ARTICLES

Race As An Under-Inclusive and Over-Inclusive Concept

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I

INTRODUCTION

Race is an important concept in civil rights law. It is important in a technical sense, because it helps to define the scope of many civil rights statutes and triggers the highest level of judicial scrutiny of legislative acts under the Equal Protection Clause of the Constitution.  

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2. Racial classifications other than those imposed by Congress are subject to judicial review under the strict scrutiny test, see City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-99 (1989). See also Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (congressionally designed racial classifications are reviewed under the intermediate standard of review); Craig v. Boren, 429 U.S. 190, 197-98 (1976) (gender classifications are subject to the intermediate standard of review); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (classifications based on disability are subject to second-order rational basis review); Pruitt v. Cheney,
For African Americans, race (or rather the prohibition of discrimination on the basis of race) has been especially important because it has conferred legal status—a kind of personhood—upon African Americans. Nowhere is the latter point more poignantly illustrated than in the aftermath of Brown I. That decision, which prohibited racial segregation in public schools, changed the legal status of African Americans from mere supplicants “seeking, pleading, begging to be treated as full-fledged members of the human race” to persons entitled to equal treatment under the law.

Civil rights does not have its own unique concept of race but, rather, appears to have adopted the sociological concept of race. In sociology, race is traditionally defined by the phenotypical differences—differences in facial features, skin color, hair, and so on—between human, social, or, more precisely, ethnic groups. Not unlike a biological or political concept of race, a sociological and, hence, civil

963 F.2d 1160, 1162 (9th Cir. 1991) (classifications based on homosexual status receive second-order rational basis review); Meinhold v. United States Dep't of Defense, 808 F. Supp. 1455 (C.D. Cal. 1993) (same).

3. At one time viewed as property belonging to whites, see Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), African Americans have since acquired personhood through the civil rights laws. See Patricia Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 HARV. C.R.-C.L L. REV. 401, 402-03 (1987).


7. A race is a “human group that defines itself and/or is defined by other groups as different from other groups by virtue of innate and immutable physical characteristics,” PIERCE L. VAN DEN BERGHE. RACE AND RACISM: A COMPARATIVE PERSPECTIVE 9 (1967), or “any people who are distinguished, or consider themselves distinguished, in social relations with other peoples, by their physical characteristics.” OLIVER C. COX. CASTE, CLASS, AND RACE 402 (1948).

8. The Feagins define a racial group as a social group “that persons inside or outside the group have decided . . . is important to single out as inferior or superior, typically on the basis of real or alleged physical characteristics subjectively selected.” JOE R. FEAGIN & CLAIRECE BOOHER FEAGIN. RACIAL AND ETHNIC RELATIONS 7 (4th ed. 1993). As can be seen, the Feagins’ definition is more narrow but also more fluid than the traditional sociological definition. It helps to explain how Jews can be viewed as a racial category even though many Jews lack a distinguishing set of physical characteristics.

9. There is no consensus definition of “ethnicity.” The list of defining characteristics include: geographic origin; language or dialect; religious faith; traditions, values, and symbols; internal sense of distinctiveness; external perception of distinctiveness; and race. ROBERT M. JOBOUT. ETHNICITY & ASSIMILATION: BLACKS, CHINESE, FILIPINOS, JAPANESE, KOREANS, MEXICANS, VIETNAMESE, AND WHITES 4-5 (1988). See related discussion infra text accompanying notes 98-99.

10. Traditionally, biologists have used the term “race” to refer to a group of human beings distinguished from other human beings by a set of physical traits that are transmitted by the
rights concept of race (hereinafter referred to as the "civil rights concept of race") places groups into separate and independent social categories. African Americans, Native Americans, Hispanics (or Latinos), Asians, whites, Arabs, and Jews are some of the groups that constitute a distinct racial category under the civil rights laws. Some scholars in the social sciences have suggested that this "theoretical ghettoization of race" makes little sense today. Given the
common experiences of all subordinated groups (including women, the disabled, gays, and lesbians), "racial" categories can no longer be defined exclusively in terms of phenotypical differences. Rather, "racial" categories should be defined by the common experience of cultural subordination. African Americans, Asians, women, the disabled, and homosexuals, for example, are "racially" identifiable in terms of their "outsider" status, in terms of their "otherness," and in terms of their common cultural experiences in relation to the socially dominant group in American society — namely, straight, able-bodied white males.

Thus, for civil rights purposes, all victims of cultural oppression or alienation would occupy one "racial" category, and all perpetrators would occupy another. There would be "blacks" and "whites"; "outsid-

intellectual perspective to law, civil rights in particular.

It should also be noted that some proponents of Critical Race Theory (CRT) seem to claim that African Americans and other "oppressed groups" stand on the same civil rights ground, that all "people of color" are "outsiders" in both the civil rights context and the larger social context. CRT has not, however, fully formulated the notion of "outsiderdom," at least not to the level of abstraction as the social scientists. See generally Richard Delgado, The Imperial Scholar Revisited: How to Marginalize Outsider Writing Ten Years Later, 140 U. PA. L. REV. 1349 (1992); Alex M. Johnson, Jr., The New Voices of Color, 100 YALE L.J. 2007 (1991). On the other hand, it may be that CRT intends to borrow the social science concept of "outsiderdom." See Richard Delgado, When a Story Is Just a Story: Does Voice Really Matter?, 76 VA. L REV 95, 95 n.1 (1990) (defining CRT as legal scholarship that, inter alia, "borrow[s] . . . insights from social science on race and racism"). Yet, as I shall argue subsequently, the social science concept of race — the lumping together of several groups under a single theory of victimization — is problematic when applied to civil rights. See infra note 17 and Part II. See also Frances Lee Ansley, A Civil Rights Agenda for the Year 2000: Confessions of an Identity Politician, 59 TENN. L REV. 593, 599 (1992) (argues that racism has been so persistent and destructive in society that only a color-conscious movement has a chance of combatting the subordination. If such a movement enters into coalitions, it should demand that its coalition partners "fairly encounter and respond to the tough issues, the history, and the insights afforded by the identity politics of race."). I might also add that Jesse Jackson's idea of a "Rainbow Coalition" and the notion of "diversity" as practiced in higher education seem to attenuate toward the social science view of race in that significant experiential differences among members of the outsider class are discounted or ignored. Thus, I take issue with a law school that maintains it has satisfied its commitment to minority or "diversity" admissions, even if only 1% of the entering class is African American so long as a significant percentage (say 15%) of the entering class is minority or a larger percentage (say 40%) is female. The Rainbow Coalition and diversity can dilute African American political and educational interests.

15. See, e.g., Platt, supra note 13, at iii-v; TAKAKI, supra note 14, at viii, 136. This perspective, which may be more political than sociological, is analogous to the "culture of the deaf," in which deafness is deemed to be the common element that bonds together an otherwise disparate group of individuals — African Americans, women, homosexuals, white males, and so on. Those who live in the deaf world, who experience "deaf life," reject the hearing culture (the culture of the "oppressors") and celebrate the blessings of "not hearing" (which some say is different from "not listening"). See LEAH HAGER COHEN, TRAIN GO SORRY: INSIDE A DEAF WORLD 110-11 (1994) (arguing that surgical procedures aimed at improving hearing denigrate the group and are perceived by some as attempts to "pass"). Some within the deaf culture reject, for example, hearing devices because they cannot choose which sounds to ignore; instead, they amplify everything. See generally HANNAH MERKER, LISTENING 121-27 (1994).

16. See, e.g., Platt, supra note 13, at iii-v (sources cited therein).
ers” and “insiders”; “victims” and “perpetrators.”

The attempt to use race as a cultural metaphor for “otherness” raises at least two important issues. First, are the traditional racial classes in civil rights law too narrow? Second, are they, at the same time, overly broad? Using the African American racial category as an example, I argue that in placing groups into rigid, separate and independent social categories largely defined by phenotypical differences (i.e., the so-called “theoretical ghettoization of race”), the civil rights concept of race is not under-inclusive; it is over-inclusive.

II

RACE AS UNDER-INCLUSIVE

In defining race by the phenotypical differences of social groups rather than by the common cultural experiences of all subordinated groups, it might be argued that the civil rights concept of race is too narrow because it necessarily looks at the cultural (or, more precisely, discriminatory) experiences of social groups separately rather than jointly. There is no attempt in our civil rights laws to understand how the experiences of traditional racial classes — African Americans, Native Americans, Latinos, and Asians — and traditional nonracial classes excluded from society’s mainstream — women, the disabled, gays and lesbians — relate to each other. Rather than view subordination as an interdependent phenomenon (the common theme being society’s rejection of “otherness”), civil rights conceptualizes subordination as a series of independent group experiences.

The legal consequences of a broader concept of race would, however, counsel against such expansion. Proceeding from such a broad

17. The use of cultural oppression or alienation as a standard for creating racial categories in civil rights is fraught with line-drawing problems. For example, it could be argued that smokers and obese people also suffer a kind of cultural oppression or alienation in our society. Are they, then, to be treated as “blacks” or “outsiders”? If the answer is no, because smoking and obesity unrelated to a physiological disorder (see Cook v. Rhode Island Dept. of Mental Health, 10 F.3d 17 (1st Cir. 1993)) represent life-style choices, then what about homosexuality, which may also be a behavioral manifestation? See John Sibley Butler, Homosexuals and the Military Establishment, Society, Nov.-Dec. 1993, at 13, 13-20 (arguing generally that it is improper for groups oppressed for reasons outside of their race, especially those oppressed due to behavioral characteristics, to use the “race metaphor” as a platform to secure additional rights). See also infra note 28.
19. See supra text accompanying notes 12-17. Here, I am attempting to extend to civil rights a particular theory of race originally developed outside civil rights. See supra note 14.
20. See supra notes 8 & 9 and accompanying text. See also supra notes 10, 11 & 12 and accompanying text.
view of race, discrimination against women or the disabled would be subject to the same level of judicial scrutiny under the Equal Protection Clause as discrimination against African Americans. This would create a monumental change in current constitutional law by expanding the number of suspect classifications.22

Moreover, a broader concept of race would surely strain our limited and already over-burdened judicial system. Giving every culturally alienated group the same level of civil rights protection as African Americans or other traditional racial groups — e.g., Native Americans, Latinos, or Asians — would substantially increase the number of civil rights filings each year. Judges would respond predictably to this litigation explosion in the same way they have responded to the increase in Section 1983 filings over the years.23 They would attempt to find ways to limit civil rights plaintiffs' access to court, such as by erecting heightened pleading standards24 or by disproportionately sanctioning civil rights plaintiffs for bringing "frivolous" lawsuits.25 If the gates to the palace of justice are locked or open fewer hours, African Americans will be hurt more than any other "racial" group, for litigation has been the traditional and often most effective vehicle used by African Americans in the drive toward racial equality.26 Not surprisingly, then, the great majority of civil rights plaintiffs appear to be African

22. See supra note 2.


24. See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993) (ruling that such a pleading standard is impermissible unless formulated within the federal rule-making process).

25. According to one study covering 1983-1987, motions for sanctions under Fed. R. Civ. P. 11 were most often made and granted in civil rights cases. Robert L. Carter, The Federal Rules of Civil Procedure as a Vindicator of Civil Rights, 137 U. PA. L. REV. 2179, 2192 (1989). Of the 680 motions for sanctions that resulted in published opinions during these years, more than 28% were brought in civil rights cases. Id. Plaintiffs were the target of such motions 86% of the time, and sanctions were granted against plaintiffs more than 70% of the time. Id. at 2193.

Americans. Using race as a proxy for all forms of social or cultural oppression would not only harm African Americans but would also create significant conceptual difficulties in civil rights law. The unique history of racism in America defies a unifying theory of subordination. Let us take African Americans to illustrate the point.

African Americans have an exceptional history. They are the only social group, racial or nonracial, that did not come to this country of their own free will. While all other groups acted upon a heart-felt desire to be here — most came here with their families looking for opportunities and continue to do so — African Americans were separated from their families, stolen from their homeland, and packed like sardines in ships for an inhumane three-month ocean voyage. Coming to a new country under these conditions would create in any group an attitudinal disadvantage ab initio.

While poor whites, Native Americans, and African Americans were placed in indentured servitude in the early years of our country, African Americans were the only group forced into an institution of legalized slavery. Poor whites could escape into other cities or colo-

27. See, e.g., Roy L. Brooks, Rethinking the American Race Problem 44 (1990) (noting, inter alia, that African Americans constituted 85% and other nonwhites constituted 5%, of the plaintiffs in race-based employment discrimination cases in a recent one-year, randomly selected period).

28. As suggested in note 17 supra, it could also be argued that some classes “deserve” less protection than others or no protection at all. Some might argue, for example, that group identification based on an immutable personal trait (e.g., skin color or gender) should enjoy greater protection than group identification predicated on behavior (e.g., some forms of obesity or homosexuality). Even if a condition (say homosexuality) is immutable, should groups who can “pass” receive the same protection as groups who cannot “pass”? For example, the Clinton Administration’s “Don’t Ask, Don’t Tell” policy toward gays in the military could never work for African Americans, because one can always “tell.” This observation raises two additional questions: whether homosexuality is an “immutable” characteristic in the same way that race and gender are; and, even assuming that it is, whether the line between protected and unprotected classes should be based upon whether discrimination against a group is reasonable or unreasonable under the circumstances? See, e.g., Butler, supra note 17, at 17 (argues that the gays’ use of the idea of common oppression with African Americans is fallacious, because it may trivialize the history of suffering blacks have endured because of racial characteristics — “characteristics which cannot be hidden as one goes through life”).


31. See generally Kenneth M. Stampp, The Peculiar Institution: Slavery in the Ante-bellum South (1956). I readily admit that Native Americans, Native Hawaiians, and perhaps Puerto Ricans and a few other groups within the American territories can be considered “conquered” or “colonized” groups who, like African Americans, are psychologically disinvested, spiritually unconnected to American society. But even the Supreme Court has recognized that there is a difference between being a conquered nation and an enslaved people — the latter had no rights, no legal status, not even the right to enter into treaties (enforceable today) with whites.
nies and Native Americans could escape into the wilderness, often conducting guerilla raids on white settlements.\textsuperscript{32} The distinctive mark of color prevented African Americans from escaping anywhere.

Ending after two and one-half centuries in a bloody civil war (the only civil war this nation has known), the institution of slavery was the major, though certainly not the only, regime of racial subordination during this period. African Americans outside the "peculiar institution" were singled out for special mistreatment under a policy of what one might call "separate-and-unequal."\textsuperscript{33} Under this policy, African Americans had no legal rights in interactions with whites, not even the procedural right to sue whites in federal court as citizens of the United States.\textsuperscript{34}

Without a doubt, white racism was a major motivation behind the separate-and-unequal policy. As the Supreme Court in \textit{Dred Scott v. Sandford} stated unabashedly, emancipated African Americans were "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect."\textsuperscript{35}

Toward the end of the nineteenth century, the government's sepa-
rate-and-unequal policy was replaced with a new racial relations policy — "separate-but-equal" — the constitutionality of which was upheld in *Plessy v. Ferguson*. Like its predecessor policy, this new policy took special aim at African Americans, resulting in the enactment of hundreds of "Jim Crow" laws designed not only to exclude African Americans from mainstream society but also to stigmatize them. The federal government, as well as state and local governments, authorized racial segregation and discrimination in public schools, libraries, restrooms, public accommodations, places of employment, and other areas of American life. Florida went so far as to enact a law that required "school textbooks used by one race to be stored separately from those used by the other race." Substantial racial inequality existed throughout the South in per pupil expenditures, teacher salaries, and working conditions. Disparity even existed among African American and white schools in the same school district. For example, "[t]he typical black teacher labored in a poorly equipped classroom, taught larger classes for fewer days per year, and earned less doing it than did her white counterpart." "In the Deep South states of Louisiana and Mississippi, black teachers earned about 80 percent of what white teachers earned [in 1890]."

Conditions in the North were little better. Describing his first visit to the North in the 1930's, one white southerner stated:

Proudly cosmopolitan New York was in most respects more thoroughly segregated than any Southern city: with the exception of a small coterie of intellectuals, musicians, and entertainers there was little traffic between the white world and the black enclave in upper Manhattan called Harlem.

Under the separate-but-equal policy, African Americans were, in short, legally locked out of mainstream society by a system of apartheid that controlled all aspects of life in the South and by a looser but rigorously enforced form of racial segregation in the North.

Like its predecessor policy, the government's separate-but-equal
policy was motivated by racism. The following observations reflect the prevailing intellectual view of African Americans at the time:

No savant anywhere in the western world arose to challenge the conclusion of the famous 1910 edition of Encyclopedia Britannica, assembled under the supervision of the faculties of Oxford and Cambridge: ‘... the negro would appear to stand on a lower evolutionary plane than the white man, and to be more closely related to the highest anthropoids.’

The government’s separate-but-equal policy ended with the Supreme Court’s decision in Brown v. Board of Education. Since Brown, African Americans have continued to experience a special form of subordination, due in large part to the lingering effects of their special history in this country. At every level of society, African Americans experience more racism and discrimination than any other social group, with the exception of Native Americans, who now appear to be on the verge of economic prosperity.

In his oral argument before the Supreme Court in Brown, Thurgood Marshall asked the question: “Why of all the multitudinous groups of people in this country [do] you have to single out Negroes and give them this separate treatment?” The answer to that question — namely, color — is precisely why a unifying theory of subordination is not possible. Race should be treated as a “separate” category for

43. ASHMORE, supra note 42, at 44.
44. 347 U.S. 483 (1954).
45. See, e.g., Williams, supra note 3 at 407-08 (the writer speaking of the lingering effects of being only recently evolved from “... three-fifths of a human; a subpart of the white estate”). See also ANDREW HACKER, TWO NATIONS: BLACK AND WHITE. SEPARATE. HOSTILE. UNEQUAL. 16 (1992) (asserting that African Americans have not been able to succeed like other groups because they have been subjected to “the presumptions of inferiority associated with Africa and slavery”). In a new book, Professors Feagin and Vera probe “white-on-black racism” in contemporary society, noting how whites see themselves as “not racist” even as they discriminate. See JOE R. FEAGAN AND HERNÁN VERA, WHITE RACISM (1994).
46. See, e.g., infra text accompanying notes 44-47, 52-57, 58-60; Alex M. Johnson, Jr., Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, 1992 U. ILL. L. REV. 1043, 1046-54. See also BROOKS, supra note 27, at 44 and 201 n.18; HACKER, supra note 45, at 14 (alleging that one of the lingering effects of slavery is that blacks are separated more severely than any other group); A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY, (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989).
48. Quoted in HIGGINBOTHAM, supra note 30, at 3.
49. Color (along with hair and lips) is a physical trait that allows whites to self-identify. All negative qualities in a human being will be associated with blackness because the dominant group will necessarily define its own color, whiteness, in a positive manner. See WINTHROP D. JORDAN, WHITE OVER BLACK. AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812 (1968). Moreover, other groups, unlike African Americans, have been allowed to use intermarriage, personal achieve-
purposes of civil rights, because people of color have suffered and continue to suffer a "separate" form of subordination. As I have shown with the African American example, the experience of racism in America, both historical and contemporary, has been unique. A unifying theory of subordination linking African Americans with women, the disabled, gays and lesbians, and other culturally oppressed groups would not only be empirically incorrect but would also dilute the attention that should be given to the "separate" problems of African Americans.

This is not to say, however, that all African Americans must receive the same remedies (legal or otherwise) in order to resolve the American race problem. Such an approach to the problems African Americans face ignores important intra-racial differences within African American society — a point on which I elaborate next.

50. In the legal academy, such a claim is supported by critical race theorists who have concluded that oppression is an integral part of the African American experience. See Alex M. Johnson, Jr., Bidwhist, Tonk and United States v. Fordice: Why Integrationism Fails African-Americans Again, 81 CAL. L. REV. 1401, 1421-22 (1993); See, e.g., T. Alexander Aleinikoff, A Case for Race Consciousness, 91 COLUM. L. REV. 1060 (1991); Neil Gotanda, A Critique of "Our Constitution Is Color-Blind," 44 Stan. L. REV. 1 (1991); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987). For a discussion of the issue outside of legal academia, see HACKER, supra note 45, at 25-30 (from colonial times to the present, white political figures, scientists, and citizens, in general, have treated African Americans as inferiors); ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS: WHY ARE MIDDLE-CLASS BLACKS ANGRY? WHY SHOULD AMERICA CARE? 8-9 (1993) (positing that like African Americans, other ethnic minorities, women, gay people, and the elderly are all victims of discrimination, but "[t]he histories and current experiences of all these groups differ too much to lump them together in one coherent analysis").

51. As two of my colleagues in the legal academe have pointed out, "the use of analogy exacerbates this natural desire to have our own struggles receive recognition. For if we can convince ourselves that another's experience is 'just like' ours, we are then exempt from having fully to comprehend that experience." 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, 409 (discussing how comparing race to other allegedly analogous bases for oppression carries the danger of fostering a false sense of understanding and obscures the importance of race). It is for this reason that I would take issue with the many groups who have attempted to create a civil rights niche by making bogus comparisons with African Americans. Gays who rightfully seek military service are not "just like blacks"; women who rightfully seek equal pay are not forced into "slave labor" by a sexist employer; and white college student protesters certainly cannot claim to be treated like "niggers" by administrators who reject their demands. See Butler supra note 17, at 17-18 (stating that such comparisons are imprecise and are attempts to use "metaphor[s] of oppression" to effect significant changes in the law. Such attempts can detract from the severity of African American subordination and the importance of race in our society).
III

RACE AS OVER-INCLUSIVE

While the traditional civil rights conceptualization of race into separate ethnic categories may not, on the one hand, constitute a theoretical ghettoization of race, it may, on the other hand, create a superficially broad understanding of race within these categories. By focusing on a single ethnicity (e.g., African Americans), the traditional civil rights concept of race — perhaps in the interest of constructing a unifying experience of subordination — ignores significant internal divisions of socioeconomic class, gender, politics, sexual orientation, disability, race-gender intersectionality (e.g., the experiences of African American women who encounter more than one form of subordination, namely, race and gender discrimination) and other intersectionalities.52

One of the great lessons of the controversy involving Justice Clarence Thomas and Professor Anita Hill is that these internal differences cannot be ignored without distorting the real life experiences of those who belong to the racial group, in this instance African Americans. As Cornel West has admonished, we should “never forget[] about the significance of race but [we should likewise] refuse[] to be confined by race.”53

In this Part of the article, I shall explore some of the ramifications of intra-racial diversity in African American society. I shall focus particularly on class differences. My discussion will highlight the importance of a more complex understanding of race than has been the tradition in civil rights law.

52. See, e.g., Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1991) (arguing that essentialist concepts envision a world where a monolithic “woman’s experience” or “Black Experience” can be defined independent of factors such as class and sexual orientation); Kimberlé W. Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies, 1989 U. CHI. L. REV. 139 (discussing intersectionality); Roy L. Brooks & Mary Jo Newborn, Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?, 81 CAL. L. REV. 787 (1994) (arguing that the doctrine of intersectionality finds broad appeal among some classical liberal scholars and critical race theorists like Professor Crenshaw); Roy L. Brooks, Rethinking the American Race Problem (2d prtg. 1992) (discussing class stratification in African American society and, in the preface, internal political divisions highlighted by the Justice Clarence Thomas/Professor Anita Hill controversy).

Some might argue that it is because African Americans are so often used as the “measuring rod” for social victimization for all “outsider” groups that intra-racial differences and needs are often lost. The focus is placed more on the group as a whole than on its constituent parts. For example, the phrase “blacks and women” is frequently used in civil rights discourse, detracting from the unique interests of a distinct sub-group — “black women.” See All the Women Are White. All the Blacks Are Men. But Some of Us Are Brave (Gloria T. Hull et al. eds., 1982).

African American society has three socioeconomic classes: a middle class (which includes the upper class); a working class; and a poverty class. The latter class includes an underclass subculture. Each class is approximately the same size, as Tables 1 & 2 at the end of the article indicate.

Middle-class African Americans are the most assimilated segment of African Americans. Professor Joe Feagin defines assimilation as "the more or less orderly adaptation of a migrating group to the ways and institutions of an established host group." Indeed, middle-class African Americans have many of the cultural trappings of middle-class whites.

A typical African American middle class household can be described in the following manner. It consists of a nuclear family in which both parents work, at least one as a business manager or professional. The household, in addition, possesses a late model automobile, a complete line of household appliances, and investments or savings. Annual household income in 1988 dollars is roughly above $25,000. Like its white counterpart, the average African American middle class household is stable and comfortable. Unlike the white middle class, however, race burdens, and, in some instances, threatens the material success of the African American middle class. Long after the death of Jim Crow, color still remains a significant factor in a skilled and talented African American person's chances for sustained happiness and worldly success. This is particularly so in high-level employment. Loneliness, disaffection, stress and hypertension (or "John Henryism"), complex racial discrimination (which is racial discrimination that is subtle and complex, at times sophisticated and at times unconscious or institutionalized, and often accompanied by nonracial factors), and conspicuous racial stratification in high-level employment are the dominant class problems facing the African American middle class. These are experiences middle-class whites simply do not encounter, at least not to the same degree as their

54. See Brooks, supra note 27, at 34-51, 67-83, 106-16.
55. See id. at 107-09.
56. Id. at 37, 38.
57. Feagin & Feagin, supra note 8, at 26.
58. See Brooks, supra note 27, at 37-38.
59. See id. at 35.
60. See id. at 36-38.
61. See id. at 34-39.
62. John Henry is a fictional African American laborer of legendary strength who died while pitting his sledge hammer against a steam drill. With supreme confidence in his abilities but without knowing he had little more than a snowball's chance in hell of succeeding, John Henry gave it his all, but to no avail. John Henry symbolizes the emotional wasting of African Americans who earnestly struggle against an incredible and unfair white advantage. Id. at 42.
African American counterparts. Race also shapes the life experiences of working-class and poverty-class African Americans. There are, however, important experiential differences between these African Americans and their wealthier middle-class brethren. Let us discuss the African American working class first.

A typical working-class African American is married, a semi-skilled or unskilled blue-collar wage earner, service worker or clerical worker. He or she has a working spouse with a similar occupational status, and has an annual family income in 1988 dollars between the poverty level and approximately $25,000. A family with these characteristics, inter alia, uses free recreational facilities, either rents or owns its own home, can afford a new TV set every ten years, a new refrigerator every seventeen years, and a used car every four years, and has no savings.

Whereas most middle-class African Americans experience socioeconomic difficulties primarily in the employment context, most working-class African Americans, although somewhat exposed in the employment arena, are subject to socioeconomic vulnerability primarily in housing and education. In the housing area, complex racial discrimination (e.g., steering and redlining) and de facto segregation are the dominant socioeconomic problems facing the African American working class vis-a-vis the African American middle class. Two sets of socioeconomic problems face the African American working class in education. In primary education, the problem consists of poor or ineffective public schooling — the lack of “quality education” — by which I mean inferior instruction in the three “Rs,” little or no programs dealing with African American pride or awareness, and essentially no cultural diversity. In higher education, low African American enrollment is the major problem. Again, African Americans in the lower

63. Id. at 40-51. While this article is less concerned with the experiential differences between middle-class whites and African Americans (interracial differences) than with the experiential differences among the African American classes (intra-racial differences), for an excellent discussion of the former subject, see COSE, supra note 50, at 11-192; HACKER, supra note 45; JOE R. FEAGIN & MEL SIKES, LIVING WITH RACISM (1994).
64. See BROOKS, supra note 27, at 67-68.
65. Id. at 67. See infra Tables 1 & 2.
66. Id. at 67, 103.
67. See supra text accompanying notes 61-63.
68. Working-class African Americans, unlike middle-class African Americans, lack the time, money or flexibility to pursue protracted civil rights litigation. Of course, African Americans in the lower middle class are basically in the same boat as some working-class African Americans. See BROOKS, supra note 27, at 70.
69. Id. at 70-74.
70. Id. at 74-81.
71. Id. at 81-83.
range of the middle class may experience some of these problems. But as a group, middle-class African Americans do not.

The diurnal racial experiences of the African American working class set this segment of African American society apart from not only the African American middle class but also the African American poverty class. African Americans who live below the poverty line, approximately $12,000 for a family of four, are in the poverty class. Like their white counterparts, poor African Americans are typically single or live in single-parent households and are either unemployed, semi-skilled or unskilled blue-collar or service workers, or retired. But unlike poor whites, a substantial percentage of poor African Americans live an underclass existence.

If some perverse soul wanted to design a recipe for socioeconomic dysfunction and self-destruction, it might be this: take one group of poor African Americans; add unemployment and despair; season with racial isolation; allow to stew for one or more generations. You have the African American underclass.

A subclass of the African American poverty class, the African American underclass exhibits a behavioral pattern, a set of attitudes, and a value system that offer few springboards from which to launch a

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72. This $12,000 figure is adjusted upward from the 1988 annual household income figure of $10,997 presented in id. at 37.
73. Id. at 106-07.
74. Estimates of the size of the African American underclass can range from a low of 16% to a high of 60% of poor African Americans, depending upon how one defines the underclass. Id. at 108. For a discussion of one of several definitions of the African American underclass, see infra note 75. For a discussion on the size of the white underclass, see id. at 109 n.10 (sources cited therein).
75. There are several competing definitions of the underclass. Id. at 108. My definition — that the underclass is characterized by intergenerational poverty, unemployment, despair, and racial isolation — is based upon what one might call a “consensus definition” developed at a meeting of poverty experts convened on March 9, 1987 by the Joint Center for Political and Economic Studies. See id. Some poverty experts worry that the term “underclass” has become “increasingly pejorative,” and “hopelessly polluted in meaning.” Roy L. Brooks, The Ecology of Inequality: The Rise of the African-American Underclass, 8 Harv. BlackLetter L.J. 1, 5 (1991). Others are concerned that the term may be used in a “blame-the-victim” fashion, suggesting that the underclass is a less worthy sub-class of the poor. Id. My response has not changed since I first considered these matters in 1991:

These are legitimate concerns. Hence, it may be politically correct to use another term (perhaps ‘ghetto poor’) in lieu of the term underclass. But a proliferation of terms representing varying definitions that describe essentially the same phenomenon makes communication among scholars and policymakers difficult, confuses the public, and can distort reality. As [William Julius] Wilson himself recognizes, ‘not to try to describe reality is the biggest risk of all.’

successful life. Underclass African Americans live a life of despair—one that moves toward social dysfunction and self-destruction. It is a life far removed from mainstream society replete with high rates of teenage pregnancy, malnourished babies, welfare dependency, crime, drug abuse, semi-illiteracy, and unemployment. This life, or culture, was created in part by the legacy of slavery and Jim Crow and the desegregation of once thriving African American communities.

The internal class divisions outlined above can have significant consequences for the reach and merits of civil rights laws and policies. Poor African Americans are in less of a position to take advantage of civil rights remedies than middle-class and working-class African Americans. There is almost a symmetrical relationship between class and civil rights—the higher the class, the more useful are civil rights. Let us take a few examples.

Title VII and other employment discrimination laws are less useful to the African American underclass than to the African American middle-class and working class because, as we have seen, the former are not usually actively pursuing employment. As a general proposition, it can be said that economic remedies would better serve the employment interests of the underclass than legal remedies. Thus, although the civil rights laws are technically applicable to all African Americans, their utility varies from class to class.

Likewise, while it has long been assumed that a policy of racial integration is beneficial for all African Americans, the merits of that assumption can be challenged on class grounds. Integration has been more beneficial to middle-class and working-class African Americans than to poor African Americans. The following passage articulates the controversial proposition:

The tenet of racial integration subordinates the civil rights interest of the underclass by depleting African American communities of vital resources—resources that are necessary for sustaining a vibrant culture and stable families. Racial integration, in other words, has been something of a boon for those African Americans least handicapped by the emotional and physical hardships of slavery and Jim Crow. It has given these individuals, mainly from the middle-class and working-class African Americans, the opportunity to move out of previously-segregated

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76. Brooks, supra note 27, at 111-16.
77. See id. at 117-27.
78. See supra text accompanying notes 67-68.
79. Economic remedies (such as an equal employment opportunity program, see id. at 166-69) are beyond the control of the courts. Only Congress and state legislatures may initiate such remedies, because only these entities have the power to tax and spend. Based on this principle, Congress, rather than the courts, is likely to be the more appropriate forum for poor African Americans, especially the underclass, to seek solutions to their problems.
communities. But the departure of so many stable families and talented community leaders from African American communities has resulted in a concomitant loss of valuable community resources. There has not only been a steady depletion of economic resources, such as money that could be recycled within the community, but also — and more importantly — a drain of individuals capable of supplying wisdom and guidance to young African Americans in the ghetto.

. . . Racial integration provided a first-time opportunity for talented African American individuals and stable families to move out of racially isolated communities.

. . . Middle-class African Americans were leaders and role models in segregated communities . . . . As [Carl Rowan] explains: 'A generation ago, racist law and custom confined both [the Black striver and the Black defeatist] to the same neighborhoods. Strivers set the tone — in commerce, religion, social life, politics. They were role models. They provided the leavening that made Harlem, instead of the archetypal slum, into a varied, textured community that was black America's cultural capital.'

Middle-class African Americans were perhaps most important as role models for the children of poverty. Children become only what they can imagine themselves to be. And their visions are clearly affected by what they see in their environment. If all the adults around them are unemployed or work in poorly paid jobs with little security, children may simply accept this as their own fate. But if African American children see African American adults going to a job every morning and bringing home a paycheck to pay the bills and support a reasonably comfortable lifestyle, and if they see African American adults become successful professionals and leaders, then their understanding of their own potential is expanded.

. . . Clearly, but for racial integration, middle-class culture would still be a significant force in African American communities today — there simply would be nowhere else for the African American middle class to live. Comer strikes a similar note: 'After World War II, . . . successful blacks began moving out of the inner-city, taking their money, leadership and role models, leaving the poor isolated and alienated. Whites began moving to the suburbs, taking quality education and jobs with them. These trends left certain parents — black and white — less able to transmit desirable values to their children.'

Like racial integration, affirmative action (or racial preference law) cannot be properly assessed in a racially monolithic fashion. Class stratification must be taken into account in considering the merits of affirmative action, because affirmative action affects African Americans in different ways depending on class status. Middle-class and working-class African Americans stand to benefit more directly from affirmative

80. Id. at 123-25 (citations omitted).
action in the workplace than poor African Americans. This is because the latter, especially the underclass, being poorly educated and low skilled, usually do not have the qualifications that affirmative action demands.\textsuperscript{81} Affirmative action is very much a middle-class and working-class civil rights policy. True, some of the benefits of affirmative action may trickle down to the African American poverty class (e.g., through the creation of role models from afar), but this is cold comfort for poor African Americans. Affirmative action will not resolve the racial problems of the African American poverty class, because these problems — especially unemployment, teenage pregnancy, welfare dependency, drug abuse, and semi-illiteracy\textsuperscript{82} — are economically or culturally based.\textsuperscript{83} Affirmative action, thus, is for the African American middle-class and working-class; economic remedies, whether they be income transfers or new jobs, would be better suited for the African American poverty class.

This underscores a basic point made earlier. Although the African American poverty class comes within the technical reach of our civil rights laws, which ban discrimination on the basis of race or color,\textsuperscript{84} there is little that the civil rights laws can do (and have done) for this segment of African American society as a practical matter.\textsuperscript{85} Yet, this kind of understanding is rarely, if ever, revealed in traditional civil rights discourse. Because the concept of race reflected in our civil rights laws and policies makes no intra-racial distinctions (in this instance class distinctions), it is automatically assumed that all segments of African American society can benefit from these laws and policies. As a consequence, we, society in general and African Americans in particular, misplace our efforts regarding poor African Americans. We spend most of our time and energy fighting civil rights battles rather than pursuing economic remedies, self-help, or other options.

Thus far, I have discussed the civil rights ramifications of an overly broad concept of race in terms of its impact on the African American poverty class vis-a-vis the African American middle and working classes. There are also some differences in the practical application of civil rights laws between middle-class and working-class African Americans, differences that a monolithic concept of the African American race simply does not pick up. For example, the working class has less resources — time, flexibility, and money — to pursue protracted civil rights litigation. And because of their greater resources,

\textsuperscript{81} See supra text accompanying notes 74-76.  
\textsuperscript{82} See supra text accompanying note 76.  
\textsuperscript{83} See supra text accompanying notes 74-76.  
\textsuperscript{84} See supra note 1 (sources cited therein).  
\textsuperscript{85} See supra text accompanying notes 78-79.
middle-class African Americans can respond to racial slights in public places (e.g., stores and shopping centers) more positively and creatively than working-class African Americans. This leads to two conclusions. The first is a compelling argument for providing subsidized legal assistance for Title VII claimants who earn $25,000 or less. The second is that without such assistance, the African American middle-class is in the best position to actually use civil rights law but is less in need of such laws.

IV
SUMMARY AND REPLY

SUMMARY

As solutions to the American race problem, America's oldest moral and social dilemma, continue to elude scholars, policy makers, and pundits, it behooves us to re-examine our traditional way of responding to the problem — namely, civil rights. I have attempted to contribute to that endeavor in this article by raising questions concerning the way in which race is traditionally constructed in civil rights — is such concept of race too narrow, too broad, or both? My conclusion is that the concept of race as used in civil rights law and policy is not under-inclusive but over-inclusive.

I argue, in particular, that the traditional civil rights concept of race, which looks at the cultural (or discriminatory) experiences of groups on an independent, ad hoc basis, should not be retired in favor of a more expansive concept that would treat all culturally oppressed or alienated groups as one race. Treating all social groups (e.g., all ethnic groups, women, gays and lesbians, and the disabled) pari passu in the civil rights arena is problematic, because it would expand the number of suspect classifications in equal protection law, strain our already overwhelmed courts (thereby hurting African Americans), and create conceptual chaos in civil rights law. The latter problem arises from the inability of a regime of cultural subordination to make intelligible distinctions among social groups and from the tendency of such a re-

87. See supra text accompanying notes 19-20. This view of race is the necessary result of creating racial categories on the basis of phenotypical or other relatively inflexible factors. See supra text accompanying notes 9-12.
88. See supra text accompanying notes 13-17.
89. See supra Part II.
90. See supra notes 17 & 28.
gime to discount or ignore significant experiential differences among members of the “outsider” race. In short, the traditional civil rights concept of race may lack an “essence” — a feature that is common only to the groups subsumed under the general term “race” — but using race as a proxy for all forms of cultural subordination (or, indeed, any attempt to lump together a multitude of social groups under a single theory of victimization) makes matters worse, not better.

On the other hand, significant internal divisions within racial categories — class, gender, politics, sexual orientation, disability, and various intersectionalities — indicate that the traditional civil rights concept of race is over-inclusive. Using class stratification in African American society as an example, I have attempted to demonstrate how the civil rights concept of race can sweep too broadly. In failing to differentiate among the socioeconomic strata — the middle class, working class, poverty class, and underclass — within African American society when using the term race, civil rights discourse can be useless or even damaging. We have seen, for instance, that employment discrimination laws, although useful to middle-class and working-class African Americans, can do little to improve the socioeconomic conditions of underclass African Americans. Likewise, the venerable policy of racial integration has been more beneficial for African Americans at the top of the class ladder than those at the bottom. Some scholars would commit the cardinal sin of killing affirmative action on the ground that it does nothing for poor African Americans when, in fact, the doctrine does what it is designed to do — help the upper classes of African Americans.

Racial groups, in short, are internally diverse. Class, gender, intersectionality, religion, political perspective, and color are some of the significant internal dividing lines within these groups. While a broad concept of race — one that ignores these internal segments — serves an admirable purpose — namely, the attempt to construct a unifying experience of subordination — its explanatory power is attenuated by its tremendous stretch. A concept of race that does not reflect significant group divisions is too broad to be meaningful in the 21st century.

91. See supra text accompanying notes 28-51.
92. See supra notes 8 & 10.
93. See supra text accompanying notes 77-79.
94. See supra text accompanying notes 79-80.
95. See supra text accompanying notes 81-83. Several governmental and private studies of affirmative action have concluded that “racial preferences have launched many qualified African Americans on successful careers they otherwise would not have entered or dared to pursue.” BROOKS, supra note 27, at 54 (sources cited therein).
Some scholars might object to the foregoing discussion (while still agreeing with the conclusions drawn therefrom) on the ground that it erroneously accepts "race as a classificatory notion." The truth is," argues Professor Kwame Anthony Appiah, "there are no races: there is nothing in the world that can do all we ask race to do for us." Race has no referent in reality.

But if we erase the term race from the civil rights lexicon, how are we to raise civil rights questions? Appiah's answer is that we ought to use a different, more realistic concept — namely, "racial identity." This concept, Appiah argues, is constructed: "Invented histories, invented biologies, invented cultural affinities come with every identity; each is a kind of role that has to be scripted, structured by conventions of narrative to which the world never quite manages to conform."

Racial identity can be further understood by considering three propositions. First, racial identity is distinguishable from ethnic identity. Both can be viewed, Appiah argues, as points along a human identity axis. Whereas one's ethnic identity (e.g., one's Irishness) can be turned off in the public domain, one's racial identity (e.g., one's African Americanism or Blackness) cannot be hidden in the public domain. As one moves along the axis from ethnic identity to racial identity, it becomes harder to conceal one's identity.

Second, racial identity (whether chosen or not) can be a rational basis for determining which groups are entitled to heightened judicial solicitude. African Americans, but not homosexuals, might be considered a "protected class" because the latter can hide their identity in the public domain while the former cannot. Racial identity may not, however, be a necessary and sufficient condition to differentiate, for civil rights purposes, between African Americans and other minorities who cannot conceal their identities, and, hence, avoid discrimination, in the public sphere. Something more, such as a unique collective experience,

97. Id. at 45. Appiah's "race" argument has actually been made by several other scholars as well. See, e.g., Scot R. Miles, Racism (1989).
98. Appiah, supra note 96, at 174.
99. Professor Appiah's views were presented and debated in two seminars on October 28 & 29, 1994, at the University of California, San Diego (one of which I participated in). The seminars were an extension of The Tanner Lecture on Human Values, which Professor Appiah gave on October 27, 1994, at the university. The title of Professor Appiah's lecture was, Race, Culture and Identity: Understandings and Misunderstandings. The Tanner Lectures are held several times a year and are published in an annual volume.
is needed. On the other hand, Professor Appiah's notion of racial identity may automatically incorporate a group's unique ethos.

Finally, the politicization of racial identity is dualistic. On the one hand, it can be progressive and affirming of autonomy. For example, the Civil Rights Movement and Black Pride enabled African Americans to fight off racism and, hence, flourish on an individual basis. On the other hand, identity politics can be regressive and oppressive of liberty. For example, the notion that African Americans are supposed to "dig" Smokey but not be able to relate to Mozart, or that all whites are "blue-eyed devils" limits individual expression and identity. Appiah disdains ideologically overloaded and essentialist forms of identity that repress autonomy. While Appiah does not push autonomy to the exclusion of racial identity, he would jettison racial identity that impinges on autonomy.

Appiah's basic argument that there are no races but only racial identities is not inconsistent with the analysis presented in this article. I recognize that the traditional civil rights concept of race (defined by phenotypical differences) "may lack an 'essence'" and that this is certainly true of the biological (e.g., the attempt to explain the phenotypes of groups in terms of their genotypes) and political (the racially subordinating one-drop rule) concepts of race. Further, my discussion of the civil rights concept of race indicates that I wholeheartedly embrace the notion that race is a constructed or scripted concept, that race cannot be adequately defined scientifically, that race is informed by historical and socioeconomic forces. And, finally, not only do Appiah and I object to a biologically rooted concept of race, we also resist the urge to define race solely in terms of culture — the behaviors, values, and attitudes of a people — be it African American culture, a culture of victimization or some other culture. Not all African Americans can relate to rap music or happen to like basketball. In short, race and culture are not coextensive.

I could more easily bring this article into complete symmetry with Appiah's approach by simply substituting the term "race identity" for the term "race" throughout this article. But there is such strong opposition among philosophers to Appiah's position that there is no racial

100. See supra note 50 & text accompanying notes 27-51.
101. See supra text accompanying notes 97-98.
102. Appiah's position was presented in the seminars referred to in note 99 supra.
103. See supra text accompanying note 92.
104. See supra notes 6-11 & accompanying text.
105. See id. See also Parts II & III.
106. Appiah's views on race and culture were discussed at the seminars referred to in note 99 supra.
essence (to which Appiah attempted to reply in the seminars\textsuperscript{107}) that I think it best to take the more conservative, less controversial approach (i.e., use the term race but as a proxy for racial identity) so as not to drown my argument in the on-going, related debate between Appiah and his critics.

\textbf{TABLE 1}

\textit{Household Income, 1988}

\begin{tabular}{|l|c|c|}
\hline
& \textbf{Percentage of African American Population} & \textbf{Percentage of White Population} \\
\hline
Upper class & & \\
Over $100,000 & 1.0 & 3.4 \\
$75,000—$100,000 & 1.6 & 4.5 \\

Middle class & & \\
$50,000—$75,000 & 7.3 & 14.2 \\
$35,000—$50,000 & 11.4 & 18.1 \\
$25,000—$35,000 & 12.5 & 16.5 \\

Working class & & \\
$15,000—$25,000 & 19.4 & 18.6 \\
$10,000—$15,000 & 13.1 & 9.8 \\

Poverty class & & \\
Under $10,000 & 33.8 & 14.8 \\

Median income & $16,407 & $28,781 \\
Population & 10,561,000 & 79,734,000 \\
\hline
\end{tabular}


\textit{NOTE:} The poverty line in 1988 was set at an annual household income of $10,997 for a family of four. Id. at p. 127.

\textsuperscript{107} See supra note 99. For example, Professor Lucius Outlaw, the W. Wistar Brown Professor at Haverford College, argued in one seminar that Appiah fails to articulate a notion of reality and that, by arguing that the “Negro race does not exist,” Appiah is playing into the hands of racists. See also, Jayne Chong-Soon Lee, Review Essay, \textit{Navigating the Topology of Race}, 46 \textit{Stan. L. Rev}. 747 (1994) (arguing against a fixed concept of race in favor of a plural concept of race).
TABLE 2

<table>
<thead>
<tr>
<th>Socioeconomic classes</th>
<th>African Americans</th>
<th>Whites</th>
</tr>
</thead>
<tbody>
<tr>
<td>Upper class</td>
<td>2.6%</td>
<td>7.9%</td>
</tr>
<tr>
<td>Middle class</td>
<td>31.2%</td>
<td>48.8%</td>
</tr>
<tr>
<td>Working class</td>
<td>32.5%</td>
<td>28.4%</td>
</tr>
<tr>
<td>Poverty class</td>
<td>33.8%</td>
<td>14.8%</td>
</tr>
</tbody>
</table>