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IMPLICATIONS OF A UNIRACIAL WORLDVIEW: RACE AND RIGHTS IN A NEW ERA

Jonathan K. Stubbs**

INTRODUCTION

Race is a human puzzle. This work analyzes how the puzzle fits together, *preliminarily* suggests a way to rethink what we mean by race, and briefly explores some implications of re-visioning race.

As we enter a new millennium, the prophetic words of Dr. Martin Luther King, Jr. remind us that rethinking race is not optional. It is imperative:

[I]f we are to have peace on earth, our loyalties must ... transcend our race, our tribe, our class, and our nation; and this means we must develop a *world perspective*. No individual can live alone; no nation can live alone ... [W]e must either learn to live together as brothers or we are all going to perish together as fools.¹

We need a worldview (or to quote Dr. King, “world perspective”)² which will promote human survival and justice. This article seeks to assist that intellectual and practical goal. Worldviews involve the ways in which most human beings, consciously, subconsciously, and otherwise make sense of reality. More precisely, a worldview is: “[A] culturally structured, systematic way of looking at, perceiving, and interpreting various world realities, a society’s ‘weltanschauung,’ to use a word made popular in sociological studies.”³ This article’s thesis is that as we

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1. Martin Luther King, Jr., *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.*, 253 (James M. Washington ed., Harper Collins 1990) (emphasis added).

2. *Id.*

3. Audrey Smedley, *Race in North America: Origins and Evolution of a Worldview* 19 (2nd ed., Perseus Books 1998). Smedley contends that: “Once established and conventionalized, worldviews become enthroned in

move into a new millennium, we must consciously adopt a uniraical worldview. In other words, we need to systematically understand that, at best, "race" means *the human race* or the human species, *homo sapiens*.⁴

Why do we need to embrace our identity as members of one human race, or species or family? Dr. King suggested that our collective survival substantially depends upon our understanding our human identities, especially the relationships which humans should share with one another.⁵ While this article attempts to help analyze the relationship between human survival and race, at least one lawyer's cautionary word seems appropriate. Since so much has been said about race, it would be both naive and presumptuous to attempt an analysis of *all* that has been said. Accordingly, it is beyond the scope of this article to discuss the long, complicated and evolving history of the concept of race in (some) western societies. That type of inquiry is diligently explored in more depth elsewhere.⁶

This article begins by asking, "What is Race: Some Modern Western Perspectives?" Section I surveys race from various vantage points, including views associated with social and natural scientists, jurists, and members of the general public. In short, Section I grapples with what we currently mean when we use the term race.

Many people, especially westerners, believe that the human family consists of multiple races. Such thinking flows from and reinforces multi-racial worldviews.

individuals as mind-sets. They may even achieve the state of involuntary cognitive processes, actively if not consciously molding the behavior of their bearers." *Id.* In addition, see Thomas Luckmann's description of a worldview as embracing an "encompassing system of meaning in which socially relevant categories of time, place, causality and purpose are super-ordinated to more specific interpretive schemes in which reality is segmented." Thomas Luckmann, *The Invisible Religion: The Problem of Religion in Modern Society* 52-54, 61 (MacMillan Publ. Co. Feb. 1967), quoted in , Mechal Sobel, *The World They Made Together: Black and White Values in Eighteenth Century Virginia* 8 (Princeton Univ. Press 1987).

4. Jonathan Marks, *Human Biodiversity: Genes, Race and History* 44-47, 200 (Aldine deGruyter Jan. 1995). Marks' work provides an illuminating and comprehensive analysis of the historical development of the concept of race in Western European and North American societies as well as a critical analysis of modern physical scientific understanding(s) of race.

5. King, *supra* n. 1.

6. Smedley, *supra* n. 3; Ivan Hannaford, *Race: The History of an Idea in the West* (Woodrow Wilson Ctr. Press 1996); Ashley Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* (6th ed., Altamira Press 1997); and Marks, *supra* n. 4. The literature of legal academicians on race and American law is voluminous and geometrically increasing. See for example, Crossroads, Directions, and a New Critical Theory (Francisco Valdes, Jerome McCristal Culp and Angela Harris, eds., 2002); Critical Race Theory: An Introduction (Richard Delgado and Jean Stefancic, eds. 2001); Frank Wu, *Yellow: Race in America Beyond Black and White* (2002). While space limitations make it impossible to cite all of the many fine perceptive works in this area, a few additional representative pieces include Donald Braman, *Of Race and Immutability*, 46 UCLA L. Rev. 1375 (1999); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 Stan. L. Rev. 221 (1999); Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black-White Binary Constitution*, 36 Wm. & Mary L. Rev. 571 (1995); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 Stan. L. Rev. 1 (1991); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor and the Racial Self*, 82 Geo. L.J. 437 (1993); Vincene Verdun, *If the Shoe Fits Wear It: An Analysis of Reparations To African Americans*, 67 Tul. L. Rev. 597 (1992); Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993); George Martinez, *The Legal Construction of Race: Mexican Americans and Whiteness*, 2 Harv. Lat. L. Rev. 321 (1997). In addition, another emerging branch of the critical studies movement is Global Critical Race Feminism which, among other things, encompasses a multidimensional analysis of race, gender, law, and nationality. See, Adrien Katherine Wing, *Access to Justice: The Social Responsibility of Lawyers: Global Critical Race Feminism Post 9-11: Afghanistan*, 10 Wash. U. J. Of L. & Policy 19 (2002).

Thus, Section II asks: "What Does a Multi-racial Worldview Look Like?" Here, using graphic symbols we attempt to communicate some sense of what a multi-racial perspective involves. Further, Section II introduces a uniracial worldview and contrasts that worldview with multi-racial worldviews.

In preliminary fashion, Section III attempts to point a way out of difficulties generated from many people's adoption of multi-racial worldviews. Specifically, Section III urges jurists and other policy makers (especially in the United States but also in sister nation states) to adopt a uniracial analysis in their decision making processes. Section III also outlines transformative possibilities of a uniracial worldview in the context of majoritarian public policy decision making, concerns about international human rights (including the innocuous subject of affirmative action), and interpersonal communications. Section IV furnishes concluding thoughts on the historic challenges and opportunities presented by a uniracial approach.

We now consider some western perspectives on race.

I

What is Race: Some Modern Western (?) Perspectives?

The Oxford English Dictionary spends nearly a half dozen pages, single-spaced, triple-columned (in small type!), attempting to define and illustrate race.⁷ According to the Oxford English Dictionary, race embraces rapid or continuous movement: "The act of running"; "Onward movement of a thing, as the heavenly bodies, a vehicle . . . running or rush of water."⁸ Thus, race may be used as an action verb, for example, "I'll *race* you to the house". Similarly, race may mean: "[A] portion of time or space"; "The act of running, riding, sailing . . . in competition with one or more rivals."⁹ In this context race is used as a noun, for example: "The older I get, the harder it is to keep up in the *race*."

These uses of race are pervasive; however, they are not as controversial -- indeed sometimes literally explosive -- as a second major sense of race, specifically: "A group of persons, animals, or plants, connected by common descent or origin," "A limited group of persons descended from a common ancestor; a house, family, kindred," "A group or class of persons, animals or things having some common feature or features."¹⁰ This meaning of race revolves around groups of persons, animals, or plants with common characteristics.

This article focuses on the second description of race, namely, humans who are perceived as fitting into groups "having some common features."

7. It is unclear precisely when race became part of European languages; however, etymological studies suggest 1200-1500 C.E. as the most likely time period. Hannaford, *supra* n. 6, at 4-6 and Smedley, *supra* n. 3, at 37-41 furnish perceptive analysis of the origin of the term race.

8. Oxford English Dictionary 67 (2d ed., Oxford U. Press 1989).

9. *Id.* at 68.

10. *Id.*

In this context, social and natural scientists also wrestle with the implications of race. For instance, in a path-breaking article entitled, "On the Non-Existence of Human Races," Dr. Frank B. Livingstone, a well respected geneticist and cultural anthropologist, stated that "the term, race, has had a long history of anthropological uses and it can be generally defined as referring to a group of local or breeding populations within a species."¹¹ Livingstone noted that this definition of race failed to consider the societal structure and movements of many early human populations and also did not account for the impact of "the basic cause of biological variation, natural selection."¹² Further, Livingstone suggested that the concept of race should be abandoned in favor of that of "cline," a term suggested by Dr. Julian Huxley. Cline refers to a "gradation in measurable characters."¹³ For instance, over a particular geographical area, one can observe variations in human characteristics like the skin color of northern and southern Europeans.¹⁴

According to Livingstone, the variability of genes is almost infinite; and if one classified individuals into distinct races based on whether they had different genes, there would be innumerable races. "With this definition there is also a high sickle cell gene frequency race consisting of some Greeks, Italians, Turks, Arabs, Africans and Indians, and low sickle cell race consisting of the rest of humanity. One could also speak of a high color blind and a low color blind race."¹⁵

The notion that a race is a "single breeding population that varies in definable ways from other human sub-populations" continues to have some modern followers. However, it has been noted that "in practice . . . the common designation of race is based on socially defined phenotypic traits, usually skin color and facial features, as they are seen through the filter of individual as well as social prejudice."¹⁶

Professor Ashley Montagu, a physical anthropologist and leading thinker on race, has argued that many physical anthropologists have assumed that races exist. According to Professor Montagu, such scientists contend that "in nature there exist groups of human beings comprised of individuals each of whom possesses a certain

11. Frank B. Livingstone, *On the Non-Existence of Human Races*, 3 *Current Anthropology* 279 (1962).

12. *Id.*

13. See, Julian Huxley, *Clines: An Auxiliary Taxonomic Principle*, *Nature* 219 (July 30, 1938).

14. C. Loring Brace, *Region Does Not Mean "Race" - Reality Versus Convention in Forensic Anthropology*, 40 *J. of Forensic Sci.* 171- 72 (1995).

15. Livingstone, *supra* n. 11, at 280.

16. Richard S. Cooper, *Special Report: Papers from the C.D.C.-A.T.S.D.R. A Case Study in the Use of Race and Ethnicity in Public Health Surveillance*, 109 *Pub. Health Rep.* 46 (1994). See also, Frank Browning, *Race Relations* (National Public Radio Broadcast Transcript for October 31, 1998). One significant work involving genes and race noted that:

Another problem . . . in the study of genetic differentiation of populations is the effect of migration. Migration seems to have always occurred among neighboring populations. Thus, the change of gene frequencies from one population to another is generally clinal rather than discrete. . . . [O]ur judgment about the grouping of human races is quite subjective and dependent on the availability of gene frequency data. (We shall use the word *race* and *population* interchangeably without any social implication.)

Masatoshi Nei and Arun K. Roychoudhury, *Genetic Relationship and Evolution of Human Races*, 14 *Evolutionary Biology* 3-4 (1983) (emphasis in the original).

aggregate of characters which individually and collectively serve to distinguish them from the individuals in all other groups.”¹⁷ While some scientists have called these groups races, Montagu asserts that the existence of human races ought not to be assumed: it must be proved.¹⁸

In a similar vein, Professor Jonathan Marks has argued that:

Human races, whatever they are conceived to be, cannot be objectively limited in space; to a large extent membership within them is culturally rather than biologically defined. We don't know how many there are, where to draw the boundaries between them, or what those boundaries and the people or places they enclose would represent. Human biological variation, instead, is gradual and continuous. Populations from different parts of the world are obviously often distinguishable from one another as they represent end points of a continuum. Given that race has little biological meaning for humans, we are left with populations.

Human populations differ, and often differ from one another on the average in some particular biological characteristics. In some cases the differences are constitutional and genetic; in others they are not. The social differences that often exist between human groups have served to exaggerate their biological differences.¹⁹

Indeed recently, two independent scientific studies have sought to furnish a blueprint of the human genome, and have come to the somewhat startling conclusion that human beings are, at the cellular level, ninety nine and nine tenths per cent (99.9%) the same!²⁰ Dr. Craig Venter, chief researcher for one of the scientific teams has been quoted as stating: “No serious scholar in this field now considers race to be a scientific concept...It doesn't matter what the genetic trait is, there are few if any of them that are related to what society calls race or ethnicity.”²¹ Data derived from the Human Genome project strongly suggests that all human

17. Ashley Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* 102 (6th ed. Alta Mira Press 1997).

18. Taxonomic exercises in the classification of assemblages of phenotypical (external) traits characters will never succeed in elucidating the relationships of different groups of mankind to one another, [because] it is not assemblages of characters which undergo changes in the formation of the individual and the group but the single units, the genes, which are physiologically associated with those traits characters. One of the great persisting errors involved in the anthropological conception of “race” has been due to steady refusal to recognize this fact.

Id. at 104.

19. See, Marks, *supra* n. 4, at 273-74.

20. Lisa M. Krieger, *Genetic Code Doesn't Reveal Distinctions in Race*, San Jose Mercury News (Feb. 21, 2001); Mark Henderson, *Colour Irrelevant, Say Genome Researchers*, The Times (London) (Feb. 12, 2001); Rick Weiss, *Life's Blueprint in Less Than an Inch; Research: Little of Genome Makes a Human*, Wash. Post A1 (Feb. 11, 2001); *Human Genome: Analysis of Genetic Map Yields Surprises*, Am. Health Line (Feb. 12, 2001); Jack Kemp, *Genome Shows Race is Non-Existent*, Seattle Post-Intelligencer, B5 (Feb. 21, 2001).

21. Henderson, *supra* n. 20.

beings originated in Africa, and that about twenty five thousand years ago, a relatively small number of Africans emigrated to Europe and established the earliest European societies.²² A related study demonstrates that a strong probability exists that Africans also colonized East Asia between approximately thirty and ninety thousand years ago.²³ While these studies have not attracted widespread media attention, they furnish additional support for the decision of many natural scientists to abandon “race” as a concept for classifying human beings.

Despite mounting empirical evidence, strident dissenting voices exist. For example, in a relatively recent controversial work, J. Philippe Rushton, asserted that his research demonstrates that:

On more than 60 variables, people of east Asian ancestry (Mongoloids, Orientals) and people of African ancestry (Negroids, blacks) define opposite ends of the spectrum, with people of European ancestry (Caucasoids, whites) falling intermediately, and with much variability within each broad grouping. This racial matrix emerges with measures of brain size, intelligence, reproductive behavior, sex hormones, twinning rate, speed of physical maturation, personality, family stability, law-abidingness, and social organization.²⁴

Rushton’s studies have convinced him that despite initial misgivings, “the races do differ genetically, in the mechanisms underlying their behavior.”²⁵

In contemporary popular American conversation, it is not uncommon to hear terms such as the following: “white race,” “black race,” and occasionally “brown race,” “yellow race,” and “red race” to boot.²⁶ In contexts where words denoting skin tones are used with the term race (for example “white race”), race serves as a proxy for color.²⁷

Similarly, some people use the term “African American race” or “Hispanic race” as a way to describe individuals who have been classified as belonging to

22. Eric S. Lander, et. al., *Linkage Disequilibrium in the Human Genome*, 411 *Nature* 199 (2001); David L. Chandler, *Heredity Study Eyes European Origins*, *The Boston Globe* A22 (May 10, 2001); Emma Moss, *Europeans Traced to Tiny Group of Africans*, *The Record* A1 (Apr. 21, 2001); *Europeans Descended From Africans – Study a Few Hundred Just 25,000 Years Ago All It Took, Research Finds*, *Charlestown Gazette* A2 (Apr. 21, 2001).

23. Li Jin, et. al. *African Origins of Modern Humans in East Asia: A Tale of 12,000 Y Chromosomes*, 292 *Science* 1151 (2001).

24. J. Philippe Rushton, *Race, Evolution and Behavior* xiii (Transaction Pub.1995).

25. *Id.* at. xiv.

26. Tunku Varadarajan, *Madrid Students See Red Over Professor’s Views on Colour*, *Times* (Jan. 6, 1997); Teresa Poole, *Humiliating History Feeds an Obsession With Race*, *Indep.* 10 (Jan. 3, 1997); Michael Richardson, *Immigration Policy/Fearing the ‘Yellow Race’: Australia Debates How Asian It Should Be*, *Int’l Herald Trib.* (Nov. 5, 1996); William Rusher, *Should We Abandon Selection by Merit*, *Las Vegas Rev. J.*, B11 (Feb. 6, 1997) (arguing in favor of the California Civil Rights Initiative). Robert S. Boyd, *Scientists Discarding Notion of Race; Find No Biological Reality*, *The Record* A1 (Oct. 21, 1996).

27. Brace, *supra* n. 14, at 171-72.

certain groups having a common "culture." At the very least, culture involves patterns and peculiarities of individual and group life and perceptions of reality.²⁸

In addition, though less common now than in the not too distant past, the phrases "Jewish race" and even "Mohammadan race" are not foreign to the contemporary American lexicon.²⁹ Indeed, in the United States since September 11, 2001, in the minds of many Americans an ambiguous category of people exists consisting of people who "look Arab" or "middle eastern" and who profess Islam. In some people's minds such individuals have become identified as a "race."³⁰ In contemporary America, race is associated increasingly with individuals' religious and theological beliefs and practices as well as their places of birth.

As mentioned previously, race also implicates nationality. For instance, phrases like "Mexican race"³¹ still occasionally find their way into contemporary

28. For example, in his seminal work on the concept of race, Ashley Montagu states that:

If you or I, with our present genetic background, had been born and brought up among a group of Australian Aborigines, we should be, culturally, behaviorally Australian Aborigines though physically we should remain members of our own ethnic group. . . . Why? Because - and by "culture" is to be understood the way of life of a people; cultures are people's ideas, sentiments, religious and secular beliefs, its language, tools and other material products, its institutions, customs, and ideals - because culture is something that one acquires by experience, unlike one's physical appearance, which one acquires through the action, for the most part, of inherited genes, but which under the influence of culturalizing factors is subject to considerable modification. The culture of persons, as of groups, will differ according to the kinds of experience they have undergone. Montagu, *supra* n. 17, at 254.

29. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 612 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); Perea, *supra* n. 6. See also, Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English Only in the Marketplace*, 45 Am.U.L. Rev.1087 (1996); Mary J. Woodhead, Comment, *Ethnic Origin Discrimination as Race Discrimination Under Section 1981 and Section 1982*, 1989 Utah L. Rev. 741. For a thoughtful review of the legislative history of the Civil Rights Act of 1866 (42 U.S.C. § 1981, 1982) see Joseph Avanzato, N., *Section 1982 and Discrimination Against Jews: Shaare Tefila Congregation v. Cobb*, 37 Am. U.L. Rev. 225 (1987).

30. See, Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 Asian L.J.1, 12-29 (2001)(describing the racist treatment of Arab Americans and Muslims before the September 11, 2001 catastrophe); accord, Susan M. Akram & Kevin R. Johnson, "Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy": *Race, Civil Rights and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. Ann. Surv. [Am.] L. 295-326 (2002); Thomas J. Joo: *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 Colum. Hum. Rights L. Rev. 1, 32-46 (2002). This new emerging race group has experienced racism reflected in social ostracism, "hate crimes" perpetrated against them by other members of the society, and unwarranted racial profiling by some law enforcement personnel. See, Leti Volpp, *Critical Race Studies: The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575-81 (2002) (pointing out that over one thousand anti-Muslim hate crimes had been reported in the wake of September 11, 2001, and noting among other things, the inconsistency of governmental rhetoric which condemns racial profiling and government practices which implement racial profiling); Akram and Johnson, *supra* at 327-41 (describing draconian governmental responses to the September 11, 2001 attacks which effectively disregarded the civil rights of many individuals who were detained simply because of their identity rather than anything that they had done). For a discussion of the possibility that American Muslims are functionally being treated as a race see Jonathan K. Stubbs, *The Bottom Rung of America's Race Ladder: After the September 11 Catastrophe Are American Muslims Becoming America's New N.....?*, 19 J. Law & Rel. 115 (2004).

31. See, e.g., T.M. Allen, *Letter to the Editors*, Chattanooga Times/Chattanooga Free Press B6 (July 10, 2000) (commenting upon the alleged amnesia of the national media in condemning former Atlanta Braves pitcher, John Rocker, for derogatory racial language, and arguing in Rocker's defense that:

conversation. In using words like "Mexican" in conjunction with the word race the speaker sometimes attempts to identify people of common nationality. Furthermore, race is sometimes identified even with people's language - the "German race" or "the English race."³²

Similar terminology has long infiltrated United States Supreme Court jurisprudence. For example in *Ozawa v. United States*,³³ the federal district court denied the citizenship application of Takao Ozawa, who was born in Japan, lived in the United States for twenty years, raised his children here, and received most of his own education in the U.S. Ozawa appealed the decision to the Ninth Circuit Court of Appeals which requested guidance from the United States Supreme Court regarding whether Ozawa was eligible for naturalization under the relevant immigrant statutes.³⁴

Writing for a unanimous court, Justice Sutherland, noted that Ozawa was "a person of the Japanese race born in Japan;"³⁵ and that he was "clearly of a race which is not Caucasian."³⁶ The Court asserted that "a large number of the federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not deem necessary to review. We think these decisions are right and so hold."³⁷ During the course of the opinion, Justice Sutherland also stated that the framers of the original Immigration Statute of 1790 intended to:

confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny to all who could not be so classified. It is not enough to say that the framers did not have in mind the *brown* or *yellow races* of Asia. It is necessary to go further and be able to say that had these particular races been sug-

What those highly vocal New Yorkers have forgotten was their bigoted past. There was the Irish problem, then the Irish immigrated to New York, then the Russians, then the Italians, then the Polish, the Cubans, the Mexicans, and every other race in the world. There they were called spicks, whops, the "N" words that I cannot enclose here.)

32. In several recent provocative, perceptive articles, Professor Alfredo Mirande has scrutinized the relationship, among other things, between language and race, concluding that for bilingual persons, language is central to how many people identify themselves and are identified by others. In this sense, language is a proxy for race, and Mirande asserts that so called "English only" employment rules constitute unlawful employment discrimination both under the Fourteenth Amendment and Title VII. Alfredo Mirande's *En La Tierra del Ciego, El Tuerto Es Rey* ("In the Land of the Blind, the One Eyed Person is King"), 26 N.M.L. Rev. 75 (1996). In addition, see Mirande's compelling arguments regarding the exclusion of bilingual jurors in Mirande, *Now That I Speak English, No me Dejan Hablar* ("I'm Not Allowed to Speak"), 18 Chicano-Latino L.Rev. 115 (1996). See also Bender, *supra* n. 29, at 1095-1104 arguing among other things for a broader application of the common law fraud doctrine to unfair contracts affecting people whose first language is not English.

33. 260 U.S. 178 (1922).

34. Those statutes initially limited immigration to the United States to "free white persons." The original Immigration Act passed in 1790 was amended in 1870 to apply to "aliens of African nativity and to persons of African decent." *Id.* at 193.

35. *Id.* at 189, emphasis added.

36. *Id.* at 198.

37. *Id.*

gested, the language of the Act would have been so varied as to include them within its privileges.³⁸

More recently, in *St. Francis College v. Al-Khazraji*,³⁹ the United States Supreme Court ruled that a citizen of the United States who had been born in Iraq could maintain a suit alleging racial discrimination under the Civil Rights Act of 1866 (42 U.S.C. § 1981).⁴⁰ The Court noted that the Congressional debates leading to the passage of Section 1981 were “replete with references to the Scandinavian races . . . as well as the Chinese . . . Latin Spanish . . . and Anglo-Saxon races . . . Jews . . . Mexican . . . blacks . . . and Mongolians were similarly categorized.”⁴¹

In a remarkable footnote (perhaps anticipating the findings of the Human Genome Project?), the *St. Francis College* court stated that:

There is a common popular understanding that there are three major human races - Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings . . . These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part socio-political, rather than biological, in nature.⁴²

In these circumstances, the Court held that:

Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identi-

38. *Id.* at 195. (Emphasis added). *Accord, U.S. v. Thind*, 261 U.S. 204, 214-15 (1923) where the Supreme Court rejected the claim of a Hindu from India that he was a white person under the relevant immigration statutes. The Court held:

[T]he words “free white persons” are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word “Caucasian” only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white.

39. 481 U.S. 604 (1987).

40. *Id.* at 609. § 1981 states:

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

41. 481 U.S. at 612.

42. *Id.* at 610, n. 4.

able classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.⁴³

Very recently, United States Supreme Court Justice Antonin Scalia in a brief concurring opinion suggested that “In the eyes of government we are just one race here. It is American.”⁴⁴

By simply listing these examples, one is struck by how race serves as a proxy for a number of inter-related concepts: for example, color (“brown race”), culture (“African American race”), religion (“Jewish race”), nationality (“Mexican race”), and language (“English race”). As the Supreme Court in *St. Francis College* said: race encompasses “ancestry or ethnic characteristics.”⁴⁵ In contemporary American society, individuals use “race” to refer to an individual’s color, culture, religion, nationality, and language. The bottom line: race has become a term of art which many people use to describe attributes which they perceive as fundamental to one’s human identity.

Hopefully this introduction helps us get a feel for the puzzle that we call race. Section II outlines various multi-racial worldviews (“culturally structured, systematic way[s] of looking at, perceiving and interpreting various world realities”) and contrasts them with a uniracial worldview.

II

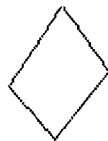
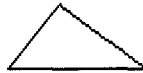
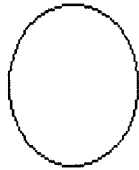
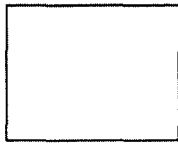
What Does a Multi-racial Worldview Look Like?

The term “multi-racial worldview” refers to the perception that the human race consists of a number of different races. Multi-racial worldviews also presume that “races” are identifiable based on color, culture, religion, nationality, and even language. Figure 1 sets forth an example of what one may call a “classical multi-racial worldview.”

43. *Id.* at 613. The Supreme Court agreed with the Court of Appeals that “§ 1981, ‘at a minimum,’ reaches discrimination against an individual ‘because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of homo sapiens.’ It is clear from our holding, however, that distinctive physiognomy is not essential to qualify for § 1981 protection.” *Id.*

44. *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

45. 481 U.S. at 613.



Multi-Racial Worldview
Chromatic Scale
Figure 1

A classical multi-racial worldview perceives the human family as comprised of distinct, separate, hierarchically arranged categories of persons.⁴⁶ These categories

46. See, e.g., Hannaford, *supra* n. 6, at 4. Professor Arnold Toynbee put it well when he said:

From the attitude which makes 'natives' out of alien human souls, it is but a short step to asserting the utter and incontrovertible inferiority of the 'natives' by branding them as the spawn of inferior races; and this is the last and the worst form of the stigmata with which the under-dog has been branded by the top-dog. In the first place, it is an assertion of the under-dog's nullity as a human being without any qualification whatsoever. In the second place, this racial dichotomy of Mankind differs from all the religious, cultural, and politico-economic dichotomies alike in fixing a gulf that is wholly and permanently impassable. In the third place, the racial stigma is unique in singling out for its criterion of distinction be-

are distinguished primarily by physical characteristics including skin tones, facial structure, lip and nose architecture, as well as the length, color and texture of the person's hair.

At least since the late 18th century, the classical multi-racial paradigm has asserted that persons of extremely fair complexion from the European continent (white persons) are at the top of the multi-racial pecking order and that individuals of extremely dark complexion, particularly from Equatorial Africa, are found at the bottom of the totem pole.⁴⁷ Between the two extremes of the hierarchy, one finds individuals of intermediate skin colors, as well as other external features like facial architecture, eye color, and the like.⁴⁸

tween one hypothetical kind of human being and another the most superficial, trivial, and insignificant aspect of human nature that could be selected for this inauspicious purpose.

In practice, in the modern world, the cultural, politico-economic, and racial criteria of inferiority have become intertwined, the racial hypothesis having been deduced from the illusion of cultural superiority which the Western Society—and especially its English-speaking representatives—entertained in its encounters with the non-Western civilizations. Racial and cultural arguments reinforce each other with insidious power, for the racist will be confirmed in his prejudice whether he deduces racial inferiority from the primitiveness of a culture, or whether he sees this primitiveness as an example of an inferiority deriving from the 'plain facts' of racial differentiation. In either case it is clear that a racist stigma is readily combined with any of the other stigmata of inferiority. The vicious effects of this most heinous of moral crimes scarcely need, unhappily, to be pointed out today: within living memory racialism has been responsible for the physical extermination of many million racial *Untermenschen* in the Western Society, and it is still responsible, at this very moment, for the physical and spiritual oppression of the black races by the white races throughout the world.

Arnold Toynbee, *A Study of History* 436 (Oxford U. Press 1972).

Similarly, in the North American context, Professor Audrey Smedley has argued that:

By the early decades of the nineteenth century, the race concept in North America contained at least five analytically ascertainable ideological ingredients . . .

The first and most basic was a universal classification of human groups as exclusive and discrete biological entities....A second element...was the imposition of an inegalitarian ethos that required the ranking of these groups....A third element of North American race ideology was the belief that the outer physical characteristics of different human populations were but surface manifestations of inner realities, for example the cognitive linking of physical features with behavioral, intellectual, temperamental, moral and other qualities....A fourth element was the notion that all of these qualities were inheritable - the biophysical characteristics, the cultural or behavioral features and capabilities, and the social rank allocated to each group by the belief system itself. Finally, perhaps the most critical element of all was the belief that each exclusive group (race), so differentiated, was created unique and distinct by nature or by God, so that the imputed differences, believe fixed and unalterable, could never be bridged or transcended.

Smedley, *supra* n. 3, at 28.

47. See e.g., Smedley, *supra* n. 3, at 19-30; Montagu, *supra* nn. 17-18; John Hope Franklin and Alfred Moss, Jr., *From Slavery to Freedom: A History of African Americans* (7th ed., Knopf 1994); Winthrop Jordan, *White Over Black: American's Attitudes Toward the Negro, 1550-1812* (U. N.C. Press 1968).

48. For a thoughtful analysis of the role of "color" in responding to oppressive societal conditions flowing from racism see, K. Anthony Appiah and Amy Gutmann, *Color Conscious: the Political Morality of Race*, 110-117 (Princeton U. Press 1996). See also, Leonard M. Baynes, *Who is Black Enough for You: An analysis of*

Moreover, some individuals who adopt a multi-racial perspective, implicitly and explicitly not only believe that white people are superior to all people of color, but also that European culture is superior to cultures of Asia, Africa or Latin America, that Christianity is superior to Judaism, Islam or other religions, that American or western European nationalities are superior to nationalities of other countries, and that English language is superior to Spanish, Chinese and other languages.⁴⁹

In the American legal context, the classical multi-racial worldview translated itself into American constitutional law decisions like *Scott v. Sanford (Dred Scott)*⁵⁰ in which the Supreme Court bluntly stated:

They had for more than a century before been regarded as *beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to*

Northwestern University Law School's Struggle Over Minority Faculty Hiring, 2 Mich. J. Race & L. 205 (1997).

49. For classic expositions and defenses of a hierarchical multi-racial perspective see, 1 Houston Stewart Chamberlain, *Foundations of the Nineteenth Century* 394-578 (John Lees trans. 1977) (1899); Thurman Rice, *Racial Hygiene: A Practical Discussion of Eugenics and Race Culture* 258, 368-69 (MacMillan Co. 1929) (discussing the evils of interracial familial relations and other "ugly realities" confronting white persons); Francis Galton, *Hereditary Genius: An Inquiry into Its Laws and Consequences* 393-415 (World Publ. Co. 1972) (furnishing an interesting quasi-scientific discussion of the supposed intellectual and related abilities of various races); and Joseph A. Gobineau, *Selected Political Writings*, 134-38 (Michael D. Biddiss ed., London Jonathan Cape 1970) (arguing that three races exist: black, yellow and white, and that whites are the superior race with the yellow race second in rank and blacks "at the foot of the ladder."). In his wide ranging discourse on topics including race, culture and history, Houston Stewart Chamberlain (whose writings later profoundly influenced many American racists as well as Adolf Hitler) put it this way:

Certain anthropologists would fain teach us that all races are equally gifted; we point to history and answer: that is a lie! The races of mankind are markedly different in the nature and also in the extent of their gifts, and the Germanic races belong to the most highly gifted group, the group usually termed Aryan. Is this human family united and uniform by bonds of blood? Do these stems really all spring from the same root? I do not know and I do not much care; no affinity binds more closely than elective affinity; and in this sense the Indo-European Aryans certainly form a family...Physically and mentally the Aryans are pre-eminent among all peoples; for that reason they are by right, as the Stagirite expresses it, the lords of the world.

Chamberlain, *supra* at 542.

The classical multi-racial worldview also infiltrated popular literature as reflected for instance in Rudyard Kipling's classic poem, *The White Man's Burden*:

Take up the White Man's burden -
Send forth the best ye breed -
Go bind your sons to exile
To serve your captives' need;
To wait in heavy harness
On fluttered folk and wild -
Your new-caught, sullen peoples,
Half devil and half child.

Rudyard Kipling, *The White Man's Burden* (McClure's Magazine 1899), reprinted in Rudyard Kipling, *The Five Nations* 79 (Methuen & Co. 1903).

50. 60 U.S. 393 (1857).

slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men of every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.⁵¹

The Supreme Court in essence viewed African Americans as non human chattels.

Following the Civil War, the Thirteenth Amendment abolished slavery and the Fourteenth Amendment recognized that native born blacks were not chattels but American citizens. In this context, *Plessy v. Ferguson*⁵² represented progress. Despite endorsing state sponsored segregation expressed in the pernicious doctrine of “separate but equal,” *Plessy* embodied a grudging acknowledgment that blacks had escaped *Dred Scott*’s teaching that they were merely legal chattels. Nevertheless, as Justice Harlan perceptively stated in his incisive dissenting opinion in *Plessy*, the real import of the segregation statutes was:

[N]ot so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.⁵³

In essence the State of Louisiana had prescribed a legal “pecking order” which separated (and ranked) individuals along color lines.

Moreover, not only did governmental bodies prescribe a societal pecking order through racist laws, but Congress also adopted discriminatory policies to ensure that European Americans would be given a multi-generational advantage in efforts to accumulate material wealth. One brief example involves federal land grant and housing policies. In 1850, Congress passed legislation granting nearly three million acres of federal lands explicitly to white settlers who were willing to live for four years in the Oregon Territory comprising the present states of Oregon, Wash-

51. 60 U.S. at 407 (emphasis added).

52. 163 U.S. 537 (1896).

53. *Id.* at 556-57.

ington and Idaho.⁵⁴ Likewise in 1862, the federal government again enacted legislation (the Homestead Act of 1862) which excluded blacks, Native Americans and most other people of darker colors.⁵⁵ The 1862 Homestead Act granted over twenty five million acres of federal lands almost exclusively to white settlers.⁵⁶ Of course millions of acres of land which the federal government gave to white settlers without monetary cost were owned and occupied by Indians. That was a major problem. The federal lands policy helped facilitate many government officials' goal of enriching landless whites while subjugating and virtually annihilating Native Americans.⁵⁷

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54. [T]here shall be ... granted to every white settler or occupant of the public lands, ...[who is] a citizen of the United States...now residing in said Territory...who shall have resided upon and cultivated the same for four consecutive years...one half section, or three hundred and twenty acres of land, if a single man, and if a married man...one section or six hundred and forty acres, one half to himself and the other half to his wife, to be held by her in her own right.

An Act to create Office of Surveyor-General of the Public Lands in Oregon... and to make Donations to Settlers of the said Public Lands, ch. LXXVI, sect. 4, 9 Stat. 496, 497 (1850) ("Oregon Land Donation Act"). This provision of the Oregon Land Donation Act also applied to "American half-breed Indians". Similarly, Section five of the Act provided:

That to all white male citizens of the United States ... above the age of twenty-one years, emigrating to and settling in said Territory ...who shall ... comply with the foregoing section and the provisions of this law, there shall be ... granted the quantity of one quarter section, or one hundred and sixty acres of land, if a single man; or if married, ... one half section, or three hundred and twenty acres, one half to the husband and the other half to the wife in her own right.

Id.; see also, Benjamin Horace Hibbard, *A History of the Public Land Policies* 354 (U. Wis. Press 1965); Sylvia Law, *White Privilege and Affirmative Action*, 32 Akron L. Rev. 603, 608-15 (1999) (outlining some of the invisible privileges in the United States of white skin color).

55. Homestead Act of 1862, 12 Stat 392, ch. LXXV., § 1 (1862).

56. The Homestead Act of 1862 excluded blacks because it was limited to persons who were American citizens or who had filed necessary documentation to become citizens. It was impossible for blacks to establish American citizenship because *Dred Scott* had held that blacks were not, and could not be citizens under the Constitution. *Scott v. Sanford*, 60 U.S. 393 at 406-27 (1857); see also, Samuel Eliot Morison, 2 *The Oxford History of the American People*, 454 (Signet 1972 and Am. Philological Assn. 1965) (discussing the scope of land grants under the Act during the Civil War).

57. For an excellent historical overview of ways in which many members of western elite circles perceived and reacted to American Indians see, Robert Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford U. Press 1990). See also, Vine Deloria, Jr., *The Evolution of Federal Indian Policy Making, in American Indian Policy In The Twentieth Century*, 239-56 (Vine Deloria, Jr., ed., U. Okla. 1985) (outlining among other things, some American government legal responses to Native Americans); David Wilkins and R. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* 19-63 (U. Okla. 2001) (presenting a thoughtful historical overview of European and American legal thinking regarding property rights in land which Native Americans had possessed for centuries and which Europeans mysteriously "discovered"); Carl H. Johnson, *A Comedy of Errors: Why John Baker is Only a Tentative First Step in The Right Direction*, 18 Ak. L. Rev. 1 (2001) (providing helpful historical information and discussing Alaskan Native American courts' jurisdiction versus that of Alaskan state courts); Eric Kades, *The Dark Side of Efficiency: Johnson v. McIntosh and the Expropriation of American Indian Lands*, 148 U. Pa. L. Rev. 1065 (2000) (setting forth how American law and policy was directed towards obtaining Indian lands as cheaply as possible - by fair means or foul).

In a similar vein, President Andrew Jackson candidly acknowledged that:

Our ancestors found [Native Americans] the uncontrolled possessors of these vast regions. By persuasion and force they have been made to retire from river to river and from mountain to mountain, until some of the tribes have become extinct and others have left but rem-

Segregated federal land and housing policies were not limited to the nineteenth century, for in more recent times, European Americans' legally entrenched material advantages were multiplied through policies of the Federal Housing Administration (FHA). Specifically, for nearly thirty years following its inception in 1934, the FHA refused to make housing loans to blacks who wanted to move to new developments in the suburbs. The FHA's official policy was reflected in its *Underwriting Manual* which stated "if a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes," and to maintain segregation, the federal agency recommended "subdivision regulations and suitable restrictive covenants."⁵⁸

While the FHA was using federal tax revenues to enforce segregationist policies against blacks, the FHA loaned taxpayer money to whites who wanted to escape the central cities to enjoy a suburban life of better schools, jobs and other opportunities. By maintaining segregated neighborhoods, the federal government allowed millions of whites to realize the American dream of owning a new home and sending their children to better schools while simultaneously confining many blacks and other people of color to ghettos in which their choices involved renting or attempting to repair aging homes.⁵⁹ In their classic work on wealth inequality along America's color line, Oliver and Shapiro point out:

One infamous housing development of the period - Levittown - provides a classic illustration of the way blacks missed out on this asset accumulating opportunity. Levittown was built on a mass scale, and housing there was eminently affordable, thanks to the FHA's and VHA's accessible financing, yet as late as 1960 "not a

nants to preserve for awhile their once terrible names. Surrounded by the whites with their arts of civilization, which by destroying the resources of the savage doom him to weakness and decay...if they remain within the limits of the States...

Andrew Jackson, First Annual Message to Congress, Dec. 8, 1829, in *II Messages And Papers Of The Presidents, 1789-1902*, 456-9 (James D. Richardson, ed. 1903). Jackson shortly thereafter proposed and Congress enacted the Indian Removal Act, 4 Stat. 411-12 (1830) which resulted in the large scale forced removal of Indians from the southeastern United States to present day Oklahoma.

Unfortunately, despite many commendable achievements, American governmental officials have also abused their authority and dispossessed members of other disadvantaged groups. See e.g., Ronald Takaki, *Strangers From A Different Shore* 392-96 (Little, Brown & Co. 1989) (describing among other matters, the forced internment of many Japanese American citizens and the virtual confiscation of nearly all their material possessions); Malcolm Ebreight, *Land Grants and Lawsuits in Northern New Mexico* 34-50 (1994) (analyzing American law and policy resulting in Mexican American citizens losing vast tracts of land to the United States government and to their anglo neighbors); see, *U.S. v. Sandoval*, 167 U.S. 278 (1897) (ruling that land held in common by a pueblo under Mexican law passed to the United States under the Treaty of Guadalupe Hidalgo thereby establishing precedent by which millions of acres of land held primarily for the common benefit of Mexican American pueblo residents were transferred to the United States).

58. See, *Underwriting Manual*, quoted in Melvin Oliver and Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality*, 18 (Routledge 1995).

59. See Oliver and Shapiro, *supra* n. 58, at 17-18, 39-41, 136-51. See also, Oliver W. Hill, Sr., *The Big Bang, Brown v. Board of Education and Beyond: The Autobiography of Oliver W. Hill, Sr.* 262 (Jonathan K. Stubbs ed., Four-G Publ. 2000).

single one of the Long Island Levittown's 82,000 residents was black.”⁶⁰

The appreciation of real estate in the 1970's only exacerbated the government mandated inequalities of the preceding decades. In America, ownership of residential real estate constitutes a major source of familial wealth; accordingly, it is not surprising that some economists estimate that the current generation of blacks will lose eighty-two billion dollars due to housing discrimination.⁶¹

The inability of people of color to accumulate material wealth, in part because of laws reflecting conscious and subconscious racist attitudes, was part of the rationale for affirmative action programs. Professor Lester Thurow framed the issue well:

Imagine a race with two groups of runners of equal ability. Individuals differ in their running ability, but the average speed of the two groups is identical. Imagine that a handicapper gives each individual in one of the groups a heavy weight to carry. Some of those with weights would still run faster than some of those without weights, but on average, the handicapped group would fall farther and farther behind the group without the handicap.

Now suppose that someone waves a magic wand and all of the weights vanish. Equal opportunity has been created. If the two groups are equal in their running ability, the gap between those who never carried weights and those who used to carry weights will cease to expand, but those who suffered the earlier discrimination will never catch up. If the economic baton can be handed on from generation to generation, the current effects of past discrimination can linger forever.⁶²

Stated somewhat differently:

60. Oliver and Shapiro, *supra* n. 58, at 18.

61. *Id.* at 151. Similar examples of discriminatory governmental policies include the Social Security Act of 1935 which for decades excluded many people of color who were agricultural workers and domestics. The law hobbled the efforts of these hard working, long suffering individuals to care for themselves and accumulate a material legacy to transfer to their posterity. *Id.* at 38. Likewise, in the field of education, following World War II, many veterans took advantage of the G.I. Bill to seek further academic and vocational training. For black GIs, the bitter reality was that the doors of segregated colleges and universities throughout many states in the United States remained shut; while in other parts of the nation, “elite schools” enforced miserly unofficial quotas to keep their numbers (as well as those of other outcasts, like Jews) at token levels. In addition, as is common knowledge, the welfare system has discouraged impoverished people from accumulating sufficient wealth to become independent financially. One must divest oneself of nearly all material assets to qualify for benefits. This encourages and perpetuates dependency. *Id.* at 41-42.

62. Lester Thurow, *Affirmative Action in a Zero Sum Society*, in *From Different Shores: Perspectives on Race and Ethnicity in America* 235, 240 (Ronald Takaki, ed., 2d ed. Oxford U. Press 1994).

What is often not acknowledged is that the accumulation of wealth for some whites is intimately tied to the poverty of wealth of most blacks. Just as blacks have had “cumulative disadvantages,” whites have had “cumulative advantages.” Practically, every circumstance of bias and *discrimination* against blacks has produced a circumstance and opportunity of positive gain for whites. When black workers were paid less than white workers, white workers gained a benefit; when black businesses were confined to the segregated black market, white businesses received the benefit of diminished competition; when FHA policies denied loans to blacks, whites were the beneficiaries of the spectacular growth of good housing and housing equity in the suburbs. The cumulative effect of such a process has been to sediment blacks at the bottom of the social hierarchy and to artificially raise the relative position of some whites in society.⁶³

A recent Pew Hispanic Center Report illuminates contemporary examples of the effects of persistent race discrimination. In 2002, the median net worth of Hispanic or Latino households was only nine per cent (9%) of that of white households; and the median net worth of blacks was approximately six per cent (6%) of that of whites.⁶⁴ In other words, whites on average have eleven times more wealth than Hispanic and sixteen times more wealth than African Americans.

The bottom line: in the United States, a neoclassical multi-racial worldview consistently maintains existing (white) European-American domination in economic life (*Adarand Constructors*), politics,⁶⁵ and other significant facets of community life.

A modified version of the classical multi-racial paradigm is reflected in Figure Two.

63. Oliver and Shapiro, *supra* n. 58, at 51.

64. Rakesh Kochar, *Pew Hispanic Center, The Wealth of Hispanic Households: 1999-2002* <www.pewhispanic.org> (accessed Oct. 19, 2004).

65. See, *Miller v. Johnson*, 515 U.S. 900 (1995) (rejecting state's plan to maximize number of black majority congressional districts to enhance prospects of desegregating Congress); cf. *Easley v. Cromartie*, 532 U.S. 234 (2001) (allowing legislators to consider race in redistricting provided race is not the predominant factor culminating in the decision of where geographical lines are drawn).

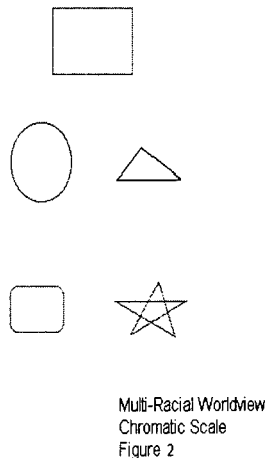


Figure Two, a modified version of the classical multi-racial paradigm,⁶⁶ suggests that in the United States a dominant racial group exists. Furthermore, among non-dominant groups there exists both relative parity *and* hierarchy. For instance, some observers may argue that Latinos/Latinas and Asian Americans are in the second tier of this hierarchy and that Native Americans and African Americans are on the bottom rung. Following the World Trade Center catastrophe, others may reasonably argue that people who are perceived as being “middle eastern” or “Arab-looking” (whatever those terms may mean!) fit somewhere near the bottom of the totem pole. Others would contend for a different ordering of the “intermediate” group(s). Regardless of the placement of the lower ranking groups, as America enters a new millennium, few individuals would argue that any group comprised of people of darker color dominates American life.

Another variant of the classical multi-racial worldview accepts the notion that distinct races of humankind exist. However, this multi-racial worldview values all races equally. Figure Three is a symbolic example of the Modern Multi-racial Worldview.

66. This figure was suggested by Derrick Walker, Esq. (University of Richmond School of Law) in a seminar on “Race, Religion and Law” offered in the fall of 1999.

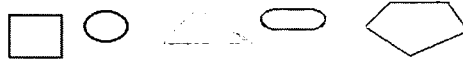


Figure 3 [Multiracial Theory: Progressives' Spectrum]

In Figure Three, each group of human beings is distinct, on the same plane, and represents a range of human diversity. A modern or progressive multi-racial worldview facilitates legal interpretations that alleviate the existing societal hierarchy based on stereotypical views of “racial supremacy”. For example, in the recent voting rights case of *Miller v. Johnson*, a multi-racial perspective undergirded a strong dissent’s argument that states can remedy the effects of past discrimination by creating voting districts comprised with majorities of people of color.⁶⁷ Such districts tend to increase the likelihood that people of color will be elected to representative bodies, and thereby enhance the desegregation of institutions like the Congress and state legislatures. In so doing, the existing electoral hierarchy based on color is mitigated.⁶⁸

Rejecting race-based pecking orders is commendable. However, one asks: are some seemingly progressive positions rooted in multi-racial worldviews which, in turn, spring from dubious origins? For example, American multi-racial worldviews evolved in part from the early English settlers who attempted to justify their previous genocide against the “wild” Irish as well as their colonization and subjugation of Native Americans.⁶⁹ These English perspectives arose in a medieval European context which included the (apparent) sympathy of many European Christians towards the attempted extermination of alleged non-Christians (specifically, Jews, Muslims, and recent converts from Judaism to Christianity) during the Spanish Inquisition.⁷⁰ The emergence of the “other” (those *not* like the members of

67. 515 U.S. 900, 931-33 (1995) (Stevens, J., dissenting).

68. While racial diversity within legislative bodies may be enhanced, some commentators have argued that concentrating voters of color in electoral districts lessens their overall influence within the political process. *New Study Claims Special Minority Voting Districts are Ineffective* <<http://www.columbia.edu/cu/record/archives/Vol21/Vol21-iss2/record2102.29.html>>; Kevin A. Hill, *Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 - 2000 Congressional Elections in the South* <<http://www.professorhill.com/pdf/redist.htm>>. (accessed Aug. 25, 2004).

69. Theodore W. Allen, *The Invention of the White Race* 52-135 (Verso 1994); Smedley, *supra* n. 3, at 53-65; Williams, *supra* n. 57, at 136-47.

70. Smedley, *supra* n. 3, at 42-71; Hannaford, *supra* n. 6, at 100-26; B. Netanyahu, *The Origins of the Spanish Inquisition in Fifteenth Century Spain*, especially 925-1092 (N.Y. Rev. of Books 1995). See also, Appiah and Gutmann, *supra* n. 48, at 41-71.

the dominant elites) in some European societies, coupled with greed, jealousy and fear, fueled the social wildfires leading to pogroms against Jewish people, the transatlantic slave trade, North American slavery, genocide against indigenous persons and European colonialism.⁷¹ For example, in a perceptive comment on the importance of “otherness” in the early evolution of western racial worldviews, Professor B. N. Netanyahu argues:

[T]he converso could still be recognized - even several generations after his ancestors' conversion - by his Jewish appearance, his habits and mannerisms, his attitudes and reactions, as well as his views on a variety of issues. In consequence, in the middle of the 15th century (and no doubt in many cases even later) the great majority of the New Christians in Spain had not yet shaken off the shadow of their past; and the result of this fact was the consciousness of their “otherness” that determined the attitude of their neighbors.

What precisely constituted the core of that “otherness” was of course not easy to determine. After decades of life in Christendom, one may assume, the convert appeared different from the Jew; yet this difference did not efface his basic Jewish features, and his otherness from Christians was felt just as keenly and generated the same hostile attitudes....In vain did the Church exhort the Christians to remember that the Jew, once converted, was spiritually reborn, that the “New Man” he put on had replaced the “Old” one, and that therefore they ought to show him brotherly affection and aid him in case of need....In consequence, that *otherness* of the converso, which was reflected by the *non*-religious side of his being, soon stamped him not only as “different” from the Old Christians but also as a “foreigner” and, as such, as an “intruder.” This brought out the Jewishness of the Marranos from another standpoint - that of the relations between an alien minority and the majority within which it lives.

Thus we touch again the direct cause, or the major root, of the deep-seated antipathy underlying the antagonism of the Old Christians toward the New. Essentially, it was the antagonism to the Jewish peoplehood that survived among the Marranos in the state of their conversion, and it is here that we find the point of affinity

71. Netanyahu, *supra* n. 70, at 991-99 (analyzing the impact of the Spanish Inquisition on western racist ideology); Smedley, *supra* n. 3, at 60-71 (critiquing English ideas of race and the role of the Spanish Inquisition in influencing western concepts of race); Jordan, *supra* n. 47, at 3-43 (discussing English persons' initial responses to and impressions of blacks); Hannaford, *supra* n. 6, at 125-26, 132-233 (outlining the evolution of the concept of race in Western European societies through the eighteenth century), Allen, *supra* n. 69; Montagu, *supra* 17, at 41-97; Franklin and Moss, *supra* n. 47; Williams, *supra* n. 57.

between the hatred of the Marranos by the Christian masses and the theoretical approaches of the racist movement.⁷²

As imported into the New World, an illustrative historical example of the practical effects of multi-racial worldviews involves America's infamous miscegenation statutes. These laws were passed primarily on the presumption that people of color were fundamentally different from and inferior to white people. Accordingly, such people were presumed unfit to marry and thereby "pollute" the "white race."⁷³ While comprehensive analysis of the historical origins, and pernicious effects of American miscegenation statutes falls outside the parameters of this paper, one is struck by the state governments' attempts to criminalize healthy human conduct (creating families), segregate the general public, and continue the exploitation (dating back to colonial times) of women of color.⁷⁴ Such women remain victims of a regime of exploitation ranging from poor employment opportunities, and sexual harassment, to rape and homicide.⁷⁵

72. Netanyahu, *supra* n. 70, at 994-95 (emphasis in the original).

73. Rice, *supra* n. 49, at 258 noting that for a white person and a black person to "cross" would be "suicide" for the white person. Such racist attitudes bear a striking resemblance to those expounded in 14th and 15th century Spain by "old Christians" as rationales against intermarriage with "new Christians" who had converted to Christianity from Judaism. Netanyahu, *supra* n. 70, at 987-97. One of the most virulent expositions of such racist ideology (only thinly disguised in some modern discourses on race) is found in Houston Stewart Chamberlain's highly influential *Foundations*:

That the Teuton is one of the greatest, perhaps the very greatest power in the history of mankind, no one will wish to deny, but in order to arrive at a correct appreciation of the present time, it behooved us to settle once for all who could and who could not be regarded as Teuton. In the nineteenth century, as in all former centuries, but of course with widely different grouping and with constantly changing relative power, there stood side by side in Europe these "Heirs" - the chaos of half-breeds, relics of the former Roman Empire, the Germanising of which is falling off - the Jews - and the Germans, whose contamination by mixture with the half-breeds and the descendants of other Non-Aryan races is on the increase. No arguing about "humanity" can alter the fact that this means a struggle. Where the struggle is not waged with cannon-balls, it goes on silently in the heart of society by marriages, by the annihilation of distances which furthers intercourse, by the varying powers of resistance in the different types of mankind, by the shifting of wealth, by the birth of new influences and the disappearance of others, and by many other motive powers. But this struggle, silent though it be, is above all others a struggle for life and death.

1 Chamberlain, *supra* n. 49, at 577-78; cf., *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down Virginia's miscegenation statutes.) For a recent comprehensive, perceptive analysis of race, sex and marriage in the private law context, see Davis, *supra* n. 6; and for a persuasive, provocative and thoughtful discussion of race reflected in the decisions of nineteenth century southern trial courts see, Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 Yale L.J. 109 (1998).

74. See e.g., A. Leon Higginbotham, Jr., *In The Matter of Color: Race and the American Legal Process: The Colonial Period*, 40-47 (Am. Philological Socy. 1978) (discussing how the early colonial law in Virginia allowed and promoted illicit sex involving white males, white females and females of color).

75. For excellent analysis of some historical antecedents of racism and sexism in the United States and especially how their pernicious effects impact the lives of (already) battered African American women see, Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African American Woman and the Battered Woman Syndrome*, 1995 Wis. L. Rev. 1003, 1030-1056 (1995). If one accepts the evidence supporting this historical perspective, one seems compelled to conclude that multi-racial perspectives are rooted implicitly if not explicitly in tenuous "scientific" analysis and blatant bigotry. See e.g., Jonathan Marks, *Science and Race*, Vol. 40, no. 2 *American Behavioral Scientist* 123 (1996); Hannaford, *supra* n. 6, at 4. In passing one notes that while "race" continues to be revealed as a category lacking scientific support, the term is still fre-

This brief historical overview suggests that while supposedly recognizing human diversity, multi-racial theory inevitably stigmatizes it. Implicitly multi-racial models assume that human beings are not fundamentally one human family. In fact most multi-racial worldviews presume that we are a menagerie of competing groups, some of whom are inherently better than others.

In global contexts, multi-racial worldviews have influenced international law. For instance, international human rights instruments reflect multi-racial worldviews. The International Convention on the Elimination of All Forms of Racial Discrimination (“Race Convention”) says: “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among *all races*. . .”⁷⁶ By using the phrase “all races,” the drafters of the Race Convention indicated that they thought that the human family was comprised of multiple races. Similarly, the Race Convention also says: “Each State Party undertakes to encourage, where appropriate, integrationist *multiracial* organizations and movements and other means of eliminating barriers between *races*.”⁷⁷

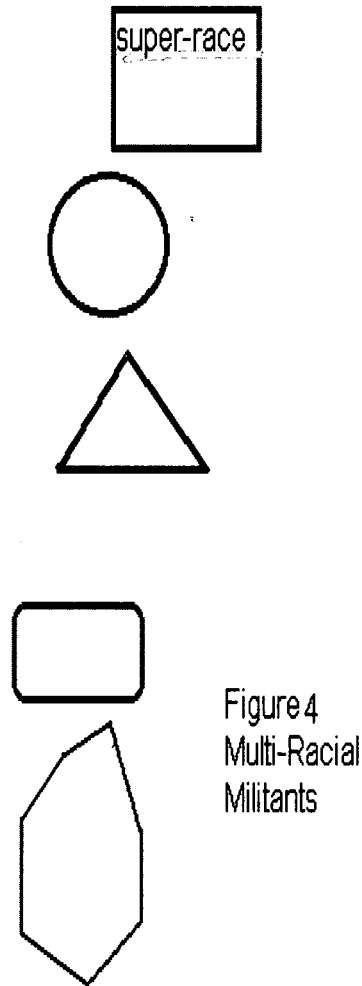
The abolition of racist practices and ideology are goals fundamental to the Convention. In light of the pervasive carnage flowing from so called racial conflicts, such goals should be embraced globally. Nevertheless, the Race Convention accepts the controversial premise that the human family is divided into a number of races. How far can an international treaty premised on a multi-racial worldview contribute to humans moving from widespread chaos to increasing community? Stated differently, to what degree does a multi-racial worldview undermine the efficacy of the Race Convention? While these issues are important, in depth analysis of them falls outside the ambit of this article.

During the 1930's and 1940's an especially militant multi-racial worldview emerged and was embraced by millions of Adolf Hitler's followers inside and outside of Nazi Germany. Figure Four depicts militant multi-racial theory which like all multi-racial theories, suggests that a number of races exist.

quently used in matters involving health and related concerns. For instance, in a recent publication on hypertension, the publisher stated “According to the California hypertension surveys, blood pressure for young Japanese men ages 18 to 49, is slightly higher (19.2 percent versus 15.0 percent) than that of other *races*, except African-American. Japanese men over 50 experience slightly lower rates than whites.” (emphasis added). Glen E. Farr, *Continuing Education: Taking Control: Understanding Blood Pressure*, Apr.1, 1997, at 19. Here race seems virtually synonymous with culture, nationality or perhaps ethnic group.

76. International Convention On the Elimination of All Forms of Racial Discrimination, *opened for signature Mar. 7, 1966*, art. 2(1), 660 U.N.T.S. 195 (hereafter “Race Convention”) (emphasis supplied). The Race Convention entered into force as to the nations ratifying it on January 4, 1969.

77. *Id.* Art. 2(1)(e) (emphasis added).



At the very top of the hierarchy of the militant multi-racial worldview there is a super race. The super race is reflected in the rectangular symbol at the top of the hierarchy. That rectangle is divided in two, suggesting that among the superior race, there is a super elite.

Today Hitler is dead; but his ideology is not. White supremacist groups in nations including the United States, the United Kingdom, France, Germany, the Czech Republic and Canada are preparing to physically annihilate people of color and religious minorities, especially Jews.⁷⁸

In the United States, hate crimes⁷⁹ have been perpetuated against people of color, members of minority religions, and even against members of the larger white

78. See, Raphael S. Ezekiel, *The Racist Mind: Portraits of American Neo-Nazis and Klansmen* (Viking Press 1995).

79. Over thirty five states and the District of Columbia have hate crime legislation. While definitions of "hate crime" vary among jurisdictions, a relatively representative example of the meaning of hate crime is found in

Christian community. For instance, the Federal Bureau of Investigation reported that in 2002, in the United States, there were nine thousand two hundred and twenty two (9,222) victims of hate crimes. Blacks constituted the largest societal group experiencing hate crimes;⁸⁰ and whites comprised the second largest victim group. The F.B.I. defined hate crimes as criminal activities “motivated in whole or in part, by the offender’s bias against a race, religion, disability, sexual orientation, or ethnicity/national origin.”⁸¹

The F.B.I.’s report also pointed out that a shocking number of anti-Jewish hate crimes were committed; there were one thousand and eighty four (1,084) victims of

The Violent Crime Control and Law Enforcement Act of 1994, 28 U.S.C. section 994 which provides:

In this section, 'hate crime' means a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.

80. Federal Bureau of Investigation, *Crime in the United States 2002*, 5 (2003) (“F.B.I. Report”). Furthermore, according to one report, in 1996 racist militias spent an estimated \$100,000,000 on explosives, weapons, and survival gear. Earl O. Hutchinson, *Wave of Hate Crimes Hit U.S.: Other States Should Follow Sheriffs, L.A.P.D.’s Lead in Responding to Racially Motivated Violence*, Daily News of L.A. V3 (Nov. 9, 1997). Hutchinson’s report stated that these organizations conducted “‘preparedness expos’ in six cities that drew thousands of participants, visitors and dozens of exhibitors.” This Los Angeles Daily News article also noted that:

At last count, these groups had at least 250 web sites, chat rooms and mailing lists. They are jammed with the standard racist articles, slogans, messages and letters.

In a six month period from July 1996, the Imperial Klan, one of several splintered Klu Klux Klan factions, received more than 70,000 hits on their web sites.

Id. See also, Scott Shepard, *Clinton to Target Hate Crimes*, Atlanta J.& Const. A14 (Nov. 9, 1997) (discussing in part the activities of white supremacists like skinheads and members of the militia movements, some of whom see themselves as “the front line troops in the coming racial apocalypse” (quoting Professor Arthur Gipson of Miami University in Ohio). *Id.*

The internet is proving a fertile ground for the recruitment of young people into neo-Nazi, Ku Klux Klan, and similar white supremacist organizations. According to the Southern Poverty Law Center, in the last few years the number of race hate oriented websites has increased from one to over a hundred and sixty. Intelligence Report, *Reevaluating the Net: A Growing Consensus of Experts Finds that Discussion Groups, not Websites are where Cyber-extremism Really Flourishes*, Southern Poverty Law Center, Summer 2001, <<http://www.splcenter.org/intelligenceproject/ip-index.html>> (accessed Aug. 30, 2004); Robert Marquand, *Hate Groups Market to the Mainstream*, Christian Science Monitor 4 (Mar. 6, 1998); Kevin Sack, *Hate Groups in U.S. Are Growing Report Says*, N.Y. Times A10 (Mar. 3, 1998). For better or worse, the worldwide web is now serving as a pathway for the worldwide dissemination of words of peace *and* destruction. For instance, indications exist that some individuals involved in the neo-Nazi movement are shifting attention from websites to chat rooms and other more personal venues.

81. In the FBI’s report, hate crime “victims” were defined as including “a person, business, institution or society as a whole.” F.B.I. Report *supra* n. 80, at 6. In a similar vein, in 1996, the California Attorney General’s report regarding hate crimes in California also suggested that, second to African Americans, white people were the most likely group to suffer racist crimes. Indeed, in 1992, following a decision by a jury that four European American male police officers were not guilty of criminal activity when they beat and almost killed an unarmed African American civilian (Rodney King), massive civil unrest broke out in Los Angeles, resulting in dozens of deaths and almost a billion dollars in property damage. At the height of the violence, one unsuspecting white truck driver, Reginald Denny, was yanked from his vehicle, kicked, punched and nearly murdered by a small group of African American men. Denny was a scapegoat and his atrocious beating (which was captured on videotape) prompted an outpouring of anger, shame, and horror at the seeming unending cycle of violence.

anti-Jewish bigots.⁸² The F.B.I. chose to categorize these crimes as religion based hate crimes; however, the classification is controversial for many reasons, not the least of which is that while many Jewish people do not perceive themselves as constituting a race, many racists do.⁸³

Illustrative examples of hate crimes in the United States, in the recent past, include a gunman walking into a Jewish community center and gunning down five persons, four of whom were children.⁸⁴

Contemporaneous with this shooting, James Byrd, an African American man in Jasper, Texas, was shackled to the back of a pick up truck by three white men and dragged at high speed along the highway until his head and one of his arms were ripped from his body.⁸⁵ Similar racist murders include the beheading and burning of another African-American man by two of his European-American associates in Virginia,⁸⁶ the cold-blooded murder of an African man by an European-American skinhead at a bus stop in Colorado,⁸⁷ and the vicious butchering of an Asian-American in California.⁸⁸ These atrocities occurred contemporaneously with the burning of scores of isolated, rural houses of worship, and a constant drum beat of white supremacist propaganda by all white militias preparing for the inevitable "race war."

82. *Id.* at 9.

83. A number of challenging issues arise: Should the crime be categorized according to the perceptions, intent, and behavior of the offender? Should the victim have the final say on how she identifies herself? How does one classify a heinous act which exceeds the usual parameters of flexible but relatively rational categories (like "religion"), and ventures into the realm of race? In depth consideration of these matters, intriguing as they are, falls outside the scope of this exploratory article.

84. Rene Sanchez and Cassandra Stern, *Gunman Wounds 5 at Summer Camp: Police Identify Suspect; 3 Children Shot*, Wash. Post A1 (Aug. 11, 1999). Teresa Mask, *Memorial Service a Call to Action: Asian Americans Vow to Battle Against Hatred*, Chi. Daily Herald 8 (July 16, 1999); Edward Walsh, *Gunman Fires at Minorities in Illinois; Black Ex-Coach dies, Six Orthodox Jews are Wounded in Spree*, Wash. Post A1 (July 4, 1999). Some material in this section is adapted from Jonathan K. Stubbs, *The Bottom Rung of America's Race Ladder: After the September 11 Catastrophe Are America's Muslims Becoming America's New N.....s?*, 19 J. Law & Rel. 115 (2004).

85. Thomas Fields-Meyer, et. al., *One Deadly Night: Deep in the Woods of East Texas, James Byrd Died a Terrible Death, Leaving a Town and a Nation in Shock*, People 46 (June 29, 1998); Michael Dorman, *Road to Hate, Raw Racism, Chance Lead to Brutal Crime in Texas*, Newsday A7 (June 29, 1998).

86. Diane Struzzi, *Judge Okays Psychologist to Evaluate Man Charged in Burning, Beheading! National Attention has Focused on the Possible Racial Angle*, Roanoke Times C4 (Dec. 13, 1997); Arlene Levinson, *Was Murder a Lynching: Racial Overtones to Heinous Killing*, Newsday A8 (Aug. 15, 1997); Diane Struzzi, *Slaying Puts Rural County in National Spotlight: Killing has Drawn the Attention of Big-City Newspapers, the FBI and Civil Rights Groups*, Roanoke Times (Aug. 5, 1997). In July, 1997, Garnett "G.P." Johnson (an African-American man) spent part of a night celebrating the birthday of a mutual acquaintance with several of Johnson's European-American associates, two of whom later took him outside into the yard of the house, doused him with gasoline, set him on fire and chopped off his head. Both of Garnett's killers were subsequently convicted of the murders. See, Sylvia Moreno, *Jury Convicts Man in Virginia Beheading Case: Defendant Found Guilty of First Degree Murder in Slaying Black Handyman*, Wash. Post B1 (Nov. 6, 1998).

87. Fred Brown, *Clinton: Don't Tolerate Hate! President Meets Officer's Widow on Denver Visit*, Denv. Post A1 (Nov. 23, 1997), discussing in part the slaying at a bus stop of Oumar Dia, a West African refugee by self-styled white supremacist skinheads. Dia was murdered in November, 1997.

88. Scott Shepard, *Clinton to Target Hate Crimes*, Atlanta J.& Const. A14 (Nov. 9, 1997). Shepard, *supra* n. 80 The victim of the attack, Thien Nih Ly, was attacked and murdered while skating on a tennis court in Tustin, California in January, 1996.

Today, in the United States, neo-Nazis continue soliciting and training “race warriors.”⁸⁹ In the aftermath of September 11, the United States government essentially resorted to racial and linguistic profiling to exclude many Muslims from immigrating to this country;⁹⁰ the government has not however, taken any discernible steps to end foreign reinforcements to neo-Nazi ranks by racially or linguistically profiling immigrants from countries with growing neo-Nazi organizations like the United Kingdom, Canada, Germany, Austria, Russia and the Czech Republic. This lack of governmental response is striking given the metastasis of a global racist movement manifesting itself in violence against people of darker colors in these countries.

Certainly, in America, the societal waters involving race are troubled. However, we are *not* alone; other nations of the West have experienced similar outbreaks. In the spring and summer of 2001, a series of riots rocked the United Kingdom. Pitched battles between British citizens of English descent versus Britishers of South Asian ancestry erupted in the cities of Bradford, Oldham, Leeds and Burnley.⁹¹ The riots left many persons (including law enforcement personnel) injured, many others were arrested, and hundreds of businesses and residences were damaged.⁹² Commentators have posited various reasons for the calamities including politicians’ inflammatory statements disparaging immigrants,⁹³ conflict among working class whites and people of color for decreasing numbers of jobs,⁹⁴ poor

89. See, e.g., Mark Potok, *In Sheep's Clothing: Around the Country, Radical Right Groups Are Staging 'European' Festivals in a Bid to Draw Ethnic Whites into the Movement*, 110 Southern Poverty Law Intelligence Report (2003) (discussing multifaceted attempts by the American white supremacist movement to recruit whites who celebrate European culture; Christopher Hewitt, *Understanding Terrorism in America: From the Klan to Al-Qaeda*, 126-28 (Routledge 2002) (suggesting that some racist attacks are designed to ignite a “racial holy war”).

90. For incisive critiques encompassing (among other things) the racial profiling of Arabs, Muslims and those thought to be Arabs and Muslims see, Volpp, *supra* n. 30; Akram & Johnson, *supra* n. 30; Joo, *supra* n. 30. See also, *Civil Rights Concerns in the Metropolitan Washington, D.C., Area in the Aftermath of the September 11, 2001, Tragedies*, D.C., Md. & Va. Advisory Committees to the U.S. Com’n on Civil Rights (hereafter “Civil Rights Concerns,” evaluating the treatment of Arabs, Muslims, South Asians and others following September 11).

91. Vikram Dodd, *Pre-riot Report Admits Bradford Plagued by Race Divisions: Race Divisions Highlighted*, *The Guardian* 1 (July 10, 2001); John Mahoney, *Crisis Talks To Halt New Riots: Race Thugs Burn Burnley*, *Daily Star* 8-9 (June 26, 2001); Alfred Lee, *Asian Youths Riot on Eve of British Polls*, *The Straits Time* 3 (June 7, 2001); Melanie Phillips, *Race Riots Grow Out of the Balkanization of Britain*, *Sunday Times* (June 3, 2001); Sarah Lyell, *Riots Break Out in Second English City*, *Int'l Herald Trib.* 7 (June 7, 2001).

92. Paul Peachey, *Minister Offers to Help Fund Recovery*, *The Independent* 6 (June 26, 2001) (reporting that British Home Office minister pledged governmental assistance to help four hundred businesses damaged in Oldham riots); Sheila Jones, *Police Maintain Zero Tolerance as Tension Remains High – Oldham Riots, 21 Arrests Made but Serious Outbreaks of Violence Contained*, *Fin. Times* 2 (May 30, 2001); Jan Disley and Stephen White, *It Started as a Fist Fight ... and Became One of the Worst Race Riots We've Ever Known*, *The Mirror* 12-13 (May 28, 2001); Paul Stokes, *White Extremists Blamed for Race Riots - Police Chiefs promise 'zero tolerance' as far-Right Groups Stand Accused of Exploiting Ethnic Tension in Oldham*, *The Daily Telegraph* 10 (May 29, 2001); Pauline Hawkins, *Appeal for Calm after Riots*, *UK Newsquest Regional Press* (June 27, 2001).

93. Harry Blaney, III, *Europe's Threat from Within*, *The Moscow Times* (June 8, 2001); Sarah Lylell, *Why are You Here? Britain's Problem*, *N.Y. Times Sect. 4* at 1 (June 4, 2001); Lee, *supra* n. 91.

94. David Jones, *Apartheid Britain*, *Daily Mail* 12 (June 23, 2001); Blaney, *supra* n. 93; Ken Livingstone, *The Media have helped stoke the flames in Oldham: "The BNP was able to gain a foothold because its message was given legitimacy"*, *The Independent* 5 (May 30, 2001); Phillips, *supra* n. 91; Alice Miles, *The Ferocity Was A Surprise, But The Riot Itself Was Not*, *The Times* (May 28, 2001); Maurice Weaver, *Race Fears On Streets Of Oldham Police Seek To Prevent A White Backlash After Attack On Pensioner In 'No-Go' Area Raises Tension*, *The Daily Telegraph* 14 (Apr. 25, 2001).

police/community relations,⁹⁵ deliberate provocations of racist right wing instigators,⁹⁶ and the rise of neo-Nazi political parties in the United Kingdom and continental Europe.⁹⁷ For instance, the new European Nazis and their American counterparts like former Klansman, David Duke, continue to meet periodically to support each other financially and programmatically.⁹⁸ Accordingly, the riots in the United Kingdom were not totally unexpected in the sense that over the past several years a series of well publicized incidents seem to have created an atmosphere ripe for societal chaos.⁹⁹

95. Phillips, *supra* n. 91; Livingstone, *supra* n. 94; *Asians in Running Street Battles*, *The Herald* 2 (June 6, 2001).

96. See, T.R. Reid, *Party Stokes Racial Ire in Britain: Presence of Fringe White-Power Organization Triggers Riots in Multi-ethnic Areas*, *Wash. Post A12* (July 10, 2001); Paul Harris, *Far Right Plot to Provoke Race Riots*, *The Observer* 5 (June 3, 2001); Melanie Phillips, *They Weren't Looking For Trouble*, *Sunday Times* (June 3, 2001); David Ward, *Oldham Riots: "This Has Been Building Up For Years": Residents And Businesses Count The Cost Of Night When Long-Term Anger Flared Up*, *The Guardian* 3 (May 28, 2001).

97. Blaney, *supra* n. 93; Livingstone, *supra* n. 94; Miles, *supra* n. 94; Jones, *supra* n. 94.

98. Harris, *supra* n. 96; Martin A. Lee, *The Wandering Jew-hater: Neo-Nazi David Duke Found Many New Friends - and Even More Buyers of His Books - During His Recent Years in Europe*, 109 *Southern Poverty Law Intelligence Report* (2003) (describing David Duke's international networking with other white supremacists while living abroad).

99. For instance, some observers believe that the widely publicized beating of Walter Chamberlain, a seventy six year old white World War II veteran, helped precipitate the recent British riots. Four teenagers of Pakistani descent were charged with the offense. Adam Powell, *Town Prays for Peace: Bishop Speaks Out After Race Demo Thwarted*, *Daily Mail* 24 (May 7, 2001). In response to significant media coverage of the assault, avowedly racist organizations targeted Oldham and later other northern English cities with large Asian-British populations for demonstrations – and some say to provoke violence. See, Harris, *supra* n. 96; Livingstone, *supra* n. 94; Jones, *supra* n. 94.

Moreover in the period leading up to recent outbreaks of violence in the United Kingdom, other notorious incidents of violence along the color line had already stressed that country's social infrastructure. For instance, in London, in January, 1998, Muhammed Rafique Khan, an Asian shopkeeper, was attacked and brutally murdered by a young white man in a section of the city which has "one of the highest rates of racial attacks in Britain," and in which several people of color had been killed in recent years. Justin Davenport and Julia Hartley-Brewer, *Shopkeeper Dies After "Race Attack" Stabbing*, *Evening Standard* 5 (Jan. 8, 1998).

Khan's slaying occurred not too far from the site of a well publicized murder of a black teenager, Stephen Lawrence, whose case continues to draw attention not only because of the brutality of the attack of a gang of hooligans, but also because of the documented failure of the local police to competently prosecute Lawrence's killers. *Id.*; Bryan Catchcart, *The Mental Ghetto that Hides Racist Killings*, *Guardian* 17 (Dec. 17, 1997) (discussing the Home Secretary's publication of a report of the Police Complaints Authority investigation involving Stephen Lawrence's murder. The report of the Home Secretary identified a number of flaws in the investigation which resulted in an inability of the authorities to appropriately prosecute the killers.) See also, Alan Travis, *Fatal Flaws in Murder Inquiry*, *Guardian* 1 (Dec. 16, 1997). Without admitting negligence, the London Metropolitan Police recently settled the case with Lawrence's parents. Nick Hopkins and Vikram Dodd, *Lawrence Family Accepts Pounds 320,000 Payout from Met*, *Guardian* 2 (Dec. 20, 2000).

Contemporaneous with Lawrence's tragic death, a public inquest was held into the killing of a black musician who allegedly was burned to death by four white assailants in London. The inquest jury concluded that the death constituted homicide but that the police's failure to properly conduct the investigation made the likelihood of successful prosecution remote. Maggie O'Riordan and Terri Judd, *Met Faces New Race Row Over Killing of Black Pop Star*, *Daily Mail* 9 (Sept. 17, 1998); Nigel Rosser and Emily Sheffield, *Police Face Fury Over Blaze Killing*, *Evening Standard* 1 (Sept. 6, 1998). Although the victim told an officer the identity of one of the assailants who had set him ablaze, the police allegedly failed to write down the name of the attacker. Further, the police secured the scene many hours after the incident occurred, thereby making it more likely that evidence would be corrupted. O'Riordan and Judd, *supra*.

Indeed, more recently in the English City of Hull, police arrested a dozen men, four white and eight thought to be from Iraq in connection with a racially motivated fight between two gangs. Tom Wilkinson, *12 Arrested After Outbreak of Racial Violence*, *PA News* (July 26, 2003). Authorities believe that inter group tensions in Hull are rising because of an alleged hit and run accident in which an Iraqi asylum seeker was run over (appar-

As in the United Kingdom, in a number of countries on the European continent the social fabric seems distressingly threadbare as reflected in reports of escalating violence against Jews, Muslims, gays and Roma individuals.¹⁰⁰ For example, not long ago in Austria, an amateur photographer videotaped paramedics and a police officer taking turns standing and jumping (literally bouncing) upon the back of Cheibana Wague, an African immigrant, who had been taken into police custody after quarreling with his employer. As the paramedics and the police officer jumped on Wague's back, according to published reports, the video shows a physician standing nearby observing "with his hands in his pockets."¹⁰¹ Wague died not long afterwards.

Similarly, in neighboring Germany, on July 27, 2000, neo-Nazis bombed Duesseldorf, Germany injuring ten people, six of whom were Jewish. The Duesseldorf bombing followed by less than two months the brutal murder of Alberto Adriano, a German resident originally from Mozambique. Three neo-Nazis kicked Adriano to death.¹⁰²

The rise of racist attacks in the United States, the United Kingdom, Austria, Germany, the Czech Republic, and other western nations has not confined itself to violence between people of different hues (inter-color conflict). Some devastating and deadly attacks have involved persons of the same "color" but different nation-

ently) intentionally by one or more racist individuals.

100. See Amanda Ripley, *Seven Days of Hatred: Anti-Semitic Attacks have Been Making Headlines, But Strikes Against any Minority-Jews, Muslims, Roma, Gays-all too Common in Europe*, Time 38 (Dec. 4, 2003).

101. Katinka Mezei, *Austria Shocked by Video Showing Mistreatment of Dead African Immigrant*, Agence France Presse (July 22, 2003); Issa Mansaray, *Austria/Africa: Police Brutality Caught on Camera: A 33 year-old Mauritanian, Cheibana Wague, was Brutalised to Death By the Austrian Police, All of Which Was Videotaped*, New African (Oct. 1, 2001); *Austrian Prosecutors Probing Doctor Over Death of African Immigrant*, Agence France Press (Sept. 27, 2003).

102. Peter Finn, *German Gets Life Term for Racial Killing; Two Sixteen Year Old Skinheads also Sentenced for Murder of African Immigrant*, Wash. Post A24 (Aug. 31, 2000). A memorial erected to honor Adriano's memory was subsequently defaced as well as memorials to the victims of the Holocaust. *Opposition calls for debate on Jewish Life in Germany*, Deutsche Presse-Agentur (Oct. 10, 2000).

Legislation has been proposed to curb the rising wave of racist and anti-Semitic violence. *German MPs Back Action Against Right-Wing Extremists*, Deutsche Presse-Agentur (Mar. 30, 2001); Roger Cohen, *German Official Pessimistic About Far-Right Violence*, N.Y. Times A6 (Aug. 26, 2000); *Over 200,000 Germans March Against Neo-Nazi Violence*, supra. Terror tactics have been widely condemned. *The March of Defiance: Brummie Nazi Attack Victim Leads Protest*, Sun. Mercury (June 17, 2001) (describing a demonstration in Berlin led by a black Briton who was partially paralyzed when neo-Nazis hurled a paving stone at his automobile causing him to have an accident); *German Mps Back Action Against Right-Wing Extremists*, supra; *Over 200,000 Germans March Against Neo-Nazi Violence*, supra. Unfortunately, the extremists may be attracting more followers in part because of the notoriety that their activities have attained. See, Peter Finn, *Bad Publicity is a Boon for German Party: Leader of Far-Right Group Says Threat of Ban has Increased Interest*, Wash. Post A16 (Aug. 20, 2000).

Not too far removed from these events (temporally and geographically) in November, 1997, a Sudanese student, Hassian Elamin Abdelradi, was stabbed to death by members of a neo-Nazi skinhead group in the Czech Republic. See, A.G.B., *Investigation into the Murder of Sudanese Almost Complete*, C.T.K. Natl. News Wire (Dec. 9, 1997).

These atrocities underline the persistent attempts of militant multiracialists to destroy individual persons perceived as being outside of their group. Ian Traynor, *Neo-Nazis Set Up "No Go" Zones*, Guardian 13 (Dec. 11, 1997). In addition, the German government commissioner for foreign persons has asserted in an annual report that Neo-Nazis have set up "liberated zones" in more than twenty-five towns and cities throughout the country. Foreigners, most of whom are people of color, are forbidden to enter the liberated zones. Such zones include cafes, discos, clubs, and "even whole streets." The commissioner for foreigners concluded that this was an "alarming, apparently wide-spread and growing phenomenon."

alities. Two of the most recent well known outrages involve the nearly successful genocide of Albanians in Kosovo by the Yugoslav government and militia (and the all too predictable Albanian retaliatory atrocities following the conflict),¹⁰³ as well as ethnic cleansing in Bosnia-Hertzezoniva.¹⁰⁴ Moving beyond the confines of the west, one confronts the heart-rending genocide of Tutsi people in Rwanda.¹⁰⁵ Intolerance of difference has become an equal opportunity destroyer.

103. For instance, recently Albanians killed approximately nineteen Serbs, burned hundreds of buildings including homes and churches, displaced thousands of persons from their homes, essentially consigning them to refugee or homeless status. See, United Nations Interim Administration Mission in Kosovo, *Kosovo Ethnic Minorities Need Continuing Protection, UN Refugee Agency Warns*, (available at <<http://www.unmikonline.org/news.htm>>) (accessed Sept. 13, 2004); Stefan Wagstyl, *Kosovo Frustrations Simmering as Inter-ethnic Tensions Remain Unresolved: Leaders on both Sides are Struggling to come to Terms with two days of Violence that Shattered a Fragile Peace*, Fin. Times 9 (July 27, 2004).

It has been estimated that approximately ninety thousand Roma people living in the Kosovo region were compelled to leave their homes by the returning Albanians. *German Study Says 90,000 Gypsies Forced to Flee Kosovo* Duetsche Presse-Agentur (Sept. 7, 1999). The Roma, who are also sometimes referred to as Romany and other times (somewhat pejoratively?) as "gypsies," present a difficult classification case for persons accustomed to thinking in multi-racial categories. The Roma lived in India approximately one thousand years ago, migrated to central Europe, and reside in a number of Central European countries. *Testimony Apr. 14, 1994, Congressman Tom Lantos, Chairman Subcomm. on Int'l Sec., Int'l Org. and Human Rights* (1994) (Statement of Tom Lantos). While having many physical features associated with "whiteness" (facial architecture, hair texture, and frequently skin complexion), in many European countries, the Roma are viewed, referred to and treated as blacks. See, VV, *Skinheads sent to Prison for Attacking Romanies*, CTK Natl. News Wire (Mar. 14, 2001) (Czech court sentenced six skinheads to between twelve and sixteen months in prison for stoning and throwing beer bottles at Roma persons in a restaurant while shouting "Gypsies to the Gas Chambers, the White Race, the Black Bastards, and Nothing but Nation.") Other recent examples of skinheads assaulting and killing Roma people include two neo-Nazis brutally beating Helena Bihariova (a mother of six), and as she lost consciousness, forcing her into a frigid river where she drowned. See, R.J.C., *Law is Disgrace to Romanies Murdered by White Racists*, CTK Natl. News Wire (Oct. 7, 1998). The assailants in Bihariova's case received sentences totaling fifteen years, in part because (according to published reports), the prosecutor asserted that the victim was killed by the icy River Elbe, rather than by the men who kicked, punched and forced her into the water. This rationale caused one commentator to conclude that "For judges in the Czech Republic [to hold that a racial hate crime existed] the only substantial proof is if the attacker had shouted 'You black bastard, I'm going to kill you because of your black skin' or such-like before committing the crime." *Id.* See, R.J.C., *Romanies Say Skinhead Attacks are Now Part of Every Day Life*, CTK Natl. News Wire (Nov. 19, 1997) discussing similar attacks against Roma people living in Slovakia, including a murder in 1997, and three other homicides in 1996.

Still more recently a group of skinheads attacked a wedding party and struck the Romany bridegroom in the head with a paving stone. Literally adding insult to injury, neo-Nazis allegedly called him "a black swine." Tam, *Romany Bridegroom Ends Up in Hospital After Skinhead Attack*, CTK Natl. News Wire (Sept. 22, 2003). The United Nations Committee Against Torture has recently expressed concern about racism and xenophobia in Czech society. See, VV, *Czechs Criticized for Discrimination against Minorities*, CTK Natl. News Wire (May 15, 2001).

104. For a perceptive application of sociological principles to the Bosnian situation, and especially an articulation of the concept of sociocide (the killing of a society), see Keith Doubt, *Sociology after Bosnia and Kosovo: Recovering Justice*, 1-32 (Rowman & Littlefield 2000). For a different perception of the conflict in Bosnia, see Danielle S. Sremac, *War of Words: Washington Tackles the Yugoslav Conflict* (Praeger Publishers 1999) (arguing that due to a number of factors including manipulation of the media by groups opposed to Serbs in the former Yugoslavia, the United States government has followed an anti-Serb policy in the Balkans); for a searching critique of the role and moral responsibilities of third party bystanders to genocide generally, and more particularly to the genocide in Bosnia see, Arne Johan Vetlesen, *Genocide: A Case for the Responsibility of the Bystander*, 37 J. Peace Research 519 (2000). See also, Sandro Contenta, *A Survivor Faces Her Tormentor*, Toronto Star A10 (Feb. 23, 2004) (describing some of the challenges of peace and reconciliation in the post Bosnian war communities).

105. Moreover, published reports indicate that the late President Laurent Kabila of the Republic of Congo actively employed Nazi type hate speeches to incite his supporters against his former Tutsi allies. See, Lara Santoro, *Congo Leader Urges Nazi-Style Tactics Against Tutsis*, Christian Sci. Monitor 1 (Sept. 2, 1998).

Another multi-racial perspective is reflected in Figure Five.

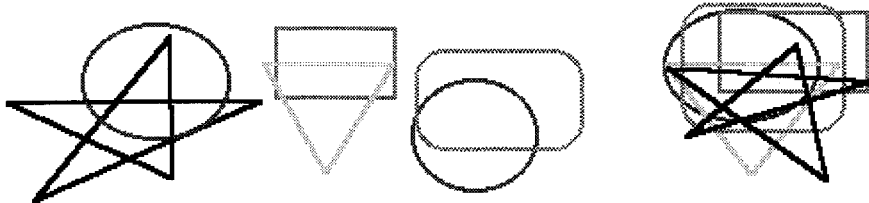


Figure 5 Multiracial Paradigm ("Mixed Race" Advocates)

Persons with this multi-racial worldview perceive human beings as a “mixture” of various groups. Figure Five includes a number of symbols like triangles, rectangles, circles ... and each symbol denotes a racial group. Starting at the left of Figure Five, and moving to the right, we see in each of the first three drawings, an overlap between two groups. Each drawing represents a human being whose identity encompasses two “racial” groups. The drawing at the far right of Figure Five depicts a mixture of a number of “races,” all reflected in one individual human being. Figure Five is representative of a “mixed race multi-racial worldview.”

A mixed race multi-racial worldview accepts the notion that human beings are comprised of many races and argues that individual humans are a composite of these various distinctive separate races).

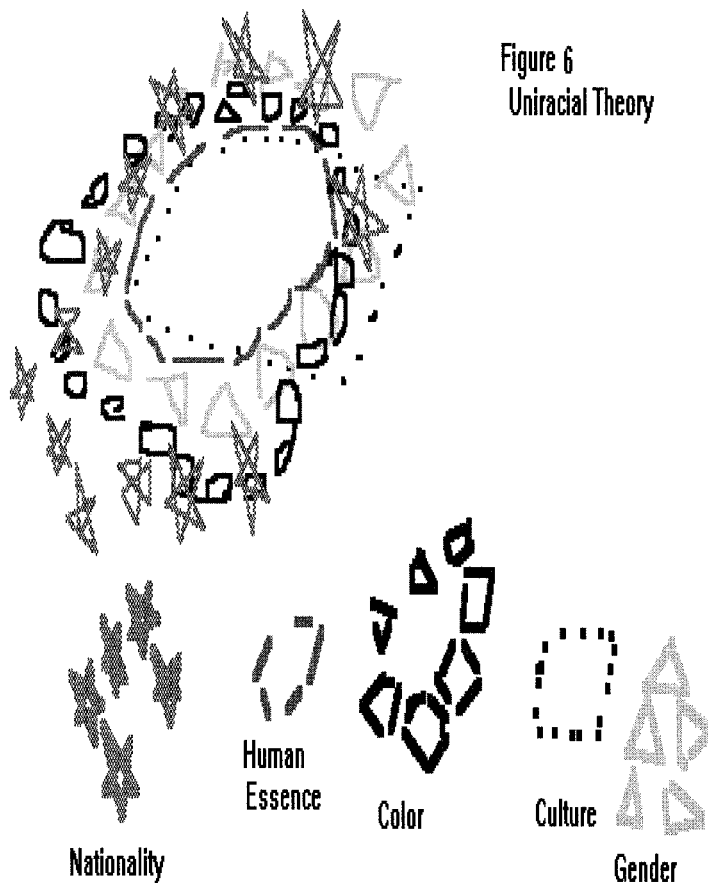
The perspective of the mixed race worldview is in part reflected in the testimony of Susan Graham, the President of “Project Race, Inc.,” who testified before the House Committee on Reform and Oversight regarding the “multi-racial” census category proposed for census forms for the year 2000.

Under the current recommendation, my children and millions of children like them, merely become “check all that apply” kids or “check more than one box” children or “more than one race” persons. They will be known as “multiple check offs” or “half and halfers.” Or as John Hope Franklin, Chairman of President Clinton’s Race Relations Commission referred to them, “half white

Negroes” and “half black whites.” They are none of the above - they are multi-racial children.¹⁰⁶

The notion underlying a mixed race multiracial worldview is that humans are a synthesis of various races.

Figure Six sets out a uniracial worldview in symbolic language.



106. H.R. Subcomm. on *Census 2000 Racial Identification, Govt. Management, Info., and Tech. of the Comm. on Govt. Reform and Oversight*, 105th Cong. (July 25, 1997) (statement of Susan Graham).

The core of the human identity is symbolized by the broken lines of a circle. For each human being, there is a distinctive physical and metaphysical essence that distinguishes that person as human. From the perspective of philosophical inquiry one would assert that each human being has an inner light, or spirit, which distinguishes that person from other life forms. Many argue this human essence has a divine origin and orientation.¹⁰⁷

Uniracial theory embraces the philosophical orientation reflected in Bishop Desmond Tutu's powerful recent book, *No Future Without Forgiveness*, which discusses the work of South Africa's Truth and Reconciliation Commission ("The Commission").¹⁰⁸ Part of the Commission's work involved facilitating the transition of South Africa from an oppressive, autocratic society to a more inclusive democracy. In negotiating a peaceful transfer of political power, leaders of various South African constituencies rejected the Nuremberg model for dealing with gross human rights violations largely because public trials would probably have led to violent unrest. (For example, such violence might have been precipitated by members of the apartheid government's South African Defense Force which remained well armed and ill disposed to see their colleagues prosecuted).¹⁰⁹

Similarly, the peace makers declined a blanket amnesty approach. Such an approach would have allowed the perpetrators of heinous acts (including torture and homicide) to obtain immunity from civil and criminal penalties without even acknowledging their horrible deeds. Stated differently it would have amounted to mandating a "national amnesia."¹¹⁰

Bishop Tutu points out that South Africans chose a "third way," which relied more on conditional amnesties to facilitate obtaining facts about the horrors of apartheid. Such amnesties provide an incentive for perpetrators of gross violations of human rights (defined as abduction, killing, torture, or severe ill treatment)¹¹¹ to make full disclosure. For example, persons who abducted or killed missing persons would be more likely to disclose the fate of such individuals if the perpetrators knew that in exchange for disclosure they would escape civil and criminal liability. Such disclosure allows victims and their families to know the truth and move on with their lives. (Provisions have been made for limited reparations as well).

Bishop Tutu identifies this approach as being "consistent with a central feature of the African *Weltanschauung* (or worldview) - what we know as *ubuntu* in the Nguni group of languages or *botho* in the Sotho languages."¹¹² Bishop Tutu describes the concept of *ubuntu* as follows:

107. See, Jonathan K. Stubbs, *Perceptual Prisms and Racial Realism: The Good News About a Bad Situation*, 45 Mercer L. Rev. 773, 793-806 (1994). One's "perceptual prism" is a way of describing how one's life experiences may influence the way one perceives, classifies, interprets, and in various ways responds to reality. *Id.* at 787-806.

108. Desmond Tutu, *No Future Without Forgiveness* (Doubleday 1999).

109. *Id.* at 25-26.

110. *Id.* at 34.

111. *Id.* at 48.

112. *Id.* at 34.

Ubuntu is very difficult to render into a Western language. It speaks of the very essence of being human. When we want to give high praise to someone we say, ‘*Yu, yu nobuntu*’; ‘Hey, he or she has *ubuntu*.’ This means they are generous, hospitable, friendly, caring and compassionate. They share what they have.¹¹³

The African worldview emphasizing *ubuntu* is similar to a uniraical worldview because both worldviews recognize the reality that: “[M]y humanity is caught up, is inexplicably bound up in [yours]. We belong in a bundle of life. We say, ‘a person is a person through other people.’ It is not ‘I think, therefore I am.’ It says rather: ‘I am human because I belong.’”¹¹⁴

Like a uniraical worldview, *ubuntu* can strengthen community:

Social harmony is for us the *summum bonum* - the greatest good. Anything that subverts or undermines this sought-after good is to be avoided like the plague. Anger, resentment, lust for revenge, even success through aggressive competitiveness, are corrosive of this good. To forgive is not just to be altruistic. It is the best form of self interest. What dehumanizes you, inexorably dehumanizes me. Forgiveness gives people resilience, enabling them to survive and emerge still human despite all efforts to dehumanize them.

113. *Id.*

114. *Id.* at 34-35. In further describing *ubuntu*, Bishop Tutu says:

A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good; for he or she has a proper self assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are.

Id. at 35.

Dr. Martin Luther King, Jr. put it this way:

It really boils down to this: that all life is interrelated. We are all caught in an inescapable network of mutuality, tied into a single garment of destiny. Whatever affects one directly, affects all indirectly. We are made to live together because of the interrelated structure of reality....[Y]ou can't leave for your job in the morning without being dependent on most of the world[.] You ... go to the bathroom and reach over for the sponge, and that's handed to you by a Pacific islander. You reach for a bar of soap and that's given to you [by] a Frenchman. And then you go into the kitchen to drink your coffee for the morning, and that's poured into your cup by a South American. And maybe you want tea: that's poured into your cup by a Chinese. Or maybe you're desirous of having cocoa for breakfast, and that's poured into your cup by a West African. And then you reach over for your toast, and that's given to you at the hands of an English-speaking farmer, not to mention the baker. And before you finish eating breakfast in the morning, you've depended on more than half of the world. This is the way our universe is structured, this is its interrelated quality. We aren't going to have peace on earth until we recognize this basic fact of the interrelated structure of all reality.

King, *supra* n. 1, at 254.

Ubuntu means that in a real sense even the supporters of apartheid were victims of the vicious system which they implemented and which they supported so enthusiastically. Our humanity was intertwined. The humanity of the perpetrator of apartheid's atrocities was caught up and bound up in that of his victims whether he liked it or not.¹¹⁵

Bishop Tutu's description of *ubuntu* suggests that a worldview can embrace perceiving, describing, and interpreting reality in a systematic way.¹¹⁶ And what's more, a worldview can also evolve into a way of life. For example, a worldview based on *ubuntu* both recognizes the practicality of forgiveness, and can lead to the act of forgiving. Viewed in this light, a worldview encompasses both a theory (an organized framework of ideas), and practice (living according to one's ideas and ideals).

One can state the matter still differently: a theory is more akin to your *clothes* whereas a worldview is like your *skin*. If one has clothes, one can relatively easily change them; however, it is much more difficult to quickly develop a completely new skin. "Uniracial theory" embraces a system (or systems) of ideas which flow from a uniracial worldview. (Whether one's behavior coincides with one's worldview may be another matter.)

A uniracial worldview is consistent not only with enlightened philosophical, theological, and humanitarian perceptions of humanity, but also with the teachings of natural scientists. At the molecular level, human beings have so much in common, that it is impossible to successfully maintain the position that there are separate species or subspecies of human beings. As noted previously, the recent findings of the Human Genome Project underline this point.¹¹⁷ In a similar vein, Professor Jonathan Marks summarized it this way:

Races are not objective or biological categories. Populations are different from one another. But races are supposed to be large chunks of humanity, and apparently our species doesn't come biologically packaged that way, despite the fact that generations of Euro-Americans have assumed so. At best it comes in lots of small bio-packages.

. . . .

115. Tutu, n. 108, at 35.

116. Cf. Smedley, *supra* n. 3, at 19 (describing a worldview as "[A] culturally structured, systematic way of looking at, perceiving, and interpreting various world realities..."). In other words, a worldview is another name for the process through which humans (in a relatively organized fashion) perceive, interpret and understand reality; and this process is largely influenced by one's cultural background and personal biography. See, Stubbs, *supra* n. 107 discussing how perception through one's personal (biographical) prism may affect decision making.

117. See nn. 20, 22, and 23, *supra* and accompanying text.

The categories we acknowledge as races are marked by any number of differences, but the biological differences between them are minimal, reinforced by social and cultural differences.¹¹⁸

In short, there is an essential genetic identity at the core of each human being which reflects our overwhelming similarities, and distinguishes us (human earthlings) from other earthlings.¹¹⁹

118. Marks, *supra* n. 4, at 274-75.

119. Former President Bill Clinton elaborated upon the theme of common human identity in a speech on the day following his final State of the Union message. Addressing the United States Conference of Mayors, President Clinton said:

I got the Congress to laughing last night when I referred to what Dr. Ladner (sp), the distinguished geneticist from Harvard, said about ... all people being genetically 99.9 percent the same. I just want to give you one more thing to think about, because we've got a pretty diverse group here. Ladner (sp) said that not only are we 99.9 percent the same, but that if you ... were to take a hundred people each in four different race groups ... a hundred African Americans, a hundred Hispanics, a hundred Irish, a hundred Jewish Americans – the genetic differences among individuals within the group are greater than the genetic differences between the groups as a whole.

[I]t's really quite stunning. The different skin color, the different characteristics that we've all developed over many thousands of years for all kinds of reasons are literally contained in one-tenth of 1 percent of our genetic makeup. And that's a statistic that I put out there on purpose, because [many members of Congress] ... thought there was a Republican gene and a Democratic gene – (laughter, applause) – and whichever party they were in, they were glad they'd got the right chip (Laughter.)

And so I hope ... you can make a lot of jokes out of this, and you can have a lot of fun with it. And the more you laugh, the more you get it. (Soft laughter.)

It seems that the former President's worldview has evolved from multiracial towards becoming uniraical. President Bill Clinton, Speech, *U.S. Conference of Mayors*, (Jan. 28, 2000) in Fed. News Service 7.

Some of the former President's previous comments regarding race indicate that at one time, his worldview was a multi-racial one. For instance in a speech before the National Association of Black Journalists President Clinton stated:

Last month in San Diego, I called upon Americans to begin a dialogue, a discussion over the next year and perhaps beyond to deal with what I think is the greatest challenge we'll face in the twenty-first century, which is whether we really can become one America as we become more diverse; whether as we move into a truly global society, we can be the world's first truly great *multi-racial*, multi-ethnic democracy.

President William J. Clinton, Remarks, *The Meeting of the National Association of Black Journalists*, (July 18, 1997) in Fed. Doc. C.H. Pol. Trans. 3 (emphasis added).

The CBS News program, *Sixty Minutes*, furnished a recent dramatic (and doubtlessly unintentional) affirmation of the former President's comments regarding genetic similarity among groups who may look very different. The Lemba people of southern Africa look phenotypically like the people of that region (dark skin, tightly curled hair, broad noses...) And have asserted for centuries that they are Jewish. Recently, through DNA testing, it was demonstrated that roughly ten per cent of the Lemba are descended from the same male as other Jewish priests. See, *The Lemba; Claims by African Black Tribe to be Jewish and Descendants [sic] of Abraham, Isaac and Jacob put to Scientific Test*, CBS News Transcripts 6 (Apr. 23, 2000); Kenneth Walker, *Genetic Evidence Seems to Point to a South African Tribe being the Descendants of Ancient Jews*, NPR Transcripts (Oct. 3, 2000).

Furthermore, the square dots around the core of the human self denote that there are various cultures and the cultures interact with one's nationality and color. These relationships impact and influence one's humanity. In addition, the triangles in Figure Six represent the gender of the individual. Gender, too, affects who the person is, how she identifies herself, and how others interact with her. What gender means in a particular time and place is in part based on societal expectations and conventions of behavior. For example, in a comprehensive thought-provoking article, Professor Julie Greenberg stated:

Gender is generally used to refer to the cultural or attitudinal qualities that are characteristic of a particular sex. Gender, as used in this instance, is socially constructed. Individuals with characteristics that are typically associated with men have a masculine gender while individuals with characteristics that are typically associated with women have a feminine gender. Most legislation utilizes the word "sex," yet courts, legislators, and administrative agencies often substitute the word "gender" for "sex" when they interpret the statutes. Despite the different meanings of the terms "sex" and "gender," they are often used interchangeably.¹²⁰

A poignant example of the elastic nature of human made categories (like gender) involves children who are "intersexual." Such children have "ambiguous or non-congruent sex features."¹²¹ Are such children, male, female, neither or both? Historically, in response to such concerns, the medical community in the United States has tended to recommend surgery to "fix the problem." Sometimes that has meant that intersexed people have had their reproductive organs surgically removed or altered while they were children.¹²² Well-intentioned surgery has resulted in tremendous emotional distress when the maturing child psychologically identifies herself with a gender significantly different than her surgically altered body. Categories like gender have often been viewed as pre-existing, definite, fixed and natural realities; in fact however, such categories may be indefinite and variable. To a significant extent, these classifications reflect questionable, even arbitrary human decision-making.

Figure Six is a work in progress. There are many more aspects of human identity that could be included in Figure 6 like language, class, religion, sexual orientation and age to mention only a few. Accordingly, there is probably no sketch that one could construct to adequately depict the multiplicity of characteristics that are arguably intrinsic to human identity. Nevertheless, despite the incomplete sketch,

120. See, Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 Ariz. L. Rev. 265, 274 (1999). (Footnotes omitted). For an illuminating analysis of sex, gender and sexual orientation, see Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and Sexual Orientation in Euro-American Law and Society*, 83 Cal. L. Rev. 3 (1995).

121. Greenberg, *supra* n. 120, at 268.

122. *Id.* at 290.

uniracial theory attempts to express our essential sameness and infinite, though relatively unimportant, differences.

The fundamental difference between uniracial theory and the multi-racial theories outlined here is this: uniracial theory suggests that every human being has an identity which distinguishes the person as being human. One's common humanity has both a material/genetic basis as well as a metaphysical/philosophical/core. Individuals have different personal attributes like nationalities, colors, cultures, and genders, but those differences are all a part of having one global identity: being human. We have unity and diversity. We share *ubuntu*. We are one family --literally soul brothers and sisters.

Experience teaches us that families (however defined) manifest significant diversity among siblings and other relatives. Similarly, uniracial theory also recognizes that on a global scale, we are not all exactly alike. Having said that, you can nevertheless tell that we are derived from the same place; and that our commonality can, if we choose, link us in a constructive "tie that binds."

Because uniracial theory starts from the premise that we are all part of one human family, psychologically the distance between human beings is reduced. It's not a matter of us and them. **We are all us.** Being all us means that we can see our similarities (just as members of a family do) and at the same time recognize that differences exist.

Uniracial theory attempts to move us away from artificial pecking order worldviews. Historically, such worldviews (the Nazis being the classic modern example) facilitated "demonizing the other." In contrast, uniracial theory undergirds an egalitarian worldview which emphasizes the intrinsic value of all humanity. Furthermore, uniracial theory rejects social classifications based on popular fictions. One such fictitious belief is that our external physical appearance dictates our individual character and consigns us to groups that, as humans, are fundamentally different.¹²³ To avoid the chaos associated with many multi-racial worldviews, a uniracial worldview provides a meaningful alternative. We begin and end our journey not as strangers, but as one human family.

Section III considers, in preliminary fashion, additional implications of uniracial theory.

III

What are Some Implications of Uniracial Theory?

This article has argued that to enhance the prospect of human survival through this century and millennium, we need to reconstruct or re-vision race. The re-

123. On race as an example of a "cultural creation," see Smedley, *supra* n. 3, at 5-35: "[R]ace does indeed exist and should be viewed not as something biologically tangible and existing in the outside world that has to be discovered, described, and defined but as a cultural creation, a product of human invention like fairies, leprechauns, banshees, ghosts, and werewolves." *Id.* at 6. (Emphasis in the original text)

vision process, involves recognizing that human beings are (a) members of one human race (or species or family), and (b) human rights flow from being members of one race: *the human race*.

In this section we preliminarily explore several implications of uniracial theory. The section begins with a modest proposal. Following the proposal, initial observations are outlined regarding human rights and affirmative action, limits on majority public policy making, and implications for interpersonal communications.

A. A Modest Initial Proposal

Uniracial theory contends that human rights flow primarily from being a member of the human family. What are some possible consequences of recognizing that one's human rights are derived from one's humanity? One important starting point is that legal decision makers (like judges) ought to recognize that any attribute which humans commonly perceive as fundamental to human identity should be protected. From whom or what? From state interference *and* from some acts of private individuals as well.

For example, the right to live is universally viewed as essential to one's human identity. Accordingly, civilians who are attacked by suicide bombers or by modern aircraft are entitled to have their lives protected. The international protection of human life (whether under international or domestic law) should not depend on whether one's would be killers are sponsored by a nation-state or by private individuals (for instance an armed militia unit).

In other words, a modest but important practical step towards promoting human rights and enhancing our prospects for collective human survival would be for jurists and policy makers in the United States and other nations to adopt a uniracial worldview. Such individuals are also invited to adopt a uniracial approach to public policy making.

By furnishing a progressive interpretation of law and policy, a uniracial interpretive approach would help protect persons from state-sponsored discrimination. This theoretical framework is similar to that outlined by a prominent, persuasive, and passionate human rights advocate, Professor Charles L. Black, Jr. Professor Black argued that comprehensive human rights protection under the United States Constitution would exist if the Supreme Court recognized the appropriate legal ambit of the Ninth Amendment, and the Privileges and Immunities Clause of the Fourteenth Amendment. In addition, Black contended that as the new nation's founding legal document, the Declaration of Independence carried substantial legal weight.¹²⁴ In addition, Professor Black's approach is consistent with international

124. See, e.g., Charles L. Black, Jr., *A New Birth of Freedom: Human Rights Named and Unnamed* 1-40 (Putnam Publ. Group 1997). See also the perceptive, systematic, sensitive and path breaking analysis of Martha Minow in *Forward: Justice Engendered*, 101 Harv. L. Rev. 10 (1987); Ronald Dworkin, *Natural Law Revisited*, 34 Fla. L. Rev. 165 (1982).

human rights standards set forth in multi-lateral treaties, some of which the United States has formally ratified.¹²⁵

Similarly, unracial analysis comports with the jurisprudential approach employed by other dynamic multi-cultural democracies like South Africa which specifically provides in its constitution that: "When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."¹²⁶ This progressive process of legal analysis supports (rather than frustrates) policy makers' decisions to promote human liberty. In addition, the South African constitution provides: "When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom."¹²⁷ These values are at the heart of the South African Bill of Rights. Such values also undergird the United States Constitution. In the absence of explicit constitutional provisions to the contrary, a more liberating interpretive approach is open to and should be followed by the United States Supreme Court.

In *Saenz v. Roe*,¹²⁸ a ray of hope recently emanated from the Supreme Court that the Court will interpret the Privileges and Immunities Clause of the Fourteenth Amendment consistent with the text of the Constitution, the structure and relationship of the provisions of the Constitution, the intent of the Framers, and ultimately, human freedom.¹²⁹ In *Saenz*, California residents who had moved to California from other states challenged California legislation requiring them to reside in California for twelve months before they could receive stipends equal to those of welfare recipients who had resided in California for twelve months or more.¹³⁰ In a five to four decision, the United States Supreme Court reaffirmed that the Privileges and Immunities Clause of the Constitution encompassed unlisted rights of American citizenship including the right to travel.¹³¹ The Court held that the right to travel meant (among other things) that California could not deny equal welfare benefits to new residents merely because the new residents had not resided in California for at least twelve months.¹³² By recognizing that the Privileges and Immunities Clause of the Fourteenth Amendment encapsulates unenumerated liberties, *Saenz* has left the door (slightly?) ajar to recognize a new birth of freedom.¹³³

The *Saenz* Court's approach is consistent with the constitutional text, for the Framers themselves coined the phrase "privileges and immunities," and would

125. S. African Const. art. 39(2).

126. *Id.*

127. *Id.* at art. 39(1).

128. 526 U.S. 489 (1999).

129. For an illuminating analysis of constitutional interpretation based on this type of approach, see, Charles L. Black, Jr., *Structure and Relationship in Constitutional Law*. (La. St. U. Press 1969).

130. 526 U.S. at 492.

131. *Id.* at 502-03.

132. *Id.* at 504-05.

133. Black, *supra* n. 124; *accord*, 1 Laurence Tribe, *American Constitutional Law* 1315-31 (2000) arguing for a more expansive reading of the Privileges and Immunities Clause, and that the Slaughter-House Cases, 83 U.S. 36 (1873), which eviscerated the Clause, should be overruled, "lock, stock and barrel." *Id.* at 1331.

surely have found it inconceivable that the Privileges and Immunities Clause did not embrace other unlisted examples of “life, liberty and the pursuit of happiness” (for example, the right to a family, or to employment, or to start a business, or to attain skills necessary to provide for one’s sustenance). The notion that “privileges and immunities” fails to encompass such basic liberties, threatens to make the liberating work of the Framers’ ring hollow -- indeed like a proverbial “sounding brass and tinkling cymbal.”¹³⁴ In fact, analogizing the Constitution to the Liberty Bell (at Independence Mall), a miserly interpretation of the Privileges and Immunities Clause unnecessarily widens the “crack” in individual liberty. In contrast, a uniracial interpretive approach would help recast the noble structure of the Fourteenth Amendment to more closely fit its original mold so that freedom might ring -- un-muffled.

In an abbreviated fashion, we now outline a few of uniracial theory’s implications for human rights generally, and affirmative action more particularly.¹³⁵

B. Initial Reflections on Human Rights and Affirmative Action

This article presumes that a human right (for example, free speech) means at least that one possesses an attribute which is (1) valuable, and (2) part of one’s humanity. Furthermore, if one is deprived of an element of one’s human identity, one suffers a wrong, which is injurious, and worthy of remediation.

Pragmatic considerations compel one to acknowledge that governmental oppression may deprive one of her human rights like the right to express her opinions. However, if the state deprives a person of a human right (like free speech), the deprivation only means that she has a right which she cannot presently exercise. This is a far cry from saying that she has no such right, for a difference exists between killing someone and saying that she had no right to live. The power of an individual or the state to violate a human right does not totally negate the right’s existence, though understandably one would prefer to experience the right to live in practice rather than solely in theory.¹³⁶ In short, the existence of a right and its exercise,

134. 1 *Corinthians* 13 : 1 (King James).

135. An in depth discussion of the international human rights implications of uniracial theory extends beyond the scope of this paper. For an illuminating discussion of the concept of human rights, see Louis Henkin, *The Age of Rights* (Columbia U. Press 1990); *The Future of International Human Rights* (Burns H. Weston & Stephen P. Marks, eds., Transnational 2000); Joel Feinberg, *Social Philosophy*, (Pearson Educ. POD 1973). For a fine overview of United Nations organs dealing with the promotion and protection of international human rights see, *The United Nations and Human Rights: A Critical Appraisal* (Phillip Alston ed., Oxford U. Press 1992).

136. A uniracial conception of human rights has natural law roots in the sense that it presumes that rights have sources which are sometimes “outside” of and pre-existent to human thought. Cf., Duncan Kennedy, *A Critique of Adjudication 306* (Harvard U. Press 1997):

The outside right is something that a person has even if the legal order doesn’t recognize it and even if “exercising” it is illegal. “I have the right to engage in homosexual intercourse, even if it is forbidden by the sodomy statutes of every government in the universe.” Or “slavery denies the right to personal freedom, which exists in spite of and above the law of slave states.”

though related, are not synonymous. A person may have a right and yet not be able to fully realize the right.

A uniraical analysis rejects a parsimonious approach to humanity (and human rights!) by frankly recognizing that a tyrannical state or other political entity is simply a temporary obstacle. To facilitate the realization of justice such obstacles must be significantly transformed. Accordingly, the existence of human rights does not and cannot depend, in an ultimate sense, upon government or other human institutions.¹³⁷ The intrinsic worth and dignity of each person as a human entitles her to justice, independent of whether state actors (or private individuals) respect her humanity.

In addition, this article suggests that societal decision making processes, especially the interpretation and creation of law, ought to err on the side of according human rights protection to those who are relatively disempowered. We can analogize the situation with a familiar aspect of American federal civil procedure law.¹³⁸ The identity based claims of the “least of these”¹³⁹ in our society ought not to be dismissed where there is a genuine issue as to whether the claims (e.g. sexual orientation) are vital to human identity.

Uniraical theory is sensitive to the historical context. For example, uniraical theory would reconstruct race by recognizing that in America, race includes color, culture, nationality, religion, and language.

Further, uniraical theory would reform equal protection analysis by mandating that the state show “a compelling state interest” to justify discrimination based on color, culture, nationality, religion, and language not because the attributes are intrinsically significant but because in the United States humans have acted as if they were. In the United States, at least two things are clear: (1) each of these aspects of human identity has been treated as though it was virtually synonymous with race,¹⁴⁰ and (2) the practical effects of legal and societal policies based on fictions (like white supremacy) rather than fact (human equality) have been devastating.¹⁴¹

137. Of course, a right is more complete when it is both recognized and respected rather than merely discussed as a worthy goal to which we aspire. *But see*, Eugene Kamenka, *Human Rights, Peoples' Rights*, 127, in *The Rights of Peoples* (James Crawford, ed. Oxford U. Press 1988) arguing that:

Rights are claims that have achieved a special kind of endorsement or success: legal rights by a legal system; human rights by widespread sentiment or an international order. All rights arise in specific historical circumstances. They are claims made, conceded or granted by people who are themselves historically and socially shaped. They are asserted by people on their own behalf or as perceived and endorsed implications of specific historical traditions, institutions and arrangements or of a historically conditioned theory of human needs and human aspirations, or of a human conception of a Divine plan and purpose. In objective fact as opposed to (some) subjective feeling, they are neither eternal nor inalienable neither prior to society or societies nor independent of them....[T]hey cannot be divorced from social content and context.

Taken to its logical extreme, this type position (associated with some analytical positivists) makes human rights solely a function of human activities (like legislation) rather than human behavior and one's individual humanity.

138. Fed. R. Civ. P. 56.

139. *Matthew 25* : 40 (King James).

140. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 612 (1987) (noting that during the Congressional debates leading to the passage of the Fourteenth Amendment, the discussion was “replete with references to the

These circumstances remain a significant obstacle to fully achieving democracy in the United States. Nevertheless, as the United States moves toward a more equitable society, for example through remedying pervasive societal discrimination flowing from governmental and private behavior, a uniracial approach recognizes that affirmative action programs are constitutional.

For instance, in *Grutter v Bollinger*¹⁴² the United Supreme Court addressed the issue of whether in the higher education context, admissions officers may consider an applicant's race in attempting to create a diverse student body. By a five to four majority, the Supreme Court ruled that admissions officers may incorporate race as one of many factors in a flexible, individualized evaluation of an applicant's request for admission. Giving prospective students that type of individualized attention is constitutional.¹⁴³ The Court specifically noted that:

Context matters when reviewing race-based governmental action under the Equal Protection Clause. Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context.¹⁴⁴

Addressing the concern of the dissenters that in effect the University's admissions program constituted racial balancing or a quota system, Justice O'Connor pointed out that:

When using race as a 'plus factor' in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount

Here, the law school engages in a highly-individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or

Scandinavian races . . . as well as the Chinese . . . Latin Spanish . . . and Anglo-Saxon races . . . Jews . . . Mexican . . . blacks . . . and Mongolians were similarly categorized.")

141. See *supra* nn. 50-64 and accompanying text.

142. *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

143. *Id.* at 2343.

144. *Id.* at 2338 (citations omitted).

de facto, of automatic acceptance or rejection based on any single “soft” variable.¹⁴⁵

The Court also pointed out that the law school takes seriously diversity factors aside from race:

The Law School frequently accepts non-minority applicants with grades and test scores lower than underrepresented minority applicants (and other non-minority applicants) who are rejected ... This shows that the law school seriously weighs many other diversity factors besides race that can make a real and dispositive difference for non-minority applicants, as well. By this flexible approach the law school sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body.”¹⁴⁶

The Court noted that the First Amendment protected freedom of thought, and that by admitting a diverse student body, institutions of higher learning could carry out one of their fundamental objectives: promoting a wide ranging and vigorous intellectual discourse.¹⁴⁷ People with different backgrounds would likely bring different perceptions and experiences to the classroom and other venues where learning might take place. To help promote vigorous intellectual cross fertilization of ideas and foster academic excellence by encouraging the flow and exchange of such ideas, universities and other institutions of higher education could, in their admissions processes, take diversity into account.¹⁴⁸ The Court would defer to the judgment of university admissions officials in the absence of a showing that such officials were not acting in good faith because good faith is presumed.¹⁴⁹

The *Grutter* majority pointed out that race conscious admissions programs must have “reasonable durational limits.”¹⁵⁰ Noting that 25 years have passed since Justice Powell stated that race could be considered in achieving student body diversity in higher education, the Court said “we expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved to date.”¹⁵¹

145. *Id.* at 2343 (citations omitted).

146. *Id.* at 2344 (citations omitted). The *Grutter* Court endorsed Justice Lewis Powell’s view expressed in *Bakke v. Board of Regents* that race could be considered in the admission process provided that each individual received individualized attention, and race was given appropriate weight. Powell specifically noted that race could be used as a plus factor but did not elaborate on precisely how one would determine how much of a plus a specific individual’s application should receive based on the racial diversity of a candidate. 438 U.S. 265 at 317-18 (1978).

147. 123 S. Ct. at 2339.

148. *Id.* Of course, not only is the individual freedom of humans enhanced in such circumstances, but also to the extent that an institution is an individual under the First Amendment, the university can enjoy its right to promote freedom of thought.

149. *Id.*

150. *Id.* at 2346 (quoting brief of respondents Bollinger).

151. *Id.* at 2347.

Responding to the majority's optimistic (and perhaps) unrealistic wishes about the duration of affirmative action programs, in a concurring opinion joined by Justice Breyer, Justice Ginsburg stated:

[I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress towards nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.¹⁵²

The issue basically boils down to fairness. In a society in which material and other resources are not allocated on an equal or even equitable basis, how can we fairly determine how well a person would have done if he or she had had the tools that her colleagues had in preparing for educational, job or other advancement? These issues are addressed in more detail in a related work in progress.¹⁵³

Justice Ginsburg's concurrence noted that transitional affirmative action programs are also consistent with international human rights jurisprudence.¹⁵⁴ A uniracial approach would however, require the government to refrain from adopting permanent public policies with negative biases based on a person's attributes which the state has historically treated as significant like color, culture, language, nationality or religion. Any *such permanent policies* would be race based and unconstitutional.¹⁵⁵

One readily acknowledges that this is somewhat paradoxical: to eliminate the effects of racism one must continue developing corrective policies that are color conscious and take account of personal attributes like skin color which have historically been used to frustrate the development of millions of Americans living under apartheid.¹⁵⁶ Even though affirmative action boils down to giving qualified

152. *Id.* at 2348 (Ginsburg, J. concurring.)

153. Jonathan K. Stubbs, *Constitutional Interpretation in the United States and South Africa: The Implications of a Uniracial Worldview* (Manuscript on file with author).

154. See, the Race Convention, art. 1(4); The International Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, art. 4(1) G.A. res. 34/180, U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A34/180 (hereafter "Women's Convention"). The internationally endorsed affirmative action programs are expressly recognized as "temporary special measures aimed at accelerating de facto equality between men and women," Women's Convention, art. 4(1); and as "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals ... to ensure... equal enjoyment or exercise of human rights and fundamental freedoms." Race Convention, art. 1(4).

155. *Grutter*, 123 S. Ct. at 2346 ("[R]ace-conscious admissions policies must be limited in time.").

156. "By virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences." *Id.* at 2344.

persons an opportunity to demonstrate their competence, considering attributes like skin color could in some contexts be viewed as stigmatizing. In addition, some people who have not themselves committed egregious racist acts will find it more difficult to attain the specific educational and vocational objectives that they desire. In the groups to which history has consigned them, they are relatively innocent vis a vis their predecessors. They are not totally innocent however, because they have reaped the rewards of better education, housing, healthcare, and employment opportunities flowing from the segregated society which their predecessors created expressly for their benefit.

Moreover, a second class of innocent victims exists. Who resides in this class? Some are the descendants of slaves, others are Jim Crow victims, yet others have survived genocide campaigns against Indians, and others still comprise the offspring of exploited workers from the Far East and dispossessed Mexicans of the Southwest. Between these two classes of "innocent" individuals, who is more innocent?

It is tempting to act as though in the United States, slavery, apartheid, anti-Semitism, racism, nationalist xenophobia, and genocidal policies against indigenous peoples neither existed nor had any effects on the life chances of past and present Americans. If public policy makers yield to that temptation they can continue to announce that they will apply color blind, culture blind and religion blind "merit systems" while perhaps failing to recognize that such an approach turns the idea of merit upon its head. For example, in the employment and educational contexts, merit suggests (among other things) that it is the demonstrated ability and potential of humans in fair competition with their peers that determines their status. For many years in the United States, the legislatures, courts, and executive branches of government have blocked many Americans' access to resources to enhance their housing, education, employment as well as other societal goods. Such governmental action constitutes *denial* of liberty and the pursuit of happiness.

Justice Blackmun also stated the case eloquently in *Regents of the University of California v. Bakke*:

It is gratifying to know that the Court at least finds it constitutional for an academic institution to take race and ethnic background into consideration as one factor, among many, in the administration of its admissions program. I presume that that factor always has been there, though perhaps not conceded or even admitted. It is a fact of life, however, and a part of the real world of which we are all a part. The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene.

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. *In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot – we dare not – let the Equal Protection Clause perpetuate racial supremacy.* So the ultimate question, as it was at the beginning of this litigation, is: Among the qualified, how does one choose?

438 U.S. 265, 406-07 (1978) (Blackmun, J., concurring in the judgment in part and dissenting in part) (emphasis added).

Accordingly, those individuals from groups with multi-generational headstarts (for instance through taxpayer supported segregated housing programs) can readily “win” the competition. Without effective measures to neutralize some aspects of unfair competition, how can one in good conscience claim that such a victory is meritorious?

In short, a uniracial worldview can generate legal theories to alleviate and avoid the suffering of individuals and groups who experience state or private discrimination based on components of their human identity which have been historically perceived as fundamental and significant. Further, uniracial theory provides a theoretical basis for extending human rights protection to persons suffering discrimination because of any human attribute which is commonly thought to be significant (even *some* disputed ones), including for instance gender, age and sexual orientation. These attributes have commonly been perceived as being fundamental to human identity; therefore, the state should not unnecessarily interfere with any of those aspects of our humanity.

We now focus attention on exploratory observations regarding uniracial theory and limits on majority public policy making.

C. Limiting Majority Public Policy Decision Making to Enhance Human Freedom

This essay has argued that, historically, a number of attributes of individual identity have been perceived as sacred. Illustrations include but are not limited to color, nationality, and gender. Whether such human characteristics are fundamental remains controversial. How should the law respond? A uniracial interpretive approach suggests that legal decision makers would do well to error on the side of liberty. When we use the protection of individual liberty as a starting point, the scope of human rights protection under the Constitution must also expand because the Constitution protects individuals from race discrimination, and in the United States, race encompasses color, culture, nationality, religion and language. In this context, an important question arises: what happens when expanded individual freedom (created by re-visioning race) conflicts with the liberty of other individuals or indeed of other groups?

For example, if language is one element identified with race, and persons ought to be free of race discrimination, what rights exist regarding language and education? More concretely, how important is it for children to receive instruction in their first language? For instance, what is the cost to Spanish speaking children if their public education fails to give them a more comprehensive understanding of their history and culture? Viewing the issue more broadly, what are the communal costs or benefits? How is community defined (e.g. *whose* community must bear which burdens, when?). In American society, difficult policy choices arise as communities grapple with concerns including (a) ensuring that all members are literate in the predominant language (English) and (b) providing instruction that

stimulates rather than alienates students whose first language is not English.¹⁵⁷ Once again, as we expand our consciousness of the many attributes that humans have perceived as fundamental to our identities, numerous significant public policy questions arise.¹⁵⁸

A uniracial worldview responds (in part) by affirming that law must protect the human liberty and dignity of individuals and relatively disempowered groups. Accordingly, where conflicts between majority and minority human rights exist, majority intrusion on such rights, through public policymaking, must be curtailed. A helpful normative framework for evaluating the contending interests is the broad corpus of international human rights norms reflected in documents like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of all forms of Racial Discrimination, and the Convention on the Rights of the Child.¹⁵⁹ The standards set forth in those documents are fundamentally consistent with the scope of the Privileges and Immunities Clause of the United States Constitution. The members of the United States Supreme Court need only the will to acknowledge (a) the reality that the United States Constitution is no less protective of human rights than these treaties and (b) the Court's mistake in failing to correct previous missteps. In short, better late than never.

Inevitably, public policymaking involves bargaining; however, identity-based human rights are outside the negotiation realm. In many cases involving race related issues (like how to respect linguistic minority groups), the majority should be precluded from adopting unreasonable discriminatory laws. This function is fundamental to judicial review.

The reduction of majority power inevitably consigns the state to a less significant role in the lives of individual humans. Less governmental interference would seem to be good news for those who are interested in "getting the government off

157. See e.g., *A Door to Good Things: Reading at Grade Level by 9 Offers Inestimable Advantages*, L.A. Times, M4 (Sept. 13, 1998). Some political observers contend that voter frustration with poor state reading scores helped fuel the decision of Californians to essentially abandon the state's bilingual education program. On the other hand, to improve the alarming drop out rate of Latino and Latina high school students, some school districts have turned to multifaceted approaches including English as a second language labs. See, April McClellan-Copeland, *Hispanics Pass on School: Educators, Agencies Battle Language Difficulties, Cultural Attitudes to Stem Alarming Drop Out Rate*, Plain Dealer A1 (Sept. 14, 1998).

In international human rights contexts, the rights of minority groups to develop their cultural lives, and more generally, their rights to self determination are implicated. See, ICCPR, art. 1, art. 27.

158. Another example is the issue of what human rights should be protected from majority intrusion in the family context? To illustrate: how far should laws be enforced which affect religious values like polygamy or polyandry? See, Marlise Simons, *African Women in France Battling Polygamy*, N. Y. Times A1 (Jan. 26, 1996), discussing the complex social, political and economic dynamics of African immigrants adapting some of their cultural practices, like polygamy, to an European context. See also, *Secretary-General Hopes Female Genital Mutilation "Will Be But A Memory"*, M2 Presswire (June 19, 1998) outlining U.N. Secretary-General Kofi Annan's support for human rights education and other practical steps to address the widespread custom of female genital excision. The term "female genital excision" was suggested by Joy C. Draper, M.D., J.D. as a non-pejorative way of describing a range of human practices which result in cutting women's genitalia.

159. Concluded Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990; signed but not ratified by the United States, Feb. 16, 1995).

of our backs" as well as for those who would like to get the government away from other parts of our anatomies.

Having (in abbreviated fashion) outlined theoretical limits on majority power, one must ask where to draw the line on government intervention. No mathematical formula comes to mind to address the dilemma. The best approach seems for members of the majority to conscientiously ask themselves how they would wish to be treated if they were in the minority's position. In deciding close cases, legal decision makers, especially the courts, should use such an "other sensitive" normative standard because it is likely to lead to a more equitable result. While such a decision making process may at first seem time and labor intensive, in the long run, it is more likely to succeed in being comprehensive, reasonable, and accepted by those affected by it.¹⁶⁰ What are the theoretical and practical difficulties of such an approach (except perhaps that we, too, seldom use it)?¹⁶¹

Uniracial theory argues for limits on majority power in policy making and upon individual liberty. For example, a religious group which practices child sacrifice and ritual juvenile prostitution would be subject to state laws proscribing such activities. The basis for such limits on adults' individual liberties would include the following considerations: first, protection of children's rights to live and to be free from sexual abuse; second, society's interest in maintaining the health, safety and welfare of the children; and third, appropriate respect for rights of persons asserting that their religion mandated killing children and having sex with them.

Uniracial theory is oriented towards protecting the freedom of those who are most socially vulnerable (like poor children) because they are most likely to be abused. For example, over six million children die annually from malnutrition,¹⁶² nearly a quarter billion children between the ages of five and fourteen are forced by economic circumstances to work rather than go to school,¹⁶³ over a hundred million children worldwide are homeless,¹⁶⁴ and over half of the thirteen million refugees in the world are children who are *unaccompanied* by their families.¹⁶⁵ Perhaps the crowning global insult to the world's children manifests itself in adults'

160. For further discussion on this kind of servant/leader approach see, Robert K. Greenleaf, Larry C. Spears & Stephen R. Covey, *Servant Leadership: A Journey into the Nature of Legitimate Power and Greatness* 13-15 (Paulist Press 1977); and see, *Luke 6 : 31* (New International) ("Do to others what you would have them do to you"); and *Luke 22 : 24-27* (New International).

161. This type interpretive approach would further a primary purpose of human civilization, namely realizing justice for all. We are all one race and in that sense "all in the family"; therefore, human rights needs to become synonymous with justice. The notion of justice for all antedates the pre-Socratic philosophers, see e.g., Geoffrey S. Kirk & J.E. Raven, *The Presocratic Philosophers: A Critical History with a Selection of Texts* 194 (2nd ed., Cambridge U. Press 1983) (discussing Heraclites' dictum on change and its relationship to Anaximander's notion of justice), and has a moral and theological foundation transcending the constitutions and domestic boundaries of any modern nation-state. See, e.g., *Amos 5 : 14-15* (New International) ("Seek good and not evil, that you may live. Then the Lord God Almighty will be with you, just as you say he is. Hate evil, love good; maintain justice in the courts . . .").

162. See, John M. Goshko *U.N.I.C.E.F. Targets Malnutrition in Yearly Report: Situation Is Called a 'Silent Emergency.'* Wash. Post A16 (Dec. 16, 1997).

163. *State of World's Children*, The Times-Picayune Publ. Co. B6 (Jan. 4, 1997).

164. *Agony of the Runaways and the Rag Pickers*, F.T. Asia Intelligence Wire 27 (Apr. 22, 1997).

165. *Report of U.N. High Commissioner on Refugees is taken up by Third Committee*, M2 Communications 1, 5 (Nov. 5, 1997). Millions of children are essentially lost, orphaned, and otherwise destitute.

use of children as soldiers and sex slaves in senseless armed conflicts.¹⁶⁶ Even in the United States, we have learned to our great chagrin that all desperate, destitute children do *not* live outside our borders.¹⁶⁷

The majority, whether defined numerically or in terms of decision making authority, must respect the liberty of those who find themselves (as we all sometimes do!) in the minority. Accordingly, in public policy making, majority rule should be circumscribed to protect fundamental liberties regardless of whether government activity affects individuals *or* groups.

In the United States the political power axis would tilt towards individuals, families and communities and away from the federal government and the states. Where conflict exists, as it does now and as it will in the future, individuals and groups will need to sensitively discuss the issues which cause divisions. Moreover, we must work towards consensus.¹⁶⁸ Perhaps increased intergroup consensus building and negotiations are not the worst thing that could happen in the sprawling, diverse, multi-cultural, multi-lingual, multi-chromatic society called the United States of America.

Having said that, one cannot be oblivious to another practical reality: at the local level individuals and groups can act at least as oppressively as sometimes happens in state and national arenas. Accordingly, one recognizes the crucial need for (a) judicial willingness to take a more human rights friendly approach to legal interpretation and dispute resolution, (b) appropriate legislation to protect human rights, and (c) a comprehensive program of human rights education. In America, such constructive legal and educational responses are especially vital because many politically and economically subordinated individuals and groups have historically suffered government sanctioned bias, as reflected for example in Jim Crow laws.¹⁶⁹ Moreover, in the international context, unracial theory affirms the legal and moral necessity of disempowered individuals and minorities exercising more authority in promoting and protecting their human rights. Such a jurisprudential worldview can

166. It is estimated that over twenty thousand children have been abducted from their homes in Northern Uganda and forced into service as sex slaves and child soldiers by the Lord's Resistance Army cult. *See, Over Seventy Bodies of Civilians Killed by Rebels Found in Northern Uganda*, British Broad. Corp. (Dec. 7, 2003). *See also*, Thalif Deen, *Rights: Ban on Child Soldiers Hailed by Human Rights Groups*, Inter Press Serv. (Jan. 21, 2000); Cesar Chelala, *The Worldwide Tragedy of Child Soldiers*, Seattle Times B5 (Mar. 21, 2000); William R. Macklin, *Child Soldiers Give Today's Warfare New Fury*, Fla. Times-Union C-8 (Feb. 6, 2000). To combat these abominable circumstances, the United Nations Children's Fund (UNICEF) and the Canadian government recently co-sponsored a week-long summit in Winnipeg, Canada to formulate an action plan to be presented at the U.N. Special Session on Children. *See*, Thalif Deen, *Children: War-Affected Youth Subject of Major Global Conference*, Inter-Press Serv. (Aug. 21, 2000).

167. For instance, a study by the Children's Defense Fund found that the rate of extreme poverty among African American children has risen dramatically since the late 1990's, and is higher now than in over twenty years. Elizabeth Levin, *16% of Children Live in Extreme Poverty, Report Says*, L.A. Times, A27 (May 1, 2003). In a similar vein see, *Starting Points: Meeting the Needs of Our Youngest Children, The Report of the Carnegie Task Force on Meeting the Needs of Young Children*, 2-22 (Carnegie Corp. of N.Y. 1994).

168. *See*, e.g., Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness In Representative Democracy* (The Free Press 1994).

169. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that segregated intrastate transportation was constitutional), *Cummings v. Richmond Co. Bd. of Educ.*, 175 U.S. 528 (1899) (affirming that in practice the separate but equal doctrine allowed a local school district to segregate black and white children, and provide the white children with a high school education while not providing a high school education for blacks).

potentially lead to an intellectual revolution in rethinking the roles of such individuals, groups (or “peoples”)¹⁷⁰ and their agents (like non-governmental organizations) in vindicating human rights.¹⁷¹

In fact, adoption of a uniracial approach could encourage nations (some of whose political structures are similar to the United States) to devolve decision making from the center to the local level.¹⁷² Increased local autonomy in nations with a legacy of strong central governments can be a prescription for increased liberty – or anarchy (or both!) . . .

We now spotlight a few additional practical communication issues flowing from a uniracial worldview.

D. A Note on a Uniracial Worldview and Language

Outside the legal context, uniracial theory could significantly influence our use of language. The term “race” would in fact no longer refer to a person’s color (“white race”) or culture (“African American race”). For example, findings of the Human Genome Project suggest that about twenty five thousand years ago Africans immigrated to Europe and that they adapted and evolved into the branch of the human family that we today refer to as Europeans. In these circumstances, are “white” Europeans who immigrated to the New World really Africans in America -- or African Americans?

If we take a uniracial approach, “race” encompasses any human on planet earth, and in that sense, race is a synonym for *species*. A uniracial worldview affirms that humans constitute one species: *homo sapiens*. Scientists tell us that we humans are so similar that, technically, within the human species there is only one subspecies—*homo sapiens sapiens*.¹⁷³ We are all members of that subspecies: there are no further genetic subdivisions and certainly no more than one race.

In this context, “inter-racial” becomes a meaningless term as applied to humans - we are all members of one race. Similar terms like “bi-racial,” “trans-racial” and of course “multi-racial” seem anachronistic - relics of a passing epoch in human history. . .

As former President Clinton’s Advisory Board on Race perceptively noted in its discussion of “A Nation in Racial Transition”:

There are no easy metaphors or key slogans to describe what we are becoming . . . “Melting pot” and “mosaic” are inadequate

170. Draft International Covenant on the Rights of Indigenous Peoples, *adopted* by U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Apr. 20, 1994, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1.

171. Whether domestically or internationally, government’s role is to recognize and protect human freedom rather than purporting to create liberty. The source(s) of human freedom pre-exists and transcends the state.

172. For an interesting discussion of issues involving decentralization and devolution of authority to local governments in Asia and the Pacific basin see: Kevin Sproats, *Local Government in Asia and the Pacific: A Comparative Analysis of Fifteen Countries*, U.N. Economic and Social Commission for Asia and the Pacific, <<http://unescap.org/rural/index.htm>> (1999).

173. See, Marks, *supra* n. 4, at 200.

given what we know today. The melting pot suggests a loss of identity and mosaic suggests that people will never come together but instead will maintain rigid separation. Instead, we are becoming a new society based on a fresh mixture of immigrants, *racial groups*, religions, and cultures, in search of a new language of diversity that is inclusive and will build trust.¹⁷⁴

One can salute the Advisory Board's forward thinking perspectives on race and language; however, the Board's use of the term "racial groups" demonstrates that the Board itself seems to have (or be deeply influenced by) a multi-racial perspective.

Race can continue to be a societal stumbling block – a twenty first century shibboleth.¹⁷⁵ Alternatively, rightly understood, race can embrace the reality that we are one human family. Oliver W. Hill, Sr., a leading architect of the *Brown* litigation strategy and Presidential Medal of Freedom recipient, has suggested a possible solution to the dilemma of articulating the unity of humanity. Hill argues that one should recognize that all living things on planet Earth are earthlings, that humans are a subcategory of living things (earthlings), and that we should identify ourselves as "human earthlings."¹⁷⁶

IV.

Concluding Thoughts

In closing, we must not ignore multiplying challenges threatening the survival of the human family; or dismiss the necessity to respond expeditiously. We witness the continued proliferation of nuclear and deadly conventional weapons,¹⁷⁷

174. Advisory Board to the President's Initiative on Race, *One America in the Twenty-First Century: Forging a New Future* 50, 52 (U.S. Govt. Printing Off. 1998) (emphasis added).

175. See *Judges 12* : 4-6 (King James).

176. Hill, *supra* n. 59, at 294-341.

177. Jill M. Sheldon, *Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the Use of Nuclear Weapons in All Circumstances?*, 20 *Fordham Intl. L.J.* 181, 196-200 (1996), discussing among other things the many states which have or are on the threshold of having nuclear weapons, including the United States, Russia, China, France, the United Kingdom, India, Pakistan, Israel, South Africa, Brazil . . . The prevention of nuclear proliferation is complicated by numerous factors including the economic and political difficulties experienced by the Russian Federation as it attempts to develop a strong societal infrastructure that can control the activities of groups like the "Russian Mafia." Organized criminal entities in Russia seem involved in activities including quite possibly stealing, smuggling, and selling nuclear weapons and materials to various nation states and terrorist organizations. Shoshanah V. Asnis, *Controlling the Russian Mafia: Russian Legal Confusion and U.S. Jurisdictional Power-Play*, 11 *Conn. J. Intl. L.* 299 (1996). More recently, the United States, United Kingdom and several other nation states have engaged in a major military conflict with Iraq ostensibly to prevent Iraq from using weapons of mass destruction against them. Whether weapons of mass destruction either existed or will be found is problematic, though use of such weapons by international terrorists seems more likely than use of such weapons by nation states. In a similar vein, the North Korean/American continuing war of words over North Korea's revelation that it has nuclear weapons has also captured global attention. For thoughtful commentary considering this situation from varying vantage points see, Emily K. Penney, *Comment: Is That Legal?: The United States' Unilateral Withdrawal from the Anti-Ballistic Missile Treaty*, 51 *Cath. U.L.Rev.* 1287 (2002); Cecilia Y. Oh, *Comment: The Effect of Reunification of North and South Korea on Treaty Status*, 16 *Emory Intl.*

the human failure to learn non-violent conflict resolution (nationally or internationally),¹⁷⁸ the thoughtless destruction of our environment,¹⁷⁹ the egregious maldistribution of national resources,¹⁸⁰ and child abuse on a global scale.

The God of history has a sweet sense of irony. At one time various ruling elites dominated others like Native Americans and threatened their extinction. However, today, given the daunting challenges to our survival as a human species, we all find ourselves in the same existential boat as Native Americans. Who would deny that we seem successful in making the planetary house in which we all live

L. Rev. 311 (2002); Erik A. Cornellier, *Comment: In the Zone: Why The United States Should Sign the Protocol to the Southeast Asia Nuclear-Weapon-Free Zone*, 12 Pac. Rim L. & Policy 233 (2003). In addition, for yet another disturbing example of the proliferation of nuclear material see, Steve Inskip, *Seizure of a Truck Containing Radioactive Material that was traveling from Kazakhstan to Pakistan*, N.P.R. Morning Edition (Apr. 7, 2000). For an evaluation of the effectiveness and prospects of the Nuclear Non-Proliferation Treaty as a international response to the proliferation of weapons of mass destruction, see, Craig T. Mierzwa, *The Indefinite Nuclear Non-Proliferation Treaty: Substantial Accomplishments or Ambitious Hopes*, 4 D.C.L. J. Intl. L. & Prac. 555 (1995). For a discussion of the equally distressing prospects of the use of toxins as weapons during human conflicts, see, Leonard A. Cole, *The Eleventh Plague: Biological and Chemical Warfare* (W.H. Freeman & Co. 1996); John Paul Jones and Eileen Wagner, *Poison Gas Proliferation: Paradox, Politics and Law*, 15 Loy. L.A. Intl. & Comp. L.J. 521 (1993).

178. The current American/Iraqi conflict is the most notorious of a sad line of contemporary examples which include the recent assaults, rapes, abductions and killings of thousands of innocent civilians in the Sudan; the displacement, intimidation, and massacres of large numbers of ethnic Albanians in Kosovo (and the predictable retaliatory reprisals); the widespread deaths and carnage in East Timor in the wake of elections for independence; bombings directed at civilians in Northern Ireland and the deaths of hundreds of civilians in Kenya and Tanzania following the bombing of American embassies in those countries. Human beings' failure to curb their use of physical force as a means of "conflict resolution" is perhaps no better exemplified than in the widespread continued use of devastating weapons of destruction against civilians, like land mines. See, Jack H. McCall, Jr., *Infernal Machines and Hidden Death: International Law and Limits on the Indiscriminate Use of Land Mine Warfare*, 24 Ga. J. Int'l & Comp. L. 229 (1994); Norman B. Smith, *A Plea for the Total Ban of Land Mines by International Treaty*, 17 Loy. L.A. Intl. & Comp. L.J. 507 (1995). For a discussion of possible legal bases for holding the producers of land mines responsible for their creations, see, Brian Owsley, *Land Mines and Human Rights: Holding Producers Accountable*, 21 Syracuse J. Intl. L. & Com. 203 (1995). Moreover, an upsurge in civilian murders perpetrated by individuals who bomb, kidnap and kill in the name of God and their personal political agendas has devastated communities in diverse parts of the globe like Afghanistan, South Africa, Indonesia and Uganda. For perspectives on the desperate plight of over one million northern Ugandans who have been displaced by seventeen year old civil war, see Jason Beaubien, *Parts of Northern Uganda Struggling due to the Activities of a Rebel Group in a 17-year Civil War with the Government*, NPR (Dec. 2, 2003); Mark Thomas, *Mark Thomas Wonders Why We don't Like Children; In Northern Uganda, Thousands of Children Are abducted and Subjected to Atrocities. Is This Another Case Where the West Doesn't Care Because There's No Oil Involved?*, New Statesman (Dec. 1, 2003).

See also, *Stolen Children: Abduction and Recruitment in Northern Uganda*, 15 Human Rights Watch (2003) (describing the abuse of children in Northern Uganda through abducting and recruiting them to serve in the armed forces of insurgent groups as well as the children's recruitment and use as soldiers with the Ugandan government's armed forces.)

179. In response to the well documented pervasive degradation of the earth's bio-system, several years ago, over one hundred nations gathered in Kyoto, Japan and signed an agreement to reduce their collective emission of so-called "greenhouse gases" by the year 2012. Primary focus for reduction include carbon dioxide, methane and nitrous oxide. *Industrialized Countries to Cut Greenhouse Gas Emissions by 5.2% by Legally Binding Agreement*, M2 Communications 1 (Dec. 15, 1997). The Kyoto conference generated and continues to generate significant commentary and debate; and the United States government has recently sought to lower the standards required to reduce the slow suffocation of life on earth: See, Eric Pianim, *Koizumi Strengthens Bush's Hand on Kyoto*, Wash. Post A2 (July 2, 2001); *Climate Change III: How is it Playing*, American Political Network, Greenwire (Dec. 15, 1997). For a different environmental hazard which may be linked to issues of human technological development, see, Ramanan Laxminarayan & Mark Plotkin, *"Superbug" Threat*, Wash. Post A25 (Nov. 4, 2003) (discussing the development of drug resistant microbes).

180. Oliver and Shapiro, *supra* n. 58.

increasingly dirty, dangerous, and desolate? To put it bluntly, our collective backs are “up against the wall.”

Despite these chilling circumstances, opportunity is the Siamese twin of adversity. We grapple with how to enhance prospects of human survival; however, we are not without resources. Science, technology, and human creativity may allow us to devise ingenious ways to improve, prolong and enrich life. Rather than dying at fifty-five, sixty or seventy, our generation and the generations that follow stand at the threshold of scientific discovery which may help us, through stress reduction, appropriate dietary changes, and manipulation of genetic material, to live for several hundred years.¹⁸¹ In short, we might be the last generation not to live long and well like the Biblical patriarchs and matriarchs; alternatively, some of us may become the first ones to emulate that venerable tradition.

If we work assiduously to assure that all human beings have meaningful access to resources necessary to reach their individual potential, massive wells of untapped human capital could be plumbed. Such human development would enhance our global economic, cultural, scientific and social accomplishments. Professor Montagu has eloquently contended: “The birthright of every human being should be the recognition of his uniqueness, and the opportunity to develop that uniqueness to the optimum. It is in individual differences that the real wealth of humanity lies. The development of that wealth is an immediate need.”¹⁸² To meet the needs of human development, as societies and persons evolve, we should embrace a uniracial worldview.

Before we can reach our maximum potential for living longer and better, at the national and international levels, we need to conscientiously *resolve not to annihilate ourselves*. Instead, we must commit ourselves to live cooperatively on earth. Such decisions require a moral revolution in thought and action beginning with each individual human being.

Oliver W. Hill, Esq., articulated the issue superbly when he said that we need to promote “a renaissance in human relationships” in the twenty first century.¹⁸³ By adopting and promoting a uniracial worldview which ultimately seeks community (*ubuntu* based on forgiveness and reconciliation), jurists and policy makers in the

181. Terrence Monmaney, *Scientists Give Cell Apparent Immortality*, L.A. Times A1 (Jan. 14, 1998); Nicolas Wade, *Cell's Life Stretched in Lab*, N.Y. Times A1 (Jan. 14, 1998). See also, Thomas H. Maugh, II, *Scientists Move Closer to Ability to Grow Tissue*, L.A. Times A1 (Nov. 6, 1998); Nicholas Wade, *Scientists Cultivate Cells At Root of Human Life*, N.Y. Times A1 (Nov. 6, 1998) (discussing the possibilities flowing from work with human embryonic stem cells that may, in time, be cultivated in such a way to create body tissues, organs and even cloned human beings).

182. Ashley Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* xiii (5th ed. Oxford U. Press 1974). See also, The International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, G.A. res.2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3; U.N. Declaration on Development, G.A. res.41/128, 41 U.N. GAOR Supp. (No.53) at 186, U.N. Doc. A/41/53 (1986). Human development includes, among other things, facilitating the access of individuals and members of groups to the necessities for human existence like food, education, shelter, productive employment, health care, and recreation. Human development can occur not only regarding one's material circumstances but also one's self knowledge which may (and hopefully does), continue to grow during one's earthly life cycle.

183. Hill, *supra* n. 59, at 341.

United States and abroad can help spawn this renaissance. Human survival may well depend on it.

