

American Indian Law Review

Volume 31 | Number 1

1-1-2006

Who's Who: Exploring the Discrepancy Between the Methods of Defining African Americans and Native Americans

Keneisha M. Green

Follow this and additional works at: <https://digitalcommons.law.ou.edu/ailr>



Part of the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Keneisha M. Green, *Who's Who: Exploring the Discrepancy Between the Methods of Defining African Americans and Native Americans*, 31 AM. INDIAN L. REV. 93 (2006), <https://digitalcommons.law.ou.edu/ailr/vol31/iss1/3>

This Comment is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

COMMENTS

WHO'S WHO: EXPLORING THE DISCREPANCY BETWEEN THE METHODS OF DEFINING AFRICAN AMERICANS AND NATIVE AMERICANS

*Keneisha M. Green**

I. The Exploration Begins

[T]he power of a drop of 'Negro Blood' is to contaminate. In contrast, the power of a drop of 'Indian Blood' — if no more than a drop — is to enhance, ennoble, naturalize, and legitimate.¹

Our society is one of classifications and separations. When it comes to people, the dominant culture has struggled to make sure everyone fits into a specific category. Historically, non-whites have been defined by white culture according to their function in American society.² The Native American was categorized as a wild animal that could be tamed; the African American was categorized as a draft animal that could be harnessed and put to use.³

While people are no longer classified by the dominant society as one animal or another, classifications persist in our society and, despite holding ourselves out to the rest of the world to be a “melting pot” of cultures and blind to racial differences, these rigid racial definitions persist. Particularly in the case of African Americans and Native Americans, these racial definitions have far-reaching effects. But who gets to decide within which racial category an individual falls? How does that person decide who is a member of each racial category and, therefore, the recipient of both the positive and negative consequences that come with being Native American or African American? Is it even possible to determine who's who as far as racial categories are concerned?

This comment will explore these questions. It will explore how Native Americans and African Americans have typically been defined in our country.

* Third-year student, University of Oklahoma College of Law.

1. PAULINE TUNER STRONG AND BARRIK VAN WINKLE, “INDIAN BLOOD”: REFLECTIONS ON THE RECKONING AND REFIGURING OF NATIVE NORTH AMERICAN IDENTITY 551 (1996).

2. VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 171 (1988) (1969).

3. *See id.*

Using very similar methods of characterization for the two groups — the amount of blood content from the particular group in question — society has reached divergent results as to what defines members of each particular class. A narrow definition of race is used with Native Americans, while a broad view is taken regarding African Americans. This comment will begin by addressing and explaining the traditional means by which these two groups have been defined. It will then explore the common threads between the seemingly polar means of classification. Next, it will explore the present effects these classifications have on each group. Finally, it will explore possible solutions to alleviating these discrepancies, while recognizing the strengths and weaknesses inherent with correcting any long-standing, widely-used method.

II. Exploring Traditional Means of Defining Native Americans — Blood Quantum

I feel as if I'm not a real Indian until I've got that BIA stamp of approval . . . You're told all your life that you're Indian, but sometimes you want to be that kind of Indian that everybody else accepts as Indian.

— Cynthia Hunt, Lumbee Indian⁴

A. The Historical Perspective of Blood Quantum

The federal government has struggled with how to define who is a Native American. A common way of defining Native Americans has been by measuring blood quantum. Blood quantum first became important as a determinant of when an individual Indian would be allowed to alienate an allotment of land acquired under the Dawes Severalty Act.⁵ Underlying the reasoning behind using blood quantum was the increasing number of whites and blacks who were claiming to be Native American in order to receive the benefits of federal land allotments.⁶ This reasoning was accompanied by a belief that the less Native American blood an individual possessed, the whiter he was, the more sophisticated he was thought to be⁷, and therefore, the less federal protection he

4. FERGUS M. BORDEWICH, *KILLING THE WHITE MAN'S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE TWENTIETH CENTURY* 63 (1996).

5. Steve Russell, *A Black and White Issue: The Invisibility of American Indians in Racial Policy Discourse*, 4 *GEO. PUB. POL'Y REV.* 129, 132 (1999).

6. GAIL K. SHEFFIELD, *THE ARBITRARY INDIAN: THE INDIAN ARTS AND CRAFTS ACT OF 1990*, at 82 (1997).

7. Russell, *supra* note 5, at 132.

would need. Even in the early stage of utilizing blood quantum, Native Americans themselves were well aware that blood quantum determinations were made carelessly and often inaccurately due to the high degree of racial intermingling.⁸ Blood quantum is affected not only by cross-racial intermingling, but also tribal intermingling.⁹ Thus, a full-blood Native American becomes a half-blooded Native American if his parents are from different tribes, which makes blood quantum an even more peculiar and inexact measure of Native American identity.¹⁰

Despite the inexactitude of blood quantum as a measure of Native American identity, Congress began incorporating blood quantum requirements into legislation with the Indian Reorganization Act of 1934 (IRA), also known as the Wheeler Howard Act.¹¹ With the passage of the IRA, Congress recognized that Native Americans in our country had been deprived of civic rights and powers and attempted to give Native American tribes a greater degree of self-governance, both politically and economically.¹² In order to achieve these goals, the IRA provided Native Americans with numerous benefits including land allotments, educational benefits, job preferences, vocational grants, and employment assistance.¹³

B. The BIA's Role in Blood Quantum

Shortly after passing the IRA, Congress charged the Bureau of Indian Affairs (BIA) with the task of developing a method by which to certify individuals who claimed to be half-blood Native American in order to gain the benefits of the IRA.¹⁴ The BIA based its determination on five factors: 1) tribal rolls; 2) testimony of the applicant; 3) affidavits from people familiar with the applicant; 4) findings of an anthropologist; and 5) testimony of the applicant that he has retained a "considerable measure of Native American culture and habits of living."¹⁵ Thus, circumstantial evidence, without any pure scientific proof, determined whether an applicant was Native American.¹⁶ Those persons

8. *Id.*

9. *Id.*

10. *Id.*

11. Indian Reorganization Act, 25 U.S.C. § 479 (2000).

12. *Morton v. Mancari*, 417 U.S. 535, 542-45 (1974).

13. *See* 25 U.S.C. §§ 461-494 (2000).

14. 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. REFORM 275, 288 (2001).

15. *Id.* (citing letter from Thomas M. Boyd, Ass't Attorney General, to Sen. Daniel K. Inouye, Chairman of the Select Committee on Indian Affairs 2 (Jan. 30, 1989)).

16. *Id.* (citing Memorandum from John Collier, Commissioner of Indian Affairs, U.S. Dep't

possessing the required quantum of Native American blood received a Certificate of Degree of Indian Blood (CDIB), which entitled them to the benefits of the IRA.¹⁷ The five factor formula proved somewhat unworkable.¹⁸ In the early years, only persons capable of either establishing their Native American ancestry or exhibiting sufficient Native American physical characteristics to be equated with one-half or more degree Native American blood were told they were entitled to the benefits of the IRA.¹⁹

In the five decades following the passage of the IRA, the BIA continued to struggle with developing an administrative procedure for determining blood quantum. Scott Keep, Assistant Solicitor of the Department of the Interior, recognized this struggle in a memorandum in which he stated, “[w]e strongly recommend that the Bureau establish, or more accurately re-establish, an administrative decision procedure to determine whether individuals claiming eligibility for the IRA benefits actually possess one-half degree Indian blood.”²⁰

Despite numerous recommendations and acknowledgments that the BIA needed more accurate administrative procedures to measure blood quantum, the BIA’s efforts at establishing such procedures lagged.²¹ The efforts lagged so much that in 1986 the Department of Interior’s Board of Indian Appeals reprimanded its own agency for its “hidden regulations” regarding how blood quantum was determined.²²

That same year, Morgan Underwood challenged a BIA decision that lowered his blood quantum from full-blood Chickasaw Indian to half-blood.²³ Eleven years prior, Mr. Underwood received a CDIB from the BIA certifying that he was full-blood Chickasaw Indian.²⁴ In 1983, he returned to the BIA in order to obtain a card-sized CDIB to replace his larger certificate.²⁵ The BIA revisited his blood quantum determination and found that it should be decreased to half-blood.²⁶ The BIA based this decision on the finding that his birth certificate may have been a forgery, which indicated that he was illegitimate absent a judicial

of the Interior 2 (Sept. 22, 1936)).

17. *Davis v. United States*, 192 F.3d 951, 956 (10th Cir. 1999).

18. Brownell, *supra* note 14, at 289.

19. *Id.* at 288.

20. *Id.* at 289 (citing memorandum from Scott Keep, Ass’t Solicitor, U.S. Dep’t of the Interior, Deputy Ass’t Sec’y of Indian Affairs 2 (July 12, 1981)).

21. *Id.*

22. *Underwood v. Deputy Ass’t Sec’y, Indian Affairs*, 93 Interior Dec. 13, 23 (1986).

23. *Id.* at 24.

24. *Id.* at 15.

25. *Id.* at 15, 24.

26. *Id.* at 24.

determination of paternity.²⁷ The Board of Indian Appeals (Board) criticized the BIA for its obscure way of determining blood quantum.²⁸ The Board particularly emphasized its concern that the procedures were never published and consequently, provided no notice to Indians of the methods by which CDIB determinations were made.²⁹ The Board reversed the decision of the BIA and ordered it to issue Mr. Underwood a card-sized CDIB stating that he was full-blood Chickasaw.³⁰

C. Present System for Determining Native American Identity

Despite rulings like the one in Mr. Underwood's case, the BIA has continued to proceed without formally publishing its certification procedures as required by the Administrative Procedures Act.³¹ At present, how the BIA defines "Native American" for purposes of federal statutes still produces confusion. If blood quantum is to continue to be that measure, even more confusion will arise on how blood quantum is to be determined. Many Native Americans believe that blood quantum as a measure should be disposed of all together.³² In March of 1999, Native Americans marched in protest over the use of blood quantum by tribes to determine membership.³³ The protesters insisted that the use of blood quantum by tribes worked to disenfranchise a number of mixed-blood Native American youths, and to exclude them from the benefits of scholarships and the right to receive housing and business loans.³⁴

III. Exploring Traditional Means of Defining African Americans — The One Drop Rule

My grandmother was her master's daughter; and my mother was her master's daughter; and I was my master's son; so you see I han't got but one-eighth of the blood. Now, admitting it's right to make a slave of a full black nigger, I want to ask gentlemen acquainted with

27. *Id.* at 15-16, 24.

28. *Id.* at 24.

29. *Id.*

30. *Id.* at 25.

31. 5 U.S.C. §§ 552-553 (2000) (requiring agencies to publish requirements and other materials on which they rely).

32. Brownell, *supra* note 14, at 309 (citing Shelba R. Wheeler, *Indian Lineage Rules Decried Tribal-Blood Limits Called Exclusionary*, DENV. POST, Mar. 22, 1999, at B1).

33. *Id.*

34. *Id.*

business, whether because I owe a shilling, I ought to be made to pay a dollar?

— Lewis Clarke, fugitive slave, 1842³⁵

A. The History of the One Drop Rule

For centuries, the determination of who is an African American has been governed by the informal “one drop rule.”³⁶ According to this adage, anyone with a known Black ancestor is considered an African American.³⁷ Thus, one drop of Black blood makes a person an African American.³⁸

More formally, the one drop rule is known as hypodescent.³⁹ The origins of hypodescent and the one drop rule can be traced to the early seventeenth century.⁴⁰ Race mixing, especially mixing between White men and Black women, has historically been disapproved of both socially and politically.⁴¹ A mulatto, the term given to an individual mixed of White and African decent, held a lower status than his white parent and as a result, White society excluded him and the Black race absorbed him.⁴² Until 1665, however, his absorption was primarily informal,⁴³ an unspoken rule. That changed with the Virginia case of *In re Mulatto*.⁴⁴ The case of *In re Mulatto* is the first known incident of a court legally treating a mulatto as Black.⁴⁵ The case involved a mulatto in Virginia who was deemed by the court to be a slave.⁴⁶ In a one sentence opinion, the

35. Christine Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1163 (1997) (citing JOHN W. BLASSINGAME, *SLAVE TESTIMONY* 152 (1977)).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. F. JAMES DAVIS, *WHO IS BLACK? ONE NATION'S DEFINITION* 33 (2002).

41. See Hickman, *supra* note 35, at 1172-73.

42. *Id.* at 1173.

43. Though several states by that time had passed laws to the same effect. See Chronology on the History of Slavery 1619 to 1789, <http://www.innecity.org/holt/slavechron.html> (last visited Nov. 29, 2006) (quoting a 1662 Virginia statute which provided that “[c]hildren got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother”).

44. Hickman, *supra* note 35, at 1174 (citing 1 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 78 (Helen Catterall ed., Greenwood Publishing Corp. 1968) (1926)).

45. *Id.*

46. *Id.*

court found that a person of both European and African ancestry was legally considered African and thus, legally embraced the one drop rule.⁴⁷

Defining mulattos as black served both psychological and economic importance.⁴⁸ The psychological importance resulted by excusing white fathers from social responsibility for their illegitimate children.⁴⁹ “If [the White father] could not restrain his sexual nature, he could at least reject its fruits and solace himself that he had done no harm.”⁵⁰ The economic benefits of the one drop rule, in a time when slavery was at its peak, are obvious. Not only were the White fathers free from financially supporting their illegitimate offspring; but the plantation’s inventory also conspicuously increased.⁵¹ The offspring became the property of the slave’s master thus creating a twisted incentive for continuing this illicit behavior.⁵²

The Supreme Court, in 1896, embraced the one drop rule with its decision in *Plessy v. Ferguson*.⁵³ The Court found *Plessy* to be colored for purposes of a state statute requiring the segregation of public train cars⁵⁴ despite the fact that he had only one-eighth African blood and his African heritage was not discernible in his physical characteristics.⁵⁵ The *Plessy* Court created the infamous “separate but equal” doctrine.⁵⁶ Once enacted by the Court, the doctrine was widely-used not only to exclude African Americans from mainstream society but also to stigmatize them.⁵⁷ The “separate but equal” doctrine became a tool to draw a line in the sand between African Americans and Whites. Society drew these dividing lines in public schools, libraries, restrooms, public accommodations, places of employment, and, most importantly, in the American conscious.⁵⁸ Under this policy, anyone who had so much as one drop of black blood was effectively excluded from mainstream society.

47. *Id.*

48. *Id.* at 1175.

49. *Id.*

50. *Id.* at 1176 (citing WINTHROP D. JORDAN, *WHITE OVER BLACK* 178 (1968)).

51. *Id.*

52. *Id.*

53. 163 U.S. 537 (1896).

54. *Id.* at 541 (citing LA. REV. STAT. ANN. § 45:528-534 (1890) (requiring the assignment of persons to separate train cars for white and colored races)).

55. *Id.*

56. *See id.* at 544.

57. Roy L. Brooks, *Race as an Under-Inclusive and Over-Inclusive Concept*, 1 *AFR.-AM. L. & POL’Y REP.* 9, 17 (1994).

58. *Id.*

B. The One Drop Rule's Present Persistence

Though the "separate but equal" doctrine ended in 1954 with the Supreme Court's decision in *Brown v. Board of Education*,⁵⁹ the principle that put it in motion, the one drop rule, endures today. In 1990, Renee Tenison earned the title of being the first African American woman to become Playmate of the year, notwithstanding the fact that her mother is white.⁶⁰ In 1995, Chelsi Smith was crowned Miss USA and was misnomered the first African American to win the title.⁶¹ Chelsi Smith publicly rejected the label of African American because of her desire to acknowledge her entire heritage which consisted of both African American and White.⁶² Tiger Woods is probably the most famous example of the present persistence of the one drop rule. Tiger Woods is constantly looked upon by the media as the first great African American golfer; despite the fact that he is one-fourth Thai, one-fourth Chinese, one-eighth Native American, one-eighth White and one-fourth African American.⁶³ Today, there is widespread rejection of the one-drop rule by those confined to a category by its rigid application.

IV. Exploring the Common Denominators

I'm left to defend one lonely drop of blood. I might terminate if I get a nosebleed.

— Marie Annharte Baker, a writer of mixed Salteaux and Irish descent⁶⁴

Despite the seemingly divergent means of identifying Native Americans as compared to African Americans, some commonalities exist. Some of the common denominators are the interests served to the dominant society, the fact that neither group initially had the opportunity to decide how they would be defined, the obvious emphasis placed on biology and genetics, and the exclusion of the dominant society from its own methods of defining itself.

As this comment will show in the following sections, these definitions have the common theme of working in such a way as to benefit the majority. Whether the benefit is economic — as with Native Americans — or social —

59. 347 U.S. 483 (1954).

60. F. JAMES DAVIS, *WHO IS BLACK? ONE NATION'S DEFINITION* 191 (2002).

61. *Id.*

62. *Id.*

63. *Id.*

64. STRONG & VAN WINKLE, *supra* note 1, at 552.

as with African Americans, the classifications all act to the benefit of the majority. Using blood quantum in the case of Native Americans means the number of “recognized” Native Americans is reduced. As the number of recognized Native Americans is reduced, so is the responsibility of the federal government.⁶⁵ Using the one drop rule in the case of African Americans had the initial benefit of increasing the slave masters’ inventory, as discussed above, and the continued benefit of exclusion from society which allows the dominant society to maintain their dominance.

Further apparent in the system of classifications, is that neither class had the opportunity to choose their own method of defining themselves. The dominant society made these determinations for them at some point in history. In a society where the dominant class decides how the minority classes will be defined, is it any surprise that the classifications would act to benefit the drafters?

Biology and genetics are noticeably emphasized in the methods of defining both Native Americans and African Americans. This emphasis comes from the ease, at least initially, with which the dominant society could place a certain individual into a less desirable category or another based on physical characteristics. During the early years of determining whether an individual was White, Native American, or African American, stereotypical physical features dominated the determination.⁶⁶ If a person appeared physically to be of Native American descent or had some features that were typical in persons of African descent, he or she was placed into that category without further review. These imprecise assessments of race allowed the dominant society almost limitless discretion in its determination of who fit into which of their defined categories.

The final common denominator between the classifications is the complete exemption given to Whites. Mixing of two Whites, no matter how diverse their European backgrounds, has never been called a “mixture”. To the contrary, Whites are permitted to mix as much as they want with no effect on their racial classification or the status of their offspring.⁶⁷ Inter-marriage between White settlers of different European decent was actually encouraged as America held itself to be a “melting pot” of cultures leaving behind “ancient prejudices” and melting into a new race of men.⁶⁸

65. Russell, *supra* note 5, at 133.

66. F. Michael Higginbotham, “*Yearning to Breathe Free*”: *Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1237 (1993).

67. Hickman, *supra* note 35, at 1180.

68. *Id.*

V. Exploring the Present Effects

We want freedom from the white man rather than to be integrated. We don't want any part of the establishment; we want to be free to raise our children in our religion, in our ways, to be able to hunt and fish and to live in peace. We want to have our heritage, because we are the owners of this land and because we belong here. The white man says there is freedom and justice for all. We have had "freedom and justice," and that is why we have been almost exterminated. We shall not forget this.

— Unknown, taken from the 1927 Grand Council of American Indians⁶⁹

The effect of traditional definitions of Native Americans and African Americans is not just a matter of this country's past. The effects are not confined to the history books as a matter to look back on with shameful reflection. On the contrary, the effects of these traditional definitions persist today with both Native Americans and with African Americans. The focal point of the present effects of the use of blood quantum in defining Native Americans is dispossession. The traditional methods of classification have worked to dispossess Native Americans of their land and resources and also to dispossess them of the rights "guaranteed" them by the United States' government. The present effects on African Americans are primarily social. The traditional definitions have resulted in a persisting exclusion from society at large, a robbing of culture, as well as creating tension among African Americans.

A. The Dispossession of Native Americans

The traditional method of defining Native Americans has resulted in a systematic dispossession of Native American lands and resources, as well as a dispossession of the rights otherwise guaranteed them by the federal government. For example, in 1906, Congress passed the Osage Allotment Act,⁷⁰ which divided approximately 1.5 million acres of land among the members of the Osage Tribe with certain restrictions.⁷¹ The 1906 Act also

69. JASON A. MERCHEY, *BUILDING A LIFE OF VALUE: TIMELESS WISDOM TO INSPIRE AND EMPOWER US* 170 (2005).

70. Act of June 28, 1906, ch. 3572, 34 Stat. 539. The 1906 act was amended in 1912, 1925, 1950, 1978, and 1984.

71. *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS* 346 (Frederick E. Hoxie ed., 1996).

placed the mineral interest for these lands in trust for the benefit and use of the Osage Tribe.⁷² The Act further provided that all funds due to the Osage Tribe would be credited to individual members of the Tribe on the basis of a pro rata division among the members or their heirs.⁷³ This pro rata interest in the fund came to be known as a headright.⁷⁴ A headright consists of the right to receive, at the end of a specified trust period, funds arising largely from the mineral income, and the right to participate, during the specified trust period, in the distribution of bonuses and royalties arising from the mineral estate plus accrued interest on the trust fund.⁷⁵ The 1906 Act provided that Osage Indians could not alienate their headright interest.⁷⁶ The 1906 Act did, however, allow for the passage of headrights by intestate succession.⁷⁷ In 1925, Congress restricted the inheritance of headrights by non-Indians where the decedent owning the headright was one-half or more Osage Indian blood.⁷⁸ While this seems on the surface to be Congress' attempt to protect the interest of the Osage Indians and ensure that the headrights stay within the Tribe, this act failed to do so for two reasons. First, as previously mentioned, because of tribal as well as racial intermingling,⁷⁹ it is likely that few members of the Osage Tribe are one-half degree or more Osage blood, so the group of Osage Indians "protected" by the restriction is rather small. Second, although the 1925 amendment restricted the inheritance of headrights, Congress allowed an Osage Indian to dispose of a headright by will.⁸⁰ Thus, as a result of succession to headrights by inheritance and devise by will, most persons of Osage ancestry own no headrights and earn no tribal income.⁸¹

In addition to dispossessing Native Americans of their land and resources, traditional definitions based on blood quantum have also worked to deprive them of the rights guaranteed them by the federal government. One such example is found in the federal government's hiring preference. The IRA accords employment preference for qualified Indians for positions with the BIA by providing,

72. *Eckelt v. Herrell*, 783 P.2d 1, 1-2 n.1 (Okla. Civ. App. 1989).

73. *Id.*

74. *Id.*

75. *In re Estate of Tayrien*, 609 P.2d 752, 754-55 (Okla. 1980).

76. Act of June 28, 1906, ch. 3572, 34 Stat. 539.

77. *Id.*

78. Act of Feb. 27, 1925, ch. 359, § 7, 43 Stat. 1008, 1011.

79. Russell, *supra* note 5, at 132.

80. Act of Feb. 27, 1925, § 7, 43 Stat. at 1011.

81. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 791 (Rennard Strickland et al. eds., 1982).

[t]he Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.⁸²

Congress' stated reason for passing the Act and the employment preference was to rectify the fact that Native Americans had been long deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs.⁸³ The eligibility criteria for the hiring preference is defined in the BIA manual as "an individual [who is] one-fourth or more degree Indian blood and [is] a member of a federally-recognized tribe."⁸⁴ This effort by Congress to accord a hiring preference, but only to those Native Americans who meet its strict requirements, is somewhat disingenuous based on the few numbers of Native Americans who meet the blood quantum requirement.

"Based on current patterns of intermarriage, only eight percent of the American Indian population during the next century will have a blood quantum of one-half or more."⁸⁵ Accordingly, the proportion of the Native American population with less than one-fourth blood quantum will increase to about sixty percent.⁸⁶ Therefore, over sixty percent of the Native American population will be estopped from receiving the benefit of the hiring preference under the BIA requirements.

B. The Social Exclusion of African Americans

The continued use of the one drop rule has resulted in a continued exclusion of African Americans from society in general, as well as robbing and distorting African American culture. African Americans have been traditionally stigmatized in American society. Being labeled "Black" or

82. 25 U.S.C. § 472 (2000).

83. *Morton v. Manacari*, 417 U.S. 535, 543-44 (1974) (citing 78 CONG. REC. 11,729 (1934)).

84. *Id.* at 544 n.24.

85. Rachel F. Moran, *The Mixed Promise of Multiracialism*, 17 HARV. BLACKLETTER L.J. 47, 54 (2001) (citing Russell Thornton, *Tribal Membership Requirements and the Demography of 'Old' and 'New' Native Americans*, 16 POPULATION RES. & POL'Y REV. 33, 39 (1997)).

86. *Id.*

“African American” has historically meant being a member of a class of people who were deemed secondary. One need only look back a few years into this nation’s history, to the Jim Crow era to see the quintessential example of stigmatization and exclusion of African Americans from white society.⁸⁷ Jim Crow laws, accompanied by the separate but equal policy, were designed to legally shut out African Americans from mainstream society.⁸⁸ Though the days of Jim Crow laws and separate but equal are gone, the remnants of this part of our history remain and African Americans continue to experience racism and discrimination by society.

The one drop rule has also resulted in intra-racial prejudice between African Americans and their mixed-blood counterparts.⁸⁹ This phenomenon, known as colorism, has existed at least since the existence of the first mulatto slaves.⁹⁰ Slave owners would choose the light-skinned mulatto slaves, often their own offspring, to perform the more high status household jobs such as housekeeper, driver, and cook.⁹¹ The slave owners believed the darker-skinned slaves were better suited to withstand the heat and toil of the demanding fieldwork and were left to plow, harvest and plant the crop.⁹² The light-skinned slaves soon began to imitate the ways of upper-class white families creating friction among the slave community.⁹³ Additionally, light-skinned women, with their exotic yet European features, were worth more when sold, and thus, were more valued by the slave owners.⁹⁴ As a result of this early division, many African Americans have a present fixation about color and features that often leads African Americans to discriminate against each other.⁹⁵ Within the African American community, color has become a symbol of class, intelligence and beauty.⁹⁶ Therefore, the light-skinned African American is revered by both White and African American society.⁹⁷ Though movements to relax the lines of colorism in African American society have formed, intra-racial prejudice still persists.

87. Brooks, *supra* note 57, at 17.

88. *Id.*

89. See generally KATHY RUSSELL ET AL., *THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS* (1992).

90. *Id.* at 15-16 (discussing the three-tiered social system in the lower South).

91. *Id.* at 18.

92. *Id.*

93. *Id.* at 17-18.

94. *Id.* at 18.

95. *Id.* at 2.

96. *Id.* at 67-68.

97. *Id.*

VI. Exploring the Possible Solutions

What is the solution to this problem of defining who's who? How do we alleviate the discrepancies in the means of classification? Scholars have posed a number of possibilities including self-identification, disposing of racial classifications completely, and using a strictly biological definition.

A. Self-Identification

The concept of self-identification as a means of defining race is similar to the census model of defining race. According to one scholar, self-identification for Native Americans could occur on either an individual or a tribal level.⁹⁸ The concept of self-identification would eliminate the use of blood quantum altogether and is free from government assumptions about what it means to be a Native American and allows Native Americans to do their own defining.⁹⁹ Self-identification would allow for considerable variation among individuals defined as Native American which would reflect the tremendous variations present among Native Americans and embrace the different notions of what it means to be a Native American.¹⁰⁰

A system of self-identification, however, has obvious drawbacks. Such a process would make Native American status a purely racial category.¹⁰¹ This would undermine the political grounding for the government's special treatment of Native Americans.¹⁰² This special treatment is based on the concept that Native American status is not a racial classification but rather a political one.¹⁰³ Even if the political grounding was not shattered, the current system would become unworkable. The number of people who would self-identify as Native American would no doubt sky rocket, therefore increasing the number of people who would seek federal benefits.¹⁰⁴ This may be a bold step and one that would be met with some opposition. It may be one, however, that needs to be taken and is ready to be taken.

98. RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492*, at 224 (1987).

99. *Id.*

100. Brownell, *supra* note 14, at 317.

101. *Id.*

102. *Id.*

103. See *Morton v. Manacari*, 417 U.S. 535, 554 (1974) (holding the BIA hiring preference passed constitutional muster because the requirement of membership in a federally recognized tribe and one-quarter blood quantum was a political rather than a racial preference).

104. Brownell, *supra* note 14, at 317.

The Indian Arts and Crafts Enforcement Act of 2000, enacted in 1990 by President George Bush, Sr., and amended in 2000, has taken an experimental and tentative step toward self-identification.¹⁰⁵ The Act defines “Indian” as “any individual who is a member of an Indian tribe; or . . . is certified as an Indian artisan by an Indian tribe.”¹⁰⁶ The Act defines an “Indian tribe” as not only those who are federally recognized, but also as “any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority.”¹⁰⁷ Though the Act leaves some questions unanswered, such as whether state-recognized tribes should be put on the same footing as federally-recognized tribes, it is an example of how self-identification might work.

Self-identification for African Americans is based on the assumption that the most significant factor in racial identity is self-identification. One scholar who supports self-identification is Kwame Anthony Appiah.¹⁰⁸ Appiah uses the life of W.E.B. DuBois, an African American with Dutch ancestry, as an example of how racial identity is something that can be chosen.¹⁰⁹ In Appiah’s opinion, DuBois chose to identify himself as African American, rather than Dutch, and for this reason, history recognizes DuBois to be African American.¹¹⁰ This logic has several flaws; the most obvious is that in society today, how one identifies himself matters less than how society identifies that person. As much as an individual may wish to identify himself with a particular race, this desire takes a backseat to the will of society. This is evident in the cases of famous persons such as Tiger Woods, Chelsi Smith, and Renee Tenison previously discussed. Despite their desire to be recognized as biracial or at least to acknowledge all of their ancestries, society persists in placing them in the African American category. If self-identification is to work in the case of African Americans, society at large must first decide to accept the change. Until this happens, the concept of self-identification will be nothing more than semantics.

105. 25 U.S.C. § 305 (2000).

106. *See id.* § 305e(d)(1).

107. *See id.* § 305e(d)(3)(B).

108. KWAME ANTHONY APPIAH, *IN MY FATHER’S HOUSE* (1992).

109. *Id.* at 32-35.

110. *Id.* at 32.

B. Disposal of Racial Classifications

Probably the most radical of the proposed solutions is the complete disposal of racial classifications altogether. Vine Deloria, Jr., alludes to this proposed solution in his book entitled, *Custer Died For Your Sins*.¹¹¹ Deloria suggests that if the dominant society persists in focusing on racial classifications, it will doom its own existence.¹¹² In Deloria's opinion, the continued conceptualization in terms of African American problems and Native American problems will result in the loss of a sense of societal responsibility for economic and social issues.¹¹³

Many anthropologists reject the idea of a physical race.¹¹⁴ These anthropologists propose that the morphological differences that exist between different groups have little genetic significance.¹¹⁵ They further propose that the genetic differences that exist among peoples do not track the traditional racial groups; there are huge genetic variations that exist among people in the same racial group; and there are significant genetic similarities among people of different racial groups.¹¹⁶ These anthropologists recognize race as a political or social group rather than a biological one.¹¹⁷

This proposed solution is a radical one. A complete disposal of racial classifications would be a generational shift in ideals, and it would change the way the government chooses to protect certain groups. Because Native Americans receive benefits and preferential treatment from the government under the protection that they are a political classification rather than a racial classification, little would change in this area with the disposal of "Native American" as a racial category. A disposal of racial classifications altogether would, however, be problematic in the case of African Americans. What would happen to the preferential treatment that is given to African Americans and other recognized minorities if racial classifications were not available to determine who is the "minority"? In a perfect world, the answer would be simple: with the disposal of racial classifications comes the disposal of societal and political racial prejudice; thus, preferential treatment programs

111. DELORIA, *supra* note 2.

112. *Id.* at 188-89.

113. *See id.*

114. Hickman, *supra* note 35, at 1203 (citing Robert Lee Hotz, *Is Concept of Race a Relic?*, L.A. TIMES, Apr. 15, 1995, at A1).

115. *Id.*

116. *Id.*

117. *Id.*

will no longer be needed. Unfortunately, we do not yet live in this perfect world. While this solution might be a plausible one, it is one that would take time to see any positive effects, and in the meantime, the results might actually be quite negative as human nature would be left to its own devices.

C. Strictly Biological Definitions

Another proposed solution to the inconsistent standards in defining race is to use strictly biological definitions across in a uniform manner.

Few Native Americans support the strict use of blood quantum as a measure of Native American heritage, but, instead desire to see that people who label themselves Native American be able to somehow trace their Native American ancestry.¹¹⁸ Supporters of blood quantum use want to see consistency in its application.¹¹⁹

The use of a strictly biological definition in the case of African Americans could cause two different results. It could mean the creation of an official multiracial category or it could further narrow the majoritarian classification system. The implementation of a broad multiracial category has much support.¹²⁰ A multiracial category would encompass persons who are mixed with two or more sources of ancestry.¹²¹ Such a category would allow persons to recognize and embrace all aspects of their heritage, something that the one drop rule does not allow. A multiracial category does, however, have certain drawbacks, such as its tendency towards “racial purity.” The proposed new category could serve as a means of fettering out those that are “pure” African American, Hispanic, Asian, etc., and serve as yet another means to exclude those who do not meet the standard of pure, lumping them into the category of multiracial.¹²² While this option could work, in conjunction with a self-identification theory, for those who truly wish to embrace their full heritage, it risks becoming yet another method of excluding and stigmatizing people.

The second option of creating a narrow classification system, would involve tracing one’s lineage and counting one’s ancestors.¹²³ A person with a majority of White ancestors would be White, while a person with a majority of African American ancestors would be African American. A system of

118. See L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 765 (2001).

119. See Brownell, *supra* note 14, at 315-16.

120. Hickman, *supra* note 35, at 1203.

121. *Id.*

122. See *id.* at 1205.

123. *Id.* at 1206.

classification of this nature would provide a more accurate reflection of an individual's race than the one drop rule, but a problem may arise in focusing on the ancestry aspect. In some cases, an ancestry trace may be nearly impossible. What happens when one cannot trace their lineage more than a few generations? What happens to those individuals who have the majority of their origins from one racial classification but have socially been held to another category for generations?

VII. The Exploration Ends

Stories of cultural contact and change have been structured by a pervasive dichotomy: absorption by the other or resistance to the other. A fear of lost identity, a Puritan taboo on mixing beliefs and bodies, hangs over the process. Yet what if identity is conceived not as a boundary to be maintained but as a nexus of relations and transactions . . . ?

— James Clifford¹²⁴

Racial distinctions and classifications have existed since the beginning of mankind. Man's nature is to separate and distinguish himself from his neighbor. The desire to dominate one another also stems from the most primitive nature of man. Racial distinctions and separations become a necessary tool for this dominance. The dominant group separates in a manner which is beneficial to them and maintains these separations, which have now become barriers, in order to maintain their dominance. As many scholars have noted, however, the effects of racial classifications have not been entirely negative, but have served some positive purposes. Within individuals, racial distinctions can create self-esteem, a sense of belonging, common experience and shared identity that translates into psychological and, potentially, economic benefits. A system of racial classifications, however, needs to be reviewed periodically, to ensure that the benefits created continue to outweigh the negative aspects. In any event, the time has come for our society to review the way we decide "who's who."

124. JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART* 344 (1988).