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BOOK REVIEW

Being White

THOMAS ROSS†

We inhabit a nomos—a normative universe... This nomos is as much "our world" as is the physical universe of mass, energy, and momentum. Indeed, our apprehension of the structure of the normative world is no less fundamental than our apprehension of the structure of the physical world.¹

INTRODUCTION

Whites, most of the time, do not consciously think of themselves as "White."² Yet, when the question is posed, the typical White person self-identifies as "White" without hesitation or doubt, even though they have never really thought through what that label means and how it arises. They just know that they are "White."

African-Americans, Native-Americans, Asian-Americans, Latinos, and others deemed "not White," in contrast, often do think about what their racial label means and how it arose. In recent years, scholars of color have produced a large and growing body of work, often collectively identified as "Critical Race Theory."³

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2. Throughout this Essay, I will capitalize the term, "White" as well as Black, Yellow, and Red, as a way of signaling the fact that race is a social construction and not a description of physical reality. Thus, I am not a white man in the same sense that I might be a tall man.

3. See, e.g., DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); DERRICK BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1992); Kimberle
This scholarship tells us that, unlike Whites, racial minorities must confront the implications of their racial label, a label that profoundly affects the perception of them by others. These perceptions, and the corresponding decisions and actions by others, have a powerful impact on the lives of those labeled not-White.

Many White critics, and some minority critics as well, do not care much for this body of work. They say that racial minorities are obsessed with their race and its supposed implications. The critics say that minority scholars, haunted by ghosts of the past, overstate the influence of race. Within the larger non-academic culture, the idea that racial minorities, especially African-Americans, are whiners looking for excuses for their own failures is abundantly present. Presumably, those holding this viewpoint would urge non-Whites to adopt the sense of naturalness that Whites attach to their race, pointing out that Whites do not typically run around insisting on an analysis of their Whiteness and its implications for their lives.

Yet, Whites are not always blasé about their own racial label. In fact, they experience a rush of the sense of their race whenever they feel threatened or victimized at the hands of, or in the name of, not-White persons. Thus, the contemporary debate about affirmative action and immigration—legal and illegal—is filled with the voices of White Americans who are, at


least for the moment, focused on their race. The argument on behalf of the “innocent White victims” of affirmative action is a prominent example. Still, in the day-to-day life of most White Americans, their race seems to them as undeniable as it is insignificant.

The race of White Americans is probably undeniable—from their perspective. But it is not insignificant. The label, “White,” both in its impact in terms of the perceptions of others and in what it means in the self-conception of Whites, is of immeasurable significance.

Some version of this understanding of the significance of being White animates Ian Haney Lopez’s insightful new book, White by Law—The Legal Construction of Race. To advance his understanding of Whiteness, Haney Lopez shares with us an historical narrative, one that few contemporary Americans know. It is a narrative about citizenship and racism.

One can become a U.S. citizen in two ways, by being born in this country or by the process called naturalization. Thus, for the millions of immigrants who have come and continue to come to this country, the passage to citizenship is naturalization. And throughout virtually the entire history of this country, ending only in the mid-1950s, that passageway was guarded by a federal statute that in essence allowed only “white persons” to become citizens.

The story of the enforcement of this statute in the federal courts is Haney Lopez’s historical narrative. Persons the courts identified as Chinese, Japanese, Hawaiian, Burmese, Mexican, Native-American, Syrian, Armenian, Asian Indian, Filipino, Korean, Afghani, Arabian, and persons of various permutations of mixed race took their claims to the courts. And in each instance the court measured the individual against the standard of

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Whiteness. The courts' holdings, although most often adverse to the applicant, were varied and at times, contradictory. An Oregon federal court in 1910 concluded that a "Syrian" was a "white person"; federal courts in South Carolina several years later reached the opposite conclusion. The federal courts sometimes identified Asian Indians as White until 1923 when the Supreme Court held that they were not White.

The specter of federal judges discerning the racial fitness of persons for citizenship, within opinions brimming with expressions of blunt racism, is disturbing and unsavory. This narrative becomes all the more disturbing when one realizes that this law marched its way right through the first half of the twentieth century. Every scholar of law knows that we interred the formal holding of Dred Scott, which placed African-Americans outside the bounds of citizenship simply by virtue of their race, with the passage of the Reconstruction Amendments at the close of the nineteenth century. But White by Law teaches us that race and racism remained as the defining formal elements of citizenship well into our own century.

Like every good writer, Haney Lopez has a purpose. He tells his story to advance a contemporary social agenda. Haney Lopez wants his readers, especially White Americans, first, to become self-conscious about their racial status, to understand that Whiteness is a purely social construction, not grounded in any physical or scientific reality, and that the purpose of this social construction has always been the unjust subordination of others. Second, he calls for the dismantling of race and challenges Whites to give up their Whiteness. In his words, "[a] self-deconstructive White race-consciousness is key to racial justice."

White by Law recounts a shameful historical chronicle. When so much of the contemporary debate about race suggests that we live in a color-blind society, we need to be told that it was not so long ago that our racism was so powerful and socially ingrained that we expressed it in our formal legal structures. Most adult Americans living today were born and raised in a time of racial apartheid and, as Haney Lopez tells us, a time when non-Whites were barred from naturalized citizenship.

8. Ex parte Shahid, 205 F. 812 (E.D.S.C. 1913); Ex parte Dow, 211 F. 486 (E.D.S.C. 1914); In re Dow, 213 F. 355 (E.D.S.C. 1914).
9. United States v. Thind, 261 U.S. 204 (1923); see also infra text accompanying notes 15-17.
10. Lopez, supra note 3, at 156.
How can we imagine, a mere generation later, that this virulent racism has today been washed away? Those who want to pretend that racism is nothing but a ghost from a distant past must ignore history. The work of legal historians like Haney Lopez and books like *White by Law* make it harder to indulge in this delusion of a color-blind society. This alone makes the book a worthy read.

My response to Haney Lopez's call for redemption is more complicated. First, his suggestion that White Americans hold the key to racial justice is sure to be controversial. But, more importantly, I am deeply pessimistic about the chances that Whites will join in the dismantling of Whiteness. Haney Lopez signals his own pessimism by a brief concluding chapter, “The Value to Whites of Whiteness,” that explains why Whites are unlikely to embrace his call for a “self-deconstructive White race-consciousness.” Yet, Haney Lopez understates the case for pessimism. Put bluntly, his “self-deconstructive” agenda is dead on arrival at the consciousness of virtually all White readers.

I devote this Essay to the explication of this despairing conclusion. By doing so, I want to make it harder to pretend that race has no significance for Whites. I want to demonstrate that Whites, when confronted with truly meaningful choices, will almost certainly, out of their fear and desperate needs, seek to shore up, not dismantle, their Whiteness. It gives me no pleasure to express this understanding. I express it because I believe that we must not delude ourselves into supposing that what lies ahead will be anything but nearly unimaginably difficult.

I. “Then, What Is White?”

Most members of the legal community understand that race and law have been intertwined formally in many ways throughout our legal history, e.g., the original Constitution's sanction of slavery, miscegenation statutes, and the various laws that constituted the formal apparatus of apartheid. But fewer know the story that Haney Lopez tells.

In 1790 Congress passed a law that restricted naturalized citizenship to “white persons.” Although amended, the statute continued to explicitly restrict citizenship on racial lines until 1952. It is hardly surprising that a late eighteenth century

Congress concluded that citizenship ought be limited to Whites. Nor is it startling that Congress would have failed to expunge such a statute until the middle of this century. What makes this piece of our legal history interesting and important is the case law that developed around this statute. These cases that measured human beings against the formal prerequisite of Whiteness, what Haney Lopez calls the "prerequisite cases," are the focus of the book.

Surprisingly the first reported prerequisite case was not until 1878. Haney Lopez suggests that this was probably a function of the demographics of immigration in the first half of the nineteenth century. Most immigrants were from western Europe. No one questioned the status of western Europeans as White. The involuntary immigrants during this period—Africans arriving in chains—presented an equally non-controversial case for citizenship.

All of this changed in the late nineteenth century. Prerequisite cases began to appear in the federal courts. In virtually every case the applicant for naturalization was Asian, most commonly Chinese or Japanese, and in each instance the court concluded that the applicant was not a "white person."

While the outcomes of these early prerequisite cases are unsurprising, the courts’ explanations of the process by which they discerned the presence or absence of Whiteness in the applicants are striking and important. Haney Lopez focuses on the two rationales that the courts most commonly offered to justify their conclusions that the applicant was not a "white person": (i) science; and (ii) "common knowledge."

The science of race was serious business in the late nineteenth and early twentieth century.14 Like other domains of physical science, the ambition of race science was to discern and type by racial category each human being and to do so according to some objective reality. Thus, the central tenets of race science were that each person belonged to one, and only one race, and

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that each individual's race was a product of a genealogical and physical reality.

Although race scientists disagreed among themselves, most apparently agreed on the basic categories: the "Negro" or "Black Division," the "Mongolic" or "Yellow Division," the "American (Amerind)" or "Red Division," or the "Caucasic" or "White Division." Within this typology, the race scholars placed Chinese and Japanese persons in the "Yellow" race, and they put western Europeans in the "White" race.

Thus, in the early prerequisite cases, judges used the science of race to justify their decisions to exclude from citizenship the Chinese and Japanese applicants. These judges simply equated the statute's term "white persons" with the scientifically defined category, Caucasian or White. Race science typed Chinese and Japanese as members of the Yellow, not White, race. Thus, they were not "white persons" and were ineligible for naturalized citizenship.

Judges expressed the other dominant rationale, common knowledge, as what the judge supposed the common man meant when he thought of the category of white persons. At the close of the nineteenth century, the common man, at least the common White man who was surely the judges' imagined arbiter, had no doubt that Asians were not White and were instead of a different and inferior race. Thus, in the early prerequisite cases, race science and common knowledge coincided and both rationales appeared together in the opinions. The federal courts consistently denied naturalized citizenship to the Chinese and Japanese applicants; harmony reigned in the case law.

But this harmony soon began to break down. The two dominant rationales began to diverge as applicants from central and western Asia appeared before the courts. The problem arose because race scientists typed some of these persons as Caucasian, while the common White man thought of these persons as belonging to a different and inferior race. The breakdown was most vividly displayed in the only two prerequisite cases decided by the U.S. Supreme Court, *Ozawa v. United States*¹⁵ and *United States v. Thind*.¹⁶

In *Ozawa*, decided in 1922, the Court unanimously held that a person born in Japan of Japanese parents was not a "white person" and thus could not become a naturalized citizen. Justice Sutherland employed both the science and common

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¹⁵. 260 U.S. 178 (1922).
¹⁶. 261 U.S. 204 (1923).
knowledge rationales.\textsuperscript{17} First, Sutherland equated the statute’s category, “white persons,” with the scientist’s Caucasian racial category. Next, he referenced the numerous scientific authorities that agreed Japanese persons were not Caucasian. Thus, race science put Ozawa outside the realm of “white persons.” This scientific rationale of course coincided with the “common knowledge” that Japanese were not White. All very neat and tidy.

This tidy coincidence between science and popular prejudice unraveled only three months later when the Supreme Court decided \textit{Thind}. The applicant for citizenship, Bhagat Singh Thind, had good reason to believe that his application was a sure thing. He was born in India and the race scientists then agreed that Asian Indians were members of the Caucasian race. The \textit{Ozawa} Court’s equation of “white person” and Caucasian, just several months before the oral argument in his case, made Thind’s position seem an undeniable syllogism—“white person” equals Caucasian; I am Caucasian; therefore, I am a “white person.”

The Court unanimously rejected Thind’s position. Again, Sutherland wrote the opinion. He conceded the second premise: “It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today.”\textsuperscript{18} Having conceded the truth of that premise, Sutherland repudiated the first premise, the one that he had himself constructed several months before, rejecting the equation of white and Caucasian. The race scientists may have had the power to type Thind as Caucasian but the Court possessed the power to strip that scientific conclusion of any legal significance: “What we now hold is that the 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.”\textsuperscript{19} The Court thus resolved the conflict between science and common belief by molding the law to common White belief.

For Haney Lopez these cases are a defining moment. The Court, faced with the loss of its scientific rationale, might have seen finally that no scientific basis for Whiteness existed, that race was purely a social construction that served the cause of unjust subordination. The only way to understand the \textit{Thind} case was to understand that White Americans saw Asian Indi-

\textsuperscript{17} Id.
\textsuperscript{18} Id. at 209, quoted in LOPEZ, supra note 3, at 89.
\textsuperscript{19} Id. at 214-15 quoted in LOPEZ, supra note 3, at 90.
ans as racially distinct and inferior and it was, after all, racism, and not science, that counted: "Science was, in the prerequisite cases, eroding the borders of Whiteness . . . [Yet] the Court stanched the collapsing parameters of Whiteness by shifting judicial determinations of race off of the crumbling parapet of physical difference and onto the relatively solid earthwork of social prejudice." By explicitly embracing social prejudices as the sufficient source for its statutory interpretation, the Court stood squarely with the common White man and his racism. Those whom this common man deemed not White were of course unworthy of the privilege of naturalized citizenship.

Moreover, Haney Lopez makes it clear that these federal judges generally were not reluctant or shy about their work. White by Law chronicles the patent and often unabashed racism expressed in the opinions of the prerequisite cases. For example, a federal court in 1921 explained its rejection of the naturalization of Asians in the following terms.

It is obvious that the objection on the part of Congress is not due to color, as color, but only to color as an evidence of a type of civilization which it characterizes. The yellow or bronze racial color is the hallmark of Oriental despotisms. It is deemed that the subjects of these despotisms . . . were not fitted and suited to make for the success of a republican form of Government. Hence they were denied citizenship.

It was not a matter of skin color per se; it was the inherent disposition of Yellow persons to subject themselves to despotic rule. In contrast, Whites possessed presumably an inherent strength

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20. Lopez, supra note 3, at 94.

21. Lopez, supra note 3, at 91. In addition to analyzing the cases and their rationales, Haney Lopez also tells the stories of some of the applicants. For example, in 1909 an applicant named Knight, who had served in the U.S. Navy for more than a quarter century, all of his adult life, and who had earned a medal in battle, applied for citizenship. Unfortunately, although his father was British, his mother was Asian and thus, in the judge's words, Knight was a "half-breed," unfit to be a U.S. citizen. Id. at 59.

Before the Thind decision, some Asian Indians had been successful in obtaining citizenship by naturalization. After the Supreme Court's decision, the government began a process of denaturalizing those citizens. One such person was Vaisho Das Bagai. Bagai had immigrated from India in 1915 with his family. When the government took away his citizenship, he committed suicide, leaving a note that read: "But now they come to me and say, I am no longer an American citizen . . . What have I made of myself and my children? We cannot exercise our rights, we cannot leave this country. Humility and insults . . . Obstacles this way, blockades that way, and the bridges burnt behind." Id. at 91.

22. Terrace v. Thompson, 274 F. 841, 849 (W.D. Wash. 1921), aff'd, 263 U.S. 197 (1923), quoted in Lopez, supra note 3, at 55-56. Haney Lopez notes that Terrace was an alien land law case and not a naturalization case. Nonetheless, the opinion expresses that federal judge's understanding of the logic of the naturalization law.
and autonomy that made them fit for a republican form of government. Yet, skin color was not always legally irrelevant, especially when the applicant was dark-skinned. For example, a judge denying naturalization to a Syrian applicant explained his decision by describing the applicant as "in color . . . about that of a walnut."23 The opinions also revealed the hierarchy of racism. Courts noted the illogic of extending the boon of naturalization to the "savage" Africans while denying naturalization to the "intermediate and much-better-qualified red and yellow races."24

All in all, the chronicle of the prerequisite cases is a disturbing piece of legal history that has received little notice in contemporary writing. This alone could justify the book. But Haney Lopez tells this chronicle for another purpose. He seeks to show, beyond doubt, that race has never been anything but a purely social construction, deployed to unfairly subordinate those deemed not White. His analysis of the prerequisite cases demonstrates that the courts found the statute's meaning in the common man's, and their own, racism. For so long as science paralleled prejudice, the courts used the scientific rationale. But as soon as science failed to back up the racist premises, the courts abandoned science. Haney Lopez hopes that the reader of his chronicle will learn and accept the idea that race is nothing but a human invention, and a vicious one at that. And, finally, from this understanding he hopes that his readers will join him in a redemptive strategy of dismantling Whiteness.

I share much of Haney Lopez's understandings about race. And I share fully his redemptive vision of a world where persons are no longer deemed different and less worthy by reference to the human invention we call race. But I am even more pessimistic than he about the White reader's reception of his message. In the balance of this Essay, I will explain why.

II. "IT IS VERY FAR FROM OUR THOUGHT TO SUGGEST THE SLIGHTEST QUESTION OF RACIAL SUPERIORITY OR INFERIORITY"25

Running through White by Law is the distinction between the physical world, or "reality," and the social understanding of that reality. More particularly, Haney Lopez repeatedly insists that race exists not in reality but only in the realm of social un-

23. Ex parte Shadid, 205 F. at 813, quoted in Lopez, supra note 3, at 69.
derstanding, reminding us that race is "only [a] human invention"26 and is a "purely social construction."27

Haney Lopez acknowledges of course that science is inescapably connected with culture. After all, the belief in the very idea of science is culturally contingent.28 Different cultures have demanded scientific theories to explain different phenomenon.29 Also, history tells us that each scientific gospel is an historically contingent understanding and that today's physics will likely be tomorrow's alchemy.30

Still, Haney Lopez says that the effort to make a science out of race was not merely another historically contingent scientific theory. It was an inherently unscientific form of thought, from the beginning.

[All taxonomies of nature—plants and animals, mice, elephants, and frogs, Black, White, Yellow, and Red races, men and women—are in important senses social constructions, labels created through social conventions to describe the world around us. Yet, the critique of race, science, and nature goes further than this. With race, unlike, for example, with gender, there is nothing on the nature side: there is no underlying reality to be interpreted in admittedly socially embedded ways; there are no essential differences measurable through the problematized techniques of science. Rather, there is only social belief31

While it is true that race science ultimately went the way of phrenology, we commonly connect race with certain physical realities, most significantly, dark skin pigmentation. Although we socially construct the significance of this physical reality, the physical traits that we imbue with such significance are quite real.

On the other hand, the physical traits associated with race are merely signals to the White person of the more essential racial quality in those deemed racially distinct and inferior. While

27. Lopez, supra note 3, at 96.
28. See Conley, supra note 14; see generally Stephen Jay Gould, Time's Arrow, Time's Cycle (1987) ("In any case, objective minds do not exist outside culture...[t] is important that we, as working scientists, combat these myths of our profession as something superior and apart...[from] human creativity and social context."); id. at 7; R. Hooykaas, The Principle of Uniformity in Geology, Biology, and Theology (1963).
29. The legal academy in the twentieth century has embraced and rejected the understanding of law as science. See generally John H. Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 Buff. L. Rev. 459 (1980); Ronald K. L. Collins, Gilmore's Grant (Or the Life & Afterlife of Grant Gilmore & His Death), 90 Nw. U. L. Rev. 7 (1995).
31. Lopez, supra note 3, at 96.
Whites typically recognize a Black person as such by the perception of dark skin, or the Yellow person by her almond-shaped eyes, they do not require such traits to see the other as not White. For example, the laws that defined Blackness in the apartheid scheme used the concept of blood as the defining trait. In some states one-eighth or more Black blood in your lineage made you Black, in other states, a mere drop of Black blood would be enough to taint the person. Straight hair and light skin would do no good for the person discerned as possessing too much tainted Black blood.

One thing is certain. Race has never been connected with any reality that supports its racist premises. Those deemed Black are not in fact inherently more lazy than those deemed White. The negative stereotypes of race are not a product of any underlying reality. To this extent, I agree with Haney Lopez's statement that race is backed up only by "social belief."

Haney Lopez, I believe, wants us to see race as purely social belief because he believes that we might thereby be more willing to set it aside. He wants us to understand race as a collective societal nightmare from which we need to wake up.

Yet, this purely human invention, this nightmare we call race, is far more embedded and durable than any ordinary scientific taxonomy or any other scientific understanding connected with the physical world. To explain this point, I need to revisit the Supreme Court prerequisite cases, Ozawa and Thind, and explore a mystery they pose.

Justice Sutherland concluded his opinion in Ozawa in a striking manner. As he rejected the claims of the Japanese to naturalized citizenship, Sutherland stated: "Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved."

Basically the same profession of innocence appears at the conclusion of the Thind opinion, this time explaining the denial of citizenship to the Asian Indian applicant:

It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such a character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

33. Thind, 261 U.S. at 215.
In other words, Sutherland seems to suggest that the statute and the Court's judicial interpretations are in no way manifestations of racism.

Now, this is odd. The federal statute initially passed in 1790 limited naturalization to "white persons." What could we imagine to have been the rationale for this law apart from the assumption that Whites were different and more worthy of citizenship than those deemed not White, simply by virtue of their race? And when the Supreme Court in *Thind* dismissed race science and embraced common knowledge as a sufficient basis for labeling Asian Indians as not White and thereby sensibly excluded from naturalized citizenship, what could have been the Justices' rationale apart from the assumptions of racial inferiority and superiority? Finally, what was this supposedly non-racist conception that Sutherland called "racial difference"?

I cannot know what Sutherland was actually thinking about when he wrote those opinions. But it seems likely that he thought he was talking sense. And I found his passages eerily familiar.

As every student of race and the law knows, the Supreme Court sanctioned apartheid in the 1896 case, *Plessy v. Ferguson*, and then struck it down in *Brown v. Board of Education* in 1954. Fewer students know, however, that in each case, the defenders of apartheid asserted the idea of a non-racist foundation for the law.

In his majority opinion in *Plessy*, Justice Brown defended apartheid from constitutional attack by asserting that plaintiffs built their argument on the erroneous idea that apartheid was somehow a continuing symbol or badge of slavery and was a basic denial of the concept of equality guaranteed in the Fourteenth Amendment. Brown replied: "Laws permitting, and even requiring, [racial segregation] in places where [the races] are liable to be brought into contact do not necessarily imply the inferiority of either race to the other ..." And he finished off his response with the now infamous "self-imposed stigma" suggestion:

> We consider the underlying fallacy of plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses

34. 163 U.S. 537 (1896).
Like our reaction to Sutherland's concluding flourishes in *Ozawa* and *Thind*, we react to Justice Brown's words with incredulity. What else could apartheid have been but an expression of racism? When an African-American living in the South in the late nineteenth century felt stigmatized by the laws that commanded the physical separation of the races, she was not choosing that interpretation, she was not misunderstanding the message of the law; she understood all too well the intended message of racial inferiority and superiority. What then could Justice Brown have meant?

The case that overturned *Plessy* provides another example of this sort of dissonance. In the *Brown* case the lawyers defending apartheid from constitutional attack advanced their own version of this non-racist racism. For example, the Attorney General of Texas argued: "There is no discrimination on the part of the State of Texas in administering its public school system, only separation of the races." At oral argument, the lawyer representing North Carolina spoke explicitly of this mysterious non-racist foundation for apartheid.

Everybody in North Carolina—practically everybody in North Carolina—is either Anglo-Saxon or Negro. As a result of that, we have more consciousness of race in North Carolina than is to be found in some of the border and northern states. That race consciousness is not race prejudice. It is not race hatred. It is not intolerance. It is a deeply ingrained awareness of a birthright held in trust for posterity.

Finally, the eminent Supreme Court advocate, John W. Davis, also rejected racism as the foundation of the apartheid laws: "You say that [segregation is a product of] racism. Well, it is not. Recognize that for sixty centuries and more humanity has been discussing questions of race and race tension, not racism."

This idea that the laws separating white and black school children were not grounded in racism seems ludicrous. Like the

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37. Id. at 551.
idea of a self-imposed stigma in *Plessy*, and like Sutherland's professions of non-racism in *Ozawa* and *Thind*, we see only racism and we wonder what they imagined they meant.

Although we cannot know what the authors of these arguments actually thought, we can imagine how someone might have spoken such ideas and made sense of them. And in doing so, we will return to Haney Lopez's point that race is purely a social construction.

Robert Cover, whose quote prefaces this Essay, taught that we each inhabit not just a physical world but also a normative world, a nomos. It is within the normative world that we create and maintain a sense of right and wrong, lawful and unlawful. Just as we must learn to make our way through our physical world, we must learn how we shall respond to the presence and needs of others.

The formal laws of the state are a critical part, but only a part, of the nomos. Our religious community, family, professional community, and other normative communities to which we might belong are also sources of law to which we may feel a deep sense of obligation.

Cover also taught that the "law," emanating from whatever community, is a product of precept, narrative, and commitment. Taking the example of the law of the prerequisite cases, the federal statute, a precept, was only a part of the law. Judges had to determine the meaning of "white person." To do so, they had to resort to narrative. "Narrative" in this usage means both the stories we possess about others and the assumptions and understandings that do not necessarily take a formal narrative structure. The confluence of precept and narrative yields meaning. Judges in the prerequisite cases brought their narratives about race, about their role as judges, about the nature of citizenship, all to bear upon the precept of the statute. The meaning that emerged truly became the state's law when the judges backed it up with commitment. The judges demonstrated their commitment by pronouncing the meaning, applying it to the case before them, and implicitly or explicitly bringing to bear the force of the state.

For example, when the federal judge quoted earlier referred to the Yellow race as the "subjects of Oriental despotisms," he brought narratives of his normative world to bear upon the task of statutory interpretation. In that judge's normative world,

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42. See generally Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389 (1992) (applying the insights of Cover to the legal profession's nomos).
Asians were different, inclined to subservience to despotic rulers, inherently less capable of participating in a democracy. Such a narrative of course demands its contrasting opposite, the White person, the person whose racial identity makes him well-suited to citizenship in a democracy and presumably ill-suited to subjection to a despot. This contrast of course fits perfectly with yet another narrative—the story of the founding of this republic and our forbearers' intolerance of the despotic rule of the British monarch. And so on. Presumably, the judge made sense out of the decision to deny citizenship to the Asian man before him by finding a justice and coherence within the interwoven narratives of his normative world.

Moving from Haney Lopez's vocabulary of "social construction" to Cover's "nomos" is more than just a shift in terminology. One of the powerful insights of Cover's extraordinary conception, a conception that I have only sketched in part in this Essay, is that the normative world is as real and fundamental as our physical world. The laws of our nomos provide the essential normative coherence that lets us live a life of sanity and connection. The narratives that form part of those laws are essential to that coherence.

The point is not that our narratives are fixed; we can come, and in fact inevitably do come, to possess different narratives. But while we possess a narrative as part of our normative world, its significance to us can be far greater than any physical reality. In fact, we are much less likely to renounce a central narrative of our normative universe than to accept a radically different understanding of our physical world. Tomorrow, I might read in the morning newspaper that the theory of relativity has been disproved and simply assimilate that new data, however startling. I might even witness an apparent contradiction of my more basic understanding of my physical world and accept it—I see, for example, a physical object move without any apparent application of force and suppose that perhaps there are forces that exist not within our current scientific understanding.

Our willingness to set aside any particular understanding about our world depends on what we see at stake. Until recently I understood that the conditions for what we call "life" did not exist on any other planet in our solar system. Now I read that we have discovered evidence that some basic form of life may have once existed on Mars.43 Fine. I can easily accept this new

43. See John Noble Wilford, Clues in Meteorite Seem to Show Signs of Life on Mars
understanding because so little is at stake for me. On the other hand, if I had built my entire professional career as a scientist around the initial understanding, the stakes would obviously be very different and I would probably resist the implications of this new data.

When it comes to the displacement of the central narratives of our normative universe, everything hangs in the balance. If, for example, I have made sense out of my participation in a legal and social system of apartheid by resort to narratives of Whites as inherently superior to non-Whites, giving up those narratives turns my normative world upside-down. If, for example, I am a judge who has spent his life enforcing the apartheid laws, how could I even contemplate rejecting the narratives of White superiority and social incompatibility, and all the other narratives by which I made sense of my exercise of power? My self-conception, the judgment of my life's work, the very moral quality of my existence are all at stake.

Recalling the strange profession of innocence by Justice Sutherland in *Ozawa* and *Thind*, and its apparent analogues in the opinion of Justice Brown in *Plessy*, and the segregationist lawyers' rhetoric in *Brown*, we might understand that those who claimed that innocence truly imagined that they possessed it. Within the normative universe of the defenders of apartheid, their narratives of race justified a "race consciousness." If you embrace the story of the social inferiority and incompatibility of Black children as part of the reality of your normative universe, your advocacy of segregated schools is thus a manifestation of a reality you call, "race consciousness," and not a matter of "race prejudice." Race prejudice would involve reliance on made up, false stories about Black children.

In the contemporary debate about race we see reflections of just such distinctions. White persons, from politicians to professors, often speak and act in ways that signal that they must possess some version of the narratives we would call racism. Still, they deny that they are racists. They might say, "I would be very uncomfortable with a Black neighbor—not because I am a racist—but only because I am worried about crime and the security of my neighborhood." They cannot see their own racism so long as the narratives of their normative world remain intact, and they cannot give up their narratives without losing the coherence of their normative world. To them, racism is the unjustified prejudice of the neo-Nazi and not the "reality" constructed

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by their narratives about the inherent propensity of black men to commit crime. They might say that they are merely expressing the reality of “race consciousness.”

Perhaps some version of this understanding explains the professions of innocence in the prerequisite cases and similar episodes of our legal history. After all, if you possess within your normative universe narratives of Asians as inherently disposed to despotic, not democratic, rule, denying them access to U.S. citizenship is a matter of race consciousness not racism. Justice Sutherland might say, “It’s a matter of trying to put a round peg in a square hole, that’s all.” In this manner, he could understand himself to be making sense when he said that the federal statute and the prerequisite cases merely reflected “racial difference” and not “racial inferiority.”

The significance of this understanding of those strange claims to the moral high ground by the defenders of apartheid has nothing to do with our judgment of the morality of those ideas and their corresponding actions. We can say that the choices, backed up by law, to enslave, subordinate, and exclude others by reference to race were morally wrong, however deeply held the convictions of the actors. Most evil is done with great sincerity, if not zealotry. The point is that what Haney Lopez calls the “purely social construction of race,” understood as the narratives of a nomos, however evil its nature, may be the last thing Whites would be willing to give up. There’s just too much at stake.

Haney Lopez understands the basic problem. He in fact projects a deep pessimism about the chances for his agenda of White renunciation and explains this pessimism in the concluding chapter of his book, entitled The Value to Whites of Whiteness. Haney Lopez takes the example of the Supreme Court in the Thind case. Those Justices faced the breakdown of any scientific basis or objective reality against which race might be measured. But instead of questioning the very idea of Whiteness and the underlying logic of the statute’s exclusion of non-Whites, the Court instead preserved Whiteness. Haney Lopez explains the Court’s response in Thind in the following terms:

While the Court’s decision is intelligible on a number of levels, it is perhaps best understood as an expression of the value of Whiteness to Whites. White identity provides material and spiritual assurances of superiority in a crowded society. We should thus not be too surprised that the prerequisite courts clung to the notion of a fixed White race, even
He concludes his book with the image of contemporary Whites as persons, like the judges of the prerequisite cases, “unwilling to relinquish the privileges of Whiteness.”

The roots of racism in the White consciousness run deep. Yet, I would not imagine that White racists, past or present, typically engage in a conscious calculation of the utility of their own racism. If it were this simple, racism might have been displaced by the many appeals to conscience, so eloquently and passionately articulated by the opponents of racial subordination in every generation.

Racism remains embedded in the White consciousness because it has never been so simple as a material cost/benefit analysis. Racists, of each generation, cannot set aside the narratives that allow them to make sense out of their collaboration in a system that first enslaved, and then subordinated innocent human beings. To give up those narratives would entail a loss of the coherence of their normative world. Yes, the slave owner presumably enslaved blacks because it made him richer than he would be if he set them free. But the various normative understandings of that choice, that slavery was as morally acceptable as his use of livestock, or that slavery was an unfortunate social structure that he had to manage, and that his slaves were better off enslaved than turned loose, or whatever his moral justification, were not, at least in his mind, the product of a conscious, self-interested choice to embrace a particular set of narratives about blacks. His normative understanding was ultimately grounded in the reality of his nomos. For example, he might say that he did not choose to think of blacks as less than fully human, anymore than he chose to think of cattle that way. In both instances, the creatures, to him, just were what they were.

This explanation, however, is incomplete and perhaps too kind. Racism brings to its possessor not just coherence but also pleasure. The psychic satisfaction, the ego boost, of knowing that there is an “other,” to which you are inherently superior, is like an addictive drug. When times are tough, and the racist doubts himself, he can always draw some measure of comfort from the sure knowledge that he is White and not Black. In this way it brings a pleasure like heroin coursing through the veins, or a swallow of Scotch warming the troubled soul.

44. Lopez, supra note 3, at 198.
45. Id. at 202.
I do not mean to suggest that Haney Lopez misunderstands the deeply rooted quality of race. The author of a book that so carefully and thoughtfully analyzes race, racism, and the law could not possess any serious misunderstanding on this point. But I see, and must share, an even bleaker picture.

III. "How Much Would It Be Worth ... To Be Regarded As A White Man ... ?"46

When Haney Lopez calls for Whites to renounce their Whiteness, one can imagine the White liberals lining up, with little hesitation. Who, among the liberals, would seek to preserve this evil conception?

The answer is that most Whites, of whatever political persuasion, are likely to act in ways that preserve Whiteness. Sure, many Whites have spoken the formal renunciation but Haney Lopez has more in mind than the mere lip service of the common liberal message on race. He outlines a three step process.

First, Whites must overcome the omnipresent effects of transparency and of the naturalization of race in order to recognize the many racial aspects of their identity ... Second, they must recognize and accept the personal consequences of breaking out of a White identity. Third, they must embark on a daily process of choosing against Whiteness.47

Haney Lopez explains his last step.

[In deciding what to eat, how to dress, whom to befriend, and where to vacation ... racial choices are rendered. These common acts are not racial choices in the sense that they are taken with a conscious awareness of their racial implications, or in the sense that these quotidian decisions by themselves can establish or change a person's racial identity ... Given the thorough infusion of race throughout society, in the daily dance of life we constantly make racially meaningful decisions.48

One might easily imagine that the first two steps are the easy part and that the third step, requiring action, is the hard part. Taking account of the racial meanings of actual choices like where to vacation, where to live, and so on, sounds enormously burdensome. Yet, if you suppose that the first two steps call for a clear, honest, and sincere commitment, it may well be that the first two steps are even more difficult than the last one.

46. Brief for Plaintiff in Error at 10, Plessy v. Ferguson, 163 U.S. 537 (1896), reprinted in 13 LANDMARK BRIEFS, supra note 38, at 37 (Brief of James C. Walker).
47. Id. at 193.
48. Id.
Haney Lopez tells us that the essential first step in his strategy is that Whites must "recognize the many racial aspects of their identity." White liberals have little problem acknowledging what we might call the "burden" side of the equation. They acknowledge the burden of racism on those deemed not-White, arguing for example that affirmative action is a necessary response to the continuing burden of societal racism. But all of these acknowledgments are about the impact of racism on others. Haney Lopez is seeking another kind of acknowledgment from the White audience—he wants us to recognize the racial aspects of our identity. What does it mean to be White, he insists?

Being White means first being free of the burden that others carry. Not every White person enjoys a life of privilege or even one free of societal bias. Other Whites deem poor Whites, gay Whites, White women, and others as different and less worthy. But even for those Whites who experience other forms of bias, at least race prejudice emanating from other Whites is absent. And for many Whites, including me, no real form of bias from the White community enters their lives.

But being White doesn't just mean being free of the race prejudice that burdens the lives of those deemed not White. It also means that many other Whites will see you as presumptively worthy, belonging, and capable, simply because you are White. And this beneficial presumption demands the contrasting opposite, the non-White who is discerned as less worthy, less capable, less welcome. The burden of racism on persons deemed not White is the essential price paid to create the corresponding benefits enjoyed by those deemed White. Being White means, more than anything else, riding on the wings of racism.

So long as Whites control most of the wealth and power of this society, Whiteness will be an invaluable thing. When I enter a classroom, I may feel uncomfortable—perhaps I am unprepared, or it's the first day of class—but I never wonder whether my race will affect the perceptions of that overwhelmingly White audience. And I often enter those rooms with utter confidence. But, if I were not White, could I ever enter without thinking about how I am perceived, racially? And what value could we possibly attach to that transparency, that naturalness about race, that Whites possess? In the concluding pages of the book, Haney Lopez uses the story from Andrew Hacker's remarkable book on race, *Two Nations: Black and White, Separate, Hostile, Unequal*, about the White college students asked what they thought might be fair compensation for being transformed in but one respect—made Black. Many supposed that a figure of
$50 million, or about $1 million per year over their life expectancy, would be reasonable. Or, in the words of the lawyers challenging apartheid in the *Plessy* case a century ago:

How much would it be worth to a young man entering upon the practice of law, to be regarded as a white man rather than a colored one? Six-sevenths of the population are white. Nineteen-twentieths of the property of the country are owned by white people. Ninety-nine hundredths of the business opportunities are in the control of white people. These propositions are rendered even more startling by the intensity of feeling which excludes the colored man from the friendship and the companionship of the white man. Probably most white persons if given a choice, would prefer death to life in the United States as colored persons.49

Whiteness has always had an enormous value to Whites. It propped up a system of slavery and then apartheid. It continues to provide the presumption of worthiness to contemporary Whites. If Whites truly confront their Whiteness, they will see that giving up Whiteness not only entails the lifting of the burden of racism from the others, it also entails the loss of the boost of racism for them. Still, it is comforting to imagine that at least some Whites would see this boost as illicit and undeserved and, for that reason, would be willing to give it up.

But the problem is yet deeper. When Whites truly encounter the implications of Whiteness they face a threat to their very identity and sense of self-worth. Recognizing that I have received the gift of the presumptions that accompany my Whiteness every day of my life, however unwanted that gift might be, I must then see all my accomplishments and all that I possess as tainted by the illicit benefits of racism. The education I received, the job opportunities that came to me, and, more importantly, the sense of social acceptance and belonging that provided the base from which I might take the risks that brought the big rewards, these are all things that became mine in part because the game called my life was rigged from the beginning. To recognize the implications of Whiteness is like winning a game only to discover later that someone else had bought off the officials to help your side. The victory and what it meant to your self-image was built on the assumption that you had been fairly tested. If you discovered that you had an unearned and unfair advantage, what would happen to that self-image now seen as built on an illusion of fairness?

The White males occupying elite positions, including me, have gotten there in part by the boost of racism. That is the part of Whiteness that is the hardest to confront, for if we took a really close look at the effects of racism on our lives, we might see that we are less capable, less successful, less worthy than we had supposed. It is a curtain that we don’t want to raise.

Thus, many reasons exist to be pessimistic about Haney Lopez’s strategy of Whites dismantling Whiteness. First, some Whites are unabashed racists—neo-Nazis, Klan, skinheads, or whatever. Such Whites seek to bolster, not tear down, the edifice of Whiteness. Many more are “race conscious” Whites. The narratives of racism, by whatever name, are a part of their normative universe and provide an essential coherence to their choices and lives. Dismantling Whiteness, for them, means losing that normative coherence, as well as the loss of that psychic comfort of knowing that there is an “other” to whom you are superior. Finally, even for those Whites who reject at the conscious level the narratives of racism, the prospect of confronting and dismantling Whiteness is daunting. First, the strategy of dismantling Whiteness entails loss and the coming of a new, unfamiliar world. Second, the full confrontation of the implications of Whiteness as we look back across the story of our lives has the potential to shatter our sense of self-worth and accomplishment.

It is no wonder that Whites fall into a transparent sense of their race. We can’t bear to look too closely at our Whiteness. And, I fear, we can’t bear to give it up.