Hybrid

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The year 1967 was a watershed in the history of interracial relationships in the United States. In the landmark *Loving v. Virginia* decision, the U.S. Supreme Court struck down a Virginia statute that made it a felony for "any white person [to] intermarry with a colored person, or any colored person [to] intermarry with a white person."

An interracial babyboom followed the Supreme Court's decision. Children born to parents of different races accounted for more than 3 percent of births in 1990, up from 1 percent in 1968. Since 1980, the number of interracial married couples has increased from 651,000 to 1.2 million. The number of black and white interracial married couples has increased seventy-eight percent since 1980. The rate of interracial marriage is even higher for other racial groups—38 percent of American Japanese females, 18 percent of American Japanese males, and 70 percent of American Indians enter into interracial marriages. Our racial classification system, however, has not kept up with this demographic trend.

Our predominant classification system remains white/black with little recognition of other racial groups, or racial mixing of white and black. The Virginia statute itself reflected this
classification system—the state was concerned with whites intermingling with "coloreds" but did not object to various "colored" subgroups intermingling with each other. The purity of the "white" race was the state's only concern. Despite this historical concern, the terms multiracial and biracial are not part of contemporary legal discourse.

Nonetheless, color and mixed-race heritage (which are not synonymous) can define an individual's experiences. Maria O'Brien Hylton, a multiracial candidate for an appointment at Northwestern University, became a source of public controversy in the affirmative action debate because she was not a "pure" black in appearance or heritage. Gregory Howard Williams lived "on the color line" because, in his early years, his light-skinned African-American father and Caucasian mother tried to "pass" the immediate family as white. After living with black friends and family, and attending segregated black schools for more than a decade, he was not readily accepted as authentically "black" for affirmative action purposes. Shirlee Taylor Haizlip's family tree was divided depending upon whether her relatives could "pass" as white. Her "darker-skinned" mother was separated from her "lighter-skinned" sister at a young age because her mother's presence would prevent the family from "passing." When Haizlip finally reunited her mother and aunt, then both in their seventies, she found that they could not discuss the reason for their separation although they clearly knew that color had been a major factor.

The racial classification system also renders invisible individuals who do not fit the two or three categories recognized by the legal system. Chinese-Americans, for example, were labeled as "Indian" in nineteenth-century California because the only available categories were white, Negro, and Indian. The current U.S. census form contains numerous classifications yet still
lumps together quite dissimilar groupings of people. The global category of “Asian or Pacific Islander” includes Native Hawaiians along with eight other distinctive national groups\(^\text{13}\) that have about as much in common with each other as Chinese-Americans had with Indians in nineteenth-century California.

Although Americans generally prefer to ignore issues of mixed-race and color, legal issues involving such individuals have been part of our history since 1896, when a light-skinned “black,” Homer Plessy, attempted to sit in the “white” section of a segregated Louisiana railroad car. One hundred years later, the U.S. Census Bureau is contemplating changing its forms to allow individuals to indicate their multiracial heritage. At the same time, we are struggling to develop rules governing affirmative action which will determine whether the Hyltons and Williamses will be eligible for affirmative action. What then is race, and when should it matter?

I. Mulattoes, Quadroons, and Octoroos

Louisiana has been a hotbed for legal challenges to the system of racial classification because so many people of mixed-race historically have resided there. The local language reflects this racial and color landscape with such terms as mulatto, quadroon, and octoroon. The courts have been confronted continually with the existence of people of mixed-race, yet have resisted overturning a bipolar classification system of “negro” and “white.”

The first major case challenging Louisiana’s classification system was the infamous *Plessy v. Ferguson*,\(^\text{14}\) decided by the U.S. Supreme Court in 1896. Lawyer Albion Tourgée wanted to challenge the arbitrariness of the racial classification system underlying the Louisiana statute, although the case is usually
only remembered as a challenge to Louisiana’s practice of segregating railway cars. Tourgee urged his associates to select as a defendant a Negro whose complexion was white or nearly white.\textsuperscript{15} Plaintiff was “of mixed Caucasian and African blood, in the proportion of one-eighth African and seven-eighths Caucasian, the African admixture not being perceptible.”\textsuperscript{16} Criticizing the arbitrariness of a railroad conductor determining Homer Plessy’s race, Tourgee argued:

The Court will take notice of the fact that, in all parts of the country, race-admixture has proceeded to such an extent that there are great numbers of citizens in whom the preponderance of the blood of one race or another, is impossible of ascertainment, except by careful scrutiny of the pedigree. . . . But even if it were possible to determine preponderance of blood and so determine racial character in certain cases, what should be said of those cases in which the race admixture is equal. Are they white or colored?\textsuperscript{17}

Tourgee’s strategy was controversial because darker members of the African-American community thought that it would only benefit those who were nearly white or wanted to pass for white.\textsuperscript{18} It might move the color line so that light-skinned “blacks” could sit in the white car but not eliminate segregation. The question that his strategy raised was whether alleviating discrimination for light-skinned blacks who could “pass” as white would really rid society of its most invidious forms of discrimination.

The color strategy was eventually dropped from the \textit{Plessy} case so we will never know what would have been the effect of raising the arbitrariness of the racial classification system. Moreover, Homer Plessy lost his case, thereby reinforcing the constitutionality of “separate but equal.” When \textit{Plessy} was overturned more than fifty years later, the issue of racial classification was never raised. Hence, the law has become “separate
cannot be equal” without attention to how we define the racial categories themselves.

Although Plessy did not challenge the system of racial classification, other multiracial plaintiffs in Louisiana did have limited success in challenging their racial classification. In a 1910 decision by the Louisiana Supreme Court, State v. Treadway, the court concluded that defendant Treadway, who was one-eighth black, could not be classified as “negro or black” to be convicted for violating the state’s anti-miscegenation statute. In holding for the defendant, the Court distinguished between “negro” and “colored,” concluding that the term “colored” refers to individuals who have any “traceable” “negro blood.” Because the legislature used the word “negro” rather than the word “colored” in its anti-miscegenation statute, the court concluded that defendant could not be classified as a “Negro.” It ruled that the legislature “meant negro, plain negro, or persons black as negroes and having the characteristics of negro, and not these other persons not coming within that description.”

The court’s decision therefore made it possible for “mulattoes, quadroons, and octofoons” to evade prosecution for cohabitating with whites but left intact prosecutions against the “plain negro.” Legally-sanctioned discrimination remained alive.

(Not all courts at the time, however, agreed with the Louisiana Supreme Court’s restrictive definition of a “negro.” A New York State court in 1937 concluded that a woman who was one-eighth black was a “negro” for the purpose of interpreting a racially restrictive covenant. This court concluded that the term “negroes” was synonymous with “colored,” thereby precluding plaintiff and her husband, who was three-fourths black, from purchasing property in a residential neighborhood in Westchester County, New York. Thus, Mr. Treadway would be reclassified from “colored” to “negro” if he moved from
Louisiana to New York in 1937 and attempted to move into a white neighborhood.

By the mid-1970s, it appeared that the Louisiana courts might conclude that racial classification was wholly arbitrary. In *Thomas v. Louisiana State Board of Health*, the state court of appeals affirmed a lower court judgment ordering the state census bureau to change the designation from Negro to white on the birth certificates of Norma Gravolet Thomas and her two children. Racial designation had been made in this instance through a review of previous classifications of plaintiffs' ancestors as "mulatto" or "quadroon." The court rejected the reliability of that kind of classification system noting:

In absence of definitions accurately applied at the time race determinations or designations are made on records, there are no legal means by which a person's racial content can be computed where the records bear such description names as mulatto, quadroon, colored, personne de couleur, F.M.C. or F.C.M. Without a legal definition to be applied to such terms, these terms mean various things to different people. Under such circumstances no accurate mathematical percentage can be computed to comply with the provisions of [Louisiana law].

The Louisiana Supreme Court, however, resisted concluding that the racial classification statute was unconstitutional on the grounds of vagueness. In a similar case involving racial classification on a birth certificate, the Louisiana court of appeals concluded that it was unconstitutional for a statute to define only the term "negro" and to do so through ambiguous requirements. The Louisiana Supreme Court, with one dissenting opinion, rejected that argument finding the statute constitutional because it was not "so vague that it cannot be administered" and was not void "because of invidious racial discrimination." In a strong dissent, Justice Barham disagreed. He noted that
the statute only defines who is considered to be a "Negro" and instructs the Bureau of Vital Statistics to withhold a birth certificate for such a person if he attempts to classify himself as white. "No comparable statutes exist for the Caucasian and Mongoloid races. . . . Citizens of other races do not have to endure this administrative procedure. . . . The jurisprudential 'traceable amount' formula applied only to the Negro race is equally as repugnant as is the act which we consider." 26

Justice Barham's dissent goes as far as any opinion in throwing out racial classification, but even he would not abandon it entirely. He argued that "it is the legislature's responsibility to produce a formula that may be equally applied to Negro, Caucasian and Mongoloid races if they wish to have preciseness of race determined objectively." 27 He accepted the idea that race has an "objective" component which was not reflected in the Louisiana classification system.

Even though the court did not find the statute unconstitutional, it did order the Bureau of Vital Statistics to issue a birth certificate for the plaintiff indicating that she was white, thereby upsetting established practice at the Bureau. Similarly, in numerous other cases, 28 appellate courts concluded that the Bureau had not met its burden of establishing that an individual was "Negro" and the person should be classified as white. The color line was moving but still existed.

Nonetheless, in the mid-1980s, the state and federal courts laid a stronger foundation under Louisiana's system of racial classification. In a case resembling many of the other birth certificate cases, family members sought to change the race of their deceased parents. The court of appeals raised the burden of proof for petitioners who wanted to challenge their racial designation as "Negro" and concluded that petitioners had not met the required higher burden. The racial designation of "Ne-
“Negro” was maintained despite strong evidence that the deceased parents were of mixed-race. Both the Louisiana Supreme Court and U.S. Supreme Court refused to hear the case. The modification in the burden of proof, although a technical change, had a major effect on the law in this area. No longer does one find large numbers of claimants successfully challenging their own or a family member’s racial designation as “Negro.” It appears that the courts could not tolerate the shifting designation of race that had become commonplace under Louisiana law and put an end to it.

This history brings us back to the question—are challenges to the arbitrariness of racial classification effective? These examples support the point made by Tourgée’s detractors—challenges to arbitrariness only move the color line so that more “blacks” become “whites.” They do not undermine classification itself nor improve the lives of “pure” blacks. On the other hand, this history shows that repeated, successful challenges to racial classification lead to the conclusion, in the words of a Louisiana state appellate court, that the entire system is “wholly irrational and scientifically insupportable.”

The Louisiana courts had to stop the successful reclassification cases for light-skinned “blacks” in order to prevent the entire system from toppling. The legislature ultimately responded by repealing the “one thirty-second” statute and allowing parents to designate their own race on the birth certificate. Challenges by mixed-race individuals may therefore have an incremental effect, although in the short term they are unlikely to topple the system.

II. Ameliorative Treatment

At Bank X, once a target of a case on which I was working, dark-skinned blacks were often hired to perform jobs away
from public view, such as sorting and counting money in the vault, whereas light-skinned blacks were occasionally hired as tellers. The light-skinned blacks were not usually passing; they were benefiting, as compared to darker-skinned blacks, from an overt appeal to the values of a color conscious society. Nonetheless, light-skinned blacks were less likely to be hired as tellers than similarly qualified whites. If they were hired as tellers, they were less likely to be promoted to managerial position. To label all the blacks as “black” would not have dismantled the racial classification system in that workplace. Only by acknowledging the cultural significance attached to the points along the spectrum of race could one begin to fully address discrimination in the workplace. Failing to recognize the significance of color in fashioning a remedy causes the problems noted by Tourgée’s critics—that only light-skinned blacks benefit from a remedial order. Unfortunately, the voluntary and private settlement of this case was not attentive to these problems of color and thereby diminished race discrimination without dismantling color discrimination.

Cheryl Harris tells a story that reflects the importance of being conscious of color when responding to problems of discrimination. Her light-skinned “black” grandmother passed as a “white” in order to work in a department store during the Depression. Her light skin thus had a property value. Harris’s grandmother was able to obtain employment while her grandfather, presumably darker-skinned, “was trapped on the fringes of economic marginality.” The story of her grandmother “passing” is a story about the range of experiences that “blacks” may endure, depending on their skin color. It reflects our society’s consciousness of color along a spectrum, rather than its consciousness of race only at two bipolar points.
These two stories demonstrate that we need to be careful about describing race discrimination too monolithically. Compounding variables such as color may ameliorate some of the effects of racism. Nonetheless, we have typically developed ameliorative programs to remedy our history of race discrimination simply by giving preferences to “blacks.” Rarely do we consider which blacks may be most deserving of such ameliorative treatment and, in particular, whether mixed-raced or light-skinned individuals should be treated as “black” for ameliorative purposes.

This problem is made more difficult when we ask the more general question, when is race used for an ameliorative purpose? Can racial classification serve an ameliorative and a subordinating purpose? Affirmative action policies are somewhat easy to classify because their purported purpose is benign. Nonetheless, racial stereotyping and stigma might accompany this benign purpose. A focus on affirmative action for multiracial individuals adds a new level of difficulty to this problem, because the ameliorative results of race-based affirmative action become more ambiguous.

Racial preference policies in the context of transracial adoption are harder still to classify. The National Association of Black Social Workers, for example, believes that racial classification serves an ameliorative purpose whereas other leaders in the black community, such as Randall Kennedy, argue that racial placement policies harm the well-being of black children and perpetuate racial stereotypes. A focus on the adoption of multiracial children, historically categorized as “black,” adds a further dimension to this tension because the ameliorative purposes of race-conscious placement become more ambiguous.
A. Affirmative Action

Classification

In 1977, the federal government issued “Directive No. 15” to standardize the definition of race used by the public and private sectors. This Directive is still in use and does not include a multiracial category; instead, it categorizes multiracial individuals into a monoracial category. “The category which most closely reflects the individual’s recognition in this community should be used for purposes of reporting on persons who are of mixed racial and/or ethnic origins.”

The Directive’s handling of multiracial individuals is troublesome in three respects. First, it perpetuates the community’s right to define race, rather than to allow individuals to define their own race. Second, it renders the category of multiracial invisible. Third, it lumps together quite different national groupings and confuses race with national origin with respect to people with Latino backgrounds.

The problems with this directive can be seen in an early affirmative action controversy in New York City. After the City of New York instituted an affirmative action program for promotion from police officer to sergeant, six officers came forward and asked to be reclassified from white to black or Hispanic. One officer indicated that he had originally checked both black and white on the application form but that the department computer had arbitrarily classified him as white. A similar problem occurred in Boston when two firefighters, the Malones, claimed they were black because their maternal great-grandmother was black. The assertion was brought into question because they did not claim blackness until after they had taken the first exam for the position. Moreover, there was
some question as to whether they held themselves out in the community as black.

The New York and Boston cases show the awkwardness of racial classification systems, even for benign purposes. In both cases, the question was whether the public safety employees could be considered "black." There was no discussion of the need for a multiracial category and whether the multiracial category should be treated differently from the "black" category.

No one asked whether these individuals had a special reason to be deserving of affirmative action protection. Had they experienced educational or economic deprivation because of their racial status? Did they have a special interest in assisting with public safety problems in minority communities? Boston and New York felt more comfortable developing and enforcing clumsy categories of black and white with all blacks benefiting from affirmative action and no whites benefiting than asking these more probing questions. As a result of such policies, the Malones of this society will have an incentive in the future, when seeking the benefits of affirmative action, to check the box "black" at the earliest possible stages of the application process and not acknowledge their multiracial background, perpetuating the "one drop of blood" rule.

Despite these problems with Policy Directive No. 15, which would not allow any of these individuals to be classified as multiracial, the federal government received strong criticism when it tried to change the policy in 1988. The proposed 1988 changes would have added the racial category "other" and required classification by self-identification. Opponents of the change argued "that the present system provided adequate data, that any changes would disrupt historical continuity, and that
the proposed change would be expensive and potentially divisive. Some members of minority communities interpreted the proposal as an attempt to provoke internal dissension within their communities and to reduce the official counts of minority populations."\textsuperscript{45} Acquiescing to such arguments, the federal government decided not to make any changes at that time.

In 1994, the federal government again began to explore making changes in the racial classification system. In June 1994, it invited comments on changes such as adding an "other" category, adding a "multiracial" category and providing an open-ended question to solicit information on race and ethnicity.\textsuperscript{46} It is not clear whether the federal government will permanently add a multiracial category, but the Census Bureau is moving in that direction. For 1996, the Census Bureau has sought reaction to including a multiracial category on its survey instrument.\textsuperscript{47} This proposal has caused much controversy in the civil rights community. The Association for Multiethnic Americans, an umbrella group for approximately sixty multiracial groups, supports the change. Billy Tidwell, of the National Urban League, however, opposes the change because "splintering the black community between light-skinned and dark, would 'turn the clock back on the well-being' of African-Americans."\textsuperscript{48} Tidwell's arguments sound remarkably like those made against Tourgée's strategy to challenge the racial classification system in the nineteenth century. The National Urban League wants to insist on its right to claim a large number of individuals as black who might self-identify as multiracial. Multiracial groups therefore criticize such groups as the National Urban League for "clinging to racial differences and a zero-sum mentality."\textsuperscript{49} They argue that Tidwell's position is disrespectful to multiracial people who suffer emotionally when there is no fitting box for
It is ironic that the same groups who have criticized white society for defining them stereotypically are not more tolerant of the desire of multiracial groups to be able to define themselves more accurately. Their lack of tolerance, however, does not stem from racial stereotypes. It stems from the political awareness that modification in how we count the number of “blacks” in society could have profound repercussions in resource allocation as well as the structure of voting districts. As will we see in chapter 8, the Census controversy does not lend itself to easy solution since this is one area of life where categorization is presumed essential.

Although the federal government has been slow to recognize multiracial individuals, some private institutions have begun to try to change this practice of insisting that people classify themselves within rigid categories. Columbia Law School, for example, asks student applicants who wish to have their racial or ethnic background taken into account for admission to submit personal statements. In addition, the application invites students to check off more than one racial or ethnic category if appropriate. This question makes some people feel uncomfortable because they interpret it as asking how closely they fit racial stereotypes. But transgressing boundaries to acknowledge a multiracial category is a step toward creating a more individualized sense of the meaning of race to each person. Such ethnic statements might make us feel uncomfortable, but they may be a more respectful way to acknowledge the socially constructed and individualized experience of race in our society.

Nonetheless, the Columbia Law School policy of seeking personal narratives is problematic. It presumes that the only purpose of affirmative action is to assist individuals in overcoming disadvantage by asking students to comment on their per-
sonal histories. Affirmative action for African-Americans in law school admissions also serves other forward-looking purposes such as diversifying a student body, educating African-Americans who can serve as role models for the next generation, and increasing the quantity and quality of legal services available to the black community. The Columbia approach does not facilitate affirmative action for those other purposes. In order to construct appropriate admissions questions, we need to understand better why we use affirmative action and what programs would best achieve its purposes.

B. Purposes of Affirmative Action

Naomi Zack, author of Race and Mixed Race, shares with the reader her own story of benefiting from affirmative action. Zack explains that her mother was a white Jewish immigrant with whom she grew up. Her father, who was not identified to her as her father until she was sixteen, was a black man. Race did not become a preeminent occupation in her life until she returned to academia in 1990 at the age of forty-six. After doing some adjunct teaching, she obtained a tenure-track position in the Department of Philosophy through a university affirmative-action recruitment program for racial minorities called Target of Opportunity (“TOP”). She rationalizes acceptance of this position by noting that only seventy-five out of ten thousand academic philosophers in the United States are “of African descent.”

Zack’s story sharply raises the question of why we have affirmative action. As someone who was not aware of her African heritage until the age of sixteen and did not strongly identify with that heritage until the age of forty-six, should she qualify for affirmative action for people of African descent?
Four rationales for affirmative action are often offered and can help us answer that question:

*Diversity of Ideas.* Because racial minorities have had a distinctive life experience which can be reflected in their perspectives, affirmative action can increase the diversity of ideas at an institution.

*Role Models.* Affirmative action provides racial minorities with examples of success. These examples, in turn, will help shape high goals and aspirations for racial minorities.

*Overcoming Disadvantage.* Prior victims of racial injustice are entitled to "reparations" to put them in their "rightful place."

*Overcoming Stereotypes.* Diversifying opportunities on the basis of race will help overcome stereotypes about racial minorities thereby helping to overcome disadvantage in the future.

Zack's appointment reflects two of these rationales. She contributes to the "diversity of ideas" because of her multiracial heritage. She is an outspoken member of the multiracial community, and serves as an excellent multiracial role model. Zack's personal history, to the extent that she recounts it for the reader, however, does not seem to reflect much race-based disadvantage. She did not grow up in a household defined by racial adversity nor would she help overcome stereotypes by virtue of being visibly black. Should the diversity or role model rationales be used as a justification without concrete evidence of disadvantage stemming from race? Should race have been an explicit consideration in Zack's appointment?

Diversity of Ideas

The "diversity of ideas" rationale has received the strongest support from the U.S. Supreme Court. In *Regents of the University of California v. Bakke,* a white applicant for admission to
the Medical School of the University of California at Davis challenged the "special admissions program" which was open to "disadvantaged" special applicants. Because no white had ever been admitted through this special program, plaintiff successfully characterized it as a race-based affirmative action program. The University defended the program through reference to each of the rationales listed above.

Justice Powell accepted the diversity rationale in an opinion that served as the "swing" vote. He found that such a rationale could even pass muster under strict scrutiny:

Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.... The atmosphere if 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.58

Although Justice Powell approved of the diversity rationale as meeting the "compelling state interest" test which is required under strict scrutiny, he rejected the argument that the race-specific means chosen by the University were necessary. Powell concluded that although race could be a "plus" along with other diversifying factors such as being raised on a farm, a university could not assign a fixed number of places to a minority group.59 Moreover, the "plus" would not "insulate the individual from comparison with all other candidates for the available seats."60

It is not clear from Justice Powell's opinion whether he thought that all racial or ethnic minorities should receive such a "plus," whether there should be a rebuttable presumption of diversity, or whether diversity must be established on a case-by-
case basis. He simply stated that race or ethnic background "may" be deemed a "plus" without explaining why it may provide such a "plus."

Other legal scholars, such as Randall Kennedy,\(^1\) have questioned whether there should be any presumption at all that racial or ethnic minorities bring a "plus" to the educational process. What exactly is the basis of this "plus"? Is it a "plus" based on life experience or ideology? If it is a plus based on life experience, then it is the same as the disadvantage rationale. If it is a plus based on ideology, it is problematic. As Clarence Thomas's presence on the Supreme Court highlights, there is not a monolithic "black" perspective on any issue.

The diversity rationale often is applied in the context of academic appointments, but it is inappropriate to assume that members of racial minority groups have an inherently distinctive way of thinking about race or a specialty in that area. If we want to hire someone to teach and write about race issues, then we should redefine merit by identifying an opening in the field of race relations or African-American history. Then, when someone like Naomi Zack applies, we might hire her because of her proven expertise in that field, not simply because she is of African heritage.

Clumsy uses of affirmative action in the hiring or promotion context often circumvent probing discussions of the definition of merit. One of the best examples of this phenomena is *Johnson v. Transportation Agency*,\(^2\) in which the Santa Clara Transportation Agency successfully defended an affirmative action program in which it promoted a woman, Joyce, over a man, Johnson. Joyce had been one of the first women hired in a road maintenance position and led the way for other women by, for example, persuading the employer to issue her coveralls (as it had the men) so that she would not keep soiling her own
clothes. Rather than get credit for this activism, she was labeled as a troublemaker. (One panel member described her as a “rebel-rousing, skirt-wearing person.”) Johnson was initially selected for the position over Joyce because he scored a 75 as compared to her 73 on the interview. That decision was reversed when Joyce complained to the affirmative action officer about interview bias. The employer ultimately promoted Joyce and then had to defend itself in a reverse discrimination lawsuit brought by Johnson. The employer defended Joyce’s promotion as a lawful example of affirmative action, and prevailed. Rather than defend her selection as lawful affirmative action, it would have been more appropriate to defend her selection under the principle that a redefinition of merit showed that she was more qualified than Johnson. Joyce was entitled to be told that she was selected, in part, because her advocacy on behalf of women was valued and that the interview had suffered from gender bias.

Affirmative action as a justification can be a mechanism that allows white men to avoid confronting their inadequacies. Allan Bakke, for example, insisted in the U.S. Supreme Court that his race (white) was the reason he was not admitted to medical school. The Supreme Court accepted that rationale with little question. Bakke, however, was refused admittance to dozens of medical schools, many of which were not using race as a positive factor in the admissions process. More likely, Bakke’s age and poor interviewing combined to render him less qualified than many other applicants. When a white person fails or when a minority or female succeeds, we are quick to use “affirmative action” as the explanation. We need to find ways to use affirmative action that make clear the positive attributes that women and minorities bring to an employment or educational setting; similarly, we need to make it clear how and why white
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men may not be competent for a particular position. We need to question and make them question their quick reflex of blaming "affirmative action" for their failures.

I have often been the beneficiary of the "diversity" rationale but grow tired of its mechanical application to my situation. Each time that I have been hired at an academic institution, I am surprised to find out how few members of the faculty bothered to acquaint themselves with the quality or substance of my scholarship. It is easier to say that I diversify the faculty because of my gender or sexual orientation rather than to ask the more probing question of whether my gender or sexual orientation have affected my scholarship in ways that are original and thought-provoking. By contrast, when I have observed the hiring deliberations for white men, I have seen close attention paid to the quality of their work. When they are hired, they receive very positive feedback about their qualifications. Anita L. Allen has written: "White men, who predominate in higher education, have frequently failed to communicate confidence in the possibility of minority achievement. Snap judgments made on the basis of skin color alone are not uncommon; nor are begrudging affirmative action appointments. Black women have been made to feel inferior and out of place in higher education." As a white woman, I would add that white male academics have rarely taken my scholarship seriously and made me feel valued or welcome. The scholarship of women and minorities deserves serious attention as part of the appointment process.

Role Models

Anita L. Allen has offered the fullest explanation for what constitutes the "role model" theory. The role model theory, she
argues, presumes that an individual will serve as one or more of the following:

1. an ethical template for the exercise of adult responsibilities;
2. a symbol of special achievement;
3. a nurturer providing special educational services.67

Put more simply, the theory presumes that "if students are to realize their full potential as responsible adults, they need others in their lives whom they can emulate and by whom they will be motivated to do their best work."68 This argument was put forward most strongly in the academic context when Derrick Bell, a tenured black professor at Harvard Law School, took an unpaid leave of absence until the law school tenured a black woman. Bell, and others who supported his position, argued that black female law students need black female law teachers as role models.69 After his leave of absence extended for several years, and Harvard Law School failed to tenure a black woman, Bell resigned his position. His political stance raises the question of whether all students need "same-kind" role models.70

The role model theory was proposed and rejected by the U.S. Supreme Court in Wygant v. Jackson Board of Education.71 The district court and court of appeals had approved the role model theory, concluding that "teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models."72 This theory has also been accepted as a basis for affirmative action by many academics who argue that it has engendered "the expansion of a professional class able to pass its material advantages and elevated aspirations to subsequent generations."73
The Supreme Court rejected the role model theory because it relies on the existence of “societal discrimination” rather than the existence of discrimination at a particular institution. Because it was not tied to a particular institution’s actions, the Court found that it has “no logical stopping point.”

The role model theory may have no logical stopping point, but only because it is forward-looking rather than backward-looking. The premise of the role model theory is that we train students to be high achievers at all institutions irrespective of whether those institutions engaged in egregious discrimination in the past. It is not a reparations theory; it is a theory about the future we want to create.

The role model justification has also received strong criticism from minority academics. Anita L. Allen offers many arguments for not relying primarily on the role model argument for affirmative action; one of her arguments relates to the application of the theory to multiracial individuals. She argues that the role model justification presumes that one must be recognizable as belonging to a specific group. A role model theory, she suggests, might preclude a light-skinned black from being considered for affirmative action purposes yet “throughout American history black communities have embraced high-achieving blacks of whatever hue as symbols of special achievement for the race” irrespective of how discernable is their black appearance. “Indeed, a number of historically important black political leaders have been men of mixed-race ancestry who ‘looked white,’ but opted against ‘passing.’”

Allen recognizes the value of black female students having black female role models but does not believe that this end should be pursued through role model justifications. Role model arguments, she contends, “treat minorities like inferiors.” She would prefer to achieve same-kind role models through “a
search for talent in its many and diverse forms.” In other words, she prefers the diversity justification while recognizing that it accomplishes the same role model result.

Like the diversity rationale, the role model theory could benefit from a redefinition of merit. It is typical in higher education, for example, for women and racial minorities to serve an enhanced advising function on a faculty because of their underrepresentation in comparison to the student body. At tenure time, however, the qualifications for tenure usually focus primarily on scholarship with some attention to classroom teaching. Hours spent inside or outside of the office advising students or attending functions usually are not included in the definition of merit for tenure. If we are going to embrace the role model theory in our affirmative action programs then we have a responsibility to the individuals we hire to value the work they do in the community and as role models.

But we need not abandon the role model justification for affirmative action entirely. White men often make black women “feel inferior and out of place in higher education.” The role model theory lets white men off the hook by making them think they have no responsibilities toward women or minorities. We should respond to that problem by insisting that everyone be willing to serve as a role model rather than by not valuing the important role model work that is usually done by women and minorities.

If we insist that everyone has the obligation to serve as a role model, then there is no problem in deciding how to deal with individuals who are multiracial. They, like everyone else, can agree to take on the commitment to be a positive role model. If they seem uninterested in that commitment, then that fact should be a negative factor in the appointment process. But, of course, we cannot ask questions about role model commitments
only to multiracial or minority candidates. We have to ask those questions of everyone.

Overcoming Disadvantage

The disadvantage theory was raised by the University of California at Davis in *Bakke* and accepted by Justice Brennan, in an opinion joined by Justices White, Marshall, and Blackmun. As applied to the medical profession, the Brennan opinion found that “the problem of underrepresentation of minorities was substantial and chronic and that the problem was attributable to handicaps imposed on minority applicants by past and present racial discrimination.” Moreover, the Brennan opinion concluded that this pattern would continue if a single admissions standard were continued: “Massive official and private resistance prevented, and to a lesser extent still prevents, attainment of equal opportunity in education at all levels and in the professions.”

The lower court had rejected the disadvantage rationale concluding that race-neutral rather than race-specific means should have been used to achieve that objective. The Brennan opinion responded that a race-neutral approach would not have been effective because *economic* disadvantage and *racial* disadvantage are not synonymous: “While race is positively correlated with differences in GPA and MCAT scores, economic disadvantage is not. Thus, it appears that economically disadvantaged whites do not score less well than economically advantaged whites, while economically advantaged blacks score less well than do disadvantaged whites.” In other words, even economically advantaged blacks often require affirmative action to be admitted to medical school when in competition with economically disadvantaged whites. A race-neutral solution might benefit economically disadvantaged whites but would have little
impact on the historical disadvantage faced by blacks of any economic background.

Justice Powell rejected the disadvantage theory concluding that it was not fair to impose disadvantages on individuals such as Allan Bakke “who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.” The Brennan opinion refused to accept the categorization of Allan Bakke as an “innocent white”:

If it was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent [Bakke] would have failed to qualify for admission even in the absence of Davis’ special admissions program.

Because Justice Powell would not go along with the Brennan group, the disadvantage theory only garnered four votes in Bakke.

Nonetheless, the disadvantage theory continues to shape much of the legal discourse surrounding affirmative action. Most recently, the U.S. Supreme Court considered whether a disadvantage theory could justify a race-based subcontractor compensation clause in Adarand Constructors, Inc. v. Pena. The programs at issue in this case were shaped with the disadvantage theory in mind. Instead of calling the favored companies “minority” business enterprises, as they had been called in earlier cases, they were called “disadvantaged” business enterprises. Designation as a DBE varied from program to program but generally consisted of a rebuttable presumption that members of a racial minority group (and women, in some cases) were disadvantaged unless there was contrary evidence; whites
were permitted to qualify for the program if they could establish disadvantage (but did not get the benefit of a presumption). Because the factual record was unclear as to how individualized were the findings of disadvantage, and the role that race played in those deliberations, the Supreme Court remanded the case back to the trial court for further findings. Interestingly, the same dispute existed in *Bakke* concerning how individualized the program was in practice. The University argued, and the Brennan opinion concluded, that “Davis considers on an individual basis each applicant’s personal history to determine whether he or she has likely been disadvantaged by racial discrimination.”

The Powell opinion rejected this nonracial explanation, finding that no disadvantaged whites received an offer of admission through the special admission process, although many applied. In *Adarand*, the program clearly applied to whites who could demonstrate disadvantage; the key factual dispute concerned whether some minorities were actually disqualified under the rebuttable presumption.

Although the issue remained the same—how individualized was the finding of disadvantage—the factual predicates shifted from *Bakke* to *Adarand*. In *Bakke*, the Brennan opinion argued that we should not conflate economic and racial disadvantage. Even economically advantaged blacks face serious educational and economic barriers to advancement in society. Nearly twenty years later, attempts to describe the distinctiveness of racial oppression have largely ended in judicial opinions. The dissent by Justices Stevens and Ginsberg in *Adarand* focused on the individualized nature of the programs at issue. It stressed that race played only a part in the decisionmaking process; the racial presumption was rebuttable. The dissent emphasized that the Small Business Administration was instructed to periodi-
cally review the status of DBEs. "Such review prevents ineligible firms from taking part in the program solely because of their minority ownership, even when those firms were once disadvantaged but have since become successful. The emphasis on review also indicates the Administration's anticipation that after their presumed disadvantages have been overcome, firms will 'graduate' into a status in which they will be able to compete for business, including prime contracts, on an equal basis." 88

Whereas the Brennan decision in *Bakke* was premised on the notion that racial disadvantage is a lifelong experience, the Stevens and Ginsburg decision in *Adarand* was premised on the notion that one could "graduate" from racial disadvantage in a relatively short period of time. The Stevens and Ginsburg view was possible, because their opinion conflated racial and economic disadvantage. Once economic resources are acquired, racial disadvantage presumably disappears.

The empirical literature on black and white poverty, however, suggests that the Supreme Court was wrong to conflate racial and economic disadvantage. As Andrew Hacker has noted: "To be black in America is to know that you remain last in line for so basic a requisite as the means of supporting yourself and your family. More than that, you have much less choice among jobs than workers who are white. . . . entire occupations still remain substantially closed to people who were born black." 89

The disparities between blacks and whites is starkest in the business world. Robert Suggs has documented this disparity:

The black participation rate [in business] is only about one-quarter of the national average. While blacks make up twelve percent of the population, they own only two percent of all business firms. Only $16 of every $10,000 in business receipts, less than 0.2%, comes from
black-owned firms. Black business receipts would have to increase seventy-five fold before they would be proportionate to the black share of the total population.\textsuperscript{90}

These disparities are due, in part, to racism. As Suggs notes: Negative stereotyping of blacks still remains a significant feature of black-white relations. So long as continuing discrimination can be identified in housing and employment opportunities, it seems fair to infer its persistence in the business world. . . . The sheer volume of current legal decisions finding discrimination in these areas suggests that race and ethnicity are pervasive in their effects in American society. Absent some compelling evidence to the contrary, it would be disingenuous to assume that these factors play no role in business decisions and that they do not affect a firm's choice of its suppliers.\textsuperscript{91}

Nonetheless, disregarding the evidence of racism throughout our society, the Supreme Court is moving affirmative action to a purely economics model of disadvantage. As the Brennan opinion noted in Bakke: "With respect to any factor (such as poverty or family educational background) that may be used as a substitute for race as an indicator of past discrimination, whites greatly outnumber racial minorities simply because whites make up a far larger percentage of the total population and therefore far outnumber minorities in absolute terms at every socio-economic level."\textsuperscript{92} If we eliminate considerations of race in defining disadvantage, we will have affirmative action primarily for disadvantaged whites. That will do nothing to overcome the pervasive inequality faced by racial minorities in our country. If anything, it will magnify it by improving yet another group's situation while leaving racial minorities behind.

One must also wonder if the move toward individualized inquiries reflects a genuine commitment to affirmative action because it so impractical. As the Brennan opinion noted: "A case-by-case inquiry into the extent to which each individual
applicant has been affected, either directly or indirectly, by racial discrimination, would seem to be, as a practical matter, virtually impossible, despite the fact that there are excellent reasons for concluding that such effects generally exist."

Affirmative action should not be entirely reshaped into an economic disadvantage theory. We need to be mindful that racism as a historic practice and current reality still exists. Poor whites do not face racism. Supreme Court jurisprudence cannot be used to erase the existence of racism. As Robert Suggs has argued, blacks can become "temporary whites" when they succeed within one employment sphere. However, they cannot transfer their social capital from one employment situation to another. Similarly, middle-class black parents can provide their children with the comforts of life and a good education but cannot shield them from the racism that is endemic in the commercial sector. Their children will face a much higher likelihood of slipping back into poverty than will the children of middle-class white parents. Irrespective of how much economic capital blacks bring with them, they face barriers not faced by whites when entering new industries or situations. This lack of transferability of social capital is consistent with the empirical literature from social cognition theory—strangers will always first see a black person as "black" with all of the attendant stereotypes. Many blacks, for example, find that when they patronize expensive stores, restaurants, or other settings where blacks are infrequent participants, they are often subject to discriminatory and even hostile treatment, ranging from avoidance to police confrontation. Economic success does not erase blackness.

With the advent of the Civil Rights Act of 1964, some social scientists, most notably Richard Freeman, thought that labor market discrimination against blacks would virtually collapse,
thereby precluding the need for affirmative action.97 Other social scientists thought that the disparities between whites and blacks would disappear over time as young blacks benefitted from educational opportunities not available to their older relatives. (This was called the “vintage” theory.)98 Unfortunately, both schools of thought have been proven wrong:

Labor market discrimination did not “collapse” with the passage of civil rights legislation; instead it underwent a metastasis, living on, one suspects having received considerable nourishment from the past Reagan administration.

The vintage hypothesis is also wrong. Before it can be taken seriously, it must explain why black and white youths whose skill levels are supposedly converging have such disparate employment opportunities.99

Civil rights legislation and increased educational opportunities for blacks have not been able to end the pattern of labor market discrimination.

But what happens to the disadvantage theory when applied to multiracial individuals? As the many autobiographies of such people reveal, even when they look “white,” they still live an existence defined by their minority racial status. For those who are multiracial yet look black, society is unlikely to consider them anything other than “black” irrespective of how they might self-identify. The presumption of disadvantage would appear to exist for all persons of any discernable African heritage, because economic opportunity in the United States has been created under the “one drop of blood rule.” A rebuttable presumption (i.e., a presumption that could be overcome with evidence that the disadvantage rule should not apply) could certainly uncover individual cases in which such individuals have spent their entire lives “passing” as white and living in “white” households, thereby avoiding racism. In fact, it appears
that in some of the cases in which the Small Business Administration successfully challenged claims of “disadvantage” by “minorities,” the individual was, in fact, someone who “discovered” a minority ancestor for the purpose of obtaining the benefits of the set-aside program. 

A rebuttable presumption may therefore be an excellent way to resolve the variation in experience among multiracial individuals.

It is important to insist that multiracial individuals have grown up in a minority, rather than white, household if we are to be true to the literature which distinguishes racism from poverty. If it is true that whites, in general, have more social capital than blacks to help them attain economic development, we should not lump poor whites with blacks for affirmative action purposes. If Greg Williams truly passes as white, then we have to contend with whether we want to have affirmative action for poor whites. But we should not taint that decision by classifying him as black. Greg Williams’s children (who have a white mother), for example, most likely would not qualify for affirmative action under the disadvantage theory. If, like Greg, they decide to devote their attention and scholarship to racial issues, then they might qualify under a diversity rationale.

Nonetheless, by accepting the disadvantage rationale, we should not preclude ourselves from making distinctions among blacks so that, if possible, we can try to help the most disadvantaged. An example which illuminates this point emerges from a conversation I had with my colleague, Jody Armour. Jody described an educational program in which he has participated that tries to help disadvantaged blacks get a “better chance” by attending high-achievement high schools. Originally, the program primarily benefited blacks from inner-city segregated schools. Today, he has seen an increasing number of black children who apply to the program who come from middle-
class backgrounds. It is tempting for the organizers of this program to pick such children because, given their lesser disadvantage, they are less at risk of failure in the “better chance” program, thereby making the program appear “successful.” When we devise a program for the explicit purpose of assisting disadvantaged individuals in our society, we should stay mindful of that original purpose in selecting beneficiaries even within the group of blacks.

Stephen Carter has made a similar point in arguing that we should reserve affirmative action for the most needy blacks in our society:

Because the principal battleground is affirmative action, which benefits mainly those least in need of society’s aid, there may be a tendency for all of us to forget who it is that is suffering as the rest of us toss our brickbats: for it is our people, black people, those on whose behalf all of us claim to be laboring, who are withering in the violent prisons that many of our inner cities have become.101

Carter is correct to argue that the most needy blacks especially require our assistance but that argument should not obscure the fact that, unfortunately, even the children of middle-class blacks often need affirmative action to overcome the racism that is endemic in our society. We should not fail to admit the children of middle-class blacks to medical school under a special admissions program when more impoverished blacks are unavailable for those slots. Blacks, like whites, benefit from education and class background. The children of blacks who have recently entered the middle-class need affirmative action so as not to slip back into poverty in the next generation. We cannot delude ourselves into thinking that racism is solved in one generation because we “graduate” from racism. Carter’s approach, unfortunately, would risk the loss of the modest
gains made by the emerging black middle class. Thus, we should make distinctions among blacks while also remembering that racism can touch even the children of Harvard and Yale law professors.

Overcoming Stereotypes

The University of California argued in Bakke that one justification for its affirmative action program was to “dismantle pernicious stereotypes.” That argument, however, was not considered seriously by any member of the Court. Since Bakke, that theory rarely has been raised. Justice Stevens used the theory in his dissent in Wygant arguing that: “It is one thing for a white child to be taught by a white teacher that color, like beauty, is only ‘skin deep’; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.” No other member of the Court, however, joined his opinion.

The stereotype justification should be an important justification in light of the social cognition research on prejudice. An important component to racism is stereotypical thinking which cuts across the socioeconomic status of blacks in our society. For example, one study found that when an individual “bumped” someone in the hall, the reaction of the person being bumped varied depending on the race of the person who bumped them. When they were bumped by a black person, they felt that the person was hostile or violent; when they were bumped by a white person they felt that the individual was merely playing around or dramatizing. When they were bumped by a white person, they excused the behavior as unintentional and harmless. The employment of more black physicians, lawyers, or even Supreme Court justices, might help overcome those stereotypes. Having a black teacher will make black and
white students put aside their stereotypes about the incompetence of blacks. Especially, as affirmative action moves beyond tokenism, a substantial influx of minorities into positions of respect and authority might help overcome stereotypes about incompetence.

The stereotype theory, however, is difficult to apply in the multiracial context. The issue is really one of identifiability rather than mixed-race. If Naomi Zack, Greg Williams, Maria O’Brien Hylton, or Judy Scales-Trent are walking down a hall and bump into a stranger, what will that stranger think? Will that stranger think that he or she was bumped by a “white” person or by a “black” person? Being able to “pass” as white when, metaphorically speaking, walking down the hall can be a real privilege when it is extended to business meetings and social gatherings. A dark-skinned person does not have the option of moving back and forth across the color line. A light-skinned person exercises that option, even without trying. If our primary goal is to help overcome racial stereotypes, then it is hard to see how hiring multiracial individuals who are light-skinned furthers that purpose.

So Where Does This Leave Us?

This discussion of the various rationales for affirmative action creates much confusion. Some justifications work well for multiracial individuals; other rationales do not. There are, simply, no easy answers or blanket solutions. The important point is that we recognize the range of ways that affirmative action can be justified for multiracial individuals. In applying these justifications, we need to be mindful of the utility of these justifications. If a hiring decision comes down to two blacks—one who is light-skinned and who has often passed as white and
the other who is dark-skinned and has lived a life defined by racial prejudice—we should prefer the dark-skinned over the light-skinned individual (assuming all other factors are equal). On the other hand, if a hiring decision comes down to a white person and a mixed-race black person, we should favor the mixed-race black over the white, knowing that economic disadvantage for whites is more easily overcome than it is even for advantaged blacks. Having a sensitivity to race and color as well as the justifications for affirmative action might permit us to use our limited resources more fairly and effectively.

Returning to Greg Williams’s story about being considered for the sheriff position in Indiana can highlight the usefulness of this discussion. Greg’s relative who commented that Greg deserved to be the beneficiary of affirmative action because he had not received any “breaks” in life was referring to the disadvantage theory. Greg’s childhood, after he went to live with his black relatives, was defined by his minority racial status. Greg deserves reparations for those experiences. The black minister, however, was also correct to note that Greg would do little to overcome stereotypes about blacks when he walks on patrol in the neighborhoods. The community would view him as another “white” police officer. If a more visible black were available for the position, who could also meet the reparations theory, then that other person may be more deserving (assuming all other factors are the same). But, if the alternative is another white sheriff, then clearly Greg is the more deserving candidate. No matter how disadvantaged was Greg’s life experience, he will always have the privilege of “passing” that is not accorded to many dark-skinned blacks. As Albion Tourgée noted, and Cheryl Harris has reiterated, there is a property value in whiteness, even for “blacks.”
C. Transracial Adoptions

The National Association of Black Social Workers (NABSW) strongly influenced our adoption and placement policies by its 1972 position paper in which it strongly argued against the adoption of black children by white families. Although the NABSW may have made an important contribution to our understanding of the best interest of black children seeking family placement, it has also perpetuated stark black/white thinking about society. Its position paper states: "Our society is distinctly black or white and characterized by white racism at every level. We repudiate the fallacious and fantasied reasoning of some that whites adopting Black children will alter that basic character." Unfortunately, in trying to protect the interests of black children, the NABSW ignored the interests of the growing number of multiracial children by assuming that we can easily divide society into black and white categories.

The NABSW position paper has generated extensive discussion of transracial adoptions. Will blacks face cultural genocide if black children are made available for adoption by white couples? Do black children suffer so much from the foster care system that they are better off placed with a white family than allowed to languish in the foster care system?

Many voice concern about preserving "black culture" and serving the best interest of "black children," but give little attention to how we define "black." In particular, they ignore that many children available for adoption are multiracial rather than exclusively white or black. Multiracial children are usually lumped into the category "black" on the assumption that steps need to be taken to preserve their black heritage without any consideration of whether we are using family law to create rather than preserve cultural heritage.
A biracial youngster whose birth mother is White and whose father is unknown was classified as Black. His foster family was then classified as White, even though the White foster mother was married to an African American. The foster child thus became a candidate for removal.\textsuperscript{111}

When we assume that all children with a white parent and a black parent should be treated as if they are black in the context of family placements, we are sending the message that these children should be classified and treated as if they are black, thus increasing the likelihood that they will languish in foster care.

We generally ignore what the family composition of these children would be without adoption. In many of the reported cases of biracial children, the biological mother is white and the biological father (who is not the mother’s husband) is black.\textsuperscript{112} Given our gendered system of childrearing, the child would most likely have been raised in a white household absent adoption. Ironically, when we classify these types of mixed-race children as black and place them in a black family, we have transported the children to a different family situation than they would have experienced absent adoption. Those who consider “transracial adoptions” to be cultural genocide for black children often ignore the weaknesses of the cultural genocide argument when children with white mothers and black fathers are placed in white families. By lumping together all children with at least one biological black parent into the category “black” for adoption purposes, we help construct a larger category of “black” than would exist absent adoption.\textsuperscript{113}

In one case, \textit{Reisman v. State of Tennessee Department of Human Services},\textsuperscript{114} the court recognized the mixed-race background of a child and searched for a “mixed-race” couple to adopt the child.\textsuperscript{115} But the court never defined exactly what it
meant by a “mixed-race” couple. Ordinarily, if no adoption takes place and the nuclear family stays intact, a mixed-race child is raised by parents of two different races (let’s assume white and black for this discussion). Those parents do not have the same racial make-up as the child, who is half white and half black. The only way that child would share the racial make-up of his or her parents is if the parents were each half-white and half-black (possible but unlikely). In what sense, one must wonder, is it better for a “mixed-race” child to have parents of two different races than two parents of the same race? In neither case does the child really share her racial heritage fully with her parents.116

Other courts have used the term “biracial,” failing to appreciate that nearly all blacks (as well as many whites) are of “mixed-race” background in the United States.117 The term “biracial,” as used by the courts seems to be limited to an instance where a child has a white and a black parent. What happens, one must wonder, when a biracial child who grew up in a white household grows up and bears a child. If she bears a child with a white man is her child still biracial? What if she bears a child with a black man? Is the child still biracial or will social convention cause it to be considered black? The biracial category, as used by courts and commentators, seems to only reflect the situation where a child is exactly 50 percent white and 50 percent black. It is not a term that reflects a spectrum; it simply designates a new point—the middle—on the bipolar racial scale. Ironically, that middle point probably does not even exist in the cases to which it is being applied because the parent who is labeled as “black” probably is the product of a mixed-race heritage. Thus, although it might make sense abstractly to recognize the category “biracial” and use that category to find homes for biracial children, the category is actually
unworkable. Nearly all of us are, in fact, multiracial, and it distorts reality further to consider only the child with one “white” and one “black” parent to be biracial.

These classification questions are challenging, because the courts do not define the race of a child in a vacuum. The fact that a court recognizes a child as multiracial will not necessarily cause society to treat the child as multiracial. Society may still choose to treat the child as if she is black. If a court, for example, insisted on giving no racial preference to black parents over white parents in the adoption of a multiracial child, and the child was eventually placed with white parents, the child may still face unfavorable treatment by friends, classmates, teachers, employers, and health care workers who consider the child to be black. Some people may therefore argue that we should try to place the multiracial child with a black family so that the child will learn how to deal with a racist society. But such a preferential policy makes the assumption that the best way to learn to deal with society’s classification scheme is to adopt it as part of one’s self-identity. That is a dangerous presumption because it puts the courts and social service agencies in the position of helping to perpetuate an arbitrary classification system. While some people may consider such a racial classification system in the adoption context to be ameliorative, it also helps perpetuate the subordinating “one drop of blood” rule for racial classification under which a person with a known trace of African ancestry is considered to be black. Racial preference policies for adoption of multiracial children therefore do not present exactly the same problems as they do for “black” children. Classifying a multiracial child as “black” and thereby preferentially placing her in a black home promotes a racist and subordinating classification system.

We get a different perspective on the transracial adoption
Race controversy when we examine it from the context of a multiracial child. First, we see that many of the children who the courts and social agencies have unreflexively labeled as “black” for adoption purposes are, in fact, multiracial. It is therefore too simplistic to say that these cases raise issues of “transracial” adoption only when a white couple or individual tries to adopt a multiracial child. Second, we see that our goal should be to respect an individual’s full racial heritage rather than distort one aspect of that racial heritage. When courts or social agencies distort one aspect of that racial heritage, they help perpetuate our racist “one drop of blood” rule. Nonetheless, as we should stop applying to the context of multiracial children what is considered by some to be good social policy for black children, we should also be careful not to transfer these lessons from cases involving multiracial children to cases involving black children. Our policy of preferring black parents for a black child may be beneficial in terms of preserving racial heritage and even teaching a child how to deal with the racism of our society. Stretching that policy to include all multiracial children with a “drop” of African-American blood reinforces racism rather than the best interest of the child. By taking that step, we are helping to construct a bipolar racial model which is disrespectful to the genuine mixed-racial heritage of that child. Children should not be the instruments of such social engineering.

How then could we really move toward a spectrum of race rather than false polarities? We could begin by truly investigating our racial heritage. The assumption would be that we all are of mixed-racial heritage and the challenge would be to discover as much of that family tree as possible. If the child in the Reisman case, for example, could be determined to have ancestry from Africa, Europe, and North America, then we
could hope the child would be taught to honor and value that mixed-racial heritage. It is wrong to assume, however, that only parents who shared that identical racial background would try to honor and respect a child's racial heritage. Outside the adoption context, adults who marry someone of another race and bear children together routinely raise multiracial children. We expect them to honor and respect a heritage to which they do not directly belong. By only sending the multiracial child to a multiracial household, we attempt to do the impossible—give each of us parents with racial backgrounds identical to our own. That does not always happen outside the adoption context, and there is no reason to impose it artificially onto the adoption context.

A problem with this thesis is that much African heritage was lost through forced deportation and enslavement. Whereas many people of European heritage can trace their families back to a specific country, many people of African heritage cannot because of the coercive nature of their voyage to the United States. For the child with African heritage, the task of tracing back ancestry may become a lesson in the trials of forced enslavement. And, for a multiracial child, it may lead "a descendant to an irreconcilable slave and slave-owning genealogy." As we begin to acknowledge the multiracial category, we may also take the opportunity to break down the monolithic category of "Africa" and discuss the many countries of that continent. Such discussions may not only help children of African heritage to learn more about their heritage but may help all of us to move beyond our monolithic thinking about Africa.

A final difficulty is confidentiality. Children who are adopted often have special problems in tracing their heritage because of the confidentiality of the adoption proceedings. Nonetheless, if their racial heritage is to be meaningfully honored and re-
spected, it would seem important for the adoption agency to collect as much information as possible while the birth mother and father are known to them. Rather than classifying a child as "black" or "multiracial," it would be helpful to learn as much as possible about what kind of African heritage the child may have (as well as what kinds of other heritage the child might have). If this information is communicated to the adoptive parents, then they can try more faithfully to learn about that heritage and to imbue in the child a sense of pride about that heritage.

Adoption, by definition, is a highly individualized process to which we devote considerable social resources. There is no excuse for social agencies and courts to blindly perpetuate the "one drop of blood rule" without fully investigating the best interests of the child.

In sum, the invisibility of multiracial individuals is subtly enforced, through Census rules, affirmative action programs, and adoption policies. Clumsy policies have unconsciously preserved a "one drop of blood rule" that results in nearly all people of mixed-racial heritage being labeled "black." It is time for us to consider why we engage in racial categorization so that we can develop rules that achieve ameliorative rather than subordinating purposes. I will present a modest proposal for how to achieve respectful Census categorization in chapter 8, and hope that others will join me in beginning the journey toward respectful racial categorization in the context of other issues.