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Christian B. Sundquist

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* This Article was created by Christian B. Sundquist, Professor of Law, Albany Law School, 80 New Scotland Avenue, Albany, NY 12208. I can be reached at csund@albanylaw.edu and 518-763-6469.

An emerging narrative of racial transcendence has taken root in our law, politics and public consciousness.[1] The end of *de jure* racial discrimination in the United States, coupled with the adoption of equal opportunity laws during the Civil Rights Era has fostered an assumption shared by many that we now live in a colorblind and, perhaps, post-racial society. America has elected its first African-American President, viewed by many as proof that our society has finally moved beyond race.[2] Our courts have similarly employed a colorblind constitutionalism to disregard systemic racism as a relic of times past, while invalidating race-conscious attempts to remedy existing racial inequality.[3] During the last Supreme Court term alone, we have witnessed a disturbing roll back of civil-rights gains in the affirmative action,[4] voting rights,[5] and employment discrimination contexts.[6]

And yet social and economic disparities based on race persist. In the aftermath of the "Great Recession," disparities between the rich and poor and white and non-white have been exacerbated. The rate of income inequality between the richest Americans and the middle-class and poor has eclipsed the previous high set during the Great Depression.[7] The wealth

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1. *See* Christian B. Sundquist, *Resisting Post-Oppression Narratives*, TIKKUN MAGAZINE, Fall 2013, at 39–41.

2. *See, e.g.*, John McWhorter, *Racism in America is Over*, FORBES (Dec. 30, 2008, 2:00 PM), http://www.forbes.com/2008/12/30/end-of-racism-oped-cx_jm_1230mcwhorter.html; *see also* TERRY SMITH, BARACK OBAMA, POST-RACIALISM, AND THE NEW POLITICS OF TRIANGULATION (2012).

3. *See generally* Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1, 2–3 (1991) (arguing that "[a] color-blind interpretation of the Constitution, legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans"); *see also* IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 158–59 (Richard Delgado & Jean Stefancic eds., 2006); *see also* Ricci v. DeStefano, 557 U.S. 557, 559 (2009) (dismissing systemic racism as a "statistical disparity").

4. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (holding that the strict scrutiny standard should be applied to race-based admission policies).

5. *See* Shelby County v. Holder, 133 S. Ct. 2612, 2630–31 (2013) (holding that the Voting Rights Act of 1965 provision setting forth a "coverage formula" was unconstitutional).

6. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2522–23 (2013) (holding that Title VII retaliation claims must be proved according to traditional principles of but-for causation); *see also* Vance v. Ball State Univ., 133 S. Ct. 2434, 2439 (2013) (offering employers an affirmative defense under Title VII if they do not cause "tangible" harm to employees).

7. U.S. CONG. J. ECON. COMM., INCOME INEQUALITY AND THE GREAT RECESSION 4 (2010), *available at* http://www.jec.senate.gov/public/?a=Files.Serve&File_id=91975589-

gap between white and non-white households, similarly, has escalated to its highest level in twenty-five years.[8] As the degrees of economic inequality continue to rise during the current financial storm, so do startling race-based disparities in a variety of social contexts, including education,[9] health outcomes,[10] and rates of incarceration.[11]

The persistence of racial inequality creates a moral dilemma for the post-race, colorblind perspective. Racism, after all, is viewed through this lens as aberrational and non-systemic in nature. The dogged survival of race-based disparities, in the wrongly assumed absence of racial

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257c-403b-8093-8f3b584a088c (detailing that the share of total wealth enjoyed by the richest 10% of Americans increased from 34.6% in 1980 to 48.2% in 2008, while the richest 1% of Americans saw their wealth skyrocket from 10% of total national income in 1980 to 21% in 2008). The Report makes the following stark observation:

> Income inequality peaked prior to the United States' two most severe economic crises—the Great Depression and the Great Recession. At the peak of the stock market bubble that capped the Roaring Twenties, in 1928, the share of income accruing to the top decile peaked at 49.3%. The crash that followed set off the cascade of events that would ultimately land the United States in the deepest recession in history. Nearly 80 years later, on the eve of the Great Recession in 2007, the share of income held by the wealthiest 10% topped its earlier high when it hit 49.7%.

8. RAKESH KOCCHAR ET AL., WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS, PEW RESEARCH CTR. 1, 1–3 (2011) (stating that "inflation-adjusted median wealth fell by 66% among Hispanic households and 53% among black households, compared with just 16% among white households"). The Pew Research Center found that the median wealth of white households is 20 times larger than that of African-American households, and 18 times larger than that of Hispanic-American households. *Id.* at 3.

9. *See generally* U.S. DEP'T OF EDUC., NAT'L ASSESSMENT OF EDUC. PROGRESS & NAT'L CTR. FOR EDUC. STATISTICS, ACHIEVEMENT GAPS HOW BLACK AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS STATISTICAL ANALYSIS REPORT (2009).

10. *See* David R. Williams & Selina A. Mohammed, *Discrimination and Racial Disparities in Health: Evidence and Needed Research*, 32 J. BEHAV. MED. 20 (2009) (outlining disparate health outcomes by race).

11. *See* Huma Khan & Michele McPhee, *Obama Defends Criticism of Cambridge Police in Arrest of Gates*, ABC NEWS (July 23, 2009), http://abcnews.go.com/Politics/Story?id=8153681&page=1 (summarizing that while African-Americans represent only 13% of the total population in the United States, they configure 55% of the total federal prison population); *see also* Albert R. Hunt, *A Country of Inmates*, N.Y. TIMES (Nov. 20, 2011), http://www.nytimes.com/2011/11/21/us/21iht-letter21.html?pagewanted=all&_r=0; *see also Louisiana Has Highest Incarceration Rate In The World; ACLU Seeks Changes*, ACLU (Dec. 11, 2008), https://www.aclu.org/racial-justice/louisiana-has-highest-incarceration-rate-world-aclu-seeks-changes (stating that 60% of Louisiana prisoners are African-American).

discrimination, creates tension with the colorblind belief that society has achieved a state of post-racial liberal equality.

Historically, the artifice of "race" evolved to resolve the dilemma created when social, economic and legal inequality persists notwithstanding society's professed belief in liberal equality for all persons. The notion of "race" and of "racial difference" developed as a socio-political tool to legitimate the existence of social, economic, and legal inequality on the grounds of biological inferiority. A product of the scientific sophistry and political exigency that marked early European Modernity, the concept of biological difference was relied on for hundreds of years to justify the enslavement, genocide and unequal treatment of persons deemed "non-white." In the terrible wake of chattel slavery in the United States and the Holocaust of World War II, the Postwar World rejected biological theories of racial difference in the face of conclusive evidence of the socio-political reality of race. Race, it was finally agreed, had no natural biological or genetic meaning. Rather, it was recognized that the taxonomy of race was constructed as a means to impute socio-political meaning to perceived human differences in order to morally rationalize unequal human treatment.[12]

In the modern Postwar World, it was no longer legally, scientifically, or politically appropriate to justify the existence of racial inequality in terms of biological difference. Social inequities based on race were finally acknowledged as stemming from past and present structural discrimination. For a brief period during the Civil Rights Era, our society was thus able to enjoy significant advancements in the expansion of constitutional rights, the end of *de jure* public school desegregation, and the pursuit of other affirmative measures to address entrenched, structural racism.[13] The desire by society to distance itself from moral responsibility for past and present racial disparities, however, did not completely fade. Extensive racial disparities continued to persist following the Civil Rights period, and an

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12. *See* UNESCO, FOUR STATEMENTS ON THE RACE QUESTION 33 (1969) (stating that race was not "so much a biological phenomenon as a social myth"); *see also* Angela Harris, *From Color Line to Color Chart: Racism and Colorism in the New Century,* 10 BERKELEY J. AFR.-AM. L. & POL'Y 52, 68 (2008) (summarizing the prevailing Post War view as one that holds that "race does not exist in the body but rather is the product of socially-produced understanding"); *see also* Howard Winant, *Race and Race Theory,* 26 ANN. REV. SOC. 169, 172 (2000) (describing race as "a concept that signifies and symbolizes sociopolitical conflicts and interests in reference to different types of human bodies").

13. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000 (2006)).

ideology of colorblind constitutionalism—that social policy should be blind to existing racial disparities—filled the void.[14] The doctrine of "equal opportunity," for instance, has been employed to justify persistent racial disparities as the product of cultural depravity and a lack of individual responsibility.[15] In a similar fashion, classic market theory has been often relied on to rationalize continuing racial inequalities as the natural products of non-biased market processes, rather than the symptoms of past and present structural racism.[16]

As our society ascends into the 21st Century, we continue the struggle to take account of race and racial inequality.[17] The moral need to reconcile pervasive racial disparities with the comforting perception of racial transcendence and absolution has never been stronger. The courts and public continue to rely on time-tested sophisms, such as the doctrine of equal opportunity and market theory, to explain why inequalities continue to exist in the *assumed* absence of structural racism. Yet these dated colorblind distancing strategies may no longer be sufficient to assuage the

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14. EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 3 (2003) ("Much as Jim Crow served as the glue for defending a brutal and overt system of racial oppression in the pre-Civil Rights era, color-blind racism serves today as the ideological armor for a covert and institutionalized system in the post-Civil Rights era.").

15. *See, e.g.*, WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE (1978); *see also* Christian B. Sundquist, *Equal Opportunity, Individual Liberty and Meritocracy in Education: Reinforcing Structures of Privilege and Inequality*, 9 GEO. J. ON POVERTY L. & POL'Y 227, 228–29 (2003). As I have previously summarized, the cultural deficit interpretation of "equal opportunity" provides as follows: "The story goes like this: the paradigm of equal opportunity is a truly objective, neutral, and fair method to allocate educational, employment, and political resources to members of society, without regard to race, class, gender, or ethnicity. The ideal of equality assumes the possibility of an objective measure of merit under which individuals' abilities and performances may be evaluated. Accordingly, through the creation of a baseline that presupposes the inherent sameness of all people and disregards systemic discrimination as a fallacy, any social and economic inequality that exists is said to be legitimate because it purportedly reflects the natural results of deficient personal choices. In the context of education, a child's inability to capitalize on an equal opportunity to achieve can only be understood as personal failure. Using this framework to interpret my own experiences, it would appear that the relative educational failure of my friends and students was not influenced by their status as low-income racial minorities, but rather was the inevitable end result of poor choices and individual deficiencies."

16. *See, e.g.*, CASS R. SUNSTEIN, *Why Markets Don't Stop Discrimination, in* FREE MARKETS AND SOCIAL JUSTICE 151, 151–67 (1997).

17. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 9 (1903). The words of W.E.B. DuBois are as true today, as they were in the past: "The problem of the Twentieth Century is the problem of the color line."

cognitive dissonance and moral shame stoked by acknowledging continuing inequality. After all, the devices of equal opportunity, colorblind constitutionalism, and market deregulation have been in force for decades—during which time we have seen racial disparities *increase* rather than decrease.[18]

The undiminished desire to interpret the world in post-race and colorblind terms has found a fresh, yet familiar, rationalization for inequality that sounds in genetic racial difference. Reminiscent of discredited racial biologies of yore, the emerging scientific, social and legal trend is to treat race as a scientifically relevant grouping of persons. The modern field of population genetics has been relied on to support spurious claims that "race" can be distilled to a meaningful biological essence. A scientific analysis of a sample of deoxyribonucleic acid ("DNA") can purportedly empirically determine an individual's biological race, even though it relies on the same antiquated (and discredited) racial taxonomies first developed during the 1700s. As a result, pharmaceutical companies have spent millions of dollars to develop and market race-based drugs.[19] Private genetic companies have also popularized DNA testing with the misleading claim that they are able to scientifically isolate a person's racial and ethnic ancestry.[20] The United States Patent and Trademark Office (USPTO) has similarly entered the fray by approving race-based biotechnology patents.[21] And perhaps most disturbingly, modern genetic theories of race have obtained the official imprimatur of law, as state and federal courts throughout the United States routinely permit the admission of racial DNA probabilistic evidence.[22] It is now, for instance, normal for courts in criminal cases to admit evidence that there is only a "1 in 41

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18. KOCCHAR, *supra* note 8, at 4; *see also* U.S. CONG. JOINT ECON. COMM., *supra* note 7, at 1.

19. *See* Nicholas Wade, *Race-Based Medicine Continued*..., N.Y. TIMES (Nov. 14, 2004), http://www.nytimes.com/2004/11/14/weekinreview/14nick.html (describing a heart-attack drug which has been developed for and marketed to African-Americans).

20. *See, e.g.*, *Ancestry DNA Testing: Unlock Your Past*, ANCESTRY BY DNA, http://www.ancestrybydna.com/ (last visited Nov. 14, 2013).

21. *See* Jonathon Kahn, *Race-ing Patents/Patenting Race: An Emerging Political Geography of Intellectual Property in Biotechnology,* 92 IOWA L. REV. 353, 364 (2007).

22. *See infra* Part III (discussing how DNA probabilistic evidence consists of expert testimony and documents that provide an estimate of the probability that a party's genetic profile "matches" that of DNA sample found at a crime scene, on a crime victim or in some civil setting. Such genetic probabilistic evidence is "racialized" when the estimate provided to the finder of fact relies on racial genetic profiles).

million chance" that another "Hispanic-American" or "African-American" or "Caucasian" or "Native-American" or "Asian-American" or "Puerto-Rican" or "Caribbean-American" shares the same genetic profile as a criminal defendant.[23] The Supreme Court of the United States has so far ignored the troubling implications of racial DNA evidence in its cases.[24]

The reemergence of a biological understanding of race is not surprising, both given the recentness of our history of manipulating science to validate racial difference and the increasing cognitive and moral need to rationalize continuing racial inequalities as normal and natural in a "post-race" era.[25] This Article links the modern trend to view race in genetic terms to the post-race worldview, while framing the doctrinal and constitutional argument against the legal acceptance of genetic racial theories. The first section of the Article will chart the historical invention of the race concept, while highlighting the critical role that science has played in shaping our understanding of race and difference. The section will also examine the Postwar rejection of biological theories of race, while further elaborating on the socio-political nature of race.

Part II of the Article explores the conflicting ways in which our Postwar society has interpreted racial inequality. A model of race consciousness dominated the manner in which our society viewed existing racial disparities during the Civil Rights era, yet was soon displaced by colorblind and post-racial interpretative methodologies. This section examines this history, while relying on psychological theory to suggest that such post-race distancing moves are motivated by an implicit desire to move beyond race and conceal systemic racism.

Part III of the Article analyzes the modern trend to view race in genetic terms, and explores the manner in which the field of population genetics has been relied on to normalize scientific racial distinctions. This section also analyzes the judicial acceptance of racial probabilistic interpretations of DNA evidence, and sets forth a doctrinal critique of the practice under the Federal Rules of Evidence. In particular, this section

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23. *See, e.g.*, Gov't of Virgin Islands v. Penn, 838 F. Supp. 1054, 1065 (D.V.I. 1993); *see also infra* Part III of this Article.

24. *See* Williams v. Illinois, 132 S. Ct. 2221 (2012).

25. *See* DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 291 (2012) (discussing that the notion of biological difference was "the predominant explanation for racial inequality for several centuries").

argues for an amendment to the Federal Rules of Evidence that would clearly establish the inadmissibility of such evidence at trial.

The final section of the Article sets forth a substantive Due Process challenge to the legal acceptance of genetic theories of race. This section argues that the substantive Due Process doctrine underlying the Fifth and Fourteenth Amendments, as informed by the Ninth Amendment, is violated whenever the State officially embraces genetic views on race. In particular, this section argues that such a practice violates the fundamental constitutional right to a shared humanity by placing State imprimatur on discredited notions of racial biological difference.

I. Science Fictions and the Fantasy of Race

The fantasy of "race" as a means of assigning social and political value to perceived human difference did not develop until fairly recently. The origin of the race concept cannot be traced to neutral scientific discoveries of natural biological difference. Race was never empirically established as a scientific property of humanity, in the same way that skin color, hair texture, and body shape have biological roots. Rather, the taxonomy of race has historically developed as a tool of social control, and as a means to rationalize the unequal treatment of subjugated persons.[26]

A. European Imperialism and Colonization

Any understanding of race must begin with an appreciation of the critical role played by the period of European imperialism and colonialism in shaping our ideas of human difference. The European colonization, conquest and exploitation of non-European lands were initially justified on the grounds of religious difference and messianic duty.[27] Rough folk notions of "race" then developed during the Fifteenth and Sixteenth centuries as a measure of religious difference. Whereas Europeans were

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26. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960'S TO THE 1990'S (2d ed. 1994) (detailing the theory of race's social construction).

27. *See* Klaus Ernst, *Racialism, Racialist Ideology and Colonialism*, *in* SOCIOLOGICAL THEORIES: RACE AND COLONIALISM 458, 458–59 (1981) ("At the beginning of the capitalist colonial expansion, campaigns of looting and conquest against non-Europeans were justified by the Cross and by the desire to spread the Christian religion in the true spirit of the Middle Ages.").

viewed as achieving a nigh perfect state of Christian humanity, non-Europeans were viewed as existing in an inferior non-Christian and subhuman state of nature.[28] The pre-modern linkage of racial and religious difference was necessary to legitimate the class exploitation and conquest that marked the period of European imperialism. Early notions of racial difference thus developed to "resolve the contradiction between humanistic universalism and Christian particularism—by representing non-Christians as nonhuman" and therefore subject to conquest and enslavement.[29]

B. The Age of Empiricism

The pre-modern understanding of human identity and racial inferiority was deeply rooted in religious difference during the period of European imperialism. The assumptions of religious and moral inferiority that informed the nascent colonial concept of race, however, gave way to "scientific" interpretations of racial difference during the Enlightenment period. The development of the modern scientific method during this time, with its focus on empiricism and rationality, facilitated the scientific study of human difference. The pre-modern belief in natural human inequality, as exemplified by the Aristotelian concept of a "great chain of being," made it "but a small step to apply the same concept of hierarchical ordering within the ranks of humankind" during Enlightenment scientific studies of race.[30] As the philosopher David Theo Goldberg recounts,

> Empiricism encouraged the tabulation of perceivable differences between peoples and from this it deduced their natural differences. Rationalism proposed initial innate distinctions (especially mental ones) to explain the perceived behavioural disparities… The emergence of independent scientific domains of anthropology and biology defined a

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28. JOE R. FEAGIN & CLAIRECE BOOHER FEAGIN, RACIAL AND ETHNIC RELATIONS (5th ed. 1996) (noting that the imperialist quest for colonization, and the creation of slave colonies, were legitimated by folk notions of African inferiority).

29. Peter Fenves, *What "Progresses" Has Race-Theory Made Since the Times of Leibniz and Wolff*?, *in* THE GERMAN INVENTION OF RACE 11, 12–13 (Sara Eigen & Mark J. Larrimore eds., 2006); s*ee also* PAUL GILLEN & DEVLEENA GHOSH, COLONIALISM & MODERNITY 176 (2007) (arguing that race developed as "a legitimation of class exploitation" and as a "way of constructing certain populations as laboring classes." As such, "a crucial object for [European] imperialism was the organization of the social world according to these [racial] categorizations, or to force the population into its natural class position").

30. WILLIAM H. TUCKER, THE SCIENCE AND POLITICS OF RACIAL RESEARCH 10 (1994).

> classificatory order of racial groupings – subspecies of Homo sapiens – along correlated physical and cultural matrixes.[31]

The modern scientific method that emerged during the period of the Enlightenment by itself, certainly, is not stained with the irrationality of race. Rather, the modern scientific beliefs in empiricism and reason were subjectively applied in an effort to rationalize human inequality in terms of purported "racial" difference.[32] As such, the early Enlightenment theories of race are marked by the assumption of innate human differences in moral, mental and physical capabilities. One of the earliest theories of race was proposed by the Swedish biologist Carolus Linnaeus in 1735. In the classic text *Systema Natura*, Linnaeus strove to scientifically separate the natural world into distinct biological categories: the plant kingdom, the animal kingdom, and the kingdom of stones.[33] Linnaeus proposed that humankind be separated into four distinct biological categories, described by geographical region: Europeaus, Africanus, Americanus and Asiatic.[34] The Linnaeus taxonomy, eerily similar to contemporary racial categories, assigned moral, intellectual and physical values to racial difference:

Europeaus	Skin (white); build (muscular); hair (long, flowing); eyes (blue); disposition (gentle and inventive)
Americanus	Skin (reddish); build (erect); hair (black, straight, thick); distinct facial features (wide nostrils); disposition (stubborn and angered easily)
Asiaticus	Skin (sallow; yellow); hair (black); eyes (dark); disposition (avaricious and easily distracted)
Africanus	Skin (black); hair (black; frizzled); skin texture (silky); distinct facial features (nose flat, lips tumid); disposition (relaxed and negligent)

31. DAVID THEO GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING 28–29 (1993).

32. KENAN MALIK, THE MEANING OF RACE: RACE, HISTORY AND CULTURE IN WESTERN SOCIETY 40 (1996) (stating that "[e]ighteenth century Europe was the cradle of modern racism" because "racism has its foundations in the Enlightenment's 'preoccupation with a rational universe, nature and aesthetics'").

33. *Systema Naturae—an epoch-making book*, UPPSALA UNIVERSITET, http://www.linnaeus.uu.se/online/animal/1_1.html (last visited Feb. 13, 2014).

34. *See* Tucker, *supra* note 30, at 9.

Other Enlightenment theories of race similarly imbued racial difference with moral, mental and physical meaning. Emmanuel Kant proposed a racial taxonomy very similar to Linnaeus, separating humanity into four racial categories: "the noble blond (northern Europe); copper red (America); black (Senegambia); and olive-yellow (Asian-Indians)."[35] Kant believed that racial distinctions were biologically based and immutable.[36] Unsurprisingly, Kant's conception of race justified the unequal treatment and slavery of non-white persons on the assumption of white biological superiority. As Kant described in his essay *On the Different Human Races:*

> (Whites:) contain all natural motive springs in affects and passions, all talents, all predispositions to culture and civilization and can obey as well as rule. They are the only ones who constantly progress toward perfection… Blacks can become disciplined and cultivated but never truly civilized… All races will become exterminated/uprooted (Americans and Blacks cannot govern themselves. They thus serve only as slaves) only not the Whites. The stubbornness of Indians in their usages is the reason why they do not melt down with the Whites into a single people. It is not good that they intermix. Spanish in Mexico. On the race of the Whites, who have brought about all revolutions in the world. Nomads have only brought about violent revolutions, not ones that sustain themselves… Our (ancient) history of man reliably proceeds only from the white race.[37]

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35. John H. Zammito, *Policing Polygeneticism in Germany, 1775: (Kames,) Kant, and Blumenbach*, *in* THE GERMAN INVENTION OF RACE 35, 42 (Sara Eigen & Mark Larrimore eds., 1996).

36. *See* IMMANUEL KANT, ESSAY ON RACE (1775) (arguing that each racial group had biological traits that were "unalterably sustained by succeeding generations even under change of ecological setting for protracted periods of time").

37. Susan M. Shell, *Kant's Conception of a Human Race*, *in* THE GERMAN INVENTION OF RACE 55–56 (Sara Eigen & Mark Larrimore eds., 2006). As the sociologist William H. Tucker notes, "the assumptions by [the Enlightenment theorists] that mental and moral traits were associated with race was to inform many scientific investigations during the next two hundred years." TUCKER, *supra* note 30, at 9. The German physiologist Johann Freidrich Blumenbach also developed a popular racial classification scheme during this time. Blumenbach essentially adopted Linnaeus' division of the world into five racial groups, while introducing enduring racial terminology such as "Caucasian" and "Mongoloid." *See* JOHANN FRIEDRICH BLUMENBACH, THE ANTHROPOLOGICAL TREATISES OF JOHANN FRIEDRICH BLUMENBACH 264–70 (Thomas Bendyshe ed. & trans,, 1865). While this scheme became one of the most referenced early racial taxonomies, Blumenbach ironically believed that any racial classification scheme would be very arbitrary indeed both in number and definition." *Id.* at 99. In fact, Blumenbach believed that differences in complexion and phenotype were caused by climate, and argued against theories of racial superiority and inferiority. *Id.* at 196–98.

For Kant and other Enlightenment race theorists, the "full personhood" of the moral citizen was dependent on race.[38] Under this Kantian perspective, complete membership in the political community (e.g., "personhood") is only available to those moral beings that were capable of both reason and will.[39] Non-moral agents that are lacking in either reason or will, then, are not entitled to the rights attendant to political membership—including social equality and even personal freedom. Kant provided that beings that were not capable of achieving morality in this strict sense (reason and will), were valueless "animals whom he [the moral person] can master and rule at will."[40] Under this framework, only white persons were deemed to possess the moral agency to access the equality rights guaranteed by membership in the political community. The scientific racial typologies developed by Kant and other Enlightenment thinkers, then, were critical in the dehumanization of persons deemed to be "non-white."

The development of a ***scientific*** theory of racial inequality was also necessary to reconcile persistent class disparities with the Enlightenment belief in universal humanity and the natural rights concept of social equality. Pre-modern social inequality was viewed during this time as stemming from unjust feudal and monarchist social structures. An Enlightenment belief in universal natural rights and human equality necessarily conflicted with continuing social and class disparities in the modern era. The inherent wealth inequality that results from private ownership of property had to be morally and politically justified in order to placate the call for universal rights made by the non-propertied lower economic classes. Adam Smith and other classic economic theorists were thus prompted to argue that limits and exceptions to "universal equality" were necessary to protect the "natural rights" of the propertied, wealthy classes.[41]

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38. *See* CHARLES MILLS, THE RACIAL CONTRACT 111 (1997) ("It is no accident, then, that the . . . practical struggles of nonwhites have so often centered on race, the marker of personhood . . . .").

39. *See* FREDERICK P. VAN DE PITTE, KANT AS PHILOSOPHICAL ANTHROPOLOGIST 49–57 (1971) (discussing the role of one's will and practical disposition in social order).

40. IMMANUEL KANT, ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW 9 (Hans H. Rudnick ed., Victor Lyle Dowdell trans., Southern Illinois University Press 1978) (1798).

41. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 320 (Edwin Cannan ed., University of Chicago Press 2008) (1789) ("Civil Government supposes a certain subordination.").

Early theories of race were used during this time to rationalize class distinctions in a post-feudal modern society:

> It has already been established that every social order is founded upon three original classes, each of which represents a racial variety: the nobility, a more or less accurate reflection of the conquering race; the bourgeoisie composed of mixed stock coming close to the chief race; and the common people who live in servitude or at least in a very depressed position. These last belong to a lower race which came about in the south through miscegenation with the negroes and in the north with Finns.[42]

The move towards viewing race in terms of immutable biological difference was thus also a move towards naturalizing social inequality in a capitalist modern world.

C. Chattel Slavery, Science and Racial Power

The scientific view of race gained prominence during the period of chattel slavery in the United States. Slavery further exacerbated the tension between the seemingly inconsistent Enlightenment principles of social equality and natural property rights. After all, the individual right to freedom and social equality clearly conflicted with the claimed natural right to own human property. Three key rationales were popularized to reconcile this tension in liberal rights theory: economic necessity, religious difference, and biological racial difference.

Early Colonial law initially made no distinction between African and European indentured servants.[43] The bondage of both African and European indentured servants during this time was viewed as temporary, as such servants were allowed to pay off their "debt" over time and obtain freedom.[44] African and European indentured servants also possessed a number of important legal rights, including the right to own property and enter into contracts.[45] As such, indentured servitude was justified primarily on grounds of economic necessity. While such bondage imposed a

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42. COUNT ARTHUR DE GOBINEAU, ESSAYS ON THE INEQUALITY OF RACES 120 (1915).

43. *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM 65 (Alfred A. Knopf 8th ed. 2000) (1947) (describing the introduction of Africans into the labor force as "simply more indentured servants").

44. *See id.* at 39 (noting that the first indentured servants were poor whites).

45. *See id.* (mentioning the right of indentured servants to sue their masters).

restriction on the servant's freedom, it was temporary and regarded as a "necessary evil" to support economic progress in the burgeoning republic.

The economic rationale became less normatively coherent as the indentured servitude of Africans was transformed into a system of chattel slavery.[46] A strictly economic rationale was simply insufficient to mediate the tension between a system of perpetual human slavery and the principle of universal human equality recognized in the Declaration of Independence. One enduring method to resolve the long-standing conflict between social equality and property rights, as discussed *infra*, has been to emphasize human difference. As such, the unequal treatment of African slaves came to be justified on the grounds of religious difference. Africans were soon viewed as non-Christian heathens and less than "human," and thus not morally entitled to social equality. Religious difference thus became an important basis upon which to resolve the tension between the religious and legal tenets of equality and the reality of human enslavement. It is important to note that during this period, moral and religious inferiority was distinguished from natural or biological inferiority. As such, Africans that converted to Christianity were afforded legal protections not available to non-Christian slaves.[47] Chattel slavery was thus promoted as means of facilitating the Christian conversion of African slaves.[48]

The rationalization of chattel slavery under the guise of religious difference, however, became unsustainable as the country's reliance on the "peculiar institution" increased. The conversion of scores of African slaves to Christianity threatened the stability of the chattel slavery system. The law responded by eliminating the religious exemptions from perpetual

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46. *See id.* ("England came to realize that white servants were unsatisfactory . . . [e]ven with all the means used to recruit [indentured servants], the supply was still insufficient because the tobacco, rice and indigo plantations had an almost insatiable appetite for laborers.").

47. *See, e.g.*, PAUL FINKELMAN, THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK 10–11 (1986) (discussing two cases: *In re* Sir Henry Maneringe where a black person named John Phillip could testify in court because he was "a negro Christened in England" and *In re* John Graweere where a black servant could purchase his son's freedom so that he could raise his son "in the Christian religion").

48. *See* THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 31 (1997) ("In the South, when the institution of slavery came under heavy attack in the nineteenth century, a principal justification offered for it was that it was a means of converting the heathen.").

bondage, and affirming that African slaves were to be viewed as a form of fee simple property.[49]

Once the economic and religious difference justifications for slavery proved lacking, biological race theory filled the void in mitigating the tension between the democratic principle of social equality and the expansion of chattel slavery. Science was relied upon to provide "objective" and "empirical" validation of the biological inferiority of non-white persons in order to classify slaves as less than human, and thus not entitled to social equality.[50] Race was viewed as an immutable biological fact, and slavery as "an expression of the harmony between natural law and social organization," as a means to respond to the equality dilemma.[51]

American courts embraced the biological theories of racial inferiority of the time to justify the denial of constitutional rights to African-Americans.[52] One of the starkest examples of scientific racial views informing constitutional interpretation occurred in the despicable *Dred Scott* decision.[53] The United States Supreme Court was tasked with resolving whether an African slave had become free by virtue of living in a

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49. For instance, the Virginia legislature passed a statute in 1662 declaring that all children born in the colony would acquire the same legal status as their mother, regardless of whether the children were baptized as Christians. *See* FINKELMAN, *supra* note 47, at 16 (providing the text of the act entitled "Negro women's children to serve according to the condition of the mother"), *available at* http://vagenweb.org/hening (last updated July 19, 2009). The Virginia legislature also passed an act in 1667 providing that while African "servants" could be baptized as Christians, that such "baptism of slaves doth not exempt them from bondage." *Id.* By 1705, Virginia formally decreed that Africans no longer occupied the class of indentured servants, but instead were to be considered a form of fee simple property. William Walter Hening, *An act declaring the Negro, Mulatto, and Indian slaves within this dominion, to be real estate,* HENING'S STATUTES AT LARGE, http://vagenweb.org/hening/vol03-20.htm (last updated July 19, 2009); *see also*, A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD 32–53 (1978) (surveying Virginia's statutes through the colonial period).

50. *See* Joel M. Sipress, *Relearning Race: Teaching Race as a Cultural Construction*, 30 HIST. TCHR. 175, 175–85 (1997) (discussing the transition from teaching that disparities between races exist as a biological problem to a social construction).

51. *See* TUCKER, *supra* note 30, at 12–25 (discussing the scientific law used to rationalize slavery); *see also* Sipress, *supra* note 50, at 175–85 (discussing the biological relationship).

52. *See, e.g.*, Scott v. Sandford, 60 U.S. 393, 404–05 (1856) [hereinafter *Dred Scott*] (holding that persons of African descent were not intended to be considered citizens under the Constitution).

53. *See id.* (holding that persons of African descent were not intended to be considered citizens under the Constitution).

free state and U.S. territory where slavery was prohibited under the Missouri Compromise.[54] The Court held that African-Americans—whether free or enslaved—had no legal rights under the U.S. Constitution, and thus could not sue as "citizens" in courts of law. The Court justified its holding on the assumed biological inferiority of African-Americans:

> [African-Americans] were considered as subordinate and inferior class of beings, who . . . had no rights or privileges . . . . [African-Americans] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.[55]

D. Social Darwinism and Race Theory

The end of *de jure* slavery in the United States did not temper the sway of biological theories of race. The continuing social and legal oppression of African-Americans during the Reconstruction and Jim Crow eras, after all, would only be seen as morally justifiable to many white Americans if black inferiority remained a matter of immutable biological fact. Biological theories of race thus continued to play a vital role in carving out the "'somatic demarcations' between those persons fit/unfit for full moral personhood and full membership in the polity."[56]

The emergence of Darwinian evolutionary theory in the biological sciences played a crucial role in the continued scientific reification of innate racial difference during this period. Charles Darwin theorized that biological variation in the natural world resulted from gradual evolution within species pursuant to a process of natural selection.[57] Darwin

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54. *See id.* at 403 ("Can a negro, whose ancestors were imported to this country, and sold as slaves, become a member of the political community formed and brought into the existence by the Constitution . . . and become entitled to all the rights and privileges, and immunities guarant[e]ed by that instrument to the citizen?"); *see also* Paul Finkelman, Scott v. Sandford*: The Court's Most Dreadful Case and How it Changed History*, 82 CHI.-KENT L. REV. 3, 39–43 (2007) (discussing the issues the Court had to resolve).

55. *Dred Scott*, 60 U.S. at 404–05, 407.

56. Thomas McCarthy, *The Racial Contract by Charles W. Mills*, 109 ETHICS 431, 453 (1999) (book review).

57. *See generally* CHARLES DARWIN, ORIGIN OF THE SPECIES (1959) (discussing his theories on evolution and natural selection).

recognized the possibility that his work could be wrongly utilized to bolster claims of biological racial inferiority, and thus took pains to clarify that all races of humans belonged to the same species:

> Although the existing races of man differ in many respects as in color, hair, shape of skull, proportions of the body, etc., yet if their whole structure be taken into consideration they are found to resemble each other closely in a multitude of points. Many of these are so unimportant or of so singular a nature that it is extremely improbable that they should have been independently acquired by aboriginally distinct species or races.[58]

The possibility of rationalizing unequal social treatment in terms of evolutionary inferiority, however, proved too alluring for scores of scientists. In particular, the social Darwinism movement sought to apply Darwin's evolutionary theory to contemporary social problems in order to rationalize existing racial and class inequality.[59] Social Darwinists believed that unfettered market competition was necessary in order to further human evolutionary progress.[60] Accordingly, the social Darwinist movement opposed any and all attempts to eliminate social inequality, including government programs to aid the poor, minimum wage legislation, charitable donations, and free public education.[61] Social Darwinists also misapplied evolutionary theory to claim that the different "races" represented different positions on the human evolutionary ladder.[62] Building off past scientific assumptions of non-white racial inferiority, social Darwinists argued that the white race had achieved the highest level of evolution, while non-white races remained hopelessly stuck in a lower stage of natural evolution.[63] The whole of human civilization and social progress, under this view, was

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58. CHARLES DARWIN, THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX 237 (1902) (1871), *available at* http://darwin-online.org.uk/.

59. *See* TUCKER, *supra* note 30, at 26–28 (describing the application of social Darwinism in American society).

60. *See* TUCKER, *supra* note 30, at 27 (describing the belief that helping the weak and poor would harm the evolution of society).

61. *See* TUCKER, *supra* note 30, at 27 ("As a consequences, the social Darwinists opposed all governmental programs for charity, free meals, or other benefits for the undeserving inferior.").

62. *See* TUCKER, *supra* note 30, at 29 (illustrating the application of Social Darwinism's survival of the fittest as a competition between races).

63. TUCKER, *supra* note 30, at 29 (discussing Social Darwinists attempts to rank the races).

attributed to "'the struggle of race with race and the survival of the physically and mentally fitter [white] race.'"[64]

The infamous *Lochner v. New York*[65] Supreme Court decision was likely influenced by the views of social Darwinists. In *Lochner*, the Court struck down a New York state labor regulation that limited the number of hours that bakers could be forced to work by their employers.[66] The Court held that the statute impinged on the employers' freedom to contract for labor, and therefore violated the Due Process Clause of the Fourteenth Amendment.[67] Justice Oliver Wendell Holmes dissented from the majority holding, decrying that the majority's reasoning was inappropriately based "upon an economic theory" of laissez faire that was informed by the "Social Statics [sic]" of the preeminent social Darwinist leader – Herbert Spencer.[68]

The social Darwinist perspective posited that the continued legal and social oppression of "inferior races" was the only rational method to improve society.[69] Under this view, the resolution of the "race problem," and the advancement of society as a whole, depended on the elimination of biologically inferior races from the genetic pool:

> If [blacks] were the highest form of human life, we might be concerned… [But] to the clear, cold eye of science, the plight of these backward peoples appears practically hopeless. They have neither part nor parcel in the future history of man.[70]

Many scientists during this period were emboldened by the burgeoning social Darwinism field to develop scientific methods in order to hasten the human evolutionary process. Francis Galton, a cousin of Charles Darwin,

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64. TUCKER, *supra* note 30, at 29 (quoting KARL PEARSON, NATIONAL LIFE FROM THE STANDPOINT OF SCIENCE 21 (1905)).

65. *See* Lochner v. New York, 198 U.S. 45, 58 (1905) (holding that a New York statute regulating bakers' working hours violated the freedom to contract between employers and employees protected by the Constitution).

66. *See id.* at 52 (describing the mandate of the statute).

67. *See id.* at 53 ("The statute necessarily interferes with the right of contract between the employer and the employees . . . [the] right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment for the Federal Constitution.").

68. *See id.* at 75 (Holmes J., dissenting) ("The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.").

69. *See* TUCKER, *supra* note 30, at 28–34 (noting that any attempt to help blacks was useless).

70. TUCKER, *supra* note 30, at 31 (quoting WILLIAM BENJAMIN SMITH, COLOR LINE: A BRIEF IN BEHALF OF THE UNBORN 187 (1905)).

was one of the first scientists to found the field of eugenics. Galton and other eugenicists believed that science could be utilized to create a perfect "human race," by promoting the transmission of superior genes and inhibiting the transmission of inferior genes.[71] Unsurprisingly, for Galton and most other social Darwinists, the goal of eugenics during this time meant the scientific validation of folk assumptions of white superiority and black inferiority.

A principal goal of eugenicists, therefore, was to develop scientific measures by which to evaluate genetic potential. Some of the first eugenic tests sought to determine intellectual ability and human "merit." Galton was able to develop one of the first standardized IQ tests, finding that African-Americans scored two grades lower than whites. Galton interpreted these early findings as indicating that the majority of African-Americans were "half-witted" and thus genetically inferior to white persons.[72]

Following Galton's "scientific" findings of black intellectual inferiority, the psychology field collaborated with eugenicists to develop additional mental tests in order to scientifically determine human worth. The intelligence test soon became the principal scientific method in psychology, despite the fact that these purportedly neutral tests were racially biased:

> Even before data from the new mental tests had been gathered, many social scientists had already made up their mind about the intelligence of blacks and immigrants . . . Indeed, had the data conflicted with already received opinion, the new instruments would probably have been invalidated as measures of intelligence and discarded; some earlier tests of ability had already suffered such a fate when they failed to yield the expected racial ordering.[73]

E. Applied Racial Eugenics and the Holocaust

The biased assumptions and disturbing policies of eugenicists were soon integrated into society by law. Restrictive immigration laws,[74] Jim

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71. See Tucker, supra note 30, at 41–45 (describing Galton's eugenics program).

72. *See* GOSSETT, *supra* note 48, at 156 (detailing Galton's racial hierarchy).

73. TUCKER, *supra* note 30, at 74–75.

74. *See generally* Christian B. Sundquist, *The Meaning of Race in the DNA Era: Science, History and the Law*, 27 TEMPLE J. SCI. TECH. & ENVTL. L. 231 (2008); *see also* Gabriel J. Chin, *Segregation's Last Stranglehold: Race Discrimination and the Constitutional Law of Immigration,* 46 UCLA L. REV. 1 (1998) (providing a more detailed

Crow policies, anti-miscegenation laws, and forced sterilization policies[75] were all justified by the eugenicist claim that African-Americans and non-white immigrants possessed inferior genetic material. The fervor over applied eugenics as a scientific method to improve the "racial health" of society eventually extended beyond American scientists and politicians, as a number of Northern European countries began advocating racial eugenic reforms. For instance, in 1931 the Swedish Professor Herman Lundborg advocated for restrictive racial eugenic measures such as confinement and sterilization of "*the inherently degenerate*."[76] Professor Lundborg cautioned that failed to adopt a program of "race hygiene" would result in "the [superior white] race" facing "dissolution and extinction."[77] Accordingly, Professor Lundborg urged that European societies "*must at any price keep the quality of the [white] race at a high level*" in order to avoid social disintegration.[78]

German scientists and politicians also became intrigued by the promise of applied racial eugenics to preserve hierarchical structures of power. Following the First World War, German politicians attributed the nation's dire economic distress to racial biological degeneration and social welfare programs for the genetically inferior.[79] The Weimar government soon established "race hygiene" – *Rassenhygiene* - centers around the country in order to preserve the racial health of Germany. German eugenicists soon proposed sterilization programs and anti-miscegenation policies that were modeled after similar measures adopted in the United States.[80] Many German eugenicists – including Hans F.K. Gunther, who would later be seen as one of the key founders of Nazi racial ideology - believed that the

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discussion of the intersection of racial eugenics and immigration law).

75. *See* TUCKER, *supra* note 30, at 61 (noting that by conservative estimates, over forty-five thousand persons were sterilized in thirty states under sterilization statutes aimed at prohibiting genetic transmission from "socially inadequate" persons).

76. *See* Herman Lundborg, *Race Biological Perspectives*, 9 SOC. FORCES 397, 400 (1931) (emphasis in original) ("The inferior, on the other hand, *the inherently degenerate*, should by confinement, sterilization, and other means be prevented from reproducing.").

77. *See id.* ("If strong measures in race hygiene are not taken in time, the race will meet with dissolution and extinction.").

78. *See id.* (emphasis in original) (noting Lundborg's argument).

79. *See* TUCKER, *supra* note 30, at 112 ("Unsurprisingly, the German geneticists concluded that their nation's decline in eminence was primarily due to biological degeneration . . . .").

80. *See* TUCKER, *supra* note 30, at 111–16 (describing the Weimer government's interest in "racial hygenics").

restrictive immigration, sterilization and anti-miscegenation programs adopted in the United States were "only the first step… to still more definite laws dealing with race and eugenics."[81]

The nation regrettably adopted more severe eugenics measures once the Nazi political party of Adolf Hitler came into power in 1933.[82] Compulsory sterilization laws were strictly enforced, and the anti-miscegenation Nuremberg Laws restricted intermarriage between Jews and Aryans.[83] Fearing that these measures were not advancing the racial health of Germany in a timely manner, the Nazi government thereafter created euthanasia programs to murder those persons deemed genetically inferior.[84] At first directed only towards the mentally and physically handicapped, the euthanasia programs soon were applied to all non-white persons, including Jews, Slavs and the Roma.[85] The "Final Solution" euthanasia program adopted by Nazi Germany sought to eliminate the entire Jewish population of 9 million persons, who were deemed to be a non-white, genetically inferior race that impeded the racial purity of the German political community. Over six million persons were coldly murdered during the Holocaust, including two-thirds of the Jewish population of Europe.[86] Millions of other persons perished in forced labor camps created by the Nazi government, and through other euthanasia programs.[87]

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81. *See* TUCKER, *supra* note 30, at 116 (quoting HANS F. K. GUNTHER, THE RACIAL ELEMENTS OF EUROPEAN HISTORY 245 (Kennikat 1970) (1927)).

82. *See* TUCKER, *supra* note 30, at 118–22 (noting the Nazi's strengthened focus on eugenics).

83. *See* TUCKER, *supra* note 30, at 120–22 (detailing the Nazi's involuntary sterilization programs).

84. *See* TUCKER, *supra* note 30, at 127 ("Though sterilization might *eventually* have produced the desired result, in the meantime an enormous number of 'useless eaters' were draining scarce resources.").

85. *See* TUCKER, *supra* note 30, at 127–32 (describing the Nazi's application of euthanasia).

86. *See Introduction to the Holocaust*, U.S. HOLOCAUST MEM'L MUSEUM, http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005143 (last visited Nov. 14, 2013) (discussing the implementation of the "Final Solution" by the Nazi Regime during World War II).

87. *See id.* (illustrating several components the "Final Solution" as they developed over time). The racial genocide ended around March 7, 1945, once the Allied Forces defeated Nazi Germany in World War II. *Id.* (noting that the "death marches" used by Nazi Germany continued up until the day of surrender).

F. The Post-War Sociology of Race

As the preceding section briefly illustrates, the conception of race as a biologically meaningful category has had terribly dire consequences for persons deemed "non-white" in our world's history. Race developed as a political means to rationalize the unequal legal and social treatment of individuals and groups. Science historically has played a vital role in obscuring the contrived roots of the race concept while validating the rape, enslavement, unequal legal treatment, discrimination, and murder of millions upon millions of people deemed falling outside of the "white" racial construct.

The Postwar World finally realized its error in succumbing to the allure of invented biological notions of racial difference in the aftermath of the unspeakable Nazi atrocities. The newly-formed United Nations created a special organization – the Educational, Scientific and Cultural Organization ("UNESCO") – in part to articulate an authoritative statement on the nature of race. Relying on the contributions of scores of prominent anthropologists, sociologists, historians, and biologists, the UNESCO committee conclusively determined that "race" had no meaningful biological meaning. In particular, the UNESCO committee concluded that "'race' [was] not so much a biological phenomenon as a social myth" and construction.[88]

The scientific, political, legal and academic recognition of race as a social construction has been nearly universal. Esteemed social scientists have long declared that "race isn't very important biologically"[89] and that it would "be better if the term 'race' were altogether abandoned."[90] Rather, race is recognized as an invented "concept that signifies and symbolizes sociopolitical conflicts and interests in reference to different types of human bodies."[91] As a political construction, racial meaning is derived not from genetic differentiation but from socio-legal attitudes. Such an account restores historical accuracy to our understanding of the race concept, as race

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88. UNESCO, THE RACE QUESTION 6–7 (1950), *available at* http://unesdoc.unesco.org/images/0012/001282/128291eo.pdf. The UNESCO committee further stated that members of different "races" possessed equal intellectual and social abilities. *Id.* ("[G]iven similar degrees of cultural opportunity to realize their potentialities, the average achievement of the members of each ethnic group is about the same.").

89. Wilson D. Wallis, *Race and Culture*, 23 SCI. MONTHLY 313, 315–16 (1926).

90. Ashley Montagu, *The Concept of Race*, 64 AM. ANTHROPOLOGIST 919, 919 (1962).

91. OMI ET AL., *supra* note 26, at 179.

is viewed as an "ideology of inequality devised to rationalize European attitudes and treatment of the conquered and enslaved peoples" in order to perpetuate social inequality and existing structures of power.[92]

The biological account of race has been shown to be inaccurate at best, and a vehicle for legitimating racial discrimination and inequality at worst.[93] During the Enlightenment age, the era of European colonialism, and the periods of American chattel slavery and Jim Crow discrimination, biological conceptions of race were employed in order to reconcile the obvious tension caused by belief in democratic constitutional equality in the face of continued social and class inequality. Race is simply meaningless as a biological matter. As the renowned sociologist Howard Winant explains:

> Although the concept of race appeals to biologically based human characteristics (phenotypes), selection of these particular human features for purposes of racial signification is always and necessarily a social and historical process. There is no biological basis for distinguishing human groups along the lines of race, and the sociohistorical categories employed to differentiate among these groups reveal themselves, upon serious examination, to be imprecise if not completely arbitrary.[94]

Other commentators have noted that "responsible scientists have long discredited any biological or genetic definition of racial groups."[95] Rather, "historians have increasingly recognized that the so-called races of mankind are the fortuitous and arbitrary inventions of European and American history, the by-products, primarily, of Europe's religious, economic and imperial expansion across the seas of the earth."[96]

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92. AM. ANTHROPOLOGIST ASS'N, *American Anthropological Association Statement on Race*, 100 AM. ANTHROPOLOGIST 712, 712 (1998).

93. *See, e.g.*, Angela Harris, *From Color Line to Color Chart? Racism and Colorism in the New Century*, 10 BERKELEY J. OF AFR.-AM. L. & POL'Y 52, 68 (2008) ("[R]ace does not exist in the body but rather is the product of a socially-produced understanding."); Anthony Paul Farley, *All Flesh Shall See it Together*, 19 CHICANO-LATINO L. REV. 163, 166 (1998) ("There is no such thing as 'race' save as a 'social construction'"); IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 111 (Richard Delgado & Jean Stefancic eds., New York University Press 1996) (broadly examining the legal construction of race and "whiteness").

94. OMI ET AL., *supra* note 26, at 172.

95. David Brion Davis, *Constructing Race: A Reflection*, 54 WM. & MARY Q. 7 (1997).

96. *Id.*; *see also* Sipress, *supra* note 50, at 175 ("[T]he tripartite division of humankind into 'Negroid,' 'Mongoloid,' and 'Caucasoid' occupies a position in the biological sciences equivalent to that of the Ptolemaic model of the universe in astronomy.").

The law, in contrast to the current judicial trend to define race in genetic terms, had also affirmed the social constructivist underpinnings of race in much of its Postwar racial discrimination jurisprudence.[97] The United States Supreme Court adopted the findings of modern Postwar science that "racial classifications [are] arbitrary" in reaching its conclusion in a Title VII race discrimination action that race is "for the most part sociopolitical, rather than biological, in nature."[98] In a similar fashion, the Ninth Circuit also stridently affirmed the law's recognition of the social construction of race in its past jurisprudence:

> Race got its standing in the nineteenth century by pseudo-science. In the name of that science the "Anglo-Saxon race" was glorified, and immigration to America diluting "the Anglo-Saxon heritage" was viewed with alarm. In the name of that science the "yellow peril" of immigration from Asia was decried . . . . In the name of that science, persons were assigned to biological groupings that were perceived as superior or as degenerate. Now it is scientifically accepted that races "are not, and never were, groups clearly defined biologically."[99]

Recognition of the political and sociological nature of race had thus become one of the bedrock truisms of the Postwar era. The change in how race was perceived during this time eventually shifted social and legal perceptions on the State's role in addressing persistent racial inequality.

II. On Colorblindness, Postracialism and the Politics of Difference

The Postwar World largely embraced the scientific conclusion that race was a socio-political creation. It was therefore no longer legally, scientifically, or politically defensible to rationalize the continued existence of race-based inequities in terms of biological different. As racial

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97. *See, e.g.*, United States v. Parada, 289 F. Supp. 2d 1291, 1305 (D. Kan. 2003) (stating that "given that race is merely a social construct," the courts have struggled with "resolv[ing] the inherent difficulties in identifying the race or ethnicity of a particular person"); Perkins v. Lake County Dept. of Utils., 860 F. Supp. 1262, 1272–73 (N.D. Ohio 1994) (finding in a Title VII racial discrimination action that the term race was of such "doubtful sociological validity as to be scientifically meaningless); Cote-Whitacre v. Dept. of Pub. Health, 844 N.E.2d 623, 662 n.4 (Mass. 2006) (referring to race as a "social construct").

98. St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987).

99. Ho v. S.F. Unified Sch. Dist., 147 F.3d 854, 863 (9th Cir. 1998).

inequality could no longer be formally justified on the grounds of genetic inferiority, the United States was forced to recognize structurally-embedded systems of racial discrimination as the root of racial inequalities. For a brief period during the Civil rights era, America was thus able to enjoy significant advancements in the expansion of constitutional rights, the end of *de jure* segregation, and the pursuit of other affirmative measures to address entrenched, structural racism.

A. The Civil Rights Era

In the immediate wake of World War II, the United States struggled with resolving the conflict between the American democratic ideal of equality and the reality of domestic racial oppression. The historian Peter B. Levy concisely summarizes the critical role that the end of World War II played in changing America's attitudes toward race:

> The impact of World War II on the nation's ideology cannot be understated. The war put white supremacy on the defensive through propaganda put forth by the United States in opposition to the Nazi regime and by means of official proclamations, such as the Atlantic Charter and the founding documents of the United Nations, which reaffirmed America's belief in the principles expressed in the Declaration of Independence. Despite segregation in the armed forces and racial violence at home, the overall message of the war effort was that proponents of racial supremacy were wrong and that America would prosper because of its faith in equality and freedom for all. The Holocaust, which revealed to the world the atrocities that could be committed by a people driven by the ideology of racial supremacy, strengthened the American public's belief in the ideal of equality for all and marginalized open advocates of white supremacy.[100]

The Civil Rights Movement capitalized on the hypocrisy of America race relations, in part by framing its political message in terms of liberal equality and justice.[101] Professor Kimberlé Williams Crenshaw observes that "[t]he use of rights rhetoric during the civil rights movement created

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100. PETER B. LEVY, THE CIVIL RIGHTS MOVEMENT 46 (1998).

101. *See, e.g.*, Juan F. Perea, *An Essay on the Iconic Status of the Civil Rights Movement and its Unintended Consequences*, 18 VA. J. SOC. POL'Y & L. 44, 51 (2010) (describing the African American struggle based its argument in terms of "equality" and "justice"); Gerald N. Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 ST. LOUIS U. L.J. 1147, 1148 (2004) (discussing the political impact of the Civil Rights Movement).

[an ideological] crisis by presenting and manipulating dominant ideology in a new and transformative way."[102] Organized by courageous and inspirational leaders, the movement focused public attention on the moral contradiction between the "American creed" of democratic equality and state-sanctioned racism.[103] The movement's success in unmasking the pervasiveness of entrenched racial inequality created enormous political and moral pressures on the executive, legislative and judiciary branches for social change.[104]

As public awareness of race discrimination increased as a result of the Civil Rights Movement, so did international scrutiny of American race relations.[105] Spurred by such international criticism, President Harry Truman was forced to acknowledge that the "United States was not so strong, the final triumph of the democratic ideal is not so inevitable that we can ignore what the world thinks of our [racial] record."[106] As such, President Truman established the President's Committee on Civil Rights in 1946 (the "Committee").[107] The Committee was tasked with examining the state of civil rights in America following the war, and proposing recommendations to "safeguard the civil rights of the people."[108] In a

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102. *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 119 (Kimberlé Crenshaw et al. eds., The New Press 1995).

103. *See* GUNNAR MYRDAL, THE AMERICAN DILEMMA 5 (1944) (describing the value premise of the study as the "American Creed," or, namely, that "Negroes are entitled to justice equality").

104. Attempts to define the beginning of the iconic "Civil Rights Movements" can be problematic. As Professor Juan Perea (and many others) aptly note, African-Americans have actively resisted racial oppression "in visible, powerful ways ever since the beginnings of that oppression, usually traced to the rise of slavery in the early seventeenth century." Juan F. Perea, *An Essay on the Iconic Status of the Civil Rights Movement and its Unintended Consequences*, 18 VA. J. SOC. POL'Y & L. 44, 51 (2010). While many historians locate the beginning of the Civil Rights Movement to coincide with the *Brown v. Bd. of Educ.* decisions in 1954, or with the Greensboro, North Carolina student sit-ins in 1960, this narrative has the potential to devalue the importance of earlier struggles to achieve racial justice. *Id.*

105. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 29 (2000) (discussing effects of Civil Rights Movement on the United States international reputation).

106. LEVY, *supra* note 100, at 47.

107. *See* PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS VII (1947), *available at* http://www.trumanlibrary.org/civilrights/srights1.htm#3 (discussing the date and purpose of establishing the Committee).

108. *See* Exec. Order No. 9,808, 11 Fed. Reg. 14,153 (1946) (establishing committee with responsibility to examine ways in which the "authority and means possessed by

report entitled *To Secure These Rights*, the Committee recommended direct government action to combat racial discrimination for three reasons: "a moral reason (race discrimination was wrong), an economic reason (racism harmed the US economy), and an international reason (racism damaged foreign relations)."[109] The report was significant in that it was one of the first Postwar attempts to articulate a right to "equal opportunity," whereby each citizen is entitled to "enjoy the benefits of society… with complete disregard to race, color, creed and national origin."[110] In so doing, the Committee attempted to reconcile the disconnect between the American "heritage of freedom and equality" and the "reality" of widespread race discrimination and inequality.[111] While the meaning of "equal opportunity" eventually would be perverted by future jurisprudence to *invalidate* State attempts to address racial inequality,[112] at the time this concept was at the vanguard of state efforts to affirmatively address race discrimination.

The gradual social recognition of the persistence of racism and the pervasiveness of race-based social inequalities enabled significant progress during the Civil Rights era.[113] Spurred by the transformative Civil Rights Movement, as well as the perceived political need to repair the American record on race relations during the Cold War,[114] the United States achieved

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Federal, State, and local governments may be strengthened and improved to safeguard the civil rights of the people").

109. DUZIAK, *supra* note 106, at 80–81; *see also* Letter from Acting Secretary of State Dean Acheson to the Chairman of the Fair Employment Practices Commission (FEPC):

> An atmosphere of suspicion and resentment in a country over the way a minority is being treated in the United States is a formidable obstacle to the development of mutual understanding and trust between the two countries. We will have better international relations when these reasons for suspicion and resentment have been removed.

110. PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 10 (1947).

111. *Id.* at 9–10.

112. *See infra* Part II of this Article.

113. *See* LEVY, *supra* note 100, at 45–46 (describing the advances of the Civil Rights Movement in the time immediately following the end of World War II). "The contradictions between the rhetoric of democracy and the reality of race relations in the United States compelled Presidents Truman, Eisenhower, and Kennedy to support civil rights measures that otherwise they might not have. The Supreme Court considered the foreign policy implications of racial inequality in arriving at its decisions in key civil rights cases, including *Brown v. Board of Education.*"

114. *See, e.g.*, LEVY, *supra* note 100, at 46–47 for a discussion of the impact that Cold War rhetoric had on the adoption of race-conscious measures. Levy explains, for instance, that the United States felt compelled to repair their international image on race matters as part of the overall effort to neuter the Cold War propaganda of the socialist Soviet Union:

an end to *de jure* racial segregation,[115] enacted critical civil rights legislation,[116] and adopted affirmative measures to address entrenched racial inequality in employment and education.[117]

B. The Move Beyond Race: Non-Biological Distancing

The laws enacted during the civil rights period provided for the formal protection of equal employment, voting and educational opportunities for all Americans.[118] While the *de jure* recognition of such civil rights was undoubtedly critical to racial progress, the achievements of the Civil Rights era failed to completely undermine historical legacies of white privilege and racial inequality.[119] In that the laws passed during this period did little to upset the unequal distribution of property, wealth and other social resources that existed along racial lines, the gains of the civil rights era were conservative and fleeting. The eradication of formal racial discrimination simply "failed to address the synergy between law and society that helped

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"As the rivalry between the Soviet Union and the United States heated up, the Soviets pointed to the 'U.S. policy' of discriminating against minorities and used virtually every incident of violence toward or mistreatment of African Americans as a propaganda weapon to embarrass the United States and to win favor with the numerous developing, newly independent nations, many of which were nonwhite."

115. *See* Exec. Order No. 9,981, 13 Fed. Reg. 4,313 (1948) (creating a committee to examine the existing rules, procedures, and practices of the armed forces to suggest alterations to end racial segregation in the military); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (ending *de jure* racial segregation in public education); *but see* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) ("Brown II") (allowing desegregation to take place "with all deliberate speed").

116. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000 (2006)); and Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (prohibiting discrimination or segregation in places of public accommodation).

117. *See* Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (1961) (requiring government contractors to take "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin"). Additionally, the Executive Order established the President's Committee on Equal Employment Opportunity, which would later become the Equal Employment Opportunity Commission in the Civil Rights Act of 1964.

118. *See* Perea, *supra* note 104, at 51 (noting that a principal aim of the civil rights movement was to "eliminate the continuing vestiges of one of the United States' most profound and recognized moral sins: federal and state sponsored slavery").

119. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 3–4 (1992) (discussing the continuing effects of racial inequality and the statistical evidence to support such a finding).

accumulate and compound centuries of white power and privilege using neutral means."[120]

Racial disparities in education, employment, income, wealth, health outcomes, incarceration and a slew of other social metrics continued to exist following the civil rights era.[121] Such disparities continued to exist due to a failure to interrogate the background conditions of racial inequality and privilege, as well as the persistence of systemic racial discrimination.[122] Rather than acknowledge a continuing moral and legal responsibility for persistent racial disparities, society and its institutions strove to contrive alternative race-neutral explanations for inequality. America, simply put, was unwilling to interrogate its underlying racial privilege.

The government thereafter ushered in a period of "benign neglect" on race matters, choosing to focus on race-neutral approaches to racial inequality. New York Congressman Daniel Patrick Moynihan, for instance, pleaded that white Americans needed a psychological respite from racial matters following the Civil Rights era. In an internal memo sent to President Nixon, Moynihan advised that "the time may have come when the issue of race could benefit from a period of 'benign neglect'" and that "the subject" of race "has been too much talked about."[123] An earlier report published by Moynihan in 1965 on the status of "the Negro Family" similarly argued that government policy should "deemphasize the issue of racism and discrimination" and address persistent racial inequality through race-neutral policies such as "equal opportunity" and "colorblind universalism."[124] Rather than continue "social policies aimed at addressing racism" that were proven effective during the Civil Rights era, the Moynihan Report recommended that the government adopt unproven race-neutral policies to resolve the matter of racial inequality. That such

120. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1612 (2009).

121. *See* BELL, *supra* note 119 (discussing the continuing disadvantages that continued to plague the black community).

122. *See id.* (identifying the various reasons for continued disadvantage within the black population).

123. Peter Kihss, *"Benign Neglect" on Race is Proposed by Moynihan*, N.Y. TIMES, Mar. 1, 1970, at 1.

124. TIM WISE, COLORBLIND: THE RISE OF POST-RACIAL POLITICS AND THE RETREAT FROM RACIAL EQUITY 27–28 (2010) (discussing OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION ("The Moynihan Report") (1965)).

recommendations were motivated by a desire to assuage the moral conscious of white American voters seems beyond reasonable dispute. [125]

Race-neutral social ideology in the post-Civil Rights world tends to rationalize race-based inequality in four overlapping ways, by employing (1) cultural explanations for inequality, (2) the rhetoric of liberal concepts of the free market, individualism and equal opportunity, (3) the tools of colorblind constitutionalism and (4) the politics of post-racialism. Immediately following the end of the Civil Rights Movement, the underlying cause of persistent racial disparities was linked to black cultural depravity under a burgeoning colorblind mentality. In other words, the race-neutral colorblind perspective advanced by Moynihan and others sought to shift the moral responsibility of racial inequality from the government and white America to African-Americans and other persons of color. The move to view racial disparities as caused by black and non-white cultural deficiencies soon found its voice in sociological "culture of poverty" theories. Sociologist William Julius Wilson concluded in his book *The Declining Significance of Race* that government policy on eliminating racial disparities should not be race-regarding or focus on discrimination.[126] Echoing the perverse story of black depravity cultivated during the slavery era, Wilson argued that the government should continue race-neutral policies to address social inequality. While "culture of poverty" models were heavily criticized and discredited by many in years past, they have experienced a popular resurgence in the academic literature.[127] The new found popularity of "culture of poverty" arguments is likely traceable to the broader socio-cognitive impulse to obscure the structural roots of racial and class inequality.[128]

Emphasizing non-white, and in particular black, cultural inferiority has enabled considerable political gain amongst white voters by both conservative and liberal politicians. Ronald Reagan, for instance, infamously wielded the racist imagery of the "black welfare queen" in campaigning for the presidency.[129] President Bill Clinton similarly utilized

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125. *See generally* Darren Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917 (2009).

126. WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE (1980).

127. "Culture of poverty" sociological theories have experienced a resurgence in recent years. *See* David J. Harding, Michele Lamont & Mario Luis Small, *Reconsidering Culture and Poverty*, 629 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 6–7 (2010).

128. *See infra* Part III.

129. *See* Andre Pond Cummings, *Racial Coding and the Financial Market Crisis*, 2011

the racially coded language of "undeserving welfare queens" to rationalize severe cuts to social welfare spending.[130] And even President Barack Obama has deployed racial narratives of black cultural depravity for political gain.[131]

The move to view race-based disparities as the natural offshoot of cultural deficiencies found its ideological packing in the liberal notion of equal opportunity. During the Civil Rights Movement, the concept of equal opportunity developed as an attempt to affirmatively respond to the disconnect between the American "heritage of freedom and equality" and the "reality" of pervasive racism and discrimination.[132] Part and parcel of the original vision of equal opportunity, then, was recognition that affirmative state measures were necessary to remedy racial inequality.[133] As Justice Harry Blackmon famously noted, a prevailing view during the Civil Rights Movement was that "[in] order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."[134] This conception of equal opportunity, borne out of the social progress achieved during the Civil Rights Movement, was based on an understanding that racial inequality was caused by continuing racial discrimination and a legacy of racial oppression. And what if American society moved to embrace race-neutral explanations for racial inequality? What if society disingenuously ignored the persistence of racism, and rather viewed racial disparities as being caused by cultural factors? What role would the concept of "equal opportunity" play in this colorblind re-envisioning of race?

Unfortunately, the notion of "equal opportunity" became a normative centerpiece of the racial project to view inequality in terms of cultural deficiency and market outcomes. Detached from its intellectual moorings, the notion of equal opportunity has been perverted under "culture of

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UTAH L. REV. 141, 217–218 (2011) (discussing racial coding in the American tradition and the welfare queen in political dialogue).

130. *See* TERRY SMITH, BARACK OBAMA, POST-RACIALISM, AND THE NEW POLITICS OF TRIANGULATION 84–85 (2012); *see also* Francine Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of "Undeserving" Poor*, 7 NEV. L.J. 736, 741–42 (2007).

131. *See id.* at 102–112.

132. Exec. Order No. 10,925, *supra* note 117, at 10.

133. *Id.*

134. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J. concurring).

poverty" theories to justify government and social inaction on issues of racial inequality. As I have summarized previously, the colorblind interpretation of equal opportunity provides:

> [that] the paradigm of equal opportunity is a truly objective, neutral and fair method to allocate educational, employment, and political resources to members of society, without regard to race, class, gender or ethnicity. The ideal of equality assumes the possibility of an objective measure of merit under which individuals' abilities and performances may be evaluated. Accordingly, through the creation of a baseline that presupposes the inherent sameness of all people and disregards systemic discrimination as a fallacy, any social and economic inequality that exists is said to be legitimate because it purportedly reflects the natural results of deficient personal choices.[135]

In this way, the colorblind reinterpretation of the "equal opportunity" concept became critical to race-neutral attempts by the government and the courts to resolve the tension between American liberal equality and persistent racial inequality.

The artifice of "equal opportunity" has similarly been utilized by the Supreme Court to rationalize its adoption of "colorblind constitutionalism."[136] From its early iteration in anti-affirmative-action cases such as *City of Richmond v. J. A. Croson Co.*[137] and *Metro Broadcasting v. FCC*[138] to its modern reliance in school integration cases such as *Parents Involved in Community Schools v. Seattle School District No. 1*[139] and *Fisher v. Texas*,[140] the concept of colorblindness has been employed by the Court to dismantle and prohibit race-regarding social policy. Implicit in the colorblind construct is an assumption that pervasive racial discrimination is a social anomaly, such that state measures, which directly respond to racial inequality, are viewed as constitutionally suspect. Explicit in colorblind jurisprudence is an ironic interpretation of civil rights laws as requiring no state consideration of race in policymaking so as to protect the liberties of individual white "victims."[141]

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135. Sundquist, *supra* note 15, at 228–29.

136. *See* Gotanda, *supra* note 3.

137. 488 U.S. 469 (1989).

138. 497 U.S. 547 (1990).

139. 551 U.S. 701 (2007).

140. 133 S. Ct. 2411 (2013).

141. *See, e.g.*, Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction,* 32 WM. & MARY L. REV. 1 (1990).

The modern construct of post-racialism[142] may be viewed as the "liberal embrace of colorblindness."[143] As Professor Sumi Cho has succinctly described:

> [P]ost-racialism . . . is a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action.[144]

Post-racialism, then, enables a "retreat from race" as an explanation for racial inequality while "insulat[ing] white normativity from criticism."[145] Under this burgeoning worldview, race-regarding remedies and even explicit discussion of racial inequality are seen as unnecessary and unfounded in an era that has transcended racism.[146]

C. On Masking Racism: Cognitive Dissonance and the Psychology of Moral Absolution

Our society has long struggled to reconcile its moral belief in equality with the seeming intransigence of racial inequality.[147] The socio-legal success of a given race-neutral distancing strategy thus depends in large part on how well it rationalizes the continued existence of racial inequality in an ostensibly equal society. The process of post-race rationalization involves a distinct psychological dimension, characterized by the normalization of racial privilege (and thus racial inequality) and the redemption of whiteness.

Race-neutral distancing moves, such as post-racialism and colorblindness, are motivated by a psychological desire to avoid the cognitive dissonance that comes with acknowledging privilege. As I have stated in other contexts:

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142. *See* Cho, *supra* note 120, at 1591.

143. Ian F. Haney Lopez, *Symposium: Acknowledge Race in a "Post-Racial" Era: Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 808 (2011).

144. Cho, *supra* note 120, at 1594.

145. *Id.* at 1594–1596.

146. *See id.* at 1604–1644 for examples of post-racial jurisprudence and rhetoric.

147. *See* RICHARD H. KING, RACE, CULTURE, AND THE INTELLECTUALS 1940–1970, 26 (2004) (arguing that Gunnar Myrdal's notion of the "American Creed" . . . "provided the moral foundation of American culture and institutions").

> Confronting privilege means acknowledging that benefits and advantages received were not necessarily the result of merit and hard work, while exposing the deeply held values that have supported privilege. [T]he potential psychic damage to privilege holds forces most to ignore and suppress alternative explanations for their status that depart from the assumption of naturalness and neutrality.[148]

Psychological findings confirm that the expression of colorblind and post-race attitudes function to normalize racial privilege while reducing the potential for cognitive dissonance. Psychological theory holds that cognitive dissonance "describes the state of psychological discomfort that arises" when an individual possess conflicting conceptions of the self.[149] Applied to the racial privilege context, cognitive dissonance theory provides that holders of privilege will employ "dissonance reduction mechanisms"[150]—such as colorblindness—in an effort to preserve a view of themselves as non-biased and free from privilege.[151] The expression of post-race and colorblind attitudes, then, exemplifies the "tendency to sidestep the mention of race"[152] and normalize the racial status quo.

System Justification Theory ("SJT") has further empirically concluded that "people are motivated to accept and perpetuate features of existing social arrangements, even if those features were arrived at accidentally, arbitrarily, or unjustly."[153] The cognitive tendency to rationalize the status quo represents a coping mechanism for persons confronted with privilege or systemic inequality by "reducing anxiety and uncertainty."[154] Therefore, holders of privilege have a strong psychological motivation to express

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148. Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III*, 1 COLUM. J. RACE & L. 119, 148 (2011).

149. *See generally* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

150. *See* Paul M. Collins, Jr., *Cognitive Dissonance on the U.S. Supreme Court*, 64 POL. RES. Q. 362, 362 (June 2011).

151. *See* Evan P. Apfelbaum et al., *Racial Colorblindness: Emergence, Practice and Implications*, 21 CURRENT DIRECTIONS IN PSYCHOL. SCI. 205, 206 (June 2012).

152. *Id.*

153. Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119, 1124 (2006).

154. *Id.*; *see also* John T. Jost et al., *Shared Reality, System Justification and the Relational Basis of Ideological Beliefs,* 2 SOC. & PERSONALITY PSYCHOL. COMPASS 171, 172 (2007) ("[P]eople defend and bolster the legitimacy of the societal status quo following exposure to various manipulations of system threat.").

system-justifying attitudes, as "acceptance of traditional distinctions tend to reduce cognitive dissonance."[155]

The psychological and moral need to reconcile pervasive racial disparities with the comforting perception of racial transcendence and absolution, as expressed through colorblindness and post-racialism, also serves to redeem whiteness. Professor Sumi Cho has described racial redemption as "the process by which whiteness can be restored to its full material value by removing the encumbrances that the legacy of racism has placed upon it."[156] Whereas the acknowledgement of structural racism and white privilege "infringed upon the normative value of whiteness," the modern move towards post-racialism redeems whiteness while insulating racial privilege from critique.[157]

III. The New Race Science

The cognitive-moral dissonance that arises when an ostensibly "equal" and free society acquiesces in the existence of racial inequality has been historically mediated in both race-regarding and race-neutral ways. Initially, the artifice of "race" itself developed as a socio-political tool to justify the unequal treatment of persons living within a democratically equal society on the grounds of biological inferiority.[158] Following the rejection of race as biologically meaningful in the morbid aftermath of World War II, the full weight of the physical and social sciences embraced a socio-political construction of race. American society was thus no longer able, at least as a formal legal matter, to justify racial disparities on the basis of genetic inferiority. Rather, postwar America was forced to acknowledge that racial inequality was caused by pervasive structural racism and discrimination. Partly as a result, society was able to strike down many barriers to *de jure* racial equality during the emergent Civil Rights Era. Utilizing race-regarding legal measures, such as the Voting Rights Act of 1965, *Brown* desegregation, and affirmative action policy,

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155. *See* Sundquist, *supra* note 148, at 148.

156. Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren,* Brown*, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 122 (1998).

157. Cho, *supra* note 120, at 1596 (explaining that colorblind and post-racial attitudes changes the meaning of race in politics).

158. *See supra* Part I.

society thus enjoyed substantial (though incomplete) progress on race matters.

The gains of the Civil Rights Era, however, gradually diminished as race-regarding legal responses to inequality and discrimination were displaced by race-neutral responses. Colorblind and post-racial methodologies have been relatively successful in their attempts to rationalize continuing racial inequality in race-neutral terms, utilizing the language of "equal opportunity" and cultural inferiority. And yet during this period of race-neutrality, marked by white "exhaustion" over race, we have witnessed glaring increases in racial disparities rather than decreases.

Perhaps one of the more important consequences of the colorblind and post-race project has been the demise of the Civil Rights Movement. A brief review of the most recent Supreme Court term is telling in this regard, where the Court rolled back critical civil rights advances in the voting discrimination, affirmative action, employer discrimination and criminal justice contexts. During the summer of 2013, the Court held the most vital section of the Voting Rights Act unconstitutional.[159] Declaring that "[o]ur country has changed," the majority deployed the post-racial trope of "racial progress" to invalidate the centerpiece legislation of the Civil Rights Era.[160] States previously under federal review have already begun to implement rigid voting requirements that likely will have the effect of disenfranchising scores of minority voters.[161] The Court also made it much more difficult for educational institutions to consider race in admissions,[162] despite disturbing patterns of re-segregation and increasing racial disparities in higher education.[163] In a pair of Title VII cases, the Court issued rulings that made it more difficult for plaintiffs to prevail on employment discrimination cases. [164] And finally, the Court held constitutional the forcible collection of DNA samples for persons merely arrested on suspicion of committing a

159. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2630–31 (2013).

160. *Id.*

161. *See* Blair Bowie, *In the Aftermath of VRA Ruling, A Wave of Voter Suppression Laws*, U.S. PIRG (Aug. 7, 2013), http://www.uspirg.org/blogs/blog/usp/aftermath-vra-ruling-wave-voter-suppression-laws.

162. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).

163. *See, e.g.*, Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003).

164. *See* Vance v. Ball, 133 S. Ct. 2434 (2013); *see also* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 978 (2013).

crime, despite the fact that such collection disparately impacts racial minorities.[165]

The death of the Civil Rights Movement will almost certainly lead to further increases in racial inequality.[166] And yet the continued exacerbation of racial disparities arguably threatens the post-race perception of racial transcendence. It becomes more and more difficult to profess a post-racial belief in an equal society when racial disparities on nearly every social metric continue to widen. Race-neutral rationalizations of inequality, such as class and cultural deficiency explanations, may no longer be sufficiently persuasive to relieve the cognitive dissonance generated by the increasingly dire "American dilemma." As such, we likely will see new forms of rationalization emerge from this complicated socio-cognitive *milieu* as the post-race narrative adapts to changing social patterns.

A. Post-Racialism and the New Race Science

One such rationalization can be found in the troubling resurrection of biological conceptions of racial difference. The long rejected notion that race has genetic meaning has been resuscitated in a variety of modern scientific, legal and social contexts. From pharmacogenomics to forensic evidence, the folk allure of viewing race as an empirically sound biological category has surged at the same time that the allure of acknowledging structural discrimination has dwindled.

In a perverse way, the rise of the new "race science" makes sense in light of the post-racial project. A key feature of post-racialism is the rejection of systemic racism as an explanation for disparate racial outcomes. And while flawed race-neutral explanations (such as cultural, class and market theories) have filled the void in the last few decades, the central justification of racial inequality for centuries has been biological difference.[167] As Professor Roberts has explained:

> "[b]iological distinctions, seemingly validated by genomic science and technology, appear to explain why stark racial disparities persist despite

165. *See* Maryland v. King, 133 S. Ct. 1 (2013).

166. *See generally* Christian B. Sundquist, *Post-Oppression*, TOURO J. GENDER & RACE (forthcoming 2014).

167. *See infra* Part I.

> the abolition of official discrimination on the basis of race and despite most white American's belief that racism has ceased to exist."[168]

In particular, modern biological theories of racial difference provide colorblind and post-race adherents with a seemingly morally defensible way to mediate the cognitive dissonance that arises when confronted with the reality of racial inequality. Understanding racial inequality in biological terms allows a shift in moral responsibility for racial disparities from the state and individual to the market and biotechnology.[169] In this way, the new race science naturalizes the existing social order, by making racial differences seem biologically rooted and unchangeable by social policy.

Conveniently utilizing the same flawed racial categories developed during oft-maligned 19th century "race science" era, modern biological race theory has re-emerged as a tool to commoditize personal identity and racial difference.[170] The market for private genetic ancestry testing has exploded, fueled by misleading claims that genetic testing can produce percentage breakdowns of race.[171] The field of race-based medicine and pharmacogenomics has similarly become popular, involving the development and marketing of drugs by pharmaceutical companies for specific racial groups.[172] And all the while, the use of race to secure patent protection in biotechnology development has expanded.[173]

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168. ROBERTS, *supra* note 25, at 297.

169. *Id.*; *see also* Christian B. Sundquist, *On Race, Theory and Norms*, 72 ALB. L. REV. 953 (2009); Christian B. Sundquist, *Science Fictions and Racial Fables: Navigating the Final Frontier of Genetic Interpretation*, 25 HARV. BLACKLETTER L.J. 57 (2009) [hereinafter *Science Fictions*].

170. *See* ROBERTS, *supra* note 25, at 147.

171. ROBERTS, *supra* note 25, at 226. Out of academic interest, I personally submitted a genetic sample to one of the leading for-profit ancestry testing companies a few years ago. This company promised customers that they could discover their racial "roots" and ancestral past through the mere swab of a cheek. While I have devoted my research to matters of racial constructionism, I admit that I waited with bated breath for the results of my racial scientific analysis. Would the results conflict with my own personal and familial racial identity as "Black"? Or would the results confirm my understanding of the complexities of my racial history? As a racially "ambiguous" individual whose race is contested and re-constructed by others on a daily basis, the anxiety I experienced over "scientific" testing that I knew to be false is telling. I eventually received a "certificate of racial authenticity" proclaiming that I was "Native-American"- which was more telling for the manner in which such testing rigidly re-enforced discarded biological notions of racial difference than for describing my true racial "essence."

172. *See* Osagie K. Obasogie, *Playing the Gene Card? A Report on Race and Human Biotechnology,* CTR. FOR GENETICS & SOC'Y (2009).

173. *See, e.g.*, Kahn, *supra* note 21.

The most troubling manifestation of biological race theory, however, has occurred in our state and federal courts. It has now become commonplace for courts to admit racial genetic evidence against criminal defendants at trial. For almost a decade, state and federal judges have routinely allowed racial DNA evidence that there is only a "1 in 40 million chance" that another "Hispanic-American" or "African-American" or "Caucasian" or "Native-American" or "Asian-American" or "Puerto-Rican" or "Caribbean-American" shares the same genetic profile as a criminal defendant. The Supreme Court has at best ignored the shaky legal status of racial DNA evidence in its cases, and at worst has implicitly accepted its admission against criminal defendants.[174]

B. Racial DNA Evidence

The forensic analysis of DNA samples to identify criminal perpetrators is increasingly important to law enforcement. It has been almost twenty years since Congress first passed an act allowing the Federal Bureau of Investigation ("FBI") to develop a national DNA database, which was named the Combined DNA Index System ("CODIS").[175] THE CODIS database went into operation in 1998, and allows both state and federal law enforcement agents to upload DNA profiles and search the database for a match to their crime-scene sample. Congress thereafter passed the DNA Analysis Backlog Elimination Act in 2000, which compels persons convicted of particular federal crimes to submit a DNA sample for uploading to the CODIS database.[176] As of May 2013, the CODIS database contained over 10,376,000 DNA profiles in its convicted offender index, 1,515,800 arrestee profiles and 493,500 forensic profiles.[177] The number of

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174. *See* Maryland v. King, 133 S. Ct. 1 (2013).

175. DNA Identification Act of 1994, 42 U.S.C. § 14132 (1994).

176. *See Codis Brochure: Combined Data Index System,* FBI, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_brochure (last visited Nov. 10, 2013); *see also* JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY AND GENETICS OF STR MARKERS 85 (2d ed. 2005) (explaining that CODIS is a "distributed" database, containing local, state and national DNA indexing systems. The National DNA Index System ("NDIS") is the highest hierarchal level of CODIS, and allows for the comparison of profiles contained in the local DNA Index System ("LDIS") and the state DNA Index Systems ("SDIS"). All uploaded DNA profiles originate at the LDIS level, and are then uploaded to the SDIS and NDIS indexes).

177. *CODI—NDIS Statistics*, FBI, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics (last visited Nov. 10, 2013).

DNA profiles contained in CODIS has doubled in less than five years,[178] and will likely continue to expand exponentially following the Supreme Court's holding that state and federal officers can upload DNA samples taken from persons merely arrested on suspicion of a felony.[179] The expansion of DNA databases has dire implications for racial justice, given the disparate representation of racial minorities in these databases. By most estimates, the DNA profiles of African-Americans represent at least 40% of the profiles contained in the convicted offender database,[180] even though African-Americans make up only 13.1% of the general population. As Professor William C. Thompson observes, "[b]ecause there are racial, ethnic, and class disparities in the composition of databases, the risk of false incrimination will fall disproportionately on members of the included groups."[181]

All persons, with the exception of identical twins, possess a unique molecular signature that can be determined through DNA analysis.[182] While it is currently both too time-consuming and expensive to map out the entire genome of an individual for criminal identification purposes, scientists have identified specific chromosomal regions of the genome that differ from person to person.[183] The comparison of the genetic profile created from a DNA sample found at a crime scene with the genetic profile created from a suspect's DNA sample is, thus, of obvious importance to both criminal investigators and prosecutors. The determination of a "match" or "inclusion" between the compared genetic profiles does not represent conclusive evidence of identification, given that the individual's entire genome has not been analyzed.[184] Rather, a DNA match establishes that a suspect *potentially* could have contributed the DNA sample found at

178. *See Science Fictions*, *supra* note 169, at 68–69 (stating that the CODIS system contained only 5,074,473 DNA profiles of convicted offenders in October 2007, along with 194,785 profiles in its forensic crime scene index).

179. *See Maryland*, 133 S. Ct. at 3.

180. *See* Henry T. Greely et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. MED. & ETHICS 248, 258 (2006); *see also* Osagie, *supra* note 172 at 38.

181. Osagie, *supra* note 172 at 43.

182. Tom O'Connor, *Omaha's "CSI" Unlocks Hidden Clues*, 24 UNIV. OF NEB. MED. CTR. (Fall 2007), http://www.unmc.edu/publicrelations/docs/discover/fall2007discovercsi.pdf.

183. *See id.* at 24–26.

184. TONY N. FRUDAKIS, MOLECULAR PHOTOFITTING: PREDICTING ANCESTRY AND PHENOTYPE USING DNA 3 (2008).

a crime scene.[185] The crucial next step of the DNA identification process therefore involves creating a probability estimate of the possibility that someone other than the suspect was the source of the crime-scene DNA sample.[186]

The development of the "random match" probability estimate depends on determining the frequency with which the particular DNA profile appears in a given population. One method of determining the probability of a random match is to analyze how often the DNA profile at issue appears in the entire population. After comparing the DNA profile at issue to the entirety of the profiles contained in such a "general population" database, the scientist could then benignly opine that there is, for instance, a "1 in 1 million chance" that some person other than the suspect shares the same DNA profile.[187] The presentation of such expert opinion evidence at trial does not rely on biological assumptions of race whatsoever, as the frequency estimate is developed without regard to race.

While the creation of a probability estimate using a general population database is generally scientifically and legally sound, forensic scientists and prosecutors have nonetheless been successful in admitting race-based probability estimates in criminal trials. This alternative method of probability analysis involves measuring the frequency with which the DNA profile at issue appears in a given "racial" group. While the genetic profiles uploaded to the CODIS database are typically not classified by race, some twenty years ago the FBI created a separate population file that estimated genetic frequencies in sub-populations according to the entrenched racial taxonomy: African-American, "United States" Caucasian, Hispanic, Far East Asian, and Native-American.[188] This allows prosecution experts to present a racialized DNA probability estimate in criminal trials. My own research indicates that the presentation of racialized DNA probability estimates at trial exceeds the presentation of estimates making comparisons to the general population.

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185. *See* NORAH RUDIN & KEITH INMAN, AN INTRODUCTION TO FORENSIC DNA ANALYSIS 139–40 (2d ed. 2002).

186. *Id.* at 143.

187. *See Science Fictions*, *supra* note 169, at 59–60 (illustrating the chances of two people sharing the same DNA).

188. *See* BUTLER, *supra* note 176, at 438–439 (2005) (explaining the CODIS pilot project).

C. Debunking the Myth of Genetic Race

Why have biological assumptions of race seeped into our criminal law? Why do forensic experts and criminal prosecutors choose to present racial DNA evidence at trial when they could just as easily present non-raced DNA evidence with the same degree of evidential force? As discussed previously, the burgeoning acceptance of racial DNA evidence can be traced to the larger post-racial project. The resurrection of biological understandings of race—such as the assumption that science can empirically create genetic probability estimates of race—normalizes the racial status quo and explains the persistence of racial disparities. Simply put, the new race science strengthens the post-race rationalization of racial inequality while displacing society's moral responsibility to pursue race-regarding social policy.

It is not possible to underestimate the enduring folk appeal of understanding race in biological terms. We are all deeply susceptible to culturally learned assumptions about race, and cultural attitudes continue to unconsciously shape the manner in which judges, prosecutors and scientists construct and interpret race. The intoxicating allure of viewing racial distinctions as natural and biologically based is historically rooted to an often unconscious cognitive urge to legitimate the racial status quo.[189] What becomes of racial hierarchy and privilege, after all, if racial categories no longer exist? Science has long been utilized to validate folk notions of the supposed "fixed" nature of race.[190]

Beyond the historical and sociological critique of biological theories of race, see *supra*, the "science" underlying such conceptions is seriously flawed. As an initial matter, the racial taxonomy relied on by the new "race science" eerily mirrors antiquated folk classifications created almost three hundred years ago. For example, the racial DNA population file created by the FBI is based on familiar socio-political racial distinctions: African-American, Caucasian, Hispanic, East Asian and Native-American. Yet these categories are neither scientifically meaningful nor universally recognized. The world exhibits a mind-numbingly wide range of racial conceptions, which do not always mirror the traditional racial taxonomy

189. *See* Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987) (discussing how this unconscious racial motivation manifests itself in American society); Blasi & Jost, *supra* note 153, at 1124 (describing this as a "psychological attachment").

190. *See supra* Part I (discussing the folk notion of African inferiority).

adopted by the United States. As discussed in Part One of this Article, scientists at various times in history have estimated the number of human "races" in the world to be as little as three and as many as two hundred. And while the FBI and our courts have incorrectly assumed that there has been some consensus on the meaning and number of each racial category, modern genetic studies continue to rely on conflicting assumptions regarding racial taxonomies.[191] The very malleability of race in the global context undermines the claim that there is any legal or scientific basis for racially categorizing genetic samples.[192] As the anthropological geneticists Lorena Madrigal and Guido Barbujani observe, "[i]f races are biological realities, they must be the same everywhere, whereas forensic race catalogues differ across countries."[193]

Furthermore, the vast majority of geneticists agree that race has no biological meaning. Numerous studies have concluded that "allele frequency comparisons among human populations rarely show discontinuities that map onto racial boundaries" and that there is no scientific basis for racial classification schemes.[194] Scientists have even established that the greatest genetic variation occurs *within* so-called racial population groups rather than as between races.[195] Indeed, "there [is] no such thing as race" in genetics,[196] as race is "a concept that signifies and symbolizes sociopolitical conflicts and interests in reference to different types of human bodies."[197] As the UNESCO Commission concluded

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191. *See* Sundquist, *supra* note 74, at 264 ("However, the assumption that race has a discernable biological essence misapprehends the nature of race and genetic difference, and runs counter to a bevy of genetic studies that demonstrate that race is not a biologically meaningful category.").

192. *See Science Fictions*, *supra* note 169, at 86 (presenting the issues of race in DNA analysis).

193. Lorena Madrigal & Guido Barbujani, *Partitioning of Genetic Variation in Human Populations and the Concept of Race, in* ANTHROPOLOGICAL GENETICS: THEORY, METHODS, & APPLICATIONS 19, 27 (Michael Crawford ed., 2007).

194. *See* Pilar Ossorio & Troy Duster, *Race and Genetics: Controversies in Biomedical, Behavioral and Forensic Sciences,* 60 AM. PSYCHOLOGIST 115, 116 (2005) (compiling genetic studies).

195. *See id.* at 117 ("Most human genetic variation—approximately 85%—can be found between any two individuals from the same group (racial, ethnic, religious, etc.)."); FEAGIN & FEAGIN, *supra* note 28, at 32 (describing scientific findings about genetic variations).

196. Elliot Marshall, *DNA Studies Challenge the Meaning of Race,* 282 SCIENCE 654, 654 (Oct. 23, 1998) (quoting the geneticist Kenneth Kidd).

197. Winant, *supra* note 12, at 172.

following World War II, race is "not so much a biological phenomenon as a social myth."[198]

The judiciary's acceptance of genetic estimates of race in criminal trials is particularly troublesome in terms of scientific reliability. In addition to the above critiques of biological race theory, the methodology underlying the development of racial probability estimates is wholly unreliable. As discussed, there are two possible methods to calculate genomic frequency. The first method counts the number of times that a particular DNA profile occurs in the general population, and then utilizes classic statistical principles to place upper and lower confidence limits on that estimate. The "general population" DNA estimate thus using a "straight counting" methodology, and does not incorporate theoretical assumptions about the reference population.[199]

The second method of calculating genomic frequencies involves applying theoretical principles developed in the field of population genetics, which would allow for the creation of genomic estimates for specific sub-populations (such as races). The tabulation of racial genetic estimates is premised on three central assumptions of population genetics: (1) application of the product rule, (2) the Hardy-Weinberg principle and (3) linkage-equilibrium principles. A central step in developing a racial DNA estimate is the application of the product rule; that is, the multiplication of individual allele frequencies in a given DNA sample. Population genetics provides that every "matching allele is assumed to provide statistically independent evidence, and [that] the frequencies of the individual alleles [may be] multiplied together to calculate [the] frequency of the complete DNA pattern."[200] A key assumption allowing the application of the product rule to estimate genomic frequencies, thus, is that the reference population does not contain sub-populations with distinct allele frequencies. In other words, the reference population must be sufficiently homogeneous – where allele frequencies are similar or constant in order to apply the product rule.

The Hardy-Weinberg principle allows geneticists to assume that genotype frequencies within a population remain in such constant equilibrium, unless there is reason to believe that the frequencies of a

198. UNESCO, *supra* note 12, at 33 (1969).

199. *See* NAT'L RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 10 (4th ed. 2000) ("Such estimates produced by straightforward counting have the virtue that they do not depend on theoretical assumptions, but simply on the sample having been randomly drawn from the appropriate population.").

200. *Id.* at 10.

population group was "acted on by one of the four evolutionary forces (mutation, selection, gene flow (or admixture), and drift)."[201] Hardy-Weinberg equilibrium is not present, however, when either mating within the reference population is not random or migration occurs within the reference population. And yet it seems clear "that mating is not random in most human populations, that some mating populations are not large, and that migration is variable among mating populations throughout the world. In fact, it is well accepted that the United States population is a mixture of people of various origins."[202] Given the overwhelming evidence that racial groups are not genetically homogeneous, the state of Hardy-Weinberg equilibrium is simply not achievable when creating racial probability estimates.[203]

Racial DNA evidence is also scientifically unsound due to the lack of an empirical method to classify DNA samples by race. Given that race is a social construct, the process of racial classification necessarily is dependent on a wide range of social variables- including skin color, phenotype, language, dress and performance. And while racial categorization is often imposed on an individual by others in society, it is also a deeply personal question of identity formation.[204] It does not appear, however, that any rigorous or consistent methodology is employed to classify racial DNA samples. The expert witnesses and population geneticists that develop racialized DNA estimates for use at trial rarely, if ever, identify the protocols used to categorize genetic samples by race.[205] It is likely that

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201. Mark D. Shriver, *Part I: Introduction: Brief History of DNA in Forensic Sciences*, *in* MOLECULAR PHOTOFITTING: PREDICTING ANCESTRY AND PHENOTYPE USING DNA 7 (2008).

202. NORAH RUDIN & KEITH INMAN, AN INTRODUCTION TO FORENSIC DNA ANALYSIS, 144 (2nd ed. 2002).

203. *See Science Fictions*, *supra* note 169, at 70–76 (discussing the Hardy-Weinberg principle). The anthropological geneticists Lorena Madrigal and Guido Barbujani also observe that "it is impossible to claim that a discontinuous population structure with well-identified clusters has emerged so far." Madrigal & Barbujani, *supra* note 193, at 25.

204. *See* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law,* 82 CALIF. L. REV. 1231, 1239 (1994) (describing the construction of racial classification).

205. Most population genetics studies rely on either other-ascribed or self-reported race to classify DNA samples. *See* Madrigal & Barbujani, *supra* note 193, at 26 (collecting studies). Other studies that rely on blood bank DNA samples seem to rely only on self-reported race. *See, e.g.*, Peter M. Vallone, Amy E. Decker & John M. Butler, *Allele Frequencies for 70 Autosomal SNP Loci with U.S. Caucasian, African-American and Hispanic Samples,* 149 FORENSIC SCI. INT'L 279 (2005).

many DNA samples are classified by race according to the self-reporting of the person providing the sample.[206] This method of racial classification, however, is scientifically unreliable given the subjective nature of identity formation. As I have previously described:

> [I]n the United states cultural attitudes towards hypodescent and the "one-drop" rule may lead many "light-skinned" African-Americans to identify as "black" even if they are "light, bright, and damn near white." Similarly, evolving conceptions of race mean that there is no guarantee that a "mixed" person will automatically identify as non-white as opposed to white . . . Even if we disregard these not so extreme examples of racial identification, many persons who fit within a stereotypical racial phenotype likely have a mixed "racial" background.[207]

Other DNA samples may be classified by race according to determinations made by outsider-reference.[208] And yet adopting an "other-ascribed" methodology is similarly lacking in scientific rigor, given that the protocols and process of categorizing a person by race is unclear in the racial DNA context. As others have concluded, "[t]he process of assigning a racial label to DNA samples is too speculative, resting on an uneasy and often unspoken factual ground, to be deemed reliable."[209]

For these reasons, the offer of racial DNA evidence at trial must be rejected as scientifically unreliable under our rules of evidence.[210] Such evidence should also be excluded at trial on the grounds of legal irrelevance and unfair prejudice.[211] The presentation of racial probability estimates unfairly interjects race into a case, while failing to make the identification of a criminal perpetrator any "more probable or less probable" than if a

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206. *See, e.g.*, United States v. Bonds, 12 F.3d 540, 550 (6th Cir. 1993) ("[B]y conducting DNA studies on FBI agents, the FBI has developed a table of DNA allele frequencies for each of three racial groups—caucasian, black and hispanic . . . .").

207. *See Science Fictions*, *supra* note 169, at 90.

208. "Outsider-reference" refers to the process of allowing others to classify the race of a person, as opposed to relying on racial self-identification. *See* Ford, *supra* note 204, at 1239 (describing different methods of racial classification).

209. *Science Fictions*, *supra* note 169, at 91; *see also* ROBERTS, *supra* note 25, at 263 (describing the "scientific flaws that plague racial phenotyping").

210. *See id.* at 88–94 (explaining in detail why racial DNA evidence should be excluded on the basis of Federal Rules of Evidence 401, 402, 403 and 702).

211. *See Science Fictions*, *supra* note 169, at 91–94 ("Such evidence unnecessarily injects issues of race and ethnicity into the trial, thereby leading the trier of fact to improperly focus on the race of the defendant and, at times, victim.").

general probability estimate were utilized.[212] While I have previously demonstrated that racial DNA evidence is inadmissible under our existing rules of evidence,[213] an amendment to the Federal Rules of Evidence would authoritatively exclude such evidence in our federal courts. Such an amendment could take the following form:

> Proposed Federal Rule of Evidence 416 ("Racial DNA Evidence"): Evidence of a DNA random match probability estimate is not admissible in any civil or criminal case to the extent such evidence relies on a racial population database.

An amendment to our federal procedural rules would thus result in a sea-change in the manner in which DNA probability evidence is received by federal courts. Given the *Erie* doctrine, however, such an amendment to our federal statutory rules would do little to directly impact the admissibility of racial DNA evidence in state courts.[214] While grass-root efforts to amend state evidentiary rules in each of the union's fifty states would be commendable, there are broader constitutional reasons why such evidence should be excluded at trial. As I will demonstrate in the following section, the substantive Due Process doctrine underlying the Fifth and Fourteenth Amendments, as informed by the Ninth Amendment, is violated whenever the State officially embraces genetic views on race. In particular, I argue that such a practice violates the fundamental constitutional right to a shared humanity by placing State imprimatur on discredited notions of racial biological difference.

IV. Substantive Due Process and the Fundamental Right of Shared Humanity

The government's embrace of biological theories of race in the criminal justice context is not only wrongheaded as a scientific and sociological matter, but also violates its constitutional obligation to recognize the shared humanity of all its citizens. The substantive due process doctrine underlying the Fourteenth and Fifth Amendments prohibits

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212. *See id.* (discussing the particular issues arising between race and DNA evidence).

213. *See id.* at 88–94 (illustrating the issue with racial DNA evidence); *see generally* Sundquist, *supra* note 75.

214. *See* Erie R.R Co. v. Tompkins, 304 U.S. 64 (1938) (establishing the jurisdictional principle that state courts may develop their own procedural rules).

the government from engaging in a genetic racial taxonomy which undermines the democratic principle that "all persons are created equal." At its core, the substantive due process doctrine establishes a fundamental respect for the shared humanity of all of society's members. The practice of placing State imprimatur on discredited concepts of racial biological difference violates this norm of shared humanity in that it infringes upon the constitutional "right to define one's own concept of existence . . . and . . . personhood."[215]

Charting the often rocky waters of the substantive due process doctrine can prove to be a frustrating process. The indeterminate nature of the doctrine is much lamented, owing largely to the failure of the Court to adopt a single coherent theory of decision-making.[216] And yet the "vague contours of the Due Process Clause do not leave us . . . without adequate guides" to ascertain which "personal immunities" are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[217] As Justice Frankfurter has observed:

> In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions.[218]

The identification of fundamental rights protected by the substantive due process doctrine has typically been guided by appeals either to history,

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215. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood of Southeastern Pa. v. Casey*,* 505 U.S. 833, 851 (1992)).

216. *See, e.g.*, Daniel O. Conkle, *Three Theories of Substantive Due Process,* 85 N.C. L. REV. 63, 63 (2006) ("Substantive due process is in serious disarray, with the Supreme Court simultaneously embracing two, and perhaps three, competing and inconsistent theories of decisionmaking."); Ryan C. Williams, *The One and Only Substantive Due Process Clause,* 120 YALE L.J. 408, 499–510 (2010) (describing the different methods of interpretation that substantive due process analysis yields); RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 210 (2004) (describing the Court's inconsistency in invoking substantive due process); EDWARD KEYNES, LIBERTY, PROPERTY, & PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS (2004) ("Since the late 1880s, the Supreme Court has flirted with substantive due process, sometimes affirming, at other times rejecting, the due process clauses as a restraint on the exercise of legislative power.").

217. Rochin v. California, 342 U.S. 165, 169 (1952) (quoting Snyder v. Commonwealth of Massachusetts, 291 U.S. 87, 105 (1934)).

218. *Id*. ("Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'").

"reasoned judgment," or evolving social values.[219] While the use of multiple theories of decision-making have led to inconsistent and conflicting results at times, each of these jurisprudential methods supports the finding of a fundamental right of shared humanity in the racial genetics context.

A. Historical Tradition and Substantive Due Process

The historical interpretive method accords substantive due process protection to those fundamental rights that are "deeply rooted in this Nation's history and tradition."[220] While the historical doctrinal approach is clearly conservative in nature, it should be distinguished from strict originalist theory in that "framers' intent" and "original meaning" are not the sole constitutional touchstones for decision-making. Rather, the historical method locates the "appropriate limits on substantive due process" through an examination of "the teachings of history [and] solid recognition of the basic values that underlie our society."[221]

The Court has employed the historical method at various moments in its jurisprudence, at times reaching conclusions that would shock modern sensibilities. For example, in *Bowers v. Hardwick*[222] the Court applied an extremely narrow version of the historical method to uphold a state statute criminalizing certain sexual activities engaged in by same sex persons.[223] The Court refused to recognize a substantive due process right to engage in private sexual conduct, relying on a distorted view of history to find that no right to engage in "homosexual sodomy" had been historically recognized.[224] Some seventeen years later the Court in *Lawrence v. Texas*[225] overruled *Bowers*, finding that *Bowers* Court had improperly

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219. *See generally* Conkle, *supra* note 216 (evaluating these three theories of substantive due process).

220. Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

221. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

222. *See Bowers*, 478 U.S. at 191 (holding that homosexual sodomy was not a fundamental liberty protected by the Constitution).

223. *See id.* at 194–97 (upholding the Georgia statute).

224. *See id.* at 192–94 ("[T]o claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is at best, facetious.").

225. *See* Lawrence v. Texas, 539 U.S. 558, 560 (2003) (holding that a Texas statute,

framed the right at issue through an unduly narrow and selective reading of history.[226] The *Lawrence* Court applied a more nuanced historical method to identify a fundamental right to engage in private sexual conduct, noting that "'history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'"[227]

An earlier iteration of the historical method appeared in the Court's decision in *Moore v. City of East Cleveland.*[228] In *Moore,* the Court recognized a substantive due process right of an extended family to reside together while invalidating a housing ordinance that limited residential occupancy to nuclear families.[229] Justice Powell, writing for the plurality, identified the existence of such a fundamental right by reference to the American historical tradition of non-nuclear family members sharing a household together.[230] Powell noted that such a historical tradition reflected "the accumulated wisdom of civilization, gained over centuries and honored throughout our history."[231]

The historical tradition underlying the development of modern substantive due process doctrine strongly and clearly supports the finding of a fundamental right to shared humanity in the racial genetics context. While earlier versions of substantive due process arguably pre-date the Civil War Amendments, it is without question that the Fourteenth Amendment has distinctly informed modern doctrine. The Fourteenth Amendment was ratified in a post-Civil War historical context, where the "primary focus of the framers was on equality [of African-Americans] under the law."[232] That the substantive protections of the Fourteenth

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prohibiting intimate sexual conduct between two persons of the same sex, "furthers no legitimate state interest" and is therefore unconstitutional).

226. *See id.* at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent, it should now be overruled.")

227. *Id.* at 572 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

228. *See generally* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

229. *See id.* at 503 (recognizing that the United States Constitution "protects the sanctity of family precisely because the institution of family is deeply rooted in the Nation's history and tradition").

230. *See id.* ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.").

231. *Id.*

232. *See* WASSERMAN, *supra* note 216, at 9 (discussing the racial equality motivations behind the passage of the Fourteenth Amendment).

Amendment were designed to promote the legal equality of African-Americans is beyond the pale: As Senator Jacob Howard explained in testimony to the Senate at the time of ratification, the due process clause was intended "to protect the black man in his fundamental rights as a citizen with the same shield which it throws over the white man."[233] A critical focus, then, of the substantive due process protections of the Fourteenth Amendment is racial equality, given that the Postwar Amendments "were adopted to repair the nation from the damage slavery had caused."[234]

The damage caused by slavery was not limited to enslavement itself or *de jure* legal inequality. As previously noted in Part I of this Article, the damage wrought by slavery was enabled by biological theories of racial difference. Such "pseudo-science" rationalized the unequal treatment of non-white persons as a social, religious and legal matter.[235] At its core, the Fourteenth Amendment disrupted this slavery narrative by emphasizing the shared humanity of all citizens.

The recognition of a fundamental right to shared humanity in substantive due process doctrine is also strongly supported by the long-standing "teachings of history [and a] solid recognition of the basic values that underlie our society."[236] It is difficult to imagine a tradition that is more ingrained in our recent history than the understanding that race is a social construct, devoid of biological meaning. From the UNESCO Statement on Race following the Second World War to the countless findings of sociologists and state and federal courts, our society has historically affirmed our democratic belief in shared humanity by

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233. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). Representative Thaddeus Stevens also emphasized the goal of African-American equality: "Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes . . . . Now color disqualifies a man from testifying in courts, or being tried in the same way as white men." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

234. McDonald v. City of Chicago, 130 S. Ct. 3020, 3060 (2010) (Thomas, J., concurring); *see also* David H. Gans, *The Unitary Fourteenth Amendment,* 56 EMORY L.J. 907, 932–33 (2007) ("Slavery dictated the roles slaves could serve . . . . [while] [t]he Fourteenth Amendment . . . [gave] them all the rights inherent in citizenship and empower[ed] them to make decisions about the roles they would play in a reconstructed nation.").

235. *See* Sundquist, *supra* note 166, at 62 (forthcoming 2014); Sundquist, *supra* note 74, at 238–241 (discussing the justifications used to support disparate treatment of individuals based upon race).

236. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

embracing sociological understandings of race. The "historical tradition" of viewing race as a socio-political construction "has roots [which are] deserving of constitutional recognition," in that it reflects "the accumulated wisdom of civilization, gained over the [decades] and honored throughout our history."[237] The historical method therefore supports the identification of a fundamental right to shared humanity, which is violated by laws or practices that reify genetic racial distinctions.

B. Substantive Due Process and Reasoned Judgment

Substantive rights are also identified by the Court through a process of "reasoned judgment,"[238] whereby the weight of the asserted liberty interest is evaluated through political-moral reasoning.[239] The due process protections of the 5th and 14th amendments have been interpreted under this methodology to provide a range of un-enumerated substantive liberty rights, including the right to make a choice regarding abortion,[240] the right to sexual and contraceptive privacy,[241] and the right to personal autonomy and personhood.[242] The "reasoned judgment" interpretive method tends to

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237. *Id.* at 505.

238. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 982 (1992).

239. *See* Conkle, *supra* note 216, at 98–99 (discussing the evolving conception of the role of substantive due process). Professor Conkle describes the "reasoned judgment" method in great detail in his Article. In particular, Professor Conkle summarizes the "reasoned judgment" approach as a method through which the Court "should itself evaluate the liberty interest of the individual and weigh it against competing governmental concerns, determining on this basis whether the liberty interest deserves protection as a constitutional right." Ronald Dworkin has further described the "reasoned judgment" method as requiring judges to refer to their "own views about political morality" in order to "find the best conception of constitutional moral principles…that fits the broad story of America's historical record." (quoting RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 3–4, 11 (1996)).

240. *See* Roe v. Wade, 410 U.S. 113, 164 (1973) (finding that the state law, which criminalized abortion "without regard to pregnancy stage and without recognition of the other interests involved, [violated] the Due Process Clause of the Fourteenth Amendment")

241. *See* Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (finding that Connecticut statute which banned contraceptives invoked questions of Due Process); *see also Casey*, 505 U.S. at 982 (1992) (recognizing Fourteenth Amendment interpreted method as "reasoned judgment"); Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977) (recognizing the Fourteenth Amendment's "right to privacy" included "independence in making certain kinds of important decisions" such as "procreation [and] contraception"); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (citing *Griswold* in concluding that statute which prohibited distribution of birth control to single individuals was unconstitutional).

242. *See Casey*, 505 U.S. at 983–84 (discussing the "notions of personal autonomy"

frame the liberty interest protected by substantive due process as one implicating "the autonomy of the person,"[243] "personal dignity,"[244] or "self-definition."[245]

The Court in *Planned Parenthood v. Casey* was the first to label this interpretive method as one involving "reasoned judgment," although earlier cases clearly had engaged in similar political-moral philosophizing to identify substantive due process rights. Prior to the *Casey* decision, the Court in its landmark *Roe v. Wade* "recognized the right of a woman to make certain fundamental decisions affecting her destiny" in striking down a Texas law which prohibited abortions.[246] In its evaluation of the liberty interest at stake, the Court reasoned that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[247] In its weighing of the relevant liberty and governmental interests, the *Roe* Court relied in part on the political-moral reasoning adopted in its earlier *Griswold v. Connecticut*[248] and *Eisenstadt v. Baird*[249] cases. In both *Griswold* and *Eisenstadt* the Court invalidated state laws that prohibited either the use or distribution of contraceptives. The *Griswold* Court framed the liberty interest protected by substantive due process as "a right to privacy" on marital issues.[250] The *Eisenstadt* case, decided on equal protection grounds, extended the *Griswold* rationale to non-marital relationships.[251] The Court held that the state prohibition on contraceptives to unmarried persons violated a "fundamental human right" based in

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underlying the Court's reasoning in Roe v. Wade); *see also* Lawrence v. Texas, 539 U.S. 558, 559 (2003) (recognizing the Fourteen Amendment Due Process Clause expends protection to some "personal decisions"); Rochin v. California, 342 U.S. 165, 169 (1952) (observing the constitutional guarantee of certain "personal liberties" found to be "rooted in the traditions of conscience of our people").

243. Planned Parenthood v. Casey, 505 U.S. 833, 983–84 (1992).

244. Lawrence v. Texas, 539 U.S. 558, 574 (2003).

245. Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting).

246. Frank August Schubert, Introduction to Law and the Legal System 67 (10th ed. 2012).

247. Roe v. Wade, 410 U.S. 113, 153 (1973).

248. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1985).

249. *See generally* Eisenstadt v. Baird, 405 U.S. 438 (1972).

250. *See Griswold*, 381 U.S. at 485 (concluding that the "right to privacy" in the marital context is "as noble [in] purpose as any" prior rights found protected by Due Process).

251. *See Eisenstadt*, 405 U.S. at 453 (mirroring the reasoning in *Griswold* to conclude, where probation on contraceptives within the marital relationship violated Fourteenth Amendment Due Process, a statute which prohibited access of such contraceptives to only single individuals must also be unconstitutional).

privacy and liberty.[252] The Court elaborated that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[253]

These political-moral considerations on the meaning of "liberty" and "privacy" greatly influenced the Court's later holding in the *Casey* decision. In *Casey*, the Court reaffirmed the "central holding" in *Roe v. Wade*[254] while invalidating portions of a Pennsylvania statute, which restricted the availability of abortion.[255] In a case perhaps best representative of "reasoned judgment" analysis, the Court in *Casey* attempted a grand "explication of [the meaning of the] individual liberty" interests protected by substantive due process.[256] The Court philosophized that:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[257]

The Court's interpretation of liberty as involving a fundamental right of personal autonomy and self-definition was extended in the *Lawrence v. Texas* case.[258] In *Lawrence*, the Court overruled its prior decision in *Bowers v. Hardwick* while invalidating a Texas statute, which criminalized same-sex sexual conduct.[259] The Court framed the liberty interests protected by substantive due process as those involving "the autonomy of the person" and "personal dignity."[260] In determining that the Texas statute impermissibly intruded upon the fundamental liberty rights of same sex

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252. *Id.* at 445.

253. *Id.* at 453.

254. Roe v. Wade, 410 U.S. 113, 164 (1973) (finding that a state law which made it a crime to procure or attempt an abortion except for purpose of saving life of mother violated the Due Process Clause of the Fourteenth Amendment protecting the "right to privacy").

255. *See* Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992) (noting that advances in medical technology which may have "overtaken" some of *Roe's* factual assumptions has "no bearing on the validity of [the Court's] central holding).

256. *See id.* at 853 (referencing the court's prior discussion of "individual liberty" as a reason not to part from the central holding of Roe v. Wade).

257. *Id.* at 851.

258. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

259. *See id*. at 578 (finding that "*Bowers* was not correct when it was decided, and is not correct today" based upon notions that Homosexuals "right to liberty" entitled them to engage in sexual intercourse within the privacy of their bedroom).

260. *Id*. at 574.

persons, the Court reasoned that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[261]

The "reasoned judgment" interpretive method provides perhaps the strongest support for recognizing a fundamental right of shared humanity when applied to the racial genetics context. The validation of biological theories of race by the State clearly undermines the "dignity" and "autonomy of the person," in light of the historical use of "race science" to promote notions of non-white racial inferiority. Just as it would clearly be constitutionally suspect for the State to support *de jure* racially segregated public schools,[262] so too would it be unconstitutional for the State to embrace biological classifications of race which resurrect the "badges and incidents of slavery."[263]

The government's promotion of racial genetic evidence in the criminal justice context also undercuts the fundamental "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[264] The Court's recent jurisprudence demonstrates that substantive due process, at its core, protects the ability of individuals to define and exercise their personal identity free of government compulsion.[265] The formation of one's racial identity, in particular, is a deeply personal and private process.[266] The presentation and admission of racial genetics evidence constrains an individual's choice to reject

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261. *Id.* at 562.

262. *See* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (invalidating racial segregation of public schools under the Due Process Clause of the Fifth Amendment to the U.S. Constitution).

263. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (explaining that the purpose of the Thirteenth Amendment was to "abolish the badges and incidents of slavery").

264. Lawrence v. Texas, 539 U.S. 558, 574 (2003).

265. *See id.* at 562 (finding that "liberty presumes [individual] autonomy" as protected under the Due Process Clause of the Fourteenth Amendment); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 685–86 (1977) (phrasing liberty as necessitating "choice[]" regarding contraception); Roe v. Wade, 410 U.S. 113, 168 (1973) (framing "liberty" under Due Process Clause as assuring certain "freedoms"); Planned Parenthood v. Casey, 505 U.S. 833, 869 (1992) (framing the "constitutional liberty" as "freedom" to terminate pregnancy); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (finding a protection for single individuals right to chose to access contraceptives); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (preserving martial privacy and the ability for individuals to make choices within the privacy of the marital relationship).

266. *See, e.g.*, OMI ET AL., *supra* note 26, at 12–13 (discussing the way in which society "utilize[s] race to provide clues to *who* a person is").

biological racial classifications. The embrace of racial genetics evidence by the State damages the "racial dignity" of non-white persons by providing *de jure* status to rejected notions of racial difference and inferiority.[267] Similar to the questions of "personal dignity" at issue in *Lawrence, Roe,* and *Eisenstadt,* an individual's "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[268]

C. Substantive Due Process and Evolving Communal Values

The final method used by the Court to identify fundamental rights protected by the substantive due process doctrine involves an appreciation of evolving social values. While President Obama famously referred to his perspective on same-sex marriage as "evolving" just a few years ago, the Court has a much longer history of giving due weight to shifting public values on important social issues.[269] Whereas the historical interpretive method locates protected interests solely from an examination of "deeply rooted" social and legal history, the evolving values theory focuses instead on "whether the asserted individual right has broad contemporary support in the national culture."[270]

The landmark decision in *Lawrence v. Texas* provides the freshest and most concrete example of the Court's reliance on the "evolving values" method in identifying rights protected by the substantive due process doctrine. As noted previously, the Court in *Lawrence* struck down a Texas statute that criminalized same-sex conduct on the ground that the law

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267. Professor Anthony V. Alfieri has written extensively on the concept of "racial dignity." He describes racial dignity as: "the physical and psychological integrity of self, experienced as an interior sense of worth and as an exterior acknowledgement of respect. Dignity confers self-esteem and the esteem of others outside the self. Equality here relates to the outward egalitarian treatment of the self by others, whether private individuals and groups, or public agents and institutions of the state." Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1163 (1999); *see also* Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice,* 51 STAN. L. REV. 935, 949 (1999) (referring to the "dominant visions of racial dignity and community in American law"); Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1294 (1998) (suggesting an attempt to "reconfigure race trials by reconstructing racial identity, reimagining racialized narrative, and reforming race-neutral representation").

268. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

269. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003); *see also* Rochin v. California, 342 U.S. 165 (1952); *see also* Poe v. Ullman, 367 U.S. 497 (1961).

270. Daniel Conkle, *supra* note 216, at 128 (observing that "[t]his contemporary support might be a continuation of longstanding historical tradition").

violated the fundamental liberty rights of same-sex persons.[271] While the Court relied heavily on a "reasoned judgment" analysis in reaching its holding, it also paid strong attention to shifting socio-political conceptions of the legal protections which extend to same-sex persons. Whereas the overruled *Bowers* Court primarily rested its despicable ruling on an acceptance of society's history of bias and prejudice towards same-sex relationships, the *Lawrence* Court indicated that an understanding of modern social values could better inform its decision-making. The Court reasoned that "[i]n all events we think that our laws and traditions in the past half century are of most relevance" when identifying fundamental rights protected by the substantive due process doctrine.[272] Following an extensive review of recent judicial and legislative action on same-sex rights, the Court found that an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[273]

Notwithstanding the current scientific and legal trend to treat race as a distinct biological category, it is clear that an appreciation of the evolving social values on race during the "past half century" support a finding that substantive due process protects individuals from racial biological ascriptions imposed the State. The social and legal recognition that race was a purely social construction was largely influenced by post World War II developments.[274] Stunned by the atrocities enabled by biological conceptions of race, the newly formed United Nations issued a definitive statement as to the sociological nature of race.[275] Since that time, the scientific consensus on race has overwhelmingly reaffirmed that race is not born in our genes, but rather is socially and politically constructed. Our courts and legislatures have similarly embraced a sociological understanding of race during the last fifty years, dismissing biological racial theories as "arbitrary" and recognizing that race is "for the most part sociopolitical, rather than biological, in nature."[276] Modern social attitudes

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271. *Lawrence*, 539 U.S. at 578.

272. *Id.*

273. *Id.* at 579.

274. *See supra* Part I.

275. *See supra* Part I.

276. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987); *see also supra* Part I.

on race have also evolved to understand race in social constructionist terms.[277]

Remarkably, even key defenders of racial population genetics and racial DNA evidence acknowledge that race is a social construction. For example, the National Research Council admitted that "race is meaningless" and that racial "definitions are to some extent arbitrary" while it nonetheless advocated for the use of race-based DNA databases.[278] The same courts that routinely allow racial DNA evidence against criminal defendants similarly reach judicial findings regarding the sociological nature of race.[279] What can account for such schizophrenic and conflicted thinking on the nature of race? One answer lies in recognizing the weight of our past racial legacies on cognitive understandings of race and prejudice. Despite conclusive scientific findings on the social nature of race, folk notions of biological racial difference continue to both consciously and unconsciously influence our perceptions on race. These lingering, although non-empirical, assumptions of racial difference impact both scientific and judicial reasoning, often at an unconscious level.[280]

D. The Evidentiary Dimension of Substantive Due Process

The substantive due process doctrine protects not only against legislative and executive actions that undermine individual fundamental rights, but also against the judicial admission of evidence against criminal defendants which offend "a sense of justice" and "decency."[281] The actions by the judiciary, as State actors, are subject to the same constitutional limitations as the actions of the executive and legislature. The Court's celebrated case in *Rochin v. California* demonstrates the manner in which substantive due process applies to the evidentiary context.[282]

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277. *See supra* Part I.

278. NAT'L RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 57 (1996).

279. *Compare Saint Francis College*, 481 U.S. 604 (protecting a person of Arab ancestry from racial discrimination despite the racial classification that Arabs are Caucasian, and explaining that a distinctive physiognomy is not essential to qualify for protection), *with* Maryland v. King, 133 S. Ct. 1958 (2013) (upholding the Maryland DNA Collection Act, which includes a cheek swab upon arrest for a violent crime to determine identity, as a reasonable search under the 4th Amendment).

280. *See* ROBERTS, *supra* note 25; Sundquist, *supra* note 169.

281. Rochin v. California, 342 U.S. 165, 165 (1952).

282. *Id.*

In *Rochin*, the Court held that the admission of illegally obtained evidence during a criminal trial violated the substantive due process rights of the defendant.[283] The facts of the case should be well familiar to most students of the substantive due process doctrine. State police officers entered the defendant's house in order to investigate rumored drug selling activity.[284] After forcing Rochin's bedroom door open, they discovered the defendant sitting on his bed next to his wife, as well as two suspicious capsules resting on top of a nightstand.[285] Rochin immediately swallowed the capsules after the police officers questioned him about the drugs.[286] Following a struggle, the officers attempted in vain to extract the capsules from Rochin's mouth.[287] Rochin was then handcuffed and taken to a hospital, where the police officers instructed a doctor to force "an emetic solution through a tube into Rochin's stomach against his will."[288] Rochin then vomited the capsules, which were later determined to contain morphine.[289] Rochin was thereafter charged and convicted of illegal drug possession.[290] The principal evidence against Rochin was the two vomited capsules, which were admitted at trial into evidence over Rochin's objections.[291]

The Court found that the admission of the seized drug evidence at trial violated the substantive due process rights of the criminal defendant.[292] Justice Frankfurter, writing for the Court, observed that the limitations of the Thirteenth and Fourteenth Amendments "concern not restrictions upon the powers of the States to define crime… but restrictions upon the manner in which States may enforce their penal codes."[293] As a result, the substantive due process clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-

283. *Id.*
284. *Id.*
285. *Id.* at 166.
286. Rochin v. California, 342 U.S. 165, 166 (1952).
287. *Id. at* 165.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. Rochin v. California, 342 U.S. 165, 174 (1952).
293. *Id.* at 168.

speaking peoples even toward those charged with the most heinous offenses."[294] The Court further defined substantive "[d]ue process of law [as] a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or are 'implicit in the concept of ordered liberty.'"[295] Applying these standards to the facts in the case, the Court found that the admission of evidence obtained through methods which "shocks the conscience" violated the defendant's due process rights. The Court reasoned that allowing the admission of such evidence would "offend the community's sense of fair play and decency."[296]

Strikingly similar to the *Rochin* case, the admission of racial DNA evidence against a criminal defendant violates the "canons of decency and fairness" which give meaning to the substantive due process doctrine. As Justice Frankfurter concluded for the Court, our due process protections require that "convictions [are not] brought about by methods that offend 'a sense of justice'" or that have the potential to "discredit law and thereby to brutalize the temper of a society."[297] The admission of racial DNA evidence "offends a sense of justice" and violates "canons of decency and fairness" by placing State imprimatur on dangerous notions of biological racial difference. The routine admission of racial DNA evidence by state and federal courts not only runs afoul of traditional and evolving values concerning the nature of race, but violates the criminal defendant's fundamental right of shared humanity. Such a right protects against governmental actions, which deny the humanity and dignity of individuals by imposing a biological racial taxonomy to scientific evidence.

The imposition of biological racial distinctions undermines the essential humanity protected by substantive due process by rendering non-white persons something less than human. Biological race theories have been developed and/or used throughout every moment in history to dehumanize non-white persons, thereby rationalizing unequal social and legal treatment.[298] The acceptance of biological racial distinctions by the

294. *Id.* at 169 (quoting Malinsky v. People of the State of New York, 324 U.S. 401, 416–417 (1945)).

295. *Id.* (quoting Snyder v. Commonwealth of Massachusetts, 291 U.S. 97 (1933) and Palko v. State of Connecticut, 302 U.S. 319 (1937)) (internal citations omitted).

296. *Id.* at 173.

297. *Id.* at 174.

298. *See supra* Part I.

State must be viewed against this historical record. And while racial DNA evidence does not explicitly define non-white persons as less than human, the admission of such evidence promotes disturbing assumptions of racial difference and inferiority. As previously discussed, the admission of racial DNA evidence also undermines an individual's "right to define one's own concept of existence" and "personal dignity."[299] Such taxonomies of race have absolutely no place in our science or public consciousness, much less our courts of law.

E. The Absence of Compelling Government Interests

The Court in *Washington v. Glucksberg*[300] adopted a fairly mechanical framework for analyzing substantive due process, holding that the doctrine does not come into play unless (1) a fundamental liberty interest has been violated by State action and (2) the state action was not rationally related to compelling government interests. While the articulation of a fundamental right to a shared humanity has been the principal focus of this Article, it is also clear that the admission of racial DNA evidence at trial is not rationally related to legitimate government interests.

There are simply no legitimate government interests that support the re-inscription of biological racial distinctions. The admission of a racialized genetic probability estimate at trial promotes neither the accuracy nor the fairness of a trial. A purported state interest in evidentiary relevance and reliability must therefore fail, as non-racial DNA evidence possesses similar guarantees of probative force without the dangers of prejudice and unreliability associated with racial DNA evidence.[301] The National Commission on the Future of DNA Evidence has endorsed this approach, and recommends that racial DNA databases be replaced with a single general population database to develop probability estimates.[302]

Substantive due process doctrine protects "against government interference with certain fundamental rights and liberty interests," such as the newly articulated right to a shared humanity. The State places an undue burden on the exercise of that right when it admits racial DNA evidence at

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299. Lawrence v. Texas, 539 U.S. 558, 574 (2003).

300. 521 U.S. 702 (1997).

301. *See Science Fictions*, *supra* note 169.

302. NAT'L COMMISSION ON THE FUTURE OF DNA EVIDENCE, NAT'L INST. OF JUSTICE, THE FUTURE OF FORENSIC DNA TESTING: PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP 27 (2000).

trial, notwithstanding the absence of any legitimate government interest in such evidence.[303]

V. Conclusion

The scientific and judicial trend to view race in biological terms raises the troubling specter of a modern "Race Science." The danger in ascribing to biological theories of race lies not only in its potential to resurrect discarded notions of racial difference and inferiority, but in that it denies a person's "right to define one's own concept of existence" and racial identity. The admission of racial DNA evidence at trial thus undermines the very heart of the liberty and personal dignity protected by substantive due process.

The concept of "race" was contrived to resolve the moral dilemma that arises when a society commits to liberal equality and yet still suffers from group-based social inequality. The notion of "biological racial difference" historically has been deployed to rationalize the persistence (and exacerbation) of such social disparities, as well as the unequal socio-legal treatment of persons deemed "non-white." Notwithstanding the resounding rejection of biological theories of race following the Second World War, our society has strained to disavow moral responsibility for past and continuing racial disparities. Rather, our society has justified the persistence of racial inequality using various race-neutral conceptual mechanisms, including colorblind constitutionalism, culture of poverty theories, equal opportunity rhetoric, and post-racialism.

The emergence of modern biological race theory, in this light, reflects our continuing struggle to take account of "the problem of the color line."[304] The moral and cognitive desire of many to be blind to race, to normalize inequality, to believe in a world of racial transcendence and absolution, is furthered by genetic explanations for racial difference. The State should play no role in perpetuating post-racial ideology, and certainly should not lend its official imprimatur on the admission of racial genetic evidence at trial. Given that race is devoid of biological meaning, such evidence not only must be excluded on the statutory grounds of irrelevance, unreliability

303. Maryland v. King, 133 S. Ct. 1958 (2013).

304. DUBOIS, *supra* note 17, at 9.

and unfair prejudice, but for constitutional reasons fundamental to our democratic society.

At the core of our constitutional guarantees is recognition of the shared equality and humanity of all persons. Our substantive due process doctrine, in particular, protects the ability of individuals to define their own understanding of existence and personhood without government interference. The government practice of presenting and admitting evidence of genetic racial taxonomies against criminal defendants violates this fundamental right to a shared humanity. The admission of racial genetic evidence is not supported by this country's deeply rooted values, and conflicts with the racial justice focus of the Fourteenth Amendment. Furthermore, evolving understandings of the constructionist nature of race demonstrate that the substantive due process doctrine protects against racial biological ascriptions imposed by the State. Such a practice by the State inevitably resurrects the ugly ghost of 19th Century "race science," and with it the prospect that biological racial difference will once again be used to rationalize inequality. Recognition of a fundamental right to a shared humanity accords not only with the history, purpose and goals of substantive due process, but with the broader equality aspirations of our democratic society.