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

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# CHOICE AND FRAUD IN RACIAL IDENTIFICATION: THE DILEMMA OF POLICING RACE IN AFFIRMATIVE ACTION, THE CENSUS, AND A COLOR-BLIND SOCIETY

Tseming Yang\*

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## INTRODUCTION

On May 30, 1942 a young man who gave his name as Clyde Sarah was arrested by the San Leandro police. Sarah claimed that he was of

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Spanish-Hawaiian origin but had been born in Las Vegas. His parents were deceased. He was subsequently charged with having violated federal orders to leave that particular area. To avoid detection of his true identity, Sarah had gone as far as obtaining rudimentary plastic surgery. It turned out that Clyde Sarah was an alias; his real name was Fred Korematsu, and he was a Japanese-American. Pursuant to Presidential Executive Order 9066 and military exclusion orders, all individuals of Japanese ancestry had been required to report to internment centers.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup> Further investigations within the Boston fire department and at fire and police departments in several other cities revealed similar troubling claims about racial identity.<sup>4</sup>

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.<sup>5</sup> Moreover, U.S. Census records showed an ancestor whom Churchill had claimed as an American

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1. PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 93-94* (1983).

2. Peggy Hernandez, *Firemen Who Claimed to Be Black Lose Appeal*, BOSTON GLOBE, July 26, 1989, at 13.

3. *Malone v. Haley*, No. 88-339, slip op. at 3 (Sup. Jud. Ct. for Suffolk County, July 25, 1989). On file with author/Vermont Law School Law Library [hereinafter *Malone v. Haley*].

4. In San Francisco, a firefighter of Portuguese ancestry claimed to be Asian because he was born in the former Portuguese colony of Macao, China. Two others, who were generally known as Italian-Americans, claimed to be Hispanic and Mexican-American on job promotion applications. Edward Lucas, *Firemen Go Back to Their Roots in Search of Promotion*, THE INDEPENDENT (London), Feb. 20, 1991, at 12.

5. Howard Pankrantz, *CU Prof Affirms Indian Heritage: Tribe Says He Is Not a Full Member*, DENVER POST, Feb. 3, 2005, at A-1. Some even suggested that "associate" membership was only an honorary form of membership. See Stuart Steers, *Churchill's Membership in Tribe Honorary Only*, ROCKY MOUNTAIN NEWS, Feb. 4, 2005, at 26A. Churchill has maintained that his associate membership was "actual" and based in part on documented lineage. E-mail communication with Natsu Saito, Sept. 29, 2005 (on file with author).

Indian listed as White.<sup>6</sup> While Churchill has continued to assert “that he is an Indian,” a claim that he has maintained since his high school days,<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> He was later cleared of those charges.<sup>10</sup>

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.<sup>11</sup> It appears to be most prevalent with respect to American Indian and Hispanic/Latino identities.<sup>12</sup> While it is unclear how often such incidents occur, they do not appear to be rare.<sup>13</sup> There seem to be no formal mechanisms to challenge or check abuses and opportunism.<sup>14</sup>

6. Kevin Flynn, *Prof's Genealogy is Sketchy; He Offers Little Clarification*, ROCKY MOUNTAIN NEWS, Feb. 5, 2005, at 4A.

7. *Id.*

8. Together with other law professors, I have signed a letter to University of Colorado officials criticizing the investigation of Churchill as driven by political pressure and contrary to principles of academic freedom.

9. *Report on Conclusion of Preliminary Review in the Matter of Professor Ward Churchill*, University of Colorado, (Mar. 24, 2005), (on file with author) available at <http://www.colorado.edu/news/reports/churchill/report.html>.

10. *Id.*

11. See Amy Harmon, *Seeking Ancestry in DNA Ties Uncovered by Tests*, N.Y. TIMES, April 12, 2006, at A1.

12. See, e.g., Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle That Famous House?*, 75 N.Y.U. L. REV. 283, 296 (2000).

13. See, e.g., Cornel Pewewardy & Bruce Frey, *American Indian Students' Perceptions of Racial Climate, Multicultural Support Services, and Ethnic Fraud at a Predominantly White University*, 43 J. OF AM. INDIAN EDUC. 32 (2004). See also Grayson Noley, *Commentary: "Ethnic Fraud,"* ASAIL NOTES, Vol. 13, No.2, Oct. 1995, p. 12; Dirk Johnson, *Census Finds Many Claiming New Identity*, N.Y. TIMES, Mar. 5, 1991, at A1 (A California contractor, “who is one sixty-fourth American Indian, obtained \$19 million in contracts set aside for minority-owned companies”); John Martinez, *Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs*, 12 HARV. BLACKLETTER L.J. 49 (1995).

14. A small informal survey of law school admissions officers offers anecdotal evidence that box-checking is usually unchallenged—in other words that the admissions officer accepts the racial identification of the individual. Informal e-mail survey of law school admissions officers, Nov. 8–9, 2004 (on file with author).



In the popular imagination, the idea of changing one's racial identity invokes images of Eddie Murphy putting on white make-up and exploring the secret privileges of Whites on his Saturday Night Live skit "White Like Me."<sup>15</sup> One might also think of a recent James Bond movie, where plastic surgery transforms the megalomaniac arch-villain from a North Korean soldier into a White British billionaire.<sup>16</sup> The examples are numerous.<sup>17</sup> In fact, if one broadened the protagonist's or villain's change of identity to gender and social status, such a transformation is a common literary plot device.<sup>18</sup>

Similar to these cinematographic and other literary works, Korematsu, the Malone brothers, and Churchill were engaged in their own efforts to cross racial lines. All of their actions were self-conscious and intentional efforts to identify themselves as something other than what the general community recognized them as. Many might even say that these individuals "misrepresented" their racial identity. From a conventional point of view, the question that these instances of "racial misrepresentation" pose is whether it is appropriate to "lie" about, or to mis-state, one's racial identity. They can also be seen as disputes about the permissibility of altering one's racial identity. How should one interpret or judge such acts as a social, moral or legal matter?

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.<sup>19</sup> Criticism of contemporary uses of racial classification have

15. See GAYLE WALD, *CROSSING THE LINE* 2-3 (2000). There is an entire genre of "Whiteface" in film and on TV, including such recent films as *WHITE CHICKS*. See James Hannaham, *Beyond the Pale*, *NEW YORK MAG.*, June 28, 2004, at 98.

16. *DIE ANOTHER DAY* (MGM 2002).

17. See generally ELAINE K. GINSBERG, *PASSING AND THE FICTIONS OF IDENTITY* (1996); SUSAN GUBAR, *RACECHANGES: WHITE SKIN, BLACK FACE IN AMERICAN CULTURE* (2000).

18. See generally GINSBERG, *supra* note 17. For an illustration of "gender-passing," see the tragic story of Teena Brandon as depicted in the movie *BOYS DON'T CRY* (Fox Searchlight Pictures 1999).

19. See, e.g., Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 *STAN. L. REV.* 1 (1991); IAN HANEY-LOPEZ, *WHITE BY LAW* (1996); Cheryl Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707 (1993).

either denied their necessity wholesale<sup>20</sup> or focused on the substantive "accuracy" of classifications and designations.<sup>21</sup> 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 we 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?

This Article focuses on the implications of self-conscious efforts by individuals to alter their racial identity and the challenge that they pose to social conventions and the law. Part I will provide an overview of the range of acts of crossing the race line and their societal significance. In addition to surveying the historical antecedents, this part also identifies new ways of racial passing and locates the source of discontinuity and fluidity of racial identity in the social construction of race. Part II considers the two dominant methods of evaluating racial identity: individual choice and racial fraud. It asks whether these two perspectives are adequate analytical frameworks and concludes that both perspectives pose significant difficulties.

Parts III and IV take up a functionally driven analytical framework. Part III identifies the different functions that racial identification serves. Such identification can be a descriptive summary of particular physical characteristics, an act of expressive affiliation with a particular group or community, or a regulatory/social conclusion about the applicability of a variety of criteria supplied by others, government or community. The latter function is most relevant to the role of race in generating social and legal status. Finally, Part IV then considers the implications of a functional understanding of the racial identification/classification process for affirmative action and the federal decennial census. It also considers some implications of such a framework to the promotion of a color-blind

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20. See, e.g., DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991).

21. See, e.g., Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994).

society, in particular with respect to health care services and bureaucratic records.

It should be clear that I am not so ambitious as to resolve the problem of racial classification generally, especially the substantive boundaries of racial categories. However, a better understanding of the meaning of the racial identification process provides useful insights into these issues.

## I. CROSSING LINES OF COLOR AND RACE

### A. *Past Efforts to Cross Color and Race Lines*

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.

#### 1. Racial Passing

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.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup> One of the most promi-

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22. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 283 (2003).

23. See generally *id.* at 281–366. The act of passing is not unique to the race context. Homosexuals sometimes pass as straight in order to avoid anti-gay prejudice and violence. Gender-crossing women have disguised themselves as men to escape sexual harassment or to avail themselves of employment opportunities. In World War II Germany, numerous Jews passed as gentiles or converted to Christianity in order to escape persecution and the Holocaust.

24. *Id.* at 286; WILLIAM CRAFT, *RUNNING A THOUSAND MILES FOR FREEDOM: THE ESCAPE OF WILLIAM AND ELLEN CRAFT FROM SLAVERY* (1860). For other examples, see Elaine K. Ginsberg, *Introduction: The Politics of Passing*, in GINSBERG, *supra* note 17, at 1.

25. RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 44–45 (2001); GREGORY HOWARD WILLIAMS, *LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK* (1995) (experience of passing by father of law dean Gregory Williams).

ment examples includes Walter White, an active member of the NAACP during the first half of the 20<sup>th</sup> 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.”<sup>26</sup> Using his ability to pass as White, he investigated lynchings for the NAACP during Jim Crow times.<sup>27</sup>

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.<sup>28</sup> 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 19<sup>th</sup> and early 20<sup>th</sup> century. During the period of Chinese Exclusion, it was one of the only means available to enter the United States via Mexico or Canada.<sup>29</sup> 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 Mexican citizenship papers, and they also learned to say a few words of Spanish, in particular ‘Yo soy Mexicano’ (‘I am Mexican’).<sup>30</sup>

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.’”<sup>31</sup>

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26. See KENNEDY, *supra* note 22, at 287.

27. *Id.* at 287–289; WALTER F. WHITE, *A MAN CALLED WHITE: THE AUTOBIOGRAPHY OF WALTER WHITE* (1948). *But cf.* Lawrence Wright, *One Drop of Blood*, *NEW YORKER*, July 24, 1994, at 46 (discussing other “light skin” African Americans).

28. HENRY LOUIS GATES, *THIRTEEN WAYS OF LOOKING AT A BLACK MAN* 180–214 (1997).

29. ERIKA LEE, *AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943* at 161–165 (2003).

30. *Id.* at 161.

31. *Id.* at 162. For an example of passing as White by South Asians in Britain, see Shompa Lahiri, *Performing Identity: Colonial Migrants, Passing, and Mimicry Between the Wars*, 10 *CULTURAL GEOGRAPHIES*, 408, 411–413 (2003). Prominent actors Dean Cain and Keanu Reeves have Asian Pacific American ancestry. Keanu Reeves—Biography, available at <http://www.imdb.com/name/nm0000206/bio>; Dean Cain—Biography, available at <http://www.imdb.com/name/nm0001002/bio>. However, they are generally perceived as

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.<sup>32</sup> 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.<sup>33</sup> Such individuals arguably are not engaged in any deliberate "deception" about their racial identity.<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup>

Racial line crossing has not only occurred in the direction of Whiteness. With respect to Asian Americans, for example, the on-screen

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White. See, e.g., Liz Goodman, *Inaction Hero: Surviving Keanu Reeves*, Nov. 1, 2000, available at <http://modelminority.com/printout737.html>.

32. See, e.g., SPOTLIGHT ON HETEROGENEITY: THE FEDERAL STANDARDS FOR RACIAL AND ETHNIC CLASSIFICATION—SUMMARY OF A WORKSHOP 30 (Barry Edmonston et al. eds., 1996) ("Among Indians enumerated in the 1910 census, only slightly more than one-half (56 percent) reported full-blood ancestry.") (quoting C. MATTHEW SNIPP, *AMERICAN INDIANS: THE FIRST OF THIS LAND* 167 (1989)). See also Roger Sanjek, *Intermarriage and the Future of Races*, in STEVEN GREGORY & ROGER SANJEK, *RACE* 103, 106 (1994). See generally CIRCE STURM, *BLOOD POLITICS: RACE, CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA* (2002).

33. On the flip-side, there have been doubts expressed about the *bona fide* nature of Native American racial identity of individuals whose phenotype is White, regardless of their ancestry. See, e.g., Delphine Red Shirt, *These are not Indians*, 26 AM. INDIAN Q. 643; John J. Miller, *Honest Injun? The Incidence of Fake Indians is Almost Epidemic*, THE NAT'L. REV. Mar. 28, 2005, at 34; see also, Kathryn Rand & Steven Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y. & L. 381 (1997).

34. Even though passing has been described as "a deception," suggesting some active effort at misrepresentation, the most common view of the term, and the view I adopt here, includes instances in which one individual fails to correct others' misperception of his or her racial identity. However, it is quite different from somebody who is "merely mistaken about his or her racial identity—for example, the man who, having been told all his life that he is White, thinks of himself as White, and holds himself out to be White, though he and everyone else in the locale would change that identification to "black" were the facts of his ancestry known." KENNEDY, *supra* note 22, at 283–284.

35. MORAN, *supra* note 25, at 48–49.

36. See, e.g., Kevin Johnson, "Melting Pot" or "Ring of Fire.?" *Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259 (1997).

roles of actors Lou Diamond Philips and Tommy Chong have led them to be commonly perceived as Latino.<sup>37</sup> Tiger Woods is predominantly and primarily perceived as African American, even though his mother is Thai.<sup>38</sup> 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.<sup>39</sup>

There have been some well-known instances of White individuals passing as Native Americans.<sup>40</sup> Passing as African American, however, has generally been rare.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

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37. See, e.g., Peter Skerry, *E Pluribus Hispanic?*, WILSON Q., Summer (1992), available at [http://wwics.si.edu/index.cfm?fuseaction=wq.essay&essay\\_id=16545](http://wwics.si.edu/index.cfm?fuseaction=wq.essay&essay_id=16545).

38. Jay Nordlinger, *Hunting Tiger: Everybody Wants a Piece of Him*, THE NAT'L REV. Sept. 16, 2000, at 38.

39. VIRGINIA R. DOMINGUEZ, *WHITE BY DEFINITION* 204 (1986) (pointing to the example of the Houma tribe).

40. Miller, *supra* note 33 (discussing the example of Iron Eyes Cody who passed as a Native American in the 1970's). See also discussion *infra* on ethnic/racial fraud; ALAN TRACHTENBERG, *SHADES OF HIAWATHA: STAGING INDIANS, MAKING AMERICANS 1880-1930* (2005).

41. In contrast, examples of impersonations of African Americans and other people of color in the theatrical or black-face minstrel show context, and other similar theatrical portrayals of other racial groups, are legion. See, e.g., GINSBERG, *supra* note 17; GUBAR, *supra* note 17; JOSEPHINE LEE, *PERFORMING ASIAN AMERICA* (1997).

42. MORAN, *supra* note 25, at 46. See also *Malone v. Civil Service Commission*, 646 N.E.2d 150, 151 (1995); Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classification*, 48 VAND. L. REV. 513 (1995) (discussing the example of "soulmanning").

43. JOHN HOWARD GRIFFIN, *BLACK LIKE ME* (1960). See also Joshua Solomon, *Skin Deep; Reliving "Black Like Me": My Own Journey into the Heart of Race-Conscious America*, WASH. POST, Oct. 30, 1994, excerpted in JUAN F. PEREA ET AL., *RACE AND RACE: CASES AND RESOURCES FOR A DIVERSE AMERICA* 461-464 (2000); WALD, *supra* note 15, at 57 (Jazz musician Milton "Mezz" Mezzrow, born Milton Mesirov to a Jewish family). But cf. LANGSTON HUGHES, *Who is Passing for Who*, in *LAUGHING TO KEEP FROM CRYING* (1952).

## 2. Legal Recognition of Whiteness (and other Racial Identities)<sup>44</sup>

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<sup>45</sup> and 1923<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> At trial, her purported owner submitted documentary evidence supporting her status as a slave, and hence Black.<sup>49</sup> 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.<sup>50</sup>

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 law suits were unsuccessful.<sup>51</sup>

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44. See generally HANEY-LOPEZ, *supra* note 19.

45. *Ozawa v. United States*, 260 U.S. 178, 198 (1922).

46. *United States v. Thind*, 261 U.S. 204, 214-15 (1923).

47. EILEEN TAMURA, *AMERICANIZATION, ACCULTURATION, AND ETHNIC IDENTITY: THE NISSEI GENERATION IN HAWAII* 76 (1994).

48. *Daniel v. Guy et al.*, 19 Ark. 121 (1857).

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

50. See also *Johnson v. Boon*, 28 S.C.L. 268, 1 Speers 268 (S.C.App.L. 1843) (defendants successfully asserted that they were White in order to avoid a tax assessment imposed on free colored persons.) For an unsuccessful effort at changing racial identity by legal recognition, see *Green v. City of New Orleans*, 88 So. 2d 76 (La. Ct. App. 1956). See also DOMINGUEZ, *supra* note 39, at 87-89.

51. See *Doe v. State*, 479 So.2d 369 (La. Ct. App. 1985). See generally DOMINGUEZ, *supra* note 39, at 36-51. The Louisiana state legislature changed the law in 1983. *Id.* at 3. Drake was arguably a fanatic about enforcing rules of hypo-descent and implementing

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.<sup>52</sup> 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.<sup>53</sup> In the tribal programs and affirmative action context, racial identity is a pre-requisite for program eligibility.<sup>54</sup>

*B. New Ways of Passing and Changing One's Racial Identity:  
Medical Technology and Bureaucratic Records*

There are two modern trends that have increased the options available to those wishing to cross color and race lines: 1) advancements in science and medical technology; and 2) the increasing use of what might be called "paper" or virtual identities.

Since at least the 19<sup>th</sup> century, surgical alteration of appearance has been part of the repertoire of racial and ethnic minorities who could not pass solely based on their naturally given physical appearance. Designed to alter ethnic facial characteristics, such surgery has grown in popularity in recent decades.<sup>55</sup> According to Sander Gilman, rudimentary facial surgery techniques were used to lessen the "ethnic" size and appearance of Jewish and Irish noses.<sup>56</sup> Rhinoplasty was also used by "coloured" individuals in apartheid South Africa to facilitate passing as White.<sup>57</sup> Among East Asians,

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procedures to re-examine racial designations as White when surnames suggested Black ancestry. She was openly defiant of direction by supervisors and court orders requiring racial designation changes. She was not dismissed until 1965. *Id.* at 44–45.

52. *Id.* at 1–5.

53. See, e.g., *Perkins v. Lake County Dept. of Utilities, et al.*, 860 F. Supp. 1262 (N.D. Ohio 1994).

54. While eligibility for Native American programs is usually formulated in terms of ancestral blood quantum prerequisites, such requirements have been interpreted as a substantive proxy for racial identity. *Rice v. Cayetano*, 528 U.S. 495, 511–16 (2000).

55. SANDER L. GILMAN, *MAKING THE BODY BEAUTIFUL: A CULTURAL HISTORY OF AESTHETIC SURGERY* 85–156 (1999).

56. *Id.* at 139–142. Gilman even points to pre-nineteenth century surgical reversal ("decircumcision") of circumcised Jews to facilitate passing.

57. *Id.* at 114–115.

efforts to alter the body to conform more closely with Western (White) ideals have focused primarily on the eyes. The most common surgery, double eye-lid surgery, is designed to create a fold in the upper eye-lid, thereby making them rounder and more Western.<sup>58</sup>

Advancements in science and medical technology have significantly expanded these options and allowed for more sophisticated efforts to disguise the ethnic or racial phenotype. The most widely known example is probably pop-singer Michael Jackson's repeated surgeries that have turned him from a brown-skinned African American boy into a pale-skinned individual with a thin-nosed, surgically sculpted face.<sup>59</sup> The most recent medical advances hold even greater promise for successful physical transformations. Recent reports of a partial face transplant<sup>60</sup> and the prospect of full face transplants<sup>61</sup> suggest the prospect of complete erasure of the most visible aspect of racial phenotypes.

Other advancements in biomedical research present the possibility for physical changes that go even deeper. In the not-so-distant future, gene therapy could enable the alteration of a person's DNA not only to cure inherited diseases but also to change the make-up of a person's genetic heritage. It would not only present radically new possibilities for "passing," but also challenge biologically deterministic views of race by erasing the genetic evidence of one's racial ancestry.<sup>62</sup>

For those individuals whose physical characteristics either match their expected racial phenotype or who will simply be unable to afford the medical technology necessary to accomplish the physical transformation, opportunities to cross racial lines will arise primarily through paper identities or some other virtual representation. Jerry Kang has suggested that cyberspace, and the necessity to use virtual identities in such contexts, may offer people some opportunity to free themselves from the restraints of race in the real world, even though there may be pitfalls.<sup>63</sup> His description is also applicable to increased bureaucratization and reliance on personal records in our society.

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58. *Id.* at 98–111.

59. For a discussion of the politics of skin color and appearance in the African American community, see KATHY RUSSELL, MIDGE WILSON & RONALD HALL, *THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS* (1992.)

60. Carole Bianchi, *Woman in France Receives World's First Face Transplant*, WASH. POST, Dec. 1, 2005, at A22.

61. Osborne Wiggins, et al., *On the Ethics of Facial Transplantation Research*, 4, AM. J. OF BIOETHICS (Summer 2004). See also Eric F. Trump & Karen Maschke, *A Stranger in the Mirror: Should Doctors Transplant Faces?*, N.Y. TIMES, Oct. 12, 2004, at F5; Rick Weiss, *Face Transplants Raise Hopes—And Some Fears*, WASH. POST, Nov. 8, 2004, at A1; Michael Mason, *A New Face: A Bold Surgeon, An Untried Surgery*, N.Y. TIMES, July 26, 2005, at F1.

62. See *infra* section III(A). However, such developments would not significantly affect theories about the socially constructed nature of race.

63. Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130 (2000).

Because of increased complexity of interactions between individuals and institutions, record-keeping has created extensive "paper-identities" similar to the virtual identities described by Kang.<sup>64</sup> A tremendous amount of personal information is now kept by entities ranging from government to medical to financial institutions. The records of the Internal Revenue Service, Social Security Administration, hospitals, credit rating agencies, banks, schools and universities contain not only a person's vital statistics, but also consumption preferences, financial profile, and health history. In short, one's whole life may be found in a virtual form.

In the recent past, the substantive content of the records, and hence the paper identity, has become increasingly important because decisions about credit, government benefits, and other important life advantages are now primarily or even exclusively made on the basis of such records. For example, in the consumer credit card approval process, the issuing bank and the consumer virtually never meet in person; instead, most of the process hinges on the individual's credit score which is assembled through impersonal financial records.<sup>65</sup> All that the lender knows of the consumer is usually the paper identity—the records available to the institution or submitted by the applicant.<sup>66</sup> In the personnel offices of large institutions, there may be little or no interaction between the individual handling bureaucratic aspects of employment and the actual person. To the personnel officer, the individual may be represented entirely by the personnel record, the paper identity.

For racial identification purposes, the identity assigned in such records will thus oftentimes be the only information available regarding the racial background of the real person. If a paper record designates the individual as, for example, Asian, to a personnel officer, credit card application reviewer, or social security agency employee, that person is for all practicable purposes Asian.

Most of these virtual/record identities co-exist in infrequent and insubstantial contact with their real-world counterparts. Consequently, the possibilities of passing as a person of an alternate race are almost boundless.<sup>67</sup> Unlike passing that depends on consistency of visible physical

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64. See, e.g., Richard Sobel, *The Degradation of Political Identity Under a National Identification System*, 8 B.U.J. SCI. & TECH. L. 37, 56–57 (2002).

65. Jennifer Barrett Ozols, *Boon or Bust?*, NEWSWEEK, Aug. 18, 2004, available at <http://msnbc.msn.com/id/5750688/site/newsweek/> (on file with author).

66. The general growth of identity fraud is a side-effect. FEDERAL TRADE COMMISSION—IDENTITY THEFT SURVEY REPORT (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/synovaterreport.pdf>; U.S. GEN. ACCOUNTING OFFICE, GAO-02-363, *IDENTITY THEFT: PREVALENCE AND COST APPEAR TO BE GROWING* (Mar. 2002).

67. This might be one explanation why the racial and ethnic mis-identifications of the Malone brothers were not challenged for years. *But see*, Hernandez, *supra* note 2, at 13; Peggy Hernandez, *Wife Defends Ex-Firefighter, Asserts Everybody Knew How Brothers Were Hired*, BOSTON GLOBE, Nov. 4, 1988, at 21; Steven Marantz and Peggy Hernandez, *Defining*

markers with the phenotype of the asserted alternate race, passing via a paper identity does not. No need for physical plausibility is required. Passing via a paper identity is thus open not only to mixed race individuals or those to whom nature has endowed with particular physical features, but to anybody.<sup>68</sup>

### C. *The Construction of Race and Racial Identity*

The phenomenon of passing and other manifestations of racial line crossing illustrate important aspects of the concept of race and racial identity. Most traditional and modern ways of passing do not "change" an individual physically. Passing is still considered a deception about one's racial identity.

Yet, passing changes one's racial identity for all practical purposes. The individual is recognized and treated as a member of another race or ethnicity. In that sense, the individual has "changed" his or her racial identity. With respect to successful efforts to persuade the courts to recognize White identity (or any other racial identity, for that matter), that crossing is legally complete. The individual has acquired a different racial identity.

Passing and other manifestations of racial line crossing illustrate the modern understanding of racial identity as a social and legal construct.<sup>69</sup> According to Stephen Cornell and Douglas Hartmann, race is the

product of human perception and classification . . . 'Both what constitutes a race and how one recognizes a racial difference are culturally determined.' . . . We decide that certain physical characteristics—usually skin color, but perhaps also hair type, stature, or other bodily features—will be primary markers of group boundaries. We invent categories of persons marked by those characteristics. The categories become socially significant

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*Race a Sensitive, Elusive Task; Boston's Hiring Probe Brings System Under Fire*, BOSTON GLOBE, Oct. 23, 1988, at 33.

68. The possibility of using virtual/paper identities to deceive a discriminatory system about the very basis of discrimination is not new. One historical antecedent was the practice of creating "paper sons" during the Chinese exclusion period. Kitty Calavita, *The Paradoxes of Race, Class Identity, and "Passing": Enforcing the Chinese Exclusion Act, 1872–1910*, 25 LAW AND SOC. INQUIRY 1 (2000); see generally RONALD TAKAKI, *A HISTORY OF ASIAN AMERICANS: STRANGERS FROM A DIFFERENT SHORE* 234–237 (updated & rev. ed., 1<sup>st</sup> Black Bay ed. 1998).

69. Michael Omi & Howard Wynant, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (1994); Stephen Cornell & Douglas Hartmann, *ETHNICITY AND RACE: MAKING IDENTITIES IN A CHANGING WORLD* (1998); EDMONSTON ET AL., *supra* note 32, at 18–19; Ian F. Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); American Anthropological Association Statement on "Race," (May 17, 1998), available at <http://www.aaanet.org/stmts/racepp.htm> (on file with author).

to the extent that we use them to organize and interpret experience, to form social relations, and to organize individual and collective action. In other words, the categories become important only when we decide they have particular meanings and act on those meanings. The characteristics that are the basis of the categories, however, have no inherent significance. We give them meaning, and in the process we create races.<sup>70</sup>

Accordingly, White, Black, American Indian, Asian, and Latino races are not natural categories, but rather constructed identity groups.<sup>71</sup> The "racialization" process used "certain bodily features or assumed biological characteristics . . . to mark [them] for differential status or treatment."<sup>72</sup> For Blacks, American Indian, Asian, and Latinos, the rationale and process were relatively obvious. Used among other things to justify economic exploitation of human labor and claims to natural resources and land, these racial classifications created persons who were relegated to lower social class status and invested with fewer legal rights, including relegation to chattel status during times of slavery. In contrast, the White racial category was established in opposition to the non-White racial categories. Like the other racial categories, certain people were assigned to it and provided with distinct status and legal rights.<sup>73</sup>

The social construction of racial categories is most visible in the criteria used to define them. While biological characteristics may have been the asserted basis of the typology, cultural factors, behavior, and other arbitrary criteria, such as "common knowledge," were usually equally or more important.<sup>74</sup>

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70. CORNELL & HARTMANN, *supra* note 69, at 23–24 (quoting geneticist James King).

71. While the U.S. Census and others consider Latino, as a synonym for Hispanic, to be an ethnic category only, among the public it is quite frequently thought of as a racial category. OFFICE OF MANAGEMENT AND BUDGET, PROVISIONAL GUIDANCE ON THE IMPLEMENTATION OF THE 1997 STANDARDS FOR FEDERAL DATA ON RACE AND ETHNICITY at 16–17, 26–27, 70 (Dec. 15, 2000), available at <http://www.whitehouse.gov/omb/inforeg/statpolicy.html#dr>. In fact, during cognitive field testing of the 2000 Census question on race and ethnicity, it became apparent that many Hispanic or Latino respondents thought of themselves as a separate racial category. *Id.* at 27. See also EDMONSTON ET AL., *supra* note 32, at 24, 29 (during 1990 Census, many "Hispanics checked the 'Other' category for race and then did not respond to the Hispanic-origin question"); Rachel L Swarns, *Census Plan Perplexes Hispanics*, DESERET MORNING NEWS, Oct. 24, 2004, at A13; Luis Angel Toro, "A People Distinct from Others": Race and identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15, 26 TEX. TECH. L. REV. 1219 (1995); HANEY-LOPEZ, *The Social Construction of Race*, *supra* note 69, at 27–34 (describing the racialization of Mexicans).

72. HANEY-LOPEZ, *The Social Construction of Race*, *supra* note 69, at 33.

73. *Id.*

74. See, e.g., DOMINGUEZ, *supra* note 39, at 205–261; HANEY-LOPEZ, *supra* note 19; Gross, *supra* note 49.

Popular and scholarly understanding of race has not always acknowledged the socially constructed nature of race. For much of the 19<sup>th</sup> century, race was widely accepted as a valid scientific concept.<sup>75</sup> Yet, there was little scientific consistency in its use or description.<sup>76</sup> As a tribute to the arbitrariness of racial classifications during those times, legislators even on occasion spoke of races in the same way as nationalities, distinguishing for example between the Irish, German, Italian, and Greek races.<sup>77</sup>

Even if some biologically deterministic views of race persist to this day,<sup>78</sup> science has largely shown that any significant biological differences between racial groupings are illusory.<sup>79</sup> Most importantly, science has shown that inter-racial variations are dwarfed by intra-racial variations in physical characteristics and biological distinctions.<sup>80</sup>

Racial passing, racial identity, and the ability for some to cross racial lines are artifacts distinctly associated with the socially constructed nature of race. Their content and meaning arise out of and are bounded by the social and legal descriptions of race.

## II. CHOICE OF IDENTITY AND RACIAL FRAUD

Given the history of passing and other acts of crossing the race and color lines, what does one make of contemporary instances of related efforts, such as by the Malone brothers, Ward Churchill, and university applicants who are engaged in box-checking? These acts are commonly evaluated through two different lenses. On one hand, they may be seen as instances of individuals exercising personal choices about their conceptions of self. This perspective is best embodied in the federal government's

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75. For a history of the origination of the use of the race concept in race as a form of descent and lineage as well as race as a typology of differences between human groups, see MICHAEL BANTON, *RACIAL THEORIES* 1-64 (1987). See generally JOSEPH L. GRAVES, JR., *THE EMPEROR'S NEW CLOTHES: BIOLOGICAL THEORIES OF RACE AT THE MILLENNIUM* (2001).

76. CORNELL & HARTMANN, *supra* note 69, at 21.

77. See, e.g., *Saint Francis College v. Al Khazraji*, 481 U.S. 604, 611-13 (1987) (discussing post-Civil War congressional debates that referred to various ethnic groups as separate races, including Scandinavians, Anglo-Saxons, Germans, Jews, Latinos, Mexicans, Spaniards, Chinese, Mongolians, and Gypsies); EDMONSTON ET AL., *supra* note 32, at 5.

78. See, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994); MICHAEL LEVIN, *WHY RACE MATTERS: RACE DIFFERENCES AND WHAT THEY MEAN* (1992). Both publications were funded in part by the Pioneer Fund. "The purpose of the Pioneer Fund was to demonstrate the genetic inferiority of blacks." GRAVES, *supra* note 75, at 154.

79. See, e.g., STEPHEN J. GOULD, *THE MISMEASURE OF MAN* (1981).

80. See, e.g., R.C. LEWONTIN, STEVEN ROSE, & LEON J. KAMIN, *NOT IN OUR GENES: BIOLOGY, IDEOLOGY, AND HUMAN NATURE* 126-127 (1984). See also L.L. Cavalli-Sforza, *The Genetics of Human Populations*, 231 *SCI. AM.* 80 (Sept. 1974); R.C. Lewontin, *The Apportionment of Human Diversity*, 6 *EVOLUTIONARY BIOLOGY* 381, 397 (1972).

approach to race in the decennial census. Alternatively, they may also be viewed as efforts of deception. Recent assertions of fraud in racial and ethnic self-identification for affirmative action programs represent this other perspective.

### A. Choice of Identity

In the census, the federal government's official and principal position with respect to racial classification is self-definition.<sup>81</sup> Accordingly, question 6 of the Census, "What is your race," asks each individual "to indicate what this person considers himself/herself to be."<sup>82</sup> The question requests the self-considered, personal views of racial identity of the respondent. The response is arguably conclusive and not subject to second-guessing by contrary views or perceptions of third parties.<sup>83</sup>

#### 1. Why Choice?

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).<sup>84</sup> 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.<sup>85</sup>

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

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81. Self-identification dates back to the 1960s. See SKERRY, COUNTING ON THE CENSUS? 46 (2000) (citing MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 201-202 (1988)).

82. Bureau of the Census, United States Census 2000, Form D-2, Question 6.

83. OFFICE OF MANAGEMENT AND BUDGET, PROVISIONAL GUIDANCE *supra* note 71, at 10. But see discussion *infra*.

84. OFFICE OF MANAGEMENT AND BUDGET, REVISIONS TO THE STANDARDS FOR THE CLASSIFICATION OF FEDERAL DATA ON RACE AND ETHNICITY, 62 FR. 58782, 58788 (Oct. 30, 1997).

85. See, e.g., Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans and the U.S. Census*, 95 MICH. L. REV. 1161 (1997); Ford, *supra* note 21; KENNEDY, *supra* note 22, at 334-335.

social perceptions and interactions with others is known most completely only to the census respondent him or herself.<sup>86</sup>

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.

## 2. The Limits of Choice

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?

The Massachusetts Supreme Judicial Court's decision in *Malone v. Haley* suggested at least one limit to self-identification: sincerity. Just as religious beliefs must be sincere for Free Exercise Clause purposes, the same requirement could be applied to racial identification.<sup>87</sup> This requirement would probably allow the screening of a variety of opportunistic claims, like those of the Malone brothers.

Is such a criterion enough, however? What if the only evidence supporting racial identity claims points to a sincere belief and acts of expressive affiliation,<sup>88</sup> but unaccompanied by community recognition, consistent physical appearance, and documentary evidence? For example, take a White individual who sincerely enjoys Black culture and would like to be part of that community. Or maybe somebody who sincerely admires American Indian culture and spiritual beliefs, perhaps especially their en-

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86. EDMONSTON ET AL., *supra* note 32, at 17.

87. See, e.g., Tserming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 172 (1997).

88. See *infra* Part III(B).

vironmental tenets, and seeks to practice them on his own. Given the limited resources of virtually all affirmative action programs, is it appropriate to allow an individual with such minimal claims to displace another person who can marshal support via official records, community recognition, and physical appearance? Unquestioned acceptance of sincere self-identification seems questionable as a fair selection criterion unless the inquiry is to become meaningless as a practical decision-making tool.

In practical reality and by instinct, of course, most people's racial identity judgments are not based only on sincere self-identification. They also look to considerations such as ancestry, documentary evidence or community recognition. Hence, minimalist claims arguably should not pose a real threat because they are so uncommon. According to Randall Kennedy, even if they did pose a threat, society ought to tolerate some amount of racial fraud as a price of permitting individuals freely to determine for themselves their racial identity.<sup>89</sup>

But what about the corollary question that the Census approach raises but leaves unanswered: If racial identity is truly a matter of individual and personal choice, should people be made aware of such a choice, and should we encourage the exercise of such choice openly? Existing attitudes suggest the opposite. Free choice appears to contradict some governmental policy, most social expectations, and the "practical reality" of choice.

### 3. The Reality of Choice

The "practical reality" of choice must be evaluated by reference to its social and legal context. Assumed away by the Census' personal choice approach is this question: is it appropriate to conceptualize racial identity as primarily within the control of the particular individual? What about external constraints on racial identity choice?

As a socially, politically, and legally constructed concept, popular views about race are not *sui generis*. Just as individual identity generally is shaped indelibly by the community, perceptions and choices about racial identity are shaped by social conventions and expectations, historical uses, and applicable legal norms.<sup>90</sup> In other words, self-perception and choices of racial identity are not only the result of what individuals believe or may want to believe about themselves as an ideal, but also what *others* think or have thought, however unreasonable or false. How we conceive ourselves is necessarily affected by others, including their racial perceptions,

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89. KENNEDY, *supra* note 22, at 337.

90. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 222 (1993) ("bonds of society and culture, of history and social place of origin, begin so early to shape our life and are normally so strong that the right of emigration . . . does not suffice to make accepting its authority free [of coercion]").

stereotypes and prejudices.<sup>91</sup> If others perceive me as Asian American, is there not a delusional quality to my choice to be White, Black, or any other race? If nobody else accepts my choice or treats me any different based on it, is my choice at all meaningful?<sup>92</sup>

Perceptions about racial identity also do not exist in a historical vacuum. Beliefs and assumptions expressed in public discourse about racial identity remain generally consistent with traditional racial classification schemas, including the one-drop rule. Inertia of perception, as well as the private persistence of the racial caste system and White privilege, mean that racial identity categories are changing only slowly.<sup>93</sup> The one-drop rule may have been discredited as a legal determinant of African American identity. Nevertheless, it continues to be widely used and relied upon, even by many within the African American community, as a means of determining identity and belonging to the community.<sup>94</sup>

High-profile cases like *Malone v. Haley* also shape popular perceptions about racial identity. The fact that racial mis-identification by the Malone brothers was treated as a fraud, investigated, and punished suggests to popular perception that racial misrepresentation is both illegal and punishable. Consistent with the earlier history of laws governing racial classification in the United States, *Malone v. Haley* arguably confirms not only the immutability of race, but also that attempts to cross racial lines are punished with the force of law.

Finally, it is unclear how well known the Census position on racial identity is. The Census forms do not make explicit that self-identification is *conclusive* of racial status as opposed to being an information gathering technique intended to promote administrative efficiency. For example, nobody would believe that just because a government form instructs an applicant to fill in a birth date, the individual can make up a date without any relationship to one's actual date of birth and have it accepted by the government as conclusively true. Virtually everybody would agree that false information could at a minimum be corrected and might even lead to criminal prosecution or a fraud charge.

Consistent with such perceptions, the Census engages in spot-checking to determine the accuracy of the information provided on their

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91. See e.g., Haney-Lopez, *The Social Construction of Race*, *supra* note 69, at 46–50; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 614 (1990); Deborah Waire Post, *Reflections on Identity, Diversity and Morality*, 6 BERKELEY WOMEN'S L.J. 136, 137 (1991).

92. See Hickman, *supra* note 85, at 1246–1247. See also *infra* Part III(B).

93. See, e.g., OFFICE OF MANAGEMENT AND BUDGET, PROVISIONAL GUIDANCE *supra* note 71, at 7. Cf. *Id.* at 69 (suggesting that children have a significantly higher rate of multiple race reports than adults).

94. An example is the racial identity of Tiger Woods as perceived by himself and by the public.

forms.<sup>95</sup> It “corrects” responses that are inconsistent with information provided elsewhere in the Census questionnaire.<sup>96</sup> Checking answers for “accuracy” would suggest to many that the Census expects people to use objective criteria. In other words, racial self-identification decisions are made in the shadow of what most people perceive to be legally binding classification criteria, however ambiguous the criteria may be.<sup>97</sup> Uniformity in racial classification may thus be attributable to misunderstanding rather than consensus.

### B. The Case of Racial Fraud

The alternative to making racial identification entirely subjective, especially where abuse is a concern, is regulation of classification criteria. Otherwise, limited resources for affirmative action may be misused or squandered, anti-discrimination law implementation and enforcement rendered ineffective, and our understanding of the continuing existence of discrimination made inaccurate.

Application of traditional fraud doctrine, as applied by the administrative hearing examiner and the reviewing court in *Malone v. Haley*, is the most recent judicial analysis of traditional fraud doctrine applied racial identity claims. Given the paucity of such cases, the test set out in *Malone v. Haley* would likely be the starting point for any inquiry, judicial or otherwise, into racial fraud in other jurisdictions. The reasoning of *Malone* continues to be used officially within Massachusetts.<sup>98</sup>

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95. In 1993, the Census Bureau's Content Reinterview Survey (CRS) contacted approximately 13,000 households who had returned the 1990 Census forms (With approximately 24,000 individuals) in order to determine how responses provided to Census interviewers compared to responses given in the written Census form. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE 1990 CPH-E-1, CONTENT REINTERVIEW SURVEY: ACCURACY OF DATA FOR SELECTED POPULATION AND HOUSING CHARACTERISTICS AS MEASURED BY REINTERVIEW (Sept. 1993), available at <http://www.census.gov/prod/cen1990/cph-e/cph-e-1.pdf>.

96. For example, individuals who selected the “Some Other Race” category on the 2000 Census, including many who wrote in “Latino,” were re-assigned a racial identity based on other information provided on the questionnaire. Swarns, *supra* note 71.

97. See discussion *supra*, Part I(A)(1), and *infra*, Part III(C). See also SKERRY, *supra* note 81, at 54–56 (detailing examples of popular misunderstandings about conclusive self-identification on the Census).

98. See Glossary of Civil Service Terms (setting out *Malone v. Haley* definition of “black”), available at [http://www.mass.gov/portal/index.jsp?pageID=hrdterminal&L=3&L0=Home&L1=Civil+Service&L2=Guides+%26+Publications&sid=Ehrd&b=termin alcontent&f=cs\\_glossary\\_cs\\_glossary&csid=Ehrd](http://www.mass.gov/portal/index.jsp?pageID=hrdterminal&L=3&L0=Home&L1=Civil+Service&L2=Guides+%26+Publications&sid=Ehrd&b=termin alcontent&f=cs_glossary_cs_glossary&csid=Ehrd) (on file with author).

### 1. A Modern Application of Racial Fraud: *Malone v. Haley*

The review of the Malone brothers' racial identification was triggered by a fraud provision in the Massachusetts Civil Service System regulations, Personnel Administration Rule 3(4)(c). The provision stated that:

The administrator may . . . declare a candidate's appointment invalid upon proof of any of the following conditions after a hearing held by the administrator.

(c) The knowingly making of a material false statement by any person in his application . . . , or the commission of or attempt to commit any fraud against civil service law or rules . . . .<sup>99</sup>

In early 1988, Boston Fire Commissioner Leo Stapleton noticed that the Malone brothers were listed as Black on a promotion list sent to his office. He knew them because they were the only set of identical twins, and he understood that they were White.<sup>100</sup> After an investigation by the Department of Personnel Administration and an administrative hearing, they were fired for "willfully and falsely" claiming that they were Black "'for the sole purpose of obtaining the minority preference' under a 1975 federal court decree."<sup>101</sup> They "thus had their jobs illegally."<sup>102</sup>

At the administrative hearing, the Malones were given the opportunity to rebut their allegedly false race designation either by 1) showing that they had "acted in good faith," or 2) demonstrating that they were in fact "Black".<sup>103</sup> The criteria that the hearing officer applied, and which had been used by the Massachusetts Personnel Administration since 1984,<sup>104</sup> were: "(i) visual observation of physical features; (ii) documentary evidence establishing black ancestry, such as birth certificates; and (iii) evidence that the Malones or their families held themselves out to be black and are considered black in the community."<sup>105</sup>

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99. Massachusetts Personnel Administration Rule 4(3)(c), Office of Legal Counsel, Human Resources Division Feb. 28, 2003, available at <http://www.mass.gov/Ehrd/docs/cs/publications/personneladministratorrulesforonline.doc>.

100. Peggy Hernandez and John Ellement, *Two Fight over Disputed Claim They are Black*, BOSTON GLOBE, Sept. 29, 1988, at 29.

101. NAACP v. Beecher, 504 F.2d 1017, C.A. No. 72-3060-F (C.A. 1974) (cited in *Malone v. Haley*, No. 88-339 at 2).

102. *Id.*; *Malone v. Civil Service Commission*, 646 N.E.2d at 151; *Malone v. Haley*, No. 88-339 at 3.

103. See *Malone v. Civil Service Commission*, 646 N.E.2d at 147.

104. Peggy Hernandez, *No Minority Job Screens Done Before '84 City Says*, BOSTON GLOBE, Jan. 18, 1989, at 19; Marantz & Hernandez, *supra* note 67, at 33.

105. *Malone v. Civil Service Commission*, 646 N.E.2d at 151; *Malone v. Haley*, No. 88-339 at 17. (When asked why he thought someone might question his claim of minority

After a 2-day hearing, the hearing officer Hilda I. Lopez-Soto concluded that the Malones had failed conspicuously to establish any of the three factors. She stated, "I visually observed the Malone brothers at the hearing. They each appear to me to have fair skin and fair hair coloring, to have Caucasian facial features. Based on my visual observation, they do not appear to be black."<sup>106</sup>

Their defense also failed on the documentary evidence. Birth certificates "established the White racial identity of the Malones for three generations."<sup>107</sup> The purported photograph of their great grandmother Sarah, who was alleged to be Black and thus supportive of their claims, was found to be inconclusive and questionable.<sup>108</sup> The "hearing officer and the personnel administrator simply did not credit the Malones story that, after having failed to gain appointment in 1974 as non-minority candidates, they discovered the existence of a Black ancestor in 1976."<sup>109</sup>

Moreover, "there was no reliable means of verifying the identity of the woman in the photograph" as their ancestor, other than their hearsay testimony.<sup>110</sup> The "photograph itself was inconclusive on the issue of the race of the woman pictured."<sup>111</sup> Finally, the hearing officer found that the Malones had neither "identified themselves personally or socially as Blacks" nor that they "conducted themselves in the community as Blacks."<sup>112</sup>

The hearing officer determined that the Malones had acted in bad faith and without a reasonable basis. They made no effort to confirm their claim of Black ancestry, nor did they attempt to "clarify the standards for asserting minority status."<sup>113</sup> On the day of his appointment as a firefighter, Philip Malone was given a Personnel Survey form that "asked for an explanation of the source of his claim of minority status."<sup>114</sup> He "left that part of the form blank," explaining to the hearing officer that he did not think the question pertained to him and that it was not important at the time.<sup>115</sup> Paul Malone answered the same question by stating that his father was Black.<sup>116</sup> In short, their conduct suggested that they made significant

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status Philip Malone also stated "... well, very light skin fellow. Somebody might question and say 'he doesn't look Black' whatever.")

106. Hernandez & Ellement, *supra* note 100, at 29. See also *Malone v. Haley*, No. 88-339 at 17.

107. *Malone v. Civil Service Commission*, 646 N.E.2d at 152 n.5.

108. *Id.*

109. *Malone v. Haley*, No. 33-889 at 19.

110. *Id.*

111. *Id.*

112. *Id.* at 19-20.

113. *Id.* at 21.

114. *Id.*

115. *Id.*

116. *Id.* at 22.

efforts to avoid any challenge or inquiry into the factual basis of their racial identity claims.

The Malone brothers lost on both their objective claim of being Black and the sincerity of their belief. The administrative findings and terminations were upheld by Justice Herbert Wilkins of the Massachusetts Supreme Judicial Court as supported by substantial evidence.<sup>117</sup> The decision to fire them relied on two key elements of the fraudulent misrepresentation doctrine specifically articulated within the Personnel Administration rule: objective falsity and intention to deceive.<sup>118</sup> Even if the Malones had not intentionally falsified the “suddenly discovered” photograph of their Black maternal great grandmother, most people would interpret the factual circumstances of the discovery, and their subsequent assertion of being Black, as having been made recklessly and without any good faith belief in the well-foundedness of that connection. Either way, the Malones would not have prevailed under applicable doctrine.<sup>119</sup>

With respect to objective falsity, the hearing officer combined quasi-objective criteria, like documentary evidence and in-court factual determinations by visual observation (presumably through the use of physical racial identity markers), with subjective ones of public self-identification and community acceptance. Other than the “suddenly discovered,” but inconclusive photograph of their maternal grandmother, the Malones provided virtually no other supporting evidence.

## 2. The Limits of Fraud Doctrine

The Malone brothers’ actions were plainly unpalatable, and the case outcome makes intuitive sense. But the application of fraud doctrine to test racial identity raises significant questions. Below, I evaluate the two elements examined in *Malone v. Haley*, objective falsity and good faith, as well as a third, materiality of the misrepresentations.<sup>120</sup>

### a. Objective Falsity

The hearing officer found that the Malone brothers were not “objectively” Black under three criteria: 1) visual appearance, 2) documentary evidence, and 3) community perception.<sup>121</sup> The only substantial evidence

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117. *Id.* at 23.

118. DAN B. DOBBS, *THE LAW OF TORTS* 1345 & n. 1 (2000); *REST. (2D) TORTS* § 525 (1976).

119. *See, e.g.,* *Gross v. Sussex Inc.*, 332 Md. 247, 630 A.2d 1156 (1993). *See also* DOBBS, *supra* note 118, at 1347.

120. *REST. (2D) TORTS* § 538 (1976); DOBBS, *supra* note 118, at 1363–1364.

121. *Malone v. Civil Service Commission*, 646 N.E. 2d at 152 n.5.

introduced was the photo of the Malone brothers' supposed Black maternal great grandmother, but the hearing officer discounted the picture.<sup>122</sup>

If one takes the *Malone* test seriously, a different conclusion should have resulted if a birth certificate for their grandmother had been found indicating her race as Black or African American. The twins would have had 1/8 Black ancestry, little different from Homer Plessy and many other light-skinned African Americans. Given popular notions about racial identity and the persistence of hypo-descent, most people would have considered the brothers Black.<sup>123</sup>

But should that have been enough? Neither they nor their family had ever held themselves out as anything but White. They were recognized by their community, co-workers, and employer as White. And they had no cultural or social connections to the Black community. Other than within their fire department employment records, they had always been White.

The contradictory considerations in determining the Malones' racial identity are an inherent consequence of the conflicted nature of race as a social and legal construct. Unlike fixed or absolute criteria used to characterize or define physical objects, race has ill or no defined boundaries. For example, because slavery depended on the maintenance of the color line, racial mixing and the associated blurring of racial categories required continual re-definition of who was considered legally Black and thus enslavable.<sup>124</sup> Around the beginning of the 20<sup>th</sup> century these developments culminated in the rules of hypo-descent. In contrast, Virginia created the so-called "Pocahontas exception" which accorded individuals who had only minimal American Indian ancestry status as White. It was said to have been specifically designed for the descendants of Pocahontas and Englishman John Rolfe and other prominent citizens of Virginia.<sup>125</sup>

Even the definition of Whiteness changed over time. Until the early 20<sup>th</sup> century, it was presumed that being White meant having "White" or fair skin color. In the context of the U.S. naturalization statute, which provided that only free White persons could become U.S. citizens, White became equivalent to Caucasian ancestry<sup>126</sup> and finally designated only

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122. *Malone v. Haley*, No. 33-889 at 19.

123. If truthful, their discovery would have shared bits of the lives of Suzie Phipps and Anatole Broyard. Like Suzie Phipps, "discovery" of their Black ancestry came only later in life. Like Anatole Broyard, they presumably sought to avoid losing the privileges of being White by passing.

124. See, e.g., A. Leon Higginbotham, Jr., & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989).

125. MORAN, *supra* note 25, at 49-50.

126. *Ozawa*, 260 U.S. 178.

individuals who were known by common knowledge to be White.<sup>127</sup> What such "common knowledge" meant was left entirely undefined.<sup>128</sup>

Modern equal protection jurisprudence has largely ended the use of the legal definitions of old. Nevertheless, concepts such as hypo-descent persist in popular views of race. Without a consensus about the specific content, both meaning and boundaries, of racial categories, assertions about racial identity are impossible to evaluate in a rational fashion.<sup>129</sup> As a result, it is nonsensical to seek an objectively truthful determination of racial identity in much the same way that one ordinarily looks for truth or falsity in a fraud inquiry.<sup>130</sup> Like statements of opinion, judgment, or belief, racial identifications cannot be objectively determined true or false for purposes of fraud.<sup>131</sup>

The hearing examiner did discount the photograph of the Malones' purported Black ancestor, the single piece of substantial evidence introduced by the Malones. But even if the existence of a Black ancestor had been confirmed, that should not have been the end of the inquiry into whether they were Black for purposes of the affirmative action hiring program. Racial identity is not a question that can be answered by ancestral "facts" alone.<sup>132</sup> The Malone brothers' Black identity was questionable not only because of the lack of specific and conclusive evidence of ancestry, i.e. because their racial identification was *factually incorrect*, and thus they had made a "false statement;" rather, it is because as a matter of social or legal *judgments* they were not deemed to be Black.

### *b. Sincerity or Good Faith Belief*

The hearing examiner also "concluded that the Malones had wilfully and falsely identified themselves as Black in order to receive appointments to the department."<sup>133</sup> They had "claimed minority status in bad faith."<sup>134</sup> Since they and their families had always held themselves out

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127. *Thind*, 261 U.S. 204.

128. HANEY-LOPEZ, *supra* note 19.

129. Some communities and groups, such as anthropologists, scientists, or even White supremacists, may have their own internal definitions. However, none of these definitions can be described as universal or generally accepted even in the loosest sense of the term.

130. There are parallels to an individual's sincerely held religious beliefs. Neither racial identity nor religious belief can be objectively "wrong." For religious beliefs, that may be attributable to their inherently subjective, metaphysical context.

131. REST. (2D) TORTS, § 525, cmt. d.

132. The same question is posed more subtly when it is asked whether an individual is "Black" enough to qualify as African American for affirmative action hiring. See, e.g., Leonard M. Baynes, *Who is Black Enough for You? An Analysis of Northwestern University Law School's Struggle over Minority Faculty Hiring*, 2 MICH. J. RACE & L. 205 (1997).

133. *Malone v. Civil Service Commission*, 646 N.E. 2d at 151.

134. *Id.* at 152.

as White and were recognized as such by the community, their claim simply seemed non-credible and opportunistic.

The unspoken premise of the finding is that one's public racial identity, that ascribed by and held out to the community, is always consistent with one's self-identified race. But as racial passing demonstrates, individuals sometimes go to great lengths to conceal their "true" race. Anatole Broyard, for example, concealed his racial heritage even to his own children until his death.<sup>135</sup> For some families, such concealment may be so complete that Black ancestry is forgotten or hidden for generations.

It seems plausible that the Malone brothers might not have known about their Black ancestor until their adulthood. If the very reason for concealment is to avoid prevailing prejudice and discrimination, there would be no reason to disclose one's Black racial identity if it would only lead to disadvantage.<sup>136</sup> That changed when the Malones applied for jobs at the Boston Fire Department.

However, there is a further reason why one might consider the brothers' claims to have been made in bad faith. If the Malones had claimed to be Black only for the purpose of obtaining the fire department jobs, their claim was arguably a pretext rather than a genuine expression of their racial identity. They neither changed their social or cultural associations, nor publicized their new-found racial identity to the Black community or anyone else.<sup>137</sup>

Again, doing so may not necessarily be inconsistent with claiming to be Black. Apart from simply passing as White, the Malones could have continued to view themselves as White in spite of having a Black ancestor. That was the very claim that fair-skinned Susie Phipps made when she sued the state of Louisiana to be declared White. Phipps had always believed that she was White until she applied for a passport. Then she found out that her birth certificate designated her as Black because she had 1/32

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135. GATES, *supra* note 28, at 180–214.

136. See, e.g., Barbara J. Flagg, "Was Blind, But Now I See:" *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Stephanie Wildman & Adrienne Davis, *Making Systems of Privilege Visible*, in *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 7, 11–20 (Richard Delgado & Jean Stefancic eds., 1996). See generally PEREA, *supra* note 43, at 455–464.

137. Bella English, *Color Coordinated*, BOSTON GLOBE, Oct. 12, 1988, at 21; Peggy Hernandez, *Wife Defends Ex-Firefighter, Asserts 'Everybody Knew' How Brothers Were Hired*, *supra* note 67, at 21. The Malone brothers did present evidence at the administrative hearing that "various co-workers were aware that they had claimed to be Black on the 1977 [civil service] examination or that they were listed in Fire Department records as Black, [But] there was no testimony that the Malones in any way conducted themselves in the community as Blacks." *Malone v. Haley*, No. 33-889 at 19–20 (emphasis added).

Black ancestry.<sup>138</sup> Susie Phipps continued to identify and view herself as White. Louisiana law, of course, did not agree.<sup>139</sup>

Massachusetts has had no blood quantum definition of race. Given the persistence of hypo-descent views,<sup>140</sup> it does not seem unreasonable for the Malones to have believed that 1/8 Black ancestry could justify a claim of Black racial identity for legal purposes, including employment, even if the claimants viewed themselves to be White. Put differently, if racial identity is a legal or social conclusion, as I have suggested above, why could one not believe, genuinely, that one is Black for legal purposes, but White for social and community purposes? If one has a remote Black ancestor, conflicting views about rules of hypo-descent and racial self-identification would seem to support either conclusion.

Maybe an individual should not be entitled to the benefits of being Black unless they have also been subject to the detriments of that status—what Adrian Piper has called the “Suffering test.”<sup>141</sup> Yet, that type of requirement would seem to judge those who pass rather harshly. More importantly, it misjudges their state of mind. While they may not desire the burdens of being Black, they do not really believe that they are White. They are well aware of their act of deception and that society would likely view them as Black if all relevant facts of their background and ancestry were known to the community.<sup>142</sup>

As a biological matter, there is little question that virtually every individual is the result of some intermixing of human populations from various continents—the question is only whether it occurred in the near past or hundreds or thousands of years ago.<sup>143</sup> If racial ancestral claims are sincere, even if temporally distant, society’s conflicted views about race make it arguably legally reasonable for just about anybody to assert that

138. *Doe v. State*, 479 So.2d at 369. See generally DOMINGUEZ, *supra* note 39, at 36–51; Adrian Piper, *Passing for White, Passing for Black*, 58 TRANSITION 4, 18 (1992).

139. DOMINGUEZ, *supra* note 39, at 36–51.

140. For example, until 1988, the National Center for Health Statistics essentially applied hypo-descent notions to assign the racial identity of mixed-race children. “If the parents were of different races and one parent was White, the child was assigned the race of the parent who was not White.” OFFICE OF MANAGEMENT AND BUDGET, PROVISIONAL GUIDANCE, *supra* note 71, at 81. See generally NATIONAL CENTER FOR HEALTH STATISTICS, BIRTHS TO UNMARRIED MOTHERS: UNITED STATES 1980–1992, VITAL AND HEALTH STATISTICS, at 53, series 21, no. 53 (1995), available at [http://www.cdc.gov/nchs/data/series/sr\\_21/sr21\\_053.pdf](http://www.cdc.gov/nchs/data/series/sr_21/sr21_053.pdf).

141. Piper, *supra* note 138, at 7.

142. KENNEDY, *supra* note 22, at 283–86.

143. One look at European history over the past several millennia reveals a multitude of trans-continental migrations, invasions, and empires that spanned Europe, Africa, and Asia. See, e.g., Armand Marie Leroy, *A Family Tree in Every Gene*, N.Y. TIMES, March 14, 2005, at A21. Archaeological discoveries also indicate the evolutionary descent of humans from pre-historical individuals in Africa and elsewhere.

they may be Black, Asian, etc.<sup>144</sup> Such claims enjoy plausibility because the "rules" for determining racial identity have been confused, are themselves extreme in their application, and still enjoy significant acceptance as a social method of determining racial identity.<sup>145</sup>

In the *Malone* case, the evidence suggested that they were either lying about their personal beliefs or did not care whether they truly had any Black ancestors. The Malone brothers *themselves* did not believe in their Black identity. Anything short of such a factual finding, however, would have been inadequate if one takes the conflicted nature and beliefs about race seriously.

### *c. Materiality*

The *Malone* case did not specifically address why racial identity was material to their hiring. Since the twins' civil service exam scores were not high enough to be hired if they had identified as White, it was not an issue.<sup>146</sup> However, the materiality element raises troubling questions when viewed in a larger context, especially with respect to the more general need to collect racial identity information for the implementation of affirmative action programs and other race remedial efforts. Desegregation efforts at Lowell High School in San Francisco are one illustration.

Beginning in 1983, the San Francisco Unified School District became the subject of a desegregation consent decree designed to increase enrollment by Blacks and other racial minorities. The decree required that each school be made up of no more than 45% of any one racial or ethnic minority group (40% at some schools) and that no fewer than four of nine defined ethnic/racial groups be represented.<sup>147</sup> Accurate racial identity information for each pupil was critical to ensure racial balance and the fair application of the admissions criteria. Misrepresentation could

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144. For an illustration of the mixed race ancestry of some prominent historical European individuals and families, see *generally* <http://www.pbs.org/wgbh/pages/frontline/shows/secret/famous/>.

145. In one informal and light-hearted social conversation, some friends revealed to me that they had designated their infant son as Hispanic at birth, thinking far ahead about racial identification for affirmative action purposes. They had previously described their own ethnic background as Scottish and Jewish. The justification for their son's Hispanic designation was the Jewish father's ancestors who had migrated to Spain some time in the early Middle Ages, but then had been expelled from there in the 15th Century.

146. When they had done so two years earlier, they had been turned down. *Malone v. Haley*, No. 33-889 at 1-2.

147. *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 53 (N.D.Cal. 1983). The nine defined racial and ethnic groups were: 1) Spanish-surname; 2) Other White; 3) Black; 4) Chinese; 5) Japanese; 6) Korean; 7) Filipino; 8) American Indian; 9) Other Non-White.

make it impossible to implement or monitor compliance with the consent decree.<sup>148</sup>

Prior to 2001, the San Francisco Unified School District required "all children . . . new to the School District [or] wishing to transfer out of their assigned school" to complete "Preregistration and Optional Enrollment Request" forms. On these forms, "parent/guardians [had to] identify the racial/ethnic composition of students."<sup>149</sup> The information sheet accompanying the form went on to state that the racial/ethnic identification would become part of the permanent record of the student and could be altered only once, if it was substantiated by appropriate documentation and rationale.

A different portion of the information sheet warned that "[u]nder both federal and state law, any falsification of information provided to the District will constitute perjury, and will result in possible further legal action and cancellation of any transaction that involved the enrollment of a child."<sup>150</sup> The form itself contained a section entitled "Racial/Ethnic Identification: CHECK ONLY ONE." "The thirteen boxes of which only one may be checked [were] as follows: "African American; American Indian; Chinese; Filipino; Hispanic/Latino; Japanese; Korean; White; Arabic; Samoan; Southeast Asia (Cambodia, Laos, Thailand, Vietnam, etc.); Middle Easterner (Turkey, Iran, etc.); Other Non-White."<sup>151</sup>

Applying concepts of racial fraud to police accurate racial data collection is problematic, however. How would such information be necessary, or material, when assignment to a specific school was irrelevant to the child's (or parents') wishes, or if a child wanted to enter a non-competitive school that was already racially balanced? In other words, what if a *non-beneficiary* of affirmative action lies about his or her racial identity? If the particular individual does not receive undeserved benefits, no limited resources have been expended. The same would apply if a Black person asserted that they were White.

One answer is that the school district would not know beforehand which school the child might end up and whether that school could become racially unbalanced in the future. And since the enrollment or transfer process is a good point for student data collection, gathering racial information at that time is efficient and makes sense.

On the other hand, school attendance is mandatory, and a child must be allowed to enter the school district irrespective of his or her racial identity. Furthermore, a transfer decision would ordinarily be made based on criteria presumably unrelated to a child's race unless the transfer would upset racial balance at a school. Most of the time, racial identity

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148. For a discussion of what the motivation for misrepresentation might be, see discussion *infra* at Part II(B)(3).

149. *Ho v. San Francisco Unified School District*, 147 F.3d 854, 858 (9th Cir. 1998).

150. *Id.*

151. *Id.*

would not be material to the decision. Yet, misidentification would have obvious adverse consequences for the quality of the data used to assess the success of or ongoing necessity for district-wide desegregation efforts.

In fact, for any type of affirmative action program to be effective, accurate racial identification is needed for both beneficiaries and non-beneficiaries. Any large-scale lying or deception would undermine the program. But for racial fraud purposes, accurate racial identification information could only be material for those who actually received a positive benefit. By definition, other individuals would receive no affirmative action benefit; hence, their race would be immaterial. For example, a White individual identifying as Asian American (assuming that no benefit accrued) would not have made a material misrepresentation. The same should arguably result if a Black individual, or other program-preference-eligible individual, declared themselves White.

The problem is magnified many-fold when racial identity information is collected and included in various bureaucratic records—as part of a paper identity, for example. Given that personal record information is used for a multitude of purposes, sometimes even without the individual's knowledge, how could one predict materiality at the time that race information is provided? In fact, an individual who is a racial minority might purposefully provide false information or engage in passing in order to prevent the misuse of racial identity information and to avoid racial discrimination.<sup>152</sup>

For the Decennial Census, self-identification is the touchstone for racial classification. It seems to be unconcerned with objective accuracy or consistency of racial designations. Nevertheless, that same data is used by federal agencies to monitor compliance with federal anti-discrimination laws and to distribute federal funds to various communities. In such situations, accuracy of racial identification may be desirable, yet not be material in a fraud inquiry.

### 3. The Taint of the History of Racial Fraud

Reliance on fraud doctrine to address problems of racial misidentifications raises one further concern: the moral taint of the infamous history of racial fraud doctrine. During segregation and slavery, enforcement of the color line was necessary to maintaining the system of power and privilege for Whites. Laws setting out rights and disabilities based on race covered all aspects of life.<sup>153</sup> They included prohibitions on

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152. See, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

153. See, e.g., PAULI MURRAY, *STATES' LAWS ON RACE AND COLOR* 478 (1950); Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull describing Black Codes).

misrepresentations of one's racial identity, enforceable in civil and criminal proceedings. Fraud doctrine supplied the applicable law and remedy in private transactions.

Misrepresentations as to race, when made with respect to a person or organization that had a policy of doing business with Whites only, allowed the voiding of contracts.<sup>154</sup> Racial misrepresentations resulted in the voiding of agreements for interment in a Whites-only cemetery,<sup>155</sup> for life-insurance provided by an all-White benevolent association,<sup>156</sup> and for conveyance of property subject to a racially restrictive covenant.<sup>157</sup> As one Louisiana court observed, "[t]o any tribunal of justice familiar with social conditions and the customs of the White people in the Southern States of this country, there can be no doubt that this is sufficient cause to vitiate [a] contract."<sup>158</sup>

Interracial marriages resulting from racial misrepresentations were void or could be annulled pursuant to the antimiscegenation laws of many states.<sup>159</sup> Fraudulent concealment of non-White racial ancestry could also serve as a defense to lawsuits seeking to enforce promises to marry and probate claims.<sup>160</sup> States like Virginia attached independent criminal penalties to false statements made with respect to one's racial identity.<sup>161</sup>

Given its past use to support slavery and segregation, is it appropriate to rely on racial fraud doctrine today? The argument is a variation of a common one asserted by those arguing for formal color-blindness—because racial classification was used for evil then, its use is evil now.<sup>162</sup>

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154. See, e.g., *Plick v. Toye Bros. Auto & Taxicab Co.*, 13 La.App. 525, 532 (La. App. 1930).

155. *Forrest Lawn Memorial Park Ass'n v. De Jarnette*, 250 P. 581 (Cal. Ct. App. 1926).

156. *Aubert v. Thibodeaux Benevolent Ass'n*, 6 La. App. 569, (1st Cir. 1927).

157. *Lee v. Hansberry*, 10 N.E.2d 406 (1937).

158. *Aubert*, 6 La. App. at 569.

159. *KENNEDY*, *supra* note 22, at 295–297. See, e.g., *Sunseri v. Cassavagne*, 191 La. 209, 185 So. 1 (1938).

160. *Van Houten v. Morse*, 38 N.E. 705 (1894) (promise to marry); *In re Monks' Estate*, 120 P.2d 167 (1941) (probate). There were mitigating doctrines. For example, when an individual had "always been regarded as members of the White race and . . . associated with persons of that race," annulment was not to be granted on the basis of misrepresentation of the defendant's Whiteness unless "all the evidence adduced leaves no room for doubt that such is the case." *Sunseri*, 191 La. at 223. See also *Ferrall v. Ferrall*, 69 S.E. 60 (N.C. 1910).

161. See, e.g., VA. CODE ANN. § 20–51 (1950), reprinted in *MURRAY*, *supra* note 153, at 478 ("It shall be a felony for any person willfully or knowingly to make a registration certificate false as to color or race. The willful making of a false registration or birth certificate shall be punished by confinement in the penitentiary for one [1] year.").

162. See, e.g., Editorial, *A Color-Blind Constitution*, WALL ST. J., Mar. 22, 1996, at A12.

For one thing, there is no moral or legal equivalency between the past and the present uses of race.<sup>163</sup> While it was used to enforce segregation and White supremacy, today's use in affirmative action and desegregation is designed to counteract the effects of past and ongoing discrimination. It functions directly contrary to its purposes in the past. Others have suggested that policing racial designations is a necessary evil.<sup>164</sup> Even if there may be difficulties at the margins, it is arguably an appropriate tool to prevent large-scale opportunism.

But what if one looks beyond the case of the Malone brothers and the problem of opportunism by Whites? What about racial fraud by others? In the desegregation decree involving the San Francisco Unified School District, Chinese Americans have been especially affected. Over the decade following the entry of the consent decree, changing population demographics made Chinese-American students the largest ethnic group in the system. These demographics were most felt at Lowell High School, San Francisco's premier academically selective high school.

Admission to Lowell High School was based on an index derived from both middle school grades and standardized test scores. In order to maintain the consent decree's cap on the proportion of any one ethnic/racial group at Lowell High School, Chinese-American students had to achieve index scores higher than all other ethnic and racial groups to be admitted, including Whites.<sup>165</sup> In 1995, the lowest index score that would have admitted a Chinese-American student was 3 points higher than for Whites.<sup>166</sup> This prompted some to call the admissions policy "affirmative action for Whites."<sup>167</sup>

Herein lies the problem. What if a Chinese American parent designated her child's race as White or, for that matter, any other race listed? Doing so would have increased the chance to be admitted to Lowell High School; in fact, if the child's index score had been above the cut-off for the other relevant racial/ethnic groups, it would have guaranteed admission.

Would this constitute racial fraud? Like the Malones, they would have misrepresented their race in order to maximize the chances of obtaining a particular benefit rather than to express a good faith belief about their race. But then again, Fred Korematsu and Anatole Broyard would

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163. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 245 (Stevens, J., dissenting) ("difference between a 'No Trespassing' sign and a welcome mat").

164. See, e.g., Noley, *supra* note 13; Wright, *supra* note 42.

165. David Levine, *The Chinese American Challenge to Court-mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 HARV. BLACKLETTER L.J. 39, 56 n.100 (2000).

166. Nanette Asimov, *A Hard Lesson in Diversity: Chinese-Americans Fight Lowell's Admissions Policy*, S.F. CHRON., June 19, 1995, at A1.

167. Levine, *supra* note 165, at 59 n.100 (quoting Joan Walsh, *Can This Man Fix Our Schools?*, S.F. FOCUS, Oct. 1993, at 135).

have failed the *Malone* test as well. Should one compare the act of a Chinese parent designating their child as White with the desires of Korematsu and Broyard to become White to avoid discrimination? Or would it be objectionable simply because it would undermine an important government program, especially one intended to remedy the present vestiges of past and the effects of ongoing forms of discrimination?<sup>168</sup> At a minimum, these issues raise questions about whether racial fraud is an appropriate way of evaluating such acts.

### *C. The Contingency of Racial Identity in Social Context and over Time*

Choice and fraud have different strengths and weaknesses in their ability to address the role that race and identity play in our society. However, there is one significant short-coming of both: they are premised on the idea that racial identity can be fixed—that it is static and singular. Both assume that there is one “true” identity that an individual has, an identity that can be ascertained just like most type of facts. Fraud doctrine is fairly explicit in this by asking questions about whether the racial identification matches with an objective set of criteria, such as physical phenotype or consistent public actions.

Instead of attempting to judge the outcome and whether it is objectively correct, a choice approach focuses on the process of racial identification as the means of finding a “true” identity. Choice re-centers the locus of classification from one that is externally imposed to one internally selected. Allowing a particular individual to choose the “correct” identity for him or herself is deemed to make the result more accurate.

Everyday experience, however, demonstrates that identity is contextual and changes over time.<sup>169</sup> I am all at once a father, son, teacher, and

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168. See also Amber Arellano, *MSU Sees Tension among Minorities*, DETROIT FREE PRESS, April 21, 1993, at 1A (Asian-Pacific and Hispanic students at Michigan State University threatened in 1993 to identify themselves as White).

Since 2001, racial identification has been optional and race *per se* has not been used to assign students due to a 1994 equal protection challenge by several Chinese American students. They objected primarily to the race-balancing admissions decisions for Lowell High School. *San Francisco NAACP*, 59 F. Supp.2d at 1036–1037 (modifying the consent decree). However, more recently the consent decree monitor, school officials, and other parties to the case have suggested that the use of race and ethnicity in school assignments be revisited because of alarming re-segregation patterns and an increasing achievement gap between minority groups. Jeff Chorney, *Old Problem Returning to Old Case*, THE RECORDER, Nov. 10, 2004, at 1.

169. See, e.g., DEREK PARFIT, REASONS AND PERSONS 302–306 (1984); David S. Oderberg, *Johnston on Human Beings*, 86 J. PHIL. 137 (1989). See also DAVID HUME, A TREATISE OF HUMAN NATURE 635 (1888) (“If perceptions are distinct existences, they form a whole only by being connected together. But no connexions among distinct existences are ever discoverable by human understanding. We only feel a connexion.”).

student. These identities are not all relevant at the same time and in all places. Some of them appear contradictory. The particular social context and setting is critical to determining which identity is the appropriate one used to describe me. Being with my parents triggers a different role than when I am with my daughter, just as the law students in my course invoke a different identity than my language tutor.

One can view each of these identities as just an aspect of my self. They are not exclusive of each other because different parts are perceived in different settings. If one views identity as the part of the self that is publicly perceived, however, then my identity changes also from one social context to another.<sup>170</sup>

This is particularly relevant to racial identity. Since racial identity is a social, political, and legal construct, it acquires meaning only in the context of a particular set of social relationships. Changes in social context can change that identity.<sup>171</sup> For example, Black racial identity and how it is created through rules such as hypo-descent has meaning only in the context of the maintenance of a racial caste system and the superiority of Whites over other races.<sup>172</sup>

The very idea of passing is an indication of the significance of social context. For example, some African Americans passed as White only "during the workday, nine to five, while presenting themselves as African American in their private lives."<sup>173</sup> At work, they were White, at home Black. For mixed race individuals, identification may also vary with multiple racial communities, depending on the company they are in.

Racial identity may also change over time.<sup>174</sup> An individual who has always passed for White, but one day decides to reveal his "true" racial identity, has effectively changed his or her identity. Such acts encompass efforts of individuals like Anatole Broyard who voluntarily choose to cross the color line on a permanent basis, as well as those like Susie Phipps and law professor Gregory Williams who were thrust across the color line involuntarily. Their racial identity changed not only in terms of how they perceived themselves or how they wished others to perceive them. Their

170. See, e.g., EDMONSTON ET AL., *supra* note 32, at 19; MARY C. WATERS, *ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA* (1990); Jonathan Y. Okamura, *Situational Ethnicity*, 4 *ETHNIC & RACIAL STUD* 452 (1981).

171. See, e.g., Piper, *supra* note 138. Maybe, the contingency of racial identity on social context is illustrated best by a fictional Langston Hughes short story. In *Who is Passing for Who*, Hughes wrote about White Iowans who were able to pass as "Black" by asserting that they were colored individuals "passing for White." HUGHES, *supra* note 43.

172. See *supra*, discussion at I(C). See also Estelle T. Lau, *Can Money Whiten? Exploring Race Practice in Colonial Venezuela and Its Implications for Contemporary Race Discourse*, 3 *MICH. J. RACE & L.* 417 (1998); Darryl Fears, *People of Color Who Never Felt They Were Black: Racial Label Surprises Many Latino Immigrants*, *WASH. POST*, Dec. 26, 2002, at A1.

173. KENNEDY, *supra* note 22, at 289–290 (citing *White by Day . . . Negro by Night*, *EBONY*, April 1952); see also Harris, *supra* note 19.

174. EDMONSTON ET AL., *supra* note 32, at 42–43.

community and the rest of society did in fact perceive them differently.<sup>175</sup> Ultimately, identity is not static and singular. Neither is racial identity.

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Neither choice nor fraud are adequate frameworks for understanding acts of racial identification. In the following section of this paper I will explore a better fitting description.

### III. A FUNCTIONAL UNDERSTANDING OF RACIAL IDENTIFICATION

The primary difficulty of evaluating the accuracy of racial identity arises out of the multiple functions of racial and ethnic identification. Its main purposes are: 1) a physically descriptive typology; 2) an expression of a sense of belonging to a particular racial or ethnic community; and 3) a conclusion about the applicability of various social and/or regulatory criteria.<sup>176</sup> These considerations are all reflected in the racial identity test used in *Malone v. Haley*.<sup>177</sup>

#### A. Physical Description

The most widespread and traditionally orthodox understanding of race has been as a physically descriptive category that classifies people according to biological or anthropological criteria.<sup>178</sup> Race is thus used as a label for both scientifically-based as well as quasi-objective descriptions of differences that occur naturally among human beings. Mostly the references are to characteristics like skin color, facial features, and other anatomical and morphological differences visible to the naked eye. However, it would also include differences at the genetic level, such as differences in the prevalence of certain genetic markers, or so-called genetic polymorphisms.<sup>179</sup>

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175. If after the discovery of the supposed Black ancestor the Malone brothers had decided to associate more closely with the Black community, the sincerity of their claim would clearly have been more plausible. More importantly, community views of their racial identity might have changed. If accepted as Black by the community, they would arguably have "become" Black under the Massachusetts test.

176. See Haney-Lopez, *The Social Construction of Race*, *supra* note 69, at 8 ("appearance and ancestry, social setting, and personal action").

177. See discussion *supra* Part II(B)(1).

178. Gotanda, *supra* note 19. Neal Gotanda has distinguished this use of race further into scientific race and formal race.

179. See, e.g., Michael J. Bamshad & Steve E. Olson, *Does Race Exist?*, *SCI. AM.*, Dec. 2003, at 81.

The hearing examiner in *Malone v. Haley* cast her determination of the physically descriptive version of race as a visual observation of the Malone brothers. But she would undoubtedly also have accepted genetic or other scientific evidence, if available and validated, in support of their claim.

Contemporary scientific knowledge about human genetics and biology has shown that variations within the same racial grouping exceeds that between races.<sup>180</sup> It has become the accepted consensus that physical differences between the races are more imagined than real.<sup>181</sup> Nevertheless, race continues to be utilized as a classification tool, especially in the medical sciences. In fact, even the idea of race as a version of taxonomic subspecies classification has not disappeared in the sciences, though its use is controversial.<sup>182</sup>

The resurgence is attributable to research arising out of the human genome project.<sup>183</sup> New research suggests that racial identity is linked to identifiable genetic polymorphisms and may be correlated with an individual's geographical ancestral origin.<sup>184</sup> Thus, some have suggested that even in its self-identification form, racial ancestry could serve as a scientifically and medically relevant predictor not only of genetic make-up and variation, but also disease and health.<sup>185</sup>

The proposition remains controversial.<sup>186</sup> However, there are well-known examples of genetically transmitted diseases correlated with certain racial and ethnic groups, including Tay-Sachs disease and sickle cell anemia. The link of race and ethnicity with genetic make-up has also contributed to the development of pharmacogenomics and the tailoring of drugs to the specific genetic make-up of particular population groups.<sup>187</sup>

180. See generally L.L. Cavalli-Sforza, *The Genetics of Human Populations*, 231 SCI. AM. 80 (Sept. 1974); LEWONTIN ET AL., *supra* note 80.

181. See, e.g., GOULD, *supra* note 79; BANTON, *supra* note 75, at vii; GRAVES, *supra* note 75, at 5-7.

182. Sandra Soo-Jin Lee & Joanna Mountain et al., *The Meanings of "Race" in the New Genomics: Implications for Health Disparities Research*, 1 YALE J. HEALTH POL'Y. L. & ETHICS 33, 39 (2001). See also S.O.Y. Keita & R.A. Kittles, et al., *Conceptualizing Human Variation*, 36 NATURE GENETICS S17 (Nov. 2004).

183. See, e.g., Esteban Gonzalez Burchard et al., *The Importance of Race and Ethnic Background in Biomedical Research and Clinical Practice*, 348 NEW ENGLAND J. OF MED. 1170 (2003).

184. See, e.g., Leroy, *supra* note 143.

185. See, e.g., Bamshad, *supra* note 179, at 78; Joanna L. Mountain & Neil Risch, *Assessing Genetic Contributions to Phenotypic Differences among 'Racial' and 'Ethnic' Groups*, 36 NATURE GENETICS S48 (Nov. 2004).

186. See, e.g., Nicholas Wade, 2 *Scholarly Articles Diverge on Role of Race in Medicine*, N.Y. TIMES, Mar. 20, 2003, at A30; Richard S. Cooper, Jay S. Kaufman, & Ryk Ward, *Race and Genomics*, 348 NEW ENGLAND J. OF MED. 1166 (2003).

187. Pharmacogenomics is "the study of the genetic basis for differential drug responses between individuals." Lee et al., *supra* note 182, at 58; Stephanie Saul, *FDA*

B. *Expressive Affiliation*

A less orthodox function of racial identity is its expression of membership or a sense of belonging in a particular racial or ethnic community. Racial identity expresses a person's self-definition and group membership.<sup>188</sup>

For example, Adrian Piper, Walter White, and many others in the African American community could pass or easily be mistaken as White. Nevertheless, they chose to associate with the African American community, thereby expressing their affiliation and sense of belonging to that community. In the past few decades, such acts can also be seen in the dramatic increase in the American Indian population recorded by the Census. Such increases have been attributed not to greater number of births but the re-discovery of American Indian ancestry and cultural interest by those who previously considered themselves White or would not acknowledge Indian ancestry.<sup>189</sup> As passing also suggests, the desire to belong to a particular racial community may not be limited to those with the "proper" set of ancestors. Nor need it be directed toward becoming White.<sup>190</sup>

Racial identification as an expressive affiliative act is based upon the idea that racial and ethnic groups are communities bound together by ties of culture and common experience, including discrimination and exclusion. In such communities, common physical characteristics have become integral traits around which a community has taken shape.<sup>191</sup> Within

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*Approves a Heart Drug for African Americans*, N.Y. TIMES, June 24, 2005 at C2 (FDA approval of first heart medication marketed to Blacks).

188. See, e.g., OFFICE OF MANAGEMENT AND BUDGET, REVISIONS TO THE STANDARDS FOR THE CLASSIFICATION OF FEDERAL DATA ON RACE AND ETHNICITY, *supra* note 84 (race as a "deeply personal issue"). But see SKERRY, *supra* note 81, at 48 (ridiculing the idea or subjectivity of racial identity).

189. Dirk Johnson, *Census Finds Many Claiming New Identity*, N.Y. TIMES, Mar. 5, 1991, at A1; OFFICE OF MANAGEMENT AND BUDGET, PROVISIONAL GUIDANCE, *supra* note 71, at 10. In fact, culturally, there are individuals who identify themselves as American Indians who speak no native languages and have little or no familiarity with tribal culture. Politically, the latest census data provide strong indication that self-identifying Indians are far more numerous than tribal rolls would indicate. The 1990 census counted 8.8 million people who reported at least part American Indian ancestry and 1.8 million as being of American Indian race. Yet according to the Bureau of Indian Affairs, tribal rolls totaled only a little more than 1 million people at the end of 1993. EDMONSTON ET AL., *supra* note 32, at 30 (citing Karl Eschbach, *Changing identification among American Indians and Alaskan Natives*, 30 DEMOGRAPHY 635 (1993)).

190. See, e.g., Wright, *supra* note 42, at 517 (Stockton, California City Councilman Mark Stebbins who claimed he was Black even though birth records identified him as White).

191. See, e.g., WILL KYMLICKA, LIBERALISM, COMMUNITY & CULTURE 89 (1989); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 321-23 (1986); MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 147-154 (1982).

*Malone v. Haley*, consideration of whether the Malones held themselves out to the community as Black and the good faith nature of their belief all reflect the expressive affiliative characteristic of racial identification.

Simply expressing a sense of belonging to a particular group, however, does not mean that one actually belongs. If it is not recognized or accepted by other community members, it is little more than the venting of a subjective feeling. For example, any attempt of W.E.B. Dubois to identify with his Dutch—and thus White—ancestry, would have been ineffective.<sup>192</sup> In his times, a Black man would have been laughed at or ridiculed for attempting to be accepted as White.

Racial lines still matter today. Rejecting the plausibility and effectiveness of such an expression of affiliation, however, imagines race only as a binary classification of Black and White that has remained untouched by the passage of time. Even if White racial identity may have been constructed primarily by legal acts and social efforts of exclusion and oppression, other racial groups have had a very different history. Asian American racial identity, for example, has been the result of conscientious efforts of pan-Asian cooperation and amalgamation of separate national identities of Japanese, Chinese, Philippino, Indian, and other Asian communities. A similar story might be told even about African Americans and the creation of a Black identity from the many different tribal and national identities brought by slave ancestors from Africa.<sup>193</sup>

With the passage of time, efforts to “become” White, or for that matter any other race, have become much more plausible today than during the times of Dubois. Popularization of ideas about the malleability and the social construction of race have themselves worked to change people’s perceptions about the permeability of racial boundaries.<sup>194</sup> Racial identities are clearly not as inflexible and unchangeable as they might have been a century or even just a few decades ago, even if they must continue to work against old conceptions of race.

### C. Regulatory/Social Conclusion

A third major function of racial identification is as a legal conclusion or social judgment about the applicability of particular social and legal criteria. These criteria do not have to include the physical characteristics and expressive actions referred to above. Within *Malone v. Haley*, it

192. HICKMAN, *supra* note 85, at 1246–47.

193. OMI & WYNANT, *supra* note 69.

194. For example, in a recent TV sit-com episode, a character with an African American phenotype asserted his Irish cultural heritage to the bewilderment but embarrassed acquiescence of the show’s main character. *Andy Richter Controls the Universe* (Fox Network broadcast, “We’re All the Same, Only Different, Dec. 1, 2002). Even if popular culture is only a faint reflection of people’s attitudes, the fact that such a story line aired says much about the plausibility and acceptability of such claims.

constituted the second prong and part of the third prong of the racial identity test.

Race as a regulatory or social conclusion establishes social and/or legal status independent of any physical appearance or self-recognition.<sup>195</sup> It is the same as legal status established, for example, by state bar admission to practice law. While a law school graduate may have the same legal skills before bar admission, the act of admission confers status as an attorney licensed to practice law, thus providing new legal rights and obligations.

In the past, criteria used to determine Black or White legal or social status included not only physical appearance and expressive acts, but also rules of hypo-descent,<sup>196</sup> racial performance,<sup>197</sup> and common knowledge.<sup>198</sup> These specific rules and criteria may be things of the past, but the concept of race as a legal conclusion or social judgment has not disappeared. For example, *Malone v. Haley* looked to physical characteristics, documentary evidence, community perception, and expressive self-identification as criteria for being Black for purposes of affirmative action hiring. Its most wide-spread use, arguably, remains with respect to American Indians. Legal status as American Indian for many governmental benefits may be dependent on tribal enrollment, blood quantum, reservation residence, or any combination of these.<sup>199</sup>

Apart from legal status, racial identity may also express a judgment about a person's social status. The persistence of hypo-descent rules in social judgments about race as well as residential segregation, discrimination in the market place, and employment discrimination—all the subjects of various prohibitions by federal antidiscrimination laws—is illustrative. It is a consequence of the nature of race as a construction not only of the law but also of social practices, norms, and expectations.<sup>200</sup>

#### IV. APPLYING RACIAL IDENTIFICATION FUNCTIONALLY

Neither fraud nor choice are satisfactory frameworks for understanding the functions of racial identification. The premise of racial fraud is that race has a single fixed meaning susceptible of being verified. Unfortunately, it conflates the descriptive, expressive and conclusive functions of racial identification. The choice perspective falsely assumes that racial

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195. Neal Gotanda has referred to this as "status race." Gotanda, *supra* note 19, at 4.

196. See, e.g., Hickman, *supra* note 85.

197. See, e.g., Gross, *supra* note 49 (asking whether the individual acted as a White person would). See also *supra* Part I(C).

198. See, e.g., *Thind*, 261 U.S. at 214–15 (asking if "common knowledge" indicated that individual was White).

199. Margo S. Brownell, *Who is an Indian: Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J. L. REF. 275 (2000–2001). For an example of eligibility criteria, see, e.g., 25 U.S.C. § 345; 25 U.S.C. §§ 479, 480.

200. See Haney–Lopez, *Social Construction of Race*, *supra* note 69.

identity determinations are entirely subjective to an individual. But racial designations can also be social or regulatory conclusions, independent of and contradictory to one's self-chosen racial identity.

Racial identification is an act that must be evaluated with respect to context and function.<sup>201</sup> I consider two specific government-related situations: 1) remedial and race-conscious programs, especially race-based affirmative action programs and 2) the decennial federal census. In addition, I also address racial identification in health care and bureaucratic records. For each context, I also provide suggestions of how the particular functions of racial identification can be disaggregated.

### A. Remedial and Race-Conscious Programs

Anecdotal evidence suggests that many race remedial and race-conscious programs operate on the basis of self-identification.<sup>202</sup> In essence, they operate largely on the "honor system." In spite of the potential for manipulation by "racial opportunists" and attendant dilution of program purposes, there appear to be no large-scale systematic studies examining the prevalence of opportunistic misrepresentation.

Some small studies and anecdotal evidence, including the Malone case and other related news reporting, indicate that opportunism does occur, and "bona fide" racial minority candidates are displaced from university admissions, scholarship, and job opportunities.<sup>203</sup> If personal choice justifications for racial identity become more widely accepted, and if social stigma associated with some racial minority groups decreases, individual willingness and the social acceptability of changing (or manipulating) one's racial identity may rise.

Improving the elicitation of the "correct" racial identity, however, is not the answer to the problem. It is premised on the "wrong" question. A more effective approach ought to focus on the purposes of affirmative action and other race-conscious programs, thereby circumventing problems of authenticity of a person's racial identification.

For example, discrimination is a result of the use of race as a regulatory and social conclusion—race as status, as Neil Gotanda has described it.<sup>204</sup> Since race-based affirmative action programs are designed to remedy past and ongoing discrimination, eligibility for program benefits should

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201. See Anthony Appiah, *The Uncompleted Argument: DuBois and the Illusion of Race*, 12 CRITICAL INQUIRY 21 (1985) (repudiating notion of race).

202. See, e.g., Telephone interviews by Jeffrey Allmon with undergraduate admissions officers at Harvard University, Dartmouth College, Stanford University, University of Oregon, and the University of Kansas, July 28 – August 1, 2005 (on file with author). Only Stanford had a verification policy, though officials would not divulge it in order to maintain its effectiveness. *Id.*

203. See *supra* text accompanying notes 12–13.

204. Gotanda, *supra* note 19, at 3–5.

not be based only on the applicant's self-identified racial identity. Self-identified race can, truthfully and sincerely, reflect not only racial status, but also physical characteristics and expressive affiliative desires. Instead, it would be more appropriate to inquire into the individual's experience or relationship with racial discrimination.<sup>205</sup>

Racial identity requirements in race conscious programs, such as diversity-based university admissions, could be treated similarly. One might ask whether the particular applicant has experienced significant amounts of discrimination as an African American, Asian American, Latino, or other racial minority as well as other relevant specific racial or ethnic experiences. Rather than relying on racial self-identification as a purported proxy for experiences of discrimination and culture, and having to "hope" for the best—that those choices are in fact authentic, sincere, and not opportunistic—it would be more effective to ask directly about relevant experiences.

Determining program eligibility in this fashion would not alter the substantive basis and design of any race-remedial or race-conscious program, including whether it was designed to respond to a documented history of past discrimination by an institution or based on a forward-looking rationale. A functional analysis, however, would take a more nuanced view of why race may be more than a simple description of a person's physical characteristics. It could articulate why racial identity can be a *relevant difference* for strict scrutiny purposes.<sup>206</sup> With respect to university diversity admissions programs, disaggregating racial identity into its relevant functions would improve the narrow-tailoring of the use of race.<sup>207</sup>

The process of determining program eligibility would require far more individualized determinations and thus be more complicated and time-consuming than requesting a one- or two-word racial identity. But in the university admissions context, it would be no different from the processes and criteria that diversity admissions programs already rely upon. Its benefit with respect to traditional racial affirmative action programs would be to emphasize that affirmative action is less a function of pure racial status and more of racial experience with discrimination.

In most instances, there should be little difference in the outcome between orthodox requests for racial identity (the identity perceived by

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205. One might think of experiences of having lived in a racial ghetto, being the subject of racial stereotyping, or overcoming disadvantages commonly associated with racial minority status. Claims or experiences of reverse discrimination by Whites would be fundamentally different in nature and relevance. Even though they would be relevant for general diversity purposes, similar to special musical talent or experiences with foreign cultures, they would not have arisen out of a system of exclusion and caste in which race is a proxy for status. See discussion in section I(C).

206. *Adarand*, 515 U.S. at 228.

207. See *Gutter v. Bollinger*, 539 U.S. 306, 332–35 (2003).

the particular individual) and functional questions about experiences tied to racial status (the social and legal effects of racial identity as it is ascribed by others). When there is divergence, however, the program-eligible set of individuals would be reduced. Given anecdotal observations of box-checking, that is likely to be true for American Indians, some of whom have had little connection to the Native American community, as well as for the muddled definition of Hispanics/Latinos.

Finally, this type of inquiry would also explicitly recognize the contingency and malleability of racial identity across context and time, including among different government programs. For example, it could provide a clearer articulation of why an individual ought to qualify for protection or benefits under one government program but not another. Even if both use the same generic racial identity term, due to their diverging purposes they might utilize different criteria and come to different regulatory/social conclusions about racial identity.<sup>208</sup> Focusing explicitly on the functional purposes of these programs could avoid what would appear to be contradictory uses of race.<sup>209</sup>

Understanding race as a social or regulatory conclusion acknowledges that it remains a socially constructed concept referring to criteria beyond notions of physical description or expressive affiliation. It does *not* require reliance only on notions of hypo-descent and other odious classification rules dating from times of officially sanctioned racism. Instead, it allows the utilization of a social concept appropriate to the present-day.

### B. *The Census and Vital Statistics*

The racial and ethnic classifications utilized by the Census are governed by Directive 15 of the Office of Management and Budget

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208. Of course, one could also continue to use race as before, but define it explicitly by reference to specific criteria. Such definitions might be based on the experiences, discrimination and culture specific to each racial group. The outcome should theoretically be no different. However, it might introduce additional issues of consistency and create new openings for insincerity and opportunism. For a general example, see Tanya Kateri Hernandez, "Multiracial" Discourse: Racial Classification in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97, 167-169 (1998).

209. In other words, as Richard Delgado has pointed out to me, it would avoid the seeming contradiction when an individual might be considered a minority for some government programs but not others. For example, racial identity might reasonably be construed more narrowly for affirmative action purposes than for anti-discrimination protections. Thus, the Malone brothers should not have benefited from the affirmative action decree of the Boston Fire Department. However, if they had become the subject of racial bigotry or violence because some White supremacists believed the assertions of a Black ancestor, they should be able to invoke the protections of the anti-discrimination laws. A functional approach would expose that the contradiction is an artifact of the poorly defined and over-broad usage of racial identity terms rather than a contradiction in concept and use.

(OMB).<sup>210</sup> In 1997, OMB changed the racial classifications used by agencies, including the US Census Bureau.<sup>211</sup> The process and the subsequent changes have given rise to plenty of controversy and criticism by commentators,<sup>212</sup> such as persisting inconsistencies in how racial categories are defined, ambiguities in terminology, and other serious flaws in racial category delineations. I do not intend to duplicate those more comprehensive critiques, especially given the limited scope of this Article. A functional understanding of racial identification, however, does indicate a couple of points relevant to the post-1997 classification system.

On the problem of racial identification, the federal Census proceeds from a perspective that is almost exactly the opposite of that relied upon in the affirmative action setting. In redesigning the federal racial classification system, OMB has explicitly acknowledged the socially constructed nature of racial identity.<sup>213</sup> OMB and the Census Bureau have also stated that racial classifications are principally within the choice of a particular individual.<sup>214</sup> However, there are many situations when racial identity is assigned by the Census.

In most instances, assignments of racial identity are imputations of race, primarily due to reasons of administrative convenience. Usually, they are intended to be a substitute for the individual's supposed choice, rather than a contravention of it.<sup>215</sup> In some instances, however, such assignments run directly, and deliberately, contrary to the actual choices made. The reasons have primarily been manageability and efficiency considerations. The Census choice offerings are limited and unable to accommodate the full range of perception and imagination that exist within the population. The most troubling issues arise when racial identity assignments conflate race as expressive affiliation with race as a social and regulatory conclusion. That has arguably occurred with the Census compilation of multiracial data.

Prior to the 2000 Census, complaints by the multiracial movement focused attention on the inadequacies of the existing scheme. It forced multiracial individuals to identify themselves incorrectly as mono-racial.<sup>216</sup> In other words, the requirement of designating a mono-racial identity was

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210. OMB has authority over record-keeping and paper work by federal agencies.

211. OFFICE OF MANAGEMENT AND BUDGET, REVISIONS TO THE STANDARDS FOR THE CLASSIFICATION OF FEDERAL DATA ON RACE AND ETHNICITY, *supra* note 84.

212. For criticisms of the revised racial classification system of the 2000 decennial Census, see Toro, *supra* note 71; Ford, *supra* note 21; Hernandez, *supra* note 208; SKERRY, *supra* note 81.

213. OFFICE OF MANAGEMENT AND BUDGET, REVISIONS TO THE STANDARDS FOR THE CLASSIFICATION OF FEDERAL DATA ON RACE AND ETHNICITY *supra* note 84, at 58788.

214. *Id.* at 58789.

215. SKERRY, *supra* note 81, at 49–50.

216. Susan Graham, *The Real World*, in *THE MULTIRACIAL EXPERIENCE: RACIAL BORDERS AS THE NEW FRONTIER* 37 (Maria P.P. Root, ed., 1996).

inadequate in allowing such individuals to express their sense of racial affiliation.<sup>217</sup> The 2000 Census questionnaire compromise allowed multiple box-checking as a way of indicating multiple racial heritages and expressing more accurately a distinctive sense of identity.

However, the change is deceptive in its accommodation of multiracial individuals. Instead of forcing individuals to *choose* just one category, the Census now *assigns* a mono-racial category to individuals who check more than one category. With respect to those who have some White ancestry, the process utilizes essentially one rule to process multiple race choices for federal program purposes.<sup>218</sup> According to OMB Bulletin 00-02, any individual who has selected a combination of White and one or more minority races is classified as one of the minority races.<sup>219</sup>

With respect to the implementation of federal anti-discrimination programs and monitoring by civil rights advocacy organizations, the primary reason for this policy can be found in the data needs of the federal government.<sup>220</sup> Such data needs cannot rely on the aspirational racial self-perception of individuals. Instead, as the rules applied by the Census to multiracial responses indicate, it requires information about the racial identity that is perceived by those who can potentially or have actually discriminated against that particular individual.

The practical effect is to create a second racial identity for multiracial individuals, albeit in a confused and ambiguous fashion. The first is the individual's self-perceived identity, one designated by the particular individual that accommodates expressive affiliative purposes. The second is an other-ascribed identity that is mono-racial in nature and that is created by the Census based on criteria reflecting popular perceptions about race, including rules of hypo-descent. If one takes both the expressive affiliative aspect of racial identification and the data needs of the federal

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217. Critics of the multiracial movement have argued that many of the advocates are more concerned with opting out of racial stigma than with a true sense of distinct racial identity. See, e.g., Hernandez, *supra* note 208; see also JON MICHAEL SPENCER, *THE NEW COLORED PEOPLE: THE MIXED-RACE MOVEMENT IN AMERICA* (1997). For the off-spring of White and racial minority unions, especially White and Black parents, critics have suggested that a multiracial category is primarily intended to pass along some amount of White privilege. After all, a very high proportion of the population classified as African American or Black is in fact multi-racial as a result of slavery. By some accounts, about thirty percent of the African American population has European paternal ancestry. See Amy Harmon, *Blacks Pin Hope on DNA to Fill Slavery's Gaps in Family Trees*, N.Y. TIMES, July 25, 2005, at A1.

218. OFFICE OF MANAGEMENT AND BUDGET, OMB BULLETIN 00-02: GUIDANCE ON AGGREGATION AND ALLOCATION OF MULTIPLE RACE RESPONSES FOR USE IN CIVIL RIGHTS MONITORING AND ENFORCEMENT, Mar. 9, 2000.

219. *Id.* at 4; OFFICE OF MANAGEMENT AND BUDGET, PROVISIONAL GUIDANCE, *supra* note 71, at 63, 67, 71-72.

220. OFFICE OF MANAGEMENT AND BUDGET, OMB BULLETIN 00-02, *supra* note 218.

anti-discrimination programs seriously, this approach seems half-baked and half-hearted.

First, the approach manages to introduce new inconsistencies in how racial identity is determined. The 2000 Census questionnaire explicitly states that individuals are permitted to check multiple race boxes. Persons may mark "one or more races to indicate what this person considers himself/herself to be."<sup>221</sup> For individuals who are self-aware and mindful of their multiracial status, the expressive affiliative nature of the racial identification question is thus made obvious.

For most others, including individuals unaware of their multi-racial ancestry, self-perceived racial identity will coincide with other-ascribed identity. In asking for "what this person *considers* himself/herself to be," the question does not specify the criteria on which "this person" should base his or her choice. While the question does allow for an expressive affiliative choice, it can also easily be interpreted as requiring the application of prevailing social or quasi-legal criteria, including the one-drop rule. For many racial minorities, especially most African Americans, prevailing perceptions about hypo-descent and other rules of racial classification may readily trigger, and be perceived as *requiring*, a response of racial identity as a social or legal conclusion rather than as an act of expressive affiliation.

Second, this approach complicates the racial classification process by adding a new layer of rules to determinations of racial identity. However, the rules are of dubious value to the extent that they are mere restatements about racial stereotypes and import rules of classification originally designed for racist purposes.

Instead of such race-assignment algorithms, the simplest and best source of information about other-perceived identity of the particular individual himself/herself should be utilized. The Census understands that the individual has the best and most complete information about which racial group they feel the greatest sense of belonging. The individual usually also has the most complete information about how their racial identity is perceived by others. A second question to that effect would obviate the Census dilemma. The Census could request both self-perceived (aspirational) and other-perceived racial identity information from individuals.<sup>222</sup>

Implementing such perspectives would be relatively straight-forward. Undoubtedly, it would also raise concerns about cost, administrative efficiency in data collection, and the significant limits to the changes that can

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221. 2000 Census Form D-2, Question 6 states: "**What is this person's race? Mark X one or more races** to indicate what this person considers himself/herself to be." (emphasis in original).

222. Requesting information both about an individual's expressive affiliative identity and social/regulatory conclusion identity would likely clarify the disparity between the large number of individuals claiming some American Indian ancestry and the significantly smaller number of individuals claiming some formal tribal affiliation.

be made to the Census questionnaire format. However, if one takes the problem of racial identification seriously, it is unlikely that an effective solution will be simple or available on the cheap.

### C. *Private/Informal Use of Racial Identity*

What about racial identification questions that arise outside of governmental programs? While there is significantly less regulation of racial identification, the marketplace and private social institutions are also affected by these issues. Federal and state anti-discrimination laws require government contractors, federal funds recipients, and other private entities to monitor racial populations for implementation and enforcement purposes. Moreover, traditional common law fraud principles, as applied in *Malone v. Haley*, can give rise to racial identification disputes.

Given the limited analytical scope of this Article, a comprehensive prescription as to how race should be used in a color-blind society is more than what I can adequately provide. Nevertheless, there are some things that can be said with respect to issues related to bureaucratic records and health care.

Misrepresentations in the civil context, in particular with respect to bureaucratic records, are commonplace. The pervasive use and reliance on bureaucratic records in the marketplace, in social institutions, and governmental processes has created many new occasions for individuals to mis-state their racial identity or to create a false paper identity.

In most of these contexts, civil rights laws prohibit racial discrimination. Accordingly, with the exception of race-remedial programs, most racial identity designations should be irrelevant. Any "misrepresentation" ought to be immaterial to the transaction. Alternatively, one could also "justify" a racial identity "misrepresentation" by using a person's sense of belonging as well as their social interactions and recognition.

Unfortunately, this creates difficulties for civil rights monitoring and enforcement. Detection and responses to racial discrimination and monitoring of compliance with federal civil rights laws depend in part on racial identity data reported by employers, financial institution, and other organizations. Misreporting could significantly undermine such efforts. For example, to the extent that racial minorities were to designate "White," the data could suggest that discrimination against racial minorities has lessened even if the institutions had done nothing different.

There seems to be little that could be done. Like traditional self-identification, such information requests remains vulnerable to outright and intentional misrepresentation. Moreover, fraud doctrine would seem of little help. Given that the racial identity information would not be a condition of nor linked to any benefit received, any misinformation could not be deemed material in a fraud analysis.

Instead, requesting functional information with respect to racial identity could reduce ambiguity and improve accuracy of responses. Thus, to the extent that racial identity is relevant to experiences of discrimination, it would be most useful to collect information about other-ascribed identity, i.e. the individual's identity as socially perceived by others. Since the *discriminator's* perception of the target's racial identity is rarely available directly from the discriminator, asking how potential discrimination targets are perceived is the next-closest approximation. This form of the question would convert it from one with three possibly legitimate answers into one simpler, fact-driven question—"how do others perceive your racial identity?"<sup>223</sup>

There is also one other distinct advantage. Requesting an individual to provide information about their perceived racial identity exposes the contingency of identity. It explicitly allows for and anticipates different answers in different contexts—an explicit recognition of the context and time-dependency of racial identity. This form of the question accommodates the reality that one's identity is not the same everywhere and at every time, especially since levels of racial integration and perceptions of racial identity differ in regard to geographic locales and social institutions. At the same time, it also accounts for changes in race relations and racial perceptions over time, with accompanying effect on individual identity.

What about the use of racial identity labels in health care? Such use continues to be wide-spread, especially when monitoring and studying public health and diseases. However, given the overwhelming scientific consensus that genetic variations within racial groups are much greater than between racial groups, is there still a legitimate need for "accurate" racial identification?

When racial disparities and discrimination in the delivery of health care services are at issue,<sup>224</sup> such racial identity labels are arguably not only legitimate but necessary. As in the study of other contexts of discrimination, racial identity as a social or regulatory conclusion describes how others judge the individual's race and relates identity to how the individual is treated.

The use of racial identity in the scientific research-oriented areas of health care and medical sciences, as a means of cataloging disease prevalence among different population groups, for example, is more troubling.<sup>225</sup> Its functions as labels expressing a sense of belonging or as a

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223. Again, in most situations, when the individual's appearance conforms with many of the popularly associated characteristics of a particular racial group, the answer to this question should not diverge significantly from contemporary answers to a traditional self-identification question, such as "What is your race?" This may not necessarily be true in the future.

224. See, e.g., David R. Williams, *Race, Health and Health Care*, 48 ST. LOUIS U. L.J. 13 (2003).

225. Lee et al., *supra* note 182, at 65–66.

social or legal conclusion are irrelevant. The only legitimate use of race is as a physical description, a label for geographical ancestral population groups linked to the prevalence of certain genetic polymorphisms.<sup>226</sup> It has been discredited as a descriptor of other fundamental physiological or biological differences.

In its nature, however, genetic polymorphisms cannot be perceived with the unaided senses but requires sophisticated genetic tests. Such genetic information is not yet available on a large-scale basis. Thus, any particular racial identity furnished by a patient or medical research subject is likely to be based on discredited notions of physiological differences or stereotypical views about racial appearances, a sense of racial group belonging, or the application of social and legal criteria.<sup>227</sup> In short, any racial identity information will often be irrelevant or misleading to the fact-driven scientific endeavor.

Moreover, the correlation of racial ancestry with particular genetic markers, is not exact. In other words, genes and biology do not necessarily predict disease, behavior, or other consequences. In fact, the contribution of environmental factors to health and disease susceptibility is significant, but is not easily quantified or separated from genetic contributions.<sup>228</sup>

There is also a danger of the renewed use of ancestral origin versions of race to popular discourse about race. The words may be the same, but the meanings are not. The increased use of such terminology creates a temptation to import scientific race terminology into popular debate. The result might only be confusion, but also the risk of "conflating biology and culture."<sup>229</sup>

Wide-spread testing for genetic polymorphisms and increased availability of such information for each individual could arguably allow for more accurate use of racial ancestry labels. Apart from privacy concerns, considerations of cost and practicability, and genetic reductionism,<sup>230</sup> however, such a solution would be round-about and inept. After all, the racial identity label would be used as a proxy for possible genetic differences. To the extent that direct information about relevant genetic markers is available and relevant to the researcher's investigation, obfuscating the presence or absence of particular genetic markers by reverting back to racial identity labels seems counter-productive.

Instead, as Sandra Soo-Jin Lee, Joanna Mountain, and Barbara A. Koenig have suggested, "individualized research and practice" would be

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226. Bamshad & Olson, *supra* note 179; see also Lee et al., *supra* note 182, at 58–60.

227. Identification of the individual's race by a third-party will fare no better since the same constraints apply.

228. Sarah K. Tate & David B. Goldstein, *Will Tomorrow's Medicines Work for Everyone?*, 36 NATURE GENETICS S34 (Nov. 2004). See, e.g., Lee et al., *supra* note 182, at 34.

229. Lee et al., *supra* note 182, at 54. The authors also suggest that the concept misguides researchers.

230. *Id.* at 63–64.

far more effective.<sup>231</sup> Rather than carelessly using the prevailing racial identity labels in medical research studies, health care professionals and research would be better served, and could serve the ultimate beneficiaries of the research better, by classifying individuals in accordance with relevant genetic differences. It would "save us from the tautological quandary of searching for differences in places where they are expected, thus reifying the idea of racial difference and ignoring the true range of genetic variation across the human population."<sup>232</sup>

This advice is arguably applicable more broadly to situations when public institutions, such as law enforcement authorities, continue to use racial identity labels as a proxy for visible physical features that are purportedly distinctive to individuals of particular racial groups. That is not to suggest that racial identity labels may never have a place in research, such as in designating geographic ancestral populations.<sup>233</sup> However, their continued careless use without regard to meaning and function perpetually resurrects discredited ideas of racial difference. It directs us away from real differences and distinguishing features between individuals that are the true object of study or description.

## CONCLUSION

The dilemma of policing the accuracy of racial identifications arises out of the connection between the past, the present, and the future. The use of racial identity labels arguably contributes to the perpetuation of racial stereotypes and the continued salience of race. Yet, prohibiting the use of racial identity labels and ignoring prejudice and discrimination will not make them disappear. The very persistence of discrimination creates a need for a tool to monitor and redress its effects.

Unfortunately, methodologies relying on conclusive self-identification (choice) or objective/third-party determination (fraud) have not proven to be satisfactory as methods for ensuring accuracy. A functional approach that distinguishes between physically descriptive, expressive affiliative, and social/regulatory conclusive meanings avoids these deficiencies.

In many instances there will not be a significant difference between existing racial identification practices and what I propose here. However, evolving public views of race, changes in race relations, and the growing multi-cultural and mixed race make-up of our nation will gradually in-

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231. *Id.* at 64.

232. *Id.* at 65.

233. In fact, to the extent that racial identity labels or categories are used as scientific terms of art with specifically defined meanings and explicitly and carefully distinguished from their popular counterparts and uses, the concerns raised by the popular use of racial identity labels does not arise.

crease the number of occasions when existing racial identification and classification schemes will be inadequate. Focusing on the function and meaning of the racial identification process is one way of making racial identity appropriate for our times. Perhaps most importantly, it is a way of articulating the continued legitimacy and need for the consideration of race issues by public and governmental institutions without getting trapped in some of the pitfalls of today's politics of race.