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## IS THERE A “MULATTO ESCAPE HATCH” OUT OF RACISM?: A REFLECTION ON MULTIRACIAL EXCEPTIONALISM DURING A TIME OF #BLACKLIVESMATTER

Tanya Katerí Hernández\*

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A mulatto escape hatch is “an escape from the disabilities of blackness for some colored people.”<sup>1</sup>

To have a symposium organized to review the ideas in my book, *Multiracials and Civil Rights: Mixed-Race Stories of Discrimination*,<sup>2</sup> is an honor, and the JCREd editors, along with their dynamic Faculty Advisors Elaine Chiu and Rosa Castello, have my gratitude for pulling it all together. Having each symposium contributor take the time to deeply engage the ideas in the book is an incredible gift, and exactly what every author dreams of—being read and provoking reflection. Without readers, ideas do not have an opportunity to matter. Thank you Taunya Lovell Banks, Nancy Chi Cantalupo, and Jasmine Mitchell, for helping my ideas matter, even where you did not fully agree with them. Now as to those points of disagreement . . . .

Taunya Lovell Banks astutely observes that *Multiracials and Civil Rights* “sidesteps the question of whether there is a right to

\*Archibald R. Murray Professor of Law at Fordham University School of Law (THernandez@law.fordham.edu). This essay is dedicated to the late Anani Dzidzienyo, the much revered Brown University Professor of Africana Studies, who taught me and so many others the skill of critical racial analysis. Obrigada padrinho. Saudade de você sempre.

<sup>1</sup> CARL N. DEGLER, *NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* 178 (1971) (coining the term “mulatto escape hatch” to describe the intermediate social position of Brazilian mixed-race persons between Whites and Blacks).

<sup>2</sup> TANYA KATERÍ HERNÁNDEZ, *MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES OF DISCRIMINATION* (2018).

[racial] self-definition that must be respected.”<sup>3</sup> I understand this observation to be expressing a reader’s curiosity as to why a book focused on concerns with equality would not stake a position on how personal choices about racial identity affect racial hierarchy. The omission was not inadvertent. The primacy of wanting to intervene in multiracial-identity proposals for the reform of civil rights laws that have the real danger of eroding racial equality discouraged me from deviating in any way from this principal focus.

Moreover, for at least twenty years, numerous commentators and scholars have thoroughly excavated the politics of treating multiracialism as a distinct racial identity.<sup>4</sup> Yet the multiracial identity movement response has consistently been resistant to any political considerations of what they perceive to be a very personal choice.<sup>5</sup> The questioning of multiracial identity has not yielded the intended space for productive debate and reflection. Instead, it has caused many multiracial-identified persons to shut down behind a barricade of hurt feelings.<sup>6</sup> The resentment stems from the supposition that identity-critics are so focused on maintaining an *antiquated* model of White versus Black civil rights that they are not truly concerned with the wellbeing of multiracial-identified persons.<sup>7</sup>

Thus, rather than having multiracial-identified readers close off from the insights in the book, I decided to take a page from social workers and others in the helping professions, who “meet people where they are.”<sup>8</sup> This means connecting with people in a way that

<sup>3</sup> Taunya Lovell Banks, *Personal Identity Equality and Racial Misrecognition: Review Essay of MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES OF DISCRIMINATION*, 34 J. OF C.R. & ECON. DEV. 13, 35 (2020).

<sup>4</sup> See HABIBA IBRAHIM, *TROUBLING THE FAMILY: THE PROMISE OF PERSONHOOD AND THE RISE OF MULTIRACIALISM* xxvii (2012); JARED SEXTON, *AMALGAMATION SCHEMES: ANTIBLACKNESS AND THE CRITIQUE OF MULTIRACIALISM* 5 (2008); Paul Spickard, *Does Multiraciality Lighten? Me-Too Ethnicity and the Whiteness Trap*, in *NEW FACES IN A CHANGING AMERICA: MULTIRACIAL IDENTITY IN THE 21<sup>ST</sup> CENTURY* 289, 293 (Loretta I. Winters & Herman L. DeBose eds., 2003); Minkah Makalani, *A Biracial Identity or a New Race? The Historical Limitations and Political Implications of a Biracial Identity*, 3 *SOULS* 83, 107 (2001).

<sup>5</sup> See HERNÁNDEZ, *supra* note 2, at 101.

<sup>6</sup> See *id.* at 120.

<sup>7</sup> See *id.* at 97.

<sup>8</sup> Clay Drinko, *Meet Them Where They Are*, *PSYCHOL. TIMES* (Mar. 4, 2020), <https://www.psychologytoday.com/us/blog/play-your-way-sane/202003/meet-them-where-they-are>; *Social Workers: Meeting Families Where They Are*, *CROSSROADS HOSPICE &*

is effective *for them*, by considering their needs and emotions.<sup>9</sup> In the multiracial context specifically, it means refraining from disputing a person’s belief that personal racial identity is an individual choice disconnected from social influence and political consequences. The value of the book’s non-engagement with multiracial personal identity is that multiracial-identified persons are not triggered with resentments that close them off from considering new ideas. As a consequence, the book’s invitation to consider the concrete ways racism operates and affects all non-Whites, regardless of their personal racial identity, is not automatically rejected. That is the primary goal of the book.

However, the narratives about discrimination and its effects provide data<sup>10</sup> that may also come to influence how those with mixed-race backgrounds choose to racially identify. Being provided actual data about the racialization process that harms all non-Whites enables individuals to be better informed amidst the rhetoric about multiracial exceptionality. Once exposed to the actual details of how incidents of discrimination lump multiracial-identified persons into the denigrated group of non-White racial undesirables, the politics of multiracial personal identity are unassailable. Nevertheless, regardless of the racial label an individual adopts, the book’s socio-political race approach is offered as the path forward for consciously choosing antiracist politics separate from the choice of personal racial identity.<sup>11</sup> A socio-political race inquiry into the existence of discrimination does not focus on a claimant’s personal identity but rather the context of how the claimant was treated within any existing racial hierarchy.<sup>12</sup> As the concluding sentences of *Multiracials and Civil Rights* state, “we do not choose our color, we [can] choose our commitments. We do not choose our parents, but we do choose our politics.’ Importantly, we can choose social justice.”<sup>13</sup>

PALLIATIVE CARE (Mar. 9, 2016), <https://www.crossroadshospice.com/hospice-palliative-care-blog/2016/march/09/social-workers-meeting-families-where-they-are/>.

<sup>9</sup> See Denise Lazo & Ellinor Vik, *Reflections on Empathy in Social Work Practice*, U. OF GÄVLE DEP’T OF SOC. WORK & PSYCHOL. 5, 10 (2014), <https://www.diva-porta.org/smash/get/diva2:733643/FULLTEXT01.pdf>.

<sup>10</sup> See HERNÁNDEZ, *supra* note 2, at xii–xiii, xvi, 1, 16–18, 39–44, 55–57, 77–82.

<sup>11</sup> HERNÁNDEZ, *supra* note 2, at 117–18.

<sup>12</sup> See *id.* at 117–18.

<sup>13</sup> *Id.* at 126.

A multiracial choice for social justice irrespective of personal racial identity is exemplified by the contemporary Black Lives Matter (#BLM) movement for racial justice in the criminal justice context. Indeed, #BLM's prominent activists include mixed-race persons such as Shaun King.<sup>14</sup> Nor is Shaun King the only mixed-race person who feels personally implicated and invested in #BLM.<sup>15</sup> *Multiracials and Civil Rights'* examination of the criminal justice context found that mixed-race arrestees describe their experiences of racial profiling and police violence in much the same way that single-race identified non-Whites do.<sup>16</sup> Thus, "[l]ike Trayvon Martin, the [B]lack teenager who was shot dead in 2012 in Sanford, Florida, for looking suspicious by walking home in the rain with his hood on while holding a Skittles bag of candy, multiracial persons can also experience being viewed as inherently suspicious" based upon their non-White racial appearance, like so many other countless non-Whites.<sup>17</sup>

The excessive force case of Brian and Derek Patterson against five White officers from the City of Akron police department is one such story.<sup>18</sup> Brian and Derek are brothers who are identified in the case as biracial and of African ancestry, who came home to Akron, Ohio to visit their family over the Memorial Day weekend in 2006.<sup>19</sup> On the evening of May 27, 2006, the brothers met with friends at the Fat Tuesday Bar in downtown Akron, near the University of Akron.<sup>20</sup> Patrons of Fat Tuesday and the neighboring bars often gather on the sidewalk to mingle and were doing so that evening as well.<sup>21</sup> Approximately several hundred people were gathered together outside when the bars closed that evening.<sup>22</sup>

<sup>14</sup> See *id.* at 77. See also Janell Ross, *The Curious Case of Shaun King, Blogger and Conservative Media Target*, WASH. POST (Aug. 21, 2015, 3:01 PM), <https://www.washingtonpost.com/news/the-fix/wp/2015/08/21/the-curious-case-of-shaun-king-blogger-and-conservative-media-target/>.

<sup>15</sup> See, e.g., Rudy P. Guevarra, et al., *In Solidarity with BLM*, CRITICAL MIXED RACE STUD., <https://criticalmixedracestudies.com/in-solidarity-with-blm/> (last visited Sept. 4, 2020).

<sup>16</sup> See HERNÁNDEZ, *supra* note 2, at 76-77.

<sup>17</sup> *Id.* at 77.

<sup>18</sup> See *Patterson v. City of Akron*, 619 F. App'x 462 (6th Cir. 2015).

<sup>19</sup> See *id.* at 464, 466 n. 1.

<sup>20</sup> See *id.* at 464.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

Brian was sitting on the trunk of a police cruiser for several minutes when a police officer walked over and told him to get off his vehicle.<sup>23</sup> Brian stood up without protest.<sup>24</sup> After the officer walked away, Brian continued talking with a friend and she testified that he then inadvertently leaned on the cruiser but did not sit on it.<sup>25</sup> The friend further testified that after Brian just leaned against the police cruiser, the police officer “grabbed [Brian] up” and put his hands behind his back.<sup>26</sup> The officer testified that when he saw Brian leaning against the police cruiser he told Brian to not even lean on the car, and that he should leave the public area or risk going to jail, and that when Brian refused to leave the officer viewed it as a “defensive posture” and thought Brian might be intoxicated and thus decided to arrest him.<sup>27</sup>

Brian’s older brother Derek saw that two police officers were flanking Brian with his hands cuffed behind him.<sup>28</sup> Brian told him that he did not know why he was handcuffed.<sup>29</sup> The police officer then allegedly “yanked Brian by his left arm from the sidewalk into the street and tried to body slam him.”<sup>30</sup> A predominantly White crowd of about 10 to 12 people followed the officers to the driver’s side of the cruiser and began shouting that the officers were racist and yelling the words “police brutality.”<sup>31</sup>

In the process of arresting Brian, a crowd gathered and someone jumped on an officer, trying to intervene.<sup>32</sup> Additional officers arrived and Brian was tased in the chest, and when he fell to the ground while still handcuffed he was stunned several more times in “the back, left leg, and buttocks.”<sup>33</sup> When Derek saw Brian being tased he attempted to run to him and was tackled to the ground by an officer and was also tased five separate times after he was handcuffed.<sup>34</sup> While the officers dispute the number of times they

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

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

<sup>25</sup> See *id.*

<sup>26</sup> *Id.* at 465 (internal quotations omitted).

<sup>27</sup> *Id.* at 464.

<sup>28</sup> See *id.* at 465.

<sup>29</sup> See *id.*

<sup>30</sup> *Id.* at 465.

<sup>31</sup> *Id.* at 466.

<sup>32</sup> See *id.*

<sup>33</sup> *Id.* at 467.

<sup>34</sup> See *id.* at 467-68.

used their taser guns on the brothers, a computer readout of the taser gun corroborates the number alleged by the brothers.<sup>35</sup>

For the brothers, a simple gathering with friends over a holiday weekend resulted in them being exposed to unprovoked police violence because their presence in the predominantly White space was interpreted as hostile from their “defensive posture.”<sup>36</sup> Unlike the many White young people who were similarly socializing with Brian and Derek out on the sidewalk amidst parked cars and police cruisers, it was only Brian and then his brother Derek who were viewed as inherently suspicious and their leisure as warranting excessive force with taser guns.<sup>37</sup> The general inherent police suspicion of the non-White body is unfortunately also evident in the case of these biracial-identified brothers of African descent. Their personal racial identity as biracial neither diminished nor aggravated the commonality of their experience of the criminal justice system as racially biased.

When the brothers’ excessive force claim went to trial, the judge refused to admit the taser report corroborating their account.<sup>38</sup> Upon appeal, the Sixth Circuit Court of Appeals concluded that the trial court had committed a reversible error in excluding the taser report (because of the mistaken assertion that it was hearsay evidence).<sup>39</sup> The case was accordingly remanded for a new trial.<sup>40</sup> Thereafter the parties reached a settlement agreement, “thereby making the brothers some of the very few litigants to garner success on an excessive force claim against the police.”<sup>41</sup> Contrary to the assumptions of multiracial-identity scholars, their biracial identity neither mitigated their exposure to racially informed excessive force, nor did it interfere with their ability to use the law to redress their grievances.

In short, case law suggests that “multiracial persons can be targeted for police interrogation based upon their racial appearance,

<sup>35</sup> *See id.* at 482.

<sup>36</sup> *Id.* at 464.

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

<sup>38</sup> *See id.* at 479.

<sup>39</sup> *See id.* at 462; *see also* FED. R. EVID. 801 (generally prohibiting the admission into evidence of a person’s oral or written statement offered to prove the truth of the matter stated, when that person is not physically in court and able to be questioned).

<sup>40</sup> *See Patterson*, 619 F. App’x at 479.

<sup>41</sup> HERNÁNDEZ, *supra* note 2, at 79.

just as innumerable other [non-Whites] are on a daily basis.”<sup>42</sup> The book’s case law findings also parallel the results from in-depth interviews where multiracial persons describe being targeted by law enforcement based upon their non-White racial appearances.<sup>43</sup> Stories of White police violence against multiracial persons also circulate in the news media.<sup>44</sup> Mixed-race identity does not alter the influence of racialized stereotypes and implicit bias regarding the inherent criminality of those viewed as non-White. Like so many other anti-discrimination law contexts, the criminal justice system operates in a White/non-White binary that entangles people not based upon their personal identity and/or knowledge about their non-White ancestry, but instead based on their non-White appearance.<sup>45</sup> There is no “mulatto escape hatch” out of racialized police violence when African ancestry is in any way visible.<sup>46</sup>

However, symposium reviewer Nancy Chi Cantalupo queries whether there might instead be a kind of mixed-race on-ramp to sexual harassment.<sup>47</sup> Cantalupo notes that the 2011 National Intimate Partner and Sexual Violence Survey (NISVS) reports that “multiracial” women are disproportionately sexually harassed and raped more than women of other races, and is rightfully concerned about how such women may be sexually victimized based on their racial appearance.<sup>48</sup> Indeed, my own research has also raised the

<sup>42</sup> *Id.* at 84.

<sup>43</sup> See Nicole Reannon Holliday, *Intonational Variation, Linguistic Style and the Black/Biracial Experience* 137-38 (May 2016) (Ph.D. dissertation, New York University) (on file with the Department of Linguistics, New York University).

<sup>44</sup> See Carrie Antlfinger, *Three Ex-Cops Get Long Terms in 2004 Milwaukee Beating*, MADISON.COM (Nov. 30, 2007), [https://madison.com/news/local/three-ex-cops-get-long-terms-in-2004-milwaukee-beating-one-gets-17-years-in/article\\_a985d467-3372-5c4e-bf24-d131fe2475eb.html](https://madison.com/news/local/three-ex-cops-get-long-terms-in-2004-milwaukee-beating-one-gets-17-years-in/article_a985d467-3372-5c4e-bf24-d131fe2475eb.html); Samuel Gonzalez, *Voice of Calm and Reason Emerges: Madison Police Shooting Not Just About Race Because Victim Tony Tyrell Robinson Was Biracial, Says Family Spokesman Uncle Turin Carter*, RIGHT WING NEWS (Mar. 9, 2015), <https://rightwingnews.com/top-news/voice-of-calm-and-reason-emerges-madison-police-shooting-not-just-about-race-because-victim-tony-tyrell-robinson-was-biracial-says-family-spokesman-uncle-turin-carter-video/>; Thomas Tracy, *Cop who received slap on wrist for tackling tennis star James Blake gets hammered for violating minor NYPD rules*, NEW YORK DAILY NEWS (Mar. 18, 2019), <https://www.nydailynews.com/new-york/nyc-crime/ny-metro-james-frascatore-receives-big-punishment-20190316-story.html>.

<sup>45</sup> See DEGLER, *supra* note 1, at 262-63.

<sup>46</sup> *Id.* at 170, 262-63 (coining the term “mulatto escape hatch” to describe the intermediate social position of Brazilian mixed-race persons between Whites and Blacks).

<sup>47</sup> See Nancy Chi Cantalupo, *“I Think You Didn’t Get It Because They Misidentified You as Latina”: A Commentary on MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES OF DISCRIMINATION*, 34 J. C.R. & ECON. DEV. (2020) 39, 59.

<sup>48</sup> See *id.* at 53.



alarm about the intersection of race in gender in the occurrence of sexual harassment.<sup>49</sup> But what exactly is the NISVS data illuminating about the operation of race and gender in how sexual harassment is deployed?

It is here that symposium reviewer Taunya Lovell Banks' caution about the singular focus on reifying *multiracial* as a racial category absent a consideration of *Multiracials and Civil Rights'* socio-political analysis, is brought into stark relief.<sup>50</sup> Women who identify as multiracial can have connections to a huge diversity of ancestries and therefore racial appearances.<sup>51</sup> Furthermore, other women who personally identify with a single racial category may have a racially ambiguous appearance or may themselves be racially mixed (as is often the case with African American identified women).<sup>52</sup> From an empirical research perspective then, the multiracial category is too amorphous to effectively explain anything. Its overlap with presumably single race categories embraced by those with racial mixture also exists, further hampering the ability to elicit analytically useful data with a multiracial category.<sup>53</sup> In fact, sociological deep dives by demographers into data sets like the 2015 Pew Survey<sup>54</sup> purporting to shed light on "multiracial attitudes and experiences," reveal that generation level significantly influences the choice to identify as multiracial.<sup>55</sup> Stated differently, it is impossible to make empirical conclusions about the social status of multiracialism when so many racially mixed people

<sup>49</sup> See Tanya Katerí Hernández, "What Not to Wear" – Race and Unwelcomeness in Sexual Harassment Law: The Story of *Meritor Savings Bank v. Vinson*, in WOMEN AND THE LAW STORIES 277, 278 (Elizabeth Schneider & Stephanie Wildman eds., 2010); Tanya Katerí Hernández, *The Racism of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 479, 480 (Catharine MacKinnon & Reva Siegel eds., 2004); Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & The Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1239-40 (2006).

<sup>50</sup> See HERNÁNDEZ, *supra* note 2 at 2-3, 111, 117-18; Banks, *supra* note 3, at 15-16.

<sup>51</sup> See Taunya Lovell Banks, *Multiracial Malaise: Multiracial As A Legal Racial Category*, 86 FORDHAM L. REV. 2792 (2018).

<sup>52</sup> See Ann Morning & Aliya Saperstein, *The Generational Locus of Multiraciality and Its Implications for Racial Self-Identification*, 677 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 59 (2018); see also KIM PARKER ET AL., PEW RESEARCH CTR., MULTIRACIAL IN AMERICA: PROUD, DIVERSE AND GROWING IN NUMBERS 37 (2015), [https://www.pewsocial-trends.org/wp-content/uploads/sites/3/2015/06/2015-06-11\\_multiracial-in-america\\_final-updated.pdf](https://www.pewsocial-trends.org/wp-content/uploads/sites/3/2015/06/2015-06-11_multiracial-in-america_final-updated.pdf).

<sup>53</sup> See Morning & Saperstein, *supra* note 52, at 59.

<sup>54</sup> PARKER ET AL., *supra* note 52, at 1.

<sup>55</sup> See Morning & Saperstein, *supra* note 52, at 61.

are not captured by the category.<sup>56</sup> Generational diversity is therefore another factor that hinders the multiracial category from providing any useful data.<sup>57</sup>

The attenuated nature of the data that is inherent to using the amorphous category of multiracial is in large measure why the U.S. Census Bureau refuses to use it as a racial category on the decennial census racial question.<sup>58</sup> Since 2000, the census racial question instead directs respondents with multiple racial ancestries to “check all that apply.”<sup>59</sup> The *check all that apply* model of compiling statistics enables researchers to analyze data that provides a specificity needed for meaningful racial analysis.<sup>60</sup> Racial specificity is crucial because mixed-race people are often alternatively either welcomed or excluded depending on what their particular racial ancestral connections are.<sup>61</sup> For example, research of online dating indicates that White male daters are more receptive to White-Asian and White-Latino mixed-race profiles and most disinterested in White-Black mixed-race profiles.<sup>62</sup> As the *Multiracials and Civil Rights* socio-political analysis of racism reveals, not all those who personally identify as “multiracial” have the same *multiracial* experience.<sup>63</sup> The specifics of known racial ancestry and appearance are much more influential on life circumstances.

It is thus ill-advised to attempt to extrapolate meaning from surveys like the NISVS relying upon the empirically unreliable multiracial category. More insight about the intersection of race and gender can be derived from the qualitative research into how a

<sup>56</sup> See *id.* at 59, 65-66.

<sup>57</sup> See PARKER ET AL., *supra* note 52, at 42-43.

<sup>58</sup> See Revisions to the Standards for the Classification of Federal Data on Race & Ethnicity, 62 Fed. Reg. 58782, 52784 (Oct. 30, 1997) [hereinafter Revisions] (discussing that a “multiracial” category may be too broad and compromise the utility of the data while also acknowledging the need to accommodate individuals who identify with more than one race by extending to them the ability to mark the multiple that apply).

<sup>59</sup> See Tanya Katerí Hernández, “Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97 at 112 (1998).

<sup>60</sup> See Revisions, *supra* note 58, at 58789 (explaining how the “mark all that apply” method allows data producers to provide detailed distributions of all possible combinations to the racial question).

<sup>61</sup> See generally HERNÁNDEZ, *supra* note 2.

<sup>62</sup> See Celeste Vaughan Curington, Ken-Hou Lin & Jennifer Hickey Lundquist, *Positioning Multiraciality in Cyberspace: Treatment of Multiracial Daters in an Online Dating Website*, 80 AM. SOC. REV. 764, 773 (2015).

<sup>63</sup> See generally HERNÁNDEZ, *supra* note 2.

particular vision of racially mixed women is sexualized (regardless of whether she identifies as mixed-race or not). For instance, Jasmine Mitchell's work illustrates how media outlets in both Brazil and the United States present a very specific sexualized visual portrayal of racially mixed women that does not encompass darker skin or tightly coiled hair.<sup>64</sup> That sexualization of the specifically crafted racialized image of an *exotic* woman is one that is simultaneously under and over inclusive with respect to a multiracial category, inasmuch as it excludes many racially mixed women who are darker skinned and includes many light skin women who do not identify as multiracial.<sup>65</sup> It is also important to underscore that sexualizing women as *exotic* has already been documented to be a racial project rooted in stereotypes about non-White wantonness irrespective of their personal racial identity.<sup>66</sup> In short, researching how notions of race influence the sexualization and victimization of women is incredibly important, but using a multiracial category for the research hinders the pursuit of useful information for addressing that victimization.

Related to the topic of effective research design is Cantalupo's query about the adequacy of relying upon court cases.<sup>67</sup> First, it should be noted that *Multiracials and Civil Rights* has as its primary aim to investigate the assertion that jurists are unable to properly administer discrimination claims brought by multiracial-

<sup>64</sup> See generally JASMINE MITCHELL, *IMAGINING THE MULATTA: BLACKNESS IN U.S. AND BRAZILIAN MEDIA* (Univ. of Ill., 2020).

<sup>65</sup> See generally *id.*

<sup>66</sup> See Tanya K. Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER, RACE & JUST. 183, 214 (2000-2001) (using the term "the politics of the exotic" to explicate how the racial non-Whiteness of women is sexualized); see also Kamala Kempadoo, *Continuities and Change: Five Centuries of Prostitution in the Caribbean*, in SUN, SEX, AND GOLD: TOURISM AND SEX WORK IN THE CARIBBEAN 3, 4 (Kamala Kempadoo ed., 1999) (defining sex tourism as travel to other countries for the purpose of having sexual relations with exotic natives "in exchange for money, luxury items, and clothes, or a ticket off the island"); Amalia L. Cabezas, *Women's Work is Never Done: Sex Tourism in Sosúa, the Dominican Republic*, in SUN, SEX, AND GOLD: TOURISM AND SEX WORK IN THE CARIBBEAN, 93, 110 (Kamala Kempadoo ed., 1999) (describing the sex tourism industry's "desire for an exotic 'other' constituted in racial, sexual, and national differences"); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 191-92 (1997) (describing stereotypes of Asian women, including beliefs that they are exotic, masochistic and "the antidote to visions of liberated career women"); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 819-20 (1993) (describing stereotypes of Asian women as exotic and submissive, and Latinas as "naturally sexual").

<sup>67</sup> See Cantalupo, *supra* note 47, at 42, 62.

identified claimants because they do not understand the experiences of such claimants and the law is too racially binary to resolve their claims. Given that aim, the focus on court cases is essential.

There is also a broader benefit of focusing on court cases. Court cases are the domain in which narratives about racial discrimination are formulated, and its language effectively deployed to clarify what is racially-motivated bias.<sup>68</sup> The language and grammar of anti-discrimination legal cases illuminate what is often obfuscated in societal exotification of multiracial status and the deflection from the realities of racism.<sup>69</sup>

This is not to say that court cases are perfect and always precise in their articulation. Nevertheless, court cases have the advantage of being the space in which longstanding attended focus has been dedicated to formulating devices for identifying and describing discrimination.<sup>70</sup> In short, legal cases help to illuminate the contours of what is discriminatory in the stories of multiracial-identified persons, because it is the public space dedicated to exposing and naming the harms of discrimination.<sup>71</sup>

It is the examination of the legal cases that reveals the recurring pattern of multiracial-identified persons experiencing discrimination in a before-and-after manner. The “before” refers to the state of non-discrimination that exists before the defendant learns that the claimant’s racial appearance is rooted in non-Whiteness and often specifically Blackness.<sup>72</sup> After discovering the racial specifics of the multiracial-identified person’s ancestral connections is the moment the racial discrimination follows.<sup>73</sup> This pattern of the before-and-after unfolding of discrimination demonstrates how multiracial narratives of discrimination often contain built-in comparator evidence that is persuasive to judges and juries, contrary to the multiracial-identity scholar claim that mixed-race claimants are especially hampered by the judicial demand for a showing that persons of other races similarly situated to the claimant were

<sup>68</sup> See HERNÁNDEZ, *supra* note 2, at 6.

<sup>69</sup> See generally *id.*

<sup>70</sup> See *id.* at 12.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.* at 13.

<sup>73</sup> See *id.*

treated better because of race.<sup>74</sup> Notably, the before-and-after dynamic in the legal cases also illuminates the disconnect between personal racial identity and experiences of racial discrimination that is otherwise overlooked in conjectures about the discrimination multiracial-identified persons experience.<sup>75</sup> Using legal cases as research sources provides insights not otherwise prevalent in public discourse.

Cantalupo raises a well-meaning concern that court cases cannot capture all the ways in which some potential claimants never bring their claims into the legal system.<sup>76</sup> Yet this is a concern that is relevant to potential claimants of all racial identities—not only those who are multiracial identified. The hypothetical story of “Liz” laid out by Cantalupo<sup>77</sup> actually exemplifies the common access to justice plight that multiracial-identified potential claimants share with others of various racial identities. Liz feared she was discriminated against because she did not appear “enough” like a woman of color for an employer seeking visual validation of its racial inclusion efforts.<sup>78</sup> That is not a dynamic unique to mixed-race persons. Color discrimination claims have frequently been brought by light skin claimants who believed they experienced disparate treatment because they were not visually “Black enough” to African American supervisors and hiring personnel.<sup>79</sup>

Liz’s anxiety that bringing a claim might harm racial solidarity and progress for others<sup>80</sup> is also not unique to multiracial-identified persons. Studies of African American women who have been sexually harassed often note the disinclination to file claims when it is an African American man who is the harasser.<sup>81</sup> Like the hypothetical Liz, the actual African American women interviewed

<sup>74</sup> See Suzanne Goldberg, *Discrimination by Comparison*, 120 *YALE L.J.* 744-45 (2011) (describing the judicial search for comparator as the “predominant methodological device for evaluating discrimination claims”).

<sup>75</sup> See HERNÁNDEZ, *supra* note 2, at 100.

<sup>76</sup> Cantalupo, *supra* note 47, at 42, 62.

<sup>77</sup> See *id.* at 39–41.

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

<sup>79</sup> See generally Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 *UCLA L. REV.* 1705 (2000).

<sup>80</sup> See Cantalupo, *supra* note 47, at 41.

<sup>81</sup> Charles B. Adams, *The Impact of Race on Sexual Harassment: The Disturbing Confirmation of Thomas/Hill*, 2 *HOW. SCROLL* 1, 17-18 (1993); Anna-Maria Marshall, *Closing the Gaps: Plaintiffs in Pivotal Sexual Harassment Cases*, 23 *LAW & SOC. INQUIRY* 761, 779 (2006).

prioritize racial solidarity and community uplift over filing their claims in court.<sup>82</sup> The intersectional position of being simultaneously raced and gendered make the decision of whether to file discrimination claims fraught for all women of color.<sup>83</sup> Finally, large-scale surveys of people of all races show that many people do not file claims because they are unsure whether their claim is a “real” instance of discrimination, and if so whether it is viable.<sup>84</sup>

Hypothetical Liz has lots of company, as many people report being discouraged from filing claims of discrimination.<sup>85</sup> Barriers to filing claims are real and deserve attention and remediation for persons of all racial backgrounds. Given that commonality of unfiled claims across racial groups, it is entirely appropriate for *Multiracials and Civil Rights* to assess the adequacy of law for those who do file claims.

Furthermore, symposium reviewer Jasmine Mitchell’s essay even suggests that *Multiracials and Civil Rights* not only illuminates the question about the adequacy of law for claims brought by multiracial-identified claimants, but it also “opens up potential forms of solidarity and coalitions for anti-racist struggles across various communities.”<sup>86</sup> Specifically, the socio-political approach proposed in *Multiracials and Civil Rights* prompts an assessment of how instances of discrimination connect to structures of racism rather than personal racial identity.<sup>87</sup> As such it is in step with Ibram X. Kendi’s concept of an antiracist.<sup>88</sup> An antiracist actively confronts power and policies that create racial inequalities irrespective of their racial identity.<sup>89</sup>

The reactions to #BlackLivesMatter effectively illustrate the distinctions between responses rooted in concerns with personal

<sup>82</sup> See Adams, *supra* note 81, at 12-13.

<sup>83</sup> See Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1468-69 (1992).

<sup>84</sup> See Laura Beth Nielsen, Ellen C. Berrey & Robert L. Nelson, *Dignity and Discrimination: Employment Civil Rights in the Workplace and in Courts*, 92 CHI.-KENT L. REV. 1185, 1189 (2017).

<sup>85</sup> See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 653-54 (1980-81).

<sup>86</sup> Jasmine Mitchell, *Commentary and Book Review: MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES OF DISCRIMINATION*, 34 J. C.R. & ECON. DEV. (2020) 1, 11.

<sup>87</sup> See HERNÁNDEZ, *supra* note 2.

<sup>88</sup> See IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 9 (2019).

<sup>89</sup> See *id.*

racial identity and responses rooted in socio-political concerns. The embrace of the #WhiteLivesMatter and #WhiteLivesMatter-Too as a response to #BLM is firmly rooted in a concern with White personal racial identity and completely divorced from any considerations with how their experiences connect to structures of systemic racism.<sup>90</sup> Robin DiAngelo characterizes the receding into personal racial identity when being exposed to empirically documented facts about the harms of racial hierarchy, as evidence of a “White fragility” that keeps racial inequality in place.<sup>91</sup>

One contrasting non-racially fragile response to #BLM is that of those multiracial-identified persons who embrace a “Black Multiracial” or “Black Biracial” personal identity to reflect how their Black ancestry influences social reactions and racially positions them at the same time that their interracial family dynamics may be culturally distinctive from single-race identified families.<sup>92</sup> Self-identified Black multiracials and Black biracials have not responded to #BLM with concerns about how their personal identities are not specifically named by #BLM, or otherwise threatened by the naming of Blackness as the target of victimization. Instead, self-identified Black multiracial and Black biracial persons and scholars have used the socio-political lens to recognize how their own experiences of being racially profiled are part of the #BLM concerns irrespective of how one personally identifies.<sup>93</sup> Similarly, the Critical Mixed Race Studies Association, the national organization of scholars researching multiracial identity issues from a critical perspective, have also aligned themselves with the social

<sup>90</sup> See Nell Irvin Painter, *White Identity in America is Ideology, Not Biology. The History of ‘Whiteness’ Proves It.*, NBC NEWS (June 27, 2020, 4:50 AM), <https://www.nbcnews.com/think/opinion/white-identity-america-ideology-not-biology-history-whiteness-proves-it-ncna1232200>.

<sup>91</sup> See generally ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* 22 (Beacon Press, 2018).

<sup>92</sup> See Amity Page, *Editorial: Biracial in the Time of Black Lives Matter*, NBC NEWS <https://www.nbcnews.com/news/nbcblk/editorial-biracial-time-black-lives-matter-n466801> (Nov. 22, 2015, 3:10 AM).

<sup>93</sup> See *id.*; see also generally SIKA A. DAGBOVIE-MULLINS, *CROSSING B(L)ACK: MIXED-RACE IDENTITY IN MODERN AMERICAN FICTION AND CULTURE* (Univ. Tenn. Press, 2013); RALINA L. JOSEPH, *TRANSCENDING BLACKNESS: FROM THE NEW MILLENNIUM MULATTA TO THE EXCEPTIONAL MULTIRACIAL* (Duke Univ. Press, 2013); Jennifer Patrice Sims & Remi Joseph-Salisbury, “We Were All Just the Black Kids”: *Black Mixed-Race Men and the Importance of Adolescent Peer Groups for Identity Development*, 6 SOC. CURRENTS 51, 53 (2019).

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justice aims of #BLM.<sup>94</sup> In short, being an Antiracist includes the socio-political recognition that there is no *mulatto escape hatch* out of racism whatever your personal racial identity may be.

<sup>94</sup> *In Solidarity with BLM*, CRITICAL MIXED RACE STUD., <https://criticalmixedracestudies.com/in-solidarity-with-blm/> (last visited Aug. 13, 2020).