Dedication

This book is dedicated to the memory of Judge A. Leon Higginbotham, Jr.,[1] "Uncle Leon" as I called him,[2] whose life and work represent a commitment to racial justice for all. During his professional career as a lawyer, teacher, and judge, Leon Higginbotham often spoke for those who needed it most—the poor, the powerless, and the hopeless. As a result, he provided inspiration to many and the belief in a better tomorrow. In recognition of Leon Higginbotham's values and steadfastness, many referred to him as the conscience of the American judiciary on issues relating to race.

Preparation for this book began in 1995 as a joint project between Leon Higginbotham and me. It was a project we discussed for more than a decade but one that had been delayed due to job demands and time constraints. After Leon Higginbotham retired from the federal bench in 1993, I was determined to go forward with this project. This co-authorship was an outgrowth of our close personal and professional relationship. Leon Higginbotham served as a second father to me providing guidance, support, and love. Our working relationship began in 1974 and included my service as a research assistant on Shades of Freedom: Racial Politics and Presumptions of the American Legal Process, co-author of three law review articles, and co-teacher of Race and the Law classes at the University of Pennsylvania and New York University. Some of the original material contained in this book was initially drafted or edited by Leon Higginbotham.

Upon Leon Higginbotham's death in 1998, I decided to complete the project we started together. While my name appears as the sole author, the idea for this book and its earlier development represent a collaborative effort of Higginbotham and Higginbotham.

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1. For articles honoring the work of A. Leon Higginbotham, Jr., *see* Gates, *Remembering Leon*, VI HARV. J. AFR. AM. POL. 1 (2000); Nye, *Harvard Farewell*, VI HARV. J. AFR. AM. POL. 5 (2000); Sellers, *Working With the Judge*, VI HARV. J. AFR. AM. POL. 7 (2000); Higginbotham, *Promises Kept*, VI HARV. J. AFR. AM. POL. 11 (2000); Chon, *The Mentor and His Message*, 33 LOY. L.A. L. REV. 973 (2000); Adams, Sinins & Yueh, *A Life Well Lived: Remembrances of Judge A. Leon Higginbotham, Jr.—His Days, His Jurisprudence, and His Legacy*, 33 LOY. L.A. L. REV. 987 (2000); Higginbotham & Anderson, *Who Will Carry the Baton?*, 33 LOY. L.A. L. REV. 1015 (2000); Costilo, *An Unforgettable Year Clerking For Judge Higginbotham*, 33 LOY. L.A. L. REV. 1009 (2000); Higginbotham, *A Man for All Seasons*, 16 HARV. B.L. L.J. 7 (2000); Fitts, *The Complicated Ingredients of Wisdom and Leadership*, 16 HARV. B.L. L.J. 17 (2000); Green & Franklin-Suber, *Keeping Thurgood Marshall's Promise—A Venerable Voice For Equal Justice*, 16 HARV. B.L. L.J. 27 (2000); Higginbotham, *Saving the Dream for All*, 26 HUM. RIGHTS 23 (1999); Becker, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1813 (1999); Ogletree, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1818 (1999); N. Jones, *In Memoriam: A Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1818 (1999); E. Jones, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1823 (1999); Norton, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1829 (1999); Hocker, *A. Leon Higginbotham: A Legal Giant*, 13 NAT. BAR ASSOC. MAG. 16 (1999); and Brennan, *Tribute to Judge A. Leon Higginbotham, Jr.*, 9 LAW & INEQ. 383 (1991).

2. Although Leon Higginbotham has no brothers or sisters, I always refer to him as my Uncle even though he and my Dad are cousins. In the Higginbotham Family, it is customary to refer to cousins of one's parents who are from the same generation as Uncle or Aunt, consistent with a tradition followed by some black families with southern roots.

Foreword

F. Michael Higginbotham*

Speaking Truth to Power:
*A Tribute to A. Leon Higginbotham, Jr.***

It has been several years since that November day when A. Leon Higginbotham, Jr.[1] made his last public appearance, testifying before the House Judiciary Committee considering the impeachment of President William Jefferson Clinton. His candid, objective, and scholarly testimony before the Committee helped to convince many members of Congress that the impeachment of Clinton was inconsistent with constitutional provisions, unsupported by legal history, and intellectually dishonest. As he did so many times

* (footnote omitted).

** The phrase "speaking truth to power" is taken from Anita Hill's wonderful book of the same name examining the 1991 Anita Hill-Clarence Thomas hearings before the Senate Judiciary Committee. ANITA HILL: SPEAKING TRUTH TO POWER (1997). To speak truth to power is to maintain the truthfulness of one's speech or actions in the face of a powerful and potentially hostile audience.

As will be indicated in footnotes throughout this Tribute, portions of this Tribute are reprinted with permission from F. Michael Higginbotham, A Man for All Seasons, 16 HARV. BLACKLETTER L.J. 7, 13–14 (2000) [hereinafter Higginbotham, A Man for All Seasons]; F. Michael Higginbotham & Jose Felipe Anderson, A. Leon Higginbotham, Jr.: Who Will Carry the Baton?, 33 LOY. L.A. L. REV. 1015 (2000); and F. Michael Higginbotham, Saving the Dream for All, HUMAN RTS., Summer 1999, at 23 (Reprinted by Permission: Copyright © 1999 by the American Bar Association; F. Michael Higginbotham) [hereinafter Higginbotham, Saving the Dream].

1. Aloyisus Leon Higginbotham, Jr. was born the only child of Aloyisus Leon Higginbotham, Sr. And Emma Douglas Higginbotham in Trenton, New Jersey. He graduated from Ewing Park High School in Trenton at the age of sixteen and went on to Purdue University, but transferred to Antioch College in Ohio, from which he graduated in 1949. He graduated at the top of his class from Yale Law School in 1952 and was admitted to the Pennsylvania Bar in 1953. In the years following, Judge Higginbotham served as President of the Philadelphia branch of the NAACP, a commissioner of the Pennsylvania Human Relations Commission, and a special deputy attorney general.

In 1962, after a successful private practice, Judge Higginbotham was appointed by President John F. Kennedy to the Federal Trade Commission. In 1964, President Lyndon B. Johnson appointed him a federal district court judge, and in 1977, President Jimmy Carter appointed him to the United States Court of Appeals for the Third Circuit. Judge Higginbotham served as Chief Judge of that court from 1989 to 1991, and as a senior judge from 1991 until his retirement in 1993.

During his judicial service, Chief Justices Warren, Burger, and Rehnquist appointed Judge Higginbotham to a variety of judicial conference committees and other related responsibilities. Judge Higginbotham also found time to teach at the law schools of Harvard University, University of Michigan, New York University, University of Pennsylvania, Stanford University, and Yale University.

By appointment of President Johnson, Judge Higginbotham also served as Vice Chairman of the National Commission on the Causes and Prevention of Violence. In November 1995, he was appointed to the United States Commission on Civil Rights. Also in 1995, he received the Presidential Medal of Freedom, the nation's highest civilian award.

throughout his professional career, Leon spoke truth to power.[2] Sometimes, power acceded to his truth, but more often only history proved him right. Nonetheless, Leon had the courage to speak the truth no matter how strong the opposition or controversial the issue.

Leon's position regarding impeachment was that, while Congress certainly has the power to remove the President from office when an impeachable offense has been committed, President Clinton's alleged act of perjury was not such an offense.[3] In Leon's view, not all illegal acts, not even all felonies, rise to the level justifying Congress's removal of the President. Leon posed the following hypothetical question: Would the Judiciary Committee have proposed impeaching President Clinton had he been cited for driving at a speed of fifty-five miles per hour in a fifty mile-per-hour speed zone, yet later falsely testified, under oath, that he had been driving only forty-nine miles per hour?[4] He then stated:

> I submit that as to impeachment purposes, there is not a significant substantive difference between the hypothetical traffic offense and the actual sexual incident in this matter. The alleged perjurious statements denying a sexual relationship between the President of the United States and another consenting adult do not rise to the level of constitutional egregiousness that triggers the impeachment clause of Article II.[5]

As Leon intimated, yes, it was true that President Clinton may have lied under oath. Yes, it was true that President Clinton's behavior with Monica Lewinsky may have been unwise. Yes, it was true that some of these activities could reasonably be characterized as felony offenses. Yet, as Leon so persuasively argued, it was also true that not all felonious conduct would or should lead to impeachment. The Senate's subsequent refusal to convict President Clinton and remove him from office suggests its recognition of Leon's truth.

A. Leon Higginbotham, Jr. began speaking truth to power in 1944 when he was a sixteen-year-old freshman at Purdue University. In the preface to his first book, *In the Matter of Color*,[6] Leon wrote about his first experience speaking truth to power:

> I was ... one of twelve black civilian students. If we wanted to live in West Lafayette, Indiana, where the university was located, solely because of our color the twelve of us at Purdue were forced to live in a crowded private house rather than, as did most of our white classmates, in the university campus dormitories. We slept barracks-style in an unheated attic.
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> One night, as the temperature was close to zero, I felt that I could suffer the personal indignities and denigration no longer. The United States was more than

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2. *See supra* note *. Perhaps Leon's most famous "truth to power" was the letter he sent to Justice Clarence Thomas in 1992 after Thomas's confirmation as an Associate Justice of the United States Supreme Court. A. Leon Higginbotham, *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U.PA. L. REV. 1005 (1992). Much has been written about this letter, but a further examination of it and the circumstances surrounding its writing are beyond the scope of this article.

3. Portions of the following anecdote are reprinted with permission from Higginbotham, *A Man for All Seasons*, *supra* note *, at 13–14.

4. *Consequences of Perjury and Related Crimes Before the House Comm. on the Judiciary*, 105th Cong. 67 (1998), *available at* http://www.house.gov/judiciary/full.htm (statement of A. Leon Higginbotham, Jr.).

5. *Id.*

6. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE IN THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD (1978). The book has been cited by federal and state courts as a reliable source of the legal history of the American colonial period. *E.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 329 (1987) (Brennan, J., dissenting); *United States v. Long*, 935 F.2d 1207, 1211 (11th Cir. 1991); *Commonwealth v. Rogers*, 393 A.2d 876, 880 (Pa. Super. Ct. 1978).

two years into the Second World War, a war our government had promised would "make the world safe for democracy." Surely there was room enough in that world, I told myself that night, for twelve black students in a northern university in the United States to be given a small corner of the on-campus heated dormitories for their quarters. Perhaps all that was needed was for one of us to speak up, to make sure the administration knew exactly how a small group of its students had been treated by those charged with assigning student housing.

The next morning, I went to the office of Edward Charles Elliot, president of Purdue University, and asked to see him. I was given an appointment.

At the scheduled time I arrived at President Elliot's office, neatly (but not elegantly) dressed, shoes polished, fingernails clean, hair cut short. Why was it, I asked him, that blacks—and blacks alone—had been subjected to this special ignominy? Though there were larger issues I might have raised with the president of an American university (this was but ten years before *Brown v. Board of Education*) I had not come that morning to move mountains, only to get myself and eleven friends out of the cold. Forcefully, but nonetheless deferentially, I put forth my modest request: That the black students of Purdue be allowed to stay in some section of the state-owned dormitories; segregated, if necessary, but at least not humiliated.

Perhaps if President Elliot had talked with me sympathetically that morning, explaining his own impotence to change things but his willingness to take up the problem with those who could, I might not have felt as I did. Perhaps if he had communicated with some word or gesture, or even a sigh, that I had caused him to review his own commitment to things as they were, I might have felt I had won a small victory. But President Elliot, with directness and with no apparent qualms, answered, "Higginbotham, the law doesn't require us to let colored students in the dorm, and you either accept things as they are or leave the University immediately."

As I walked back to the house that afternoon, I reflected on the ambiguity of the day's events. I had heard, on that morning, an eloquent lecture on the history of the Declaration of Independence, and of the genius of the founding fathers. That afternoon I had been told that under the law the black civilian students at Purdue University could be treated differently from their 6,000 white classmates. Yet I knew that by nightfall hundreds of black soldiers would be injured, maimed, and some even killed on far flung battlefields to make the world safe for democracy. Almost like a mystical experience, a thousand thoughts raced through my mind as I walked across campus. I knew then I had been touched in a way I had never been touched before, and that one day I would have to return to the most disturbing element in this incident—how a legal system that proclaims "equal justice for all" could simultaneously deny even a semblance of dignity to a 16-year-old boy who had committed no wrong.[7]

Leon explained the simple facts to the most powerful person at Purdue University. It was true that the attic was cold. It was true that the attic was overcrowded. Unfortunately, as Leon found out that day, it was also true that those in power at Purdue University would not remedy this injustice. In this initial experience, Leon began to display the com-

7. HIGGINBOTHAM, *supra* note 7, at vii–ix.

mitment, leadership, dedication, sacrifice, honesty, directness, and courage that would guide him throughout his life.

Some of Leon's most powerful truth was reserved for the leaders of the National Party, the ruling political party in South Africa from 1948 until 1994 and the creator of apartheid.[8] In 1986, on one of his six trips to South Africa, Leon and a group of American business and academic leaders[9] visited during a period of "reform" of the apartheid system.[10] While the National Party had instituted apartheid in 1948 and had vigorously defended it for forty years, due to some recent newspaper accounts, there was some sense among members of the American delegation that the Party might be willing to reevaluate its position. Upon arrival at the impressive government building in Capetown, however, the American delegates were roundly informed that the National Party remained enthusiastically committed to racial segregation and discrimination. Several National Party members of Parliament explained that blacks and whites had vastly different cultures, resulting in constant conflict between the races. Consequently, they said, it was necessary to separate the races in order to protect each from the other and to create an atmosphere where each culture could thrive. These lawmakers were adamant that the races must remain separated, and throughout their presentation, they appeared to ignore Leon, the only black person in the delegation.

Most of the Americans seemed stunned that the National Party officials had reiterated their commitment to racial separation so enthusiastically, had been so dogmatic in their presentation, and had displayed such rudeness to Leon. When the Americans were asked to respond, they all looked to Leon to articulate their collective feelings.[11]

Leon addressed the Party officials without fear or hesitation. He began by talking about how much all human beings have in common. They all need food, shelter, and clothing. They all desire love and happiness. And they all are able to benefit from education, scientific discoveries, and health care. He kept reiterating the theme that we are all part of the human family, and that when we work together we are able to accomplish so much more. Leon then discussed the infamous atrocities that human beings had committed against one another over the years and how the perpetrators of such oppression had been judged in the corridors of history. He talked about how wrongs would not go unpunished much longer. In conclusion, Leon quoted the character Shylock from William Shakespeare's play "The Merchant of Venice." Shylock said to his adversaries:

> He hath disgraced me ... scorned my nation ... cooled my friends, heated mine enemies, and what's his reason? ... If you prick us do we not bleed? If you tickle us do we not laugh? If you poison us do we not die? And if you wrong us

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8. After winning its first national election in 1948, the National Party began to implement a variety of racial segregation laws and policies that collectively became known as apartheid. *See* A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763; A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479 (1990) [hereinafter *American Experience and the South African Challenge*, 42 DUKE L.J. 1028 (1993) [hereinafter Higginbotham, *Seeking Pluralism*]. The following anecdote is in large part reprinted with permission from Higginbotham, *A Man for All Seasons*, *supra* note *, at 9–10.

9. The group included W. Michael Reisman, Professor of Law at Yale University, James Laney, President of Emory University and member of the board of directors of Coca Cola, and Robert Rotberg, President of the World Peace Foundation.

10. For improved domestic and international relations, on several occasions, the National Party made minor or cosmetic changes to the racial laws of South Africa. *See* TOM LODGE, BLACK POLITICS IN SOUTH AFRICA SINCE 1945 (1985).

11. *Id.* at 9.

> shall we not revenge? If we are like you in the rest, we will resemble you in that.... The villainy you teach me I will execute, and it shall go hard but I will better the instruction.[12]

Leon then added a final, stinging observation. He stated that based upon the substance and behavior of the speakers, he could no longer, in good conscience, consider them part of the human family.[13]

As Leon knew so well, Shakespeare's expression captures the hidden fears of all persons who are or have been oppressors. While none of the Americans were deluded into thinking that any racist attitudes had been changed that day by Leon's truth, there was a great sense of satisfaction in knowing that these race supremacists had been made to understand that they, not black South Africans, were the real outcasts, and that sooner or later there would be a high price to pay for their continued oppression. As each American delegate stood, indicating unanimous agreement with Leon's response, the powerful members of Parliament were made to consider the truth of those statements. The National Party's subsequent negotiation with the African National Congress to end apartheid suggests their recognition of Leon's truth.

Leon had a special gift for helping decision-makers in positions of authority realize the error of their thinking and to open up their hearts' compassion.[14] He could criticize without being offensive, prod without being irritating, and motivate without being preachy. One of his favorite stories involved his alma mater, Yale University, and its decision to make its undergraduate program coeducational. Leon was the first African American to serve on Yale's board of directors,[15] and he was a vigorous advocate for the admission of women into Yale College. Leon often reminded listeners of the vast contributions of both America's forefathers and foremothers, and how Americans should recognize the significant involvement of women in the abolition of slavery and in the Civil Rights Movement.[16] More specifically, Leon spoke at several board meetings about how to measure the quality of a university. He talked about the extent of the resources, the quality of the faculty, but, most significantly, the contribution of its students. He then began to identify the many contributions to the life of the university made by female graduate students at Yale, and how those contributions had benefited the entire school. After an historic meeting where, at the urging of Leon and others, the board of directors decided to admit women to its undergraduate ranks,[17] one of the directors opposed to such admission remarked to Leon that it was a sad day in Yale's great history and one that they all would come to regret. Several years later that same director told Leon at a Yale graduation ceremony how happy he was and what a great day it was for him because his daughter was in Yale College's graduating class.

It was true that Yale College would admit women for the first time. It was true that such admittance would help to create gender equality, which would fundamentally change

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12. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, *in* THE COMPLETE WORKS, act 3, sc. 1, 11, 50–68 (Stanley Wells & Gary Taylor eds., Clarendon Press 1986).

13. Leon often quoted Shakespeare in responding to comments made in support of apartheid. *Cf.* Higginbotham, *Seeking Pluralism*, *supra* note 9, at 1061–63.

14. Some portions of the following anecdote are reprinted with permission from Higginbotham, *A Man for All Seasons*, *supra* note *, at 10.

15. Samuel M. Hughes, *Summing Up Leon Higginbotham*, PA. GAZETTE, Feb. 1993, at 18, 20.

16. *See* A. Leon Higginbotham, Jr., *Rosa Parks: Foremother & Heroine Teaching Civility & Offering a Vision for a Better Tomorrow*, 22 FLA. ST. U. L. REV. 899, 900–8 (1995).

17. The Yale Law School had begun admitting women in 1884. A. Leon Higginbotham, Jr., *The Life of the Law: Values, Commitment, and Craftsmanship*, 100 HARV. L. REV. 795, 796 n. 2 (1987).

Yale forever. And history has proven Leon's assertion that this fundamental change would be good for far more than just those women admitted. It was also good for those men who would be their classmates, and for the university. It was good for those who lacked the foresight to perceive the long-term common benefit, for those who lacked the compassion to see the unfairness of such exclusion, and for those who possessed the selfishness to want to keep the greatness of Yale all to themselves.

As an enthusiastic supporter of the Civil Rights Movement, Leon often spoke to conservatives who had unsuccessfully opposed the movement and subsequently attempted to reverse its accomplishments. In an eye-opening 1992 editorial entitled "The Case of the Missing Black Judges,"[18] Leon examined the impact and meaning of the judicial appointments of President Reagan and the first President Bush, concluding that their desire to create a more "conservative" federal court system resulted in few judicial appointments of African Americans. He explained:

> [T]o the extent that the appointment of judges is a barometer of a President's feelings about placing historically excluded groups in positions of power, Jimmy Carter showed that he had complete confidence in African Americans.

President Reagan apparently felt otherwise and President Bush apparently does, too. On taking office, they both asserted that they wanted a far more "conservative" Federal court system. In that, they have succeeded admirably. But in the process they have turned the Courts of Appeals into what Judge Stephen Reinhardt of the Court of Appeals for the Ninth Circuit has called "a symbol of white power."

In eight years of office, out of a total of 83 appellate appointments, Ronald Reagan found only one African American whom he deemed worthy of appointment, Lawrence W. Pierce. President Bush's record is just as abysmal. Of his 32 appointments to the Courts of Appeals, he also has been able to locate only one African American he considered qualified to serve: Justice Clarence Thomas....

By 1993, six of the 10 African Americans sitting on the Courts of Appeals will be eligible for retirement. As the African-American judges appointed by President Carter have retired, Presidents Reagan and Bush have replaced them largely with white judges in their 30s and early 40s....

I am forced to conclude that the record of appointments of African Americans to the Courts of Appeals during the past 12 years demonstrates that, by intentional Presidential action, African-American judges have been turned into an endangered species, soon to become extinct.[19]

Shortly after publication of this editorial, the first President George Bush was defeated by Bill Clinton, whose judicial appointments were much more racially diverse than his immediate predecessors. In seven years, Clinton appointed 52 African-American judges out of a total of 296, including five to the courts of appeals.[20] Thanks to a concerted effort to reverse political conservatism in the courts, which was initially identified and enthusiastically supported by Leon, it seems that President Clinton was able to recognize the truth of Presidents Reagan and Bush's judicial appointments records and to solve "the case of the missing black judges."

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18. A. Leon Higginbotham, Jr., *The Case of the Missing Black Judges*, N.Y. TIMES, July 29, 1992, at A15.

19. *Id.*

20. Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 264, 275, 280 (1999).

Leon served as a judge on the federal bench for twenty-nine years.[21] In one of his most powerful opinions, *Commonwealth v. Local 542, International Union of Operating Engineers*,[22] Leon responded to a motion asking that he recuse himself because he was black. This case was a civil rights employment action brought by black construction workers against the construction industry. The defendants moved for Judge Higginbotham to recuse himself because of comments the Judge had made while speaking to a luncheon organized by the Association for the Study of Afro-American Life and History. At the luncheon, Leon stated that African Americans could no longer rely exclusively on the Supreme Court as an instrument for social change. In responding to this recusal motion, Leon explained that the presence of bias, not skin color, should be the determining factor in a recusal decision.[23] He explained:

> I concede that I am black. I do not apologize for that obvious fact. I take rational pride in my heritage, just like most other ethnics take pride in theirs. However, that one is black does not mean, ipso facto, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant.[24]

Again, Leon spoke truth to power. It was true, he was a proud black man understanding and appreciating the obstacles, sacrifices, and accomplishments of those African Americans who had fought and, in some cases died, for freedom and equality. It was true that he was not consequently anti-white. Leon spent his entire professional career writing, speaking, and treating all individuals, irrespective of race, as equal and respected members of the human family.[25] But as Leon so truthfully pointed out, he was not going to allow wealthy and powerful white litigants to characterize him as less objective than white judges just because he happened to be black.

Leon saved his most frequent criticism, however, for those who refused to acknowledge the continued presence of racism in America. He frequently reminded listeners of Justice Roger Brooke Taney's[26] 1857 opinion in *Dred Scott v. Sandford*,[27] where Taney reasoned that blacks were "beings of an inferior order, and altogether unfit to associate with the white race ... and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his [own] benefit."[28] Leon reminded listeners that the *Dred Scott* opinion will be remembered as the legal decision that paved the way for the Civil War.[29]

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21. Leon was appointed to the United States District Court for the Eastern District of Pennsylvania in 1964 by President Lyndon Johnson. He was elevated to the United States Court of Appeals for the Third Circuit in 1977 by President Jimmy Carter. He became Chief Judge of the Third Circuit in 1989. The following story is reprinted with permission from Higginbotham, *A Man for All Seasons*, *supra* note *, at 11.

22. 388 F. Supp. 155 (E.D. Pa. 1974).

23. *See id.* At 159–60.

24. *Id.* at 163.

25. (footnote omitted).

26. Taney served as Chief Justice of the United States Supreme Court from 1836–1864. "Taney brought infamy upon himself because he viewed the alleged inferiority of blacks as an axiom of both law and the Constitution, a legal discrimination that he saw sanctioned even in the Declaration of Independence." THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 859 (Kermit L. Hall ed., 1992).

27. 60 U.S. 393 (1857).

28. *Id.* at 407.

29. Professor Derrick Bell points out that "the very excessiveness of the decision's language likely spurred those opposed to slavery to redouble their efforts to abolish [slavery]." DERRICK BELL, RACE,

Leon also recognized that *Dred Scott* will be remembered as the case that most clearly demonstrates that many white Americans embraced the notion of black inferiority. Justice Taney explained that the assumed inferiority of blacks at the time the country was founded was "fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute."[30] This view was shared by writers of the time[31] and endured after the Civil War into the early 1900s.[32]

Leon observed that this belief that "African Americans are of an 'inferior order' is an idea some find difficult to abandon."[33] Although he recognized that many people would challenge this notion and even more would find the suggestion that they harbor such feelings "downright insulting,"[34] he nevertheless was adamant in opposing the notion that the Civil War had a cleansing effect on the wrongness and impact of slavery.[35] He spoke truth in the face of an unreceptive white majority. He began by identifying the problem that the majority of white Americans believe "that they personally have nothing whatsoever to do with slavery, segregation, or racial oppression because neither they nor—as far as they know—their ancestors ever enslaved anyone, ever burned a cross in the night in front of anyone's house, or ever denied anyone a seat at the front of the bus."[36] This "self-absolving denial," Leon maintained, made it "nearly impossible to have an honest discussion about what used to be called 'the Negro Problem.' "[37] In Leon's view, this explains why it is so difficult to remove racial oppression from our society even though *de jure* segregation and discrimination have been eliminated in the law. He would ask rhetorically, why are so many statistical,[38] economic,[39] and educational[40] disparities attributed to racism by most blacks, but dismissed as mere coincidence by many whites? Leon's explanation for this dichotomy was that the effects of dormant or even unconscious racism emerge through the application of law, but cannot be directly traced to the law itself.

As Leon pointed out in his book *Shades of Freedom*, the statistical disparities continue to be overwhelming, and as Leon also highlighted, these disparities began and were exacerbated by slavery, segregation, and discrimination. Leon wrote volumes on the connection between past discrimination and present inequities,[41] but when reason failed

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RACISM, AND AMERICAN LAW 25–26 (3d ed. 1992). Portions of the following discussion are reprinted with permission from Higginbotham & Anderson, *supra* note *, at 1027.

30. *Dred Scott*, 60 U.S. at 407.

31. For an interesting collection of pro-slavery writings produced in the decades prior to the Civil War, see SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH (Eric L. McKitrick ed., 1963).

32. After the Civil War, attitudes about racial inferiority were sometimes presented as being supported by dubious scientific research. *See* HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE 5–6 (1978) (summarizing research at the turn of the century alleging that black inferiority was a hereditary characteristic).

33. A. LEON HIGGINBOTHAM, JR.: SHADES OF FREEDOM 7 (1996).

34. *Id.*

35. *See id.* at 29.

36. HIGGINBOTHAM, *supra* note 34, at 7. This belief was articulated by Justice Scalia. *See* Antonin Scalia, *The Disease As Cure: "In Order To Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147, 152.

37. *Id.* at 7–8.

38. Blacks have been over-represented in the criminal justice system compared to their relative numbers in the population. *See* JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 461 (1985).

39. *See* HIGGINBOTHAM, *supra* note 34, at 7.

40. *See* BELL, *supra* note 29, at 611 (discussing the lower quality of education in predominantly black schools).

41. *See* HIGGINBOTHAM, *supra* note 34, at 207–12.

he always seemed to return to the one simple axiom "we should not be ignorant as judges of what we know to be true as men."[42]

Leon refused to accept any award, no matter how prestigious, from organizations that did not reflect racial, ethnic, religious, and gender pluralism.[43] I will never forget the time he rejected the University of Chicago Law School's invitation to judge their prestigious moot court competition because they had no black faculty at the law school and had not for many years.[44]

Speaking so much truth to power did have its benefits. Throughout his professional career and particularly during the last ten years of his life, Leon received numerous awards, including the Lifetime Achievement Award from the National Bar Association, the NAACP's Spingarn Medal, and the nation's highest civilian honor—the Presidential Medal of Freedom. He was the first member of a minority group and the youngest person ever appointed to be a federal commissioner of the Federal Trade Commission. At the age of thirty-six, he was the youngest African American appointed to the federal bench. At the time of his death, Leon held more than sixty honorary degrees.

While no stranger to criticism from conservatives[45] and never hesitant to refute their constant policy attacks,[46] Leon's primary concern was to continue the progress begun by the Civil Rights Movement.[47] He recognized that the civil rights tradition that he was fighting to preserve was much more important than his own popularity. Personal attacks, no matter how unfounded, would not dissuade him from this focus. Leon expressed specific concerns about several recent decisions of federal circuit courts of appeals that attacked traditional civil rights doctrine. He critiqued the Fifth Circuit's affirmative action decisions[48] and the Fourth Circuit's approaches to accused criminals' procedural rights[49] that represented what he called a "substantial threat to what [he] thought was well-settled legal doctrine."[50]

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42. Justice Frankfurter used these words in Watts v. Indiana, 338 U.S. 49, 52 (1949) (citing *Bailey v. Drexel Furniture Co.* (The Child Labor Tax Case), 259 U.S. 20, 37 (1922)).

43. Much of the following discussion is Reprinted by Permission. It is taken from Higginbotham, *Saving the Dream*, *supra* note *, at 24.

44. Letter from A. Leon Higginbotham, Jr., Judge of the United States Court of Appeals for the Third Circuit, to Geoffrey Stone, Dean, University of Chicago Law School (Mar. 12, 1987) (on file with Yale Law and Policy Review).

45. Al Knight, *New Racial Stereotypes Are Replacing the Old*, DENVER POST, Aug. 2, 1998, at G3; Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC Dec. 9, 1996, at 27–28; Tony Snow, *Thomasphobes Are Unremitting; Clarence Thomas Is Hate Target*, CINCINNATI ENQUIRER, June 22, 1998, at A6.

46. *See* A. Leon Higginbotham Jr., *Blacks Remember Other Contracts Put Out on Them*, PHILA. INQUIRER, May 11, 1995, at A19; A. Leon Higginbotham Jr., *Breaking Thurgood Marshall's Promise*, N.Y. TIMES, Jan. 18, 1998, Magazine, at 28; Higginbotham, *supra* note 19, at A21; A. Leon Higginbotham, Jr., *Dear Mr. Speaker: An Open Letter to Newt Gingrich*, NAT'L L.J., June 5, 1995, at A19.

47. This discussion is reprinted with permission from Higginbotham & Anderson, *supra* note *, at 1029–30.

48. In 1996, the United States Court of Appeals for the Fifth Circuit held that "the use of race to achieve a diverse student body ... simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny." *Hopwood v. Texas*, 78 F.3d 932, 948 (5th Cir. 1996).

49. The Fourth Circuit had been described as "by far the most restrictive appeals court in the nation granting new hearings in death penalty cases, according to statistical studies." Recently the Fourth Circuit issued an opinion that directly challenged the validity of the Supreme Court's precedent in *Miranda v. Arizona*, 384 U.S. 436 (1966), which provided that criminal defendants be advised of their rights upon arrest. *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999) *See* Neil A. Lewis, *A Court Becoming a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1.

50. This quotation and the following story (including the footnotes) are reprinted with permission from Higginbotham & Anderson, *supra* note *, at 1030.

In one of the last conversations I had with Leon during Thanksgiving weekend of 1997, he suggested that some legal scholars needed to get together and "do the difficult work of reviewing every reported civil rights decision of the circuit courts and attack those decisions which would serve as precedent to turn back the civil rights clock." He lamented that he did not have time to do it himself, saying that such an effort done properly would require thousands of hours by many diligent academics. Nevertheless, he considered such an effort to be the single most important scholarly project one could imagine.

Leon concluded the conversation with the hope that sometime soon he could sponsor a conference in order to discuss some of these ideas with the many supporters of civil rights throughout the country. He thought that such a gathering could be the touchstone for new strategies and initiatives to create equal opportunity in the new millennium. He imagined a conference similar to the legendary Niagara Project, which served as a catalyst for the important work of the NAACP.[51]

Soon thereafter, Leon passed away. But his idea for a second Niagara Conference is alive and well today at Yale. As we go forward to discuss the issues that meant so much to A. Leon Higginbotham, Jr., remember his life, his dedication, his compassion, but most importantly his belief that speaking the truth about injustice, no matter how powerful the recipient or unwelcomed the message, will one day set us all free.

20 *Yale Law & Policy Review* 341, 341–51.

51. The NAACP was started when a distinguished group of blacks and whites convened a conference on the Canadian side of Niagara Falls in early 1905 to discuss ways to reduce racial discrimination in the United States. A location in Canada was chosen to avoid racial segregation laws in the United States. *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 318–20 (7th ed. 1994).

Gift Chapel—Fort Sam Houston. Houston, Texas. November 1, 1917. Largest murder trial in American history. Negro Almanac Collection, Amistad Research Center at Tulane University. Copyright © (1966) Amistad Research Center. Reprinted with permission of the Amistad Research Center. For background information on the trial, see text accompanying the Preface.

Preface

F. Michael Higginbotham

Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces

Perhaps because of the symbolic nature of military service or of the fear of blacks who were organized, disciplined, and trained in the use of firearms and explosives, black military personnel paid a high price for opposing racially discriminatory treatment and policies. Two famous incidents involving black protests and self-defense demonstrate the high price many blacks paid for their patriotism.

The first incident occurred in Brownsville, Texas, in 1906. Soldiers of the Twenty-Fifth Infantry were accused of rioting against white residents of Brownsville who were discriminating against black soldiers. Incidents of discrimination were widespread including refusals of service at stores open to the public, verbal and physical assaults, and false arrests. White residents reported that in the early morning hours of August 14, a group of six to twenty black soldiers fired hundreds of shots into several buildings within a three block radius. One white civilian was killed and a police officer was injured. An investigation failed to identify the soldiers involved in the incident, yet President Theodore Roosevelt imposed a never before utilized group punishment approach and dishonorably discharged three entire companies, totaling 167 men. Some of these men had twenty-seven years of service and six of them were recipients of the Medal of Honor, the Nation's highest military award.

A second incident occurred in Houston, Texas, in 1917. Black soldiers were subjected to the scorn of certain racist civilians and police officers living near the military base, just like those at Brownsville. Not only were they segregated on trolleys, black soldiers were spat upon, called derogatory names, assaulted, and incarcerated in the city jail. After one particularly brutal arrest involving threats of lynching, soldiers of the Twenty-Fourth Infantry broke into the base armory, seized weapons, and attacked some of the townspeople involved in the incident including several of the racist police officers. Seventeen people were killed. In response to the deaths, the military indicted 118 soldiers. Again, military justice was swift, deadly, and severely prejudiced. Thirteen soldiers were tried, convicted, and executed for murder and mutiny before their appeal could be heard. Six additional soldiers were hung at a later date. Moreover, approximately sixty-three soldiers received sentences of life imprisonment.

While duty, honor, and country were values universally embraced by the United States armed forces, when it came to black soldiers, such values were minimized or completely ignored. The values of duty, honor, and country were subordinated to the notion of white supremacy. Despite a legal system based on the premise of individual guilt and responsibility, African-American soldiers were collectively blamed for the alleged criminal activity of fellow black soldiers. Despite a legal system based on due process of law, African-American soldiers on trial were rushed to judgment and punishment. Finally, despite a legal system

based on the notion that the punishment should fit the crime, African-American soldiers were given the harshest sanctions available even in the presence of numerous mitigating circumstances.

These two incidents exemplify the military's notion of race law prior to its desegregation in 1948. As the picture accompanying the preface so starkly portrays, race law often involved white prosecutors, white judges, and white jurors interpreting and enforcing racially discriminatory laws and choosing the harshest options available for non-whites in order to maintain and strengthen the notion of white racial superiority.

8 *William & Mary Bill of Rights Journal* 273, 300–2 (2000).

XXXI. History Timeline

The Earliest Protest Against Slavery (1688)
(Meeting held by Quakers disparaging the institution of slavery and those who participated in it).

The Declaration of the Causes and Necessity of Taking Up Arms (1775)
(Stating grievances, including taxation without representation, by the colonies against Great Britain).

The Declaration of Independence (1776)
(Declaring colonial independence from Great Britain and stating that all men are created equal and are endowed by their creator with certain inalienable rights).

The Revolutionary War (1776–1781)
(A war to secure colonial independence from Great Britain).

The Articles of Confederation (1781)
(A failed attempt at federal authority over the colonies).

The Northwest Ordinance (1789)
(A law for the government of the Territory of the United States northwest of the Ohio River that included a prohibition on slavery).

The Constitution of the United States (1789)
(Delineating the rules governing inhabitants of the United States including several provisions sanctioning the institution of slavery and vesting legislative power to the Congress of the United States, executive power to the President of the United States, and judicial power to the Supreme Court of the United States).

The Fugitive Slave Act (1793)
(A law implementing the return of fugitives from justice and slaves escaping from the service of their owners).

State v. Boon, 11 N.C. 246 (1801)
(Holding that it was not a crime for a white person to kill a slave).

Hudgins v. Wrights, 11 Va. 134 (1806)
(Holding that slavery or freedom depended upon the status of one's mother at the time of birth, and declaring that there was a presumption in the law that if a person was white, then he was presumed free, and if he was black, then he was presumed to be a slave).

The Missouri Compromise (1820)
(A law to authorize the people of the Missouri Territory to form a state government and to be admitted into the Union as a slave state on an equal footing with the original states, providing that for each slave state admitted to the Union a corresponding free state must also be admitted).

Johnson v. McIntosh, 21 U.S. 543 (1823)
(Holding that without Congressional authorization, Native Americans had no legal authority under the Constitution to convey title of land to private individuals that could be recognized in an American court).

State v. Mann, 13 N.C. 263 (1829)
(Holding that cruel and unreasonable battery on a slave by the hirer is not indictable because of the recognition of full dominance of the owner over the slave except where the exercise of it is forbidden by statute).

The Indian Removal Act (1830)
(A law providing for an exchange of lands with the Native Americans residing in any of the states or territories in the East, and for their removal west of the Mississippi River).

The Cherokee Nation v. Georgia, 30 U.S. 1 (1831)
(Holding that Native Americans do not constitute a foreign nation entitled to the rights and privileges thereof).

Crandall v. Connecticut, Conn. Rep. 339 (1834)
The issue in this case was whether blacks were citizens under the Constitution.
(The lower court ruled that blacks were not citizens. The appellate court did not reach a decision on the merits but dismissed the case on a technicality).

The United States v. Amistad, 40 U.S. 518 (1841)
The issue in this case was whether captured blacks born in Africa were the property of slave-owners. (Holding that the captured blacks were free due to the Congressional prohibition of the international slave trade).

Prigg v. The Commonwealth of Pennsylvania, 41 U.S. 539 (1842)
(Holding that the Pennsylvania law prohibiting the forcible removal of escaped slaves from the state violated the Fugitive Slave Clause of the Constitution).

The Commonwealth of Virginia v. Jones, 43 Va. (2 Gratt.) 477 (1845)
(Holding that cohabitation of a white man with a slave was not a common law crime but was punishable under the criminal code).

Abolitionist Frederick Douglass publishes his autobiography, *Narrative of the Life of Frederick Douglass, an American Slave* (1845)
(Describing slavery and how Douglass escaped to freedom).

Roberts v. The City of Boston, 59 Mass. 198 (1850)
The issue in this case was whether race segregation was reasonable. (Holding that based on tradition, segregation was reasonable and, therefore, lawful).

The Fugitive Slave Act (1850)
(A law—amending the first fugitive slave act making it easier to return fugitive slaves).

Souther v. The Commonwealth of Virginia, 48 Va. 673 (1851)
The issue in this case was whether the slave-owner who fatally beat his slave was liable for murder. (Holding that under certain rare circumstances, a slave-owner could be convicted for murdering his slave).

Harriet Beecher Stowe publishes her novel *Uncle Tom's Cabin; or, Life Among the Lowly* (1852)
(Describing slavery and slave life in brutal detail).

People v. Hall, 4 Cal. 399 (1854)
(Holding that the term "black" includes all those not classified as white).

Scott v. Sandford, 60 U.S. 393 (1857)
The issue in this case was whether a person of African descent could be a citizen of the United States. (Holding that Scott was not a citizen within the meaning of the Constitution of the United States, and, therefore, not entitled to sue in its courts).

George v. State, 37 Miss. 316 (1859)
(Holding that it was not a crime to rape a slave woman).

The Civil War (1860–1865)
(A war between Northern and Southern states over the withdrawal of some Southern states from the Union and disagreements over the abolishment of slavery).

The Emancipation Proclamation (1863)
(Executive order by President Abraham Lincoln that those held in slavery in states in rebellion are free, and that the government "will recognize and maintain" their freedom).

The Thirteenth Amendment (1865)
(Prohibiting slavery and involuntary servitude and giving Congress the authority to enforce the prohibitions).

The Freedman's Bureau Act (1865)
(A law to establish financial and social assistance to freed slaves).

The Black Code of Mississippi (1865)
(Creation of state laws impeding the civil rights of freed slaves in Mississippi).

The Civil Rights Act (1866)
(Declaring that all persons born in the United States including former slaves are citizens; prohibiting racial discrimination in the sale or lease of land, the issuance and enforcement of contracts, the bringing of law suits and presentment of testimony, and all other laws and proceedings for the security of person and property; and, providing that the federal courts would have jurisdiction over all disputes under the Act and could punish any persons in violation).

The Fourteenth Amendment (1868)
(Declaring that all persons born in the United States are citizens, guaranteeing them equal protection of the laws, due process, and privileges and immunities of citizenship, and giving Congress the authority to enforce the provisions).

The Fifteenth Amendment (1870)
(Prohibiting racial discrimination in voting and giving Congress the authority to enforce the prohibition).

The Enforcement Act (1870)
(A re-enactment of the jurisdictional component of the Civil Rights Act of 1866 providing that the federal courts would have jurisdiction over all disputes involving alleged violations of the civil and constitutional rights of African Americans).

Hiram Rhodes Revels becomes a United States Senator representing Mississippi (1870)
(Becoming the first African American to hold a seat in the Senate).

The Slaughterhouse Cases, 16 Wall. 36 (1873)
(Holding that a Louisiana statute creating one slaughterhouse in the state for all butchers did not violate the Thirteenth or Fourteenth Amendment because of narrow definitions given to the terms contained in the amendments).

The Civil Rights Act (1875)
(Prohibiting racial discrimination in public accommodations).

United States v. Cruikshank, 92 U.S. 542 (1875)
(Holding that the United States did not show that it was the intent of the defendants, by their conspiracy, to injure and murder black members of the Republican Party or to hinder or prevent the enjoyment of any right granted or secured by the Constitution).

Strauder v. West Virginia, 100 U.S. 303 (1880)
(Holding that a state law barring African Americans from jury service violated the Equal Protection Clause of the Fourteenth Amendment).

The Civil Rights Cases, 109 U.S. 3 (1883)
The issue in these cases was the constitutionality of exclusionary laws prohibiting blacks access to public accommodations. (Holding that Congress did not have the authority to prohibit racial discrimination in public accommodations under either the Thirteenth or Fourteenth Amendment).

Elk v. Wilkins, 112 U.S. 94 (1884)
This case involved an action brought by an American Indian residing in Nebraska, against the registrar of one of the wards of the city of Omaha, for refusing to register him as a qualified voter. (Holding that the plaintiff, not being a citizen of the United States under the Fourteenth Amendment of the Constitution because he was an American Indian, has been deprived of no right secured by the Fifteenth Amendment).

Yick Wo v. Hopkins, 118 U.S. 356 (1886)
(Holding that Chinese persons, born outside of the United States and remaining subjects of the Emperor of China, are "subject to the jurisdiction thereof" under the meaning of the Fourteenth Amendment including the protection of the federal government in the same sense as all other aliens residing in the United States).

Chae Chan Ping v. United States, 130 U.S. 581 (1889)
This case involved an appeal of the validity of the act of Congress of October 1, 1888, prohibiting Chinese laborers from entering the United States. (Holding that Congress retained plenary power under the Constitution to exclude aliens and that Congress could exercise such power on any reasonable basis it chose including race).

United States v. Wong Kim Ark, 169 U.S. 649 (1898)
The issue in this case was whether a child, born in the United States of parents of Chinese descent who were not American citizens, becomes at the time of his or her birth a citizen of the United States. (Holding that such a child is a citizen of the United States within the meaning of the Fourteenth Amendment).

W.E.B. DuBois completes his doctoral degree at Harvard University (1895)
(Dubois is the first African American to receive a PhD from Harvard; his lifetime of research, writing, advocacy, and teaching explored and documented racism in the twentieth century).

Plessy v. Ferguson, 163 U.S. 537 (1896)
(Creating the "separate but equal" doctrine that permitted states to separate blacks and whites in railroad cars, and in all social activities and public accommodations. The

"separate but equal" doctrine becomes the basis of Jim Crow laws, state and local laws that imposed racial segregation).

Cumming v. County Board of Education, 175 U.S. 528 (1899)
(Affirming a decision refusing an injunction against a local board of education to prevent maintenance of a high school for white children without also maintaining one for black children).

Berea College v. Commonwealth of Kentucky, 211 U.S. 45 (1908)
(Upholding the validity of a 1904 Kentucky statute that prohibited a private college from teaching white and black pupils in the same classroom).

World War I (1914–1918)
(Major military confrontation between Germany, Austria, the United States, Great Britain and France. United States military forces were segregated by race).

Buchanan v. Warley, 245 U.S. 60 (1917)
(Striking down racial segregation ordinances in housing as a violation of the Due Process Clause of the Fourteenth Amendment).

Ozawa v. United States, 260 U.S. 178 (1922)
(Holding that Japanese are not considered white for purposes of immigration and naturalization law).

Gong Lum v. Rice, 275 U.S. 78 (1927)
(Holding that the Equal Protection Clause of the Fourteenth Amendment does not prohibit the state from placing Asian Americans and African Americans in the same school under a two-school segregation program where one school is for whites and the other school is for everyone else).

Charles Curtis is elected Vice President of the United States (1928)
(Becoming the first person with American-Indian ancestry to hold this position).

Octaviano Larrazolo is elected to the United States Senate representing New Mexico (1928)
(Becoming the first Latino member of the Senate).

Gaines v. Canada, 305 U.S. 337 (1938)
(Declaring that the Equal Protection Clause of the Fourteenth Amendment must be satisfied within the confines of a particular state).

The Executive Order 8802 (1941)
(Reaffirming the policy of full participation in the defense program by all persons, regardless of race, creed, color, or national origin, and directing certain action in furtherance of the policy).

World War II (1942–1945)
(Major military confrontation between the Axis Powers, Germany, Italy, and Japan and the Allied Powers, the United States, Britain, France, China, and the Soviet Union. United States military forces were segregated by race).

Korematsu v. United States, 321 U.S. 760 (1944)
(Holding that the Equal Protection Clause of the Fourteenth Amendment did not prevent the government's forcible internment of thousands of Americans of Japanese ancestry).

Morgan v. Commonwealth of Virginia, 328 U.S. 373 (1946)
(Holding that racial segregation on interstate buses and trains violated the Commerce Clause).

Jackie Robinson makes his debut in Major League Baseball (1947)
(Becoming the first African-American player in the League since the early 1900s).

The Executive Order 9981 (1948)
(Desegregating the armed forces of the United States and requiring equality of treatment without regard to race).

Shelley v. Kraemer, 334 U.S. 1 (1948)
(Holding that judicial enforcement of racially restrictive covenants violated the Equal Protection Clause of the Fourteenth Amendment).

McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950)
(Declaring that the Equal Protection Clause of the Fourteenth Amendment requires that, once admitted, a black student must be treated the same as other students including no racial segregation within the institution).

Sweatt v. Painter, 339 U.S. 629 (1950)
(Holding that new, underfunded, graduate schools for blacks violated the Equal Protection Clause of the Fourteenth Amendment and would not be viewed as the constitutional equivalent to the long-established, well-endowed, and highly esteemed schools that had been open to all other races for decades).

Hernandez v. Texas, 347 U.S. 475 (1954)
(Holding that Mexican Americans may be a distinct group under certain circumstances for purposes of applying the Equal Protection Clause of the Fourteenth Amendment).

Brown v. Board of Education (*Brown I*), 347 U.S. 483 (1954)
(Holding that *de jure* racial segregation in education violated the Equal Protection Clause of the Fourteenth Amendment).

Brown v. Board of Education (*Brown II*), 349 U.S. 294 (1955)
(Mandating desegregation of previously *de jure* segregated schools).

Dr. Martin Luther King, Jr. leads the Montgomery, Alabama, bus boycott (1955)
(Mass strike opposing racial segregation on public buses).

Daniel Inouye is elected to the United States House of Representatives representing Hawaii (1959)
(Becoming the first Japanese-American member of Congress).

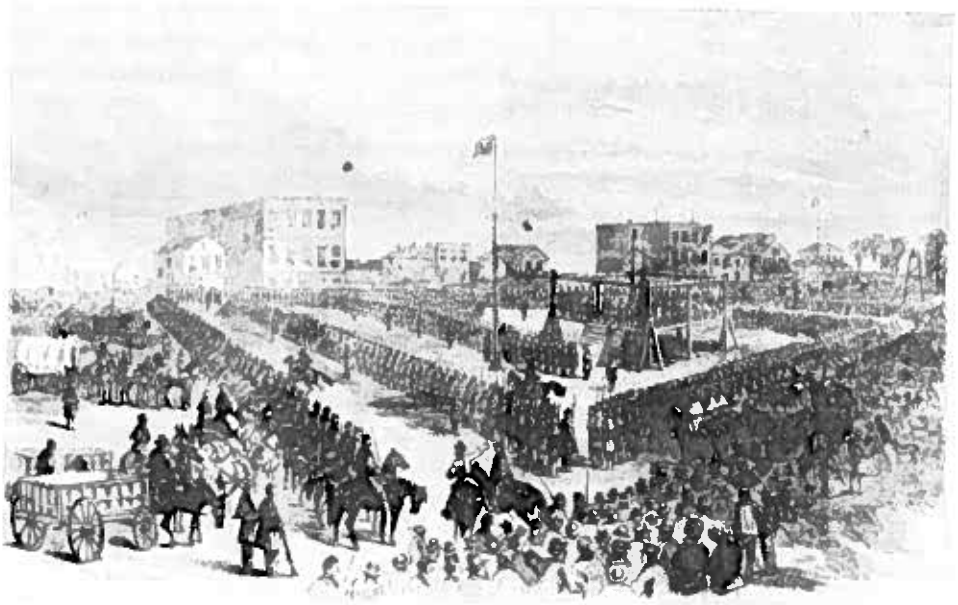
The Civil Rights Movement (1960–1970)
(Mass protests by blacks, other racial minorities, and whites against continuing racial discrimination and segregation).

A. Leon Higginbotham, Jr. appointed by President John F. Kennedy to the Federal Trade Commission (1962)
(Becoming the first African American appointed to a federal commission).

Dr. Martin Luther King, Jr. delivers his speech, "*I Have a Dream*," on the steps of the Lincoln Memorial at the culmination of the March on Washington, protesting racial oppression (1963)
(The following year, he is awarded the Nobel Peace Prize for working to end racial segregation and discrimination through non-violent means).

Title II of the Civil Rights Act (1964)
(Providing for desegregation in all places of public accommodation).

Title VI of the Civil Rights Act (1964)
(Enacted to prevent discrimination in federally-funded activities or programs).



The execution of 38 Sioux Indians by the U.S. authorities at Mankato, Minnesota, Friday, December 26, 1862. (Artist: W. H. Childs. Copyright (1996) The Minnesota Historical Society. Reprinted with permission of the Minnesota Historical Society.)

The picture above depicts the largest mass execution in United States history. Thirty-eight Lakota Sioux warriors were found guilty of "murder and other outrages" by a military commission and ordered executed by President Abraham Lincoln on December 26, 1862, in Mankato, Minnesota.[1]

The causes of the Dakota Conflict were complex. The treaties of 1851 and 1858 eroded the authority of tribal chieftains causing factions among the Sioux.[2] Exorbitant annuity payments left the Sioux dependent upon a corrupt system of Indian agents. Under the treaties, the Sioux could only purchase goods from licensed traders at a 100% to 400% markup.[3] Moreover, the treaties left the Sioux without effective means of seeking relief. Their only option for survival was theft and violence.[4]

Late annuity payments in the summer of 1862 heightened the tension between the Sioux and Minnesotans. In an August 15, 1862 meeting between Sioux and government officials, licensed trader Andrew Myrick, when asked to extend credit to feed the starving Sioux, bluntly stated, "so far as I am concerned, if they are hungry, let them eat grass."[5] Bloodshed began on August 17, 1862, when four young Dakota Sioux men killed three

1. THROUGH DAKOTA EYES: NARRATIVE ACCOUNTS OF THE MINNESOTA INDIAN WAR OF 1862 (G. ANDERSON AND A. WOOLWORTH, EDS. 1988).

2. CHARLES S. BRYANT AND ABEL B. MURCH, A HISTORY OF THE GREAT MASSACRE BY THE SIOUX INDIANS IN MINNESOTA, (2d ed. 1864) 1977.

3. *Id.*

4. *Id.*

5. THROUGH DAKOTA EYES: NARRATIVE ACCOUNTS OF THE MINNESOTA INDIAN WAR OF 1862 (G. ANDERSON AND A. WOOLWORTH, EDS. 1988).

white men, a white woman, and a fifteen-year-old white girl while hunting for food.[6] In the following days, nearly 250 white Minnesotans were killed and thousands left homeless as townships were burned to the ground.[7] Among the dead was Andrew Myrick, who reportedly was found with his mouth stuffed full of grass.[8]

On August 26, 1862, Governor Alexander Ramsey appointed Colonel Henry Sibley to command 1,400 soldiers to quell the Sioux uprising.[9] Colonel Sibley's troopers took 1,250 Sioux prisoners. On September 28, 1862, Colonel Sibley, without clear authority to do so, appointed a five-member military commission to "try summarily" Sioux and mixed-bloods for "murder and other outrages" committed against Americans.[10] These hearings were conducted expeditiously without due process considerations. Ultimately, 393 cases were heard in seven days, resulting in the conviction of 323 Sioux and sentencing 303 of those convicted to death.[11] President Lincoln, in response to a meeting with Henry Whipple, the Episcopal Bishop of Minnesota, expressed concern about the convictions, yet recognized that a stay of execution would only subject all 303 condemned men to mob justice.[12] As a result of this recognition, President Lincoln isolated 39 condemned Sioux, and in a handwritten note ordered their executions. To convince Governor Ramsey to agree to his plan, President Lincoln promised to remove every American Indian from the state and provide Minnesota with $2,000,000 in federal funds.[13]

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6. Marion P. Satterlee, A Detailed Account of the Massacre by the Dakota Indians of Minnesota in 1862 (1923).

7. *Id.*

8. Through Dakota Eyes: Narrative Accounts of the Minnesota Indian War of 1862 (G. Anderson and A. Woolworth, Eds. 1988).

9. William Watts Folwell, A History of Minnesota, 109–264 (1926).

10. *Id.*

11. *Id.*

12. Stephen B. Oates, With Malice Towards None, The Life of Abraham Lincoln, 367, 368 (Harper Perennial 1994) (1977).

13. *Id.*

Part One

Analysis and Framework

I. Introduction

From my experience in teaching Race and the Law for a period of twenty-five years, I have concluded that it is advantageous for the student to have a textbook-type analysis consisting of historical background, commentary, biographical information, and questions, as well as original materials such as cases, statutes, and executive orders. Though textbook-type analysis offers the professor's focus and evaluation of the materials and the era, it is essential that students become proficient with the skill of critically reading cases, statutes, and related historical and legal documents. Accordingly, most of the information contained in this book has been collected from original source materials related to the federal legal process. It is contemplated that in addition to this book, the student will read textbook-type analysis in other sources including, *In The Matter of Color: Race and the American Legal Process, The Colonial Period* (*In the Matter of Color*); *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* (*Shades of Freedom*), both authored by A. Leon Higginbotham, Jr.; and, *Ghosts of Jim Crow: Ending Racism in Post-Racial America* (*Ghosts of Jim Crow*), my recent book on racial inequality in the twenty-first century. Analysis of race in connection to the American legal process will always be subject to the criticism that a focus primarily from the legal perspective fails to deal in detail with the additional economic, sociological, historical, and anthropological factors that surround the complex subject matter. In his introduction to *In The Matter of Color*, Leon Higginbotham identifies the benefits of focusing primarily on the legal aspects of this analysis rather than a multiple disciplinary approach. In addition to the time limitations inherent in a semester course, the effort to include all of the other disciplines often results in a blurring of the impact and manipulation of the legal process. The strength and weakness of my approach is that it requires a focus primarily on legal aspects, which were the mechanism of systematic deprivations, and simultaneously serve as a measure of the other societal factors. Accordingly, I suggest that you reflect upon William Goodell's admonition:

No people were ever yet found who were better than their laws, though many have been known to be worse.[1]

The foci of *Race Law: Cases, Commentary, and Questions* (*Race Law*), however, are not limited merely to the rules of law adopted. The book explores the values of the individuals who held power in the past or who currently hold power, and it probes how their personal values affected the choices they made within their available options. In this way, *Race Law* provides an important link between the traditional approach to case study which

1. William Goodell, The American Slave Code in Theory and in Practice 17 (1853). Goodell attributes this statement to Dr. Priestly.

emphasizes substantive rules, and the more modern approach of critical race theory which emphasizes techniques, strategies, and practices. For those with limited previous exposure to the history of American race relations law, this book provides a unique introductory learning experience.

Race Law is divided into eight parts: Analysis and Framework; Slavery; Reconstruction, Citizenship, and Sovereignty; Segregation; Attempted Eradication of Inequality; Supreme Court Confirmation Controversies; Ongoing Controversies; and Appendix. While the material is presented primarily in chronological order, a few cases are strategically placed for pedagogical reasons consistent with the book's focus on the values held by the decision-makers, and how those values influenced their actions. In addition, all original source materials have been lightly edited and structured for easier reading. References reflecting the values of the authors of the original source materials, however, remain intact, consistent with the book's theme.

II. The Racial Prejudices That Judges Share

A. Introduction

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[2]

Justice Holmes' analysis deserves careful examination. At the very least, judges are expected to follow the law. However, if Holmes is correct, it is critical not only to identify the rules of law enunciated by the decision-makers but also to uncover the values that those decision-makers embrace. What exactly is the relationship between the values held by decision-makers and the rules they promulgate in court decisions and enact in legislation?

B. Background on *Mann*

More than any other case on slavery, *State v. Mann* (13 N.C. 263), an 1829 North Carolina Supreme Court case, exemplifies the preferences and indeed the "prejudices which judges share[d] with their fellow" plantation owners. In order for society to execute a race-based system of rights and privileges, there must be a socially accepted or legally sanctioned scheme in place. In order for this race-based system to be maintained over time, the decisions that implement it, and keep it in place, must reflect the social values in which the system is based. The *State v. Mann* decision is an example of just such implementation. When reading this case, ask whether Judge Ruffin was making his judgment on indisputable legal doctrines, sound principles of logic, and historical precedent, or simply on the security and profit of the slaveowner. Did he have any humanitarian concern for the slaves' welfare? Applying Justice Holmes's analysis of the judicial process, one should ask which conclusions were based on long standing precedential law or *stare decisis*, and which were based on previous "moral and political theories." Is it possible for a judge to have a "neutral" view which has not been shaped and influenced by contemporaneous

2. Oliver Wendell Holmes, The Common Law 1 (1881).

economic concerns or racial biases? Which concepts were more an exemplification of the prejudices which some judges shared with their fellow plantation owners and which doctrines, if any, were devoid of economic preferences or racial "prejudices"? Finally, one must ask whether there were any other options that Judge Ruffin could have followed under the rule of law? Did an application of available common law to the existing facts support any other possible outcome for the plaintiff, the slave Lydia, here represented by the State? If several outcomes were possible, what does Ruffin's conclusion reveal about his personal values?

C. *State v. Mann*, 13 N.C. 263 (1829)

1. *Facts*

Judge RUFFIN delivered the opinion of the court.

The Defendant was indicted for an assault and battery upon *Lydia*, the slave of one *Elizabeth Jones*. On the trial it appeared that the Defendant had hired the slave for a year—that during the term, the slave had committed some small offence, for which the Defendant undertook to chastise her—that while in the act of so doing, the slave ran off, whereupon the Defendant called upon her to stop, which being refused, he shot at and wounded her. His honor, Judge Daniel, charged the Jury that if they believed the punishment inflicted by the Defendant was cruel and unwarrantable, and disproportionate to the offense committed by the slave, that in law the Defendant was guilty, as he had only a special property in the slave.

A verdict was returned for the State, and the Defendant appealed. No Counsel appeared for the Defendant. The Attorney General contended that no difference existed between this case and that of the *State v. Hall* (2 Hawks 562). In this case, the weapon used was one calculated to produce death. He assimilated the relation between a master and a slave to those existing between parents and children, masters and apprentices, and tutors and scholars, and upon the limitations to the right of the Superiors in these relations, he cited *Russell on Crimes*, 866.

2. *Opinion*

A judge cannot but lament, when such cases as the present are brought into judgment. It is impossible that the reasons on which they go can be appreciated, but where institutions similar to our own, exist and are thoroughly understood. The struggle, too, in the Judge's own breast between the feelings of the man, and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible. It is useless however to complain of things inherent in our political state. And it is criminal in a Court to avoid any responsibility which the laws impose. With whatever reluctance therefore it is done the Court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North Carolina.

The indictment charges a battery on *Lydia*, a slave of *Elizabeth Jones*. Upon the face of the indictment, the case is the same as the *State v. Hall* (2 Hawks 582)—no fault is found with the rule then adopted; nor would be, if it were now open. But it is not open; for the question, as it relates to a battery on a slave by a stranger, is considered as settled by that case. But the evidence makes this a different case. Here the slave had been hired by the Defendant, and was in his possession; and the battery was committed during the period of hiring. With the liabilities of the hirer to the general owner, for an injury permanently impairing the value of the slave, no rule now laid down is intended to interfere. That is

left upon the general doctrine of bailment. The inquiry here is whether a cruel and unreasonable battery on a slave, by the hirer is indictable. The Judge below instructed the Jury that it is. He seems to have put it on the ground that the Defendant had but a special property. Our laws uniformly treat the master or other person having the possession and command of the slave as entitled to the same extent of authority. The object is the same—the services of the slave; and the same powers must be confided. In a criminal proceeding, and indeed in reference to all other persons but the general owner, the hirer and possessor of a slave, in relation to both rights and duties, is, for the time being, the owner.

This opinion would perhaps dispose of this particular case; because the indictment, which charges a battery upon the slave of *Elizabeth Jones*, is not supported by proof of a battery upon Defendant's own slave; since different justifications may be applicable to the two cases. But upon the general question, whether the owner is answerable *criminalizer*, for a battery upon his own slave, or other exercise of authority or force, not forbidden by statute, the Court entertains but little doubt. That he is so liable, has never yet been decided; nor, as far as is known, been hitherto contended. There have been no prosecutions of the sort. The established habits and uniform practice of the country in this respect, is the best evidence of the portion of power, deemed by the whole community, requisite to the preservation of the master's dominion. If we thought differently, we could not set our notions in array against the judgment of everybody else, and say that this, or that authority, may be safely lopped off. This has indeed been assimilated at the bar to the other domestic relations; and arguments drawn from the well established principles which confer and restrain the authority of the parent over the child, the tutor over the pupil, the master over the apprentice, have been pressed on us. The Court does not recognize their application. There is no likeness between the cases. They are in opposition to each other and there is an impassable gulf between them. The difference is that which exists between freedom and slavery—and a greater cannot be imagined. In the one, the end in view is the happiness of the youth, born to equal rights with that governor, on whom the duty devolves of training the young to usefulness, in a station which he is afterwards to assume among freemen. To such an end, and with such a subject, moral and intellectual instruction seem the natural means; and for the most part, they are found to suffice. Moderate force is superadded only to make the others effectual. If that fail, it is better to leave the party to his own headstrong passions, and the ultimate correction of the law, than to allow it to be immoderately inflicted by a private person. With slavery it is far otherwise. The end is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being to convince him what, it is impossible but that the most stupid must feel and know can never be true—that he is thus to labor upon a principle of natural duty, or for the sake of his own personal happiness, such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition, I feel it as deeply as any man can. And as a principle of moral right every person in his retirement must repudiate it. But in the actual condition of things, it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited without abrogating at once the rights of the master and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of master and slave.

That there may be particular instances of cruelty and deliberate barbarity, where, in conscience the law might properly interfere, is most probable. The difficulty is to determine where a Court may properly begin. Merely in the abstract it may well be asked which power of the master accords with right. The answer will probably sweep away all of them. But we cannot look at the matter in that light. The truth is that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man at least if not by the law of God. The danger would be great indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper, and every dereliction of menial duty. No man can anticipate the many and aggravated provocations of the master, which the slave would be constantly stimulated by his own passions, or the instigation of others to give; or the consequent wrath of the master prompting him to bloody vengeance upon the turbulent traitor—a vengeance generally practiced with impunity by reason of its privacy. The Court therefore disclaims the power of changing the relation in which these parts of our people stand to each other.

We are happy to see that there is daily less and less occasion for the interposition of the Courts. The protection already afforded by several statutes, that all powerful motive the private interest of the owner, the benevolence towards each other seated in the hearts of those who have been born and bred together, the frowns and deep execrations of the community upon the barbarian who is guilty of excessive and brutal cruelty to his unprotected slave, all combined, have produced a mildness of treatment and attention to the comforts of the unfortunate class of slaves, greatly mitigating the rigors of servitude and ameliorating the condition of the slaves. The same causes are operating and will continue to operate with increased action, until the disparity in numbers between the whites and blacks shall have rendered the latter in no degree dangerous to the former, and when the policy now existing may be further relaxed. This result, greatly to be desired, may be much more rationally expected from the events above alluded to and now in progress, than from any rash expositions of abstract truths by a Judiciary tainted with a false and fanatical philanthropy seeking to redress an acknowledged evil by means still more wicked and appalling than even that evil.

3. *Holding*

I repeat that I would gladly have avoided this ungrateful question. But being brought to it the Court is compelled to declare that while slavery exists amongst us in its present state, or until it shall seem fit to the Legislature to interpose express enactments to the contrary, it will be the imperative duty of the Judges to recognize the full dominion of the owner over the slave except where the exercise of it is forbidden by statute. And this we do upon the ground that this dominion is essential to the value of slaves as property, to the security of the master, and the public tranquility greatly dependent upon their subordination; and in fine, as most effectually securing the general protection and comfort of the slaves themselves.

Let the judgment below be reversed and judgment entered for the Defendant.

D. Commentary on *Mann*

1. State v. Mann: *An "Objective" Legal Analysis or an Expression of Individual Whim and Social and Economic Bias?*

Although this book is organized generally in chronological historical sequence, this chapter departs from such a pattern. *State v. Mann*, decided in 1829, is set within the context of a highly structured and developed agricultural system of plantation slavery in the nineteenth-century American South. At that point in time, slavery was deeply ingrained in the social structure of the colonies and was the basis of their economic growth. This case is included at the outset to raise basic questions concerning race and the law that will be relevant to the analysis of each historical period in subsequent chapters.

Without great exaggeration, it may be said that an entire course on the relationship of the American legal system to the development of slavery and the status of black Americans might be taught from *State v. Mann*. Certainly the problems presented by the facts of this case and the court's response raise many of the questions that will be considered throughout this book. For example, what was the logic, clarity, forthrightness, and moral sensitivity of the court's opinion and what was the impact of contemporary values, racial attitudes, and legal traditions in affecting the status of blacks?

Legal opinions cannot be read as abstract syllogisms unrelated to the current and past historical events from which the opinion evolves. Without an understanding of these events, an opinion such as *State v. Mann* can be deceptive.

In the beginning it must be emphasized that, like all of the court opinions reprinted in this book, *State v. Mann* should be slowly and carefully read several times. For only then does one recognize that the legal judgment made by Judge Ruffin was not as self-evident or necessary as he implied. Only after careful analysis does one recognize that Ruffin's opinion raises more questions than it provides answers. Even more importantly, there was just as compelling an argument for the court to have reached a completely opposite result and holding, had the rationale been rooted in both law and history.

In North Carolina in 1830, there were 245,601 slaves, 19,543 free blacks, and 472,823 whites. All plantation owners recognized that their economic success was dependent upon the maintenance of the slavery system. When speaking to the State Agricultural Society of North Carolina in 1855, Ruffin expressed his views on slavery as follows:

> Then let me say once more to you, men of North Carolina, stick to her, and make her what she can and ought to be. For you and your sons she will yield a rich harvest; to some thirtyfold, some sixtyfold, and some hundredfold, according to the skill and diligence with which the tillage of the good ground is done.
>
> The nature of the labor employed in our agriculture is the next subject for our consideration. It is a most important element in the cost, amount, and value of production. I very frankly avow the opinion that our mixed labor of free white men of European origin and of slaves of the African race is as well adapted to the public and private ends of our agriculture as any other could be—making our cultivation not less thorough, cheap, and productive than it would be, if carried on by the whites alone, and far more so than the blacks by themselves would make it; and therefore, that it has a beneficial influence on the prosperity

> of the country, and the physical and moral state of both races, rendering both better and happier than either would be here, without the other.[3]

Though in the above comments Ruffin was speaking solely as a plantation owner to an agricultural group in 1855, he may have had those same economic views when authoring *State v. Mann* 26 years earlier, in 1829. Yet, if he had included in *State v. Mann* the more precise economic preferences and social biases that he expressed when speaking to the State Agricultural Society, his opinion in *State v. Mann* might be regarded as "less objective." For then, on its face, the opinion would be more vulnerable to criticism, leaving some to have questioned whether Ruffin was relying on legal precedent or merely on his individual whim. Thus, we see in *State v. Mann* that Ruffin could mask his economic philosophy through use of legal nomenclature and legal doctrines; the way he expresses his views changes but not the result. Ruffin's economic philosophy, personal racial biases, and preferences obviously carried more weight in determining the result than any "legal precedent" he cited or legal analysis he used. Notwithstanding, Ruffin still expressed his biases, political and economic views, and values more candidly and precisely than most jurists of the era. Thus, from a sociological and historical standpoint, *State v. Mann* is still a significant opinion. Indeed, it is not that others were more objective in their ultimate findings and holdings; it is just that they were not as brutally candid about the factors that motivated their findings.

Professor Vilhelm Aubert has said "[B]eneath the veneer of consensus on legal principles, *a struggle of interest is going on, and the law is seen as a weapon in the hands of those who possess the power to use it for their own ends.*"[4] Thus, law is seen both as a cohesive force and as an instrument that maintains and confirms basic cleavages in a society. Was Ruffin as a judge, in the words of Professor Aubert, involved in a "struggle of interest" and using the law "as a weapon in the hands of those who possess the power to use it for their own ends"?

2. *The Ruling of the Trial Court: Special Property versus Absolute Property in the Slave*

In the lower trial court, Judge Daniel did not accept the concept that the hirer had absolute property in the slave. Obviously, Judge Daniel felt that there was some limitation on the hirer's property interest and some restraint on the brutality which the hirer could impose on his slaves. Thus, Judge Daniel instructed the jury that Mann could be guilty of assault and battery upon Lydia because Mann had only a "special property" interest in Lydia. Judge Daniel charged the jury that if they believed "the punishment inflicted by the defendant was *cruel and unwarrantable* and *disproportionate* to the offense committed by the slave, that in law the defendant was guilty as he had only a *special property* in the slave." (13 N.C. at 265)

The issue of special property goes to the core of a longstanding debate as to whether slaves were persons having rights of their own. Did slaves have a soul, a personality, or any human rights recognized by the law? Were there any limitations in terms of the abuse that a hirer or an owner could impose upon slaves?

The view that slaves were like animals with no rights of their own was often expressed. For example, Judge Baldwin explained:

> [P]ersons in the *status* of slavery have no civil rights, save that of suing for freedom when entitled to it: they can make no contracts, nor acquire any property: they can obtain no redress by action against their masters or others, for personal

3. *Publications of the North Carolina Historical Commission*, Volume 6, Part 4, "The Papers of Thomas Ruffin," IV, pp. 329–37.

4. VILHELM AUBERT, SOCIOLOGY OF LAW 11 (1972).

injuries: they are in truth *civiliter mortuus*, and without protection of public authority, except that of the criminal law.[5]

Ruffin, who was aligned with these sentiments, rejected Judge Daniel's view that the hirer had merely a special property right, instead of an absolute total property right in the slave. Did Ruffin choose to support an absolute property right because he sought to make the power of the hirer, as well as the master, absolute "to render submission of the slave perfect"? On what precedent did Ruffin rely?

3. *Precedent and Analogies: The Choices the Court Had*

In his opinion, Ruffin cites only one case, *State v. Hall* (2 Hawks 582). This opinion in the official volumes is cited as *State v. Hale*, 9 N.C. 582 (1823). Ruffin distinguishes *State v. Hall* because it involved "a battery on a slave by a stranger." The Supreme Court of North Carolina held that it was an indictable crime to assault, beat, and wound a slave. Ironically, in *State v. Hall*, Judge Daniel in the lower court, had ruled that it was not a crime to beat a slave even without provocation because neither the common law nor statute specified that such attacks were criminally indictable offenses. In an appeal from Judge Daniel's dismissal of the case at the trial court level, the Supreme Court of North Carolina held, in a plurality opinion, that such an attack was a criminal offense. Chief Justice Taylor acknowledged that there was "no positive law decisive to the question. A solution of it must be deduced from general principles, from reasonings founded on the common law adapted to the existing conditions and circumstances of our society, and indicating that result which is best adapted to general expedience." (13 N.C. at 266).

Chief Justice Taylor wrote:

> It would be a subject of regret to every thinking person, if Courts of Justice were restrained, by any austere rule of judicature, from keeping pace with march of benignant policy, and provident humanity, which for many years, has characterized every Legislative act, relative to the protection of slaves, and which Christianity, by the mild diffusion of its light and influence, has contributed to promote; and even domestic safety and interest equally enjoin. The wisdom of this course of legislation, has not exhausted itself on the specific objects to which it was directed, but has produced wider and happier consequences, in securing to this class of persons, milder treatment and more attention to their safety; for the very circumstance of their being brought within the pale of legal protection, has had a corresponding influence upon the tone of public feeling towards them; has rendered them of more value to their masters, and suppressed many outrages, which were, before, but too frequent. It is, however, objected in this case, that no offense has been committed, and the indictment is not sustainable, because the person assaulted is a slave, who is not protected by the general criminal law of the State; but that, as the property of an individual, the owner may be redressed by a civil action. But though neither the common law, nor any other code yet devised by man, could foresee and specify every case that might arise, and thus supersede the use of reason in the ordinary affairs of life, yet it furnishes the principles of justice adapted to every state and condition of society. It contains general rules, fitted to meet the diversified relations, and various conditions of social man. Many of the most important of these rules are not set down in any statute or ordinance, but depend upon common law for their support.... The

5. *Peter v. Hargrave*, 46 Va. (5 Gratt.) 12, 17 (1848).

> common law has often been called into efficient operation, for the punishment of public cruelty inflicted upon animals, for needless and wanton barbarity exercised even by masters upon their slaves, and for various violations of decency, morals and comfort. Reason and analogy seem to require that a human being, although the subject of property, should be so far protected as the public might be injured through him.... Mitigated as slavery is by the humanity of our laws, the refinement of manners, and by public opinion, which revolts at every instance of cruelty towards them, it would be an anomaly in the system of police which affects them, if the offence stated in the verdict were not indictable. At the same time it is undeniable, that such offence must be considered with a view to the actual condition of society, and the difference between a white man and a slave, securing the first from injury and insult, and the other from needless violence and outrage. From this difference it arises, that many circumstances which would not constitute a legal provocation for a battery committed by one white man on another, would justify it, if committed on a slave, provided the battery were not excessive. It is impossible to draw the line with precision, or lay down the rule in the abstract; but..., the circumstances must be judged by the Court and Jury, with a due regard to the habits and feelings of society. But where no justification is shown, as in this case, I am of opinion the indictment is maintainable.[6]

The other two judges concurred in the result. Judge Hall noted:

> I concur in the opinion given. I think it would be highly improper that every assault and battery upon a slave should be considered an indictable offence; because the person making it, might have matter of excuse or justification on his side, which could not be used as a defense for committing an assault and battery upon a free person. But where an assault and battery is committed upon a slave without cause, lawful excuse, or without sufficient provocation, I think it amounts to an indictable offence. Much depends upon the circumstances of the case when it happens; these circumstances are not set forth in this case, and I think it material that they should appear. I therefore think the judgment of the Court below should be reversed, and a new trial granted for that purpose.[7]

State v. Hall is cited in such detail to show that, even under North Carolina law in 1823 (six years before *Mann*), the North Carolina Supreme Court did recognize that it had some options in defining which acts constituted a criminal offense—even if a particular act had not been previously categorized as a crime by statute or the common law. Thus, *State v. Hall* was good precedent, and demonstrates that the court in *State v. Mann* in 1829 could have held that an unprovoked[8] attack on a slave by her hirer constituted a criminal offense.

The Attorney General also argued by analogy that Lydia could be protected because her situation was similar to the "well established principles which confer authority of restraint of the parent over the child, the tutor over the pupil, the master over the apprentice."[9] Ruffin summarily dismissed these analogies by saying "the Court does not recognize their application. There is no likeness between the cases. They are in opposition to each other, and there is an impassable gulf between them."[10] From the standpoint of

6. 2 N.C. 582, 583–86 (1823).
7. 2 N.C. 582, 586–87 (1823).
8. The attack is considered "unprovoked" because Lydia had done nothing to Mann.
9. 13 N.C. 263, 265 (1829).
10. *Id.*

legal analysis, what was the criteria Ruffin used to conclude that there is no likeness between the two situations? Does he announce any criteria leading to his conclusion? You will note that Ruffin cites no cases where courts have rejected these analogies; apparently, even from Ruffin's view, no courts had ever considered these analogies. Since there were no cases or statutes that controlled, Ruffin indeed had an option either to provide some semblance of protection for the slave or to sanction repressing all rights for slaves. Did Ruffin object to the analogies for any compelling legal reasons that he sought but failed to note in his opinion? Or was the decisive factor that Ruffin feared his wealth and property would suffer some diminution of value if the doctrines of Judge Daniel in the court below were sustained? Did Ruffin fear that extending to slaves some protection under the law would or could lessen the value of slaves or contribute to the gradual abolition of slavery?[11] Was the profitability of slavery the most significant factor in his judgment in finding no likeness between the analogies?

Consider the relevance of the Attorney General's analogies concerning the relation between master and slave and those existing between "parent and children, masters and apprentices, and tutors and scholars ... and the limitations to the right of the superiors" in these latter relations. Without assuming that these analogies are sufficient authority to support the intervention of courts in the relationship between master and slave, do they not at least suggest that courts have been authorized and competent to make some judgments about the appropriate degree of punishment a social superior may inflict on a person who is his social inferior?

4. *The Role of the Court versus the Role of the Legislature*

Is there any basis for Ruffin's conclusion other than his judicial perception of the social and moral nature of slavery? Do any facts in the record of the case developed in the trial court concern these questions? Generally, legislatures make the laws, executives implement the laws, and courts interpret the laws. Ruffin, however, appears to be doing two tasks. Is this form of historical, social, and ultimately moral perception and judgment a function which one would expect courts to perform? Are there any qualities of the judicial process that give courts a particular competence to engage in this form of historical and psychological judgment concerning the nature of slavery, which Judge Ruffin finds necessary to define the limits of criminal responsibility for the violent discipline of slaves? Are there aspects of the legislative process, on the other hand, that might make representative assemblies more qualified than courts to make these ultimate judgments about the nature and goals of slavery? In what ways might the legislative process be ineffective in resolving the problems presented by *State v. Mann*? In his holding, Ruffin indicates that an express statute to the contrary could prevent a judge from recognizing the "full dominion of the owner over the slave."

5. *Is There a Universal View of Slavery on Which Ruffin Could Rely?*

In his opinion, Ruffin asserts that "the established habits and uniform practice of the country in this respect, is the best evidence of the portion of power, deemed by the whole community, requisite to the preservation of the master's dominion." (13 N.C. at 265). Ruffin also says:

> The end is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge,

11. See Ruffin's second rough draft of the opinion in *State v. Mann*, especially the first paragraph.

> and without the capacity to make anything his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being, to convince him what, it is impossible but that the most stupid must feel and know can never be true—that he is thus to labor upon a principle of natural duty, or for the sake of his own personal happiness, such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect.[12]

What is the historical and social validity of Judge Ruffin's conclusions concerning the nature of slavery, its ends, and the necessary means of enforcing discipline over slaves? In reaching these conclusions, does Judge Ruffin consider the historical origin of slavery in the United States? Would this history be relevant to his judgment concerning the nature of slavery in North Carolina at the time and his legal conclusions concerning the limits of a master's right to discipline his slaves? If slavery in the United States evolved in part from lesser forms of servitude, such as apprenticeship and indentured servitude, would this history be relevant to Judge Ruffin's view of what he considers the natural, if not inevitable, nature of slavery?

Does Judge Ruffin conclude, or at least assume, that the relationship of master and slave is essentially the same for all times and places where slavery has existed? Does he consider the possibility that different legal restrictions on the authority of the master, and consequently greater legal protection of the slave, might exist under other legal and social systems? Would it be relevant to his opinion to seek out and consider such evidence? According to Frank Tannenbaum, during the time that *Mann* was decided, if a slave in Brazil considered himself mistreated by his owner, he had the right to be sold to another, more humane, owner.[13] Would the existence of this legal possibility in another society undermine the force of Judge Ruffin's reasoning against limiting the authority of the master over the slave? Would the Brazilian practice most strongly support the adoption of a similar right for slaves in North Carolina at that time?

What is the relevance of the court's conclusion concerning the nature and end result of slavery to its conclusion concerning the need for uncontrolled authority over the body of the slave? If the end result of slavery includes the profit of the master and the public safety, how can the shooting of a slave under the facts of the present case be justified as serving either interest? Does the court consider whether the doctrine of uncontrolled authority contributes to either of these ends? Assuming the importance of slavery to the economy and society of North Carolina at the time, does not the decision of the court restrict the protection of slaves; an interest that if only on grounds of expedience, a slave-holding society would be expected to protect? Consider also the end of public safety. How does the exposure of slaves to shooting under these circumstances contribute to the advancement of public safety? Would not such brutality create greater risk of provoking slaves and creating increased instability in the slave society?[14]

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12. 13 N.C. 263, 266 (1829).
13. F. TANNENBAUM, SLAVE AND CITIZEN: THE NEGRO IN THE AMERICAS 54 (1967).
14. On these questions of the psychological and social structure of slavery, *see generally* JOHN BLASSINGAME, THE SLAVE COMMUNITY (1979).

6. *Remedies and Change through the Judicial Process*

Ruffin seemed to concede that in some instances there were grave abuses, but he believed that the courts could not deal with those injustices because the courts would be "seeking to redress and acknowledge evil by means still more wicked and appalling than that evil."[15] Was he suggesting that the courts were incapable of differentiating abuses from appropriate treatment? Or was he suggesting that some white masters were such villains that any legal interventions would be to the ultimate detriment of the slaves? Did Ruffin rely on any legal basis when he sought to limit the court's judicial scope to some injustices but not others?

If redress were possible, would blacks feel that such means would be "more wicked and appalling" than no redress at all? Would non-slaveholding whites consider redress for slaves to be evil? In other words, what competence does the judge have to conclude that such means would be "more wicked and appalling" than a battery without legal remedy?

What factors, other than its judgment of the nature of slavery and the discipline necessary to this system, contribute to the court's refusal to uphold criminal liability under the facts of this case? Consider how the court is affected by its estimate of the probable impact of a decision upholding criminal liability in this case. Note Judge Ruffin's declaration that "the court disclaims the power of changing the relation, in which these parts [master and slave] of our people stand to each other."[16] Do you agree with the court that the imposition of criminal responsibility on a master or hirer for the shooting of a slave under the circumstances of this case (or in any circumstances other than actual self-defense) would seriously change the relationship between master and slave? Is there any indication in the opinion that the shooting of a slave under these circumstances was either frequent or in any way condoned by the community? If such brutality was not frequent or necessary or acceptable, how would the imposition of criminal liability under these circumstances "change the relation" between master and slave?

If one concludes that a finding of criminal liability under the facts of this case would not greatly change the "established habits and uniform practices"[17] of the community, what other consequences of the decision may trouble the court? Note the following comment: "[t]he danger would be great indeed if the tribunals of justice should be called on to graduate the punishment appropriate to every temper, and every dereliction of menial duty."[18] Consider again the holding of the trial court. Do you agree with the appellate court that a finding of criminal liability in this case would necessarily serve as precedent for the court's future involvement, through the criminal law, in graduating "the punishment appropriate to every temper, and every dereliction of menial duty"?[19]

For example, would a holding sustaining criminal liability under the facts of this case serve as precedent for a finding of criminal liability in the case of an owner, who without justification, struck a slave with a piece of wood, a whip, or with his fists? Would not Judge Ruffin be equally justified in anticipating that a decision in favor of the State in *State v. Mann* would serve as precedent for judging similar punishment "appropriate to *every* temper, and *every* dereliction of duty between master and slave"? What principle of decision would justify a finding of criminal liability for an unreasonable battery in the

15. 13 N.C. 263, 268 (1829).
16. *Id.* at 267.
17. *Id.* at 265.
18. *Id.* at 267.
19. *Id.*

present case, but which would not require the court to become involved extensively in administering the relationship between master and slave? Could you argue convincingly that the shooting for any unprovoked act of any person by another (except in legitimate self-defense) is always unreasonable and that the adoption of this *per se* rule need not compel the court to become involved in evaluating the propriety of every form of discipline administered by masters to slaves, or of tutors to scholars, or masters to apprentices?

E. Explaining Judge Thomas Ruffin

1. Ruffin's Biography

1787	
Nov. 17	Born at "Newington," King and Queen County, Va.
1801–03	Student at Warrenton Academy, Warrenton, N.C.
1803	Entered Junior Class at Nassau Hall, Princeton, N.J.
1805	
Sept. 26	Received degree of A.B. from Princeton
1806–07	Law student at Petersburg, Va., under David Robertson
1807	Moved to "Oakland," Rockingham County, N.C.
1807–08	Law student under Archibald D. Murphey.
1808	Admitted to the bar.
1809	
June 9	Moved to Hillsboro, N.C.
Dec. 9	Married to Anne Kirkland of Hillsboro.
1813	Member of the House of Commons for the borough of Hillsboro.
1815	Member of the House of Commons for the borough of Hillsboro.
1816	Presidential elector on the Monroe ticket. Member of the House of Commons for the borough of Hillsboro. Speaker of the House of Commons.
Dec. 16	Elected judge of the Superior Court.
1813	
Dec. 23	Resigned from the bench to engage in the practice of law.
1820–22	Reporter of the Supreme Court of North Carolina
1824	Candidate for presidential elector on the Crawford ticket.
1825	Elected judge of the Superior Court.
1828	Resigned from the bench to become president of the State Bank of North Carolina.
1829	Elected judge of the Supreme Court of North Carolina. Authored the decision in *State v. Mann.*
1830	Moved to "Haw River."
1833	Became Chief Justice of the Supreme Court.
1834	Received degree of Doctor of Laws from the University of North Carolina.
1835	Delivered address before the Dialectic and Philanthropic Societies at the University of North Carolina.
1852	Resigned from the Bench.
1853	Delegate to the General Convention of the Protestant Episcopal Church in New York City.
1854–60	President of the North Carolina Agricultural Society.
1858	Elected judge of the Supreme Court of North Carolina.
1861	Delegate to the Peace Conference.

Delegate from Alamance to the Convention of 1861.

1866 Moved to Hillsboro.

1870

Jan.15 Died at his home in Hillsboro.

2. *Ruffin's Petition for a Pardon*

On August 19, 1865 Judge Ruffin petitioned President Andrew Johnson for a "full and free pardon" as to his own acts on behalf of the Confederacy during the Civil War. In 1861 he had been a member of a North Carolina Convention that supported the ordinances of secession and confederation, and he had supported military and financial measures on behalf of North Carolina's secession. Now he wanted a Presidential pardon for his former misdeeds.

In his petition Ruffin pled:

> It is here submitted, whether for such acts the People, who made him their organ, or he, as their representative, ought under our form of Government, to be subject to the pains and penalties of *Treason*, either in person or property; and whether, if legally liable thereto, it be not true, as well as the benignant policy of the Government, not to bring that point to Judicial decision before a Jury and Judge, but rather by a general amnesty bring back a conciliated People with such small means of livelihood as a protracted and most wasting war has left them, with renewed citizenship in this great country, with a patient submission to the losses they have incurred and quiet acquiescence in the laws under which they may have to live—

He further pledged:

> That for his own part he purposes to pass the short remnant of his days in unbroken retirement and certainly without any resistance in any form to the National authorities, and has attested to that purpose by having taken the Oath prescribed by your Proclamation ...

He asked that his property not be "liable to the confiscation" or any other penalty or forfeiture. Ruffin emphasized his economic losses:

> He further represents, that he was during and up to the close of the war the owner of more than one hundred Slaves, nearly all of whom were born his and raised by him; and furthermore had investments in corporate and public stocks to a considerable amount which are now of little or no value in the market; so that his losses from the war will, directly or indirectly, amount probably to the sum of Two hundred and Fifty Thousand dollars or more and the residue of property still held by him has been so reduced in value as to render it at least doubtful, whether it could be fairly assessed for taxation to $20,000 ...

In his last paragraph, he requested a maximum compassion for himself. Ruffin said:

> In conclusion then, he submits, that, considering the course of his life as herein set forth, his age, the motives for his actions, the condition of his family, his pecuniary losses already incurred, the state of the Country and the propriety of healing our political troubles by acts of Pardon and Oblivion, his be not a proper case for Executive interposition under the powers vested in the President by the Act of Congress: and therefore if any of his acts herein mentioned can be construed

to amount to Treason, he asks for a full and free pardon therefore, or one on such other terms as may seem right and proper—and he will ever pray, etc.—[20]

Thus, in 1865, there was Judge Ruffin, a former owner of slaves and a harsh judge, pleading for a liberality from the legal process; yet in *State v. Mann* in 1829 he could not find that liberality or compassion in himself to aid a slave woman, Lydia, who had been shot without legal provocation.

3. *Letter from His Father*

Judge Ruffin received the following letter from his father, Sterling Ruffin, who wrote:

I have no apology to offer for not complying with the promise made in my last, of writing again, in a few days, except that I wished to have forwarded you a small B. Note, for fear, from some unforeseen event, it might be serviceable to you; as yet, I have not been able to procure one; and as I find from your last which has come to hand, you are anxious to receive the promis'd one, I now do myself the pleasure of gratifying your wishes.

I was not surpris'd at reading your sentiments on Slavery, as I was well aware of the impressions which a different mode of treatment than that pursued in Virginia, would make on a Heart, which I hop'd was capable at all times of sympathizing in the misfortunes of a fellow mortal; and would as the mind matur'd, and contemplated the miserable situation of those unhappy beings, feel most sensibly for them; but alas! Like all others who are not entirely void of every spark of Sensibility, you feel for them, lament, greatly lament their uncommon hard fate, without being able to devise any means by which it may be ameliorated! That they are a great civil, political, and moral evil no Person will deny, but how to get rid of them, is a question which has imploy'd many much more expansive minds than mine, without fixing on any rational, or probable means to make their situations more comfortable, without endangering the political safety of the State, and perhaps Jeopardizing the lives, property, and everything sacred and dear of the Whites. You will not pretend to throw blame on the present generation for the situation of these unhappy domestics, for as they are impos'd on us, and not with our consent, the thing is unavoidable. You will perhaps ask why we do not treat them with more humanity? the answer is obvious: the fewer there are of this description intermix'd with the Whites, the more they are under our immediate eye, and the more they partake of the manners and habits of the whites, and thereby require less rigidness of treatment to get from them, those services which are absolutely necessary for their support and very existence. Unhappily for us and them, there are too many with us to render a tolerably free intercourse of sentiment possible, and of course their minds have degenerated into as abject slavery as their persons; and as there is no gratitude or affection on their parts towards their masters, nothing is to be expected from them, but as fear, servile fear operates on them, which produces a sluggishness of action, which must be increased momentarily by a greater degree of fear, with a greater degree of personal attention on our parts. It has been one of many benefits which has resulted to Society from the Christian Religion to expose the impropriety of

20. *Publications of the North Carolina Historical Commission*, Volume 8, Part 4, THE PAPERS OF THOMAS RUFFIN, IV, pp. 16–21 (emphasis added). (Collected and Edited by J.G. De Roulhac Hamilton, 1918).

keeping our Brothers in bondage, and however we may at present justify ourselves from the peculiar situation of our Country consider'd politically; I cannot but look forward with pleasure to the time, when an All wise, and Merciful! Creator will by a more universal revival of his blessed Religion prepare the Hearts of all men to consider each other as Brothers, and put us more on an equality even in temporal things—When this much to be wished for period will arrive, or what will be the means adopted for a general emancipation, I do not pretend to divine; but that such a time will be, I have little doubt.

Tom you cannot conceive the happiness that I receive in believing from your letters that you begin to see the necessity and reality of Religion; believe me my Son, who have had a fair opportunity of contimating the pleasure of Sin, (by enjoying all the comforts that independence and the things of this world could bestow unconnected with a Spiritual love for the giver of these blessings) that there is no comparison between the real solid happiness of a life spent in faith, bringing forth the fruits of the Spirit, and a hope growing therefrom that [Rest of letter missing.][21]

4. *Ruffin's Treatment of His Slaves*

Ruffin felt confident that he had an accurate perception of the slave personality; he never doubted his belief that slavery was beneficial to the slave. He also thought well of the property class, particularly the slave-owners. In his famous 1855 speech he said, "[W]e, like every other people, have the idle and the vicious amongst us. But they are chiefly those who have the least connection with slaves, and particularly those employed in agriculture, and are to be found, without means, lounging about cities and villages."[22] He favored religion for slaves, so "[t]he comfort, cheerfulness, and happiness of the slave should be, and generally is the study of the master; and every Christian master rejoices over the soul of his slave saved, as of a brother, and allows of his attendance on the ministry of God's word and sacraments, in any church of his choice in his vicinity."[23] But he was quick to add that "[t]he condition of a slave denies to him, indeed, opportunities of education sufficient for searching the Scriptures for himself, and working there out his own conversion; but God forbid that should be necessary to salvation ... among the slaves of this country there are many exemplary Christians. Indeed, slavery in America has not only done more than the civilization and enjoyments of the African race than all other causes, but it has brought more of them into the Christian fold than all the missions to that benighted continent from the Advent to this day."[24]

Ruffin was confident that slaves were inherently docile. He said:

We know that our slaves are generally humble, obedient, quiet and a contented and cheerful race of laborers. Scattered over the plantations in rural occupations, they are never riotous or dangerous, as the same number of uneducated working

21. *Letter to Judge Thomas Ruffin from His Father, Sterling Ruffin* written from Brunswick in June of 1804. Taken from THE PAPERS OF THOMAS RUFFIN, Vol. I, pp. 54–55 (Collected & Edited by J.G. De Roulhac Hamilton, 1918).

22. *Publications of the North Carolina Historical Commission*, Volume 6, Part 4, THE PAPERS OF THOMAS RUFFIN, Vol. IV, pp. 335–36.

23. *Id.*

24. *Id.*

> men have often been in other parts of our country. Slaves are no part of this State, with no political power, and seek no violent or sudden changes in the law or policy of the country; and where slavery exists labor and capital never come in conflict, because they are in the same hands, and operate in harmony. It is not, then, a blot upon our laws, nor a stain on our morals, nor a blight upon our land.[25]

Between Ruffin and Paul Lawrence Dunbar, who most accurately captures the inner mood and tension of the slave? In his writings, Ruffin expressed his belief that slaves were "content" and "cheerful." Dunbar wrote in 1896 of the "mask" worn to cover the reality of suffering:

Paul Lawrence Dunbar

We Wear the Mask

We wear the mask
That grins and lies,
It hides our cheeks and shades our eyes,—
This debt we pay to human guile;
with torn and bleeding hearts we smile,
And mouth with myriad subtleties.
Why should the word be over-wise,
In counting all our tears and sighs?
Nay, let them only see us,
While we wear the mask.
We smile, but, O Great Christ, our cries
To thee from tortured souls arise.
We sing, but O, the clay is vile.
Beneath our feet and along the mile;
To let the world think otherwise
We wear the mask!

Ruffin's private actions toward the blacks on his own plantation at the Hawfields (Alamance County, N.C.) and at his homes in Hillsborough and Raleigh mirrored the harsh philosophy he displayed in *State v. Mann*. He had little compassion for slaves' human condition. This lack of compassion is also evident from letters which were written to Judge Ruffin by those who witnessed his mistreatment of his own slaves.

Martin H. Brinkley

Judge Thomas Ruffin

a. Archibald DeBow Murphey to TCR,[26] June 3, 1824 (Archibald DeBow Murphey Papers, SHC): Murphey writes Ruffin, his former law student and the purchaser of his

25. *Id.*

Hawfields plantation, a carefully worded and tactful, but clearly urgent, letter about the treatment of Ruffin's slaves by his overseer, Cephus Hudson. Murphey told Ruffin that his character was at stake; all his neighbors were complaining. To convince Ruffin that the allegations of cruelty were true, Murphey added that he had seen the slaves' backs himself. Murphey wrote: "I know nothing myself, except that the Negroes have often applied to me and begged me to let them strip and show me their Backs. We are all the more astonished at what is going on, from the fact that your overseer is a mild, placid, Man in his social Intercourse and a good, kind neighbor. Messrs. Albright, Wm. Rogers, Jo. Russell and Wm. Faucette are witnesses." *Cf.* Herbet Snipes Turner, *The Dreamer: Archibald DeBow Murphey, 1777–1832* 26 (1971) ("In after years when the farm passed into the hands of Thomas Ruffin, he was determined to make it financially profitable. Under a new overseer all the leisurely way of life which the slaves had known under Murphey was changed and they were driven to their work under the lash. Reluctantly, Murphey interceded on their behalf.").

b. Dr. John Webb to TCR, Jan. 16, 1823 (SHC): Dr. Webb, a Hillsborough physician, wrote of a Ruffin slave who complained to him of Ruffin's treatment; even Anne K. Ruffin, who seldom wrote letters, even to her husband, wrote to him of a woman and child who could no longer endure their treatment and were planning to leave. Not surprisingly, Ruffin was plagued with cases of runaway slaves.

c. TCR to Anne K. Ruffin (wife), Jan. 3, 1852: Patty Ruffin (dau. of TCR) to TCR, Jan. 11, 1852 (Thomas Ruffin Papers, SHC): A neighbor, General Allison, inquired whether Ruffin would be willing to sell Noah, a long-time Ruffin slave, for $150. The price was high for a slave past his working days. Ruffin told his daughter to consult Noah about his wishes in the matter. Although he learned from his daughter that Noah was anxious to spend the "remnant of his pilgrimage here on earth on the society of his beloved better half," Ruffin was unmoved and took the $150. "Old Uncle Noah," Sally Ruffin wrote her father, "left here this morning according to your directions; he disliked parting very much." *Sally Ruffin to TCR, Jan. 17, 1852; Peter Browne Ruffin (son of TCR) to TCR, Jan. 29, 1852* (Thomas Ruffin Papers, SHC).

d. Given the above facts, it is hardly surprising that Anne K. Ruffin privately feared her slaves or that in 1835 the Ruffin house was twice set on fire by an unhappy house servant.

e. TCR's participation in Slave Trading; TCR Partnership with Benjamin Chambers, Oct. 26, 1821, June 15, 1825: In 1821, when his affairs were in precarious shape, Ruffin resorted to a solution that most men of his standing would have found repugnant—slave trading. He formed a partnership with Benjamin Chambers "to carry on together and as copartners the purchasing of slaves and the selling the same." Chambers would do the actual dirty work while Ruffin would put up the initial $4,000 to get the operation started. When their original contract expired, it was renewed, presumably because it had proved profitable. It was terminated only by Chambers's death in 1826.

f. TCR's Willingness to Sell Slaves at a Moment's Notice: In 1811 Ruffin purchased forty-three acres on the eastern boundary of Hillsborough and set up housekeeping with his new wife, Anne K. Ruffin. The same year Sterling Ruffin, TCR's father, gave him seven slaves, two of whom TCR immediately sold (he kept Cupid, Henry, Molly, Parmy, and

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26. SHC denotes the Southern Historical Collection, Wilson Library, University of North Carolina. TCR denotes Thomas Carter Ruffin.

Dick). TCR's father-in-law, William Kirkland, also helped with a gift of a woman Milly and her two children, all of whom TCR sold within a year or so. Gifts of slaves, Aug. 1, 26, 1811; Anne K. Ruffin to TCR, Nov. 29, 1815; John MacRae to Ruffin, July 29, 1859 (Thomas Ruffin Papers, SHC).

Unpublished manuscript (1997).
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5. *Ruffin's Place in History*

State v. Mann is the focus of this introductory chapter because in many ways it typifies the judicial process of the South in the early 1800s. The case illustrates the judicial atmosphere of that time because Ruffin was regarded by many commentators as an exemplary judge. He was no anti-black fanatic; he cannot claim to be uneducated or unaware of the principles of liberty and justice that were being demanded by people of good will, both throughout the nation and the world. He was not uninformed about the persuasive arguments which had been made in condemnation of racial slavery. Rather, he was a product of a superior education—Princeton University, class of 1805, well aware of the disparities within society, and a member of the property class, with at least second-generation wealth. His father was an Episcopalian minister, and so his upbringing was likely steeped in moral and religious values.

In 1938 Roscoe Pound listed Judge Ruffin as one of the ten great state judges who "must be ranked first in American judicial history in shaping the peculiar contours of American history during the century after the American Revolution."[27] Harvard's esteemed James Bradley Thayer in 1895 in his famous casebook, *Cases on Constitutional Law*—the first casebook on constitutional law—compares Ruffin with men like Chief Justice John Marshall and Judge Lemuel Shaw of the Massachusetts Supreme Court. Thayer says, "[I]n this wide and novel field of ... [constitutional law] our judges have been pioneers. There have been men among them, like Marshall, Shaw, and Ruffin,[28] who were sensible of the true nature of their work and of the large method of treatment which it required, who perceived that our constitutions had made them, in a limited and secondary way, but yet a real one, coadjutors with the other departments in the business of government; but many have fallen short of the requirements of so great a function."[29]

How then is a study of Ruffin relevant to an understanding of race and the law? Examining Ruffin helps focus on what factor has been most important in determining the rules of American law. While precedent, analogies, facts, and statutory construction are significant, a decision-maker's personal values most accurately reflect how the rules of law will be formulated or interpreted. While no direct legal precedent existed, Ruffin had several viable options grounded in general principles of common law, statutory interpretation, and analogy. At the least, Ruffin could have ruled that Lydia was entitled to some minimal legal protection. Instead, he chose the harshest option available for Lydia,

27. Roscoe Pound, The Formative Era of American Law 4 (1938) as quoted in 31 S. L. Rev. 144 by Nash.

28. Note that, in many ways, Thayer's selection of these three jurists as particularly great men reflects the perception of the unimportance of the rights of blacks under the legal process, even in 1895. Marshall and Shaw had each written several opinions adverse to blacks while on the bench.

29. J. Thayer, Cases on Constitutional Law 178 (1895).

one giving her no rights whatsoever. The reason for this choice was not a legal justification but a personal one, based entirely on the profit and safety of the slave-owner.

F. Judge Thomas Ruffin's Rough Drafts of *Mann*[30]

1. *First Draft*

The Indictment charges a battery by the defendant on *Lydia*, the slave of E. Jones. Upon the face of the indictment, the case is the same as the *State v. Hall*, 2 Hawks, 382.— That case is considered as settling this question, as it relates to a stranger. The Court finds no fault with the rule then adopted, even if it were now open. But it is then put to rest. The evidence makes this a different case. Here the slave had been hired by the defendant and was in his possession, and the battery was committed during the period of hiring. With the liabilities of the hirer the general owner for an injury to the slave permanently impairing the value, no rule now to be adopted can interfere. The common doctrine of bailment would, no doubt, apply to that state of facts, modified to the emergency. The enquiry is, whether a cruel and unreasonable battery on a slave, by the hirer, is indictable. The Judge below instructed the Jury, that it is. It seems in the charge, to be put upon the ground, that the defendant had but a special property.

Our laws uniformly treat the master, overseer or other person having the possession and command of the slave, as entitled to the same authority. The object is the same— the services of the slave: And the same powers must be confided. In a criminal proceeding and in reference to all other persons but the general owner, the hirer and possessor of a slave in relation to both rights and duties, is, for the time being, the owner. This opinion would dispose of the particular case before us; because this indictment, which charges a battery upon the slave of E. Jones, is not supported by proof of a battery upon the defendant's own slave, since, certainly, different kinds of justification are applicable to the two cases. But upon the general question, whether the owner is answerable criminaliter for a battery upon his own slave or other exercise of authority or force on him, not forbidden by Statute, the Court entertains as little doubt. That he is so liable has never yet been decided: nor even, as far as is known, has been before contended. There have been no prosecutions of the sort. The established habits and uniform practice of the Country, in this respect, is the best evidence of the portion of Power deemed by the whole Community, requisite to the preservation of the Master's dominion. We cannot set our notions in array against the judgment of everybody else and say that this or that authority may be safely topped off. This has, indeed, been assimilated: the Bar to the other domestic relations; and arguments drawn from the well-established principles which confer and restrain the authority of the Parent over the child, the Tutor over the Pupil, and the Master over the Apprentice have been pressed on us. The Court does not recognize their application. There is no likeness between the cases. They are in opposition to each other and there is an impassable gulf between them. The difference is that, which exists between Freedom and Slavery—and a greater cannot be imagined. In the one, the end in view is the

30. Three drafts of Judge Ruffin's decision in this famous case were found among his papers written in his own handwriting, and present a most interesting illustration of his method of developing an opinion. The last draft is identical to the printed opinion of the Supreme Court as found in 13 N.C. 263 and, therefore, has been omitted from this section. *See* THE PAPERS OF THOMAS RUFFIN, Vol. IV, pp. 251–54 (Collected and edited by J.G. De Roulhac Hamilton, 1918).

happiness of the youth, born to equal rights with that governor, on whom the duty devolves of training the young to usefulness in that Station which he is afterwards to assume among free men. To such an end and with such a subject moral and intellectual instruction seem the natural means; and for the most part, they are found to suffice. Force is suppurated, only to make the others effectual. With slavery it is far otherwise. The end is, the profit of the Master, his security, and the public safety: The subject, one deemed in his own person and his posterity to live without knowledge and without capacity to make anything his own and to toil, that another may reap the fruits. What moral consideration shall be addressed to such a being, to convince him what it is impossible but that the most stupid must know can never be true,—that he is thus to labor upon a principle of natural duty or for the sake of his personal happiness? Surely such services can be expected only from one, who has no will of his own; who surrenders his will, in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the Body. The power of the master must be absolute to render the submission of the slave perfect. I most freely and fully confess my sense of the harshness of this position. I feel it as deeply as any man can, and as a principle of moral right everyone in his retirement must repudiate and condemn it. But in the actual conditions of things, there is no remedy. This discipline belongs to the State of Slavery. They cannot be disunited without abrogating at once the rights of the Master and destroying the subjugation of the slave. It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of Master and Slave.

That there may be particular cases of cruelty and deliberate barbarity where, in conscience, the law might properly interfere is most probable. The difficulty is to determine, which is the proper case. Merely in the abstract, it may be asked, what power of the master accords with right? The answer will probably be found to sweep away all. The truth is that every consideration forbids their being brought into discussion before Courts of justice. The Slave, to remain a slave, must be made sensible that there is no appeal from his master and that his power is, in no instance usurped but is conferred by the laws of man at least, if not the law of God. The danger would be great indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper and dereliction of menial duty. We are happy to see, that there is daily less and less occasion for their interposition. The protection already afforded by sundry statutes, the private interest of the owner, the benevolence towards each other seated in the hearts of those who have been born and bred together, the frowns and deep execrations of the Community upon the barbarian who is guilty of excessive and brutal cruelty to his unprotected slave, all combined, have produced a mildness of treatment and an attention to the comforts of that unfortunate class, greatly mitigating the rigors of slavery and ameliorating the condition of the slaves. The same causes will continue to produce and enlarge the same effects, until the disparity between the numbers of the whites and blacks shall leave the latter without power dangerous to the others, when the police now existing may be further relaxed. This result, much to be desired, may be much more rationally expected from the events above alluded to and now in progress than from any rash expositions of abstract truths by a Judiciary tainted with a fanatical philosophy and philanthropy.

I repeat therefore, that we would gladly have avoided this ungrateful question, but Courts are often compelled to set on principles, which outrage individual feeling. This is one instance of it. We are obliged therefore to declare, that, until the Legislature shall otherwise order the Courts must recognize the rights of the owner to full dominion over the person of the Slave, unless restrained in particular instances by Statute. And this we do upon the ground, that such dominion is essential to their value as property and to the

public peace, greatly dependent upon their subordination: and while slavery shall continue to exist in its present form as most effectually securing the general protection and comfort of the Slave—Let there be a new trial.

2. *Second Draft*

This is one of those cases which a Court will always regret being brought into judgment—One in which principles of policy urge the Judge to a decision in discord with the feelings of the man. But until the condition of our population be much changed or it shall seem fit to the Legislature to alter the rule, Courts are obliged, however reluctantly, to recognize the rights of the owner to full dominion over the *Slave*, as essential to their value as property, to the public peace as dependent upon their subordination and, indeed, while slavery in its present form shall continue to exist, as most effectually securing the general protection and comfort of the slave himself.

The Indictment charges the defendant with an assault and battery on Lydia, a slave, the property of Elizabeth Jones. This brings the case within the rule established in the *State vs. Hall*, 2 Hawks, 532. It is not intended to question what is there decided even if it were an open question and had not been decided. But it is not considered open. It is settled by that case. The question, here, is altogether different, upon the evidence. The slave had been hired by the defendant for the year 1825 from E. Jones; and the battery complained of was committed during that year. The liability of the defendant to the general owner for a permanent injury, impairing the value of the slave, caused by the excessive and wanton battery on her or other fault of the hirer is a distinct matter of consideration. There can be no doubt, that the common doctrines of bailments are applicable to such a study of facts. But in a criminal proceeding and in reference to all other persons but the owner, the hirer and possessor of a slave in relation to his rights and duties, is, for the time being, the owner. The case therefore presents the general question, whether the owner of a slave is responsible criminaliter for a battery upon his own slave or other exercise of authority or force over him, not expressly forbidden by statute. Such a rule has not yet been established. This Court disclaims the power to lay down such a rule, or to enforce it, without it be first prescribed by the Legislature. The province of interposing between Master and Slave is too delicate, in our State of Society, to be assumed by Courts without the positive injunction of the lawmaker. This has been assimilated to the other domestic relations; and arguments drawn from the well established principles, which confer and restrain the authority of the Parent over the child, the Master over the apprentice and the tutor over the pupil, have pressed on us with seal and ability. The Court cannot recognize their application. There is no likeness between the Cases. They are separated from each other by an impassable gulf. Without enlarging on the subject, it is enough to say that the difference between them is that, which exists between Freedom and Slavery. A contrast greater than that cannot be imagined. In the one case the subject of government is one born to equal rights with the governor, his offspring or his ward, young, helpless or inexperienced, the object of affection or benevolence, confided by providence or the law to the charge of another to be trained for usefulness in a station among freemen—the end in view, the happiness of the youth, the means, morals and intellectual instruction which, for the most part, are found to suffice. Force is suppurated, only to make the former effectual in cases of intractability. In the other, the end is the profit of the master and the security of his person, and the public safety. And who is the subject of this authority? One who has only intelligence and moral feeling enough to make his service reluctant to enable him to understand that the laws, which condemn him to toil for another is unjust, to condemn that injustice and abhor the master who avails himself of

it. Can he who has these consciousness be prevailed on by moral considerations to perform the functions of servitude? What moral consideration can be presented to him? Is it that there is to be no end to the degradation of himself and his descendants—that, thro' time, his offspring as well as himself are to have no will of their own and that their exertions are never to yield fruit but for a master? Surely every passion, good or bad, of the human heart combine to rebuke the folly of him, who advises or expects the Slave to serve his master upon a principle of natural duty. A submissive and entire obedience to the will of the Master can alone be expected to produce that subordination and those efforts of labor exacted from the slave. That submission of will can only follow from the power of the Master over the Body—a power which the Slave must be made sensible is not usurped, but conferred at least by the law of man, if not of God. Restraint, therefore, constant, vigilant, not infrequently severe and exemplary and painful punishments of the slave is the unwelcome, and the necessary task of the Master. This discipline belongs to the state of slavery. They cannot be disunited without abrogating all the rights of the master and annulling the duties of the slave. It makes the curse of slavery both to the bond and the free portion of our population. But in the actual condition of things, there is no remedy. The power of the master must be as strong and as absolute as the submission of the Slave must be unconditional and implicit. It is inherent in the relation of Master and Slave.

It is with pride as Citizens and sincere joy as men, that we observe every day improvements in the condition of slaves. The Legislature compels the owner to provide a comfortable subsistence for them, and gives him the same security of life which belongs to a free man: The Courts protect him from the cruelty and abuse of a stranger. Public opinion, in accordance with the humanity of the laws, demands a mitigation of the rigors of slavery, which has not been without the happiest effects upon the feelings of Masters, who now, generally, practice towards the blacks more mildness than formerly and as much indulgence as is consistent with the true interests of both classes and the common safety.

It is to be lamented when such cases as the present are brought into judgment. It is impossible that the reasons on which they go can be appreciated, but when institutions similar to our own exist and are thoroughly understood. Besides, the struggle in the Judge's own breast between the feelings of the man and the convictions of the Magistrate is a severe one—presenting a strong temptation to put aside such questions if it be possible. It is useless however to complain of things inherent in our political State. And it is criminal in a Court to avoid any duty which the laws impose. While therefore Slavery exists among men or until it shall seem fit to the Legislature to interpose express enactments to the contrary, it will be the imperative duty of the Judges to refrain from laying down any rule, which can diminish that dominion of the Master, which is necessary to enforce the obedience and exact the services of the Slave accorded by our law to the owner.

G. Questions and Notes

The two drafts and the opinion in *State v. Mann* reveal much about Judge Ruffin's methods and values. Can you identify and describe these methods and values? In any of his drafts did he explore the possibility that Lydia had any rights at all?

Lydia, as did most slaves in North Carolina in 1829, suffered immense physical and emotional cruelty at the hands of evil overseers. Was there any direct cause or catalyst for such cruelty? Whom do you blame for such cruelty?

H. Point/Counterpoint

Abolitionist and former slave Frederick Douglass described the risk to white society of relinquishing firm control and domination of slaves:

> Beat and cuff the slave, keep him hungry and spiritless, and he will follow the chain of his master like a dog, but feed and clothe him well, work him moderately and surround him with physical comfort, and dreams of freedom will intrude.... You may hurl a man so low beneath the level of his kind that he loses all just ideas of his natural position, but elevate him a little, and the clear conception of rights rises to life and power, and leads him onward.

Do you agree or disagree with the theory of Frederick Douglass?

III. Race Classification

A. Introduction

Race consciousness is primarily a modern development. As Professor Roger Sanjek explains:

> [I]n the ancient world, human rank ordering was largely a product of ethnocentrism or caste consciousness. In large part, this organization stemmed from the arrangement of primitive communities in close proximity to one another where, among the peoples of these communities, gradations in physical characteristics were not very marked. The contemporary social hierarchy, on the other hand, particularly in the United States, is largely a function of race consciousness. It was only after the global expansion undertaken by western Europeans in the fifteenth century had led to the colonization of the new world and the discovery of new sea passages to Asia that "race" assumed social significance. Western Europeans sought to maintain and rationalize their economic and political dominance by demonstrating that their subjugation of newly encountered and physically distinct peoples was natural, inevitable, and divinely predetermined.[31]

Recent scientific advances have shed new light on genetic bases for legal definitions of race. While research has revealed that there are genetic codes that cause blue eyes or dark skin, there are no genetic codes by which we can group people according to race. Consequently, it would appear that race is a socio-legal construction rather than a genetic one. The formation of race classifications, therefore, evolved through a series of choices and practices within societies, not from a genetic basis. Race classifications are a social

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31. *See* Roger Sanjek, *The Enduring Inequalities of Race*, in RACE 2–4 (Steven Gregory and Roger Sanjek eds. 1994). *See generally* MICHAEL OMI AND HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO 1980S (1986).

construct, sustained by the legal system, not by science. As a result, the primary focus of this chapter is law instead of science.

Michael J. Bamshad and Steve E. Olson

Does Race Exist?

Look around on the streets of any major city, and you will see a sampling of the outward variety of humanity: skin tones ranging from milk-white to dark brown; hair textures running the gamut from fine and stick-straight to thick and wiry. People often use physical characteristics such as these—along with area of geographic origin and shared culture—to group themselves and others into "races." But how valid is the concept of race from a biological standpoint? Do physical features reliably say anything informative about a person's genetic makeup beyond indicating that the individual has genes for blue eyes or curly hair?

The problem is hard in part because the implicit definition of what makes a person a member of a particular race differs from region to region across the globe. Someone classified as "black" in the U.S., for instance, might be considered "white" in Brazil and "colored" (a category distinguished from both "black" and "white") in South Africa.

Yet common definitions of race do sometimes work well to divide groups according to genetically determined propensities for certain diseases. Sickle cell disease is usually found among people of largely African or Mediterranean descent, for instance, whereas cystic fibrosis is far more common among those of European ancestry. In addition, although the results have been controversial, a handful of studies have suggested that African Americans are more likely to respond poorly to some drugs for cardiac disease than are members of other groups.

Individuals from different populations are, on average, just slightly more different from one another than are individuals from the same population. In general, we would answer the first question yes, the second no, and offer a qualified yes to the third. Our answers rest on several generalizations about race and genetics. Some groups do differ genetically from others, but how groups are divided depends on which genes are examined; simplistically put, you might fit into one group based on your skin-color genes but another based on a different characteristic. Many studies have demonstrated that roughly 90 percent of human genetic variation occurs within a population living on a given continent, whereas about 10 percent of the variation distinguishes continental populations. In other words, individuals from different populations are, on average, just slightly more different from one another than are individuals from the same population. Human populations are very similar, but they often can be distinguished.

As a first step to identifying links between social definitions of race and genetic heritage, scientists need a way to divide groups reliably according to their ancestry. Over the past 100,000 years or so, anatomically modern humans have migrated from Africa to other parts of the world, and members of our species have increased dramatically in number. This spread has left a distinct signature in our DNA.

To determine the degree of relatedness among groups, geneticists rely on tiny variations, or polymorphisms, in the DNA—specifically in the sequence of base pairs, the building blocks of DNA. Most of these polymorphisms do not occur within genes, the stretches of DNA that encode the information for making proteins (the molecules that constitute much of our bodies and carry out the chemical reactions of life). Accordingly, these common variations are neutral, in that they do not directly affect a particular trait. Some

polymorphisms do occur in genes; however, these can contribute to individual variation in traits and to genetic diseases.

Given that people can be sorted broadly into groups using genetic data, do common notions of race correspond to underlying genetic differences among populations? In some cases they do, but often they do not. For instance, skin color or facial features—traits influenced by natural selection—are routinely used to divide people into races. But groups with similar physical characteristics as a result of selection can be quite different genetically. Individuals from sub-Saharan Africa and Australian Aborigines might have similar skin pigmentation (because of adapting to strong sun), but genetically they are quite dissimilar.

In contrast, two groups that are genetically similar to each other might be exposed to different selective forces. In this case, natural selection can exaggerate some of the differences between groups, making them appear more dissimilar on the surface than they are underneath. Because traits such as skin color have been strongly affected by natural selection, they do not necessarily reflect the population processes that have shaped the distribution of neutral polymorphisms affected by natural selection may be poor predictors of group membership and may imply genetic relatedness where, in fact, little exists.

Another example of how difficult it is to categorize people involves populations in the U.S. Most people who describe themselves as African American have relatively recent ancestors from West Africa, and West Africans generally have polymorphism frequencies that can be distinguished from those of Europeans, Asians and Native Americans. The fraction of gene variations that African Americans share with West Africans, however, is far from uniform, because over the centuries African Americans have mixed extensively with groups originating from elsewhere in Africa and beyond.

Over the past several years, Mark D. Shriver of Pennsylvania State University and Rick A. Kittles of Howard University have defined a set of polymorphisms that they have used to estimate the fraction of a person's genes originating from each continental region. They found that the West African contribution to the genes of individual African-Americans averages about 80 percent, although it ranges from 20 to 100 percent. Mixing of groups is also apparent in many individuals who believe they have only European ancestors. According to Shriver's analyses, approximately 30 percent of Americans who consider themselves "white" have less than 90 percent European ancestry. Thus, self-reported ancestry is not necessarily a good predictor of the genetic composition of a large number of Americans. Accordingly, common notions of race do not always reflect a person's genetic background.

Understanding the relation between race and genetic variation has important practical implications. Several of the polymorphisms that differ in frequency practical implications. Several of the polymorphisms that differ in frequency from group to group have specific effects on health. The mutations responsible for sickle cell disease and some cases of cystic fibrosis, for instance, result from genetic changes that appear to have risen in frequency because they were protective against diseases prevalent in Africa and Europe, respectively. People who inherit one copy of the sickle cell polymorphism show some resistance to malaria; those with one copy of the cystic fibrosis trait may be less prone to the dehydration resulting from cholera. The symptoms of these diseases arise only in the unfortunate individuals who inherit two copies of the mutations.

Genetic variation also plays a role in individual susceptibility to one of the worst scourges of our age: AIDS. Some people have a small deletion in both their copies of a gene that encodes a particular cell-surface receptor called chemokine receptor 5 (CCR5).

As a result, these individuals fail to produce CCR5 receptors on the surface of their cells. Most strains of HIV-1, the virus that causes AIDS, bind to the CCR5 receptor to gain entry to cells, so people who lack CCR5 receptors are resistant to HIV-1 infection. This polymorphism in the CCR5 receptor gene is found almost exclusively in groups from northeastern Europe.

Several polymorphisms in CCR5 do not prevent infection but instead influence the rate at which HIV-1 infection leads to AIDS and death. Some of these polymorphisms have similar effects in different populations; others only alter the speed of disease progression in selected groups. One polymorphism, for example, is associated with delayed disease progression in European Americans but accelerated disease in African Americans. Researchers can only study such population-specific effects—and use that knowledge to direct therapy—if they can sort people into groups.

In these examples—and others like them—a polymorphism has a relatively large effect in a given disease. If genetic screening were inexpensive and efficient, all individuals could be screened for all such disease-related gene variants. But genetic testing remains costly. Perhaps more significantly, genetic screening raises concerns about privacy and consent: some people might not want to know about genetic factors that could increase their risk of developing a particular disease. Until these issues are resolved further, self-reported ancestry will continue to be a potentially useful diagnostic tool for physicians.

Ancestry may also be relevant for some diseases that are widespread in particular populations. Most common diseases, such as hypertension and diabetes, are the cumulative results of polymorphisms in several genes, each of which has a small influence on its own. Recent research suggests that polymorphisms that have a particular effect in one group may have a different effect in another group. This kind of complexity would make it much more difficult to use detected polymorphisms as a guide to therapy. Until further studies are done on the genetic and environmental contributions to complex diseases, physicians may have to rely on information about an individual's ancestry to know how best to great some diseases.

But the importance of group membership as it relates to health care has been especially controversial in recent years. Last January the U.S. Food and Drug Administration (FDA) issued guidelines advocating the collection of race and ethnicity data in all clinical trials. Some investigators contend that the differences between groups are so small and the historical abuses associated with categorizing people by race so extreme that group membership should play little if any role in genetic and medical studies. They assert that the FDA should abandon its recommendation and instead ask researchers conducting clinical trials to collect genomic data on each individual. Others suggest that only by using group membership, including common definitions of race based on skin color, can we understand how genetic and environmental differences among groups contribute to disease. This debate will be settled only by further research on the validity of race as a scientific variable.

A set of articles in the March 20 issue of the *New England Journal of Medicine* debated both sides of the medical implications of race. The authors of one article—Richard S. Cooper of the Loyola Stritch School of Medicine, Jay S. Kaufman of the University of North Carolina at Chapel Hill and Ryk Ward of the University of Oxford—argued that race is not an adequate criterion for physicians to use in choosing a particular drug for a given patient. They pointed out two findings of racial differences that are both now considered questionable: that a combination of certain blood vessel-dilating drugs was more effective in treating heart failure in people of African ancestry and that specific

enzyme inhibitors (angiotensin converting enzyme, or ACE, inhibitors) have little efficacy in such individuals. In the second article, a group led by Neil Risch of Stanford University countered that racial or ethnic groups can differ from one another genetically and that the differences can have medical importance. They cited a study showing that the rate of complications from type 2 diabetes varies according to race, even after adjusting for such factors as disparities in education and income.

The intensity of these arguments reflects both scientific and social factors. Many biomedical studies have not rigorously defined group membership, relying instead on inferred relationships based on racial categories. The dispute over the importance of group membership also illustrates how strongly the perception of race is shaped by different social and political perspectives.

In cases where membership in a geographically or culturally defined group has been correlated with health-related genetic traits, knowing something about an individual's group membership could be important for a physician. And to the extent that human groups live in different environments or have different experiences that affect health, group membership could also reflect nongenetic factors that are medically relevant.

Regardless of the medical implications of the genetics of race, the research findings are inherently exciting. For hundreds of years, people have wondered where various human groups came from and how those groups are related to one another. They have speculated about why human populations have different physical appearances and about whether the biological differences between groups are more than skin deep. New genetic data and new methods of analysis are finally allowing us to approach these questions. The result will be a much deeper understanding of both our biological nature and our human interconnectedness.

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The study of DNA, and specifically polymorphisms, indicates there is extremely low variation between the genetic sequencing found in distinct populations or different geographic regions. A system of race-based classifications is not supported by the science of DNA. The science of DNA reveals that humans all over the world have more characteristics in common than in contrast.

For many Americans race may exist biologically (which differs from genetically due to the development of illnesses reflective of a particular group), visually, culturally, socially, psychologically, or geographically; however, race does not exist genetically. Genetically speaking, all human beings are the same, yet the social constructs of racial differentiation continue.

This chapter examines the nature of race in America today, definitions of race, the laws maintaining racial purity and barring interracial marriage and the meaning of the term "black" in American race-classification law. It explores problems in defining racial discrimination, identifies difficulties in delineating racial categories, reveals the myth of white racial purity, discusses the contribution of this body of law to the development and maintenance of racial classification systems throughout the country, and analyses cases interpreting race-classification schemes.

B. The Nature of Race

Charles R. Lawrence III

The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism[*]

Much of one's inability to know racial discrimination when one sees it results from a failure to recognize that racism is both a crime and a disease. This failure is compounded by a reluctance to admit that the illness of racism infects almost everyone. Acknowledging and understanding the malignancy are prerequisites to the discovery of an appropriate cure. But the diagnosis is difficult, because our own contamination with the very illness for which a cure is sought impairs our comprehension of the disorder.

Scholarly and judicial efforts to explain the constitutional significance of disproportionate impact and governmental motive in cases alleging racial discrimination treat these two categories as mutually exclusive. That is, while disproportionate impact may be evidence of racially discriminatory motive, whether impact or motive is the appropriate focus is normally posed in the alternative: Should racially disproportionate impact, standing alone, trigger a heightened level of judicial scrutiny? Or, should the judiciary apply a deferential standard to legislative and administrative decisions absent proof that the decisionmakers intended a racial consequence? Put another way, the Court thinks of facially neutral actions as either intentionally and unconstitutionally or unintentionally and constitutionally discriminatory.

I argue that this is a false dichotomy. Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.

There are two explanations for the unconscious nature of our racially discriminatory beliefs and ideas. First, Freudian theory states that the human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right. While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness.

Second, the theory of cognitive psychology states that the culture—including, for example, the media and an individual's parents, peers, and authority figures—transmits

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[*] (footnotes and chapter headings omitted).

certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings: Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level.

In short, requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious ...

Racism is in large part a product of the unconscious. It is a set of beliefs whereby we irrationally attach significance to something called race. I do not mean to imply that racism does not have its origins in the rational and premeditated acts of those who sought and seek property and power. But racism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is a part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities ...

Whatever our preferred theoretical analysis, there is considerable commonsense evidence from our everyday experience to confirm that we all harbor prejudiced attitudes that are kept from our consciousness.

When, for example, a well-known sports broadcaster is carried away by the excitement of a brilliant play by an Afro-American professional football player and refers to the player as a 'little monkey' during a nationally televised broadcast, we have witnessed the prototypical parapraxes, or unintentional slip of the tongue. This sportscaster views himself as progressive on issues of race. Many of his most important professional associates are black, and he would no doubt profess that more than a few are close friends. After the incident, he initially claimed no memory of it and then, when confronted with videotaped evidence, apologized and said that no racial slur was intended. There is no reason to doubt the sincerity of his assertion. Why would he intentionally risk antagonizing his audience and damaging his reputation and career? But his inadvertent slip of the tongue was not random. It is evidence of the continuing presence of a derogatory racial stereotype that he has repressed from consciousness and that has momentarily slipped past his ego's censors. Likewise, when Nancy Reagan appeared before a public gathering of then-presidential-candidate Ronald Reagan's political supporters and said that she wished he could be there to "see all these beautiful white people," one can hardly imagine that it was her self-conscious intent to proclaim publicly her preference for the company of Caucasians.

Incidents of this kind are not uncommon, even if only the miscues of the powerful and famous are likely to come to the attention of the press. But because the unconscious also influences selective perceptions, whites are unlikely to hear many of the inadvertent racial slights that are made daily in their presence.

Another manifestation of unconscious racism is akin to the slip of the tongue. One might call it a slip of the mind: While one says what one intends, one fails to grasp the

racist implications of one's benignly motivated words or behavior. For example, in the late 1950s and early 1960s, when integration and assimilation were unquestioned ideals among those who consciously rejected the ideology of racism, white liberals often expressed their acceptance of and friendship with blacks by telling them that they 'did not think of them as Negroes.' Their conscious intent was complimentary. The speaker was saying, "I think of you as normal human beings, just like me." But he was not conscious of the underlying implication of his words. What did this mean about most Negroes? Were they not normal human beings? If the white liberal were asked if this was his inference, he would doubtless have protested that his words were being misconstrued and that he only intended to state that he did not think of anyone in racial terms. But to say that one does not think of a Negro as a Negro is to say that one thinks of him as something else. The statement is made in the context of the real world, and implicit in it is a comparison to some norm. In this case the norm is whiteness. The white liberal's unconscious thought, his slip of the mind, is, "I think of you as different from other Negroes, as more like white people." ...

A crucial factor in the process that produces unconscious racism is the tacitly transmitted cultural stereotype. If an individual has never known a black doctor or lawyer or is exposed to blacks only through a mass media where they are portrayed in the stereotyped roles of comedian, criminal, musician, or athlete, he is likely to deduce that blacks as a group are naturally inclined toward certain behavior and unfit for certain roles. But the lesson is not explicit: It is learned, internalized, and used without an awareness of its source. Thus, an individual may select a white job applicant over an equally qualified black and honestly believe that this decision was based on observed intangibles unrelated to race. The employer perceives the white candidate as "more articulate," "more collegial," "more thoughtful," or "more charismatic." He is unaware of the learned stereotype that influenced his decision. Moreover, he has probably also learned an explicit lesson of which he is very much aware: Good, law-abiding people do not judge others on the basis of race. Even the most thorough investigation of conscious motive will not uncover the race-based stereotype that has influenced his decision.

This same process operates in the case of more far-reaching policy decisions that come to judicial attention because of their discriminatory impact. For example, when an employer or academic administrator discovers that a written examination rejects blacks at a disproportionate rate, she can draw several possible conclusions: that blacks are less qualified than others; that the test is an inaccurate measure of ability; or that the testers have chosen the wrong skills or attributes to measure. When decisionmakers reach the first conclusion, a predisposition to select those data that conform with a racial stereotype may well have influenced them. Because this stereotype has been tacitly transmitted and unconsciously learned, they will be unaware of its influence on their decision.

39 *Stan. L. Rev.* 317, 321–23, 330–45.

Peggy McIntosh

White Privilege: Unpacking the Invisible Knapsack

"I was taught to see racism only in individual acts of meanness, not in invisible systems conferring dominance on my group."

Through work to bring materials from women's studies into the rest of the curriculum, I have often noticed men's unwillingness to grant that they are overprivileged, even though they may grant that women are disadvantaged. They may say they will work to improve women's status, in the society, the university, or the curriculum, but they can't or won't support the idea of lessening men's. Denials that amount to taboos surround the subject of advantages that men gain from women's disadvantages. These denials protect male privilege from being fully acknowledged, lessened, or ended.

Thinking through unacknowledged male privilege as a phenomenon, I realized that, since hierarchies in our society are interlocking, there was most likely a phenomenon of white privilege that was similarly denied and protected. As a white person, I realized I had been taught about racism as something that puts others at a disadvantage, but had been taught not to see one of its corollary aspects, white privilege, which puts me at an advantage.

I think whites are carefully taught not to recognize white privilege, as males are taught not to recognize male privilege. So I have begun in an untutored way to ask what it is like to have white privilege. I have come to see white privilege as an invisible package of unearned assets that I can count on cashing in each day, but about which I was "meant" to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks ...

I decided to try to work on myself at least by identifying some of the daily effects of white privilege in my life. I have chosen those conditions that I think in my case attach somewhat more to skin-color privilege than to class, religion, ethnic status, or geographic location, though of course all these other factors are intricately intertwined. As far as I can tell, my African-American coworkers, friends, and acquaintances with whom I come into daily or frequent contact in this particular time, place, and line of work cannot count on most of these conditions.

1. I can, if I wish, arrange to be in the company of people of my race most of the time.
2. I can avoid spending time with people whom I was trained to mistrust and who have learned to mistrust my kind to me.
3. If I should need to move, I can be pretty sure of renting or purchasing housing in an area which I can afford and in which I would want to live.
4. I can be reasonably sure that my neighbors in such a location will be neutral or pleasant to me.
5. I can go shopping alone most of the time, fairly well assured that I will not be followed or harassed by store detectives.
6. I can turn on the television or open to the front page of the newspaper and see people of my race widely and positively represented.
7. When I am told about our national heritage or about "civilization," I am shown that people of my color made it what it is.
8. I can be sure that my children will be given curricular materials that testify to the existence of their race.

9. If I want to, I can be pretty sure of finding a publisher for this piece on white privilege.
10. I can be fairly sure of having my voice heard in a group in which I am the only member of my race.
11. I can be casual about whether or not to listen to another woman's voice in a group in which she is the only member of her race.
12. I can go into a book store and count on finding the writing of my race, represented, into a supermarket and find the staple foods that fit with my cultural traditions, into a hairdresser's shop and find someone who can deal with my hair.
13. Whether I use checks, credit cards, or cash, I can count on my skin color not to work against the appearance that I am financially reliable.
14. I could arrange to protect our young children most of the time from people who might not like them.
15. I did not have to educate our children to be aware of systemic racism for their own daily physical protection.
16. I can be pretty sure that my children's teachers and employers will tolerate them if they fit school and workplace norms; my chief worries about them do not concern others' attitudes toward their race.
17. I can talk with my mouth full and not have people put this down to my color.
18. I can swear, or dress in secondhand clothes, or not answer letters, without having people attribute these choices to the bad morals, the poverty, or the illiteracy of my race.
19. I can speak in public to a powerful male group without putting my race on trial.
20. I can do well in a challenging situation without being called a credit to my race.
21. I am never asked to speak for all the people of my racial group.
22. I can remain oblivious to the language and customs of persons of color who constitute the world's majority without feeling in my culture any penalty to such oblivion.
23. I can criticize our government and talk about how much I fear its policies and behavior without being seen as a cultural outsider.
24. I can be reasonably sure that if I ask to talk to "the person in charge," I will be facing a person of my race.
25. If a traffic cop pulls me over or if the IRS audits my tax return, I can be sure I haven't been singled out because of my race.
26. I can easily buy posters, postcards, picture books, greeting cards, dolls, toys, and children's magazines featuring people of my race.
27. I can go home from most meetings of organizations I belong to feeling somewhat tied in, rather than isolated, out of place, outnumbered, unheard, held at a distance, or feared.
28. I can be pretty sure that an argument with a colleague of another race is more likely to jeopardize her chances for advancement than to jeopardize mine.
29. I can be fairly sure that if I argue for the promotion of a person of another race, or a program centering on race, this is not likely to cost me heavily within my present setting, even if my colleagues disagree with me.

30. If I declare there is a racial issue at hand, or there isn't a racial issue at hand, my race will lend me more credibility for either position than a person of color will have.
31. I can choose to ignore developments in minority writing and minority activist programs, or disparage them, or learn from them, but in any case, I can find ways to be more or less protected from negative consequences of any of these choices.
32. My culture gives me little fear about ignoring the perspectives and powers of people of other races.
33. I am not made acutely aware that my shape, bearing, or body odor will be taken as a reflection of my race.
34. I can worry about racism without being seen as self-interested or self-seeking.
35. I can take a job with an affirmative action employer without having my co-workers on the job suspect that I got it because of my race.
36. If my day, week, or year is going badly, I need not ask of each negative episode or situation whether it has racial overtones.
37. I can be pretty sure of finding people who would be willing to talk with me and advise me about my next steps, professionally.
38. I can think over many options, social, political, imaginative, or professional, without asking whether a person of my race would be accepted or allowed to do what I want to do.
39. I can be late to a meeting without having the lateness reflect on my race.
40. I can choose public accommodation without fearing that people of my race cannot get in or will be mistreated in the places I have chosen.
41. I can be sure that if I need legal or medical help, my race will not work against me.
42. I can arrange my activities so that I will never have to experience feelings of rejection owing to my race.
43. If I have low credibility as a leader, I can be sure that my race is not the problem.
44. I can easily find academic courses and institutions that give attention only to people of my race.
45. I can expect figurative language and imagery in all of the arts to testify to experiences of my race.
46. I can choose blemish cover or bandages in "flesh" color and have them more or less match my skin ...

Disapproving of the systems won't be enough to change them. I was taught to think that racism could end if white individuals changed their attitudes. But a "white" skin in the United States opens many doors for whites whether or not we approve of the way dominance has been conferred on us. Individual acts can palliate, but cannot end, these problems ...

Excerpted from Working Paper 189,
"White Privilege and Male Privilege: A Personal Account of Coming to
See Correspondences through Work in Women's Studies."

F. Michael Higginbotham

Racism Less Pervasive, More Complex

Forty years ago today, the Rev. Martin Luther King Jr. was murdered. The night before he died, the Nobel Peace Prize winner delivered a speech predicting the nation's future and his own demise. Dr. King prophesied that, while he likely would not live to see the day, he had no doubts that all Americans, including blacks, would someday "get to the promised land" of racial equality.

Four decades after Dr. King's death, Barack Obama, the U.S. Senate's only black member, may become America's first black president. This stirs powerful emotions. In a country with a long history of slavery and segregation, what a monumental moment in the American story.

That is why the cover of many major magazines feature variations on the question, "Does Barack Obama's Rise Mean the End of Racism?" The answer is not a short yes or no, but rather a long maybe. Whether racism ends in America depends upon what Americans do with this latest opportunity.

Many say Mr. Obama's success is insignificant. Some even suggest that his popularity with whites is a cynical ploy on their part to end, once and forever, any discussion of current racism. They are wrong. Mr. Obama's multiracial coalition demonstrates an eagerness for dialogue, a desire for change, and a sense of the possibilities of this moment.

Progress and setbacks in racial equality have occurred in a cyclical nature in American history. Three major opportunities for change presented themselves: the founding, Reconstruction, and the civil rights movement. In each, racial progress was made, but setbacks followed due to continuing notions of white superiority. Mr. Obama's achievement, whether or not he wins the presidency in 2008, signifies a fourth era of opportunity.

This is not to suggest that Mr. Obama's success indicates the end of racism. Those who believe that are as wrong as those who say racism today is as bad as it was under Jim Crow. It does, however, indicate an opportunity to take the final step in a long journey. As Mr. Obama recognized in his momentous speech last month on America's racial divide, now is the time for the real conversation to begin.

No doubt, for many Americans the conversation will be uncomfortable. It must, however, take place if we are ever to realize those "self-evident truths" of equality identified more than 200 years ago by the Founding Fathers and reiterated in 1963 in Dr. King's "I Have a Dream" speech.

Racial inequality today is much more complex than it was when Dr. King led protests against Jim Crow. Forty years ago, laws enshrined discrimination, and violence was used to maintain the divide. Today, what I call the ghosts of Jim Crow are caused by choices that result in housing isolation, inequitable school funding, criminal justice stereotyping, and health care service inadequacy that maintain inequality.

One ghost of Jim Crow is exemplified in the story of Tim Carter and Richard Thomas, arrested in 2004 in separate incidents three months apart in nearly the same location in St. Petersburg, Fla. Police found one rock of cocaine on Mr. Carter, who is white, and a crack pipe with cocaine residue on Mr. Thomas, who is black.

Both men claimed drug additions, neither had any prior felony arrests or convictions, and both men potentially faced five years in prison. Mr. Carter had his prosecution withheld, and the judge sent him to drug rehabilitation. Mr. Thomas was prosecuted, convicted and went to prison. Their only apparent difference was race.

Harsher punishment for blacks is common, even today. Statistics indicate that nationally blacks are prosecuted and imprisoned at a rate more than five times that of whites.

Equally reflective of current racial disparities is the pattern of property ownership, and the fact that whites continue to embrace the "tipping point" notion in housing integration.

"Tipping point" bigotry inspired Jeremy Parady, who pleaded guilty in 2005 to conspiracy to commit arson in a series of fires in a new housing development in Southern Maryland. Mr. Parady admitted that he set fire to this development because many of the buyers were blacks and the surrounding neighborhood was mostly white.

Much progress toward equality has been made; official government discrimination is rare, and blatant bigotry has been substantially reduced.

But racial disparities continue to haunt us decades after Dr. King's assassination, and racist choices continue to influence those disparities. These ghosts of Jim Crow must be eradicated if Dr. King's "Promised Land" prediction is ever to come true.

Baltimore Sun A21 (April 4, 2008).

C. Definitions of Race

A. Leon Higginbotham, Jr. and Barbara Kopytoff

*Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia**

In order to separate by race you must first define race. There is probably no better place than Virginia to examine the origins of the American doctrine of racial purity and its maintenance through prohibitions on interracial sex and interracial marriage. Many people applaud Virginia as the "mother of Presidents" (four of the first five Presidents were Virginians)[3] and the "mother of revolutionaries," such as Thomas Jefferson, George Washington, and Patrick Henry. Yet few stress that colonial Virginia was also the "mother" of American slavery and a leader in the gradual debasement of blacks[4] through its institution of slavery. Virginia was also one of the first colonies to formulate a legal definition of race[5] which it enforced through prohibitions against interracial marriage and interracial sex. For more than three centuries,[6] the Virginia courts and legislatures advocated and endorsed concepts of racial purity that most Americans today would call racist.

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* (some footnotes omitted).

3. These were Presidents Washington, Jefferson, Madison, and Monroe.

4. The term "black" is used to include all those who, during the pre-Civil War period, were classified by law as Negroes or mulattoes. The two comprised a single legal category, but a single term was not generally used in legal writing of the time. After the Civil War, the term "colored" was used for both, which term has recently been replaced by "black" or African American. *See* 1888 Code of Virginia tit. 4, ch. VI, §49 (defining "colored" persons and Indians).

5. *See* Ch. IV, 3 Laws of Va. 250, 252 (Hening 1823) (enacted 1705) (mulatto defined as child, grandchild, or great-grandchild of Negro (and presumably a white) or child of Indian (and presumably a white)).

6. The first prohibition against interracial sex came in a 1662 statute; Act XII, 2 Laws of Va. 170, 170 (Hening 1823) (enacted 1662). Virginia's prohibition on interracial marriage was declared unconstitutional in 1967. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (prohibition violated equal protection and due process clauses of the fourteenth amendment).

While Virginia was a pioneer in these areas of law both before and after the Civil War, the pre-Civil War law differed significantly from that of the early twentieth century. The law of racial purity in the eighteenth and nineteenth centuries defined "white" as a less exclusive term than did the law of the twentieth century: People with some ancestors known to be African could be legally white. The laws banning interracial sex and marriage were less harsh on blacks before the Civil War than they were afterwards: blacks were not punished at all for marrying or for engaging in voluntary sexual relations with whites.

This is not to say that Virginia was less racist and oppressive to blacks before the Civil War than it was in the late nineteenth and twentieth centuries, but merely that the legal mechanisms of oppression were somewhat different. Slavery had its own mechanisms for legal control. When it was abolished, white Virginians devised other mechanisms to preserve the racial hierarchy of the slave era, such as the laws regarding racial purity and interracial sex.

The laws regarding racial purity and interracial sex and marriage in pre-Civil War Virginia sprang from two concerns. The first concern was with the maintenance of clear racial boundaries in a society that came to be based on racial slavery. Starting in the late seventeenth century, white Virginia legislators enacted statutes to discourage racial intermingling. Later, they enacted statutes to racially classify the mixed-race children born when the earlier statutes were ineffective. The statutes punishing voluntary interracial sex and marriage were directed only at whites; they alone were charged with the responsibility of maintaining racial purity.[7]

When Europeans, sub-Saharan Africans, and Native Americans first encountered one another in large numbers during the seventeenth century, the three populations had effectively been separated for thousands of years and each had developed distinctive physical characteristics. The visible differences, especially between Africans and Europeans, were so striking that travelers usually commented on them: "indeed when describing Negroes they frequently began with complexion and then moved on to dress (or rather lack of it) and manners." The causes of the physical variations were open to question, and theories to explain them abounded. But the more important issue in the Americas became the consequence of racial difference rather than its causes: that is, the legal and social significance of race.

In practical terms, the fact that the differences between Africans and Europeans were so visible made it particularly easy to operate a racially based system of slavery. In theoretical terms, when people bothered to ponder the question, they often saw the differences among races as part of a "natural ordering of creatures by Providence into a Great Chain of Being, from the highest to the lowest." Clearly, such a conception of a hierarchical ordering of races need not imply slavery; the English thought that the Irish were an inferior "race" but did not advocate denying them all basic human rights. Yet just as clearly, the idea of racial hierarchy could be, and came to be, used as a justification for slavery.

7. The second concern was with involuntary interracial sex—that is, rape. This was seen primarily as an aspect of power relations between the races. Virginia applied the early law of rape more harshly to blacks than to whites: it punished only black men for interracial rape and, in the nineteenth century, the state formulated anti-rape statutes directed specifically at blacks.

In a 1772 suit in Virginia brought by a group of Native Americans who claimed they had been unjustly enslaved, Colonel Bland, the lawyer for the slave owner, argued:

> That societies of men could not subsist unless there were a subordination of one to another, and that from the highest to the lowest degree. That this was conformable with the general scheme of the Creator, observable in other parts of his great work, where no chasm was to be discovered, but the several links run imperceptibly into one another. That in this subordination the department of slaves must be filled by some, or there would be a defect in the scale of order.

In Colonel Bland's notion of the "Great Chain of Being," Native Americans and blacks were created inferior and were meant to be subservient to whites. Although seldom expressed clearly and explicitly in eighteenth-century Virginia, the view was implicitly held throughout Virginia society, especially with regard to blacks.

Since the racially-based systems of slavery that developed in the New World were premised on the concept of the racial inferiority of the enslaved, it would have been far simpler to maintain that system had there been no intermingling of races, no anomalous offspring, and no confusion of the "natural order" by beings who did not clearly belong to one rather than another of the three populations of Indians, Africans, and Europeans. But human sexual behavior did not respect the "natural order," and mixed-race children invariably sprang up wherever the races had contact. Many white Virginians were disturbed by racial intermingling, especially white-black mixtures, and introduced laws penalizing whites who engaged in interracial sex in order to prevent what they saw as the "abominable mixture and spurious issue." When that failed, they turned to drawing strict racial boundary lines, defining some mixed-race children as white and others as mulatto. They also devised a separate rule to settle the status of mixed-race children as slave or free, depending on the status of the mother. This rule applied generally to all children born in Virginia, whether of mixed race or not.

Virginia did not create a perfect social system in which black equaled slave and white equaled free with no confusing middle ground. Virginia's racially-based system of slavery was created in the context of continuous racial mixing, legal anomalies, and recurring attempts to patch holes in the fabric of the system. Looking at the system in terms of its anomalies and patches helps bring into focus some of the central concepts of race in pre-Civil War Virginia.

The Law of Slave Status

Part of the reason there was no complete correlation of race with slave status in pre-Civil War Virginia was that the rule for the inheritance of slave status was, as written, technically independent of race. While white Virginians seemed increasingly to want blacks to be slaves, the statutes avoided a direct and explicit statement equating race and status. In 1662, the House of Burgesses set down the law on the inheritance of slave status, and it remained virtually unchanged throughout the slave period in Virginia. It was devised to settle the status of the mulatto children of free white fathers and black slave mothers. The act read:

> Whereas some doubts have arisen whether children got by any Englishman upon a negro woman should be slave or free. Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shall be held bond or free only according to the condition of the mother....

There was an implicit confounding of "black" and "slave" in this early statute. It stated that the problem was the doubtful status of the mulatto children of "Negro" women; yet "Negro" must have meant "slave" or there would have been no question of the slave or

free status of the children. In a world in which whites were assumed to be free and blacks were increasingly assumed to be slaves, a decision had to be made about the status of individuals who did not clearly belong to one race or the other: children whose parents represented two distinct races and two extreme statuses.

The statute did not say that all children of black men or of black women were to be slaves, probably because not all blacks were then slaves. It would have seemed extreme, no doubt, even to white Virginians of that time, to enslave the child of two free people just because one or both of them were black. Some blacks were landowners and held slaves themselves. The statute said, rather, that all children would be "bond or free" according to the status of the mother.[8] The rule embodied in the statute was thus phrased only in terms of status, not in terms of race.

Nonetheless, a rough correlation of race and status was assumed; even though the two categories did not correspond entirely then and they diverged over time, partly as a result of the 1662 statute. Consider, for example, the status of free blacks. Some blacks imported into Virginia before 1662 had never been slaves, and others who had been born slaves were later emancipated. The children of free black women were free under the statute, as were mulatto children born to white women. Free mulattoes were classified with free blacks in terms of race and position in society.[9] They also failed to correspond because white men mated with mulatto slave women producing a class of very light-skinned slaves. Some individuals were slaves because they were remotely descended in the maternal line from a

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8. It was contrary to English tradition for children to inherit the status of their mothers, but since the children who posed the problem were almost certainly illegitimate, it may also have been contrary to English tradition for them to inherit a position or status from their fathers. Indeed, the inheritance of slave status was itself anomalous in English law of that era. Villeinage had died out in England and all English men and women of the 17th century were free born, whether legitimate or not. When it existed, villeinage had been heritable in the male line. *See* Morris, *"Villeinage ... as it existed in England, Reflects but little light on our subject": The Problem of the "Sources" of Southern Slave Law*, 32 AM. J. LEG. HIST. 95, 105–7 (1988) (concluding common law of property rather than villeinage source of slave law). The decision to make slave status heritable in the female line marked a departure. The rule of having children take their mother's status is known in Civil Law as *partus sequitor venturm*. Exactly how the doctrine came into use in Virginia is unclear. It is not known whether it came with slaves brought from Civil Law countries, or was borrowed by the legislators from Roman Law, or was independently invented by Virginians. It is clear that the legislators did not in 1662 invent the idea that the progeny of female slaves were also to serve for life; there is evidence for that practice as early as the 1640s. *See* Jordan, *Modern Tensions and the Origins of American Slavery*, 28 J.S. HIST. 18, 23–24 (1962) (sales of Negroes for life and of Negro women with future progeny recorded in 1640s).

9. While one can sort out the legal categories of race, the numbers in each are uncertain. The population figures on which estimates are based are incomplete, especially for the early period, and they do not distinguish Negroes and mulattoes and sometimes do not distinguish slave and free blacks. Edmund Morgan has given population estimates for 17th-century Virginia in the appendix to AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 404 (1975). He also has estimated the number of blacks, but he says those figures are largely conjectural. In 1964, by his estimates, Virginia had 1,000 to 3,000 blacks out of a total population of 13,392. By the end of the century, in 1699, he suggests, Virginia's population included 6,000 to 10,000 blacks out of 58,040. *Id.* at 423. There is even less idea how many of those blacks were free.

The first U.S. census reports, from 1790, show that during the 18th century the free and slave black population increased at a far greater rate than the white. In 1790, the total black population was 305,493—of whom 12,866 were free—and the white population was 442,117. By 1860, the last U.S. census under slavery, the total black population was 548,907—of whom 58,042 were free—and the white population was 1,047,299. U.S. BUREAU OF THE CENSUS, NEGRO POPULATION IN THE UNITED STATES 1790–1915, at 57 (W. Katz ed. 1968) [hereinafter NEGRO POPULATION 1790–1915] (figures for black population); *id.* at 44–45 (figures for white population).

black slave woman, but had such a high proportion of European ancestry that they looked white.[10] Some would even have qualified as legally white under eighteenth and nineteenth-century Virginia statutes that defined race in terms of a specific proportion of white and non-white ancestry. Yet, legally, they were also slaves.[11] Being legally white did not make one free if one's mother was a slave; being black or mulatto did not make one a slave if one's mother was free.[12] The law of the inheritance of slave status was technically independent of race. As a result, many people obtained a social status considered inappropriate for their race in the white Virginians' ideal conception of their slave society.

To say that a person could legally be a slave if he or she were descended in the maternal line from a slave raises the question of whether the first woman in the line had been legally enslaved. It seems clear from the early documents that Virginians gradually made what Winthrop Jordan has called an "unthinking decision" to enslave blacks, and they did so in the absence of any specific legal sanction for the practice. It was only after the practice was well established that it was reinforced by positive law. Thus the first statute on the legality of enslavement came in 1670, eight years after the statute on the inheritance of slave status.

The stated purpose of the 1670 statute was to settle the question of whether Native Americans who were bought as war captives from other American Indians could be slaves. Blacks were not mentioned explicitly, but by curiously circumspect language the legislature indicated that imported blacks were to be slaves. The act as published was captioned "what tyme Indians to serve." It read, in its entirety:

> Whereas some dispute have [sic] arisen whither Indians taken in warr by any other nation ... that taketh them sold to the English, are servants for life or terms of years, It is resolved and enacted that all servants not being Christians imported

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10. There are a number of references to slaves who looked white. *See* J. JOHNSTON, RACE RELATIONS IN VIRGINIA & MISCEGENATION IN THE SOUTH, 1776–1860, at 209–14 (1970) (contemporary accounts of fair-skinned slaves). The numbers of fair-skinned slaves increased over time, as the slave population "lightened."

> [T]he glaring fact is that throughout the South, Mulatto slavery was on the rise in the decade before the Civil War. Slavery as an institution was becoming whiter and whiter, a direct contradiction to the fundamental white notion that slavery was meant for black people. In 1835, Chancellor Harper of South Carolina had declared that it was "hardly necessary to say that a slave cannot be a white man," but by the end of the ante-bellum period the facts said otherwise. Growing number of persons with predominantly white blood were being held as slaves.
>
> J. MENCKE, MULATTOES AND RACE MIXTURE 20 (1979).

11. No case held that a slave was free solely on the ground that he or she was legally white. The point was raised in *Henry v. Bollar*, 34 Va. (7 Leigh) 552 (1836), in which the plaintiffs alleged, among other things, "that they were in fact white persons, and therefore could never have been lawfully held in slavery." *Id.* at 556. The defendants in the case claimed that those suing for their freedom were mulattoes. *Id.* at 557. The court did not address the interesting question of whether persons who had so small a proportion of black ancestry that they were legally white could, in fact, be slaves. It found the plaintiffs free on other grounds, namely, that their owner, who had tried to free them both by will and by deed of emancipation, had been mentally competent to do so. *Id.*

12. For a brief period of fifteen years, starting in 1676, some Native Americans also could be legally enslaved, and a female ancestor from that period could produce a line of descendants who were legally slaves. Act I, 2 LAWS OF VA. 341, 346 (Hening 1823) (enacted 1676) (Native-Americans taken during war held as slaves for life); Act I, 2 LAWS OF VA. 401, 404 (Hening 1823) (enacted 1676) (same); Act I, 2 LAWS OF VA. 433, 440 (Hening 1823) (enacted 1679) (same); Act IX, 3 LAWS OF VA. 69, 69 (Hening 1823) (enacted 1691) (abolition of all trade restrictions with Native Americans). The 1691 statute was later interpreted as having made enslavement of Native Americans illegal. *See Gregory v. Baugh*, 25 Va. (4 Rand.) 246, 252 (1827) (Green, J.) (discussion of these and other statutes regarding enslavement of Native Americans).

> into this colony by shipping shalbe slaves for their lives; but what shall come by land shall serve, if boyes or girles, untill thirty years of age, if men or women twelve years and no longer.[13]

Why was enslavement made to depend on manner of importation? If the legislators wanted to enslave blacks but not American Indians, why did they not say so? There seems to have been a curious avoidance of any mention of blacks in the statute. In 1682, the statute was revised to eliminate the distinction based on the manner of importation, for the legislature had, in the interim, approved the enslavement of Indians. This time the legislators offered explicit examples of the people whom they contemplated enslaving: "all [imported] servants except Turkes whilest in amity with his majesty, ... whether Negroes, Moors, Mullattoes or Indians." The list of likely slave peoples was dropped from the act in the 1705 revision; the revised act noted only which imported servants could not be enslaved, not which could be.

Thus, the rule of enslavement, like the rule of the inheritance of slave status, was technically independent of race. However, even a superficial familiarity with the history of the era would indicate that white Virginians did not truly intend that slave status and race be independent. As the 1682 statute shows, they saw slaves as "Negroes, Moors, Mullatoes or Indians."[14] Yet, for the most part, they avoided racial designations in their laws, making enslavement depend on other characteristics instead. Were white Virginians of the mid-seventeenth century reluctant to admit, even to themselves, what they were doing: establishing a slave society based on race?

Statutory Definitions of Race in Virginia

There existed the anomaly of people whose status in Virginia society was not entirely dependent on their race. There were also racial anomalies: people whose race was in itself ambiguous, who did not fit into one or another of the set categories of race that comprised the white Virginian's view of nature.

When Europeans, Native Americans, and Africans first came into contact with each other in Virginia, there was no question or problem as to which race an individual belonged. It was evident at first glance. As Judge Roane observed in *Hudgins v. Wrights:*

> The distinguishing characteristics of the different species of the human race are so visibly marked, that those species may be readily discriminated from each other by mere inspection only. This, at least, is emphatically true in relation to the negroes, to the Indians of North America, and the European white people.

Thus, there was no need to establish an immediate statutory definition of race and there were no problems of racial identity to be solved by legislative fiat. However, as soon as the races began to mingle and reproduce, problems of racial identity arose. How should mixed-race offspring be classified?

Strictly in terms of genetic contribution, the child of one white parent and one black parent had the same claim to being classified as white as he or she did to being classified

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13. Id. at 283 (italics omitted). The treatment of Native Americans by the Virginia legislature and courts is an area which goes far beyond the coverage of this Chapter. However, even within the context of racial purity and interracial sex, the Virginia legal process demonstrated a hostility to Native Americans because they were nonwhite.

14. Act I, 2 Laws of Va. 490, 491 (Hening 1823) (enacted 1682). The Moors that the Virginians meant to enslave were most likely blacks while those "in amity with his majesty" who were not to be enslaved were most likely lighter-skinned people from North Africa.

as black. The child was neither, or either, or both. One could decide to call such half/half mixtures mulattoes, but that merely raised the question of classification again in the next generation. Was the child of a mulatto and a white to be deemed a mulatto or a white? Or should another name, like quadroon, be devised for such a person?

Of course, the important point was not the classification itself but the set of rights and privileges that accompanied that classification. In Virginia, there were only three racial classifications of any legal significance, though there were far more combinations and permutations of racial mixture. Those three were "white," "Indian," and "Negro and mulatto."[15] Mulattoes of mixed African and European ancestry had the same legal position as blacks, although their social position may have been somewhat different. These legal classifications gave rise to the need for a legal definition of race. As Winthrop Jordan notes, "if mulattoes were to be considered Negroes, logic required some definition of mulattoes, some demarcation between them and white men." Virginia was one of only two colonies to bow to the demands of logic by creating a precise statutory definition in the colonial period.

As noted above, slave status was legally independent of race. Slaves who looked white had no special legal privileges until the nineteenth century, and then their only advantage was that they were relieved of the burden of proof in freedom suits. Race did, however, make a considerable difference for free people. Thus, the first legal definition of "mulatto" appeared in a statute dealing with the rights of free persons.

In 1705, the Virginia legislature barred mulattoes, along with blacks, Native Americans, and criminals, from holding "any office, ecclesiastical, civil or military, or be[ing] in any place of public trust or power." The mixed-race individuals defined as mulatto under the statute were "the child of an Indian, or the child, grandchild, or great grandchild of a Negro." Whites had distinct legal advantages, but mulattoes had no greater rights than blacks. Thus, the important dividing line was the white/mulatto boundary, not the mulatto/black boundary. The fact that some people were classified as mulatto rather than as black seems to have been simply a recognition of their visible differences.

One notes in the statute's definition of "mulatto" the different treatment of those whose non-white ancestors were American Indians as opposed to blacks. A person with one Native American parent and one white parent was a mulatto. Someone with one Native American grandparent and three white grandparents was, by implication, legally white and not barred from public office under the statute. For black-white mixtures, it took two additional generations to "wash out the taint" of Negro blood to the point that it was legally insignificant. A person with a single black grandparent or even a single black great-grandparent was still considered a mulatto.

This 1705 statute represents the beginning of racial hierarchy in American race classification law. The black, Native American, and mulatto classifications were inferior to the white classification, at least for purposes of holding a high government job. In addition, the black classification was inferior to the Native American classification.

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15. Other aspects of an individual's heritage might, of course, determine important legal rights. For example, whether his mother was a slave or freewoman, or whether his mother was an unwed indentured white servant or a free white woman. *See* Act XII, 2 Laws of Va. 170, 170 (Hening 1823) (enacted 1662) (whether children bound or free depends solely on condition of mother); Act C, 2 Laws of Va. 114, 114–15 (Hening 1823) (enacted 1661) (birth of bastard child by servant extends term of indenture or subjects servant to fine).

Why was there a difference in the legal treatment of white Native American mixtures and white-black mixtures? Perhaps it was related to the degree to which a mixed-race individual looked white to eighteenth-century white Virginians. Perhaps it was also because Europeans tended to see Native Americans as higher on the scale of creation than blacks, though still lower than themselves.[16]

Though these definitions of race state the rule in theory, they were not rigidly followed in practice. There is no case from this period in which a claim to being legally white was based on the exact proportion of white blood. At the time of the statute in 1705, some eighty-five years after the first blacks had arrived in Virginia, there would barely have been time for the four generations of offspring necessary to "dilute the taint" of black blood to the point that it did not count under law. Thus, few if any white-black mixtures would have qualified as white, though there were likely some white Native American mixtures who did.

The Virginia legislature, meeting in 1785, changed the legal definition of mulatto to those with "one-fourth part or more of negro blood."[17] Thus, by implication, those of one-eighth black ancestry (one black great-grandparent), who by the 1705 statute had been mulattoes, were now legally white. There is no mention in the statute of Native American ancestry. Interestingly, while the definition of mulatto in 1705 excluded from the category of white virtually all of those with any black ancestry at the time, the 1785 definition, some four generations later, did not attempt to do the same. Instead, under the 1785 act, a number of mixed-race people who previously would have been classified as mulatto could be considered white. This was the only time Virginia law was changed to allow persons with a greater proportion of black ancestry to be deemed white. All subsequent changes were in the opposite direction—making a smaller proportion of black blood bar one from being considered white.

Was this statute, as James Hugo Johnston suggests, an effort to bring the law into line with social practice? He says, "[i]t would appear that the lawmakers of the early national period feared that a declaration to the effect that the possession of any black ancestry, however remote, made a man a mulatto might bring embarrassment on certain supposedly white citizens." He notes that before the Civil War, in no state did the law provide that a person having less than one-eighth black blood should be deemed a mulatto.

Johnston also says that it was no doubt believed to be exceedingly difficult, if not impossible, to enforce a more drastic law of racial identity. Yet, in fact, Virginia did enact more drastic laws in the twentieth century. Under a 1910 statute, as small a proportion

16. The favored treatment of Indians was still present in 1924 as indicated by an act of the Virginia legislature that made it unlawful for a white person to marry anyone but another white. A white was defined as someone with "no trace whatsoever of any blood other than Caucasian" or someone with no admixture of blood other than white and a small proportion of Native American blood. 1924 Va. Acts ch. 371, §5, at 535. This provision was the so-called "Pocahontas exception," designed to protect descendants of John Rolfe and Pocahontas, who were by then considered part of the white race. However, in 1924, John Rolfe could not have married Pocahontas. Under the most likely interpretation of the statute, he would have been limited to whites or those who were no more than 1/16 Native American. Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1202–3 (1966).

17. The statute was entitled "An Act declaring what persons shall be deemed mulattoes," and it stated:

[E]very person whose grandfathers or grandmothers any one is, or shall have been a negro, although all his other progenitors, except that descending from the negro, shall have been white persons, shall be deemed a mulatto; and so every person who shall have one-fourth part or more of negro blood, shall, in like manner, be deemed a mulatto.

Ch. LXXVIII, 12 LAWS OF VA. 184, 184 (Hening 1823) (enacted 1785; effective 1787).

as one-sixteenth African ancestry made one "colored." Then, in 1924 and 1930, any African ancestry at all, no matter how small a proportion, meant that one was not legally white.

Another possible explanation for the 1785 statute is that it reflected strategic considerations. If supposedly white men of power and position were declared to be mulatto and thus deprived of civil and political rights, they might have formed a dangerous alliance with other "less white" free mulattoes and blacks whose rights were similarly denied. Their combined forces would have threatened the social control over the society of the remaining smaller number still classified as white. For example, at that time, Georgia legislators were apparently more concerned about hostile Native Americans on their southern border than they were about the racial makeup of the colony's white population. To encourage the immigration of free mixed-race persons into the colony, the Georgia legislature provided in 1765 that free mulatto and "mustee"[18] immigrants might be declared "whites," with "all the Rights, Privileges, Powers and Immunities whatsoever which any person born of British parents" would have, except the right to vote and to sit in the Assembly.

These explanations are merely suggestions. There is no satisfactory answer as to why the 1785 Virginia statute redefined racially mixed persons who formerly were classified as mulatto as legally white. The Act itself does not articulate a reason for the change. The percentage of allowable African ancestry in a legally white person was not changed again until the twentieth century, and Native American mulattoes were reintroduced in an 1866 statute making a person who was one-quarter Native American a mulatto, if he or she was not otherwise "colored."

Objectively, the effect of statutes defining a mulatto as someone with a certain proportion of African or Native American ancestry, and implying that someone with a smaller proportion of nonwhite ancestry was legally white, was to make "white" into a mixed-race category. By the early twentieth century, when those classified as white had to have "no trace whatsoever"[19] of black "blood," there was indeed a great deal of untraced (and, in some cases, untraceable) "black blood" in the white population.

One can see the notion that African ancestry can be gradually diluted into legal insignificance in the case of *Dean v. Commonwealth*. There, a criminal defendant claimed that two witnesses were incompetent to testify against him because they were mulattoes and mulattoes could not testify against whites. The court found the witnesses competent, since they had less than one-fourth black blood, the legal dividing line under the statute then in force. The description of legal "lightening" over the generations in the reporting of the case is telling:

" ... [F]rom the testimony it appeared certainly, that they had less than one fourth of negro blood. Their grandfather, David Ross, who was spoken of as a respectable man, though probably a mulatto, was a soldier in the revolution and died in the service. The evidence as to the grandmother was contradictory; though she was probably white, the

18. "Mustee" was a term used in Georgia and the Carolinas to describe a person who was part Indian, "usually Indian-Negro but occasionally Indian-white."

19. Ch. 371, §5, 1924 Va. Acts 534–35. All of the acts setting out racial definitions, with the exception of the 1924 "Act to Preserve [white] Racial Integrity" defined "mulatto" or "colored" rather than "white." White is defined by implication. In the 1924 act, "white" is given an explicit definition for the first time in the statute which sets out whom whites could marry. It is the most restrictive of the racial definitions. It defines a white person as one "who has no trace whatsoever of any blood other than Caucasian; but persons who have [only] one-sixteenth or less of the blood of the American Indian ... shall be deemed to be white persons." Ch. 371, 1924 Va. Acts 535. The 1930 statute defining as colored anyone "in whom there is ascertainable any Negro blood" is only slightly less restrictive. Ch. 85, 1930 Va. Acts 97.

mother was so certainly." The grandfather would have been incompetent to testify because he was a mulatto, but the grandchildren were not. Thus, in mid-nineteenth century Virginia, mulatto parents and grandparents could have children and grandchildren who were legally white. That became legally impossible only in the twentieth century, when any trace of African ancestry would disqualify a person from being considered white under the law.

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. Then, however, their racial rationale for slavery would have been undermined because the number of legally white slaves would have increased greatly. It would have been hard to maintain that slavery was justified by the inferiority of blacks if large numbers of slaves were classified as white under Virginia law. The white population was in fact racially mixed, but the proportion of non-white ancestry allowable in a white person was so small that it was not very visible. It was so small that, as we shall see, white Virginians could maintain the myth that it was not there at all.

In nineteenth-century Virginia, the concept of a "pure white race" as a category of nature was a myth. It was a powerful myth, however, one used to support social and legal action, as in the *Kinney* decision, and to justify the oppression of non-whites. Pure white race as a legal concept was a vigorous and powerful cultural construct. It gained force in the late nineteenth and early twentieth centuries and was called on to justify an ever harsher set of repressive legal measures against blacks.

77 *Georgetown Law Journal* 1967, 1967–68 (1989) (some footnotes omitted).

D. Preserving the Myth of White Racial Purity

A. Leon Higginbotham, Jr. and Barbara Kopytoff

*Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia**

Concern over the Production of Mulatto Children

A special group of cases concerned white women who produced mulatto children while being married to white men. Several of these men applied to the House of Burgesses for a special act granting them a divorce. The question of whether a white woman was to be divorced or punished under the criminal code, or both, for producing a mulatto child outside of marriage was sometimes complicated by uncertainty as to whether the child was a mulatto. It seems that this question may have been at issue in the case of Peggy and Richard Jones.[25] In that case, a divorce was granted provisionally, pending the outcome of a jury trial deciding the husband's claim. The divorce would take effect, "provided that it shall be found by the verdict of a jury, upon ... trial ... that the child of said Peggy Jones is not the child of said Richard Jones, but is the offspring of some man of colour."[26] In other cases no reference was made to a trial.[27] The Jones child probably looked white

* (some footnotes omitted).

25. Act of Nov. 25, 1814, divorcing Richard Jones from his wife Peggy, Ch. XCVIII, 1814 Acts of Va. 145.

26. *Id.* at 145.

27. Act of Jan 4, 1803, dissolving a marriage between Dabney Pettus and his wife Elizabeth, Ch. LXIV, 1802 Acts of Va. 46, 47 (divorce granted without trial when wife publicly acknowledged mulatto

enough so that there was some question as to whether Richard Jones might not be the father after all, and Peggy Jones may have contested the accusation of adultery.

It is interesting to note that when a couple classified as white produced a child whose racial identity was uncertain, the wife was suspected of having committed adultery with a black or mulatto man. Another possible explanation was that either the husband or the wife or both were in fact of mixed black-white ancestry, though legally white (if the proportion of black ancestry were small enough), or passing as white. Mixed-race parents would, on occasion, produce a child whose complexion was darker than either of theirs, a child who looked mulatto when they did not. That possibility was not explored. It may not have occurred to white Virginians, or it may have been suppressed. It may have been more disturbing to them than the attribution of adultery to the women, for it called into question the idea of clear racial classifications, an idea that was central to the maintenance of slave society in Virginia.

Offspring of Interracial Unions

Virginians from an early date lashed out at interracial sex in language "dripping with distaste and indignation." The distaste turned to revulsion when they spoke of the resulting mulatto children, especially those with white mothers, as an "abominable mixture and spurious issue."

Mixed-race offspring were disturbing to white Virginians for several reasons. First, they were anomalies. They simply did not fit into the whites' vision of the natural order of things: a great chain of Being comprised of fixed links, not of infinite gradations. Things which do not fit into the perceived natural order are seen as unnatural and often as dangerous and "abominable." The term "spurious," used by the Virginia legislature for the children of marriages between whites and blacks, shows a fundamental uneasiness and aversion to the idea of racial mixture, an aversion that is not entirely explainable by practical considerations. The aversion was greatest toward the mulatto children of white women. Since mulattoes were classified with blacks, the prospect of a mulatto child of a black mother was not as disturbing as that of a mulatto child of a white mother. It seemed less anomalous. Second, the idea of a racially based system of slavery depended on a clear separation of the races. Mulattoes challenged that idea. Winthrop Jordan suggests that the psychological problem was handled in part by categorizing mixed-blood offspring as belonging to the lower caste, thus, in effect, denying their existence:

> The colonist ... remained firm in his rejection of the mulatto, in his categorization of mixed-bloods as belonging to the lower caste. It was an unconscious decision dictated perhaps in large part by the weight of blacks on his community, heavy enough to be a burden, yet not so heavy as to make him abandon all hope of maintaining his own identity, physically and culturally. Interracial propagation

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child as son of black slave); Act of Dec. 20, 1803, dissolving a marriage between Benjamin Butt, Jr. and Lydia his wife, Ch. VI, 1803 Acts of Va. 20, 20–21 (same); Ch. LIX, 1806 Acts of Va. 26, 26 (divorce granted without trial when 'reasons to believe' that child born to white woman was fathered by black slave and not her white husband); Act of Jan. 10, 1817, divorcing Abraham Newton from his wife Nancy, Ch. 120, 1817 Va. Acts 176, 176 (divorce granted without trial when white woman gave birth to mulatto child five months after marriage to white man). In the case of Hezekiah Mosby and his wife Betsy, a trial was also ordered to determine the facts. Act of Jan. 25, 1816, authorizing the divorce of Hezekiah Mosby from his wife Betsy, Ch. CXXXV, 1816 Acts of Va. 246, 246–47. The fate of these women after the divorce is unknown, though they were subject to the act penalizing white women who had mulatto bastards with a heavy fine or five years of servitude. Act XVI, 3 Laws of Va. 86, 87 (Hening 1823) (enacted 1691); Ch. XLIV, 3 Laws of Va. 447, 453 (Hening 1823) (enacted 1705).

> was a constant reproach that he was failing to be true to himself. Sexual intimacy strikingly symbolized a union he wished to avoid. If he could not restrain his sexual nature, he could at least reject its fruits and thus solace himself that he had done no harm. Perhaps he sensed as well that continued racial intermixture would eventually undermine the logic of the racial slavery upon which his society was based. For the separation of slaves from free men depended on a clear demarcation of the races, and the presence of mulattoes blurred this essential distinction. Accordingly, he made every effort to nullify the effects of racial intermixture. By classifying the mulatto as a black he was in effect denying that intermixture had occurred at all.

Third, mulattoes created a practical problem for a racially based system of slavery. They had to be classified in terms of status as well as in terms of race, and as discussed earlier, race did not automatically determine one's status as slave or free. The law of the inheritance of slave status was a response to the question of how to classify the children of white men and slave women, and the 1662 statute gave them the status of their mothers.

It has been suggested that, rather than having been dictated solely by racism, this policy might have reflected, among other things, the "prudential considerations of keeping a child with its mother and reimbursing the mother's master for its support." However, keeping a child with its slave mother hardly required such a drastic measure as making the child a slave. Many free white children were raised from infancy by slave women. If mulatto children by white fathers had been declared free, the slave mothers would probably have continued to raise them. Furthermore, masters could have been reimbursed by making the child serve an indenture as well as by making it a slave. Whatever the precise combination of motives behind the rule of the inheritance of slave status, it had two notable practical effects: first, it separated the large majority of the children of interracial unions from whites by assigning them the status of slave; second, it provided slave owners with easy and cheap ways to increase the number of slaves they held. In the psychological terms suggested by Jordan, it also allowed white men to deny their responsibility for racial intermixture far more effectively than they could have done had the child inherited its status from the father.

The rule that children were to take the status of their mothers meant that some mulattoes (the great majority) were slave and some were free. Free mulattoes fell into two categories that were treated very differently. Under a 1691 statute, a mulatto child born out of wedlock to a white woman was to be bound out as a servant by the church wardens until the age of thirty. The statute prescribed no similar fate for the legitimate mulatto children of white mothers or the legitimate or illegitimate mulatto children of free black mothers. The same statute prescribed banishment within three months for white women who married black, mulatto, or Native-American men, so that the mother, and any legitimate mulatto children who went with her, were removed from local society anyway. When, however, in 1705, the penalty was changed to six months in prison and a fine, white women who served their time presumably were able to raise families of free legitimate mulatto children. These children were not to be sold into service for the benefit of the parish for that provision applied only to bastard children. While the products of the mixed marriages might have been "spurious and abominable" to the white Virginians, they were not illegitimate. The sacrament of marriage was effective even in the case of interracial marriage until 1849.

Just as the legislators were much harder on white women who produced free mulatto bastards than they were on free black women who also produced free mulatto bastards, the legislators were also much harder on the free mulatto bastards descended from white

women than they were on other free mulattoes.[32] What was the difference between the free mulattoes of white mothers and the others that the former should be treated more harshly? Perhaps it was an extension of the outrage the legislators felt toward the mothers of such children. Perhaps it was that they were evidence of the corruption of the white race in a way that the mulatto children of black mothers were not. Once Virginians had made the decision to classify mulattoes with blacks, the mulatto child of a white mother was an assault on racial purity. The mulatto child of a black mother merely exhibited a lighter shade within the range of skin color of the lower racial caste.

77 *Georgetown Law Journal* 1967, 1997–2007 (1989) (some footnotes omitted).

E. Background on *Hall*

D. Wendy Greene

Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?

> "Race must be understood as a sui generis social phenomenon in which contested systems of meaning serve as the connections between physical features, faces and personal characteristics ... social meanings connect our faces to our souls."

Throughout American history, skin color has been used to determine an individual's race, but it has not served as the sole marker of one's race. Distinguishable physical markers signifying "whiteness" and "non-whiteness" generated the creation of a hierarchical social system based on race and color, whereby whiteness represented the superior status and non-whiteness the inferior. Accordingly, philosophers and scientists promulgated hierarchical racial nomenclatures based upon discernible corporal traits. These racial classification systems gained credence throughout the seventeenth and eighteenth centuries. For example, in 1797, George Léopold Cuvier theorized that the "Ethiopian" or "negro race" was

> marked by a black complexion, crisped or woolly hair, compressed cranium, and a flat nose. The projection of the lower parts of the face, and the thick lips, evidently approximate it to the monkey tribe; the hordes of which it consists have always remained in the most complete state of utter barbarism.

Whereas the "Caucasion" or "white race" was

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32. When female mulatto bastards of white women who were bound out as servants had children during their service, those children served the mother's master until they reached the age their mother was when she completed her service. Ch. IV, 4 Laws of Va. 126, 133 (Hening 1820) (enacted 1723). It was left to the courts to decide the fate of the third generation of children born to such mulatto women servants, and the courts did so. In *Gwinn v. Bugg*, 1 Va. (Jeff.) 48 (1769), the General Court interpreted the statute prescribing indenture for the mulatto bastards of white women to apply to the bastard children of females so indentured whether such children had been formally bonded out by the church wardens or had simply stayed on with the master of their mother. *Id.* at 48–49.

Despite the revulsion the legislators seemed to feel toward mulattoes, and especially toward free mulattoes with white mothers, the one 'solution' they would not tolerate was for the mothers quietly to kill their children at birth. To discourage free women wishing to avoid penalties for producing bastards from killing their infants, the legislators prescribed the death penalty for any non-slave woman who killed her bastard child to conceal it. Ch. XII, 3 Laws of Va. 516, 516 (Hening 1823) (enacted 1710). Presumably, a mother who killed her child might always face the death penalty, but the legislators felt the practice in this case warranted a special statute.

> distinguished by the beauty of the oval formed by its head, varying in complexion and the colour of the hair. To this variety, the most highly civilized nations, and those which have generally held all others in subjection, are indebted for their origin.

And, though Cuvier declared that Native Americans could not be classified within a particular race, he did propound an essentialist portrayal of Native Americans comprising of a "copper-coloured complexion[,] ... generally black hair ... defined features, projecting nose, large and open eye."

... However, it was not the physical markers alone that engendered the relative subordination and empowerment of racial groups; it was the meaning that society attached to these physical markers. These physical markers—skin color, hair texture, the shape of one's lips, nose, eyes and head—fostered notions about the individual's intellectual ability, morality, and humanity. Consequently, society's interpretation of these physical markers, in other words "race," determined the individual's participation and status in society socially, politically, legally, and economically. Whiteness signified positive attributes such as freedom, respectability, civilization; non-whiteness represented the inferior opposite.

Race provided the basis for American slavery, racial segregation, and the attainment or denial of political, social, legal and economic privileges and rights, including voting, owning property, traveling freely, receiving an education, and even becoming a citizen. Because of interracial unions which produced offspring who destabilized predetermined and (presumably permanent) racial constructs based on physical characteristics, early American courts concluded that "biological" or "immutable characteristics" were not reliable determiners of one's "race." In addition to miscegenation, emancipation threatened the foundations of American slavery: the putative natural inferiority of Blacks and superiority of whites. The independence free Blacks exhibited by establishing schools, churches, and communities, for example, contravened the notions that Blacks were subordinate to whites and the agency of whites was critical to Blacks' survival, and thereby undermined core justifications for the perpetual enslavement of Blacks. In order to retain the privileges restricted to whites, the purity of the white race and, thus, white supremacy, courts promulgated a more "absolute" and "consistent" test to determine one's race by examining one's behavior in relation to other members of society. As a result, daily actions and interactions became racialized and an individual's performance or non-performance of certain behaviors could signify one's race.

In its 1835 decision in *State v. Cantey*, the South Carolina Court of Appeals illustrated this shift from appropriating a "biological" definition of race to determining race based on an individual's "performance" in society through its explicit rejection of a biological construct of race. The *Cantey* court held that an individual's race was not determined by the degree of white or colored "blood" a person possessed but

> by [his] reputation, by his reception into society, and his having commonly exercised the privileges of a white man. But his admission to these privileges, regulated by the public opinion of the community in which he lives, will very much depend on his own character and conduct; and it may be well and proper, that a man of worth, honesty, industry and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste.

In 1866, the Michigan Supreme Court in *People v. Dean* expressed similar sentiments depicting a naturally autonomous and universally accepted method of determining an individual's Blackness (or whiteness) by his or her social behaviors. According to the *Dean* court,

> it is very well known that the associations of persons having visible portions of African blood, have generally been closer with each other than with those acknowledged as white. They consider themselves as of one race, and live and act together. This mutual recognition, coupled as it undoubtedly is with a general disposition on the part of white persons to avoid social relations with the mass of mixed, as well as unmixed, races of African descent, furnishes a commentary on the terms *white* and *colored*, which can hardly be resisted.

As the courts in *Cantey* and *Dean* reveal, genetic inheritance or physical appearance did not simply determine one's race. Conformity with race-based stereotypes and behaviors, which were constructed through group-based social relations as well as the law, also determined one's race.

79 Colorado L.Rev. 1355, 1365–1369.

Ariela J. Gross

*Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South**

In April of 1855, Abby Guy sued William Daniel in the Circuit Court for Ashley County, Arkansas, complaining that he held her and her children unfairly in slavery despite the fact that she was white. The trial was held in the small town of Hamburg's brand-new courthouse, no doubt drawing spectators from all over the county to witness the dramatic determination of Guy's racial status. After Guy won her case, William Daniel appealed it to the state supreme court, and it was tried again in a neighboring county before she finally prevailed in the Arkansas Supreme Court on the eve of the Civil War. At the two trials, jurors watched Guy and her children display themselves for inspection, read documents of sale and a will, and listened to the opinions and descriptions of medical experts and witnesses from several counties. Witnesses testified about Guy's appearance, her reception in society, her conduct, her self-presentation, and her inherited status. In each case, the judge left the question of "race" for the jury to decide, because the jury represented the community consensus.

Trials like Abby Guy's, at which the central issue became the determination of a person's racial identity, were a regular occurrence in Southern county courts in the nineteenth century. While nineteenth-century white Southerners may have believed in a racial "essence" inhering in one's blood, there was no agreement about how to discover it. Legal determinations of race could not simply reflect community consensus, because there was no consensus to reflect. Despite the efforts of legislatures to reduce racial identities to a binary system, and of judges to insist that determining race was a matter of common sense, Southern communities harbored disagreement, suspicion, and conflict—not only over who was black and who was white, but over how to make such determinations at all ...

This Article is based on a reading of all of the surviving trial records that I have been able to locate for the sixty-eight cases of racial determination appealed to state supreme courts in the nineteenth-century South. More than half of these (thirty-six) took place in the last years of slavery—between 1845 and 1861—and the majority involved men. These cases arose from a variety of circumstances. Certain criminal statutes specified that a crime was particular to persons of color or "Negroes," so that one might raise the defense of whiteness to an indictment. Nearly all of these cases involved men. In inheritance

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* (footnotes omitted).

disputes, one claimant to the estate sometimes claimed that another claimant, or the testator himself, was black and therefore could not inherit or devise property. In other inheritance disputes, racial determination often arose in litigating questions of legitimacy: one party might attempt to overcome the presumption of paternity with evidence that the child was mulatto. In the only kind of case in which women were disproportionately the subject of racial determination, slaves sued for their freedom by claiming whiteness. In suits for slander, a man who held himself out as white sued for lost status or property because another person impugned his whiteness. The circumstances of these cases included scuttled weddings, economic disputes between neighboring grocers, and blackballing from clubs or militia units. There were also a few criminal cases in which defendants sought to disqualify witnesses by claiming that they had "colored" blood. Finally, slaveholders sued steamboats and railroad companies that carried runaway slaves "passing" as white; the transportation companies usually defended by arguing that the slaves were, for all intents and purposes, white.

Of course, courtroom battles were not the routine mechanism for knowing a person's racial status in Southern society. For Southerners whose appearance seemed clearly to mark them as "black," the vast majority of whom were enslaved before 1863 or 1864, racial status was over-determined. The confluence of dark skin, degraded status, reputation, and ancestry rendered the possibility of litigation over racial identity impossible for those African Americans. Yet litigated cases of racial determination are important to the understanding of the creation of racial meanings for a number of reasons. First, there was a substantial and growing number of people of mixed racial ancestry for whom racial presumptions based on appearance could not settle the question of identity. Second, the presence of Indians in the population complicated the equation of dark skin with "Negro" identity or slave status. Even dark skin and curly hair did not automatically consign one to the "Negro" race if one could trace one's color to "Indian blood." But even more importantly, the possibility of ambiguity created by people of contested racial identity was a source of great anxiety to white Southerners, who expended a great deal of energy trying to foreclose the possibility of white slaves, "passing" blacks, and the interracial sex that lay behind both. If we take their anxiety seriously as a clue to what mattered to white Southerners in their struggle to define racial categories, we cannot simply dismiss the litigated cases as odd or freakish.

108 *Yale Law Journal* 109, 111–12, 120–22.

While blackness was certainly the mark of slavery, being classified as nonwhite was the mark of a degraded caste. As the slave cases indicate, Asian or Indian ancestry through the maternal line may legally justify freedom, but such non-African ancestry would not alleviate the burdens of state-imposed racial discrimination.

F. *People v. Hall*, 4 Cal. 399 (1854)

1. Facts

Chief Justice MURRAY delivered the opinion of the Court.

The appellant, a free white citizen of this State, was convicted of murder upon the testimony of Chinese witnesses.

The point involved in this case, is the admissibility of such evidence.

2. *Opinion*

The 394th section of the Act Concerning Civil Cases, provides that no Indian or Negro shall be allowed to testify as a witness in any action or proceeding in which a White person is a party.

The 14th section of the Act of April 16th, 1850, regulating Criminal Proceedings, provides that "No Black, or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man."

The true point at which we are anxious to arrive, is the legal signification of the words, "Black, Mulatto, Indian and White person," and whether the Legislature adopted them as generic terms, or intended to limit their application to specific types of the human species.

Before considering this question, it is proper to remark the difference between the two sections of our Statute, already quoted, the latter being more broad and comprehensive in its exclusion, by use of the word "Black," instead of Negro.

Conceding, however, for the present, that the word "Black," as used in the 14th section, and "Negro," in 394th, are convertible terms, and that the former was intended to include the latter, let us proceed to inquire who are excluded from testifying as witnesses under the term "Indian."

When Columbus first landed upon the shores of this continent, in his attempt to discover a western passage to the Indies, he imagined that he had accomplished the object of his expedition, and that the Island of San Salvador was one of those Islands of the Chinese sea, lying near the extremity of India, which had been described by navigators.

Acting upon this hypothesis, and also perhaps from the similarity of features and physical conformation, he gave to the Islanders the name of Indians, which appellation was universally adopted, and extended to the aboriginals of the New World, as well as of Asia.

From that time, down to a very recent period, the American Indians and the Mongolian, or Asiatic, were regarded as the same type of the human species.

In order to arrive at a correct understanding of the intention of our Legislature, it will be necessary to go back to the early history of legislation on this subject, our Statute being only a transcript of those of older States.

At the period from which this legislation dates, those portions of Asia which include India proper, the Eastern Archipelago, and the countries washed by the Chinese waters, as far as then known, were denominated the Indies, from which the inhabitants had derived the generic name of Indians.

Ethnology, at that time, was unknown as a distinct science, or if known, had not reached that high point of perfection which it has since attained by the scientific inquiries and discoveries of the master minds of the last half century. Few speculations had been made with regard to the moral or physical differences between the different races of mankind. These were general in their character, and limited to those visible and palpable variations which could not escape the attention of the most common observer.

The general, or perhaps universal opinion of that day was, that there were but three distinct types of the human species, which, in their turn, were subdivided into varieties or tribes. This opinion is still held by many scientific writers, and is supported by Cuvier, one of the most eminent naturalists of modern times.

Many ingenious speculations have been resorted to for the purpose of sustaining this opinion. It has been supposed, and not without plausibility, that this continent was first

peopled by Asiatics, who crossed Behring's Straits, and from thence found their way down to the more fruitful climates of Mexico and South America. Almost every tribe has some tradition of coming from the North, and many of them, that their ancestors came from some remote country beyond the ocean....

The similarity of the skull and pelvis, and the general configuration of the two races; the remarkable resemblance in eyes, beard, hair, and other peculiarities, together with the contiguity of the two Continents, might well have led to the belief that this country was first peopled by the Asiatics, and that the difference between the different tribes and the parent stock was such as would necessarily arise from the circumstances of climate, pursuits, and other physical causes, and was no greater than that existing between the Arab and the European, both of whom were supposed to belong to the Caucasian race.

Although the discoveries of eminent archeologists, and the researches of modern Geologists, have given to this Continent an antiquity of thousands of years anterior to the evidence of man's existence, and the light of modern science may have shown conclusively that it was not peopled by the inhabitants of Asia, but that the Aborigines are a distinct type, and as such claim a distinct origin, still, this would not, in any degree, alter the meaning of the term, and render that specific which was before generic.

We have adverted to these speculations for the purpose of showing that the name of Indian, from the time of Columbus to the present day, has been used to designate, not alone the North American Indian, but the whole of the Mongolian race, and that the name, though first applied probably through mistake, was afterwards continued as appropriate on account of the supposed common origin.

That this was the common opinion in the early history of American legislation, cannot be disputed, and, therefore, all legislation upon the subject must have borne relation to that opinion.

Can, then, the use of the word "Indian," because at the present day it may be sometimes regarded as a specific, and not as a generic term, alter this conclusion? We think not; because at the origin of the legislation we are considering, it was used and admitted in its common and ordinary acceptation, as a generic term, distinguishing the great Mongolian race, and as such, its meaning then became fixed by law, and in construing Statutes the legal meaning of words must be preserved.

Again: the words of the Act must be construed in *pari materia.* It will not be disputed that "White" and "Negro," are generic terms, and refer to two of the great types of mankind. If these, as well as the word "Indian," are not to be regarded as generic terms, including the two great races which they were intended to designate, but only specific, and applying to those Whites and Negroes who were inhabitants of this Continent at the time of the passage of the Act, the most anomalous consequences would ensue. The European white man who comes here would not be shielded from the testimony of the degraded and demoralized caste, while the Negro, fresh from the coast of Africa, or the Indian of Patagonia, the Kanaka, South Sea Islander, or New Hollander, would be admitted, upon their arrival, to testify against white citizens in our courts of law.

To argue such a proposition would be an insult to the good sense of the Legislature.

The evident intention of the Act was to throw around the citizen a protection for life and property, which could only be secured by removing him above the corrupting influences of degraded castes.

It can hardly be supposed that any Legislature would attempt this by excluding domestic Negroes and Indians, who not unfrequently have correct notions of their obligations to

society, and turning loose upon the community the more degraded tribes of the same species, who have nothing in common with us, in language, country or laws.

We have, thus far, considered this subject on the hypothesis that the 14th section of the Act Regulating Criminal Proceedings, and the 394th section of the Practice Act, were the same.

As before remarked, there is a wide difference between the two. The word "black" may include all Negroes, but the term "Negro" does not include all black persons.

By the use of this term in this connection, we understand it to mean the opposite of "white," and that it should be taken as contradistinguished from all white persons.

In using the words, "No black, or Mulatto person, or Indian shall be allowed to give evidence for or against a white person," the Legislature, if any intention can be ascribed to it, adopted the most comprehensive terms to embrace every known class or shade of color, as the apparent design was to protect the white person from the influence of all testimony other than that of persons of the same caste. The use of these terms must, by every sound rule of construction, exclude everyone who is not of white blood.

The Act of Congress in defining what description of aliens may become naturalized citizens, uses the phrase "free white citizen." In speaking of this subject, Chancellor Kent says, that "the Act confines the description to "white" citizens, and that it is a matter of doubt, whether, under this provision, any of the tawny races of Asia can be admitted to the privileges of citizenship." 2 Kent's Com. 72.

We are not disposed to leave this question in any doubt. The word "white" has a distinct signification, which *ex vi termini*, excludes black, yellow, and all other colors. It will be observed, by reference to the first section of the second article of the Constitution of this State, that none but white males can become electors, except in the case of Indians, who may be admitted by special Act of the Legislature. On examination of the constitutional debates, it will be found that not a little difficulty existed in selecting these precise words, which were finally agreed upon as the most comprehensive that could be suggested to exclude all inferior races.

If the term "White," as used in the Constitution, was not understood in its generic sense as including the Caucasian race, and necessarily excluding all others, where was the necessity of providing for the admission of Indians to the privilege of voting, by special legislation?

We are of the opinion that the words "white," "Negro," "Mulatto," "Indian," and "black person," wherever they occur in our Constitution and laws, must be taken in their generic sense, and that, even admitting the Indian of this Continent is not of the Mongolian type, that the words "black person," in the 14th section must be taken as contradistinguished from white, and necessarily excludes all races other than the Caucasian.

We have carefully considered all the consequences resulting from a different rule of construction, and are satisfied that even in a doubtful case we would be impelled to this decision on grounds of public policy.

The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls.

This is not a speculation which exists in the excited and over-heated imagination of the patriot and statesman, but it is an actual and present danger.

The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and

national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.

3. *Holding*

These facts were before the Legislature that framed this Act, and have been known as matters of public history to every subsequent Legislature.

There can be no doubt as to the intention of the Legislature, and that if it had ever been anticipated that this class of people were not embraced in the prohibition, then such specific words would have been employed as would have put the matter beyond any possible controversy.

For these reasons, we are of opinion that the testimony was inadmissible.

The judgment is reversed and the cause remanded.

G. Commentary on *Hall*

Before emancipation, oppression had operated largely through the institution of slavery, but, as noted above, slave status was technically independent of race. There were the anomalies of free blacks and of slaves who, based on appearance of their skin alone, were considered to be white. These "anomalies" interfered with a perfect correlation of race and status. Oppression thus operated partly in terms of race and partly in terms of slave status. Mistreatment could be based on former status, even if a racial classification could not be made.

After emancipation, the special, precise status of slave ceased to exist. Racial oppression then became entirely based on the notion of white supremacy. Thus, as indicated in *Hall*, all those identified as black, mulatto, or Indian had a special low status and were subject to discrimination. Unless expressly stated otherwise, the term "black" used in the context of a white/black divide would include all other racial minorities. The classification "black" became ever more expansive. Moreover, as race became the sole means of identifying those who belonged to the lower caste, the legal definition of white became more exclusive, and the maintenance of the myth of white racial purity became more important.

As Professor Derrick Bell has noted:

> Race, racialization, and racism are largely modern-day concepts. The three concepts, although distinct in meaning, necessarily developed in tandem. Whereas the concept of "race" implies "the framework of ranked categories segmenting the human population,"[33] racialization denotes the process by which individuals are assigned membership in those categories. Racism is a product of the two:

33. *See* Roger Sanjek, *The Enduring Inequalities of Race*, in RACE 1 (Steven Gregory and Roger Sanjek eds., 1994).

> the assignment of negative value to the traits commonly associated with a particular race and the subordinate ranking of that race on the social hierarchy.[34]

In order for a race-based system of rights and privileges to function, there must be an articulable, identifiable race-classification. In order for this system to be maintained continuously, the decisions implementing it must reflect the values held by the society in which the system is based, and it must be sustained by ongoing political and legal support.

While the basis for white supremacy has varied over the years from biological to sociological to historical or a combination thereof, one constant is the use of race classification as the critical factor in determining and limiting legal status and privilege. Definitions of racial categories and exceptions to these categories were created and manipulated by those who held positions of power: elected officials, legislators, and judges. The ongoing manipulation of race classification schemes over time demonstrates that race was an indeterminate social concept, continually altered and revised in order to maintain domination by those classified as white.

H. Questions and Notes

This chapter traced the roots of the law of racial purity and related prohibitions on interracial sex and marriage that arose during the era of slavery, and discussed the role played by such laws in maintaining the slave society. Unfortunately, those laws did not end with slavery. Northern states, as well as Southern states, were determined to uphold the racially based social, economic, and political hierarchy of their slave society, even after the institution of slavery had been outlawed.

If you had to classify yourself based upon race, what category would you place yourself in, and on what basis would you make that determination? What factors and elements comprise your notion of race classification? What is the source and basis of your perception?

I. Point/Counterpoint

The subject of race and the Census has been extremely controversial in recent years. Do you support a multiracial category on the census form on which respondents must check one box and only one? Does the merger of several racial categories lead to benefits or setbacks for minorities? Would you classify Rachel Dolezal as black or white?

Langston Hughes

Cross

My old man's a white old man And my old mother's black. If ever I cursed my white old man I take my curses back. If ever I cursed my black old mother And wished she were in hell, I'm sorry for that evil wish And now I wish her well. My old man died in a fine

34. D. Bell, Race, Racism and American Law 1–2 (4th ed. 2000). *See generally*, Michael Omi and Howard Winant, Racial Formation in the United States from the 1960s to 1980s (1986).

big house. My ma died in a shack. I wonder where I'm gonna die, Being neither white nor black?

Collected Poems by Langston Hughes 58–59.

Kamaria A. Kruckenberg

*Multi-Hued America: The Case for the Recognition of a Multiethnic Identity in US Data Collection**

My little girl in her multi-hued skin
When asked what she is, replies with a grin
I am a sweet cuddlebums,
A honey and a snugglebums:
Far truer labels than those which are in.

The above poem resonates deeply with me, and it should: my mother wrote it about me. She recited its lines to me during my childhood more times than I can count. It was a reminder that I, daughter of a woman whom the world saw as a white and a man whom the world called black, could not be summed up into any neat ethnic category. The poem told me that, though my skin reflected the tones of a variety of cultures, I was more than the sum of my multiple ethnic identities. Over my lifetime, I have recalled this message each time someone asked, "What are you?" and every time I checked "other" in response to the familiar form demand that I mark one box to describe my race.

The classification of multiethnic individuals like myself recently has been the focus of many heated debates. The Office of Management and Budget ("OMB") sets the racial categories used on numerous forms, including the census. In 1997, the OMB revised Statistical Policy Directive 15, its rule for racial data classification, requiring all federal agencies to allow individuals to mark multiple races on all federal forms. Because the implications of the classification of multiethnic individuals in federal racial data collection are potentially far reaching, this change has been surrounded by controversy. The census tracks the numbers and races of Americans for legislative and administrative purposes. This information is particularly important for this country's enforcement of civil rights laws.

Numerous authors argue that the recognition of multiethnic identity will hamper traditional civil rights efforts. They claim that policies that maintain civil rights must win out over the individual caprice of those who advocate for multiethnic recognition. On the other hand, many argue that the recognition of the personal meaning of multiethnic identity is important and does not hamper the traditional goals of civil rights groups.

Civil rights advocates ought to support and encourage multiethnic people as they struggle for governmental recognition. The experience of multiethnic individuals is descriptively different than that of their monoethnic peers and ethnic self-identification is a basic right that once was championed by civil rights groups. Both civil rights and multiethnic activists stand to benefit from such a partnership.

While some writers argue that because it crosses culture, heritage, and physical biology, multiethnic status is different from other ethnic categories, multiethnic people share certain characteristics. The socioeconomic status of bi-ethnic people, for instance, consistently falls between that of the lower and higher status parent. Additionally,

* (footnotes and chapter headings omitted).

multiethnic people frequently report prejudice based on having varied heritages. Finally, there is a growing sense of multiethnic community, which will further develop as multiethnicity becomes more prevalent and accepted. Perhaps the demand for a multiethnic identity is reflective of a new understanding of race, one that recognizes that the lines that divide us by race or ethnic status are actually quite blurry.

Perhaps the strongest reason to recognize multiethnicity is that self-definition ought to be encouraged. The individual and collective right of ethnic self-identification has been recognized and exercised by other racial and ethnic advocates as they redefined themselves with new terms like *Chicano, Xicano, Latino, Asian American, Black, African American,* or *Native American.* Multiethnic people are similarly looking for a way to turn experiences of alienation, racism, and marginalization into positive experiences of shared cultural identity. Giving an official label to those who identify as multiethnic creates a forum in which to discuss the discrimination and marginalization of those experiences. Recognition is the first step toward securing rights.

Self-definition allows people to express an ethnic identity that causes less cognitive dissonance with their experience than being forced to choose between ethnicities. The recognition of multiethnic identity marks a shift to an understanding of race that is more fluid and multi-faceted than before.

Of course, some multiethnic people will not want such a label, but for those who do, the classification system ought to be flexible. Recognizing that racial identification is not a simple process in which any given person can correctly categorize any other is beneficial to all. Internal perspective ought not be the only factor in determining someone's ethnicity, but individuals deserve as much freedom as reasonably possible to engage in good-faith self-definition. While a multiple race box may not make sense for data collection given its potential negative impact on civil rights enforcement, the ability of multiethnic people to list multiple identities provides room for the growth of a concept of multiethnic identity. It seems the least society can offer.

The growth in the numbers of multiethnic people has forced America to ask what race means today. While multiethnic advocates have noted the point so often that it is almost cliché, a recognized multiethnic identity will benefit society if only by raising the question. Civil rights advocates now must consider whether they are more concerned with the principles they have espoused, including self-identification and multicultural pride and acceptance, or in maintaining the system as it is. Multiethnic identity is a double-edged sword because it begs the question of how we can move to a world in which our historical race categories to not limit us without risking the accomplishments that civil rights advocates struggled so hard and long to achieve.

If civil rights comes to encompass multiethnic rights, civil rights groups are likely to gain members who currently may feel unrepresented. This is especially true given the concern that multiethnic advocates have been willing to work with conservatives to accomplish their goals. If more established civil rights leaders step forward, the multiethnic agenda and the civil rights agenda can be framed hand in hand, rather than in potential conflict. Additionally, multiethnic individuals ought to be free to be members of ethnic groups without feeling required to check their multiethnic identity at the door. In a world increasingly aware of multiculturalism, the framing of fluid identities, including multiple identities, ought to be a priority.

4 *The Modern American* 50–51, 54–55.

Tanya Katerí Hernández

*"Multiracial" Discourse: Racial Classifications in an Era of Color-blind Jurisprudence**

For the past several years, there has been a Multiracial Category Movement (MCM) promoted by some biracial persons and their parents for the addition of a "multiracial" race category on the decennial census. The stated aim of such a new category is to obtain a more specific count of the number of mixed-race persons in the United States and to have that tallying of mixed-race persons act as a barometer and promoter of racial harmony. As proposed, a respondent could choose the "multiracial" box in lieu of the presently listed racial classifications of American Indian or Alaskan Native, Asian or Pacific Islander, black, white, or other. The census schedule also includes a separate Hispanic Origin ethnicity question. On October 29, 1997, the U.S. Office of Management and Budget (OMB) adopted a Federal Interagency Committee recommendation to reject the multiracial category in favor of allowing individuals to check more than one racial category. Some MCM proponents are not satisfied with the OMB's decision, because multiple box checking does not directly promote a distinct multiracial identity. These MCM proponents are committed to continue lobbying for a multiracial category on the 2010 census ...

Roderick Harrison

The Multiracial Responses on the Census Pose Unforeseen Risks to Civil Rights Enforcement and Monitoring

For the first time in the nation's history, the 2000 Census allowed respondents to check more than one race. Although the great majority of Americans—98 percent—selected a single race, more than 6.8 million people took the opportunity to declare a mixed racial heritage. This number represents a small portion of the total population—2.4 percent—but the impact could be substantial as we try to figure how to count these numbers. Brought to the forefront again is the age-old American question of race, as the multiracial responses on the census compel us to ask what it means to be white, African American, American Indian, Asian American, or other minority. Our answer to this question will have enormous ramifications for the future of the nation's efforts to meet civil rights goals, to allocate funding equitably, and to produce reliable, useful data for a variety of purposes.

The great majority of the nation's 281.4 million people (98 percent) still chose one race in identifying themselves. Of those, 75.1 percent were white, 12.3 percent were African American, 0.9 percent were American Indian, 3.6 percent were Asian American, 0.1 percent were native Hawaiians or Pacific Islanders, an 5.5 percent (mostly Hispanics) chose the designation "Some other race."

The official count of the African-American population will be the 34,658,190 who reported their race as black or African American alone. However, another 1,761,244 people reported black or African American in combination with one or more other races. Almost half (44.6 percent) of those who marked another race along with black or African American reported that they were also white. Nearly another quarter (23.7 percent) gave "Some

* (footnotes omitted).

other race" as their second race. The majority of these are likely black Hispanics since about 60 percent of those reporting "Some other race" were Hispanic. A little over 10 percent (10.4 percent) of the multiple responses involving African Americans gave American Indian or Alaska Native as the second race, and 6.4 percent listed Asian American.

So how many African Americans were there in the United States in 2000? How many American Indians and Alaska Natives? How many Asian American? What are their poverty and birth rates? The answer is: It depends on how you do the counting.

There were at least 34.7 million blacks in the United States in April 2000. If the 1.76 million who checked "black or African American" together with other races were added to the number who reported black as a single race, the total would be 36,419,434. This "all-inclusive" figure is about 5 percent higher than the single race count and would represent 12.9 percent of the nation's population.

Although some might be happy to use the higher, all-inclusive number for their own group, the result is that people who reported two races are counted twice, those who reported three are counted three times, and so forth. If this is done for all groups, the total counted becomes larger than the actual population by 2.6 percent. The all-inclusive numbers are, therefore, of little use in the major applications that require data on race, including monitoring and enforcing civil rights and tracking trends in education, employment, health, housing and other sectors of society. As the data from the 2000 Census roll out, a question likely to be asked with increasing frequency and urgency is: How should the multiple responses be tabulated for these important purposes?

Focus Magazine 5–6 (April 2001).

Tseming Yang

*Choice and Fraud in Racial Identification; The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society**

In 1989, the case of the Malone brothers triggered a well-publicized inquiry into the racial and ethnic backgrounds of a number of Boston firefighters. The Malones, two fair-haired and fair-skinned identical twins, had claimed in their job applications over twelve years earlier that they were Black for affirmative action hiring purposes. During a job promotion review, the fire commissioner was startled to learn that the brothers' names appeared on a list of Black firefighters. Their justification was that in 1976, after they had been passed over for jobs in the fire department and before they applied a second time, their mother had informed them about a Black maternal great grandmother. The Malones were eventually fired and their dismissals affirmed by the Massachusetts Supreme Judicial Court. Further investigations within the Boston fire department and at fire and police departments in several other cities revealed similar troubling claims about racial identity.

In early 2005, Ward Churchill, ethnic studies chair and tenured professor at the University of Colorado, was charged with ethnic fraud. Churchill was an expert on indigenous issues and, according to the Denver Post, had "described himself as an Indian." His opponents, however, pointed out that he was not a regularly enrolled member in the tribe he claimed, but rather only an "associate" member. Moreover, U.S. Census records

* (footnotes and chapter headings omitted).

showed an ancestor whom Churchill had claimed as an American Indian listed as White. While Churchill has continued to assert "that he is an Indian," a claim that he has maintained since his high school days, political pressures associated with Churchill's controversial views on the 9/11 terrorist attacks triggered a university investigation into Churchill's scholarship and other aspects of his past. A preliminary review suggested that fraud in "misrepresenting himself as a Native American in order either to gain an employment-related benefit or to add credibility and public acceptance to his scholarship" could be sanctionable conduct. He was later cleared of those charges.

In recent years, the practice of "box-checking," and the abuse of affirmative action programs has increasingly become a concern. In such instances, applicants for university admission and affirmative action programs "check" ethnic and racial heritage boxes indicating minority status even if the actual personal connection is remote, tenuous, or even non-existent. There have even been reports of systematic efforts to find such connections via genetic analysis. It appears to be most prevalent with respect to American Indian and Hispanic/Latino identities. While it is unclear how often such incidents occur, they do not appear to be rare. There seem to be no formal mechanisms to challenge or check abuses and opportunism.

In a color-blind society, under the premise that race or skin color are no different from personal physical attributes like hair or eye color, alteration or misrepresentation ought to be irrelevant or of minimal consequence. Accurate racial identification and classification, however, remain crucial to the effective implementation of racial affirmative action programs and the administration of anti-discrimination laws more generally. It remains important to the federal government's decennial census and has continuing salience in many areas of life, such as health care.

The historical role of race in maintaining systems of slavery, segregation, and racial caste has shaped the meaning of race and methods of racial classification. Criticism of contemporary uses of racial classification have either denied their necessity wholesale or focused on the substantive "accuracy" of classifications and designations. Largely ignored has been the question of process in the assignment of racial identity—*who* should determine racial identity and the meaning of the chosen process. Who should control the construction of the concept central to anti-discrimination law in the present?

The acts and circumstances of individuals like the Malone brothers, Churchill, and Korematsu raise important questions about the nature of racial identification and its determinants. When individual choice does not conform with community perception, which prevails and what are the consequences? How should be understand such contradictions? To leave such questions unresolved leaves the racial identification process open to opportunistic manipulation by the unscrupulous. Alternatively, a rigid system of racial classification raises the specter of South African Apartheid or the Jim Crow Deep South. In times when society seeks to erase racial lines and redress racial inequality, how do we manage the dilemma of contradictory efforts by individuals to shape and manage racial identity?

Efforts to cross color and race lines have traditionally manifested themselves in two ways: racial passing and formal efforts to gain legal recognition of a particular racial identity, usually Whiteness.

In the past, racial passing referred to the efforts of an individual with non-White ancestry to hold themselves out as White when "prevailing social standards" (or legal ones) would bar that identification. It was most often, but not always, associated with individuals of mixed-race ancestry who had "White" physical features—primarily fair skinned individuals of African and White backgrounds.

Prior to the Civil War, being able to pass as White facilitated the escape of light-skinned slaves. For example, a racial deception enabled Ellen Craft to flee from slavery in Georgia to freedom in Philadelphia in 1848. She disguised herself for four days as a White man and had her husband pretend to be her servant. In later times, being "mistaken" as White allowed some African Americans also to avoid some of the burdens of segregation, social stigma, and racial violence. One of the most prominent examples includes Walter White, an active member of the NAACP during the first half of the 20th century. He was a "fair-skinned, blue-eyed, and blond-haired ... son of light-complexioned Negroes who were stalwarts of Atlanta's black middle class." Using his ability to pass as White, he investigated lynchings for the NAACP during Jim Crow times.

Passing has not disappeared in modern day times. Prominent author and critic Anatole Broyard, a daily book reviewer for the New York Times for over a decade, was born to Negro parents in 1920s New Orleans; he passed as White for most of his adult life until his death in the early 1990s. Racial passing has not been unique to African Americans. Among Asian Americans, Fred Korematsu's cosmetic surgery and pretense of being Spanish-Hawaiian may be seen as an exemplar. Erika Lee has also described the attempts by some sojourner Chinese to disguise themselves as American Indian or Mexican in the late 19th and early 20th century. During the period of Chinese Exclusion, it was one of the only means available to enter the United States via Mexico or Canada. Thus,

> [I]t was not uncommon for White "smugglers" to disguise Chinese as Native Americans crossing from Canada to the United States in pursuit of trade. They would be dressed in "Indian garb," given a basket of sassafras, and rowed across the border in a boat.... [For crossings to the United states from Mexico,] Chinese [immigrants] cut their queues and exchanged their "blue jeans and felt slippers" for "the most picturesque Mexican dress." They received fraudulent a Mexican citizenship papers, and they also learned to say a few words of Spanish, in particular 'Yo soy Mexicano' ('I am Mexican').

A U.S. immigration inspector who examined fake Mexican citizenship papers of such Chinese immigrants in 1907 "expressed with some amazement that it was 'exceedingly difficult to distinguish these Chinamen from Mexicans.'"

Racial passing by individuals with Native American and Latino ancestry has had additional wrinkles. For Native Americans, centuries of forced assimilation and intermarriage with Whites has resulted in many mixed-race individuals with a White phenotype. Like African American families who have permanently passed into Whiteness, many such individuals no longer have any knowledge of their Native American ancestry. They simply consider themselves, and may be considered by prevailing social standards, as White. Such individuals arguably are not engaged in any deliberate "deception" about their racial identity. In fact, even during colonial times, some states considered such mixed-race individuals to be legally White if the blood quantum of American-Indian ancestry was sufficiently small.

For individuals of Latino, and in particular Mexican, ancestry, lineage has always been multi-racial by definition. As descendants of Latin American indigenous people and Spanish colonizers, attempts at passing as White were often facilitated by innate physical characteristics. It may have been as simple as denying one's indigenous ancestry and holding oneself out as Spanish.

Racial line crossing has not only occurred in the direction of Whiteness. With respect to Asian Americans, for example, the on-screen roles of actors Lou Diamond Philips and Tommy Chong have led them to be commonly perceived as Latino. Tiger Woods is predominantly and primarily perceived as African American, even though his mother is

Thai. During World War II, some Japanese Americans claimed to be Chinese in order to avoid war-time internment. In Louisiana, individuals with both African American and American Indian ancestry frequently choose to assert their Native American identity rather than their African American identity.

There have been some well-known instances of White individuals passing as Native Americans. Passing as African American, however, has generally been rare. Some instances when Whites did attempt to do so have been described by Rachel Moran; it usually occurred when interracial couples sought advantage or to avoid embarrassment. An unusual, but well-known instance involved John Howard Griffin. Seeking to explore the experience of being Black in America, Griffin, a White journalist, chemically darkened his skin to journey through the South in 1959.

A less obvious effort in crossing racial lines has had little equivalent to passing in other contexts: seeking legal recognition of a different racial identity, primarily Whiteness. Until 1954, federal naturalization statutes restricted U.S. citizenship to free White persons. Before the Supreme Court authoritatively held in 1922 and 1923 that Asians were not White, hundreds of Chinese and Japanese were able to persuade the federal courts that they were White, enabling them to become naturalized U.S. citizens. In doing so, they crossed the color line within the eyes of the law, even if their social status and standing within the community may have remained unchanged.

Similar efforts are exemplified by lawsuits filed by slaves seeking judicial declarations that they were White. For example, in ante-bellum Alabama, Abby Guy contested her status as a slave by asserting and litigating her Whiteness. At trial, her purported owner submitted documentary evidence supporting her status as a slave, and hence Black. The judge found in her favor. The court's judgment not only set her free but also determined as a judicial matter that she was White.

Contemporary litigation-driven efforts to acquire a White racial identity have become less significant with the end of legal segregation. The continuing significance of racial identity in individual self-conception and everyday social interactions have not made such efforts irrelevant, however. Some contemporary cases have focused on government practices of collecting and maintaining racial identity information. In Louisiana, the acts of Naomi Drake, supervisor and deputy registrar of the Louisiana Bureau of Vital Statistics, led to a series of cases beginning in the 1950s and up until the 1980s that challenged racial identity designations on birth certificates. Most of the lawsuits were unsuccessful.

One particularly well-publicized case involved Suzie Phipps. Phipps found out late in life that she was classified as Black in her birth records; all her life she had believed herself to be white. When the registrar refused to change the racial designation on her birth certificate, she sued. The courts acknowledged the arbitrariness of the racial designations. Unfortunately, they also found that such designations were "correct" according to the standards of the times when they were made. Hence, the registrar could not be legally required to change the designation.

Legal recognition of non-White identity has remained significant, primarily in three contexts: race discrimination claims, affirmative action, and federal programs for members of federally recognized Indian tribes. In race discrimination cases, the plaintiff's membership in a legally protected class—usually a racial minority—is a threshold question for any discrimination claim. In the tribal programs and affirmative action context, racial identity is a pre-requisite for program eligibility.

The Census adopts a system of self-identification as opposed to classification by some set of "objective" criteria, or by a disinterested third-party. Its position reflects the view

that race is a social and political construct rather than a fixed attribute dependent only on physical, phenotypic appearance (or genetic make-up, for that matter). Arguably, the most important reason for doing so is the history of government-sponsored classification. The racial caste systems of segregation and slavery were vitally dependent on government sponsorship of rigid racial classification criteria. Explicit choice of a self-recognition approach as the primary and conclusive method openly rejects the past. The Census position also supports the strong popular sentiment that racial identity is a matter of individual autonomy and self-determination.

Self-identification is usually also most accurate. Racial identity is not only a function of physical characteristics and appearances, but also of an individual's social interactions and relationships. The full spectrum of social perceptions and interactions with others is known most completely only to the census respondent him or herself.

Finally, the most powerful reason for self-identification is the common wisdom that our society now lives in, or at least is striving to create, a color-blind society. In a color-blind society, racial designation is relevant only as a vital statistic, like hair or eye color, and ought not have any social or legal significance. As a corollary, an individual's choice of racial identity presumably would have no social or legal significance either. Governmental regulation would not only be unnecessary but also non-sensical—just like the regulation of ice cream flavor preference.

Sole reliance on a system of self-identification encounters problems, however. It leaves unaddressed concerns about manipulation, administrative workability, and fairness. After all, a color-blind society still remains (and may forever be) more a great sounding slogan than an existing reality. Race is still a salient personal characteristic in social interactions. It continues to be relevant in legal contexts such as anti-discrimination laws and affirmative action programs.

How can one "check" opportunistic manipulation of the system, as in the case of the Malone brothers? If classification is solely a function of an individual's choice with no constraints and criteria ensuring consistency, how can the designation be useful for any systematic regulatory use? Is it possible to maintain public confidence and support for governmental programs that rely on such classifications if there is no assurance that such programs are being fairly and effectively applied?

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The 2010 Census form continues the self-identification option of choosing more than one racial category for an individual's race classification. Question number 8 asks about ethnicity as to whether one is of "Hispanic, Latino, or Spanish origin." Question number 9 asks about race regardless of whether the person is of "Hispanic, Latino, or Spanish origin" and permits more than one racial category to be identified.