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ARTICLES

JUDICIAL ERASURE OF MIXED-RACE  
DISCRIMINATION

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#### INTRODUCTION

The ideal of America as a racial and ethnic melting pot is a fundamental archetype in our national mythology. But discomfort with the idea of miscegenation and with the individuals born to parents of different races is equally fundamental to the American story. Indeed, one historian documents the punishment of Captain Daniel Elfrye for “too freely entertaining a mulatto” in 1632.<sup>1</sup> Since then, racial mixing has engendered a continuously evolving social unease, troubling different groups for different reasons at different times. But the underlying inquietude has persisted. At times, this discomfort has manifested itself through legal mechanisms—for example, as a statutory scheme designed to police the boundaries of racial classification based on blood quantum. At other times, the discomfort has emerged through direct social interaction—for example, as violence directed at interracial couples and at individuals viewed as racially mixed.

Despite the historical and ongoing hostility to racial mixing, our legal system consistently fails to recognize racism directed at those seen as racially mixed. Race discrimination jurisprudence relies heavily on a familiar set of racial categories that David Hollinger has termed the “ethno-racial pentagon” of Asian, Latino/a, White, Black, and Native American.<sup>2</sup> Science has largely demonstrated that the

1. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1172 (1997) (quoting WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO*, 1550–1812, at 166 (1968)).

2. DAVID A. HOLLINGER, *POSTETHNIC AMERICA: BEYOND MULTICULTURALISM* 23–25 (1995). People tend to assert that “Latino/a” or “Hispanic” is an ethnicity rather than a race, or that it should be discussed as a different type of category than races such as “Black,” “Asian,” and so forth. See, e.g., Katherine Culliton-González, *Time to*

boundaries of these crude categories are arbitrary and that the categories themselves are social constructs rather than biological realities.<sup>3</sup> Nonetheless, the categories constitute the paradigm through which we view race. And antidiscrimination jurisprudence continues to reflect and reify those categories in recognizing and remedying claims of racial discrimination.

This Article aims to expose the shortcomings of the prevailing crude racial categories as a means to implement the core provisions of antidiscrimination law—constitutional and statutory provisions such as the Equal Protection Clause and Title VII, and the jurisprudence that has developed around these provisions. Such provisions are designed to address racial discrimination by prohibiting inequitable treatment of individuals based on race and by punishing such inequitable treatment when it occurs. The provisions are *not* intended to protect specific racial categories. Rather, categories are simply the mechanism that the judiciary has adopted for implementing the goals of our antidiscrimination regime.

In light of these goals, I demonstrate that a categorical approach to race renders antidiscrimination jurisprudence inhospitable to claims brought by individuals who allege that they were discriminated

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*Revive Puerto Rican Voting Rights*, 19 BERKELEY LA RAZA L.J. 27, 46–47 n.150 (2008) (explaining that “Hispanic” or “Latino” is generally a term describing ethnicity in the United States and that Latinos can be of different races). The U.S. Census treats “Hispanic” as an ethnicity, asking respondents first to identify themselves as “Spanish/Hispanic/Latino” or non-Hispanic, and then asking separately what race they are. U.S. Dep’t of Commerce, Bureau of the Census, United States Census 2000, Form D-61A, *available at* <http://www.census.gov/dmd/www/pdf/d61a.pdf>. I acknowledge that some have argued in favor of treating Latino/a as other than a race. *See, e.g.*, Juan Perea, *Five Axioms in Search of Equality*, 2 HARV. LATINO L. REV. 231, 241 (1997) (arguing that ethnicity is a more appropriate categorization for Latinos for purposes of understanding discrimination because it encompasses aspects of race as well as characteristics such as language and history). Nonetheless, I believe that for purposes of this Article, it is more appropriate to adopt a functional definition of Latino/a. In the eyes of society, the label “Latino/a” functions similarly to the other four points on the ethno-racial pentagon; therefore, I refer to Latino/a as a race. *See, e.g.*, Kevin R. Johnson, “Melting Pot” or “Ring of Fire”? *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1268 (1997) (explaining that Latinos have been categorized as a race because of their perceived status as “foreigners” and their limitations in assimilation).

3. *See generally* JOSEPH L. GRAVES, JR., *THE EMPEROR’S NEW CLOTHES: BIOLOGICAL THEORIES OF RACE AT THE MILLENNIUM* (2001) (employing research in the field of human genetics to demonstrate the lack of scientific justification for regarding human populations as belonging to distinct racial groups); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 11–16 (1994) (noting that scientific data demonstrates that “greater genetic variation exists *within* the populations typically labeled Black and White than *between* these populations”).

against because they were perceived as multiracial.<sup>4</sup> Categories suppress ambiguity and stifle nuance, channeling plaintiffs who have suffered discrimination based on their perceived mixed ancestry into recognized monoracial narratives of discrimination. Courts' reliance on categories thus obscures racial animus specifically directed at those perceived as multiracial. Consequently, by relying on categories, courts blunt antidiscrimination law as a tool to promote racial understanding and eliminate racism.

No scholarly work has previously focused on the treatment of individuals specifically identified as multiracial in antidiscrimination jurisprudence.<sup>5</sup> The absence is surprising in light of the sheer volume of scholarship relating to multiracial individuals.<sup>6</sup> In discussing racial identities that transcend Hollinger's ethno-racial pentagon, scholars have generally focused on the problems related to recognizing and categorizing multiracial people.<sup>7</sup> Much research has

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4. I use terms such as "mixed-race," "multiracial," and "biracial" throughout this Article, and I believe that it is critical to explain what I do and do not mean by these terms for purposes of my discussion. To some extent, the terms "multiracial" and "biracial" seem to rely on the idea of biological races: for someone to be multiracial, they must be a mixture of two "pure" races. Some scholars have thus criticized the use of the term "multiracial" as embracing an outdated biological view of race. See, e.g., RAINIER SPENCER, CHALLENGING MULTIRACIAL IDENTITY 2 (2006) (associating the advocacy of multiracial identity with the belief "that biological race exists as a physical reality"). I explicitly renounce the notion that there is a biological basis for race. Rather, I view race as a socially constructed phenomenon. But my view does not render race a phenomenon undeserving of legal recognition. Some people are perceived by society either as racially mixed or as simultaneous members of two socially recognized monoracial groups. The fact that this socially perceived identity exists and exerts social force is the notion that I invoke in this Article when I use the word "multiracial."

5. One scholar has mentioned discrimination against multiracial individuals in the larger context of arguing that focusing on the employer's discriminatory intent is a better test for Title VII claims than an immutable-trait analysis. See Ken Nakasu Davison, Note, *The Mixed Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 ASIAN L.J. 161 (2005).

6. Indeed, several anthologies of such scholarship are currently in print. See, e.g., AMERICAN MIXED RACE: THE CULTURE OF MICRODIVERSITY (Naomi Zack ed., 1995) (exploring identity theory as well as the personal, artistic, social science, and public policy implications of mixed race); THE MULTIRACIAL EXPERIENCE: RACIAL BORDERS AS THE NEW FRONTIER (Maria P. P. Root ed., 1996) (examining aspects of gender, education, and rights through the use of personal narratives); THE NEW RACE QUESTION: HOW THE CENSUS COUNTS MULTIRACIAL INDIVIDUALS (Joel Perlmann & Mary C. Waters eds., 2002) (analyzing the national policy implications of the census allowing respondents to choose their race); RACIALLY MIXED PEOPLE IN AMERICA (Maria P. P. Root ed., 1992) (looking at issues involving categorization, multiracial children, and the census).

7. See, e.g., SPENCER, *supra* note 4 (criticizing multiracial scholarship for bolstering traditional racial categories); RONALD R. SUNDSTROM, THE BROWNING OF AMERICA AND THE EVASION OF SOCIAL JUSTICE (2008) (reflecting on shifting

examined the sense of disenfranchisement experienced by people who identify themselves as multiracial or as belonging to multiple racial categories.<sup>8</sup> Scholars have explored the individual psychological harms that result from such racial alienation<sup>9</sup> and have discussed whether demographic mechanisms, such as the census, should provide a forum for self-identified multiracial people to assert their self-perceived identities.<sup>10</sup>

While these issues are surely worthy of scholarly exploration, I believe that acknowledging animus directed at people whom others

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demographics and their impact on race theory and political philosophy); KIM M. WILLIAMS, MARK ONE OR MORE: CIVIL RIGHTS IN MULTIRACIAL AMERICA (2006) (noting various levels of recognition of multiracial interests according to factors such as total minority population and liberal/progressive tendencies of a state); Nancy A. Denton, *Racial Identity and Census Categories: Can Incorrect Categories Yield Correct Information?*, 15 LAW & INEQ. 83 (1997) (articulating the importance of the difference between social and individual identity); Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 LAW & INEQ. 183 (1993) (recognizing the constant social and psychological questioning that multiracial individuals face); Tanya Katerí Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998) (questioning the implementation of multiracial discourse in the quest for racial equality as hiding the racial impact of supposedly race-neutral laws); Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701 (2003) (highlighting the efforts of mixed race individuals to gain recognition by the census and noting the interdependence of legal and cultural categories); John A. Powell, *The Colorblind Multiracial Dilemma: Racial Categories Reconsidered*, 31 U.S.F. L. REV. 789 (1997) (analyzing the limitations of colorblind and multiracial-position advocacy and acknowledging, instead, the different levels at which race operates); Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994) (challenging the practice of racial-matching by courts and child-placement agencies, and arguing for a choice in the child's best interest).

8. See, e.g., JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY (1995) (providing insight through accounts of a mixed race woman often mistaken for a white woman); GREGORY HOWARD WILLIAMS, LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK (1995) (telling the story of a White boy who discovers that he has poor Black relatives who are passing as White); Johnson, *supra* note 2 (describing how multiracial individuals are marginalized or ignored and thus shut out of discourse); Adrian Piper, *Passing for White, Passing for Black*, 58 TRANSITION 4 (1992) (recounting how the author was isolated from both races because she was a light-skinned middle-class Black woman).

9. See, e.g., Gilanshah, *supra* note 7, at 189–90 (“Multiracial individuals constantly confront sociological and psychological identity questions . . . . In general, multiracial people have problems coping with their marginal status.”).

10. See, e.g., THE NEW RACE QUESTION, *supra* note 6, at 40 (“When self-identification is used to identify race . . . respondents should be given the opportunity to identify with more than one race, but the term ‘multiracial’ is not to be used. Rather, the names of specific races are to be presented as choices for the respondent.”); Denton, *supra* note 7, at 92–96 (suggesting a two-question scheme regarding personal and social identification); Powell, *supra* note 7, at 794–95 (identifying a discrepancy between how the government classifies groups compared to common usage).

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identify as multiracial is an urgent task fundamental to the project of situating multiracial people within a jurisprudence targeted at combating racism. Race matters in the first instance only because some people are treated differently—and worse—because of their race. Therefore, understanding how and why people who are viewed as racially mixed suffer racial discrimination should be the first step in theorizing how the legal system should regard such people.

Throughout this Article, I pass no judgment on who “is” or “is not” racially mixed. This approach is appropriate given my focus on discrimination, where the key question is not whether someone is in fact of a particular race, but rather whether a discriminator perceives that person to be a member of that race. Therefore, I employ an outsider’s perspective in discussing racial identification. When I refer to “Asian people,” for example, by default I mean people who are identified as Asian by other people (or by a specific other person). And when I refer to “multiracial people” or “mixed-race people,” I mean those who are identified as multiracial. Determining whether mixed-race identification is “accurate” in any particular instance—or, indeed, defining what “accuracy” entails—is not my project here. Likewise, when I refer to an “interracial relationship,” I mean a relationship between two people whom society views as members of different racial groups. Again, whether the individuals are “really” members of different races does not concern me.

I clearly indicate the few instances where I depart from this “other-identified” approach to racial identity. The departure is necessary because mixed-race self-identification has gained traction as a social phenomenon, and as a result, many Americans voluntarily identify themselves as “mixed-race,” “biracial,” or “multiracial.” This self-identification is relevant to my project because a person who views herself as multiracial may choose to engage in a wide array of identity performance that leads other people also to identify her as multiracial. Moreover, a plaintiff who identifies herself as multiracial and who claims discrimination on that basis may experience alienation if her narrative of discriminatory treatment is distorted by a court intent on conforming that narrative to a category-reliant jurisprudence. But identifying oneself as multiracial is neither necessary nor sufficient to being identified as multiracial by others.<sup>11</sup>

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11. See Mezey, *supra* note 7, at 1753 (“People discriminate based on who they think you are and not how you understand yourself.”).

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So just as I need not pass judgment on whether outside identification of an individual as multiracial is accurate, I also need not pass judgment on whether an individual's self-identification as multiracial is accurate.

Finally, I acknowledge color discrimination as an issue related to but distinct from multiracial discrimination. Because physical appearance is one characteristic by which society identifies people as mixed-race, undoubtedly skin color cues multiracial identification in some instances. But as I explain, physical appearance is not the only characteristic by which an individual might come to be identified as racially mixed, nor will any particular physical trait automatically cue multiracial identification. Thus, race and color are not coextensive in the context of multiracial discrimination. An individual might suffer color discrimination even if others do not identify him as multiracial. Likewise, he might suffer discrimination on the basis of multiracial identification regardless of the color of his skin.<sup>12</sup>

This Article proceeds in five parts. Part I briefly discusses the myriad ways by which people might come to identify an individual as racially mixed. Such identification might result from a number of cues, including physical appearance, language, speech, name, association with family members or friends, behavior, or any other factor that might be interpreted as a racial cue. I need not address whether such identification is "accurate" to conclude that the identification may engender tangible consequences for how the mixed-identified individual is treated.

Part II then explores the phenomenon of animus against individuals perceived as racially mixed. I begin by summarizing the historical roots of animus against mixed-race people. Well into the twentieth century, both scientists and society at large generally agreed that mixed-race people were genetically inferior to "pure" members of all races. This consensus both flowed from and supported a generalized hostility toward racial mixing and multiracial people, and was instrumental in justifying statutory prohibitions on miscegenation in many states.

The Supreme Court's decision in *Loving v. Virginia*<sup>13</sup> removed legal obstacles to interracial marriage,<sup>14</sup> and the subsequent increase in

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12. Future research might usefully interrogate the overlap and distinction between multiracial discrimination and color discrimination.

13. 388 U.S. 1 (1967).

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interracial unions laid the groundwork for the multiracial identity movement. That movement increased social awareness of individuals who identify themselves as multiracial or who are identified as such by others, and these individuals have been accorded a measure of legal recognition in certain contexts outside of the core provisions of antidiscrimination law.<sup>15</sup> But recent research indicates that many people still view interracial marriage—and, by extension, children born of such marriages—as undesirable. I conclude that animus against multiracial people persists today and results in tangible negative treatment of people viewed as multiracial.

Part III examines the paucity of discrimination claims filed by individuals who are socially identified as racially mixed. This absence is surprising given the persistence of animus against those viewed as multiracial. As noted, antidiscrimination law is intended to ensure that individuals are not treated differently from one another on the basis of race, and the current jurisprudence interpreting those laws relies heavily on the existence of clear racial categories. Within this realm, plaintiffs who allege discrimination based on an ascribed non-categorical identity remain largely unacknowledged. To the extent that the courts do acknowledge or accord protection to such plaintiffs, they generally skirt the non-categorical nature of the identity in question or they attempt to adapt the identity to conform to the prevailing categorical scheme.

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14. *Id.* at 12 (holding that a prohibition of interracial marriage violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution).

15. In some legal contexts, individuals who identify themselves as multiracial have succeeded in gaining acknowledgement that either they or society—or perhaps both—view traditional racial categories as inadequate to capture their racial identity. In what I refer to as the “diversity” context, a program is structured around the benefits that are believed to flow from the integration of people whom society perceives as members of multiple racial categories. This justification applies to policies such as affirmative action and school redistricting. Some such programs allow individuals to identify as multiracial and to have their contribution to diversity assessed on that basis. And in what I refer to as the “demographic” context, a program involves governmental efforts to gather and retain statistical information about individual members of our population from which a variety of policy decisions and legal outcomes flow. The census is the obvious example of the demographic context, but various state data-gathering contexts and other governmental data-collection efforts also fall within this category. In some instances within this context, individuals are likewise given the opportunity to assert multiracial identification, either explicitly or by checking multiple boxes corresponding to racial classifications. Neither the diversity context nor the demographic context is the focus of this Article, but in both contexts, individuals who identify themselves as racially mixed have gained a measure of recognition.



Part IV considers the troubling consequences of the phenomenon described in Part III. On an individual level, when a judicial actor revises a plaintiff's narrative of multiracial discrimination, that plaintiff suffers injury to his dignity and alienation from the legal system. Such revision also renders antidiscrimination jurisprudence inhospitable to claims by mixed-race individuals, making it difficult for an individual to succeed on a claim explicitly alleging multiracial discrimination. And on a broader social level, the suppression of non-categorical claims of discrimination leaves unaddressed the unique type of animus directed at multiracial individuals. For example, the discrimination suffered by an individual who has one Black and one White parent is not necessarily a subset of the discrimination directed at Black individuals or White individuals. Rather, the Black/White individual may suffer discrimination precisely *because* he is perceived as racially mixed rather than as a "full" member of one category or the other. Courts' failure to recognize the possibility of discrimination specific to mixed-race individuals is self-perpetuating: a lack of precedent acknowledging multiracial discrimination decreases the likelihood that future decisions will acknowledge such discrimination. Moreover, this failure stifles awareness of multiracial discrimination and impedes an open discussion that might catalyze eradication of such forms of discrimination. And finally, courts' use of prevailing monoracial categories to remedy multiracial discrimination reifies the rigid monoracial categories as "true" and further entrenches them in social consciousness.

In Part V, therefore, I offer a general outline for incorporating claims of discrimination by people identified as multiracial into antidiscrimination jurisprudence. The framework I propose can readily be implemented under existing constitutional, statutory, and regulatory provisions; it neither contradicts existing jurisprudence nor does away with categories altogether. Rather, the framework would supplement current jurisprudence with a means to identify and remedy discrimination based on animus that does not fit easily into a category. I do not advocate for the recognition of a sixth category—"multiracial"—that would receive equal standing with the other five. Instead, I hope to show that courts may address racial discrimination without necessarily consigning the plaintiff to any of the conventional racial categories. My proposed framework would allow movement past our current racisms and toward a more

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nanced understanding of the social construction of race—one in which racial identity is both fluid and contingent, and, to the extent that racial categories exist, they no longer bear the stigma associated with years past.

I. “WHAT ARE YOU?”<sup>16</sup>: CUEING PERCEPTION OF RACIAL MIXING

The view of race as a social rather than a biological phenomenon is not a recent development. More than twenty years ago, the Supreme Court acknowledged research positing that racial categories are invented social constructions:

Many modern biologists and anthropologists . . . criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the “average” individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.<sup>17</sup>

Subsequent advances in scientific understanding have confirmed that race is, in fact, a social construction rather than a biological reality.<sup>18</sup> Because race is socially constructed, racial mixing is as well. Without the social perception that people belong to different racial categories, society would attach no particular label to the offspring of a relationship between supposed members of different races.<sup>19</sup> But having parents who are members of different socially ascribed racial categories is neither necessary nor sufficient to one’s identification as a multiracial person. Rather, many factors may lead to perception of an individual as racially mixed. I emphasize that

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16. PEARL FUYO GASKINS, *WHAT ARE YOU?: VOICES OF MIXED-RACE YOUNG PEOPLE* 5 (1999) (“As a racially mixed person, I have been asked . . . ‘What *are* you?’ or ‘Where are you from?’ countless times by curious and sometimes obnoxious people . . .”).

17. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987).

18. See sources cited *supra* note 3.

19. Likewise, individuals would be unlikely to attach a “multiracial” label to themselves if their parents were not perceived as members of different races.

such perception need not be “accurate”—whatever accuracy might entail—to result in tangible negative consequences for how the person viewed as multiracial is treated. Rather, the point is that various cues may lead one person to perceive another as multiracial, and that this labeling may alter the way the perceiver treats the multiracial-labeled person.

An individual may come to be labeled as multiracial in two primary ways. The first consists of identification triggered solely or primarily by various physical traits or by an aggregation of those markers. Camille Rich offers a thorough analysis of the cognitive process of “morphology-based racial/ethnic ascription,” explaining that such ascription occurs when someone “interprets another person’s visible, physical features to correlate with a set of features she identifies with a certain race or ethnic group.”<sup>20</sup> Features triggering racial ascription include skin color, hair texture, and nose or eye shape.<sup>21</sup> Although most people believe that they can identify others’ race or ethnicity based on morphology, in some instances, individuals are forced to acknowledge that morphology “fail[s] to provide a clear basis for identifying another person’s race or ethnicity.”<sup>22</sup> In the aggregate, morphological markers may lead to an individual being seen as racially ambiguous—the kind of person of whom strangers often inquire, “What are you?” or perhaps, “What’s your ancestry?” Many individuals, therefore, are identified as racially mixed based purely on their physical appearance.<sup>23</sup>

Because genetic variance is unpredictable, not all people whose parents would be perceived as members of different socially constructed racial categories would themselves be perceived as

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20. Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1145 (2004) (identifying ascription of race and ethnicity as learned responses).

21. *Id.* at 1146.

22. *Id.* at 1146–48 (correlating increased human interaction with increased evidence of the limitations of morphology).

23. The likelihood of an individual being labeled multiracial may be higher for some racial combinations than for others. Given America’s ugly history of slave rape and hypodescent, I suspect that, in many instances, society instinctively labels Black/White individuals as Black even if they are relatively light-skinned and their other physical features tend to connote some degree of White ancestry. With respect to Asian/White individuals, I believe that there is more social iconography encouraging identification of such people as mixed. See, e.g., KIP FULBECK, PART ASIAN, 100% HAPA (2006) (featuring portraits and self-descriptions of individuals who identify themselves as racially mixed and Asian). I do not pursue this tentative conclusion further here, but perhaps it will provide interesting fodder for future research.

mixed-race upon sight. Rather, such people are sometimes labeled as monoracial based on purely physical cues.<sup>24</sup> The second form of multiracial labeling, therefore, occurs when a person who is initially perceived as monoracial based on morphology comes to be perceived as multiracial—that is, when some other factor leads the perceiver to view the person as racially mixed. The perceiver’s reaction in that instance is not “What are you?” but rather “You’re not what I thought you were.”

With respect to the second form of multiracial labeling, many factors other than physical appearance may trigger perception of an individual as mixed-race. An individual’s style of speech—accent, vocabulary, syntax, and so on—may run counter to impressions created by that individual’s physical appearance, perhaps leading to the conclusion that the person is racially mixed. One study found that people are only seventy percent accurate at identifying others’ race based solely on hearing their voices.<sup>25</sup> While the study did not specify how the race of the participants was identified or how mixed-race people were classified, its findings reinforce the notion that speech may influence perception of race. For example, if the perceiver initially forms an impression of someone’s race based on a telephone conversation, that impression might be revised based on a subsequent in-person encounter.

Language may likewise cue perception of an individual as multiracial. Perhaps an employee could pass as White but occasionally speaks Spanish in the workplace, either to other employees or to friends or relatives on the telephone within earshot of colleagues. That employee, while initially perceived by coworkers as White, might come to be perceived as multiracial. At the very least, the use of Spanish, Chinese, Tagalog, Swahili, or any other language might trigger questions that would lead to the bilingual individual

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24. See, e.g., Johnson, *supra* note 2, at 1287 (suggesting that Latinos and African-Americans with lighter complexions might have more choice regarding their asserted identity as opposed to being assigned a socially constructed race by others based on sight); Jean Shin, *The Asian American Closet*, 11 *ASIAN L.J.* 1, 3–4 (2004) (contending that stereotypes about assimilating Asians influence the physical erasure of multiracial individuals, including Keanu Reeves and Dean Cain, mixed-race actors who are regarded as white in the popular media).

25. Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 *WIS. L. REV.* 1283, 1308–09 (2005). This study was one of a series of phonetic experiments examining the correlation of perception of speech and discrimination. See Thomas Purnell et al., *Perceptual and Phonetic Experiments on American English Dialect Identification*, 18 *J. LANGUAGE & SOC. PSYCHOL.* 10, 11, 19–22 (1999).

“outing” herself as racially mixed by explaining that she learned the language in question from her parents or grandparents.

An individual’s first, middle, or last name may also cue mixed-race identification. Angela Onwuachi-Willig relates the story of a White friend named Nyasha who frequently encounters surprise when people meet her in person, having assumed, based on her name, that she was Black.<sup>26</sup> Similarly, many mixed Asian children are given an Anglo first name and an Asian middle name by their parents. An employer who previously viewed a particular employee as White might consequently come to perceive him as multiracial after seeing his Asian middle name listed on company paperwork. I note that the inferences drawn from a name need not be accurate to cement an impression of a person as racially mixed. For example, were Nyasha’s morphology sufficiently ambiguous, others might come to perceive her as partially Black based on her name and their interpretation of her morphology in light of her name.

Association may also cue identification as mixed race. For example, in *Mitchell v. Champs Sports*,<sup>27</sup> the plaintiff testified that her mother was White and that her father was Black, but based on her appearance, “many people consider her of mixed Hispanic and European descent.”<sup>28</sup> However, the plaintiff was often visited at the store where she worked by Black friends and relatives, and her treatment by her supervisor rapidly deteriorated after he observed these visits and identified her as a person with Black ancestry.<sup>29</sup> Likewise, an employee’s marriage to or partnership with a person perceived to belong to a particular race may lead to a perception that the employee is racially mixed—i.e., that he is a “partial” member of his partner’s ascribed race. This is particularly likely if he makes his relationship visible by introducing his partner to his coworkers or by displaying pictures of his partner on his desk. Indeed, even a superficially insignificant associative act, such as an employee’s decision to eat lunch with a group of employees whose ascribed race is inconsistent with his own physical appearance, may trigger multiracial identification.

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26. Onwuachi-Willig & Barnes, *supra* note 25, at 1301 n.72.

27. 42 F. Supp. 2d 642 (E.D. Tex. 1998).

28. *Id.* at 646.

29. *Id.*

Additionally, any number of behaviors may lead others to view an individual as mixed-race.<sup>30</sup> For example, a man who appears White in the eyes of society might list membership in an Asian Pacific American student organization on his resume, thereby inducing an employer to perceive him as part-Asian.<sup>31</sup> A relatively fair-skinned woman with kinky hair might restyle her hair in cornrows, causing her boss to view her as part-Black. An olive-skinned, Spanish-speaking man with the surname “Ramirez” may announce his intent to visit his mother’s side of the family in Japan, triggering assumptions—or at least questions—about whether his mother is Asian. The extent to which an individual *intentionally* engages in behavior designed to promote a certain perception of his racial background is a rich and fascinating topic. Devon Carbado and Mitu Gulati have examined the incentives to perform racial identity in a certain way—to “work identity”—and the consequences of that performance.<sup>32</sup> While I believe that this topic is important and deserving of close examination, for present purposes, it will suffice to posit intentional identity performance, or identity work, as another mechanism by which an individual might come to be perceived as racially mixed.

I cannot overemphasize the role of the perceiver in multiracial identification. With respect to any non-physical factor—speech, language, name, association, and other behavior—the perceiver’s recognition of the potential cue may also cause the perceiver to become more attentive to certain physical traits that, correctly or incorrectly, cue a designation of racial mixedness in the perceiver’s mind. Relatedly, the way in which an individual is labeled based purely on physical appearance may depend on external factors, such as geography, or on the background and life experiences of the person doing the labeling. For example, someone who would likely be perceived as a multiracial Asian/White person in San Francisco, California, where Asian/White intermarriage is relatively common,

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30. See generally Rich, *supra* note 20, at 1139–44 (discussing various behaviors and other forms of self-presentation as racial signifiers).

31. Judy Scales-Trent describes the experience of “hav[ing] been at social gatherings where I did not know a certain person was ‘black’ until they dropped verbal markers into the conversation (‘Are you a Delta too?’).” SCALES-TRENT, *supra* note 8, at 89.

32. See, e.g., Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (exploring how the ways in which “workplace outsiders” perform their racial and ethnic identities affects others’ perceptions and the treatment that the “workplace outsiders” receive).

might simply be perceived as Asian in Charleston, West Virginia, where there are relatively few Asians, let alone intermarriages between Asians and Whites.<sup>33</sup> The non-physical cues I have enumerated may likewise take on different significance to different perceivers. For example, Camille Rich has discussed how a manner of speaking that tends to be perceived as a Black dialect in the Northeast may simply connote low socioeconomic status in the South.<sup>34</sup>

The perception of an individual as multiracial is fluid and contingent, and such perception depends significantly on the perceiver's situation and past experiences. Thus, we must focus on the perceiver's perspective in examining multiracial labeling and how such labeling may lead to discrimination. The next Part, then, takes this perspective in examining how, once a person has come to be perceived as racially mixed or otherwise outside of traditional racial categories, that perception sometimes triggers animus on the part of the perceiver. Emphasizing the perceiver's perspective, I discuss the historical roots of multiracial animus and its persistence in society today.

## II. "A MONGREL BREED OF CITIZENS"<sup>35</sup>: ANIMUS AGAINST MULTIRACIAL PEOPLE

One might argue that discrimination against multiracial people is merely a subset—perhaps even a milder one—of discrimination against monoracial individuals. In other words, a person who is identified as partially Black might be subject to the same kind of animus as one who is identified as fully Black. This Part aims to disprove that notion and demonstrate that animus against people identified as multiracial is a unique phenomenon.

I readily acknowledge some overlap between what we might call monoracial and multiracial animus: a racist who dislikes people who she views as Asian might well dislike an individual whom she

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33. The 2000 Census reported that 30.8% of San Franciscans were Asian, compared to only 1.8% of Charleston's population. U.S. Census Bureau, American FactFinder, <http://factfinder.census.gov> (enter "san francisco" and "california" in "Fast Access to Information" fields; follow "San Francisco city, California" hyperlink; select "2000" tab; repeat search for "charleston" and "west virginia") (last visited Feb. 3, 2010).

34. Rich, *supra* note 20, at 1158.

35. See *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955), *vacated*, 350 U.S. 891 (1955) (per curiam).

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identifies as part-Asian for some of the same reasons. But viewing someone as part-Asian also lends itself to unique forms of animus not directed at those perceived as monoracial. A mixed-race person may be viewed as polluted, defective, confusing or confused, passing, threatening, or—in our diversity-obsessed society—as opportunistic, gaining an advantage by identifying with a group in which he is at best a partial member. These negative associations may be distinguished from those directed at people perceived as monoracial.

I use history, sociology, and jurisprudence to buttress my claim that animus against multiracial people is a unique form of animus that is distinguishable from animus directed at any monoracial group. In the process, I hope to demonstrate that animus against racially mixed individuals is anything but benign or mild.

Other scholars have attempted to illuminate the reason underlying the persistent discomfort with racial mixing and racial mixedness.<sup>36</sup> My own view is that different groups' discomfort with mixing is so heterogeneous that any theory attempting to explain animus toward multiracial people will by necessity be quite complicated. While I believe that development of such a theory is an important project, it is one I do not address in this Article. Instead, I focus on demonstrating that racism directed at people who are viewed as multiracial is a real phenomenon that may result in tangible negative consequences to the lives of the people thus identified.

#### A. *Historical Origins*

Hostility toward people perceived as racially mixed has a long pedigree in American society and is intricately interwoven with disapproval of interracial relationships. For many years, racial mixing between Black and White individuals was the most salient form of mixing due to the history of slavery, and the ongoing tension between Black and White communities yielded heightened animosity toward Black/White mixed individuals. This focus on Black/White mixing was reflected and reinforced by contemporaneous social science research. As a result, the academic literature contains a more

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36. See, e.g., SCALES-TRENT, *supra* note 8, at 57–59 (discussing incidents during which her distinctly mixed-race physical appearance “upset [people] because there was not a good fit between what they saw and heard, and what they expected to see and hear”); Piper, *supra* note 8, at 7 (asserting that “perceptual and cognitive distortions” result from “the failure to see any act of racist aggression as a defensive response to one’s own perceived attack on the aggressor’s physical or psychological property, or conception of himself or of the world”).



thorough examination of Black/White relationships than relationships involving other races.

While I, too, acknowledge the importance of Black/White mixing, and while I begin my historical discussion with that relationship, I emphasize that hostility to racial mixing and mixed-race individuals was also directed at relationships between Whites and Native Americans; that such hostility expanded to include Asians and Latinos as they entered the country; and that such hostility was by no means limited to relationships in which one partner was White. Animus toward these other instances of racial mixing has, in my view, received insufficient acknowledgment as a complement to the Black/White narrative. While I therefore do my best in this Section to examine thematically the hostility toward racial mixing among members of all races, my efforts are somewhat limited by the prevalence of scholarship related to the Black/White paradigm. Likewise, my purpose is to provide a conceptual overview rather than a comprehensive account: other scholars have explored the history of animus toward racial mixing—at least with respect to Black/White relationships—in considerable detail, which I do not replicate here.<sup>37</sup>

Well into the beginning of the twentieth century, prevailing science demonized racial mixing between Blacks and Whites as undesirable and even dangerous. Herbert Hovenkamp draws a fine distinction between two strains of social scientific thought regarding such racial mixing.<sup>38</sup> The first emphasized the role of God in creating different races, invoking so-called natural law to predict that “ugly consequences” would result from “any tampering—such as the interbreeding of dissimilar organisms.”<sup>39</sup> The second strain of thought, which gradually came to predominate, was driven by evolutionists who emphasized the role of genetics.<sup>40</sup> These “hereditary determinists” argued that racial mixing would “slow the evolutionary progress of the more advanced race” and would “increase[] the possibility of producing bizarre, unhealthy offspring .

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37. See, e.g., A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996); *INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE AND LAW* (Werner Sollors ed., 2000); GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

38. Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 *DUKE L.J.* 624, 634 (1985).

39. *Id.*

40. *Id.*

. . . with disproportioned features, mental deficiency, weakness, and disease.”<sup>41</sup>

Indeed, the attitude that racially mixed individuals were defective undergirded the legal prohibitions on miscegenation.<sup>42</sup> Prominent social scientists agreed that the “mulatto” was physically, intellectually, and psychologically inferior to *both* Black and White individuals. For example, Nathaniel Southgate Shaler, a well-known professor at Harvard at the turn of the twentieth century, noted that mulattos are “general[ly] of feeble vitality, rarely surviving beyond middle age,”<sup>43</sup> and that they possessed “a refinement unfitting [them] for all work which has not a certain delicacy about it” as well as “a laxity of morals.”<sup>44</sup> Shaler’s colleagues echoed these views.<sup>45</sup> Hovenkamp summarizes the views of Shaler and his contemporaries: “[T]he mulatto was an outcast in both worlds—too civilized to be comfortable with the black, but too primitive to live with the white without giving offense.”<sup>46</sup>

These views were reflected in popular opinion. In *Rhineland v. Rhineland*,<sup>47</sup> perhaps the most sensational case involving miscegenation, a wealthy white man sought an annulment of his marriage on the ground of fraud after learning that his wife had “colored blood.”<sup>48</sup> His attorney—a well-known and successful member of the bar—exhorted the jury to find in his client’s favor, urging: “[T]here isn’t a father among you [the jury members] who would rather not see his son in his casket than to see him wedded to a mulatto woman. . . . Decent blacks have the same feeling.”<sup>49</sup> While the jury ultimately found against the husband, the fact that a highly regarded attorney conceived this argument attests to the contempt with which many Whites viewed “mulattos”; moreover, the same

41. *Id.* at 634–35.

42. See Gilanshah, *supra* note 7, at 193–94 (explaining that court decisions often contained rationales that expressed fear and anxiety over the possibility of interracial relationships weakening the overall population, often using “pseudo-scientific myths” and religious beliefs).

43. N. S. Shaler, *Our Negro Types*, 29 CURRENT LITERATURE 45, 46 (1900).

44. N. S. Shaler, *An Ex-Southerner in South Carolina*, ATL. MONTHLY, July 1870, at 53, 57.

45. Hovenkamp, *supra* note 38, at 654–55.

46. *Id.* at 655.

47. 219 N.Y.S. 548 (App. Div. 1927).

48. *Id.* at 549.

49. See Angela Onwuachi-Willig, *A Beautiful Lie: Exploring Rhineland v. Rhineland as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CAL. L. REV. 2393, 2418, 2436 (2007) (citations omitted) (providing a detailed account of the *Rhineland* case while drawing on primary sources).

attitudes toward those perceived as racially mixed were imputed to “decent blacks.”

Contemporaneous accounts of attitudes toward Mexican-American immigrants reflect a similar disparaging attitude toward racial mixture. Juan Perea has described the general contempt for the “mongrel race” of Mexican immigrants.<sup>50</sup> Indeed, well into the twentieth century, “American visitors to the Mexican frontier were nearly unanimous in commenting on the dark skin of Mexican mestizos who, it was generally agreed, had inherited the worst qualities of Spaniards and Indians to produce a ‘race’ still more despicable than that of either parent.”<sup>51</sup> The focus, therefore, was on the inferiority specifically produced by perceived racial mixing. As Guadalupe Luna likewise documents, early twentieth-century texts link immigrants’ racially mixed heritage and their perceived intellectual and social shortcomings.<sup>52</sup> In 1927, one author explained: “The Mexican ‘peon’ (Indian or mixed-breed) is a poverty-stricken, ignorant, primitive creature, with strong muscles and with just enough brains to obey orders and produce profits under competent direction.”<sup>53</sup>

Statutory law reflected this condemnation of racial mixing. Scholars have documented the long history of anti-miscegenation statutes in America, beginning with statutes in Maryland and Virginia in the 1660s.<sup>54</sup> At one point, thirty-eight states had statutes banning miscegenation,<sup>55</sup> and more than half of all states had retained these statutes as of 1955.<sup>56</sup> Virginia’s statute, passed in 1924 and titled

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50. Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 975–77 (1995).

51. *Id.* at 976 (quoting FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS 59–60 (David J. Weber ed., 1973)).

52. See Guadalupe T. Luna, “Agricultural Underdogs” and International Agreements: *The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. 9, 9 (1996) (introducing the article’s analysis of agricultural inequality by quoting early literature that traced racial inequality to the intersection of socioeconomic status and ethnicity).

53. *Id.* (quoting LOTHROP STODDARD, RE-FORGING AMERICA: THE STORY OF OUR NATIONHOOD 214 (1927)).

54. See DERRICK BELL, RACE, RACISM AND AMERICAN LAW 66–67 (3d ed. 1992).

55. *Id.* at 67 (citing Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 50 (1964)).

56. Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1512 (2000).

“An Act to Preserve Racial Integrity,” provides a typical example demonstrating a desire to prevent racial mixing.<sup>57</sup>

Moreover, even when the law did not explicitly condemn racial mixing, it served as a tool to monitor interracial relationships. The census and other governmental mechanisms for statistical data collection reveal a preoccupation with what Naomi Mezey and Tseming Yang have described as “policing” racial identity claims.<sup>58</sup> The intensely detailed racial classification system on census forms, which at one point included categories such as “Quadroon” and “Octoroon,” reflected a preoccupation with monitoring the number and “type” of mixed race individuals with (what was perceived as) scientific precision.<sup>59</sup>

Against this backdrop of explicit prohibition of miscegenation and more generalized racial monitoring, courts repeatedly upheld statutes designed to prevent interracial interaction. *Plessy v. Ferguson*<sup>60</sup> was, of course, the seminal case, upholding “the separation of the two races” specifically with respect to public railway cars while also indicating that such separation was broadly constitutional in a variety of contexts.<sup>61</sup> Underlying the notion of “separate but equal” was anxiety about the potential consequences of social interaction across racial lines, which might in turn lead to interracial relationships and marriage.<sup>62</sup> Given the legislature’s power to control marriage as a vital institution central to social order, courts generally agreed that

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57. Act of Mar. 20, 1924, ch. 371, § 4, 1924 Va. Acts 534–35 (providing that a couple could not receive a marriage license until the state verified that each applicant’s race was pure and that it matched the other individual’s race).

58. See Naomi Mezey, *supra* note 7, at 1755 (framing the debate over who should administer the census in terms of “protect[ing] a particular vision of the group against attack from both within and without”); Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 154 (1997) (noting the clash between the state’s regulatory judgment and one’s right to “define one’s own conception of the self”).

59. In 1870, for instance, the instructions to census enumerators cautioned: “Be particularly careful in reporting the class Mulatto. The word is here generic, and includes quadroons, octoroons, and all persons having any perceptible trace of African blood. Important scientific results depend upon the correct determination of this class . . . .” See C. Matthew Snipp, *Racial Measurement in the American Census: Past Practices and Implications for the Future*, 29 ANN. REV. SOC. 563, 566–67 (2003) (quoting U.S. BUREAU CENSUS, TWENTY CENSUSES: POPULATION AND HOUSING QUESTIONS 1790–1980, at 18 (1979)).

60. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

61. *Id.* at 550–51 (referring to the constitutionality of mandating racial segregation in “public conveyances” generally).

62. See Hovenkamp, *supra* note 38, at 634 (describing anxiety over interactions across racial lines as grounded in either a creationist or evolutionist world view).

the legislature reasonably exercised that power to prevent undesirable interracial relationships and the defective offspring such unions were believed to produce.

Several cases exemplify this form of judicial reasoning. For example, in *Berea College v. Commonwealth*,<sup>63</sup> the highest court in Kentucky upheld the imposition of a \$1000 fine on a private school for operating a racially integrated institution in violation of a state statute.<sup>64</sup> The court held that “to assert separateness is not to declare inferiority in either [race] . . . . It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix.”<sup>65</sup> Likewise, in *Naim v. Naim*,<sup>66</sup> a case involving a White woman and a Chinese man, the Virginia Supreme Court upheld the state’s anti-miscegenation statute in order “to preserve the racial integrity of [the state’s] citizens.”<sup>67</sup> The court emphasized the need to prevent “the corruption of blood” and foreclose the genesis of “a mongrel breed of citizens.”<sup>68</sup>

Similar concerns are evident in cases revoking citizenship from White women who married men ineligible for naturalization—primarily Asian men—based on legislation such as the Expatriation Act of 1907<sup>69</sup> and the Cable Act of 1922.<sup>70</sup> While comprehensively documenting these events, Leti Volpp explores the marriage between Mary Das, a White woman descended from a Mayflower passenger, and Taraknath Das, a prominent Indian independence activist residing in the United States.<sup>71</sup> While Taraknath Das successfully naturalized in 1914, his citizenship was revoked after the Supreme Court found that Indians were not “white” for purposes of

63. 94 S.W. 623 (Ky. 1906), *aff’d*, 211 U.S. 45, 58 (1908).

64. *Id.* at 623–24.

65. *Id.* at 628.

66. 87 S.E.2d 749 (Va. 1955), *vacated*, 350 U.S. 891 (1955) (per curiam).

67. *Id.* at 756.

68. *Id.*

69. Ch. 2534, § 3, 34 Stat. 1228 (revoking citizenship from women of any race who married male non-citizens).

70. Ch. 411, § 3, 42 Stat. 1021, 1022 (ending expatriation of women who married men eligible for citizenship while maintaining expatriation for women who married men ineligible for naturalization); see Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 432–34 (2005) (explaining that the Cable Act only ended expatriation for marriages between Blacks and Whites, but had no effect on Asian-American women who had married men ineligible for naturalization).

71. See Volpp, *supra* note 70, at 435–36.

citizenship<sup>72</sup>—leading to the revocation of Mary Das’s citizenship as well.<sup>73</sup>

Finally, the prohibition against miscegenation even extended overseas. During World War II, Black American soldiers stationed in Europe often had greater opportunity to interact and develop romantic relationships with White European women. Nonetheless, commanding officers continued to deny Black troops permission to marry their European fiancées if their marriages would violate anti-miscegenation statutes in the United States.<sup>74</sup>

The distaste for multiracial people I have so far discussed is principally that of a White ruling class concerned with the dilution of its racial purity and the disruption of the society it controlled. As I have mentioned, my discussion is a byproduct of the fact that this White ruling class was the primary producer of scientific thought, statutory provisions, and judicial decisions. But members of other racial groups, though lacking the same access to power structures, were not immune to the view that racial mixing would lead to defective offspring or dilute the desirable properties of their own race. Cornel West, for example, discusses Malcolm X’s antipathy toward cultural mixing.<sup>75</sup> West explains that in the context of a culture of White oppression and Black subordination, Malcolm X viewed “mulattoes[] as symbols of weakness and confusion.”<sup>76</sup>

Paradoxically, while historically many individuals believed that multiracial people were socially inferior to members of “pure” races, the reverse perception also inspired animus. Mixed-race people experienced dislike from disadvantaged racial groups based upon the perceived greater social options available to those who could claim mixed ancestry. This animus is related to antipathy toward the practice of “passing”—holding oneself out, explicitly or implicitly, as a member of a different race.<sup>77</sup> Historically, perhaps the most

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72. See *United States v. Thind*, 261 U.S. 204, 214–15 (1923) (“It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white.”).

73. Volpp, *supra* note 70, at 435–36.

74. ALEX LUBIN, *ROMANCE AND RIGHTS: THE POLITICS OF INTERRACIAL INTIMACY 1945–1954*, at 101 (2005).

75. CORNEL WEST, *RACE MATTERS* 103 (1993).

76. *Id.*

77. See Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1145 (2001) (clarifying that “passing” is a voluntary act, different from the situation in which an individual is told he is one race when he would be considered something else if his actual ancestry were disclosed).

common form of passing in America involved light-skinned Blacks—often the descendants of White slave masters and Black slaves—passing for White in order to improve their economic opportunities and social standing.<sup>78</sup> Predictably, White supremacists objected to passing because it threatened notions of racial purity.<sup>79</sup> But many Blacks also objected to passing, arguing that passing was a “betrayal” of “racial loyalty” to the Black community and that passers become “complicit in the regimes that they attempt to escape.”<sup>80</sup>

The negative reactions to passing relate closely to racial mixing, as those who engaged in passing often were also perceived as racially mixed. For example, the selection of light-skinned Homer Plessy, who was seven-eighths White, to serve as the plaintiff in a challenge to Virginia’s “Separate Car Law” provoked resentment from some members of the Black community on the ground that the challenge would represent only the interests of light-skinned mulattos and was therefore “an attempt by mulattos to retain the privileges that their light skin had previously afforded.”<sup>81</sup> Light-skinned Blacks experienced hostility even when they did not fully pass. As Trina Jones has explained, in the early 1900s, “[a]lthough the mulatto elite were generally in a higher socioeconomic class than unmixed Blacks due to their historically favored status . . . their lighter skin and better socioeconomic status spawned resentment within the Black community.”<sup>82</sup> Racial mixedness thus engendered animus from both advantaged and disadvantaged racial groups.

Ultimately, courts invalidated legal prohibitions against racial mixing. In 1948, in *Perez v. Sharp*,<sup>83</sup> the California Supreme Court struck down the state’s anti-miscegenation statute in the face of a challenge brought by a Latina woman and a Black man.<sup>84</sup> And in 1967, the Supreme Court followed suit in *Loving v. Virginia*, holding that statutes prohibiting miscegenation were unconstitutional on the

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78. *Id.* at 1157.

79. *Id.* at 1157–58 (noting that the threat focused mostly on an unsuspecting White person marrying a Black person “passing” as White).

80. *Id.* at 1158, 1175.

81. Mark Golub, Plessy as “Passing”: *Judicial Responses to Ambiguously Raced Bodies in Plessy v. Ferguson*, 39 LAW & SOC’Y REV. 563, 563, 571 (2005).

82. Jones, *supra* note 56, at 1517; *see also id.* at 1518–21 (documenting the various ways in which “the dominant preference operates in favor of lighter skin tones” among Blacks, just as it does among Whites).

83. 198 P.2d 17 (Cal. 1948).

84. *Id.* at 29 (holding that California’s miscegenation law was too vague to be enforced and that it violated the Equal Protection Clause of the U.S. Constitution).

ground that they violated the Fourteenth Amendment to the U.S. Constitution.<sup>85</sup> Now, more than four decades after that decision, one might hope that animus against mixed-race people would be virtually nonexistent, particularly in an era when multiracial people and families appear regularly on our movie screens and televisions and when our forty-fourth president is the son of a Black man from Kenya and a White woman from Kansas.<sup>86</sup> Surely social attitudes have evolved toward tolerance, but *Loving* and the other race-related civil rights gains of the 1960s have not fully dissipated animus against those identified as racially mixed. The next Section discusses the continuing discomfort with interracial relationships and the offspring of such relationships.

### B. Contemporary Attitudes

The phenomenon now known as the multiracial identity movement has undoubtedly shaped our current attitudes toward racial mixing and multiracial people. Two events paved the way for this movement. The first was the *Loving* decision, described above, which removed legal obstacles to intermarriage between individuals of different races.<sup>87</sup> The other event was the decision of the Bureau of the Census to discontinue the practice of having a census enumerator visually determine the races of people surveyed in the census.<sup>88</sup> In 1960, the Bureau instead began to ask the head of the household to fill out the census form.<sup>89</sup> To governmental demographers, race thus became a feature of how an individual (or, at least, the head of the individual's household) perceived himself, rather than a product of how outsiders (such as census enumerators) perceived that individual.

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85. 388 U.S. 1, 12 (1967).

86. Interestingly, Barack Obama is not the first president to claim racially mixed ancestry. Bill Clinton also described himself as a "multiracial American" because some of his ancestors were Native American. Reynolds Farley, *Racial Identities in 2000: The Response to the Multiple-Race Response Option*, in THE NEW RACE QUESTION, *supra* note 6, at 37.

87. For example, post-*Loving*, the number of Black/White married couples living in the United States increased over 600% in less than twenty years, with the number of Black/White offspring increasing more than seven-fold between 1968 and 1994. Patrick F. Linehan, *Thinking Outside of the Box: The Multiracial Category and Its Implications for Race Identity Development*, 44 HOW. L.J. 43, 47-48 (2000).

88. See Snipp, *supra* note 59, at 569 (explaining that the role of the census enumerator was reduced after a large undercounting of minority populations was discovered).

89. *Id.*



These two events—the *Loving* decision and the census modification—laid the groundwork for the multiracial identity movement. Reynolds Farley has noted that, “[a]s early as the 1950s, married interracial couples had organized clubs in Detroit, Los Angeles, and New York to support one another and their mixed-race children.”<sup>90</sup> But multiracial identity groups first gained broader recognition as a social movement in the 1970s and 1980s. A group called Interracial Intercultural Pride (“I-Pride”) formed in the 1970s “to convince the Berkeley public schools to include an ‘interracial’ category on official forms.”<sup>91</sup> The Association of MultiEthnic Americans, which was created from an alliance of I-Pride and several other grassroots organizations, also increasingly lobbied for political and legal recognition.<sup>92</sup> In 1988, an Atlanta woman who objected to the Georgia public school system’s classification of her children and other mixed-raced children solely as Black, regardless of their preferences or their parents’ preferences, formed an organization called Reclassify All Children Equally.<sup>93</sup> Several other multiracial advocacy groups subsequently emerged.<sup>94</sup>

By 1990, although the census still instructed people to check one box that best described their race, over half a million people explicitly disobeyed these instructions by picking two or more races.<sup>95</sup> In 1992, nearly 400 multiracial and biracial individuals attended the “Loving Conference,” which was “the first national gathering of the multiracial community.”<sup>96</sup> Although the multiracial identity movement failed to induce the U.S. Office of Management and Budget to include a “multiracial” category on the 2000 census, that census did, for the first time, allow individuals to select more than

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90. Farley, *supra* note 86, at 34.

91. *See Mezey, supra* note 7, at 1749 (noting that while I-Pride successfully forced the change in Berkeley public schools, the state refused to use a classification system that conflicted with the federal system).

92. *Id.* The founder of this organization, a San Francisco attorney who identified as both White and Mexican, even considered filing suits about the single-race classification system on the 1990 census but was unable to locate qualified plaintiffs. Farley, *supra* note 86, at 34–35.

93. Farley, *supra* note 86, at 34.

94. *See id.* at 35 (highlighting mixed-race support groups such as “A Place for Us,” the “Brick by Brick Church,” the “Interracial Family Alliance,” and the “Interracial Lifestyle Connection”).

95. Wendy D. Roth, *The End of the One-Drop Rule? Labeling of Multiracial Children in Black Intermarriages*, 20 Soc. F. 35, 38 (2005).

96. Gilanshah, *supra* note 7, at 183–84.

one racial category to describe themselves.<sup>97</sup> Multiracial individuals have also received legislative attention at the state level,<sup>98</sup> and the number of self-identified multiracial people continues to increase.<sup>99</sup>

Despite the multiracial identity movement, animus toward people perceived as racially mixed lingers in society and, indeed, has mutated to take on new forms. As previously discussed, attitudes toward multiracial people are linked to perceptions of interracial relationships. Although one might hypothesize a racist who vehemently opposes interracial relationships but has no problem with the offspring of those relationships, in practice, the coexistence of such attitudes seems unlikely. A more plausible notion is that the multiracial person is targeted for disapproval for reasons similar to the reasons that motivate disapproval of interracial relationships. As detailed below, the fact that many Americans continue to view such relationships with suspicion and disapproval is indicative of how those same Americans view multiracial individuals.

Polling indicates that reservations regarding interracial relationships linger. For example, a 2007 study by the Pew Institute found that eighty-three percent of a representative sample of Americans agreed with the statement: “[I]t’s all right for blacks and

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97. Joel Perlmann & Mary C. Waters, *Introduction* to THE NEW RACE QUESTION, *supra* note 6, at 1.

98. Georgia, Illinois, Indiana, Maryland, Michigan, and Ohio all have passed multiracial category legislation. See GA. CODE ANN. § 50-18-135 (1994) (requiring a multiracial category on state forms used for reporting racial data to federal agencies); 105 ILL. COMP. STAT. ANN. 5/2-3.111 (West 2006) (requiring a multiracial category on all forms used by the State Board of Education to gather data relating to racial categories); IND. CODE ANN. § 5-15-5.1-6.5 (LexisNexis 2006) (requiring a multiracial category for some forms used by public agencies); MD. CODE ANN., STATE GOV'T, § 10-606(c)(2) (LexisNexis 2009) (requiring a multiracial category for any form that requires identification of individuals by race); MICH. COMP. LAWS SERV. § 37.22202a (LexisNexis 2001) (requiring public agency forms that request racial information to include a multiracial category); OHIO REV. CODE ANN. § 3313.941 (LexisNexis 2009) (requiring a multiracial category on forms that collect racial data). Florida and North Carolina have administratively mandated a multiracial category, and legislators have introduced multiracial category bills in California, Massachusetts, Minnesota, Oregon, and Texas. WILLIAMS, *supra* note 7, at 65.

99. One projection suggests that by 2050, 17.8% of the population will be of mixed ancestry—a figure that includes 87.8% of “American Indians,” 27.6% of “Asians and Pacific Islanders,” 22.7% of “African Americans,” 45.4% of “Hispanics,” and 19.1% of “Whites.” Barry Edmonston et al., *Recent Trends in Inter marriage and Immigration and Their Effects on the Future Racial Composition of the U.S. Population*, in THE NEW RACE QUESTION, *supra* note 6, at 246–47 tbl.9.8. The same projection predicts that by 2100, 34.2% of the total population will be of mixed ancestry. *Id.*

whites to date.”<sup>100</sup> Therefore, by logical extension, seventeen percent of the population has some sort of reservation about Blacks and Whites dating, let alone marrying and having children. Another Pew study conducted in March 2008 asked a representative sample of White Democrats whether they agreed or disagreed with the statement: It’s “[a]ll right for blacks and whites to date each other.” Thirteen percent of study participants stated that they “disagree[d]”; twenty-four percent stated that they “mostly agree[d]”; and sixty-one percent “completely agree[d].”<sup>101</sup> While a majority of respondents therefore expressed no concern about interracial dating, the survey nonetheless indicates that more than one-third of self-identified White Democrats have at least some hesitation about dating relationships between Blacks and Whites (let alone relationships involving marriage and children) *and* are willing to say so to a phone surveyor.

Likewise, a 2001 survey of interracial couples found that, while the majority felt that their relationship was accepted by their families and friends, many couples believed that marrying someone of a different race makes marriage more difficult.<sup>102</sup> Indeed, sixty-five percent of couples in Black/White partnerships and twenty-four percent of Asian/White and Latino/White couples said that at least one set of parents initially objected to the relationship.<sup>103</sup> In a companion survey, nearly half of the White individuals surveyed stated that it was “better” for people to marry someone of their own race.<sup>104</sup> Thus, regardless of the precise numbers, these surveys demonstrate that many Americans retain some level of discomfort with the notion of racial mixing.

This antipathy toward interracial relationships mirrors the hostility directed at people viewed as racially mixed.<sup>105</sup> The sheer number of

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100. Pew Research Center for the People & the Press, The Databank, *83%-Approve Interracial Dating*, <http://pewresearch.org/databank/dailynumber/?NumberID=285> (last visited Nov. 13, 2009).

101. Pew Research Center for the People & the Press, *Obama Weathers the Wright Storm, Clinton Faces Credibility Problem*, Mar. 27, 2008, <http://people-press.org/report/?pageid=1281>.

102. Darryl Fears & Claudia Deane, *Biracial Couples Report Tolerance*, WASH. POST, July 5, 2001, at A1.

103. *Id.*

104. *Id.*

105. I note that people who experience hostility because they are viewed as multiracial may *also* experience hostility because they are viewed as monoracial. For example, someone who is subject to hostility as a biracial Black/White person might also be subject to hostility as a White person from Black people and as a Black

slurs specifically designated for multiracial individuals attests to such animus.<sup>106</sup> While it is unnecessary to catalog each permutation of perceived racial mixing and the specific hostility it engenders, I discuss some of the common themes and provide a few examples of how these themes play out in specific communities.

People viewed as multiracial are subject to simultaneous, and sometimes conflicting, criticism from various angles. As David Theo Goldberg has observed, “there is no single unified phenomenon of racism, only a range of racisms.”<sup>107</sup> A person may simultaneously suffer “rejection for refusing to assimilate” from a majority group and be “challenge[d] [by a minority group] as an ‘imposter’ out for personal gain through such programs as affirmative action.”<sup>108</sup> Members of an in-group may shun a person perceived as multiracial as less than a full-status member of that group. A person perceived as multiracial may be subjected to what Adrian Piper has termed the “Suffering Test”—recitation from an in-group member of experiences of racism, followed by trivialization of the multiracial person’s own experiences with racism.<sup>109</sup> Or a multiracial person may simply be asked to justify his claim to membership in any group with which he might choose to identify.<sup>110</sup>

Kevin Johnson has explored the experience of people perceived to be mixed Latino and White, observing that “Latinos of mixed heritage at various times feel less than fully accepted by the Latino community[,]” but that “being rejected by Latinos does not necessarily mean full acceptance by Anglos.”<sup>111</sup> He explains that, from non-Latinos, “light-skinned Mexican-Americans may suffer ‘microaggressions,’ such as racial insults of Mexican-Americans in

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person from White people. See Piper, *supra* note 8, at 6–7 (decrying the experience of having Blacks transfer their hostility from recent experiences with racist Whites to the author as a Black who looked White). While my focus is on discrimination against those viewed as multiracial, these other motivations for discrimination may provide an additional gloss on the discriminatory narrative in some instances.

106. A few examples (listed roughly in order of ascending creativity) include: “mulatto”; “half-breed”; “zebra”; “mutt”; “mongrel”; “cholo”; “halffrican”; “oreo”; “chigger”; “jewgaboo.” I collected these terms from various sources, including cases, articles, and discussions with colleagues. See generally NationMaster.com, <http://www.nationmaster.com/encyclopedia/Ethnic-slurs#M> (last visited Feb. 3, 2010).

107. DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* 213 (1993).

108. Johnson, *supra* note 2, at 1288.

109. Piper, *supra* note 8, at 7.

110. See Johnson, *supra* note 2, at 1311 (“My experience has been that others await an explanation when I claim to be Mexican-American.”).

111. *Id.* at 1293.

their presence.”<sup>112</sup> His example illustrates the distinction between the treatment a mixed-identified person and a Latino-identified person would receive: An insult of Mexican-Americans in front of a mixed-identified, light-skinned Mexican-American constitutes a “microaggression,” perhaps a means of testing his racial commitments or a means of daring him to “out” himself as Latino. But the same comment made in front of a person unequivocally identified as Mexican would be an *unambiguously* aggressive insult based on race. In either instance, the comment contributes to a racially hostile environment, but the two narratives are distinguishable. Moreover, individuals subject to such microaggressions also “may be challenged by their fellow Mexican-Americans as being ‘too White.’”<sup>113</sup> Johnson explains that “[t]he term *gabacho*, slang for Anglo,” is sometimes directed at individuals viewed as mixed as a means of exclusion.<sup>114</sup>

Likewise, in some Asian communities—particularly, though not exclusively, within those that are relatively insular and are comprised of recent immigrants—the prevailing belief is that marriage between Asians and members of other races is undesirable. A 1998 study found that sixty-nine percent of Chinese-American parents agreed with the statement, “I would prefer that my children marry someone in the same ethnic group,” and fifty percent of younger Chinese Americans who were not yet parents also agreed with that statement.<sup>115</sup> According to sociologist Betty Lee Sung, interracial marriage is “the worst thing that could happen” for many Asian parents.<sup>116</sup> Such resistance to interracial marriage is linked to the undesirability of multiracial children. As Frank Wu explains, “[e]ach set of would-be in-laws may want grandchildren who ‘look like us.’”<sup>117</sup> Less academic research has explored Asians’ attitudes regarding racial mixing, perhaps in part because linguistic obstacles make such communities less accessible to a primarily White legal academy. But such attitudes are common knowledge within some communities.

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112. *Id.* at 1292.

113. *Id.*

114. *Id.*

115. FLAVIA TAM ET AL., INTER-GENERATIONAL PAPER ON ASIAN AMERICAN ATTITUDES TOWARDS FAMILY VALUES, INTERRACIAL DATING AND MARRIAGE 7 (1998).

116. Barbara Kantrowitz, *The Ultimate Assimilation*, NEWSWEEK, Nov. 24, 1986, at 80.

117. FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 282 (2002). Wu recalls asking his mother whether she would love him if he married an American girl; his mother stated that she would, but responded that “she would love [him] more if [he] married a Chinese girl.” *Id.* at 261.

A recent thread on the Asian-themed website “Yellowworld Forums” discussed whether “hapas” (mixed-race Asians) who look “more Asian” experience more or less racism than those who are “just Asian.”<sup>118</sup> One commenter who identified herself as half-white and half-Japanese explained:

I’m definitely a more Asian looking hapa. But ironically, I feel more racism and discrimination and whatnot from full Asians than I do from non-Asians. I don’t know if this is because of my height and size or my very non-stereotypical Asian culture and look. But I definitely feel a little bit [more] uncomfortable or judged in a restaurant or store full of Asians than in one with a mixture of non-Asian and Asian races.<sup>119</sup>

Another commenter agreed that she “had the impression my hapa friends have gotten more crap from other Asians than they have from whites.”<sup>120</sup> And a third explained: “All’s well so long as the subject of my ‘other half’ doesn’t enter into the conversation. If it does, some of my friends’ Asian friends’ perceptions change. They’ll still be polite and all, but you can almost feel like they think that I’m not one of them.”<sup>121</sup> Thus, while understudied in the academic literature, the hostility of some Asian communities to interracial relationships is supported by anecdotal evidence and is surely worthy of a more detailed examination.

Animus toward people viewed as racially mixed evokes the criticisms of “passing” that have been voiced in decades past.<sup>122</sup> For example, Randall Kennedy links historical opposition to passing with contemporary resistance to Black/White intermarriage and the opposition to a multiracial census category. Some members of the Black community, he writes, “see these activities as kindred to passing and condemn them as ‘escapist,’ ‘inauthentic,’ even ‘fraudulent’

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118. Yellowworld Forums, <http://forums.yellowworld.org/archive/index.php?t-11424.html>.

119. Posting of hapakristina to Yellowworld Forums, <http://forums.yellowworld.org/archive/index.php?t-11424.html> (Dec. 8, 2003, 15:00 EST). She later added: “I’ve been labeled a sell-out . . . a wannabe Asian, ugly, a disgrace. Many, many things, and my ex’s mother didn’t like the fact that a possible mixed non-Korean, non-full Asian was possibly entering her family.” *Id.* at 20:20 EST. The comments drawn from Yellowworld Forums have been edited for capitalization, spelling, and punctuation to make them more readable.

120. Posting of AngryABCGirl to Yellowworld Forums, <http://forums.yellowworld.org/archive/index.php?t-11424.html> (Dec. 8, 2003, 15:36 EST).

121. Posting of Emperor\_Mike to Yellowworld Forums, <http://forums.yellowworld.org/archive/index.php?t-11424.html> (Dec. 8, 2003, 16:09 EST).

122. See *supra* text accompanying notes 77–82.

efforts that will lead to a debilitating ‘whitening’ of what should be an authentically ‘black’ African American community.”<sup>123</sup> The negative reaction of the Black community to Tiger Woods’s description of himself as “Cablinasian,” rather than Black, is simply one example.<sup>124</sup> But multiracial animus as an iteration of antipathy toward passing is hardly limited to the traditional Black/White binary. Rather, hostility toward individuals perceived as attempting to pass—perhaps by asserting a multiracial identity—might be expressed by a member of any racial category. Those seen as multiracial may be viewed as perpetrators of “racial desertion” based on the view, correct or otherwise, that they are attempting to opt out of a monoracial group to which they owe an intrinsic loyalty.<sup>125</sup>

Hostility toward people seen as employing their mixed-race identity to reap social advantage has in some ways intensified with the ascent of the multiracial identity movement. In the context of higher education, several scholars have raised the concern that mixed-race people may be checking the application-form boxes corresponding to underrepresented racial groups solely to gain advantage in the admissions process.<sup>126</sup> The extent of such academic opportunism is unclear, but the possibility undoubtedly engenders resentment. Many scholars have attested to firsthand experience with this hostility. Kevin Johnson explains that “one fears being accused of claiming to be a minority—sometimes by members of the very group with which he or she identifies—simply to obtain a ‘special’ preference.”<sup>127</sup> Adrian Piper likewise describes repeated incidents of skepticism

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123. Kennedy, *supra* note 77, at 1187–88. I emphasize that I do not claim that individuals who oppose a multiracial census category would necessarily discriminate against individuals who they viewed either as multiracial or as attempting to claim a multiracial identity. My point is simply that, just as passing motivated hostility toward passers, so might perception of an individual as multiracial motivate hostility toward that individual under some circumstances.

124. See Gary Kamiya, *Cablinasian Like Me*, SALON, Apr. 30, 1997, <http://www.salon.com/april97/tiger970430.html> (noting that Woods’s self-identification “infuriated many African Americans who . . . see him as a traitor,” and that “[s]ome blacks saw Woods’ [sic] assertion of a multiracial identity as a sellout that could touch off an epidemic of ‘passing’”).

125. Kennedy, *supra* note 77, at 1187.

126. See, e.g., Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1215–18 (2007) (describing fraud and concealment as two types of racial manipulation schemes); Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2074 (1996) (stating that the problem of identity fraud “is much less common in the race context [than the religious context], though it arises in situations involving either mixed parentage or hard-to-define classifications such as Hispanic”).

127. Johnson, *supra* note 2, at 1268.

regarding her race, including an academic colleague who “grilled” her regarding her self-identification as Black and what fraction “African” ancestry she had.<sup>128</sup> She summarizes: “The implicit accusation . . . was, of course, that I had fraudulently posed as black in order to take advantage of the department’s commitment to affirmative action.”<sup>129</sup>

The news also contains a wide array of examples of antipathy toward interracial families and multiracial people. Recently released tapes reveal former President Nixon making the following statement to an aide following the Supreme Court’s 1973 decision in *Roe v. Wade*<sup>130</sup>: “There are times when an abortion is necessary. I know that. When you have a black and a white . . . [o]r a rape.”<sup>131</sup> In 1992, the volunteer coordinator of Pat Buchanan’s Republican presidential campaign in New Jersey was removed after he compared mixed marriages to the cross-breeding of animals.<sup>132</sup> In Alabama in 2000, about forty percent of voters opposed a symbolic repeal of Alabama’s unquestionably unconstitutional anti-miscegenation statute.<sup>133</sup> More recently, a principal in Alabama threatened to cancel his school’s prom if interracial couples attended.<sup>134</sup> When a student who was half Black and half White asked him who *she* should go with, he reportedly stated: “That’s the problem. Your mom and dad shouldn’t have had you. You were a mistake.”<sup>135</sup> Although the principal was suspended by a vote of four to two for his remarks, three years later he was popularly elected and inducted as superintendant of the school district.<sup>136</sup> Just within the past year, a mixed-race family in Oregon decided to move to a different neighborhood to protect their four- and two-year-old daughters after suffering repeated instances of racial intimidation, including having

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128. Piper, *supra* note 8, at 9.

129. *Id.*

130. 410 U.S. 113.

131. Charlie Savage, *On Nixon Tapes, Ambivalence over Abortion, Not Watergate*, N.Y. TIMES, June 24, 2009, at A1.

132. *Buchanan Aide is Removed over Mixed-Marriage View*, N.Y. TIMES, Jan. 29, 1992, at A14.

133. Elizabeth Becker et al., *The 2000 Elections: State by State*, N.Y. TIMES, Nov. 9, 2000, at B15.

134. Ronald Smothers, *Principal Causes Furor on Mixed-Race Couples*, N.Y. TIMES, Mar. 16, 1994, at A16.

135. *Id.*

136. Russ Jamieson, *Alabama Town Fears New School Superintendent’s Alleged Bigotry*, CNN INTERACTIVE, July 2, 1997, <http://www.cnn.com/US/9707/02/humphries.return/index.html>.



the words “KKK” and an obscenity spelled out in gasoline on their street,<sup>137</sup> and in Buffalo in 2009, an individual whom authorities described as a “white supremacist” pled guilty to felony charges stemming from burning a cross on the lawn of the home of a mixed-race couple consisting of a Puerto Rican man and a White woman.<sup>138</sup>

Most recently, in October 2009, Louisiana Justice of the Peace Keith Bardwell made national headlines after refusing to marry an interracial couple.<sup>139</sup> Bardwell, who has since resigned, reportedly refused to marry at least four other interracial couples over the past two and a half years.<sup>140</sup> When asked his reasons for refusing to marry the couple, he explained that “he was concerned for the children that might be born of the relationship and that, in his experience, most interracial marriages don’t last.”<sup>141</sup> Bardwell further emphasized: “I’m not a racist. . . . I do ceremonies for black couples right here in my house. My main concern is for the children.”<sup>142</sup>

It is worth noting that identification as a multiracial person may yield certain arguably positive consequences as well as harms. A person labeled multiracial—say, the daughter of a Vietnamese father and Irish mother—may be viewed as “exotic” while one labeled monoracial—the American-born daughter of two Vietnamese immigrants—is still perceived as “foreign.” Indeed, certain segments of society fetishize the “unusual” physical features of the “ethnically ambiguous” with many advertising campaigns that intentionally employ models with “racially indeterminate features” that “reflect[] a current fascination with the racial hybrid.”<sup>143</sup> Yet this exoticization can be a double-edged sword. Elizabeth Emens notes our “mixed reaction” to those who prefer individuals with certain racial characteristics, noting that it is telling that in such circumstances we

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137. Anita Burke, *Hate Crime Suspect Jailed*, S. OR. MAIL TRIBUNE, May 31, 2008, available at <http://www.mailtribune.com/apps/pbcs.dll/article?AID=/20080531/NEWS/805310308>.

138. Aaron Besecker, *Suspect Admits Guilt in Hate Crime*, BUFFALO NEWS CITY & REGION, Feb. 25, 2009, available at <http://www.buffalonews.com/cityregion/story/589559.html>.

139. *Louisiana Justice Who Refused Interracial Marriage Resigns*, CNN, Nov. 3, 2009, <http://www.cnn.com/2009/US/11/03/louisiana.interracial.marriage/index.html>.

140. *Id.*

141. *Id.*

142. *Id.*

143. Ruth La Ferla, *Generation E.A.: Ethnically Ambiguous*, N.Y. TIMES, Dec. 28, 2003, § 9.

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apply the “language of having a ‘fetish’ as opposed to a ‘type.’”<sup>144</sup> Exoticism, Emens concludes, is complicated: “If one is to be treated as a thing, one would rather be treated as a rare and pretty thing than as a disgusting or dangerous one. But that is still to be treated as a thing.”<sup>145</sup>

The dubious advantage associated with this exoticization notwithstanding, people identified as racially mixed are subject to a complex and multifaceted web of negative responses from society, ranging from discomfort to distaste to outright hostility. These negative responses are rooted in a long history of dislike for miscegenation and have so far survived—and, in some ways, perhaps have even been exacerbated by—the multiracial identity movement. The negative responses are not suppressed; rather, they manifest themselves in a variety of situations.

Unsurprisingly, given these various forms of social disapprobation, federal case law includes many narratives that reflect hostility toward interracial relationships and racial mixing. I want to distinguish clearly, however, between cases incidentally describing animus toward those perceived as multiracial—of which there are many—and cases actually brought by multiracial plaintiffs—of which there are extraordinarily few, a phenomenon that serves as the starting point for Part III. I discuss the former species of case here—those in which the factual background reveals animus against those individuals perceived as racially mixed though the case itself does not address a claim of multiracial discrimination. For example, an employee seen as monoracial may be harassed on the basis of his association with a biracial person, often his child.

A paradigmatic example is *Defoe v. Spiva*,<sup>146</sup> in which the court describes an incident during a high school basketball game where students threw Oreos onto the court when a biracial student entered the game.<sup>147</sup> The case, however, did not actually involve a claim by the biracial student; rather, the plaintiff was a student who claimed

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144. Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1343 (2009) (exploring intimate discrimination in the context of racial, sexual, and (dis)ability based preferences).

145. *Id.* at 1344 (quoting PHYLLIS ROSE, JAZZ CLEOPATRA: JOSEPHINE BAKER IN HER TIME 44 (1989)).

146. No. 3:06-CV-450, 2008 WL 80258 (E.D. Tenn. Jan. 7, 2008).

147. *Id.* at \*2.

that his First Amendment rights were violated by the school's prohibition on clothing bearing the confederate flag.<sup>148</sup>

In *Green v. Franklin National Bank*,<sup>149</sup> a black plaintiff filed a Title VII claim against her employer, claiming that her termination was motivated by racial animus.<sup>150</sup> To buttress her claims of bigotry in her work environment, the plaintiff introduced evidence that the bank's vice president told the plaintiff's direct supervisor, who "is a woman of African-American and Caucasian heritage,"<sup>151</sup> that she would have expected the mixed-race manager's "son to have blue eyes like his father."<sup>152</sup> When the supervisor stated that her son had brown eyes, the vice president asked, "[D]oes that mean she [sic] is full of shit like you?"<sup>153</sup> The vice president made other comments about the mixed-race supervisor's children, including, "[S]o you have poo poo kids too."<sup>154</sup>

*Wheaton v. North Oakland Medical Center*<sup>155</sup> likewise paints a troubling picture of animus against multiracial individuals. In that case, a White plaintiff who worked in a predominantly Black division brought a claim of employment discrimination.<sup>156</sup> The plaintiff testified that her coworker described her daughter, whose father is Black, as a "half-breed."<sup>157</sup> Other coworkers also made disparaging comments about the plaintiff's interracial relationship and left an email in her desk drawer containing a magazine article condemning relationships between White women and Black men.<sup>158</sup>

In *Madison v. IBP, Inc.*,<sup>159</sup> the plaintiff's coworkers also expressed animus against her children specifically because the children were seen as mixed-race.<sup>160</sup> The plaintiff, "a Caucasian woman married to an African American man," presented "detailed evidence" of "an

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148. *Id.* at \*1.

149. 459 F.3d 903 (8th Cir. 2006).

150. *Id.* at 906.

151. *Id.* at 907.

152. *Id.* at 910.

153. *Id.*

154. *Id.*

155. 130 F. App'x 773 (6th Cir. 2005).

156. *Id.* at 776-77.

157. *Id.*

158. *Id.* at 777-78.

159. 330 F.3d 1051 (8th Cir. 2003).

160. *Id.* at 1053. The district court included additional details, such as the fact that a coworker referred to the plaintiff's children as "monkeys" and "zebras," asked her "what are you doing with a fucking nigger having fucking nigger babies," and asserted that "niggers and whites should stay with their own." *Madison v. IBP, Inc.*, 149 F. Supp. 2d 730, 752 (S.D. Iowa 1999).

unusual record of pervasive harassment” based both on her sex and on her “interracial family.”<sup>161</sup> Her coworkers made derogatory and racist comments about her husband and children, stating that she had “ruined herself” by marrying a black man and having biracial children.<sup>162</sup>

While *Defoe*, *Green*, *Wheaton*, and *Madison* offer a few examples of hostility directed at those perceived as multiracial, they are far from idiosyncratic. Many other federal cases describe animus against interracial relationships and the children born of such unions.<sup>163</sup>

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161. *Madison*, 330 F.3d at 1053.

162. *Id.*

163. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 131–32, 134 (2d Cir. 2008) (denying summary judgment to the defendants where a White basketball coach married to a Black woman was fired after his supervisor called him “nigger lover” and asked whether he was “going to marry that Aunt Jemima”); *Austin v. Caterpillar, Inc.*, 67 F. App’x 956, 957–58 (7th Cir. 2003) (describing a complaint by a female forklift driver—who kept a picture of her biracial child on her forklift—that she was fired after complaining about a coworker’s derogatory racial comments about her child); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 990, 995 (6th Cir. 1999) (holding that an individual brought a cognizable Title VII claim when he alleged that he suffered an adverse employment action because he had a biracial daughter); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (acknowledging that a White woman stated an employment discrimination claim on the ground that she was fired for dating a Black man), *vacated in part on other grounds* by 182 F.3d 333 (5th Cir. 1999); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 890, 892 (11th Cir. 1986) (holding that a White salesman stated a cognizable claim by alleging failure to hire based on his marriage to a Black woman); *Johnson v. Anderson*, No. 2:07-CV-161, 2008 WL 4093352, at \*2 (E.D. Tenn. Aug. 28, 2008) (noting that coworkers expressed disapproval of the relationship between a White prison worker and a Black former inmate); *Frazier v. Tenn. Dep’t of Corr.*, No. 3:07-0818, 2008 WL 2781665, at \*1–2 (M.D. Tenn. July 14, 2008) (noting that a White female prison employee was harassed by Black coworkers after her marriage to a Black man and that, when she reported the harassment, her supervisor told her that “there were things she had to expect” regarding her marriage); *Kanitz v. Cooke*, No. 03-10180, 2008 WL 2199672, at \*1–2, 7 (E.D. Mich. May 23, 2008) (holding that, where a Black prisoner brought suit alleging that he and his White girlfriend (as well as other interracial couples) were treated with greater suspicion during visiting hours, “plaintiffs *have* alleged violation of a clearly established constitutional right—the right to be free from disparate treatment based on their status as a mixed-race couple”); *Campbell v. Bradshaw*, No. 2:05-cv-193, 2007 WL 4991266, at \*27 (S.D. Ohio Nov. 27, 2007) (describing a biracial convicted prisoner’s experience of racial harassment, including frequently being called “half breed” and “zebra,” and finding that confusion about his racial identity led to “self-esteem problems, alienation, anger, poor self-confidence, and isolation”); *Krieman v. Crystal Lake Apartments Ltd.*, No. 05 C 0348, 2006 WL 1519320, at \*1–2 (N.D. Ill. May 31, 2006) (describing the defendant’s derogatory comments about the plaintiff’s son, which included calling him both “nigger” and “biracial boy,” and stating pejoratively that “she [the plaintiff] has this biracial boy running around”); *EEOC v. Foodcrafters Distrib. Co.*, No. Civ. 03-2796(RBK), 2006 WL 489718, at \*5 (D.N.J. Feb. 24, 2006) (describing harassment experienced by a White plaintiff after coworkers learned she had a biracial child); *Murphy v. Mo. Dep’t of Corr.*, No. 00-6134-CV-SJ-GAF, 2006 WL 223111, at \*6 (W.D.

State court cases likewise evidence animus against multiracial people. In *Loeffelman v. Board of Education*,<sup>164</sup> an eighth-grade English teacher brought a First Amendment claim challenging her termination for making derogatory comments about biracial children.<sup>165</sup> She stated that “mixed children” are “racially confused” and “dirty”; that they “come to school with ‘dirty little faces and their hair never combed properly’”; and that “a female in an interracial relationship should have herself ‘fixed’ so she can never have children.”<sup>166</sup> Her comments were delivered in front of biracial students during regular school hours, and the students later testified to the psychological harm they suffered as a result of her comments.<sup>167</sup> The court ultimately rejected the teacher’s claim that her remarks were made in her private capacity and therefore were protected by the First Amendment.<sup>168</sup> While *Loeffelman* is an unusually explicit example, state court case law also contains many examples of hostility to racial mixing in cases involving employment discrimination,<sup>169</sup> housing discrimination,<sup>170</sup> and child custody.<sup>171</sup>

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Mo. Jan. 30, 2006) (describing a religious organization known as the “Christian Separatist Church” which “mandate[s] . . . absolute racial separation” and forbids “African-Americans, Jews, and ‘mongrels’” from membership as enforcement of the organization’s belief that “the Sixth Commandment is translated as ‘You will not mongrelize’”); *Monley v. Q Int’l Courier, Inc.*, 128 F. Supp. 2d 1155, 1156 (N.D. Ill. 2001) (describing a female employee’s allegation that she was terminated because she was involved in an interracial relationship and had a biracial child); *Rosenblatt v. Bivona & Cohen, P.C.*, 946 F. Supp. 298, 298 (S.D.N.Y. 1996) (describing the plaintiff’s allegation that he was discriminated against as a result of his marriage to a Black woman).

164. 134 S.W.3d 637 (Mo. Ct. App. 2004).

165. *Id.* at 639.

166. *Id.* at 641.

167. *Id.* at 644.

168. *Id.* at 645–46.

169. *See Gonzalez v. Rinard*, No. E041658, 2008 WL 257443, at \*3 (Cal. Ct. App. Jan. 31, 2008) (noting that a boss involved in a romantic relationship with an employee called her a “Nigger lover” because she was the single mother of a mixed-race child); *Ky. Lottery Corp. v. Riles*, No. 2004-CA-001053-MR, 2007 WL 1785451, at \*2 (Ky. Ct. App. June 8, 2007) (noting, in the course of upholding a jury verdict for the plaintiff on a claim of racial employment discrimination, that a Black plaintiff’s supervisors made disparaging remarks about his Black/Filipino mixed-race children and stated that his speech was “too black”); *Boggs v. Phillip S. Van Embden, P.C.*, No. L-00257-03, 2005 WL 3158037, at \*2 (N.J. Super. Ct. App. Div. Nov. 29, 2005) (describing a White plaintiff’s allegations that her boss expressed hostility to mixed-race intimacy—by questioning why no one had told him her children were biracial after seeing a photograph of them, by asking her whether a group of Black high school boys knew her children’s father or whether she had dated them, and by stating that “he didn’t understand why white girls would go with black men”—and holding the allegations insufficient to survive a motion to dismiss); *Hunt v. Trumbull Cmty. Action Program*, No. 2005-T-0036, 2006 WL 847225, at \*1 (Ohio Ct. App. Mar.

My point in detailing instances of animus toward racial mixing from federal and state case law is not to provide an exhaustive catalog of such incidents. Rather, I simply wish to establish that judges are not blind to such animus—in fact, they regularly encounter it and describe it in their opinions. These examples, therefore, demonstrate that judges are aware of mixed-race discrimination. Indeed, judicial oblivion is particularly unlikely given the many news stories that describe hatred directed at multiracial individuals.<sup>172</sup>

In sum, overwhelming evidence indicates that animus against people identified as multiracial persists. Such animus is distinct from animus directed at members of monoracial groups, and multiracial animus is even discussed in many judicial opinions. Yet this animus does not manifest itself in antidiscrimination claims brought by people identified as mixed-race. The next Part discusses the dearth of claims in which a plaintiff alleges multiracial discrimination and traces the reasons underlying the absence of such claims.

### III. “DISCRETE AND INSULAR”<sup>173</sup>: THE PROBLEM WITH CATEGORIES

Only a handful of race discrimination cases have been brought by plaintiffs explicitly identified as multiracial. Given the overwhelming evidence of animus against multiracial individuals discussed in Part II, it would be naïve to theorize that multiracial people simply do not suffer from racist treatment. Rather, I argue that plaintiffs seldom

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31, 2006) (noting that an employee’s “African-American supervisor told her that she did not believe that it was right that she had biracial children”).

170. See *Matteo v. N.Y. State Div. of Human Rights*, 761 N.Y.S.2d 517 (App. Div. 2003) (noting that the landlord refused to rent to mixed-race couples); *Hobbs Realty & Constr. Co. v. Scottsdale Ins. Co.*, 593 S.E.2d 103, 293 (N.C. Ct. App. 2004) (noting that the landlords refused to give a key to their tenants’ biracial adult daughter and her three friends (two White, one Black) and that they used a racial epithet); *Allison v. Pa. Human Relations Comm’n*, 716 A.2d 689, 690 (Pa. Commw. Ct. 1998) (noting that the landlord told prospective tenants that she “had to be leery of mixed couples” because her current tenants might move out); *W. Va. Human Rights Comm’n v. Wilson Estates, Inc.*, 503 S.E.2d 6, 11 (W. Va. 1998) (noting that the White woman tenant was evicted for having mixed-race guests).

171. See *Dansby v. Dansby*, 189 S.W.3d 473 (Ark. Ct. App. 2004) (rejecting evidence that a father was teaching discrimination by objecting to his ex-wife dating White men and thus exposing the children to a “biracial situation”). However, the dissenting opinion contended that the majority was ignoring the racism that the father was instilling in the children—for example, the older daughter was “embarrassed” to see her mother in a restaurant with a White man, suggesting that she had already internalized her father’s racist norms, while the younger daughter was simply “confused.” *Id.* at 483 (Pittman, J., dissenting).

172. See *supra* notes 131–137 and accompanying text (collecting examples of mixed-race animus in the news).

173. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

allege multiracial discrimination because antidiscrimination jurisprudence is premised upon the existence of clearly drawn racial categories. Indeed, proof of discrimination generally requires individuals to show that they were treated worse due to their membership in some category as compared to people outside that category. This dependence on categories renders antidiscrimination jurisprudence inhospitable to people identified and discriminated against as multiracial. Because their ascribed racial identity does not fit neatly into conventional categories, they cannot deploy those categories as a means to demonstrate the racist treatment they suffered.

This Part first briefly summarizes the categorical foundations of our antidiscrimination jurisprudence. It then describes the few cases where individuals specifically identified as multiracial have brought antidiscrimination claims, and demonstrates the tension between those claims and the categorical model. To resolve that tension, courts have generally reformulated claims of discrimination brought by multiracial people to comport with the categorical model, and have acknowledged multiracial discrimination only when the facts leave no other alternative.

#### A. *Categorical Foundations*

Our antidiscrimination jurisprudence is built around the existence of clear categories. In 1938, Justice Stone, writing for the majority in *United States v. Carolene Products Co.*,<sup>174</sup> left open the question of “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>175</sup> The famous *Carolene Products* footnote generated an entire jurisprudence in which protection of an individual against discrimination depended on whether that individual fell into a “discrete” category—one for which the very terminology implies that the category is straightforward and has distinct boundaries.

The Supreme Court soon directed the “more searching judicial inquiry” of *Carolene Products* at racial categories. The Court’s first explicit reference to race as a “suspect” class for discrimination

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174. 304 U.S. 144.

175. *Id.* at 152 n.4.

occurred in *Korematsu v. United States*.<sup>176</sup> Ironically, *Korematsu* reached the rare conclusion that a classification that imposed a disadvantage based on race could survive strict scrutiny.<sup>177</sup> But more importantly for present purposes, Justice Black's opinion accepted the categorical nature of race without question: "[A]ll legal restrictions which curtail the civil rights of a *single racial group* are immediately suspect. That is not to say that all such restrictions are unconstitutional . . . . Pressing public necessity may sometimes justify the existence of such restrictions . . . ."<sup>178</sup> Indeed, Justice Murphy's dissent, while protesting the majority decision to uphold the internment of individuals with Japanese ancestry, parallels the majority in conflating race and national origin while asserting the categorical nature of both.<sup>179</sup> He believed that the exclusion order applicable to "all persons of Japanese ancestry" was "an obvious racial discrimination," and he dissented from "this legalization of racism" without questioning whether the group subject to internment comprised a discrete category.<sup>180</sup>

As it decided milestone civil rights cases, the Warren Court perpetuated the view of race as categorical and stable. Even in *Loving v. Virginia*, the Court described the anti-miscegenation statute it ultimately invalidated as "proscrib[ing] generally accepted conduct if engaged in by members of different races."<sup>181</sup> The Court automatically accepted that racial categories are fixed classifications in which one is either a member or a non-member—an ironic stance given that *Loving* would presumably call those categories into question by legalizing marriage between members of supposedly different racial categories and paving the way for offspring whose identities in relation to the categories would be unclear.<sup>182</sup> The entrenched notion of race as discrete and categorical survived the Warren Court. In the 1984 case *Palmore v. Sidoti*,<sup>183</sup> the Court invalidated a custody decision based solely on the race of the parties involved, explaining that "[c]lassifying persons according to their

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176. 323 U.S. 214 (1944).

177. See KATHLEEN SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 631 (14th ed. 2001).

178. *Korematsu*, 323 U.S. at 216 (emphasis added).

179. See *id.* at 233, 235–38 (Murphy, J., dissenting).

180. *Id.* at 234, 242.

181. 388 U.S. 1, 11 (1967).

182. *Id.* at 5.

183. 466 U.S. 429.



race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category.”<sup>184</sup> This implicit acceptance of stable racial classifications and corresponding tiers of scrutiny continues today. For example, the Court recently invalidated a school redistricting scheme in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>185</sup> without commenting on the descriptive utility of the racial classifications at issue.

The Court has likewise assumed the categorical nature of racial identity when deciding cases brought pursuant to Title VII. The burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*<sup>186</sup> and refined in *Texas Department of Community Affairs v. Burdine*<sup>187</sup> requires the plaintiff to make out a prima facie case by showing: (1) membership in a protected class; (2) qualification for the position which she held or to which she applied; (3) rejection for the position despite her qualifications; and (4) selection of an individual outside the protected class to replace the plaintiff.<sup>188</sup> The Court has assumed that membership in a protected class is stable and defined by conventional racial categories. Indeed, *McDonnell Douglas* itself equated the first part of the prima facie case with a requirement that the plaintiff allege membership in a “racial minority,” implying that minority membership is both obvious and self-defining.<sup>189</sup>

In each instance, the Court’s decision presumed the categorical nature of group identity. Categories are the framework from which the rest of our antidiscrimination jurisprudence flows. Courts review claims of discrimination in light of the existence of a category to which the individual claiming the discrimination belongs. Whether a plaintiff succeeds on a claim of race discrimination hinges on a showing that she was discriminated against *because she was Asian* (or Black, or White, etc.). In other words, proving discrimination implicitly entails a link to the underlying category against which animus is directed. Categories are so central to our antidiscrimination jurisprudence that we have difficulty conceiving what a race discrimination claim would look like without a

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184. *Id.* at 432.

185. 551 U.S. 701 (2007).

186. 411 U.S. 792 (1973).

187. 450 U.S. 248 (1981).

188. *Burdine*, 450 U.S. at 252–56; *McDonnell Douglas*, 411 U.S. at 802.

189. *McDonnell Douglas*, 411 U.S. at 802.

description of animus directed at one of the socially acknowledged racial categories. The claim, “I was fired because of my race,” thus invites the question, “So what race are you?”

As a result of this dependence on categories, antidiscrimination jurisprudence is a lonely place for individuals—such as those who are identified as multiracial—whose identification transcends prevailing categorical schemes. When multiracial individuals have brought claims alleging that they were discriminated against *because* they were perceived as multiracial, courts have generally skirted the issue of their race. The next Section details that evasion and explores its consequences within courts’ decision-making processes.

### *B. Judicial Treatment of Multiracial Plaintiffs*

Plaintiffs explicitly identified as multiracial or biracial are a rarity within antidiscrimination jurisprudence. Searching Westlaw for federal cases brought within the past two decades yielded only three Equal Protection claims and five Title VII claims brought by explicitly identified mixed-race plaintiffs.<sup>190</sup> All were district court cases, and five of the eight were unpublished. Multiracial plaintiffs, then, are seldom identified even at the district court level and are wholly absent from appellate and Supreme Court decisions within antidiscrimination jurisprudence. Remarkably, I was unable to locate any state court decisions within the past twenty years brought by a person identified as mixed-race.<sup>191</sup> This paucity of claims brought by plaintiffs identified as multiracial does not mean that no such

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190. To identify federal cases, I conducted the following search in Westlaw’s “ALLFEDS” database: (biracial multiracial “mixed race” “racially mixed”) & (“equal protection” “title vii”) & da(aft 01/01/1990). This search yielded 329 cases, which I then read to determine whether the plaintiff in the case was explicitly identified as multiracial. The vast majority of plaintiffs were not. Three cases in which the plaintiff was explicitly identified as multiracial involved Equal Protection claims. *Moore v. Bd. of Educ.*, 300 F. Supp. 2d 641 (N.D. Ill. 2004); *Cannon v. Burkybile*, No. 99 C 4623, 2000 WL 1409852 (N.D. Ill. Sept. 25, 2000); *Godby v. Montgomery County Bd. of Educ.*, 996 F. Supp. 1390 (M.D. Ala. 1998). Five cases involved Title VII claims. *Smith v. CA, Inc.*, No. 8:07-cv-78-T-30TBM, 2008 WL 5427776 (M.D. Fla. Dec. 30, 2008); *Watkins v. Hospitality Group Management, Inc.*, No. 1:02CV00897, 2003 WL 22937710 (M.D.N.C. Dec. 1, 2003); *Callicutt v. Pepsi Bottling Group*, No. CIV. 00-95DWFJBJ, 2002 WL 992757 (D. Minn. May 13, 2002); *Mitchell v. Champs Sports*, 42 F. Supp. 2d 642, 646 (E.D. Tex. 1998); *Walker v. Univ. of Colo. Bd. of Regents*, Civ. A. No. 90-M-932, 1994 WL 752651 (D. Colo. Mar. 30, 1994).

191. To identify state cases, I conducted the same search described *supra* note 190 in Westlaw’s “ALLSTATES” database. This search yielded 85 cases, but none of them involved mixed-race plaintiffs.

plaintiffs have brought claims—it simply means that courts have only *acknowledged* the plaintiff’s multiracial identification in eight cases.<sup>192</sup>

Recognizing that any generalizations drawn from so small a number of cases are necessarily tentative, I suggest the following descriptive pattern: courts have generally lumped individuals identified as multiracial together with other members of conventional categories, reformulating the narrative of discrimination of those identified as multiracial to avoid disruption of the prevailing racial classification scheme. Only in a few instances have courts acknowledged discrimination against multiracial individuals *qua* multiracial individuals and then only when the circumstances evinced animus so explicitly motivated by racial mixedness that there was no alternative. I first discuss the former type of case, then the latter. Finally, I briefly explain why courts’ limited acknowledgment of discrimination against interracial couples is not tantamount to acknowledgment of discrimination against multiracial people.

1. *Categorical reformulation of multiracial identification*

In most instances, courts have addressed multiracial plaintiffs’ claims by reformulating them to comport with the prevailing scheme of racial classification. This Subsection details courts’ various strategies for channeling multiracial plaintiffs into the existing categorical system.

One court has explicitly denied multiracial identification as a ground for a separate discrimination claim. In *Walker v. University of Colorado Board of Regents*,<sup>193</sup> the plaintiff filed a Title VII claim following his unsuccessful application for Associate Vice President for Human Resources.<sup>194</sup> He “identified himself as a multiracial person of Black, Native American, Jewish and Anglo descent,” and contended that under the *McDonnell Douglas* framework, “the protected class is limited to multiracial persons.”<sup>195</sup> The court rejected his argument “because it would be impracticable to apply and could be so self limiting that a particular person is the only

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192. I believe that the reasons for this lack of acknowledgment are multiple and complex. See *supra* Part IV.A (discussing possible explanations for the exclusion of multiracial individuals from antidiscrimination jurisprudence).

193. Civ. A. No. 90-M-932, 1994 WL 752651 (D. Colo. Mar. 30, 1994).

194. *Id.* at \*1.

195. *Id.*

identifiable member of the group.”<sup>196</sup> Moreover, the court held that the plaintiff’s multiracial status actually *diminished* his likelihood of success: “Multiracial persons may be considered members of each of the protected groups with which they have any significant identification.”<sup>197</sup> The logical extension of this statement is that if the position to which the plaintiff in *Walker* applied were filled by a Black, Native American, Jewish, or Anglo individual, courts should view that individual as a member of the plaintiff’s protected class for Title VII purposes. Defining the scope of the plaintiff’s protected class in this manner would preclude the plaintiff from demonstrating that he was disadvantaged because of his race in favor of a person similarly situated. *Walker* therefore highlights a concrete problem associated with failure to acknowledge uniquely multiracial discrimination: it forecloses the plaintiff from demonstrating that he is not similarly situated to individuals who are not multiracial.

While *Walker* thus functions as an explicit denial of uniquely multiracial discrimination, courts more typically engage in a subtle reframing of the discriminatory narrative. One paradigmatic case to which I have already alluded<sup>198</sup> is *Mitchell v. Champs Sports*, in which the plaintiff testified that her mother was White and her father was Black, but based on her appearance, “many people consider her of mixed Hispanic and European descent.”<sup>199</sup> Her treatment by her employer rapidly deteriorated after her supervisor noticed that she was often visited at the store by her Black friends and relatives; at one point, after a visit from a Black male friend, the supervisor commented that “she only dated black men.”<sup>200</sup> In allowing the plaintiff’s claim to proceed,<sup>201</sup> the court simply stated that the treatment deteriorated after her supervisor “discovered . . . *that she was black.*”<sup>202</sup> This narrative reveals a troubling application of a principle rather like hypodescent: although the plaintiff testified that her mother was White and her father was Black, the court reframed her self-description and classified her simply as Black. In so doing, it

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196. *Id.*

197. *Id.*

198. See *supra* notes 27–29.

199. 42 F. Supp. 2d 642, 646 (E.D. Tex. 1998).

200. *Id.*

201. *Id.* at 650. The case arose on the plaintiff’s motion for appointed counsel, which the court granted, stating: “Because Mitchell’s allegations, if proven, would likely establish intentional discrimination and support a verdict in Mitchell’s favor, her claim has probative merit.” *Id.*

202. *Id.* (emphasis added).

failed to acknowledge the possibility that her poor treatment was motivated by animus against racial mixing. The employer may have perceived the plaintiff as *mixed*, and therefore racially deceptive, rather than simply as Black.

Similarly, *Callicutt v. Pepsi Bottling Group, Inc.*<sup>203</sup> involved Title VII claims brought by five plaintiffs, of whom the court stated flatly: “Plaintiffs are African-American.”<sup>204</sup> For four of the plaintiffs, the claimed incidents involved racial epithets and negative comments about Black people.<sup>205</sup> But for one plaintiff, the alleged incidents wove a more complex racial narrative.<sup>206</sup> Some coworkers referred to him as “FUBU,” invoking a Black identity.<sup>207</sup> Others referred to him as “Sinbad,” a reference that is less clear.<sup>208</sup> And one coworker told him that “he was not black”—only in discussing that incident did the court mention that the plaintiff was “biracial and admits that he has a light complexion.”<sup>209</sup> But the court did not explore the complex situation in which the plaintiff found himself—discriminated against as Black by some, and as “not-really-Black” by others—and instead opted to categorize the mixed-race plaintiff as “African-American” like the other four plaintiffs.<sup>210</sup> The court allowed the claims of all plaintiffs to survive summary judgment *except* those of the mixed-race plaintiff, holding that the instances of discrimination he suffered were not sufficiently severe to support a Title VII claim.<sup>211</sup> While one can never predict with certainty the result a court will reach, I believe that, had the court considered the multiracial dimension to the rejected plaintiff’s discriminatory narrative, it might have viewed the comments as more serious. For example, the court’s analysis omits any discussion of the comment that the light-skinned plaintiff was “not really black.” In the aggregate, a more thorough analysis of the multiracial dynamic may have persuaded the court that the plaintiff’s case should survive summary judgment.

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203. No. CIV. 00-95DWFAJB, 2002 WL 992757 (D. Minn. May 13, 2002).

204. *Id.* at \*1.

205. *Id.* at \*1–5.

206. *See id.* at \*4 (discussing the distinct racial treatment one plaintiff received because he was biracial).

207. *Id.* The court explained that “FUBU” is “an African-American line of clothing, which stands for “For Us By Us.” *Id.*

208. *Id.* Sinbad is a relatively light-skinned Black stand-up comedian and actor. *See* Sinbad, The Internet Movie Database, <http://www.imdb.com/name/nm0005435> (last visited Feb. 3, 2010).

209. *Callicutt*, 2002 WL 992757, at \*4.

210. *Id.* at \*10–11.

211. *Id.* at \*11.

In other instances, while the court nominally acknowledges that the plaintiff was identified as multiracial, it fails to develop the implications of that identification in its discussion. One such case is *Godby v. Montgomery County Board of Education*,<sup>212</sup> in which the court considered an Equal Protection challenge to a school's practice of mandating that there would be one White and one Black representative from each grade on the homecoming court each year.<sup>213</sup> Each homeroom held a vote to nominate students for the homecoming court; the ballot for the nomination was divided into "White" and "Black" categories.<sup>214</sup> The plaintiff, a student at the school, had one White parent and one Black parent.<sup>215</sup> She "thinks of herself as being 'both' races; and when she has been asked for her race on forms, such as those at school, she has routinely checked both categories."<sup>216</sup>

On the day of the homecoming court nominations, a student suggested that the plaintiff should run as the homeroom's Black nominee.<sup>217</sup> "Matters became complicated when one of [the plaintiff's] classmates said that she should run as the homeroom's white nominee. Other students complained that it would be unfair for [the plaintiff] to run for both slots, and a discussion about race ensued among the students."<sup>218</sup> At one point, the homeroom teacher took the plaintiff outside and told her that she could only run in one category and that she would have to decide whether to run in the Black category or the White category.<sup>219</sup> The school's homecoming director was eventually summoned to the classroom, and she told the plaintiff that she had to choose one slot or the other in which to run:

In effect, the biracial child had to choose: was she white or black? [The plaintiff] returned to the room and asked her classmates which slot she should choose. The majority of the classmates told her that she should run as the white nominee. [The plaintiff] ran for the white slot and was selected as her homeroom's [white] nominee.<sup>220</sup>

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212. 996 F. Supp. 1390 (M.D. Ala. 1998).

213. *Id.* at 1396.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 1396-97.

218. *Id.* at 1397.

219. *Id.*

220. *Id.*

But when the school-wide ballot was disseminated, the plaintiff's name was not on it.<sup>221</sup> Although the school claimed that she had been omitted due to an unrelated procedural irregularity, the school's homecoming director "admitted that she used the school computer in the guidance counselor's office to look up [the plaintiff's] race" and found that "the registry on the school computer listed [the plaintiff] as Black."<sup>222</sup> The homecoming director justified her actions by explaining that "she thought that it was her 'duty to make sure what [the plaintiff] was telling [her] was true.'"<sup>223</sup> When the plaintiff discovered that her name was not on the ballot, she asked the homecoming director why, and the homecoming director stated that it was because she "had looked up her school records and discovered that [the plaintiff] was black."<sup>224</sup>

In the factual section of its opinion, the court acknowledged that "the biracial child had to choose,"<sup>225</sup> thereby implicitly suggesting harm unique to mixed-race identification. But despite this acknowledgment, the court did not further explore the unique injury suffered by the plaintiff. Rather, it struck down the school's classification system on more general grounds, holding simply that the Fourteenth Amendment "bars the racial distinctions [that the school adopted] in its homecoming nominations."<sup>226</sup> It also noted that "[i]t does not matter . . . that the categorization in this case applied to everyone."<sup>227</sup> The court's only acknowledgment of the particular harm to the biracial plaintiff was one oblique comment: "The classification paints only with the broad brush of black and white, ignoring any subtleties," and is thus unlikely to be narrowly tailored.<sup>228</sup> The court's decision denying summary judgment to the defendants is otherwise a general indictment of the use of racial

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221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 1398.

225. *Id.*

226. *Id.* at 1407.

227. *Id.* at 1408.

228. *Id.* at 1410. At the very end of its Equal Protection analysis, the court also noted that the school "has engaged in a practice of racially classifying students for purposes of extracurricular activities, and perhaps enforcing a rigid racial system which considers all (partial) non-whites to be 'black.'" *Id.* at 1411. This comment might be read as a gesture at the possibility that the school disqualified the plaintiff from running as the White nominee because she was mixed-race, but the phrasing is open to interpretation.

categories without narrow tailoring and a compelling government interest.<sup>229</sup>

The court's analysis could have been phrased the same way had the case been brought by a White, Black, or Asian student, and its generalized invalidation is a legally correct way of deciding the case. Yet the analysis also reflects a choice to ignore the nuances of the factual narrative, which indicated an injury unique to a person identified as multiracial. A person perceived as monoracial would not have been subject to her classmates' debate over her racial identity. Nor would a teacher have taken a student perceived as monoracial into the hall and instructed her that she had to choose one of the established racial categories. Nor would the chosen racial identification of a student perceived as monoracial have engendered suspicion in an administrator such that the administrator felt compelled to verify the "truth" of that self-identification. Nor would a student perceived as monoracial have been deprived, ultimately, of the opportunity to compete in the homecoming nomination process. In effect, the school erased the plaintiff's biracial identity with its categorical homecoming nomination system; the court in turn erased that same identity with a generalized invalidation that failed to acknowledge the harm imposed by the school. In so doing, the court revealed its reluctance to engage the complexities of multiracial identification and to acknowledge the unique injuries suffered by multiracial people by categories that do not include them.

*Smith v. CA, Inc.*<sup>230</sup> provides another example of judicial denial of multiracial animus. The plaintiff, a "biracial African American and Caucasian[.]" brought a Title VII claim contending that he had suffered an adverse employment action on account of his race.<sup>231</sup> The facts alleged convey a unique multiracial dynamic. The court noted that the plaintiff, Walter Smith, asked his employer to classify him as Caucasian and that his employer agreed to do so.<sup>232</sup> In his deposition, Smith explained that he is biracial, stating, "I pick and choose what I call myself, or how I identify myself, dependent on the situation at hand and what's beneficial for me at the time."<sup>233</sup> Smith

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229. See *id.* at 1407–11 (rejecting the school system's position on the ground that the system presented no remedy to any problem, let alone a narrowly tailored remedy).

230. No. 8:07-cv-78-T-30TBM, 2008 WL 5427776 (M.D. Fla. Dec. 30, 2008).

231. *Id.* at \*5, \*11.

232. *Id.* at \*2 n.3.

233. *Id.*



added that he received racially derogatory treatment from both White and Black people, noting, “[S]ince I get hit from both sides, I play both sides.”<sup>234</sup> Smith’s remark indicated that at least some people tended to identify him as racially mixed, and his request that his employer classify him as Caucasian indicated that he himself identified at least in some ways as White. And by making the request, he made his mixed-race background salient to the employer, increasing the likelihood that his coworkers perceived him as multiracial.

Moreover, the instances of discrimination that Smith alleged are frankly ambiguous with respect to how he was perceived. In one instance, a coworker referred to him as a “bitch” and as a “boy.”<sup>235</sup> When addressed to an adult male, these terms are perhaps most associated with anti-Black animus. Yet another coworker made a derogatory comment about African-American fathers in Smith’s presence.<sup>236</sup> This comment is more open to interpretation: it might have been motivated by animus against Black people, or it might have been targeted at Smith because he had a Black father and a White mother. But while the court nominally acknowledged that the plaintiff was biracial, it tailored its analysis of his employment discrimination claim to match a standard anti-Black narrative of discrimination; the court did not acknowledge the multiracial dynamic of Smith’s racial self-identification coupled with the nature of the discrimination he alleged.<sup>237</sup>

The court stated tersely:

There is no dispute that Smith was a member of a protected group as a biracial African American and Caucasian. Smith has provided evidence of only two instances in which he was arguably harassed based on his protected characteristic. The first instance involved the “bitch/boy” comments made by [a coworker]. The second instance involved the comments made by [a different coworker] about African American fathers.<sup>238</sup>

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234. *Id.*

235. *Id.* at \*1 n.1.

236. *See id.* at \*1 (describing Smith’s claim that a coworker “stated he was surprised an African American father like Smith would fight so hard for custody of his children”).

237. *See id.* at \*11 (considering the frequency and severity of the racial remarks and the defendant’s remedial action in response to comments from the plaintiff’s coworker).

238. *Id.*

The court ultimately decided the case against Smith on the ground that he did not suffer an adverse employment action,<sup>239</sup> and therefore a firm resolution of whether the harassment he suffered was based on his protected characteristic was not essential to the outcome of the case. But the court failed even to acknowledge that, were it to grapple with the sufficiency of Smith's allegations of discrimination, the question was a complicated one. By failing to engage the possibility that the comments were motivated by the employer's identification of Smith as biracial rather than Black, the court essentially ignored the record evidence that potentially supported a reading of animus against Smith as biracial.

A comparison of *Moore v. Dolgencorp, Inc.*<sup>240</sup> and *Watkins v. Hospitality Group Management, Inc.*<sup>241</sup> provides telling evidence of the courts' insistence on categorization in the antidiscrimination context. In *Moore*, an African-American woman who brought a Title VII claim after being replaced at her job described herself as dark-skinned, "even within the range of other African Americans, and especially compared to persons of non-African-American heritage, including persons of mixed race."<sup>242</sup> She argued that she was treated worse than a mixed-race person who had considerably lighter skin.<sup>243</sup> The court rejected the claim, holding that the mixed-race individual "is a member of plaintiff's protected class."<sup>244</sup> It further held:

To recognize a legal hierarchy within the protected class of race based upon differences in the hues of skin color would create or deny legal remedies based upon sub-categories of this class that Congress has not chosen to recognize. It could also open the door to nearly insurmountable issues of proof in court regarding the actual racial heritage of a plaintiff and/or a person replacing a plaintiff, not to mention difficulties for everyone in the daily application of the Civil Rights Act.<sup>245</sup>

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239. *Id.*

240. No. 1:05-CV-107, 2006 WL 2701058 (W.D. Mich. Sept. 19, 2006).

241. No. 1:02CV00897, 2003 WL 22937710 (M.D.N.C. Dec. 1, 2003).

242. *Moore*, 2006 WL 2701058, at \*2.

243. *Id.* *Moore* seems like a strong candidate for a color claim, and, indeed, she attempted to raise such a claim before the district court. *See id.* at \*3 (stating that this "appears to be a back-door attempt to . . . add claims of sex and color discrimination"). But the district court held that it lacked jurisdiction over that claim because the plaintiff had failed to raise it before the EEOC and thus had failed to exhaust her administrative remedies as required under Title VII. *Id.* at \*3-4.

244. *Id.* at \*4.

245. *Id.*

In short, the court held that a biracial person with Black ancestry and a non-mixed-race Black person are equivalent for Title VII purposes. This decision essentially affirms the logic of hypodescent—if someone is even partially Black, then that person *is* Black and is properly classified with other Black people.

*Moore's* analysis contrasts sharply with the court's brief statement in *Watkins*. There, the court explained that the plaintiff "is a female of mixed race who was fired and replaced by a white male," and that "to establish a prima facie case of discrimination, she need only demonstrate that her job performance met [her employer's] legitimate expectations when she was fired."<sup>246</sup> The court thus found it obvious that a mixed-race person was a member of a different racial class than a white person—so obvious, in fact, that no further analysis was needed. That the issue of whether a mixed-race person is held to be comparable to a monoracial person is resolved one way when the monoracial person is White and another way when the monoracial person is Black demonstrates the arbitrariness of the courts' rulings on these issues. It also demonstrates the extent to which hypodescent continues to infect judicial reasoning, even if courts now make such judgments implicitly rather than explicitly. Most importantly for purposes of this Article, the two cases both reveal a judicial unwillingness to grapple with the complexity of multiracial identity in the context of antidiscrimination jurisprudence.

## 2. *Limited acknowledgment of mixed-race discrimination*

In the cases in which courts have addressed plaintiffs' multiracial identification, they did so because the narrative of multiracial discrimination was so explicit that they had no alternative but to deviate from the established monoracial narrative. Only two such examples appear in the case law.

One, *Moore v. Board of Education*,<sup>247</sup> involved a claimed Equal Protection violation brought by a student described as an "African-American/Caucasian mixed race male" who suffered harassment from a Black teacher as a result of his mixed ancestry.<sup>248</sup> Among other allegations, the teacher referred to the plaintiff as a "Euronigger"; told other students that the plaintiff "was like a plantation owner telling students what to do"; told one of the

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246. *Watkins*, 2003 WL 22937710, at \*9.

247. 300 F. Supp. 2d 641 (N.D. Ill. 2004).

248. *Id.* at 642.

plaintiff's friends not to lower a blind after plaintiff had asked him to because "it's the Caucasian blood in him that he thinks he can tell you what to do"; stated that he didn't know whether the plaintiff "was Caucasian or Negroid"; stated that the plaintiff was arrogant because of his lighter complexion; and stated that the plaintiff was a "'confused person' because of his 'mixed heritage.'"<sup>249</sup> Tensions came to a head during an incident in which the plaintiff commented that the teacher was distracting him with "interruptions" and the teacher responded: "That's the Caucasian blood in him makes him think he can say whatever he wants."<sup>250</sup> After the plaintiff was instructed to leave the classroom, the teacher first blocked his exit; then, after the plaintiff tried to walk around him, the teacher placed him in a "choking headlock," breaking two wires from a prior cervical spine surgery, which forced the plaintiff to wear a neck brace and restricted his physical activity for six weeks.<sup>251</sup>

The other case in which a court acknowledged animus as multiracial *qua* multiracial, *Cannon v. Burkybile*,<sup>252</sup> involved a prisoner who filed an Equal Protection claim following repeated racial harassment by a guard.<sup>253</sup> The guard challenged the prisoner's right to use the law library stating: "You are either a half-breed or of a mixed race and you shouldn't be up here. I hate all you half-breeds and you definitely won't be coming back to the law library this afternoon."<sup>254</sup> The guard repeatedly blocked the inmate's access to the library after that incident and at one point told the inmate that "he was the same half-breed he always hated."<sup>255</sup> The court denied the defendants' motion to dismiss the Equal Protection claim, explaining that the plaintiff had adequately pled claims of racial discrimination by alleging that the guard "impeded his access to the law library . . . on account of his mixed-race."<sup>256</sup>

*Moore* and *Cannon* share such explicit evidence of specifically multiracial animus that it would be extraordinary, even bizarre, for a court to frame either case as one of discrimination stemming from animus against a monoracial group. But these isolated instances—

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249. *Id.* at 643 n.2.

250. *Id.* at 643.

251. *Id.*

252. No. 99 C 4623, 2000 WL 1409852 (N.D. Ill. Sept. 25, 2000).

253. *Id.* at \*1.

254. *Id.*

255. *Id.* at \*2.

256. *Id.* at \*5.

two examples in the entire corpus of federal cases—attempts to the rarity of judicial acknowledgment of animus that is uniquely multiracial in character. And of course, because both cases are district court cases, they lack significant precedential force.<sup>257</sup> Moreover, the courts in both *Moore* and *Cannon* simply described the discrimination that the plaintiffs suffered without any analysis of the uniqueness of that discrimination to the plaintiffs' perceived multiracial identification.

3. *Discrimination against interracial couples: related but distinct*

Perhaps bolstered by the animating principles of *Loving*, courts have been more receptive to claims of discrimination brought by one member of an interracial couple.<sup>258</sup> One paradigmatic case is that of *Holcomb v. Iona College*,<sup>259</sup> in which a White basketball coach who married a Black woman claimed that he was fired after his supervisor called him a “nigger lover” and asked him whether he was “really going to marry that Aunt Jemima.”<sup>260</sup> Writing for a panel of the U.S. Court of Appeals for the Second Circuit, Judge Calabresi held that a claim of adverse action based on an employee's association with a person of another race is cognizable under Title VII and agreed that the basketball coach had raised factual issues with respect to whether race was a motivating factor in his termination.<sup>261</sup>

One might argue that judicial validation of such claims is tantamount to an acknowledgment of multiracial identification and the need to protect those identified as multiracial—after all, protection of the unions that produce people likely to be perceived as multiracial is closely linked to protection against discrimination of multiracial people themselves. But this interpretation is too generous: the notion of an “interracial relationship” is predicated on the two people in the relationship being of different races, and this, if anything, reinforces the categorical foundations of antidiscrimination jurisprudence. In existing case law, interracial relationships are always characterized as occurring between two monoracial people—no court has considered a claim of interracial discrimination brought by a couple of whom one member was multiracial and one member

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257. Indeed, *Cannon* is unpublished, and its citation is therefore prohibited in many jurisdictions.

258. See cases cited *supra* note 163.

259. 521 F.3d 130 (2d Cir. 2008).

260. *Id.* at 134.

261. *Id.* at 132.

was monoracial. Thus, judicial sympathy for those engaged in interracial relationships does not equate to recognition of the unique form of animus directed at multiracial people.

Moreover, some courts have resisted acknowledging our society's lingering hostility to interracial marriage. In *United States v. Barber*,<sup>262</sup> the Fourth Circuit, sitting en banc, held that the trial court did not violate the Equal Protection Clause when it denied the request of an interracial couple, tried jointly on criminal fraud charges, to question jurors regarding attitudes about interracial marriage.<sup>263</sup> The majority held:

[E]very criminal trial cannot be conducted as though race is an issue simply because the trial participants are of different races. If racial prejudice is ever to be eliminated, society's general concerns about such prejudice must not be permitted to erode the courts' efforts to provide impartial trials for the resolution of disputes.<sup>264</sup>

The majority felt that "[t]he very process of exploring such factors would heighten their role in the decision-making process," and would therefore run a greater risk of corrupting the process.<sup>265</sup> The dissent disagreed, explaining: "[N]o matter how much we dislike it, . . . we do not live in a color blind world and . . . many individuals still harbor negative attitudes and feelings about marriage between blacks and whites. To deny that fact is to ignore a social reality."<sup>266</sup> The dissent thus found persuasive the defendants' claim that they would need to know jurors' attitudes toward interracial marriage "when attempting to secure an unbiased and fair jury."<sup>267</sup> The majority's resistance to acknowledging the possibility of prejudice motivated by an interracial relationship exemplifies some courts' skepticism about the extent of such prejudice and the need for remedies expressly tailored to address animus motivated by racial mixing.

In summary, courts' acknowledgment of animus against interracial relationships does not meaningfully challenge the paradigmatic racial categories. While such acknowledgment does provide a measure of judicial recognition that society is not fully comfortable with racial mixing, this recognition does not actually challenge the categories that make racial mixing salient. And some courts remain skeptical

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262. 80 F.3d 964 (4th Cir. 1996) (en banc).

263. *Id.* at 970.

264. *Id.* at 967.

265. *Id.* at 967-68.

266. *Id.* at 973 (Murnahan, J., dissenting).

267. *Id.*

both of the extent of antipathy toward racial mixing and of the notion that the judiciary should intervene to combat such antipathy. Consequently, acknowledgment of animus motivated by interracial relationships is not a functional substitute for claims of multiracial discrimination.

### C. *Academic Omission*

Courts' erasure of multiracial discrimination in the antidiscrimination context is mirrored by scholarly literature. As noted, in recent years multiracial individuals have been the subject of extensive scholarly discussion.<sup>268</sup> Yet such discussion almost always occurs when multiracial individuals are the primary subject of the scholarly work, and this focus is almost always linked to the diversity or demographic contexts.<sup>269</sup> A search of the "Journals and Law Reviews" database within Westlaw yields about fifty articles with the term "multiracial," "biracial," "mixed race," or "racially mixed" in the title of the piece. While there is some overlap among topics, by my rough estimate, one-third of the articles discuss either the demographic or diversity contexts; one-third discuss the role of multiracial identity in the legal system from a theoretical perspective; and one-third use the term "multiracial" in a non-individual context (for example, to refer to "multiracial coalitions," meaning coalitions that involve more than one race).

Only one student note has even mentioned discrimination against mixed-race people in relation to antidiscrimination jurisprudence: in the Title VII context, Ken Nakasu Davison focuses primarily on mixed-race individuals whose employers view them as members of a racial category other than the one with which they identify themselves.<sup>270</sup> While exploring that topic, Davison also briefly summarizes the notion of multiracial discrimination.<sup>271</sup> He explains

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268. See *supra* notes 6–10 and accompanying text (discussing the focus of scholarly literature addressing multiracial individuals).

269. See Jean Stefancic, *Multiracialism: A Bibliographic Essay and Critique in Memory of Trina Grillo*, 81 MINN. L. REV. 1521, 1525–38 (1997) (organizing multiracial scholarship into seven categories—(1) interracial relationships and marriage; (2) racial identity; (3) racial formation; (4) census categories and other classifications; (5) essentialism and intersectionality; (6) transracial adoption and child custody; and (7) "toward the new multiracial society"—but omitting discussion of animus against those perceived as mixed-race).

270. Davison, *supra* note 5, at 180–85.

271. See *id.* at 179–80 (arguing that racism against mixed-race individuals comes in the form of direct discrimination, because of the individuals' mixed-race status, as well as discrimination based on an incorrect assumption about the individuals' race).

that mixed-race people “are directly discriminated against because of their distinct mixed identity,” primarily based on quasi-scientific arguments about multiracial individuals’ inferiority due to “hybrid degeneracy” and “sociocultural rejection.”<sup>272</sup>

But aside from Davison’s work, no research has examined discrimination claims specifically alleging multiracial discrimination. Indeed, some scholarly work ignores the potential confounding influence of multiracial identification in the antidiscrimination context. For example, Kenji Yoshino relates the story of Lawrence Mungin, “an African-American attorney who brought an unsuccessful race discrimination suit against his law-firm employer.”<sup>273</sup> Yoshino provides a thorough account of Mungin’s struggle to ascend through the predominantly White ranks of an elite law firm.<sup>274</sup> Ultimately, after Mungin was denied promotion to partner, he filed a Title VII suit alleging race discrimination.<sup>275</sup>

Yoshino focuses on Mungin’s attempts to shield White people from the threat of his Black identity. Although Yoshino acknowledges that Mungin “was raised in poverty in Brooklyn and Queens by his biracial mother,” Yoshino does not further engage the possibility that having a biracial mother may have affected Mungin’s life course.<sup>276</sup> Was Mungin ever identified as biracial, like his mother? Did he ever identify *himself* as biracial? How did Mungin’s biracial mother influence his interactions with others in the community? To the extent that Mungin identified himself or was identified by others as biracial, how did his mixed-race identification shape his own views about race? How did it affect his ability to perform his race in a way that was non-threatening to White people? Perhaps the impact was negligible, perhaps not—but the complete omission of discussion is noteworthy.

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272. *Id.* at 179.

273. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 879–86 (2002).

274. *See id.* at 882–84 (describing Mungin’s numerous efforts to assimilate through dress, emphasis on his academic reputation, disassociation from other African-Americans, and disregard of racial slights).

275. *Id.* at 879.

276. *Id.* at 880–81. Yoshino notes that Mungin’s mother “considered herself to be black,” but does not provide further analysis of her mixed race status. *Id.* at 880. Did others also consider her to be black? What about Mungin’s father? The extent to which Mungin’s early experiences involved awareness of racial mixing and racial fluidity may well have affected the course of his life—or they may have had no effect at all—but Yoshino’s account does not address that possibility.



A similar omission occurs in Randall Kennedy's discussion of the *Rhineland* case.<sup>277</sup> Kennedy's description of the case acknowledges the wife's racially-mixed background, noting that she "was the daughter of a white mother and a black father."<sup>278</sup> Kennedy then describes the closing argument in *Rhineland* as follows: "The attorney for Rhineland made an all-out plea for the jury simply to register its disgust with inter-racial marriage. 'There isn't a father among you,' he declared, 'who would not rather see his son in his casket than to see him wedded to a mulatto woman.'"<sup>279</sup> Yet this analysis of the multiracial dynamic in *Rhineland* is incomplete. Had Kennedy quoted more of the closing argument, it would have become clear that the attorney's speech actually revealed not only antipathy toward interracial marriage, but also a unique contempt for those perceived as racially mixed. The sentence immediately following the portion Kennedy chose to quote in his article reads: "Decent blacks have the same feeling."<sup>280</sup> In other words, at least according to the attorney, Blacks as well as Whites would rather see their children dead than married to a "mulatto." This statement draws a distinction between "mulattos" and "decent blacks," and suggests that perhaps at least some Whites and Blacks were unified in preferring not to marry those seen as racially mixed. Yet Kennedy elides that interpretation, describing the attorney as playing to the jury's disgust with "inter-racial marriage" rather than disgust at marrying a woman perceived as racially mixed and hence intrinsically impure.

The omissions I have detailed are only two of many such scholarly elisions, and I have chosen them as examples simply because the work in which they appear is otherwise meticulous and provocative. But many other scholarly works also gloss over multiracial identity in the context of discrimination, preferring to cast their claims in terms of conventional discrete racial categories without even bracketing the possibility of non-categorical identification. This scholarly omission both reflects and reinforces the reluctance of the courts to acknowledge multiracial individuals in the antidiscrimination context.

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277. See generally Kennedy, *supra* note 77, at 1155–56 (considering the annulment of a marriage between a mixed-raced woman and a White man). *Rhineland* is also discussed in more detail in the text accompanying notes 47–49.

278. *Id.* at 1155.

279. *Id.* at 1156.

280. Onwuachi-Willig, *A Beautiful Lie*, *supra* note 49, at 2436 (citations omitted).

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#### IV. “INVISIBLE PEOPLE”<sup>281</sup>: THE ERASURE OF MULTIRACIAL DISCRIMINATION

In considering claims of racial discrimination, courts typically slot plaintiffs into one of the five categories of Hollinger’s ethno-racial pentagon.<sup>282</sup> Yet animus is not always so easily classified. Society does not always perceive an individual’s racial identity as falling into a neat category, and consequently racial animus is not always captured by one of the conventional categories.<sup>283</sup>

Some may object that, as an empirical matter, multiracial identification is so rare as not to merit substantial discussion. A small percentage of people may be identified as multiracial—these skeptics may argue—but the vast majority of people are slotted into one category or another based on their physical appearance, and, to the extent that they experience discrimination, it is on the basis of their perceived membership in that category. “Sure, Tiger Woods has White, Black, Asian, and Native American ancestors,” these skeptics may say, “but when society sees him on the street, they see a Black man.”<sup>284</sup>

In response, I first reiterate the point I raised in Part I—that many other cues aside from physical appearance may trigger identification of an individual as racially mixed. Perhaps people would label Tiger Woods as Black if they saw him on the street, perhaps not. But if they heard him describe himself as “Cablinasian,” as he has to reporters,

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281. See, e.g., Ramona E. Douglass, Letter to the Editor, *Multiracial People Must No Longer Be Invisible*, N.Y. TIMES, July 12, 1996, at A26 (arguing that multiracial people are “invisible statistically to the medical research community”).

282. See *supra* note 2 and accompanying text.

283. See *supra* Part III.

284. Public discourse surrounding Woods’s recent disclosures of marital infidelity reflects preoccupation with both his racial identity and with interracial relationships. The fact that Woods’s wife and his alleged mistresses are White adds an additional dimension to the scandal that, for many, affects their perception of Woods’s behavior. Some self-identified members of the Black community describe themselves as less sympathetic to his situation given that he has refused to identify himself as Black and that he married a White woman; others express the sentiment that even given Woods’s disavowal that he is Black, they would prefer to see him with a Black woman. See, e.g., *Tiger Woods Alienates Black Community with White Lovers*, N.Y. DAILY NEWS, Dec. 6, 2009, [http://www.nydailynews.com/news/national/2009/12/06/2009-1206\\_tiger\\_woods\\_alienates\\_black\\_community\\_with\\_white\\_lovers.html](http://www.nydailynews.com/news/national/2009/12/06/2009-1206_tiger_woods_alienates_black_community_with_white_lovers.html) (discussing the relationship of Woods’s multiracial identity to public perception of the scandal and, remarkably, generating over six hundred comments from readers); Lisa Fritsch, *Tiger Woods and the Problem of the “Great Black Example,”* AFROSPEAR, Dec. 28, 2009, <http://afrospear.com/2009/12/28/tiger-woods-and-the-problem-of-the-great-black-example%E2%80%8Fby-lisa-fritsch> (discussing hostility generated toward Woods’s racial choices in romantic partners within the “black community”).

their perceptions might change.<sup>285</sup> I also invite skeptics to peruse one of the many books featuring photographs and biographies of people identified as racially mixed.<sup>286</sup> My intuition is that most people will have considerable difficulty visually classifying many of the featured individuals using conventional racial categories, and this difficulty may help persuade skeptics that many individuals are, indeed, identified as multiracial. Finally, I emphasize that the inhospitality of antidiscrimination jurisprudence to multiracial people is particularly problematic from a forward-looking perspective. As rates of interracial marriage continue to increase,<sup>287</sup> the number of individuals who are perceived as and discriminated against as multiracial will likely continue to increase as well.

Proceeding from the conclusion that individuals identified as multiracial are a non-negligible segment of the population, and that such individuals do indeed experience a unique form of animus as demonstrated in Part II, this Part examines the reasons underlying the absence of multiracial people from antidiscrimination jurisprudence. It then explores the consequences of that absence both for individuals who are identified as multiracial and for society.

#### A. *Causes of Unacknowledged Multiracial Discrimination*

Multiracial individuals are largely absent from antidiscrimination jurisprudence for a variety of interwoven reasons. This Section rules out several potential causes and then posits a more plausible explanation for the absence.

As the many examples in Part II demonstrate, animus against multiracial people is real and powerful. For some, the notion of racial mixing incites a visceral contempt. It is not the case, therefore, that antidiscrimination claims brought by multiracial people are uncommon because animus against multiracial people simply does not exist.

Nor are there obvious constitutional, statutory, or regulatory barriers to such suits. Rather, the reverse is true. The Equal

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285. See Kamiya, *supra* note 124 (noting that Tiger Woods admitted on Oprah that it bothered him when he was called an “African-American”).

286. See, e.g., FULBECK, *supra* note 23 (introducing “Hapas,” mixed-race individuals of Asian or Pacific Island descent, through a book that offers pictures and words from the Hapa population).

287. See EDMONSTON, *supra* note 99, at 246 (hypothesizing that the increase in the population of mixed-race individuals, from 22 million to 189.1 million in the next century, translates also into an increase of interracial marriages).

Protection Clause straightforwardly guarantees to all people “the equal protection of the laws,”<sup>288</sup> while Title VII forbids discrimination “because of [an] individual’s race.”<sup>289</sup> And the Equal Employment Opportunity Commission’s (EEOC) website specifically explains that “Title VII’s prohibitions apply regardless of whether the discrimination is directed at Whites, Blacks, Asians, Latinos, Arabs, Native Americans, Native Hawaiians and Pacific Islanders, *multi-racial individuals*, or persons of any other race, color, or ethnicity.”<sup>290</sup> The EEOC’s Compliance Manual does not specifically address multiracial individuals.<sup>291</sup> It does note, however, that “Title VII does not contain a definition of ‘race,’ nor has the Commission adopted one.”<sup>292</sup> Coupled with the explicit mention of multiracial individuals on the EEOC’s website, the most logical reading is that the EEOC views discrimination against multiracial individuals as illegal and that it views claims of such discrimination as administratively and judicially cognizable.

Having ruled out lack of multiracial animus and explicit governmental prohibition as explanations for the lack of antidiscrimination suits filed by multiracial people, we must seek other explanations for the invisibility of multiracial discrimination claims in antidiscrimination jurisprudence. Perhaps the absence of multiracial individuals from the antidiscrimination context is in part the result of monoracial self-identification by people of mixed race.<sup>293</sup> Many people who might be viewed by some as mixed-race identify more strongly, or even exclusively, with one race or another.<sup>294</sup> When such individuals suffer discrimination, they may choose to bring

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288. U.S. CONST. amend. XIV, § 1.

289. 42 U.S.C. § 2000e-2(a)(1) (2006).

290. U.S. Equal Opportunity Employment Commission, Race/Color Discrimination, <http://archive.eeoc.gov/types/race.html> (last visited Feb. 3, 2010) (emphasis added).

291. See EEOC Compliance Manual, Section 15: Race and Color Discrimination (2006), available at <http://www.eeoc.gov/policy/docs/race-color.pdf>.

292. *Id.* at 15-3.

293. See David L. Brunsmas & Kerry Ann Rockquemore, *What Does “Black” Mean? Exploring the Epistemological Stranglehold of Racial Categorization*, 28 CRITICAL SOC. 101, 110 (2002).

294. See, e.g., Melissa Herman, *Forced to Choose: Some Determinants of Racial Identification in Multiracial Adolescents*, 75 CHILD DEV. 730, 736 tbl.2 (2004) (surveying multiracial youth, ages fourteen to nineteen, and finding that, when forced to choose one race, sixty-eight percent of Black/White students, fifty-two percent of Hispanic/White students, and forty-three percent of Asian/White students chose the minority race instead of “White”).

lawsuits in which they describe themselves as monoracial rather than multiracial.

Although this approach might be taken in many cases, evidence does not support the conclusion that monoracial self-classification occurs in every case or even in most cases. Research indicates that many people who might be identified by others as multiracial also perceive themselves that way. For example, David Brunσμα and Kerry Ann Rockquemore found that when participants in a study who identified themselves as having one Black parent and one White parent were given an array of identity options, only 16.7% adopted a “singular identity,” considering themselves either exclusively Black (13.1%) or exclusively White (3.6%).<sup>295</sup> The proposition that multiracial people unilaterally decide to identify themselves as monoracial in their claims of discrimination is therefore an incomplete explanation.

Alternatively, even people who identify themselves as multiracial may be viewed by outsiders—employers, coworkers, classmates, and so on—as monoracial based on the same factors discussed in Part I. For example, an individual with one Black parent and one White parent may be labeled by others as Black based on her appearance, or an individual with one White parent and one Latina/o parent may be labeled by others as Latina after she is overheard speaking Spanish with a friend. This public perception of an individual as monoracial may provoke the discriminatory behavior that culminates in an Equal Protection or Title VII claim. In such a situation, it may make logical narrative sense for the plaintiff to describe herself as monoracial in her lawsuit, regardless of how she views herself. When the discriminatory behavior is motivated by animus against a single race, identification of a plaintiff as racially mixed may not add to the narrative for purposes of an Equal Protection or Title VII claim and may even provide an unwanted distraction. This explanation, however, while plausible in some instances, also seems incomplete given the evidence of animus uniquely directed at those perceived as racially mixed. Perhaps multiracial people may sometimes be identified as monoracial and consequently decide to identify themselves as such in their lawsuits, but many examples indicate that they are not always so identified.<sup>296</sup>

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295. Brunσμα & Rockquemore, *supra* note 293, at 110.

296. See cases discussed *supra* notes 146–172 and accompanying text.

Advice from legal counsel motivated by tactical considerations may also lead to the invisibility of multiracial people in antidiscrimination jurisprudence. The likelihood of success on an Equal Protection or Title VII challenge no doubt increases when a plaintiff can conform his or her claim to an established narrative; and as I have discussed, our category-dependent antidiscrimination jurisprudence consists primarily of narratives that embrace categories and, hence, monoracial identification.<sup>297</sup>

But the influence of legal counsel in fact indicates another explanation. Given that lawyers are primarily guided by the precedents created in judicial opinions, courts bear significant responsibility for the invisibility of multiracial plaintiffs. In most cases involving a plaintiff described as multiracial, the court failed to acknowledge explicitly that the plaintiff was perfectly entitled to bring a case *as a multiracial plaintiff* and that at least part of the harm alleged may have been unique to the perception of the plaintiff *as a multiracial individual*. The employee in *Mitchell* may have received worse treatment from her employer, not because the employer realized that she “was black” as the court said,<sup>298</sup> but because her employer came to view her as racially mixed. The problem with the categorical scheme in *Godby* was not only that it established separate divisions for White and Black homecoming nominees, but also that it created a unique dilemma for multiracial individuals: either unwillingly choose one of two prescribed racial labels or else face exclusion from both racial categories.<sup>299</sup> The discrimination alleged in *Smith* may well have been directed at Smith as a multiracial person rather than as a Black person—a logical outgrowth of Smith’s own statement that he gets discrimination from “both sides,” so he plays it both ways.<sup>300</sup> And courts’ failure—as in *Moore* and *Watkins*—to acknowledge that people identified as racially mixed may not be similarly situated to those identified as monoracial further obscures

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297. See *supra* Part III.B.

298. *Mitchell v. Champs Sports*, 42 F. Supp. 2d 642, 646 (1998).

299. See *supra* notes 212–229 and accompanying text.

300. *Smith v. CA, Inc.*, No. 8:07-cv-78-T-30TBM, 2008 WL 5427776, at \*2 (M.D. Fla. Dec. 30, 2008). Of course, the court’s failure to engage this dynamic may result in part from Smith’s attorney’s failure to engage this dynamic in the briefs or enter it in the factual record. But such an absence does not need to be ignored; rather, it can be bracketed and highlighted as a genuine void in the record.

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the distinct character of multiracial animus in the antidiscrimination context.<sup>301</sup>

In short, courts generally fail to recognize a multiracial dynamic even in cases where the opinion itself notes that the plaintiff identifies himself as multiracial. This evasion strongly suggests that in other instances courts simply neglect to mention that the plaintiff identified himself as racially mixed in his pleadings. Given the reliance of antidiscrimination jurisprudence on racial categories, it is easiest for courts to assume that a plaintiff who works in a predominantly White work environment and describes himself as a biracial Black/White person in his pleadings was actually discriminated against because his employer harbored animus toward Black people. The same is true of other perceived racial mixtures. While this monoracial judicial narrative likely reflects reality in some circumstances, the many incidents reflecting animus targeted at racially mixed people indicates that it is an incomplete explanation.<sup>302</sup> The logical conclusion, therefore, is that courts are ignoring or eliding at least some cases that reflect a multiracial narrative of discrimination in order to harmonize those cases with traditional categorical doctrine. The next Section discusses the consequences of this elision.

*B. Consequences of Unacknowledged Multiracial Discrimination*

By ignoring multiracial discrimination in adherence to a category-dependent antidiscrimination jurisprudence, courts create precedent encouraging future courts to ignore record evidence of discrimination directed specifically at multiracial people. This failure obscures the fact that—just as there are certain modes of discrimination targeted at Latinos, Native Americans, and so forth—there are certain modes of discrimination triggered specifically and uniquely by animus toward multiracial people.

Courts' failure to acknowledge this real animus leads to its trivialization or even its denial. Denial, in turn, engenders an array of harms: it warps the narratives of individual plaintiffs. It skews the development of the law, discouraging future claims of multiracial discrimination. And it further entrenches the crude racial categories

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301. See cases discussed *supra* notes 240–246 and accompanying text.

302. See *supra* Part II.

in our social consciousness, along with the stereotypes associated with those categories.

1. *Damage to individual narratives of discrimination*

Narrative is a source of power.<sup>303</sup> Catherine MacKinnon famously describes it as feminism's "methodological secret,"<sup>304</sup> and other historically disadvantaged groups have likewise adopted narrative as a means to convey the injuries they have suffered.<sup>305</sup> Among various forms of communication, narrative is uniquely capable of capturing human experience and inspiring empathy. As Steven Winter explains:

The attraction of narrative is that it corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law. . . . In narrative, we take experience and configure it in a conventional and comprehensible form. This is what gives narrative its communicative power; it is what makes narrative a powerful tool of persuasion and, therefore, a potential transformative device for the disempowered.<sup>306</sup>

Deploying narrative, then, is a valuable technique by which an individual may convey what has happened to him. Indeed, the Supreme Court has acknowledged the power of narrative, attesting to the persuasive force of "tell[ing] a colorful story with descriptive richness" rather than merely presenting sterile facts.<sup>307</sup>

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303. Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 627 (explaining that, in the context of the Mashpee Indian case, "as with most narratives, its very telling is an expression of power").

304. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW* 5 (1987).

305. See, e.g., DERRICK A. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) (discussing thoughts on racial justice issues for African-Americans); Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988) (critiquing Bell's use of "imaginative tales" and a fictitious alter ego); Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1359 n.3 (1992) (describing itself and other narrative scholarship as "example[s] of the 'legal storytelling' genre employed by a number of Critical Race theorists and feminists to analyze legal thought and culture"); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073, 2074 (1989) (collecting articles by Milner S. Ball, Derrick Bell, Mari J. Matsuda, and others on the use of stories and narratives to promote critical examination of dominant legal paradigms).

306. Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989).

307. *Old Chief v. United States*, 519 U.S. 172, 187 (1997).



Consequently, judicial adaptation of a party's narrative affects the dynamic of power surrounding a particular controversy. A court's act of recounting the facts of a case inherently introduces some degree of discrepancy from each party's original version of the facts, as well as some discrepancy from the events that actually transpired. Even the most scrupulous judicial summary will inevitably present a gloss of some sort on a party's narrative by emphasizing certain facts or eliding others.<sup>308</sup> Depending on the circumstances, then, the court's treatment may serve either to dignify or to devalue that party's concerns. This narrative effect occurs regardless of the actual outcome of the case: a court might dignify a party's concerns and empathize with her situation, for example, while ultimately ruling against that party as a matter of law.

The judicial decisions surrounding the life of Fred Korematsu illustrate the role that courts play in conferring dignity and distributing power through narrative.<sup>309</sup> Dean Hashimoto persuasively argues that the Supreme Court's failure to include Korematsu's narrative of events in its decision deprived him of the dignity that having his story told would have conferred.<sup>310</sup> By offering a generalized analysis of the authority of the United States government to intern Japanese citizens during wartime rather than acknowledging Korematsu's personal life history, the Court disempowered Korematsu by rendering his individual experience irrelevant.<sup>311</sup> Likewise, forty years later when Korematsu's case was reexamined before district court judge Marilyn Patel, the issue of whether the judge would publish her decision in writing provoked more controversy than the substantive question of whether she would exonerate Korematsu. While the government did not oppose Korematsu's exoneration, it argued that a written decision was unnecessary; in contrast, "the Japanese American community felt strongly about . . . articulating the exact wrongs committed by the

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308. And this gloss is in addition to whatever gloss the parties' lawyers may already have imposed.

309. *Cf.* *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that the exclusion of all persons of Japanese ancestry, including Fred Korematsu, from the West Coast war area without suspicion of wrongdoing was within Congress's war-making power because it was impossible to determine which persons were aiding the Japanese).

310. Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 *ASIAN PAC. AM. L.J.* 72, 114, 117 (1996).

311. *Id.* at 113, 115–17.

internment.”<sup>312</sup> This controversy would not have occurred but for the fact that the act of written judicial acknowledgment confers power upon those whose stories are told.<sup>313</sup> Patel’s choice to publish a written decision ultimately reshaped the narrative around both Korematsu’s experience and the Japanese internment as a whole.<sup>314</sup>

In assessing the courts’ ability to confer or withhold power through narrative, I emphasize their tendency to reframe plaintiffs’ individual narratives into universal archetypes. As the result of this reframing, “[t]he recrafted stories replace the realities of the litigants’ view of the ‘facts’ with an assimilated reality more congenial to the dominant culture.”<sup>315</sup> Gerald Torres and Kathryn Milun have explored the “universalizing” function of narrative in discussing the well-known Mashpee Indian case.<sup>316</sup> The Mashpee claimed that their land had been transferred to a nearby town without statutorily required approval from the federal government.<sup>317</sup> A threshold issue in the case was whether the Mashpee were a “tribe” for purposes of the relevant statutory provisions.<sup>318</sup> Torres and Milun explained how the court relied on a definition of “tribe” already embedded in American legal culture, disregarding the Mashpee’s understanding of their own identity.<sup>319</sup> Thus, “requir[ing] a particular way of telling a story not only strips away nuances of meaning but also elevates a particular version of events to a non-contingent status.”<sup>320</sup> For example: “By imposing specific ‘ethno-legal’ categories such as ‘Tribe’ on the Mashpee, law universalizes their story. This universalizing process eliminates differences the dominant culture perceives as destabilizing.”<sup>321</sup> In sum, regardless of whether the court’s construction of the word “tribe” was fair or proper, the imposition of such a construction aptly demonstrates the influence that existing cultural norms exert over judicial narrative framing.

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312. *Id.* at 73.

313. *Id.* at 73–74.

314. *Id.*

315. Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISC. L.J. 611, 618 (1998).

316. Torres & Milun, *supra* note 303, at 630.

317. *Id.* at 633.

318. *Id.* at 633–36. A jury ultimately found that the Mashpee were not a tribe, and that finding was upheld on appeal. *Id.* at 635–36.

319. *Id.* at 654.

320. *Id.* at 629.

321. *Id.* at 630.

Claims of discrimination brought by people identified as multiracial and discriminated against on that basis are likewise subject to the influence of dominant social and cultural norms. The jurisprudential reliance on discrete monoracial categories may influence courts to reframe the narratives of multiracial plaintiffs, recasting them as narratives of monoracial discrimination. This judicial reconstruction subsumes the narratives of multiracial plaintiffs within the dominant legal paradigm, ultimately distorting those plaintiffs' narratives of what they have experienced. In the context of multiracial discrimination, acknowledging the multiracial dynamic in a particular narrative is critical to an account of the harm experienced. When courts reframe a narrative of discrimination motivated by multiracial identification as one of discrimination motivated by monoracial identification, they warp or render invisible the specific narrative of discrimination that the individual perceived as mixed-race has suffered.

Skeptics may question whether harm ensues from a court characterizing a particular narrative of discrimination as something other than what the plaintiff has alleged, particularly if this recharacterization does not affect the outcome of the case. I believe, however, that this narrative infidelity is, in fact, independently harmful.

Consider the following stylized scenario. A plaintiff claims that he was discriminated against because he was Asian. He alleges that his coworkers called him a "chink," asked him whether he ate dogs, and mocked the shape of his eyes. He was ultimately fired for what he believes were pretextual reasons masking racial animus. The first sentence of the court's opinion is as follows: "Plaintiff alleges that he was discriminated against because he is Hispanic." Undoubtedly, this plaintiff would feel that the court had disregarded his narrative. Not only did the court characterize him in a way that he had not characterized himself, but the way in which the court characterized him divests the other facts of their narrative impact because they are not associated with the category of "Hispanic" as they are with the category of "Asian." My example is intentionally exaggerated, and the Reader's reaction is likely that the court's characterization was simply *wrong*. But that is exactly the point: just as an Asian plaintiff may believe it to be wrong for a court to characterize him as Hispanic, a multiracial plaintiff may feel it was wrong for a court to characterize him as monoracial.

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Thus, reframing a multiracial plaintiff's injury as one of monoracial discrimination inherently devalues the plaintiff's original account of the wrong that she suffered. Regardless of the ultimate outcome of the case, this reframing undermines the plaintiff's dignity by depriving her of the opportunity to vindicate her rights based on *her* version of her injury. It sends the plaintiff the message that her nuanced version of events is of no moment and that her success or failure depends on her ability to rework her discriminatory narrative to square with the paradigmatic narrative account involving categories. This forced revision of the plaintiff's story silences her voice and displaces her from a narrative to which her experience should be central.

Moreover, suppression of a narrative describing the harm to an individual plaintiff—even if the narrative merely recasts one harm as another—may produce a ripple effect of tangible negative consequences for that plaintiff. The denial of harm leads to alienation and isolation on the part of the plaintiff, rendering the plaintiff vulnerable to repetition of the harm in question. The denial of a plaintiff's narrative may lead to disenfranchisement from the legal system, thereby reducing the likelihood that the plaintiff will rely on the legal system to rectify future harms. As Richard Delgado explains:

If the only narrative law recognizes is a bad one—one that requires that you demean yourself or tell your story in a strange or contorted way, or jump through very high hoops even to be heard at all—you will not choose to tell your story there very often.<sup>322</sup>

By devaluing the individual multiracial plaintiff's narrative and recasting it as a familiar monoracial one, courts divest the plaintiff of the power associated with narrative integrity; likewise, they deprive the plaintiff of the dignity inherent in the opportunity to vindicate his narrative in court. Moreover, the court distances the individual from the legal system, decreasing the likelihood that he will place his trust in the legal system to address his grievances in the future. By rechanneling a narrative of multiracial discrimination into a monoracial framework, courts thus inflict an additional injury upon an individual already wounded by an original instance of discrimination.

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322. Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 92–93 (1996).

## 2. *Inhospitality to claims of multiracial discrimination*

Reframing narratives of mixed-race discrimination also has consequences beyond the case in which the reframing occurs. Such reframing skews the law in favor of certain narratives of discrimination at the expense of others, creating precedent that makes legal recovery easier for plaintiffs who employ a favored narrative. Torres and Milun explain that narratives of racial discrimination “enter legal discourse in an illustrative, even exemplary, fashion.”<sup>323</sup> By fitting stories of multiracial discrimination into a jurisprudence based on categories, courts reinforce monoracial narratives and decrease the likelihood of recovery based on multiracial discrimination.

In some instances, the imposition of categorical norms upon situations of multiracial discrimination may have concrete consequences for plaintiffs’ ability to recover. As this Article has noted, in *Walker*, the court held that for purposes of Title VII, a plaintiff may be considered to be a member of all the racial groups with which she identifies, thus limiting her ability to demonstrate that she was treated worse than non-members of those groups.<sup>324</sup> Courts have not widely adopted the approach advocated in *Walker*, but they also have yet to confront the issue that *Walker* presents in any systematic fashion. Given the ever-increasing rate of interracial marriage, it seems likely that the number of plaintiffs asserting identification with two, three, or even four conventional racial categories will increase as well. If courts do eventually adopt *Walker*’s approach to defining a plaintiff’s racial comparables for purposes of Title VII, plaintiffs who choose to identify with multiple races will have considerable difficulty demonstrating that they were treated worse than those outside their racial “classification.”

The problem *Walker* presents is concrete. But on a more general level, the failure to acknowledge multiracial discrimination means that individuals who suffer discrimination because they are identified as multiracial may choose to reframe their circumstances to fit a more conventional narrative of monoracial discrimination. This process further eclipses the existence of uniquely multiracial forms of discrimination.

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323. Torres & Milun, *supra* note 303, at 628.

324. *Walker v. Univ. of Colo. Bd. of Regents*, No. 90-M-932, 1994 WL 752651, at \*1 (D. Colo. Mar. 30, 1994); *see supra* text accompanying notes 193–197.

Several scholars have explored the impact of legal regimes on the interrelated issues of which narratives receive recognition and how plaintiffs frame their narratives. I discuss four examples here and then draw broader themes from their aggregation.

The form that doctrine takes has the power to channel claims into specific narratives at the expense of others. In the context of Title VII jurisprudence, Vicki Schultz argues that law privileges certain narratives, explaining that its focus on sexual harassment has diverted attention away from the broader problems of gender inequality.<sup>325</sup> She explains that the emphasis on sexuality “displac[es] attention away from genuine problems of sex discrimination” and “encourages employees to articulate broader workplace harms as forms of sexual harassment, obscuring more structural problems.”<sup>326</sup> For example, female employees may complain about sexual jokes and pornography in the workplace when their real concern is that they suffer from low status and a lack of respect.<sup>327</sup> Moreover, the myopic focus on sexual harassment marginalizes the experiences of women who encounter non-sexualized gender discrimination.<sup>328</sup> Schultz observes that “sexual harassment law has taken on a life of its own, uprooted from the larger project of achieving gender equality that animates Title VII.”<sup>329</sup> Her insight may be analogized to the race discrimination context: Title VII was not intended to protect specific racial *categories*, but rather to eliminate racial discrimination; yet the emphasis on categories has resulted in the exclusion of non-categorical narratives from race discrimination jurisprudence.

Such channeling also occurs in the context of discrimination based on racial and ethnic performance. Camille Rich explains that according legal recognition to certain kinds of discrimination while withholding such recognition from others affects the way that plaintiffs present their claims.<sup>330</sup> Rich contends that Title VII should

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325. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2064 (2003).

326. *Id.* at 2067.

327. *Id.*

328. *See id.* at 2076–77 (discussing a judge’s analysis of a sexual harassment case that did not focus on the harassment’s sexual content, “but instead rightly stressed that the conduct was designed to denigrate [the plaintiff] as a woman”).

329. *Id.* at 2119; *see also* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686–87 (1998) (highlighting that, although it appears that sexual motivations lie at the core of sexual harassment, “much of the gender-based hostility and abuse that women (and some men) endure at work is neither driven by the desire for sexual relations nor even sexual in content”).

330. Rich, *supra* note 20, at 1145–46.

protect behavior associated with race and ethnicity, emphasizing that identity may be claimed only through “‘performative’ acts” and positing that such identity performance is critical to an individual’s dignity and sense of self.<sup>331</sup> She suggests that when particular forms of performance-based discrimination are not recognized by the courts, plaintiffs will seek to recharacterize their claims under a more hospitable regime. For example, in *McGlothlin v. Jackson Municipal Separate School District*,<sup>332</sup> a teacher brought a claim of religious discrimination under Title VII on the ground that the school district where she worked fired her for wearing African head wraps and dreadlocked hairstyles, as her Rastafarian and Hebrew-Israelite beliefs required.<sup>333</sup> While documentary evidence established that the teacher had communicated that she wore the hairstyles in relation to her “practice and heritage,” the school successfully argued that she had never communicated the religious basis for her self-presentation.<sup>334</sup> Rich explains that the outcome of the case resulted from the hostility of courts to claims based on “racial performance.”<sup>335</sup> Because a race discrimination claim was not available under these circumstances, the teacher “sought to recharacterize her claims as religious discrimination.”<sup>336</sup>

Identity categories likewise channel claims. Kenneth Karst explains that identity categories—for example, race or sexual orientation—are simply myths that society writes.<sup>337</sup> Judicial opinions exert a form of control over this social mythology because they “teach[] that the identity category exists, and that membership in the category implies a pattern of behavior within the story lines conventionally associated with the category.”<sup>338</sup> Consequently, “[l]aw maintains a vocabulary of identities and sometimes even channels claims (and thus claimants) into recognized identity categories with conventional scripts for behavior.”<sup>339</sup> By choosing how to frame and address plaintiffs’

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331. *Id.* at 1176–79.

332. 829 F. Supp. 853 (S.D. Miss. 1992).

333. *Id.* at 854.

334. *Id.* at 855, 858–60.

335. Rich, *supra* note 20, at 1208 (finding that the court dismissed the plaintiff’s claim because she “never represented these activities as religious but rather as associated with race”).

336. *Id.*

337. Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 283 (1995) (“We ‘make up people,’ inventing categories . . .”).

338. *Id.* at 293.

339. *Id.* at 295.

allegations of racial discrimination, courts dictate the acknowledgment of certain identities and the narratives of discrimination associated with them. By reframing or omitting certain narratives, courts perpetuate the erasure of other identities and narratives.

Finally, specifically with respect to racial categories, Juan Perea has argued that the pervasiveness of the Black/White paradigm in legal scholarship and jurisprudence has led to the suppression of other narratives of discrimination.<sup>340</sup> Because that paradigm implicitly requires other groups to analogize their experience to that of the relationship between Blacks and Whites, “reliance on the binary paradigm leads to the exclusion and marginalization of other racialized people who also suffer from racism.”<sup>341</sup> This marginalization has tangible consequences, particularly where the analogy is imperfect. For example, a non-Black racial minority may suffer from forms of discrimination that are not directly comparable to anything within the Black/White binary paradigm. Perea suggests that courts may have been indifferent to claims of discrimination based on accent and language in part because the Black/White binary remains central to scholarship and jurisprudence, and accent and language are not traditional components of that binary narrative of discrimination.<sup>342</sup> In other words, the prevailing legal paradigm

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340. Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213, 1213, 1215 (1997) (focusing on the exclusion of Latinos from “full membership and participation in racial discourse”).

341. *Id.* at 1221; see also Stephen Reinhardt, *Guess Who’s Not Coming to Dinner!?*, 91 MICH. L. REV. 1175, 1178 (1993) (reviewing DERRICK BELL, *FACTS AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992)) (criticizing Bell’s binary Black/White racial narrative as failing to reflect the complexities of race in America).

342. Perea, *supra* note 340, at 1238–39. I suspect that some Readers will question Perea’s assertion that accent and language fall wholly outside the narrative of discrimination associated with the Black/White binary paradigm. However, in many parts of the country, people associate a certain dialect with Black speakers, and many Black immigrants have non-American accents and speak languages other than English. See, e.g., Jill Gaubling, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. MICH. J.L. REFORM 637, 645 (1998) (finding that “recruiters are less likely to offer a job to a Black English speaker” and that “black speech patterns were an immediate marker of an undesirable job candidate”); Rich, *supra* note 20, at 1162 (noting that when a “caller has triggered a cultural code associated with a low-status race or ethnic group . . . [he], as a consequence, is denied a[] [job] opportunity”). Although I disagree with Perea that accent and language are irrelevant to the Black/White paradigm, I do believe that these attributes are less central to the narrative of Black/White discrimination than they are to narratives involving non-Black minorities. So to the extent that the Black/White paradigm represents the dominant model for thinking about race,



shaped the development—or rather, lack of development—of antidiscrimination jurisprudence.

I do not take a position on the substantive merits of the broader arguments that each of these four scholars advances in their respective works. But relevant to this Article, each has presented compelling evidence that whether a court chooses to recognize a certain narrative influences how future plaintiffs will present their claims.<sup>343</sup> Karst and Perea emphasize that such influence extends specifically to the categories that plaintiffs use to describe their claims. And if a narrative is recognized, the way that the court frames that recognition in its opinion likewise influences the fate of future plaintiffs. First, the precedent created by judicial opinions shapes how plaintiffs will choose to characterize their narratives of discrimination. And second, the presence or absence of such precedent influences the likelihood that plaintiffs will succeed in the event that they do frame their narratives in a particular way.

The lack of precedent relating to discrimination against people identified as multiracial creates a powerful incentive for plaintiffs to present the discrimination they have suffered as a monoracial narrative. Indeed, attorneys are likely to advise them to do so. In our common law system, after all, the attorney's goal is to analogize her client's case as closely as possible to previous cases. When little precedent exists for claims of discrimination against those viewed as multiracial, an attorney is likely to analogize her client's case to those involving monoracial discrimination. While nothing prevents the attorney from analogizing a claim of mixed-race discrimination to one of monoracial discrimination—just as nothing automatically prevents an analogy between a case involving a Latina plaintiff and one involving an Asian plaintiff—the attorney may decide that introducing a multiracial dimension to the claim will provide unnecessary distraction. For example, in a Title VII claim, mentioning that a particular plaintiff is part Asian and part White may raise questions in the judge's mind about whether the plaintiff is in fact in a different racial category from her comparables, regardless whether the proffered comparables are Asian or White. It may inspire the defendant to argue that it never viewed the plaintiff as a

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Perea is correct that the courts' inhospitality to accent and language claims reflects the fact that such claims receive lower priority within the Black/White paradigm.

343. I do not take a position on the substantive merits of the broader arguments that each of these four scholars advances in their respective works.

member of the minority group, or cause the judge to wonder about the same issue. Or it may simply present the judge with an unfamiliar scenario, one that does not necessarily resonate as one of discrimination or generate empathy for the plaintiff.

The incentive to cast a claim as monoracial becomes even stronger when the plaintiff has suffered discrimination that is not clearly monoracial or multiracial in character, or that has elements of both. Consider, for example, a case such as *Smith*, where the plaintiff alleged that his coworkers referred to him as “bitch” and “boy” and made repeated comments about African-American fathers.<sup>344</sup> This narrative of discrimination is frankly ambiguous, particularly in light of Smith’s explicit request that his company’s human resources department reclassify him as Caucasian rather than African-American, making his mixed-race identity salient to his coworkers.<sup>345</sup> But in such cases, it is far easier to couch the narrative as one of discrimination straightforwardly involving animus against African-American individuals. Previous cases provide a well-trodden narrative path that makes the briefing more straightforward; by describing the plaintiff as Black, the attorney need not worry about addressing multiracial discrimination that deviates, even slightly, from this well-trodden path.

And even if a plaintiff decides to couch his claim as a narrative of discrimination based on others’ perception of him as multiracial, the lack of precedent would reduce his likelihood of success. A court familiar with a monoracial narrative from innumerable prior Title VII cases is predisposed to be amenable to a similar claim. As Richard Ford observes, “[j]udges are likely to want the culture to be fixed and knowable,”<sup>346</sup> and multiracial discrimination introduces an element of uncertainty and fluidity that judges have substantial incentives to reject. The court’s dismissive response to the plaintiff’s claims in *Walker* illustrates the unlikelihood of success as a multiracial plaintiff: there, the court declined even to discuss how a mixed-race plaintiff

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344. *Smith v. CA, Inc.*, No. 8:07-cv-78-T-30TBM, 2008 WL 5427776, at \*1 (M.D. Fla. Dec. 30, 2008).

345. As noted, “bitch” and “boy,” when addressed to adult men, are terms perhaps most associated with animus against Black individuals. But the comment about African-American fathers may be either the expression of further animus against Black individuals, or it might be the expression of animus against racial mixing and against Smith for being racially mixed. See *supra* notes 230–237 and accompanying text.

346. RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 71 (2005).

might proceed with a claim.<sup>347</sup> In short, judges are unlikely to want to address the issue of discrimination against those perceived as multiracial unless it is clear to them that they have no alternative but to do so.

In sum, the paucity of claims brought by plaintiffs identified as multiracial creates a self-perpetuating phenomenon. Plaintiffs' attorneys are less likely to frame cases in terms of multiracial discrimination because it makes strategic sense to adhere to an existing narrative of discrimination based on one of the five well-known monoracial categories. In the rare instances when plaintiffs choose to frame their cases by invoking multiracial discrimination, courts are more inclined to view such cases with skepticism, both because little precedent has addressed this unfamiliar situation and because addressing the situation involves complicated analytical work that the court may be unwilling to perform. Thus, if courts continue to reframe cases involving multiracial discrimination, the cycle of erasure will continue to repeat itself. Meanwhile, discrimination against people perceived as multiracial will remain unaddressed, and the existence of such discrimination will remain obscured.

### 3. *Instantiation of racial categories and associated stereotypes*

Serious negative consequences flow from continued reliance on racial categories in antidiscrimination jurisprudence, including harm to individual narrative integrity and obstacles to raising claims of multiracial discrimination. But perhaps the most troubling harm is the impediment to progress toward a more nuanced understanding of racism and, consequently, of the social construct of race itself.

There is no inherent reason for our racial categories to be the way they are. Indeed, less than a century ago, our classification of races was quite different.<sup>348</sup> Consequently, our exclusive reliance on

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347. *Walker v. Univ. of Colo. Bd. of Regents*, No. 90-M-932, 1994 WL 752651, at \*1 (D. Colo. Mar. 30, 1994) (rejecting the plaintiff's contention that the protected class under the *McDonnell Douglas* framework is limited to mixed-race persons "because it would be impracticable to apply and could be so self limiting that a particular person is the only identifiable member of the group").

348. See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006) (tracing the legal construction of "whiteness" and examining the way that construction of non-white identities has evolved over the past century). Of course, it would be disingenuous to deny that the categories of "White" and "Black" did not exist a hundred years ago; however, López ably demonstrates that the boundaries of these categories were in fact permeable and that the "intermediate" racial categories we recognize today bear little resemblance to those of the early twentieth century. See *id.* at 27–77.

arbitrary socially constructed categories in antidiscrimination jurisprudence calcifies our current understanding of race as well as the stereotypes that attend each racial category. Karst elaborates that “the very act of [assigning an identity category in a judicial decision] serves to intensify categorical meanings—the social truths about what it means to be black or white[,] . . . etching these group portraits more deeply in the consciousness of those members of society who learn of the decision.”<sup>349</sup> Because our antidiscrimination jurisprudence continually reinforces these categories, they remain the salient framework for thinking about race, and they prevent more nuanced understandings. As Ian Haney López explains: “[L]aw constructs race.”<sup>350</sup>

Cognitive psychology research exposes the power of legal regimes to reinforce existing rigid racial classifications. When people are exposed to, or “primed” with, a particular categorical framework for thinking about the world, that framework persists even when the source of the priming is removed. One precept of modern psychology is that past experience structures present thinking—in other words, “people understand the world by relating what they are currently experiencing to the knowledge that they have previously accumulated.”<sup>351</sup> That knowledge is largely organized into “cognitive structures.”<sup>352</sup> In interpreting new information, therefore, we are inclined to gravitate toward these existing cognitive structures.<sup>353</sup> Reliance on the familiar “offers tangible cognitive benefits, such as rapid inference generation and the efficient deployment of limited processing resources.”<sup>354</sup> In short, people are much more likely to remember and process information in terms of preexisting cognitive structures—such as those cognitive structures involving race.<sup>355</sup>

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349. Karst, *supra* note 337, at 282.

350. LÓPEZ, *supra* note 348, at 7.

351. Constantine Sedikides & John J. Skowronski, *The Law of Cognitive Structure Activation*, 2 PSYCHOL. INQUIRY 169, 169 (1991).

352. *Id.*

353. See C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93, 96 (2000) (noting that people usually “construct and use categorical representations to simplify and streamline the person perception process”); Sedikides & Skowronski, *supra* note 351, at 170 (explaining that individuals tend to view things “in terms of one or two cognitive structures at a time,” even though there may be a “variety of cognitive structures” through which something could be understood).

354. Macrae & Bodenhausen, *supra* note 353, at 105.

355. See, e.g., Bower et al., *Hierarchical Retrieval Schemes in Recall of Categorized Word Lists*, 8 J. OF VERBAL LEARNING & VERBAL BEHAV. 323 (1969) (presenting experiments involving categorized word lists).

In its reliance on racial categories, antidiscrimination jurisprudence provides exactly the type of cognitive structure that we are predisposed to adopt. By couching their analysis in terms of Hollinger's ethno-racial pentagon, courts shape and reinforce the thinking of judges, attorneys, policymakers, scholars, law students, and other stakeholders who read their opinions. These readers, in turn, react to the case through subsequent judicial decisions, legal scholarship, statutory enactments, policies, print and television media coverage, and blogs. And these sources gradually shape popular consciousness: "[J]udicial stories are spread among the general population and are absorbed as part of our popular culture."<sup>356</sup> By adhering to a particular racial framework, then, courts calcify that framework in the minds of the readers, who in turn transmit that framework throughout society.

The reinforcement of a perceptual framework is particularly troubling with respect to race because the set of categories it imposes is not neutral in nature. When hazel-eyed people confront a form that asks them to list their eye color as either brown or green, they may experience minor annoyance, or may feel that the options they have are descriptively inaccurate. In the situation of race, however, this mild irritant is eclipsed by the fact that the existing racial categories, once activated, trigger a host of associated stereotypes.<sup>357</sup> In many instances, the stereotype is triggered even when only the racial category (rather than the stereotype itself) is primed.<sup>358</sup> Thus, the negative cognitive associations flow from the use of the category itself.

Cognitive psychology research has documented the ease with which racial stereotypes are activated merely by invocation of the racial category. For example, several studies have demonstrated that police officers may be more likely to shoot an unarmed Black suspect than

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356. Backer, *supra* note 315, at 614.

357. See, e.g., Lorella Lepore & Rupert Brown, *Category and Stereotype Activation: Is Prejudice Inevitable?*, 72 J. OF PERSONALITY & SOC. PSYCHOL. 275, 283–84 (1997) (explaining the "inevitability of stereotype activation"); Macrae & Bodenhausen, *supra* note 353, at 100 (describing the process through which stereotypes are assimilated by the mind and then triggered by external stimuli).

358. Lepore & Brown, *supra* note 357, at 276, 283–84 (noting differences in stereotype activation between high- and low-prejudice individuals depending on whether the stereotype or merely the category associated with the stereotype was primed, but also noting that stereotypic associations resulted for many research subjects merely as a result of category priming).

an unarmed White suspect in a computer simulation.<sup>359</sup> Stereotyping, then, is subconscious and involuntary, and the activation of stereotypes occurs even among individuals whose beliefs are fundamentally egalitarian.<sup>360</sup> Consequently, by reinforcing the existence of a given set of racial categories, courts are also reinforcing the stereotypes attached to those categories. And the reification of stereotypes likewise perpetuates the well-documented problem of stereotype threat.<sup>361</sup>

In sum, research indicates that adherence to racial categories in the antidiscrimination context reifies and entrenches those categories in our collective social consciousness. Further, this entrenchment solidifies the stereotypes associated with those categories. The continued reliance on categories, in short, prevents social progress away from racism and racial stereotyping. Yet many scholars have expressed hesitation about dispensing with categories. In the next Part, I sketch the contours of a functional antidiscrimination regime that would allow for assertion of non-categorical discrimination without necessarily eliminating categories altogether.

V. “THE EYE OF THE BEHOLDER”<sup>362</sup>: RECONCILING  
ANTIDISCRIMINATION LAW AND MULTIRACIAL IDENTIFICATION

I do not advocate that we remedy the deficiency of racial categories simply by adding a new category—“multiracial”—thereby converting the ethno-racial pentagon into a hexagon. A multiracial category would itself reify prevailing racial classifications by implying that a multiracial person is the offspring of two members of such “pure”

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359. See, e.g., Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, INTERPERSONAL REL. & GROUP PROCESSES (2007), available at <http://www.apa.org/journals/releases/psp9261006.pdf> (finding that both community members and police officers had slower response times in deciding how to react to Black suspects as opposed to White suspects in a shooting simulation); E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 PSYCHOL. SCI. 180 (2004), available at <http://www.psychologicalscience.org/pdf/ps/racialbias.pdf> (noting that police officers were able to eliminate their biases only after extensive training).

360. Macrae & Bodenhausen, *supra* note 353, at 109–13.

361. See, e.g., Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613, 613 (1997) (describing the “stereotype threat” as “the threat that others’ judgments or [one’s] own actions will negatively stereotype” an individual).

362. Clara E. Rodriguez et al., *Latino Racial Identity: In the Eye of the Beholder?*, 2 LATINO STUD. J. 33 (1991) (describing the wide variety of ways in which Latinos identify themselves and are identified by others).

racess. And the heterogeneity of those who might be identified as multiracial itself undermines the utility of such a classification. Grouping a biracial Black/White individual together with a biracial Asian/Latina individual impedes recognition of the considerable differences in the lived experiences of the two individuals. A multiracial category, then, is not the answer, at least not within the setting created by the core legal principles that comprise our antidiscrimination jurisprudence.

Some scholars have acquiesced to the inevitability of categories. Ruth Colker, for instance, argues that “[c]ategorization under the law . . . is inevitable,” and that “we can be sure that categories will always be the basis of our legal system.”<sup>363</sup> Martha Minow agrees: “Cognitively, we need simplifying categories . . . . Ideas that defy neat categories are difficult to hold on to, even if the idea itself is about the tyranny of categories.”<sup>364</sup> The solution, these scholars believe, is to employ *better* categories: “Recognizing that categories are indispensable, we should consider how categories can be *improved* so as not to play a role in the destruction of human identity.”<sup>365</sup> And as a general matter, scholars writing about race implicitly accept the need for categories without challenging or discussing that need.

Despite the longstanding reliance on categories within antidiscrimination jurisprudence, the categorical model need not and should not remain the paradigm for recognizing racial discrimination to the exclusion of all other paradigms. Rather, we should aspire to a more fluid understanding of race, one that acknowledges animus directed against a person’s perceived race without an attendant need to define that person’s “objective” racial identity or to place that person in a category. A jurisprudence constructed around that understanding would focus entirely on whether the perception of someone’s race—whatever that perceived race might be—motivated discriminatory treatment. Analyzing the relationship between racial perception and discriminatory treatment could, but would not have to, proceed by reference to defined racial identity categories.

Existing jurisprudence already indicates that courts are competent to examine how a person’s race is perceived. In *Perkins v. Lake County*

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363. RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* xiii (1996).

364. Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 64 (1987).

365. COLKER, *supra* note 363, at xiii.

*Department of Utilities*,<sup>366</sup> for example, the plaintiff filed a Title VII claim alleging that he was discriminated against because he was American-Indian.<sup>367</sup> His employer countered that the plaintiff was not, in fact, American-Indian and introduced copious evidence attempting to disprove his claim of ancestry.<sup>368</sup> The court held that the evidence as to the plaintiff's ancestry was inconclusive, but that he could prevail so long as he demonstrated that his employer *believed* he was an American-Indian, regardless whether he was "actually" an American-Indian.<sup>369</sup> The *Perkins* court's reliance on the employer's perception, rather than an "objective" notion of race, demonstrates that such an approach could be readily applied to cases involving multiracial discrimination.

The approach of examining an employer's perception also parallels courts' willingness, in the disability context, to entertain claims that a plaintiff suffered discrimination because he was "regarded as" a person with a disability. The Americans with Disabilities Act (ADA) defines a person with a "disability" to include an individual who is "regarded as having" a "physical or mental impairment that substantially limits one or more major life activities."<sup>370</sup> In *Murphy v. United Parcel Service, Inc.*,<sup>371</sup> for example, the Supreme Court would have allowed the plaintiff to proceed with his claim if he had "create[d] a genuine issue of material fact as to whether [he] is *regarded as* unable to perform a class of jobs utilizing his skills."<sup>372</sup> In other words, under the ADA, the plaintiff does not need to show that he was in fact disabled according to the statutory definition; he only needs to show that other people saw him as being disabled.<sup>373</sup> The fact that courts have found the "regarded as" model manageable in the disability context indicates that it would be serviceable in the race discrimination context as well. Indeed,

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366. 860 F. Supp. 1262 (N.D. Ohio 1994).

367. *Id.* at 1262.

368. *Id.* at 1266-69.

369. *Id.* at 1277-78.

370. 42 U.S.C. § 12102(1)(A),(C) (West Supp. 2009).

371. 527 U.S. 516 (1999).

372. *Id.* at 524 (emphasis added).

373. See 42 U.S.C. § 12102(3)(A) ("An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived mental impairment whether or not the impairment limits or is perceived to limit a major life activity.").



it would be ideally suited to race discrimination because the discriminator's perspective is central to the act of discrimination.

Given that courts are capable of examining racial perception, it is a short step to decouple that examination from the notion of categories. Moreover, the jurisprudence I propose would not jettison categories altogether. Rather, my approach would largely supplement, rather than overhaul, our current antidiscrimination legal regime.

Nothing in the constitutional and statutory provisions from which antidiscrimination jurisprudence flows mandates linkage of a discrimination claim to a category. The Equal Protection Clause states simply: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>374</sup> As discussed in Part III, the application of that guarantee to race via a categorical mechanism is a judicial creation.<sup>375</sup> Thus, a demonstration that one was denied the equal protection of the laws does not inherently require a demonstration of membership in, or discrimination in reference to, a category. If a particular law or regulation intentionally classifies individuals on the basis of race and treats some worse than others on that basis, certainly evidence of that disparate treatment and the underlying discriminatory intent should provide grounds for a legal remedy. But if that same provision results in worse treatment for an individual identified as multiracial, identification with a particular racial category should not be a prerequisite to recovery. Rather, simply showing that the individual's ascribed racial identity—whatever that ascribed identity might be—was the basis for discrimination should suffice to allow the plaintiff to recover.

Likewise, Title VII already makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>376</sup> It also makes it unlawful to "limit, segregate, or classify [any] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise

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374. U.S. CONST. amend. XIV, § 1.

375. See *supra* notes 174–189 and accompanying text.

376. 42 U.S.C. § 2000e-2(a)(1).

adversely affect his status as an employee” based on his protected status.<sup>377</sup>

Thus, similar to the Equal Protection Clause, Title VII prohibits discrimination based on race generally—not necessarily based on membership in a recognized racial category.<sup>378</sup> In practice, of course, courts examine categories as a means to determine whether a plaintiff was treated worse than those “outside the protected class” to which the individual belonged.<sup>379</sup> Identification of a protected class, with members both within and outside that class, serves as a shorthand for determining whether a plaintiff was treated worse based on her race. But neither modification of the statute nor a radical revision of existing jurisprudence is required to contend that the court need not say what race a mixed-race person is or what race her comparables are. The plaintiff need only show that the employer perceived her as racially *different* and that she was subjected to discrimination on account of this perceived difference. By adopting such a regime, courts would place the emphasis on the employer’s illegitimate use of perceived racial *difference* as a means for making employment decisions, rather than on needlessly forcing the plaintiff to relate her narrative in the context of categories. In some instances, surely, categories would be invoked; but such invocation would be a means to show the illegitimate discrimination between two people based on a perceived racial disparity, not an end in itself.

This approach would circumvent the conundrum foreseen by the court in *Walker*, which held that “[m]ultiracial persons may be considered members of each of the protected groups with which they have any significant identification.”<sup>380</sup> The *Walker* court’s solution is logically questionable, given that an employer may perceive a mixed-race individual quite differently from the way the employer perceives members of the various categories with which that individual might be identified. My approach, therefore, shifts the focus to the employer’s perception rather than creating an artificial affiliation

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377. *Id.* § 2000e-2(a)(2).

378. The EEOC’s Compliance Manual, which abstains from defining race, reflects this non-categorical approach to racial identification and discrimination. See EEOC Compliance Manual, *supra* note 291.

379. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (stating that, in evaluating whether the petitioner’s professed reason for not hiring the respondent was merely pretext, one could look at whether White employees engaged in similar behavior but nevertheless retained employment).

380. *Walker v. Univ. of Colo. Bd. of Regents*, No. 90-M-932, 1994 WL 752651, at \*1 (D. Colo. Mar. 30, 1994).

between the individual perceived as multiracial and the categories with which she has “any significant identification.” Moreover, the approach I advocate is also appropriately forward-looking. As discussed previously, the rising rates of interracial marriage are likely to make the now-idiosyncratic problem *Walker* presents far more common in just a few decades.<sup>381</sup>

Furthermore, *Mitchell* illustrates how this approach would reshape antidiscrimination jurisprudence more indirectly, ultimately making it more hospitable to claims of multiracial discrimination. In *Mitchell*, the court categorized the self-identified Black/White plaintiff as Black, stating that the plaintiff suffered worse treatment after her employer noticed that she was visited at the store where she worked by Black relatives and consequently “discovered . . . that she was black.”<sup>382</sup> But instead of this category-induced simplification of her narrative, the court could have said something similar to the following:

Plaintiff alleges that she suffered an adverse employment action after she was visited at work by Black friends and relatives and that at one point her employer commented—with a negative implication—that plaintiff only dated Black men. If established, these allegations would likely allow plaintiff to succeed on her claim that she suffered discrimination because of her race. Plaintiff has testified that her mother is White and that her father is Black and that many people, at least initially, view her as Latina and/or White. Consequently, the alleged discrimination may have occurred because her employer came to view her as Black. Alternatively, it may have occurred because her employer viewed her as racially mixed. Regardless, if plaintiff can show that the adverse employment action was based upon her employer’s perception of her race, it occurred in violation of Title VII and she is entitled to compensation.

Although this approach, if applied in *Mitchell*, would not have affected the result of the case—i.e., the plaintiff would still have received court-appointed counsel and would still have been permitted to proceed to trial—it would have acknowledged the manner in which the plaintiff presented her claim, and it would have

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381. See *supra* note 99 and accompanying text (compiling statistics on the increasing rate of interracial marriage).

382. *Mitchell v. Champs Sports*, 42 F. Supp. 2d 642, 650 (E.D. Tex. 1998).

created precedent upon which future multiracial-identified plaintiffs might more readily identify as multiracial.<sup>383</sup>

In the Title VII context, this reinterpretation of current jurisprudence could have the effect of creating a question of fact as to whether two people were racially similarly situated from the perspective of the employer. But this factual component is entirely compatible with the current Title VII burden-shifting analysis established in *McDonnell Douglas* and refined in *Burdine*. That analysis requires the plaintiff to make out a prima facie case by showing: (1) membership in a protected class; (2) qualification for the position which she held or to which she applied; (3) rejection for the position despite her qualifications; and (4) selection of an individual outside the protected class to replace the plaintiff.<sup>384</sup> The burden then “shifts to the defendant ‘to articulate some legitimate, nondiscriminatory reason for the [plaintiff’s] rejection’”; if the defendant meets that burden, the plaintiff’s task is then to create a factual dispute as to whether the defendant’s proffered reason is pretextual.<sup>385</sup> If the plaintiff succeeds in establishing such a genuine factual question, then the case may proceed to trial.

My proposed modification to the current analysis would simply add flexibility to the definition of “protected class,” allowing the protected class to consist of any set of individuals that the employer disfavored because of their perceived race; any individuals outside of that set would be outside the protected class. In *Moore*, for example, the factfinder would have had to determine whether the self-described dark-skinned African-American plaintiff was perceived by the employer as racially similarly situated to the lighter-skinned biracial individual who replaced her.<sup>386</sup> This question may be difficult; it may involve ambiguous evidence about the employer’s treatment of the two individuals; and ultimately, it may involve a common sense judgment. But it is exactly this type of judgment for which we traditionally rely on juries. Such an approach makes far

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383. Such consequences would address concerns relating both to narrative integrity, discussed in Part IV.B.1, and the inhospitality of antidiscrimination jurisprudence to claims by people identified as multiracial, discussed in Part IV.B.2.

384. *McDonnell Douglas*, 411 U.S. at 802. In *Burdine*, the Court noted that the burden of establishing such a prima facie case “is not onerous.” *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

385. *Burdine*, 450 U.S. at 253 (citations omitted).

386. *See Moore v. Dolgencorp, Inc.*, No. 1:05-CV-107, 2006 WL 2701058, at \*4 (W.D. Mich. Sept. 19, 2006).

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more sense than the *Moore* court's bald assertion that a light-skinned biracial individual and a dark-skinned African-American individual are members of the same crude, socially constructed racial category and that the latter consequently failed to state a prima facie case of discrimination under Title VII.<sup>387</sup>

In advocating for jurisprudential recognition of those who are discriminated against because they are perceived as multiracial, I wish to acknowledge three potential critiques of my proposal. First, I anticipate the objection that my proposal would engender essentialization by creating a new category of individuals who would be subjected to a stereotyped mythology of identity. But in the model I have proposed for the antidiscrimination context, any risk of essentialism would be substantially mitigated by the focus on outside perception rather than on inherent identity. The fact that others identify various individuals as racially mixed does not necessarily impute any essence to the group itself. Moreover, those identified as multiracial are resistant to essentialization almost by definition. The multiracial-identified are a remarkably heterogeneous group, displaying no consistent physical markers, language, accent, associations, or behaviors signifying multiraciality. Essentialization is unlikely simply because little material exists from which one might construct an essence. Acknowledging discrimination against those perceived as multiracial is thus unlikely to instantiate the identity of multiracial people as a group.

Second, I wish to address the critique that acknowledgment of animus directed at multiracial people would reify the traditional racial classifications rather than destabilize them. The notion that an individual is racially mixed implicitly reinforces the notion that pure races exist: if someone is a racially mixed person, it must be because he has ancestors of at least two different races, which implies that different races exist in some form beyond social construction. I take this concern particularly seriously because one of my goals is to promote a more nuanced and fluid understanding of race, and if recognizing multiracial discrimination in fact serves to calcify the traditional racial categories, then my project is largely self-defeating. Once again, however, I believe that focusing on the perception of the discriminator avoids this undesirable result. The fact that a racist individual discriminates against someone she perceives as racially

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387. *See id.*

mixed does not reinforce the existing racial classification system; rather, it exposes that classification system as a product of the discriminator's own perception. Indeed, by calling attention to the way that various social cues can arbitrarily cause a discriminator to perceive someone as racially mixed, the jurisprudential framework I propose would also force us to recognize the arbitrariness of the traditional racial categories themselves.

Third, I do not believe that modifying antidiscrimination jurisprudence to render it more hospitable to individuals perceived as multiracial would create a logical slippery slope culminating in recognition of self-proclaimed multiracial people in every legal context. I recognize the myriad problems involved in the creation of a multiracial category on the census and other official government forms, which other scholars have discussed in considerable detail.<sup>388</sup> While I believe that these concerns are significant and that they deserve serious consideration, I need not address them here because my project has no automatic implications for other contexts. The core provisions of our antidiscrimination jurisprudence—the Equal Protection Clause and Title VII—are uniquely focused on the perception and intent of the person perpetrating the discrimination, and consequently, the approach I advocate here embraces an “other-identified” conception of racial identity. Other contexts—the diversity and demographic contexts, for example—require a separate debate over what conception of identity to embrace.<sup>389</sup> I therefore take no position on the relative advantages and disadvantages of acknowledging multiracial identity—whether other-ascribed or self-imposed—outside of the provisions I have discussed.

Ultimately, my advocacy of acknowledging animus against those identified as multiracial reflects my belief that our race discrimination jurisprudence should focus on racism rather than on the social constructs we call races.<sup>390</sup> We should aspire to develop a jurisprudence that does not rely on categories *per se*, but rather targets animus directed at an individual due to a particular perception of his race. I have proposed here the shape that such a

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388. See, e.g., THE NEW RACE QUESTION, *supra* note 6.

389. See *supra* note 11 and accompanying text.

390. Cf. John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1074 (1997) (“Ironically, while the nation is increasingly preoccupied with matters and formations of race, there is a general perception that racism is receding from the national ethos, and this perception only serves to empower racist forms and expressions.”).

jurisprudence could take, and I believe that the implementation of such a jurisprudence is both possible and desirable.

#### CONCLUSION

Multiracial individuals have long vexed courts and commentators because they challenge and confound existing racial categories. Despite the recognition that multiracial individuals have received in some contexts, the reliance of antidiscrimination jurisprudence on categories has generally excluded plaintiffs identified as multiracial. This absence obscures animus directed at multiracial individuals. Moreover, the dominance of racial categories calcifies existing racial classifications and the stereotypes associated with them, preventing society from moving beyond these arbitrary categories.

Courts, therefore, should view the jurisprudential conundrum of multiracial discrimination as an opportunity. Acknowledging multiracial identity and meticulously discussing the discrimination associated with it provides courts with a context in which to acknowledge the complexity of lived race. That ongoing project promises an opportunity to destabilize our preconceptions about race and the hierarchy that accompanies them.