The Social Construction of Race

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

The appalled... asserted this right... as having been descended, in the maternal line, from a free Indian woman, but their genealogy was very imperfectly stated... [The youngest...and] the characteristic features, the complexion, the hair and eyes...the same with those of whites... Hannah, [the mother] had long black hair, was of the right Indian copper colour, and was generally called an Indian by the neighbours. 1

Because the Writs, grandmother, mother, and daughter, could not prove they had a free maternal ancestor, nor could their owner, Hughes, show their descent from a female slave, the side charged with the burden of proof would lose. Allocating that burden required the court to assign the plaintiffs a race. Under Virginia law, Blacks were presumably slaves and thus bore the burden of proving a free ancestor. Whites and Indians were presumably free and thus the burden of proving their descent fell on those alleging slave status. In order to determine whether the Writs were Black and presumptively slaves or Indian and presumptively free, the court, in the person of Judge Tucker, devised a racial test:

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

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

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

...[Verdict] pronouncing the appellants absolutely free. . . . 5

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

Introduction: The Confounding Problem of Race

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

*Hudgins v. Wright* also enables me to emphasize the role of law in shaping racial identities. By emulating in the form of legal presumptions and evidentiary burdens the prejudices society attaches to vestiges of African ancestry, *Hudgins* demonstrates that the law serves not only to reflect but to solidify social prejudice, making law a prime instrument in the construction and reinforcement of racial subordination. Judges and legislators, in their role as arbiters and violent creators of the social order, continue to concentrate and magnify the power of race. Race suffuses all bodies of law, not only obvious ones like civil rights, immigration law, and federal Indian law, but also property law, 9 contracts law, 10 criminal law, 11 family law, 12 and even "the purest of corporate law questions within the most unquestionably Anglo scholarly paradigm." 13 I assert that no body of law exists untainted by the powerful strident of race in our society.

In largest part, however, I begin with *Hudgins v. Wright* because the case provides an empirical definition of race. *Hudgins* tells us one is Black if one has a single African antecedent, or if one has a "flat nose" or a "woolly head of hair." I begin here because in the last two centuries our conception of race has not progressed much beyond the primitive view advanced by Judge Tucker.

Despite the pervasive influence of race in our lives and in U.S. law, a review of opinions and articles by judges and legal academics reveals a startling fact: few seem to know what race is and is not. Today most judges and scholars accept the common wisdom concerning race, without pausing to examine the fallacies and fictions on which ideas of race depend. In U.S. society, "a kind of 'racial etiquette' exists, a set of interpretive codes and racial meanings which operate in the interactions of daily life . . . Race becomes 'common sense'—a way of comprehending, explaining and acting in the world." 14 This social etiquette of common ignorance is readily apparent in the legal discourse of race. Rehnquist-Court justices take this approach, speaking disingenuously of the peril posed by racial remediation to "a society where race is irrelevant," while nevertheless failing to offer an account of race that would bear the weight of their cynical assertions. 15

Arguably, critical race theorists, those legal scholars whose work seems most closely bound together by their emphasis on the centrality of race, follow the same approach when they powerfully decry the permanence of racism and persuasively argue for race consciousness, yet do so without explicitly suggesting what race might be. 16 Race may be America’s single most confounding problem, but the confounding problem of race is that few people seem to know what race is.

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

Note that Whites exist as a race under this definition. It is not only people of color who find their identities mediated by race, or who are implicated in the building and maintenance of racial constructs. White identity is just as much a racial construction, and Whites are equally, or even more highly, implicated in preserving the racially constructed status quo. I therefore explicitly encourage Whites to critically attend to racial constructs. Whites belong among those most deeply dedicated to fathoming the intricacies of race.

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

Biological Race

There are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Blacks. One’s race is not determined by a single gene or gene cluster, as is, for example, sickle-cell anemia. Nor are races marked by important differences in gene frequencies, the rates of appearance of certain gene types. The data compiled by various scientists demonstrate, contrary to popular opinion, that intra-group differences exceed inter-group differences. That is, greater genetic variation exists within the populations typically labeled Black and White than between these populations. This finding refutes the supposition that racial divisions reflect fundamental genetic difference.

Racial Illusions

Unfortunately, few in this society seem prepared to relinquish fully their subscription to notions of biological race. This includes Congress and the Supreme Court. Congress’ anachronistic understanding of race is exemplified by a 1988 statute that explains that “the term ‘racial group’ means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent.” The Supreme Court, although purporting to sever race from biology, also seems incapable of doing so.
Khadija, the Court determined that an Arab could recover damages for racial discrimination under 42 U.S.C. § 1981. Writing for the Court, Justice White appeared to abandon biological notions of race in favor of a sociopolitical conception, explaining: "Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the 'average individuals of different races.' Despite this seeming rejection of biological race, Justice White continued: "The Court of Appeals was thus quite right in holding that § 1981, 'at a minimum,' reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physically distinctive sub-grouping of Homo sapiens.' By adopting the lower court's language of genetics and distinctive sub-groupings, Justice White demonstrates the Court's continuing reliance on blood as a synonym for race. During oral argument in Metro Broadcasting v. FCC, Justice Scalia again revealed the Court's understanding of race as a matter of blood. Scalia attacked the argument that granting minorities broadcasting licenses would enhance diversity by blasting the "policy as a matter of 'blood,' at one point charging that the policy reduced to a question of 'blood... blood, not background and environment.'"

Racial Formation

Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continuing basis for racial categorization. The process by which racial meanings arise has been labeled racial formation. In this formulation, race is not a determinant or a residue of some other social phenomenon, but rather stands on its own as an amalgamation of competing societal forces. Racial formation includes both the rise of racial groups and their constant refutation in social thought. I draw upon this theory, but use the term "racial fabrication" in order to highlight four important facets of the social construction of race. First, humans rather than abstract social forces produce races. Second, as human constructs, races constitute an integral part of a whole social fabric that includes gender and class relations. Third, the meaning-systems surrounding race change quickly rather than slowly. Finally, races are constructed relationally, against one another, rather than in isolation. Fabrication implies the workings of human hands, and suggests the possible intention to deceive. More than the industrial term "formation," which carries connotations of neutral construction and processes indifferent to individual intervention, referring to the fabrication of races emphasizes the human element and evokes the plastic and inconsistent character of race. An archaeological exploration of the racial identity of Mexicans will illustrate these four elements of race.

In the early 1800s, people in the United States ascribed to Latin Americans racialities and, separate from these, races. Thus, a Mexican might also be white, black, red, or Asian. By the 1840s and 1850s, however, U.S. Anglos began to view Mexicans in terms that conflated and stigmatized their race and nationality. This animus has its source in the Anglo Mexican conflict in the Southwest, particularly in Texas and California. In the newly independent Texas, war propaganda from the 1830s and 1840s purporting to chronicle Mexican "atrocitys" relied on racial disparagements. Little time elapsed following the U.S. annexation of Mexican territory in 1848 before laws began to reflect and reify Anglo racial prejudices. Social prejudices quickly became legal ones, highlighting the close ties between race and law. In 1855, for example, the California Legislature targeted Mexicans as a racial group with the so-called "Greasier Act." Ostensibly designed to discourage vagrancy, the law specifically applied to "all persons who are commonly known as 'Greasers' or the issue of Spanish and Indian blood... and who go armed and are not peaceable and quiet persons."

Typifying the arrogant belligerence of the times are the writings of T. J. Farnham: "No one acquainted with the insolent, mixed race of California, will ever believe that they will populate, much less, for any length of time, govern the country. The law of Nature which curses the mulatto here with a constitution less robust than that of either race from which he springs, lays a similar penalty upon the mingling of the Indian and white races in California and Mexico. They must fade away, while the mixing of different branches of the Caucasian family in the States will continue to produce a race of men, who will enlarge from period to period the field of their industry and civil domination, until not only the Northern States of Mexico, but the Californias also, will open their glory to the pressure of its unconquered arm. The old Saxon blood must unite the continent, must command all its northern shores, must here press the grape and the olive, here eat the orange and the fig, and in their own undeveloped might, erect the altar of civil and religious freedom on the plains of the Californias."

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

Second, because races are constructed, ideas about race form part of a wider social fabric into which relations, not least gender and class, are also woven. Farnham's choice of martial and masculine imagery is not accident but a reflection of the close symbiosis in the construction of cultural and social hierarchies during the nineteenth century. This close symbiosis was reflected, for example, in distinctive patterns of gender racialization during the era of frontier expansion—the native men of the Southwest were depicted as indolent, slothful, cruel, and cowardly Mexicans, while the women were described as fair, virtuous, and lonely Spanish maidens. Consider the following stanza verse:

The Spanish maid, with eye of fire,
At balmy evening turns her lyre
And, looking to the Eastern sky,
Awaits our Yankee chivalry
Whose pure blood and valiant arms,
Are fit to clasp her budding charms.
The man, her mate, is sunk in sloth—
To love, his senseless heart is lost:
The pipe and glass and tinkling lute,
A sofa, and a dish of fruits,
A nap, some dozen times a day;
Sombre and sad, and never gay.36

This popular song depicts the Mexican women as Spanish, linking their sexual desirability to European origins, while concurrently comparing the purportedly slothful Mexican man to the ostensibly chivalrous Yankee. Social renditions of masculinity and femininity often carry with them racial overtones, just as racial stereotypes invariably embody some elements of sexual identity. The archaeology of race soon becomes the excavation of gender and sexual identity.

Farnham's appeal to industry also reveals the close interconnection between racial and class structures. The observations of Arizona mine owner Sylvester Mowry reflect this linkage: "The question of [resident Mexican] labor is one which commends itself to the attention of the capitalist; cheap, and under proper management, efficient and permanent. They have been proven for generations. They will remain so, as it is their natural condition." When Farnham wrote in 1840 before U.S. expansion into the Southwest, Yankee industry stood in counterpoint to Mexican indolence. When Mowry wrote in 1863, after fifteen years of U.S. regional control, Anglo capitalism stood in a fruitful managerial relationship to cheap, efficient Mexican labor. The nearly diametric change in the conception of Mexicans held by Anglos, from indolent to industrious, reflects the emergence of an Anglo economic elite in the Southwest and illustrates the close connection between class relations and ideas about race. The syncretic nature of racial, gender, and class constructs suggests that a global approach to oppression is not only desirable, it is necessary if the amelioration of these destructive social hierarchies is to be achieved.

Third, as evidenced through a comparison of the stereotypes of Mexicans pro pounded by Farnham and Mowry, racial systems of meaning can change at a relatively rapid rate. In 1821, when Mexico gained its independence, its residents were not generally considered a race. Twenty years later, as Farnham's writing shows, Mexicans were designated in explicitly racial terms as indolent cowards. About another two decades after that, Mowry lands Mexicans as naturally industrious and faithful. The rapid emergence of Mexicans as a race, and the similarly quick transformations wrought in their perceived racial character, exemplify the plasticity of race. Accretions of racial meaning are not sedimentary products which once deposited remain solid and unchanged, or subject only to a slow process of abrasion, erosion, and buildup. Instead, the processes of racial fabrication continuously melt down, mold, shatter, and recast races: races are not rocks, they are plastics.

Fourth and finally, races are relationally constructed. Despite their conflicting views on the work ethic of Mexicans, the fundamental message delivered by Farnham and Mowry is the same: though war, conquest, and expansion separate their writings, both tie race and class together in the exposition of Mexican inferiority and Anglo superiority. The denigration of Mexicans and the celebration of Anglos are inseparable. The attempt to racially define the conquered, subjugated, or enslaved is at the same time an attempt to racially define the conqueror, the subjugator, or the enslaver. Races are categories of difference which exist only in societies they are produced by myriad conflicting social forces; they overlap and inform other social categories; they are fluid rather than static and fixed; and they make sense only in relationship to other racial categories, leaving no meaningful independent existence. Race is socially constructed.

**Conclusion**

I close where I began, with *Hudgings v. Wright*. The women in that case lived in a liminal area between races, being neither and yet both Black and Indian biologically; they were neither. Any objective basis for racial divisions fell into disrepute a hundred years ago, when early eugenics proved incapable of delineating social demarcations across human diversity. Despite Judge Tucker's beliefs and the efforts of innumerable scientists, the history of nineteenth-century anthropology convincingly demonstrates that morphological traits cannot be employed as physical arbiters of race. More recently, genetic testing has made clear the close connection all humans share, as well as the futility of explaining those
differences that do exist in terms of racially relevant gene codes. The categories of race previously considered objective, such as Caucasian, Negroid, and Mongoloid, are now widely regarded as empty relics, persistent shadows of the social beliefs in races that permeated early scientific thought. Biological race is an illusion.

Social race, however, is not, and it is here that the Wrights' race should be measured. At different times, the Wrights were socially both Black and Indian. As slaves and in the mind of Hudgins, they were Black; as free women and in their argument for liberty, they were Indian. The particular racial options confronting the Wrights reflect the history of racial fabrication in the United States. Races are thus not biological groupings, but social constructions. Even though far from objective, race remains obvious. Walking down the street, we consistently rely on pervasive social mythologies to assign races to the other pedestrians. The absence of any physical basis to race does not entail the conclusion that race is wholly hallucination. Race has its genesis and maintains its vigorous strength in the realm of social beliefs.

For the Wrights, their race was not a phantasm but a contested fact on which their continued enslavement turned. Their struggle makes clear the importance of chance, context, and choice in the social mechanics of race. Aspects of human variation like dark skin or African ancestry are chance, not denotations of distinct branches of humankind. These elements stand in as markers widely interpreted to connote racial difference only in particular social contexts. The local setting in turn provides the field of struggle on which social actors make racially relevant choices. For the Wrights, freedom came because they chose to contest their race. Without their decision to argue that they were Indian and thus free, generations of their race might have been reduced into slavery.

This is the promise of choice at its brightest: by choosing to resist racial constructions, we may emancipate ourselves and our children. Unfortunately, uncoerced choice in the arena of U.S. race relations is rare, perhaps nonexistent. Two facets of this case demonstrate the darkened potential of choice. First, the women's freedom ultimately turned on Hannah's long straight hair, not on their decision to resist. Without the legal presumptions that favored their features, presumptions that were in a sense the concrete embodiments of the social context, they would have remained slaves. Furthermore, these women challenged their race, not the status ascribed to it. By arguing that they were Indian and not Black, free rather than enslaved, the women lent unfortunate legitimacy to the legal and social presumptions in favor of Black slavery. The context and consequences of the Wrights' actions confirm that choices are made in a harsh racist social setting that may facilitate but more likely will forestall freedom; and that in our decisions to resist, we may shatter but more probably will inadvertently strengthen the racial structures around us. Nevertheless, race is not an inescapable physical fact. Rather, it is a social construction that, however perilously, remains subject to contestation at the hands of individuals and communities alike.

20. Goss, supra note 18, at 65–68. Charles Darwin proposed several of these axes, arguing at one point that “with civilized nations, the intellectual activity of the higher classes is often so intense that the mind has no room for the development of other faculties.” Darwin also supposed that the body hair of some races could not live on the bodies of members of other races, thus prompting him to suggest that “a racial scale might be worked out by exposing doubtless cases to different varieties of climate.” Id. at 81. Leonardo da Vinci is another icon of intellectual greatness, for believing that the clothing and adornments of the body were important to the mind, a concept that was widely held in the Middle Ages. Id. at 16.


22. Id. at 197.


26. Id. at 610, n.4.

27. Id. at 613.


29. Om & Wnaff, supra note 4, at 61.

30. Cal. Stat. 175 (1858), excerpted in ROBERT F. HEIZER & ALAN J. ALMQUIST, THE OTHER CALIFORNIANS: PREJUDICE AND DISCRIMINATION UNDER SPANISH, MEXICAN, AND THE UNITED STATES TO 1910, at 151 (1971). The recollections of “Dame Shirley,” who resided in a California mining camp between 1851 and 1852, record efforts by the ascendant Anglos to racially demean Mexicans. “It is very common to hear vulgar Yankees say of the Spanish, ‘Oh, they are half-civilized blockheads!’ These unjust expressions naturally irritate the latter, many of whom are highly educated gentlemen of the most refined and cultivated manners.” L.A.R.S. Clapper, The Shirley Letters from the California Mines, 1851–1852, at 158 (1892), quoted in Heizer & Alquist, supra at 141.
