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FRIZZLY STUDIES

Negotiating the Invisible Lines of Race

Daniel J. Sharfstein

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In 1927 a Radcliffe graduate student named Caroline Bond Day began researching her anthropology master's thesis on mixed-race families in the United States. The subject had personal resonance for Day, who was a fixture of colored society in Atlanta and had a complexion that defied easy categorization. To gather data for her thesis, she wrote to dozens of men and women in her large circle of friends, among them civil rights leaders such as W. E. B. Du Bois, John Hope, and Walter White. She asked for exhaustive genealogies, with estimates of blood proportions—Negro, white, Indian—for each ancestor. She provided a detailed questionnaire about their physical features, from eye and skin color to the fullness of their lips. And she requested family portraits and locks of hair.[1]

Day was capable of speaking about race with an almost absurd degree of scientific precision. One year earlier, the National Urban League had given her a prize for an autobiographical short story called "The Pink Hat," about a young woman who discovers that one of her hats covers her hair and casts a rosy glow on

1. See Caroline Bond Day, *A Study of Some Negro-White Families in the United States* (1932; Westport, CT: Negro Universities Press, 1970); Adele Logan Alexander, *Homelands and Waterways: The American Journey of the Bond Family, 1846–1926* (New York: Vintage, 2000), 478.

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her skin in such a way that most people at first glance think she is white. Near the beginning of the story, Day described the main character as "anthropologically speaking, a dominant of the white type of the F^3 generation of secondary crossings."[2] But Day was also capable of using more accessible taxonomies. When she asked the research subjects of her thesis to describe the texture of their hair, she gave them a range of options. Was it straight? Wavy? Curly? Or was it something in between wavy and curly? That intermediate category was what Day called "frizzly."[3]

Frizzly. I had never seen that word before encountering it in Day's writing. Make no mistake: on a humid day when I am a couple of weeks overdue for a visit to the barber shop, my hair has a tendency to get *frizzy*. But there is something actively different about that extra "l" toward the end of the word. *Frizzly* was a designation that was supposed to be scientific, but at the same time it felt homemade, improvised. Reading through Day's manuscripts at Harvard, I was astonished by the richness of the correspondence and the portrait that emerged of a group of educated African Americans who were keenly aware of the absurdities of the color line but still bound by Jim Crow in its most ossified and oppressive forms. Yet my thoughts kept coming back to *frizzly*.

Frizzly is a word that has been used in English for five hundred years, but no one quite knows its origin.[4] It can suggest wildness, but also purposeful chaos: the unkempt locks of a servant girl,[5] but also the wig of a respected government official.[6] People tried to control their frizzly hair, but they also frizzled it just so. Physical anthropologists used the term at various points in the nineteenth and twentieth centuries to describe hair texture of the Jews of Europe and Morocco,[7]

2. Caroline Bond Day, "The Pink Hat," *Opportunity* 4 (December 1926): 379–80.

3. Examples of the questionnaires survive in the Caroline Bond Day Papers, ser. III, box 3, at the Peabody Museum Archives, Harvard University. Day describes the "hair form" of her sample and provides a foldout image of thirty-one locks of hair in *Study of Some Negro-White Families*, 12–14.

4. "Frizzle, v.1," *Oxford English Dictionary*, oed.com/view/Entry/74837#eid3457638 (accessed December 20, 2012).

5. Thomas Hardy, *Tess of the D'Urbervilles*, cited in "Frizzle, n.1," *Oxford English Dictionary*, oed.com/view/Entry/74835#eid3457436 (accessed December 20, 2012) ("Durbeyfield was seen moving along the road in a chaise belonging to The Pure Drop, driven by a frizzle-headed, brawny damsel, with her gown sleeves rolled above her elbows").

6. Nathaniel Hawthorne, *The Scarlet Letter*, cited in "Frizzle, n.1," *Oxford English Dictionary*, oed.com/view/Entry/74835#eid3457436 (accessed December 20, 2012) ("Nothing . . . was left of my respected predecessor, save an imperfect skeleton, and some fragments of apparel, and a wig of majestic frizzle"). For "wig of majestic frizzle," see Anthony Trollope, *He Knew He Was Right*, 2 vols. (London: Strahan, 1869), 1:54 ("her grey hair was always frizzled with the greatest care").

7. Maurice Fishberg, "Physical Anthropology of the Jews II—Pigmentation," *American Anthropologist* 5 (January–March 1903): 98–100, jstor.org/stable/659365 (accessed December 20, 2012); J. E. Budgett Meakin, "The Jews of Morocco," *Jewish Quarterly Review* 4 (1892): 383, jstor.org/stable/1450273 (accessed December 20, 2012).

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Australian aborigines,[8] and various South Pacific islanders,[9] among others. But in Day's questionnaire, it was not just a scientific category for measuring physical types. It was also something colloquial that the recipients of the questionnaire — her friends — could readily understand. Wavier than wavy. Not exactly curly. Frizzly.

As a category on the line between objective and subjective, abject and aspirational, observed and imagined, frizzly calls into question the whole enterprise of drawing the line between black and white: what appears to be scientific reveals itself to be social. Caroline Bond Day knew this, from her own experience of being mistaken for white and from the experience of the families she was studying, 10 percent of whom had members who were living as white people.[10] Her meticulous documentation of mixed-race families reinforced a notion of race as blood-borne and susceptible to precise measurement, while at the same time exposing the contingency, subjectivity, and uncertainty of racial categories.

When Day was writing her thesis, mapping out the complex permutations of race had undeniable academic value, opening up to scientific study what her adviser called "the almost inaccessible class of educated persons of mixed Negro and White descent."[11] While research like Day's had the potential to expose essential fallacies underlying American ideas about race, the study of the physical traits of people with remote African ancestry also seemed useful, even necessary, for a world of increasingly rigid racial categories. Most Southern states had adopted "one-drop rules" during the first decades of the twentieth century, defining anyone with any African "blood" as legally black.[12] In 1924, three years before Day started her work, Virginia's "Act to Preserve Racial Integrity" not only defined " 'white person' " to mean "the person who has no trace whatsoever of any blood other than Caucasian" but also placed the administration of the color line in the hands of a state "vital statistics" agency staffed by ideologically committed eugenicists.[13] The following year, the sensational Rhinelander annulment trial, in which an heir to a New York society family alleged that he had

8. C. S. W., "Review of *Étude sur les Races Indigènes de l'Australie* by Paul Topinard," *Journal of the Anthropological Institute of Great Britain and Ireland* 2 (1873): 308–9, jstor.org/stable/2841178 (accessed December 20, 2012).

9. R. G. Latham, "On the Pagan (Non-Mahometan) Populations of the Indian Archipelago, with Special Reference to the Colour of Their Skin, the Texture of Their Hair, and the Import of the Term Harafura," *Transactions of the Ethnological Society of London* 1 (1861): 202–3, 205–6, jstor.org/stable/3014194 (accessed December 20, 2012).

10. In addition to the families who answered her questionnaire, Day claimed to know at least fifty other families who were passing for white. See *Study of Some Negro-White Families*, 5.

11. Earnest A. Hooton, foreword to Day, *Study of Some Negro-White Families*, iii.

12. See Pauli Murray, ed., *States' Laws on Race and Color* (1951; Athens: University of Georgia Press, 1997), 22 (Alabama), 39 (Arkansas), 90 (Georgia), 237 (Mississippi), 428 (Tennessee), 462–63 (Virginia).

13. An Act to Preserve Racial Integrity, 1924 Va. Acts ch. 371. See also Paul Lombardo, "Miscegenation, Eugenics, and Racism: Historical Footnotes to *Loving v. Virginia*," *UC Davis Law Review* 21 (1988): 421–52.

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unwittingly married a woman with "colored blood," made hundreds of front-page headlines.[14] Racial categories affected how people lived and how they died: where they could go to school, whom they could marry, what kinds of jobs were open to them, and how they related to and understood the state. In Day's world, a little frizzle could go a long way.

It is a matter of no great insight to say that race is a conceptual blur. Regarding "the commonplace that race is 'socially constructed'," the historian Barbara J. Fields memorably commented that "a German shepherd dog or even an intelligent golden retriever knows [this] without instruction."[15] Race conflates what is plain to see with something that is invisible but present in more or less knowable forms in our veins, minds, or souls.[16] It roots today's policy decisions in a remote and often imagined past.[17] It blurs subject and object, agency and overwhelming structural inequality. It is a set of categories that people define for themselves and that at the same time others—strangers, neighbors, government officials—relentlessly impose upon them.[18] Race pits experience and personal relationships against politics and ideology, local knowledge against universal assumptions. It confuses ends with means, racial inequality and subordination with classification by race.[19] It gains and loses focus alongside other contingent and elusive categories such as class, gender, nationality, and slave or free status.[20] For four hundred years, the meaning of racial categories in North America has remained unstable. In the earliest English colonies, "African," "European," and "Indian" quickly faded into more creolized identities.[21] The content and contours of race shifted and mutated as economies boomed and went bust, colonies gained independence, slaves became citizens, farms gave way to cities, mountains were hollowed out for mines, a frontier closed, and an empire emerged.

Despite the substantive blur that defines race, American society for much of its history was premised on the clarity and viability of racial categories. A starting

14. Elizabeth M. Smith-Pryor, *Property Rites: The Rhinelander Trial, Passing, and the Protection of Whiteness* (Chapel Hill: University of North Carolina Press, 2009).

15. Barbara J. Fields, "*Origins of the New South* and the Negro Question," *Journal of Southern History* 67 (2001): 811, 816.

16. This conflation continues in the age of DNA. See Dorothy Roberts, *Fatal Invention: How Science, Politics, and Big Business Re-create Race in the Twenty-First Century* (New York: New Press, 2011).

17. See Ariela Gross, "When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument," *California Law Review* 96 (2008): 283–322.

18. Barbara J. Fields, "Whiteness, Racism, and Identity," *International Labor and Working-Class History* 60 (2001): 48.

19. See Owen M. Fiss, "Groups and the Equal Protection Clause," *Philosophy and Public Affairs* 5 (1976): 107–77; Jack M. Balkin and Reva B. Siegel, "The American Civil Rights Tradition: Anticlassification or Antisubordination?," *University of Miami Law Review* 58 (2003): 9–34.

20. On the contingency of slavery and freedom, see Rebecca J. Scott and Jean M. Hébrard, *Freedom Papers: An Atlantic Odyssey in the Age of Emancipation* (Cambridge, MA: Harvard University Press, 2012), 49–82; Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* (1979; New York: Vintage, 1980), 221–91.

21. See Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (Cambridge, MA: Harvard University Press, 1998), 29–46; Mechal Sobel, *The World They Made Together: Black and White Values in Eighteenth-Century Virginia* (Princeton, NJ: Princeton University Press, 1987).

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point for understanding how there could be so much consensus about a blur is the law, a set of institutions and cultural practices that constantly tread the line between clarity and fuzziness. At a fundamental level, race has functioned as a set of rules and rights; legal entitlements and disabilities are a primary source of meaning for racial categories. To ask, what does it mean to be black?,[22] has often required an answer rooted in law, and for much of American history the law delineated racial differences with hard-edged rules that denied the possibility of anything overly complex, let alone incoherent, about race.[23] Dark skin once meant the presumption of slave status. Free people who were designated "of color" often paid higher taxes, faced obstacles to inheriting property, were forbidden to own land or a gun, and could not defend themselves physically or testify against whites.[24] The racially segregated South that emerged in the decades following Reconstruction was, among many things, an extraordinary and obsessive legislative undertaking.[25] Du Bois, for one, saw racial categories as indistinguishable from their legal consequences. Considering the question of how he could "differentiate" African Americans as a group, given the "infinite . . . variety" of human beings, he wrote that he could "recognize ['black'] quite easily and with full legal sanction: the black man is a person who must ride 'Jim Crow' in Georgia."[26]

The clarity of the categories, and the stark inequality that they embodied, assumed absolute and easily recognizable difference. If race could not be discerned and enforced, then no one would be safe.[27] Yet every instance in which the law distinguished black from white became an occasion for individuals to challenge or otherwise confound how they were being classified. Different bundles of legal entitlements for blacks and whites separated and ordered people by race but at the same time created powerful incentives for anyone who could plausibly

22. This is, of course, hardly the only question one could ask about race, which in the United States has never been solely about black and white. See John W. Wertheimer et al., "'The Law Recognizes Racial Instinct': *Tucker v. Blease* and the Black-White Paradigm in the Jim Crow South," *Law and History Review* 29 (2011): 471–95.

23. On the fundamental legality of race and slavery, see Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 103n104. On "hard-edged doctrines that tell everyone exactly where they stand" versus "fuzzy ambiguous rules of decision," see Carol M. Rose, "Crystals and Mud in Property Law," *Stanford Law Review* 40 (1988): 577–610.

24. See Daniel J. Sharfstein, *The Invisible Line: Three American Families and the Secret Journey from Black to White* (New York: Penguin, 2011), 21, 41–43; Ira Berlin, *Slaves without Masters: The Free Negro in the Antebellum South* (1974; New York: New Press, 1992).

25. See Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (New York: Alfred A. Knopf, 1998), 229–37; J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910* (New Haven, CT: Yale University Press, 1974).

26. W. E. B. Du Bois, *Dusk of Dawn: An Essay toward an Autobiography of a Race Concept* (1940), in *W. E. B. Du Bois: A Reader*, ed. David Levering Lewis (New York: Henry Holt, 1995), 477.

27. Adrienne D. Davis, "Identity Notes Part One: Playing in the Light," *American University Law Review* 45 (1996): 706–7 (describing "a latent danger of slavery for whites: the loss of a liberty interest. . . . whites also might find themselves on the accused end of being a slave").

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claim white status to do so. Laws that purported to keep whites racially pure actually turned many people of color into whites. After all, at the margin these rules drew lines between some individuals who looked white and others who also looked white. People who were taxed as blacks, prosecuted for marrying whites, or denied a jury trial insisted that they were white or claimed some space between black and white that allowed them to be dark, but white—they said they were Portuguese, Native American, or something else entirely. From New York to Texas, communities might have blacks and whites, but also "little races" that transcended conventional categories, groups called Melungeons, Brass Ankles, Red Bones, Dominickers, Wesorts, and more. Racial categories, however starkly drawn, cast shadows.

While dozens of lawsuits across more than two centuries sought to qualify or redraw the law's bright lines, courts often addressed these challenges in ways that affirmed that race was important and absolute and capable of being known, confidently justifying and naturalizing the existence of the racial boundary lines that they had drawn.[28] One of the most influential cases was one of the first, *Hudgins v. Wright*, which was decided by Virginia's high court in 1806. Jacky Wright and her family sued a man who claimed to be their owner and was going to "send them out of the State."[29] Having, by all accounts, "entirely the *appearance* of white people," the Wrights asserted that they were descended from "American Indians," not Africans, and were thus entitled to their freedom.[30] Their case suggested the extent to which the legal categories of black and white failed to reflect a society that had always crossed color lines, as well as the ease with which many Americans could confound the line between white and black with third categories that split the difference.

The court held that the women were free but saw no occasion to question the integrity or wisdom of the color line. Rather, one justice, writing for the majority, opined that he could tell that the women were free because the hair of people descended from Africans would retain "a degree of flexure, which never fails to betray . . . the party distinguished by it." A "woolly head of hair," wrote

28. I discuss two of these "racial determination" cases in depth in *The Invisible Line*. See also Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America* (Cambridge, MA: Harvard University Press, 2008); Martha Hodes, *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* (New Haven, CT: Yale University Press, 1997); Ian F. Haney-López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 1996).

29. According to the legal reporter, the plaintiffs included three generations of the family, "grand-mother, mother, and grand-daughter." *Hudgins v. Wright*, 1 Hen. and M. 134 (Va. 1806). Peter Wallenstein describes the plaintiffs as "Jacky Wright and her children—Maria, John, and Epsabar." Wallenstein, "Indian Foremothers: Race, Sex, Slavery, and Freedom in Early Virginia," in *The Devil's Lane: Sex and Race in the Early South*, ed. Catherine Clinton and Michele Gillespie (New York: Oxford University Press, 1997), 65. See also Gross, *What Blood Won't Tell*, 23–24; Davis, "Identity Notes," 703–11; Ian F. Haney-López, "The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice," *Harvard Civil Rights-Civil Liberties Law Review* 29 (1994): 1–5.

30. *Hudgins v. Wright*, 141.

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St. George Tucker, would remain visible "long after the characteristic distinction of colour either disappears or becomes doubtful."[31] The invisible essence of race would always reveal itself, and racial hierarchies could be administered by judges as long as they had a keen eye for frizzliness. Yet the fact remained that people had continuously claimed the Wright women and their ancestors as slaves for more than a century. How could that be? A second justice, Spencer Roane, acknowledged what Tucker would not: that racial "intermingl[ing]" could make it "difficult, if not impossible to say from inspection only, which race predominates in the offspring." Nevertheless, he could join the majority in holding the Wrights free because there was no genealogical evidence before the court that suggested that they had descended from an "African."[32] The integrity of racial categories rested on the idea that if most people could be eyeballed into one race or another, a more objective and inescapable criterion would sort the rest.

Or so it would seem: the distinction between visual and genealogical evidence is deceptively easy. Yet in 1806 there were few reliable records that litigants or judges could use to construct a genealogy. As a result, genealogical evidence often required witnesses who would describe decades-old recollections of what ancestors of the litigants had looked like.[33] Genealogical evidence was not simply visual — it was visual memory. That a court would regard it as reliable, arguably even more definitive than looking at the litigants, suggests something important about law. Legal decision making is itself a process that blurs the distinction between what is objective and subjective, scientific and social, precise and penumbral. At its most basic level — in what Clifford Geertz has called "the artisan task of seeing broad principles in parochial facts," not to mention selling those ideas to lay juries — the law often performs competing and contradictory tasks.[34] Courts may draw clear lines but at the same time almost always reveal what Sally Falk Moore called "a certain range of maneuver, of openness, of choice, of interpretation, of alteration, of tampering, of reversing, of transforming."[35] The facts that get "found" at trial are, Geertz has written, "not born, [but] socially constructed . . . by everything from evidence rules, courtroom etiquette, and law reporting traditions, to advocacy techniques, the rhetoric of judges, and the scholasticisms of legal education."[36] If the "legal representation of fact is normative from the

31. *Hudgins v. Wright*, 139.

32. *Hudgins v. Wright*, 141–42.

33. In *Hudgins*, the justices were unimpressed by the testimony relating to the appearance of the Wrights' ancestor, a woman known as Butterwood Nan. *Hudgins v. Wright*, 142.

34. Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 167, 172–73.

35. Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge and Kegan Paul, 1978), 41. As Moore notes, at 40, "Every explicit attempt to fix social relationships or social symbols is by implication a recognition that they are mutable."

36. Geertz, *Local Knowledge*, 173.

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start"—if law is "part of a distinctive manner of imagining the real"—the facts that get hashed out by the courts tend themselves to be shaped and constructed by other social processes before they ever become the subject of litigation.[37] The legal doctrine that courts ultimately develop often begins as a set of "straightforward common law crystalline rules," in property theorist Carol Rose's words, but over time has a way of being "muddied repeatedly by exceptions and equitable second-guessing, to the point that the various claimants . . . don't know quite what their rights and obligations really are."[38] When it comes to race, legal decisions take a frizzly concept and filter it through a fuzzy process.

Writing the legal history of race necessarily blurs disciplines and methods. The law is textual and contextual, reconciling the autonomous logics of precedent and professional norms with the need for legitimacy beyond the courtroom, in a world where people interpret rules for themselves, develop and advocate for competing codes, and craft their own expectations for what the courts can and should do.[39] The law's role in producing, reproducing, and maintaining racial inequality is a subject that cuts across intellectual, political, social, and cultural history. In my own writing, I have found that it begs for the richness and complexity of narrative. While narrative is often dismissed as an imprecise alternative to positivist and quantitative history,[40] the fuzziness of narrative allows the dynamics of race and law to emerge in relief.[41] An effective historical narrative works through multiple lenses and points of focus, posing an argument while telling a story through characters and setting and plot. Real lives are never a frictionless medium between argument and story.[42] There will always be digressions, frolics and detours, some congenial and others confounding, that tip one way or the other. (Anyone who does not skip the chapters of *Moby-Dick* on whale anatomy knows this.) Narrative historians constantly negotiate elements of plot and character that steer away from argument, as well as didactic points that divert

37. Geertz, *Local Knowledge*, 173–74.

38. Rose, "Crystals and Mud," 578–79. After muddying crystalline doctrines, the law often cycles back to clearer and more hard-edged rules.

39. See Gordon, "Critical Legal Histories"; Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review*, no. 4 (1985): 899–935. Eugene Genovese's discussion of "the hegemonic function of law" in the context of slavery provides useful examples of the competing interests, internal and external, that the law constantly serves. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: Vintage, 1976), 25–49.

40. See Peter Burke, "Fuzzy Histories," *Common Knowledge* 18, no. 2 (2012): 239–40, 247–48.

41. Some of the best recent works of narrative history have focused on race. See, for example, Scott and Hébrard, *Freedom Papers*; Martha A. Sandweiss, *Passing Strange: A Gilded Age Tale of Love and Deception across the Color Line* (New York: Penguin, 2009); Martha Hodes, *The Sea Captain's Wife: A True Story of Love, Race, and War in the Nineteenth Century* (New York: Norton, 2006); Melissa Fay Greene, *Praying for Sheetrock: A Work of Nonfiction* (New York: Fawcett Columbine, 1991); J. Anthony Lukas, *Common Ground: A Turbulent Decade in the Lives of Three American Families* (New York: Alfred A. Knopf, 1985).

42. See Arlette Farge, *Le goût de l'archive* (Paris: Seuil, 1989). I thank Rebecca Scott for pointing me to this source.

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attention from the story. The opportunities narrative affords for turning the focus away from explicit discussions of race and racial categories can reveal their shifting and ultimately elusive qualities, their meaninglessness outside the context of how they are lived and experienced.

Take, for example, the story of Jordan Spencer, an illiterate subsistence farmer who established himself as white in the 1850s in an isolated community in the Appalachian Mountains of eastern Kentucky.[43] His complexion was unmistakably dark. Decade after decade, census takers took a look at him and scrawled "mulatto" on their enumeration sheets. When I came across testimony about Spencer's life by his neighbors, I was intrigued by the detail that he dyed his hair red. One could easily conclude that he was trying to hide his identity, but a narrative account of this grooming decision suggests something more complicated. How did a man dye his hair 160 years ago? The technology was not what it is today. Spencer probably rinsed his hair with a concoction rendered from the bark of chestnut and hickory trees that grew on his property. Every time he would sweat, his sweat ran red. Spencer was a man who did grueling work on his land and in town, farming and logging on steep mountainsides, breaking horses and doing construction labor. He prided himself on being able to carry a heavy load. So it is no understatement to say that he spent most of his days sweating. Just about every time a neighbor saw him, it was an occasion to be reminded that Spencer dyed his hair. If he was trying to disguise himself, he was not fooling anyone. Yet dyeing his hair seemed to shift how his neighbors thought about and categorized how he looked. It became less public—less about his race—and more private, a function of his personal habits, which his neighbors would remember decades later as very "particular."[44]

Shifting the focus from Spencer to his hair dye enables a reader to grasp how race functioned less as an objective fact than as a set of shared subjectivities. For people whose race was up for grabs, becoming white did not necessarily conform to a conventional narrative of "passing for white"—one that required people to change their identities completely, abandon family, move far away, and constantly fear betrayal. Often communities knew that certain people were different but still accepted them as white, even at times when the politics of race were at their most polarized and violent. Certainly, Jordan Spencer's community could see what made him different. His sweat ran red. He had dark skin. His hair may even have been frizzly—although he combed it "down slick," a neighbor remembered, Spencer never could quite keep it from "lay[ing] a little in waves."[45]

43. I describe Spencer and his world at length in *The Invisible Line*.

44. *Spencer v. Looney* (Va. 1912), no. 2012, Virginia State Law Library, Richmond, trial transcript, 62, 65–66, 116; Sharfstein, *Invisible Line*, 74.

45. *Spencer v. Looney*, trial transcript, 62, 66.

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But he was a white man. Spencer was regarded as white for most, if not all, of his life. People were willing to hire him for various jobs, do business with him, and lend the money that enabled him to buy property in their community. They accepted him as a neighbor. They prayed with him in church. Their children married his. Toward the end of his life, a 1900 US Census enumeration initially listed Spencer's race as "B," but the census taker had second thoughts, writing a "W" over it with a heavy hand.

Twelve years later, one of Jordan Spencer's grandsons brought a slander suit in Virginia against a neighbor who had spread rumors about the family's race that resulted in a Spencer boy's expulsion from a local school. Faced with a wealth of testimony suggesting that Jordan Spencer had African ancestry but was generally regarded as white, the Virginia Supreme Court refused to treat the Spencers as legally black without hard proof that Jordan Spencer was at least "one-half negro."[46] More than one hundred years after *Hudgins v. Wright*, this seemingly precise genealogical measure was still impossible to establish. By insisting on a blood-borne, bright-line definition of race, the court endorsed a notion of race as knowable and administrable, while at the same time making it very difficult to reclassify people who had been living as white. A clear standard that could not be satisfied actually allowed community consensus to determine race.

The court's sleight of hand, blurring the objective and subjective, does not simply confirm what seems obvious about race: that it is a social construction. More significant, we can see the extent to which courts and communities were in on the game: for centuries, even during the depths of slavery and segregation, Americans of every racial designation have been capable of candid assessments of the artificiality of the color line.[47] In an adversarial legal system, cases involving racial definitions inevitably pitted lawyers who advocated for hard lines against lawyers who wanted more flexibility. Those who sought to attack formalistic rules about racial categories had an easy argument to turn to: that the lines drawn by the courts did not reflect a considerably messier reality.[48] Reluctant to disrupt community norms, courts often had to find ways to justify bending the color line. When a justice of South Carolina's supreme court refused in 1835 to reclassify a militia officer who had "one sixteenth part of African blood," he did not mince words. "In general it is very desirable that rules of law should be certain and precise. But it is not always practicable, nor is it practicable in this instance. Nor do I know that it is desirable," William Harper wrote. "[I]t may be well and proper, that a man of worth, honesty, industry and respectability, should have the rank of

46. *Spencer v. Looney*, 82 S. E. 745, 749 (Va. 1914). See also Sharfstein, *Invisible Line*, 275–92.

47. See Daniel J. Sharfstein, "The Secret History of Race in the United States," *Yale Law Journal* 112 (2003): 1488–95.

48. See *Ferrall v. Ferrall* (N. C. 1910), no. 151, North Carolina Supreme Court Library, Raleigh, plaintiff's brief, 3.

a white man, while a vagabond of the same degree of blood should be confined to the inferior caste."[49] By this account, race was less a category than a contingency.

Just two years later, however, the same justice declared in a lecture to the Society for the Advancement of Learning in South Carolina that the "negro race" was "inferior to our own in mind and character" and that those who would allow "intermixture" of races were the moral equivalents of "the parent who should voluntarily transmit disease, or fatuity, or deformity to his offspring."[50] Just because white Southerners knew that race was fuzzy did not mean that they were any less committed to it. Lawyers who argued that hard-edged rules about blood quantum were untenable — that race was really a function of "social status, associations and daily living," in the words of a North Carolina lawyer in 1910 — were not attacking the integrity of racial categories.[51] Rather, they could use these arguments to advocate for one-drop rules that would keep whites "altogether free of the African taint."[52] One could say that a central question underlying the history of race in the United States is how people could structure their lives, communities, politics, and culture around racial categories even when they acknowledged the incoherence of these categories.

When trying to grasp how the social construction of race could be a concept without a progressive valence, we must turn for aid to the notion of racial categories as a legal regime, a set of rules, formal or otherwise. Although the rules of race required people to commit to a set of categories that they knew at some level to be false, just about every system of rules did and does much the same thing. The law constantly relies and trades on fictions.[53] Legal fictions are necessary to keep a system functional and legitimate and, more generally, to foster a stable society in a changing world when rules do not, in legal theorist Lon Fuller's words, "encompass neatly the social life they are intended to regulate."[54] To the extent that people could understand that race was a fiction, they also understood that such legal fictions could and did serve larger interests.

In the case of race, those larger interests included the economic and political imperatives of slavery and segregation. When Justice William Harper of South Carolina held in 1835 that race was "not to be determined solely by the distinct and visible mixture of negro blood, but by reputation, . . . reception into society, and . . . having commonly exercised the privileges of a white man," he was not subverting the color line. Rather, he was rewarding people, like the militia

49. *State v. Cantey*, 20 S. C. L. (2 Hill), 614–16 (S. C. Ct. App. 1835).

50. William Harper, "Harper on Slavery" (1837), in *The Pro-Slavery Argument, as Maintained by the Most Distinguished Writers of the Southern States* (Charleston, SC: Walker, Richards, 1852), 92.

51. *Ferrall v. Ferrall*, plaintiff's brief, 3.

52. *Ferrall v. Ferrall*, 2.

53. Lon L. Fuller, *Legal Fictions* (Stanford, CA: Stanford University Press, 1967); Peter Smith, "New Legal Fictions," *Georgetown Law Review* 95 (2007): 1435.

54. Fuller, *Legal Fictions*, viii.

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officer who kept his white racial status, who were protecting and contributing to a slave society. A shifting and subjective test for racial status served the interests of slavery by encouraging people to do whatever it took to remain categorized as white. "It will be a stimulus," Harper wrote, "to the good conduct of these persons, and security for their fidelity as citizens."[55]

In succeeding decades, as the Jim Crow state developed in order to preserve slavery's economic and social hierarchies, it continued to make legal and political sense for judges to conceive of racial categories in ways that minimized the courts' intrusion into what individual communities had hashed out as their own consensus on racial categories. Disregarding local norms would put everyone who claimed to be white at risk. The Virginia high court that in 1914 recognized the white status of Jordan Spencer's grandson was not a group of subversives when it came to the issue of race. To the contrary, one could argue that the Virginia Supreme Court at that moment existed in large part to administer a rapidly segregating society. Its decision in the Spencer case reinforced how important it was for white communities to be secure from the possibility of reclassification in order for them to be able to commit fully to segregation and white supremacy. If race has always been frizzly, and the law pervasively fuzzy, this blur of substance and process ensured the resilience of clear and definable regimes of discrimination and hierarchy.[56]

55. *State v. Cantey*, 614–16. A militia officer's role in protecting the institution of slavery from runaways and rebels would have been obvious when *Cantey* was decided in 1835, shortly after Nat Turner's 1831 slave revolt in Virginia and well within memory of the 1822 conspiracy in Charleston led by Denmark Vesey. South Carolina's slave patrols, "the first line of defense against a slave rebellion," drew their members from state militias. See Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (Cambridge, MA: Harvard University Press, 2001), 41–47.

56. Barbara J. Fields makes a useful distinction between *race* and *racism*. She defines the latter as "the assignment of people to an inferior category and the determination of their social, economic, civic, and human standing on that basis." Fields, "Whiteness, Racism, and Identity," 48.