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INTRODUCTION

"What are you?" As the hapa[1] daughter of a Japanese father and a half-German, half-English mother, people have often asked me this question. I have had total strangers ask me "Where were you born?" After my response of "Colorado," I usually get a reply like: "Oh, I thought maybe you were from Hawaii—has anyone ever told you that you look Hawaiian?" As a child, I was never quite sure what to make of such questions. Before I actually visited Hawaii, I had always pictured an island where everyone looked like me. The truth is, I do not really know "what I am."

The United States is full of individuals questioning their heritage and racial identity. Recently, racial identification has been brought to the forefront by the DNA connection between Thomas Jefferson's heirs and the heirs of one of his slaves, Sally Hemings. Jefferson wrote that "all men are created equal," thereby establishing a fundamental, yet contradictory, principle of our nation. Thomas Jefferson himself had a very complicated relationship with these words—he was a slave owner who called slavery an "abominable crime."[2] Jefferson considered himself to be a friend to slaves, but believed "[t]he improvement of the blacks in body and mind, in the first instance of their mixture with the Whites, has been observed by every one, and proves that their inferiority is not the effect merely of their condition in life."[3] Jefferson expressed on sev-

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1. "Hapa" is a commonly used phrase employed by all Asian subgroups, translating into "half." "Hapa haole" is a word of Hawaiian origin which means "of part-white ancestry or origin." MERRIAM WEBSTER'S NEW COLLEGIATE DICTIONARY 552 (10th ed. 1996).

2. *See* Aaron Schwabach, *Jefferson and Slavery*, 19 T. JEFFERSON L. REV. 63, 77 (1997).

3. *Id.* at 85 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, *reprinted in* THOMAS JEFFERSON: WRITINGS 288 (Merrill D. Peterson ed., 1984)).

eral occasions that he believed that miscegenation was the "horror of horrors,"[4] yet he not only engaged in a sexual relationship with one of his slaves, Sally Hemings, but also fathered several mixed-race children with other women.[5]

In November 1998, *Nature,* a British science journal, announced that DNA testing established that Thomas Jefferson fathered a child with Sally Hemings.[6] The debate about whether Jefferson fathered several biracial children has raged for almost two hundred years.[7] However, whether or not Jefferson was the father of Sally Hemings's children is less important than the debate surrounding that possibility, and the vehement denials of such a possibility by Jefferson's White descendents and historians.[8] That Jefferson himself could literally be the forefather of many African-Americans or that Sally Hemings could be the "foremother" of many White individuals sheds a new light on the conceptualization of "race" and the identity of multiracial Americans. Is it possible for people who identify themselves as "Black" to embrace a White ancestor and continue to be Black-identified? Such questions of heritage and ancestry play an important role in defining how society makes racial distinctions.

The concepts of ethnicity, culture, and race are extremely complex. We take pride in and identify with a certain culture or race as a direct result of whom we identify as our ancestors. At the same time, society itself dictates and defines racial categories. Not everyone fits so neatly in these rigidly defined

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4. *See* VIRGINIUS DABNEY, THE JEFFERSON SCANDALS: A REBUTTAL 123 (1981).

5. *See* Stephanie L. Phillips, *Claiming Our Foremothers: The Legend of Sally Hemings and the Tasks of Black Feminist Theory*, 8 HASTINGS WOMEN'S L.J. 401, 403 (1997).

6. *See Founding Father*, NATURE (Nov. 5, 1998) <http://www.nature.com>. Some questions remain as to whether Jefferson himself was the father of Sally Hemings's biracial children. The DNA test, which found a match in Y chromosome DNA from the descendents of Eston Hemings (Sally's youngest son) and Jefferson's paternal uncle (Jefferson did not father any legitimate sons), is not conclusive, as it is possible that any one of the 25 other Jefferson men within 20 miles of Jefferson's home could have also fathered Hemings's children. *See id.*

7. *See generally* ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY (1997). The rumors about Jefferson's and Hemings's children surfaced in newspapers during Jefferson's first term as president. *See id.* at 1.

8. *See* Lauren Adams De Leon, *The Thomas Jefferson/Sally Hemings Story May Be One Without A Happy Ending For All* (Mar. 1999) <http://www.betonjazz.com/content/live/1059.asp>.

categories. At some level, almost all individuals, both those who describe themselves as a particular minority and those who describe themselves as White, are racially mixed.[9] Many, however, do not identify with some part of their racial and ethnic background.[10] Vehement denial of the Jefferson-Hemings affair by Jefferson scholars and descendents alike, even in light of this new scientific evidence, is indicative of a deeper sentiment: the thought of miscegenation is still distasteful to many Americans—especially when it concerns a most beloved forefather.[11]

Historically, racial classifications have been social constructions used as a means to achieve various social purposes.[12] Such classifications, which do not recognize the possibility of the "multiracial experience," take "whiteness as the norm," and allow institutions such as the law to play major roles in "shaping and legitimizing social ideas that accept subordination of those who are not white."[13] For example, the "one-drop rule" served to further the institution of slavery by defining a Black person as someone who had as little as one drop of Black blood.[14] Today, the practice of racial classification can still be seen; despite estimates that as many as ninety percent of the Black population is multiracial, those individuals are socially considered Black, and are grouped into a "monolithic black category."[15] As one scholar commented: "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

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9. *See* Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore,* 47 STAN. L. REV. 957, 964 (1995).

10. *See id.*

11. *See* Scot A. French & Edward L. Ayers, *The Strange Career of Thomas Jefferson, in* JEFFERSONIAN LEGACIES 418, 445 (Onuf ed., 1993). As stated by professor Annette Gordon-Reed: "The horror is not at the thought of the defilement of Sally Hemings but at the thought of Thomas Jefferson defiling himself by lying with Sally Hemings. By doing so, Jefferson would have hurt himself and, by extension, other whites. That particular sin would be unforgivable." GORDON-REED, *supra note* 7, at 113.

12. *See generally* IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) [hereinafter WHITE BY LAW].

13. Jean Stefancic, *Multiracialism: A Bibliographic Essay and Critique in Memory of Trina Grillo,* 81 MINN. L. REV. 1521, 1529 (1997).

14. *See* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African-Americans, and the U.S. Census,* 95 MICH. L. REV. 1161, 1163 (1997).

15. Ramirez, *supra* note 9, at 964.

not just the history of this race but a large part of the history of America."[16]

Today, however, racial categories are not as "Black and White" as they purport to be. The growing number of multiracial people in the United States challenges the existing racial classification system, highlighting its inadequacies. Racial categories evolved from racist policies continue to perpetuate racism and stereotypes of people of color. Furthermore, these categories inadequately describe the growing number of multiracial individuals in this country. It is clear that monoracial categories and current methods of race identification do not allow for a "multiracial identity." Therefore, the purpose of this comment is to analyze the illegitimacy and marginalization of multiracial individuals in the United States.

Part I of this comment begins by discussing the question of "what is race" within the framework of Critical Race and anti-essentialism theories. Critical Race Theory views race as a social and legal construction. Part I also analyzes the history of legal racial classifications enforced through the "one-drop rule" and naturalization laws. An analysis of the evolution of the meaning of a "White" race and a "Black" race reveals how the law and legal institutions aided in the American construction of race. Finally, Part I explains how these classifications shape racial discourse in the United States. Rigid racial categories of what it means to be "Black" or "White" promote the phenomenon of the white/black binary and the transparency of Whiteness, both of which serve to exclude mixed-race individuals from the scope of accepted racial identities.

Part II presents the problems of racial identification faced by mixed-race individuals caused by the rejection of both—or all—of their cultures and the turmoil of taking the racial identity of one parent over another. Part II also discusses the Mixed-Race Category Movement and presents both the advantages and disadvantages of using this method to achieve a multiracial discourse. Specifically, Part II argues that the proponents of the movement do not have the same interests as the majority of multiracial individuals. In the long run, a single "multiracial category" may serve to further marginalize and trivialize the experiences of mixed-race individuals, and will not aid in the process of acceptance or self-identification. Fi-

16. Hickman, *supra* note 14, at 1163.

nally, this comment concludes by addressing the possibility of an expanded discourse and a dialogue of multiple consciousness that would be more beneficial to persons of mixed heritage.

I. THE HISTORICAL CONSTRUCTION OF BLACK AND WHITE

Historically, legal rules and classifications have shaped what it means to be "White" and what it means to be "Black."[17] Under a legal regime that places great social and economic importance on such distinctions, it is not surprising that rigid racial categories developed to "unambiguously classif[y]" people as Black or White.[18] This presumption of monoraciality has served to marginalize mixed-race persons by excluding the possibility of a racial identity that includes all parts of their racial make-up. This section explores the legal and social construction of race through the historical application of the one-drop rule and naturalization laws.

A. A Critical View of Race

What is race? This is a difficult question to answer because it necessarily implicates complex social and legal relationships. The Supreme Court has recognized the confusion and inadequacy of racial definitions. As stated by Justice White in *Saint Francis College v. Al-Khazraji*:[19]

> There is a common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist

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17. *See, e.g.*, Kenneth E. Payson, Comment, *Check One Box: Reconsidering Directive No. 15 and the Classification Of Mixed Race People*, 84 CALIF. L. REV. 1233 (1996); WHITE BY LAW, *supra* note 12.

18. *See* Payson, *supra* note 17, at 1243.

19. 481 U.S. 604 (1987) (holding that § 1981 protects persons of Arab ancestry from racial discrimination). Looking at the 19th-century conception of "race," the Court found that although Arabs historically were considered to be an ethnic group within the Caucasian race, if a plaintiff "can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981." *Id.* at 610, 612.

> and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. . . . It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.[20]

1. Critical Race Theory

Before beginning a discussion on a multiracial identity, the difficult question of "what is race?" must be asked. Critical Race Theorists argue that race and racial identity are socially constructed through the political process and social or cultural meaning.[21] Law has played a pivotal role in the meaning of race through "rigid categories and identities which perpetuate subordination."[22] Race, therefore, does not have a fixed meaning that is simply a result of scientific or biological attributes such as skin color, but it is a fluid categorization made by "complex . . . social meanings," which are perpetually "transformed by political struggles."[23] These social constructions "tend to be bipolar," suggesting that the social meanings of race are confined to a black/white framework.[24]

The goal of Critical Race Theory ("CRT") is to "examine the entire edifice of contemporary legal thought and doctrine from the point of the law's role in the construction and maintenance of social domination and subordination."[25] Racial power is produced by narrowing the scope of legal rules, many of which have nothing to do with rules against discrimination.[26] There-

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20. *Id.* at 609 n.4.

21. *See generally* Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography 1993, A Year of Transition,* 66 U. COLO. L. REV. 151 (1993).

22. Theresa Raffaele Jefferson, *Toward a Black Lesbian Jurisprudence*, 18 B.C. THIRD WORLD L.J. 263, 271 (1998) [hereinafter *Lesbian Jurisprudence*].

23. *See* Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 51 (1997).

24. *See Lesbian Jurisprudence*, *supra* note 22, at 271–72.

25. *Id.* at 642.

26. *See* Iijima, *supra* note 23, at 53.

fore, by focusing on the relationship of legal scholarship and the "struggle to create a more humane and democratic society,"[27] the law itself may remedy racial subordination. This approach addresses the interests of racial minorities more fairly than the Supreme Court's current strict scrutiny standard of review for all racial classifications, which does not take into account the perspectives and interests of minorities.[28]

Racial identity is not constructed through a biological or physiological manifestation of skin color, but is a social and relational construct. This social and relational construct of race both defines an individual's relationship with society, and identifies his or her place within the social order.[29] As Professor Haney Lopez states: "[H]uman interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization."[30] Race is both an external and an internal construct.[31]

2. Essentialism, Race, and Mixed-Race

Racial categories in the United States are further complicated by the assumption that everyone is monoracial—either one race or another.[32] The perpetuation of this "monoracial paradigm" creates the fiction that one can draw a definitive line separating the races. Historically, law and legal institutions have established this line between the races in part because "[w]ithout a bright line to distinguish white from [the other races], the efficient administration of American society, in which substantial legal rights were based on being white, would have been impossible."[33] In essence, the line that distinguishes Whites from minorities developed as a way to continue

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27. Harvey Gee, *Changing Landscapes: The Need for Asian Americans to Be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 643 (1997).

28. *See id.* at 643–44.

29. *See* DORINNE KONDO, ABOUT FACE: PERFORMING RACE IN FASHION AND THEATER 9 (1997).

30. 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, 27 (1994) [hereinafter *Construction of Race*].

31. *See id.* at 53–54.

32. *See* Payson, *supra* note 17, at 1242. This is the idea that everyone is one race *or* another, excluding the idea that individuals can be one race *and* another.

33. Hickman, *supra* note 14, at 1221–24.

to subject men and women of color to social and legal discrimination.

There is also a general assumption that all people from each race share the same traits and experiences. This "essentialism" argument uses biological, anatomical, or physiological differences as a basis for legal policies, institutional practices, cultural attitudes, and the legal and social construction of race and gender.[34] Essentialism assumes, therefore, the existence of a monolithic "Black experience" or "Woman experience," creating a further problem of false universalisms and identity splitting.[35] False universalisms are characteristics of individuals who are dominant in that group—White males, or in the case of the feminist movement, White, middle class females—which are then implicitly attributed to all members of that group.[36] Identity splitting means that each part of an individual's identity is separated from the other parts and these parts are "treated as separate and independent factors, hence 'splitting' identities and failing to account for the interrelationships between multiple parts."[37]

An example of essentialism is the single Asian racial category that groups together people from several different cultures, including the Japanese, Chinese, Filipinos, and Koreans, all of whom have distinct cultures and very different experiences.[38] Furthermore, Asians are perceived to be the "model minority"[39]—an inference that Asian-Americans have broken the cycle of discrimination. Because the American majority accepts them as educated, successful, and prosperous members of society, other minority groups are encouraged to look to Asians as the paradigm minority.[40] As a result, the monolithic image of relative success achieved by third or fourth generation Japanese- or Chinese-Americans implies that the needs of recent Southeast Asian immigrants and refugees can be largely ig-

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34. *See* Lucinda M. Finley, *Sex-Blind, Separate But Equal, or Anti-Subordination? The Uneasy Legacy of* Plessy v. Ferguson *for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089, 1091 (1996).

35. *See id.*

36. *See Lesbian Jurisprudence*, *supra* note 22, at 265–66.

37. *Id.* at 266 (quoting KATHERINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 871 (1993)).

38. *See* Ramirez, *supra* note 9, at 963.

39. *See* Pat K. Chew, *Asian Americans: The "Reticent" Minority And Their Paradoxes*, 36 WM. & MARY L. REV. 1, 32 (1994).

40. *See id.*

nored.[41] Although many Japanese-Americans have established economic success, a significant number of Asian-Americans—those of Vietnamese, Cambodian, Hmong, and Laotian origins—live well below the poverty line.[42]

Angela Harris describes the voice of essentialism as "the voice that claims to speak for all," independently of race, class, sexual orientation, and other realities of experience.[43] She goes on to say that the "effect of gender and racial essentialism (and all other essentialisms, for the list of categories could be infinite) is to reduce the lives of people who experience multiple forms of oppression to addition problems: 'racism + sexism = straight black woman's experience', or 'racism + sexism + homophobia = black lesbian experience.'"[44]

The Mixed-Race Category Movement, discussed in Part II, argues for a single "multiracial box" to check on federal census forms. The problem with labeling an individual simply as "biracial" or "multiracial" is that such labels essentialize the mixed-race experience and begin to imply new stereotypes about the mixed-race experience. Multiracial individuals complicate the neat monolithic categorization, as their experiences do not easily fit into a single conception of the "Black," "Hispanic," or "Asian" race. Furthermore, as there is no such thing as a single multiracial experience, efforts to classify persons of mixed heritage into a single multiracial category miss the mark.

The continued existence of a deep societal aversion to miscegenation colors the experiences of the multiracial individ-

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41. *See* Natsu T. Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 90 (1997).

42. *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1261 (1993). In fact, the average individual income for all Asian-Americans is slightly lower than the national average, and the overall rate of poverty is about twice that of all Whites. *See* Chew, *supra* note 39, at 28–29. The poverty rate among these national groups is startling: for the Laotians it is 67.2%, for the Hmong it is 65.5%, for the Cambodians it is 46.9% and for the Vietnamese it is 33.5%. *See* Chang, *supra*, at 1261. These statistics compare with a national poverty rate of 9.6%. *See id.* These figures become even more disconcerting considering that almost half of all Asian-born immigrants have four or more years of college and arrive in the United States possessing extensive professional skills. *See* Chew, *supra* note 39, at 28–29.

43. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, *in* CRITICAL RACE FEMINISM 11 (Adrien Katherine Wing ed., 1997).

44. *Id.*

ual.[45] Furthermore, the legal institutionalization of racial identity in terms of separate and distinct racial categories forces mixed-race people to "choose a race," not allowing them to identify with all parts of themselves.[46] The "voice that purports to speak for all," is in reality buttressing the rigid social classifications of White, Black, Yellow or "Other," and continues to exclude groups that are "perpetually excluded from the political, social and legal discourses about race."[47]

B. The Historical Development of the Meaning of Race

The categorization of an individual as a racial minority was used to further racism and racist goals of the white majority. The need to define race grew out of a tension between the institutionalized discrimination of non-Whites and the inevitable racial mixing that created children who were at least part White.[48] In the beginning, racial legal rules were developed to enhance and fortify the socioeconomic institution of slavery, which was itself defined by race.[49] An individual's racial classification literally meant the difference between freedom and slavery.[50] Whites used these classifications to their advantage, not only to reaffirm their social status, but also to enhance their economic position because mulattos automatically became the property of the woman's master.[51]

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45. *See* NAOMI ZACK, RACE AND MIXED RACE 34–35 (1993).

46. Many mixed race individuals are "raced" according to how society perceives them and are treated accordingly. *See* Chris K. Iijima, *Political Accommodation and the Ideology of the "Model Minority": Building a Bridge to White Minority Rule in the 21st Century*, 7 S. CAL. INTERDISC. L.J. 1, 28 (1998).

47. *Id.*

48. *See* 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, 521 (1995) [hereinafter *Who Cares*].

49. *See id.*

50. *See id.*

51. *See* Hickman, *supra* note 14, at 1176. Because of this automatic property enhancement, the result was a "perverse incentive for the sexual abuse of slave women: 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." *Id.* (footnote omitted). This raises another interesting question concerning Thomas Jefferson's relationship with Sally Hemings, which has been described as a "love story." *See generally* BARBARA CHASE-RIBOUD, SALLY HEMINGS (1979). Many commentators, however, deny that such a relationship between a master and a slave is possible. *See generally* Phillips, *supra* note 5. In any case, because multiracial sexual relationships violated the sexual taboos of White society, the prod-

A "functionalist view of law" is one way of understanding the relationship between the law and racial categorizations.[52] Such a view holds that "[l]aw changes in response to the needs and 'interests' of society, or of the class with power on society."[53] It is useful, therefore, to outline the historical progression of race-based laws in order to gain a better understanding of the creation of race.[54] Laws, however, did not by themselves create racial categories. Legal rules often defined a race in terms of blood, or "fractional ancestry."[55] In a practical sense, however, these quantifications were impossible for a jury to see, so blood ancestry had to be inferred from cultural understandings of race—behavior and physical appearance.[56]

1. The Rise of the "One-Drop Rule" and the Legal Construction of Black

In 1662, to deal with the "uncertain status" of mixed-race children the state of Virginia attempted to write one of the first statutes to define race.[57] Under this statute, the race of the mother determined the race of the child.[58] This method later proved to be unsatisfactory, however, because at that time, there were many free Blacks in Virginia, and it was difficult to tell if a child received his or her Black heritage from the maternal or paternal line.[59] Later, states began to define race by the amount of "African blood" in a person's veins, adopting one-fourth, one-sixteenth, and one-thirty-second formulations as bright lines for establishing race.[60] Before the Civil War, the rules of racial classification were used to determine freedom, and later, to continue the subordination of mulattos and African-Americans. White society became apprehensive about the

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ucts of such unions, namely mulatto children, were also viewed with a certain degree of shame. *See* ZACK, *supra* note 45, at 112–13. This shame is another historical factor which contributes to the mixed-race experience.

52. *See* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 116 (1998).

53. *Id.*

54. *See id.*

55. *See id.* at 118.

56. *See id.*

57. *See Who Cares*, *supra* note 48, at 522–23.

58. *See id.* at 523.

59. *See id.*

60. *See id.* at 524.

increasing number of biracial people who could pass for White under the existing laws.[61] The "obsessive phobia on the part of White southerners"[62] that Blacks could pass themselves off as Whites—thereby making fools of Whites and White society—led to stricter hypodescent rules and culminated in the one-drop rule.

The one-drop rule places into the Black race (and all of its social realities) everyone who has one drop of Black or African blood.[63] In 1900, Booker T. Washington noted the obvious oppressive reality:

> It is a fact that, if a person is known to have one percent of African blood in his veins, he ceases to be a white man. The ninety-nine percent of Caucasian blood does not weigh by the side of the one-percent of African blood. The white blood counts for nothing. The person is a Negro every time.[64]

By 1920, most states and the federal government had adopted the one-drop rule.[65] This rule maintained the social reality of White superiority through the fiction that White and Black were clear, distinct racial categories, which arguably became even more "intense and intrinsic" after emancipation.[66]

In 1656, a Virginia case set the stage for the judicial application of hypodescent rules. The case, *In re Mulatto*, states in its entirety: "Mulatto held to be a slave and appeal taken."[67] The court's use of the term "mulatto" indicates that the litigant was found to be of both African and European descent. Although the court obviously did not make a finding as to the fraction of African ancestry, it did find that the European ancestry made no legally significant difference to the slave.[68]

It was not enough for states to simply define the line between Black and White; courts needed to be able to apply the

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61. *See id.*

62. ZACK, *supra* note 45, at 82–83 (stating that between 1860 and 1890 the mulatto population doubled). "Hypodescent rules" are defined as "[f]ormula-based definitions of race, usually relying on fractional quantities of minority ancestry." *Who Cares*, *supra* note 48, at 524; *see also* discussion *infra* notes 85, 96.

63. *See* Hickman, *supra* note 14, at 1163.

64. ZACK, *supra* note 45, at 83 (quoting BOOKER T. WASHINGTON, THE FUTURE OF THE AMERICAN NEGRO 158 (1900)).

65. *See id.* at 83.

66. *See id.* at 84.

67. McIlwaine 504 (1656).

68. *See* Hickman, *supra* note 14, at 1173.

so-called line to particular cases. Judicial application of these rules, however, became more difficult when the litigant appeared by all accounts to be White, or claimed to be of Indian descent.[69] Moreover, these definitional rules were routinely relied upon by juries as well, thereby, increasing their application.[70]

Since it was impossible in many cases to prove ancestry by direct evidence, many courts and juries had to rely on circumstantial evidence.[71] Litigants in "freedom trials" would frequently call so-called expert witnesses "to certify the purity of White blood" or to find Black blood.[72] In *Daniel v. Guy*,[73] for example, a woman named Abby Guy sued William Daniel for false imprisonment of herself and her four children. Daniel contended that they were his slaves. Guy claimed that she was of Indian, not African heritage, and therefore a free person.[74] The court called experts to testify not only as to the physical characteristics of Guy and her children but also as to her behavior.[75] There was also character testimony that Guy "managed her own business, as a free woman, and visited among the Whites as an equal."[76] Implicit in the testimony, however, was not the importance of "tainted blood," but of behavior and the status afforded to her by society.[77] Therefore, the argument was that if an individual were a slave—or acted as a slave—then he or she must have been Black, because only Blacks were slaves. In essence, this created a circular argument that race defines status, and status defines race.[78]

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69. *See* L. Scott Stafford, *Slavery and the Arkansas Supreme Court*, 19 U. ARK. LITTLE ROCK L.J. 413, 459 (1997).

70. *See id.*

71. *See generally* Gross, *supra* note 52.

72. *Id.* at 131.

73. 19 Ark. 121 (1857).

74. *See id.* at 125.

75. *See id.* at 129. The appellate court found that one of the "rules of law" that should have been applied by the jury was that

> [i]f the jury believe, from the evidence, that Abby [Guy] has always been known and held as a slave for the last thirty years, and during that time called William Daniel 'Master,' and acted as his slave, it is evidence she is a slave, unless she has been set free by law.

Id. *See also* Gross, *supra* note 52, at 134; Stafford, *supra* note 69, at 459.

76. *Daniel*, 19 Ark. at 124.

77. *See* Gross, *supra* note 52, at 134.

78. *See id.* at 135.

The law in Arkansas at that time defined a mulatto as "every person, not a full negro, who shall be one-fourth or more negro."[79] In addition, freedom was not presumed: "If the plaintiff be a negro or mulatto, he is required to prove his freedom."[80] It seems, however, that on the eve of the Civil War, the jury liberated Guy and her children not because they determined that Guy had a certain fraction of African blood, but because they relied on other behavioral evidence.[81]

Later cases utilized the notion of "performing" racial identity, meaning that the courts believed that evidence of race—since one-drop of blood cannot be physically seen—was found in the way people acted or behaved. The thought was that people of color would inevitably "[act] out their true nature."[82] Evidence of such behavior included character evidence, reputation, and even more importantly, exercising the rights of a White man or woman.[83]

Included in this notion of "White rights" was the idea that White was good, and Black was bad; good traits and behavior were ascribed to whiteness, and bad traits to blackness.[84] The admission of such evidence by the court legitimized the notion that racial stereotypes, in fact, define race—a notion that still persists today. While laws and legal rules such as the one-drop rule have changed, the use of racialized stereotyping continues to be a factor in defining race. Furthermore, although at least one commentator has argued that "non-Black mixed-race persons have never been subject to the 'one-drop' rule,"[85] the rule

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79. ENGLISH'S DIGEST ch. 75, §1 (1848).
80. *Id.* at ch. 74, §12 (1848).
81. *See* Gross, *supra* note 52, at 137.
82. *Id.* at 156.
83. *See id.* at 156–57.
84. *See generally id.* at 151–176.
85. Payson, *supra* note 17, at 1249. Kenneth E. Payson argues that Native Americans and persons of part-Asian heritage are usually "raced" as "White" persons:

> Eurasians also are not subject to the "one-drop" rule. Historically, whites seeking to "preserve the race" have long considered White/Asian miscegenation an abomination; Asian communities have likewise denounced race mixing. Consequently, Americans who were part Japanese, for example, were often White by default because the Japanese-American community would not have them.

Id. at 1250. Although I disagree with the proposition that persons who are part White and part Asian are "White by default," what is important is not *which* race such persons are forced to identify with—only that they are forced

itself has served to aid the practice of forcing multiracial individuals of all races to "choose" one part of their heritage over another. In other words, because of the historical application of the one-drop rule, mixed-race persons cannot embrace a multiracial identity.

2. Naturalization Laws and the Legal Construction of White

After the passage of the Fourteenth Amendment, which gave African-Americans certain fundamental rights, Congress turned its attention to immigration, and began to pass naturalization laws in order to continue to deny rights to minority races—"[i]t was no coincidence that greater legal freedoms for African-Americans were tied to Chinese misfortunes."[86] Congress is given the power to define the citizenry through the Constitution. In 1790, Congress exercised this power by limiting naturalization to "any alien, being a free *White* person who shall have resided within the limits and under the jurisdiction of the United States for a term of two years."[87] Subsequent case law, therefore, needed to establish a working definition of "White" in order to apply the law efficaciously.

Later, in 1870, Congress gave "persons of African nativity" the right to naturalize.[88] However, in the fifty-one racial prerequisite cases between 1870 and 1952, all but one of the naturalization applicants claimed a "White racial identity."[89] Natu-

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to choose only one in the first place. Furthermore, the one-drop rule has given way to the principle of hypodescent—"the principle that a person of mixed racial heritage must assume the racial identity of the lowest-ranking racial group of that heritage." Stephen Satris, *"What Are They," in* AMERICAN MIXED RACE 53, 59 (Naomi Zack ed., 1995).

86. Kevin R. Johnson, *Race, Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111, 1123 (1998).

87. Act of March 26, 1790, ch. 3, § 1 Stat. 103 (emphasis added); *see also* WHITE BY LAW, *supra* note 12, at 42.

88. *See* Act of July 14, 1870, ch. 254, § 7 Stat. 254; *see also* WHITE BY LAW, *supra* note 12, at 44.

89. *See* WHITE BY LAW, *supra* note 12, at 49–51. Most likely, the geographic emphasis in defining Blacks in the statute and the harsh discrimination and subordination associated with a "Black" identity discouraged applicants from going this route. *See id.* at 52. It is interesting to note, however that in the one case where the claimant petitioned the court for citizenship as a person of "African descent" he was unsuccessful because he was only one-quarter African and three-quarters Native American. *See In re* Cruz, 23 F. Supp. 774 (E.D.N.Y. 1938). This was well after the adoption of the one-drop rule. Here is another example of the

ralization was limited to African-Americans and "Whites" until 1940.[90] At that time, Nazi Germany was the only other nation that limited naturalization on the basis of race.[91]

In 1878, *In re Ah Yup*[92] was the first racial prerequisite case decided by a Circuit Court. The court found that the petitioner, a Chinese man, was not eligible to naturalize, because he was not White. In order to define White, the judge relied on the "ordinary meaning" which included the "well settled meaning in common popular speech . . . [as understood] . . . everywhere" in the United States.[93]

In *Ozawa v. United States,*[94] a man of Japanese descent argued that he was "White" within the meaning of the statute because his skin was actually white in color.[95] The Court, however, reiterated a lesson it had learned from the application of the one-drop rule—that skin color is not necessarily indicative of race.[96] The Court did not wholly reject scientific classifications of race, but it relied on ethnological experts who placed the Japanese in a physical grouping of "Mongolians."[97] These people therefore were not Caucasians, leaving the Court free to equate Caucasian with White in order to keep Mr. Ozawa from becoming a citizen of the United States.

After this decision, however, the courts had to become more restrictive with their definition of White, finding this

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court manipulating the definitions of "African" versus "African descent" in order to further racist goals.

90. *See* WHITE BY LAW, *supra* note 12, at 44.

91. *See id.* This association forced the United States to change its immigration policy in 1940. However, racial bars on naturalization were not completely eradicated until 1952. *See id.* at 46.

92. 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104).

93. Enid Trucios-Gaynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV 369, 401 (1997). "Thus, the words 'white person' meant a person of the Caucasian race in popular language, literature, and even in scientific parlance, distinguishing persons based on color as the important factor despite the vagueness of the word as a description." *Id.*

94. 260 U.S. 178 (1922).

95. *See* WHITE BY LAW, *supra* note 12, at 81.

96. *See id.* at 82. *Cf.* Payson, *supra* note 17, at 1249–50. Historically non-Black mixed-race persons were not subject to the one-drop rule. While in the strictest sense of the term this is probably correct, there are still hypodescent rules which have always been in place for non-Black mixed races. For example, the Bureau of Indian Affairs currently recognizes Native Americans as individuals with as little as one-quarter Indian blood. *Id.*

97. *See* WHITE BY LAW, *supra* note 12, at 82.

definition too inclusive of other races, such as the Asian Indians, whom ethnologists classified as "Caucasian." In *United States v. Thind,*[98] three months after *Ozawa,* the Supreme Court found that although Mr. Thind, a Hindu from India, was Caucasian, he was not within the statutory meaning of a "free white person."[99] In its holding, the Court embraced the definition articulated by a California Circuit Court in 1878 that the words "free White persons" are ones "of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' as that word is popularly understood."[100] The Court's quick reversal and rejection of scientific evidence as proof of "race" again demonstrates that racial distinctions are not based on biological fact, but are legal and social constructions.[101]

The courts—unable to escape the historical classifications that designated White as pure, and non-White as everything else[102]—also interpreted naturalization laws to exclude people of mixed-race heritage.[103] When faced with the question of whether an individual with an English father and a mother who was one-half Chinese and one-half Japanese was White, one court stated that "[a] person, one-half white and one-half of some other race, belongs to neither of those races, but is literally a half-breed."[104] Labeling persons of mixed descent as "half-breeds" effectively enabled the courts to label them as non-White and therefore ineligible for naturalization.[105]

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98. 261 U.S. 204 (1923).

99. *See id.* at 214; Trucios-Gaynes, *supra* note 93, at 404–05. The court's use of the word "Hindu" seems to be more of a racial designation rather than a religious one. Many people who were called "Hindu" were actually Muslim or Sikh. *See* WHITE BY LAW, *supra* note 12, at 87–88.

100. *Thind,* 261 U.S. at 214–15; *see also* WHITE BY LAW, *supra* note 12, at 90.

101. *See* WHITE BY LAW, *supra* note 12, at 102–03.

102. *See supra* Part I.B.1 (discussing the one-drop rule).

103. By this, I mean people whose multiracial background included "White" ancestors. This demonstrates that although someone may be of equal amounts of White and non-White heritage, to classify such an individual as white would go against social conceptions of how "White" was defined—reinforcing the notion of the social construction of race.

104. *In re* Knight, 171 F. 299, 301 (E.D.N.Y. 1901); *see also* WHITE BY LAW, *supra* note 12, at 59.

105. *See* Kevin R. Johnson, *"Melting Pot" or "Ring of Fire?": Assimilation and the Mexican-American Experience,* 85 CAL. L. REV. 1259, 1301 (1997) [hereinafter *Melting Pot*] (relating the author's choice to remain identified as a Chicano and his brother's choice to pass as White).

3. Side-Effects of the One-Drop Rule and Exclusive Naturalization: It's Not Just Black and White

There are several consequences of the American historical application of legal regimes such as the one-drop rule and naturalization. Because much of our legal history was dedicated to preserving the White race—keeping the "others" out—the definition of what it is White became rigid. Furthermore, because race has been consistently defined in terms of either White or non-White, racial discourse tends to be conducted within the framework of a black/white binary. As such, race is usually conceived of in terms of Black *or* White, excluding other races from meaningful racial discourse. The binary also obviates a spectrum of race that would include Black *and* White.

a. The Black / White Binary

What does it mean to say "I am an American?" Often, the conception of what it means to be an American excludes certain racial groups, including Latinos, Arabs, and Asians. This construct of "foreignness" is due in part to the restrictive naturalization laws of the late nineteenth and early twentieth centuries, and persists to the present day:

> Within the United States, if a person is racially identified as African-American or white, that person is presumed to be legally a U.S. citizen and socially an American but these presumptions are not present for Asian Americans, Latinos, Arab Americans, and other non-Black racial minorities. Rather, there is the opposite presumption that these people are foreigners; or, if they are U.S. citizens, then their racial identity includes a foreign component.[106]

Because of the legal and social history described above, much of our legal resources have been used to define individuals as either White or Black (or more specifically, "non-White"), creating the binary in racial discourse that exists today.

The binary excludes individuals of other minority races, as well as those who are multiracial, from the scope of racial dis-

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106. Saito, *supra* note 41, at 77 (quoting Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome," in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1088, 1096 (Hyung-chan Kim ed., 1992)).

course. In the United States, this bipolar black/white dialogue of race relations has been the framework that has shaped our understanding of race, defined our conception of racial problems, and constructed a vocabulary to deal with race issues.[107] In fact, the word "minority" often means African-American. Professor Juan F. Perea has argued that "[m]any scholars of race reproduce this paradigm when they write and act as though *only the Black and the White races matter* for purposes of discussing race and social policy with regard to race."[108] Furthermore, "[t]he mere recognition that 'other people of color' exist without careful attention to their voices, their histories, and their real presence, is merely a reassertion of the Black/White paradigm."[109]

The changing demographics of the minority population make the inclusion of other minorities in the racial discourse even more important. For example, African-Americans no longer constitute ninety-six percent of the minority population, as they did in 1960.[110] Today, Asians, Latinos, and "others" constitute fifty percent of the minority population.[111] Many, however, are still excluded from what it means to be "an American" and are therefore perceived as undeserving of the same protections, rights, or economic success as other Americans.[112]

The black/white binary also serves to exclude persons of mixed heritage. This is because the binary sets up a polar conception of race that only allows a "Black *or* White" construction of race. Furthermore, because Whites do not view race as an

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107. *See* Iijima, *supra* note 23, at 68.

108. Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 10 LA RAZA L.J. 127, 133 (1998) (emphasis added).

109. *Id.*

110. *See* Ramirez, *supra* note 9, at 962.

111. *See id.*

112. *See* Saito, *supra* note 41, at 82. One such example was the Japanese internment during World War II. The United States Government incarcerated over 120,000 people of Japanese ancestry, many of whom were American-born. *See id.* at 73. Although the United States had also declared war on Germany and Italy, only Japanese-Americans were interned, reaffirming the construct of Asians as "foreigners," and adding the elements of disloyalty and suspicion. *See id.*

essential part of their identity, mixed-race persons are often "raced" as Black or non-White.[113]

b. The Transparency of Whiteness

An important consequence of the black/white binary is the fact that

> viewing African-Americans as the canonical example of a racial group tends to make White racial identity invisible. Seeing Blacks as the most representative example of a race tends to . . . reinforce[ ] the idea that to have a race is to be more like a black person and less like a white person.[114]

This "racial transparency" is a result of viewing White or whiteness as the cultural norm, so that once identified, it "fades almost instantaneously from white consciousness into transparency."[115] As one White professor has commented:

> White people externalize race. For most whites, most of the time, to think or speak about race is to think or speak about people of color, or perhaps, at times, to reflect on oneself (or other whites) in relation to people of color. But we tend not to think of ourselves or our racial cohort as racially distinctive. Whites' "consciousness" of whiteness is predominantly unconsciousness of whiteness. We perceive and interact without whites as individuals who have no significant racial characteristics. In the same vein, the white person is unlikely to see or describe himself in racial terms, perhaps in

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113. *See generally* Christine C. Iijima Hall, *Please Choose One: Ethnic Identity Choices for Biracial Individuals, in* RACIALLY MIXED PEOPLE IN AMERICA 250 (Maria P. Root ed., 1992).

114. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 994 (1998).

115. Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness And The Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 971 (1993) (arguing for a "transparency-conscious disparate impact rule"); *see also* WHITE BY LAW, *supra* note 12, at 158 (arguing that racial transparency "racially victimize[s]" Whites who never have cause to reflect upon their own racial identity); Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 701 (1996) (stating that "White Americans do not appear to have a sense of racial identity that is not linked to ethnicity or class, unless when juxtaposing themselves against Blacks, Asian Americans, or sometimes Latinos/as").

part because his white peers do not regard him as racially distinctive.[116]

One problem associated with transparency for multiracial individuals is that most Whites do not understand the need to assert a "racial identity."[117] This is because Whites do not usually identify themselves by their race, and so they do not readily see the significance of racial identity.[118] Persons of part White and part minority heritage may have family members who do not understand the individual's need to know their race. It is argued that because whiteness is the norm, "institutional, structural racism is maintained, ensuring that whites are systematically advantaged, and that cultural racism, 'the usually unstated assumption that white culture is superior to all others,' is practiced."[119]

C. The Need to Allow for Multiracial Identification

As outlined above, the law and legal definitions of race have helped to shape an American conception of race and racial categories. The effect of these categories, however, has left a framework for racial categorization that ignores the experiences of multiracial individuals. Furthermore, legal maxims such as the one-drop rule have not allowed individuals to develop a racial identity that includes all parts of their heritage. Instead, a person of mixed-race is forced to "choose" a single race with which to identify. Past and present discrimination compels the need for a consistent system of racial classification—one which takes account of the needs and experiences of multiracial people without alienating them. More importantly,

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116. Flagg, *supra* note 115, at 970.

117. *See* WHITE BY LAW, *supra* note 12, at 157.

118. *See id.* at 156–64. When an interviewer at Harvard Law School asked ten White individuals and ten African-American individuals "How do you identify yourself?" eighty percent of the African-Americans referred to their race when answering while only twenty percent of the Whites referred to their race. *See id.* at 157. It is interesting to note that the two White individuals referencing their race were women. *See id.* Professor Lopez argues that because White women are conscious of their subordinate gender status, they are also more in tune with other oppressive identifiers, such as race. *See id.*

119. O'Connor Udell, *Stalking The Wild Lacuna: Communication, Cognition and Contingency*, 16 LAW & INEQ. 493, 512 (1998) (quoting Flagg, *supra* note 115, at 959).

however, the voice from which legal doctrine and normative values are conceived needs to be of a multiracial character.

II. MULTIRACIAL IDENTIFICATION

William Wei, author of *The Asian American Movement*, identifies the importance of racial identification, in the context of the Asian experience, in order to establish a voice in society:

> Without a self-defined identity . . . they were vulnerable psychologically and politically. They therefore consciously set out to develop "a new identity by integrating [their] past experiences with [their] present conditions" and to raise "group esteem and pride, for it [was] only through collective action that society's perception of the Asian-American [could] be efficiently altered."[120]

Many multiracial individuals lack sufficient categories with which to racially identify themselves.

Almost all Americans, by definition, are of mixed-race heritage; it is estimated that most African-Americans, Latinos, American Indians, and even a large number of people who consider themselves to be White are multiracial.[121] Despite these numbers, those who genuinely view themselves as biracial or multiracial are not permitted to "race" themselves as such. Social and legal constraints do not allow acceptance of multiraciality. As one commentator stated:

> [A]s long as it is assumed that each person will fall into one and only one category, people of mixed race will frustrate the system. The system is supposed to enable its users to pigeonhole people, to have a handy set of categories (and perhaps stereotypes) to relate them to. Mixed-race people will cause anxiety among those for whom it is important to establish a one-category classification for everyone.[122]

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120. WILLIAM WEI, THE ASIAN AMERICAN MOVEMENT 46 (1993) (describing the rise of the Asian-American movement in order to express a "Yellow Identity" in a predominantly White society).

121. *See* Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender and the Institution of Property*, 18 CARDOZO L. REV. 309, 331–32 (1996).

122. Satris, *supra* note 85, at 54–55.

It is not only White individuals who take comfort in racial boundaries, but "all racial and ethnic groups."[123]

Historically, multiracial children who were the products of "sexual taboos," or whose existence could result in criminal punishment, represented a violation of the ideal of racial purity, and a stain on the concept of whiteness.[124] An important notion intrinsic to the notion that mixed-race children violated socially protected standards of racial purity is the fact that "whiteness" has become a "property interest" that is protected by law.[125] As Professor Cheryl Harris explains: "Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privilege, American law has recognized a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated."[126]

Because of continued animosity towards multiracial individuals, "[t]he rich diversity literally embodied by Multiracial people [has been] hidden from view, hidden from discourse, hidden from recognition and thus, invisible."[127] The issue of

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123. *See* Cynthia L. Nakashima, *An Invisible Monster: The Creation and Denial of Mixed-Race People in America, in* RACIALLY MIXED PEOPLE IN AMERICA 162, 175 (Maria P.P. Root ed., 1992). The treasuring of clear boundaries is evident in the fact that multiracial African Americans are 'allowed' to be "full members of the African American community, but only as long as they do not assert multiracial identities . . . ." *Id.* at 175–76.

124. *See id.*

125. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1713–14 (1993). Professor Harris states:

> Whiteness as property has carried and produced a heavy legacy. It is a ghost that has haunted the political and legal domains in which claims for justice have been inadequately addressed for far too long. Only rarely declaring its presence, it has warped efforts to remediate racial exploitation. It has blinded society to the systems of domination that work against so many by retaining an unvarying focus on vestiges of systemic racialized privilege that subordinates those perceived as a particularized few—the "others." It has thwarted not only conceptions of racial justice but also conceptions of property that embrace more equitable possibilities. In protecting the property interest in whiteness, property is assumed to be no more than the right to prohibit infringement on settled expectations, ignoring countervailing equitable claims that are predicated on a right to inclusion.

Id. at 1791 (citations omitted).

126. *Id.* at 1713–14.

127. Johnson, *supra* note 105, at 1302 (quoting Julie C. Lythcott-Haims, Note, *Where Do Mixed Babies Belong? Racial Classification in America and Its*

nonexistent societal recognition and participation in the political discourse is only one part of the problem faced by biracial or multiracial individuals. Another part stems from issues of self-identification. A significant portion of the United States considers itself biracial or multiracial.[128] It has been argued that the "ambiguous gap resulting from the multiracial individual's inability to belong to one monoracial group creates a lack of identity that is perpetuated by the United States government's racial classifications, which force multiracial individuals to identify [with and embrace one part of their heritage while excluding] others."[129] This pressure to "choose one" comes from many different sources, including parents, community, and the government's "check one box only."[130]

One example of this phenomenon is Tiger Woods, who has single-handedly managed to bring golf into America's pop culture. While age is one factor contributing to America's fascination with Tiger, race is another. On the day Tiger won the Masters, many reporters asked Tiger how he felt to be the first African-American to win the prestigious tournament. Tiger, however, is one-quarter Thai, one-quarter Chinese, one-quarter African-American, one-eighth Native American, and one-eighth White.[131] It is clear that Tiger is uncomfortable being cast as a role model for other African-American golfers and pigeonholed into a monoracial Black race categorization.[132] Tiger, however,

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Implications for Transracial Adoption, 29 HARV. C.R.-C.L. L. REV. 531, 540 (1994)).

128. In the 1990 decennial census, almost ten million people marked the "other race" category which the Bureau of the Census Summary of Population and Housing Characteristics says includes persons of "multiracial, multiethnic, mixed, interracial . . . origin group." *See* Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 LAW & INEQ. 183, 187 (1993). This number, however, is misleading because there are many multiracial people who "adopt an either/or approach . . . by accepting one racial heritage in virtual denial of their other racial self." *See id.* at 189.

129. *Id.* at 189.

130. *See* Nakashima, *supra* note 123, at 176.

131. *See* Gene Amole, *Color Makes Us Blind to Humanity*, ROCKY MTN. NEWS, Apr. 24, 1997, at 6A. Tiger describes himself as "Cablinasian,"—a mixture of Caucasian, Black, Indian, and Asian—but when forced to check one box only, Tiger usually checks "Asian." *See* Michael A. Fletcher, *Woods Puts Personal Focus on Mixed-Race Identity*, WASH. POST, Apr. 23, 1997, at A1. *See also* Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 ASIAN L.J. 39, 43 n.21 (1996).

132. *See* Robert S. Chang, *Who's Afraid of Tiger Woods?*, 19 CHICANO-LATINO L. REV. 223, 225 n.11 (1998) (stating "Tiger Woods was criticized by some

may not have much choice in the matter. Tiger looks like an African-American—according to societal perceptions and conceptions of race—and multiracial individuals are classified into one racial category, usually based on how they are perceived.

A. Who Am I? Rejection by Both Cultures

Many cultures—the Japanese, Koreans, and Vietnamese—have historically believed in a racial purity so extreme that half-breeds literally are "cast out."[133] Often, "multiracial people who are part Caucasian are seen as inherently 'white-washed,'"[134] and loyalty to both cultures is constantly questioned. An example of minorities not accepting multiracial individuals as part of their community can be seen at the annual Japanese Cherry Blossom Festival. The Festival prohibits anyone who is less than one-half Japanese, or does not "look Japanese," from participating.[135]

One Asian-American college student named Song Richardson explained the internal conflict such alienation causes:

> I can see them look at me and some don't think I can understand Korean. I hear them making derogatory remarks about the fact that I'm mixed . . . I'll walk into a market and see someone behind the counter who looks like my Mom, and I'll feel a certain affection. But then she'll treat me with complete lack of respect and cordiality. Differently

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of the Black community for claiming to be '90 percent Oriental, more Thai than anything'") (citations omitted). Furthermore, "multiracial Asian Americans, especially when they are part Black, are generally considered 'outsiders' and have very limited entrée into Asian American communities, except for those who have become respected or well known for some reason (the 'claim-us-if-we're-famous' syndrome)." Nakashima, *supra* note 123, at 176.

133. This is seen by the many numbers of women and their biracial children who were ostracized from their native countries after having sexual relations with American soldiers stationed in those countries during World War II, the Korean conflict, and Vietnam. *See* Maria B. Montes, Note, *U.S. Recognition of Its Obligation to Filipino Amerasian Children Under International Law*, 46 HASTINGS L.J. 1621 (1995).

134. Nakashima, *supra* note 123, at 174. Furthermore, "[multiracial individuals] are not allowed to discuss their multiraciality if they want to be included as legitimate 'persons of color.'" *Id.*

135. *See* TIMOTHY P. FONG, THE CONTEMPORARY ASIAN AMERICAN EXPERIENCE: BEYOND THE MODEL MINORITY 234–35 (1998).

> than she would treat a white person who comes into the market.[136]

White society also refuses to accept multiracial people as "one of their own"—especially in light of the narrow definition afforded to the meaning of whiteness. Furthermore, racial stereotypes associated with physical appearance continue to pervade American culture.

B. Choose Only One: Identity, Family, and the Multiracial Category Movement

The current racial dialogue that takes place within the black/white binary leaves little room for discourse concerning multiracial individuals. It is estimated that nearly all Latinos, Native Americans, and Filipinos are multiracial.[137] Thirty to seventy percent of the African-American population and an unknown number of individuals who are White-identified are actually multiracial.[138]

Not all biracial or multiracial children take their mother's race; many are assigned the race of the non-White parent—perpetuating, in a sense, the one-drop rule and other hypodescent rules.[139] A manifestation of "racing" children as a minority parent can be seen in the custody cases—between natural parents—of biracial children.[140] Often, courts award custody to the parent with whom the child shares the most "racialized physical traits."[141] In 1950, the Washington Supreme Court granted custody of biracial daughters to their African-American father stating: "[t]hese unfortunate girls, through no fault of their own, are the victims of a mixed marriage and a broken home. They will have a better opportu-

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136. *Id.* at 235 (quoting Angelo Ragaza, *All of the Above*, A MAGAZINE, Vol. 3 No. 1 (1994) at 74).

137. *See* Ramirez, *supra* note 9, at 968.

138. *See id.*

139. *See* Mary Coombs, *Interrogating Identity*, 2 AFR.-AM. L. & POL'Y REP. 222, 230 (1995). At birth, a child's race is determined by pre-existing coding guidelines provided by the National Center for Health Statistics to state bureaus of vital statistics. *Id.* at 231.

140. *See generally* Gayle Pollack, *The Role of Race In Child Custody Decisions Between Natural Parents Over Biracial Children,* 23 N.Y.U. REV. L. & SOC. CHANGE 603 (1997).

141. *Id.* at 612.

nity to take their rightful place in society if they are brought up among their own people."[142]

As recently as 1996, courts granted custody rights to minority children on the basis of this perception that biracial children cannot accept both races of their parents, but must be exposed to one or the other.[143] In *Jones v. Jones*,[144] the South Dakota Supreme Court held that it was proper for the trial court, who had granted custody to the Native American father, "to consider the matter of race as it relates to a child's ethnic heritage and which parent is more prepared to expose the child to it."[145] Although the court recognized the importance of children developing their "own personal identities,"[146] the court actually picked the identity for the child—eliminating any element of choice and in effect ordering the child to become monoracial. This ruling essentially denied a child's right to half of their heritage.

Therefore, it makes sense that the rise of the Multiracial Category Movement (the "MCM")—a movement designed to lobby for the inclusion of a multiracial category on all official governmental data collection forms such as the Census—is also partially a result of one parent (often the White parent) feeling as if they have been eliminated from their children's racial make-up.[147]

Today, a fiction of "color-blind" jurisprudence has gained currency. Supreme Court Justices Rehnquist, Scalia, and O'Connor have all advocated a color-blind approach to the Constitution.[148] However, "critical race scholars have equated the [conception] of 'color-blindness' to white racial dominance and cultural genocide."[149] Many White Americans view the "enforcement of any further remedial action on the racial front as . . . no longer necessary, if not a form of 'reverse discrimina-

142. Ward v. Ward, 216 P.2d 755, 756 (Wash. 1950); *see also* Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 935 (1994).

143. *See* Pollack, *supra* note 140, at 617–18.

144. 542 N.W.2d 119 (S.D. 1996).

145. *Id.* at 123–24, *noted in* Pollack, *supra* note 140, at 617.

146. *See* Pollack, *supra* note 140, at 618.

147. *See* Tanya K. Hernández, *The Interests and Rights of the Interracial Family in a "Multiracial" Racial Classification*, 36 BRANDEIS J. FAM. L. 29, 30–31 (1998) [hereinafter *Interracial Family*].

148. *See Who Cares*, *supra* note 48, at 533–35.

149. *Id.* at 534.

tion.'"[150] The problem with advocating color-blind jurisprudence in a society that continues to practice *de facto* racial discrimination and is nowhere near the establishment of equality, is that it maintains the "status quo existence of race-based privilege."[151] Color-blind jurisprudence denies that it is human nature to categorize, stereotype, and label. Denial, however, allows oppressive categorizations to prevail by avoiding the question of how cultural understanding aids in forming social and legal conceptions of race.[152]

The MCM is also partially a product of color-blind jurisprudence.[153] The true number of multiracial individuals living in the United States is unknown because the Census Bureau requires that all citizens choose a single race by "checking one box only."[154] According to Census Bureau statistics, children normally take the race of the mother.[155] Proclaiming oneself to be one race, however, denies an entire line of racial ancestry of one parent. This rule of "check one box only" forces multiracial children not only to deny one of their heritages, but in essence to deny one of their parents.[156]

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150. G. Reginald Daniel, *Beyond Black and White: The New Multiracial Consciousness, in* RACIALLY MIXED PEOPLE IN AMERICA 333, 337 (Maria P.P. Root ed., 1992).

151. Tanya K. Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence,* 57 MD. L. REV. 97, 144 (1998) [hereinafter *Multiracial Discourse*].

152. *See* Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1628–29 (1991) ("This forgetting of the 'we' who do the 'expounding,' this bracketing of the 'I'—in short, this eclipse of the problem of the subject—became a vital, pervasive, constitutive characteristic of American legal thought. Indeed, American legal thought has been conceptually, rhetorically, and socially constituted to avoid confronting the question of who or what thinks or produces law."). Professor Schlag explains the problem of the subject as follows:

> In a nutshell, then, this is the problem of the subject. Notice that it has already become at least two problems. One problem is that we are missing any convincing accounts of who or what it is that thinks or produces law. Another problem is that apparently we and our legal rhetoric have been constituted to avoid inquiry into this question of who or what produces law.

Id. at 1629.

153. *See Multiracial Discourse, supra* note 151, at 106–15.

154. *See* Ramirez, *supra* note 9, at 964–69.

155. *See* Lawrence Wright, *One Drop of Blood*, NEW YORKER, July 25, 1994 at 46, 47.

156. *See* Ramirez, *supra* note 9, at 966 n.45; *see also* Iijima Hall, *supra* note 113, at 254. Consider the problems of a child who has one parent that is African-American and one parent that is Asian. Which box should this child check?

C. *Mixed-Race Within the Black/White Binary: Rejection of the MCM*

The MCM is "usually presented in terms of its disapproval of all forms of racial classification."[157] The argument equates advocating a multiracial category with abandoning racial and ethnic classifications entirely.[158] As proponents of the MCM "wish to use the multiracial category as a mechanism for moving toward a color-blind society that will effectuate racial equality," this view is consistent with color-blind jurisprudence.[159] This view, however, does not allow for a true multiracial identity. Part of the rationale for allowing a mixed-race person to identify him or herself as "multiracial" is to acknowledge all parts of his or her heritage, not deny them. In identifying the purposes of the MCM, it should be noted that White parents of biracial and multiracial children are the main proponents of the MCM.[160] The interests of White parents are vastly different from the interests of biracial and multiracial persons.

Many advocates of the Multiracial Movement ("MRM") argue that true racial harmony may only be experienced through the "eradication of all racial classifications."[161] In other words, what these parents want for their children is non-race, or to pass on the benefits of the "transparency of whiteness."[162] Because White parents see passing on their Whiteness as a function of biology or genetics, however, they ignore the fact that race is a social construct.[163] It also seems illogical to argue that the best way to get rid of racial classifications is to add one more. Not only is this another classification, but it could become a forced, even oppressive classification. People of mixed descent have never identified themselves as a coherent "mixed-

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157. *Multiracial Discourse, supra* note 151, at 108.

158. *See id.* (quoting Carlos Fernandes, former President of the Association of MultiEthnic Americans, *Review of Federal Measurements of Race and Ethnicity: Hearings Before the Subcomm. on Census, Statistics and Postal Personnel of the House Comm. on Post Office and Civil Service*, 103d Cong. 166 (1993)).

159. *Id.* at 109.

160. *See Interracial Family, supra* note 147, at 32.

161. *Multiracial Discourse, supra* note 151, at 108.

162. *See Interracial Family, supra* note 147, at 33; *see also* note 118 and accompanying text.

163. *See Multiracial Discourse, supra* note 151, at 34–35.

race," but instead identified with one racial group or another in order to establish a sense.[164]

As previously stated, racial classifications are relational, and in a large part determined by a sense of identification and community.[165] Historically, legal rules and social constructions of race identification did not recognize multiracial people as a distinct group, but neither did multiracial individuals themselves.[166] As stated by Naomi Zack:

> Most minorities, no matter how badly they are oppressed by the dominant society, have the option of forgetting about what it is that designates them as different while they are among other members of the same group. But an American of mixed black and white race is as strange to blacks as she is to whites, as soon as she insists on an identity of mixed race. Presumably, her racial condition is shared by those 19,999,999 other individuals of mixed race, but the awareness of the possibility of a mixed-race identity does not even exist as something that is commonly understood among those 19,999,999 people, because they have not yet been identified as mixed race in any way beyond genetic statistics.[167]

In the long run, however, a single multiracial category may further marginalize the experiences of biracial and multiracial individuals by suggesting that there can be a single monolithic "multiracial experience." This suggestion is as baseless as the possibility of a monolithic "Black" or "White" experience. The MRM, while having good intentions and lofty ideals, is not the answer to the multiracial identity problem.

CONCLUSION

What is race? The problems of racial identification have been increased through rigid monoracial categorizations of race. Not only do racial categories tend to encourage stereo-

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164. *See* ZACK, *supra* note 45, at 142.

165. *See supra* Part I.A.1.

166. *See* ZACK, *supra* note 45, at 82–83. By 1920, mulattos as well as Whites had accepted the one-drop rule as an acceptable classification due to their tendency to identify with Blacks as a whole. *See id.*

167. *Id.* at 142–43.

types, but they also marginalize a growing population who wish to recognize all parts of their heritage.

Multiracial identity will not emerge through the institutional imposition of additional racial categorizations. Instead, the "categories [should be] explicitly tentative, relational, and unstable."[168] One defense against the oppressive institutional "racing" of multiracial individuals is for those individuals to "maintain[ ] private identities and cultures that reflect their true racial and cultural combinations."[169]

Legal scholar Mari Matsuda has defined "multiple consciousness" as the ability of women and minorities to shift their thinking from the predominantly White male perspective to their own perspectives gained from their personal experiences: "Minorities . . . can be members of communities that are both privileged and unprivileged. They may shift back and forth, but they are always captured by a social identity that imparts to them because of their visible racial difference and inferior social identity . . . ."[170] Furthermore, multiple consciousness is "relational and it changes according to individuals' wills and the institutions within which they exist."[171]

Multiple consciousness for multiracial individuals may include a perspective derived from experiences as an outsider to both the dominant culture and/or one, two, or more minority cultures. Although Professor Matsuda argues for multiple consciousness as an analytical and jurisprudential tool,[172] it could also be used as a tool for constructing a racial identity.

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168. Harris, *supra* note 43, at 586.

169. Nakashima, *supra* note 123, at 177.

170. Mari J. Matsuda, *When The First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297 (1992). The term "double consciousness" was first coined by W.E.B. Dubois. *See* Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1366 (1992).

> [The term] refers to the propensity of excluded people to see the world in terms of two perspectives at the same time—that of the majority race, according to which they are demonized, despised, and reviled, and their own, in which they are normal. . . . [S]ome—particularly feminists of color—have invented the term 'multiple consciousness' to describe their experience.

Id.

171. Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 283 (1999).

172. *See* Matsuda, *supra* note 170, at 298.

Multiple consciousness as a tool for multiracial identity would alleviate some of the external tensions that are caused by the "racing" of individuals through social and legal categories. Multiple consciousness in the context of mixed race would incorporate not only an understanding of the majority and minority viewpoints, but also experiences gathered by interacting within each group. By using multiple consciousness in this way, a value is placed on the ability to view experiences from two (or more) perspectives at once. It also allows for the incorporation of gender and sexual orientation into any conceptualization of the self.

In arguing for multiple consciousness as a tool for constructing a racial identity, there is no need to create new categories, but rather only a need to redefine existing racial classifications. Because multiple consciousness already advocates a simultaneous, furcated understanding of multiple viewpoints, mixed-race individuals could use this method to identify with two or more races at the same time. Therefore, multiracial people will not have to choose to be one *or* the other, but can be one *and* the other. Furthermore, because rigid racial classifications are not socially beneficial for individuals who consider themselves to be Black-identified or White-identified—or monoracial—anyone could racially identify themselves according to a multiple consciousness method.

The affirmation of a founding father's affair with a slave woman has brought to the forefront the possibility of using "multiple consciousness" as a tool for racial identification. Although the descendents of Sally Hemings, who may be "White-identified," are historically precluded from recognizing a Black ancestor and continue to retain their whiteness, it is now possible for those individuals to recapture a consciousness lost generations ago. It is every individual's choice, however, to consciously decide to recognize every part of him or herself. The dilemma this poses is one multiracial individuals face every day—how do you recognize that you are a part of two separate and distinct cultures, especially when one has historically oppressed the other? Can a biracial person, who is half "of color" and half-White, claim their place in both the oppressed minority and the privileged majority cultures? Usually, the answer is no, and the multiracial individual is forced to choose one or the other. Multiracial individuals can escape restrictive cate-

gories, though, by viewing themselves as belonging to both cultures—claiming "one *and* the other."