

# Standard White: Dismantling White Normativity

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*Standard White reviews White By Law by Ian Haney López and examines the content and construction of whiteness as a racial category. Drawing on examples from medicine, higher education, and naturalization law, Standard White illustrates the central position that whiteness continues to occupy in the United States. By focusing on the operation of white normativity, this Book Review explores the pernicious effects of privileging a particular racial group, even in the absence of overt discrimination or racial animus. Standard White also draws attention to the adaptability of bias. By claiming the center for whites, white normativity allows the pressing concerns of minority groups to be marginalized, even while it simultaneously acknowledges their exceptional achievements. This Book Review concludes by suggesting ways in which the corrosive influence of white normativity might be addressed.*

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## INTRODUCTION

What does it mean when we call someone “white”? How do we make that determination, and what does it imply? This Book Review uses white normativity to address those questions. In his groundbreaking book, *White by Law*, Ian Haney López identifies “whiteness” as central to racial classifications and race relations in the United States and calls for its dismantlement.<sup>1</sup> This Book Review expands the examination of white normativity beyond race relations and the law. It also reexamines the racial prerequisite cases on which Haney López focuses his pioneering analysis. *White by Law* refers to whiteness as the “racial norm,”<sup>2</sup> but as this Book Review will demonstrate, white normativity is not confined to explicitly racial issues. Whites are not just the racial norm. In many instances, they also serve as the cultural, political, economic, physical, and scientific norm.

This Book Review also seeks to enlarge Haney López’s rather narrow treatment of the concept of normativity, in which a “norm” appears to be synonymous with an “ideal.”<sup>3</sup> *White by Law* inextricably links white normativity with white superiority and minority denigration.<sup>4</sup> In Haney López’s view, “Whites continue to be defined, and to define themselves, as the positive opposite to minorities.”<sup>5</sup> But this is too simplistic. Minorities are not universally and unremittingly denigrated. Society very often ascribes positive attributes to minorities, as well as many negative ones. White normativity operates not to position whites as the best at everything—the ideal—but as the most human. It endangers the fabric of our multiracial society, not by trumpeting white superiority, but by using real or perceived differences between whites and others to undermine the humanity of minority groups. It treats the supposed strengths of minority groups, as much as the stereotypical weaknesses ascribed to them, as evidence that the members of such groups are not “people” in the same way whites are.

If white racial identity depended on being “the positive opposite to minorities” in all cases, then one could construct a simple, linear racial hierarchy with whites at one end and all other groups arranged behind them. The problem with defining whiteness in strictly positive terms is that it fails to account for all the instances in which whites are not dominant—either in fact, in popular perception, or both. If whiteness were simply a matter of occupying

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1. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 129–34 (rev. ed. 2006).

2. *Id.* at 111 (“That Whites often do not see themselves in racial terms because they are constructed as the racial norm is at best only a partial explanation for transparency.”).

3. *Id.* at 132.

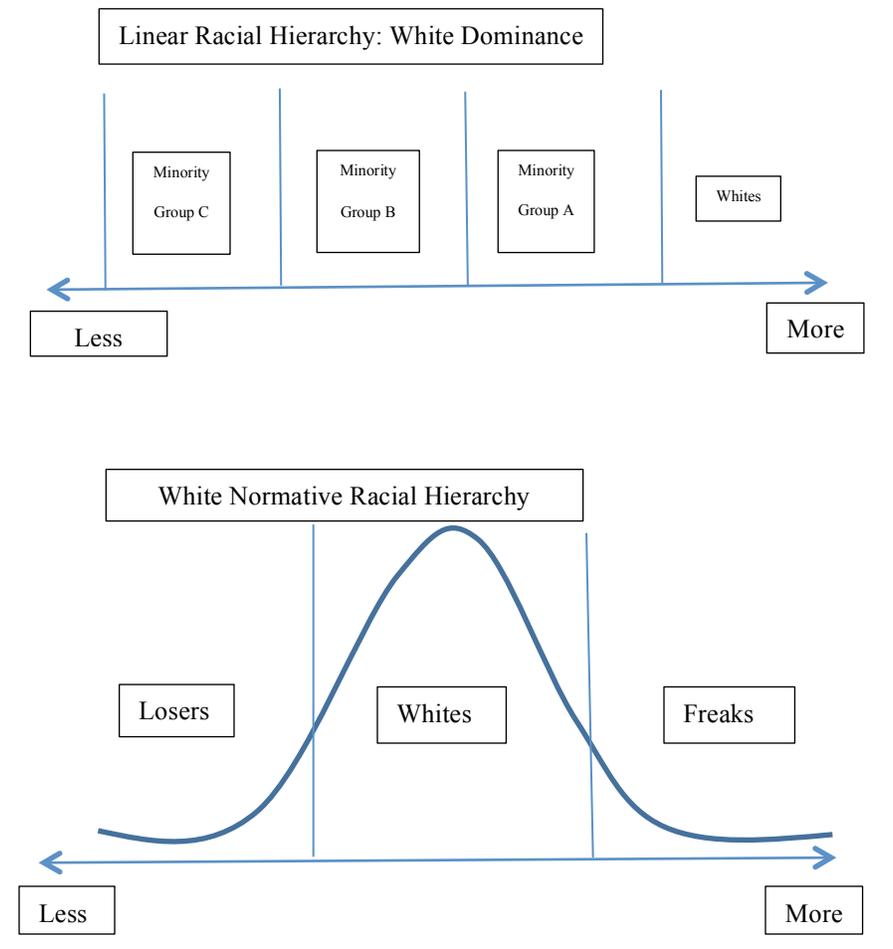
4. See *id.* at 22–23.

5. *Id.* at 118.

the highest point on the scale, then individuals might cease being white when outperformed by members of a minority group. By the same token, members of racial minorities could become white through superior achievement—that is, by having reached the ideal.

In contrast to a linear racial hierarchy, white normativity resembles a bell curve. Whites occupy the heart of this normal distribution and, in a country that exalts the middle class and majoritarian politics, find great advantage in claiming the center. Minority groups that fare worse than whites are relegated to one tapering tail, and those that surpass whites in some way are relegated to the other. If white racial identity hinges on white normativity instead of white superiority, then the racial minorities who outperform whites are not white; they are freaks and outliers.<sup>6</sup>

Figure 1: Ranking of Positive Attributes by Racial Group



6. See *infra* Figure 1.

Whiteness serves a normative function by defining the expected or “neutral” range of human attributes and behavior. Other racial categories emerge as deviations from this norm, which places them outside the protection of the law and civil society. The normative function of whiteness has important, but unappreciated, implications for the treatment of whiteness as a legal category, and it complicates Haney López’s call for dismantling the concept. White normativity accommodates and acknowledges the shortcomings of whites while simultaneously maintaining white privilege and whiteness’s centrality in the U.S. racial classification scheme.

Part I of this Book Review defines white normativity. Part II describes its operation in particular areas of U.S. society. Part III explores the durability of racial categories and the prospects for dismantling the concept of whiteness. Part IV concludes by examining potential avenues for reducing the influence of whiteness and rendering society more egalitarian and just.

## I.

### WHITE AS NORMAL: DEFINING WHITE NORMATIVITY

The basic principle of white normativity might be summarized as follows: white people are people, and the members of other racial groups are people to the extent they resemble white people. While easily intertwined with overt discrimination or racial animus, white normativity operates more subtly. Whiteness defines the normal or accepted range of conduct and characteristics, and all other racial categories are contrasted with whiteness as deviations from the norm. As a result, whiteness sits at the center of racial categorization.

White normativity functions to make whites “standard” or “typical” but not always explicitly superior. Haney López’s characterization of whiteness as dependent “on a demonization of non-Whites so that by comparison Whites are deified”<sup>7</sup> ignores the positive stereotypes applied to minorities and the negative stereotypes attached to whites. White normativity makes any difference between whites and a minority group, even one to which society attributes a generally positive trait, look like evidence that the minority group is abnormal, or not quite human. This effect is based in part on racial stereotypes’ ability to minimize the perception of variation among individuals within nonwhite groups.

A pair of examples illustrates the point. The high visibility of African Americans in certain professional sports, particularly football and basketball, feeds the stereotype that African Americans are more athletic than others.<sup>8</sup>

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7. HANEY LÓPEZ, *supra* note 1, at 130.

8. See RICHARD LAPCHICK ET AL., THE INST. FOR DIVERSITY & ETHICS IN SPORT, THE 2014 RACIAL AND GENDER REPORT CARD: NATIONAL FOOTBALL LEAGUE 3 (2014), <http://nebula.wsimg.com/1e912077d1fd5c5c7ee7c4633806cfb5?AccessKeyId=DAC3A56D8FB782449D2A&disposition=0&alloworigin=1> [<https://perma.cc/HN8Y-EGLT>] (finding African Americans accounted for 67.3 percent of all NFL players); RICHARD LAPCHICK ET AL., THE INST. FOR DIVERSITY

Through the lens of white normativity, the success that some African Americans have experienced as athletes carries with it the implication that they are successful because they are more like animals than standard human beings.<sup>9</sup> The stereotype also suggests that successful African American athletes do not possess the positive mental or moral qualities—such as drive or determination—normally associated with a superior level of achievement.<sup>10</sup> In the white normative narrative, a white person would have to be unusually dedicated to compete at the highest level, but a black person might reach the same level without exhibiting any moral worth—just as one would not think to congratulate a fish for being a good swimmer or a horse for being able to gallop.<sup>11</sup>

The reputed intellectual prowess of Asian Americans offers a second example. White normativity recasts the academic success of some Asian Americans as nothing more than “being Asian.”<sup>12</sup> As in the field of athletics, a minority individual’s success is not attributed to the characteristics or effort of that individual. Instead, the individual’s success is written off as the result of a group characteristic that makes competition between whites and that minority group in some way unfair.<sup>13</sup>

Although Haney López is correct that whiteness and white normativity ultimately harm minority groups, describing the relationship among racial groups as one in which whites are always superior and nonwhites are always subordinated misses much of the situation’s complexity. When Haney López advocates for the development of more positive racial identities for minorities, he fails to account for the ways in which white normativity can distort even ostensibly positive stereotypes.<sup>14</sup>

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& ETHICS IN SPORT, THE 2014 RACIAL AND GENDER REPORT CARD: NATIONAL BASKETBALL ASSOCIATION (2014), <http://nebula.wsimg.com/aeb858de2e57def5bdac3465e7e8762d?AccessKeyId=DAC3A56D8FB782449D2A&disposition=0&alloworigin=1> [<https://perma.cc/J5L8-NJSA>] (finding African Americans accounted for 77 percent of all NBA players).

9. JON ENTINE, TABOO: WHY BLACK ATHLETES DOMINATE SPORTS AND WHY WE’RE AFRAID TO TALK ABOUT IT 3 (2001) (quoting an interview with University of California, Berkeley, sociology professor Harry Edwards, “What really is being said in a kind of underhanded way is that blacks are closer to beasts and animals in terms of their genetic and physical and anatomical make up than they are to the rest of humanity”).

10. *Id.* at 7 (“[Sybil] Smith had starred in a sport in which blacks have been notably unsuccessful and the subject of a controversy about whether they are physiologically incapable of competing at the elite level. Yet teammates used to explain away her swimming accomplishments by glibly saying, ‘You’re so lucky that you don’t have to work that hard.’”).

11. *See id.*

12. *See* Carolyn Chen, *Asians: Too Smart for Their Own Good?*, N.Y. TIMES (Dec. 19, 2012), <http://www.nytimes.com/2012/12/20/opinion/asians-too-smart-for-their-own-good.html> [<https://perma.cc/9R47-JASX>].

13. This type of thinking has seemingly led to informal admission caps on Asian and Asian American applicants at many elite colleges and universities to prevent those institutions from becoming “too Asian.” *See id.*

14. *See* HANEY LÓPEZ, *supra* note 1, at 127–29.

Transparency—that is, “the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific”—presents a further complication in addressing white normativity.<sup>15</sup> White privilege helps to create transparency because “[b]eing the norm allows whites to ignore race.”<sup>16</sup> Whereas racial discrimination fosters race consciousness, freedom from discrimination encourages obliviousness. Naturalization helps to make whiteness invisible by treating race as a physical fact, “meaning innate, heritable, universal, and exclusive.”<sup>17</sup> If one believes that races occur naturally, examining how or why they are constructed makes no sense. In conjunction, white privilege and naturalization engender transparency and conceal the operation of white normativity.<sup>18</sup>

White normativity may have arisen in part from the numerical superiority enjoyed by whites throughout U.S. history.<sup>19</sup> As Haney López convincingly demonstrates, the white majority is neither a simple accident of history nor a matter of opportunistically redefining the boundaries of whiteness.<sup>20</sup> Instead, laws that limited immigration to particular physical types or prohibited intermarriage between certain types of individuals created and maintained a pool of white individuals. Those same laws also reinforced racial boundaries for all groups.<sup>21</sup> In addition, legal decisions about who was white defined how certain physical traits would be perceived—that is, as signifying membership in the white, black, Asian, Latino, or another racial category.<sup>22</sup> Early conceptions of whiteness shaped the U.S. populace, and in circular fashion, the existence of a community of whites reinforced the idea of race as a basic, naturally occurring feature of human populations.

Culturally, the prevalence of whites—particularly middle-class whites—has meant that stereotypes regarding their nature and behavior are less likely to develop, because numerous, and often contradictory, representations of them are available in popular culture. When stereotypes do develop, they tend to gravitate toward an average of the conflicting viewpoints available.<sup>23</sup> The relative rarity of perspectives on the lives and experiences of minorities and

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15. Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

16. Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397, 405.

17. HANEY LÓPEZ, *supra* note 1, at 113.

18. *See id.* at 109–16.

19. The exact size of the white population at any given moment in time is debatable because of the socially constructed nature of the category, which leads to uncertainty concerning which groups and individuals fall within it.

20. *See* HANEY LÓPEZ, *supra* note 1, at 10–11, 13, 27–28, 82.

21. *Id.* at 82.

22. *See id.* at 12.

23. This may be the reason why most stereotypes of middle-class whites are rather bland—for example, white bread, identical suburban houses, gray suits, and inhibited social manners.

poor whites, on the other hand, makes them much more susceptible to stereotyping. When a very limited number of representations of a group (which may be accurate depictions of only a few individuals or even none at all) circulate in the culture at large, those representations are more likely to be generalized to all members of the group. In addition, since stereotypes are widely held beliefs, the stereotypes of whiteness that do develop are likely to reflect the white majority's beliefs about itself. By contrast, stereotypes of other racial groups will largely reflect the white majority's views without being tempered by either the self-interest or the extensive personal interaction that is present when the white majority characterizes itself.

In the operation of many racial stereotypes, one finds an implicit comparison between whites and other racial groups. When African Americans are stereotyped as athletic, it is through implicit comparison with seemingly less athletic whites. When Asian Americans are stereotyped as adept at mathematics, it is through implicit comparison with allegedly lesser skilled whites. When Latinos are stereotyped as passionate, it is through implicit comparison with supposedly staid whites. Of course, the same mechanism operates where negative stereotypes are concerned. Perceptions of African Americans as criminal, Asian Americans as sly and scheming, and Latinos as lazy circulate in contrast with perceptions of white Americans as law-abiding, forthright, and industrious.

Because society treats whiteness as neutral, the benefits that accrue to whites are taken as givens. Those benefits pass almost unnoticed, because they are simply the way the system is supposed to work. Put another way, the status of whites represents how our social, political, and legal systems are meant to function—and validates that functioning—while the status of other groups represents those systems' inevitable imperfections. White normativity does much of its work by defining the perspective from which acceptability is judged. If one judged our institutions from the perspective of minority groups instead, one might conclude that those institutions are fundamentally illegitimate.

In this way, white normativity poses a more insidious threat than overt racism. Bald assertions of white superiority make racist systems easy to identify and vulnerable to contradiction. For example, slavery and Jim Crow made no pretense of concealing themselves.<sup>24</sup> Although many of their ramifications were not immediately apparent, they primarily operated in the open. Auctioneers who sold people because of their skin color could not simultaneously deny the effects of race. Likewise, shopkeepers who posted signs on their storefronts that read "Whites Only" or "Colored" could not deny that a racial classification system was at work. Since the race-based assertions

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24. See generally JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* (2003).

of these systems—namely, “people with dark skin are property” and “people with dark skin must be kept separate from people with light skin”—were openly made, they could be openly challenged, though usually at great personal risk.

A system that simply assumes the centrality of the white experience is much more pernicious and difficult to dislodge. Legislators who draft a white normative statute, for example, may conceive of it, or at least describe it, in race-neutral terms. Nevertheless, the statute will discriminate against racial minorities if only white experiences and behaviors inform the drafters’ assumptions about “typical” or “ordinary” American behavior. Instead of proclaiming racial judgments, white normativity hides behind a screen of objectivity and colorblindness. Often, the participants in a white normative system can plausibly deny that race played a role in their actions or decisions. Like the invisible hand of the market, white normativity channels economic and social benefits to the favored group without tainting any individual’s judgment with racist intent.<sup>25</sup> The system works to the advantage of some people, because they conform to the system’s underlying assumptions. They behave in the expected fashion. Their requirements, needs, habits, hopes, and ways of communicating are seen as reasonable. Within the confines of the system, they exist as naturally as a round peg in a round hole. If one happens to be a square peg, the system offers little purchase for protest. After all, no one bears you any ill will; you just do not fit.

## II.

### THE (WHITE) GOLDEN MEAN: WHITE MEN AS MODEL HUMANS

In many different arenas, U.S. society assumes that white people, particularly middle-class white men, are a neutral or standard category of human beings. From medical treatment to mental acuity to political legitimacy,

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25. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Edwin Cannan ed., 5th ed. 1904) (“As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.”). In a similar manner, white people seeking their own self-interest help maintain a system that promotes white privilege generally. To paraphrase, by preferring to support and deal with those who look like them and share similar backgrounds, whites intend only their own security. In seeking to maximize the return they receive from the taxes they pay, mortgage payments they make, and school districts they support, whites intend only their own gain. Whites are in this, as in many other cases, led by an invisible hand to promote an end that they did not intend.

whites have been, and continue to be, the measure by which society judges all others.<sup>26</sup>

#### A. *The Standard Body*

In the United States, minority racial groups face stark health disparities relative to whites. If you are African American, your infant mortality rate is twice that of whites.<sup>27</sup> Your risk of death from heart disease is 40 percent higher.<sup>28</sup> Your risk of death from all cancers is 30 percent higher.<sup>29</sup> An African American man is twice as likely as a white man to die from prostate cancer, and an African American woman is more likely than a white woman to die from breast cancer even though both have comparable mammography rates.<sup>30</sup> Your risk of having a limb amputated due to diabetes is three times greater.<sup>31</sup> If you are an African American with HIV or AIDS, you are over seven times more likely than a white person with the same diagnosis to die from it.<sup>32</sup> If you are Latino, you are twice as likely as whites to die from diabetes. You are also disproportionately more likely to contract tuberculosis and suffer from high blood pressure and obesity.<sup>33</sup> If you are an American Indian or an Alaska Native, your infant mortality rate is twice that of whites, and you are more than twice as likely to suffer from diabetes.<sup>34</sup> If you are Asian American, you are more likely than a white person to contract tuberculosis and hepatitis, and if you are a Vietnamese American woman, you are almost five times more likely to develop cervical cancer.<sup>35</sup>

Although these health disparities are the result of a complex interaction between biology and culture, the role of white normativity should not be

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26. The examples of white centrality in U.S. culture could be multiplied beyond those discussed below. *See, e.g.*, JANE ADDAMS, *TWENTY YEARS AT HULL-HOUSE* (1912) (providing a firsthand account of the Americanization movement for recent immigrants); TONI MORRISON, *THE BLUEST EYE* (2007) (describing the desire of a young African American girl for the standard markers of beauty: blond hair and blue eyes); *The Bureau of Indian Education (BIE)*, U.S. DEP'T INTERIOR: INDIAN AFF., <http://www.bia.gov/WhatWeDo/ServiceOverview/IndianEducation> [<https://perma.cc/53J5-KY5P>] (last visited Mar. 18, 2015) (noting that prior to 1934, "it had been Federal policy to acculturate and assimilate Indian people by eradicating their tribal cultures through a boarding school system").

27. *About Minority Health*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=23> (last visited Mar. 9, 2015).

28. *Id.*

29. *Id.*

30. *Id.*

31. Sophie Trawalter, Kelly M. Hoffman & Adam Waytz, *Racial Bias in Perceptions of Others' Pain*, PLOS ONE (Nov. 14, 2012), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0048546#pone.0048546-Agency1> [<https://perma.cc/ER3E-7EX2>].

32. *About Minority Health*, *supra* note 27.

33. *Id.*

34. *Id.*

35. *Id.*

discounted.<sup>36</sup> White normative thinking often leads physicians and academics to use white males as the baseline group in medical science.<sup>37</sup> Researchers calibrate drugs and other treatments to maximize the benefits and minimize the side effects for white males on the assumption that the treatment will function the same way for all other groups—an assumption that does not hold true. As the Food and Drug Administration (FDA) notes:

It's important to test medical products in the people they are meant to help. In the past, most new drug testing had been done on white men. Groups such as women, blacks, and Hispanics often were not adequately represented. It's important to test medical products in a wide variety of people because drugs can work differently in people of various ages, races, ethnicity, and gender. The FDA seeks to ensure that people from many different groups are included in clinical trials.<sup>38</sup>

Therefore, when women or minority groups seek medical treatment, they are likely to receive care designed for and tested on white males. This practice alone, quite apart from any racial or gender bias, may explain at least part of the difference in health outcomes between white males and other groups.

Cultural assumptions regarding normal body function, as much as physiological differences among individuals and groups, mediate the experience of disease and may also give rise to health disparities.<sup>39</sup> To use a simple example, a five out of ten on the pain scale may not mean the same thing in black, Asian, Latino, and white communities.<sup>40</sup> As a result, doctors who proceed from a white normative perspective may fail to secure the information necessary for an accurate and complete diagnosis and leave treatable conditions unattended. Even when patients of different races rate their pain similarly, doctors and nurses may perceive patients' distress levels differently and act accordingly.<sup>41</sup> Thus, African American and Latino patients who arrive in an emergency department with a broken arm or leg are significantly less likely than similarly injured whites to receive pain medication.<sup>42</sup> In other words, white normativity can contribute to health

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36. *Id.* (“Current information about the biologic and genetic characteristics of minority populations does not explain the health disparities experienced by these groups compared with the white, non-Hispanic population in the United States.”).

37. *See Clinical Trials Shed Light on Minority Health*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm349063.htm> [https://perma.cc/SF33-M4MQ] (last visited Nov. 30, 2015).

38. *Inside Clinical Trials: Testing Medical Products in People*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Drugs/ResourcesForYou/Consumers/ucm143531.htm> [https://perma.cc/P2KT-9JS6] (last visited Mar. 18, 2015).

39. *See* Trawalter, Hoffman & Waytz, *supra* note 31.

40. *See id.*

41. *Id.*

42. *See* Knox H. Todd et al., *Ethnicity and Analgesic Practice*, 35 ANNALS OF EMERGENCY MED. 11 (2000); Knox H. Todd, Nigel Samaroo & Jerome R. Hoffman, *Ethnicity as a Risk Factor for Inadequate Emergency Department Analgesia*, 269 J. AM. MED. ASS'N 1537 (1993).

disparities by conditioning the responses of health care professionals to the symptoms reported by patients.<sup>43</sup>

In addition, norm theory, which posits that “the abnormality of a victim’s fate affects the sympathy that the victim receives from others,”<sup>44</sup> offers insight into the operation of white normativity, and associated cultural assumptions, in health care. If medical professionals perceive being in pain as more abnormal for a white person than for a black or Latino person, norm theory predicts (and empirical evidence confirms) that they will more readily offer pain medication to the white person.<sup>45</sup> Similarly, “[i]t is as though a negative fate for which a more positive contrast is highly available is worse or more unfair than one for which there is no highly available positive alternative.”<sup>46</sup> Thus, the use of the white body as the standard for health—free from pain and disease—makes a more positive contrast highly available and provokes a more pronounced emotional response when the expectation of normal functioning is confounded.

The underrepresentation of racial minorities in medical research, which contributes to a white-centric understanding of the human body, does not appear to be due to a lesser willingness by minorities to participate, although such reluctance would be understandable.<sup>47</sup> In the past, when medical studies included minorities, those individuals risked being valued less than the condition from which they suffered. Officials who conducted the *Tuskegee Study of Untreated Syphilis in the Negro Male* (Tuskegee Study), “the longest nontherapeutic experiment on human beings in medical history,” repeatedly denied African American men available cures for syphilis so that their physicians could observe the nature and progression of the untreated disease.<sup>48</sup> The Tuskegee Study began in 1932 as a partnership between the U.S. Public Health Service and the Tuskegee Institute.<sup>49</sup> It sought to build on a previous collaboration between the Public Health Service and the Julius Rosenwald Fund that had screened 2,000 black men working for the Delta Pine and Land Company for syphilis and provided treatment to the 25 percent found to be

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43. Inadequate care, in turn, may exacerbate health disparities by discouraging the patients who receive it from seeking medical treatment in the future.

44. Daniel Kahneman & Dale T. Miller, *Norm Theory: Comparing Reality to Its Alternatives*, 93 PSYCHOL. REV. 136, 145 (1986).

45. *Id.*

46. *Id.* at 146.

47. See David Wendler et al., *Are Racial and Ethnic Minorities Less Willing to Participate in Health Research?*, 3 PLOS MED. 201, 207 (2005), <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0030019#pmed-0030019-g004> [https://perma.cc/EZU5-DYFH] (concluding that, despite historic abuses such as the Tuskegee Study, minorities in the United States are as willing to participate in health research as whites).

48. Stephen B. Thomas & Sandra Crouse Quinn, *The Tuskegee Syphilis Study, 1932 to 1972: Implications for HIV Education and AIDS Risk Education Programs in the Black Community*, 81 AM. J. PUB. HEALTH 1498, 1501 (1991).

49. *U.S. Public Health Service Syphilis Study at Tuskegee*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/tuskegee/timeline.htm> [https://perma.cc/X9C5-CXE4] (last visited Mar. 18, 2015).

carrying the disease.<sup>50</sup> The Tuskegee Study was set to follow a similar model, but in 1929—after the participants had been screened for syphilis but before treatment had started—the stock market crash devastated the finances of the Rosenwald Fund.<sup>51</sup> Lacking the resources to provide treatment on its own, the Public Health Service in 1932 decided to continue to monitor the condition of 399 black men with syphilis and 201 members of a control group, asking the Tuskegee Institute to participate.<sup>52</sup>

Although the Tuskegee Study was originally set to last for six to nine months, it continued until 1972 and ended only after a public outcry over the government's failure to treat—and successful efforts to prevent others from treating—the participants.<sup>53</sup> During World War II, roughly fifty of the participants received notice from their draft board that they would have to receive treatment for syphilis. However, at the request of the Public Health Service, the draft board later removed the men from the list of those requiring treatment.<sup>54</sup> In 1943, the Public Health Service began administering penicillin to patients at selected clinics throughout the country but excluded the participants in the Tuskegee Study from this treatment program to allow the full course of the disease to be charted, which included allowing the untreated syphilis to result in blindness, dementia, and death.<sup>55</sup> By 1951, the effectiveness of penicillin in treating syphilis was well established, but Public Health Service officials continued to deny Tuskegee Study participants this readily available cure because the very effectiveness of the treatment would make the large-scale study of syphilis impossible to repeat.<sup>56</sup> Over the course of forty years, Public Health Service officials never told Tuskegee Study participants that they suffered from a known disease that could be transferred by sexual intercourse and from mother to fetus, that their disease was treatable, or that they were being denied treatment for the sake of scientific data.<sup>57</sup> The men neither gave, nor were ever in a position to give, informed consent to be used as they were.

The absence of informed consent also marks the case of Henrietta Lacks, a black tobacco farmer who sought treatment for cervical cancer from the Johns Hopkins Hospital in 1951.<sup>58</sup> Without informing her, hospital staff removed a portion of her tumor and sent it to a research laboratory at the hospital where

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50. Thomas & Quinn, *supra* note 48, at 1499.

51. *Id.*

52. *Id.* at 1499–500.

53. *U.S. Public Health Service Syphilis Study at Tuskegee*, *supra* note 49.

54. Thomas & Quinn, *supra* note 48, at 1501.

55. *Id.*

56. *Id.*

57. *Id.* at 1500–01.

58. Sarah Zielinski, *Cracking the Code of the Human Genome: Henrietta Lacks' "Immortal Cells,"* SMITHSONIAN.COM (Jan. 22, 2010), <http://www.smithsonianmag.com/science-nature/henrietta-lacks-immortal-cells-6421299/?page=1> [<https://perma.cc/9BWB-N6W9>].

researchers used it to develop the world's first immortal line of human cells.<sup>59</sup> Lacks died a few months after her cells were removed, but the "HeLa" cell line, derived from the cancer that killed her, persists in laboratories around the world. It has been used in over 70,000 scientific studies, including the development of the polio vaccine and research into cell biology, in vitro fertilization, cloning, and cancer.<sup>60</sup> Lacks's family, like the patient herself, was unaware of her contribution to medicine until 1973, when researchers contacted them seeking blood samples to compare with the HeLa cell line.<sup>61</sup> Largely thwarted in their attempts to gain control over the use and sale of the cell line, family members were not informed before the European Molecular Biology Laboratory published the genome of a line of HeLa cells, which overlaps to a significant degree with their own genomes.<sup>62</sup> A subsequent agreement between the family and the National Institutes of Health, which had funded a similar DNA sequencing project at the University of Washington, resulted in the creation of the HeLa Genome Data Access working group to administer the distribution of Henrietta Lacks's genetic information.<sup>63</sup>

Medical science's use of people like Henrietta Lacks and the men in the Tuskegee Study created an undercurrent of distrust between minorities and health professionals that continues to hinder health initiatives like screening and treatment programs for HIV and AIDS.<sup>64</sup> Too often, minorities find that they fall outside the protected range of individuals to whom care and consideration are due and are instead viewed in terms of their biology rather than their humanity. In the words of Dr. John Heller, Director of the Division of Venereal Diseases at the U.S. Public Health Service during a portion of the Tuskegee Study, "The men's status did not warrant ethical debate. They were subjects, not patients; clinical material, not sick people."<sup>65</sup>

For over a century, the medical establishment and the white majority, particularly white men, enjoyed a most convenient relationship. When medical science searched for cures, it established its goals and measured its successes by reference to whites. When it studied the progression of disease or required specimens for experimentation, black bodies would do. Even today, blacks and Latinos indisputably in need of medical care receive less treatment than whites presenting the same symptoms.<sup>66</sup> By using whites to define the standard for the normal functioning of the human body, medical science shunted all others aside as abnormal. As a result, the emotional response of medical professionals to the

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59. *Id.*

60. *Id.*; Carl Zimmer, *Family Gets Role in Use of "Immortal Life" Cells*, N. Y. TIMES, Aug. 8, 2013, at A1.

61. Zimmer, *supra* note 60.

62. *See id.*

63. *Id.*

64. *See* Thomas & Quinn, *supra* note 48, at 1498–99.

65. JAMES H. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* 179 (1981).

66. *See supra* note 42 and accompanying text.

suffering of nonwhites has been deadened, and a degree of pain and dysfunction that would be shocking in whites is commonly accepted in minorities.

### B. *The Standard Mind*

The first intelligence tests, the progenitors of current aptitude tests like the Scholastic Aptitude Test (SAT), were born out of the eugenics movement, which treated the inferiority of nonwhite groups as a given.<sup>67</sup> Francis Galton, who coined the term eugenics, pioneered the application of statistical methods to the study of human intellect. In the preface to the 1892 edition of *Hereditary Genius*, Galton explained what he meant by “genius.” He did not intend to use the term in its technical sense, which was often connected with a kind of insanity.<sup>68</sup> Rather, “[t]he natural ability of which [*Hereditary Genius*] mainly treats, is such as a modern European possesses in a much greater average share than men of the lower races.”<sup>69</sup> This is the foundational definition of measurable intelligence, and although the concept has been purged of explicit racism over the years, it remains entangled with ideas of racial difference. In the assessment of intelligence, as in so many areas, whiteness made itself the standard. This is white normativity at work.

Galton’s use of intelligence is a post hoc rationalization for the advantages of whites, created to be as heritable as their wealth and as immutable as their skin color. The concept of intelligence bolstered the argument that European ascendancy was not a contingent, transitory phenomenon,<sup>70</sup> but rather an inevitable state of affairs. Whites invented the concept of quantifiable intelligence, invested it with profound significance, and then created tests to demonstrate that they possessed more of it than any other group.<sup>71</sup>

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67. See, e.g., FRANCIS GALTON, *HEREDITARY GENIUS: AN INQUIRY INTO ITS LAWS AND CONSEQUENCES*, at x (1892) (“There is nothing either in the history of domestic animals or in that of evolution to make us doubt that a race of sane men may be formed, who shall be as much superior mentally and morally to the modern European, as the modern European is to the lowest of the Negro races.”).

68. *Id.* at viii–ix.

69. *Id.* at x.

70. See generally JARED DIAMOND, *GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* (1999) (identifying geographic factors, not the genetic or intellectual superiority of Europeans, as the primary drivers of European colonialism).

71. See, e.g., LEWIS M. TERMAN, *THE MEASUREMENT OF INTELLIGENCE: AN EXPLANATION OF AND A COMPLETE GUIDE FOR THE USE OF THE STANFORD REVISION AND EXTENSION OF THE BINET-SIMON INTELLIGENCE SCALE 91–92* (1916) (“It is interesting to note that M.P. and C.P. represent the level of intelligence which is very, very common among Spanish-Indian and Mexican families of the Southwest and also among negroes. Their dullness seems to be racial, or at least inherent in the family stocks from which they come. The fact that one meets this type with such extraordinary frequency among Indians, Mexicans, and negroes suggests quite forcibly that the whole question of racial differences in mental traits will have to be taken up anew and by experimental methods. The writer predicts that when this is done there will be discovered enormously significant

In 1905, Alfred Binet developed a test to identify children struggling academically and who would benefit from additional support.<sup>72</sup> Lewis Terman, while working in the psychology department at Stanford University, adapted Binet's methods to create the first widely administered intelligence test in the United States, the Stanford-Binet.<sup>73</sup> In the process, Terman also coined the term "intelligence quotient" (IQ) to describe the ratio of mental age to chronological age.<sup>74</sup> Terman's explanation of how Binet selected particular tests for inclusion in the overall assessment of IQ is revealing: "[I]f children of a given age, who on other grounds were known to be bright, passed more frequently than children of the same age who were known to be dull, then the test was judged a satisfactory test of intelligence."<sup>75</sup> So, the basic process went like this: (1) Decide which subjects are bright. (2) Decide which subjects are dull. (3) Use only the tests that confirm what you have already decided is true. (4) Treat your test results as if they were objective evidence supporting the personal judgments you made about the subjects. In this way, the results of intelligence tests invariably serve to reproduce the existing social order.

The white-centric exposition of intelligence became the cornerstone of college admissions testing. Carl Campbell Brigham, author of the SAT, was a committed eugenicist in his early years. He used the results from an IQ test, designed in part by Terman and given to nearly two million army recruits during World War I, to examine the mental differences between the three white races thought to populate Europe.<sup>76</sup> Brigham concluded that these races—Nordic, Alpine, and Mediterranean—ranked in that order of native intelligence and that a shift in the patterns of immigration to the United States from the Nordic to the Mediterranean was driving down intelligence in this country.<sup>77</sup> Brigham also concluded that whites generally were more intelligent than blacks and the native-born generally were more intelligent than the foreign-born.<sup>78</sup> By increasing the difficulty of the questions used on the army test, Brigham created the first version of the SAT in 1926.<sup>79</sup>

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racial differences in general intelligence, differences which cannot be wiped out by any scheme of mental culture.").

72. NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 17 (2000).

73. Mitchell Leslie, *The Vexing Legacy of Lewis Terman*, *STAN. ALUMNI MAG.* (2000), [https://alumni.stanford.edu/get/page/magazine/article/?article\\_id=40678](https://alumni.stanford.edu/get/page/magazine/article/?article_id=40678) [<https://perma.cc/C7H7-JF8J>].

74. LEMANN, *supra* note 72, at 17.

75. TERMAN, *supra* note 71, at 47.

76. See CARL C. BRIGHAM, *A STUDY OF AMERICAN INTELLIGENCE* 157–76 (1923).

77. *Id.* at 110–11, 168–76.

78. *Id.* at 197–210.

79. LEMANN, *supra* note 72, at 30–31.

The original SAT focused heavily on the size and complexity of a test-taker's vocabulary.<sup>80</sup> A sample question illustrates the type of vocabulary that was thought to provide a window into one's inherent mental capacity:

Find the wrong word and change it to the right word in the following passage:

In the citron wing of the pale butterfly, with its dainty spots of orange, he sees beyond him the stately halls of fair gold, with their slender saffron pillars, and is taught how the delicate drawing high upon the walls shall be traced in tender tones of orpiment, and repeated by the base in notes of graver hue.<sup>81</sup>

This is not a utilitarian vocabulary of the kind one might acquire while working on the family farm or at the corner grocery. It is not the vocabulary of one in the process of learning English. It is not the vocabulary needed to work in a factory or a sweatshop. It is, I would argue, the vocabulary of affluent young men attending New England preparatory schools.<sup>82</sup> As a matter of course in the first half of the twentieth century, these young men would be overwhelmingly, if not exclusively, white.<sup>83</sup>

As the history of intelligence testing shows, the idea of intelligence as an objectively verifiable attribute began as a racial concept, and it continues to function as one.<sup>84</sup> Both intelligence and race are culturally defined: “[t]o be considered as intelligent or adaptive, one must excel in the skills valued by one's own group.”<sup>85</sup> Indeed, intelligence, though often cited as an explanation for successful behavior, is in truth more of a synonym for it.

Measuring intelligence supports racial classifications generally, but, as Galton pointed out, it is more particularly concerned with whiteness.<sup>86</sup> Whiteness and intelligence are linked answers to the same questions: Who is most entitled to limited resources? How should individuals be valued and ranked? Consistent with the Galton tradition, “SAT data form a cornerstone on

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80. *Id.*

81. *Id.* at 31 (quoting CARL C. BRIGHAM, A STUDY OF ERROR: A SUMMARY AND EVALUATION OF METHODS USED IN SIX YEARS OF STUDY OF THE SCHOLASTIC APTITUDE TEST OF THE COLLEGE ENTRANCE EXAMINATION BOARD 213 (1932)).

82. *Id.*

83. Peter W. Cookson, Jr. & Caroline Hodges Persell, *Race and Class in America's Elite Preparatory Boarding Schools: African Americans as the "Outsiders Within,"* 60 J. NEGRO EDUC. 219, 219 (1991).

84. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994) (advancing controversial views regarding the extent to which intelligence exists as an independent attribute, is heritable, varies across racial and ethnic groups, and serves as a determinant of socioeconomic status).

85. Ulric Neisser et al., *Intelligence: Knowns and Unknowns*, 51 AM. PSYCHOL. 77, 77, 80 (1996); see also Etienne Benson, *Intelligence Across Cultures*, 34 MONITOR ON PSYCHOL. 56 (2003) (“Many psychologists believe that the idea that a[n intelligence] test can be completely absent of cultural bias—a recurrent hope of test developers in the 20th century—is contradicted by the weight of the evidence.”).

86. See GALTON, *supra* note 67, at x.

which rests the edifice of the argument that people of color are inherently inferior.”<sup>87</sup> The SAT is a racial test, and whiteness is the scale on which it is scored.<sup>88</sup>

The use of aptitude tests in undergraduate and graduate admissions thus warrants reconsideration. If the aim of higher education is to create opportunity generally, then admissions tests of any kind are socially counterproductive. Denying education on the basis of a test score runs counter to our fundamental ideals of equal opportunity and social mobility, especially given the great and increasing importance of a college education to full participation in the U.S. economy.<sup>89</sup>

From the perspective of individual institutions, some admissions criteria are necessary whenever the number of applicants exceeds the number of available spots. Scarcity creates competition, and tests like the SAT allow large numbers of applicants to compete in a way that is easily administered and produces a strict rank ordering. It is a basic tenet of U.S. capitalism—even U.S. culture generally—that fair competition creates fair outcomes, but that conclusion is not inevitable. If the result is to have any validity, the terms of the competition—the attribute measured—must bear a close relation to the reward for victory. As an aptitude—not an achievement—test, the SAT seeks to measure not what you have done but what you are capable of doing. Although descended from intelligence tests that had grander aims, the SAT, technically speaking, was developed to predict a student’s first-year college grades.<sup>90</sup> At the time schools were widely adopting it, the SAT managed to explain about 15 percent of the observed variance in those grades.<sup>91</sup>

The SAT could be dismissed for offering little more than a hazy view into the near future of a student’s academic life, but that risks missing the larger point. Even if the SAT had infallible predictive power, it might be providing the perfect answer to the wrong question. Instead of focusing on selecting those likely to have the highest college GPAs, one might ask why particular groups have consistently struggled in the U.S. educational system, including on measures like the SAT. Indeed:

The stark differences across assessments and other measures collectively illustrate the inequities minorities have suffered through inadequate academic preparation, poverty, and discrimination; years of tracking into dead-end educational programs; lack of advanced and rigorous courses in inner-city

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87. LEMANN, *supra* note 72, at 349.

88. *See id.*

89. ANTHONY P. CARNEVALE ET AL., GEORGETOWN PUB. POLICY INSTITUTE, RECOVERY: JOB GROWTH AND EDUCATION REQUIREMENTS THROUGH 2020 (2014), [https://cew.georgetown.edu/wp-content/uploads/2014/11/Recovery2020.FR\\_Web\\_.pdf](https://cew.georgetown.edu/wp-content/uploads/2014/11/Recovery2020.FR_Web_.pdf) [<https://perma.cc/M5CS-CT94>].

90. LEMANN, *supra* note 72, at 86.

91. *Id.*

schools, or lack of access to such programs when available; threadbare facilities and overcrowding; teachers in critical need of professional development; less family support and experience in higher education; and low expectations.<sup>92</sup>

Standardized intelligence testing began as a quest to quantify the attribute that whites believed those of European descent possessed in greater degree than members of other races. Through long-term structural inequality, the U.S. educational system has helped produce the measurable differences that Galton and those who followed in his footsteps always assumed existed. By treating the achievement gap between white students and many minorities as a given, white normativity perpetuates the discriminatory treatment of minority students even where blatantly racist educational policies have been eliminated.

### C. *The Standard Citizen*

The U.S. Constitution begins with the words, “We the People of the United States.”<sup>93</sup> Today, that phrase can be read expansively. It includes families who have lived in this country for generations and some who are newly arrived. It includes men and women, the young and old, and members of nearly every racial and ethnic group the world has to offer. At the time it was written, however, its meaning was not so broad.<sup>94</sup> One of the first actions of the U.S. Congress under the Constitution was the passage of the Naturalization Act of 1790 (Act), which allowed an alien to become a citizen only if he were a “free white person.”<sup>95</sup> The Act made explicit what the Constitution treated as implicitly understood. “We the People” did not include everyone who lived in the United States. It did not include Native Americans. It did not include blacks held in slavery. It did not include blacks who were free. It did not include those with mixed racial ancestry.

As originally written, “We the People” was more an expression of white normativity than of inclusiveness: we, the drafters and signatories to this document and those like us, are the people, and we establish this Constitution to secure the blessings of liberty to ourselves and our posterity, which we shall only acknowledge if they are also considered white. White normativity as originally understood in the Constitution enabled a disconnection between U.S. ideals and Americans’ actions. It allowed whites to profess with sincerity that all men are created equal while holding some men in chains, because it told whites that the slaves were not really men.

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92. WAYNE J. CAMARA & AMY ELIZABETH SCHMIDT, COLL. ENTRANCE EXAMINATION BD., GROUP DIFFERENCES IN STANDARDIZED TESTING AND SOCIAL STRATIFICATION 13 (1990) (citation omitted), <http://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-1999-5-group-differences-standardized-testing-social-stratification.pdf> [<https://perma.cc/F45E-ZC9K>].

93. U.S. CONST. pmbl.

94. See HANEY LÓPEZ, *supra* note 1, at 28–29.

95. Naturalization Act of 1790, 1 Stat. 103 (1790).

Although Congress amended the Act on a number of occasions and introduced various exceptions, the general requirement that only a white person was eligible for naturalization remained part of the law for over 160 years.<sup>96</sup> The racial restrictions imposed by U.S. immigration and naturalization laws ensured that only those considered white (and those who fell within a limited number of exceptions) could shape the law and politics of the United States by voting and being elected to public office.<sup>97</sup> Not surprisingly, those who met the exceptions to the requirement of whiteness and could not be denied citizenship, most notably those of African nativity or descent, faced a host of other obstacles that prevented their exercise of political power and denied them their legal rights.

By enshrining “white person” as a legal category, the Act placed the federal courts in the position of adjudicating the whiteness of individual applicants for citizenship in racial prerequisite cases.<sup>98</sup> The quandary the courts faced in making those decisions and the eventual solution reached by the Supreme Court illustrate how white normativity can shape public policy and legal standards while remaining out of view.<sup>99</sup>

In their search for content that would allow them to apply the standard of whiteness, the courts turned both to science and the common wisdom, but later rejected science, defining whiteness in terms of what it is not.<sup>100</sup> Although racial anthropology attempted to define and delineate the borders of the races for decades, it eventually had to abandon the task as scientifically unsound.<sup>101</sup> Even before anthropologists admitted defeat, they produced results unpalatable to the courts by classifying “dark-skinned peoples,” such as “immigrants from western and southern Asia,” as Caucasian.<sup>102</sup> Deprived of objective criteria by which to assess an applicant’s whiteness, the courts began to rely exclusively on common conceptions of racial difference and followed an exclusionary method, rather than try to advance a positive definition of whiteness.<sup>103</sup> Courts had such difficulty defining whiteness, except in terms of what it is not, because they conceived of it as what is normal. If one tries to define “normal,” one arrives at a definition very close to what the courts used for white, i.e., it is what people commonly think it to be and how most people in the United States think of themselves. Or, as one federal court put it after examining the use of the word white in “colonial practice, in the federal statutes, and in the

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96. See, e.g., Immigration and Nationality Act of 1952 § 311, ch. 2, 66 Stat. 239 (codified as amended at 8 U.S.C. § 1422 (2012)).

97. See HANEY LÓPEZ, *supra* note 1, at 61 (explaining the effects of this phenomenon on Japanese immigrants).

98. See, e.g., *In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878); *In re Camille*, 6 F. 256 (C.C.D. Or. 1880).

99. See *United States v. Thind*, 261 U.S. 204 (1923).

100. HANEY LÓPEZ, *supra* note 1, at 3–7.

101. See *id.*

102. *Id.* at 5.

103. See *id.* at 3–7.

publications of the government,” white is used to “designate persons not otherwise classified.”<sup>104</sup> Similarly, it would be fruitless to search for a definition of a healthy psyche in the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-5). Both the DSM-5 and the U.S. racial classification system are designed to catalog difference and deviation, not to elucidate (except by implication and omission) what is “normal.”

The vast majority of applications for naturalization were resolved without formal judicial proceedings.<sup>105</sup> Of the fifty-two cases heard in court, only two came before the U.S. Supreme Court<sup>106</sup>: *Ozawa v. United States*<sup>107</sup> and *United States v. Thind*.<sup>108</sup> In *Ozawa*, the Court rejected arguments based on skin color and cultural affiliation to find that an individual born in Japan was not white. In its opinion, the Court equated white with Caucasian,<sup>109</sup> but this formulation was short-lived. Just a few months later, in *Thind*, the Court backed away from its scientific rationale and held that the common conception of the white race was the true standard by which eligibility for citizenship should be judged.<sup>110</sup>

Takao Ozawa, who unsuccessfully sought citizenship, appealed all the way to the Supreme Court by putting forth arguments that, though unavailing, are illuminating on the subject of white racial identity. Ozawa was born in Japan but attended high school in California and studied at the University of California, Berkeley.<sup>111</sup> After having lived in the United States for twenty years, Ozawa applied to become a citizen and was denied at every level of review.<sup>112</sup> When his case came before the Supreme Court, Ozawa argued that he was white because his skin was pale.<sup>113</sup> The Court responded that a racial test based on the “mere color of the skin of each individual is impracticable.”<sup>114</sup> And yet, some twelve years later, Justice Cardozo would observe that “[i]n the vast majority of cases the race of a Japanese or a Chinaman will be known to any one who looks at him.”<sup>115</sup> In the eyes of the Court, appearance was not immaterial to determining race. Ozawa seems to have lost on this point, not because he proposed an invalid criterion of whiteness, but because he failed to satisfy it. Looking white is a necessary, but not a sufficient, condition for being white.

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104. *In re Halladjian*, 174 F. 834, 843 (C.C.D. Mass. 1909).

105. HANEY LÓPEZ, *supra* note 1, at 1.

106. *See id.* at 3, 35.

107. 260 U.S. 178 (1922).

108. 261 U.S. 204 (1923).

109. *See Ozawa*, 260 U.S. at 197–98.

110. *See* 261 U.S. at 209–10.

111. *Ozawa*, 260 U.S. at 189.

112. HANEY LÓPEZ, *supra* note 1, at 56–57.

113. *Id.* at 57–58.

114. *Ozawa*, 260 U.S. at 197.

115. *Morrison v. California*, 291 U.S. 82, 94 (1934).

Next, Ozawa argued his eligibility for citizenship on the basis of cultural assimilation.<sup>116</sup> He pointed out that he had severed all ties with Japan, belonged to a U.S. church, chose a U.S.-educated woman as his wife, and so restricted the use of the Japanese language in his home that his children could not speak it.<sup>117</sup> Instead of lamenting the loss of bilingualism, the Court seemed to note it with approval, acknowledging that Ozawa “was well qualified by character and education for citizenship.”<sup>118</sup> Of course, being well qualified as an individual did not remove the disability of belonging to the “Japanese race.”<sup>119</sup> Ultimately, the Court sidestepped a discussion of the ways Ozawa was clearly American—and ideally, or normatively, white—and took refuge in his failure to be Caucasian, which the Court equated with white.<sup>120</sup>

In *Thind*, the Court could not make such a facile semantic escape, but instead denied citizenship based on a reinterpretation of “Caucasian.” Unlike Ozawa, Bhagat Singh Thind received a certificate of citizenship because he qualified as Caucasian, but the U.S. government then pursued him to the Supreme Court to revoke his citizenship.<sup>121</sup> In the process of disavowing the equivalence of “Caucasian” and “white,” the Court offered greater insight into its thinking on whiteness than it had in *Ozawa*. Because the racial science of the day no longer offered a convenient cover, the Court explained that in *Ozawa* it had not intended to use Caucasian as it was scientifically understood, but rather as it was popularly understood.<sup>122</sup>

Although there is much in both *Ozawa* and *Thind* that could be discounted as disingenuous (such as the Court’s protestations that through disqualifying Ozawa and Thind for citizenship it did not mean to “suggest the slightest question of racial superiority or inferiority”), there is reason to take at face value the claim that the Court intended to use “Caucasian” in its popular sense.<sup>123</sup> The claim rings true primarily because the Court did not need scientists to tell it who was white and who was not. As the Court frequently noted, Congress wrote the Naturalization Act in “the words of common speech, for common understanding, by unscientific men.”<sup>124</sup> The First Congress was referring to its own shared conception of race, not racial science, when it employed the words “free white person.” Following this tradition, the Court rejected the contemporary scientific meaning of Caucasian as equivalent to

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116. See HANEY LÓPEZ, *supra* note 1, at 56–57.

117. *Id.*

118. *Ozawa*, 260 U.S. at 189.

119. *Id.*

120. See *id.* at 198 (“The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side.”).

121. See *United States v. Thind*, 261 U.S. 204, 207 (1923).

122. See *id.* at 207–08.

123. *Id.* at 215; see also *Ozawa*, 260 U.S. at 198 (“Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority.”).

124. *Thind*, 261 U.S. at 210.

white because, while “[i]t may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, . . . the average man knows perfectly well that there are unmistakable and profound differences between them to-day.”<sup>125</sup> These “unmistakable and profound differences,” though invisible to science, were perfectly plain to the average man, forming the basis for the Court’s racial classifications.

But the Court was not forthcoming on the exact nature of these “differences.” Such differences divided whites from many classified as Caucasian, “which under scientific manipulation, ha[d] come to include far more than the unscientific mind suspect[ed].”<sup>126</sup> Referring to the diversity of Caucasians, the Court asserted “that the average well-informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.”<sup>127</sup> This, it seems, was the Court’s real standard, which might be called the Surprise Test: Would the average white American be surprised to find you studying in his school? Worshipping at his church? Working in his office? Visiting his home? If a white person cannot see you as a member of the same community, you are not white. Because *Ozawa* and *Thind* failed the test, they could not be citizens.

Haney López describes the Supreme Court as facing a “highly perplexing dilemma” in the *Ozawa* and *Thind* cases.<sup>128</sup> He sees the cases, decided three months apart with unanimous votes and opinions written by the same Justice (a naturalized Englishman), as evidence of confusion.<sup>129</sup> In *Ozawa*, the Court embraced the contemporary science of race when it rejected *Ozawa*’s petition for naturalization; in *Thind*, the Court declared that Caucasian was not the equivalent of white.

However, the Court’s equivocation regarding the term “Caucasian” need not be a sign of confusion about the content of whiteness. “Caucasian” may have proved a splintered reed on which to lean, but the Court’s conception of race did not undergo a dramatic shift between the two decisions. Any difficulty the Court experienced was one of expression, not of understanding. The holding in both cases was essentially the same: we are white, and you are not. If the Court had to cast around for rationales, it is not because it lacked certainty regarding the ultimate result. Instead, white normativity served both to doom *Ozawa*’s and *Thind*’s petitions and to make the justification for their nonwhite status difficult to articulate. Norms, as a form of shared expectation, act to reduce surprise. It is exactly because current members would have seen the presence of *Ozawa* and *Thind* in the club of whiteness as an anomaly that the Court turned *Ozawa* and *Thind* away.

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125. *Id.* at 209.

126. *Id.* at 211.

127. *Id.*

128. HANEY LÓPEZ, *supra* note 1, at 65.

129. *Id.*

## III.

## THE ENDS OF WHITENESS: SCENARIOS OF WHITE NORMALITY'S DEMISE

Given that white normativity has impaired Americans' health, educational opportunities, and ability to claim the full rights and privileges of citizenship,<sup>130</sup> Haney López's call to dismantle the concept of whiteness seems well justified. The real question is how.

In the United States, racial categories exist as a totalizing system. Racial categorization does not allow for any individual to go uncategorized, and it purports to offer at least a partial explanation for the whole range of personal behaviors and human endeavors. The central role that skin color, a readily perceived attribute, plays in racial categorization makes it virtually inescapable. Since no one can be "unraced," simply abandoning white as a category does not seem possible unless the whole scheme of racial classification is jettisoned. Unfortunately, the U.S. racial hierarchy has proven to be resilient.

A set of basic biological concepts undergirds the durability of race as a concept. It is true that children tend to resemble their parents, and individuals from different parts of the world tend to share certain physical characteristics (though with great variation that often goes unacknowledged).<sup>131</sup> These common conceptions are supplemented by actual genetic differences among individuals of different backgrounds—the genes controlling the metabolism of alcohol in some Asian populations, the greater prevalence of sickle cell anemia among populations living in areas where malaria was or is endemic, and the mutation common among Tibetans that allows them to function normally at high altitudes with low oxygen saturation.<sup>132</sup> But these facts are half-truths that only seem to give credence to the conception of biological race. Scientists have not found any racially determined genetic markers for work ethic, sexuality, criminality, or a host of other character traits attributed to race. As Haney López notes, "Science today has virtually abandoned the idea that races exist in nature."<sup>133</sup> Nevertheless, for the foreseeable future, existing in the United States without race seems as likely as being born without parents.

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130. See discussion *infra* Parts II.A, II.B, and II.C.

131. See *What Is Heredity?*, LEARN.GENETICS, <http://learn.genetics.utah.edu/content/inheritance/intro> [https://perma.cc/STY8-FFTM] (last visited Dec. 5, 2015); Michael J. Bamshad et al., *Human Population Genetic Structure and Inference of Group Membership*, 72 AM. J. HUM. GENETICS 578, 578 (2003).

132. Cian O'Lunaigh, *Mutation in Key Gene allows Tibetans to Thrive at High Altitude*, GUARDIAN (July 2, 2010), <http://www.theguardian.com/science/2010/jul/02/mutation-gene-tibetans-altitude> [https://perma.cc/MD68-LGYX]; *Natural Selection Protected Some East Asian Populations From Alcoholism, Study Suggests*, SCIENCE DAILY (Apr. 3, 2008), [www.sciencedaily.com/releases/2008/04/080402071551.htm](http://www.sciencedaily.com/releases/2008/04/080402071551.htm) [https://perma.cc/LS23-FQC7]; *Protective Effect of Sickle Cell Trait Against Malaria-Associated Mortality And Morbidity*, CTRS. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/malaria/about/biology/sickle\\_cell.html](http://www.cdc.gov/malaria/about/biology/sickle_cell.html) [https://perma.cc/YN4V-8S5R] (last visited Jan. 24, 2016).

133. HANEY LÓPEZ, *supra* note 1, at 71.

*A. No One Is White*

If removing the surrounding framework of racial categories cannot dismantle whiteness, perhaps other categories can stand in for white. There was a time when many of the groups now subsumed in white were quite distinct. Because Greeks, Jews, Italians, and Irish were all formerly separate from white people, it is conceivable that categorization based on national or ethnic origin could be reintroduced to the exclusion of an overarching grouping of white. If white as a racial category becomes sufficiently fractured such that it no longer constitutes a majority of the population, all racially defined groups may find themselves on a more equal footing. Moreover, the acknowledgment of differences among former whites might encourage greater awareness of the skewed perspective that white normativity advances.

The replacement of the white racial category would face a number of serious, perhaps insurmountable, challenges. As an initial matter, straight substitution raises the possibility that any category used in place of white might simply become a code word for white, without any fundamental change in the racial hierarchy. In addition, individuals are capable of belonging simultaneously to multiple overlapping, and even conflicting, groups. Increasing an individual's identification with a national or ethnic group would not inevitably undermine that individual's identification with the white racial category. Finally, ethnicity and national origin simply do not have the same salience as skin color and are therefore unlikely to displace racial categorizations. When people make judgments about race within a split second of first seeing someone, any recategorizations that require investigating an individual's family history will be hard pressed to compete.<sup>134</sup>

*B. Everyone Is White*

If white must remain a racial category, perhaps the best option is to revise the criteria for inclusion. These criteria have frequently fluctuated, and the history of racial categorization in the United States offers examples of groups that initially fell outside the circle of whiteness but later gained entry, or the reverse.<sup>135</sup> The difficulty lies in reforming the conception of white deliberately, with an eye toward fostering greater equality. If whiteness defines the group to which full protection is due under the law and to which the benefits of our legal, social, and economic systems should naturally flow, the ideal solution would be to identify all Americans as white. However, purposefully changing

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134. See generally MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2007) (exploring the nature of decision making and the substantial role played by subconscious biases).

135. See, e.g., Kenneth Prewitt, *Racial Classification in America: Where Do We Go from Here?*, 134 *DAEDALUS* 5 (2005) (discussing the shifting of subcontinent Indians and Mexicans between white and nonwhite categories in the U.S. census).

the criteria for being white would likely face opposition from people both inside and outside the white category for several reasons.

First, perceptible physical differences, like skin tone, might serve as points of resistance for any recategorization and allow the current categories to persist. If being an American and being white were redefined as coterminous, race would be divorced from any pretense of a biological basis. Although race as a biological category has fallen into disrepute, racial categorization still largely hinges on physical differences. The formerly nonwhite groups, largely from Central, Southern, and Eastern Europe, that have been incorporated into the white category have all borne a superficial resemblance to the Northern and Western Europeans who first defined the category in the Americas. The criteria of whiteness seem flexible in many respects, but their irreducible core may be the exclusion of African Americans and other dark-skinned individuals. An expansion of whiteness to all but those with the darkest skin would only reinforce the pernicious effects of race.<sup>136</sup>

Second, a radical expansion of whiteness is easier to implement on paper than in society (imagine a census form on which the only demographic category available was white). While most Americans might eventually be persuaded that white should signify “American” in public discourse—just as a majority has agreed that certain racial epithets are no longer to be used in public—this would not by itself dismantle whiteness or foster racial justice. Historically, public proclamations of equality for all have been coupled with discrimination, both private and public. What recategorizing all Americans as white might accomplish, instead, is the concealment of discrimination that occurs in practice.<sup>137</sup> If the categories that form the bases for discrimination in daily life cease to exist as a legal matter, then proving that minority groups are being treated inequitably will become impossible. Unless whiteness is fundamentally reconstructed in popular conception as well as in official practice, expanding whiteness will serve only to cover a multitude of sins.

Third, many groups might resist whitening because of feelings of ethnic pride and cohesion. The destruction of more than one minority group through deracination and forced assimilation was once official U.S. policy and remains a current concern for some.<sup>138</sup> In light of that fraught history, minorities are unlikely to welcome an expansion of whiteness. Although a fully realized

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136. See Jennifer L. Hochschild, *Looking Ahead: Racial Trends in the United States*, 134 *DAEDALUS* 70, 75 (2005) (describing successive waves of assimilation “in which immigrants get to become American by stepping over the only group that cannot, and does not want to, attain whiteness (or at least nonblackness)”).

137. See Prewitt, *supra* note 135, at 8–11.

138. See *The Bureau of Indian Education (BIE)*, *supra* note 26; NAT’L ASSOC. OF BLACK SOC. WORKERS, POSITION STATEMENT ON TRANS-RACIAL ADOPTIONS (1972), [http://c.ycmdn.com/sites/nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW\\_Trans-Racial\\_Adoption\\_1972\\_Position\\_\(b\).pdf](http://c.ycmdn.com/sites/nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW_Trans-Racial_Adoption_1972_Position_(b).pdf) [<https://perma.cc/MX3F-EBH4>] (opposing the transracial adoptions of black children).

expansion might bring certain material benefits, it would be an abandonment of the ideal of justice for all, regardless of minority status. Purchasing equality with one's identity would be, for many, too high a price. Racial boundaries are, thus, likely to be patrolled and maintained from both sides.

### C. *Everyone Is a Little Bit White*

A further possibility is that the white racial category might slowly dissolve or be incorporated into other groups as the United States becomes increasingly multiracial.<sup>139</sup> In the 2010 census, more than two million households indicated a multiracial background or identity.<sup>140</sup> However, social and romantic networks continue to be segregated.<sup>141</sup> Americans live, work, and eat along racial lines,<sup>142</sup> and as long as that is true, opportunities for interracial marriage will be constrained. Although the incidence of interracial marriage has increased over time,<sup>143</sup> marriage across racial lines seems unlikely to lead to the complete dissolution of all racial categories in light of the continued segregation of Americans' daily lives. The more probable outcome is that monochromatic islands will persist in the midst of a multiracial sea. How large those islands will be is an open question.

Even if all members of U.S. society were multiracial, it would not mean the end of white as a racial category. The concept of whiteness could persist because it is a malleable social construct with little or no biological basis.<sup>144</sup> As noted above, society has repeatedly refashioned whiteness to include or exclude certain groups.<sup>145</sup> Many individuals who are considered white today are in fact multiracial, but the diversity of their backgrounds has been concealed by the passing of generations. Many who are not considered white have European ancestry. Perceived racial differences are conditional and

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139. See LINDSAY HIXON ET AL., U.S. CENSUS BUREAU, THE WHITE POPULATION: 2010 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-05.pdf> [<https://perma.cc/DKG9-UXUA>].

140. See U.S. CENSUS BUREAU, HISPANIC ORIGIN AND RACE OF COUPLED HOUSEHOLDS: 2010 tbl.5 (2012), <http://www.census.gov/population/www/cen2010/cph-t/tables/tab05.pdf> [<https://perma.cc/5RJ3-4NDR>].

141. See *Reactions to the Shooting in Ferguson, Mo. Have Sharp Racial Divides*, N.Y. TIMES (Aug. 21, 2014), <http://www.nytimes.com/interactive/2014/08/21/us/ferguson-poll.html> [<https://perma.cc/7X7Z-LFTZ>] (75 percent of the white Americans polled answered that “none” or “a few” of the people they regularly came into contact with were black).

142. See *Race and Americans' Social Networks*, PUB. RELIGION RES. INST. (Aug. 28, 2014), <http://publicreligion.org/research/2014/08/analysis-social-network/#.VvLuYMdEfY8> [<https://perma.cc/58B2-J5PJ>].

143. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 497–98 (6th ed. 2008).

144. See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 71 (2d ed. 1994) (arguing that “race has no fixed meaning”).

145. See, e.g., JUAN F. PEREA ET AL., RACE AND RACES 487–525 (2d ed. 2000); GEORGE A. YANCEY, WHO IS WHITE? LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE 27 (2003) (“But European ethnic groups that today are considered white were once thought of as being different from majority group members, and it seemed ‘natural’ for Americans to perceive them as ethnic or racial minorities.”).

relative. So long as physical variation is present in the U.S. population, the U.S. racial scheme will have ample pretext for grouping and classifying individuals.

#### IV.

##### WHITENESS IS HERE TO STAY: MITIGATING WHITE NORMALITY

Dislodging whiteness from its position as the golden mean of human behavior offers one potential method of addressing the racial stratification that whiteness supports, without entirely dismantling the concept itself. Even if we cannot dispense with whiteness as a category, perhaps we can mitigate the worst effects of white normativity. If the white racial category became simply one among many, instead of the measuring stick for other racial categories, some of the inequities of white privilege might be more easily remedied even in the absence of a colorblind society.<sup>146</sup>

Some of the most obvious effects of white normativity are being addressed in particular areas. Medical researchers are expanding their pool of test subjects and gaining a greater understanding of the disparate effects that treatments can have across racial, ethnic, gender, and age groups.<sup>147</sup> In addition, the 1993 National Institutes of Health Revitalization Act requires that studies funded by the National Institute of Health include as diverse a range of participants as possible.<sup>148</sup> Whiteness is no longer an explicit prerequisite for naturalization, and promoting diversity is an avowed purpose of immigration policy.<sup>149</sup>

While encouraging, this progress has been offset by a movement to dismantle governmental and legal structures that explicitly deal with the effects of race.<sup>150</sup> In addition, simply addressing the effects of white normativity may not be enough to displace it from its central position in U.S. society.

White normativity derives great advantage from its ability to operate without drawing attention to itself. It is racialized thought masquerading as objectivity. It plays out subconsciously in what we fail to consider. In contrast with explicitly racist statements that today find little favor in public discourse and are at odds with the lofty ideals of our law and founding documents, white

146. See Flagg, *supra* note 15, at 1017.

147. See, e.g., John Lechleiter, *Closing the Diversity Gap in Clinical Trials*, FORBES (Apr. 9, 2014, 11:09 AM), <http://www.forbes.com/sites/johnlechleiter/2014/04/09/closing-the-diversity-gap-in-clinical-trials> [<https://perma.cc/C464-GBU5>]; *Personalized Medicine*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/scienceresearch/specialtopics/personalizedmedicine/default.htm> [<https://perma.cc/7KET-JBJK>] (last visited Mar. 19, 2015).

148. National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, 107 Stat. 122.

149. Immigration and Nationality Act § 203(c), 8 U.S.C. § 1153 (2012).

150. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); AM. C.R. INST., <http://acri.org> [<https://perma.cc/GD5X-GEK7>] (last visited Mar. 19, 2015) (proposing that the federal and state governments discontinue collecting any data respecting race).

normative policies can proceed in the name of equality and fairness, or at least colorblindness.

Since white normativity acts through our assumptions, the best countermeasure may be to drag it into the light. An assumption that has been questioned loses much of its ability to channel thoughts and conclusions outside the awareness of the thinker. For example, a person who realizes that he assumed a college professor would be white, or that a maintenance worker would be Latino or black, may be confronted with a choice: either admit that he relies on racial stereotypes as mental shortcuts to judgment about individuals, or reject the assumption and resolve to proceed more deliberately the next time he faces a similar situation. In either case, white normativity will cease to shape the individual's behavior and attitudes while simultaneously concealing its own existence. If the operation of white normativity becomes widely acknowledged, white normativity might grow increasingly susceptible to the direct challenges that helped dislodge more overtly racist systems.

Repeatedly challenging the racial assumptions about who is a "regular" or "ordinary" person could eventually force these categories to accommodate a more diverse view of the world. In this respect, the evolution of the phrase "We the People" from the U.S. Constitution may be instructive. From origins that were essentially exclusionary and race-based, the phrase has changed to take on a legitimately inclusionary meaning. Membership in "We the People" is no longer predicated upon race, which is a significant advance for our society. Of course, any sense of accomplishment must be tempered by an awareness of the time and effort required to effect that change and the amount of progress left to be made in guaranteeing the full fruits of citizenship to all Americans. Thought may be swift, but changing patterns of thought is almost unbearably slow.

To strike at the root of white normativity, one may need to advance competing norms. For example, the idea that the "usual" college applicant is white (as demonstrated by admissions officers' assumptions when applications do not contain racial signifiers)<sup>151</sup> might be challenged by the sharp rise in college enrollment by Latinos and African Americans over the past two decades. During the same period, enrollment for whites has experienced only a modest gain.<sup>152</sup> However, statistics face a difficult task in overturning

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151. Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1147 (2008) ("[A]n admissions officer's default presumption will be that the applicant is white.").

152. See ANTHONY P. CARNEVALE & JEFF STROHL, GEORGETOWN PUB. POLICY INSTITUTE, *SEPARATE & UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL PRIVILEGE* (2013), [https://cew.georgetown.edu/wp-content/uploads/2014/11/SeparateUnequal.FR\\_pdf](https://cew.georgetown.edu/wp-content/uploads/2014/11/SeparateUnequal.FR_pdf) [<https://perma.cc/FPP4-R9NZ>]; Michael A. Fletcher, *Minorities and Whites Follow Unequal College Paths, Report Says*, WASH. POST (July 31, 2013), [http://www.washingtonpost.com/business/economy/minorities-and-whites-follow-unequal-college-paths-report-says/2013/07/31/61c18f08-f9f3-11e2-8752-b41d7ed1f685\\_story.html](http://www.washingtonpost.com/business/economy/minorities-and-whites-follow-unequal-college-paths-report-says/2013/07/31/61c18f08-f9f3-11e2-8752-b41d7ed1f685_story.html) [<https://perma.cc/8ZAP-UHM9>].

stereotypes, because they lack the emotional impact of our prejudgments. We accept stereotypes without requiring them to have factual foundations, because they accord with beliefs we already hold. They are reassuring and serve to confirm our place within our community, which (we believe, at least) holds opinions similar to our own.

Popular media may offer a more effective means for denorming whiteness than a point-by-point refutation of its implicit assertions. After all, popular media broadcast racial stereotypes to a large audience in this country, which helped to establish the attitudes that now stand as barriers to progress.<sup>153</sup> Narratives and characters that convey the complexity of race in the United States and question the implicit biases we hold about members of other racial groups could undercut the idea that white is normal, thereby decreasing racial bias in society.<sup>154</sup>

From a legal perspective, the operation of white normativity calls into question the efficacy of antidiscrimination measures that require discriminatory intent.<sup>155</sup> White normativity produces severely discriminatory effects, not because it targets racial minorities for ill treatment, but because it fails to consider them at all or consigns them to a special category. If equal treatment under the law is truly the goal, then measures designed only to punish blatantly racist conduct will not suffice. Just as a tort regime that covered only intentional acts would be incomplete and ineffective in addressing the wide variety of instances in which carelessness produces significant harms, an antidiscrimination regime focused only on intentionally racist behaviors would be largely ineffective in addressing the damage caused by inadvertent racism. A more complete remedial framework would include something like a cause of action for discriminatory negligence, which would recognize a duty to exercise reasonable care to avoid discriminating on the basis of race.<sup>156</sup> Conscious and deliberate racism is more worthy of blame, but racism based on latent bias is far from harmless. Providing fair and even-handed treatment for all individuals requires addressing both forms of discrimination.

Whites constitute a shrinking segment of the population, and thus, despite all the obstacles to changing American attitudes and reforming our social, legal, and political systems, a real challenge to white normativity may soon

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153. See ETHNIC NOTIONS (Signifyin' Works 1986).

154. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1385–87 (discussing the “social contact” hypothesis of Gordon Allport and others for reducing racial prejudice).

155. See Flagg, *supra* note 15, at 980–91 (“The threshold requirement that the constitutional plaintiff prove discriminatory intent operates to draw a sharp distinction between facially neutral but unconsciously race-specific instances of white decisionmaking, on the one hand, and the deliberate use of race, whether overt or covert, on the other; only the latter is constitutionally impermissible.”).

156. See generally David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (proposing an analogue to the doctrine of negligence in the field of employment discrimination).

develop, and the operation of white normativity may become more obvious.<sup>157</sup> As the population identified as white declines, but the systems established to serve that population's needs continue to function as they always have, the disparity between white normativity and equal treatment will grow. A system set up to serve whites is much easier to justify when whites comprise 75 percent of the population than when they comprise only 25 percent. The former situation looks like democracy; the latter bears a strong resemblance to oligarchy, or even a plantation.

Genuine reform might occur in the face of widespread discontent and the possibility of real social upheaval caused by the increasingly apparent inadequacy of U.S. society's response to the effects of racism.<sup>158</sup> A stronger bargaining position for racial minorities, and a desire among whites to maintain social order, could result in compromises that push the United States further toward egalitarianism. Alternatively, whites might recruit Asian Americans and Latinos to reverse this demographic trend and maintain a dominant position.<sup>159</sup> In either case, the concept of whiteness may be poised to undergo a transformation. It may lose its favored place in the racial hierarchy, or may endure by accommodating groups whose ancestry is not predominantly European. The former would undoubtedly be a watershed moment in the history of race in America. The latter, the cooption of Asian Americans and Latinos, raises a more sobering prospect: whiteness might bend but not break. By expanding its circle of privilege, whiteness, and the racial disparities it engenders, might survive without undergoing fundamental change. Such an outcome would fit a familiar pattern. But the pattern is not inevitable. Race persists in part because it evolves along with other cultural attitudes and assumptions. This adaptability makes race resilient, but it also presents an opportunity to remake conceptions of race. Despite all the obstacles and inertia we face, we remain free to reinterpret, reevaluate, and even reject race.

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157. See Hochschild, *supra* note 136, at 70 (noting that whites constituted 69 percent of the population in the United States in the 2000 census and are expected to make up 50 percent of the U.S. population in 2050).

158. BELL, *supra* note 143, at 19–25.

159. See YANCEY, *supra* note 145, at 37–44, 125–132; Hochschild, *supra* note 136, at 74–75.