

## Personal Identity Equality and Racial Misrecognition: Review Essay of Multiracials and Civil Rights: Mixed-Race Stories of Discrimination

Taunya Lovell Banks

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**PERSONAL IDENTITY EQUALITY AND  
RACIAL MISRECOGNITION: REVIEW ESSAY  
OF MULTIRACIALS AND CIVIL RIGHTS:  
MIXED-RACE STORIES OF  
DISCRIMINATION**

Taunya Lovell Banks\*

INTRODUCTION

There is a growing body of social science literature documenting multiracials as an “emergent minority group. . . who . . . have not always been recognized as either a separate racial group or as legitimate members of racial groups.”<sup>1</sup> Tanya Hernández has been writing about aspects of American multiracialism for twenty years. Her 1998 article in the *MARYLAND LAW JOURNAL* focused on the multiracial discourse about racial categories on the 2000 U.S. census.<sup>2</sup> In that article, she analyzes the multiracial identity movement’s effort to get a multiracial category on the U.S. census.<sup>3</sup> Although that movement failed, the 2000 census did permit responders to mark more than one race.<sup>4</sup> Hernández’s new book, *Multiracials and Civil Rights: Mixed-Race Stories of*

\*Jacob A. France Professor of Equality Jurisprudence, University of Maryland Francis King Carey School of Law.

<sup>1</sup> Todd L. Pittinsky & R. Matthew Montoya, *Is Valuing Equality Enough? Equality Values, Allophilia, and Social Policy Support for Multiracial Individuals*, 65 J. SOC. ISSUES 151, 152 (2009) (citation omitted). See Diana T. Sanchez & Courtney M. Bonam, *To Disclose or Not to Disclose Biracial Identity: The Effect of Biracial Disclosure on Perceiver Evaluations and Target Responses*, 65 J. SOC. ISSUES 129, 129 (2009).

<sup>2</sup> See Tanya K. Hernández, “Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97, 105 (1998).

<sup>3</sup> See *id.* at 98-99.

<sup>4</sup> See Taunya Lovell Banks, *Multiracial Malaise: Multiracial as a Legal Racial Category*, 86 FORDHAM L. REV. 2783, 2786 (2018).

*Discrimination*,<sup>5</sup> explores another aspect of this movement: the growing scholarship of those she identifies as multiracial identity scholars (hereinafter identity scholars),<sup>6</sup> a concept she first introduced in 2017.<sup>7</sup> In her book, Hernández critiques these scholars' claims that legal recognition of a separate "multiracial" category is needed to address the discrimination multiracial plaintiffs face.<sup>8</sup>

Professor Hernández uses anti-discrimination law to examine identity scholars' claim that the law and society *misrecognize* multiracials' self-identified *personal* racial identity and relies instead on their ascribed or *legal* identity.<sup>9</sup> Thus, many multiracial identity scholars argue for a separate multiracial category.<sup>10</sup> These scholars target anti-discrimination law for failing to protect a right to racial personal identity equality. As Lauren Sudeall Lucas writes: "To assume that identity and the law must serve the same ends may unfairly stunt identity formation and, perhaps more importantly, prevent the law from fulfilling an important function on behalf of subordinated racial groups."<sup>11</sup>

Mixed-race people vary in their racial identification.<sup>12</sup> "[Some] described themselves as biracial"—meaning neither black nor white, or perhaps biracial but experiencing the world as a black

<sup>5</sup> TANYA KATERÍ HERNÁNDEZ, *MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACED STORIES OF DISCRIMINATIONS* (NYU Press 2018).

<sup>6</sup> *Id.* at 4. Some people she identifies as multiracial identity legal scholars includes Nancy Leong, Scot Rives, Tina Fernandes, Leora Eisenstadt and Camille Gear Rich. *Id.*

<sup>7</sup> See Tanya Katerí Hernández, *Racially-Mixed Personal Identity Equality*, 15 L., CULTURE & HUMAN. J. 1, 4 (2017).

<sup>8</sup> See *id.* at 4-5, 7.

<sup>9</sup> See *id.* at 5.

<sup>10</sup> See Hernández, *supra* note 7, at 4.

<sup>11</sup> See Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CAL. L. REV. 1243, 1250 (2014).

<sup>12</sup> As Lauren Sudeall Lucas also writes:

Social science scholars have identified several different manifestations of multiracial identity. First, some mixed-race individuals may choose to identify with a single race—for example, exclusively black or exclusively white. This is often described as a 'monoracial' or "singular" identity. Second, others may identify exclusively as biracial or multiracial, explicitly rejecting the idea that they can fit into any one racial category. This is often referred to as a 'border identity.' Third, multiracial individuals may adopt what some have labeled a "protean" or shifting identity: identifying as one racial category in one or more contexts and as another racial category (or perhaps as biracial or multiracial) in another context or contexts. For example, a study by David Harris shows a statistically significant difference in the race reported by white-black individuals at home and at school (8.6 percent identified as white-black at school and 16.6 percent as white-black at home). Last, some multiracial individuals assume a "transcendent" identity, meaning that they view themselves as occupying a space where racial categories do not apply and, in effect, reject any racial identity. *Id.* at 1264.

person, where “their self-understanding is rejected by others who do not consider ‘biracial’ a meaningful racial identification.”<sup>13</sup> “[S]ome mixed-race people” have “several ways of identifying . . . shift[ing] between Black, White, and biracial identities, depending on the racial composition of the group they are interacting within.”<sup>14</sup> Other mixed-race people refuse to accept any racial definition – they considered themselves raceless.<sup>15</sup> Canadian journalism scholar Minelle Mahtani writes: “Race does not exist, yet it remains a salient feature in the public imagination.”<sup>16</sup> She adds that it “is almost irrelevant whether race is a social construction when the lived reality of race is so abundantly apparent in the lives of mixed race people.”<sup>17</sup>

The view of race as malleable and fluid is at odds with the historic treatment of mixed-race individuals. The United States has historically treated all people as monoracial with mixed-race people being assigned the race of their non-white ancestor.<sup>18</sup> This classification system presumed that racial purity exists, but, like race itself, is a myth.<sup>19</sup> Racial classifications in this country typically are crafted as a means of protecting those classified as white from those *raced* as non-white.<sup>20</sup> Thus, the multiracial identity movement purports to unravel or destabilize this approach to race.

Identity formation focuses on the role of society in defining race rather than the “other” status of the mixed race individual.”<sup>21</sup> In an earlier article, I argued that because race is an artificial, unstable and unscientific means of classifying individuals and groups, legal recognition of a separate multiracial category only furthers racial subordination.<sup>22</sup> This essay distinguished legal

<sup>13</sup> Kerry Ann Rockquemore & Patricia Arend, *Opting for White: Choice, Fluidity and Racial Identity Construction in Post Civil-Rights America*, 5 RACE & SOC’Y 49, 54 (2002).

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

<sup>15</sup> *See id.*

<sup>16</sup> MINELLE MAHTANI, MIXED RACE AMNESIA: RESISTING THE ROMANTICIZATION OF MULTIRACIALITY 24 (2014).

<sup>17</sup> *Id.* at 25.

<sup>18</sup> *See* Banks, *supra* note 4, at 2790-91. Before the 1980s The National Center for Health Statistics racially classified racially mixed individuals in terms of their “minority” parent. *See also* G. REGINALD DANIEL, MORE THAN BLACK? MULTIRACIAL IDENTITY AND THE NEW RACIAL ORDER 104 (2002).

<sup>19</sup> MAHTANI, *supra* note 16, at 23, 184.

<sup>20</sup> *See* Banks, *supra* note 4, at 2786.

<sup>21</sup> MAHTANI, *supra* note 16, at 37.

<sup>22</sup> *See* Banks, *supra* note 4, at 2789, 2792.

identity—imposed or societally perceived identity (ascribed identity)—from chosen or self-identity.<sup>23</sup> It asked whether self-identification as multiracial undermines the subordinating use of race in America, particularly its anti-black animus, and whether it reinforces the negative aspect of the racing process in the United States.<sup>24</sup>

A major contribution of *Multiracials and Civil Rights* is the empirical evidence Hernández compiles to support her argument that existing anti-discrimination laws, although flawed, can be used to resolve multiracials' claims of race-based discrimination; and that judges are able to comprehend what is driving discrimination complaints by mixed-race plaintiffs.<sup>25</sup> Further, she uses the same cases as those she identifies as multiracial legal identity scholars to refute their claims.<sup>26</sup>

Hernández's book also provides an opportunity for a conversation about the extent and degree to which the multiracial identity movement undercuts not only the rights of multiracial individuals to seek legal remedies for race discrimination in various aspects of their lives, but more importantly, the larger racial project—namely the dismantling of an American hierarchy grounded in an ideology of white dominance and anti-black animus.<sup>27</sup> This essay explores the problem Hernández identifies and her suggestions for remediation. I also use Hernández's book to address whether recognition of multiracials' *chosen*, as opposed to ascribed, racialized identity minimizes or reinforces racial subordination in the United States. I end by reflecting on her suggestions for remediation. This essay starts with an exploration of multiraciality as a concept.

## I. MULTIRACIALITY: AN AMERICAN VERSION OF MESTIZAJE?

The freedom to *choose* one's racial identity and have that identity accepted by the rest of society is at the heart of the multiracial identity movement.<sup>28</sup> Professor Lucas argues that the law's

<sup>23</sup> See *id.* at 2788.

<sup>24</sup> See *id.* at 2791.

<sup>25</sup> HERNÁNDEZ, *supra* note 5, at 6.

<sup>26</sup> See *id.* at 8.

<sup>27</sup> See *id.* at 4, 14-15.

<sup>28</sup> See Lucas, *supra* note 11, at 1260.

powerful function in preventing racial subordination should not prevent one from self-identifying as multiracial and having society accept that racial identity rather than confining mixed-race people to a single racial identity.<sup>29</sup> An unanswered question is whether such a separation is possible, or advisable, given the persistence of racial subordination in the United States. “Racial identity refers mainly to the subjective understanding of oneself as a racialized person, and the recognition that one is both *similar to* and *different from* other people.”<sup>30</sup> Terms like multiracial, mixed-race and “‘hybridity’ suggest[] a combination of two seemingly pure things . . . . [T]hese dualisms are imagined as opposites . . . . But what are the “things” to be mixed? To describe the process of mixing is at the same time to define the entities that existed before the mixing.”<sup>31</sup> Indeed, the question we should be asking is “[w]hy do we see more people as mixed race now?”<sup>32</sup>

The multiracial movement claims that blurring racial boundaries through the recognition of multiraciality strengthens racial self-identification and thwarts state efforts to use race for subordination purposes.<sup>33</sup> In reality, there is no single all-encompassing definition of multiracial.<sup>34</sup> Identities are fluid and flexible.<sup>35</sup> “Mixed-race” includes people with partial white ancestry (black-white) and people with mixed non-white ancestry (Asian including inter-ethnic – black – Latinx – Indigenous).<sup>36</sup>

This essay does not directly address the place of non-white, non-black, mixed-race people, but looks instead at the special case of black-white mixed-race people. The focus of most writing and research on multiraciality is on people with partial white ancestry.<sup>37</sup> “The politics of multiracialism is . . . properly understood only as

<sup>29</sup> See *id.* at 1249-50.

<sup>30</sup> Rockquemore & Arend, *supra* note 13, at 51 (citation omitted).

<sup>31</sup> MAHTANI, *supra* note 16, at 40 (quoting Henry Yu, *Tiger Woods is Not the End of History: Why Sex Across the Color Line Won't Save Us All*, 108 AM. HIST. REV. 1406, 1407 (2003)).

<sup>32</sup> *Id.* at 7 (emphasis omitted) (quoting MICHELE ELAM, *THE SOULS OF MIXED FOLK: RACE, POLITICS, AND AESTHETICS IN THE NEW MILLENNIUM* 6 (Stanford University Press ed. 2011)).

<sup>33</sup> See Lucas, *supra* note 11, at 1260.

<sup>34</sup> See MAHTANI, *supra* note 16, at 31; see also Banks, *supra* note 4, at 2787.

<sup>35</sup> See MAHTANI, *supra* note 16, at 36-37.

<sup>36</sup> See *id.* at 37.

<sup>37</sup> See *id.* at 5.

a purely formal negation of blackness.”<sup>38</sup> Multiracial advocates “situated blackness as outmoded and multiracial as emergent.”<sup>39</sup> Thus, mixed-race identity emerges as open resistance to the one-drop rule.<sup>40</sup>

Some critics argue that the quest for a mixed-race self-identity represents a non-white yearning for self-identity that is “inattentive to racism and white supremacy, or even its employment of white supremacist ideologies in order to escape blackness.”<sup>41</sup> According to Mahtani, even “[b]eing perceived as racially ambiguous . . . provid[es] a way to opt out of race politics and instead access the white privilege that so often accompanies the experience of multiraciality,” particularly for those people without partial white descent.<sup>42</sup> More specifically, discussions about multiraciality often ignore anti-black racism.<sup>43</sup> Mahtani continues: “multiraciality has ‘always been linked to the broader system of racial domination that demarcates white from black.’”<sup>44</sup>

Historically the United States did not recognize black-white mixed-race identity, except as a subset of black identity, applying the “one drop” rule.<sup>45</sup> In contrast, the multiracial identity movement rejects what is seen as the “internalization of the norms and values of . . . White society [in favor of one] based on a new awareness and definition of self, racial group membership, and racism” that reflects emotional components and changes in beliefs, behaviors, and attitudes.<sup>46</sup> In some ways, this approach to mixed-racial

<sup>38</sup> *Id.* at 43 (quoting JARED SEXTON, *AMALGAMATION SCHEMES: ANTIBLACKNESS AND THE CRITIQUE OF MULTIRACIALISM* 53 (2008)).

<sup>39</sup> *Id.* (quoting HABIBA IBRAHIM, *TROUBLING THE FAMILY: THE PROMISE OF PERSONHOOD AND THE RISE OF MULTIRACIALISM* vii (2012)).

<sup>40</sup> Rockquemore & Arend, *supra* note 13, at 52-53.

<sup>41</sup> Jessie D. Turner, *Reconsidering the Relationship Between New Mestizaje and New Multiraciality as Mixed-Race Identity Models*, 1 *J. CRITICAL MIXED RACE STUD.* 133, 137 (2014) (citations omitted).

<sup>42</sup> MAHTANI, *supra* note 16, at 7.

<sup>43</sup> *See id.* at 42.

<sup>44</sup> *Id.* at 7 (quoting KIMBERLY MCCLAIN DACOSTA, *MAKING MULTIRACIALS: STATE, FAMILY AND MARKERS IN THE REDRAWING OF THE COLOR LINE* 14 (2007)).

<sup>45</sup> *See A Race to Know*, NPR (Apr. 2, 2020, 12:01 AM), [https://www.npr.org/transcripts/825227253#:~:text=ABDELFAH%3A%20The%20one%2Ddrop%20rule,were%20concerned%20about%20invisible%20blackness](https://www.npr.org/transcripts/825227253#:~:text=ABDELFAH%3A%20The%20one%2Ddrop%20rule,were%20concerned%20about%20invisible%20blackness.). (“The one-drop rule—the idea that anyone with even the smallest trace of African ancestry would be counted as black.”); MELISSA NOBLES, *SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS* (2000).

<sup>46</sup> Charmaine Wijeyesinghe, *Towards an Understanding of the Racial Identity of Bicultural People: The Experience of Racial Self-Identification of African-American/Euro-*

identity seems analogous to the Mexican model of *mestizaje*, which recognizes that society is racially mixed, but constructs *mestiza/o* as a distinct racial category.<sup>47</sup>

Some scholars argue that the goal in constructing Mexicans as *mestiza/o* was to erase the “indigenous, African, and Asian components” of their identity and inscribe José Vasconcelos’s theory of *raza cósmica* (the cosmic race) with notions of white superiority.<sup>48</sup> Depending on the construction of *mestizaje*, the full nature of the racial mixture, especially the African component, usually is overlooked or erased.<sup>49</sup> In an earlier article, Hernández argues that the Latin American *mestizaje* model does not differ greatly from the facially distinct U.S. racial model.<sup>50</sup> A racialized hierarchy is a substantive and structural reality in both cases.<sup>51</sup>

Today, American notions of multiraciality mirror Latin American notions of *mestizaje*.<sup>52</sup> The construction of the multiracial identity often erases the African or non-white component of mixed-race identity.<sup>53</sup> Thus the *mestizaje* approach to American multiraciality provides mixed-race people (not considered “white”) a way to avoid being labeled as a member of a specific non-white racialized group.<sup>54</sup> As a result, this mixed-race identity model does not advance the racial justice project, but instead operates to reinforce and privilege an ideology of white supremacy.

In each racial model—*mestizaje* and multiracial—the racialized construction of identity, skin tone, and phenotypical

American Adults and the Factors Affecting Their Choices of Racial Identity (Jan. 1, 1992) (Ed.D. dissertation, University of Massachusetts Amherst) (Scholarworks at UMass Amherst).

<sup>47</sup> Turner, *supra* note 41, at 134. See also Tanya Kateri Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 CORNELL L. REV. 1093, 1103 (2002).

<sup>48</sup> Turner, *supra* note 41, at 134. For a more complete discussion of the erasure of African roots in Mexico, see Taunya Lovell Banks, *Mestizaje and the Mexican Mestizo Self: No Hay Sangre Negra, So There is No Blackness*, 15 S. CAL. INTERDISC. L. J. 199, 202-04, 206-07 (2006).

<sup>49</sup> See Turner, *supra* note 41, at 134. While both the colonial and postrevolutionary Mexican constructions of *mestizaje* glorified the Spanish, the “more recent construction of *mestizaje*, . . . Chicano nationalism. . . privileges the indigenous and constructs the Spanish/Anglo as the other, while concurrently denying multiple ancestries such as African, Asian, and Middle Eastern.” *Id.* Vasconcelos erased indigenous ancestry as well. *Id.*

<sup>50</sup> See Hernández, *supra* note 47, at 1101.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See Turner, *supra* note 41, at 134, 137; cf. Banks, *supra* note 48, at 202-03.

<sup>54</sup> See Hernández, *supra* note 47, at 1095-97.



characteristics are essential components.<sup>55</sup> They are convenient racial markers. The next section briefly discusses this point.

## II. COLORISM AS A COMPONENT OF MULTIRACIAL IDENTITY

In *Multiracials and Civil Rights*, Hernández starts by using the Latinx experience to help readers better understand underappreciated issues about the multiracial identity movement, especially the push to create a legal multiracial category. The preface begins with a very personal family narrative about skin tone and phenotypical features, especially hair texture, as racial markers within a Latinx context.<sup>56</sup> The story starts with Professor Hernández's grandmother, a light-skinned Puerto Rican woman who weds a dark-skinned Puerto Rican man.<sup>57</sup> Their daughter, Hernández's mother, is described as brown-skinned with "kinky" hair.<sup>58</sup> These descriptors illustrate the social racialization process within the ethnic category Puerto Rican.

According to the narrative, Hernández's mother is treated differently from her light-skinned sister because her appearance acknowledges her partial African ancestry.<sup>59</sup> Hernández's mother marries a "white" Cuban and they have Hernández, but much to the distress of her grandmother, Hernández's hair retains some African characteristics and her grandmother presses her to blow-dry her hair.<sup>60</sup> Thus, the grandmother's desire to erase or suppress visual evidence of her granddaughter's partial African ancestry illustrates anti-black bias.<sup>61</sup>

As a black American with no Latinx ethnicity, Hernández's story seemed familiar. It is analogous to narratives about intra-ethnic colorism among African Americans—how skin tone and hair texture—often determine societal acceptance and life chances, especially for women.<sup>62</sup> The more one looks "white," the more

<sup>55</sup> See *id.* at 1109-10.

<sup>56</sup> See HERNÁNDEZ, *supra* note 5, at ix-xiv.

<sup>57</sup> See *id.* at x.

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

<sup>59</sup> See *id.* at x-xi.

<sup>60</sup> See *id.* at xii.

<sup>61</sup> See *id.* at xii-xiii.

<sup>62</sup> See Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1719-21, 1720 n.58, 1736-39 (2000).

acceptable one is in the eyes of the dominant society in Puerto Rico or the American mainland.<sup>63</sup> As I have previously written, I consider colorism practices a form of race-based discrimination.<sup>64</sup>

As Hernández's story illustrates, Latinx people are commonly perceived, as multiracial—as *mestiza/o*.<sup>65</sup> This societal perception is reflected in the classification of the "Hispanic" category on the United States census as an ethnic category.<sup>66</sup> Individuals, who self-identify as Hispanic, are asked to "choose" a racial identity within that ethnic category.<sup>67</sup> Thus the treatment of the Hispanic category on the U.S. census presupposes that someone who ethnically identifies and/or is identified as Hispanic can be of any race or races.<sup>68</sup>

After reading Hernández's book, I realized that I was seeing the Latinx phenomenon she describes through my *black* American lens as skin tone discrimination among people who are racialized the same way. The problem, however, is more complicated because various Latinx communities see the racialized label "Hispanic" as an ethnic, not racial, category, and various national *mestizaje* models normalize the internal racing process in each community. This reality raises the question of whether there is a meaningful difference for anti-discrimination law purposes between race and

<sup>63</sup> See *id.* at 1708-10; HERNÁNDEZ, *supra* note 5, at x, 31–32.

<sup>64</sup> See Banks, *supra* note 62, at 1713; Taunya Lovell Banks, *Multilayered Racism: Courts' Continued Resistance to Colorism Claims*, in SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS 213, 213, 216 (Evelyn Nakano Glenn ed., 2009); Taunya Lovell Banks, *A Darker Shade of Pale Revisited: Light-Skinned Negroes, Neo-Mulattoes and Colorism in the "Post-Racial" Obama Era*, U. MD. SCH. L. 1, 1, 17 (2010); Taunya Lovell Banks, *Colorism Among South Asians: Title VII and Skin Tone Discrimination*, 14 WASH. U. GLOBAL STUD. L. REV. 665, 667–68 (2015).

<sup>65</sup> See Hernández, *supra* note 47, at 1105-06.

<sup>66</sup> See *About Hispanic Origin*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/hispanic-origin/about.html> (last visited Sept. 20, 2020).

<sup>67</sup> Specifically, "Hispanics or Latino refers to a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.... Origin can be viewed as the heritage, nationality group, lineage, or country of birth of the person or the person's parents or ancestors before their arrival in the United States." *Quick Facts: Hispanic or Latino Origin*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/note/US/RHI725218> (last visited Sept. 20, 2020).

<sup>68</sup> See *2020 Census Questionnaire*, U.S. CENSUS BUREAU, (2020), <https://www2.census.gov/programs-surveys/decennial/2020/technical-documentation/questionnaires-and-instructions/questionnaires/2020-informational-questionnaire.pdf>. Persons who identify as Hispanic on the census also are asked to identify their race. The options on the 2020 census questionnaire include: White, Black or African American, American Indian or Alaskan Native, specific Asian ethnicities, or "Some other race."

ethnicity, at least for racial categorization purposes. Scholars, and courts, remain divided over this point.<sup>69</sup>

Recognition of an ethnic, as well as racial, category on the census assumes that there is a well-defined difference between these two categories.<sup>70</sup> Ethnicity is thought to be a “self-label” based on one’s cultural or social identity and/or language.<sup>71</sup> In contrast, race traditionally relies more on descent or ancestry, and may include other factors like physical traits and cultural identity as components.<sup>72</sup> The treatment of the Hispanic category on the U.S. census is an explicit recognition of the existence of mixed-race people.<sup>73</sup> So too is the option, available since the 2000 census, for non-Hispanics to select more than one race.<sup>74</sup> Given these options, one wonders why the need for a separate multiracial category.

“[C]olorism facilitates the ability of partially white individuals to hold higher social status. . . . Thus a connection to whiteness means social mobility.”<sup>75</sup> Even without the traditional physical markers of race, such as skin tone, hair texture and other non-white phenotypical characteristics, once a person’s multiracial ancestry is known, people who initially perceive them as white, will consider them non-white or, at most, what I call a marginal or “fringe” white—someone whose identity is in constant limine. This reality, the non-recognition of one’s personal identity as partially white, is what troubles identity scholars.<sup>76</sup> The next section explores the dilemma some multiracials experience when the white component of their personal racial identity is different from the racial identity imposed on them by American society.

<sup>69</sup> See, e.g., Juliet Hooker, *Hybrid Subjectivities, Latin American Mestizaje, Latino Political Thought on Race*, POLITICS, GROUPS, & ID., 2 (2014).

<sup>70</sup> See, i.e., *2020 Census Questionnaire*, supra note 68.

<sup>71</sup> See Robert Bartlett, *Medieval and Modern Concepts of Race and Ethnicity*, 31 J. MEDIEVAL & EARLY MOD. STUD. 39, 47 (2001).

<sup>72</sup> See *id.*

<sup>73</sup> See HERNÁNDEZ, supra note 5, at 119.

<sup>74</sup> See *2020 Census Questionnaire*, supra note 68.

<sup>75</sup> Shantel Gabriel Buggs, *Does (Mixed-) Race Matter?: The Role of Race in Interracial Sex, Dating, and Marriage*, 11:11 SOC. COMPASS 1, 11 (Sept. 2017).

<sup>76</sup> See HERNÁNDEZ, supra note 5, at 19.

### III. THE PERSONAL VERSUS SOCIETAL RACIAL IDENTITY DILEMMA

In Chapter Six of *Multiracials and Civil Rights*, Hernández offers a provocative answer to the real injury claimed by identity scholars. She characterizes the right claimed by multiracial identity legal scholars as a claim for what she calls racial *personal identity equality*.<sup>77</sup> The gravamen of the harm claimed by these scholars, according to Hernández, is the *misrecognition* by others of their *personal* identity, more specifically the non-recognition by society of a multiracial person's chosen identity.<sup>78</sup>

At the same time, multiracials “object[] to being ‘minoritized,’ [seeing this as] an attempt to divorce [their] nonwhite ancestry from the societal derogation that is often attributed to it.”<sup>79</sup> This is not a trivial injury. But this harm is not the result of society rejecting their chosen identity. Rather the non-recognition is an essential aspect of the American racing project, the primacy of whiteness, and the degradation of non-whiteness, especially blackness.

According to Hernández, “the primary locus of multiracial discrimination is in any societal resistance to the assertion of multiracial identity.”<sup>80</sup> Looking at the writings of identity scholars and the cases they cite to support their argument that a separate legal multiracial category is needed to address the discrimination they complained of, Hernández argues that the precise nature of their injury seems unclear.<sup>81</sup> Every discrimination claim cited involved some non-white racial incident, and most of the time the multiracial claimant's complaint about negative treatment was based on their partial non-white, usually African, ancestry.<sup>82</sup>

The push for societal recognition of multiracials' personal identity seems unconnected to more general concerns about racial

<sup>77</sup> See *id.* at 91.

<sup>78</sup> See *id.*

<sup>79</sup> *Id.* at 108.

<sup>80</sup> *Id.* at 91.

<sup>81</sup> See *id.* at 91, 97.

<sup>82</sup> See HERNÁNDEZ, *supra* note 5 at 94. Hernández cites one study that “suggests that phenotype and known black ancestry are stronger drivers of multiracial discrimination than actual mixed-race status. . . . [and m]ultiracials of nonblack ancestry also receive greater social acceptance to assert a white racial identity with or without a cultural ethnic identity.” *Id.*

inequality and group-based disparities.<sup>83</sup> “Personal Racial Identity Equality is . . . problematic . . . because identity claims are isolated from material inequality concerns with social hierarchy and group-based disparities.”<sup>84</sup> Hernández argues, “the rhetoric of Personal Racial Identity Equality has come to be used to undermine the enforcement of antidiscrimination law.”<sup>85</sup> She concludes that “multiracial Personal Racial Identity Equality overstates the distinctive complexity of multiracial identity” because identity is not static.<sup>86</sup>

The outlawing of state anti-miscegenation laws in *Loving v. Virginia* resulted in an increased number of interracial marriages and offspring of these unions.<sup>87</sup> There is a tendency among multiracial identity advocates to romanticize mixed-race ancestry as something unique post *Loving*.<sup>88</sup> Many interracial parents, and their mixed-race children, reject the binary approach to race and the hypodescent rule, pressing instead for legal and social recognition of multiracial children as a distinct racial identity.<sup>89</sup>

Importantly, post-*Loving*, it is white parentage, as opposed to partial white ancestry, that *really* triggers the claim of multiracial identity. The real injury of racial non-recognition is the non-recognition of white parentage signified by the “what are you”? question.<sup>90</sup> Asking this question is evidence that the questioner does not view the multiracial person as white.<sup>91</sup> Thus, the push for recognition of multiracial identity is an attempt to transfer or benefit from white parentage in a society that does not recognize a person as white because of that person’s partial non-white ancestry. This focus may explain why the multiracial identity movement is limited to the children of interracial parentage.<sup>92</sup> It does

<sup>83</sup> See *id.* at 91-92.

<sup>84</sup> *Id.* at 95.

<sup>85</sup> *Id.* at 100.

<sup>86</sup> *Id.* at 97.

<sup>87</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967); see also Banks, *supra* note 4, at 2783-84.

<sup>88</sup> See Banks, *supra* note 4, at 2784.

<sup>89</sup> See Lucas, *supra* note 11, at 1255.

<sup>90</sup> See HERNÁNDEZ, *supra* note 5, at 94.

<sup>91</sup> See *id.*

<sup>92</sup> See Lucas, *supra* note 11, at 1250.

not include the older, and larger, multiracial community largely identified or “raced” as black or African American.<sup>93</sup>

A few mixed-race people with one black and one white parent might identify as white.<sup>94</sup> Social scientists Rockquemore and Arend argue that this is not the same as passing for white, rather these people “have constructed a [w]hite identity to the degree that they understand themselves and their social location as [w]hite.”<sup>95</sup> Thus, “having a Black parent does not disqualify [one] from whiteness.”<sup>96</sup>

This possibility raises several question: whether it is “possible for a mixed-race person in post-Civil Rights America to have a validated identity as [w]hite;” whether adopting a white racial identity is “a new form of passing or has passing become obsolete in a changing racial hierarchy;”<sup>97</sup> and whether multiracials who adopt a white racial identity can be considered culturally white, even if they are not considered white phenotypically.<sup>98</sup> If the answers to all of these questions is yes, then Rockquemore and Arend argue, you have is a new form of whiteness – people who self-identify as white “but who are barred from full inclusion as [w]hite because of their phenotype.”<sup>99</sup>

Another component of the multiracial identity movement worth noting is the connection between interracial parentage and socioeconomic status as a factor in multiracials self-identification. Professor Lucas concedes that:

[t]hose who consistently identify as multiracial are more likely to come from higher-educated households (functioning as a proxy for socioeconomic status) and to be associated with higher-status racial and social class groups. Thus,

<sup>93</sup> See *id.* at 1266. “Earlier studies of multiracial identity suggested that it was ‘culturally accepted’ that the ‘interracial child must select the identity of one parent, usually the parent of color’ or that ‘Black/White biracial children should identify themselves as Black because society will ultimately characterize them that way.’” *Id.*

<sup>94</sup> See Rockquemore & Arend, *supra* note 13, at 55.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 57.

<sup>97</sup> *Id.* at 59.

<sup>98</sup> See *id.*

<sup>99</sup> *Id.*

even when it may appear to be, the decision to identify as multiracial is not wholly insulated from external factors.<sup>100</sup>

The connection between higher socio-economic status, skin color, phenotype, and the quest for racial personal identity equality by some multiracials, seems analogous to the Latin American notion that “money lightens”—specifically, that affluent persons of partial African ancestry with light-skin can ascend the racial hierarchy moving away from the racial “taint” of blackness, and in some cases, even become white.<sup>101</sup> In Latin America it once was possible for economically successful or prominent mixed-race people to change their race through a process called the “*gracias al sacar*,” or, “thanks for the exclusion.”<sup>102</sup> Using this process, “an elite cohort of *pardos* and mulattos could apply and pay for a decree that converted them to whites.”<sup>103</sup> Thus, these individuals were excluded from the harsh racial restrictions imposed on nonwhites.

Similarly, American social scientists find a correlation between socio-economic status and skin tone for African Americans.<sup>104</sup> Historically there was a correlation between skin tone and socio-economic status of African Americans.<sup>105</sup> The primary

<sup>100</sup> Lucas, *supra* note 11, at 1266 (citations omitted).

<sup>101</sup> Mark E. Hill, *Color Differences in the Socioeconomic Status of African American Men: Results of a Longitudinal Study*, 78 SOC. F. 1437, 1439 (citing CARL N. DEGLER, NEITHER BLACK NOR WHITE (1986)).

<sup>102</sup> Ann Twinam, *Purchasing Whiteness: Race and Status in Colonial Latin America*, NOT EVEN PAST (Sept. 1, 2015), <https://notevenpast.org/purchasing-whiteness-race-and-status-in-colonial-latin-america/> (last visited Sept. 15, 2020). For more discussion of this point, see ANN TWINAM, PURCHASING WHITENESS: PARDOS, MULATTOS AND THE QUEST FOR SOCIAL MOBILITY IN THE SPANISH INDIES (2015).

<sup>103</sup> Twinam, *supra* note 102.

<sup>104</sup> See Hill, *supra* note 101, at 1438.

<sup>105</sup> See Howard Bodenhorn & Christopher S. Ruebeck, *Colorism and African-American Wealth: Evidence from the Nineteenth-Century South* 3, 7-8, 19-20, 26 (NBER, Working Paper No. 11732, Nov. 2005), <https://www.nber.org/papers/w11732.pdf> (last accessed Sept. 15, 2020). See also Arthur H. Goldsmith, Darrick Hamilton, and William Darity, Jr., *Shades of Discrimination: Skin Tone and Wages*, 96 AM. ECON. REV. 242, 243-45 (2006) (arguing that black male workers with medium and dark skin lost at least ten percentage in wages compared with white male workers while wage differences between light-skinned and white male workers was insignificant); Michael Hughes & Bradley R. Hertel, *The Significance of Color Remains: A Study of Life Chances, Mate Selection, and Ethnic Consciousness Among Black Americans*, 68 SOC. FORCES 1105, 1107, 1109-15 (1990) (Finding that black women are disproportionately impacted economically by colorism practices because successful black men of all hues prefer to marry light-skinned women.); Verna M. Keith & Cedric Herring, *Skin Tone and Stratification in the Black Community*, 97 AM. J. SOC. 760, 762, 764-65, 773

difference between the United States and some Latin American countries is that partial African ancestry in the U.S. prevents the racial designation from changing from black to white.<sup>106</sup>

Professor Hernández discusses identity scholars' complaints about the invisibility of their white ancestry. She cites, as an example, the complaints of identity scholars about college admissions officials focusing on "what they term 'the least represented portion' of a multiracial applicant's ancestry, meaning the nonwhite [aspect]. . . 'foreclosing the possibility of more nuanced self-identification'."<sup>107</sup> Hernández notes that "nonwhite appearance was more predictive of discrimination than the respondents' varying personal mixed-race racial identities."<sup>108</sup> The personal racial identity problem discussed above is a problem primarily for multiracials, who the dominant society does not accept as white.<sup>109</sup> In a highly racialized society, some multiracials do not feel that they fit into a world that defines race singularly. "[T]he definition of [b]lack is historically unique from the rules of inclusion for other racial groups, and inseparable from the social and economic institution of slavery, it allows a clear illustration of the link between structure and identity."<sup>110</sup> Thus, the psychological consequences of denying one's personal racial identity may be especially severe when the multiracial person has some African ancestry and society does not recognize and value that person's non-black parentage.<sup>111</sup>

The question is whether the consequences of societal non-recognition of a multiracial person's white parentage undermines efforts to remove the social stigma that attaches to African ancestry; and whether this stigma, rather than non-recognition, is what triggers the psychological distress some multiracial people with some African ancestry claim. Afro-pessimists would take Professor Hernández's black-white binary argument a step further. They argue that anti-blackness is distinct from other forms of

(1991); Richard Seltzer & Robert C. Smith, *Color Differences in the Afro-American Community and the Differences They Make*, 21 J. BLACK STUD. 279, 280, 283-84 (1991).

<sup>106</sup> See Goldsmith, *supra* note 105, at 242-43.

<sup>107</sup> HERNÁNDEZ, *supra* note 5, at 107-08.

<sup>108</sup> *Id.* at 108.

<sup>109</sup> See *id.*

<sup>110</sup> Rockquemore & Arend, *supra* note 13, at 52.

<sup>111</sup> See HERNÁNDEZ, *supra* note 5, at 108.



American racism and replaces the conventional black-white binary analysis of race with “an antagonism between blacks and nonblacks. . . . [A]ntiblackness, [according to afro-pessimists] not white supremacy, explains the social conditions of blacks. . . .”<sup>112</sup>

Some Afro-Pessimists argue that the celebration of multiraciality is not necessary a sign of progress, but instead merely a “shifting mechanism[] reproducing changes in racial inequality in response to minority gains.”<sup>113</sup> Thus it is the stigma of blackness stemming from African enslavement in the United States that creates a problem for mixed-race people with some African ancestry.<sup>114</sup> Complicating the question of ethnic and racial identity is whether the multiracial label is more akin to an ethnic label, like Hispanic, used as an attempt to distance one from African Americans.<sup>115</sup> This question is beyond the scope of this essay.

For the other multiracials, visibly “passing” for white or refusing to acknowledge your non-white ancestry is problematic. This approach ignores or attempts to erase non-white ancestry.<sup>116</sup> Further, any white privilege usually is lost once one’s non-white, usually black ancestry, is known.<sup>117</sup> As Hernández powerfully points out in the book, most of the people who are bringing these claims are people who have some African ancestry.<sup>118</sup> Thus, the *real* problem for some multiracials may be a person’s partial African ancestry as opposed to their racially mixed ancestry.

#### IV. PERSONAL IDENTITY AND ETHICAL RACE

Societal acceptance of a person’s chosen racial identity is a complex question. The issue raised by some multiracial individuals is

<sup>112</sup> Victor Erik Ray, Antonia Randolph, Megan Underhill and David Luke, *Critical Race Theory, Afro-Pessimism, and Racial Progress Narratives*, 13 SOC. RACE & ETHNICITY 1, 3 (2017).

<sup>113</sup> *Id.*

<sup>114</sup> Professor Mary Waters, for example, writing at the end of the 20th century noted that black West Indians “strive to make known their ethnic difference from African Americans” to distance themselves from African descendants of people enslaved in the United States. Ray et al., *supra* note 112, at 4 (citing MARY C. WATERS, BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES 64-5 (1999)).

<sup>115</sup> *See id.* (citing VILNA BASHI TREITLER, THE ETHNIC PROJECT: TRANSFORMING RACIAL FICTION INTO ETHNIC FACTIONS (2013)).

<sup>116</sup> *See* HERNÁNDEZ, *supra* note 5, at 92.

<sup>117</sup> *See id.* at 8.

<sup>118</sup> *Id.* at 6.

whether one has the right to choose or not choose a racialized identity.<sup>119</sup> The choices people make about their racial identity raise questions about whether one also has an “ethical” racial identity.<sup>120</sup> Specifically, whether the social reality of living in a society where race is a defining factor, and where anti-blackness is an important component, it is unethical to either actively conceal, or ignore, the social reality of one’s African ancestry, whether or not that ancestry is apparent.<sup>121</sup>

Arguably a multiracial person with some African ancestry who denies this ancestry, hiding instead behind a label as multiracial, or even the race of that person’s white parent, is engaging in self-deception.<sup>122</sup> More than thirty years ago, Professor Deborah Waire Post, a mixed-race person with a white mother, argued that this deception, whether intentional or not, is being “inauthentic.”<sup>123</sup> Thus, the person is acting unethically.<sup>124</sup>

The question of ethical race arises in several contexts. The first is where a mixed-race person who self-identifies as white takes advantage of affirmative action programs designed to assist non-whites to increase their opportunities.<sup>125</sup> This action might be considered as a form of “passing,” traditionally where “an individual defined as [b]lack (via the one-drop rule), who physically appears [w]hite, presents a [w]hite identity for economic and social gain.”<sup>126</sup> Instead this action is an example of “*pass[ing]*” for [b]lack to received social, economic and educational opportunities.<sup>127</sup>

The ultimate question, however, is not racial self-identification but societal acceptance of that identity. A famous skit by comedian Dave Chappell illustrates an aspect of the problem. The 2003

<sup>119</sup> See e.g. Lucas, *supra* note 11, at 1258-59, 1263-64. Some multiracial individuals argue for the abolition of racial categories altogether. See Banks, *supra* note 4, at 2787n.30 (citations omitted).

<sup>120</sup> See Deborah Waire Post, *Reflections on Identity, Diversity and Morality*, 6 BERKELEY WOMEN’S L. J. 136, 139-40 (1990-1991). Professor Post, while identifying this phenomenon in the context of her mixed racial ancestry (a black father and a white mother), does not fully define or describe it. *Id.*

<sup>121</sup> See *id.* at 139 (quoting Anthony Appiah, “But Would That Still Be Me?” *Notes on Gender, “Race,” Ethnicity as Sources of “Identity,”* 87 J. PHILOSOPHY 493, 499 (Oct. 1990).

<sup>122</sup> See Post, *supra* note 120, at 139-40.

<sup>123</sup> *Id.* at 136, 139.

<sup>124</sup> See *id.* at 139.

<sup>125</sup> See Rockquemore & Arend, *supra* note 13, at 60.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

inaugural show of his program the *Dave Chappell Show*, on cable's Comedy Central channel, featured a skit, *Blind Supremacy*, a spoof of the PBS public affairs program *Frontline*.<sup>128</sup> Chappell, an African American comedian, played Clayton Bigsby, a reclusive blind African American white supremacist raised to think he is white.<sup>129</sup> Through his writings Bigsby becomes "a leading force in the white supremacist movement," until he unmask himself and learns from his supporters that he is black.<sup>130</sup> Disgraced, his response to this discovery is to divorce his blind white wife of nineteen years for being a n\*\*\*\*r lover.<sup>131</sup>

Bigsby is an interesting character, someone with significant African ancestry who is treated as white because he was raised not knowing his black ancestry, and his supporters, who have never seen him, make assumptions about his race based on his hateful ideas and comments. Bigsby is unknowingly engaged in self-deception, unlike most multiracials whose mixed ancestry is known. Once Bigsby's physical appearance belies his claimed racial identity, he is rejected by his fellow white supremacists despite his continued beliefs, emphasizing the well-known power of physical appearance in the racing process.<sup>132</sup> This is a rather obvious twentieth century conclusion, but Chappell, not content with the obvious, throws his audience a twenty-first century curve.

Reversing the joke, Chappell has the blind Bigsby racially taunt a carload of white teenagers he thinks are black because they are playing rap music—cultural association.<sup>133</sup> The teens, at first incredulous, are delighted to be mistaken for African Americans.<sup>134</sup> They are opportunist whites who pose as black by adopting aspects of commodified black subculture, in this instance rap music.<sup>135</sup> Social psychologists prefer the term *allophilia*, which is commonly

<sup>128</sup> See *Chappelle's Show: Popcopy & Clayton Bigsby*, COMEDY CENTRAL (Jan. 22, 2003), <http://www.cc.com/episodes/9l1jqa/chappelle-s-show-popcopy-clayton-bigsby-season-1-ep-101>.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

defined as harboring a positive attitude towards another group that is not one's own.<sup>136</sup>

There have been white racial posers at various points in the twentieth century, notably the “white negroes” of the 1920s jazz age.<sup>137</sup> The most well-known white negro of this era was the Jewish jazzman, Milton “Mezz” Mezzrow, who considered himself black because of his love of black music and close associations with black musicians, like Louis Armstrong.<sup>138</sup> He even lived in the black Harlem neighborhood of New York City.<sup>139</sup> Further, Mezzrow was listed as “negro” on his draft card.<sup>140</sup> Nonetheless, he never fully relinquished his white identity.<sup>141</sup>

The late nineteenth-century geologist Clarence King, the subject of Martha Sandweiss' book, *PASSING STRANGE*, is another example of a “white negro.”<sup>142</sup> King posed as a light-skinned African American Pullman porter named James Todd so that he could marry a black woman and help raise their family.<sup>143</sup> King lived a double life; like Mezzrow, King never fully relinquished his white identity and the privileges that it accorded him.<sup>144</sup> For Mezzrow and King, their decision to “pass” as black was temporary—like a costume to

<sup>136</sup> See Todd L. Pittinsky, *A Two-Dimensional Model of Intergroup Leadership: The Case of National Diversity*, 65 *AM. PSYCH.* 194, 195 (2010).

<sup>137</sup> See Norman Mailer, *The White Negro*, 4 *DISSENT MAG.* 276, 276-93 (1957), reprinted in *DISSENT MAG.* (June 20, 2007), [https://www.dissentmagazine.org/online\\_articles/the-white-negro-fall-1957](https://www.dissentmagazine.org/online_articles/the-white-negro-fall-1957). See also Mark P. Orbe, *The Rhetoric of Race, Culture and Identity: Rachel Dolezal as Co-Cultural Group Member*, 6 *J. CONTEMP. RHETORIC* 23, 24 (2016).

<sup>138</sup> See Corey Kilgannon, *Son of Mezz Mezzrow Finds His Father's Legacy Lives in a Jazz Club in the Village*, *N.Y. TIMES* (July 10, 2015), <https://www.nytimes.com/2015/07/11/nyregion/son-of-jazz-legend-finds-his-fathers-legacy-lives-in-a-club-in-the-village.html>. See also Beth Johnston, *REALLY THE BLUES by Mezz Mezzrow and Bernard Wolfe, 464 Pages*, *CLEAVER* (Oct 3, 2016), <https://www.cleavermagazine.com/really-the-blues-by-mezz-mezzrow-and-bernard-wolfe-reviewed-by-beth-johnston>.

<sup>139</sup> See Kilgannon, *supra* note 138. See also Johnston, *supra* note 138.

<sup>140</sup> Kilgannon, *supra* note 138.

<sup>141</sup> See Orbe, *supra* note 137, at 24. See also Charles Hersch, *Every Time I Try to Play Black, It Comes Out Sounding Jewish: Jewish Jazz Musicians and Racial Identity*, 97 *AM. JEWISH HIST.* 250-282 260 (2013). Nevertheless, arguably whites who embraced black rap are a symbolic example of rhetorical white liberalism or the opportunism of majority culture. They assume the commodified aspects of black subculture for their own entertainment – but largely only early in life (i.e., in the teen years and early twenties) and only to the extent that their embrace of blackness does not interfere with their own economic success later in life. They are thereby distinguishable from whites, like Mezzrow, who truly assimilate into black culture either by virtue of their family/upbringing or by choice.

<sup>142</sup> See MARTHA A. SANDWEISS, *PASSING STRANGE* (2000).

<sup>143</sup> See *American Lives: The 'Strange' Tale of Clarence King*, *NPR* (Aug. 18, 2010, 12:00 AM) <https://www.npr.org/templates/story/story.php?storyId=129250977>.

<sup>144</sup> See *id.* See also Orbe, *supra* note 137, at 24.

put on and take off at will. In each case economics played a role. For Mezzrow, posing as black enabled him “to strengthen his musical credentials in the hipster culture.”<sup>145</sup> For King, retaining his job as a geologist enabled him to provide a comfortable lifestyle for his black wife and their children.<sup>146</sup> Their racial posing was situational and pragmatic.

Perhaps the most recent racial poser to gain national prominence is Rachel Dolezal, a woman born to white parents, who argued that she should be able to self-identify as a multiracial black woman.<sup>147</sup> Once her black racial identity was challenged Dolezal subsequently claimed that nonetheless she identified as black.<sup>148</sup> Perhaps her racial self-identification as black helped to strengthen the relationship with her bi-racial child while they were living in racially hostile environments.<sup>149</sup> Like Mezzrow and King, Dolezal’s self-identification as black was pragmatic and situational.

Nevertheless, some scholars, relying on Dolezal’s claim that she felt she was the wrong race despite the absence of any ancestral connection to black Africans,<sup>150</sup> label this phenomenon as “transracialism,” analogizing it to transgenderism.<sup>151</sup> Put succinctly, proponents of transracialism posit that “we treat people wrongly when we block them from assuming the personal identity they wish to assume.”<sup>152</sup> They argue that we should accept the decision of someone like Dolezal to change her race.<sup>153</sup> In other words, society should ignore Dolezal’s white ancestry and accept her claim to blackness.

The issue of transracialism gained prominence as part of an ongoing debate about the appropriateness of the analogy to transgenderism.<sup>154</sup> I agree with scholars who reject the notion of transracialism arguing that it operates one way—whites, but not blacks

<sup>145</sup> Orbe, *supra* note 137 at 24.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 24-26.

<sup>148</sup> *Id.* at 26.

<sup>149</sup> *Id.* at 25.

<sup>150</sup> Rebecca Tuvel, *In Defense of Transracialism*, 32 *HYPATIA* 263, 265 (2017).

<sup>151</sup> *Id.* at 264.

<sup>152</sup> *Id.*

<sup>153</sup> *See id.*

<sup>154</sup> This issue is beyond the scope of this essay, but see Lewis R. Gordon, *Thinking Through Rejections and Defenses of Transracialism*, 62 *PHIL. TODAY* 11, 12 (2018).

can claim to be transracial.<sup>155</sup> Philosopher Tina Fernandes Botts reminds us that since the person posing as black can always change back to white, their racialized experiences while black are superficial and temporary. These posers “do not eradicate the inescapable white privilege at the disposal of every person who voluntarily takes on, for whatever reason, a black identity.”<sup>156</sup> Someone like Chappell’s character Bigsby, despite his belief in his whiteness and the ideology of white supremacy, would never be accepted as white. His African ancestry trumps.

The lack of an ancestral connection makes the claims of blackness by whites like Mezzrow, King and Dolezal distinctly different from the arguments of many multiracials for racial personal self-identification. Rockemore and Arend contend that these multiracials “are not passing for [w]hite. . . . Instead, they have constructed a [w]hite identity to the degree that they understand themselves and their social location as [w]hite.”<sup>157</sup> Multiracials have an immediate ancestral connection to whiteness through their white parent, and some may choose to reject, ignore, or hide their nonwhite ancestry because of the stigma attached to nonwhite, especially black ancestry.<sup>158</sup>

A post-*Loving* example is Louisiana resident Suzy Phipps, who was not considered white by state law in 1985 because of her remote African ancestry (five generations removed).<sup>159</sup> Phipps looked white, was raised as white, attended white schools during the racial segregation era, lived in a white neighborhood and married two white men.<sup>160</sup> She was culturally and phenotypically white, yet still considered black.<sup>161</sup> Once more, ancestry remains the triggering component of anti-blackness in America.

<sup>155</sup> See Chloë Taylor, *On Intellectual Generosity: A Response to Rebecca Tuvel’s “In Defense of Transracialism,”* 62 PHIL. TODAY 3, 3, 7 (2018). See also Kris Sealey, *Transracialism and White Allyship: A Response to Rebecca Tuvel*, PHIL. TODAY 21, 22, 26 (2018) (addressing the moral and political consequences of choosing to identify as transracial); see also Tina Botts, *In Black and White: A Hermeneutic Argument Against “Transracialism,”* 95 RES PHIL. 303, 309 (2018) (arguing that racial transition is possible but probably unethical); see also Jana Cattien, *Against “Transracialism”: Revisiting the Debate*, 34 HYPATIA 713 (2019).

<sup>156</sup> Botts, *supra* note 155, at 310.

<sup>157</sup> Rockquemore & Arend, *supra* note 13, at 55.

<sup>158</sup> See Rockquemore & Arend, *supra* note 13, at 55, 56.

<sup>159</sup> *Doe v. State*, 479 So. 2d 369, 371 (La. Ct. App. 1985).

<sup>160</sup> See Robert Westley, *First-Time Encounters: “Passing” Revisited and Demystification as a Critical Practice*, 18 YALE L. & POL’Y REV. 297, 317-22 (2000).

<sup>161</sup> See *id.*

Whether or not you accept Hernández's assessment of multiracial-legal-identity scholars' motivation, chapter six of her book opens an opportunity for conversation.<sup>162</sup> She makes a persuasive case about the extent and degree to which the multiracial-identity-movement undercuts the rights of multiracial individuals who experience discrimination in various aspects of their lives.<sup>163</sup> More importantly, the quest for personal racial self-identity, an essential component of the larger multiracial-identity-movement, undercuts rather than aids the anti-subordination racial project.<sup>164</sup> Multiracialism, perhaps unintentionally, continues to privilege whiteness as a preferred racial identity.

## V. A SOCIO-POLITICAL APPROACH TO RACE

In the book's final chapter, Hernández advances an alternative approach to the problem identified by the identity scholars. She argues that it is the "taint" of non-whiteness, not multiraciality, that is the real problem.<sup>165</sup> She reminds readers that the primary concern of antidiscrimination laws is discrimination in the public sphere, not the private personal expressions of bias.<sup>166</sup> However, Hernández agrees with Lauren Sudeall Lucas that it is important not to conflate the two, using Camille Gear Rich's argument for a right to self-definition<sup>167</sup> to illustrate a misunderstanding of the purpose of antidiscrimination laws.<sup>168</sup>

Hernández sidesteps the question of whether there is a right to self-definition that must be respected, saying it is important from a legal perspective only when the self-definition "is used to deny a racialized group member access to opportunity and services."<sup>169</sup> The harm claimed is multiracials' notion that the failure to recognize a mixed-race person's personal identity is an indignity that demeans a person's self-worth.<sup>170</sup> For this reason, some

<sup>162</sup> HERNÁNDEZ, *supra* note 5, at 91-93.

<sup>163</sup> *See id.* at 94-97.

<sup>164</sup> *See id.* at 93-94.

<sup>165</sup> *Id.* at 111.

<sup>166</sup> *See id.* at 111-112.

<sup>167</sup> *See* Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1505-07, 1538 (2014).

<sup>168</sup> HERNÁNDEZ, *supra* note 5, at 112-13.

<sup>169</sup> *Id.* at 113.

<sup>170</sup> *See id.* at 116.

multiracial advocates support “racial privacy” initiatives that treat race as a private matter beyond the scope of government.<sup>171</sup> But one counterargument is that documenting race is an important step in eliminating unlawful race-based discrimination in a highly racialized society.

Hernández writes that there is a better way to approach the claims by multiracial people with some non-white ancestry.<sup>172</sup> She notes that “a dignity-focused approach cannot substitute for the harm of inequality on its own terms.”<sup>173</sup> In addressing the dilemma she proposes what she calls a “socio-political race” lens through which to analyze discrimination which “preserves an individual’s ability to assert a varied personal identity, while providing a more effective tool for analyzing and addressing racism and pursuing equality.”<sup>174</sup>

Socio-political race is “neither a biological nor a cultural construction but rather . . . a group-based social status informed by historical and current hierarchies and privileges.”<sup>175</sup> She rejects identity scholars’ focus on personal identity concentrating instead “on the societal and political factors that structure opportunity to privileging and penalizing particular phenotypes and familial connections viewed as raced across groups.”<sup>176</sup> Thus it is the context in which the treatment complained of occurs that is important rather than the person’s racial self-definition. Hernández’s social political racial analysis approach builds on, and refines, Neil Gotanda’s argument about racial formation in his 1991 seminal article critiquing color blindness.<sup>177</sup>

I fear, however, that Hernández’s alternative will not satisfy many advocates for a right to racial personal identity if the goal of identity scholars is being able to access what they consider should be an inheritable racial privilege from their white parent. This desire is heightened when members of the dominant society treat multiracials, especially at those in the higher socio-economic

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 114.

<sup>174</sup> *Id.* at 117.

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

<sup>176</sup> *Id.* at 117-118.

<sup>177</sup> See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 3-5 (1991). See also Banks, *supra* note 4, at 2789-2791, for a discussion of this concept as applied to multiracials.



levels, as “honorary whites”, people who are culturally white, but without full inclusion in mainstream society because of their phenotypical characteristics.<sup>178</sup> “[C]olorism facilitates the ability of partially white individuals to hold higher social status.”<sup>179</sup> The “connection to whiteness means social mobility”<sup>180</sup> and helps explain the tendency of some multiracial people to classify themselves as white.<sup>181</sup>

In seeking personal racial self-identification, multiracials deny or minimize the power of the state to define race both legally and socially. Honorary white status is not a substitute for whiteness. It merely creates a buffer class between white and blacks; it does not make one white or advance the project to dismantle white supremacy. By pressing for recognition of personal racial self-identity, multiracials, naively perhaps, believe that they will gain acceptance. The racial state is controlled by whites, thus racial acceptance as white is theirs to withhold and will only be granted when their interests converge with those of multiracial self-identity advocates.<sup>182</sup>

## CONCLUSION

Social scientists Rockquemore and Arend, after studying individuals from five states with one black and one white parent, conclude: “[w]hile we observe new racial identifications among our mixed-race respondents, we continue to see the lingering constraints of physical appearance that make the range of identity choices differently available.”<sup>183</sup> Their study took place almost two

<sup>178</sup> Rockquemore & Arend, *supra* note 13, at 59. G. Reginald Daniels, referring to the Brazilian racial model, calls this “situational whiteness” “an informal social mechanism by which a select few multiracial individuals, for reasons of talent, culture, or education, have been allowed token mobility into the middle class.” G. Reginald Daniels, *Multiracial Identity in Brazil and the United States*, in WE ARE A PEOPLE: NARRATIVE AND MULTIPLICITY IN THE CONSTRUCTION OF ETHNIC IDENTITY 155 (Paul Spickard & Jeffrey Burroughs eds., 2000).

<sup>179</sup> Shantel Gabriel Buggs, *Does (Mixed-)Race Matter?: The Role of Race in Interracial Sex, Dating, and Marriage*, 11 SOC. CAMPUS 1, 11 (2017).

<sup>180</sup> *Id.*

<sup>181</sup> *See id.* at 13.

<sup>182</sup> *See* Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523-24 (1980). The Supreme Court’s decision in *Brown* to rule against its long-held support of segregationist policies cannot be fully understood without understanding how the interest of whites pushing for desegregation converged with the interests of blacks. *See id.*

<sup>183</sup> Rockquemore & Arend, *supra* note 13, at 61.

decades ago.<sup>184</sup> Nevertheless, other social science studies suggest “that anyone who ‘carries a visible “stigmas sign”’ becomes reduced from the view of a ‘whole and usual person’ into one that is less desired and ‘discounted.’”<sup>185</sup> This reality of race in America leaves one to understand why some multiracials support recognition of personal racial identify. They want to avoid the opportunity-limiting stigma of blackness.

One the other hand, we live in a time when law and society are recognizing greater fluidity with regard to gender and sexuality, considered by some as social constructs.<sup>186</sup> Thus it may seem disingenuous to question the right to racially self-identify in a way different from the identity imposed by society. This attempted analogy, however, ignores the possibility that race is not socially constructed in the same way as sexuality and gender. Philosopher Tina Fernandes Botts emphasizes that unlike sexuality or gender, race is different “since American racial identity is primarily externally derived . . . defined with reference to one’s ancestry.”<sup>187</sup>

People cannot change their ancestry. Therefore, requiring American society to recognize a racial identity that is inconsistent with how race is constructed in America is problematic. More importantly, the personal identity goals of many identity scholars seem at odds with the larger post-civil rights anti-subordination racial project.

<sup>184</sup> The survey occurred between 1997 and 2002 and involved participants from Michigan, Indiana, Connecticut, Massachusetts, and Alabama. *See id.* at 53.

<sup>185</sup> Marchell Goins, Kyneitres Good & Cori Harley, *Perceiving Others as Different: A Discussion on the Stigmatization of the Mentally Ill*, 19 ANN. HEALTH L. 441, 441 (2010) (citing Stephen Pollack, et al., *The Dimensions of Stigma: The Social Situation of the Mentally Ill Person and the Male Homosexual*, 85 J. ABNORMAL PSYCHOL. 105, 105 (1976)).

<sup>186</sup> *See* Patricia Yancey Martin, *Gender As Social Institution*, 82 SOC. FORCES 1249, 1263-65 (2004). *See generally* STEVEN SEIDMAN, *THE SOCIAL CONSTRUCTION OF SEXUALITY* (3d ed. 2010).

<sup>187</sup> Botts, *supra* note 155, at 308.