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## The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census

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# THE DEVIL AND THE ONE DROP RULE: RACIAL CATEGORIES, AFRICAN AMERICANS, AND THE U.S. CENSUS

*Christine B. Hickman\**

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"My grandmother was her master's daughter; and my mother was her master's daughter; and I was my master's son; so you see I han't got but one-eighth of the blood. Now, admitting it's right to make a slave of a full black nigger, I want to ask gentlemen acquainted with business, whether because I owe a shilling, I ought to be made to pay a dollar?"

— Lewis Clarke, fugitive slave, 1842<sup>1</sup>

"If the old saying 'one drop of Black blood makes you Black' were reversed to say one drop of White blood makes you White, would the biracials still be seeking a separate classification?"

— Letter to the Editor, *Ebony Magazine*, November 1995<sup>2</sup>

### INTRODUCTION

For generations, the boundaries of the African-American race have been formed by a rule, informally known as the "one drop rule," which, in its colloquial definition, provides that one drop of Black blood makes a person Black. In more formal, sociological circles, the rule is known as a form of "hypodescent"<sup>3</sup> and its meaning remains basically the same: anyone with a known Black ancestor is considered Black. Over the generations, this rule has not only shaped countless lives, it has created the African-American race as we know it today, and it has defined not just the history of this race but a large part of the history of America.

Now as the millennium approaches, social forces require some rethinking of this important, old rule. *Plessy v. Ferguson*,<sup>4</sup> which affirmed the right of states to mandate "equal but separate accommodations" for White and "colored" train passengers, is a century old. *Brown v. Board of Education*,<sup>5</sup> which effectively overruled *Plessy* and instituted the end of *de jure* discrimination, was decided over a generation ago. Nearly thirty years have passed since the Supreme Court, in *Loving v. Virginia*,<sup>6</sup> invalidated any prohibition against interracial marriage as unconstitutional. Since the 1967 *Loving* decision, the number of interracial marriages has nearly

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1. JOHN W. BLASSINGAME, *SLAVE TESTIMONY* 152 (1977).

2. Mary Smith, Letter to the Editor, *EBONY*, Nov. 1995, at 298.

3. Hypodescent is the practice by which "racially mixed persons are assigned to the status of the subordinate group." F. JAMES DAVIS, *WHO IS BLACK?* 5 (1991) (citing MELVIN HARRIS, *PATTERNS OF RACE IN THE AMERICAS* 56 (1964)).

4. 163 U.S. 537 (1896).

5. 347 U.S. 483 (1954). In *Brown*, the United States Supreme Court distinguished *Plessy* holding that, "in the field of public education, the doctrine of 'separate but equal' has no place." 347 U.S. at 495. However, lower federal courts interpreted it as prohibiting all state authorized segregation and the Supreme Court regularly affirmed such rulings. See ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION* 591 (1991).

6. 388 U.S. 1 (1967).

quadrupled.<sup>7</sup> This trend has even extended to Black-White couples,<sup>8</sup> whose intermarriage rate has traditionally lagged behind that of other racial and ethnic groups.<sup>9</sup> For the first time, opinion polls indicate that more Americans approve of interracial marriage than disapprove.<sup>10</sup> The number of children born to parents of different races has increased dramatically,<sup>11</sup> and some of the offspring of these interracial marriages have assumed prominent roles in American popular culture.<sup>12</sup>

Some of these children of interracial marriages are now arguing cogently for a reappraisal of hypodescent. Their movement<sup>13</sup> has sprung to public consciousness with the recent bid by multiracial

7. In 1970, there were 310,000 mixed race couples. By 1992, there were 1,161,000 such couples. See Arlene F. Saluter, *Marital Status and Living Arrangements: March 1992*, in U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, X (Dec. 1992).

8. The number of intermarriages between Whites and Blacks has increased significantly since *Loving*. Census figures indicate that there were 65,000 Black-White couples in 1970. In 1992, there were 246,000 such couples. This represented an increase from 0.1% to 0.5% of all marriages. Between 1980 and 1990, Black-White interracial marriages increased over 50%. See *id.* at XI.

For a fuller discussion of intermarriage trends, see E. Porterfield, *Black-American Intermarriage in the United States*, 5 MARRIAGE & FAM. REV. 17 (1984); M. Belinda Tucker & Claudia Mitchell-Kernan, *New Trends in Black American Interracial Marriage: The Social Structural Context*, 52 J. OF MARRIAGE & THE FAM. 209 (1990); see also Steven A. Holmes, *Study Finds Rising Number of Black-White Marriages*, N.Y. TIMES, July 4, 1996, at A16.

9. The African-American intermarriage rate hovers at about 7%. See Saluter, *supra* note 7, at XI. In contrast, interracial marriage in some Asian-American communities is normal. The Japanese-American/White intermarriage rate is at 55%, while the current Chinese-American/White intermarriage rate is at 40%. See *Interracial Marriages Blur Social, Ethnic Lines*, ROCKY MOUNTAIN NEWS, Aug. 13, 1995, at 44A.

10. A 1991 Gallup Poll indicated that 48% of all Americans approve of marriage between African Americans and Whites, while 42% disapprove. Apparently the rate of approval varies by race. While 71% of African Americans approve of interracial marriage, only 44% of Whites approve. Significantly, 64% of Americans between the ages of 18 and 29 approve of marriage between African Americans and Whites. See *Most in Poll Approve of Interracial Marriage*, ST. LOUIS POST-DISPATCH, Aug. 16, 1991, at 16A.

On the other hand, a 1994 poll showed that 14.7% of White Americans still favor a law making interracial marriage illegal. See *Up From Separatism*, ECONOMIST, Oct. 21, 1995 at 30.

11. In 1991 alone, it is estimated that over 128,000 children were born to parents of different races. See Jane Gross, *UC Berkeley at Crux of New Multiracial Consciousness*, L.A. TIMES, Jan. 9, 1996, at A1. It also is estimated that nearly two million children have parents that identify with different racial groups. See Linda Mathews, *More Than Identity Rides on New Racial Category*, N.Y. TIMES, July 6, 1996, at A1.

12. For example, playwright August Wilson, mystery author Walter Mosely, Olympic Gold Medalist Dan O'Brien, golfer Tiger Woods, actress Halle Berry, and musician Lenny Kravitz are all "biracial."

13. Some cite the genesis of the "movement" as the 1992 Loving Conference, held in recognition of the twenty-fifth anniversary of the Supreme Court decision in *Loving v. Virginia*. The primary purpose of the conference was to organize a federal lobbying effort to modify existing racial classifications and to put "the American government on notice that a new multiracial movement had found its way on to the national political stage." Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 LAW & INEQ. J. 183, 184 (1993).

organizations, over the objections of civil rights groups,<sup>14</sup> to put a “multiracial” category in the “race” section of the forms that will be used when the next decennial census is conducted in the year 2000. This proposal has immense practical importance because the census provides the nation with its main source of racial and ethnic data. For example, implementation of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Equal Employment Opportunity Act of 1972 all depend on racial and ethnic statistics culled from the census, and the addition of a new category could change the count of the existing racial groups and alter the way these laws are implemented.<sup>15</sup>

One wing of this new multiracial movement argues that a new “multiracial box” should be made available for the growing number of children of interracial marriages. Another wing of this movement, in books and law review articles, suggests that the addition of this category should be part of a wholesale redefinition of the racial identities of most Americans. The thinking of both wings of the multiracial movement is informed by their rejection of hypodescent and the “one drop rule.” To date, the participants in this discourse have emphasized the racist notions of White racial purity that gave rise to the one drop rule. They have concluded that the effects of this old rule are mainly evil and that the consequences of abandoning it will be mainly good. Based in part on such reasoning, the more activist wing of this movement has proposed several neat, symmetrical, and radical redefinitions of African-American racial identity. Under one such proposed definition, any Black person with White or Native American ancestry would become “multiracial.”<sup>16</sup> Under another, any Black person with a “majority of [his] origins in the original peoples of Europe” would become European American.<sup>17</sup>

My purpose in this article is to critique this discourse. I agree that the one drop rule had its origins in racist notions of White pu-

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14. Organizations that expressed reservations about the addition of a multicultural category at Congressional hearings include the Mexican American Legal Defense and Education Fund, the National Coalition for an Accurate Count of Asians and Pacific Islanders, the National Urban League, and the National Congress of American Indians. See *Hearings Before the Subcomm. on the Census, Statistics, and Postal Personnel of the Comm. on the Post Office and Civil Service*, 103d Cong. 93-101, 171-82, 229-39 (1993) [hereinafter *Hearings*].

15. See U.S. GENERAL ACCOUNTING OFFICE, CENSUS REFORM: EARLY OUTREACH AND DECISIONS NEEDED ON THE RACE AND ETHNIC QUESTIONS 12-13 (1993).

16. For a discussion of this proposal, see *infra* note 167 and accompanying text.

17. Luther Wright, Jr., Note, *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 563 (1995).

urity. However, many scholars have misunderstood the way that this rule has shaped the Black experience in America, and this misunderstanding has distorted their proposals for a new multiracial category on the census forms. As we examine the one drop rule and its importance in the current discourse, we should recall the famous exchange between Faust and Goethe's Devil:

Faust: Say at least, who you are?

Mephistopheles: I am part of that power which ever wills evil yet ever accomplishes good.<sup>18</sup>

So it was with the one drop rule. The Devil fashioned it out of racism, malice, greed, lust, and ignorance, but in so doing he also accomplished good: His rule created the African-American race as we know it today, and while this race has its origins in the peoples of three continents and its members can look very different from one another, over the centuries the Devil's one drop rule united this race as a people in the fight against slavery, segregation, and racial injustice.

However valid the multiracial viewpoint may be in some contexts, it has tended to overlook the good the Devil did in using the rule of hypodescent in order to forge a people. This paper therefore is intended to bring a more balanced view of the one drop rule to the discourse surrounding the proposed new multiracial category and to question the proposals to invent neat new racial classifications to replace the categories that the social history of the United States has created over the last four hundred years. This article concludes with a proposal for counting the new generations of biracial Americans on the census in a way that will not ignore the social history of the African-American race.

I noted above that the one drop rule has shaped countless lives, and as "place markers" in the discussion, here, I will use incidents from two such lives: those of my great uncles, one documented in the 1944 volume of the *Pacific Reporter*, the other chronicled in a 1956 issue of *Time Magazine*.

My Uncle Clarence Jones was a Los Angeles lawyer who practiced law in the days when Black lawyers could not join county bar associations or be considered for government employment but were

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18. JOHANN WOLFGANG VON GOETHE, *Faust*, in GOETHE'S WERKE, Part I, Lines 1334-36 (Erich Trunz ed., Hamburg, Christian Wegner Verlag 1949) (1808). I would like to thank Vera Pardee for her assistance with the English translation. The original German reads as follows:

Faust: Nun gut, wer bist du denn?

Mephistopheles: Ein Teil von jener Kraft,  
Die stets das Böse will und  
stets das Gute schafft.

limited to providing probate, family law, and real estate services to an exclusively Black clientele. Reversing the norm, Uncle Clarence worked as Black but his rather fair complexion allowed him and his family to live in a neighborhood without reference to their race. Despite the ambiguity of their light-brown skin, the Jones family — in the eyes of their White neighbors — could not really have been Black: Uncle Clarence was a hardworking lawyer who had graduated from Ohio State Law School in the teens, his three daughters were all attending U.C.L.A., and his wife's skin was nearly white. So for years, he lived with his family in a home that he loved in a pretty neighborhood.

The home, however, was subject to a restrictive covenant that prohibited occupancy by any “persons other than the Caucasian race.”<sup>19</sup> Refusing to acknowledge the validity of this racist restriction, Uncle Clarence had ignored the covenant and moved his family in. Some years later, when his eldest daughter married, she decided on a home wedding. And as the various guests arrived, the neighbors were forced to see what their social training had not let them see before — the Jones family was undeniably Black. A lawsuit was brought to enforce the restrictive covenant and to force the Jones family out of its home.

When he received the summons, Uncle Clarence made two decisions. First, he would fight this eviction to the highest court in the state. Second, he would not deny his identity; he would not claim that his light skin made him any less of a Negro — even if it cost him his home. He retained two of his colleagues to represent him, lawyers who are legends among Black lawyers in Los Angeles, Loren Miller and Willis O. Tyler.<sup>20</sup>

Miller and Tyler made all the right arguments to the California Superior Court and, quite predictably, lost. In affirming the trial court's decision to evict the family, the California Court of Appeal summarily rejected the constitutional challenge to the covenants<sup>21</sup> and refused to reach the question of whether it was appropriate to

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19. *Stone v. Jones*, 152 P.2d 19, 19 (Cal. Ct. App. 1944).

20. Loren Miller became a judge and leader of the civil rights movement. He was one of the counsel in *Brown v. Board of Education* and an author of a legal history on the racial struggle in the United States. See LOREN MILLER, *THE PETITIONERS* (1966). Willis O. Tyler, in addition to handling a wide variety of criminal and family law cases, was the first Black lawyer in Los Angeles to serve in any judicial capacity when he was appointed to serve as a judge pro tempore. See Telephone Interview with Katherine Bush Mason (May 10, 1996).

21. See *Stone*, 152 P.2d at 22. The Court of Appeal held that “[t]he same proposition [that the enforcement of racial housing restrictions violated the U.S. Constitution] was presented in *Burkhardt v. Lofton* [146 P.2d 720 (1994)] and there held untenable; the discussion is supported by abundant authority.” *Stone*, 152 P.2d at 23.



restrict residency on the basis of race. Instead, the court considered the case to “involve issues that are the direct product of a contractual relation,”<sup>22</sup> and it held that the restrictive covenant was contractually valid. After losing in the court of appeal, Uncle Clarence’s attorneys filed a Petition for Hearing with the California Supreme Court. Of the seven justices, only Justice Roger J. Traynor voted to grant a hearing.<sup>23</sup>

So in the end, the family was forced to move — under the twisted logic by which racism is reified into law, Uncle Clarence could own his house but he could not live in it. Still, as they relinquished their home, the family left with their heads held high and with no regrets. Just recently, when Uncle Clarence’s daughters, now all in their seventies, visited my house, I passed around a copy of the old court of appeal opinion. “Makes you mad all over again,” one of them commented, these fifty-two years later. Mad, but also proud that their family had fought the good fight when they were sure to lose.

A decade later, in Detroit, a second uncle (my grandmother’s brother on the other side of the family) faced a similar situation but chose a different path. According to family lore, my Uncle Jack “couldn’t find work as a Black man” so he crossed the color line with his fair skinned wife.<sup>24</sup> Across the decades, Uncle Jack now looks out at me from his photo in the April 26, 1956 edition of *Time* and with his pale white skin, snowy straight hair, and aquiline features — he looks White. *Time* reports that in early April 1956, at age 69, Uncle Jack had decided to move to a new home “on Detroit’s comfortably middle class Robson Avenue.”<sup>25</sup> Shortly after he moved in, however, the neighbors discovered that he was a Negro, perhaps because his grandchild, who met the moving van, had darker skin and curlier hair. Soon the neighbors were throwing rocks through the windows and a delegation from the neighborhood “improvement association” arrived at his door with the offer to purchase the home for \$18,500, which was \$2,000 more than Uncle Jack had paid for it. While these “sales discussions” were under-

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22. 152 P.2d at 23.

23. See 152 P.2d at 23. Four years later, Justice Traynor would write the landmark plurality opinion in *Perez v. Lippold*, 198 P.2d 17 (1948), the first judicial opinion overturning an antimiscegenation law as unconstitutional. Also four years after the *Stone v. Jones* decision, the U.S. Supreme Court held that enforcement of such racially restrictive covenants to be unconstitutional. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

24. Interview with Izella Hickman Davenport Vincent, Dec. 1, 1995. Notes on file with Author.

25. *Buyer Beware*, TIME, Apr. 16, 1956, at 24.

way, "a crowd of 500 milled outside," recruited to emphasize the consequences of any failure to sell.<sup>26</sup>

In dealing with this appalling situation, Uncle Jack chose a different course than the one Uncle Clarence had taken: he implicitly denied that he was Black, telling the reporter from *Time* that he was "half Cherokee and half French Canadian," leaving out his African-American ancestry. But, *Time* reported, when he made this denial of his Black heritage, "nobody listened," and he was forced to move.<sup>27</sup>

Of course, it would not be fair to find fault with Uncle Jack's denial. As Professor Karst notes, under circumstances such as these "it is hard to locate any authenticity in an individual's 'choice' to repudiate the disfavored label."<sup>28</sup> In addition, Uncle Jack had fewer options available to him than did Uncle Clarence: Uncle Jack was not a lawyer; he was a retired bodyguard with a mob outside of his house. But still, these forty-two years later, we read the *Time* article with a touch of sadness and a twinge of disappointment, because Uncle Jack denied who he was, and the milling mob did not even listen. In a different way than Uncle Clarence, Uncle Jack lost his home.

These two incidents are relevant to many of the topics I discuss in this article, and I will return to them from time to time. Part I of this article begins by discussing the origins of the American system of racial classification, which has roots that are deep and old. This Part then analyzes some of the earliest cases and legislation dealing with racial intermixture, which indicate that by deliberate design and by operation of law the African-American race was, from the beginning, constructed to include those of mixed African-European-Native American descent. After briefly sketching the classification of African Americans through the ensuing centuries, I turn to an analysis of the previous attempt by the census to count mixed-race people — "mulattoes" — from 1850 until the Census Bureau's formal adoption of the one drop rule in 1920.

Part II critiques the discourse surrounding the proposed new racial categories. Section II.A examines how recent law review articles and essays by historians have misperceived the one drop rule. Because these commentators have focused on formal analysis of the rule and its "asymmetry," they have ignored how the rule worked in

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26. *Id.*

27. *Id.*

28. Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 323 (1995).

practice, and they have not examined the African-American experience sufficiently to see the good that the Devil did. These commentators overlook the way that this rule has forged a unified Black community that has been an effective force in battling racism. More surprisingly, they assume that other classification systems would have been better, without ever comparing hypodescent to those other systems. I conclude this discussion by making such a comparison — with the system in South Africa — which is formally more pleasing and symmetrical than hypodescent. I argue that in South Africa, this symmetrical, White-Colored-Black classification system was more effective than the one drop rule in ensuring the subordination of Black South Africans.

Section II.B analyzes the proposals found in recent law review comments for a broad multiracial category that would include anyone with “mixed blood.” While the proponents of such a category all correctly deny that there is any biological basis for race, the category that they suggest would, ironically, “rebiologize” race, by drawing a line between those African Americans who have White “blood” and those who do not. Turning to an example of this rebiologization of race, I examine one critic’s argument that the Harlem Renaissance was a form of “cultural suicide” because writers such as Langston Hughes and Zora Neale Hurston failed to embrace their mixed-race identity. Using incidents from Hurston’s life as an example, I argue that Hurston’s only tie to her “mixed race heritage” was a biological one, and that history and a powerful sense of identity forged in actual experience made her — and the many other African Americans like her with White ancestry — Black. I conclude this discussion of the “rebiologization” of race by analyzing certain old “racial credential cases,” in which courts attempted to adjudicate “who is Black,” as a reminder of our legal system’s previous experience with treating race as biology.

Section II.C turns to one of the consequences of the misunderstanding of the one drop rule and the rebiologization of race — an effect known as “distancing” — which is the creation of unnecessary and pernicious distinctions between light-skinned and dark-skinned African Americans. I identify several examples of this distancing in recent legal journals.

Part III examines how the lessons from the one drop rule inform the debate over the nature of race itself. I begin by using the experience of mixed-race people in America to respond to philosopher Anthony Appiah’s now-famous argument that there is no race. I conclude that the African-American experience shows that races do

exist; history creates races from people who share a common morphology and genealogy. I then briefly critique recent suggestions in law reviews that race is a metaphor, a "metonym" for culture, or an essence. Finally, I turn to the issue that has the most relevance to the census (where Americans are asked to "self-identify"), namely, whether race is a choice. I note that for my uncles forty years ago, and for us now, race, at least African-American race, is not just a matter of choice and that the argument that we "choose" our race by our daily actions holds special dangers for African Americans.

Finally, Part V argues that the 2000 Census should contain a multiracial inquiry directed at the growing number of Americans with parents from two different racial groups and that this inquiry should be on a line of its own and not part of the race question. To date, the proposals for adding a multiracial category to the census all have called for placing "Black" and "multiracial" in competition on the same line of the census form. Part V argues that this arrangement would set up a no-win rivalry between racial and multiracial groups for the allegiance of *Loving's* children. Worse, it could lead to a profoundly inaccurate count of Americans with parents from two different races, since it will falsely omit all biracial people who are identified strongly with the race of one parent (these people will check "Black," "White," "Asian," or "Native American" instead of "multiracial") and it will falsely include many members of traditional racial groups. Giving the multiracial inquiry its own line on the census form will avoid these conflicts and inaccuracies and lead to the first reliable count of the new generations of Americans who have parents from different racial groups.

## I. TREATMENT OF MIXED-RACE PEOPLE: THE EARLY LEGAL RECORD

Race mixing between Whites and Blacks in America is not new. Rather, it began almost immediately after the first Africans arrived in the United States. As nineteenth-century historian Robert Shufeldt rather dramatically claimed, "[t]he crossing of the two races commenced at the very out-start of the vile slave trade that brought [African slaves] thither . . . indeed in those days many a negress was landed upon our shores already impregnated by someone of the demoniac crew that brought her over."<sup>29</sup> Winthrop

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29. R.W. SHUFELDT, *THE NEGRO: A MENACE TO AMERICAN CIVILIZATION* 60 (1907), quoted in JAMES HUGO JOHNSTON, *RACE RELATIONS IN VIRGINIA AND MISCEGENATION IN THE SOUTH 1760-1860*, at 165-66 (1970).

Jordan writes that "it seems likely there was more [intermixture] during the eighteenth century than at any time since."<sup>30</sup>

The unique American definition of "Black" has roots that are almost as old as race mixing on this continent. This Part will briefly illustrate how early legislatures and courts dealt with the presence of mixed race people and guided the formation of the African-American race to include not only the recent African arrivals but also the offspring of any union between these arrivals and the White settlers. The legal record illustrates that from the beginning, by deliberate design and by operation of law, anyone with any significant African ancestry was pulled toward the African-American race. In later Parts of this article, I will argue that the three hundred years of history that began with these early cases and statutes created a strong and resilient African-American people and gave them the tools to fight slavery, segregation, and racism and that multiracial theorists tend to overlook this aspect of the Black experience in America.

This Part concludes with a review of the previous attempt by the census to count "mulattoes" and how that effort ended in 1920 with the formal adoption of the one drop rule.

#### A. *The First African Americans and the First Race Mixing*

The roots of African Americans on this continent are deep and old. It was in 1619, a year *before* the Pilgrims landed on Plymouth Rock, that twenty "Negars" arriving on a Dutch man-of-war were sold to British colonists.<sup>31</sup> Race mixing appears to have begun rather quickly. As early as 1632, a mere fourteen years after the first Blacks arrived in Jamestown, Captain Daniel Elfrye was reprimanded by his employer for "too freely entertaining a mulatto."<sup>32</sup>

The legal records are few and not a model of judicial explication,<sup>33</sup> but certain themes emerge from the early documents: interracial mating began almost immediately and was officially

30. WINTHROP D. JORDAN, *WHITE OVER BLACK* 137 (1968).

31. John Rolfe, who himself was intermarried to the Powhatan Pocahontas, was Secretary and Recorder of the Virginia colony. An apparent eyewitness, he recorded that at the end of August 1619 there came to Virginia "a dutch man of warre that sold us twenty Negars." *Id.* at 73 (quoting 2 *TRAVELS AND WORKS OF CAPTAIN JOHN SMITH* 541 (Edward Arber ed., 1910)). The "Negars" probably were captured from Spaniards by whom they had been enslaved.

32. *Id.* at 166.

33. The fragmented record makes a definitive Black history of the period difficult. Helen Catterall has noted the difficulty: "To write the history of slavery of Virginia in the seventeenth century is like . . . reconstructing a Greek vase from a few shards." 1 *HELEN CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* 53 (1926).

disapproved; a mulatto was considered to be of lower status than her White parent and was excluded from the White race and absorbed into the Black race. Race mixing, especially between White men and Black women, persisted despite legal disapproval.

While formal statutes prohibiting interracial mating would be introduced in Maryland as early as 1664,<sup>34</sup> judicial and legislative commentary on race mixing began in the colonies almost immediately. Eleven years after the first "twenty Negroes" arrived in Virginia, there is a reported opinion ordering punishment for fornication between a White and a Black person. Significantly, it is this interracial sex case that is the first reported judicial decision to allude to Blacks in any way. In this 1630 case, colonist Hugh Davis was sentenced to be soundly whipped "before an assembly of negroes and others for abusing himself to the dishonor of God and shame of Christianity by defiling his body in lying with a negro."<sup>35</sup> From the sparse record available, it is unclear whether the gravamen of Davis's offense was the act of fornication itself or the fact that the object of his affection was a "negro."<sup>36</sup> However, the fact that the court deemed it necessary to specify the race of the "negro" and designate as a punishment that Davis be whipped before an assembly of Negroes suggests, at the very least, a consciousness of the racial differences and that such racial differences were relevant enough to be noted in the legal record.

A decade later, in 1640, Robert Sweat was required to do public penance for having "begotten with child a negro woman servant."<sup>37</sup> The "negro woman" is not only identified by race but is given a harsher punishment, that of being "whipt at the whipping post."<sup>38</sup> From the record, it is unclear whether the harsher sentence is due

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34. See DAVID FOWLER, *NORTHERN ATTITUDES TOWARD INTERRACIAL MARRIAGE* 41 (1987).

35. *In re Davis*, McIlwaine 479 (1630), reported in 1 CATTERALL, *supra* note 33, at 76.

36. See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 23 (1978) (noting ambiguities due to limited record).

37. *In re Sweat*, McIlwaine (1640), reported in 1 CATTERALL, *supra* note 33, at 78.

38. *Id.*

to race, gender, class, a combination of these factors,<sup>39</sup> or other unreported circumstances.<sup>40</sup>

### B. *Mulattoes: Black by Law*<sup>41</sup>

The legal treatment of mulattoes as Blacks, with all of the attached legal disabilities, may have begun as early as the seventeenth century. One of the earliest judicial uses of the term "mulatto" to describe a person of mixed Black-White descent, appears in the Virginia case of *In Re Mulatto*.<sup>42</sup> The opinion was issued in 1656, just as race-based slavery was taking a firm hold.<sup>43</sup> Although the opinion consists of a single sentence, and we know of no supporting record to illuminate the facts of the case, its logic constructs the American view of racial mixture between Black and White that has endured for over three hundred years. *In re Mulatto* in its entirety states: "Mulatto held to be a slave and appeal taken."<sup>44</sup>

Without discussion or debate, the court thus apparently articulated the first judicial expression of the rule of hypodescent.<sup>45</sup> Implicit in its opinion is the finding that the litigant was of both African and European descent, but the court found that the European ancestry made no legally significant difference at all, and the holding is likely to have severed whatever ties this racial hybrid had with his European ancestry. In fact, it was the African ancestry that both defined his status and determined his fate.<sup>46</sup>

39. For an excellent discussion of legislative and judicial regulation of sexual behavior during slavery, see Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115 (1984). For a discussion of the intersecting patterns of racism and sexism, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

40. While the meaning of the punishment meted out in the cases of Hugh Davis and Robert Sweat may be ambiguous, the legislative intent in Virginia's 1662 fornication statute was clear. The statute *doubles* the normal fine for fornication if the partner was Negro, thereby enacting "the first clear-cut example of statutory racial discrimination in American history." GEORGE M. FREDERICKSON, *WHITE SUPREMACY* 101 (1981).

41. For a discussion of the converse, see IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

42. McIlwaine 504 (1656), reported in 1 CATTERALL, *supra* note 33, at 78.

43. There is evidence that planters had been categorizing their White servants and Black servants separately as early as 1644. Legal historian Paul Finkelman writes that by the 1650s, "blacks were more likely to be treated as slaves than as indentured servants." PAUL FINKELMAN, *THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK* 13 (1986). Legislation unambiguously linking slavery and race first appeared in Virginia in 1667. See *infra* note 46.

44. *In re Mulatto*, McIlwaine 504.

45. For a definition of hypodescent, see *supra* note 3.

46. The practice of race-based slavery was formalized by the Virginia legislature in 1667, when the Virginia legislature passed the following act in 1667:

Whereas some doubts have risen whether children that are slaves by birth, and by the charity and piety of their owners made pertakers of the blessed sacrament of baptisme,

A statute passed by the Virginia legislature in 1662, less than a decade after *In Re Mulatto* and forty-three years after the first Africans arrived, shows the early importance of drawing broad boundaries around the Negro race. Undoubtedly in recognition of the fact that most interracial fornication occurred between White men and Black women, the law provided: “[C]hildren got by an Englishman upon a negro woman . . . shall be held bond or free only according to the condition of the mother . . . .”<sup>47</sup> Significantly, this law broke with the traditional English common law rule that the children follow the status of the father.<sup>48</sup> Instead it provided that children born of a Black mother and a White father would follow the common law applicable to farm animals<sup>49</sup> — the child would follow the status of the mother.<sup>50</sup>

Keeping “mulattoes” on the Black side of the color line<sup>51</sup> was both psychologically and economically important. Its psychological importance arose because, as Winthrop Jordan writes: “The social identification of children requires self-identification in the fathers.”<sup>52</sup> White fathers were thus excused from social responsibility for their children and in this way benefited from the classification of

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should be by vertue of their baptisme be made free; It is enacted . . . that the conferring of baptisme doth not alter the condition of the person as to his bondage or freedome. 2 Hening 260 (1667), quoted in 1 CATTERALL, *supra* note 33, at 57. Catterall explains that “color became the ‘sign’ of slavery: black or graduated shades thereof.” 1 CATTERALL, *supra* note 33, at 57.

47. 1662 Act XII, II Hening 170 (1662), quoted in FINKELMAN, *supra* note 43, at 16.

48. This doctrine was known as *patrus sequitur patrem*. See HIGGINBOTHAM, *supra* note 36, at 44, 194.

49. Animal imagery persists in legal description of mixed-race people. For example, the term mulatto is from the Spanish mulatto, the diminutive of mulo, a mule. See EDWARD B. REUTER, RACE MIXTURE 12 (1931). A mule is the sterile offspring of a female horse and a male donkey. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1484 (1986).

50. This rule, *partus sequitur ventrem*, was defined by Blackstone to mean “[o]f all tame and domestic animals, the brood belongs to the owner of the dam or mother.” 2 WILLIAM BLACKSTONE, COMMENTARIES \*390. The point of the law is to ensure that the owner of a female animal retains ownership of the offspring, since the male animal who impregnated the animal is generally unknown. A further rationale is that since the dam is almost useless to the proprietor during her pregnancy, the proprietor is compensated by gaining ownership of the offspring. See *id.*

51. There is evidence that “mulattoes” were treated as a buffer race in some parts of the country during certain historical periods. Eugene D. Genovese writes that “in Charleston, New Orleans, and Mobile some semblance of a three-caste system appeared and played an important role within the local Negro community.” EUGENE D. GENOVESE, ROLL, JORDAN, ROLL 431 (1974). For a further discussion of the treatment of mulattoes in the lower South, see IRA BERLIN, SLAVES WITHOUT MASTERS (1974) (focusing on free blacks in general); DAVIS, *supra* note 3, at 34-37. For a thorough account of the history of the mulattoes of Louisiana, see VIRGINIA R. DOMINGUEZ, WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA (1986). Discussion of the experiences of these mixed-race people is outside of the scope of this article.

52. JORDAN, *supra* note 30, at 167.



their illegitimate children as "Black." They escaped responsibility not only for including these children in their families but also for including them in their larger family of the White race.<sup>53</sup> "If [the White father] could not restrain his sexual nature, he could at least reject its fruits and thus solace himself that he had done no harm. . . . By classifying the mulatto as Negro he was in effect denying that intermixture had occurred at all."<sup>54</sup>

This classification scheme had several economic benefits for white settlers. It insulated White males from any responsibility for supporting their offspring by Black women slaves; these offspring became the property, and the responsibility, of the woman's master. Thus, the birth of mulattoes provided an economic advantage to both the father, in the form of freedom from parental responsibility, and to the mother's slaveholder, in the form of a new slave. This latter factor perhaps added another perverse incentive for the sexual abuse of slave women:<sup>55</sup> The birth of mulatto children to a Black mother increased the plantation's inventory as though the child were a lamb or a bale of cotton. The economic advantages of rearranging the lines of descent were thus significant.

In addition to providing that biracial children took the status of their racially enslaved mothers, early statutes reinforced the point that mulattoes were not considered desirable offspring in any event. A 1691 statute, which provided for the banishment of Whites who intermarried with a Negro or mulatto, was enacted for the express purpose of thwarting the births of that "abominable mixture and spurious issue" — mulattoes.<sup>56</sup> In fact, Carter Woodson argues that the underlying intent of miscegenation laws in the colonial period was not to prevent sexual relations but "to debase to a still lower

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53. James Baldwin's comments to a White southerner on such selective paternal denial are instructive: "You're not worried about me marrying *your* daughter. . . . You're worried about me marrying your *wife's* daughter. I've been marrying your daughter ever since the days of slavery." GENOVESE, *supra* note 51, at 414.

54. JORDAN, *supra* note 30, at 178. This double standard, of course, affected White women as well. Diarist Mary Boykin Chestnut laments:

Like the patriarchs of old, our men live all in one house with their wives and their concubines; and the mulattoes one sees in every family partly resemble the white children. Any lady is ready to tell you who is the father of all the mulatto children in everybody's household but her own. Those, she seems to think, drop from the clouds. My disgust sometimes is boiling over.

GENOVESE, *supra* note 51, at 426.

55. For example, a master theoretically could become a breeder of slaves, thereby increasing his slave holdings.

56. Virginia, Act XVI, *quoted in* HIGGINBOTHAM, *supra* note 36, at 44. This same language was used in a 1714 North Carolina statute. *See* JOHN HOPE FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA 1790-1860*, at 35-37 (1943).

status the offspring of blacks . . . [and] to leave women of color without protection against white men.”<sup>57</sup>

While the majority of mulatto children were born to Black mothers and inherited their slave status, legislation was passed to ensure that the mulatto offspring of free White women did not go unpunished. The 1691 Virginia law mentioned above imposed a fine on a White woman who had a “bastard child by a Negro,” added five years to her term if she were an indentured servant, and committed the mulatto children to slavery until the age of thirty regardless of the status of the White mother.<sup>58</sup> This type of punishment was not unusual.<sup>59</sup> For a time, Maryland took even a stronger stand, enslaving White women who, “to the disgrace of our nation,” married Negroes, as well as enslaving their children.<sup>60</sup>

In many of the colonies, then, interracial marriage was formally prohibited;<sup>61</sup> those who engaged in interracial fornication paid a double fine;<sup>62</sup> those who intermarried were banished;<sup>63</sup> those who performed marriages for mixed couples were punished;<sup>64</sup> Whites who engaged in interracial marriages were enslaved;<sup>65</sup> the offspring of such marriages followed the slave status of the mother if the

57. CARTER G. WOODSON, *FREE NEGRO HEADS OF FAMILIES IN THE UNITED STATES IN 1830* xv (1925).

58. And it is further enacted, that if any English woman being free shall have a bastard child by a Negro she shall pay fifteen pounds to the church wardens, and in default of such payment, she shall be taken into possession by the church wardens and disposed of for five years and the amount she brings shall be paid one-third to their majesties for the support of the government, one-third to the parish where the offense is committed and the other third to the informer. The child shall be bound out by the church wardens until he is thirty years of age. In case the English woman that shall have a bastard is a servant she shall be sold by the church wardens (after her time is expired) for five years and the child serve as aforesaid.

1691 Act (Act XVI), *quoted in* HIGGINBOTHAM, *supra* note 36, at 45.

59. Pennsylvania passed a similar statute. *See* JOEL WILLIAMSON, *NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES* 11 (1980).

60. *Id.* at 10-11.

61. Antimiscegenation statutes were enacted in many colonies: Maryland adopted a law in 1662, Massachusetts in 1705, North Carolina in 1715, Delaware in 1721, and Pennsylvania in 1725. *See* JOHNSTON, *supra* note 29, at 166.

62. *See* 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823), *quoted in* JOHNSTON, *supra* note 29, at 167.

63. *See supra* note 56 and accompanying text.

64. *See* Act of 1681 (Maryland). The Act imposed a fine of 10,000 pounds of tobacco on any priest who performed a marriage ceremony for a Negro slave and a White woman servant.

65. White women who married Negro slaves in Maryland were required to serve their husband's masters during their husband's lifetime. *See* WILLIAMSON, *supra* note 59, at 10 & 198 n.15 (citing ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, JANUARY, 1637/38 - SEPTEMBER, 1664 (William Hand Browne ed., Baltimore, Maryland Historical Society 1883)).

mother were Black<sup>66</sup> and were enslaved anyway if the mother were White.<sup>67</sup> Nevertheless, the law was an ineffective deterrent to interracial relations. On the contrary, “[t]he greatest number of all the cases of the intermixture of the races were regarded as outside the province of the law and the courts, and the larger part of the mulatto population was, no doubt, due in colonial times and thereafter, to the exercise of passions by those who took no thought of marriage, law, or consent of clergy.”<sup>68</sup> The law was powerless to stem the tide. One observer of the time described Virginia during the colonial period as “swarming with mulattoes.”<sup>69</sup>

As early as 1705, the Virginia legislature, in a statute prohibiting interracial marriage, provided an ancestrally based, biological, mathematical definition of who was Black, to include “the child, grand child or great grand child of a negro” meaning anyone who was one-eighth Black.<sup>70</sup> During this period, North Carolina defined a mulatto as anyone who was one-sixteenth Black, which would mean that having a single great, great grandparent who was Black would demarcate an individual as mulatto rather than White.<sup>71</sup> Of this time Jordan writes, “[T]here is no reason to suppose that these two colonies were atypical.”<sup>72</sup>

Beginning in the mid-seventeenth century, laws dealing with Negro slaves added the phrase “and mulattoes” to ensure that mu-

66. See *supra* note 46.

67. See sources cited *supra* note 56.

68. JOHNSTON, *supra* note 29, at 181.

69. *Id.* at 161.

70. H. Leon Higginbotham & Barbara Kopytoff, *Racial Purity and Interracial Sex in Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989).

71. See Winthrop D. Jordan, *American Chiaroscuro: The Status and Definition of Mulattoes in the British Colonies*, 19 WM. & MARY Q. (3d ser.) 183, 185 (1962).

72. *Id.* at 185. This fractional, blood-borne approach would remain in some states until the twentieth century. At different times,

Alabama and Arkansas defined anyone with one drop of “Negro” blood as Black; Florida had a one-eighth rule; Georgia referred to ascertainable non-White blood; Indiana used a one-eighth rule; Kentucky relied on a combination of any appreciable admixture of Black ancestry and a one-sixteenth rule; Louisiana did not statutorily define Blackness [but] did adopt via its Supreme Court an “appreciable mixture of negro blood” standard; Maryland used a “person of negro descent to the third generation” test[;] Mississippi combined an appreciable amount of Negro blood and a one-eighth rule; Missouri used a one-eighth test, as did Nebraska, North Carolina, and North Dakota; Oklahoma referred to “all persons of African descent” adding that the “term ‘white race’ shall include all other persons”; Oregon promulgated a one-fourth rule; South Carolina had a one-eighth standard; Tennessee defined Blacks in terms of “mulattoes, mestizos, and their descendants, having any blood of the African race in their veins”; Texas used an “all persons of mixed blood descended from negro ancestry” standard; Utah law referred to mulattoes, quadroons, or octoroons; and Virginia defined Blacks as those in whom there was “ascertainable any Negro blood” with not more than one-sixteenth Native American ancestry.

LOPEZ, *supra* note 41, at 118-19.

lattoes were subject to the same restrictions as Negroes.<sup>73</sup> “From the first, every English continental colony lumped mulattoes with Negroes in their slave codes and in statutes governing the conduct of free Negroes: the law was clear that mulattoes and Negroes were not to be distinguished for different treatment.”<sup>74</sup> Thus, those colonies that chose not to deal separately with mulattoes simply added the term “mulatto” to statutes that regulated and limited the rights of Negroes. As Eugene Genovese notes, “[f]or the South as a whole whites made little distinction between Blacks and mulattoes.”<sup>75</sup>

By the beginning of the 1700s, the legal structure that would persist for well over two-hundred years was set in place. Individual rights of those who had any significant amount of Black ancestry were restricted severely by law. Negroes were presumed to be slaves in slave-holding states, and most mulattoes with a minimum amount of “Black blood” were treated the same as Negroes and presumed also to be slaves.

For mulattoes and Negroes, all rights were rooted in the past, in remote African ancestry. Ancestry alone determined status, which was fixed. A Negro could not buy out of her assigned race; she could not marry out of it, nor were her children released from its taint. As historian Gilbert Stephenson bluntly stated, “[m]iscegenation has never been a bridge upon which one might cross from the Negro race to the Caucasian, though it has been a thoroughfare from the Caucasian to the Negro.”<sup>76</sup>

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73. This practice extended to colonies outside of Pennsylvania, Virginia, and Maryland. Edward Reuter reports that

[i]n New York, in 1706, twenty-two years after the first introduction of Negroes [in New York], mulattoes were sufficiently numerous to be made the subject of legislative enactment. Connecticut began her black code in 1690 by passing a series of measures in which mulattoes were enumerated with Negroes and Indians. The first act of Rhode Island was one recognizing the manumitting or setting free of mulatto and Negro slaves. New Hampshire never legally established slavery, but as early as 1714 passed several laws regulating the conduct of “Indian, Negro and mulatto servants or slaves.” The first legislation of Delaware in 1721 mentions mulattoes. North Carolina was settled from Virginia and as some of the settlers brought slaves with them into the new territory, there were probably mulattoes in the colony as soon as there were Negroes. The first statutory recognition of slavery was in an act against intermarriage passed in 1715. South Carolina’s first positive slave act, 1712, mentions . . . mulattoes, Negroes and Indians . . . . In New Jersey the usual formula including Negro, Indian, and mulatto slaves appears in the legislation at least as early as 1714.

EDWARD BYRON REUTER, *THE MULATTO IN THE UNITED STATES* 111 (1918).

74. JORDAN, *supra* note 30, at 168.

75. GENOVESE, *supra* note 51, at 431.

76. GILBERT THOMAS STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 19 (1910).

C. *A Study in Contrasts: Exclusion of Mulattoes from De Crèvecoeur's "New Race of Men"*

While legislators kept busy discouraging or prohibiting sexual relations between Blacks and Whites and limiting the rights of their offspring, there were no bars to intermarriage between Whites of different ancestry. The union of two Whites, no matter how diverse their European background or economic class, was not the subject of legal comment. For judicial purposes, "[u]nions . . . of two white persons were *never* called mixtures of two kinds of blood."<sup>77</sup>

For White Americans, "the core of 'the American national character' [was] a denial of legitimacy and privilege based exclusively on descent."<sup>78</sup>

America was seen as a severing of roots, a liberation from the stifling past, an entry into a new life, an interweaving of separate ethnic strands into a new national design. . . . "The bosom of America," Washington said, "is open . . . to the oppressed and persecuted of all Nations. . . ." [who] would be "assimilated to our customs, measures and laws: in a word soon become one people."<sup>79</sup>

This spirit of amalgamation, of intermarriage between arrivals from different European countries, is celebrated in the famous 1782 *Letters from an American Farmer*, written by immigrant J. Hector St. John de Crèvecoeur:

What then is the American, this new man? He is either an European, or the descendant of an European, hence that strange mixture of blood, which you will find in no other country. I could point out to you a family whose grandfather was an Englishman, whose wife was Dutch, whose son married a French woman, and whose present four sons have now four wives of different nations. *He* is an American, who, leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds. He becomes an American by being received in the broad lap of our great *Alma Mater*. Here individuals of all nations are melted into a new race of men, whose labours and posterity will one day cause great changes in the world.<sup>80</sup>

But just as "White" Americans were leaving behind the "ancient prejudices," intermarrying with other Europeans and "melting" into a new race of "men," they were enacting into law new

77. JORDAN, *supra* note 30, at 166.

78. WERNER SOLLORS, *BEYOND ETHNICITY: CONSENT AND DESCENT IN AMERICAN CULTURE* 4 (1986).

79. ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* 23-25 (1992).

80. SOLLORS, *supra* note 78, at 75-76 (quoting J. HECTOR ST. JOHN DE CRÈVECOEUR, *LETTERS FROM AN AMERICAN FARMER* 39 (London, Thomas & Lockyer Davies 1782)).

prejudices that prevented mulattoes from melting into this new race. In fact, for practical legal purposes, the mulatto was usually placed squarely in the same category as Blacks with all the legal disadvantages that accompanied it. In direct contrast to Crèvecoeur's new, free spirit of amalgamation, laws directed at mixed-race Blacks restricted their rights in the smallest details. In Crèvecoeur's adopted home state, New York, for example, it was "not Lawfull for any Negro . . . or Maletto Slave to Sell any Oysters in the City of New York,"<sup>81</sup> and it was prohibited for any free "Negro, Indian or Mallatto" to "enjoy, hold or possess any Houses, Lands, Tenements or Hereditaments within this Colony."<sup>82</sup> Slave or free, African ancestry, no matter how remote, was a one-way ticket toward the Black race, not to Crèvecoeur's new race.

Perhaps the most poignant illumination of the difference between the status of the offspring of intra-European marriage and Black-White unions can be found in another American letter sent to Europe, just two years after de Crèvecoeur penned the letter quoted above. This second letter is from a Savannah merchant who, as executor of an estate, was left with the responsibility for two free mulatto children, perhaps the offspring of the decedent. He wrote, pleadingly, to a friend in Ireland:

These young Folks are very unfortunately situated in this Country . . . their descent places them in the most disadvantageous situations, as Free persons the Laws protect them — but they gain no rank in life . . . so many of their own Colour (say the mixt breed) being Slaves, they too naturally fall in with them.<sup>83</sup>

The executor begs his Irish friend to accept the "mixt breeds" as wards in Ireland noting that "this [leaving the United States and moving to Ireland] alone can save them."<sup>84</sup> As the wards were mulatto, they were inexorably pulled toward the Black race and excluded from the vaunted privileges of White America described by de Crèvecoeur.

Hypodescent, thus, began at the beginning of the Black experience in America. While the Revolutionary War and the Civil War surely affected the status of Blacks, for the most part they did not alter the fact that, for all practical purposes, Blacks with significant

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81. An Act for Preserving of Oysters (1715), *reprinted in* 1 THE COLONIAL LAWS OF NEW YORK 845 (Albany, James B. Lyon 1896).

82. An Act for preventing Suppressing and punishing the Conspiracy and Insurrection of Negroes and other Slaves (1712), *reprinted in* 1 THE COLONIAL LAWS OF NEW YORK 761, 764 (Albany, James B. Lyon 1896).

83. JORDAN, *supra* note 30, at 170-71.

84. *Id.*

White ancestry were included within the boundaries of the Black race.

Of course, the social status of mulattoes vis-à-vis Blacks did not remain constant over the centuries. Williamson argues that in the lower South, an important number of mulattoes were born of prominent fathers, and until 1850 they enjoyed a status "markedly elevated above that of the black mass, slave and free."<sup>85</sup> Similarly, Ira Berlin notes that "[t]he somatic similarities between whites and light-skinned freemen also encouraged whites to share their prized attributes with mixed-bloods."<sup>86</sup> In the Carolinas, Mobile, and New Orleans, mulattoes approached but never quite reached the status of a buffer race, at least for a period of time.<sup>87</sup> Everywhere else in antebellum America, in the Upper South and the North, there were fewer social distinctions between Blacks and mulattoes, and after the Civil War whatever distinctions there were began to fade away as mulattoes everywhere were pushed more and more into the Black race. Williams argues that even in the deep South, the "animus against miscegenation and mulattoes seemed to reach a crescendo" in about 1907. By 1920 mulattoes, even there, had become firmly part of the Black race, where they remain to this day.<sup>88</sup>

#### D. *The Census and the Mulatto Category, 1850-1910*

As we debate the wisdom of categorizing African Americans separately from multiracial people, it is instructive to review the census's earlier attempt to do so. Although Whites and Blacks have been identified in every census since 1790,<sup>89</sup> the census began to distinguish between Blacks and mulattoes with the Seventh Census of 1850.

The decision of the Bureau of the Census to count mixed-race Blacks separately from Blacks does not seem to have resulted from any policy aimed at changing the status of mulattoes from that of Blacks, creating a buffer race, or even assessing the extent of un-

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85. WILLIAMSON, *supra* note 59, at 15: *cf.* PAUL R. SPICKARD, *MIXED BLOOD* 440 n.7 (1989).

86. BERLIN, *supra* note 51, at 196.

87. *See* GENOVESE, *supra* note 51, at 431.

88. This is not to suggest that there was no intra-racial prejudice between Blacks and mulattoes. For a full discussion of colorism within the African-American race, see BERTICE BERRY, *BLACK-ON-BLACK DISCRIMINATION: THE PHENOMENON OF COLORISM AMONG AFRICAN-AMERICANS* (UMI Dissertation Services 1988). *See also* KATHY RUSSELL ET AL., *THE COLOR COMPLEX* (1992).

89. *See* BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CFF No. 4, *HISTORY & ORGANIZATION* 4 (1988).

checked miscegenation. Rather, the attempt to count mulattoes in the census of 1850 was part of a widespread effort of the "infant statistical community . . . to press for the creation of a more professional national statistical system."<sup>90</sup> For the first time, responsibility for the census was placed in the hands of a congressionally created Census Board, which turned to statistical experts in determining the scope of the inquiry.<sup>91</sup> The census was redesigned to collect individual-level data on everyone in the country.<sup>92</sup> The decision to count mulattoes can be viewed as part of a larger scheme of the census reform of 1850, which created a complex new structure for taking the census and "opened a new phase in the statistical history of the country."<sup>93</sup>

This is not to say that there was no political concern about the expansion of the scope of the census questions. Indeed, as the United States was poised on the brink of a sectional crisis in the slavery debate, Southern congressmen were concerned about how the data collected would affect the discourse on slavery.<sup>94</sup> Expansion of information on the characteristics of individual slaves would lead to analysis of the statistical differences between Whites and Blacks that could be used by the abolitionists.<sup>95</sup> Thus, there was some controversy about the level of individual detail that should be required as to the slave population. Through congressional action, questions on the individual names of slaves,<sup>96</sup> the number of chil-

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90. MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 33 (1988).

91. Congress created the Bureau of the Census and appointed as its head Joseph Camp Griffith Kennedy, a farmer and political supporter of Zachary Taylor. Kennedy, however, consulted with scholars and statisticians who pressed for substantial revision of the census process. Lemuel Shattuck of the American Statistical Association and Archibald Russell of the American Geographical and Statistical Society spearheaded the reform effort. For a discussion of the creation of the Bureau of the Census, see *id.* at 35-36.

92. See *id.* at 36-37. Prior to 1850, the population census only named heads of household and simply gave anonymous statistics for household members. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CFF No. 4, *FACTFINDER FOR THE NATION* 3 (1988).

93. ANDERSON, *supra* note 90, at 34.

94. See *id.* at 40-41.

95. See *id.*

96. In the Congressional debate on the census, Senator Borland urged that to require the census enumerators to take the names of the slaves would be too labor intensive. Senator Clemens noted, "[a]s to their names, [the master] would not know anything about that until the children had reached the age of twelve or fourteen." *CONG. GLOBE*, 31st Cong., 1st Sess. 673 (1850).



dren born to female slaves,<sup>97</sup> and information on degree of an individual's removal from White blood<sup>98</sup> were deleted.

As S.M. Lee notes, “[r]acial classifications can be usefully interpreted as reflections of prevailing ideologies . . . the dominant ideas and beliefs of society.”<sup>99</sup> In the 1850 census, it does not appear that the decision to count mulattoes separately was based on a desire to elevate or recognize mulattoes as an intermediate status superior to Blacks and inferior to Whites. On the contrary, one basis for the decision appears to have been to test a scientific theory of mulatto physical inferiority. The *Congressional Record* contains commentary suggesting that the decision to count mulattoes and ascertain their life span and fertility was to test the theory of polygenesis espoused by Southern physician Josiah Nott.<sup>100</sup> According to Nott's theory, Blacks and Whites did not belong to the same species, and when Blacks and Whites mated, the resulting hybrids — mulattoes — would be physically inferior to either the White or the Black. The congressional testimony also suggested that “the power of endurance of plantation labor diminishes in proportion to the admix-

97. The rationale offered for this deletion was especially degrading to slave women. Senator King asserted:

Now, sir, it is impossible to ascertain the number of children upon a plantation that any woman has had. The woman herself, in nine out of ten cases, when she has had ten or fifteen children, does not know how many she has actually had [A laugh.] . . . Where is the advantage, then, of filling up considerable space with this item, and swelling the document without getting any information at last?

*Id.* at 674.

98. This inquiry was rejected on the grounds that information would be too difficult to ascertain. Senator Borland argued that this inquiry required the enumerators

to go into the most delicate questions of physiology . . . [requiring] the census taker to ascertain the degrees of removal between the white and the black races. Now, I respectfully suggest that it will require a high degree of science, an acute discrimination, too determine anything of the sort. I am not aware that physiologists agree on these points; and to suppose that any young men whose service could be obtained for the paltry compensation of the deputy marshal, would be qualified to determine, for the miserable compensation of two cents per individual, these delicate and important questions of physiology . . . why, sir, it seems to be the most extraordinary proposition that I ever heard in my life.

*Id.* at 674.

99. Sharon M. Lee, *Racial Classifications in the U.S. Census: 1890-1990* 16 ETHNIC & RACIAL STUD. 75, 80 (1993).

100. See CONG. GLOBE, *supra* note 96, at 676-77. The proceedings refer to a “Southern physician,” who apparently was Josiah Nott. His thesis of polygenesis held that there was a separate creation of each of the races so that Blacks and Whites were not considered to be of the same species. The human race descended from many original pairs, “placed by God in climates best suited to their organization.” REGINALD HORSMAN, RACE AND MANIFEST DESTINY 130 (1981); see also BERLIN, *supra* note 51, at 197 (quoting Josiah C. Nott, *The Mulatto as Hybrid — Probable Extermination of Two Races if the White and Blacks are Allowed to Intermarry*, AM. J. OF THE MED. SCI. VI 254 (1843)); FOWLER, *supra* note 34, at 212-14.

ture of white blood; that the mulatto has, in a word, neither the better properties of the white man nor the negro."<sup>101</sup>

The congressional testimony, however, shows that some held a different view of mulattoes, as better than Blacks. In arguing against the decision to count mulattoes, one representative argued that the census should not be in the business of gathering details to test philosophical theories of scientists, but noted, "I believe the general opinion is, that the mulatto exceeds the black both in intelligence and pride."<sup>102</sup> However, in the end, it appears that the main reason for the addition of the mulatto category was that statisticians were happy to have a new category to count.

The "science" of distinguishing between Blacks, mulattoes, and Whites appears to have rested with the visual acuity of the "set of beardless boys,"<sup>103</sup> the youthful census enumerators. The terms "Black" and "mulatto" were not defined in either the census of 1850 or 1860. In 1850, the enumerators were simply instructed to write "B" for Black or "M" for mulatto and further admonished that "it is very desirable that these particulars be carefully regarded."<sup>104</sup> Unlike the modern census, the classifications were ascertained by the enumerator; they were not self-ascribed.<sup>105</sup>

The census proceeded on the theory that physical appearance corresponded to some ratio of White "blood" to Black "blood." Enumerators in the census of 1870 still were required to differentiate between "mulattoes" and "Negroes," but they were given a definition of "mulatto" that included "quadroons, octoroons and all person having any perceptible trace of African blood."<sup>106</sup>

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101. CONG. GLOBE, *supra* note 96, at 676. It was stated further that [t]he gentleman [who suggested that mulattoes be counted] in conversation with me said that he believed that a certain class of colored people had fewer children than a certain other class; and he believed that the average duration of the lives of the children of the darker class was longer than that of the children of the lighter colored class, or the mixed. And it was for the purpose of ascertaining the physiological fact, that he wanted the inquiry made. This was the motive for its insertion . . .

*Id.* at 676.

102. *Id.* at 677.

103. *Id.* at 674.

104. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, SEVENTH CENSUS OF THE UNITED STATES: 1850, at xxii (1853).

105. The accuracy of this census, as well as every census in which mulattoes were counted, is highly questionable. See Spickard, *supra* note 85, at 433 n.27. In reviewing the 19th century census records for my own family, I noted that a "W" had been crossed out and replaced with an "M," suggesting that my great, great grandparent may have gently corrected the mistaken impression of the beardless boy.

106. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, NEGRO POPULATION IN THE UNITED STATES 1790-1915, at 207 (William Loren Katz ed., 1968) [hereinafter NEGRO POPULATION].

By 1890,<sup>107</sup> the enumerators were instructed to categorize, by visual inspection, among different artificially constructed categories of Black, and “octoroon” and “quadroon” joined mulatto as separate classifications. How the enumerators were to make these distinctions was never — and could never have been — made clear. Rather, in the same way that an English speaker might speak more loudly to a non-English speaking person in the hopes that the volume would translate the language, the instructions kept getting more specialized by degree as though that would increase the likelihood of an accurate result. The enumerators were admonished to

[b]e *particularly careful* to distinguish between blacks, mulattoes, quadroons, and octoroons. The word “black” should be used to describe those persons who have three-fourths or more black blood; “mulatto,” those persons who have three-eighths to five-eighths black blood; “quadroon,” those persons who have one-fourth black blood; and “octoroon,” those persons who have one-eighth or any trace of black blood.<sup>108</sup>

The enumerators were instructed to become, in effect, clairvoyant gene counters.<sup>109</sup>

Even the Census Bureau admitted that the data collected under this method was “of little value,”<sup>110</sup> and, with an almost audible

107. There is no data available for the census years 1890 and 1900.

108. NEGRO POPULATION, *supra* note 106, at 207 (emphasis added).

109. The impossibility of ascertaining the exact proportion is highlighted by the following analysis:

If, for example, six individuals, in which the proportions of Negro blood are respectively precisely one-sixteenth, one-eighth, two-eighths, four-eighths, six-eighths, and eight-eighths, be presumed to intermarry, the number of possible different proportions in their children are 14; and if the group be presumed to be segregated for several generations, the possible different proportions their great-grandchildren would be represented by approximately 70 fractions having 128 as a denominator and numbers ranging between 17 to 100 as numerators. If the proportions of Negro blood in the original parents were not precisely represented by the fractions given above — as would almost certainly be the case in any group of individuals selected from the Negro population of mixed blood — the number of possible different proportions in the children of third generation would be much greater. Under the assumption made, of complete segregation the extreme range of differences in the proportion of Negro blood would tend to become less from generation to generation, but the number of different proportions, owing to the finer gradation, would tend to increase indefinitely. The tendency would be for the group collectively to approach a uniform proportion, from which individual proportions would vary by gradations becoming increasingly minute and various. In the hypothetical group supposed above, this limiting uniform proportion would slightly exceed seven-sixteenths Negro. In the mulatto population of the United States as a whole the number of proportions of intermixture is exceedingly great, and there is no reason to suppose that these proportions are concentrated in any considerable degree upon such simple fractions as one-eighth or one-quarter, or one-half. In the Negro population at the present time, it is not mathematically improbable that any given union of a mulatto with either a black or a mulatto, will in its offspring represent a unique proportion of admixture of white blood.

*Id.* at 208 n.1.

110. *Id.* at 207 n.1 (quoting BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CENSUS OF 1890, POPULATION, pt. I, at xciii).

sigh of relief, the Census Bureau stated that the data was especially misleading "as an indication of the extent to which the races have mingled."<sup>111</sup> Presumably, this meant that the mulatto category included the offspring of mulattoes who married each other.

By the Fourteenth Census in 1920, when the color line had hardened, the Census Bureau stopped counting "mulattoes" and formally adopted the one drop rule:

The term "white" as used in the census report refers to persons understood to be pure-blooded whites. A person of mixed blood is classified according to the nonwhite racial strain. . . . [t]hus a person of mixed white . . . and Negro . . . is classified as . . . a Negro . . . regardless of the amount of white blood . . . .<sup>112</sup>

This formal adoption of the one drop rule appeared in legislative definitions as well. For example, in 1924, a Virginia Act for "Preservation of Racial Integrity" defined a White person as someone with "no trace whatsoever of any blood other than Caucasian."<sup>113</sup> By 1930, Virginia defined as colored anyone "in whom there is ascertainable any negro blood."<sup>114</sup> The one drop rule was enshrined in social practice as well. In 1944 in Los Angeles and in 1956 in Detroit, it cost my uncles their homes.

The rule of hypodescent thus had its origins with the arrival of European and African people on this continent. During the ensuing three hundred years, hypodescent drew broad boundaries around the African-American race, including within these boundaries the offspring of Europeans and Native Americans, and it bound this race firmly together as a people.

## II. PROPOSALS FOR A MULTIRACIAL CATEGORY: CRITIQUING THE DISCOURSE

In this Part, I turn to the discourse regarding the one drop rule and the proposed addition of a multiracial category to the census forms. To date, this discourse has mainly followed one well worn path: Scholars and commentators recite and condemn the racist origins of the one drop rule and, armed with this condemnation, they conclude that the effects of the rule are mainly evil and that the consequences of abandoning it will be mainly good. Their path therefore often leads them toward neat, symmetrical redefinitions

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111. *Id.*

112. 3 BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, FOURTEENTH CENSUS OF THE UNITED STATES: 1920, at 10 (1923).

113. 1924 VA. ACTS ch. 371, § 5.

114. 1930 VA. ACTS ch. 85, § 67.

of the racial identities of most African Americans (and of most everyone else for that matter). But many of the participants in this discourse have set off on this path without (as Barbara Fields and Jayne Lee remind us we must always do) surveying the surrounding terrain.<sup>115</sup> The purpose of this Part is to raise a caution sign on this path and to slow the travel so that we can examine this terrain, which has been formed by the Black experience in America. I believe that there are cliffs and chasms that have been overlooked and that we continue to overlook them at our peril.

Section II.A discusses the common misperceptions of the effect of the one drop rule. Section II.B first examines certain proposals to redefine the African-American race and argues that these proposals abandon the racial categories that have been created by the social history of this country in favor of neat, biological classifications. Section II.B concludes by looking back on cases where the courts used “biological” factors to adjudicate the race of litigants. Section II.C argues that the proposals to divide the African-American race are evidence of a dangerous “distancing” between dark-skinned and light-skinned African Americans.

### A. *The One Drop Rule: The Misapprehension of the Historical Context*

The recent discourse addressing the one drop rule has focused on formal analysis of the rule without examining how the rule actually functioned on the terrain where it did its work. However valid in other contexts, the discourse overstates the importance of the one drop rule and often overlooks the ways in which it became fundamental to the struggle *against* racism, a struggle that would have been fragmented had a more symmetrical classification system been in place.

#### 1. *Misperceptions of the One Drop Rule: Gotanda's Theories of Racial Purity, Objectivity, and Subordination in Recognition*

An interesting example of this misapprehension of the hypodescent system is found in Professor Neil Gotanda's pathbreaking

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115. See Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 *NEW LEFT REV.* 95, 100 (1990); Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 *STAN. L. REV.* 747, 751 (1994) (reviewing KWAME ANTHONY APPIAH, *IN MY FATHER'S HOUSE* (1992)).

article *A Critique of "Our Constitution is Color-Blind."*<sup>116</sup> In a section of this article, Professor Gotanda compares hypodescent unfavorably with other, more formally elaborate classification systems. In this discussion, Gotanda becomes ensnared in formal abstractions and overlooks not only the ways in which Black Americans have lived under hypodescent but also the lives of the South Africans who have lived under a more symmetrical racial classification system.

Professor Gotanda's article critiques, among other things, the argument that American laws — even laws designed to protect minority rights — should be colorblind and race neutral. Gotanda correctly notes that the formal definition of the White and Black races in this country (hypodescent) is neither colorblind nor neutral; to the contrary, this definition is based on "assumptions of white racial purity" (the one drop rule) and "white domination."<sup>117</sup> Gotanda argues that "[t]he hypodescent rule when combined with color-blind constitutionalism, conveys a complex and powerful ideology that supports racial subordination."<sup>118</sup> After comparing hypodescent with more "symmetrical" classification systems used in other countries, Gotanda concludes that the hypodescent system fosters subordination because (1) it creates a powerful metaphor of White racial purity; (2) it lacks a sense of objectivity or neutrality; and (3) it leads to "subordination in recognition."<sup>119</sup>

As the following discussion demonstrates, Gotanda is unsuccessful in showing that hypodescent, per se, is a significant force, either in enforcing subordination or validating White racial purity. Instead, it is racism itself — far more than any particular classification system — that is the cause of this subordination and validation, and classification systems that are facially more neutral and symmetrical than hypodescent can just as effectively further racist goals.

*a. Gotanda's Summary of Racial Classification Systems.* Gotanda begins by concisely distilling the age-old American system of racial classification (hypodescent) into two rules:

- 1) *Rule of recognition:* Any person whose Black-African ancestry is visible is Black.

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116. Neil Gotanda, *A Critique of "Our Constitution is Color Blind,"* 44 STAN. L. REV. 1 (1991).

117. *See id.* at 30-35.

118. *Id.* at 26.

119. *See id.* at 25-27.

2) *Rule of descent*: (a) Any person with a known trace of African ancestry is Black, notwithstanding that person's visual appearance; or, stated differently, (b) the offspring of a Black and a white is Black.<sup>120</sup>

Gotanda then correctly observes that these two rules create a system which is not "symmetrical." The White race includes only people who are pure White, while the Black race includes everyone else with a known drop of Black "blood." As alternatives to hypodescent, Gotanda posits four historically documented examples of classification schemes that are "non-binary" and "logically symmetrical":

1. *Mulatto*: All mixed offspring are called mulattoes, irrespective of the percentages or fractions of their Black or white ancestry.
2. *Named Fractions*: Individuals are assigned labels according to the fractional composition of their racial ancestry. Thus, a mulatto is one-half white and one-half Black. A quadroon is one-fourth Black and three-fourths white, a sambo one-fourth white and three-fourths Black, etc.
3. *Majoritarian*: The higher percentage of either white or Black ancestry determines the white or Black label.
4. *Social Continuum*: This is a variation on the Named Fractions scheme: Labels generally correspond to the proportion of white or Black ancestry, but social status is also an important factor in determining which label applies. The result is a much less rigid system of racial classification.<sup>121</sup>

Analyzing these schemes,<sup>122</sup> Gotanda observes that "[b]ecause these schemes are symmetrical, nothing in them suggests inequality or subordination between races."<sup>123</sup>

While Gotanda notes that the *Named Fraction*, *Majoritarian*, and *Social Continuum* systems have been used in various parts of the world, there have been no substantive proposals to import these schemes into the United States for use by the Bureau of the Census, and an analysis of these three classification systems is therefore beyond the scope of this article.<sup>124</sup> The *Mulatto* system, in contrast, now has its proponents (who correctly prefer the term "biracial" or "multiracial" to "mulatto"). Accordingly, the following discussion will examine the way that Gotanda compares the *Mulatto* system

120. *Id.* at 24.

121. *Id.* at 25.

122. Gotanda asserts that all four of these classification schemes are "non-binary," and this assertion appears to be correct with respect to the *Mulatto*, *Named Fractions* and *Social Continuum* systems. The *Majoritarian* system, however, does appear to be binary, because it splits people into two groups, Black and White. See *id.* at 125.

123. *Id.* at 26.

124. An exception is a proposal by Luther Wright, Jr. for a kind of hybrid between the *Mulatto* and *Majoritarian* systems. This proposal is critiqued *infra* section II.B.3.

with the hypodescent system when he makes his three-pronged critique of hypodescent.

*b. Racial Purity.* Gotanda's analysis begins with the assertion that hypodescent validates White racial purity. He notes:

The metaphor is one of purity and contamination: White is unblemished and pure, so one drop of ancestral Black blood renders one Black. Black ancestry is a contaminant that overwhelms white ancestry. Thus under the American system of racial classification, claiming a white racial identity is a declaration of racial purity and an implicit assertion of racial domination.<sup>125</sup>

Here, Gotanda overstates the role of the classification *system* in validating White racial purity, ignoring the fact that the more "symmetrical" systems that he praises have been able to accomplish this task effectively. Consider, for example, the racial classification system that accompanied Apartheid in South Africa. There, a "mulatto" system of racial classification divided the population (more symmetrically) into "Whites," "coloreds," and "Blacks." Notwithstanding this symmetry, when a South African claims to be White, this claim — as in the United States — is a declaration of White racial purity. In South Africa, as in the United States, "White" means "pure" White; people with any detectible African features are not White, and the purity of the White race is thus validated.<sup>126</sup>

Moreover, the *Mulatto* system has its own version of the "one drop" rule, which reinforces the superiority of the White race in a way that is not found in the *hypodescent* system. Under this "one drop" rule, White blood is seen as so virtuous and superior that it elevates a Black person out of the Black race and into a formally distinct "colored" or "mulatto" race. Accordingly, when the *Mu-*

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125. Gotanda, *supra* note 116, at 26-27.

126. The Population Registration Act of 1950 thus defined a "White person" as follows: (xv) "white person" means a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a colored person.

An Act to Make Provision for the Compilation of a Register of the Population of the Union, for the Issue of Identity Cards to Person Names or Included in the Register; and for Matters Incidental Thereto, No. 30, 5 (1950) (S. Afr.), cited in Christopher Ford, *Administering Identity*, 82 CAL. L. REV. 1231, 1277 n.231 (1994). Under this statute, the emphasis was on appearance, rather than blood or genealogy. Nevertheless, the statute clearly stated that in South Africa, as here, one may look White, but not "be" White. South Africa had formal legal procedures to deal with those who wished to be reclassified from African to Colored or from Colored to White. As one reporter noted, "Diligent apartheid bureaucrats once scrutinized faces and hair, took photographs and sent thick reports back to government headquarters in Pretoria on each of the hundreds of blacks who applied annually to be reclassified as Colored — and the many more Coloreds who applied to become whites." Scott Kraft, *Four Families in South Africa: Colored Family Finds Color Still Matters*, L.A. TIMES, Apr. 28, 1992, at H2. In the case of Colored applicants, these bureaucrats would often run a pencil through the candidate's hair.



*latto* system is conceived and administered in a racist manner, it can validate White racial purity in even more ways than the *hypodescent* system. In fact, the salient feature of the *Mulatto* system makes it far more effective than *hypodescent* in promoting White racial domination: It formally divides the subordinated, not-pure-White people into two groups — colored and Black. In South Africa, this formal division of people of color was and continues to be an effective tool in their subordination, a tool that is not formally present in the system of hypodescent.

*c. Biological Objectivity.* Gotanda's next observation arises from the symmetry of the mulatto system when compared to the imbalance of hypodescent. This observation is surprising because we find Gotanda — an incisive critic of those who defend racial classifications on the grounds that they are scientifically or biologically "objective" — apparently *praising* the *Mulatto* system because of its "objectivity." Gotanda states: "The symmetry of racial categorization systems other than hypodescent brings a sense of objectivity and neutrality to these schemes, and a comparison of hypodescent to symmetrical systems exposes its nonneutral assumptions."<sup>127</sup>

But what is the basis for the *Mulatto* system's vaunted sense of "objectivity" and "neutrality"? The answer is *biology*. The *Mulatto* system "objectively" and "neutrally" draws bright blood lines that separate "pure-blooded" Blacks, "pure-blooded" Whites, and "mixed-blooded" persons into their own *biologically* homogeneous groups. From a formal standpoint, the "objectivity" and "neutrality" of the *Mulatto* system may be qualities to be admired, but in practice they merely reinforce the categorization of the races on biological grounds. As Gotanda himself recognizes, "the treatment of racial categories as functionally objective devalues the socioeconomic and political history of those placed within them."<sup>128</sup> This is precisely what the *Mulatto* system does: It gives the imprimatur of biology to racial categories, and it makes these racial categories look so neat and logical that we forget the socioeconomic forces that have drawn the bright line between Whites on the one hand and all people of African descent on the other.<sup>129</sup>

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127. Gotanda, *supra* note 116, at 27 (footnote omitted).

128. *Id.* at 26.

129. The asymmetrical system of hypodescent, in contrast, undermines the biological basis for racial categorization, because, genetically speaking, the requisite "one drop" of African blood cannot hold a race together. Instead, hypodescent finds its cohesive strength in historical forces that have created the African-American race. See generally Gotanda, *supra* note 116, at 30-35.

Thus while the *Mulatto* scheme may seem more elegant because it draws a symmetrical line between pure-blooded Blacks and mixed-blooded Blacks, this is a line based on blood that has little meaning except to biological racists, a line that would be better off not drawn at all.<sup>130</sup>

*d. Subordination in Recognition.* Gotanda next argues that the “moment of racial recognition” bespeaks the racial hierarchy imposed by hypodescent:

Under hypodescent, the moment of racial recognition is the moment in which is *reproduced* the inherent asymmetry of the metaphor of racial contamination and the implicit impossibility of racial equality. The situation which bares most fully the subordinating aspect of the moment of racial classification arises when a Black person is at first mistaken for white and then recognized as Black.

Before the moment of recognition, white acquaintances may let down their guard, betraying attitudes consistent with racial subordination, but which whites have learned to hide in the presence of non-whites. Their meeting and initial conversation were based on the unsubordinated equality of a white-white relationship, but at the moment of racial recognition, the exchange is transformed into a white-Black relationship of subordination. In that moment of recognition lies the hidden assertion of white racial purity. The moment of racial recognition is thus characterized by an unconscious assertion of the racial hierarchy implied by hypodescent.<sup>131</sup>

The flaw in this reasoning is that Gotanda again attributes to hypodescent a phenomenon (the “moment of racial recognition”) that is, in truth, a function of racism. In fact, experience tells us that such “moments” do not depend on hypodescent. Jews, Arab Americans, and Iranian Americans experience these moments frequently (and anti-Semites therefore find themselves saying: “You don’t look Jewish”), even though the boundaries of their ethnic groups are not strictly defined by hypodescent.<sup>132</sup>

With respect to African Americans, in order to test Gotanda’s hypothesis that these moments of racial recognition are a function of the hypodescent system, imagine the two ways in which such moments could play out between a White person and a mixed-race person if a *Mulatto* system were in effect.

First, the moment could play out in the very same way as under *hypodescent*: The White person assumes that the mixed-race per-

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130. Of course, in South Africa this line now has social meaning because decades of apartheid have successfully separated the Colored and African peoples into separate social groups. See Kraft, *supra* note 126, at H2.

131. See Gotanda, *supra* note 116, at 27 (footnotes omitted).

132. See DAVIS, *supra* note 3, at 13.

son with whom she is speaking is White. After the White person makes her slur, the mixed-race person makes his identity clear, and the same “hidden assertion of White racial purity” occurs.

Second, something very different could happen. When the White person makes her slur regarding Black people, the mixed-race person could declare his formal distance from the Black race (“I’m biracial and you’re right, those Blacks do need to get off welfare”) and agree with the slur, thus consciously asserting the racial hierarchy implied by the *Mulatto* category. In both of these situations “subordination in recognition” occurs with great effectiveness under the *Mulatto* system.

Gotanda also overstates his case when he argues that “at the moment of racial recognition, the exchange is transformed into a white-Black relationship of subordination.” In fact, “the moment of racial recognition” is a two-edged sword, cutting both ways. Unless the White person is an incorrigible racist, she suffers humiliation and embarrassment as a result of these “moments” — and she may also learn something. While most African Americans can give a personal example of such a situation, a very instructive one is found in a story Professor Scales-Trent tells about an experience her Aunt Midge had during a bus ride in the newly-desegregated South:

The bus was almost full, a few seats here and there, black and white scattered throughout the bus. And then, at one stop, a dark-skinned black woman got on, looked for a seat, and went over and sat down next to a white woman. . . . [T]his white woman was outraged. How *dare* this colored woman come and sit down next to her without so much as a by-your-leave! The white woman noisily gathered up all her bags and packages, rolled her eyes, muttered under her breath, and flounced over to sit next to Aunt Midge — Aunt Midge, a black woman with porcelain skin and baby blue eyes. She settled in with a haughty glance at the other bus riders, a glance that said: “No, *indeed!* Some people may be willing to sit next to niggers, but *I* am not one of them.” The other black riders, friends and neighbors of my aunt, tried to suppress a grin. But then Aunt Midge peered around this white woman and her packages, and smiled and waved at them, and they couldn’t contain themselves any more. They exploded with laughter. They laughed until the tears rolled down their cheeks. They laughed until they had to hold their sides. They laughed until they were out of breath.<sup>133</sup>

Imagine this “moment of racial recognition” under the *Mulatto* system, where Aunt Midge would have been formally assigned to a different race than many of the other Black passengers on the bus.

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133. JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN 42 (1995).

At worst, Aunt Midge and her White seat-mate would have tacitly agreed that the Blacks on the bus were the "Other" and that it *was* unacceptable to sit next to them. At best, the laughter would have been more muted and less heartfelt. Either way Aunt Midge's little victory against racial subordination would have been less pronounced.

Scales-Trent gives a final (tongue-in-cheek) warning that shows that, under a hypodescent system, these "moments of racial recognition" have for years been an effective stealth weapon that African-Americans use to combat racism:

So don't forget, white folks: we see you, we hear you, and we tell our stories. Was that you at a party joking about living in "Coon City"? Little did you know that one of those "coons" was at the party and is writing about you even now. Was it you at a bar talking about that "new nigger basketball player at the university," not knowing that the "nigger basketball player" was two chairs away? And when you were in surgery performing a brain shunt and said it was hard to cut through the skull of your patient because "Negro skulls are so thick," you never knew that the brilliant new resident you were working with was a "Negro."

We tell our stories.

And we are everywhere, white folks.

Beware.<sup>134</sup>

It is something deeper than the hypodescent scheme — something that transcends any classification system — that is doing racism's work. Comparing the history of the United States with that of South Africa, it becomes clear that, historically, the symmetrical *Mulatto* system has been just as pernicious as the asymmetrical one of hypodescent; under both systems there was a bright line between White people and people of African descent and a fainter line between mulattoes and Blacks.<sup>135</sup> The bright line was drawn not by a formal classification system, but by centuries of racism, economic forces, and sexual mores, along with the superficial physical differences. In fact, had the more elegant, more symmetrical *Mulatto* system been selected in this country, the line between White people and people of color might be much brighter than it is today.

Gotanda discussed the one drop rule obliquely in the context of colorblind constitutionalism, but other commentators who focus specifically on multiracial issues have fallen into the same traps. In the next two sections, I discuss how such commentators overlook the effects of the racial classification system in South Africa and the

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134. *Id.* at 44.

135. See *infra* notes 140-61 and accompanying text.

good Mephistopheles did when he designed the one drop rule in America.

## 2. *The One Drop Rule and "Buying into the System of Racial Domination"*

Even historian Paul Spickard, who has written the definitive history of twentieth-century mixed-race Americans, is sometimes too quick to denounce the work of the one drop rule. Spickard for example argues:

The function of the one-drop rule was to solidify the barrier between Black and White, to make sure that no one who might possibly be identified as Black also became identified as White. For a mixed person, then, acceptance of the one-drop rule means internalizing the oppression of the dominant group, buying into the system of racial domination.<sup>136</sup>

I agree that for a biracial person — a person who feels loyalty to parents of two different races — accepting the one drop rule will in some (but certainly not all) cases lead to the painful internalization of societal racism. However, I do not agree that accepting this rule constitutes "buying into the system of racial domination." History, in fact shows us that the opposite is true: Often, those who fought the one drop rule were the ones who "bought into" the system of racial domination, and those who accepted this rule fought racial domination. Consider the slave narrative quoted at the beginning of this article: "[S]o you see I han't got but one-eighth of the blood. Now, admitting it's right to make a slave of a full black nigger, I want to ask gentlemen acquainted with business, whether because I owe a shilling, I ought to be made to pay a dollar?"<sup>137</sup> The slave gives a cunning critique of the one drop rule but prefaces his critique with the words: "it's right to make a slave of a full black nigger." He rejects the one drop rule, but accepts the system of racial domination. Similarly, in the article *Time Magazine* wrote on my Uncle Jack after the racists' bricks came flying through his window, he was not quoted as denouncing the system of racial domination; instead he implied that the bricks should not have been aimed at *his* window, because he was not Black.<sup>138</sup>

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136. Paul R. Spickard, *The Illogic of American Racial Categories*, in *RACIALLY MIXED PEOPLE IN AMERICA* 19 (Maria P.P. Root ed., 1992). This observation is cited with approval in Julie C. Lythcott-Haims, Note, *Where Do Mixed Babies Belong?: Racial Classification in America and Its Implications for Transracial Adoption*, 29 *HARV. C.R.-C.L. L. REV.* 531, 542 (1994). In other writings, Spickard does acknowledge the positive works of the one drop rule. See Spickard, *supra* note 85, at 323.

137. BLASSINGAME, *supra* note 1, at 52.

138. See *TIME*, *supra* note 25, at 24.

Compare these rejections of the one drop rule with the actions of my Uncle Clarence when the neighbors sued to have him ejected from his home because of his race. Uncle Clarence accepted the one drop rule, stipulated on the record that he was Black, and then argued at every level of the California court system that in this country *nobody* should be evicted from their home because of their race.<sup>139</sup> These three real situations, which undoubtedly have been played out repeatedly throughout American history, cast doubt on the conclusion that “acceptance of the one drop rule means . . . buying into the system of racial domination.” Who was it, after all, who “bought into” the system of racial domination? Was it the opponents of the one drop rule, who said “you can’t do that to *me* — I’m not Black”? Or was it the person who accepted the one drop rule, and said “you can’t do that to *anyone*”?

### 3. *Lessons from the South African Experience*

Speaking of classification systems for race and sexual orientation, Professor Karst observes that “[w]hen a binary classification of personal identity is written into law, it is a better-than-even bet that the law was written by members of the dominant group.”<sup>140</sup> Other scholars who have contributed to the discourse also have assumed that the most efficient way for one racial group to maintain its dominance is by imposing a binary system of racial classification, such as the Black-White hypodescent system in the United States.<sup>141</sup> This, however, is not necessarily so. What has led the discourse astray is the assumption that the architects of the Jim Crow system chose *the* most efficient means of ensuring racial domination. History, however, presents no shortage of tyrants who were neither shrewd nor smart, and simply because the tyrants who fathered Jim Crow chose the one drop rule does not mean that this rule was the most efficient means of maintaining dominance over the Black population. In fact, this dominance might have been far more efficiently and permanently enforced if the architects of Jim Crow had fashioned a more symmetrical, trinary, White-mulatto-Black classification system. By building a wall between light and dark African Americans and then making a few concessions to those on the light side of this wall, the designers of Jim Crow America might have extended the life of their loathsome system for another generation.

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139. See *Stone v. Jones*, 152 P.2d 19, 19 (Cal. Ct. App. 1944).

140. Karst, *supra* note 28, at 293.

141. See Maria P.P. Root, *From Shortcuts to Solutions in RACIALLY MIXED PEOPLE IN AMERICA*, *supra* note 136, at 343.

Indeed, many American racists realized this and proposed drawing such a line.<sup>142</sup> In addition, as Higginbotham and Kopytoff note when speaking of a Virginia statute that treated mulattoes in the same way as Blacks: “What the white Virginians seemed not to realize was that they had greatly increased the danger of alliance by classifying most mixed race individuals with blacks rather than with whites in terms of their legal rights.”<sup>143</sup> They also observe that,

Whites in pre-Civil War Virginia paid a strategic price to maintain their ideal of white racial purity. Had they declared, for example, that anyone with more than fifty percent white blood was legally white, they would have had less to fear from an alliance of free mulattoes and slaves.<sup>144</sup>

Of course, we can never know how American history might be different if the architects of Jim Crow had divided the Black race into two races — a pure African race and a mulatto buffer race. But as we evaluate the Devil’s work in creating hypodescent here, we should compare it to the work he did some years later in South Africa, where he created an elegant, symmetrical, nonbinary classification system. As we make this comparison, we should ask where the Devil did more evil and where he did more good. Interestingly, the recent discourse regarding the multiracial category and the one drop rule has all but ignored the experience in South Africa.<sup>145</sup> There, the racial classification system was one of the bedrock elements of apartheid. Unlike hypodescent, it had an official intermediate “colored” category, which contained the descendants of the early White settlers, of the native inhabitants of South Africa (the Khoikhoi), and of the Malay, Indian, and Chinese immigrants.<sup>146</sup>

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142. For example, after observing race relations in Latin America and the Caribbean where he believed that the mulatto category was a more “distinct third caste in-between the white minority and the black majority,” the conservative racist Alfred Holt Stone argued that mulattoes be accorded a separate “caste” status, and that they be exempted from some of the more discriminatory state laws. JOHN G. MENCKE, *MULATTOES AND RACE MIXTURE* 124-31, 139 n.122 (1979).

143. Higginbotham & Kopytoff, *supra* note 70, at 1996-97.

144. *Id.* at 1981.

145. The discourse includes several works on the subject of mixed race, hypodescent and the one drop rule which barely mention South Africa or its racial classification system. See, e.g., NAOMI ZACK, *RACE AND MIXED RACE* 74 (1993); Gotanda, *supra* note 116; Lythcott-Haims, *supra* note 136. Spickard puts a positive spin on the South African classification system, noting, “Even South Africa’s starkly divided society has had room for an intermediate category . . . .” Spickard, *supra* note 136, at 331.

146. George Frederickson notes that:

The initial constituent elements were the progeny of unions between whites and slaves or ex-slaves of Asian or East African origin . . . and the offspring of white-Khoikhoi or slave-Khoikhoi intermixture. Eventually the unmixed slaves freed in 1838 and a large proportion of the remaining full-blooded Khoikhoi intermarried with these original Coloreds, thus increasing their nonwhite inheritance. But the white genetic contribution to this population group did not cease with the abolition of slavery; for white men con-

The effects of this categorization system are metaphorically summed up by President Mandela in his description of the allocation of food at one of the segregated prisons where he was incarcerated: “[W]hite prisoners received white sugar and white bread, while Coloured and Indian prisoners were given brown sugar and brown bread.” Black prisoners, Mandela notes, received no sugar and no bread.<sup>147</sup> This division of bread and sugar signalled the way that all of South Africa’s wealth and privilege was allocated under the old regime. In Cape Town, for example, Whites lived in nice houses, many in seaside neighborhoods, that were lavish in comparison to the brick bungalows where the colored population lived, which, in turn, were luxurious in comparison to the shacks where the African population was forced to reside.<sup>148</sup> Mean income for the colored population was only one third that of Whites but it was twice that of Blacks. Similarly, educational spending on colored children was only half that spent on White children but twice that spent on Black students.<sup>149</sup> The *New Republic* noted that “[t]hrough a labor system that gave them preference over blacks, coloreds were encouraged to feel superior to and distinct from them.”<sup>150</sup> Formal housing segregation further isolated the colored population from Black people. In many ways, Black and colored South Africa were separate societies, with colored people often called the “stepchildren” of White society.<sup>151</sup>

Prior to 1948, many colored voters had the franchise in South Africa. When the National Party’s D.F. Malan defeated Jan Smuts’s United Party in the 1948 elections, the National Party began to build the formal system of Apartheid and, within eight years of taking power, it had disenfranchised the colored electorate and segregated the colored population.<sup>152</sup> In an infamous episode in

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tinued to marry or cohabit with Colored women, and most of their children now became part of the mother’s racial group.

GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* 132 (1981). For the gene counters, Frederickson notes: “the Cape Coloured population in Cape Town . . . are constituted by approximately equal proportions of European, Asian and Southern African genes.” *Id.* at 255 (alteration in original) (quoting M.C. Botha & Judith Prichard, *Blood Group Gene Frequencies: An Indication of the Genetic Constitution of Population Samples in Cape Town*, S. AFR. MED. J., Apr. 1, 1972, at 20).

147. See NELSON MANDELA, *LONG WALK TO FREEDOM* 212 (1994).

148. See Jonathan Steele, *ANC Faces Suspicion from Mixed-Race Voters*, THE GUARDIAN, Apr. 8, 1994, at 122.

149. See Kraft, *supra* note 126, at 2.

150. Peter Beinart, *United Coloreds: How Mandela Lost the Mixed Race Vote*, NEW REPUBLIC, Feb. 28, 1994, at 16, 17.

151. See *Id.*

152. See FREDERICKSON, *WHITE SUPREMACY*, *supra* note 40, at 279, 254.



the Western Cape Province, approximately 60,000 colored residents were forcibly removed from their homes in District Six in Cape Town; these homes were razed so that a White neighborhood could be built on the spot.<sup>153</sup>

Decades later, as 1994 brought the first free elections to South Africa, this same Nationalist party sought to win the votes of the colored people it had disenfranchised, segregated, and relocated, and it began this task by emphasizing the line it had drawn between the mixed race and Black populations. Professor Lawrence summarizes one campaign tactic employed by the National Party in order to lure colored votes in the Western Cape:

The National Party's campaign comic book depicted a typical Miller's Plain Coloured family: a mother, a father, three children, and a dog. Each strip told a tale of how, if elected, Mandela and the ANC would allow the Africans to take everything the Coloured family had worked so hard to get. The depictions in the comic of both Coloureds and Africans employed blatantly racist stereotypes. In one strip, an unkempt African rings the doorbell. The mother goes to the door and asks what he wants. "I've come to look at the house that Mandela is giving me after the elections," he says.<sup>154</sup>

A review of newspaper accounts of events leading up to the 1994 campaign shows how effective the South African government's efforts to draw a line through the African race had been. For example, the *Daily Telegraph* quotes one colored voter as saying "[s]ure the National Party did terrible things to us, but the white men governed us all these years. They know how to rule. Black men can't rule the world."<sup>155</sup> Similarly, the *Los Angeles Times* quotes a Colored man observing that "[m]ost of the so-called Colored people would go for the National Party because of their inherent fear of the black man. . . . They don't understand the black man. Coloreds have been taught that he's the uneducated one who steals without asking."<sup>156</sup> And shortly before the election, the *Financial Times* reported the following from a Cape Town election rally:

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153. See Paul Taylor, *Coloreds: Oppressed Like Blacks, But Voting Like Whites*, WASH. POST, Apr. 25, 1994, at A13. After razing this vibrant and Bohemian neighborhood, the government was unable to fulfill its plans and the land remained vacant for years. See Brendan Boyle, *South Africa's Notorious Apartheid Wasteland to be Redeveloped*, REUTERS LIBRARY REPORT, Aug. 26, 1991.

154. Charles R. Lawrence III, *Foreword: Race, Multiculturalism and the Jurisprudence of Transformation* to Symposium, *Race and Remedy in a Multicultural Society*, 47 STAN. L. REV. 819, 832 (1995). For a press account of these tactics, see Steele, *supra* note 148.

155. Alec Russel, *ANC Paints Itself White to Woo the Coloureds*, DAILY TELEGRAPH, Sept. 18, 1993, at 15.

156. Kraft, *supra* note 126, at H2.

But Mr Andre Hofmeister, a coloured [man] whose name underlines his half-European ancestry, pointed to a crowd of [African National Congress] supporters dancing with posters of Mandela and said: "These people are too stupid to realise that, if a black man rules this country, it will be run into the ground."<sup>157</sup>

When the election came, the colored electorate in the Western Cape gave the majority of its votes to the National Party, the same party that had oppressed it for forty-six years, thereby electing, as premier of the Western Cape, Hernus Kriel, the man who had served the Apartheid regime in Pretoria as its last Minister of Law and Order<sup>158</sup> and who, one newspaper noted, had "opposed President F W de Klerk's reforms until the last moment."<sup>159</sup>

Fortunately for us, the designers of Jim Crow segregation in the United States were not quite as shrewd as D.F. Malan. Today, we can only speculate as to how this country would have been different if the architects of American racial classifications had designed things slightly differently, walling off mulattoes in a separate racial category; officially reserving for them slightly better jobs and neighborhoods, schools and water fountains; and poisoning them with racist propaganda touting their superiority over the "pure-blooded" African Americans. In his essay *Paths to Belonging*, Professor Karst persuasively reminds us that it is not difficult to pit one disadvantaged minority group against another; Professor Lawrence notes that in 1966 even some of California's Latino voters supported Proposition 13, the initiative that would have repealed fair housing laws.<sup>160</sup> If a separate "mulatto" race had been formally created here, would its voters — afraid of having "Blacks" as neighbors — have supported this law? Would this separate category of Americans, like the South African coloured electorate, have voted for segregationists? With three racial categories instead of two, just how differently would the struggle against racism have evolved? Of course, we cannot answer these questions with certainty, but we must at least consider them as we survey the terrain.

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157. Brendan Boyle, *South African Elections: Mixed-Race Voters Ensure Nats Triumph in the Cape*, FIN. TIMES, May 3, 1994, at 4.

158. See *id.*

159. Raymond Whitaker, *Ominous Signs as Nats Claim Western Cape*, THE INDEPENDENT, May 2, 1994, at 12.

160. See Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986). For the ironic story of one such voter, see Lawrence, *supra* note 154, at 834. Given the existence of colorism within the African-American community, see sources cited *supra* note 88, it is easy to imagine how a formal legal division of the African-American race could have splintered and slowed the struggle for racial equality.

As we examine the African-American experience more closely and compare it with the experience in South Africa, we come away with a more realistic view of the workings of hypodescent and the one drop rule. As noted at the outset of this article, when Mephistopheles was asked to "self-identify," he responded that he was "part of that power that ever wills evil and ever accomplishes good."<sup>161</sup> So it is with the one drop rule. It was begotten of racism, hatred, and ignorance, but it also created a people and united that people in the fight against those evils.

### B. *Rebiologizing Race*

With the one drop rule placed in a more balanced light, I now turn to the arguments for a radical redefinition of American racial categories. Among those who promote a multiracial category, one group urges such broad boundaries for that category that it would swallow up a great percentage of Blacks, Whites, Hispanics, Native Americans, and Filipinos. In this section, I argue that these commentators, in a quest for new biologically symmetrical racial classifications, have overlooked much of the social and historical context that has created the African-American race. They have, for example, forgotten that even the Devil is bound by the laws of motion, which declare that actions and reactions are proportional, and thus when the Devil made the White race *exclusive*, the necessary converse was that the African-American race became *inclusive*. Dorothy E. Roberts is thus correct when she observes:

Sharing genetic traits seems less critical to Black identity than to white identity. The notion of racial purity is foreign to Black folk. Our communities, neighborhoods, and families are a rich mixture of languages, accents, and traditions, as well as features, colors, and textures . . . . There is often a melange of physical features — skin and eye color, hair texture, sizes and shapes — within a single family. We are used to "throwbacks" — a pale, blond child born into a dark-skinned family, who inherited stray genes from a distant white ancestor. My children play with a set of twins who look very different from each other. The boy has light skin, green eyes, and "kinky" sandy-colored hair; the girl has dark skin, brown eyes, and long, black, wavy hair.<sup>162</sup>

Because the commentators discussed below have overlooked this social reality, their classification systems would return us to notions of racial purity; they would reduce racial categorization to a matter of biology and blood.

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161. GOETHE, *supra* note 18, at Part I, Lines 1335-36.

162. Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 237 (1995).

### 1. *The Collapse of Biological Race*

Many anthropologists now reject the concept of physical race. Of course, they do not deny that morphological differences exist between population groups; rather, they deny that these differences have much deeper genetic significance.<sup>163</sup> These anthropologists note that the genetic differences that do exist among peoples do not track the traditional racial groups. In fact, there are huge genetic variations among people in the same racial group, and there are significant genetic similarities among people of different racial groups. For example, in inventorying the genetic makeup of various population clusters, researchers have found that the largest genetic difference exists between two groups of black skinned people — the West Africans and the Australian aborigines.<sup>164</sup>

While the rejection of the genetic significance of racial categories is by no means unanimous,<sup>165</sup> it has reached the point of consensus among the participants in the discourse that I address here. All of these participants recognize race as a social rather than a biological category.<sup>166</sup> Ironically, however, these same commentators now propose to breathe new life into the biological construction of race that they unanimously reject.

### 2. *Proposals for a Broad Genetically Based Multiracial Category*

Some commentators and advocacy groups have recently suggested that the census should include a broad “multiracial” category that would be “inclusive of all racially mixed persons.”<sup>167</sup> The

163. See Robert Lee Hotz, *Is Concept of Race a Relic?*, L.A. TIMES, Apr. 15, 1995, at A1. For a compelling exposition of this view, see KWAME ANTHONY APPIAH, *IN MY FATHER'S HOUSE* 36-38 (1992); see also STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (1981).

164. See Hotz, *supra* note 163. Genetic traits that correlate with population groups often do not correlate with the traditional racial groups. For example, if races were formed on the basis of the ability to retain lactase, the enzyme needed to digest milk, one race would include some African Blacks, East Asians, Native Americans, Southern Europeans, and Australian Aborigines; the other race would consist of West Africans, Arabs, and Northern Europeans. *Id.* Similarly, the sickle cell trait appears “wherever people had to cope with prolonged exposure to malaria. It is as prevalent in parts of Greece and south Asia as in central Africa.” *Id.*

165. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE — INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

166. See NAOMI ZACK, *RACE AND MIXED RACE* 13-17 (1993); Gotanda, *supra* note 116, at 23; Cynthia L. Nakashima, *An Invisible Monster: The Creation and Denial of Mixed-Race People in America*, in *RACIALLY MIXED PEOPLE IN AMERICA*, *supra* note 136, at 162; Spickard, *supra* note 136, at 18; Lythcott-Haims, *supra* note 136, at 536; Wright, *supra* note 17, at 513.

167. Lythcott-Haims, *supra* note 136, at 532 n.7. Similarly, Project RACE proposes a census category that would define “multiracial” as a “person whose parents have origins in two or more of the above racial categories [namely, American Indian or Alaska Native, Asian or Pacific Islander, Black, Hispanic or White].” *Hearings*, *supra* note 14, at 113. Pay-

intellectual momentum for this category is drawn, in large part, from the rejection of the one drop rule. For example, in a thoughtful recent Note focused on the issue of transracial adoption, Julie Lythcott-Haims forcefully rejects the one drop rule<sup>168</sup> and proposes a broad multiracial category. Her discussion of the "Black is Beautiful" movement provides insight into the theoretical basis for this broad, new category:

The "one drop" rule is so ingrained in the American psyche that Blacks and Whites do not think twice about it. For example, *part-Black* people of all hues joined *Blacks* in embracing the "Black is Beautiful" slogan advanced in the late 1960s, finally taking pride in their skin color, their hair and other aspects of their black ancestry.<sup>169</sup>

Here, Lythcott-Haims acknowledges that the "psyche" of American Blacks was such that they never "thought twice" about the fact that they were Black. As I have argued above, this self definition arose from the social history that solidified African Americans into a single racial group. But notwithstanding African Americans' self-definition and social history, the broad category which Lythcott-Haims and others propose would draw a line between Blacks who have White blood ("part-Black people of all hues") and those who do not ("Blacks"). In doing so, this category could establish a one drop rule of its own: one drop of White blood would transform a "Black" person into a "part-Black person of all hues."<sup>170</sup> In fact, this new one drop rule could transform 75 to 80% of African Americans into multiracial persons:

It is now believed that Multiracial Americans are more common than many Americans recognize: "It has been estimated, for example, that between three-quarters and four-fifths of all so-called Negroes in the United States have some White ancestry. How many so-called Whites in the United States have Negro blood is unknown, but it must run into the hundreds of thousands, if not millions."<sup>171</sup>

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son correctly observes that "if multiracial is defined as having parents with *origins* in two or more groups, most African-American and Hispanic persons, and even a significant proportion of white persons in this country would fall under the multiracial category." Kenneth E. Payson, Comment, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1280 (1996).

168. See Lythcott-Haims, *supra* note 136, at 533.

169. *Id.* at 539 (emphasis added).

170. It is important to remember that the proponents of this category have the noblest of intentions. Lythcott-Haims, for example, states: "In no way do I suggest that being Black is undesirable and that Multiracial people should be given the opportunity to break free of the 'Black' label. . . . I implore that recognizing and accepting the fullness of one's ancestry is critical to developing a healthy identity." *Id.* at 541.

171. *Id.* at 539-40 (quoting CARL N. DEGLER, NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES 185 (1986)).

At bottom, this broad multiracial category is based on a biological view of race, specifically, that the multiracial box should be made available for all those African Americans with some admixture of White blood in their "ancestry." This biological recategorization is not confined to the Black race. The purpose is apparently to draw a racial dividing line, with those Americans who are pure blooded (pure Whites, pure Blacks, pure Native Americans) on one side, and those who have mixed blood on the other. In accomplishing this task, blood lines may be followed endlessly to their source, and the histories of peoples may be ignored. Lythcott-Haims, for example, adopts Maria P.P. Root's observation that "virtually all Latinos and Filipinos are [m]ultiracial."<sup>172</sup> In this cosmology, then, it is the fact of the mixture that is important; what is mixed pales in comparison. Consequently, all Filipinos can consider themselves as "multiracials" due to genetic mixing that occurred centuries ago and an ocean away. In fact in her discussion of the wording of the census forms, Lythcott-Haims emphasizes Root's practically limitless definition of the "multiracial" category:

[I]t is estimated that 30-70% of African-Americans by multigenerational history are [M]ultiracial; virtually all Latinos and Filipinos are [M]ultiracial, as are the majority of American Indians and Native Hawaiians. Even a significant proportion of White-identified persons are of [M]ultiracial origin. The way in which the Census Bureau records data on race makes it very difficult to estimate the number of biracial people, let alone [M]ultiracial persons, in the United States. And estimates that have been made are conservative.<sup>173</sup>

With "multiracial" defined in this way, the Census Bureau would need to forsake any accurate count of the racial groups created by the social history of this and other countries, so that it could add a category that can accommodate anyone whose "multigenerational history" shows some genetic admixture.

As discussed in section IV.B below, the entire census could be rendered meaningless by the addition of a category that can be read to include some Whites, most Blacks, most Native Americans, all Latinos, all Filipinos, and all native Hawaiians. More importantly, while such a proposal would be a victory for those who want the census to validate their genetic history, the inevitable cost of this victory would be to make the census an assessment of genetic content rather than a measure of the racial groups that have been created by the *social* history of our country.

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172. *Id.* at 544.

173. *Id.* at 44 (quoting Maria P.P. Root, *Within, Between, and Beyond Race, in RACIALLY MIXED PEOPLE IN AMERICA*, *supra* note 136, at 9).

### 3. *The Proposal for a Majoritarian Classification System*

On a more abstract level, another proposal for the complete re-writing of American racial categories is made by Luther Wright, Jr.<sup>174</sup> At the end of a Note that offers an insightful and persuasive analysis of some of the aspects of the American racial classification system, Wright briefly proposes a scheme that would use elements of both the mulatto and majoritarian systems in order to realign racial definitions in this country. For example, he would define African Americans and European Americans as follows:

*African Americans* — All natural born citizens having the majority of their origins in the original peoples of sub-Saharan Africa.

*European Americans* — All natural born citizens having the majority of their origins in the original peoples of Europe.<sup>175</sup>

Under a majoritarian system such as this one, people would count their ancestors in order to determine their race. Thus, a person with seven Black and nine White great grandparents would be White.<sup>176</sup> It is interesting to imagine which famous African Americans would be transformed into White people under this system. For example, would Thurgood Marshall, Lena Horne, and Colin Powell be White or Black? Moreover, what if records that racially identify one's ancestors are lost? Would the determination then turn on skin color, hair texture, or facial features?

In addition, Wright proposes a biracial category to be defined as follows:

*Biracial Americans* — All natural born citizens who have origins in two or more racial groups or have the majority of their origins in the original peoples of Northern Africa and the Middle East.<sup>177</sup>

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174. See Wright, *supra* note 17, at 513.

175. *Id.* at 563.

176. Wright suggests a return to the practice of including race on birth certificates. Once this is done, he claims, "there would be no need . . . to delve into an individual's ancestry beyond [what is indicated on his or her parents' birth certificates]." *Id.* at 567. But Wright does not suggest how, for example, a Black father who is filling out his daughter's birth certificate is to determine whether a "majority" of his own "origins [are] in the original peoples of sub-Saharan Africa." *Id.* at 563. Perhaps the father can look at his own parents' birth certificates but these documents may be silent as to race altogether, and they certainly will not tell him whether a "majority of [his] origins [are] in the original peoples of sub-Saharan Africa" or Europe. *Id.* To answer that question, the father may have to look back over ten or fifteen generations.

177. *Id.* at 563. As Wright defines his African-American and biracial categories, there is a great deal of overlap, and he does not fully explain how he would draw a line between the two. See *id.* at 567 & n.346. He suggests, however, that the biracial category is meant only for those people with an even split in their ancestral origins. A person with one Black grandparent and three White grandparents would be White, not biracial. See *id.* ("When only one parent is biracial the designation of the child should be the race that predominates.").

Wright's placement of Arabs, Iranians, and Israelis in this category is based partially on the assumption that this is where they fit genetically. He notes, for example, that:

[T]he common perception that physical appearances change gradually from northern Europe to southern Africa leaves northern Africa and the Middle East as the regions on the Old World Continuum where people would "appear" to be in the middle of the two extremes. . . . The very essence of the Biracial category is the perception that the individual so classified is thought to be in the center of two extremes.<sup>178</sup>

Of course, only a spectrum of skin colors places Middle Easterners, as a people, at the center of two extremes. Using other more meaningful measures, they are no more likely to be in the center, or at the extremes, than any other people. While Wright's categorization system is suffused with such neat, genetic redefinitions of racial identities, what is most interesting is his mistaken perception that his categories "seem to reflect more accurately America's sociopolitical notions of race."<sup>179</sup> In fact, he makes the following surprising claim for his system: "By adopting a sociopolitical definition of race based on a majority rule, biological notions of white supremacy give way to cultural, historical, and perceptual notions of race."<sup>180</sup> Like so many other scholars who have joined this discourse, Wright simply does not realize that his redefinition of race is based on biology rather than on the "sociopolitical" history of this country. To illustrate, consider two famous Black Americans, Thurgood Marshall and Colin Powell. Under the "cultural, historical and perceptual notions of race" in this country, both of these men are Black. Under a majoritarian system, Justice Marshall and General Powell could become White or biracial. Why? Because of their White blood.

The flaw in Wright's analysis is that, for good or for ill, the social and political history of this country has defined the Black race using the rule of hypodescent. Those who view race as a sociopolitical construct must view Marshall, Powell, and the thousands of others like them as Black people, even though a "majority of their origins" may have been White. On the other hand, those who wish to create neater, more symmetrical contours for the Black race will have to base these contours on something other than the social and political

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178. *Id.* at 564 n.336.

179. *Id.* at 564.

180. *Id.* at 566.



history of this country. Usually they choose blood. Often the choice is unwitting.<sup>181</sup>

#### 4. *Biological Passing for Black*

Another, more subtle, suggestion for reemphasizing biology in racial classification systems comes in an essay by Cynthia L. Nakashima.<sup>182</sup> In the beginning of her piece, Nakashima argues that "social scientists agree that race is a socially constructed, as opposed to a biologically concrete, concept."<sup>183</sup> Nakashima, however, gives social forces little room to draw the line between races. For example, in a discussion of "passing," she reveals a completely biological understanding of race. Speaking of someone who passes for White, she argues: "In reality if the character who passed as White had instead chosen to live in the Black community as a Black person, this would be just another version of passing."<sup>184</sup>

In order to evaluate this assertion, let us step back and ask who were the people who passed for White? *Biologically* they had more "White genes" than Black. But as race is *socially* constructed in this country, they were Black. And since they were Black, we cannot say that they would be passing for Black if they had chosen to remain in the Black community. That is, we cannot say this unless we think that race is simply a function of biology.

I see the fallacy of Nakashima's argument as I look over the old photos of generations of my forebears. When I do this, I see some ancestors who look more White than Black, but I do not see any White people; society defined all these faces, from the 1890s to the 1990s, as members of the "Black" or "Negro" or "Colored" race. If any of them had chosen to pass (and a few did), that meant that they left their socially defined race, hid their Negro background, and pretended to be White. Nakashima's suggestion that all my lighter ancestors who stayed in their race were "passing for Black" is thus wrong, because, legally and socially, they *were* Black.

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181. This trend toward rebiologization of race is seen in Ruth Colker's recent article *Bi-Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1 (1995). There, Colker considers the suggestion that "light skinned blacks . . . could more accurately be considered to be a subcategory of multiracial individuals." *Id.* at 9 n.36. She suggests that, in moving toward a "spectrum of race . . . we begin by truly investigating our racial heritage. The assumption would be that each of us is of mixed racial heritage, and the challenge would be to fully discover our family trees." *Id.* at 28.

182. Nakashima, *supra* note 166, at 162.

183. *Id.* at 163.

184. *Id.* at 176. For a similar view, see Spickard, *supra* note 136, at 17. For different view, see F. JAMES DAVIS, *supra* note 3, at 14.

Of course, if Nakashima were to ignore the laws and social reality in which my family and many like it have lived (for example, the fact that until this generation, all the parents, spouses and children shown in these family pictures are Black) and if she were to look at race as only a matter of *biology*, then maybe she could say that some of the lighter ancestors in these photos were White and that they were passing for Black. But this would be a gene counter's conclusion; it would ignore the fact that social forces created a Black race in this country and put all these ancestors — light and dark — into it. Since Nakashima views race as a social construct, she cannot logically argue that people who are socially defined as Black are "passing for Black."<sup>185</sup>

### 5. *The Harlem Renaissance and Cultural Suicide*

In the last sections, I have reviewed proposals for bringing notions of biology back to our racial classification system and I have suggested that these proposals are based on a misunderstanding of the Black experience. I now turn to the work of philosopher Naomi Zack, who has used the example of the Harlem Renaissance to raise similar biological notions of race. I suggest that her proposals, likewise, are tainted by a misunderstanding of the African-American experience.

Zack's book, *Race and Mixed Race*,<sup>186</sup> offers a fascinating critique of the hypodescent system and of race itself. In focussing on hypodescent, Zack offers a unique hypothesis. She argues that if the artists of the Harlem Renaissance had declared that they were mixed race instead of Black, White racism would have been so confused that it would have fallen. Zack laments that these artists rejected their multiracial heritage in favor of their Blackness, thus committing "cultural suicide."<sup>187</sup>

I see Zack's work as a telling example of the tunnel vision that afflicts even the most perceptive proponents of a broad separate

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185. The literature now contains several serious articles and books on the subject of White-skinned Black people. Perhaps the most elegant, trenchant and personal discussion of the issue is Adrian Piper's *Passing for White; Passing for Black*, 58 *TRANSITION* 4 (1992). Professor Cheryl Harris provides a moving account of the experience of her Grandmother who, like countless other light-skinned African Americans of her day, worked as White and came home as Black. Harris uses her Grandmother's experience as the touchstone for her examination of "Whiteness as property." Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707, 1710-12 (1993). Three books on the subject each make compelling reading: SHIRLEY HAIZLIP, *THE SWEETER THE JUICE* (1994); SCALES-TRENT, *supra* note 133; GREGORY H. WILLIAMS, *LIFE ON THE COLOR LINE* (1995).

186. ZACK, *supra* note 166, at 74.

187. *See id.* at 95-111.

category for multiracial persons. While her analysis is full of original insights, Zack falls into the same traps that ensnared the multiracial theorists discussed above. First, she sees racial injustice in the drawing of the boundaries around the Black race rather than in racism itself. Second, after the *de rigueur* denunciation of “race as biology,” she embraces, perhaps unwittingly, a purely biological view of race. Thus, she criticizes DuBois, Hughes, and Hurston for viewing their own racial identity in sociohistorical terms rather than biologically,<sup>188</sup> and she discusses a vast biological redefinition of the Black race that would remove from its numbers the 21% to 75% of African Americans who are not biologically pure Black.<sup>189</sup> Finally, she never slows down to consider the practical consequences of her major proposal: How would White Americans have reacted if the great leaders of the Harlem Renaissance had taken her suggestion and renounced their negritude by making a joint, impassioned claim that they were mixed race?

*a. Zack's View of the Hypodescent Schema.* Zack begins her analysis by carefully describing the “schema” of the one drop rule and its moral failing: “This schema unjustly excludes people with black forebears from white designation.”<sup>190</sup> She thus states at the outset that the focus of her concern is with those Blacks who are “unjustly excluded” from the “white designation.” She then develops the following proof, which is intended to establish that hypodescent is unjust:

More precisely, the injustice of the kinship schema can be presented this way, if we suppose that Alpha could be anyone:

- (1) If Alpha has a black ancestor, Alpha is black.
- (2) If Alpha is black, Alpha is treated unjustly.
- (3) If Alpha has a black ancestor, Alpha is treated unjustly.
- (4) Therefore, it is unjust to say that Alpha is black if Alpha has a black ancestor.<sup>191</sup>

To which, in my view, we could logically add:

- (5) Every Black person has a Black ancestor.
- (6) Therefore, it is unjust to say that any Black person is Black.

This illustrates the difficulty that philosophers such as Zack face when they try to prove that hypodescent is unjust. From the standpoint of justice, if people who are called Black are treated unjustly, there are two solutions: (1) Stop treating Black people unjustly; or

188. *See id.* at 105-11.

189. *See id.* at 75, 95.

190. *Id.* at 9 (footnote omitted).

191. *Id.*

(2) stop calling any of them Black.<sup>192</sup> Either way, tinkering with the boundaries of the category is not going to stop the injustice. My disagreement with Zack, therefore, is that in focusing on her fourth assumption (“it is unjust to say that Alpha is black”), she forgets that it is her second assumption (“If Alpha is black, Alpha is treated unjustly”) that houses the injustice.

*b. Zack's View of the Harlem Renaissance.* Zack's most provocative and original contribution to the discourse on hypodescent is her suggestion that the Harlem Renaissance was a form of cultural suicide. She begins by acknowledging that the Harlem Renaissance was a “magnificent enterprise,”<sup>193</sup> and she admits that her criticism of it is “theoretical,” colored by choices “available later in history.”<sup>194</sup> But she concludes that if Hurston, Hughes, and the other leaders of this movement had renounced the one drop rule and declared themselves persons of mixed race, this declaration would have been a weapon “against American racial designations, which is to say, against the core of American racism.”<sup>195</sup> She argues:

During the Harlem Renaissance, the people who were designated non-white in the sense of black, by white America, all took up their black designation on the premise of a democracy among themselves. This was a magnificent enterprise: Much was gained in black pride, culture, and achievement, and nothing of *substance*, of immediate practical value, was lost. What was lost was the concept of mixed race as a theoretical wedge against racism and against the concept of physical race — the new combined black community threw away any effective intellectual weapon against American racial designations, which is to say, against the core of American racism. It lost all means of challenging the asymmetrical kinship schema of racial inheritance and the attendant oppressive biracial system. Designated American blackness, as a cultural force capable of defeating American racism, thereby cut off its own head during the Harlem Renaissance.<sup>196</sup>

Zack then goes on to explain how this joint proclamation of mixed-race identity would have undermined American racism:

If it is possible for people to be of mixed race, based on their genetic endowment alone, then *race* is not an essential or even an important division between human beings, either naturally or culturally. If race were a natural division, individuals of mixed race would simply not exist. . . . Furthermore, if individuals of mixed race are granted a separate racial identity, then all of the myths of racial purity and stability

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192. For a powerfully written and eye-opening variant of this latter suggestion, see Fields, *supra* note 115, at 117-18.

193. See ZACK, *supra* note 166, at 97.

194. *Id.* at 99.

195. *Id.* at 97.

196. *Id.*

break down because there is then such a large universe of possible race that the historical contingency of any group's racial identity becomes transparent.<sup>197</sup>

In my view, Zack's theoretical rethinking of the Harlem Renaissance suffers from several fatal flaws. First, it assumes that "American racial designations" (how the line around the Black race is drawn), rather than anti-Black prejudice itself, is "the core of American racism." As argued above, however, these designations were not the core of American racism; this racism could have flourished just as well, if not better, under any of the other systems of "racial designation," and the designations provided by hypodescent, in practice, often provided powerful tools against racism.

But even if we leave that argument aside, Zack never fully examines how such a joint declaration of mixed-race identity would have worked as a wedge against racism and against the concept of physical race. She merely assumes that such a statement would have highlighted the existence of mixed-race people, and that their very existence would have shown that "race is not an essential or even an important division between human beings" and "all of the myths of racial purity and stability would [therefore] break down."<sup>198</sup>

I doubt the walls would have fallen so easily. Certainly a few White Americans, on hearing some of the Negro literati claim that they were multiracial, might have taken the lesson that race was not so important after all. But most White Americans were already well aware that mixed-race people existed — they did not need Zora Neale Hurston or Langston Hughes to tell them so — and this knowledge did not end their belief in races.<sup>199</sup>

More importantly, Zack mispredicts entirely how the White listener — trapped in the racism of the times — would have reacted when the icons of the Harlem Renaissance declared that they were not Black after all and jointly laid claim to their White blood. White America would have taken this as an admission that White blood is better; it would have attributed the successes of the Harlem

197. *Id.*

198. *Id.*

199. A review of the racist literature shows not only an awareness that mixed-race people existed, but a tremendous fear that miscegenation would create more mulattoes. For example, in 1905, William Benjamin Smith argued:

If we sit with Negroes at our tables, if we entertain them as our guests and social equals, if we disregard the colour line in all other relations, is it possible to maintain it fixedly in the sexual relation, in the marriage of our sons and daughters, in the propagation of our species?

Quoted in JOHN G. MENCKE, *MULATTOES AND RACE MIXTURE* 130 (1979).

Renaissance to its leaders' White ancestry; it would have concluded that White blood earned DuBois his "A"s on his Philosophy papers for William James at Harvard;<sup>200</sup> that White blood gave Langston Hughes his gift of language; that White blood is why Hurston was an anthropologist; when she later worked as a domestic, that was because of one of those "tricks of blood that always betray" Negroes.<sup>201</sup> Neither the Klan nor Philip Bruce could have done anything that would better have reinforced the absurd but common White view of the times: that race was based on blood and Negro "blood" was inferior.<sup>202</sup>

While I believe the above discussion states compelling reasons why the leaders of the Harlem Renaissance did not do as Zack wishes they had done, I do not believe that these were their central motivating considerations. The main reason they did not deny being Black is that they were Black, as Black was defined by the sociopolitical history of this country. Zack, however, tries to claim them posthumously as mixed race, primarily on the basis of the "natural facts of their ancestry," that is, biology. For example, as to DuBois, she notes: "He knew that he was both black and white, according to the natural facts of his ancestry. But he did not use a mixed-race designation for himself, based either on his ancestry or his early participation in white culture."<sup>203</sup>

But her most stunning and telling claim is for Zora Neale Hurston. Zack argues that Hurston was mixed race and implies that she had no "logical" basis for considering herself Black.<sup>204</sup> As the basis for this claim, Zack seizes on the following passage in Hurston's autobiography:

I saw no benefit in excusing my looks by claiming to be half Indian. In fact, I boast that I am the only Negro in the United States whose grandfather on the mother's side was *not* an Indian chief. Neither did

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200. See DAVID LEVERING LEWIS, W.E.B. DUBOIS, BIOGRAPHY OF A RACE 95 (1993) (reporting that DuBois earned a grade of A from James).

201. Adrian Piper, *Passing for White, Passing for Black*, 58 TRANSITION 4, 8 (1992) (quoting FRANCES E.W. HARPER, IOLA LEROY, OR SHADOWS UPLIFTED 229 (Oxford Univ. Press 1988) (1893)).

202. See MENCKE, *supra* note 199, at 128-29. Mencke notes that "Indeed, whites for the most part were convinced that the only Negroes who had ever[ ] evidenced particular ability or intelligence were of mixed blood." *Id.* at 128. "So far," Philip Alexander Bruce noted in 1889, "the only persons of unusual capacity whom the Negro race has produced have been men who were sprung, either directly or indirectly, from white ancestry." *Id.* (quoting PHILIP A. BRUCE, THE PLANTATION NEGRO AS A FREEMAN: OBSERVATIONS ON HIS CHARACTER, CONDITION, AND PROSPECTS IN VIRGINIA 244 (New York & London, G.P. Putnam's Sons 1889)).

203. ZACK, *supra* note 166, at 105.

204. See *id.* at 105-07, 146-47.

I descend from George Washington, Thomas Jefferson, or any Governor of a Southern state. I see no need to manufacture me a legend to beat the facts. I do not coyly admit to a touch of the tarbrush to my Indian and white ancestry. You can consider me an Old Tar-Brush in person if you want to. I am a mixed blood, it is true, but I differ from the party line in that I neither consider it an honor nor a shame.

. . . .

I maintain that I have been a Negro three times — a Negro baby, a Negro girl and a Negro woman.<sup>205</sup>

In reading this, Zack passes over the metaphors<sup>206</sup> and clear statements that Hurston is Black, proud of it, and not making any excuses for it, and concentrates on the fact that Hurston has mixed blood:

But Hurston does not explain how, if she sees herself as mixed race, she can *logically* identify herself as a Negro. To be sure, Hurston describes herself with charm; she not only has a folk identity but is a folk heroine. No philosophical analysis or excursion into racial theory can belittle her identity as a designated black person who is loyal to other designated black people. But Hurston illustrates all too well how morally good American identities of mixed race collapse into black racial identities.<sup>207</sup>

How *could* Hurston “logically” identify herself as a Negro?<sup>208</sup> Hurston’s life provides a clear and easy answer to this question, and I will now take a brief detour to review this life up to the time of the Harlem Renaissance, not only because it shows that Hurston was “logically” Black, but because it gives some insight into the “logic” of Zack and other multiracial theorists who have posthumously de-

205. ZORA NEALE HURSTON, *DUST TRACKS ON A ROAD* 171-72 (Henry Louis Gates, Jr. ed., Harper-Perennial 1991) (1942).

206. Hurston used this same metaphor of “excuse” or “extenuation” in her famous essay, “How It Feels to Be Colored Me.” There, she wrote:

I am colored but I offer nothing in the way of extenuating circumstances except the fact that I am the only Negro in the United States whose grandfather on the mother’s side was *not* an Indian Chief.

Zora Neale Hurston, *How It Feels to Be Colored Me*, in *NEW NORTON ANTHOLOGY OF AFRICAN AMERICAN LITERATURE* 1008, 1008 (Henry Louis Gates, Jr. & Nellie Y. McKay eds., 1997). In both passages, being Black is metaphorically seen as an infraction that could be excused on a showing of extenuating circumstances; but Hurston was not about to admit that her identity was a crime, nor would she offer a plea. As Barbara Johnson notes:

[Hurston] implies that among the stories Negroes tell about themselves the story of Indian blood is a common extenuation, dilution, and hence effacement of the crime of being colored. . . . Hurston is saying in effect, “I am colored but I am different from other members of my race in that I am not different from my race.”

Barbara Johnson, *Thresholds of Difference: Structures of Address in Zora Neale Hurston*, in “RACE,” *WRITING, AND DIFFERENCE* 317, 319 (Henry Louis Gates, Jr. ed., 1986).

207. ZACK, *supra* note 166, at 146-47.

208. Hurston, of course, did not say that she saw herself as “mixed race.” She said she was “a mixed blood,” but her race was Negro and that she was not making any apologies about it. Trying to find logic here, Zack sloughs off Hurston’s Blackness as an expression of loyalty or folk identity by a folk heroine.

termed that Hurston's true "mixed-race" identity "collapse[d] into black racial identit[y]."209

c. *Zora Neale Hurston*. Zora Neale Hurston was born Black to Black parents and grew up in an all Black town. In her autobiography, *Dust Tracks on a Road*, she describes her mother as "dark brown Lucy Ann Potts";210 her father, John Hurston is pictured as a "tall, heavy muscled mulatto," a "bee-stung yaller nigger" and as "one of dem niggers from over de creek."211 In one passage, Hurston sketches her father's light features and then immediately concedes their lack of importance: He had "gray-green eyes and light skin [which] stood out sharply from the black-skinned, black-eyed crowd he was in. Then too, he had a build on him that made you look. A stud-looking buck like that would have brought a big price in slavery time."212 John Hurston inherited his light features from his father (Zora's grandfather) who, apparently, was a White man.213 Zora never names her White grandfather in her autobiography, and while she admits she is a "mixed blood," it appears she never knew any of her White or Native American ancestors.214

Hurston describes Eatonville, Florida, where she grew up, as a "pure Negro town."215 According to her biographer, "Eatonville, Florida, existed not as the 'black backside' of a white city, but a self-governing, all-black town, proud and independent, living refutation of white claims that black inability necessitated Jim Crow."216 Hurston's father was elected mayor three times; he wrote all the laws.217

209. Zack also emphasizes Hurston's "non-Negro" attributes:

Hurston herself was middle-class, educated, and light in complexion. (She looked like a Native American; the great love of her life, "A.W.P.," said that she reminded him "of the Indian on the Skookum Apples.")

ZACK, *supra* note 166, at 106. A look at Hurston's pictures, however, shows a woman who most people would easily identify as Black. Moreover, being "middle class" and "educated" did not deprive Hurston of her Black racial identity.

210. HURSTON, *supra* note 205, at 7.

211. *Id.* at 7-8.

212. *Id.* at 8.

213. See ROBERT E. HEMENWAY, *ZORA NEALE HURSTON, A LITERARY BIOGRAPHY* 190 (1980).

214. In *Dust Tracks on a Road*, Hurston quickly breezes by her father's White ancestry, noting: "Folks said he was a certain white man's son." HURSTON, *supra* note 205, at 8-9. She reports that her maternal grandmother always called her father "dat yaller bastard." *Id.*

215. HURSTON, *supra* note 205, at 1.

216. HEMENWAY, *supra* note 213, at 11-12.

217. See *id.* at 14; cf. MELVIN DIXON, *RIDE OUT THE WILDERNESS: GEOGRAPHY AND IDENTITY IN AFRO-AMERICAN LITERATURE* 85 (1987).



Young Zora learned Negro folk culture on the steps of Joe Clarke's Eatonville General Store. There, the men of the village "sat around . . . on boxes and benches and passed this world and the next one through their mouths";<sup>218</sup> they held their lying sessions and told their stories of "God, Devil, Brer Rabbit, Brer Fox, Sis Cat, Brer Bear, Lion, Tiger, Buzzard and all the wood folk."<sup>219</sup> Not allowed to sit on the steps and tell tales with the men, Zora would walk the steps slowly and "h[a]ng around and listen[ ]" as long as she could.<sup>220</sup>

The village folklore was seared into Zora's nine-year-old soul as she stood at her mother's deathbed. The folkways required certain measures in the moments before death: The pillow must be removed from beneath the dying person's head, so that death would come easily and the escaping spirit would refrain from haunting the survivors; the mirror needed to be covered so that it would not permanently capture the image of the dying person; and the clock had to be draped with cloth lest it stop forever when the spirit, on escaping the body, looked on its face.<sup>221</sup> In her last hour, Zora's mother apparently rejected these folk ways; she called Zora and gave her "certain instructions. I was not to let them take the pillow from under her head until she was dead. The clock was not to be covered, nor the looking-glass. She trusted me to see to it that these things were not done. I promised her as solemnly as nine years could do, that I would see to it."<sup>222</sup>

Of course, nine-year-old Zora had neither the power nor the persuasion to set her "will against my father, the village dames and village custom."<sup>223</sup> As her father held her tight, the elders covered the clock and the mirror and removed the pillow from under her mother's head. Just then, Death "with big soft feet and square toes . . . finished his prowling through the house . . . and entered the room. He bowed to Mama in his way, and she made her manners and left us to act out our ceremonies over unimportant things."<sup>224</sup> Zora spent years thinking she had failed her mother: "[S]he looked

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218. HURSTON, *supra* note 205, at 45.

219. *Id.* at 47.

220. *Id.* at 47.

221. See HEMENWAY, *supra* note 213, at 16-17; HURSTON, *supra* note 205, at 62.

222. HURSTON, *supra* note 205, at 62.

223. *Id.* at 63.

224. *Id.* at 63-64.

at me, or so I felt, to speak for her. She depended on me for a voice."<sup>225</sup>

Because of Hurston's experiences in the heart of the African-American folklore tradition, her biographer notes: "She had lived African-American folklore before she knew that such a thing existed as a scientific concept or had special value as evidence of the adaptive creativity of a unique subculture."<sup>226</sup>

For her formal education, Hurston travelled north, first to Howard, then to study under Franz Boaz at Barnard, where she was the only Negro in the college (its "sacred black cow").<sup>227</sup> In these studies, she realized the importance of chronicling the Negro folklore she had lived as a child, and she realized that although the White world had reported this folklore to some extent, "often the collections carried interpretations twisting the material beyond recognition";<sup>228</sup> even in the stories of Joel Chandler Harris, it was reduced to "a childish pastime."<sup>229</sup> More ominous for Hurston, this folk culture was simply fading away.<sup>230</sup> She therefore came "to think of herself as a woman with a mission": she would become the tradition bearer.<sup>231</sup> The voice that Hurston had been unable to give to her dying mother, she would give to the folk literature and folk ways of her people: "she would demonstrate that 'the greatest cultural wealth of the continent' lay in the Eatonvilles and Polk Counties of the black South."<sup>232</sup> And she was uniquely suited for the task. When she started, "only one other member of her race . . . had equivalent professional training and knowledge."<sup>233</sup> Hurston understood her material because she had lived it; unlike White transcribers, there was little danger that she would make racist or unwitting changes in the oral texts she was to elicit and preserve. Moreover, because she was Black, because she had the "map of Florida on her tongue," her informants came to trust her.<sup>234</sup> After

225. *Id.* at 63.

226. HEMENWAY, *supra* note 213, at 22.

227. *See id.* at 21-22.

228. *Id.* at 87.

229. *Id.*

230. *See id.* at 82, 113.

231. *See id.* at 87, 113.

232. *Id.* at 113. For an analysis of this metaphor of "voice," see Henry Louis Gates, *Afterword, Zora Neale Hurston: "A Negro Way of Saying,"* in HURSTON, *supra* note 205, at 260-67.

233. HEMENWAY, *supra* note 213, at 87.

234. *See id.* at 9, 90, 110-15.

an initial failed trip, years of field work and witing resulted in her famous volume of African-American folklore, *Mules and Men*.<sup>235</sup>

Hurston's interests were not limited to folk tales but spread to every aspect of Negro art. Her "memory was overflowing with the acquired narrative legacy of her race, and . . . this was something she *brought to the Renaissance*."<sup>236</sup> She rejected the propagandistic aspect of the bourgeois Negro literary philosophy, which stated that "black art should avoid reinforcing racist stereotypes by refusing to portray the lowest elements of the race";<sup>237</sup> she wanted to be an authentic, not a bowdlerized, Negro voice. She rejected Howard students' characterization of Negro spirituals as "low and degrading . . . product[s] of . . . slavery" and "not good grammar."<sup>238</sup> She had lived the value of the spirituals. She rejected the portrayals of Black themes in the dramas of the day; White playwrights — even O'Neill — failed to get it quite right.<sup>239</sup> So she created to take the place of what she rejected. Of these creations, Saturday Review said: "No one had ever reported the speech of Negroes with a more accurate ear."<sup>240</sup> Her riveting novel, *Their Eyes Were Watching God*, painted a world only a Black woman could paint. Speaking of "resistance" literature in Africa, Appiah has commented:

A proper comparison in the New World is . . . with the world that Zora Neale Hurston records and reflects, both in her more ethnographic writings and in her brilliant novel, *Their Eyes Were Watching God* — a black world on which the white American world impinged in ways that were culturally marginal even though formally politically overwhelming.<sup>241</sup>

When a producer noted that "practically all the plays [about Blacks] . . . were serious problem dramas" or minstrel shows, and there were no comedies, she teamed up with Langston Hughes to write a Negro comedy, *Mule Bone*.<sup>242</sup> While the partnership dissolved in bitterness, Hurston's biographer notes: "Yet in a sense [*Mule Bone*] was written by neither Hurston nor Hughes. Much of the language in the play belonged to the race itself, making the argument over its ownership even more ironic."<sup>243</sup> In fact, Hurston

235. See *id.* at 160.

236. *Id.* at 79-80.

237. *Id.* at 41.

238. *Id.* at 52.

239. See *id.* at 115.

240. George Stevens, *Negroes by Themselves*, SATURDAY REV., Sept. 18, 1937, at 3, quoted in HEMENWAY, *supra* note 213, at 5.

241. APPIAH, *supra* note 163, at 9.

242. See HEMENWAY, *supra* note 213, at 137.

243. *Id.* at 156.

alone among the great Harlem artists could tell the old story that “she was once arrested for crossing against a red light but escaped punishment by explaining that she had seen the white folks pass on green and therefore assumed the red was for her,” and make it sound like it had really happened to her.<sup>244</sup> Hurston’s self confidence in her racial identity, her wit, her style, and her talent made her a fixture of the Harlem Renaissance. She called herself the “Queen of the Niggerati.”<sup>245</sup>

Henry Louis Gates, Jr. has commented that Hurston summed up her philosophy in bringing what she did to the Harlem Renaissance when she observed:

Roll your eyes in ecstasy and ape his every move, but until we have placed something upon his street corner that is our own, we are right back where we were when they filed our iron collar off.<sup>246</sup>

d. *The “Logical” Basis for Zora Neale Hurston’s Race.* This brings us back to Zack’s suggestion that Hurston could not *logically* identify herself as a Negro. By “logic,” Zack must mean biology, blood, and genetics. By these measures, Hurston was not a pure Negro, and Zack can therefore claim her as a mixed-race person. But if one believes that race is a social construct based on something more than mere biology, then Hurston’s brief for identifying herself as a Negro is compelling: her parents were Black. Africa predominated in her face. She had White and Native American ancestors, but she never met them and they warranted no mention in her autobiography. She grew up in an all Black town where she lived, laughed, and grieved Black culture and Black folklore, and then went on to become the only Black student in her class at Barnard. She saw White writers misperceive and misrepresent Black folk and high culture and made it her mission to preserve and propagate the folk culture and to add a few masterpieces to the high culture. When she went south, she spoke with the voice of her people, and so they took her in and told her their tales, and she heard them with such a keen ear that national magazines raved. In New York, she styled herself the Queen of the Niggerati, a term that even in the 1930s would not have found its way from her mouth into respectable print if she had been anything other than Black. Her metaphors, from Jim Crow traffic lights to slave collars, are those of a Black woman.

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244. *Id.* at 78.

245. *Id.* at 44.

246. Gates, *supra* note 232, at 267.

Of course, multiracial theorists, such as Zack, are free to claim Hurston as one of their own, but when they do so they are staking a genetic claim; when they decry the “collapse” of Hurston’s mixed race identity “into black racial identity”<sup>247</sup> and lament Hurston’s failure to see her own true essence, essence is defined biologically. Under *any* other definition, Zora Neale Hurston was Black.<sup>248</sup>

*e. An Abstract Category vs. a People.* As argued above, I believe that Zack and other theorists have set off on the path toward redefining “Black” without first pausing to survey the terrain. From their path, “Black” looks like a “category” that can easily be repackaged or redefined. A closer look, however, shows that Black is more than a category and far more difficult to redefine.

For example, looking back on the lives of the heroes of the Harlem Renaissance, Zack suggests that they could have used their White blood — their ties to White ancestors whom they had, by and large, never met — to declare that they were members of “a racial category distinct from the black race”:

Neither the leaders of the Harlem Renaissance nor [Historian Joel] Williamson, writing 60 years later, could free themselves from the intellectual tyranny of the one drop rule. They did not and perhaps could not conceptualize a category of mixed black and white race as a racial category distinct from the black race, in the same way that black race has always been distinct from the white race.<sup>249</sup>

Perhaps they could have, perhaps they did, conceptualize such a “category,” but in writing the following passage, Hurston clearly explains why such a category would be irrelevant: “There is no *The Negro* here. Our lives are so diversified, internal attitudes so varied, appearances and capabilities so different, that there is no possible classification so catholic that it will cover us all, except My people! My people!”<sup>250</sup> Hurston saw herself as part of a people, not a category.

The work of Langston Hughes contains strikingly similar sentiments. Zack uses the metaphor of “rules for acceptable behavior at a party” to minimize Hughes’s identity and to explain his failure to embrace a multiracial category:

247. ZACK, *supra* note 166, at 147.

248. In *infra* Part III.D, I argue that socio-historical forces made people like Hurston Black and they had little choice in the matter. For the argument that Hurston’s racial identity was “constructed,” see Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990). Using either yardstick, Hurston was Black.

249. ZACK, *supra* note 166, at 103.

250. HURSTON, *supra* note 205, at 172 (emphasis in the original).

Hughes describes the surfaces of black culture so smoothly that there is no way the reader can raise a question of mixed race to Hughes, the writer, without violating the unspoken rules of politeness in his rhetorical space. It is an exquisite and elaborate kind of politeness that allows people to enjoy their lives with grace under pressures that are totally lacking in grace. Hughes's rhetorical rules are very like the unspoken rules for acceptable behavior at a party!<sup>251</sup>

But it was not rules of "politeness" or "acceptable party behavior" that made Hughes Black. It was centuries of American history that made him morphologically and culturally part of the African-American race. Consequently, though he and Hurston had a bitter parting of the ways, he, like Hurston, thought of the Black race as a "people," not a "category"; a people whose faces, he wrote, held the beauty of the night:

The night is beautiful  
 So the faces of my people  
 The stars are beautiful  
 So the eyes of my people  
 Beautiful, also is the sun  
 Beautiful, also are the souls of my people.<sup>252</sup>

And he saw his own face among those of his people:

To fling my arms wide  
 In the face of the sun  
 Dance! Whirl! Whirl!  
 Till the quick day is done.  
 Rest at pale evening . . .  
 A tall slim tree . . .  
 Night coming tenderly  
 Black like me.<sup>253</sup>

If one views race as a matter of genetics, as Zack apparently does, these verses require some immediate explanation; after all Hughes was brown, not black, and his face favored twilight more than the night. So Zack suggests that we cannot ask Hughes about his racial identity without violating "rules for acceptable behavior at a party." But no such consultation with Emily Post is necessary. Hughes has already told us about his real identity, which transcends genetics: He is part of a people, and this people includes many, many other Black men and women like him, with White blood and White ancestors.

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251. ZACK, *supra* note 166, at 109.

252. LANGSTON HUGHES, *My People*, in *SELECTED POEMS OF LANGSTON HUGHES* 13 (1974).

253. HUGHES, *Dream Variations*, in *SELECTED POEMS OF LANGSTON HUGHES*, *supra* note 252, at 14.

This is something that Alice Walker understands. After Walker paid to place a monument on Zora Hurston's unmarked grave in a pauper's cemetery in Florida, she wrote: "We are a people. A people do not throw their geniuses away. If they do, it is our duty as witnesses for the future to collect them again for the sake of our children. If necessary, bone by bone."<sup>254</sup> Where Zack and others see a racial category, Hurston, Hughes, DuBois, and Walker see a people. While Zack is nonplussed because they "did not and perhaps could not conceptualize a category of mixed black and white race as a racial category distinct from black race,"<sup>255</sup> it was — in fact — not a "category" that they were looking for. They were part of a people, and it takes more than a gene pool to create a people.

#### 6. *Race, Biology, and the Law: The Racial Credential Cases*

I now turn to history to illuminate the dangers of "neat" biological redefinitions of American racial categories. I examine the racial credential cases (the cases that adjudicated whether someone was Black) as a reminder of how things work when race is seen as a function of biology and when people count their great grandfathers to determine their racial identity.<sup>256</sup>

As racial mixing continued largely unchecked by the laws that purported to prohibit it, the result was children. As intermixture continued through the generations, many children became light-skinned, even White-skinned. While in most statutes mulattoes were classified with Blacks, "logic required . . . some demarcation between [mulattoes] and white men"<sup>257</sup> in order to establish a clear way of distinguishing someone White from someone who would not be considered White.

Without a bright line to distinguish White from mulatto, the efficient administration of American society, in which substantial legal rights were based on being White, would have been impossible. Guarding the port of entry to White status was essential to the protection of the delicate social order of a racial caste system, and the persistence and extent of illegitimate race mixing made this an issue of both importance and some delicacy. On the one hand, families

254. Alice Walker, *Foreword to HEMENWAY*, *supra* note 213, at xviii (emphasis omitted).

255. ZACK, *supra* note 166, at 103.

256. The cases used as illustrations here have been taken from a review of the following compilations: HELEN CATTERALL, *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* (1926); CHARLES MAGNUM, *THE LEGAL STATUS OF THE NEGRO* (1940); THOMAS MORRIS, *SOUTHERN SLAVERY AND THE LAW 1619-1860* (1996).

257. See JORDAN, *supra* note 30, at 168.

considered White for generations had to be protected from the social consequences of an unknown dalliance by a distant ancestor. "To have pushed the definition [of black] any further would have embarrassed too many prominent 'white' families."<sup>258</sup> As the court noted in *State v. Davis*, "[i]t would be dangerous and cruel to subject to this disqualification [being regarded as someone in the degraded class] persons bearing all the feature of a white on account of some remote admixture of negro blood."<sup>259</sup> On the other hand, steps had to be taken to curb "[t]he constant tendency of this [mixed-race] class to assimilate to the white, and the desire of elevation, [that] present frequent cases of embarrassment and difficulty."<sup>260</sup> Finally, maintaining the color line, however ethereal, was important as a matter of social etiquette. As Chief Justice Lumpkin lamented in *Bryan v. Walton*: "Which one of us has not narrowly escaped petting one of the pretty little mulattoes belonging to our neighbors as one of the family?"<sup>261</sup>

The cases are perhaps most instructive, however, in giving historical context to the movement to create a multiracial census category that would be available to all Americans with mixed blood in their multigenerational ancestry. A chief concern expressed by the proponents of such a category is that the current racial configuration of Black and White is "inaccurate." They argue that the limited number of racial choices now available on the census forms force "the multi-racial/multi-ethnic family to signify a *factually* false identity for their child."<sup>262</sup> A multiracial category is necessary "if accurate data is what we want."<sup>263</sup> Like the Courts in the racial certification cases, the more radical proponents of a broad multiracial category often state their goals in terms of biological accuracy when, in fact, no such accuracy is possible.

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258. GENOVESE, *supra* note 51, at 420.

259. *State v. Davis*, 18 S.C.L. (2 Bail.) 558, 559 (1831), *quoted in* 2 HELEN CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 346 (1929).

260. *White v. Tax Collector of Kershaw District*, 31 S.C.L. (2 Rich.) 136, 139 (1846).

261. *See Bryan v. Walton*, Suppl. to 33 Ga. 11, 24 (1864), *quoted in* 3 HELEN CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 87 (1932).

262. *Hearings Before the Subcomm. on Census, Statistics and Postal Personnel*, 103d Cong. 126 (1993) (statement of Carlos A. Fernández, President of the Assoc. of MultiEthnic Americans). Similar concerns were made in the Testimony of Susan R. Graham, Executive Director of Project RACE (Reclassify All Children Equally) and reprinted as an article. *See Susan R. Graham, Grassroots Advocacy, in AMERICAN MIXED RACE, THE CULTURE OF MICRODIVERSITY* 185 (Naomi Zack ed., 1995).

263. *Hearings Before the Subcomm. on Census, Statistics and Postal Personnel*, 103d Cong. 107 (1993) (statement of Susan Graham, Executive Director of Project RACE).



While the litigants in the racial credential cases attempted to draw a line between Black and White, the radical wing of the multiracial movement can be viewed as promoting a variation of the same game — they are simply changing the place where the line is drawn. Just as the racial credential cases used biological factors to draw a line between Black and White, the proponents of the broad multiracial category draw a biological line between “Multiracial” and “Black.” Just as the following cases define race in terms of the degree of White ancestry, so do those who now wish to rebiologize race, effectively embracing the view of “race as blood,” as they argue that any White blood converts a Black person into a multiracial or a White person. The advocates of the broad multiracial category thus stand not as a repudiation of the methodology of racial certification cases but as an extension of them. In fact, this wing of the multiracial movement, rather than exploding the “myth” of race or rebutting the stereotypes of what it is to be Black by including multiracial people within its definition, distances itself from the “full black nigger[s],”<sup>264</sup> unwittingly relying on the ideal that race is biological, ancestral, and blood-borne. Rather than challenge the notion of race, this branch of multiracial theory merely attempts to reset the margins established in the racial credential cases discussed below.

Finally, the racial credential cases foreshadow the difficulties that lie ahead, if the current system of racial classification is further muddled by the addition of a broad, biologically based multiracial category. As the cases below reveal, turning the clock back to biology compounds the difficulties of fighting group race-based discrimination.

*a. Adjudicating Fractions of Blood.* In one type of racial credential case, courts were asked to determine whether a litigant had a sufficient fraction of Black blood to be considered Black. As explained in section II.B.6 above, many states had laws that specifically set forth the fraction of Negro blood necessary to make a person Black. Over the years, this fraction ranged from one-quarter to one drop.

The statutory standards thus imply that race was determined by the “scientific” notion of quantifiable “blood in the veins” and that the blood could be measured with some sort of scientific accuracy, ascertained by visual inspection and that all of this could be done by

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264. BLASSINGAME, *supra* note 1, at 152 (quoting fugitive slave Lewis Clarke).

the court.<sup>265</sup> By virtue of judicial wisdom, a litigant could enter a courtroom Black and leave White by adjustment of a fraction, the verdict received like a note from the Internal Revenue Service informing the litigant that it has made an error in her favor.

The concept of "pure blood," based as it was on pure conjecture, proved difficult both to litigate and adjudicate. Even though fractional definitions of race gave the appearance of judicial objectivity, fairness, and consistency, the rationale for the decisions switched fairly quickly from a pseudo-scientific basis to the common social meaning of race. In the end, the cases may say more about the nature of adjudication, the rules of civil procedure, the political sentiments of the judiciary, and the personal sensitivity of the particular judge, than about the nature of race and mixed race.

*b. Racial Adjudication Prior to Fractional Statutes.* We begin our analysis of these cases with *State v. Thurman*,<sup>266</sup> an Alabama case in which the stakes based on racial classification were highest — life or death, and in which there was not a statute defining White, Negro, or mulatto. The question presented to the court was whether the defendant Thurman, who was convicted of rape or attempted rape of a White woman, would be executed or imprisoned.<sup>267</sup> If he were a Negro or mulatto, the law provided for his execution. If he were neither Negro nor mulatto, he would not be executed. The opinion does not specify whether the conviction was for rape or attempted rape, and while this may have been of some concern to the victim, to the court the sole focus was whether the defendant was a mulatto or "White." While the court noted that the fact the defendant had "kinky hair and yellow skin" would "tend to prove that he was a mulatto," it was not conclusive enough to prove that he was mulatto, rather than someone closer to a White person. The court's anguish was over the lack of "clear language" from the legislature in defining who was mulatto. "If the statute against mulattoes is by construction to include quadroons, then where are we to stop? . . . This discretion belongs to the Legis-

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265. The idea of race as being transmitted by blood has been a persistent theme in American racial history. For an excellent discussion of the significance of the misuse of this idea in the context of miscegenation law, see Eva Saks, *Representing Miscegenation Law*, RARITAN, Fall 1988, at 39.

266. 18 Ala. 276 (1850).

267. Every state that adopted statutes to deal with rape by a slave or free person of color limited its victims to White women. There were no statutes prohibiting the rape of Black slave women by White men. See MORRIS, *supra* note 256, at 305. Indeed, it appears that there was neither a legal nor a moral taint to White male relations with Black women. As de Toqueville noted, "To debauch a Negro girl hardly injures an American's reputation; to marry her dishonors him." See Saks, *supra* note 265, at 43.

lature."<sup>268</sup> Uncomfortable with having Thurman's fate rest on such an imprecise standard, the court spared Thurman's life due to the inability of the prosecution to sustain its burden of proving that the defendant was a mulatto. Thereafter, the Alabama legislature passed a definition of race, which, like so many other states, defined race using racial fractions.<sup>269</sup>

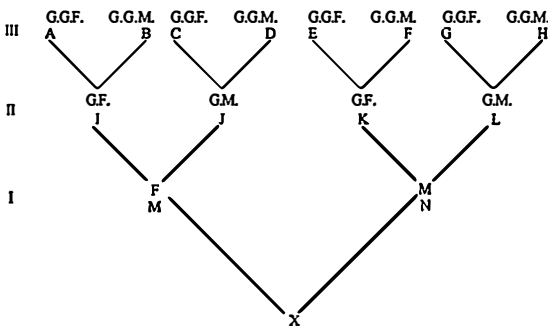
c. *Counting by Fractions.* The apparent mathematical clarity of the fractional statutes gave the appearance of objectivity and rationality,<sup>270</sup> and while a few cases attempted to apply this fractional

268. *Thurman*, 18 Ala. at 279.

269. After this decision, the Alabama legislature apparently moved quickly to include quadroons in the boundaries of the Black race. See Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860's-1960's*, 70 CHI.-KENT L. REV. 371, 374 (1994). In the twentieth century, Alabama adopted the one drop rule providing that a Negro was a person "descended on the part of the father or mother from negro ancestors, without reference to or limit of time or number of generations removed." *Id.* at 407.

270. Indeed, in explaining the operation of the statute one legal scholar writing in 1910 offered to "clarify" the statutory definitions as follows:

The following diagram will probably clarify these definitions:



Suppose it is desired to ascertain whether son X is a white person or a Negro. The first generation above him is that of his parents, M and N. If either of them is white and the other a Negro, X has one-half Negro blood and would be considered a Negro everywhere. The second generation is that of his grandparents, I, J, K, and L. If any one of them is a Negro and the other three white, X has one-fourth Negro blood, and would be considered a Negro in every State except possibly Ohio. The third generation is that of his great-grandparents, A, B, C, D, E, F, G, and H. If any one of these eight great-grandparents is a Negro, X has one-eighth Negro blood and would be considered a Negro in every State which defines a person of color as one who has one-eighth Negro blood or is descended from a Negro to the third generation inclusive. Suppose, for instance, the great-grandfather A was a Negro and all the rest of the great-grandparents were white. The grandfather I would be half Negro; the father M would be one-fourth Negro; and X would be one-eighth Negro. Thus, though of the fourteen progenitors of X only three had Negro blood, X would nevertheless be considered a Negro.

In the above illustrations only one of the progenitors has been a Negro and his blood has been the only Negro blood introduced into the line.

GILBERT THOMAS STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 18-19 (1910).

After this structural analysis, the author understandably concludes, "It is safe to say that in practice one is a Negro or is classed with that race if he has the least visible trace of Negro blood in his veins, or even if it is known that there was Negro blood in any one of his progenitors." *Id.* at 19.

approach, it too proved difficult to litigate for the party who bore the burden of proof. Thus, in criminal cases, when race was an element of the offense, convictions were difficult to obtain when the physical appearance of the defendant made him appear racially ambiguous. The party bearing the burden of proof had to undertake a kind of human title search,<sup>271</sup> by either tracing the defendant's ancestors for several generations and proving *their* race or relying on physical characteristics as a precise indicator of the fraction of Black ancestry.

In such cases, the prosecution often lost for failure to sustain a difficult burden of proving the fractions. For example, in the 1885 Virginia case of *Jones v. Commonwealth*,<sup>272</sup> Isaac Jones appealed his two year and nine month sentence imposed for the felony of marrying a White woman "against the peace and dignity of the commonwealth" in the face of a statute that defined a Negro as "a person who had one-fourth or more negro blood in him." Jones's defense was that his blood was not one-quarter Black<sup>273</sup> within the meaning of the statute. Although the court found that Jones was a "mulatto of brown skin" and that his mother was a "yellow woman," the conviction failed due to the prosecution's failure to sustain their burden of proving "the *quantum* of negro blood in his veins" exceeded one-fourth.

The difficulty of this human title search is further illustrated by the case of *Ferrall v. Ferrall*<sup>274</sup> in which the petitioner-husband wished to have his marriage declared void on the grounds that his wife "was and is of negro descent within the third generation." The issue in the divorce case, which would determine the husband's responsibility for spousal and child support, was whether his wife's

271. In the context of discussing miscegenation cases Eva Saks wrote:

Tracing the defendant's genealogy became the equivalent of a title search, the search for an authoritative legal representation of race. However, it also led to the same problem besetting any title search: how did title *originate*? In the context of race, this metaphorical title to blood, if traced back far enough, revealed the actual, historical fact of legal title: the "title in a Negro" which could be sold, deeded, or bequeathed to another white person, in the transfer of ownership that was "chief of all property rights." Blood therefore revealed itself as part of a social rather than biological pattern. While this historical origin explained the social status of blacks, it absolutely challenged the legal and "scientific" myth that the boundary between the races was natural, ahistorical, and biological. It was like other property boundaries, like the legal family itself, the positive creation of the law. Blood was merely law's representation, one that tried to render natural and scientific that which was instead legal and metaphorical.

Saks, *supra* note 265, at 52-53.

272. *Jones v. Commonwealth*, 80 Va. 18 (1885).

273. Of course, none of his blood was Black as blood cannot be typed according to race. For a discussion of this topic, see SPENCIE LOVE, *ONE BLOOD* 155-57 (1996).

274. 69 S.E. 60 (N.C. 1910).

great grandfather was a “real negro,” that is, one who did not have any White blood in him, so that the fractional requirement could be met. In rejecting the notion that the racial origin of the great grandparent should be ascertained by the general consensus of the community, the court strictly construed the statute and found that since the husband could not prove that the great grandfather was a real Negro of unmixed blood, his wife could not be shown to be one-eighth Negro as required by statute.

Similarly, the court strictly construed the fractional requirements in the later case of *Moon v. Children's Home Society*.<sup>275</sup> In that case, two children were removed from their White mother on the grounds that their stepfather had Negro blood in his veins. It was irrelevant that their natural father had died leaving the family penniless and that the stepfather had provided for them comfortably — the inquiry was one of fractions. The children were returned to their mother, however, based on the unrefuted testimony of the step-grandmother that she was only one-eighth Black, that her husband was White, and therefore her son, the children's stepfather, was only one-sixteenth Black, less than the fraction required.<sup>276</sup> The children's mother won because there was no way that the court could check the math.

Where the fractions could be “objectively” substantiated, however, the fractional requirements were strictly construed. For example, in *Peavey v. Robbins*,<sup>277</sup> plaintiff sued the voting inspectors for not allowing him to vote. He testified that both his mother and grandmother were White and that his father was a “dark colored man with straight hair” and that his grandfather was a “dark red-faced mulatto, with dark straight hair.” The court simply did the ancestral mathematics and concluded that if the plaintiff's grandfather were a mulatto, that is, half White and half Black, “the plaintiff would be within the fourth degree” and therefore ineligible to vote.<sup>278</sup>

*d. Expert Testimony.* When the difficulty of the ancestral title search became apparent, the court sometimes resorted to the use of “scientific experts” who could divine quantum of blood by visual inspection. Two Arkansas cases illustrate the limits of the use of

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275. 72 S.E. 707 (Va. 1911).

276. See 72 S.E. at 708.

277. 48 N.C. (3 Jones Law) 339 (1856), cited in 2 CATTERALL, *supra* note 259, at 198.

278. Another example of the court strictly construing the fractional statutes is *Van Camp v. Board of Education*, 9 Ohio St. 407 (1859) (noting that children who were admittedly three-eighths African and five-eighths White were forbidden from attending “White” schools).

“experts” to determine race. In *Daniel v. Guy*,<sup>279</sup> the petitioner and her four minor children sued for freedom based on their allegation that they were not Black within the meaning of the law. The court allowed the jury to consider the interpretation of lay testimony by two “expert” physicians “skilled in the natural history of the races of men.” A lay witness testified that, while the petitioner’s mother had the complexion of a dark White person and had dark straight hair, she had a telltale “curl on the side of her head.” One expert testifying on behalf of the plaintiff then opined that “the hair never becomes straight until after the third descent from the negro. . . . The flat nose remains observable for several descents.”<sup>280</sup>

In *Gary v. Stevenson*,<sup>281</sup> another suit for freedom, the “expert” witnesses disagreed. One testified that upon visual inspection, “he could discover no trace of the negro blood in [the plaintiff’s] eyes, nose, mouth or jaws — his hair is smooth and of the sandy complexion, perfectly straight and flat, with no indication of the crisp or negro curl; his eyes blue, his jaws thin, his nose slim and long.”<sup>282</sup> The “expert” concluded that it would take “at least twenty generations from the black blood to be as white as complainant.”<sup>283</sup> A second expert disagreed, judging the complainant as having “a small amount of negro blood; not more than a sixteenth, perhaps not so much. . . . [his] upper lip rather thicker than in the white race — temperament sanguine.”<sup>284</sup> The thick lip and pleasant temperament was “scientific” evidence of the Black blood.

Sometimes, the certified “experts” allowed to testify before the jury did not pretend to have scientific training at all. In *State v. Jacobs*,<sup>285</sup> the court’s expert was certified on the grounds that “he was a planter, an owner and manager of slaves . . . more than twelve years, that he . . . had had much observation of the effects of the intermixture of the negro . . . blood.”<sup>286</sup> The court affirmed both his expertise and his opinion, stating:

it would often require an eye rendered keen, by observation and practice, to detect, with any approach to certainty, the existence of any thing less than one-fourth of African blood. . . . A free negro . . . may . . . be a person who . . . has only a sixteenth. The ability to discover

279. 19 Ark. 122 (1857).

280. 19 Ark. at 127.

281. 19 Ark. 580 (1858).

282. 19 Ark. at 583.

283. 19 Ark. at 583.

284. 19 Ark. at 584.

285. 51 N.C. (6 Jones) 284 (1859), *quoted in* 2 CATTERALL, *supra* note 259, at 226.

286. 51 N.C. at 284.

the infusion of so small a quantity of negro blood . . . must be a matter of science . . . admitting of the testimony of an expert [such as] Pritchett.<sup>287</sup>

With experts of this caliber, it was not a quantum leap for the court to allow such "scientific" expertise to give way to lay opinion of the witnesses on the theory that racial identification was a matter of common knowledge. Thus, in an 1892 North Carolina case, lay testimony was competent to show that a litigant was of "mixed blood": "It was not necessary that the witness should be an expert to testify to a matter which is simply one of common observation."<sup>288</sup> Similarly in an 1829 case, a jury awarded freedom to a litigant announcing, "We of the jury . . . find, from inspection, that the said plaintiff . . . is a white woman."<sup>289</sup> Finally, in *State v. Hayes*, a criminal defendant urged that she was White because her mother was White. In rejecting her contention, the court stated, "I was satisfied from inspection that she was a mulatto. . . . The African taint reduced her to the same degraded state, as if she were a free negro."<sup>290</sup>

*e. Litigating Biological Race.* With race defined as a function of biology and blood, the courts thus struggled with fractions, experts, relatives, and visual observation in order to draw the line between Black and White. As ridiculous as these racial classification cases seem to the modern reader, I include them here because they have some relevance to today's proposals for redefining the racial identity of an African American with any White blood or with a majority of White blood. If, as some argue, many Blacks are in fact multiracial due to miscegenation that occurred generations ago, how are we to determine where we each belong?<sup>291</sup> And if, as some commentators suggest<sup>292</sup> entitlements are appended to one cate-

287. 51 N.C. at 284.

288. *Hopkins v. Bowers* 111 N.C. 175, 178 (1892).

289. 1 CATTERALL, *supra* note 33, at 121 (quoting *Hook v. Pagee*, 16 Va. (2 Munf.) 379 (1811)).

290. 2 CATTERALL, *supra* note 259, at 339 (quoting *State v. Hayes*, 17 S.C.L. (1 Bail.) 275 (1829)).

291. For a thorough discussion of this problem of people who might falsely claim to be Black, see *Wright*, *supra* note 17, at 559-61. For a persuasive, common-sense approach to this problem, see *Karst*, *supra* note 28, at 322-52.

292. For some such suggestions, see *Colker*, *supra* note 181, at 12-23. In this article, I have not discussed "affirmative action" because I believe that it has limited relevance in defining the African-American race. The boundaries of our race were drawn long before affirmative action was conceived, and affirmative action can have only a limited effect on the identity of people within those boundaries; affirmative action will not turn Black women into White men. For thought provoking suggestions on varying the degree of affirmative action available within and between minority groups, see *Colker*, *supra* note 181; *Deborah Ramirez, Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957

gory and not the other, will racial "authenticity" be determined in a fashion so different than these cases suggest?

### C. *The Dangers of Redefining Black: Distancing*

In the previous two sections of this Part, I have raised caution signs on the road toward the re-biologization of racial categories. Section II.A discussed the good that the one drop rule did in uniting African Americans in the fight against racism, and it compared the Devil's work in promulgating the one drop rule in the United States, with his creation in South Africa, where a more symmetrical classification system was very effective in ensuring racial subordination. Section II.B argued that the one drop rule created a people and that it would be difficult and wrong to biologically recategorize a people. These sections thus looked backwards over the African-American experience. With this experience in mind, section II.C will look forward to examine how the recategorization of the African-American race may move us closer to the South African system, where the evil the Devil did outweighed the good.

This section, then, addresses the phenomenon of "distancing," which is the creation of unnecessary and pernicious distinctions between light-skinned and dark-skinned African Americans. I discuss two kinds of distancing: (1) addressing problems that face all African Americans with solutions that benefit only the lighter part of the race; and (2) shying away from legitimate criticism of racism.

#### 1. *Finding Solutions for the Lighter Part of the Race*

In one species of distancing, we find proponents of the multi-racial category drawing a line through the African-American race and then finding solutions to social problems for only those persons on the multiracial side of the line. In contemporary discourse, the field of transracial adoptions provides the clearest examples of this type of distancing. The National Association of Black Social Workers (NABSW) has repeatedly stated its opposition to allowing White families to adopt Black children, and, in his recent law review article, Kenneth Karst carefully examines this issue. Karst thoughtfully discusses the applicable constitutional and ethical principles and the factual studies of children who have been adopted transracially, and he concludes with a nuanced but compelling state-

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(1995). For the views of an opponent of affirmative action who believes that an accurate census count of African Americans is crucial, see Nathan Glazer, *Race for the Cure*, THE NEW REPUBLIC, Oct. 7, 1996, at 29.



ment of support for transracial adoptions, noting that the alternative is usually a foster home or an orphanage.<sup>293</sup>

In this discussion, Karst reports a proposal that would let multi-racial children be adopted by anyone but would leave Black children to languish in their foster homes. He notes that “[s]till other positions might be considered. For example, a general preference for black parents might be put aside in adoption of biracial children — the children of parents who self-identify with different races.”<sup>294</sup> In a classic example of distancing, this proposal takes a problem that affects all Black children awaiting adoption and solves it only for those who have known White ancestry.

Another example of distancing involves private adoptions. In some states, a huge percentage of adoptions are now handled privately through attorneys, facilitators, and private agencies without much involvement from the state and county bureaucracies that historically have been responsible for race matching. These private adoption professionals report that there is not a sufficient demand for Black babies.<sup>295</sup> Indeed, there is anecdotal evidence that Blacks have fallen behind those with physical limitations in the competition for acceptance by White families. Some White families who are caring and committed enough to accept children without limbs or with other physical disabilities check “No” on the form when asked if they will accept a Black child.<sup>296</sup> Against this background, skeptics could be forgiven if they see the “Multiracial” category in this context as a sort of marketing tool, a Tiffany box in which light Black children can be placed to get them through the doorways of White homes — doorways that might be quickly closed to children

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293. See Karst, *supra* note 28, at 347-52. Likewise, Lythcott-Haims paints a compelling portrait of African-American children languishing in foster homes while qualified White adoptive parents are turned away due to the policy of “race matching.” Lythcott-Haims, *supra* note 136, at 553-56.

294. Karst, *supra* note 28, at 348. Lythcott-Haims describes a broader “compromise” proposal that would apply to any child with mixed ancestry.

A different approach, such as permitting Multiracial children to be adopted by parents who represent at least one of the heritages in the child’s ancestry, would create many more parental options for Multiracial children. Instead, Multiracial children wait in the current race-matching scheme.

Lythcott-Haims, *supra* note 136, at 553 (citation omitted).

295. Dorothy Roberts observes that “[i]n the American market, a Black child is indisputably an inferior product.” Roberts, *supra* note 162, at 246. Similarly, one private adoption attorney reports that his firm cannot find enough Americans of any race interested in adopting Black infants, although economic considerations may play a role. “The problem is so pronounced he [the adoption lawyer] had to go all the way to Holland and Switzerland to find homes for a bi-racial and a black child.” Kathleen Schuckel, *Black Couples Face Delays for Babies Too*, INDIANAPOLIS STAR, June 30, 1996, at J2.

296. See Interview with J. Potter at Silver Spoon Adoption Agency in Temecula, California (Nov. 1995).

labeled as "Black" or "African."<sup>297</sup> Of course, such categories are of limited effect in the world of private adoption, where prospective parents scrutinize the skin color and virtually every other known attribute of the birth parents and the child. For the government to give its blessing to such a use of the multiracial category, however, would be another form of distancing.

Karst convincingly explains how the NABSW has used the one drop rule in its misguided fight to keep *all* Black adoptable children in the race.<sup>298</sup> But if we take time to examine fully the use of the one drop rule in the adoption controversy, we again see Mephistopheles doing his good works. Thus, the one drop rule insists that if "race matching" is wrong, we should right this wrong for *all* Black children, not just for the ones with White blood. The rule also demands that if White Americans are wary of adopting African-American children, we should not address this problem by wrapping the lighter ones in the official bunting of a multiracial category, leaving the darker babies unadoptable.

All this brings us back to Uncle Clarence's decision not to argue that he was too light to fall under the restrictive covenant as he fought to save his home. Arguments that solve problems only for the lighter half of the race are self-defeating and morally flawed.<sup>299</sup>

## 2. *Sanitizing our Attacks on Racism*

A second example of distancing is seen when multiracial advocates shy away from legitimate criticism of racism because this criticism breaches their loyalty to their White ancestry. In her recent Note, Lythcott-Haims provides an example of this distancing when she critiques an African-American satire of the one drop rule. The Note makes the historical observation that some African Americans "refuted the conclusion of the 'one drop' rule by deducing that if one drop of 'Black blood' makes a person Black, the blood must be powerful, strong, [ ] and superior."<sup>300</sup> As an example of such a

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297. I emphasize that neither Karst nor Lythcott-Haims has made (or even mentioned) any such proposal to use the Multiracial label to make certain Black children more attractive to White adopting families.

298. See Karst, *supra* note 28, at 351.

299. Similarly, the lawyers for Homer Plessy, who was only one-eighth Black, ultimately downplayed the argument that Plessy was too light to be effectively categorized as a Negro. See CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 55 (1987); cf. Colker, *supra* note 181, at 7 (arguing that the case reflected a challenge to the arbitrary nature of racial categories).

300. Lythcott-Haims, *supra* note 136, at 539.

“deduction,” the Note quotes the mid-twentieth century movie star, Herb Jeffries:

I'd always heard that if you had *any* Negro blood you were a Negro and that was that . . . Then it can't be such inferior blood, can it? If you had a [B]lack paint that was so powerful that two drops of it would color a bucket of [W]hite, that'd be the most potent paint in the world, wouldn't it? So if Negro blood is as strong as all that it must be pretty good — maybe I'd better find out where I can get some more of it.<sup>301</sup>

In response to Jeffries's satire of the one drop rule, the Note draws a line between the “Black community” and the “Multiracial”:

[W]hile these exercises seem self-empowering and may have done wonders for the collective psyche of the Black community, they did nothing to help the plight of the Multiracial, for the Multiracial person can hardly advocate the superiority or inferiority of one race without touching off a potentially damaging identity struggle within herself.<sup>302</sup>

Here, the Note exemplifies two aspects of “distancing.” First, it distances multiracial people from the criticism of racism. The quotation from Herb Jeffries is in itself instructive. Jeffries was a light-skinned Black actor who refused his agents' suggestions that he “pass” as a South American or Latino, even though doing so would have greatly enhanced his career.<sup>303</sup> In the quoted passage, he playfully but effectively satirizes the illogic of racism without displaying any anti-White racial venom or dislike of White people. Nonetheless, the Note finds even this mild satire painful enough to touch off a “damaging identity struggle.” Of course, if the author of the Note had wanted words that could legitimately be said to cause anguish, she could have chosen the famous words of Malcolm X:

I was among the millions of Negroes who were insane enough to feel that it was some kind of status symbol to be light-complexioned — that one was actually fortunate to be born thus. But, still later, I learned to hate every drop of the white rapist's blood that is in me.<sup>304</sup>

Instead, the Note focuses on the humor of Herb Jeffries. The net effect is the suggestion that Blacks must be careful even when they playfully poke fun at racism, lest they offend multiracials' White side.

Second, in its discussion of Jeffries, the Note conveys the suggestion that multiracials do not benefit from the fight against anti-

301. *Id.* at 539 n.47 (alterations in original).

302. *Id.* at 539.

303. See Spickard, *supra* note 136, at 332.

304. MALCOLM X, AUTOBIOGRAPHY OF MALCOLM X, at 2 (New York, 1965), *quoted in* Spickard, *supra* note 136, at 323.

Black racism. Specifically, the Note concludes that “exercises” such as Jeffries’s satire “did nothing to help the plight of the multi-racial.”<sup>305</sup> I believe that the contrary is true, that it was decades of such (often subtle) attacks on racism that led to *Brown* and *Loving* and the downfall of Jim Crow. While many of these attacks may have been painful to some White ears, without them many multi-racial people would not even exist, and the ones who did find their way into the world past racist antimiscegenation laws would certainly face a far less friendly society. While it is the fight against racism that has brought them this far, some multiracial voices seem prepared to distance themselves from this fight and to replace it with a fight for distance from the Black race. The Note, for example, suggests that benign satire must be removed from the arsenal of antiracist weapons, lest it offend; instead it concentrates on more “accurate” redefinitions of American racial categories.

I believe that this combination of strategies is self-defeating. To the eyes of most Americans, children of Black-White unions are inextricably identified with the Black community, and while these biracial children *certainly* have the right to define and enjoy their own unique identity, what will “help [their] plight” the most will be the end of anti-Black racism.

### 3. Conclusion

This Part has been intended to place caution and destination signs on the path toward the adoption of a new multiracial census category. These signs remind us of the good the one drop rule did in creating a people and uniting it in the struggle against racism. They also warn us that this path may lead us toward the adoption of racial categories that ignore American social history and, instead, find their bases in blood and biology. Finally, the signs tell us of dangers posed by these new categories: They may formally divide the Black race into two races, one light and one dark; and they may create a distance between those two new races that ultimately results in different treatment for each group.

### III. FROM THE ONE DROP RULE TO THE DISCOURSE ON RACE

I now turn to the larger discourse on race itself. Here, all of the considerations that I discussed in the previous Part form only a small, but nonetheless important, part of the terrain. The construction of the boundaries around the African-American race informs

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305. Lythcott-Haims, *supra* note 136, at 539.

the debate over the nature and definition of “race” itself; the answers drawn from this debate will, in turn, be answers to the questions regarding the identity of multiracial Americans.

In section III.A, I address the question whether there is such a thing as “race,” and I conclude that the African-American experience proves that race does exist. In sections III.B and III.C, I argue that race is something *sui generis* — that it is not simply a metaphor and that it is more than culture but less than essence. In section III.D, I criticize recent arguments that race is volitional. I conclude by focusing on the argument that we chose our race by our daily actions, and I discuss how this argument can become suffocating for African Americans.

### A. *There is Race*

No one has made a greater impact on the philosophy of race in the last decade than Kwame Anthony Appiah, who, among other things, has advanced the now-famous argument that there is no race.<sup>306</sup> In the preceding sections, I discussed the abstract comparisons that certain commentators have made between hypodescent and more “symmetrical” classification systems and how these comparisons ignored the reality of the African-American experience. In concluding that there is no race, Appiah operates at the other end of the spectrum and engages in a similarly unsatisfactory abstraction — an abstraction that is again disproved by the African-American experience. Just as the Black experience in America shows that hypodescent was — in practice — no worse than the symmetrical South African system, so African-American history shows that there is such a thing as race.

Appiah begins his argument by demolishing the biological basis for race.<sup>307</sup> From biology he turns to history, and he considers DuBois’s argument that races are bound together by a “common history”:<sup>308</sup> “The issue now is whether a common history is something that could be a criterion that distinguishes one group of human beings — extended in time — from another.”<sup>309</sup> Appiah

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306. See APPIAH, *supra* note 163, at 31-32.

307. See *id.* at 35-38.

308. DuBois’s definition of race, which inspired Appiah’s analysis, is: “What then is a race? It is a vast family of human beings, generally of common blood and language, always of common history, traditions and impulses, who are both voluntarily and involuntarily striving together for the accomplishment of certain more or less vividly conceived ideals of life.” W.E. BURGHARDT DUBOIS, *DUSK OF DAWN: AN ESSAY TOWARD AN AUTOBIOGRAPHY OF A RACE CONCEPT 75-76* (1940), *quoted in* APPIAH, *supra* note 163, at 29.

309. APPIAH, *supra* note 163, at 31.

concludes that a common history, such as the African-American history of slavery and segregation, cannot create a group. He argues that it is tautological to claim that a group shares a common history; in the end, he concludes, notions of “shared history” bring us back to biological notions of race:

To put it more simply: sharing a common group history cannot be a *criterion* for being members of the same group, for we would have to be able to identify the group in order to identify *its* history. Someone in the fourteenth century could share a common history with me through our membership in a historically extended race only if something accounts for their membership in the race in the fourteenth century and mine in the twentieth. That something cannot, on pain of circularity, be the history of the race.

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Whatever holds DuBois’s races conceptually together, then, it cannot be common history.<sup>310</sup>

Appiah thus believes there must always be something besides shared history that identifies the group, and in the case of race, this “something” is simply false notions of biology. Having eliminated any historical or biological grounds for grouping people into races, he concludes that there is no race.

I disagree with this portion of Appiah’s argument, at least as it applies to the African-American race. As argued in the previous sections, history not only created the African-American race (drawing its boundaries to include the issue of Europeans and Native Americans), it also imposed on this race a tumultuous shared experience that has made the race what it is today. But before I discuss the African-American experience further, let me give a clearer example that undermines Appiah’s argument that “shared history” cannot create a group.

This example is the Buraku caste that has existed in Japan from the Tokagawa period to the present.<sup>311</sup> This caste — whose members are morphologically and genetically indistinguishable from the general population of Japan<sup>312</sup> — has its origins in ancestors who chose to work with leather in Medieval Japan. (Because leather was associated with death, leatherwork was considered an “unclean” occupation.)<sup>313</sup> During the Middle Ages, the boundaries of

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310. *Id.* at 32.

311. See IAN NEARY, *POLITICAL PROTEST AND SOCIAL CONTROL IN PRE-WAR JAPAN: THE ORIGINS OF BURAKU LIBERATION* (1989); see also J. SUGINOHARA, *THE STATUS DISCRIMINATION IN JAPAN* (1982).

312. See David Sanger, *A Japanese Group Disrupts the Sale of a Book*, N.Y. TIMES, Oct. 14, 1990, at 4.

313. See NEARY, *supra* note 311, at 13.

this caste were not hardened, and the “[c]onnection with the leather trade was not yet the basis for defining a social group. If a family severed its links with the [unclean] trade they would lose all traces of defilement.”<sup>314</sup>

During the ensuing Tokagawa period, however, history worked to permanently define these leather workers and their descendants as members of a rigid, inescapable, outcast social group. Over the years from 1700 to 1840, for example, an increasingly restrictive “series of regulations . . . insisted they adopt specific styles of clothing and behaviour which prevented normal social contact with the surrounding communities,” thus confirming “existing beliefs that they were different.”<sup>315</sup> These regulations dictated not only the “type of clothing and hairstyles which were to be worn” but also prohibited the Buraku people “from crossing the threshold of a [non-Buraku] peasant’s home.”<sup>316</sup> As Ian Neary notes: “These measures firmly established a line which separated the majority from the minority outcast group and the measures enacted in subsequent years confirmed this division in society and widened the gap between the two sections of it.”<sup>317</sup> In fact, the gap became so wide that today the Burakumin remain an underclass, earning salaries well below the mean salaries for the remainder of the Japanese population, living in segregated communities, and suffering socially imposed limitations on their interaction with their fellow Japanese. Even now, “Japanese private investigators still do a huge business tracing the family roots of job applicants, future spouses and others to determine if they have any burakumin blood.”<sup>318</sup>

314. *Id.* at 14. Neary notes that at the time:

Working with leather was still an occupation which caused the pollution of the worker, but the period of defilement was finite and it did not necessarily affect the other members of his family. A document dated 1558 warned:

To witness the death of a cow or horse and then to dispose of the carcass brings one days pollution. To skin the hide of the carcass brings five days pollution . . . .

*Id.* at 14 (quoting W.L. Brooks, *Outcaste Society in Early Modern Japan* (1976) (unpublished Ph.D. dissertation, Columbia University)).

315. *Id.* at 25.

316. *Id.* at 18.

317. *Id.* at 21. This division was quite useful to the ruling interests. Neary notes that restrictions on Buraku clothing and hairstyle, on intercourse between Buraku persons and peasants, and searches of large cities to find and return runaway Buraku were made partially because the “government feared the emergence of the united action of the poorer urban dwellers and discontented peasants.” *Id.* at 18. “It seems to have been thought that the rebelliousness of the peasants and urban dwellers would be reduced with the reminder that there was a group which was even worse off than they were. On the other hand, by further dividing the [Burakumin] from the rest of society, they became reliable as soldiers to be used to suppress the peasant riots.” *Id.* at 18.

318. Sanger, *supra* note 312, at 4.

The history of the Buraku people thus establishes not only that common history can form a group, but that history can take a cluster of people who had nothing more in common than their ancestors' choice — possibly made as long ago as the year 1500 — to work with leather, and turn this people and their descendants into a caste, a caste that functions very similarly to the way that races function in the United States and South Africa.<sup>319</sup>

Thus, Appiah overstates his case when he argues that, because we cannot identify groups by their common history, our only basis for racial groupings is the false and discredited notion of biology. History can form groups. As Haney Lopez notes:

I argue that races are peoples *created* by history. Before slavery Blacks did not exist as the race we recognize now in this country. Instead, slavery created a single group in North America defined by the common disaster that befell the disparate peoples of Africa brought to these shores. Slavery oppressed a group of people marked in comparison with their oppressors by a common morphology. African Americans remain linked by the legacy of that oppression and its current incarnation, which is the very systems of meaning that today attach to Black morphology and ancestry.<sup>320</sup>

As emphasized in the previous sections of this article, history created this group not simply from the disparate peoples of Africa, but also from the Native American and European peoples that intermixed with them.

Of course, race is different from caste, partly because notions of biology did play a larger causative role in the formation of races. In addition, *any* dynastic group, be it a race, a caste, or a group such as the Daughters of the American Revolution, is bound together by the “genetic tie” that connects ancestor to descendant. But none of this means — as Appiah would have it — that discredited notions of biology and genetics are the only possible building blocks for the African-American race. The “genetic tie” between Walter White, my Uncle Jack, Zora Neale Hurston, and Marcus Garvey was not, by itself, strong enough to create a people, let alone hold it to-

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319. The Buraku people show most of the salient markers of race: segregation, economic deprivation, the strictly enforced taboo on out-marriage, and the absence of any feeling of solidarity with people across caste lines even when those people have identical economic interests.

320. Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 38 (1994). In making this convincing argument, Haney Lopez unsuccessfully attempts to avoid disagreeing with Appiah. He observes: “I do not argue that races are peoples who *share* a history; I argue that races are peoples who are *created* by history.” *Id.* But if a group is created by history, does it not also *share* a common history? And is it not the shared history that gives the racial grouping all of its importance?



gether. History did that work. History drew the boundaries that labelled all of these people "Black" and gave that label an overriding importance in their lives, to the point where "Black," as Karst notes, becomes "a label so powerful that it can seem to be the person."<sup>321</sup> There is nothing in the African-American morphology or gene pool that dictated this result. History created this race and gave it its significance.

### B. *Race as a Metaphor*

While Appiah has been largely unsuccessful in persuading other scholars that there is *no* race, he has succeeded in knocking race down a peg. For example, scholars such as Henry Louis Gates and Kenneth Karst agree that race has no biological basis, but being reluctant to go so far as to say that there is no race, they call race a "trope,"<sup>322</sup> a "metonym,"<sup>323</sup> a "metaphor," or a "myth."<sup>324</sup> In my view, however, we can fairly and accurately use the term race without resorting to tropes, metaphors, or metonymy. My inspiration comes from an unrelated footnote in Karst's article, *Myths of Identity*, in which he humorously discusses his affiliation with the Auto Club without ever examining whether the Auto Club is a myth, metaphor, trope, or metonym.<sup>325</sup> As I read this footnote and compared the ways in which the Auto Club and race have affected our lives, I concluded that there is something odd about a theory that counts the Auto Club as real and race as a myth or metaphor.<sup>326</sup>

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321. Karst, *supra* note 28, at 286. After Arthur Ashe was diagnosed with AIDS, a reporter asked him if that illness was "the heaviest burden [he had] ever had to bear." He replied, to the reporter's surprise: "You're not going to believe this . . . but being black is the greatest burden I've had to bear. . . . Race has always been my biggest burden. Having to live as a minority in America. Even now it continues to feel like an extra weight around me." Reflecting on this answer later, he noted: "I can still recall the surprise and perhaps even the hurt on [the reporter's] face. I may even have surprised myself, because I simply had never thought of comparing the two conditions before. However, I stand by my remark. Race is for me a more onerous burden than AIDS." ARTHUR ASHE & ARNOLD RAMPERSAD, *DAYS OF GRACE* 126 (1993) (internal quotation marks deleted).

322. A "trope" is "any literary or rhetorical device, as metaphor, metonymy, synecdoche, and irony, that consists in the use of words in other than their literal sense." RANDOM HOUSE, *WEBSTER'S COLLEGE DICTIONARY* 1429 (1991).

323. A "metonym" is a "word used in metonymy" which, in turn, is "the use of one object or concept for that of another to which it is related or of which it is a part, as 'scepter' for 'sovereignty.'" *Id.* at 853.

324. See Henry Louis Gates, Jr., *Editor's Introduction: Writing "Race" and the Difference It Makes*, in "RACE," *WRITING, AND DIFFERENCE*, *supra* note 206, at 4-5; Karst, *supra* note 28, at 284, 288; see also Houston A. Baker, Jr., *Caliban's Triple Play*, in "RACE," *WRITING, AND DIFFERENCE*, *supra* note 206, at 383.

325. See Karst, *supra* note 28, at 283 n.76.

326. Here, I do not mean to slight the complexity of Professor Karst's analysis. While he refers to race as "myth" and racial groups as "metaphors," he recognizes that these myths and metaphors have become part of our "made world," *id.* at 312, 316, and he never down-

Reflecting further on my own family history, I felt that it was a safe assumption that neither the Los Angeles neighbors who sued to have my Uncle Clarence ejected from his home, nor the Detroit neighbors who rioted in order to cleanse their neighborhood of my Uncle Jack, knew the meaning of the word "trope." Nevertheless, they could all define the word "Negro" with sufficient precision that they took time out of their daily affairs in order to drive my ancestors out of their homes.

The problem that drives these scholars to metaphor is that "race" was originally defined by biology, but science no longer supports that original, biological definition. So these commentators now say that race is a "metaphor," a "metonym," or a "trope," and they thus suggest that race is some ineffable, barely existing concept that can be described only with figures of speech. In making this suggestion, however, they overlook the function of metaphor: If we say that race is a metaphor, we mean that race *is* something but we are calling it something else. We are admitting that race exists but we are, as they say, calling it outside of its name. However, if we can describe the Auto Club and AT&T and the Los Angeles Lakers without resorting to the use of metaphors and other tropes, we can do the same for race. As Appiah notes, "Wittgenstein used to quote Bishop Butler's remark that 'everything is what it is and not another thing.' There is a piece of Akan wordplay with the same moral 'Esono esono, na esono sosono,' . . . which being translated reads 'The elephant is one thing and the worm another.'"<sup>327</sup> So it is with race. It is (at least) one thing and we should call it that: not false biological classifications, but the groups that history has constructed from the morphological differences among human beings.

In the previous sections, I have discussed the ways in which history defined the African-American race by drawing broad boundaries based on morphology and ancestry. With this in mind, I believe that Professor Haney Lopez has stated it best: "In this Article I define a 'race' as a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry."<sup>328</sup> I believe that instead of denying the

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plays the quite concrete effects that race can have on people's lives. On the contrary, he carefully and realistically analyzes not only these effects but also the need to ameliorate them. *See id.* at 324-38.

327. APPIAH, *supra* note 163, at xi. The trend is now to reject any single meaning of race, and to recognize that race can be defined in many different ways simultaneously. *See* Lee, *supra* note 115, at 778-79. While there is truth in this observation, it does not follow that *all* definitions of race are necessarily correct. In the next pages, I will argue that some such definitions are wrong and others are suffocating.

328. Lopez, *supra* note 320, at 7.

existence of something as palpable as the nose on our face, we should use Haney Lopez's definition — or something close to it — in order to redefine race as what it is.

### C. *Essential vs. Cultural Concepts of Race*

The history of the boundaries of the African-American race also helps us to navigate between two competing notions of race: culture and essence. Some scholars argue that race is a metonym for culture. Appiah, for example, argues: "For, where race works — in places where 'gross differences' of morphology are correlated with 'subtle differences' of temperament, belief and intention — it works as an attempt at metonym for culture, and it does so only at the price of biologizing what *is* culture, ideology."<sup>329</sup> But Haney Lopez is correct when he comments: "I agree that there is a significant overlap between race and culture . . . . Nevertheless, I am convinced that there is something else 'out there,' some central dynamic of race that is not captured by notions of culture or community."<sup>330</sup> Much of that "something else" is morphology and genealogy. In the African-American case, history created a race from these factors, and this race runs broader and deeper than culture; this race, which extends out to boundaries defined by appearance and known descent, provides the anchor for culture. In other words, a person with Black morphology or known Black ancestry is part of the race, even if he has "lost" the culture. As Walter Benn Michael notes:

Thus, for example, the idea that people can lose their culture depends upon there being a connection between people and their culture than runs deeper than their actual beliefs and practices, which is why, when they stop doing one thing and start doing another, they can be described as having lost rather than changed their culture.<sup>331</sup>

I do not, however, argue that there is any racial essence.<sup>332</sup> Taking Benn Michael's metaphor, we also say that we "lose" our religion, but this does not suggest that people are "essentially"

329. APPIAH, *supra* note 163, at 45.

330. Lopez, *supra* note 320, at 18.

331. Walter Benn Michaels, *The No-Drop Rule*, in IDENTITIES 401 (Kwame Anthony Appiah & Henry Louis Gates, Jr. eds., Chicago, 1995).

332. Lee defines racial essence as "the real, true essence of things, the invariable and fixed properties which define the 'whatness' of a given entity." Lee, *supra* note 115, at 766 n.91 (quoting DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE, at xi (1989)). Similarly, Omi and Winant define racial essence as some "real, true human essences, existing outside or impervious to social and historical context." MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 181 n.6 (2d ed. 1994) (citing FUSS, *supra*, at xi).

Episcopalian or Shi'ite, or even Christian or Muslim. Similarly, we do not need to be essentially Black in order to be able to "lose" our Black culture.

One defender of a certain amount of racial essentialism is Jayne Lee, who suggests that essentialist concepts of race may be politically useful.<sup>333</sup> Her analysis is driven by a post-structuralist aversion to binarisms: She argues that our acceptance of socio-historical definitions of race should not preclude other definitions, including essential definitions. She therefore concludes that *any* definition of race that furthers the struggle against racism is justified.<sup>334</sup>

My objection to essentialist definitions of race, however, is not based on the feeling that the social definition of race that I asserted above has preempted the field, but on the lack of evidence to support the essentialist definitions. Appiah, for example, has masterfully demolished any meaningful argument for essential race among Africans, and since African Americans are even more diverse in their origins than Africans, *a fortiori*, there are no essential characteristics of the African-American race either<sup>335</sup> — unless, of course, those essential characteristics have been acquired during our time on this continent, but that would be, to quote Barbara Fields, just a "latter-day version of Lamarckism."<sup>336</sup>

333. See Lee, *supra* note 115, at 778-79.

334. See *id.*

335. For a discussion of African diversity, see APPIAH, *supra* note 163, at 25, 174. Appiah argues that the peoples of Africa are so diverse that it is hard to think of any generalization which applies to all of them. Accordingly it cannot be any essence inherited from our African ancestors that makes African Americans what they are. On the contrary, I, and many other African Americans, can testify that the Blackest people we have known have had light skin and straight hair.

336. Fields, *supra* note 115, at 101. Put simply, Lamarckism is the theory that acquired characteristics can be inherited and passed on to one's offspring.

Lee herself implicitly rejects essentialism when she takes sides in the great debate as to which came first, slavery or race. Commentators are divided on this issue: Some think that the African workers who came to Virginia in the seventeenth century looked and sounded so different from the English colonists that they were immediately seen as a separate "race." See Carl N. Degler, *Slavery and the Genesis of American Race Prejudice*, in RACE PREJUDICE AND THE ORIGINS OF SLAVERY IN AMERICA 44-45 (Raymond Starr & Robert Detweiler eds., 1975). Others believe that these Africans were reduced to slavery first, and the concept of race was developed later, as a justification that a liberal society needed for holding a part of its population in permanent bondage. See LOPEZ, *supra* note 41, at 12-13; Fields, *supra* note 115, at 101, 104. Lee takes the latter position, arguing that subordination came well before race. Speaking of the history of early colonial Virginia, she concludes "that historically, it was not the members of other races who were subordinated, but rather the subordinated people who became members of other races." Lee, *supra* note 115, at 761 n.64.

This view, however, is inconsistent with Lee's defense of racial essentialism. For to define race essentially is to admit that these first African arrivals in Virginia had some "real, true human, essences, existing outside or impervious to social and historical context." OMI & WINANT, *supra* note 332, at 181 n.6. And if these African immigrants had these racial "es-

Nor will theories of a racial essence further the struggle against racism. The argument that “they” are “Ice Men” and “we” are “Sun People” is destined to fail; worse, in its long, painful death, this argument will close for us all of the doors that society opens only for Ice People.<sup>337</sup> In addition, we must reject these theories because they deprive us of choice in a more horrifying way that Jim Crow and George Wallace ever did. They do so by telling us that there is something in our essence — something neither we nor our oppressors can change — that steers us as a people toward certain results and away from others.

#### D. Race as a Choice

This brings us to the issue of choice. Drawing on the experience of Black Americans like my Uncles who chose different paths in response to White racism, scholars have recently seized on the notion that people can choose their race; that what matters most in questions of racial identity is self-identification; and that we each — to some extent — select our race through the life decisions we make every day. In this section, I analyze this discourse from the standpoint of the African-American experience that I have described in the previous sections, and I raise a few more caution signs on the path.

##### 1. Appiah, Lee, and the Choice of Our Racial Identity

In *In My Father's House* and “An Uncompleted Argument,” Appiah uses the “multiracial” heritage of W.E.B. DuBois as the touchstone for his argument that racial identity is something that we can choose.<sup>338</sup> In her influential review essay, *Navigating the Topology of Race*, Jayne Lee analyzes Appiah’s argument and echoes the portion of it that asserts the voluntary nature of race.<sup>339</sup> In my view, Appiah and Lee give too much importance to individual choice in defining race and too little importance to history. Ap-

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sences” before they ever saw any White Virginia planter, then race came before subordination, and Lee’s claim that subordination created race necessarily fails.

It is interesting that Lee, in spite of her poststructuralist rejection of binarisms, views this as a binary “either-or” debate: She concludes that either race came first or subjugation came first, ruling out the view they arose at the same time, building on each other. See Winthrop D. Jordan, *Modern Tensions and the Origins of American Slavery*, in RACE, PREJUDICE AND THE ORIGINS OF SLAVERY IN AMERICA, *supra*, at 72.

337. This “theory” is attributed to Leonard Jeffries. See Jack E. White, *The Black Brain Trust*, TIME, Feb. 26, 1996, at 58; *A Rebuff for a Racist*, THE RECORD, Apr. 6, 1995 at B6.

338. See APPIAH, *supra* note 163; Anthony Appiah, *The Uncompleted Argument: DuBois and the Illusion of Race*, in “RACE,” WRITING, AND DIFFERENCE, *supra* note 206, at 21.

339. See Lee, *supra* note 115, at 765.

piah gets off on the wrong foot at the beginning of his discussion when he takes the example of the royal lineage of the Queen of England. He notes that “[i]f there were no overlaps in [the] family tree, there would be more than fifty thousand billion” lines of descent from William the Conqueror to the present generation. He concludes: “We chose one line, even though most of the population of England is probably descended from William the Conqueror by *some* uncharted route.”<sup>340</sup> In summarizing Appiah, Lee moves the choice into the present tense: “No single line can establish descent. Instead, we must choose the determinative line.”<sup>341</sup>

But “we” have not chosen the royal line of descent, nor can we. If on a visit to England we were to pursue this example and “choose” the British Sovereign by saying “good morning your majesty” to any of the millions of people who are descended through fifty thousand billion lines from William the Conqueror, we would probably be regarded as harmless lunatics; we would not be choosing the Queen. And, while Appiah notes that there are millions of people who are biologically qualified to become Queen thanks to their descent from William the Conqueror, none of these people can “choose” to become the Queen either, because the Queen’s identity has been dictated by history. Which is not to say that this is the only choice history could have dictated — if the Armada had not failed, if Charles II had fathered a “legitimate” child, if Henry VIII had been faithful to his first wife — someone else would be Queen. But it is history — long, complex, and irrevocable history — and not “we” that has made the choice.

Having suggested that we can choose the Queen, Appiah focuses on the experience of DuBois, an African American with White ancestry, and makes the equally flawed argument that we can “choose” our race: “Consider, for example, Du Bois himself. As the descendant of Dutch ancestors, why does not the history of Holland in the fourteenth century (which he shares with all people of Dutch descent) make him a member of the Teutonic race?”<sup>342</sup> Appiah concludes that the answer to the question — and the basis for DuBois’s self-identification as a Negro — is fatally circular:

The answer is straightforward: the Dutch were not Negroes, Du Bois is. But it follows from this that the history of Africa is part of the common history of African-Americans not simply because African-Americans are descended from various peoples who played a part in

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340. APPIAH, *supra* note 163, at 31.

341. Lee, *supra* note 115, at 765.

342. APPIAH, *supra* note 163, at 32.

African history but because African history is the history of people of the same race.<sup>343</sup>

Appiah concludes: "History may have made us what we are, but the choice of a slice of the past in a period before your birth as your own history is always exactly that: a choice."<sup>344</sup> And Lee comments:

Ultimately, it was not a common history that determined DuBois' race; DuBois had many common histories that might have led to any number of racial affiliations. Rather, it was DuBois' choice to identify with a certain race that determined which common history out of the many possible ones would be defining.<sup>345</sup>

In other contexts, this argument might be more successful. For example, an American of DuBois's generation whose ancestry was half Dutch and half French would have faced few constraints in choosing either nationality as "defining" his identity. But, applied to DuBois, the argument that "it was DuBois' choice to identify with a certain race" collapses into irrelevance. Its basic flaw is that it ignores the substance of the "many possible histories" from which, according to Appiah, DuBois could have chosen. It forgets that one of DuBois's "common histories" — the African-American one — eclipsed the others. It overlooks the fact that history treated African arrivals in this country in strikingly different ways than it treated Dutch settlers, and history dealt with people like DuBois, who were part African, in a way that it reserved for no other racial or ethnic intermixture.<sup>346</sup>

Thus, history acted in three ways to prevent DuBois from "choosing" to identify with his Dutch side. First, for DuBois, any meaningful outward manifestation of a Dutch "identity" would have been illegal and dangerous. DuBois grew up in Great Barrington, Massachusetts, where he notes that "[t]he color line was manifest and yet not absolutely drawn."<sup>347</sup> Nevertheless, it was with the quintessentially American ritual of exchanging Valentine greetings that he learned that any choice to identify with his Dutch ancestors faced severe practical constraints:

I remember well when the shadow swept across me. I was a little thing, away up in the hills of New England, where the dark Housatonic winds between Hoosac and Taghkanic to the sea. In a wee wooden schoolhouse, something put it into the boys' and girls' heads

343. *Id.*

344. *Id.*

345. Lee, *supra* note 115, at 765.

346. See *supra* Part I.

347. DuBois, *supra* note 308, at 10.

to buy gorgeous visiting cards — ten cents a package — and exchange. The exchange was merry, till one girl, a tall newcomer, refused my card — refused it peremptorily, with a glance. Then it dawned upon me with a certain suddenness that I was different from the others; or like, mayhap, in heart and life and longing, but shut out from their world by a vast veil.<sup>348</sup>

As DuBois moved south for his education, history placed far greater restrictions on DuBois's ability to choose to identify with his Dutch side. In Tennessee, for example, history dictated that if DuBois entered a Dutch club, he would have been ejected; that if he had married a Dutch woman, the marriage could have been annulled and he could have been jailed as a felon;<sup>349</sup> and that if he had made unwelcome romantic overtures toward a Dutch woman, he would have placed himself in danger of being beaten, castrated, or lynched.<sup>350</sup> Thus, if DuBois had "chosen" to identify with his Dutch ancestors, he would have needed to enjoy this choice as a closet Dutchman. Everywhere else the choice would have been ineffective, somewhat like "our" choice of the Queen.<sup>351</sup>

Second, history has given most American Blacks little reason, except biological lineage, to identify with their White ancestors. While Appiah decries biology as a basis for racial identity, his suggestion that DuBois could have chosen to be Dutch gives supreme importance to DuBois's biological makeup, for what would have been the basis for this choice? The primary answer is biology, more specifically, the genetic link that connected DuBois with Dutch forebears two generations removed that he had never met. History had cut all the other lines that usually connect a person to his or her

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348. W.E.B. DuBois, *THE SOULS OF BLACK FOLK 2* (Bantam Books 1989) (1903). For a riveting account of this scene replayed in the 1950s and 1960s, see WILLIAMS, *supra* note 185, at 46, 219, 269.

349. See TENN. CONST. OF 1870, art. XI, § 14, *quoted in STATES' LAWS ON RACE AND COLOR* 427 (Pauli Murray ed., 1950). The Tennessee Code, section 8409, provided that "[t]he intermarriage of white persons with negroes, mulattoes, or persons of mixed blood descended from a negro, to the third generation inclusive, or their living together as man and wife in this state, is prohibited." TENN. CODE ANN. § 8409 (Williams 1934), *quoted in STATES' LAWS ON RACE AND COLOR, supra*, at 438. Section 8410 further provided that "[t]he person knowingly violating the provisions of [8409] shall be guilty of a felony, and undergo imprisonment in the penitentiary not less than one [1] or more than five [5] years . . ." TENN. CODE ANN. § 8410 (Williams 1934), *quoted in STATES' LAWS ON RACE AND COLOR, supra*, at 438-39.

350. For an account of instances where "Black men were beaten, hanged, dismembered and dragged behind automobiles for having romantic encounters — or being accused of freshness — with White women," see Spickard, *supra* note 136, at 292, 283-92.

351. Karst reminds us that "[a]s the notions of outing and passing remind us, a person's interior sense of his or her own race or sexual orientation may or may not be enacted in public." Karst, *supra* note 28, at 283. But as the following text shows, at the same time that history outlawed any exterior expression of DuBois's Dutchness, it used several powerful tools to deprive DuBois of any *interior* sense of Dutchness.



ancestors.<sup>352</sup> History connected DuBois to the African side of his ancestry in a much different way, not just by biology but by shared experience. His close family members were — identified by themselves and society — Negroes.<sup>353</sup> Legally and culturally, he was a Negro, although like many Negroes in Northern towns, he had significant interactions with Whites. As he travelled south and as he grew older, even the narrow options for choice that he enjoyed in Great Barrington evaporated.<sup>354</sup> And so, even if DuBois had the choice to follow his bloodlines and identify with his Dutch ancestors, intelligent, rational people seldom choose to identify with things they know little about to the exclusion of things that they hold dear. History thus gave DuBois little reason to choose to be Dutch.

Third, history placed a final limitation on the agency of DuBois, the putative Dutchman — a limitation that arose from something more nettlesome and ultimately more binding than laws. History first made him a part of a “people” — an oppressed people — and then created a moral imperative that holds that it is evil for members of oppressed groups to sell out and join the other side. Adele Logan Alexander recounts DuBois’s discussion of the Hunts, a family of African Americans who were so light that they did have the choice of passing into the White race:

If everyone in Adella Hunt Logan’s generation of the Hunt family looked white, Du Bois queried, if only one of their many antecedents was “black,” and if life in the nineteenth-century South routinely heaped pain and humiliation on people of color, as it surely did, why then did the Hunts and other similar “voluntary Negroes” choose to remain a part of the African-American community. . . . DuBois un-

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352. DuBois’s biographer provides an example of how these ties were cut: DuBois’s great-grandfather, James DuBois, was “a wealthy physician of French Huguenot origins” living in Haiti, who sired three children by his slave mistress. He took the two lightest of them — including DuBois’s grandfather Alexander — to New York and enrolled them in Connecticut’s “exclusive” Cheshire School for Boys. When he died, the two “Creole sons found themselves disowned by their white relatives and forced to give up boarding school for skilled labor.” LEWIS, *supra* note 200, at 20. While DuBois did daydream about his White great-grandfather and his famous Dutch and Norman Ancestors, none of these dreams affected his racial identity. *See id.* at 46.

DuBois’s case was by no means unique. Spickard, for example, cites the work of Robert Roberts who interviewed more than three hundred Chicago “mulattoes” between 1930 and 1960. Of these three hundred, “almost none . . . had ever enjoyed a close relationship with his or her White grandparents, and most had no such relationship at all.” *See Spickard, supra* note 136, at 330.

353. *See LEWIS, supra* note 200, at 11-25.

354. Williamson notes that from 1850 to 1915, the South “led the nation in turning from a society in which some blackness in a person might be overlooked to one in which no single iota of color was excused.” WILLIAMSON, *supra* note 59, at 109. *See also id.* at 64; Spickard, *supra* note 136, at 272 & 440 n.7.

derstood the ludicrous social and political ramifications of race as well as any American of his time. "From long teaching and deeply planted conviction," [DuBois] explained with obvious distaste, "the overwhelming opinion of white Americans is that the fact of one black ancestor in eight or sixteen makes [a] tremendous difference of identity, of treatment and opportunity . . . ."

Yet even as he pinpointed and exposed the prevailing prejudices of white Americans, he had little doubt that the choice was clear for the Hunts. They and others chose to remain and identify with the darker race for two predominant reasons: responsibility and love, both providing secure anchors in a hostile world. DuBois . . . knew that "to take a stand in America as anything but a Negro would have made [the Hunts] extremely unhappy, because here there was opportunity for battle and battle on the highest plane." . . . "After all" he concluded, "life is primarily family and friends [and] one cannot lightly cast off his enveloping . . . bond of love and affection and seek to create a new place in a strange world."<sup>355</sup>

Of course, if DuBois had been a little lighter, he might have had the same choice as the Hunts, and he could have chosen to commit moral "error" by trying to "pass";<sup>356</sup> he also could have made good arguments that choosing to be Dutch was not an error at all. What he could not choose was the feeling, imposed on him by history, that if he attempted to be Dutch, he would be doing something wrong.

Lee summarizes: "Appiah's insight is that our racial identity is not dictated by our history but is always constructed."<sup>357</sup> But, as the above discussion shows, if DuBois's *racial* identity was constructed, it was history, not choice, that drew the plans and did the heavy lifting. History cut the familial ties between DuBois and his White ancestors. History gave DuBois a sense of familial loyalty and solidarity with his Negro relatives and forebears. Finally, history threatened to punish any public expression of DuBois's Dutchness with sanctions ranging from humiliation to death. Moreover, because of when and where he was born and the fact that nearly half of his distant ancestors were White, DuBois had more choice in this matter than most other African Americans. To say that most Black people of DuBois's generation (or of the generations that immediately followed) had any significant leeway in constructing their *racial* identity is absurd.

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355. ADELE LOGAN ALEXANDER, *AMBIGUOUS LIVES, FREE WOMEN OF COLOR IN RURAL GEORGIA, 1789-1879*, at 9-10 (1991).

356. In some writings, DuBois implied that he had this option, but had rejected it out of loyalty to his race. Given his morphology, this left one of DuBois's contemporaries annoyed and his biographer skeptical. See LEWIS, *supra* note 200, at 72-73.

357. Lee, *supra* note 115, at 765.

## 2. Choice Today

News of DuBois's death was announced on the Capitol Mall shortly before Martin Luther King, Jr. gave his "I Have a Dream" speech,<sup>358</sup> and much has changed in the intervening thirty-three years. Now there is far more room for self-identification. In fact, in reading some law review articles, it seems that is all there is. For example, in his careful examination of racial and sexual identity, Karst speaks only in terms of "self-identification."<sup>359</sup>

Some things, however, have not changed since the time that DuBois wrote, and Karst is therefore least convincing when, in discussing transracial adoption, he defines Black children as "children of birth parents self-identified as black."<sup>360</sup> In reality, when a woman who is pregnant with a Black or biracial child goes to an adoption agency, the self-identification of the birth parents has very little importance. What matters most is how *society* will identify the child. Second in importance is how *society* identifies the child's parents. The child's future will turn on these two factors. If she is identified as White, she will be in great demand. If she is seen as biracial, the demand will be much lower. If she is Black, the demand will be lower still.<sup>361</sup>

As I wrote this section, another example passed through the newspapers: in March 1996, a baby girl with an incomplete skull was born to a Black father and a White mother in Thomasville, Georgia. The baby died the day after she was born, and she was buried in her mother's family plot at the local cemetery. A few days after the burial, the elders of the church discovered that the Black man who had stood by the grave — a man they may have assumed to be an undertaker — was in fact the father of the child, and this meant that a Black child had been buried in the previously all-White cemetery. Of course, the child never had any chance to self-identify or to learn or choose to be Black; and the deacons never asked the baby's father how he self-identified before they voted to command that the coffin of the dead infant be removed from their graveyard.<sup>362</sup> There is room for choice but, forty years

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358. See LEWIS, *supra* note 200, at 1-4.

359. Karst, *supra* note 28, *passim*.

360. *Id.* at 347. Again, my disagreement is with Karst's descriptive labels. In spite of what I feel is an overemphasis on self-identification, Karst presents a balanced and persuasive discussion of the issue of transracial adoption.

361. See Roberts, *supra* note 162, at 246.

362. See Rick Bragg, *Just a Grave for a Baby But Anguish for a Town*, N.Y. TIMES, Mar. 31, 1996, at A14.

after the milling Detroit mob turned a deaf ear to my Uncle Jack as he tried to self-identify, we must remember that even now at the end of the twentieth century, many choices are still made for us because of our race.

### 3. *The Choice of Our Race by Daily Actions*

Those who wish to deconstruct race, who wish to remind us that we reinvent it each day, often claim that we choose our race by our daily activities. Haney Lopez, for example, correctly observes that our “many daily decisions take on racial meanings.”<sup>363</sup> He notes that “seemingly inconsequential acts like listening to rap and wearing hip hop fashions constitute a means of racial affiliation and identification.”<sup>364</sup> From this he concludes that “[i]t is here, in deciding what to eat, how to dress, whom to befriend, and where to go, rather than in the dramatic decision to leap races, that most racial choices are rendered.”<sup>365</sup> Such choices, he argues, make race “to some extent volitional.”<sup>366</sup> Lee basically agrees and suggests a political basis for racial identity. Writing of Justice Clarence Thomas, she notes that “[t]o the extent that racial identity is defined biologically and essentially, Justice Thomas is obviously ‘black.’ However, when racial identity is defined politically, as a firm commitment to antiracist struggles, Justice Thomas’s claim to racial authenticity founders.”<sup>367</sup>

These theories are attractive because they give the illusion of choice. They tell us that our race is not dictated by society or genealogy; rather it is something that we can choose as we live our lives each day. But these theories actually work to deprive people — especially African-American people — of choice. In fact, there are dangers in categorizing people *racially* based on the choices they make every day. Looking back to one of the “place markers” for this article, we see that this is the mistake that my Uncle Clarence’s neighbors made: they saw an urbane lawyer with three daughters at UCLA, and they assumed that he and his family could not really be Black. As the neighbors later discovered, they could not have been more wrong. While Uncle Clarence chose to follow paths that were

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363. Lopez, *supra* note 320, at 49.

364. *Id.* at 49-50.

365. *Id.* at 50.

366. *Id.* at 10. Haney Lopez repeatedly acknowledges the practical limitations on such choices. See *id.* at 47, 49.

367. Lee, *supra* note 115, at 769.

not open to many other African Americans of that era, those paths never led him outside of his race.<sup>368</sup>

Worse, this suggestion that people choose their race by their daily actions or political views or economic achievements limits the choices available to Black Americans. Lurking beneath the surface of this theory is the assumption that White Americans can make limitless choices without ever implicating their race, while everything that African Americans think or do is to be defined and constrained by their racial identity. White Americans, after all, can occupy any point on the political spectrum, espousing the philosophy of Friedrich Engels or Adam Smith or Ayn Rand, without implicating or abandoning their racial identity. They can live at any economic level, from the wealth of Warren Buffet to the poverty of the homeless person who asked for a quarter this morning, without raising any question as to their race. They can paint pictures as diverse as *Soup Cans* and *American Gothic* without losing their racial authenticity. They can straighten or curl their hair, darken their skin, change the color of their eyes, and have collagen injected into their lips, all without changing their race. Ironically, the argument that we can choose our race by our daily activities denies such choices to Blacks. For this argument dictates that if a Black person is economically successful, she achieves this success at the cost of her racial identity. If an African American takes the conservative side on a political issue, her *racial* authenticity is called into question. If a Black person likes the *Jupiter Symphony* or *The Magic Flute* or *Water Music*, her taste has taken her beyond the boundaries of her race.

Like one of those computer programs that spins a flat image into three dimensions on the screen, this argument transforms the race box on the census form into something tall and real. For White Americans, this "race" box remains a two-dimensional square on a government questionnaire; for Black people, this square rises off the page like the fences at Manzanar — booby-trapped and barbed-wired — and becomes the perimeter of our lives: It tells us the music we can appreciate, the people whom we can befriend, the money we can make, and the politics we can espouse — if we want to stay Black.

But as Barbara Fields has observed: "[An] absurd assumption inseparable from race in its characteristic American form takes for

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368. This is the converse of the mistake the deacons at the Georgia cemetery made: they saw a Black man standing next to the grieving White mother and assumed that he was the undertaker.

granted that virtually everything people of African descent do, think, or say is racial in nature."<sup>369</sup> In fact, all of our actions do not turn on racial axes, and to say that each quotidian deed not only takes on racial meaning but defines our racial identity is not only exaggeration, it is suffocating. Appiah is correct when he says that "there is nothing in the world that can do all we ask race to do for us,"<sup>370</sup> but this is not because there is no such thing as race, but because we are asking race to do too much.<sup>371</sup>

Toward the conclusion of her eloquent essay, Lee argues that "[i]n the theories of racial subjectivity, there must always be room for agency, a place for choice, a margin for intention, and many possibilities for change."<sup>372</sup> I write as a reminder that in the world in which my great uncles lived, and in the world half a century later in which we live, race, at least African-American race, is not just a matter of self-identification. While we do have choices, to a large extent our race is *not* one of them. Instead, we are "raced."<sup>373</sup> If we see every act as an expression of our racial identity, we trap ourselves in categories we cannot really change; we deny ourselves choice, intention, and agency. Fields correctly observes that we — as a society in the largest sense — reinvent race daily.<sup>374</sup> And as we do so, as we work for justice and take pride in our racial identity, let us avoid implicating race in every daily choice. Let us understand that we can make our choices and enjoy our "margins for intention" without necessarily bringing our race into every question. Other-

369. Fields, *supra* note 115, at 98.

370. APPIAH, *supra* note 163, at 45.

371. In speaking of transracial adoptions, Karst eloquently comments on the healthy diversity within the Black community:

Given the multiple dimensions of diversity that characterize the culture of black Americans, even a child who is socially defined as black but "raised to be white" will find kindred spirits *within black culture* — and may bring to that culture new interpretations of her own making. . . . This multidimensional quality of individuals is not a complication to be lamented but a vital force within every culture. Cultural change is the very opposite of genocide. A culture that stands still is something for archaeologists to exhume from the dust.

Karst, *supra* note 28, at 352 (footnotes omitted). Hurston's comment, which recognized this same diversity over half a century earlier, is worth repeating:

There is no *The Negro* here. Our lives are so diversified, internal attitudes so varied, appearances and capabilities so different, that there is no possible classification so catholic that it will cover us all, except My people! My people!

HURSTON, *supra* note 205, at 172. For a more detailed examination of this issue, see Roy L. Brooks, *Race as an Under-Inclusive and Overinclusive Concept*, 1 AFR.-AM. L. & POLY. REP. 9 (1994).

372. Lee, *supra* note 115, at 765 (footnote omitted).

373. One commentator has observed: "[R]ace is not so much a category but a practice: *people are raced.*" D. Marvin Jones, *Darkness Made Visible, Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 440 (1993).

374. See Fields, *supra* note 115, at 118.

wise we will need a separate *race* category on the census form not just for the Marxist, dark-skinned African American who loves Puccini and straightens her hair, but also for the thirty-three million other African Americans whose lives are arranged in thirty-three million other, differing ways.

Which brings us to the census box.

#### IV. A PROPOSAL FOR THE CENSUS

Much has changed in the generation since *Loving*. Thirty years ago the number of children who knew parents of two different races was minuscule. Today there are hundreds of thousands of such children and their number is increasing rapidly.<sup>375</sup> Unfortunately, the debate over how the census should deal with this demographic trend has become needlessly polarized. On one side of this debate are traditional civil rights and minority groups who depend on the census's racial statistics in order to safeguard voting rights, job opportunities, and school integration plans, as well as to effectively enforce antidiscrimination laws. At the Congressional hearings on this issue, a representative of one such civil rights organization stated:

Our society's ability to discourage . . . discrimination is based in part on the effective implementation of our civil rights laws. In this respect, the collection of race and ethnic data in the census is fundamental. Any changes to the data collection of race and ethnicity must be strictly scrutinized to ensure that the integrity of our civil rights laws are not compromised.<sup>376</sup>

Similarly, one commentator notes that the addition of multiracial category could lead to an inaccurate count "which could have dire political consequences."<sup>377</sup>

On the other side are several multiracial groups who see the matter as one of personal "validation," self-esteem, and the right of self-definition. Lythcott-Haims, for example, argues that the absence of a multiracial category deprives "millions of Multiracial citizens of the right to freely express their true racial identity"<sup>378</sup> and concludes that "[i]f we send in our forms but the Census [Bureau] chooses not to recognize us for what we are, it is as if we do not

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375. See *supra* note 11 and accompanying text.

376. *Hearings, supra* note 14, at 182 (statement of Steven Carbo, Mexican American Legal Defense and Educational Fund).

377. Lynn Norment, *Am I Black, White Or In Between?*, *EBONY*, Aug. 1995, at 108, 110 (quoting Halford Fairchild).

378. Lythcott-Haims, *supra* note 136, at 542.

officially exist.”<sup>379</sup> Similarly, Bijan Gilanshah argues: “This governmental recognition would validate the existence of the multi-racial community and identify the mixed movement as possessing unique cultural and social attributes.”<sup>380</sup> While the multiracial groups focus on personal “validation” rather than jobs, housing, voting rights, and anti-discrimination laws, their desire for official recognition on the census is still deeply felt. As Gilanshah observes: “Indeed, for the multiracial movement, failure of the government to include a multiracial category would result in cultural genocide.”<sup>381</sup>

This Part attempts to navigate between these two points of view. It concludes that the most accurate way of counting the new generations of Americans with parents from different racial groups is to leave the multiracial inquiry off of the race line and isolate this inquiry on a line of its own.

#### A. *The Broad, Blood-based Multiracial Category*

I first examine the addition of a simple “Multiracial” category to the race question on the census forms to serve the purpose of counting all those Americans with mixed ancestry in their “multi-generational history.” Using the figures of Maria P.P. Root, such a category could include:

- Thirty to seventy percent of all African Americans. (But not those African Americans who lack the necessary one drop of White blood.)
- The majority of Native Americans. (Again, the Native Americans who need not apply for this version of the multiracial category are those who cannot locate any White blood when conducting their genetic title search.)
- Virtually all Latinos.
- Virtually all Filipinos.
- A significant portion of Whites. (Here, history does get in the way of this scheme, because most Whites are unaware of their multiracial background.)<sup>382</sup>

Rather than attempting to count accurately the members of the racial groups that have been created by sociohistorical forces, this proposal would attempt to count a group that has no social meaning

379. *Id.* at 545.

380. Gilanshah, *supra* note 13, at 197.

381. *Id.* at 197.

382. See Maria P.P. Root, *Within, Between, and Beyond Race, in RACIALLY MIXED PEOPLE IN AMERICA*, *supra* note 136, at 3, 9.



whatsoever: the group of people with “mixed blood.” Moreover, this category could draw so many people from the traditional, socially and historically real racial groups that each of the census’ barometers of racism would give a completely useless reading. With race finally gaining recognition as a socially constructed category, this is not the time for the census to bring biology back by launching such an inventory of the nation’s genetic content. Consequently, this broad multiracial category has no place on the census questionnaire.

This, however, is not to say that there is no place for a multiracial inquiry on the census form. If the question, thirty years after *Loving*, is how many biracial people are there — people whose parents are from different racial groups — this is a question that the census should ask and answer. But the question must be asked more skillfully and carefully.

### B. *Counting Loving’s Children on the Race Line*

Of course, not all the proponents of a multiracial category want to “rebiologize” race, and there have been two proposals for limiting the multiracial category to a *socially* important category: the burgeoning group of people with parents of different races. One proposal would include a multiracial box on the race line together with an instruction explaining that this box is to be checked by people with parents from two distinct racial groups.<sup>383</sup> A second proposal would also add this multiracial box, but would require the persons who check it to identify the race of their parents.<sup>384</sup> Both proposals place the multiracial category on the race line, thereby decreeing that people can have a racial identity or a multiracial identity, but not both. There are three flaws in these proposals: (1) they incorrectly assume that multiracial status is race; (2) they force people to choose between their racial and multiracial identities; and (3) they will lead to an inaccurate count of biracial Americans.

#### 1. *Multiracial Status as Race*

In proposing a new “multiracial” answer to the race question on the census form, some theorists claim that multiracial people have enough in common to be considered a race of their own. The proponents of this category suggest that what binds this group together

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383. See *Hearings*, *supra* note 14, at 107 (testimony of Susan Graham, Executive Director of Project RACE).

384. See *Hearings*, *supra* note 14, at 137. For a thoughtful discussion of the effects of the RACE and AMEA proposals, see Payson, *supra* note 167.

as a race is its members' common experience in coping with a "dual identity." Bijan Gilanshah, for example, describes this argument as follows:

In sum, experience of the "dual" self serves as a common unifying characteristic of multiracial individuals. The new multiracial movement is composed of individuals that have either successfully come to terms, socially and psychologically, with their dual racial identities or those who continue to seek to reconcile their dual racial selves.<sup>385</sup>

There is no question that this dual identity is an important personal experience that is shared by the new generations of multiracial people, but there are several reasons why this experience is not unifying enough to qualify this group as a race. First, the nature of a multiracial person's dual identity will depend on the races of his or her parents. A child with a Black parent and a White parent, for example, will feel a very different kind of dual identity from that experienced by the child of a White and a Japanese parent. As evidence of this, we need only compare the intermarriage rates: the Japanese intermarriage rate exceeds fifty-five percent, while the African-American intermarriage rate is less than ten percent.<sup>386</sup> Obviously, society thinks of these two mixtures differently (one is the norm while the other remains uncommon) and the dual-identity experiences facing the children of these mixtures are thus also likely to be quite different.

In addition, multiracial persons will deal with their dual-identity experience in vastly different ways. As Gilanshah notes, some multiracial persons will come to terms with this identity, others will continually struggle with it. Still others will simply reject any dual identity by "accepting one racial heritage."<sup>387</sup> Consequently, the dual experience in itself is not unifying. Indeed, the claim that this experience has created common racial traits is unconvincing. Gilanshah, for example, argues:

Government recognition may lead to significant positive inter-group consequences in which mixed individuals may act as sensitive, objective negotiators of inter-group racial conflict. As one author noted, "[t]he multiracial often find themselves acting as ambassadors among fractious peoples, preaching what is to them biological reality: We can live together." With biological, psychological and sociological attachments to multiple racial heritages, multiracial possess unique credentials for mediating racial conflict. Governmental recognition

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385. Gilanshah, *supra* note 13, at 192.

386. *See supra* note 9.

387. Gilanshah, *supra* note 13, at 189.

could facilitate and legitimize the multiracial individual's assumption of this negotiator role.<sup>388</sup>

Of course, it is true that multiracial children are living examples that "we can get along." But the attempt to find common ground among multiracial people by asserting that they are natural mediators is an unpersuasive form of stereotyping. There is no reason to think that a person with one Black and one White parent will be significantly more "sensitive" or "objective" or any better at mediation than a person with two Black parents or two White parents. Like members of any other category, each biracial person will have a different aptitude toward "bridge building": Some will be sensitive, others insensitive; some will be objective, others biased; some will be good negotiators, others obstreperous; some will take from the biracial experience a desire to build bridges, others will take this experience in their stride and it will have no effect on their negotiation skills; and still others will hold a resentment toward one parent's people that will undermine any tendency toward bridge building. It is unrealistic to tie mediation and bridging skills too closely to any racial or multiracial status.

Another reason that dual identity does not form the basis of a *racial* identity is that countless other people in our society deal with dual identities in situations that do not involve race. When the son of an Orthodox Jewish family marries the daughter of a conservative Catholic family, the child of that marriage is likely to develop a dual identity which is just as profound as that of many biracial children, but this dual identity is not seen as a *racial* characteristic.

Of course dual identity is important, and the fact that this identity is not evenly shared by biracial people does not deprive it of its importance, any more than the fact that all Blacks do not share the same morphology and culture lessens the importance of those factors in defining the African-American race. But even if all multiracial people shared this dual identity evenly, this shared characteristic would not form an adequate foundation upon which to build a race, because races are built on far more substantial foundations. These foundations include shared genealogy, shared morphology, shared history, and some degree of shared culture and community. The new generations of multiracial Americans share none of these things. As Michael Thornton notes:

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388. Gilanshah, *supra* note 13, at 197-98 (citations omitted). Similarly, Christine C. Iijima Hall states that "[t]he future role of mixed people may be that of negotiators." Christine C. Iijima Hall, *Coloring Outside the Lines*, in *RACIALLY MIXED PEOPLE IN AMERICA*, *supra* note 136, at 328-29.

Further, the other groups that have designated census categories have more clear-cut bases on which to expect similar experiences, both because society identifies and treats them as separate groups and because they have common heritages (i.e. cultures). None of these categories exists simply because of common experience. Do multi-racial[s] have a core (cultural) heritage, or are they viewed as alike by others in society? . . . In fact, what seems to bind multiracial people is not race or culture, but living with an ambiguous status, an experience similar to that of all people of color. Facing a different set of dilemmas does not make one an ethnic or racial group, or signify a culture. As a group, multiracials are too diverse to categorize. This group is more biologically diverse than others, and has no common ancestry and little community. These are things one cannot say about the other census groupings.<sup>389</sup>

Zack recognized this as she mourned the "cultural suicide" of the Harlem Renaissance. If Hughes, Hurston, and DuBois had followed Zack's advice and pronounced that "mixed race" Blacks were a separate race, then there might now be a separate mixed-race culture and community in this country, like the Colored community in South Africa. Of course, Hughes, Hurston, and DuBois did no such thing, and, as a result, Zack laments that "[t]hus far no historical basis for an American identity of mixed-race has emerged."<sup>390</sup> Multiracial identity, then, is not a *racial* identity, and there is no basis to add a multiracial inquiry to the race question on the census form.

## 2. *The False Choice Between Race and Multirace*

The proposal for crowding the racial and multiracial categories together on the same line is inappropriate for a second reason: it forces biracial people to choose between two valid identities. As an illustration, consider a young man with a Black father and White mother who considers himself Black and who is identified on the street and everywhere else he goes as Black. This proposal forces this young man to choose one of his identities and deny the other as he fills out the census form. If he checks "Black" he will not be counted among the numbers of multiracial Americans; if he checks "multiracial," he denies his Black racial identity, an identity that both he and society strongly embrace. As Thornton notes, many, many people will be in this position: It is predictable that many people would exclude themselves from this [multiracial] category, a trend perhaps more pronounced among those of particular combi-

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389. Michael C. Thornton, *Is Multiracial Status Unique? The Personal and Social Experience*, in *RACIALLY MIXED PEOPLE IN AMERICA*, *supra* note 136, at 321, 324.

390. ZACK, *supra* note 166, at 127.

nations, Black-other than, say Asian-White, because of the virulent nature of racism against Blacks.<sup>391</sup>

Similarly, Gilanshah comments: "Some multiracials, for various reasons, adopt an either/or approach to identity definition by accepting one racial heritage in virtual denial of their other racial self."<sup>392</sup> After an informal unscientific survey, *Ebony* magazine concluded: "it appears that most individuals of Black-White parentage opt to identify with African-Americans . . . . Actresses Jasmine Guy, Troy Beyer and Lisa Bonet have always made it clear that they are *Black* women, despite their biracial parentage."<sup>393</sup> *Ebony* believes the views of Lenny Kravitz, son of a White father and Black mother, are widespread:

My mother taught me: "Your father's White, I'm Black. You are just as much one as the other, but you are Black. In society and in life, you are Black." She taught me that from day one.

. . . .

You don't have to deny the White side of you if you're mixed. . . . Accept the blessing of having the advantage of two cultures, but understand that you are Black. In this world, if you have one spot of Black blood, you are *Black*. So get over it.<sup>394</sup>

While Kravitz certainly does not speak for all children of Black-White parentage, multiracial theorists should be the first to understand why it would be wrong to force him (and thousands of others who feel the same way) to choose between his strong Black racial identity and his weaker, but still important identity as the child of a White father and a Black mother. For example, in criticizing opponents of the multiracial category, Lythcott-Haims argues that "[i]ronically, these groups seek to deny others the hardwon fight of accurate classification they themselves struggled for."<sup>395</sup> Placing race and multirace on the same line denies accurate classification to Lenny Kravitz and everyone like him. It requires him to be categorized as Black *or* biracial when, in fact, his racial identity is Black *and* he is biracial.<sup>396</sup>

391. See Thornton, *supra* note 389, at 324.

392. Gilanshah, *supra* note 13, at 189 (citing Carla K. Bradshaw, *Beauty and the Beast: On Racial Ambiguity*, in RACIALLY MIXED PEOPLE IN AMERICA, *supra* note 136, at 79).

393. Norment, *supra* note 377, at 112.

394. *Id.*

395. Lythcott-Haims, *supra* note 136, at 546.

396. This proposal thus puts him in the same position that multiracial activists decry: "[W]hich parent and heritage shall be denied today?" Lythcott-Haims, *supra* note 136, at 548 (quoting Carlos A. Fernandez, *La Raza and the Melting Pot: A Comparative Look at Multiethnicity*, in RACIALLY MIXED PEOPLE IN AMERICA, *supra* note 136, at 135).

Finally, multiracial theorists have criticized the Black community by asserting that “many blacks accept part-Black people as full members of the Black community only to the extent that these part-Black people do not assert Multiracial identities.”<sup>397</sup> In proposing to place race and “multiracial” in competition on the same line, however, they commit the very same transgression: they insist that Kravitz and all those like him can be counted as multiracial only if they refuse to “assert” their Black identity.

### 3. *The Multiracial Category on the “Race” Line: Guaranteed Inaccuracy*

Placing race and multirace in competition on the same line is also a blueprint for inaccuracy. The thousands of biracial Americans who identify strongly with the race of one of their parents will check “Black” or “White” or “Asian,” and, as long as “multiracial” is on the race line, they will not be counted in the multiracial group. On the other hand, thousands of African Americans with some distant White or Native-American ancestor will understandably assume that “Multiracial” is a biological category and check that box.<sup>398</sup> Arthur Fletcher, chair of the U.S. Civil Rights Commission, fears that some Black Americans will check the multiracial box simply in order to escape the “stigma” of being Black in America.<sup>399</sup> The Census Bureau will then have to guess as to whether the overcount offsets the undercount, and the estimate of the number of multiracial Americans will, sadly, be unreliable.<sup>400</sup> Compounding this inaccuracy will be one final, bitter irony: it is the children of Black-White parentage who will be most likely to check “Black” and therefore be excluded from the multiracial group; and it is these same Black-White biracial children who, percentage wise, still form the smallest multiracial group.<sup>401</sup> Thus it is this small cohort of trend setters, the group that most needs validation in numbers, that will be most undercounted if “multiracial” competes with “Black” on the race line.

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397. Lythcott-Haims. *supra* note 136, at 540.

398. See Norment, *supra* note 377, at 108.

399. See *Hearings*, *supra* note 14, at 273 (testimony of Arthur A. Fletcher).

400. See Karst, *supra* note 28, at 339-40.

401. When multiracial voices seek validation in the census *form* rather than in the census *count*, the result is far less validation.

C. A Line of Their Own

A possible solution to these problems is to place race and multi-race on separate lines. My proposal, therefore, is to leave the race question as it is<sup>402</sup> and follow it with a separate line containing a "Multiracial Inquiry." This inquiry would instruct persons whose parents are from two different racial groups to identify the race of each parent. This proposal resolves each of the problems that arise when the multiracial category competes with race on the same line of the census form.

First, it recognizes that multiracial identity is not a racial identity. Multiracial Americans share neither common culture, common history, common genealogy, nor common morphology. Instead, what binds multiracial people together is the experience of dual identity. But even if this experience were evenly distributed among multiracial people — which it is not — it would not be enough to create a race.

Second, this proposal validates the socially significant identities of mixed-race persons. Those multiracial Americans who primarily identify themselves as multiracial can express that identity — together with the races of their parents — in the separate multiracial inquiry. On the other hand, the thousands of biracial people who identify with one racial group can voice that identity in answer to

402. The 1990 Census "race" question reads as follows:

<p>4. Race Fill ONE circle for the race that the person considers himself/herself to be.</p> <p>If Indian (Amer.), print the name of the enrolled or principal tribe. _____→</p> <p>If Other Asian or Pacific Islander (API), print one group, for example: Hmong, Fijian, Laotian, Thai, Tongan, Pakistani, Cambodian, and so on. _____→</p> <p>If Other race, print race. _____→</p>	<p><input type="radio"/> White</p> <p><input type="radio"/> Black or Negro</p> <p><input type="radio"/> Indian (Amer.) (Print the name of the enrolled or principal tribe.) -----Z-----</p> <p><input type="radio"/> Eskimo</p> <p><input type="radio"/> Aleut</p> <p>Asian or Pacific Islander (API)</p> <table border="0"> <tr> <td><input type="radio"/> Chinese</td> <td><input type="radio"/> Japanese</td> </tr> <tr> <td><input type="radio"/> Filipino</td> <td><input type="radio"/> Asian Indian</td> </tr> <tr> <td><input type="radio"/> Hawaiian</td> <td><input type="radio"/> Samoan</td> </tr> <tr> <td><input type="radio"/> Korean</td> <td><input type="radio"/> Guamanian</td> </tr> <tr> <td><input type="radio"/> Vietnamese</td> <td><input type="radio"/> Other API</td> </tr> </table> <p>-----</p> <p><input type="radio"/> Other race (Print race) ----- ↗</p>	<input type="radio"/> Chinese	<input type="radio"/> Japanese	<input type="radio"/> Filipino	<input type="radio"/> Asian Indian	<input type="radio"/> Hawaiian	<input type="radio"/> Samoan	<input type="radio"/> Korean	<input type="radio"/> Guamanian	<input type="radio"/> Vietnamese	<input type="radio"/> Other API
<input type="radio"/> Chinese	<input type="radio"/> Japanese										
<input type="radio"/> Filipino	<input type="radio"/> Asian Indian										
<input type="radio"/> Hawaiian	<input type="radio"/> Samoan										
<input type="radio"/> Korean	<input type="radio"/> Guamanian										
<input type="radio"/> Vietnamese	<input type="radio"/> Other API										
<p>7. Is this person of Spanish/Hispanic origin? Fill ONE circle for each person.</p> <p>If Yes, other Spanish/Hispanic, print one group. _____→</p>	<p><input type="radio"/> No (not Spanish/Hispanic)</p> <p><input type="radio"/> Yes, Mexican, Mexican-Am., Chicano</p> <p><input type="radio"/> Yes, Puerto Rican</p> <p><input type="radio"/> Yes, Cuban</p> <p><input type="radio"/> Yes, other Spanish/Hispanic (Print one group, for example: Argentinian, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on.) -----</p>										

GEN. GOVT. DIV., U.S. GEN. ACCT. OFF., *supra* note 15, at 5.

the race question, and then, on the next line, they can be counted as multiracial in response to the multiracial inquiry. Under this proposal there will be one limitation on self naming: there will not be a pre-printed "multiracial" box on the *race* line of the census form. As argued above, omitting this box is conceptually proper and it is the only way to avoid the spurious competition between racial and multiracial identities. However, anyone who wishes to identify her race as "multiracial" will be free to write "multiracial" next to the "Other" box on the race line, and more importantly, to fully express her multiracial identity in response to the multiracial inquiry on next line of the census form.

Third, and most importantly, this proposal is the most accurate way to count *Loving's* children. The other proposals exclude from the multiracial category all the thousands of multiracial people who can be expected to identify with the race of one of their parents. This proposal includes these people. The other three proposals attract members of traditional racial groups who may believe that the multiracial category is inquiring into race mixing that may have occurred generations ago. This proposal excludes these people. It allows the census to achieve a complete and accurate count of the increasing numbers of Americans with parents from two different racial groups. With this proposal, there will be far less need for the Census Bureau to aggregate and adjust figures to make up for confusion that would be caused by placing the multiracial box where it does not belong. In addition, because the multiracial inquiry will include parental information, a data base can be built up for each cohort of biracial people (Black-White, Asian-Native American, etc.) and these cohorts can be compared for statistical purposes with the traditional racial groups.<sup>403</sup>

In summary, the proposal that I make here does not rebiologize race, and it rejects the superficial, blood-based recategorization of the races that has been created by American social history. This proposal validates the emergence in our country since *Loving* of a new category of mixed-race persons, but — unlike the other proposals — it does not require the multiracial category to compete with the traditional races for the allegiance of these people. It recognizes that in our society it is perfectly predictable that biracial

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403. For a discussion of the usefulness of these statistics in the context of affirmative action, see Payson, *supra* note 167, at 100-02. Another version of this proposal, suggested by my colleague Michal Belknap, would ask all respondents to list the race of their parents. Over time, this version would give a much better idea of how racial groups come to be constructed. A disadvantage of this proposal, however, is that because the inquiry will not be limited to multiracial persons, it will provide less validation to this group.



persons may have allegiance to one parent's race and still wish to be counted as *Loving's* children. Most importantly, because it does not set up such a "competition" between race and mixed race, it allows for the most accurate count of mixed-race people.

The addition of this separate multiracial inquiry best celebrates both *Loving* and the emerging multiracial identity. The worst way to validate this identity would be to place it in competition with racial identity by telling multiracial Americans that they cannot have a race if they want to be counted in the new multiracial category. The worst way to celebrate *Loving* would be to tell *Loving's* children that they cannot call themselves Black. The best way for the census to celebrate *Loving* is by accurately counting how many of *Loving's* children are flourishing in our society.

### CONCLUSION

However imperfect the census may be, it is our main yardstick for measuring the progress we as a society have made toward ending racism. We tamper with it at our peril. Racism is still with us, and an accurate means for measuring its hold on our society is still vital.

Few would deny that progress has been made since the April day in 1956 when a mob surrounded my Uncle Jack's new home in Detroit. Civil rights laws have been enacted, perceptions have changed, and racism has waned. What was unthinkable in 1956 — intermarriage between Blacks and Whites — is now viewed with acceptance by a plurality of Americans. There is, indeed, cause for optimism.

But things have stayed the same too. For those who are too young to remember struggles like those of my uncles, and for those who think that "race" is no longer an issue worth the trouble of an accurate count, let me close this paper with a final reference to my Uncle Jack and to another incident that occurred on an April day, this time in 1996.

As the mob milled outside of his home and the "neighborhood improvement association" knocked at his door, Uncle Jack weighed his options, and then told the *Time* reporter what motivated his decision to move: "I would have held out except for the grandchildren. If they lived here and went to school, the kids would pick on them, maybe rough them up. It could hurt them, maybe ruin their lives."<sup>404</sup> Forty years later, as I worked on the conclusion of

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404. *TIME*, *supra* note 25, at 24.

this paper, a Black woman named Bridget Ward moved into Bridesburg, a White working-class neighborhood of Philadelphia, and was greeted with “racial epithets scrawled in black ink on her windows, doors and front porch” and with “[k]etchup, looking like a trail of blood” leading up her steps.<sup>405</sup> Later, after neighbors told her she was not welcome, she received a letter threatening the lives of her daughters, ages three and nine, if she refused to leave the neighborhood.<sup>406</sup> As she decided whether to stay or go, Ward weighed the same options that had faced Uncle Jack. And, as if an old movie script had been updated to reflect a modern setting and scene, Ward’s words to a UPI reporter hauntingly reprise my Uncle Jack’s words to *Time* in 1956: “When they threaten me and my children, I’ve got to go. If I didn’t have these kids, I’d stay here to the bitter end but I can’t jeopardize my children because of these idiots.”<sup>407</sup> Forty years after Uncle Jack lost his home, Ward lost hers for the very same reason: not because of “self-identification” or “choice,” but because she is Black. Race still matters.

Since race still matters, we must be circumspect when presented with proposals to redefine it. While we should sympathize with the desire to abandon the one drop rule, we must examine how we can repudiate this rule without rejecting the race it created; how we can separate the evil the Devil did from the good. In my view, rather than entangling ourselves in this impossible task, our primary goal in designing census categories should be to ensure an accurate count, a count that is necessary to gauge the racism that still faces both minority and biracial Americans; our secondary goal should be to validate the personal identity of those filling out the census forms. Perhaps most importantly, we must not set these goals in dubious battle against each other; we must find a way to reach each of these goals without undermining the other.

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405. See Michael A. Fletcher, *A Neighborhood Slams the Door*, WASH. POST, May 18, 1996, at A12.

406. See *Black Family Moving from Racist Threat*, UPI, May 2, 1996, available in LEXIS, Nexis Library, UPI File.

407. *Id.*