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## From Reconstruction to Obama: Understanding Black Invisibility, Racism in Appalachia, and the Legal Community's Responsibility to Promote a Dialogue on Race at the WVU College of Law

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# FROM RECONSTRUCTION TO OBAMA: UNDERSTANDING BLACK INVISIBILITY, RACISM IN APPALACHIA, AND THE LEGAL COMMUNITY'S RESPONSIBILITY TO PROMOTE A DIALOGUE ON RACE AT THE WVU COLLEGE OF LAW

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## I. INTRODUCTION

He guided me to the bed and sat me down. He lifted my legs and put me under the cover. ‘An’ they chased him ‘n’ never could catch him ‘cause they didn’t know what he looked like, an’ Atticus, when they finally saw him, why he hadn’t done any of those things . . . Atticus, he was real nice.’ His hands were under my chin, pulling up the cover, tucking it around me. ‘Most people are, Scout, when you finally see them,’ [Atticus said].<sup>1</sup>

— *To Kill a Mockingbird*

When Barack Obama ran in the West Virginia Democratic primary, two out of every ten white Democratic voters told exit pollsters that they would not support a black<sup>2</sup> candidate for president.<sup>3</sup> Following the primary, some in the media began to portray the people of West Virginia as racist, backward, and unintelligent Appalachians. Additionally, the stereotypes of West Virginians were furthered by video interview footage shown on Jon Stewart’s “The Daily Show,” depicting white West Virginians answering questions concerning why they feared Obama.<sup>4</sup> One white woman in Stewart’s segment stated that she was “sort of scared of the other race because we have such conflict with them” in West Virginia.<sup>5</sup>

West Virginia is the third whitest state in the country.<sup>6</sup> In fact, 94.4 percent of the state’s population is white.<sup>7</sup> Black West Virginians account for 3.4 percent of the population.<sup>8</sup> While watching the news coverage of the Demo-

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<sup>1</sup> HARPER LEE, *TO KILL A MOCKINGBIRD* 283–84 (Warner Books 1982) (1960).

<sup>2</sup> For purposes of this Note, unless it is specifically known that a person is of African descent, I will use the term “black.” Appalachian whites will refer specifically to whites who live in the Appalachian Mountains; whereas, black persons living in the Appalachian region will be referred to as Appalachian blacks or black Appalachians. Any discussion involving Appalachians, generally, will refer to those people in the Appalachian region as a whole. Lastly, for purposes of this Note, white Appalachians are a distinct group from Southern whites.

<sup>3</sup> See *infra* Part IV.

<sup>4</sup> *The Daily Show with Jon Stewart* (Comedy Central television broadcast May 14, 2008), available at <http://www.thedailyshow.com/video/index.jhtml?videoId=168561&title=indecision-2008-west-virginia> [hereinafter *The Daily Show*].

<sup>5</sup> *Id.*

<sup>6</sup> U.S. CENSUS BUREAU, 2006–2008 AMERICAN COMMUNITY SURVEY 3-YEAR ESTIMATES, [http://factfinder.census.gov/servlet/ACSSAFFacts?\\_event=Search&\\_lang=en&\\_sse=on&geo\\_id=04000US54&\\_state=04000US54](http://factfinder.census.gov/servlet/ACSSAFFacts?_event=Search&_lang=en&_sse=on&geo_id=04000US54&_state=04000US54) (last visited Mar. 11, 2010). For the remainder of this Note, to view a particular state’s statistics from this source, select the state name from the drop down menu on the right.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

cratic primary from my home in West Virginia, I began to wonder where this prejudice came from. Were West Virginians really as racist as we seemed in media portrayals? How could this racism be resolved?

This Note adopts the theory that West Virginians are not more racist than citizens of other states. Rather, having lived my entire life in West Virginia, I find that the lack of a minority presence in the state, which I will refer to as “black invisibility,”<sup>9</sup> has allowed for white West Virginians to believe in cultural black stereotypes portrayed and communicated through the media to fuel racist thoughts and fear of blacks. In turn, West Virginians, who are predominantly white, are more likely than those who live in more diverse areas to speak openly with prejudice because these bigoted comments are unlikely to be punished by society.

The 2008 Democratic primary in West Virginia led me to consider how racism in West Virginia could be remedied. My concern led me to contemplate many questions: What is the best way to erode racism in West Virginia? How, exactly, can an invisible people be seen and understood as more than stereotypes when the state is largely racially monolithic? How can a dialogue on race begin when the state is predominantly white? Because racism in America, particularly white supremacy and black inferiority, was created by the laws of the federal government and the states, I believe that my question of how racism in West Virginia can be eroded is best answered by focusing on the law. While no legal remedy can erode prejudice — a concept in one’s heart and mind — I find that

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<sup>9</sup> In no way do I mean to say that blacks do not live in West Virginia or the Appalachian region. *But see* JOHN C. INSCOE, *RACE, WAR, AND REMEMBRANCE IN THE APPALACHIAN SOUTH* (The University Press of Kentucky 2008) [hereinafter INSCOE]. Inscoe argues that the concept of “black invisibility” and racism can be “refuted.” *Id.* at 17. According to Inscoe, because blacks have lived in Appalachia since slavery and because blacks have lived in Appalachia’s “urban areas, such as Chattanooga, Knoxville, Asheville, Bristol, and Roanoke,” that the idea that mountain whites are unfamiliar with blacks is inaccurate. *Id.* However, this argument fails. In fact, many areas in states like West Virginia are isolated, remote, and cutoff from other portions of the state due to the mountainous terrain of the state. Accordingly, even if a more urban area in the state has a higher number of black citizens than rural areas, the likelihood that a majority of citizens who live in the rural areas will have substantial relationships with blacks is unlikely. To illustrate, I will compare the minority population of Preston County, West Virginia and Kanawha County, West Virginia. Kanawha County is home to West Virginia’s state capital, Charleston, West Virginia. Kanawha County is more urban than most areas in the state of West Virginia. In fact, according to one author’s account, “[g]rowing up in urban Appalachia can be a vastly different experience from coming of age in rural Appalachia.” Stephen L. Fisher, *Appalachian Stepchild* in BACK TALK FROM APPALACHIA: CONFRONTING STEREOTYPES 189 n.1 (Dwight B. Billings, Gurney Norman, & Katherine Ledford, eds. The University Press of Kentucky 1999). Additionally, the southwestern portion of West Virginia, Kanawha County, was home to many slaves in the 1800s when West Virginia was still part of Virginia. *See infra* note 81. For the 2006 to 2008 survey, 7.5 percent of Kanawha County’s population was black. *See* U.S. CENSUS BUREAU, *supra* note 6. Conversely, Preston County, West Virginia, which is more than three hours north of Kanawha County has a black population of 0.4 percent. *See infra* note 128. Thus, even though certain regions of West Virginia may have greater minority populations, other areas have virtually no minority presence. For those people in those counties, black invisibility is very real.

the answer to ending racism and minority-unfamiliarity in West Virginia is pedagogical in nature.

As the basis for my theory, this Note will focus on legal education in the United States. Most notably, this Note will focus on West Virginia in particular. Discussions on race, racism, and American law should take place in every legal classroom where race is relevant to the subject being discussed as a way to bridge gaps between communities. This is especially true for the West Virginia University College of Law ("College of Law"), which sits in the third whitest state in the country. The College of Law is the only law school in the state, and a majority of students at the College of Law are white and West Virginian. Thus, at the College of Law, discussions of race and racism are imperative, as these discussions may serve as the first and only conversations that white students have had regarding the role that race plays in their lives as Americans and West Virginians. To facilitate this discussion, this Note provides a historical background on race and racism in Appalachia and West Virginia for context.

In Part II, this Note will explain the history of blacks and whites in the southern Appalachian region. While race in America is often examined in terms of black, white, North, and South, the place of race in Appalachia is unique, as the southern mountaineer was often too poor to own slaves. Moreover, unlike the plantation rich areas of the South, where blacks make up a larger portion of the population, the Appalachian Mountains were and are primarily inhabited by whites. Thus, in order to accurately understand race and racism in Appalachia, it is important to understand the unique lives of the Mountaineer and how the whiteness of the Mountaineer shaped race relations in Appalachia. Furthermore, Part II will explain the cultural similarities between American blacks and Appalachian whites. The overall purpose of Part II is to provide both blacks and whites with a historical and factual context for conversations on race and racism in Appalachia.

In Part III, this Note will explain West Virginia's mixed and varied history involving race. Additionally, it will explain how race, racism, and black invisibility have influenced West Virginia's secession, formation, and laws. The combined histories and experiences outlined in Parts II and III should serve as empathetic starting points for conversations in the legal classroom regarding issues of race, racism, and American law.

In Part IV, this Note will discuss my personal experiences with race and racism as a native of West Virginia. Primarily, this Note will examine the most recent developments in West Virginia's race relations by discussing President Barack Obama's Democratic Primary run in the state. Part IV will explain how the Democratic electorate in West Virginia openly declared to pollsters and reporters that they were unwilling to support a black candidate for the American presidency.

In Part V, this Note will examine why West Virginians were more openly racist than any other voters during President Obama's Primary-bid. Part V will also explain how the overwhelming white population and lack of minority presence in West Virginia has allowed for white West Virginians to rely upon

media stereotypes of blacks, as many West Virginia whites are unfamiliar with black persons.

In Part VI, this Note will explain that because the history of race and racism in America has always been tied to a legal system, the American legal classroom is the perfect setting for courses and discussions involving race and racism. Because of the legal nature of racism in America, law schools should be required to facilitate discussions on race in every legal classroom.

In Part VII, this Note will explain how a new generation of white West Virginians can begin to understand how race and racism impacts them and their black counterparts. In fact, Part VII will explain that the openness and intimacy of the legal classroom offers the best place for discussions of race and racism in West Virginia. Lastly, this Note will specifically focus on the role of race and race based classes at the WVU College of Law.

## II. THE SIMILAR EXPERIENCES OF AMERICAN BLACKS AND WHITE APPALACHIANS

Although not legally secluded and segregated, Appalachians, through poverty<sup>10</sup> and geographical seclusion, have lived lives that share similarities with black persons in America. In fact, historically, both blacks and Appalachian whites were seen as inferior to Europeans who claimed to have “discovered” them. Such ideas of inferiority continue to this day. It is my hope that through an understanding of these similar stereotypes, whites in Appalachia and blacks have an empathetic starting point for conversations and open discussions on the role of race and racism in America, the Appalachian Mountains, and West Virginia. The historical explanations in each subpart of Part II should give historical context to the role of race and racism in Appalachia, because in order to change our future history, we must understand our past history.

### A. *Into the Mountains*

The story of blacks in America and Appalachian whites is a story of two groups who were perceived as “savages,” or a tale of stereotypes bestowed upon Appalachian whites and blacks by a group of whites who saw both as inferior.<sup>11</sup>

Geographically, the Appalachian Mountains, themselves, served as a block to westward settlement, as the mountains posed a “formidable barrier” to movement and expansion for those attempting to move westward.<sup>12</sup> Eventually,

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<sup>10</sup> INCOME, EARNINGS, AND POVERTY DATA FROM THE 2007 AMERICAN COMMUNITY SURVEY, U.S. CENSUS BUREAU (2008), *available at* <http://www.census.gov/prod/2008pubs/acs-09.pdf> [hereinafter INCOME, EARNINGS, AND POVERTY DATA]. According to the report, the top seven most impoverished states have one of two things in common. These states either fall within the Appalachian region, or these states have high minority populations. For example, the states with the highest poverty rates are: (1) Mississippi – 20.6%; (2) Louisiana – 18.6%; (3) New Mexico – 18.1%; (4) Arkansas – 17.9%; (5) Kentucky – 17.3%; (6) West Virginia and Alabama – 16.9%. *Id.* at 27. Of these states, West Virginia, Kentucky, and Alabama are within the Appalachian Mountains. *Id.* As for the remaining states, they all have very high minority populations. For example, Mississippi has a 37.1 percent black population. *See* U.S. CENSUS BUREAU, *supra* note 6. Additionally, Louisiana has a black population of 31.5 percent. *See id.* Alabama has a black population of 26.2 percent. *See id.* Lastly, Arkansas has a black population of 15.5 percent. *See id.* It is my belief that through commonalities and similar circumstances, white Appalachians and black Americans have the perfect starting point for discussions on race.

<sup>11</sup> BLACKS IN APPALACHIA 53 (William H. Turner & Edward J. Cabbell eds., 1985) [hereinafter BLACKS IN APPALACHIA]. *Contra* APPALACHIAN IMAGES IN FOLK & POPULAR CULTURE 2 (W.K. McNeil, ed., UMI Research Press 1989) (arguing that “there is no evidence to suggest that those settling the mountains were appreciably different from the rest of the nation’s population in the late eighteenth and early nineteenth century”).

<sup>12</sup> JACK E. WELLER, YESTERDAY’S PEOPLE LIFE IN CONTEMPORARY APPALACHIA 9 (The University Press of Kentucky 1995) (1965) [hereinafter YESTERDAY’S PEOPLE]; *see also* ALLEN W. BATTEAU, THE INVENTION OF APPALACHIA 3 (The University of Arizona Press 1990) [hereinafter BATTEAU]. In the 1800s, travel from the East Coast into the West, through the Appalachian Mountains, was difficult and the land was considered uninhabitable. *Id.*

settlers began to discover breaks in the mountain terrain of the Appalachian region, and in the late 1700s and early 1800s they began to leave the East Coast of the United States.<sup>13</sup> In part, these settlers migrated into the Appalachian Mountains because of the “increasing migration from overseas” and the swelling population of the East Coast.<sup>14</sup> One researcher of Appalachian history described these settlers as

more the perennial frontiersman, interested in freedom from the restraints of law, order, and a differing culture. These were often the people who had been embittered by civilized life in England and Scotland and had come to these shores in rebellion against the very kind of society which they found already entrenched on the eastern shore.<sup>15</sup>

Around 1820, transportation routes bypassed the Appalachian Mountains; thus, “in-migration” to the Appalachian Mountains ceased.<sup>16</sup> Accordingly, the isolation of the mountaineer began.<sup>17</sup> To a new and growing America in the mid 1800s, the people of Appalachia were seen as a primitive folk who were “untouched by the period’s excesses.”<sup>18</sup> Appalachians were also of interest to a growing and changing America because they were viewed as a class of humans who were isolated from modernization and society.<sup>19</sup> The people of what is now West Virginia were known for “valu[ing] their communities’ seclusion and self sufficiency.”<sup>20</sup> But with isolation and seclusion came stereotypes.

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<sup>13</sup> YESTERDAY’S PEOPLE, *supra* note 12, at 10.

<sup>14</sup> *Id.* at 9.

<sup>15</sup> *Id.* at 10.

<sup>16</sup> BLACKS IN APPALACHIA, *supra* note 11, at 54.

<sup>17</sup> See APPALACHIAN IMAGES, *supra* note 11, at 2; see also BLACKS IN APPALACHIA, *supra* note 11, at 54; John Alexander Williams, *Class, Section, and Culture in Nineteenth-Century West Virginia Politics*, in APPALACHIA IN THE MAKING: THE MOUNTAIN SOUTH IN THE 19TH CENTURY 214 (Mary Beth Pudup, Dwight B. Billings, & Altina L. Waller, eds., The University of North Carolina Press 1995) (stating that “West Virginians were united in that they faced to a greater or lesser extent common obstacles to movement and communication posed by their mountain home”) [hereinafter APPALACHIA IN THE MAKING].

<sup>18</sup> BLACKS IN APPALACHIA, *supra* note 11, at 55.

<sup>19</sup> *Id.* at 54; see also APPALACHIAN IMAGES, *supra* note 11, at 2.

<sup>20</sup> See Stephen D. Engle, *Mountaineer Reconstruction: Blacks in the Political Reconstruction of West Virginia*, 78 THE J. OF NEGRO HIST. 137, 138 (1993) [hereinafter *Mountaineer Reconstruction*].



B. *White and Black "Savages": A Tale of Two Stereotypes*

When Appalachians began to be "discovered"<sup>21</sup> they were viewed as "our modern ancestors," rather than equals — a people so secluded that one journalist wrote in the late 1800s that President George Washington would have looked upon the Appalachians and its people and remark, "At last here I find a part of the world as I left it."<sup>22</sup>

Tales of "lawlessness," "romance," and "family violence" between 1870 and 1905 initially drew attention to the people of the Appalachian Mountains.<sup>23</sup> These tales appeared on the front pages of newspapers in the country, and over time these tales became cultural stereotypes.<sup>24</sup> When folklorists, newspaper reports, sociologists, literary works, historians, and geographers described the people of the Appalachian Mountains, the descriptions were similar to descriptions of black "slave conditions in the Antebellum South."<sup>25</sup>

One minister found the people 'the worst housed, worst fed, most ignorant most immoral' of any he had encountered. Others stressed the presence of homes that were mere hovels, of windowless log cabins with only one or two rooms. They told of a religious people, but one who believed in spells and witchcraft. Some writers termed the food deplorable and the speech patterns difficult to understand. Lazy, shiftless men and hard-working women inhabited this world. Their melancholy folk songs with origins across the ocean helped to lighten the burdens of everyday life and served as an emotional outlet. It was a closed, 'peculiar' society.'<sup>26</sup>

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<sup>21</sup> The term "discover" and "discovery" do not literally mean that people of the Appalachian region were unknown in other parts of the U.S. Rather, "discovery" is a term used to reflect the idea that those who came across the Appalachians believed that they were superior to the mountain people who were less than "human" — a "savage" group.

<sup>22</sup> BLACKS IN APPALACHIA, *supra* note 11, at 54. Even as late as 1930, the Appalachian region was described as a place "[c]ut off from the outside world, [where] change penetrated the Mountains slowly or not at all, so that the group adhered to . . . pioneer standards of living and perpetuated the customs and expressions of a bygone day long after they had disappeared elsewhere." *Id.*

<sup>23</sup> BLACKS IN APPALACHIA, *supra* note 11, at 52 (quoting diaries from whites in Appalachia).

<sup>24</sup> BLACKS IN APPALACHIA, *supra* note 11, at 52; *see also* BATTEAU, *supra* note 12, at 2; APPALACHIAN IMAGES, *supra* note 11, at 3.

<sup>25</sup> BLACKS IN APPALACHIA, *supra* note 11, at 51.

<sup>26</sup> *Id.*

Southern blacks, both during and after slavery, faced similar stereotypes and descriptions as those of white Appalachians.<sup>27</sup> For example, whites often described blacks as “lazy but wily people” who were inferior — a “savage people.”<sup>28</sup> But America had stereotypes of white “savages,” as well; in fact, white Appalachians were described as “later barbarians” and “no better than barbarians” — a people who had “inscrutable,” emotionless faces.<sup>29</sup> When Arnold J. Toynbee, an anthropologist, described the Appalachian people he claimed that:

the Appalachian ‘mountain people’ to-day are no better than barbarians. They have relapsed into illiteracy and witchcraft. They suffer from poverty, squalor and ill-health. They are the American counterparts of the latter-day White barbarians of the Old World . . . but, whereas these [Old World barbarians have evolved], the Appalachians present a melancholy spectacle of a people who have acquired civilization and then lost it.<sup>30</sup>

According to James C. Klotter, who wrote *The Black South and White Appalachia*, “[s]ubstitute ‘Negro’ for ‘mountaineer’ in these accounts, and they would not differ greatly from those offered by the antebellum southern traveler or planter, or the postwar Bourbon.”<sup>31</sup> These were not the only stereotypes that the whites of Appalachia shared with blacks. In fact, both blacks and Appala-

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<sup>27</sup> *Id.*; see also Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 35 n.134 (1990) (“It is clear that among Englishmen there was indeed a vague prejudice against blacks even before the first colonists set foot in North America. As a result of early contacts with Africa, Englishmen tended to associate blackness with savagery, heathenism, and general failure to conform to European standards of civilization and propriety.”).

<sup>28</sup> BLACKS IN APPALACHIA, *supra* note 11, at 52.

<sup>29</sup> *Id.* at 54. Some writers discussing Appalachians claimed that the Appalachian “is more of a genuine barbarian and closer related in instincts, habits and morals to the Huns and the Visigoths that hung on the girdle of Rome and drove arrows into the bosom of Mother of the world, than would appear on first thought.” *Id.* However, not every commentator saw Appalachian whites as savages or barbarians. While some commentators did see Appalachians as barbaric and primitive, some commentators took a more romantic view of mountain life. See generally Henderson Dain-gerfield Norman, *The English of the Mountaineer*, 105 THE ATLANTIC MONTHLY 276 (1910); see also John Fox, Jr., *The Southern Mountaineer*, Vol. XXIX SCRIBNER’S MAGAZINE 556, 556 (Jan.–June 1901). Fox wrote that “[Appalachians’] speech, while as archaic as elsewhere, is, I believe, purer.” *Id.* Compare to ANTHONY HARKINS, HILLBILLY: A CULTURAL HISTORY OF AN AMERICAN ICON, (Oxford University Press 2005) (discussing the cultural stereotypes of Appalachians as “hillbillies,” “back-woods” types, and “white-trash” from the early 1900s to present day).

<sup>30</sup> ARNOLD J. TOYNBEE & DAVID CHURCHILL SOMERVELL, A STUDY OF HISTORY: ABRIDGEMENT OF VOLUMES I–VI, vol. II 149 (David Churchill Somervell ed., Oxford University Press U.S. 1987) (1957).

<sup>31</sup> BLACKS IN APPALACHIA, *supra* note 11, at 52.

chian whites were described to outsiders as groups which promoted premarital sexual relationships<sup>32</sup> and who feasted on watermelons.<sup>33</sup>

C. *The Housing Conditions of Blacks and Appalachian Whites*

Blacks in America and Appalachian whites have historically shared more than stereotypes. In fact, blacks and Appalachian whites had similar socio-economic standing, as well. The epidemic of poverty which has disproportionately impacted both Appalachian whites and blacks in America has shaped the lives of both groups. For example, in the years following slavery, both blacks and Appalachian whites lived in homes of similar make. White Appalachians were described to have lived in tiny "huts" with very few windows.<sup>34</sup> Appalachian "huts" had dirt floors, and the homes were occupied by large families.<sup>35</sup> One author described the cabin of the mountaineer as a home "[b]uilt for service rather than appearance."<sup>36</sup>

Similarly, black housing during the Reconstruction period was described as "cramped, crudely built, scantily furnished, unpainted, and dirty."<sup>37</sup> The flooring in black homes was often considered crude.<sup>38</sup> Additionally, in black homes, five or six family members normally shared the same tiny dwelling.<sup>39</sup> Some reports even show that two to three blacks in the South shared the same bed.<sup>40</sup> When comparing the homes of blacks and white Appalachians, one historian stated that "the home of the poor white and the cabin of the Negro slave varied little in size or comfort."<sup>41</sup>

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<sup>32</sup> See YESTERDAY'S PEOPLE, *supra* note 12, at 70-71. White Appalachians were described in YESTERDAY'S PEOPLE as a group for whom "[i]llegitimacy is common and is more accepted than it is in middle class society." *Id.* From Klotter's own research, blacks were also described as a group that did not ostracize the children born of "illegitimacy." See BLACKS IN APPALACHIA, *supra* note 11, at 53 (referencing YESTERDAY'S PEOPLE, *supra* note 12).

<sup>33</sup> BLACKS IN APPALACHIA, *supra* note 11, at 52. A writer described Kentucky mountaineers as a group who "loved watermelons so much that they never counted them as part of the meal." *Id.*

<sup>34</sup> *Id.* at 53. Moreover, Klotter claims that an American Missionary Association worker during the 1800s described the Appalachian home as an almost "universal log cabin." *Id.* at 57-58.

<sup>35</sup> *Id.* at 53.

<sup>36</sup> JOHN C. CAMPBELL, THE SOUTHERN HIGHLANDER & HIS HOMELAND 72 (The University Press of Kentucky 1969).

<sup>37</sup> BLACKS IN APPALACHIA, *supra* note 11, at 53.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> CARTER GODWIN WOODSON, THE RURAL NEGRO 3 (The Association For The Study Of Negro Life And History, Inc. 1930).

<sup>41</sup> BLACKS IN APPALACHIA, *supra* note 11, at 5 (quoting Avery O. Craven, *Poor Whites and Negroes in the Ante-Bellum South*, J. OF NEGRO HIST. 15 (Jan. 1930)); see also WOODSON, *supra* note 40, at 3. In describing the housing conditions of rural blacks in the American South, an author described that "cracks and holes in the walls of their huts" was common for freed slaves' housing conditions. *Id.* at 3-4 (citing Epstein, THE NEGRO MIGRANT IN PITTSBURGH; THE NEGRO IN CHICAGO 192).

D. *The "Importance" of Color: Blacks Were Black and Appalachians Were White*

In the late 1800s, the missionary movement in America had two groups that it attempted to save: blacks and Appalachian Whites. Appalachians were of interest to missionaries because of the "influx" of European immigrants coming to America in the late 1800s. In fact, to Americans who feared the change that immigrants would bring, Appalachia, in all of its isolation and untouched attributes, became a "haven of refuge and a place of hope" because it presented a place where almost the entire population was white and American.<sup>42</sup>

Additionally, during the mid 1800s, authors also took on the cause of the Appalachian by focusing literary works on the Appalachian region and its people.<sup>43</sup> Many of these authors romanticized the life of the "down-trodden" Appalachian white.<sup>44</sup> In doing so, these authors attempted to ensure what they perceived to be "the survival of an Anglo-Saxon race threatened by immigrant hordes."<sup>45</sup> The interest in the Appalachian white was fueled by his whiteness. In fact, according to some accounts, Appalachians were seen as a "purer stock" of Americans, unlike the newly arrived immigrants.<sup>46</sup> Appalachians were even described as the "backbone" of the white, American race.<sup>47</sup>

While literary and missionary attention was placed on Appalachian whites, missionaries also took an interest in blacks in the South during this same period of time.<sup>48</sup> In a paternalistic manner, some missionaries and abolitionists believed that blacks could be saved through education because "[t]he graces of civilization would make them competent citizens in white society."<sup>49</sup>

But black suffrage did not come over night, and paternalism became more similar to racism than to nurturing.<sup>50</sup> Eventually, missionaries and disillusioned Union-sympathizers grew tired of waiting for blacks, in their opinion, to "change" and "advance" — to become less "savage" and more like them.<sup>51</sup> By this point in American history, the Civil War had ended, and blacks were consi-

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<sup>42</sup> BLACKS IN APPALACHIA, *supra* note 11, at 55. At one point, Appalachia was seen as a turf for American spiritual warfare on the side of Protestantism. *Id.* at 56.

<sup>43</sup> See BATTEAU, *supra* note 12, at 15.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> BLACKS IN APPALACHIA, *supra* note 11, at 56.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (stating that what little Union support of blacks was left involved whites who emphasized the importance of segregated education).

dered “freedmen.”<sup>52</sup> “Freedmen,” however, was a misnomer that meant nothing more than slavery was abolished. Jim Crow began to dominate the South, ensuring that blacks were still socially and legally inferior.<sup>53</sup> However, abolitionists grew tired of advancing the needs and suffrage of black Americans; in fact, by the turn of the century, “few whites inside or outside the South were in a mood to protest very strongly” against the legal and societal inequalities bestowed upon blacks.<sup>54</sup> Instead, “[t]ired white idealists could at last retire from their labors with a good conscience, and when the Negro, even with the vote, failed to improve his lot very much, many of these idealists could but reflect that perhaps they all along had overestimated [the] capabilities [of blacks].”<sup>55</sup>

Disappointment with blacks, a drive to exert white paternalism on some group, and white “savages” in the form of Appalachians created the perfect opportunity for the focus to be taken off of black equality and freedom in favor of white Appalachians.<sup>56</sup> In many respects, the missionaries who had earlier led the movement to civilize blacks who they saw as inferior found that Appalachian whites “resembled blacks in their needs, their lives and their living conditions.”<sup>57</sup> Additionally, white non-Appalachians found that mountain folk, much like blacks, needed non-mystic religions and education.<sup>58</sup> Ultimately, the goal was to civilize what a white supremacist culture saw as an untamed people.<sup>59</sup> Thus, in Appalachia, the same “reformers” who tried to exert their own racist and paternalistic help for blacks had now moved on to a different group: Appalachian whites — a group which they believed might be “capable” of being saved — a group that was white.<sup>60</sup>

Overall, the missionary movement changed its focus to white Appalachians. Instead of being seen as similar to blacks, the whiteness of the mountaineer was the key to the missionaries who believed that white Appalachians were in need of reformation and rehabilitation. Upon visiting the Appalachian Moun-

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<sup>52</sup> *Id.* (quoting JAMES M. MCPHERSON, *THE ABOLITIONIST LEGACY: FROM RECONSTRUCTION TO THE NAACP* 161 (Princeton Univ. Press, 1975); RICHARD N. CURRENT, ED., *RECONSTRUCTION IN RETROSPECT: VIEWS FROM THE TURN OF THE CENTURY* vi (La. State Univ. Press, 1969).

<sup>53</sup> STETSON KENNEDY, *JIM CROW GUIDE TO THE U.S.A: THE LAWS, CUSTOMS AND ETIQUETTE GOVERNING THE CONDUCT OF NONWHITES AND OTHER MINORITIES AS SECOND-CLASS CITIZENS* 7 (Greenwood Press Publishers 1959). “[D]espite the affirmation of the American Declaration of Independence that all men are created equal, in America in reality some are more equal than others [sic].” *Id.*

<sup>54</sup> *BLACKS IN APPALACHIA*, *supra* note 11, at 57 (quoting MCPHERSON, *supra* note 52, at 161; CURRENT, *supra* note 52, at vi); *see also* INSCOE, *supra* note 9, at 16–17.

<sup>55</sup> *BLACKS IN APPALACHIA*, *supra* note 11, at 57 (quoting MCPHERSON, *supra* note 52, at 161; CURRENT, *supra* note 52, at vi); *see also* INSCOE, *supra* note 9, at 16–17.

<sup>56</sup> *BLACKS IN APPALACHIA*, *supra* note 11, at 57; *see also* INSCOE *supra* note 9, at 16–17.

<sup>57</sup> *BLACKS IN APPALACHIA*, *supra* note 11, at 57.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

tains, one man behind the movement to “civilize” Appalachian whites stated that Appalachians were not like blacks because “they have our best blood in their veins and yet . . . have been overlooked and left behind . . . .”<sup>61</sup> Moreover, unlike blacks, Appalachian whites were not connected to slavery; instead, whites who were interested in “educating” and “civilizing” Appalachian whites viewed the Appalachians as “savages” or “barbarians” who were isolated from the rest of society. However, to these whites, the Appalachian whites were unlike black savages because they shared “our own [white] blood and language.”<sup>62</sup>

### E. Conclusion

Appalachians stayed in poverty.<sup>63</sup> Black persons were still not truly free. And stereotypes for the two groups stayed intact.<sup>64</sup> To the rest of America, both Appalachian whites and blacks in America were viewed as different, somehow. Despite analogous stereotypes and conditions shared by blacks and Appalachian whites, the two groups have never been viewed as having a unified front. No matter how similar their circumstances and stereotypes may have been, the Appalachians were white, and the blacks were black.<sup>65</sup> In America, color and race have always made all of the difference. Ultimately, it appears that the “discovery” of Appalachia, combined with an influx of immigrants to America, the perceived slow progress of blacks following the Civil War, and the paternalistic and racist American missionary movement all contributed to the shift from efforts to assist blacks in America to an effort to assist Appalachian whites. Appalachian whites, who were considered “only black people in white skins,”<sup>66</sup> gave America a more similar savage — one it considered worthy of “assistance.” However, much like blacks in American society, the Appalachian white was easily forgettable, too.

While white Appalachians can never claim that societal prejudices have impacted their lives in the same way as those of their black counterparts, both white Appalachians and blacks were seen as inferior groups to a group of whites who believed they were superior. Blacks were seen as inferior because of color, race, the vestiges of slavery, and America’s racist laws designed to keep blacks separate from white society. Appalachian whites were inferior because of their

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<sup>61</sup> *Id.* at 58.

<sup>62</sup> *Id.* at 59.

<sup>63</sup> *Id.*; see INCOME, EARNINGS, AND POVERTY DATA, *supra* note 10 (explaining the present role of poverty in the lives of Appalachians and black Americans).

<sup>64</sup> See *infra* Part IV for a discussion of Barack Obama and cultural stereotypes of white Appalachians; see The Associated Press-Yahoo Poll Wave 6, In Partnership With Stanford University, Knowledge Networks (Aug. 27, 2008–Sept. 5, 2008) (explaining whites’ views of blacks in America) (on file with author). In the poll, a majority of whites responded that they consider blacks to be violent, lazy, and irresponsible. *Id.*

<sup>65</sup> BLACKS IN APPALACHIA, *supra* note 11, at 51.

<sup>66</sup> *Id.* at 62.

isolation and poverty. Thus, in order to really discuss and understand the role of race and racism in the Appalachian region, all must understand the history discussed in this part. Moreover, such an understanding allows for blacks and whites to have an empathetic starting point for discussions of race and racism.

### III. UNION BY NAME, CONFEDERACY BY PRACTICE: RECONSTRUCTION AND JIM CROW IN WEST VIRGINIA

While West Virginia is the only state whose boundaries are within the Appalachian region, West Virginia has a distinct history from the Appalachian region on the whole, especially regarding race and racism. Moreover, because West Virginia has a small black population and a comparatively large white population, it may be difficult to understand the role that race and racism played and continues to play in the Mountain State. However, in the 1800s, race played a role in West Virginia's laws and culture when blacks were denied seats on juries when the defendant was black. In 2008, race played a role in West Virginia when whites stated that they would not support a black candidate for President.

What follows is a discussion of West Virginia's secession from Virginia during the Civil War and the role that race and black invisibility played in the formative years of the state's existence. This historical examination of West Virginia's history of race and racism provides the context of the role that race and racism continues to play in the Mountain State.

#### A. *The Motivations for Seceding*

No discussion of race in America can take place without examining the Civil War. And no discussion of West Virginia history can be explained without a discussion of the Civil War, for West Virginia was literally formed out of the battle between the Union and the Confederacy.<sup>67</sup> West Virginia, as it exists today, was once a part of the state of Virginia.<sup>68</sup> Thus, the western portion of Virginia that is now West Virginia was once part of the Confederacy.<sup>69</sup> Throughout Virginia's history, the portion of the state that makes up "the heart of the future state of West Virginia" and the southwestern portion of Virginia,

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<sup>67</sup> See *Mountaineer Reconstruction*, *supra* note 20, at 137 (stating that "West Virginia was a child, if not a stepchild, of the Civil War and Reconstruction").

<sup>68</sup> See W. VA. CONST. art. XI, § 8. [as appears in the W. VA. CODE (1870)]. It is important to note that Virginia's laws, unless otherwise amended, were good law under the West Virginia Constitution. *Id.* "Such parts of the common law and of the laws of the State of Virginia are in force within the boundaries of the State of West Virginia, when this constitution goes into operation, and are not repugnant thereto, shall be and continue of this state unless altered or repealed by the Legislature." *Id.*

<sup>69</sup> *Mountaineer Reconstruction*, *supra* note 20, at 137.

were considered distinct.<sup>70</sup> In the southwestern portion of present day West Virginia, “slavery occupied a central place in the southwestern society.”<sup>71</sup> Conversely, the northwestern portion of Virginia, now northern West Virginia, was considered “free territory.”<sup>72</sup>

In April 1861, Unionists met in the Northern Panhandle of the area now known as Wheeling, West Virginia in order to secede from the Confederacy and the state of Virginia.<sup>73</sup> By June 1863, the western portion of Virginia — the Appalachian region of Virginia — was recognized as its own, separate, Union state: West Virginia.<sup>74</sup> Recognition by the Union, though, came at a price. West Virginia would be required to abolish slavery.<sup>75</sup> Accordingly, the West Virginia Legislature adopted a measure stating that blacks who were born after July 4, 1863 would be free.<sup>76</sup> Following this move by the state’s legislature, Frederick Douglass claimed that “slavery . . . [had been] stunned nearly to death in Western Virginia.”<sup>77</sup>

Unionists in West Virginia had motivations to secede from the Confederacy and Virginia, although many of these motivations had little to do with opposition to slavery. Instead, Unionists in West Virginia were “resentful of the antebellum elite” in Virginia,<sup>78</sup> did not like Virginia’s slave taxation scheme, and had little empathy concerning blacks in the state. At this point in West Virginia’s history, blacks comprised five percent of the state’s population.<sup>79</sup> As for slavery in the portion of western Virginia that became West Virginia, the *New York Times* reported in March 1875, that, at one point, slave-owners in West

<sup>70</sup> Kenneth W. Noe, “A Source of Great Economy?” *The Railroad and Slavery’s Expansion in Southwest Virginia, 1850–1860*, in APPALACHIANS AND RACE 101, 103 (John C. Inscoe ed., The University Press of Kentucky 2001) [hereinafter APPALACHIANS AND RACE].

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See generally A DECLARATION OF THE PEOPLE OF VIRGINIA, W. VA. CODE (1870) at 18–19; see also *Mountaineer Reconstruction*, *supra* note 20, at 137.

<sup>74</sup> *Mountaineer Reconstruction*, *supra* note 20, at 137.

<sup>75</sup> *Id.*

<sup>76</sup> W. VA. CONST. art. XI, § 7 [as appears in W. VA. CODE (1870)].

The children of slaves born within the limits of this State after the fourth day of July, eighteen hundred and sixty-three [1863], shall be free; and all slaves within the said State who shall, at the time aforesaid, be under the age of ten years, shall be free when they arrive at the age of twenty-one years and all slaves over ten and under twenty-one years, shall be free when they arrive at the age of twenty-five years; and no slave shall be permitted to come into the State for permanent residence therein.

*Id.* In its original form, this passage did not allow “free person[s] of color” to come into West Virginia for permanent residence. *Id.*; see also *Mountaineer Reconstruction*, *supra* note 20, at 137.

<sup>77</sup> *Mountaineer Reconstruction*, *supra* note 20, at 137.

<sup>78</sup> *Id.* at 138.

<sup>79</sup> *Id.*



Virginia held more than 20,000 slaves.<sup>80</sup> For example, in the southern portion of present day West Virginia, known as the Kanawha Valley, slavery reached its peak in the salt mine industry in the 1850s.<sup>81</sup> In 1863, when West Virginia became a state, “a majority of West Virginia blacks were still in slavery[.]”<sup>82</sup> These slaves were owned by only one-twentieth of the state’s population and were “a source of more expense and trouble than profit”<sup>83</sup> because of Virginia’s slave taxation. Under Virginia law, after a slave became twelve years old, he or she was taxed as property.<sup>84</sup> Virginia’s slave taxation scheme required that slaves “be assessed with a tax equal to and not exceeding that assessed on land of the value of three hundred dollars.”<sup>85</sup> The *New York Times* also reported that while West Virginians may not have owned many slaves, compared to other slave states, the state’s occupants made up for their lack of slaveholdings in racism:

Although nineteen-twentieths of West Virginians owned no slaves, they obsequiously aped the other twentieth in their prejudice against the poor black and the hard labor he performed. The truth is that it was not against slavery that the complaints of West Virginians were directed [when arguing for secession], but against taxation for which they cherished an innate aversion, and of which they felt they were being paid more than a legitimate share.<sup>86</sup>

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<sup>80</sup> An Occasional Correspondent, *West Virginia Politics. Cause of the So-Called Reaction. Politics Before, During and Since the Rebellion — The State Government and Congressional Delegation — Prospects of a Change*, N.Y. TIMES, Mar. 22, 1875, at 8 [hereinafter *West Virginia Politics*]. According to this report, West Virginians considered slaves to be “a source of more expense and trouble than profit[.]” *Id.*; see also *Mountaineer Reconstruction*, *supra* note 20, at 138.

<sup>81</sup> John E. Stealey, III, *Slavery in the Kanawha Salt Industry*, in APPALACHIANS AND RACE, *supra* note 70, at 53–54. The highest number of slaves owned in Kanawha County was 3140. *Id.* at 55. In fact, “[w]hile slaveholding in southwest Virginia was not as extensive as it was in the nonmountain portions of the South, of all sections of the southern mountain region, southwest Virginia was among the leaders in the most slaves and the most slaveholders.” Noe, in APPALACHIANS AND RACE, *supra* note 70, at 103. In 1850, 11.2 percent of householders were slaveholders, and most owned around three slaves. *Id.*

<sup>82</sup> *Mountaineer Reconstruction*, *supra* note 20, at 141.

<sup>83</sup> See *West Virginia Politics*, *supra* note 80.

<sup>84</sup> VA. CONST. art. 4, § 23 [as appears in VA. CODE (1860)]. “Every slave who has attained the age of twelve years shall be assessed with a tax equal to and not exceeding that assessed on land of the value of three hundred dollars. Slaves under that age shall not be subject to taxation . . . .” *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *West Virginia Politics*, *supra* note 80; see also *Mountaineer Reconstruction*, *supra* note 20, at 137. With my experience in West Virginia’s public schools, it was common in West Virginia for people to romanticize the reasons why the state left the Confederacy. In fact, I was taught that

However, even among the mountain people of what was once Virginia, anti-slavery groups existed.<sup>87</sup> Overall, West Virginia's secession and Unionization had more to do with taxation than morality.

Nevertheless, on February 3, 1865, West Virginia became the first southern state to abolish slavery by adopting the proposed federal Thirteenth Amendment.<sup>88</sup> The state's abolition of slavery, though, did not mean that blacks were truly free or equal to their white counterparts. In fact, West Virginia's Reconstruction was "a struggle between conservative whites and liberal whites with blacks becoming the object of abuse and political leverage."<sup>89</sup> Black freedom in West Virginia was stifled by both West Virginia's own laws and the laws of Virginia that West Virginia used for its own government. As an example of inequality in West Virginia, black West Virginians, in 1865, could neither hold elected office nor vote.<sup>90</sup> While black West Virginians had to live under West Virginia's racist laws, the West Virginia Legislature did attempt to repeal some of the laws from Virginia that infringed upon black civil rights, such as laws that made gatherings of five slaves illegal<sup>91</sup> and a law that did not allow a freed black person who left the state to return to the state once he left.<sup>92</sup>

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West Virginia seceded from the Confederacy because of moral opposition to slavery. For a discussion on other Appalachian states and the role of race and racism in those states, see INSCOE, *supra* note 9, at 25. Such racism, however, was not exclusive to West Virginians. *Id.* Between 1853 and 1854, Frederick Law Olmstead, a journalist from New York reported from the South. *Id.* Olmstead traveled through Georgia, Tennessee, North Carolina, and Virginia. *Id.* Olmstead found that even in areas where poor whites did not own slaves, they still harbored prejudices toward black slaves. *Id.* According to one of Olmstead's reports, a man from the mountainous region of Tennessee had "always wished there hadn't been any niggers [there]." *Id.* Olmstead also interviewed a woman from the Tennessee mountains. *Id.* Once Olmstead explained to her that blacks were free in New York, she stated that "I wouldn't want to live where niggers are free." *Id.* She went on to state that "If they was to think themselves equal to we, I don't think white folks could abide it — they're such vile saucy things." *Id.*

<sup>87</sup> Richard B. Drake, *Slavery and Antislavery in Appalachia*, in APPALACHIANS AND RACE, *supra* note 70, at 22.

<sup>88</sup> *Mountaineer Reconstruction*, *supra* note 20, at 137.

<sup>89</sup> *Id.* at 141. In fact, "[m]any white political leaders assumed that blacks confronted freedom unprepared for the responsibilities." *Id.*

<sup>90</sup> *Id.* at 140.

<sup>91</sup> VA. CODE ch. 198, §§ 34–35 (1860). "... [A]ny person who shall so permit more than five such slaves to be at one time on his plantation, lot or tenement, shall be fined one dollar for each slave above that number, and such assemblage shall be an unlawful assembly." *Id.* at § 34; see also *id.* at § 35 which stated that "[e]very assemblage of negroes for the purpose of religious worship when such worship is conducted by a negro, and every assemblage of negroes for the purpose of instruction in reading or writing, or in the night time for any purpose, shall be an unlawful assembly." *Id.* at § 35.

<sup>92</sup> See VA. CODE ch. 198, §§ 32–33 (1860). According to § 33, "[i]f a free negro migrate[d] from [Virginia] . . . and returned into [Virginia]" he or she would be subject to the provisions of § 32. Under § 32, he would be required to leave the state within ten days and not return. See also *Mountaineer Reconstruction*, *supra* note 20, at 141.

B. *Black Invisibility and Reconstruction*

During the second year of Reconstruction, black civil rights in West Virginia began to slowly improve. The extension of rights to blacks, however, was not without controversy. For example, in February 1866, blacks received the right to testify against whites in West Virginia courts.<sup>93</sup> Before this action was taken, under Virginia law, blacks had only been considered competent to serve as witnesses in cases involving other blacks.<sup>94</sup> This legislation was supported by legislators who lived in regions of the state where the black population was at its highest. For example, representatives of regions where the black population was the highest in the state, such as the Kanawha River Valley, the Monongahela River Valley, and the Eastern and Northern Panhandles, supported the legislation.<sup>95</sup> However, conservative whites opposed this extension of rights afforded to blacks. In fact, most of the opposition to black testimony against whites came from areas in the state where the black population was virtually non-existent or very small.<sup>96</sup> Thus, even in the 1800s, black invisibility bred fear in West Virginia.

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<sup>93</sup> W. VA. CODE ch. 130, § 24 (1870). “No person shall be incompetent as a witness on account of race or color.” *Id.* It is important to note that while the code’s reference year is 1870, the code was actually printed in 1868, and received by the Library of Congress in 1871. See also *Mountaineer Reconstruction*, *supra* note 20, at 142.

<sup>94</sup> VA. CODE ch. 176, § 20 (1860): “A negro or indian shall be a competent witness in a case of the commonwealth for or against a negro or indian, or in a civil case to which only negroes or indians are parties, but not in any other case [sic].”

<sup>95</sup> *Mountaineer Reconstruction*, *supra* note 20, at 142–43. The Kanawha River valley is home to the state capitol of Charleston, West Virginia. Additionally, the Monongahela River Valley, in the north-central portion of the state, is home to West Virginia University and the West Virginia University College of Law. The Northern Panhandle of the state is close to both Ohio and Pennsylvania. Lastly, the Eastern Panhandle has become a commuter haven to the Washington, D.C. area.

<sup>96</sup> *Id.* at 142.

C. *The Universal Suffrage Misnomer*

By 1869, West Virginia ratified the Fifteenth Amendment.<sup>97</sup> Black suffrage had come to West Virginia, and it came at the same time when ex-Confederates could not vote.<sup>98</sup> This led white Republicans and blacks in West Virginia to become an unlikely political pairing.<sup>99</sup> The Republicans were the party of Reconstruction, and Reconstruction was especially important to the newly formed state of West Virginia. At the same time, Reconstruction was vital to blacks, as it freed them from slavery. But West Virginia was still below the Mason-Dixon Line, a Southern state, with a large amount of support for the former Confederacy. To many whites in West Virginia and the Appalachian region, the fact that blacks could vote, but white former-Confederates could not, led to political turmoil.<sup>100</sup> “Universal suffrage” became the cause of white Democrats and discontented Republicans who did not want to see white men, even if they were former-Confederates, denied the right to vote when blacks were now allowed to play a role in the political process.<sup>101</sup> This was especially important to whites in the state because in West Virginia, ex-Confederates made up one quarter of the eligible voting population.<sup>102</sup> Moreover, in some West Virginia counties where ex-Confederates made up a significant portion of the population, nearly 85 percent of the eligible voting population could not vote.<sup>103</sup>

While ex-Confederates were pushing for universal suffrage, the Ku Klux Klan in West Virginia capitalized on the concerns of whites in West Virginia who feared that the black population was growing.<sup>104</sup> During this same period of time, black laborers who moved into West Virginia were seen as “threatening the white labor market” by accepting less pay than white workers were willing to take for the same jobs.<sup>105</sup>

The “universal suffrage” movement gained momentum in 1869 when the state Democratic party found a political means of using black suffrage and

<sup>97</sup> *Id.* at 144.

<sup>98</sup> W. VA. CONST. art. III, § 1 (1870) [as appears in the W. Va. Code (1870)]: “No person who, since the first day of June, one thousand eight hundred and sixty-one, has given, or shall give, voluntary aid or assistance to the rebellion against the United States, shall be a citizen of this State, or allowed to vote at any election therein.” *See also* APPALACHIANS AND RACE, *supra* note 70, at 201.

<sup>99</sup> Richard B. Drake, *Slavery and Antislavery in Appalachia*, in APPALACHIANS AND RACE, *supra* note 70, at 200. Similar pairings between white, mountain Republicans and blacks happened in other Appalachian states like Tennessee, North Carolina, and Kentucky. *Id.*

<sup>100</sup> *See Mountaineer Reconstruction*, *supra* note 20, at 147.

<sup>101</sup> APPALACHIANS AND RACE, *supra* note 70, at 201–02.

<sup>102</sup> *See Mountaineer Reconstruction*, *supra* note 20, at 147.

<sup>103</sup> *Id.* at 145.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

West Virginia Republicans to ensure that ex-Confederates could vote.<sup>106</sup> In 1869, the West Virginia legislature passed an amendment to the state constitution that allowed all males twenty-one years of age or older to vote in West Virginia.<sup>107</sup> This Amendment was popular among Republicans and black suffragists as it ensured that black males could vote in West Virginia.<sup>108</sup> However, the amendment was also popular to West Virginia Democrats, who by supporting an amendment that would allow blacks to vote in the state, also guaranteed the rights of white ex-Confederates to vote.<sup>109</sup> Thus, the “universal suffrage” movement allowed more than 20,000 ex-Confederates to vote in West Virginia, as compared to the enfranchisement of only 3500 black males.<sup>110</sup>

*D. West Virginia v. Strauder: The Beginning of Jim Crow; the Beginning of Freedom*

Later in the Reconstruction period, 1872, a hallmark case of black disenfranchisement came in the form of *West Virginia v. Strauder*. On May 20, 1872, Taylor Strauder, a black man, was indicted for murdering his wife.<sup>111</sup> But under West Virginia law, blacks could not serve on juries.<sup>112</sup> Because of West Virginia’s law, Strauder believed that as a black man, he could not receive a fair trial — free from prejudice — by an all white jury.<sup>113</sup> Based on his belief that he could not receive a fair trial, Strauder sought to remove his case to the federal courts.<sup>114</sup> The case was not removed, and Strauder was found guilty of murder and sentenced to death by hanging.<sup>115</sup> Strauder appealed.

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<sup>106</sup> *Id.* at 148.

<sup>107</sup> W. VA. CONST. art. IV, § 1 [as appears in W. VA. CODE (1884)]: “The *male citizens* of the State shall be entitled to vote at all elections held within the counties in which they respectively reside [emphasis added].” See also *Mountaineer Reconstruction*, *supra* note 20, at 148.

<sup>108</sup> *Mountaineer Reconstruction*, *supra* note 20, at 148.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> State v. Strauder, 11 W. Va. 745 at Syl. Pt. 1 (W. Va. 1877).

<sup>112</sup> 1872–73 W. Va. Acts 102. “All white male persons, who are twenty-one years of age, and not over sixty, and who are citizens of this state, shall be liable to serve as jurors . . . .” *Id.*

<sup>113</sup> *Strauder*, 11. W. Va. at 775, 784–85. Accordingly, Strauder prayed that the court would remove his case to the United States Circuit Court. *Id.* at 801.

<sup>114</sup> *Id.* at 801.

<sup>115</sup> *Id.* at 745 Syl. Pt. 1.

When the West Virginia Supreme Court of Appeals heard Strauder's case, the majority opinion stated that "the mere prohibition of negroes to sit upon the jury which tried him can not be regarded as the denial of equal protection of the laws to him [sic]."<sup>116</sup> Additionally, the majority argued that even if racial prejudice existed in West Virginia, and even if that prejudice impacted the jury's decision making, "this gives [Strauder] no right to have the trial of his case removed to the Federal court."<sup>117</sup> Ultimately, the Court stated that "I can not see why a jury of white men would not be quite as likely to do justice to the prisoner as a jury of negroes; but if it were otherwise, it would give him no right to have his case removed to the Federal court for trial."<sup>118</sup>

The United States Supreme Court, however, viewed Taylor Strauder's case differently. In fact, Justice Strong's majority opinion in *Strauder* served as one of the first Supreme Court decisions to apply the Fourteenth Amendment to cases involving the unequal treatment of blacks.<sup>119</sup> According to the majority opinion:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impe-

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<sup>116</sup> *Id.* at 816-17. The majority opinion went on to state the following:

The negro has no more right to insist upon the equal protection of the laws, than a Chinaman or a woman. And surely it will not be pretended that a State, which by its laws, prohibits a Chinaman or a woman from sitting on a jury, does thereby deny to a Chinaman or woman, who is being tried for a felony the equal protection of the laws.

*Id.* at 817.

<sup>117</sup> *Id.* at 818.

<sup>118</sup> *Id.* at 818-19.

<sup>119</sup> *Strauder v. West Virginia*, 100 U.S. 303 (1879). Even though Justice Strong clearly made the right ruling, his majority opinion should not be romanticized as an opinion that broke new barriers when dealing with race and racism in American law. In fact, his majority opinion contains racist and paternalistic reasons for extending the Fourteenth Amendment protections to blacks denied the right to serve on juries. *Id.* At one point in his opinion, Justice Strong writes that the Fourteenth Amendment was designed for blacks so that they could enjoy "all the civil rights that the superior race enjoy." *Id.* at 306. Moreover, Justice Strong also states the following:

The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident.

*Id.* I highlight Justice Story's apparent racism to show that racism permeated all of American society in the 1800s. It was not exclusive to West Virginia.

diment to securing to individuals of the race that equal justice which the law aims to secure to all others.<sup>120</sup>

Justice Strong reasoned that all citizens of West Virginia, like all citizens in the United States, are guaranteed the right to a trial by jury. For the right to a trial by jury to actually have meaning, the jury must be comprised of one's peers.<sup>121</sup> Ultimately, Justice Strong concluded that to discriminate based on race in jury selection "amount[s] to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State."<sup>122</sup> In Taylor Strauder's case, this meant that he was entitled to have blacks sit on his jury.

### E. Conclusion

Following the Supreme Court's ruling in *Strauder*, the placement of blacks on juries faced "intense difficulty" in West Virginia.<sup>123</sup> Black equality in West Virginia also moved slowly. By the 1890s, West Virginia Republicans secured the black West Virginian vote.<sup>124</sup> However, by this point, white males, many of whom were ex-Confederates and Democrats, now comprised a majority of voters in West Virginia. And in the 1890s, "Democratic politicians established 'Jim Crow' laws designed to legally disenfranchise blacks."<sup>125</sup> According to one author, "[b]y 1900 comparatively few whites inside or outside the South were in a mood to protest very strongly against what was happening to the Negroes in that section."<sup>126</sup> Ironically, the Fifteenth Amendment, which gave black males the right to vote, opened up the door for white ex-Confederates to vote as well.<sup>127</sup> At the same time that black suffrage came, other fundamental rights were quashed for blacks in West Virginia — a state that seemed to be Union by name but Confederacy by practice.

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<sup>120</sup> *Id.* at 308.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 310.

<sup>123</sup> *Mountaineer Reconstruction*, *supra* note 20, at 155. For example, in 1888, West Virginia's first black attorney, John R. Clifford, empanelled blacks on a jury. *Id.* After doing so, Clifford was knocked down in the court room. *Id.*

<sup>124</sup> *See id.* at 156.

<sup>125</sup> *Id.*

<sup>126</sup> BLACKS IN APPALACHIA, *supra* note 11, at 56 (quoting CURRENT, *supra* note 52, at vi). Furthermore, Richard N. Current claims that during the Reconstruction period in the Appalachians, white idealists had given up hope and somewhat bought into the concept of the inferiority of blacks. *Id.*

<sup>127</sup> *Mountaineer Reconstruction*, *supra* note 20, at 156.

#### IV. A PERSONAL EXPERIENCE OF WEST VIRGINIA AND RACE: BARACK OBAMA IN THE MOUNTAIN MAMA

I grew up in Kingwood, the county seat of Preston County, West Virginia, a small town nestled just below the Mason-Dixon Line — the traditional division between the North and South. Preston County,<sup>128</sup> like much of West Virginia,<sup>129</sup> is predominantly white.<sup>130</sup> Every school teacher I ever had was white. Every bus driver was white. Every mayor in Preston County was white. Shopkeepers were white. All of the doctors in town were white, nurses were white, and our state representatives were white. Plumbers, janitors, coal miners — most of them were white. However, Preston County had black citizens, too. There was one black disc jockey on the local radio station, and a few black cheerleaders on the youth league squad. Kingwood had one predominantly black church known as the “Love Chapel.” Most white people in Preston County could and still can name almost every black family according to surname. Never do these last names add up to more than can be counted on both hands.

Despite this tiny amount of diversity in Preston County and West Virginia at large, the legacy and vestiges of Jim Crow<sup>131</sup> have stayed a part of the Mountain State’s culture. Growing up, it was not out of the ordinary for the historically black section of Kingwood to be referred to by white townspeople as “Nigger Hollow.” It was also not out of the ordinary for white people to warn their children and grandchildren to be sure to wash produce bought at the local grocery stores because “a colored person may have touched it.” Black people in Kingwood were still referred to as “colored,” well after the Civil Rights movement.

Given the history of my state and my hometown, I was not surprised by the results of the 2008 West Virginia Democratic Primary. In May 2008, I sat at my parents’ home in Kingwood, West Virginia, and awaited the election results

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<sup>128</sup> U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, <http://quickfacts.census.gov/qfd/states/54/54077.html> (last visited Mar. 11, 2010) (statistics are current as of 2008). Preston County, West Virginia, has a population of 30,285, and 98.7 percent of Preston County’s populous is white. *Id.* Black persons make up only 0.4 percent of Preston County’s population. *Id.* Additionally, American Indians and Alaska Natives make up only 0.1 percent of Preston County. *Id.* Asian persons account for only 0.2 percent of the County’s population. *Id.* Lastly, persons claiming mixed race account for 0.6 percent of the population. *Id.*

<sup>129</sup> See U.S. CENSUS BUREAU *supra* note 6. West Virginia has a population of 1,810,358. *Id.* Whites make up 94.4 percent of the state’s entire population. *Id.* Blacks account for 3.4 percent of the state’s populous. *Id.* American Indians and Alaskan Natives account for 0.2 percent of the state’s population. *Id.* Asians are 0.6 percent of the population. *Id.* The population of the U.S. is 301,237,703. *Id.* America, on the whole, has a 74.3 percent white population, for people reporting one race alone. *Id.* Nationally, blacks make up 12.3 percent of America’s population. *Id.* According to the U.S. Census Bureau’s findings, West Virginia is the third whitest state, with Vermont and Maine being the whitest states in the country. *Id.*

<sup>130</sup> See U.S. CENSUS BUREAU, *supra* note 6.

<sup>131</sup> KENNEDY, *supra* note 53, at 34. The term “Jim Crow” derives from a black-face minstrel’s song and dance that featured the name “Jim Crow” as part of the lyrics. *Id.*



from West Virginia's Democratic primary. Hillary Clinton was expected to win by a landslide. Clinton, unlike Barack Obama, was white. To all of the media outlets covering the election, Clinton's whiteness would be key to a Clinton victory in the Mountain State.<sup>132</sup> However, by this point in the primary, it was virtually impossible for Clinton to win the party's national primary. Within minutes of the polls closing, the national media called it: Hillary Clinton won West Virginia.<sup>133</sup> Exit polling data, however, revealed something that made a Clinton victory different: Two in every ten West Virginia Democrats who voted in the primary openly told pollsters that they would never vote for a black candidate.<sup>134</sup>

Open racism like this had not been seen in any of the other Democratic primaries, but West Virginians seemed fairly comfortable talking openly about their own racial prejudices and fears.<sup>135</sup> The *New York Times* reported that "[t]he number of white Democratic voters who said that race influenced their choice [in the primary] was among the highest recorded."<sup>136</sup> Almost 95 percent of those voting in the West Virginia primary were white, 70 percent of the voters did not hold a college degree, and 55 percent of these voters had household incomes under \$50,000.<sup>137</sup> These statistics, combined with news footage aired on Comedy Central's *The Daily Show with Jon Stewart*, reinforced cultural stereotypes of West Virginians.<sup>138</sup> To the rest of America, West Virginians were

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<sup>132</sup> In the days following Clinton's victory, the "white working class voter" became a topic of debate in the media and political circles. See Adam Nagourney, *After Big Loss, Obama Woos Blue Collar Voters*, N.Y. TIMES, May 13, 2008, at C01, available at <http://www.nytimes.com/2008/05/13/us/politics/14end-campaign.html>.

<sup>133</sup> Patrick Healy, *Clinton Wins West Virginia Primary by Wide Margin*, N.Y. TIMES, May 13, 2008, at A01, available at <http://www.nytimes.com/2008/05/13/us/politics/13end-democrats.html>.

<sup>134</sup> *Id.* But see Kevin Merida, *Racism Gives Some Obama Campaigners Pause*, WASH. POST, May 13, 2008, at A01. Racism in the Democratic race between Hillary Clinton and Barack Obama was not exclusive to the West Virginia Democratic Primary. *Id.* According to reports in the *Washington Post*, campaign volunteers for the Obama campaign experienced similar racism throughout the country. *Id.* During the Pennsylvania primary campaign, one Obama volunteer worked the phone banks. *Id.* This volunteer contacted voters in Susquehanna County, Pennsylvania. *Id.* The Obama volunteer claimed that one night a voter told her that he would not vote for a black candidate. *Id.* During that conversation, the volunteer also claims that the voter stated: "Hang that darky from a tree!" *Id.* Interestingly, although Pennsylvania is north of the Mason-Dixon Line and was always part of the Union during the Civil War, a majority of the state is within the Appalachian Mountains. According to the U.S. Census Bureau, Susquehanna County has a 0.5 percent black population — a number very close to that of many counties in West Virginia. U.S. CENSUS BUREAU, *supra* note 6. Could whiteness and minority invisibility have played a role in Susquehanna County, as well? I would answer "yes."

<sup>135</sup> Healy, *supra* note 133.

<sup>136</sup> *Id.*

<sup>137</sup> Patrick Healy, *Clinton Beats Obama Handily in West Virginia*, N.Y. TIMES, May 14, 2008, at A1.

<sup>138</sup> See *The Daily Show*, *supra* note 4; see also BACK TALK FROM APPALACHIA: CONFRONTING STEREOTYPES (Dwight B. Billings, Gurney Norman, & Katherine Ledford, eds. The University Press of Kentucky 1999) (dispelling stereotypes of Appalachians).

portrayed as backwoods, uneducated, racists who would openly declare prejudices to pollsters and reporters.<sup>139</sup>

This led me to wonder, where did all of this prejudice come from? Was West Virginia really as racist as we seemed in media portrayals or stereotypes? Growing up, I realized that whites in Kingwood didn't fear or even seem to dislike blacks from Kingwood. In fact, interracial marriages were common between Kingwood blacks and Kingwood whites. However, the fear seemed to be the unseen and unknown blacks, not the blacks with whom Kingwood was familiar. Kingwood blacks, though small in number, were viewed as exceptions to the racist perception of blacks that many whites in Kingwood had. Thus, blacks in Kingwood were not like the stereotypes that whites feared. Instead, it seems that whites from Kingwood, and West Virginia as a whole, fear the invisible.

#### V. RACISM AND WEST VIRGINIA: FEAR AND INVISIBILITY

Much like the Appalachian Mountains have shaped West Virginia's landscape, the role of race and racism in West Virginia has created a community where stereotypes and racist beliefs are common. Primarily, I believe that white West Virginians are no more racist than any other persons in the United States. Conversely, I believe that the overwhelming whiteness of West Virginia and the Appalachian region allows whites to fear blacks and to believe that black stereotypes from the media are a reality.<sup>140</sup>

The history of race in West Virginia is more mixed than clear. The same state that was formed by seceding from Virginia, the capital of the Confederacy, in order to become its own Union state, also adopted the same Jim Crow laws of the South following Reconstruction.<sup>141</sup> The same state where whites and blacks were equally poor and many worked side-by-side and for equal pay in the coal mines,<sup>142</sup> was also the same state that openly feared a black man running for President. The question then comes down to: What is the cause of such open racism in West Virginia? This is an impossible question to answer. There will always be some in our society and in West Virginia who will truly believe that blacks are inferior.<sup>143</sup> However, it is too simple to believe that white West Vir-

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<sup>139</sup> See *The Daily Show*, *supra* note 4.

<sup>140</sup> For a discussion of racial stereotypes and images in the media, see generally ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* (University of Chicago Press 2001); CLINT C. WILSON, FÉLIX GUTIÉRREZ & LENA M. CHAO, *RACISM, SEXISM, AND THE MEDIA: THE RISE OF CLASS COMMUNICATION IN MULTICULTURAL AMERICA* (Thousand Oaks California: Sage Publications 2003).

<sup>141</sup> See generally *Mountaineer Reconstruction*, *supra* note 20.

<sup>142</sup> APPALACHIANS AND RACE, *supra* note 70, at 284.

<sup>143</sup> DAVID K. SHIPLER, *A COUNTRY OF STRANGERS* 563 (Vintage Books 1998) (1997) (stating that "[p]rejudice shows no sign of disappearing from human thought, and its manifestation can be controlled and contained only if it is recognized.").

ginia and white Appalachia is comprised of stereotypical “hillbillies” who are filled with malice and contempt for blacks. Such a presumption minimizes white West Virginians to nothing more than the same type of stereotypes to which black Americans are and have been reduced.

Conversely, racism in West Virginia seems to be linked to black invisibility.<sup>144</sup> In simpler terms, whites in West Virginia are unfamiliar with people who are not white. West Virginians are not the only group in American society who have felt the effects of minority unfamiliarity. In fact, in Joe R. Feagin’s book *Systemic Racism: A Theory of Oppression*, Feagin writes about “racial isolation” and the role of “racial isolation” in fueling white persons’ fears and stereotypes of black persons.<sup>145</sup> In his book, Feagin writes about racial isolation in housing.<sup>146</sup> In particular, Feagin discusses racial segregation in housing and the impact that such segregation had on whites who lived their entire lives without any substantial contact with blacks in Chicago.<sup>147</sup> According to Feagin, “One key to understanding much white thinking about racial matters is the fact that most live in the type of social isolation that generates or reinforces separating and alienated relationships between whites and blacks in America . . . .”<sup>148</sup> This lack of contact — invisibility — “contributes materially to white unfamiliarity with black Americans.”<sup>149</sup> Furthermore, Feagin found that such unfamiliarity with blacks led many isolated whites predominantly white Chicago neighborhoods to be “fearful” of blacks because of the lack of contact between the two groups.<sup>150</sup>

The void that is created by black invisibility, in turn, is filled by images and portrayals from the media.

One of the windows looking out of the racial isolation in which the majority of whites live is that of the mass media, such as mainstream television and talk radio. Most whites spend not only much time in their important social networks but also a great amount of time with the mass media. However, the mass media do not have much of a broadening effect for most whites, who often learn, or have reinforced, from the media numerous negative impressions and images of Americans of color.<sup>151</sup>

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<sup>144</sup> See JOE R. FEAGIN, *SYSTEMIC RACISM: A THEORY OF OPPRESSION* 50 (Rutledge 2006).

<sup>145</sup> *Id.* at 246.

<sup>146</sup> *Id.* at 246–47.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 246.

<sup>149</sup> *Id.* at 247.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

Thus, in West Virginia, the lack of white familiarity with blacks has allowed for white West Virginians to define blacks solely by stereotypes and fears that, because of black invisibility, can become just as plausible as the truth in the minds of white West Virginians.<sup>152</sup> For example, white West Virginians in the 2008 Democratic Primary may have openly stated that Barack Obama's "race" was a predominant factor in their decision to support Hillary Clinton. This, however, does not necessarily make white West Virginians more or less likely to be racist than any other person in this country. Instead, because West Virginians are less familiar with black persons than other regions of the United States, it may be more socially acceptable for whites in West Virginia to openly say that they would not consider voting for a black candidate.<sup>153</sup> These statements, on the whole, were easier for white West Virginians to state before pollsters, television cameras, reporters, and the country, because in Appalachia, these comments

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<sup>152</sup> Telephone interview with Andra Gillespie, Asst. Prof. of Political Science, Emory University (Feb. 5, 2009) [hereinafter Gillespie Interview]. I conducted an interview with Prof. Gillespie, an assistant professor of political science who specializes in race at Emory University, in Atlanta, Georgia. During the interview, Prof. Gillespie commented that other states with a primarily white population supported Barack Obama in the Democratic primaries, arguing that racism must not have been an overwhelming factor for those white voters. *Id.* Prof. Gillespie specifically relied on victories in the Democratic primaries in Iowa and Kansas. *Id.*

According to the U.S. Census Bureau, Iowa has a black population of 2.4 percent. *See* U.S. CENSUS BUREAU, *supra* note 6. The white population of Iowa is 92.7 percent. *Id.* Regionally, Iowa is in the Midwest, and not a part of the normal North and South divide. Kansas, on the other hand, has a black population of 5.6 percent. *See id.* In Kansas, whites make up 85.7 percent of the population. *Id.* West Virginia has a 3.4 percent black population. *See id.* The question then becomes why did other overwhelmingly white states, such as Iowa, support a black candidate and West Virginia did not? First, it must be remembered that poll numbers showed that two out of every ten white, Democratic voters in West Virginia claimed that they would never vote for a black candidate. Healy, *supra* note 133. As for the remaining eight white voters, other reasons could have led to a Clinton victory that were not necessarily related to race. In fact, according to Prof. Gillespie herself, polls from West Virginia voters that she has studied show that the citizens of West Virginia have a strong affinity for former President Bill Clinton. According to MSNBC exit polling data, when voters were asked about the role that Hillary Clinton's husband, former Pres. Bill Clinton, played in the election, of the 62 percent who said that Pres. Clinton's campaigning was very or somewhat important to them, 80 percent of those voters voted for Hillary Clinton. *See* MSNBC, 2008 Primary Results/Exit Polls: West Virginia — Democrats, May 13, 2008, <http://www.msnbc.msn.com/id/21226014/>.

Lastly, Prof. Gillespie also noted that in the West Virginia Democratic Primary, voters found Hillary Clinton more trustworthy than Barack Obama. MSNBC exit polling data suggests that a majority of West Virginia Democrats found that Hillary Clinton was trustworthy. *See id.* Conversely, a majority of voters claimed that Barack Obama was not trustworthy. *Id.* Thus, West Virginians' affection for the Clintons coupled with their belief that Hillary Clinton was more trustworthy than Barack Obama, could have made West Virginia different than other predominantly white states which went for Obama in their Democratic primaries.

<sup>153</sup> *See* Gillespie Interview, *supra* note 152. Prof. Gillespie believes that from her studies of polling and the region, West Virginians were not more racist than others in America. *Id.* Rather, Prof. Gillespie stated that West Virginians were more openly honest about their racist beliefs toward Obama than other Americans. *Id.*

would likely go unpunished.<sup>154</sup> For example, the next day at work, coworkers were unlikely to scold a person who openly feared Obama because he was black.

In no way do I condone racism in West Virginia. My purpose is not to defend the actions and statements of white West Virginians, but is to call attention to white prejudice in the Mountain State and begin to slowly erode such thinking. America is changing. In 2008, we elected our first black president, Barack Obama.<sup>155</sup> But West Virginia's reputation has not changed. In fact, to many on the outside, we as West Virginians are still the "savages" that missionaries hoped to paternalistically save in the late 1800s and early 1900s.<sup>156</sup> This must change. Racism and prejudice can only begin to be resolved, though, through self-awareness which comes from dialogue. However, the overwhelming "whiteness" of West Virginia often times impedes open discussions on the role that race plays in our lives, in our history, in our laws, and in our society. Additionally, the lack of a black presence in the state also means that many West Virginians live their whole lives without a black friend, a black teacher, or a black mentor. Thus, black invisibility allows West Virginians to rely on cultural stereotypes presented by the media to fill the void of the unseen.

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<sup>154</sup> *Id.*

<sup>155</sup> To believe that this is a sign that America is over race is a dangerous thought. We will never truly be over race, and should not hope to be over race. Instead, no matter what color we are, we should all strive for color acceptance. See *infra* Part VI.

<sup>156</sup> See generally HARKINS, *supra* note 29 (discussing the origins of Appalachian stereotypes and the present day views of Appalachians as "white-trash" or "hillbillies"); WRONG TURN (20th Century Fox 2003) (portraying West Virginians as inbred hunters of humans who travel into the West Virginia mountains); Video: Cheney Makes West Virginia Joke, Apologizes (YouTube June 2, 2008), <http://www.youtube.com/watch?v=8rjIrNRVIXo> (featuring a video clip of former Vice-President Dick Cheney making a joke about West Virginians to the National Press Club eluding that West Virginians are inbred); Deb Riechmann, *Cheney Tells West Virginia Joke*, ABC NEWS, Jun. 2, 2008, <http://abcnews.go.com/Politics/wireStory?id=4983090>.

During my undergraduate education in West Virginia University's Perley Isaac Reed School of Journalism, I interned in Washington, D.C., at a major media outlet. After the first two weeks of work, several of the managing editors from the various departments in the newsroom took me to lunch. While at lunch, they asked me where I went to school and where I was from. I told them I was born and raised in Kingwood, West Virginia and that I attended WVU in Morgantown, West Virginia. They seemed surprised by this revelation, and I found this conversation to be somewhat awkward. Why were they surprised by the fact that I was from West Virginia? Was I dressed more neatly than they had expected? Was it the way that I spoke? Did I not have enough "twang" in my speech? They then asked me what West Virginia was like. Instead of answering, I turned the question back on them, and asked what they believed West Virginia was like. None of them had ever visited the Mountain State. Then they started to speak. One mentioned that when they first thought of West Virginia, they imagined that everyone lived in trailer parks. Another person mentioned that they imagined uneducated people, many of whom were missing teeth. Here were well educated, affluent Americans working in our nation's capital, and they believed the stereotypes, too.

However, it is at the college level, I believe, where a new generation of West Virginians can begin to see “invisible people” who have been known to many of them only as racial stereotypes. Thus, discussions on race and racism must begin at the WVU College of Law.

## VI. WHY TEACH RACE IN THE LEGAL CLASSROOM?

Some may wonder why race should be addressed in a Law Review Note and why the concept of racism should be discussed in the legal classroom. Those who ask this question see the concepts of race and racism as “social” issues that are best suited for sociology, history, or political science. While racism is a social issue that impacts everything from the stares that a young black woman encounters while she shops at a clothing store to a voter’s choice between a black or white candidate for president, race in America has always been a legal issue.

From the moment that slavery was legalized and black Africans were defined as less than a whole person in the United States Constitution, racism and the concept of black inferiority were given weight and approval by the American legal system.<sup>157</sup> When laws allowed for the whipping of black slaves, our nation’s laws made humans comparable to animals.<sup>158</sup> When laws denied blacks the right to vote<sup>159</sup> and to attend the same public schools that white students attended,<sup>160</sup> the American legal system and the laws of our country promoted the majority’s social prejudices. When intermarriage between blacks and whites was made illegal because majority white legislatures found the mixing of races to be socially and religiously immoral, America’s racist beliefs were given a stamp of approval from the laws of our states.<sup>161</sup> Racism is part of the American story — a part we don’t like to tell — a part we don’t like to hear. Yet we live it every day.

First year law students will undoubtedly cover the Rule Against Perpetuities in their first year of law school in the required Property course. Such teachings will not be questioned by academics and law professors of Property.

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<sup>157</sup> U.S. CONST. art. I, § 2 (1787). “Representatives and direct taxes shall be apportioned among the several states . . . by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.” *Id.* “All other persons” refers to black slaves. *Id.*

<sup>158</sup> VA. CODE c. CC §§ 7, 8, 10, 11 (1860). “A negro shall be punished with stripes [whipping]: First, if he use provoking language or menacing gestures to a white person.” *Id.* at § 11.

<sup>159</sup> W. VA. CONST. art. III, § 1 [as appears in W. VA. CODE (1870)]. “The white male citizens of the State shall be entitled to vote at all elections held within the election districts in which they respectively reside.” *Id.*

<sup>160</sup> W. VA. CONST. art. XII, § 8 [as appears in W. VA. CODE (1872)]. “White and colored persons shall not be taught in the same school.” *Id.*

<sup>161</sup> W. VA. CODE § 4697 (1943). “Any white person who shall intermarry with a negro shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding one hundred dollars, and confined in jail not more than one year.” *Id.*

In fact, it does not matter to many that, on the whole, the rule has little practical use in 2010. Nevertheless, law students are taught that they must learn about “O conveys Blackacre to Susan” to understand the vestiges of the Rule Against Perpetuities. Then why are law students not required to learn of the vestiges of Jim Crow and slavery in more classes than Constitutional Law? Why is America’s race narrative not discussed in the law school setting? And why is race and racism seen as “history” in America, not an enduring and living piece of our society? Moreover, given the unique history of race and racism in Appalachia and West Virginia, why are discussions of race and racism not a part of all legal classes at the College of Law?

In order for the invisible to be seen and understood, a dialogue on race must begin so that white students who live in a predominantly white state become familiar with issues that are currently unfamiliar to their lives.

#### VII. EMPATHY AND UNDERSTANDING: SHINING THE LIGHT, MAKING THE INVISIBLE VISIBLE

The WVU College of Law is a predominantly white law school, and a majority of its student body is West Virginian.<sup>162</sup> A majority of the faculty at the College of Law is also white, with only one black tenured professor and two black associate professors.<sup>163</sup> In this Part, this Note will address how the whiteness of the WVU College of Law impacts discussions of race and the law and the importance of creating a discussion of race and the law in every legal classroom where race is relevant to the subject being discussed.

##### A. *Gaining a Seat at the Table: Promoting Race-Based Discussions at the College of Law*

Alexis de Toqueville wrote that

[i]n the past, there existed among us great inequalities whose origins lay solely in legislation. What could be more factitious than a purely legal inferiority! What more contrary to man’s instincts than permanent differences established between obviously similar people! Yet these differences persisted for centuries, in many places they persist to this day. Everywhere they have

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<sup>162</sup> See WVU College of Law, About the College of Law, [http://law.wvu.edu/about\\_us](http://law.wvu.edu/about_us) (last visited Mar. 10, 2010) (scroll down the page to Admissions Credentials). According to unpublished minority enrollment statistics, the entering class of 2008 has a minority enrollment of 12.77 percent. The entering class of 2007 has an 11 percent minority enrollment. Lastly, the entering class of 2006 has a minority enrollment of 12 percent (the statistics are on file with the author). Because WVU is a public institution, many of WVU’s students also happen to be West Virginian. Accordingly, most of the students are white.

<sup>163</sup> See West Virginia University College of Law, Full Time Faculty, [http://law.wvu.edu/faculty/full\\_time\\_faculty](http://law.wvu.edu/faculty/full_time_faculty) (last visited Apr. 19, 2010).

left traces which, though they exist only in the mind, time is hardly able to efface. If inequality created solely by the law is so difficult to eradicate, how can one destroy an inequality that seems to possess an immutable basis in nature itself?<sup>164</sup>

One of the answer's to Toqueville's question is that America's race history, both past and living, must be discussed. And the legal classroom is the perfect place to have these discussions. In fact, issues of race and the law have been addressed at the College of Law. Professor Judith A.M. Scully, a former professor at the College of Law, taught Race, Racism, and American Law at the College of Law in the past.<sup>165</sup> Professor Scully, at the time she taught at the College of Law, was one of two black professors at the College of Law, and to many of her white students, as well as her West Virginia black students, Prof. Scully was a first.

[M]any of my students tell me that I am one of the first Black professors they have encountered. For some of my students, I am also one of the first Black individuals with whom they have ever had a one-on-one conversation. Prior to their experience with me, many of my students' primary contacts with Black people were through newspapers, magazines, or television. Of course, many students had some type of contact with Black people in service-oriented positions in restaurants, movie theaters, and grocery stores, however, these contacts could hardly be classified as substantial.<sup>166</sup>

Before Prof. Scully began teaching the course, she had been warned by a white, female professor at the law school who had taught Race, Racism and American Law that many of their colleagues "did not seem to think that race-based research and race-based writing qualified as real scholarship."<sup>167</sup> It must be noted that in the legal community, the view that studies and classes on race are inconsequential and unnecessary to a study of law is not exclusive to West

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<sup>164</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, Vol. I., 394–95 (Arthur Goldhammer trans., Library of America 2004) (1831).

<sup>165</sup> Throughout this Note, I will refer to Judith A.M. Scully as Prof. Scully, as she was a former professor I had who taught my Criminal Law class and served as my mentor and friend during my first year of law school. See generally Judith A.M. Scully, *Seeing Color, Seeing Whiteness, Making Change: One Woman's Journey in Teaching Race and American Law*, 39 U. TOL. L. REV. 59 (2007) (discussing and detailing her experiences as a black professor teaching race and racism to a predominantly white class at the WVU College of Law).

<sup>166</sup> *Id.* at 61.

<sup>167</sup> *Id.* at 62. However, it is important to note that Prof. Scully, who has written on issues of race throughout her legal career, believed that she was taken seriously by her colleagues. *Id.* at n.9. In fact, she wrote in her article on teaching race that "[t]he majority of my colleagues encouraged my scholarly endeavors." *Id.*



Virginia.<sup>168</sup> However, discussions of race and the law are some of the most important discussions to take place in the legal classroom. According to Prof. Francis Ansley:

American law students should not leave the law schools of the late twentieth century until they have received a thorough and explicit grounding in the role that race has played in the creation and transformation of central legal institutions. The power and burden of race, both past and present, should be seen as indispensable parts of the minimal cultural and constitutional literacy for the legal practitioners and theoreticians we send forth into the bar and the world.<sup>169</sup>

This is especially true for white law students in West Virginia because these discussions may be the first conversations that they have ever had regarding race, either someone else's or their own. In fact, for students planning to stay in West Virginia after graduation, these conversations are even more important as the opportunity for future discussions on race in the legal setting, or any other setting, in the state is unlikely due to black invisibility.

However, for the 2008–2009 academic-year at the College of Law, no specific classes on race or racism were offered as part of the curriculum.<sup>170</sup> Additionally, in the Fall semester of 2009, no classes on race were offered. A course on race, racism, and the law was not offered at the College of Law until the Spring semester of 2010. Waiting this long to offer this course was a disservice to the students at the College of Law, and one that the law school should ensure is not repeated. Moreover, having attended the College of Law for three years, it has been my experience that professors whose classes may touch on issues of race and racism within a course shy away from discussing these issues. This denial of acknowledging and discussing issues of race is dangerous because without offering race-based courses and without discussing issues of race in each class where race is relevant to the subject matter, it is possible that white students who graduate from the College of Law may never have the opportunity to learn from or communicate with invisible blacks and other minorities and may never have the opportunity to understand issues of race and racism in the law. While racial minorities are represented in the College of Law faculty, there remains a lack of diversity in the faculty at the College of Law. Once rectified, diversity of professorship at the College of Law will surely begin to add differ-

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<sup>168</sup> See *id.*

<sup>169</sup> Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1520 (1991).

<sup>170</sup> During the 2008–2009 academic year, Prof. Scully served as a visiting professor at Stetson University in Florida. No other faculty members taught Race, Racism, and American Law during the 2008–2009 school year at the WVU College of Law; moreover, the WVU College of Law also did not employ any adjunct professors to teach the course, either.

ent perspectives into Socratic classroom discussions. However, the entire College of Law faculty must begin to infuse conversations of law and legislation with discussions of race, class, prejudice, opportunity, and equality.

Discussions of race and equality will always come up in classes like Constitutional Law where topics such as affirmative action, Jim Crow, and slavery will be discussed.<sup>171</sup> But in America, and West Virginia, race does not exist in tiny vacuums and pockets. Race and racism does not solely exist as a piece of America's or West Virginia's prior history. Instead, it is our living history — that permeates every aspect of our lives and touches all of us.

Why not have a discussion on slavery in Property Law? Why not talk about overreaching practices committed against minorities in Contracts? Why not have class discussions on the quality of education in rural white and urban minority communities in Education Law? Why not discuss reparations for slavery in a Remedies course?

Discussions on race and the law are imperative at the College of Law because without a conscious effort to begin these discussions, the “norm” of whiteness that is the majority of the College of Law's student body and faculty will begin to exclude other ideas and conversations that are imperative to seeing our black friends and neighbors in the Mountain State.

#### *B. Discussing Race and Law in a Majority White Classroom*

Throughout my entire life, most of my classmates have been white. This did not change during my undergraduate experiences at WVU as a journalism major, nor did it change when I attended law school.<sup>172</sup> In my first year at the College of Law, I never had more than six black students in my class at one time, and in some courses, I shared a classroom with as little as three black students. In my second year of law school, I had classes with only one black student in a classroom of more than twenty white students.<sup>173</sup> The whiteness of the student body and the faculty make it difficult for discussions on race to begin in the classroom.

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<sup>171</sup> Commonly discussed cases in Constitutional Law courses include *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that the diversity of a college or university is a compelling interest); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding that “diversity” of the classroom in higher education could be a consideration during the admissions process); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that state laws making interracial marriages illegal were unconstitutional); *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1954) (holding that segregation of America's public schools was unconstitutional); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that “separate” facilities that were equal were equal under the law, even though they were segregated).

<sup>172</sup> It is important to stress that my classes at the WVU College of law are the most diverse classroom settings of which I have ever been a part.

<sup>173</sup> I am specifically referring to my experience in the Constitutional Law II (First Amendment) course at the WVU College of Law.

However, discussions of race in *any* American classroom, not just a monolithically white classroom at the College of Law, are difficult; in fact, Prof. John O. Calmore, who taught a course on race at Loyola Law School, described the discussions of race in the legal setting to be “complex . . . discomforting, frightening, and intimidating.”<sup>174</sup> Prof. Calmore is black and his classroom setting was ethnically diverse, with black, white, Vietnamese, Chinese, Mexican, Filipino, Japanese, Korean, and Jewish students making up his roster.<sup>175</sup> Even with a diverse classroom, Professor Calmore believed that discussions of race were comparable to the hiding of a crazy relative in the attic:

We approach questions of race and treat them like a family who is hiding the crazy aunt in the attic (or the crazy uncle in the basement). Everyone knows she is there, we feel and hear her presence, but we refuse to admit that her shouts and musings are creating a dysfunctional situation. We choose instead to continue our charade, behaving as if her intrusions have not influenced our behavior toward or relationships with one another.<sup>176</sup>

How, then, is the teaching of race and racism different when black invisibility is involved? Prof. Calmore had a diverse classroom, but the classroom at the College of Law does not resemble his diverse setting. The overwhelming whiteness of the College of Law makes it difficult for any dialogue on race to begin. Most white students, without the prompting of professors, are unlikely to begin discussing the racial implications of case law or legislation being discussed in that day’s class for many reasons.<sup>177</sup> After all, in terms of race, almost every student in the class has the same racial background. Many white students may not even see issues that impact minorities because they have always been in the majority. Additionally, the overwhelming whiteness of the classroom may

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<sup>174</sup> John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903, 905 (1997).

<sup>175</sup> *Id.* at 904.

<sup>176</sup> *Id.* at 903; see also PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE* 47 (The Noon-day Press 1998) (1997).

On some level, talking about race is a lot like having a conversation with an abusive spouse. The igniting spark may be small but the stakes great, the blaze of emotion rendering each impossible to please, the fight not really about whatever the fight is about. A war between the real and the imagined, the remembered and the fantasized, the likely and the outrageous.

*Id.*; see also Scully, *supra* note 165, at 59 (explaining that the discussion of race and racism in the classroom is an emotional endeavor for both professors and students).

<sup>177</sup> Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 655–56 (2008). Armstrong and Wildman explain that “[w]hen a discussion about race arises spontaneously in a classroom setting, white students and professors may experience discomfort about being misinterpreted or fear making a comment that might be perceived by students as racially insensitive.” *Id.*

also make white law students nervous, as they are afraid of offending their black classmates with perceived prejudices based on what they may say or how what they say is interpreted.<sup>178</sup> Moreover, black students at the College of Law may be unwilling and apprehensive to begin discussions on race with their majority white and West Virginian classmates, fearing that the media portrayal of West Virginians as bigots are and were accurate. Furthermore, some black students in a majority white classroom may fear that they will be viewed as “tokens” — persons whose racial identity predetermines his or her beliefs on race. Thus, without classes being offered to discuss race, or professors highlighting issues of race in the legal context in each class, the whiteness of the classroom may cause white students to remain silent on the issue of race. And an even greater impact could be felt by some black students in the classroom who may be apprehensive to voice their opinions since a majority of the class, unlike them, is white.<sup>179</sup> Some black students are likely to fear that their opinions will be seen as self-serving, or those of the “token black person,” rather than an opinion given full merit.<sup>180</sup> However, if professors open up a dialogue on race in the classroom, and establish common histories and experiences between both groups,<sup>181</sup> and an open dialogue is created, students can begin to understand one another.

C. *Dismissing Colorblindness: Seeing the Benefit of Being White*

[T]he last thing that a fish notices is the water. Things that are unproblematic seem natural and tend to go unnoticed. Fish take the water they swim in for granted, just as European Americans take their race as a given, as normal. White Americans may face difficulties in life — problems having to do with money, religion, or family — but race is not one of them. White Americans can be sanguine about racial matters because their race has not been (until recently) visible to the society in which they live. They cannot see how this society produces advantages for them because these benefits seem so natural that they are taken for granted, experienced as wholly legitimate. They literally do

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 655 (explaining that classroom discussions of race in law school impact students of color differently than white students).

<sup>180</sup> *Id.* Moreover, fellow classmates in the Black Law Student Association at the WVU College of Law have told me in conversation that they purposefully do not comment on issues of race or racism in classes. In fact, in Constitutional Law, where much of the discourse is directly related to race and equality, black law students have claimed that at WVU they do not speak up, believing that no matter how well formulated their opinions may be, they will not be taken seriously by their white classmates when discussing topics like school desegregation and affirmative action. When this occurs, this further adds to the black invisibility problem in West Virginia, as an entire perspective is missing from the classroom discussion.

<sup>181</sup> See *supra* Part II.

not see how race permeates America's institutions — the very rules of the game . . . .<sup>182</sup>

The above quoted passage perfectly explains the role that race plays in the lives of white Americans. A lack of seeing oneself as having a race makes discussions of race and the law difficult to begin with because race is not a direct issue in the lives of many of the students at the College of Law. In fact, many white West Virginians at the College of Law are unlikely to think about their own whiteness on a day-to-day basis; conversely, black students at the College of Law are reminded of their race daily. Even in a racially monolithic environment where the whiteness of the classroom dominates, discussions of race and the law can be implemented in every class. In order for real discussions on race and racism to begin in the classroom, all students must first disregard the concept of colorblindness. Secondly, white students must confront and accept their own racial identity and the benefits they redeem from being white. If these two goals can be accomplished at the College of Law, the school can begin to solve the problem of black invisibility in West Virginia and can begin to create a race dialogue at the College of Law.

The first problem that all students must overcome in order to discuss race in the legal classroom stems from the concept of colorblindness.<sup>183</sup> "Colorblindness" is a concept that many students and Americans are taught is the ideal regarding race.<sup>184</sup> Under the "colorblind" approach, we are taught that when noticing a person, his or her skin color is to go unnoticed.<sup>185</sup> Under this line of reasoning, we are to see only the "person" that lies under the skin color, but we are not to notice the pigmentation difference and other attributes linked to one's race.<sup>186</sup> In other words, we are to completely ignore race. Thus, discussions of race can never get off of the ground because no discussion of race can take place if students are taught to not "notice" race.<sup>187</sup>

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<sup>182</sup> MICHAEL K. BROWN, MARTIN CARNOY, ELLIOT CURRIE, TROY DUSTER, DAVID B. OPPENHEIMER, MARJORIE M. SHULTZ & DAVID WELLMAN, *WHITEWASHING RACE: THE MYTH OF A COLORBLIND SOCIETY* 34 (Univ. of Cal. Press 2003).

<sup>183</sup> "Colorblindness" has legal origins as well as social origins. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (stating that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."). Justice Harlan's "colorblind" approach to the Constitution has impacted modern Court decisions regarding race and racism, specifically affirmative action cases.

<sup>184</sup> One of "colorblindness's" most famous origins comes from Dr. Martin Luther King, Junior's "I Have a Dream" Keynote Address on the March on Washington, D.C. for Civil Rights (Aug. 28, 1963) speech. In this speech, Dr. King announced that people should "not be judged by the color of the skin, but the content of their character." *Id.* But did this mean that a person's color should go unnoticed? For more on Dr. King's speech see Gail B. Griffin, *Speaking of Whiteness, Disrupting White Innocence*, 31 J. MIDWEST MOD. LANGUAGE ASS'N 3, 3 (1998).

<sup>185</sup> Armstrong & Wildman, *supra* note 177, at 648.

<sup>186</sup> *Id.*

<sup>187</sup> See Scully, *supra* note 165, at 76 (arguing that the concept of "colorblindness" incorrectly makes students feel that noticing race is the problem, not racism).

However, no matter how utopian “colorblindness” may sound, it is nearly impossible and only perpetuates the status quo, which is exactly what we are trying to overcome at the College of Law.<sup>188</sup> “Colorblindness” is virtually impossible; in fact, “[j]ust as we see red, green, and blue objects, we are able to see the rainbow of skin colors without effort, and without thought. . . . For those of us who possess the capacity for sight, colorblindness . . . is simply not a possibility.”<sup>189</sup> White students in Appalachia will undoubtedly notice the race of their minority classmates as attending law school may be one of the first experiences they have had with minority students. Additionally, black Appalachian students will also undoubtedly notice the race of their white counterparts. Moreover, for black students from West Virginia, this may be one of the most mixed education settings they have been in, since an overwhelming majority of their classmates from secondary education were probably white.<sup>190</sup>

Instead of pretending that we do not notice these pigment differences in our classmates, we should not be ashamed that we can see the beauty in our racial differences. Noticing and acknowledging race does not mean that students are racist, which may be one of the fears that white students in West Virginia have regarding race. Instead, seeing race allows students to begin a dialogue on race and racism that will otherwise be shut off if we pretend that race does not matter, does not exist, or is inconsequential.<sup>191</sup> Additionally, colorblindness also ensures that the status quo governs. For example, in a remedies

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<sup>188</sup> A prime example of the dystopia created by “colorblindness” can be seen in modern day France. See RACE IN FRANCE — INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE 1 (Herrick Chapman & Laura L. Frader, eds., Berghahn Books 2004) (stating that “[i]n France, . . . race has seemed seldom acknowledged, in spite of both scholarly and governmental preoccupation with racism and immigration. Indeed, in the name of antiracism, leaders in France have commonly embraced ‘colorblindness’ as the preferred approach to the conflicts that arise in a multiracial or multiethnic society.”); see generally Scully *supra* note 165, at 76.; Susan Sachs, *In Officially Colorblind France, Blacks Have a Dream — And Now a Lobby*, THE CHRISTIAN SCIENCE MONITOR, Jan. 12, 2007, at World 1. According to a report in the *Christian Science Monitor*, “France does not ask about race on its census. Nor does it collect information about heritage beyond asking for the birthplace of a person’s parents.” *Id.* Because France does not take race into account, and its government uses a colorblind approach, racism is hard to measure. *Id.*; see also Michael Kimmelman, *For Blacks in France, Obama’s Rise Is Reason to Rejoice and to Hope*, N.Y. TIMES, Jun. 17, 2008, at E1. The problems that stem from racism in France cannot be addressed on a race-based basis. *Id.* In fact, because “it’s against the rules for the government to conduct official surveys according to race” no one knows the actual racial diversity in France. *Id.*; see generally THE COLOR OF LIBERTY — HISTORIES OF RACE IN FRANCE (Sue Peabody & Tyler Stovall, eds., Duke University Press 2003) (discussing the role of race and colorblindness in French society and history); ERIK BLEICH, RACE POLITICS IN BRITAIN AND FRANCE — IDEAS AND POLICYMAKING SINCE THE 1960S (Cambridge Univ. Press 2003) (discussing French laws regarding race and racism).

<sup>189</sup> Scully, *supra* note 165, at 74.

<sup>190</sup> Admittedly, this won’t hold true for black West Virginians who grew up in more diverse areas of West Virginia.

<sup>191</sup> See generally Armstrong & Wildman, *supra* note 177 (arguing that instead of “colorblindness” we should strive to achieve “color insight” both in life and the classroom setting).

course the issue of slave reparations may be discussed. If a discussion on reparations begins in a classroom and the professor, as well as the students, adopt a colorblind approach to examining the issue, the discussion is stifled. In fact, the role of race and racism is imperative to discussions of slave reparations since slavery and the vestiges of slavery were directly tied to the blackness of the African people who were enslaved in America. If we adopt a colorblind approach, we ignore all of the issues pertaining to race. This promotes the status quo by ignoring the true issue at the core of the discussion — race. Similarly, if in the classroom setting we adopt “color-blindness” as our mode of interpretation, then the status-quo will “remain” intact: blacks, and other minorities, will continue to remain invisible because their race is deemed irrelevant to the discussion.<sup>192</sup>

Once we dismiss colorblindness, the next step to effectively studying race in the legal classroom requires white students and professors to admit that, as white people, they are a race. Additionally, white students must begin to understand the role that their own “whiteness” has played in their lives.<sup>193</sup> Understanding the concept of whiteness and seeing oneself as white, rather than the societal norm, poses the biggest challenge on the road toward black visibility in West Virginia and discussions of race at the College of Law.

This step is more difficult than understanding that color differences between people exist because it is common among white students, especially in a predominantly white state like West Virginia and a predominantly white law school like the College of Law, to see themselves as the norm or the default. To many white students, they are not “raced.”<sup>194</sup> According to Prof. Scully, “[White students’] race is not normally something occupying their consciousness. This is a privilege that many of my students take for granted. They do not have any idea what it would feel like to not have the privilege of truly forgetting about their race.”<sup>195</sup> Once a white student begins to see herself or himself as

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<sup>192</sup> See *id.* at 648.

<sup>193</sup> See generally Scully, *supra* note 165; see also Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, in WHITE PRIVILEGE: ESSENTIAL READINGS ON THE OTHER SIDE OF RACISM 123 (Paula S. Rothenberg ed., Macmillan 2008) (explaining the concepts of “whiteness” and “white privilege”). According to McIntosh, “White privilege is like an invisible weightless knapsack of special provisions, maps, guides, codebooks, passports, codebooks, visas, clothes, tools, and blank checks.” *Id.* In other words, McIntosh explains that simply by being born white, rather than being born black, a white person has certain societal privileges and open doors that a black person might not have. See also BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW* (Richard Delgado and Jean Stefancic eds., New York University Press 1998); ROBERT JENSEN, *THE HEART OF WHITENESS — CONFRONTING RACE, RACISM, AND WHITE PRIVILEGE* (City Lights 2005) (discussing “white privilege” and “whiteness” from a white male perspective).

<sup>194</sup> FLAGG, *supra* note 193, at 1 (stating that “[t]he most striking characteristic of whites’ consciousness of whiteness is that most of the time we don’t have any”); see also Scully, *supra* note 165, at 83.

<sup>195</sup> Scully, *supra* note 165, at 83. According to Prof. Scully, white students pretend “that they ‘have no color.’ By claiming that they have ‘no color’ or ‘no race,’ white students can comforta-

white, she or he must then admit the harsh truth for white persons in America: Simply by being born white, I have received a societal benefit.

Once white students begin to realize this, they can begin to understand the societal benefits that being white provides them. In Appalachia, discussions of “privilege” may be especially difficult for white students to understand because the term “privilege” implies access and mobility that, because of socioeconomic factors linked to Appalachian poverty, are not possible for many white students at the College of Law.<sup>196</sup> To overcome this, professors could choose to change the term from “white privilege” to “the benefit of being white.” Professors at the College of Law should explain to their students that instead of looking at privilege in terms of economics or class, that “white privilege” has more to do with society than the economy.<sup>197</sup> This privilege could be explained to students through factual examples. For example, when a white West Virginian walks into a convenience store, he has the privilege to walk around, looking at the various items he may buy without feeling that the store owners are suspicious of him because he is white. Conversely, if the same scenario involved a black man, students should ask themselves whether they believe the black man had the same privilege as the white man? As another example; when a white man is driving down the road, does he have the same worries or fears that a black man driving down the same road on the same day may have?<sup>198</sup> The difficulty with understanding this “privilege” is that for white stu-

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bly conclude that they are either neutral on issues of race or that race simply is not an issue in their lives.” *Id.*; see also FLAGG, *supra* note 193, at 118.

<sup>196</sup> Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL’Y 245, n.6 (2005). “The term ‘privilege’ remains problematic, since privilege can connote a reward for an earned achievement. White privilege is not earned. Yet academic discourse has widely adopted the phrase ‘white privilege,’ and increasingly, more popular circles recognize it as well.” *Id.*

<sup>197</sup> See Michael Blumenthal, *Not Pure Black and White: A Meditation on Baseball and (Reluctantly) Race*, ZEEK MAGAZINE (Fall 2007) (out of print and on file with author).

I, too, am irretrievably tainted and compromised, implicated in injustices and inequities from all sides, though I may do my best to live with integrity and honor and though I may wish, selfishly, not to become a victim. Nonetheless, I am well aware that I, too, have benefited — if not directly, then most certainly indirectly — from centuries of discrimination against, and objectification of, Blacks . . . .

*Id.*

<sup>198</sup> For a prime example of the benefit of being white and white privilege in the law, see generally *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). Justice Souter’s majority opinion stated that “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” *Id.* at 354. In her dissenting opinion, Justice O’Connor argued that Justice Souter’s holding would open the door to racial profiling by police officers. In fact, Justice O’Connor wrote in her dissenting opinion that “[s]uch unbounded discretion carries with it grave potential for abuse” and “as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual.” *Id.* at 372.



dents, walking into a convenience store or driving down the road doesn't seem very privileged at all. For West Virginians, this is especially true because until a white West Virginian meets someone of a different race, she or he has no reason to see her or his own race, let alone know that she or he is privileged because of it.

Once students and professors dismiss colorblindness and understand the role that whiteness plays in the lives of white persons, students will not only have the opportunity to become race conscious, in general, but will also have the ability to see how race, racism, and whiteness have affected our nation's laws and how our laws continue to be affected by race, racism, and whiteness.

*D. The Gift of Sight*

Although not in the legal context, David K. Shipler, author of *A Country of Strangers*, explains how monumental racial discourse and understanding can be in America.<sup>199</sup> Shipler, who researched the role of race and racism in America for his book, discusses the first time he truly discovered the "divide" between blacks and whites in America.<sup>200</sup>

Shipler, a white man, wrote that after finishing his book on race in America, he "suddenly came upon a new chasm."<sup>201</sup> It marked a divide that [he] had not encountered in all [his] wandering and listening across the country, because, as a white person who had grown up in privilege, [he] had not thought to" question his privileges.<sup>202</sup>

Through researching his book and questioning his privileges, Shipler uncovered societal commonalities between groups of people.<sup>203</sup> In particular, Shipler exemplified a shared experience between blacks in America and those in poverty. Discovering these commonalities is imperative to discussions on race and racism; in fact, professors at the College of Law should use the similar histories of Appalachian whites and blacks in America discussed in this Note in order to provide students with an empathetic starting point for conversations on race and racism in the classroom. While race and the poverty of the Appalachian white are two different subjects that should not be viewed as the same, white Appalachian students, who are likely to have either grown up in poverty, known someone who grew up in poverty, or lived in a neighborhood where poverty was visible, may be able to empathize with black students and black Americans whose race may have been a key factor in their societal and economic condition and status.

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<sup>199</sup> See generally SHIPLER, *supra* note 143.

<sup>200</sup> *Id.* at 560.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 560-61.

At the same time, though, it is important to note that blacks are not monolithic. There are black students who economically may be more privileged than many white Appalachian students. Additionally, being poor and Appalachian is not the same as being poor and black in America. However, socioeconomic factors may help white students who are unfamiliar with the experience of blacks to relate and empathetically listen and begin to see one another as more than stereotypes and caricatures.

Overall, once all students in the classroom begin to become socially aware of the benefits associated with their existence, effective legal discourse can begin and black visibility in the Mountain State will become more plausible.

*E. Implementing Change: Beginning a Dialogue on Race at the WVU College of Law*

The College of Law should and must begin a dialogue on race and the law in each class offered at the College of Law when race is relevant to the subject matter being presented. This dialogue must begin with the professors who guide classroom discussions. To begin this dialogue, the administration of the College of Law should ask professors to discuss issues of race and racism as those issues relate to the area(s) of law that the professors are covering with their classes. It is imperative to discussions of race and the law that professors take the initiative to spark conversations on race because many students, both black and white, are unlikely to independently begin such discussions. Moreover, the administration must explain to the professors how important discussions of race and the law are because many professors will not change their curriculum or their teaching methods unless the administration requests that they do so.

Additionally, because many of the professors at the College of Law are white, they can be equally as impacted by their whiteness and white privilege as their white students are. For many white professors, their whiteness may lead them to shy away from discussing race in a mixed classroom setting. While professors may be apprehensive to begin these discussions, the professor, as director of the classroom, should shoulder this responsibility.

To prepare professors, the administration at the College of Law should require that each professor attend training where the professors would discuss race in small group settings. Additionally, before discussing such sensitive subjects in front of a classroom of students, the College of Law could implement a mock dialogue training for professors. Professors could work together in small groups, preferably racially diverse groups, and discuss issues of race and racism as it relates to the law that their particular course or courses.

But the professors at the College of Law cannot do this alone. Students, both black and white, cannot remain silent when professors begin these discussions. To overcome this silence, during orientation for first-year students, students should be placed in small groups to discuss talking about sensitive subjects in the legal classroom, such as race. The College of Law should offer sen-

sitivity trainings to make all students comfortable with discussing race in the legal classroom.<sup>204</sup>

Once the professors, students, and the administration of the College of Law are trained and prepared, a discussion on race and the law could begin.

### VIII. CONCLUSION

Understanding the role of race in a state that is predominantly white can sometimes be difficult. It is possible for many whites in West Virginia and the Appalachian region to live their entire lives without noticing their own race. It is also possible for many white, West Virginian students at the College of Law to have had little interaction with blacks and other racial minorities throughout their lives.

But race has played a role in West Virginia from its very formation. The only state to be born of the Civil War and the first state below the Mason-Dixon Line to abolish slavery eventually adopted the same Jim-Crow segregation laws of the American South — the Confederacy from which it broke away. It is undeniable that race played a role in West Virginia then. And after the 2008 Democratic Primary, white West Virginians can no longer claim that race does not play a role in their lives. What caused two of every ten white voters in West Virginia to tell pollsters that they would not vote for a black candidate for president? Was it simply that West Virginians were more honest about their racist beliefs than others in the U.S.? While I believe that the honesty of West Virginia voters was key to their openness with pollsters, ultimately, I find that black invisibility and minority unfamiliarity in the state allowed West Virginians to speak openly about their prejudices.

The Democratic Primary in West Virginia should serve as a wake-up call to leaders in the state and the legal community. Instead of shying away from the difficult and emotional task of beginning an open race dialogue at the College of Law, I believe that the law school should embrace this unique moment in our state's history. Ultimately, I believe that legal educators should find ways to introduce racial dialogues into all classes, not just Constitutional law or classes like Race, Racism, and American Law. The law school's Socratic classroom environment coupled with the role that race and racism have played in shaping the Mountain State and America's laws, make the legal classroom the ideal setting for such conversations.

It would be overly lofty to state that this plan will end racism in West Virginia. But I do believe that on a small scale, if professors at the College of Law begin to infuse their classes with discussions concerning race, and the law school begins to offer a race-based curriculum, white students who have never discussed such topics will begin to see how race plays a role in their lives. For

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<sup>204</sup> These training sessions would not have to be entirely about discussing race and racism. In fact, such a training session could easily address how to speak about other sensitive subjects, such as gender, economic class, sexuality, and disability.

the very first time, these white students will be able to see the invisible. Additionally, such discussions will also benefit black students at the College of Law who can begin to see their white classmates as more than the bigoted and racist caricatures presented in the media. Ideally, such conversations between black Americans and white Appalachians will highlight the commonalities between the two groups — from the epidemic of poverty to the similar stereotypes of inferiority bestowed upon both blacks and Appalachian whites.

Once these commonalities are known and discussed, a great change will occur. The invisible will be seen.

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