sex, or national origin").

384. *See supra* note 245 and accompanying text.

385. *See United States v. Nelson*, 277 F.3d 164, 177 (2d Cir. 2002) (noting that Jews are considered a "race" under particular civil rights statutes, and therefore, a law prohibiting "racially" based violent interference with enjoyment of public facilities applied to Jews).

386. *See supra* Part IV.B.1-2.

*C. A More Nuanced Approach: Assessing the Purpose of Each Statute and Substituting Appropriate Terminology for the Word "Race"*

The problem with endeavoring to unpack the meaning of "race" is that all words and phrases that might define it prove to be ambiguous, underinclusive, or overinclusive when they are themselves analyzed. No single word effectively communicates all of the different facets of human identity for which "race" might stand in different minds.<sup>387</sup> Consequently, this article recommends that the word "race" be replaced by a series of terms appropriate to the statutory context in question. Laws are passed with specific aims in mind, in order to solve particular problems,<sup>388</sup> and at their best, they are neither too narrow nor too broad. In light of the purpose of each law, drafters of civil rights legislation should be required to determine their intended subject group with precision and to choose terminology that accurately describes it. Several illustrations can elucidate this approach.

1. Anti-Discrimination Laws

Elimination of the term "race" is particularly appropriate in the anti-discrimination context. In truth, discriminators act because of superficial traits that seem apparent to them. They discriminate because of color, or national origin, or what they believe to be a person's continental or religious origins. The term "race" adds nothing to our understanding of the basis for discrimination, and it mistakenly suggests that there might be some legitimate biological or moral grounds to distinguish among different populations. It is more sound to identify the true nature of what we now call "racial" discrimination: it is based on nothing more than people's physical appearance, where they were born, or who their ancestors were.

The anti-discrimination laws generally protect individuals against discrimination based on immutable characteristics, traits that an individual cannot alter.<sup>389</sup> "Color" and "national origin" are certainly immutable and,

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387. See *supra* Part I (providing different meanings of "race").

388. See, e.g., The Age Discrimination in Employment Act's "Statement of Findings and Purpose," 29 U.S.C. § 621 (2000), and the Americans with Disabilities Act's "Findings and Purpose" 42 U.S.C. § 12101 (2000).

389. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1963) (stating that "an immutable characteristic determined solely by the accident of birth" generally constitutes the basis for identifying a suspect class); *Olagues v. Russoniello*, 770 F.2d 791, 801 (9th Cir. 1985) ("Unlike race, place of birth, or sex, language is not one of those 'immutable characteristic[s]' determined solely by the accident of birth' which typically are the basis for finding a suspect class."); Jennifer L. Nevins, *Getting Dirty: A Litigation Strategy for Challenging Sex Discrimination Law by Beginning with Transsexualism*, 24 N.Y.U. REV. L. & SOC. CHANGE 383, 410-11 (1998); Perea, *supra* note 357, at 866-67 (criticizing the requirement of immutability).

therefore, would be appropriate replacements for "race" in the anti-discrimination context.

"Continent of origin," another immutable factor, should be added to protect individuals who are not otherwise covered, such as those who look White but have Black ancestors. Although many believe that all human beings originated in Africa,<sup>390</sup> the term is appropriate as one in a series because it would cover anyone who is subjected to discrimination based on having ancestors who came from a particular continent in the last few centuries. Realistically, Caucasians would not be subjected to discrimination based on the theory that their ancestors, early in human history, originated in Africa, but they could be covered by the term to the extent that they suffer discrimination because of Eastern European or South American origins.

The term "ancestry" alone is too broad,<sup>391</sup> but the concept is useful to cover individuals who fall into no other classification, such as people who do not adhere to the Jewish faith but who have a Jewish parent or grandparent and Caucasian Americans who have a Hispanic forefather. "Ancestry" or "descent" would be appropriate additions to a list of protected classifications if they were qualified and limited to avoid overinclusiveness.<sup>392</sup> This could be achieved by the following wording: "descent from ancestors of a particular color, national origin, or religion."

If legislators determine that they wish to protect individuals who are excluded from opportunities because of their accents, dialects, spoken language, or traditional grooming, the term "ethnicity" could be added.<sup>393</sup> The term could encompass individual expression of culture and heritage that is not addressed by other terminology. "Ethnicity" itself, however, might have to be defined, as its meaning is not self-evident.<sup>394</sup> In the alternative, statutes could incorporate the wording of "culture" or "cultural expression." One scholar proposes that "ethnic traits" be added as a protected classification to Title VII and be defined as including but not

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Arguably, religion, a classification protected by Title VII, is not an immutable characteristic because people can change it by choice. However, for many, religious beliefs are so deeply held that they feel as bound to them as they are to their genders. Furthermore, as a matter of policy and in light of the First Amendment, the law could not expect individuals to change their religions simply in order to avoid discrimination.

390. de Plevitz & Croft, *supra* note 63, at 115–16.

391. *See supra* Part IV.B.2.

392. *See id.*

393. *See* Perea, *supra* note 357, at 861 (proposing that the terms "ancestry" and "ethnic traits" be added to Title VII of the CRA).

394. *See supra* IV.B.2.

being limited to "language, accent, surname, and ethnic appearance."<sup>395</sup> This definition would considerably broaden the scope of Title VII and would contravene existing judicial precedent,<sup>396</sup> but it might be appealing to more liberal legislators in the future.

Under my proposal, legislators could eliminate the term "race" from the anti-discrimination laws and prohibit discrimination based on "color, national origin, continent of origin, or descent from ancestors of a particular color, national origin or religion."<sup>397</sup> In specific instances, one or more of these terms could be removed, or "ethnicity," "culture," or "cultural expression" could be added, depending on the legislative agenda and the characteristics that are intended for statutory protection.<sup>398</sup>

Eliminating the term "race" would not make the anti-discrimination statutes less inclusive or deprive any currently covered group of statutory protection. Individuals who are subjected to discrimination because they are White or Black or of mixed origin could sue for discrimination based on color, continent of origin, or descent from ancestors of a particular color or continent of origin. Latinos could sue for discrimination based on national origin or continent of origin. Middle Eastern individuals could sue for discrimination based on national origin, color (if they believe they were targeted because of dark skin), or religion (if they were victimized because of their Muslim beliefs or attire). Jews could sue for religious discrimination or for discrimination based on descent from Jewish ancestors. Individuals who look White but have African ancestry could sue for continent of origin discrimination or discrimination based on African ancestry. White South Africans could sue based on national origin, color, or continent of origin, depending upon which theory they think is most applicable to their case. I can think of no example of an individual who is covered by the term "race" who would not also be covered by at least one of the more specific terms, "color," "national origin," "continent of origin," or "descent from ancestors of a particular color, national origin, or religion."

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395. See Perea, *supra* note 357, at 861.

396. See *supra* notes 361–363.

397. Religion, sex, age, and disability may also be added as protected classifications if the statute is intended to address those types of discrimination.

398. For the sake of comparison, it is interesting to note that the International Convention on the Elimination of All Forms of Racial Discrimination prohibits discrimination "based on race, colour, descent, or national or ethnic origin." Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996, 1001 (1966).

## 2. Other Laws

Racial profiling statutes constitute a simpler example. These laws intend to proscribe selection based on physical appearance.<sup>399</sup> While "racial profiling" has become a term of art and might be entrenched in the American vocabulary, it could more accurately be called "color profiling" or "profiling based on appearance associated with national origin." In recent years, individuals of Middle Eastern background have been targeted for profiling because they appear to originate in particular countries and not because they belong to a "race." Prohibitions against racial profiling would be equally effective if the term "race" in these laws were replaced by "color" and "appearance associated with national origin."<sup>400</sup> The more subtle matters of continent of origin, ancestry, and cultural heritage need not be included in this context because they are not of concern to those stopping individuals based on quick visual impressions.

Hate crime statutes, like anti-discrimination laws, are broad in their intended scope of coverage, criminalizing offenses that are motivated by any "racial" prejudice or animosity.<sup>401</sup> A typical statute establishes that it is a crime to injure a person or damage her property because of the victim's "actual or perceived race, color, religion, ancestry, or national origin."<sup>402</sup> Instead, the language could be refined to include more meaningful and accurate terminology: "actual or perceived color, religion, national origin, continent of origin, ethnicity, or descent from ancestors of a particular color, national origin, or religion." This very inclusive list is appropriate

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399. See *supra* Part II.C.

400. Color would clearly apply to African-Americans and individuals who are targeted because they look Hispanic or Middle Eastern would be covered by the designation "national origin." The law should apply not only to profiling based on correct national origin identification, but also to cases in which law enforcement personnel mistakenly believed that an individual was of a particular national origin because of stereotypical physical characteristics. If legislators wish to prohibit authorities from targeting individuals based on names that are associated with particular nationalities (e.g., picking out Arabic sounding names from passenger lists), the law could also prohibit all "national origin profiling."

401. Chorba, *supra* note 3, at 346–47 (2001) (citing the statutes of all twenty-six states); Scott D. McCoy, Note, *The Homosexual-Advance Defense and Hate Crime Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 644–45 & n.92 (2001) (noting that the movement against hate crimes matured in the 1980s, at which time many of the statutes were passed, and listing all relevant statutes); see, e.g., CAL. PENAL CODE § 422.6 (West 1999); COLO. REV. STAT. § 18-9-121 (1999); CONN. GEN. STAT. § 53a-181B (1999) (repealed 2000). As of 2001, twenty-six states and the District of Columbia had laws that enhanced penalties for crimes committed because of bias or hate. Chorba, *supra* note 3, at 346–47. Federal law also, however, has penalty enhancement provisions. See *supra* note 79 and accompanying text. For updated information concerning hate crimes statutes, see [www.partnersagainsthate.org/hate\\_response\\_database/laws\\_search.cfm](http://www.partnersagainsthate.org/hate_response_database/laws_search.cfm) (last visited Oct. 13, 2004).

402. COLO. REV. STAT. § 18-9-121(1)–(2) (2002).



since individuals might be victimized not only because of their color or national origin, but also because they are known to have Black or Jewish ancestors or because of their chosen expression of their cultural heritage, and thus, ethnicity.<sup>403</sup>

#### *D. Matters That Would Not Be Substantively Affected by the Proposal*

##### 1. Affirmative Action

Abandonment of the “race” concept will not restrict affirmative action programs. These policies do not depend upon the term “race” for their implementation, but rather, provide preferences to members of specific, identified minority groups. In *Grutter v. Bollinger*,<sup>404</sup> for example, the University of Michigan Law School’s program was formulated in terms of a commitment to “the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans.”<sup>405</sup> In *Gratz v. Bollinger*<sup>406</sup> the affirmative action program adopted by the University of Michigan’s College of Literature, Science and the Arts awarded twenty points to applicants who were “underrepresented minorities,” which, in practice, meant African-Americans, Hispanics, and Native Americans.<sup>407</sup> Employers and educational institutions could continue providing lawful preferences to minority group members by specifically naming the intended beneficiaries (i.e., African-Americans, Hispanics, etc.)<sup>408</sup> without any reference to whether these groups constitute “races.”<sup>409</sup>

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403. “Ethnicity” would need to be defined since it is itself a vague term. A suggested definition for the hate crimes context is “chosen expression of cultural heritage.” See *supra* Part IV.B.2. Alternatively, the terms “culture” or “cultural expression” could be used.

404. 539 U.S. 306 (2003).

405. *Id.* at 316 (internal quotations omitted).

406. 539 U.S. 244 (2003).

407. *Id.* at 253–54.

408. See *supra* notes 299–301 for a discussion of why the terms “African-American,” “Hispanic,” etc., should continue to be accepted, and why it may be important for minority communities to identify themselves as such.

409. Because so many Americans are of mixed origin, it may not always be clear who is and is not a member of a particular minority group such as African-American or Hispanic. In cases that are not obvious based on name or appearance, administrators of affirmative action programs may rely on self-identification for purposes of awarding preferences or may require proof that the individual has parents or grandparents that are of the color or national origin in question. The problem of identifying appropriate beneficiaries exists whether or not the concept of “race” is retained.

With respect to the national debate concerning affirmative action, if anything, discontinuing the use of "race" terminology will promote more honest and lucid discussion of the issue. If proponents stopped characterizing the goal of affirmative action as "racial" diversity, they would be forced to articulate their aim in more coherent and candid terms.<sup>410</sup> Do we wish to achieve color diversity, socioeconomic diversity, the inclusion of specific under-represented groups, or something else? Reliance on the catchall phrase "racial diversity" does not advance the debate.

## 2. Record-Keeping Requirements

Federal record-keeping provisions<sup>411</sup> require "race" information for purposes of enforcing and assessing the effectiveness of a variety of statutes and programs, such as the Voting Rights Act, state redistricting plans, federal affirmative action programs, and the Fair Housing Act.<sup>412</sup> Generally, record-keeping will not be affected by the proposed change in terminology because agencies will continue to utilize the categories specified in Directive 15.<sup>413</sup> Individuals, therefore, will still be identified for federal data collection purposes as American Indian or Alaska Native, Asian, Black or African American,<sup>414</sup> Hispanic or Latino, Native Hawaiian or Other Pacific Islander, and White.<sup>415</sup> Statutes that mandate data collection could easily eliminate the term "race." They could simply instruct information gatherers to record the identity of federal aid recipients according to the categories provided by Directive 15 and thus avoid the problem of labeling the data as related to "race" or some other specific classification.

## 3. California's Racial Privacy Initiative

In October 2003, the "Racial Privacy Initiative,"<sup>416</sup> a proposed amendment to the California constitution, was placed on California's

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410. See *supra* Part IV.A.2.

411. See *supra* notes 98–99 and accompanying text.

412. 1994 Revisions to Directive 15, *supra* note 271.

413. See 1997 Revisions to Directive 15, *supra* note 272.

414. Directive 15's definition of "Black or African American" would itself have to be changed so that it no longer refers to people originating "in any of the black racial groups of Africa." *Id.* The wording could be revised to include any "person having origins in any of the black people of Africa." Thus, this category would identify individuals only based on their color and continent of origin.

415. *Id.*

416. Ballot Measure No. 14, Reg. Sess. (Cal. 2000–01).

ballot.<sup>417</sup> The measure prohibited the state from classifying individuals by “race,” ethnicity, color, or national origin with respect to public education, public contracting, public employment, or other state operations, with some exceptions.<sup>418</sup> The proposal was heavily criticized for its potential to have a “devastating impact on the continued enforcement of state civil rights laws governing public education, employment, and contracting, as well as significantly affecting the state’s business, healthcare, social welfare, environmental, and criminal justice institutions.”<sup>419</sup> Many feared that without tracking “racial” data, the state would be impeded in its effort to protect the health and welfare of minorities and to promote diversity and equal opportunity.<sup>420</sup> The measure was ultimately defeated by a margin of two to one.<sup>421</sup>

Disavowing the “race” concept would not encourage passage of bills such as the Racial Privacy Initiative. While the state would not be classifying individuals by “race,” nothing would stop it from recording information concerning color and national origin or from identifying individuals as African-Americans, Hispanics, etc. The state could, therefore, develop information that is necessary to promote diversity and to combat phenomena such as hate crimes and racial profiling. The proposal outlined in this article is by no means a mechanism by which to divest minority groups of protection and benefits.

## V. CONCLUSION

In the seminal affirmative action case of *Regents of the University of California v. Bakke*,<sup>422</sup> Justice Blackmun wrote that “[i]n order to get beyond racism, we must first take account of race.”<sup>423</sup> An even better approach, however, is to eliminate the concept of “race” altogether. “Race” is not only “one of the most frequently misused and misunderstood words in

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417. Greg Pierce, *Nation: Inside Politics*, WASH. TIMES, Oct. 10, 2003, at A09. The measure was sponsored by Ward Connerly, who was instrumental in passing California’s Proposition 209, which ended affirmative action in state schools. Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 540 n.241 (2003).

418. Ballot Measure No. 14, *supra* note 416.

419. Adrienne M. Byers, *Don’t Turn Back the Clock on Civil Rights*, 24 L.A. LAW. 52 (2001).

420. *Id.* (explaining that the measure would prevent the tracking of the prevalence of particular diseases in minority population as well as accurate reporting concerning hate crimes, discrimination, racial profiling, and other practices that adversely affect minorities).

421. Pierce, *supra* note 417, at A09.

422. 438 U.S. 265 (1978).

423. *Id.* at 407.

the American vernacular,"<sup>424</sup> it is also a dangerous notion that can reinforce prejudice and discrimination.

This article has argued that the term "race" should not be included in statutory and jurisprudential texts. It has proposed that "race" be replaced by wording that is selected in light of the purpose of each statute and the intended scope of its class of beneficiaries. In replacing the word "race," legislators could choose among the phrases "color," "national origin," "continent of origin," "descent from ancestors of a particular color, national origin, or religion," and "ethnicity," the last of which may itself require explication.

Redacting the word "race" from the language of the law will not eliminate the problem of discrimination. There are still those who will believe that certain minorities are inferior to others and are unworthy of particular benefits or opportunities. It is for this reason that anti-discrimination laws will continue to be needed.

However, a shift away from the "race" concept will constitute an important step in the right direction. In the words of one commentator, "[w]ords still have power to create worlds and to become, if not flesh, at least an ordering force."<sup>425</sup> Rejection of "race" terminology would symbolize the government's commitment to combat stereotypes and misconceptions concerning the existence of human subspecies. Substitution of more precise terminology that has less suggestive power and historical baggage may bring with it a shift in social ideology by emphasizing that what we perceive to be "racial" differences are only superficial distinctions, having to do with color and geographic origin.<sup>426</sup> Finally, renunciation of the catchall "race" concept would require legislators to elucidate the intended beneficiary class of various statutes and would encourage both policymakers and those engaged in public debate to think more carefully about public policy goals. Dismantling the notion of "race," therefore, could go far in advancing civil rights and social progress.

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424. PETER I. ROSE, *THEY AND WE: RACIAL AND ETHNIC RELATIONS IN THE UNITED STATES* 7 (1964).

425. D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 440 n.11 (1993).

426. K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 169 (1996) (explaining that emphasizing color rather than "race" "helps expose in its very terminology the idea that *race* is a fiction and an ongoing source of social injustice") (emphasis added).