IDENTITY NOTES PART ONE: PLAYING IN THE LIGHT*

ADRIENNE D. DAVIS**

What parts do the invention and development of whiteness play in the construction of what is loosely described as "American"?[1]

INTRODUCTION

There is now a well-developed and compelling body of scholarship challenging the notion that race is either a natural or a scientific category.[2] Scholarly treatments regarding the social construction of race are still finding their way into law and legal scholarship.[3] Most

---

* © 1996 Adrienne D. Davis.

** Associate Professor, *American University, Washington College of Law.* B.A., J.D., *Yale University.*

This Essay had its origins in a panel held during the Washington College of Law at American University's conference on Race, Law and Justice: The Rehnquist Court and the American Dilemma on September 21, 1995. The title of my panel, "Beyond Black and White: Race-Conscious Policies and the 'Other Minorities,'" crafted by the conference organizers accomplishes subtly several things that I hope to continue in more explicit fashion in this Essay. The title challenges false binary racial logic from the position of groups who are neither Black nor white. It also foregrounds the history behind the development of this dominant model of binary reasoning about race and law in America.

The conference was co-sponsored by the Program on Law and Government, *The American University Law Review*, and the Asian and Pacific Law Students Association. Each of these organizations, as well as my colleagues Jamin Raskin and Thomas Sargentich, are to be commended for their efforts. I would like to thank Robert Chang for his inspiration and engagement, and James Boyle, Jim May, Jamin Raskin, and Joan Williams for their helpful comments and suggestions. I would also would like to express to Stephanie Wildman and Trina Grillo my sincere appreciation for all of our conversations and work over the years that sparked these thoughts in my mind. Simone Wennik provided superb research assistance.

1. TONI MORRISON, PLAYING IN THE DARK—WHITENESS AND THE LITERARY IMAGINATION 9 (1992).

2. *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (1994); KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE (1992). *See also* GORDON ALLPORT, THE NATURE OF PREJUDICE (1954) (a germinal text in the sociology of race and prejudice).

3. Legal scholars doing work in the field of racial taxonomy or architecture include Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) [hereinafter Haney López, *Social Construction*]; Neil Gotanda, *A Critique of "Our Constitution Is Color Blind,"* 44 STAN. L. REV. 1 (1991) [hereinafter Gotanda, *"Our Constitution Is Color Blind"*]; Neil Gotanda, *"Other Non-Whites" in American Legal*

of these treatments argue that race *is* socially constructed. This Essay makes a different point. Using two cases from the early and mid-nineteenth century, I discuss *how* race is socially constructed, why it matters, and how the process can appear in issues as dry as an allocation of the burden of proof. In particular, I focus on the construction of *whiteness*, which, I argue, drives the process of legally classifying groups of color.

A focus on the politics of local contests invites an archaeological exploration of historic sites where a black/white paradigm of race was in crisis and vulnerable to correction. In each of these crises, however, the force of the paradigm itself prevailed, reinscribing itself with yet more force in law and the lives of all three groups implicated: African Americans, other groups of color, and whites. An historical assessment of the relationship of other groups of color to a black/white paradigm reveals the paradigm as not only undescriptive and inaccurate, but debilitating for legal analysis, as well as civil rights oriented organizing.[4]

The two cases reveal distinct dynamics of the binary model, which I suggest is hegemonic for the following reasons. A primary mechanism of this model is its disciplining function on other groups of color seeking legal rights and recognition. It is an organizing principle for knowledge (here, law), it has an internal hierarchy of power, it masks this hierarchy through a seemingly neutral shell of "race," and it operates as self-reinforcing through its disciplining mechanism. In addition, in classicly hegemonic fashion, the paradigm includes rules that prove to be internally inconsistent. The cases reveal the internal contradiction of the rules employed by courts to establish racial identity at law. In one opinion, jurists use mutually exclusive determinations of racial identity in resolving a single legal matter. The underlying facts and interests involved suggest that the court's reasoning was driven not by the interests of the immediate parties, but rather by a larger, perhaps unconscious, desire to define white identity and secure white liberty interests.[5]

History: A Review of Justice at War, 85 COLUM. L. REV. 1186 (1985) [hereinafter Gotanda, *"Other Non-Whites"*] (reviewing PETER IRONS, JUSTICE AT WAR (1983)); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437 (1993). *See also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (describing economic privilege accruing to whiteness and its impact on "passing").

4. *See generally* William R. Tamayo, *When the "Coloreds" Are Neither Black Nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1 (1995) (discussing impediments imposed by paradigm in recent history and current anti-immigrant climate).

5. In this sense, it might be more descriptive to label the paradigm as dyadic, rather than binary, in that the designation of race appears to be inextricably linked to the task of configuring whiteness.

Finally, I hope that the contrast of the two cases demonstrates that the black/white paradigm exercises influence on legal reasoning across time and geographic space, and also that the paradigm itself *appears* to be a natural ordering, obscuring the assumption of a white subject position. Though involving seemingly unrelated legal conflicts, the cases are linked together through the discursive structure formed by binarism. It orders the legal logic and rhetoric of the judges, as well as the arguments of the litigants. Both cases prove to be inescapably embedded with racial determinations and, inevitably, legal constructions.

What follows stems from a series of discussions, and remains an inquiry directed toward certain suggestive episodes within a much broader history that I leave to others to continue to explore and excavate.[6]

I. DREAMING IN BLACK AND WHITE IN NICARAGUA

During the summer of 1992, I participated in a property-rights conference in Nicaragua. In my free time, I wandered the streets of León with old and new colleagues, looking for leather goods and dreaming of the heroes honored in the murals. As I met more Nicaraguans, I realized that my prior forays outside of the United States to France and the Bahamas had not prepared me for a country where race was not governed by the politics and economics of black and white. I found myself negotiating not merely the politics of Coca-Cola roofed houses,[7] but also a foreign structure of race into which I (alarmingly) seemed to fit nowhere and everywhere.

Until then, I had always been Black in the American imaginary. My skin tone is coffee with cream or double latte, depending on your coffee aesthetic. With big lips (now considered "full" I suppose) and curly hair, my phenotype guaranteed my racial designation through most of my life. With this phenotype, born in 1965, I have been "black" in both capital and lowercase, Afro-American, African-American. When I was fifteen I was even called a "colored girl" by an older white man who I do not think meant offense as he said it in the process of giving me a scholarship.[8] The names may have changed

6. Because of the nature of this Essay, it is limited to close readings of cases. For the reader interested in broader analyses, see sources cited *supra* note 3.

7. One of my colleagues explained to me that companies will paint people's roofs or the sides of barns if in exchange the company may paint a super-sized version of its logo. I have not seen this in the United States, but I understand that it is also a practice in some parts of the country.

8. "Colored," I believe, is an especially grating racial label as it is a reminder of the juxtaposition between "white" and "colored" facilities during the Jim Crow era of segregation.

to protect the innocent, but the significance of being the opposite of white never did. Although now I am an academic who studies race as a social construct, my own appearance had always warranted racial certainty. In America, I could never "pass."

Upon arriving in Managua, however, the racial certainty I brought with me from the States evaporated. The features that locate me as Black in America do not map onto the unfamiliar turns and curves of the Nicaraguan structure of race. In León, I learned that my brown skin and pouting lips might make me Miskito/Spanish, Caribbean/Spanish, African/Spanish, perhaps even pure Miskito. My brown skin was only the beginning of the interrogation rather than the end, an initial descriptor rather than a final conclusion. I slipped through the cracks of the Nicaraguan racial regime. I began to feel somewhat of a spectacle as children pointed and were scolded for doing so by adults who were trying to hide their own stares.[9] I still remember with vivid affection one little girl selling candy at a concert we attended. She alternated between charming my group into giving her precious American dollars and returning to my side to interrogate me about my looks, which she could not fathom.

My intention is not to romanticize the seeming racial fluidity I encountered in Nicaragua while condemning racial practices in the United States. Even during my short stay in Nicaragua, it became clear that race was controversial and politically salient there: historically determined and heavily regulated. During the course of the international conference, entitled *Revolution, Participatory Democracy, and Property: Nicaraguan Property Regime After Sandinistan Land Reform*,[10] speakers and audience members made repeated reference to the marginalization of Miskito Indians within both the national politics and the academic discourse of property rights. The texture of the debate and arguments demonstrated to me that this

---

9. "Spectacle: 1 a: something exhibited to view; usu[ally]: something exhibited as unusual and notable: a remarkable or noteworthy sight: an impressive display esp[ecially] for entertainment b: an object of curiosity or contempt esp[ecially] by reason of silly or inappropriate behavior . . . c (1): a public display appealing or intended to appeal to the eye by its mass, proportions, color, or other dramatic qualities . . . (2): a motion picture employing massively impressive scenery and much crowd action, usu[ally] set in past time, and commonly dealing with a historical or religious theme." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2188 (3d ed. 1986).

Lest anyone argue that my experience was due to some other cultural factor (e.g., dress or conduct), I asked several of my Nicaraguan colleagues whether I was doing anything to call attention to myself. They responded that the residents of León probably had not seen anyone who looked like me before.

10. Sponsored by Capital Law School, León, Nicaragua, Aug. 18-20, 1992.

marginalization was also contested in other areas of rights and participation.

My own racial anxiety increased when, after three days in the conference room of 300, I concluded that while my own racial appearance may have been contested, that of the Nicaraguans was not. The conference participants readily marked and distinguished the Miskito Indians as well as their privileged counterparts, the Spanish. Nicaragua indeed had its own complex map of racial relations and domination.[11] The only trouble was that they could not map me.

The conference concluded and my trip ended. After a long and exhausting trip from León to Managua on my way to Miami, I was joyful to find myself back in the United States. As Miami is a port of entry, one of the tense American spaces where the border is drawn taut, there were ranges of browns there, a melee of accents and languages.[12] Miami is one of many physical border sites in the United States.[13] In these places, race is recognized as more fluid, in contrast to its seeming fixity in most other American places. My own racial identity was rapidly renegotiated from open and fluid into the fixity of American Blackness. I was comforted to be once again in a space where people were searching for my "Blackness," seeking to identify and mark it, making it available for regulation. My recollection of myself hours earlier standing in front of the mural of Che Guevara, free and bereft of my racial identity, faded into memory. As I sought sleep on the plane from Miami to California, I fell with relief into the looming, dark category of Blackness.

---

11. Likewise, during my travels in France, it became clear that the French had a different system of racial coding than the American one. People routinely assumed that I was French, but of what they call "mixed" (*métisse*) descent, referring to a child of a Black African and a white parent. Although mildly disconcerting, this assumption remained grounded in black and white and did not confound my sense of identity in the way that my travels in Nicaragua did.

Both the French and American systems of binary racial coding stem from the negotiation of the West's encounter with Africa. A project for another time is to examine the distinctions between the politics of racial labeling stemming from the political economies of European imperialism versus domestic chattel slavery.

12. Legal scholars of "border theory" identify and discuss the distinctive functioning of borders for different racial groups. *See generally* Regina Austin, *"A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147 (exploring how borders of legality and illegality in informal markets affect Black Americans); Robert S. Chang, *A Meditation on Borders*, *in* THE NEW NATIVISM (Juan F. Perea ed., forthcoming 1996) (describing how borders are constructed to run parallel to notions of "foreignness"); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994) (discussing role of color-blind laws and policies in maintaining Black racial segregation); Juan F. Perea, Los Olvidados*: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995) (discussing ways in which Latino/as may be "symbolically deported").

13. *Cf.* Chang, *supra* note 12. Chang warns that "the border is not just on the periphery. For example, if a Korean national flies from Seoul and lands in Kansas, the border will be there to greet her. The border is everywhere." *Id.*

II. THE TYRANNY OF CATEGORIES

My Nicaraguan experience impressed upon me the contingency of systems of racial classification. Despite sometimes dramatic efforts to fix it through complex systems of racial tracking[14] and surveillance,[15] "race" itself remains a concept that we continually invent and construct.[16] Yet, as the recent debates over the verdict in the O.J. Simpson trial demonstrate, most Americans, of all races, do not view race as indeterminate, but rather as physically cognizable, stable, and culturally significant. Moreover, as a culture, we locate race primarily in black and white. My story about traveling in Nicaragua suggests that racial taxonomies are local and political, rather than universal and scientific. I cannot be located on the Nicaraguan racial map, and I map imperfectly onto the French one.[17] Thus far, only in the United States is my race determined and determinate.

How then, does binarism affect law and legal study? One effect of the paradigm I will suggest before discussing the cases is how the articulation of the model itself *as* a "black/white paradigm" masks a driving mechanism of the model. In the phrasing "black/white," the paradigm appears dyadic, and internally neutral, as though Blacks and whites were equally situated within the model. Yet the cases discussed below suggest that a primary motivation in the crafting of the American racial architecture may not have been a pure desire to have a taxonomy for classifying races, but to define and protect specifically white identity.

This search for white identity has been documented by Nobel Laureate Toni Morrison in her collection of critical literary essays that provide the epigraph for this Essay. She argues that whiteness as a discrete concept remains largely unexcavated in American culture.[18] Her readings of classic nineteenth-century literature indicate that

---

14. *See, e.g.*, State v. Treadaway, 52 So. 500, 508 (La. 1910) (distinguishing between griff (child of biracial "mulatto" and Black) and quadroon (child of biracial "mulatto" and white)). Louisiana's system survived (in modified form) until it was abrogated through legislation. 42 LA. REV. STAT. ANN. § 267 (West 1990), *repealed by*, 1983 LA. ACTS 441 § 1. As late as 1974, however, the Louisiana courts upheld the state's interest in tracking African ancestry to the fractional degree. *See* Plaia v. Louisiana Bd. of Health, 296 So. 2d 809, 810 (La. 1974).

15. *See generally* Eva Saks, *Representing Miscegenation Law*, 8 RARITAN 39 (1988) (discussing antimiscegenation statutes and cases as examples of regulation and scrutiny of sexual and property relations).

16. *See generally* OMI & WINANT, *supra* note 2. *See also* Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16 (1995) (discussing movement to recognize biraciality as distinct racial formation).

17. *See supra* note 11.

18. MORRISON, *supra* note 1, at 9, 31-59 (discussing not only literary references to racial whiteness, but also limited use of color white in early American literature).

whiteness became largely defined by its opposite: color, and more specifically, blackness.[19]

The dynamic suggested by Morrison has been reflected among blossoming legal thinkers in my seminars on race and law. I routinely ask the students to define "Black culture." A variety of attributions pour out: emotion and soul, instinct and intuition, violence and passion, drive and pride, spirituality and strength. Yet when I ask for the cultural attributes or meaning of "white culture" the students are stumped, sometimes disturbed. I have yet to have a student attach a meaning that is not a stand-in for a more specific class-based or ethnic culture rather than a more broad-ranging racial culture of whiteness. After six seminars, whiteness (unmodified) has remained devoid of content in my classroom.

I am not raising the absence of meaning for whiteness in an effort to have exaggerated, stereotypical, and demeaning content ascribed to Euro-Americans. I emphasize the void around whiteness rather to illuminate the embeddedness of dyadic and polarizing logic in the American racial paradigm.

Other racial groups form their identity around shared cultural norms, common histories of immigration or migration, mythologized homelands, or racial oppression.[20] Non-Hispanic white American identity appears to be formed solely around the experience of being not Black, Asian, or Latino/a.[21] White Americans do not appear to have a sense of racial identity that is not linked to ethnicity or class, *unless* juxtaposing themselves against Blacks, Asian Americans, or sometimes Latinos/as.[22] Hence, construction of colored identities is critical to the maintenance of white identity. It is against the backdrop of engaging whiteness as a juxtaposition to racialized color in general, and blackness in particular, that I will examine two cases

---

19. MORRISON, *supra* note 1, at 9, 31-59. Professor Ian Haney López makes an analogous point within law through close readings of late-nineteenth century cases. *See* Ian F. Haney López, *White by Law*, *in* CRITICAL RACE THEORY—THE CUTTING EDGE 542 (Richard Delgado ed., 1995) [hereinafter Haney López, *White by Law*]; *see also* STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (forthcoming 1996) (with contributions by Margalynne Armstrong, Adrienne D. Davis & Trina Grillo). For discussion of Native Americans and this issue, see *infra* Part III.

20. *See* OMI & WINANT, *supra* note 2, at 57-69.

21. Wildman would argue that racial privilege, or the ability to enjoy the fruits of whiteness without committing personal acts of domination, also defines white identity. *See* WILDMAN, *supra* note 19.

22. For a discussion of white racial identity, see generally ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992); DAVID R. ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY (1994); DAVID R. ROEDIGER, WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991).

in which non-Black groups of color negotiated the black/white paradigm in efforts to secure their own civil rights. The appearance of whiteness as an organizing legal principle becomes critical in understanding both the disciplining mechanism and the maintenance of contradictory rules of law and race.

III. YEARNING TO BE FREE

The cases included below are suggestive (though obviously not exhaustive) instances of the binary mode of racial reasoning at work in the lives of groups of color who are not African American. I hope that my close readings of these two cases illuminate some of the dynamics of binary legal logic that may prove to be at work in other historical (and contemporary) instances. As noted earlier, the cases indicate that a binary paradigm appears to be present in not only explicitly political, rights-based cases, but also in straight procedural matters such as establishing burdens of proof and setting evidentiary standards. Not only the language of the judicial opinions, in these cases, but the arguments made by the parties seeking redress demonstrate the ways that binary racial logic structures legal thought and argument.

One insight revealed by the cases is the extent to which the paradigm is predicated on discernible racial identity. One significant question, then, in both cases, is *who* will define and assign racial labels. This power of assigning race suggests a larger question about the role of white identity in these cases. Not only do the cases appear to turn on securing, alternatively, white economic, liberty, and political interests, but also on entrenching with the force of law a white subject position in racial designation. Clearly, the latter power has resonance beyond law, into larger culture, which I discuss in the closing section. The protection of these distinct white interests suggests the cultural hegemonic force of legal dispositions of racial identity.

In Virginia in 1806, two enslaved women, Hannah and her daughter, asserted their freedom against the man who claimed them as his slaves.[23] Prior to reaching the substantive issue of their status, the court had to decide which party, the alleged slave or claiming master, bore the burden of proof. The political economy of slavery, including the requisite legal regime, sharply restricted the capacity of any Black to participate in the production, use, and circulation of

---

23. Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134 (1806).

texts, especially any that would satisfy legal evidentiary standards.[24] Hence, the designation of alleged slaves as the party with the burden of producing documents would deny to many of them a legal remedy of freedom for false or illegal enslavement.

In *Hudgins v. Wrights*,[25] the Virginia Supreme Court clarified legal parameters for determining the servitude status of Native Americans.[26] Native Americans were held as slaves throughout the colonial era and early antebellum period. However, Virginia formally recognized by statute Native American enslavement only between the years 1679 and 1705.[27] Because slavery descended matrilineally in the United States,[28] an alleged slave would have to satisfy two prongs of a test in order to be entitled to freedom. First, the slave would have to demonstrate that he or she had a maternal ancestor who was Native American, opening the possibility that the ancestor legally was free. A free woman would be incapable of transmitting slave status to subsequent generations. The next prong, then, would be to actually demonstrate that the ancestor was not enslaved between 1679 to 1705, the period of legal Native American enslavement.

Hannah and her daughter claimed their freedom through their mother/grandmother, Butterwood Nan.[29] If Butterwood Nan had been held as a slave outside of the statutorily prescribed period in Virginia, the appellees would go free. The judges decided in *Hudgins v. Wrights* to allocate the burden of proof to the claiming master.[30] This meant that he had to prove *either* that Butterwood Nan was not Indian, but rather a member of a racial group that could be enslaved legally, *or* that she had been enslaved within the statutorily recognized period. He failed to do either, and Hannah and her child went free.

---

24. *See, e.g.*, A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 198, 258 (1978) [hereinafter HIGGINBOTHAM, MATTER OF COLOR] (describing some of the colonial origins of the slave codes that prohibited teaching slaves to read and write); PETER KOLCHIN, AMERICAN SLAVERY: 1619-1877, at 61, 116-17, 128-29, 134, 142 (1993).

25. 11 Va. (1 Hen. & M.) 134 (1806).

26. For further discussion of statutes governing Native American enslavement in Virginia, see sources cited in A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1973 n.24 (1989) [hereinafter Higginbotham, *Racial Purity*].

27. *Hudgins*, 11 Va. at 137-39. Judge Tucker's opinion modifies the standard date of repeal, 1705, to 1691. *Id.* at 139.

28. *Id.* at 137. For discussion, see HIGGINBOTHAM, MATTER OF COLOR, *supra* note 24, at 159, 194; Higginbotham, *Racial Purity*, *supra* note 26, at 1970-71.

29. *Hudgins*, 11 Va. at 134-36.

30. "[A]ll American Indians are prima facie free: and that where the fact of their nativity and descent, in a maternal line, is satisfactorily established, the burthen of proof thereafter lies upon the party claiming to hold them as slaves." *Hudgins*, 11 Va. at 139 (Tucker, J.).

It goes without saying that any outcome in which slaves were freed remains a cause for celebration. Yet a closer examination of the case reveals the extent to which the court's and parties' approach to the conflict was inextricably embedded within a political economy governed by the black/white paradigm. Although the court is attempting to locate three races within the racial map—Indian, negro, and white—its logic is at bottom solely binary in structure and subordinating in effect.

The court in *Hudgins* must have understood the potential impact of its procedural holding on the political economy of American chattel slavery. At issue was not just the economic ordering of society, but also the political and cultural negotiations of domination and subordination, infliction and resistance, between masters and slaves. These engagements occurred largely beyond the regulation of the legal system,[31] and it was in the interest of those who owned slaves to maintain this quasi-feudal authority over bondspeople by circumscribing and regulating access to the public world of the courts.

Two well-known Virginia jurists, Judges Tucker and Roane, each articulated careful, detailed rules to govern future cases in which a claim of mistaken racial identity might be made as a defense to being enslaved.[32] These rules operated largely to protect Native Americans, and whites as I will discuss, but more permanently associated slavery with blackness and blackness with slavery. To reconcile this conflict, the judges employ what prove to be two contradictory vectors of racial analysis. First, they establish a discretionary standard for allocating the burden of proof:

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

---

31. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW: 1619-1860, at 182-96 (1996) (discussing scope of master's authority over slaves); A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969 (1992) (describing mechanics of race, criminal law, and slave status); *see also* William W. Fisher, III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051, 1073-83 (1993) (discussing role of honor in structuring authority).

32. An influential and respected jurist of the time, Judge St. George Tucker, and his prolific colleague, Judge Roane Spencer, authored the opinions in the case. *See* HIGGINBOTHAM, MATTER OF COLOR, *supra* note 24, at 59; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860, at 11, 19-20, 23, 44 (1977); MORRIS, *supra* note 31, at 26, 37, 65, 117, 135, 374, 389, 404-07, 416, 419-20; A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE 204, 208-10, 215-20, 236-38 (1981).

> presumption is that he is free, and it is necessary for his adversary to shew that he is a slave.[33]

Discernments of physical phenotype thus drive the preliminary procedural element of allocation of burden of proof.

I call this physical component *scopic* in that it relies on the inspecting and scrutinizing gaze of a (white) individual in order to discern and assign racial identity.[34] "The distinguishing characteristics of the different species of the human race are so visibly marked, that those species may be readily discriminated from each other by mere inspection only."[35] Judges are mainly appointed the proper practitioners of this new taxonomy, however Judge Roane's opinion suggests that jurors also may be arbiters of racial designation in Virginia.[36] Thus, in this era, only white men are endowed with this consummate power of racial assignation.[37]

This scopic rule, and Judge Tucker's defense of it removes any of the contingency that my own Nicaragua story suggests is present in any racial taxonomic practice. Instead, there is the enforcement of a white stance as the only subjective position possible for racial identification.[38] Those excluded by law from juries and the judiciary are also excluded from a burgeoning economy of racial surveillance, buttressed by the rule itself.

Both judges used the opportunity presented by the conflict to empower with the force of law a nascent taxonomy of phenotypic race:

> Nature has stampt upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of color

---

33. *Hudgins*, 11 Va. at 141 (Roane, J.).

34. *Cf.* Gotanda, *"Our Constitution Is Color Blind," supra* note 3, at 24 (referring to "rule of recognition").

35. *Hudgins*, 11 Va. at 141 (Roane, J.). Judge Tucker agreed:

> Suppose three persons, a black or mulatto man or woman with a flat nose and woolly head; a copper-colored person with long jetty black, straight hair; and one with a fair complexion, brown hair, not woolly nor inclining thereto, with a prominent Roman nose, were brought together before a judge upon a writ of habeas corpus, on the ground of false imprisonment and detention in slavery . . . . How must a judge act in such a case? I answer he must judge from his own view.

Id. at 140 (Tucker, J.).

36. *Id.* at 141 (Roane, J.).

37. "[T]hroughout much of the 19th century the position of women in our society was, . . . comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, ..." Frontiero v. Richardson, 411 U.S. 677, 685 (1973). While I might take issue with the extent to which the material lives of slaves and white women were similar, in the context of direct participation in crafting the racial taxonomy, both were excluded from legal subjectivity.

38. For discussions of subject positions and law, see James Boyle, *Is Subjectivity Possible? The Postmodern Subject in Legal Theory*, 62 COLO. L. REV. 489 (1991).

> either disappears or becomes doubtful: a flat nose and woolly head of hair. The latter of these characteristics disappears the last of all: and so strong 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 complexions, whether white or Indians; giving to the jet black lank hair of the Indian a degree of flexure, which never fails to betray that the party distinguished by it, cannot trace his lineage purely from the race of native Americans.[39]

The court thereby gives legal determinacy to what was scientifically uncertain and socially contested. It establishes as legal standard the individual judges' perceptions of racial distinction.

The scopic rule stands in contrast as the more standard rule of determining race according to genealogy, or "blood." In fact, the formula of hypodescent stated that one's race would not be determined by appearance, but by ancestry.[40] However, the court employs this rule, too, in resolving Hannah's case. The court held that the appellees would go free if they could trace their lineage back to a Native American woman who herself would have transmitted free status to a child. Hence, ancestry, not appearance, governs the substantive disposition of the case.

The court adopts two conflicting vectors of analysis in order to map race in early national Virginia. The rule of hypodescent runs along a formalist path of employing "objective" principles of genealogy and lineage. The other rule stems from local scopic determinations made by physical judicial inspection.[41] These two rules appear irreconcilable on their face. I suggest, however, that the rules can be explained through attention to the subtext of the case: safeguarding various material interests of whites, in addition to a white subject position. Obviously the rule of hypodescent worked to secure economic interests in slavery. Designating an individual as Black subjected that person to a series of legal disabilities that made it more difficult to claim freedom.

But the conflict in *Hudgins* brought to light a latent danger of slavery for whites: the loss of a *liberty* interest. The laws severely restricting slaves, designed to protect the economic and political

---

39. *Hudgins*, 11 Va. at 139 (Tucker, J.).

40. *See* Gotanda, *"Our Constitution Is Color Blind," supra* note 3, at 23-26 ("Rule of descent: (a) Any person with a known trace of African ancestry is Black, notwithstanding that person's visual appearance."); *see also* Harris, *supra* note 3, at 1738 nn.137-38.

41. Although I argue these vectors travel different paths, an instance of their intersection might be in the legal designation of the "mulatto," a term used interchangeably to describe those children of white and black parents as well as very fair-skinned Blacks.

interests of whites in their slaves, effectively prevented those claimed as slaves from contesting their status. As the quandary of the appellees in *Hudgins* suggested, however, whites also might find themselves on the accused end of being a slave. Judge Roane tellingly shares his concern: "In the present case it is not and cannot be denied that the appellees have entirely the appearance of white people: and how does the appellant attempt to deprive them of the blessing of liberty to which all such persons are entitled?"[42] Note that although this case nominally is about the parameters of *Native American* enslavement, Judge Roane's main focus seems to be the safeguarding of *whites* from accidentally falling into the perils of slavery.[43] This is done by coding actual legal rights to race and racializing even the rhetoric of liberty interests.[44] Simultaneous protection of white economic and liberty interests can only be accomplished by utilizing differing modes of racial analysis and surveillance which, at their core, articulate white identity and code rights and liberty to it.

A second signal mechanism driving the binary legal mode is its aspirational quality that masks a disciplining function. The following language from Judge Tucker isolates Black Americans from both whites *and* Native Americans.

> Its operation is still more powerful where the mixture happens between persons descended equally from European and African parents. So pointed is this distinction between natives of Africa and the aborigines of America, that a man might as easily mistake the glossy, jetty cloathing [sic] of an American bear for the wool of a black sheep, as the hair of an American Indian for that of an

42. *Hudgins*, 11 Va. at 141. Professor Ian Haney López aptly describes the absurdity of the reasoning: "After unknown lives lost in slavery, Judge Tucker freed three generations of women because Hannah's hair was long and straight." Haney López, *Social Construction*, *supra* note 3, at 2; *see also* HIGGINBOTHAM, MATTER OF COLOR, *supra* note 24, at 59-60 (discussing judicial views of racialized freedom manifest in *Hudgins v. Wrights*); Higginbotham, *Racial Purity*, *supra* note 26, at 1985-88 (focusing on sex and gender aspects in construction of race in *Hudgins*).

43. Judge Roane's fears are echoed by his colleague Judge Tucker: "All *white persons* are and ever have been free in this country. If one *evidently white*, be notwithstanding claimed as a slave, the proof lies on the party claiming to make the other his slave." *Hudgins*, 11 Va. at 139 (italics in original); Plessy v. Ferguson, 163 U.S. 537 (1896). Cheryl Harris makes a similar point about the racial logic of the decision. Harris, *supra* note 3, at 1745-50 (explaining that *Plessy* acknowledged that whites could protect their property interest and reputation in being white, thus effectively protecting "whiteness" from intrusion and defining boundaries around "whiteness" as property).

44. Note that the court holds not only that whites and Indians do not have a burden of proof in such cases, but also dictates that those appearing negro shall remain in custody pending adjudication while those appearing otherwise will remain unfree. *Hudgins*, 11 Va. at 140. For discussion of the racialization of white liberty interests, see EDMUND MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975).

> African. Upon these distinctions as connected with our laws, the burthen of proof depends.[45]

Racial integrity of both whites and Native Americans is indicated by the power of Black admixture to corrupt the purity of each of these "fragile" races and to dilute the integrity of the scopically determined phenotype.

More than rhetoric disciplined the Native American parties. Not only had blackness been coded to servitude, but whiteness had been coded to liberty rights. If considered scopically white, the appellees could evade the burden of proof. This conundrum is reflected in the appellee's opening statement: "This is not a common case of mere *blacks* suing for their freedom; but of persons perfectly *white*."[46] The appellees, though claiming freedom substantively through Native American ancestry, employed the rhetoric of the scopic economy, hence invoking whites' fear of being accidentally enslaved.

Crafting an argument to secure rights structured to secure white economic and liberty interests meant that the appellees had to situate themselves as people who could be removed from chattel slavery without altering its fundamental order. The move then is located firmly within the paradigm of binary race rather than attempting to locate the appellees altogether outside of it.[47] The appellees' argument demonstrates that these racial divisions, the creation of whiteness as something to be aspired to and blackness to be distanced from, was already extant and powerful in this early moment in national consciousness.

The appellant negotiated within the same logic, attempting then to distance the alleged slaves from the security of whiteness. The attorney insisted that the chancellor had been disabled by his own resonance with the appearance of appellees: "[T]he circumstance of their being white operated on the mind of the chancellor."[48] He went on to warn the Supreme Court: "The circumstance of the

---

45. *Hudgins*, 11 Va. at 139-40 (Tucker, J.).

46. *Id.* at 135 (italics in original).

47. Ronald Takaki notes that, ironically, the racialization of Native Americans probably served a similar purpose in the formation of *colonial* American identity. Ronald Takaki says, "Indian identity became a matter of 'descent': their racial markers indicated inerasable qualities of savagery." RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 38 (1993). I argue that *Hudgins* cannot be understood outside of the context of American chattel slavery and the efforts by law to code Blacks as rightsless within that political economy. Takaki says of the colonial juxtaposition of Indians as racial savages: "This social construction of race occurred within the economic context of competition over land. The colonists argued that entitlement to land required its utilization." *Id.* at 39; *see also* Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 85-88 (1985) (describing Native American and colonial norms of property use and ownership).

48. *Hudgins*, 11 Va. at 134.

appellees' being white, has been mentioned, more to excite the feelings of the court as men, than to address them as judges."[49] Thus each side inexorably negotiated within the confines of the paradigm, further inscribing its logic and power.

Ultimately, the various deployments of binary logic of *Hudgins* reveals something implicit in the black/white paradigm that is often overlooked by legal racial theorists. The very label "black/white" suggests parity of the races within the paradigm. It evokes two equal poles on a line that together make up the category race. Hence race itself as a construct appears to be neutral; everyone has one, it is merely a matter of identification.[50] The appearance of neutrality is critical in order to maintain the continuing power of the paradigm.

With my Nicaragua story I hoped to encourage readers to interrogate the seeming determinacy of the race classifications. However, it is also important to question the seeming neutrality of the shell of "race" within which component parts interact. *Hudgins* makes clear that the black/white paradigm arising from chattel slavery was not merely a set of categories composing a taxonomy, but a set of dynamic juxtapositions with their own internal hierarchy, elaborated through the assignment of rights.[51] The language of both Judges Tucker and Roane, as well as the arguments of the lawyers, suggests the hegemonic nature of the paradigm.[52] The logic of the paradigm itself continually hides internal inconsistencies, dominant subject positions encoded with legal power, and even its own self-reinforcing mechanism.

The *Hudgins* opinion remains one of the most stark examples of the role of law in creating the national racial taxonomy. Its language illustrates how the national racial taxonomy took differences of phenotype and reified them into bases for legal and social discrimination and violence.[53] The hegemonic force of *Hudgins* utilizes the

---

49. *Id.* at 136.

50. *Cf.* Gotanda, *"Our Constitution Is Color Blind," supra* note 3, at 25-26.

51. Stephanie Wildman has written extensively about the privileging dynamic arising from dyadic logic. WILDMAN, *supra* note 19; *see also* Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881 (1996). Privilege is distinct from domination and subordination.

> Domination, subordination, and privilege are like three heads of a hydra. Attacking the most visible heads, domination and subordination, trying bravely to chop them up into little pieces, will not kill the third head, privilege. Like a mythic multi-headed hydra, which will inevitably grow another head if all are not slain, discrimination cannot be ended by focusing only on active acts of subordination and domination. Yet the seeming parity suggested by "black/white paradigm" itself hinders the ability to recognize and combat privilege.

52. *Cf.* EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 25-31 (1974).

53. *See generally* Haney López, *White by Law, supra* note 19.

black/white paradigm to more firmly inscribe slave status onto Blacks, ending any ambiguities of the racial coding of enslaved status that may have remained from colonial white servitude.

The cases show the use of the binary paradigm in crafting a white identity. In *Hudgins*, blackness is treated narrowly, limited in order to protect white liberty, which in this instance outweighs economic concerns. Fifty years later, the same binary mode of reasoning led a court to define blackness far more expansively, and whiteness more narrowly. But even with a different cut, the shift still secures white interests, albeit of a different sort. This shifting construction of both blackness and whiteness illuminates both the fluidity of racial classifying practices, and the inexorable nature of the securing of white rights.

In *Hudgins*, Native Americans argued their way out of a chattel slavery by legally linking it to Black Americans. Across this half century, in *People v. Hall*,[54] Chinese residents of California were situated within a completely different political economic structure. Yet, even across 3000 miles and half a century, a paradigm of binary racial reasoning functioned hegemonically to govern the judicial resolution of where to locate a third race. In *Hudgins*, Native Americans negotiated a burgeoning racial structure in Virginia. In *Hall*, Chinese attempted a similar maneuver, albeit in the context of statutory interpretation rather than matters of initial procedure. Unlike *Hudgins*, in *Hall*, literal liberty interests were not at stake. Instead the conflict was over access to the courtroom. However, as the discussion indicates, white interests still appeared paramount and were protected judicially along two axes.

At issue was a statute that coded privilege and rights to whites in an analogous fashion to *Hudgins v. Wrights*. The court had to racially locate Chinese within a prohibitory statute: "No black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, a white person."[55] While there is a nascent debate among legal scholars over the motivations behind the statute,[56] its impact is

54. 4 Cal. 399 (1854).

55. Act of Apr. 16, 1850, ch. 99, § 14, 1850 Cal. Stat. 229, 230, amended by Act of Mar. 18, 1863, ch. 70, 1863 Cal. Stat. 69, repealed by omission from codification Cal. penal Code § 1321 (1872) (officially repealed, Act of Mar. 30, 1955, ch. 48, § 1, 1955 Cal. Stat. 488, 489). Interestingly, the original statute read "against any white person." In reprinting the statute, the California Supreme Court changed the language to "against a white *man*." People v. Hall, 4 Cal. 399, 399 (1854) (emphasis added). Professor Neil Gotanda notes that this statute was passed prior to California's admission to the Union. Gotanda, *"Other Non-Whites," supra* note 3, at 1189.

56. On the one hand, in his reading of the Fourteenth Amendment, Thomas Joo argues that the interests at issue in *Hall* were perceived as political ones. Joo notes that in contrast, many of the Chinese struggles for civil rights following *Hall* may have been supported by the

unarguable. Hannah and her daughter aligned themselves with whiteness in order to gain freedom. For the Chinese in *Hall*, the taxonomic racial choices would be equally clear and stark.

People v. Hall is a far more well-known and analyzed case than *Hudgins v. Wrights*.[57] The conflict giving rise to the case itself implicated racial practices very sharply. The state charged Hall, a white man, with the murder of Ling Sing, a Chinese man. Hall was convicted following a trial that included the testimony of three Chinese witnesses. The California Supreme Court reversed the conviction, concluding that the Chinese testimony had been improperly admitted under the statute. It held that the statute applied to all non-whites and that the Chinese were prohibited from testifying against whites.

Professor Charles McClain reports the outrage of the Chinese community over the *Hall* decision.[58] Implicated was not just the value of Chinese lives, but the general availability of the courtroom as a physical and discursive site. The courts are where people go to assert their rights, from protection against violence to enforcement of contracts.[59] As one commentator points out, the segregation of Chinese/white life also meant that Chinese might not have white witnesses to support legal claims they might make.[60] Hence, in

courts because economic rights were at issue. He contends that Blacks in the late nineteenth century were seen as desirous of political and social rights, demanding admission into the full life of the country. Chinese were seen as participating in the market life of the country, a less threatening arena. Thus the Chinese may have lost in *Hall* because the issue was political rather than economic rights. *See* Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353, 358 (1995) (detailing *Hall* decision where court saw "actual and present danger" of Chinese gaining full membership in society).

Sumi Cho, on the other hand, argues persuasively that *Hall* can be read as a protection of white economic interests. White miners raided Chinese mining camps, brutalizing the residents. Cho points out that the victims were then precluded by law from bringing criminal charges. Cho thus collapses the distinction between economic and political rights. Sumi Cho, Model Minority Mythology and Affirmative Action: The Racialization of Asian-Americans in Anti-Discrimination Law (unpublished manuscript) (on file with author).

57. *See, e.g.*, Gotanda, *"Other Non-Whites," supra* note 3, at 1188-89; Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 548-53 (1984); Joo, *supra* note 56, at 361-63; Cho, *supra* note 56.

58. McClain, *supra* note 57, at 550-51. McClain asserts that "[o]f all the wrongs visited upon the Chinese in the period from 1850 to 1870, the ban on their testimony . . . rankled most deeply." *Id.* at 551.

59. Speer v. See Yup Co., 13 Cal. 73 (1859). Although a civil case, the judges use *Hall* as dispositive.

60. *See, e.g.*, Michael A. Scaperlanda, *The Paradox of a Title: Discrimination Within the Anti-Discrimination Provisions of the Immigration Reform and Control Act of 1986*, 1988 WIS. L. REV. 1043, 1068 ("The political branches of the federal government, free from judicial interference, have deported resident aliens of Chinese descent, some of whom had resided in this country for twenty years, because they could not prove residency through white witnesses."); *see also id.* at 1057.

addition to seeking remedies for criminal acts, access to the courtroom is critical to negotiating civil life in America.

Moreover, Chinese residents of the United States were precluded from citizenship and exercise of the franchise.[61] In many areas of California they lived in segregated communities, Chinatowns.[62] Thus courts provided one of the few public, formal spaces in which Chinese could participate in mainstream American political life. They were able to exercise rights not only in an individual sense, but in the sense of a group asserting its collective right to be recognized as Americans. Chinese participation in rights discourse reminded Californians that the Chinese were more than mere temporary laborers whom they wished would leave during economic downturns. Many had come to stay.

Finally, for the Chinese, the act of speaking in the courtroom was itself significant. White Californians justified the exclusion of Chinese in part on language differences. Participation in legal discourse not only forced whites to encounter the Chinese voice as coherent and comprehensible, but injected Chinese interests and concerns into this narrow slice of public life. Hence this least democratic space became a primary space for white/Chinese engagement.

The challenge by Hall to his conviction dramatically contested Chinese participation in this space. In interpreting the statute, the court said: "The evident intention of the Act was to throw around the citizen a protection for life and property, which could only be secured by removing him above the corrupting influences of degraded castes."[63] Thus, in seeking their own justice (or defending themselves from others seeking it), whites were not to have to encounter noxious others. The case also demonstrates how white interests were again at the foreground of the *Hall* decision, despite the facial dispute over Chinese rights.[64] In *Hudgins*, the main concern was to protect

---

61. *See, e.g.*, Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1425-30 (1993).

62. This was so despite the fact that Chinese residents of California contributed through a foreign mining tax five million dollars, or 25-50% of all state revenues in California, over a period of close to 20 years. *See* TAKAKI, *supra* note 47, at 195.

63. *Hall*, 4 Cal. at 403. "The European white man who comes here would not be shielded from the testimony of the degraded and demoralized caste, while the Negro, fresh from the coast of Africa, or the Indian of Patagonia, the Kanaka, South Sea Islander, or New Hollander, would be admitted upon their arrival, to testify against white citizens in our courts of law." *Id.* at 402.

64. In at least one other jurisdiction, a judge interpreted the statute so as to avoid an interaction between whites and non-whites in the courtroom. Interpreting a statute similar to California's, one Ohio judge wrote:

> No matter how pure the character, yet, if the color is not right, the man can not testify. The truth shall not be received from a black man, to settle a controversy where a white

whites from the autocracy of chattel slavery. In *Hall* it was to safeguard the courtroom as a political space that could be secured to whites.[65]

As mentioned earlier, the achievement of this pure space is done along two axes. Not only would whites be able to testify as a fundamental right of whiteness, but also they would be protected from having to engage with non-whites through the latter's testimony.[66] Hence the statute grants to whites both the positive right *to* participate in a court of law, and the *negative* right to be free, not just from challenges from people of color, but from any racially integrated legal interaction. The fact that testimony could not be offered in any civil case in which a white person was a party, or in any criminal case "in favor of, or against a white man" supports this conclusion.[67] The larger connotations of Chinese testimony for or against whites is suggested by the court: "The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls."[68] Thus, what seems to be a moment of racial confusion, making the falsely binary paradigm vulnerable to rectification, again is resolved with primary attention to white interests.

The court in *Hall* had to decide how to map Chinese in California, the parallel challenge of mapping Native Americans in Virginia's economy of slavery. As in *Hudgins*, determinacy was wrought from threatened racial chaos. Binary logic also shapes *Hall* in that the court exhibits a desire to articulate race out of physical demarcations. Taxonomic practices rest on what is visibly observable, as in the scopic rule in *Hudgins*: "These [physical differences between the different races of mankind] were general in their character, and limited to those visible and palpable variations which could not escape the attention of the most common observer."[69] This again suggests an inspection in which the scrutinizing gaze will reveal racial classification. And once again this is itself based on an implicitly shared

---

> man is a party. Let a man be Christian or infidel; let him be Turk, Jew, or Mahometan; let him be of good character or bad; even let him be sunk to the lowest depths of degradation; he may be a witness in our courts if he is not black.

Jordan v. Smith, 14 Ohio 199 (1846).

65. *See supra* note 56 and accompanying text.
66. *See supra* note 55 and accompanying text.
67. *Hall*, 4 Cal. at 399.
68. *Id.* at 404.
69. *Id.* at 400.

recognition of phenotype and mixture, linking "the most common observer" to the judges in a shared community of racial knowledge.[70]

The statute describes the organization of race for Blacks, whites, and Native Americans. The Chinese in *Hall* raised to the court the possibility of recognizing, then, a fourth race, a race that was neither Black, nor Native, nor white, and thus completely outside of the scope of the statute. Such an interpretation would have maintained the special statutory privileging to whites along the axis of being protected from Indian and Black testimony. It would not have meant that Chinese too could avoid engagement with these "degraded castes." It would however have exposed whites to Chinese in the courtroom, the second axis of the privileging.

The court at first employed a sort of combination of scientific inquiry and original intent to assess whether the Chinese were included within the term "Indian." In a lengthy treatment of history, the court noted that at the time of the statute "there were but three distinct types of the human species"[71] and that Indian included all of those not white or Negro.[72] "We have adverted to these speculations for the purpose of showing that the name of Indian, from the time of Columbus to the present day, has been used to designate, not alone the North American Indian, but the whole of the Mongolian race, and that the name, though first applied probably through mistake, was afterwards continued as appropriate on account of the supposed common origin."[73] Thus was the mistaken geography of Christopher Columbus established as foundational in American racial taxonomy.

As in *Hudgins*, American race is inextricably wound around the centrality of white identity, the need to define it and protect it. Again this can only be done through classifying and marking other groups. Although not directly implicated, blackness again becomes a pivotal concept in the racial designation of whiteness. The court begins by noting that the criminal and civil statutes employ different language: while the criminal code prohibits testimony against whites by "Black, or Mulatto person, or Indian," the civil code used the word "Negro" in place of "Black."[74] The court concludes:

> The word "Black" may include all Negroes, but the term "Negro" does not include all Black persons.

---

70. *Id.*
71. *Id.* at 401.
72. *Id.* at 402.
73. *Id.*
74. *See supra* note 55 and accompanying text; *see also Hall*, 4 Cal. at 403.

> By the use of this term in this connection, we understand it to mean the opposite of "White," and that it should be taken as contradistinguished from all White persons.
>
> In using the words . . . the Legislature . . . adopted the most comprehensive terms to embrace every known class or shade of color, as the apparent design was to protect the White person from the influence of all testimony other than that of persons of the same caste. The use of these terms must, by every sound rule of construction, exclude every one who is not of white blood.[75]

Thus is blackness the residue left once whiteness has been defined and assigned.

Within binary hegemonic logic, there is no space for securing specifically Chinese rights. Not surprisingly, in the aftermath of the decision, the political arguments by the Chinese against their own subordination were influenced by the black/white paradigm. With whiteness coded to rights, they attempted to argue for their own cultural and legal distancing from the historically subjugated races targeted in the statute. Charles McClain reports that one "prominent San Francisco merchant" wrote in an open letter to the governor expressing bitterness at their linkage to other non-whites:

> [O]f late days, your honorable people have established a new practice. They have come to the conclusion that we Chinese are the same as Indians and Negroes, and your courts will not allow us to bear witness. And yet these Indians know nothing about the relations of society; they know no mutual respect; they wear neither clothes nor shoes; they live in wild places and [in] caves.[76]

Such statements, while racist, must be understood as influenced in some part by the disciplining mechanism of binarism. The classificatory practices of the American racial taxonomy are undeniably political and inherently not neutral.

The law demanded that groups seeking rights reject and cast as inferior the non-white end of the pole. Sometimes they won rights, and sometimes they did not. Hannah and her daughter were able to win under a combination of a scopic and genealogical rule designed to protect white liberty and economic interests; the Chinese could not. The force of racial binarism links *Hudgins* and *Hall* across half a century and distinct political economies. In each, the assertion of rights by the non-Black colored plaintiff is preceded and governed by a paradigm of binary identity formation. Each case, presenting a

---

75. *Hall*, 4 Cal. at 403.
76. McClain, *supra* note 57, at 550 (footnotes omitted).

moment of instability, also presented an opportunity for hegemonic reinscription.[77]

Hudgins secures slavery as a safe space for whites and those Native Americans who meet a judicial inspection of phenotype. *Hall* secures the more specific site of the courtroom for whites. Judicial articulation of a racial taxonomy attempted to make the resolution of these cases appear neutral. The paradigm operated as a framework within which judges could simultaneously search for the meaning of white and colored identity formation and then assign legal rights along the structure of the created taxonomy. Racial analysis appears primarily motivated to secure white interests in different political economies.

Thus, in these two cases, the structure of binary legal construction and reasoning barred opportunities for distinct, legally recognized identity formation by those who were neither Black nor white. The paradigm ultimately cast non-Black people of color in the position of arguing within a binary model of identity formation that they were racially (scopically or biologically) white and hence should be legally white, as well. This came to the fore in subsequent cases, foreshadowed by *Hudgins* and *Hall*.[78] Of course, this paradox meant that winning as in Hudgins would remain the exception, but would give judges repeated opportunities to theorize and articulate with the force of law the meaning of white identity. Through this process, Black subordination was also further inscribed into the national legal and social consciousness. The historical paradigm of black and white

---

77. With whites firmly situated at the top of the racial hierarchy with rights protected, the main question then was who would be at the bottom. This, of course, varied. The language quoted in the opinion suggests that the court in *Hall* recognized that some "domestic" Blacks and Native Americans were relatively civilized. It implicitly appealed to fairness to this group by arguing that they could not be excluded while the "degraded tribes" were permitted into the courtroom. In a later California decision, the court said: "'The Chinese are vastly superior to the negro, but they are a race entirely different from ours and never can assimilate' and I don't think it desirable that they should and for that reason I don't think it desirable that they could come here." Joo, *supra* note 56, at 364 (quoting CHRISTIAN G. FRITZ, FEDERAL JUSTICE IN CALIFORNIA: THE COURT OF OGDEN HOFFMAN, 1851-1892, at 247 (1991)). On the other hand, the court also said: "It can hardly be supposed that any Legislature would attempt this by excluding domestic Negroes and Indians, who not frequently [sic] have correct notions of their obligations to society, and turning loose upon the community the more degraded tribes of the same species, who have nothing in common with us, in language, country or laws." *Hall*, 4 Cal. at 403.

78. Ian Haney López examines cases of the late 19th century in which East and South Asians attempted to establish their whiteness in order to secure citizenship. He documents the ways in which the cases became increasingly absurd as each group attempted to distance its own American racial formation from the prior group that had been cast into non-whiteness and hence non-citizenship. Haney López, *White by Law*, *supra* note 19. Indeed, distancing moves occurred in some of these cases as well. *See, e.g.*, Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 14-16 (1994) (discussing Ozawa v. United States, 260 U.S. 178 (1922)); Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 ASIAN L.J. 33, 44-47 (1995) (discussing *Ozawa*).

served numerous interests of privilege and regulation, none of them anti-racist in nature.

Not surprisingly, the paradigm of racial binarism has raised obstacles in contemporary racial coalition building. At the end of 1995, on the eve of the next century of racial struggle, it remains difficult to confront the painful realities of the ways in which non-white groups cast each other downwards on our way toward asserting our humanity. In excavating historical sites of paradigm instability and entrenchment, I hope to create contemporary space for understanding and collective forward movement. I have identified in *Hudgins* and *Hall* not only moments when the paradigm triumphed, but moments when its validity was cast momentarily into doubt by the assertions of racial identity of non-Black and non-white groups. These are moments I term categorical confusion in which the taxonomic structure at hand appears inadequate to the classificatory measures called for.

Categorical confusion creates ruptures in the security of our racial taxonomic structure, calling into question the practices by which we identify and label people. It is at these times that progressive lawyers, activists, and judges can cast light into the breach and demonstrate the hegemonic functioning of American racial construction, enabling *counter*-hegemonic moves. By destabilizing the seeming determinacy of race, we can also destabilize and better resist the inevitable privileging and subordinating dynamics criss-crossing the American racial map.

IV. COUNTER-CATEGORICAL PRACTICE

Such a confusion of categories occurs in a moment identified by Professor Robert Chang in his essay in this issue. Professor Chang begins his essay with a line spoken by a Korean grocer to a Black man in Spike Lee's *Do the Right Thing*: "I Black. You, me, same. We same."[79] The categorical confusion embedded in this textual assertion arises from the grocer's apparent transgression of the American taxonomic distinction between, and inscription of difference onto, Blacks and Koreans. This celluloid interaction, as Chang points out, creates an important space in the examination of racial subjectivity and positionality. It is also an apt point with which to conclude my interrogation of the black/white paradigm.

---

79. Robert S. Chang, *The End of Innocence or Politics After the Fall of the Essential Subject*, 45 AM. U. L. REV. 687 (1995) (quoting SPIKE LEE, DO THE RIGHT THING (Forty Acres and a Mule Filmworks 1989)).

The line is spoken in the concluding scene of the film. Several of Lee's Black characters burn down the neighborhood white-owned pizzeria, destroying the actual and metaphoric space in which they had interacted with whites as neighbors, consumers, and employees. The Korean grocer issues his taxonomic challenge in response to a threat by a Black character to burn down the grocery as well.

Lee's film primarily explores relations between working-class whites with strong ethnic identities and working-class and poor African Americans. Yet Lee's rendering reflects a much richer and nuanced depiction of urban communities than the view induced by analytic reliance on the black/white paradigm. The black/white paradigm encourages a national vision of poor, urban areas as solely "black" spaces voided by fleeing whites.[80] This image ignores not only the richness of Black life in these communities, but more significantly, that other groups, neither black nor white, are actively *coming* to these areas, enriching them with their own multiple cultures and hopes.[81]

Moreover, there is no language with which the grocer can express his own location within American racism. The grocer is neither white nor Black, yet, in this instance, the neighborhood conflict plays out in binary fashion. An expression of some sort of affiliation or politics is demanded, but the grocer confronts a paucity of language with which to describe positions in the American racial hierarchy. His assertion is not one of physical or phenotypic Blackness, but of discursive and geographic blackness. This is blackness as non-whiteness within dyadic logic. Unlike in *Hall*, the grocer's race is recognized by law as distinct from Black or white, but he remains absent within the discursive world of American racial dynamics.

Abandoning the binary paradigm permits a more accurate and legally constructive insight into urban areas as sites of physical concentration of different non-white groups into spaces with many dreams and scarce resources. Urban sites become highly flammable as public and private housing, jobs, business ownership, and cultural space become vigorously and bitterly contested commodities.[82]

---

80. *See generally* John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233 (1995) (discussing dynamics of urban segregation).

81. According to Professor Beverly Baker-Kelly, "Immigrants primarily flock to six metropolitan areas in the United States." Beverly Baker-Kelly, *United States Immigration: A Wake Up Call!*, 37 HOW. L.J. 283, 303 (1994/95). "According to the 1990 census, 70% of the adults residing in Miami, 44% of the adults residing in Los Angeles, and 33% of the adults residing in New York City are foreign-born." *Id.* at 288 (footnote omitted).

82. For discussions of such conflicts, see for example, Baker-Kelly, *supra* note 81, at 287-91; Selena Dong, Note, *"Too Many Asians": The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027, 1030-38 (1995) (discussing

This material dynamic turns discursive as conflicts over resources metamorphose into conflicts over literal and figurative racial turf, hierarchies of oppression, and cultural schisms. The hegemonic force of the black/white specter orders group engagement at the level of destructively nationalist visions of racial desert rather than encouraging collective progressive coalition-building and forward movement.

At the end of *Do the Right Thing*, Sal's Pizzeria is burned down. The Korean grocery store is not. Like Sal's, however, the grocery store is a site of commerce in which various members of the community contest both physical and metaphoric space. The functional and symbolic operation of the grocery serves as a powerful and necessary reminder of the falsity of the black/white paradigm in a contemporary context. The pending legal conflicts discussed demand an expanded understanding of racial structures and identity formation. My Nicaragua story suggests that more fluid and inclusive racial structures must be adopted. Moreover, *Hudgins* and *Hall* suggest the need for an ongoing engagement with the politics that would inevitably underlie *any* racial regime in the United States.

I want to conclude by returning to the statement made by the Korean grocer: "I Black. You, me, same. We same." Lee casts the grocer as a stand-in for those excluded by racial binarism. The grocer's statement creates a moment of rupture in the fixity of the American taxonomy of race. It thus opens the door for different political readings of the meaning of the challenge. Yet not all statements that are counter-categorical are likewise counter-hegemonic. A statement may expose the hierarchy but do nothing to challenge or reform it. Some counter-categorical actions may even reinforce the hierarchy, as in proclamations of whiteness in *Hudgins* and *Hall*. The character's statement might have been either a positive effort to restructure the American racial paradigm or merely a self-serving evasion of its force.

Certainly none of these more positive readings can fairly be ascribed to this character or any actual person's adoption of a black positionality absent more careful interrogation into the politics of the moment and the individual. But the rupture does give us insight into dynamics masked by the dyadic and hierarchical racial logic.

---

conflicts in magnet schools); Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901, 947-49 (1995) (discussing conflicts in housing); Reginald Leamon Robinson, *"The Other Against Itself": Deconstructing the* Violent Discourse *Between Korean and African Americans*, 67 S. CAL. L. REV. 15, 35-113 (1993) (analyzing relationship between African-American and Korean-American communities); Symposium, *Los Angeles, April 29, 1992 and Beyond: The Law, Issues, and Perspectives*, 66 S. CAL. L. REV. 1571-1673 (1993) (containing commentaries on 1992 riots in Los Angeles).

By searching for the ruptures that expose the constructed nature of categories, we enable a conscious dialogue about how and when to go about the inevitable taxonomic practices that will arise in the civil rights struggle. Ultimately, groups of all colors must employ counter-categorical and counter-hegemonic racial practices to defeat the debilitating force of the black/white paradigm.

CONCLUSION

The legal literature on the social construction of race concentrates mainly on making the point that race is not a natural or a biological category, using that argument to challenge contemporary race-based legal regimes. In this Essay, I have tried to suggest that we need to go further; saying that race is socially constructed is not enough. We need to study *how* race is socially constructed. By themselves, the cases I discussed in this Essay cannot *prove* anything. But they do, I think, suggest a complex and contradictory practice worthy of further investigation. The courts rely on inconsistent notions of the nature of race, even as they confidently deploy race as a natural, observable category. The nature of race varies depending on the race being discussed. "Whiteness" is "caused" by factors very different than "blackness." Racial categories are never solely the possession of the dominant culture; they are internalized and, in part, created by subordinate groups. Finally, racial categories are constructed around interests, but in a way that is not reducible to "white conspiracy" nor to manifest sociobiological destiny.