

Commentary and Book Review: Multiracials and Civil Rights: Mixed-Race Stories of Discrimination

Jasmine Mitchell

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

This Book Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

COMMENTARY AND BOOK REVIEW: MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES OF DISCRIMINATION

Jasmine Mitchell*

Can a drop of whiteness or “looking white” save someone from anti-Blackness? Are mixed-race peoples special, and should they be a protected class under the law? Did *Loving v. Virginia*’s legalization of interracial marriage¹ lead to race becoming insignificant? Tanya Hernández’s *Multiracials and Civil Rights: Mixed-Race Stories of Discrimination* debunks persistent myths that racial mixture will eradicate racism and heal the racial wounds of the United States.² Using cases and other legal sources, Hernández persuasively argues that multiracials are not exempt from racial discrimination.³ *Multiracials and Civil Rights* crystalizes the pervasiveness of white supremacy while offering a sociopolitical lens by which to tackle racial injustices.

Hernández’s book hails from legal studies and offers a much needed lens to augment understandings of race, law, and the state. Much of the scholarship on mixed race studies comes from sociology, political science, psychology, history, media studies, and literature.⁴ The book accomplishes an important intervention, with an evident dedication to engaged research and scholarship, marking

*Associate Professor of American Studies and Media Studies at the State University of New York-Old Westbury. Author of *Imagining the Mulatta: Blackness in U.S. and Brazilian Media* (University of Illinois Press 2020).

¹ See *Loving v. Virginia*, 338 U.S. 1, 1 (1967).

² TANYA KATERI HERNÁNDEZ, *MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES AND DISCRIMINATION* 2 (2018).

³ See *id.* at 5–6.

⁴ See *id.* at 2–5.

the tangible material realities of multiracials in the legal system. Presenting a valuable archive of legal records, Hernández addresses how multiracials experience discrimination and captures a U.S. landscape of white supremacy and racial discrimination co-existing with ideologies of colorblindness and racial progress.⁵ *Multiracials and Civil Rights: Mixed-Race Stories of Discrimination* converses with literature in several fields and joins a recent plethora of scholarship on mixed-race identities, stories, and experiences.⁶

Hernández's preface is a personal narrative that illustrates intimate family ties, power structures, institutions and knowledge imbued by race.⁷ Hernández offers a counternarrative to the ways in which racial mixtures have been utilized as testimonies of the promises of unity and multiculturalism in the Americas. The myriad of memoirs, from Rebecca Walker's *Black, White, and Jewish: Autobiography of A Shifting Self*, to James McBrides's *The Color of Water*, to Barack Obama's *Dreams From My Father*, to Trevor Noah's *Born A Crime*, enliven discussions of racial identities and racial mixing.⁸ Hernández's opening connects with this genre of mixed race memoirs that attest to racism and reclaim complex family histories.⁹ Her self-reflection situates her positionality to her scholarship while providing historical, local, and transnational layers of racial mixing as she recounts her Afro-Puerto Rican

⁵ See *id.* at 6-7.

⁶ See generally LEILANI NISHIME, UNDERCOVER ASIAN: MULTIRACIAL ASIAN AMERICANS IN VISUAL CULTURE (2014); GREG CARTER, THE UNITED STATES OF THE UNITED RACES: A UTOPIAN HISTORY OF RACIAL MIXING (2013); CAROLYN A. STREETER, TRAGIC NO MORE: MIXED-RACE WOMEN AND THE NEXUS OF SEX AND CELEBRITY (2012); RALINA JOSEPH, TRANSCENDING BLACKNESS: FROM THE NEW MILLENNIUM MULATTA TO THE EXCEPTIONAL MULTIRACIAL (2013); MICHELE ELAM, THE SOULS OF MIXED FOLK: RACE, POLITICS, AND AESTHETICS IN THE NEW MILLENNIUM (2011); G. REGINALD DANIEL, MORE THAN BLACK? MULTIRACIAL IDENTITY AND THE NEW RACIAL ORDER (2010); JARED SEXTON, AMALGAMATION SCHEMES: ANTIBLACKNESS AND THE CRITIQUE OF MULTIRACIALISM (2008); KIMBERLY MCCLAIN DACOSTA, MAKING MULTIRACIALS: STATE, FAMILY, AND MARKET IN THE REDRAWING OF THE COLOR LINE (2007); CATHERINE R. SQUIRES, DISPATCHES FROM THE COLOR LINE: THE PRESS AND MULTIRACIAL AMERICA (2007); KERRY ANN ROCKQUEMORE & DAVID L. BRUNSMAN, BEYOND BLACK: BIRACIAL IDENTITY IN AMERICA (Rowman & Littlefield, 2008).

⁷ See generally HERNÁNDEZ, *supra* note 2, at ix–xvii.

⁸ See generally REBECCA WALKER, BLACK, WHITE, AND JEWISH: AUTOBIOGRAPHY OF A SHIFTING SELF (2000); JAMES MCBRIDE, THE COLOR OF WATER: A BLACK MAN'S TRIBUTE TO HIS WHITE MOTHER (1st ed. 1996); BARACK OBAMA, DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE (Three Rivers Press, 1st pbk. ed. rev. 2004); TREVOR NOAH, BORN A CRIME: STORIES FROM A SOUTH AFRICAN CHILDHOOD (2016).

⁹ See HERNÁNDEZ, *supra* note 2, at ix, xvi–xvii.

family chronicles in Puerto Rico and New York.¹⁰ Hernández's personal narrative, coupled with the legal testimonies in the book, push back against the notion of race as a personal choice.¹¹ Going beyond testimonials of multiraciality, Hernández finds that discrimination is not actually about racial mixture or racial ambiguity.¹² From spheres of education, employment, public accommodation, and incarceration, multiracials are fundamentally discriminated against because they are nonwhite.¹³

Racial mixing is not a new U.S. phenomena: its roots in the nation harken back to colonization and slavery.¹⁴ Yet, the erasure of multiraciality from dominant U.S. narratives, alongside anti-miscegenation laws and legal distinctions of racial groups, upheld white supremacy and the fictitious notion of distinct bounded racial groups.¹⁵ Following the *Loving v. Virginia* (1967) decision that repealed anti-miscegenation laws, a "biracial baby boom" brought about an increase in a self-identified multiracial population, a further politicization of mixed-race identities, and a growing prevalence of mixed-race images and figures.¹⁶ *Loving v. Virginia* did not create mixed race children; rather the decision legitimized these children in the eyes of the state. However, what is novel is the rising turn towards multiracial classification and the potential political aftermath of state recognition of multiracial identities. Multiracial movements, beginning in the late 1970s, and growing in influence in the 1980s and 1990s, spread public awareness, discussions, and recognition of multiracial identities.¹⁷ The "boom in biracial biography" catapulted discussion of multiracialism.¹⁸ With the increase in interracial marriages, the growth of a self-identified multiracial population, and racial demographic shifts in

¹⁰ See *id.* at ix–xvii.

¹¹ See *id.* at 7, 100, 108.

¹² See *id.* at 6, 100, 111.

¹³ See generally *id.* at 16–38 (discussing multiracial employment discrimination); *id.* at 39–53 (discussing multiracial discrimination in education); *id.* at 54–75 (discussing multiracial housing and public accommodations discrimination); *id.* at 76–90 (discussing multiracial discrimination in the criminal justice system).

¹⁴ See *id.* at 2, 30.

¹⁵ See *id.* at 5, 13, 111; see also THE MULTIRACIAL EXPERIENCE: RACIAL BORDERS AS THE NEW FRONTIER, 325, 361 (Maria P. P. Root ed., 1996).

¹⁶ See ROOT, *supra* note 15, at xiv–xv.

¹⁷ See *id.* at 4–5.

¹⁸ See Paul Spickard, *The Subject is Mixed Race: The Boom in Biracial Biography*, in RETHINKING 'MIXED RACE' 76, 76–77 (David Parker & Miri Song eds., 2001).

the nation, *Multiracials and Civil Rights* presents a critical legal analysis of racial mixing, identity formation, and civil rights law: Hernandez asks, “is a civil right structure born in black-white binaries sufficient? Is it commodious enough to address the increasing fluidity of racial identity in a changing society? How does or should the move to multiple category checking on the census change the enforcement of civil rights law?”¹⁹ Her book considers whether contemporary law sufficiently addresses discrimination.²⁰

Hernández astutely locates rhetorical, discursive, and political shifts in the 1990s. Writing against centuries of discourse placing mixed race peoples and experiences as dysfunctional or a problem, psychologist Maria Root’s foundational 1996 “Bill of Rights for Racially Mixed People” affirms racial self-identification and multiracial identities as rights.²¹ By the 1990s, multiracial movements focused on adding a multiracial category to the U.S. census.²² While prominent Republicans such as Newt Gingrich championed the addition of a multiracial category as part of a conservative agenda to undermine programs such as affirmative action, civil rights organizations feared the multiracial category would endanger minority representation and access to resources.²³ Many multiracial movement activists and scholars appropriated the language of civil rights movements to claim that the lack of a multiracial category and the imposition of racial categories were in fact civil rights violations.²⁴ Ultimately, a Mark One or More (MOOM) option on the census emerged as a compromise.²⁵ Nonetheless, according to Hernández, the debates on racial data collecting policies “fostered a discourse of exalting personal racial identity and characterizing any incursions on expressions of personal identity as a civil rights issue in of itself absent any mixed-race specific material inequality.”²⁶ Hernández particularly takes issue with the

¹⁹ HERNÁNDEZ, *supra* note 2, at 5.

²⁰ *See id.* at 17, 24, 90.

²¹ Maria P.P. Root, *A Bill of Rights for Racially Mixed People*, in *THE MULTIRACIAL EXPERIENCE: RACIAL BORDERS AS THE NEW FRONTIER* 121 (Maria P.P. Root ed., 1996).

²² HERNÁNDEZ, *supra* note 2, at 2, 98.

²³ *See id.* at 95, 98.

²⁴ *See id.* at 93.

²⁵ *See id.* at 99.

²⁶ *Id.*

multiracial identity critique of antidiscrimination law, and thoroughly revisits both the early cases comprising this scholarship as well as a large sample of cases hereafter.²⁷

Hernández astutely diagnoses how the focus on individualism posits race as a personal choice.²⁸ Notably, much of the fervor around the individualistic personal identity stems from white mothers of multiracial children who do not want their children to also be classified as Black.²⁹ Some multiracial identity scholars and activists rationalize the need for a multiracial response due to a perceived particular discrimination targeted towards mixed race individuals.³⁰ Yet, as Hernández notes, questions of racial ambiguity such as “What are you?” are in and of themselves not evidence of discrimination, and cases of discrimination are propelled most often by phenotype and knowledge of Black ancestry.³¹ Furthermore, these same multiracial identity scholars and activists argue that the inability to choose one’s racial identity is an intolerable imposition of racial identity.³² The view that multiracials experience oppression because of racial categorization is adequately dismissed by Hernández.³³ Instead, multiracials bear oppression because of their nonwhiteness, and in many cases, particularly because of their Blackness.³⁴

Multiracials and Civil Rights compares the individualistic Personal Identity and the collective racial group paradigms of justice and equity within contemporary antidiscrimination laws and policies.³⁵ Debates over public policies regarding race, from the census, to Ward Connerly’s Racial Privacy proposals, to affirmative action, put mixed race bodies as available sites of struggle on the

²⁷ See *id.* at 7-9.

²⁸ See *id.* at 126.

²⁹ See HABIBA IBRAHIM, TROUBLING THE FAMILY: THE PROMISE OF PERSONHOOD AND THE RISE OF MULTIRACIALISM 20-21 (2012).

³⁰ See Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM. BUS. L.J. 789, 832-833 (2015); Tina Fernandes, *Anti-discrimination Law and the Multiracial Experience: A Reply to Nancy Leong*, HASTINGS RACE & POVERTY L. J. 191, 208 (2013); Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, AMERICAN U. L. REV. 469, 545 (2010); Scot Rives, *Multiracial Work: Handing Over the Discretionary Judicial Tool of Multiracialism*, 58 UCLA L. REV. 1303, 1334-36 (2011).

³¹ See HERNÁNDEZ, *supra* note 2, at 94.

³² See Eisenstadt, *supra* note 30, at 832-33; Fernandes, *supra* note 30, at 208; Leong, *supra* note 30, at 545; Rives, *supra* note 30, at 1338-39.

³³ See HERNÁNDEZ, *supra* note 2, at 119-121.

³⁴ *Id.* at 5-6.

³⁵ See *id.* at 99-100.

relevancy of race in our daily lives and to our very ideas of justice.³⁶ Therefore, even if the particular experiences of multiracial individuals may vary, multiracial peoples have borne historical and contemporary injuries due to their non-whiteness. Indeed, Hernández might have gone even further to elaborate how multiracial peoples have often been specifically pointed out as a degenerative group that would threaten the nation. Multiracials, like other nonwhite groups, have been historically oppressed.³⁷ Some multiracial individuals might not see themselves as racialized and are unaware of how colorism and racial hierarchies benefit and injure them. Nonetheless, mixed race individuals are associated with nonwhite marginalized groups.³⁸ Ignoring the structural inequities of nonwhite status, some multiracial identity scholars and activists adopt the same neoliberal individualism that oppresses nonwhite groups.³⁹

Opening with a vignette of Cleon Brown, a police officer who lived his life as a white man, Hernández effectively sets the stage for questions concerning racial identity, multiraciality, and racial discrimination.⁴⁰ Does the U.S. need new legal protections to protect the rights of multiracials as an additional category? How do multiracials challenge connections between biological notions of race and race as a social construction and how should the courts respond? Brown took an Ancestry.com test to explore if he had American Indian ancestry.⁴¹ Instead, his results identified him as having eighteen percent sub-Saharan African ancestry.⁴² After sharing his results, he encountered racial harassment, retaliation, and exclusion from his all-white police department. Brown resigned and brought a federal civil rights lawsuit against the department.⁴³ Brown's case opens up questions as to what

³⁶ See *id.* at 2; *Black businessman fights affirmative action*, NBC NEWS (Oct. 5, 2008, 5:32 AM), http://www.nbcnews.com/id/27023045/ns/us_news-life/t/black-businessman-fights-affirmative-action/#.X2afnWdKh_Q; J. Douglas Allen-Taylor, *What Does Racial Privacy Really Mean?*, SAFERO (Oct. 29, 2002), <http://www.safero.org/articles/rpi.html>.

³⁷ See HERNÁNDEZ, *supra* note 2, at 1-3, 6, 8, 12.

³⁸ See *id.* at 6.

³⁹ See *id.* at 5-6.

⁴⁰ See *id.* at 1.

⁴¹ See *id.*

⁴² See John Eligon, *A Sergeant Who Learned He's Part Black Says He Faced Racist Taunts at Work*, NEW YORK TIMES (May 12, 2017), <https://www.nytimes.com/2017/05/12/us/cleon-brown-black-lawsuit.html>.

⁴³ See HERNÁNDEZ, *supra* note 2, at 1; see also Eligon, *supra* note 42.

constitutes racial identity and racial discrimination. In Brown's case, Blackness appears as genetic rather than phenotypical, both disrupting and reifying biological notions of race. Despite his prior lived experiences as a white man, Brown's genetic test caused his coworkers to recognize him as Black.⁴⁴ In effect, for Brown and some of the white-presenting claimants in *Multiracials and Civil Rights*, just being deemed as nonwhite became a stigma with tangible effects of discrimination.⁴⁵ How are racial self-identification and racial group membership interlinked when determining discrimination? Hernández persuasively argues in Brown's case, and in other claimants' cases, that racial category, rather than appearance, is the source of discrimination.⁴⁶

Arguing against multiracial identity scholars who plea for the addition of a multiracial category, Hernández explains why multiracial categorization for antidiscrimination law actually threatens civil rights law protections from discrimination.⁴⁷ Examining civil rights cases ranging from employment, public accommodation, housing, and education, Hernández tracks the claimants who self-identify as multiracial.⁴⁸ Yet, in case after case, the discrimination and disparagement centers on nonwhiteness, especially Blackness.⁴⁹ For multiracial identity scholars and multiracial identity advocates, racial categorization inherently is a problem because of the way in which racial categories sustain ideas of race. For example, the case of Jill Mitchell, a light skinned woman with a Black father and white mother, illustrates pervasive anti-Blackness due to the discriminatory racial treatment and demotion she endured in the workplace after visits from darker-skinned relatives.⁵⁰ Here, and in almost all of the cases Hernández examines, non-whiteness, and most commonly, anti-Blackness, is at the root of discrimination rather than racial mixture itself.⁵¹ Despite the success of cases like Jill Mitchell and others, multiracial identity scholars nonetheless point to the deficiencies of current

⁴⁴ See HERNÁNDEZ, *supra* note 2, at 13.

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.* at 14-15.

⁴⁸ See *id.* at 8.

⁴⁹ See *id.* at 6, 65.

⁵⁰ See *id.* at 16.

⁵¹ See *id.* at 6.

antidiscrimination laws.⁵² Instead, Hernández in case after case points out the attentiveness of the courts in focusing on anti-Black biases or nonwhite discrimination.⁵³

Indeed, multiracial identity scholars—from legal fields to education to psychology—have consistently argued for the uniqueness of multiracial experiences and identities.⁵⁴ Despite claims that racial mixing will end racism, the focus on exceptionalism has often fueled racist thought with multiracials treated as more extraordinary, more attractive, and more assimilable than their monoracial peers.⁵⁵ Within public discourse, multiracials have been regarded as a magical salve to the nation's wounds or as symbols of racial progress.⁵⁶ Historically, multiracials in the United States have also been a source of fear and anxiety due to threats of tainting racial purity or blurring racial boundaries.⁵⁷ From a legal standpoint, Hernández deconstructs this multiracial exceptionalist narrative. First, multiracial claimants themselves expressed no objection in regards to their racial categorization in the courts.⁵⁸ It is evident here, then, that the personal everyday fluidity of racial experiences are not superseded by collective identities and processes of marginalization. Second, the discrimination experiences are in fact not exceptional to multiracials, but are rooted in nonwhiteness.⁵⁹ The illusions that multiracials are unique or occupy a separate category occlude the realities of a binary of white versus nonwhite experiences.⁶⁰ Hernández powerfully illustrates how claims of multiracial exceptionalism miss the power of white dominance.⁶¹ Notably, Hernández also points out how conservative narratives utilize multiracials to weaken claims of racial

⁵² See *id.* at 13.

⁵³ See *id.* at 19.

⁵⁴ See *id.* at 4.

⁵⁵ See Robert L. Reece, *How saying you're multiracial changes the way people see you*, CONVERSATION (Oct. 5, 2016, 6:02 AM), <https://theconversation.com/how-saying-youre-multiracial-changes-the-way-people-see-you-64509>; see also Eang L. Ngov, *Qualitative Diversity: Affirmative Action's New Reframe*, UTAH L. REV. 423, 443 (2017).

⁵⁶ See HERNÁNDEZ, *supra* note 2, at 2-3.

⁵⁷ See *id.* at 111.

⁵⁸ See *id.* at 121.

⁵⁹ See *id.* at 5-6.

⁶⁰ See *id.* at 7.

⁶¹ See *id.* (explaining how multiracials are not an exception to the white/nonwhite racist dynamic and how their racial classification is being used as a tool to challenge race based affirmative action programs).

discrimination.⁶² The notion that multiracials mark the end of racial boundaries boosts claims that policies such as affirmative action are unnecessary.⁶³ By placing multiracials as evidence of the social construction of race, advocates of colorblindness and postracialism co-opt multiracials to justify the insignificance of race and the abolishment of racial categories and racial policies all together.⁶⁴

Hernández's book is especially prescient today as contestations of racial policies and claims of reverse racism are evoked in court.⁶⁵ How might multiracials be used to challenge race-based affirmative action for example? Hernández persistently demonstrates in court cases that the weight of nonwhiteness remains a source of discrimination while also alluding to the potential implications of multiracial identity discourses for purposes of racial inclusion and race-conscious policies.⁶⁶

Multiracials and Civil Rights rejects the emphasis on personal identity in favor of what Hernández terms a socio-political approach that highlights socio-political forms of marginalization and exclusion.⁶⁷ As civil right gains are diminishing, Hernández's approach has broad utility beyond multiracials to the reinvigoration of strategic coalitions, solidarity, and alliances between non-white groups to work for racial justice.⁶⁸ By "shifting away from a focus on individual identity recognition to a focus on group-based racial realities," the processes and practices of white supremacy can be revealed and unraveled.⁶⁹ While allowing for personal racial identity in everyday experiences, Hernández's standpoint concentrates on "group-based social status informed by historical and current

⁶² See *id.* at 101.

⁶³ See *id.* at 101-04 (discussing how the Supreme Court considered arguments against affirmative action on the basis that increased multiracial applicants undermine the necessity and justification for affirmative action programs in cases like *Gratz v. Bollinger*, *Grutter v. Bollinger*, *Fisher v. Texas (Fisher I)*, and *Fisher v. Texas (Fisher II)*).

⁶⁴ See *id.* at 104-05.

⁶⁵ See Anemona Hartocollis & Giulia McDonnell Nieto del Rio, *Justice Dept. Says Yale Discriminates. Here's What Students Think.*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/us/yale-asian-american-discrimination.html> (discussing challenges brought against universities like Yale, Harvard, the University of North Carolina at Chapel Hill, and the University of Texas at Austin regarding the use of race as a factor in admissions practices and the weight it is given in decision-making).

⁶⁶ See generally HERNÁNDEZ, *supra* note 2, at 5-7, 9.

⁶⁷ See *id.* at 7.

⁶⁸ See *id.* at 110, 119.

⁶⁹ *Id.* at 126.

hierarchies and privileges.”⁷⁰ Legal recognition of multiracials is not only inadequate for addressing racism, but it actually displaces racial inequities to the domain of personal identity. The insistence that the negation of an official multiracial category is a violation of civil rights effectively denies the material inequalities between racial groups and structural racism. Neoliberal politics of choice and individual freedom perceive race as something that can be easily discarded or put on.⁷¹ This focus on the individual experiences of racial identity ignores structural racism.⁷² Even further, the accusation that racial categories perpetuate a false idea of race digs deeper into a concealment of the legacies of racial histories. The optimism that multiracality will facilitate racial progress fails to actually tangibly explain why and how multiracality will open up a future of racial justice. Hernández offers a powerful counternarrative to multiracial identity scholars that present imaginaries of racial transcendence and racial justice that disavow racial categorization.⁷³ By presenting a sociopolitical lens attached to contemporary modes of racial discrimination, Hernández communicates a vision of racial justice.

Hernández offers an important contribution towards understanding systems of racism, ways of understanding race, and the material realities of white supremacy. *Multiracials and Civil Rights* cements the call for preservation of civil rights laws rather than the amendment, and possible weakening, of such laws.⁷⁴ Given Hernández’s strengths in racial discrimination in Latin America, references or future reference to non U.S. legal systems might further illuminate legal responses to nonwhite discrimination and anti-Blackness.⁷⁵ Furthermore, how are viewpoints and forms of discrimination stemming outside of U.S. binary systems occurring within the U.S.? Hernández demonstrates why multiracial destinies can be linked to dismantling white supremacy and not a new system of racial reclassification.⁷⁶ These cases

⁷⁰ *Id.* at 117.

⁷¹ *See id.* at 95.

⁷² *See id.*

⁷³ *See id.* at 12, 15.

⁷⁴ *See id.* at 14-15.

⁷⁵ *See id.* at xiii, 18.

⁷⁶ *See id.* at 91-94, 97, 111.

2021]

COMMENTARY AND BOOK REVIEW

11

overwhelmingly center on multiracials with white parentage.⁷⁷ In the future, how might multiraciality that is not linked to whiteness offer an alternate vision of legal redress and racial justice? Hernández offers valuable foundational work for continual reassessment for paths of racial justice. The book's socio-political approach opens up potential forms of solidarity and coalitions for anti-racist struggles across various communities.

⁷⁷ See *id.* at 1, 16, 28, 35, 39, 42, 44-45, 49, 121.