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WHITENESS AS PROPERTY

Cheryl I. Harris

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

—Cheryl I. Harris, "Poem for Alma"

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

—*Plessy v. Ferguson*[1]

I. Introduction

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

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

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

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

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

From time to time, as I later sat with her, she would recollect that period, and the cloud of some painful memory would pass across her face. Her voice would remain subdued, as if to

contain the still-remembered tension. On rare occasions, she would wince, recalling some particularly racist comment made in her presence because of her presumed shared group affiliation. Whatever retort might have been called for had been suppressed long before it reached her lips, for the price of her family's well-being was her silence. Accepting the risk of self-annihilation was the only way to survive.

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

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

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

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

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

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

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

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

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

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

1. THE CONVERGENCE OF RACIAL AND LEGAL STATUS

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

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

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

2. IMPLICATIONS FOR PROPERTY

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

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

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

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

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

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

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

B. Critical Characteristics of Property and Whiteness

1. WHITENESS AS A TRADITIONAL FORM OF PROPERTY

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

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

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

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

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

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

2. PROPERTY AND EXPECTATIONS

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

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

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

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

3. THE PROPERTY FUNCTIONS OF WHITENESS

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

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

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

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

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

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

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

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

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

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

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

d. The absolute right to exclude Many theorists have traditionally conceptualized property as including the exclusive rights of use, disposi-

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

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

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

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

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

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

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

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

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

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

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

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

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

2. WHITENESS AS RACIALIZED PRIVILEGE

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

Bois termed a "public and psychological wage" vital to white workers.[27] Thus, Du Bois noted that whites

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

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

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

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

I. WHITENESS, RIGHTS, AND NATIONAL IDENTITY

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

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

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

III. The Persistence of Whiteness as Property

A. The Persistence of Whiteness as Valued Social Identity

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

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

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

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

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

B. Subordination through Denial of Group Identity

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

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

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

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

. . .

IV. Delegitimating the Property Interest in Whiteness through Affirmative Action

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Conclusion

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

NOTES

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

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

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

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

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

6. My use of the term "blackwomen" is an effort to use language that more clearly reflects the unity of identity as "black" and "woman," with neither aspect primary or

subordinate to the other. It is an attempt to realize in practice what has been identified in theory—that, as Kimberlé Crenshaw notes, blackwomen exist "at the crossroads of gender and race hierarchies"; K. Crenshaw, "Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill," in Toni Morrison, ed., *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality,* 402, 403 (1992). [. . .]

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

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

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

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

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

12. *Id.* at 366.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. *Id.* at 700.

28. *Id.* at 700-01.

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

30. *Id.* at 13.

31. *Id.* at 9.

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

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

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

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