Book Talk

Multiracial and Civil Rights: Mixed Race Stories of Discrimination
by Tanya Katerí Hernández

Discussion of Civil Rights and Race Equality in a Growing Multiracial World

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Fordham Law School
Hill Faculty Conference Room (7-119)
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Juan Cartagena  
President and General Counsel of Latino Justice

One of the nation’s leading voices on equality and nondiscrimination, Constitutional and Civil Rights Attorney Juan Cartagena inspires change to systems that marginalize communities of color. As a public speaker, El Diario columnist, and Rutgers University lecturer, Juan focuses extensively on Puerto Rican and Latino rights issues, including the community impacts of mass incarceration.

Juan is a graduate of Dartmouth College and Columbia University School of Law and is the recipient of multiple recognitions, including Dartmouth College’s Martin Luther King, Jr. Social Justice Award, and the U.S. Hispanic Leadership Institute’s Cesar Chavez Community Service Award. Juan lives in and represents the State of New Jersey, having previously served as a Municipal Court Judge in Hoboken and as General Counsel to the Hispanic Bar Association of New Jersey.

Tanya Katerí Hernández  
Fordham Law Archibald R. Murray Professor of Law

Tanya Katerí Hernández, is the Archibald R. Murray Professor of Law at Fordham University School of Law, where she teaches Anti-Discrimination Law, Comparative Employment Discrimination, Critical Race Theory, The Science of Implicit Bias and the Law: New Pathways to Social Justice, and Trusts & Wills. She received her A.B. from Brown University, and her J.D. from Yale Law School, where she served as Note Topics Editor of the Yale Law Journal.

Professor Hernández, is an internationally recognized comparative race law expert and Fulbright Scholar who has visited at the Université Paris Ouest Nanterre La Défense, in Paris and the University of the West Indies Law School, in Trinidad. She has previously served as a Law and Public Policy Affairs Fellow at Princeton University, a Faculty Fellow at the Institute for Research on Women at Rutgers University; a Non-resident Faculty Fellow at the Fred T. Korematsu Center for Law and Equality, and as an Independent Scholar in Residence at the Schomburg Center for Research in Black Culture. Professor Hernández is a Fellow of the American Bar Foundation, the American Law Institute, and the Academia Puertorriqueña de Jurisprudencia y Legislación. Hispanic Business Magazine selected her as one of the 100 Most Influential Hispanics of 2007. Professor Hernández serves on the editorial boards of the Revista Brasileira de Direito e Justiça/Brazilian Journal of Law and Justice, and the Latino Studies Journal published by Palgrave-Macmillian Press.

Professor Hernández’s scholarly interest is in the study of comparative race relations and anti-discrimination law, and her work in that area has been published in numerous university law reviews like Cornell, Harvard, N.Y.U., U.C. Berkeley, Yale and in news outlets like the New York Times, among other publications including her book Racial Subordination in Latin America: The Role of the State, Customary Law and the New Civil Rights Response (including Spanish and Portuguese translation editions). Her most recent publication is the book “Multiracials and Civil Rights: Mixed-Race Stories of Discrimination.”

Robin A. Lenhardt (moderator)  
Professor of Law and Faculty Director of Center on Race, Law and Justice at Fordham Law School

Robin A. Lenhardt is a Professor of Law and Faculty Director of the recently launched Center on Race, Law and Justice at Fordham Law School. Professor Lenhardt specializes in matters pertaining to race, family, and citizenship. In addition to Fordham, she has held teaching positions at
Columbia Law School, the Georgetown University Law Center, and the University of Chicago Law School. Before entering legal academia, Professor Lenhardt held a number of positions in the private and non-profit sectors. A law clerk to U.S. Supreme Court Justice Stephen G. Breyer and Judge Hugh Bownes of the U.S. Court of Appeals for the First Circuit, Professor Lenhardt was formerly a Counsel in the Washington, D.C. office of Wilmer, Cutler & Pickering, where she was a member of the litigation team that defended the University of Michigan in the *Grutter v. Bollinger* and *Gratz v. Bollinger* affirmative action lawsuits. Professor Lenhardt received a Skadden Foundation Fellowship to work as a staff attorney for the National Lawyers’ Committee for Civil Rights and was employed as an attorney advisor in the U.S. Department of Justice’s Office of Legal Counsel. She later returned to DOJ to review civil rights issues as part of President Barack Obama’s transition team. Professor Lenhardt’s scholarship has appeared in numerous books and journals, including the *California Law Review*, the *New York University Law Review*, and the *UCLA Law Review*. Professor Lenhardt is currently co-editor of a book entitled *Critical Race Judgements: U.S. Opinions on Race and Law* that will be published by Cambridge University Press. She holds an A.B. degree in English from Brown University; a JD from Harvard Law School; an MPA from Harvard University’s John F. Kennedy School of Government; and an LLM from the Georgetown University Law Center.

**Judge Raymond Lohier**  
*United States Court of Appeals for the Second Circuit*

Judge Lohier is a judge on the United States Court of Appeals for the Second Circuit. He was nominated by President Barack Obama in March 2010 and unanimously confirmed by the United States Senate in December 2010.

For the decade prior to his appointment, Judge Lohier was an Assistant United States Attorney in the Southern District of New York, where he served as Senior Counsel to the United States Attorney, Deputy Chief and Chief of the Securities and Commodities Fraud Task Force, and Deputy Chief and Chief of the Narcotics Unit. As the Deputy Chief and Chief of the Securities and Commodities Fraud Task Force, Judge Lohier was responsible for overseeing the Bernard Madoff prosecutions, the investigation and prosecution of Marc Dreier, the Galleon and other hedge fund-related insider trading cases, as well as several other high-profile fraud cases. Prior to his service as an Assistant United States Attorney, from 1997 to 2000, Judge Lohier served as a Senior Trial Attorney with the Civil Rights Division of the United States Department of Justice, where he spearheaded employment discrimination-related litigation and worked on other civil rights matters of importance to the federal government.


Judge Lohier graduated from Harvard College in 1988. He then earned his J.D. in 1991 from New York University School of Law, where he received a Vanderbilt Medal.

Prior to his appointment, Judge Lohier was a member of the Board of Directors of the Black, Latino, and Asian Pacific American Law Alumni Association and of the Board of Directors of the New York University School of Law Alumni Association. He also served as First Vice-Chairperson of Brooklyn Community Board 6. Judge Lohier is
currently a member of the American Law Institute, the Federal Bar Council Inns of Court, and the New York University School of Law Board of Trustees, as well as an adjunct professor of law at New York University School of Law. He is a recipient of the New York University Alumni Association's Eugene J. Keogh Award for Distinguished Public Service.

**Cara McClellan**  
**Skadden Fellow, NAACP Legal Defense and Educational Fund, Inc.**

Cara McClellan joins the NAACP Legal Defense and Educational Fund, Inc. (LDF) as a Skadden Fellow. Prior to joining LDF, she was a law clerk to the Honorable Gregory M. Sleet of the United States District Court for the District of Delaware and to the Honorable Andre M. Davis of the United States Court of Appeals for the Fourth Circuit. Cara graduated with honors from Yale College, received an M.S.Ed. from Penn Graduate School of Education and a J.D. from Yale Law School.

During law school, Cara participated in clinics where she represented youth in neglect and abuse proceedings and in expulsion proceedings. She served as a Comments Editor of the Yale Law & Policy Review. Cara spent her law school summers as an intern at LDF, an intern at the United States Department of Justice’s Civil Rights Division—Educational Opportunities Section, and as a summer associate at Wilmer Hale.

Cara previously taught middle school with Teach for America in Philadelphia. She is a co-founder of the educational advocacy organization My Sister’s Keeper Collective. Cara has published in the Yale Journal of Sociology, Yale Law & Policy.

**Ann Morning**  
**Associate Professor of Sociology, New York University**

Ann Morning is an Associate Professor of Sociology at New York University and a faculty affiliate of NYU Abu Dhabi. Trained in economics, political science, and international affairs as well as sociology, her research interests include race, demography, and the sociology of science, especially as they pertain to census classification worldwide and to individuals’ concepts of difference. She is a member of the U.S. Census Bureau’s National Advisory Committee on Racial, Ethnic and Other Populations and has consulted on racial statistics for the European Commission and the United Nations. She is currently working with Marcello Maneri (U. Milan-Bicocca) on a book tentatively entitled "An Ugly Word: 'Race' and Descent in Italy and the United States."
An Excerpt from

MULTIRACIALS AND CIVIL RIGHTS:

Mixed-Race Stories of Discrimination

By Tanya Katerí Hernández

(NYU press 2018)
Chapter 1: Racial Mixture as a Presumed Complication in Discrimination Law

“Impurity and hybridity, in and of themselves, are no guaranteed challenge to the racial orders of white supremacy and antiblackness.”

In 2016, Cleon Brown thought it would be fun to take the Ancestry.com test. Cleon appeared to the world as white and all 47 years of his life had been lived as white man. But he was curious to seek out confirmation about the Native American ancestry rumored to be in his family as well. He was thus surprised when the test results indicated that there was zero Native American ancestry, and instead eighteen-percent Saharan African ancestry. Cleon shared the news with his fellow police officers and the racist commentary began in earnest. He was called “Kunta” after the fictional slave in the “Roots” book and television series. More racial commentary and harassment followed. He was excluded from police sergeant training, mandatory TASER instructor recertification training, along with police department business meetings. Eventually Cleon was asked to resign as Sergeant and return to the lower status of patrol officer. Eighteen years of collegial work together as police officers was immaterial in the face of the knowledge of Cleon’s distant African ancestry. Cleon’s white appearance and life as a white man was immaterial to his racial harassers. All that mattered was his known affiliation however slight with the racial category of blackness and his newfound status as a non-white racially mixed person.

Ancestry.com thus introduced Cleon to the world of multiracial discrimination. His lawsuit against the police department followed in 2017. According to the Federal Bureau of

Investigations, Cleon is not the only multiracial victim of racial hatred. In 2015 alone, 3.8 percent of victims of hate crimes were multiracial. This book seeks to illuminate what it means for civil rights law when and how mixed-race persons experience racial discrimination.

The growth of a mixed-race population in the United States that identifies itself as “multiracial” has commanded public attention. The U.S. Census Bureau began permitting respondents to simultaneously select multiple racial categories to designate their multiracial backgrounds with the 2000 Census. With the release of data for both the 2000 and 2010 census years much media attention has followed the fact that first 2.4% then 2.9% of the population selected two or more races. The Census Bureau projects that the self-identified multiracial population will triple by 2060. Yet mixed-race peoples are not new. Demographer Ann Morning notes that their early presence in North America was noted in colonial records as early as the 1630’s.

Nevertheless, scholars have documented how the mainstream press has universally celebrated the growth of a multiracial identified population as a new phenomena that portends “the end of race as we know it.” Indeed, advertisers have seized upon the interest in what sociologist Kimberly McClain DaCosta describes as “racially ambiguous” and

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presumably mixed-race appearing persons for marketing numerous products.\textsuperscript{8} Ethnic Studies scholar Caroline Streeter notes that the ubiquity of media images featuring mixed-race people as visions of racial harmony is a device which “emphasizes the pleasurable aspects of ethnic diversity without engaging the challenge of cultural differences and the existence of racial hierarchies and racial inequality. Multicultural images that use multiracial people envision a future free of such power struggles.\textsuperscript{9}”

The public fascination with multiracial identity has promoted the belief that racial mixture will, in and of itself, destroy racism. For instance, leaders for the recognition of a “multiracial” census category frequently posit that multiracials are a “unifying force,”\textsuperscript{10} on the theory that multiracial individuals “as a group may be the embodiment of America's best chance to clean up race relations."\textsuperscript{11} Indeed, the equating of racial mixture with racial harmony is often quite explicit. Harvard sociologist Orlando Patterson agrees: “[i]f your object is the eventual integration of the races, a mixed-race or middle group is something you'd want to see developing.... The middle group grows larger and larger, and the races eventually blend."\textsuperscript{12} Similarly demographer William Frey, the author of “Diversity Explosion: How New Racial Demographics Are Remaking America,” asserts that multiracial identity will blur racial divisions and soothe cultural tensions.\textsuperscript{13} The multiracial discourse

narrative thus posits that “mixing away” racism will absolve the nation from having to address entrenched racial disparities in socioeconomic opportunity.\textsuperscript{14}

Yet, the current valorization of multiracial people is part of a complex dualism. This is because the imagining of mixed-race people as shamans of racial peace, is accompanied by a social reality in which multiracial people are targets of racial discrimination. The idealization of Hawaii as a site of mixed-race racial harmony is a perfect example of this dualism. Sociologist Laura Desfor Edles notes that “the myth of Hawai‘i as a model minority state grossly misconstrues the complex workings of racialization.\textsuperscript{15}” Over-investment in the notion of Hawaii as an exceptional multiracial space has been accomplished by an ahistorical envisioning of Hawaii devoid of its realities of racial hierarchy and subordination within the midst of racial mixture. Hawaiians are thus imagined as mixed-race symbols of racial peace at the same time that their victimization as targets of discrimination is overlooked. It is thus prudent to treat with caution any celebrations of multiracial identity that attribute mystical healing and racial knowledge to mixed-race persons. Yet the public discourse is greatly animated by the idealization of multiracial people, as best exemplified by news stories such as that of the New York Times’s “What Biracial People Know,” article extolling the presumption that “multiracial people are more open-minded and creative.\textsuperscript{16}”

Indeed, the captivation with multiracial identity has also entered the anti-discrimination law legal context. Specifically, the presence of fluid mixed-race racial identities within allegations of discrimination leads some legal scholars to conclude that civil

rights laws are in urgent need of reform because they were built upon a strictly binary foundation of blackness and whiteness. Building upon the social movement for recognition of multiracial identity on the census and generally, scholars conclude that courts misunderstand the nature of discrimination against mixed-race persons when they do not specifically acknowledge the distinctiveness of their multiracial identity. Even United States Supreme Court litigation has begun to associate the growth of multiracial identity with the obsolescence of civil rights policies. Particularly worrisome has been the judicial suggestion that the growth of multiracial identity undercuts the legitimacy of affirmative action policies that have long sought to pursue racial equality.

The supposition that the multiracial experience of discrimination is exceptional, and not well understood or handled by present anti-discrimination law, is evident in the publications of several multiracial-identity scholars. I coin the term “multiracial-identity scholars” to refer to authors whose scholarship promotes the recognition of the distinct challenges that multiracial identity now presumably presents for civil rights law. For instance, the central claim in legal scholar Nancy Leong’s much cited article, “Judicial Erasure of Mixed-Race Discrimination,” is that mixed-race discrimination claims are not properly administered by the legal system because the mixed-race specificity of the claims is ignored. Other legal scholars agree with Leong’s assessment. Building upon Leong’s analysis, Scot Rives and Tina Fernandes each in turn assert that the legal system is unable to

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address the “unique harms” of multiracial complaints without a specific “multiracial category” in anti-discrimination jurisprudence. In turn, Leora Eisenstadt includes multiracial identity within her call for the creation of a concept of “fluid identity discrimination” where anti-discrimination statutes recognize the fluid nature of identity. Similarly, Camille Gear Rich contends that fluid multiracial claims present “special challenges for antidiscrimination law.” Each of these reform proposals will be discussed further in the next section’s Introduction to Anti-Discrimination Law, and later in chapter six.

Before evaluating the varied proposals that the multiracial-identity scholars set forth, it is important to note that they raise an important point -- as interracial people and multiracial identities proliferate, is a civil rights structure born in black-white binaries sufficient? Is it commodious enough to address the increasing fluidity of racial identity in a changing society? How does or should the move to multiple category checking on the census change the enforcement of civil rights law? This book will explore this, with an eye toward whether current law is sufficient to meet the intended goal of these laws to address and rectify discrimination in public spheres.

The crux of the multiracial identity scholar critique of the emerging cases is that courts often reframe multiracial complainants’ self-identities by describing mixed-race complainants as “monoracial” minority individuals. Specifically, in many cases, judges refer to mixed-race claimants as solely African American or black. These scholars take

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22 Leong, “Judicial Erasure,” 472 & 511. It should be noted that Tina Fernandes and Scot Rives endorse the entirety of Leong’s critique and only depart in how they think the legal system should respond.
issue with this characterization, arguing it hinders the recognition of the racial discrimination that multiracial individuals experience.

In order to examine the important questions that the multiracial-identity scholars raise, *Multiracials and Civil Rights* conducts a rigorous review of the early cases that the scholars refer to, and a larger pool of cases that arose after their publications were released. In addition, this book goes beyond the workplace discrimination context that the multiracial-identity scholars have focused upon, and instead extends into anti-discrimination law enforcement in education, housing, public accommodations, and criminal justice. My close examination of the larger body of claims illuminates a disjunction between the multiracial-identity scholar theoretical critique of anti-discrimination law and the actual adequacy of the judicial administration of the claims.

Specifically, in an overwhelming number of the cases the scholars rely upon, the facts present a complainant whose description of the alleged discrimination includes pointed and derogatory comments about non-whiteness and blackness in particular. The overarching commonality in the cases is the exceptionalism of non-whiteness and blackness, rather than multiraciality, as subject to victimization. Although the claimants may personally identify as multiracial persons, they present allegations of public discrimination rooted in a specific non-whiteness and often black bias that is not novel or particular to mixed-race persons, nor especially difficult for judges to understand. Particularly noteworthy, is the fact that despite the fact that the Pew Research Center estimates that it is Native Americans of white ancestry who represent the largest proportion of the U.S. multiracial population as 50% of all multiracials (when solely considering the racial identities of parents and grandparents) and that Native Hawaiians and other Pacific Islanders were the group with highest proportion of its members to select multiple races on the 2010 and 2000 census (at a rate of 55.9% and

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54.4% respectively,\textsuperscript{25} it is multiracials of African ancestry who overwhelmingly file multiracial identified racial discrimination legal claims. Despite the disproportionate presence of black multiracial discrimination claims, only 7.4 percent of blacks selected more than one race on the 2010 census and 4.8 percent on the 2000 census.\textsuperscript{26}

In short, the increase in the number of individuals identifying as mixed-race or multiracial does not present unique challenges to the pursuit of political equality inasmuch as the cases are mired in a long existing morass of bias against non-whiteness and its intimate connection to white dominance. Rather than point to a need for a shift away from the existing civil rights laws, the cases instead indicate the need for further support of the current structures. This book concludes that the multiracial discrimination cases are helpful in highlighting the continued need for attention to white supremacy and for fortifying the focus of civil rights law on racial privilege and the lingering legacy of bias against non-whites.

The objective of the book is to elucidate the distinction between the presumed exceptional space that multiracial persons are rhetorically imagined to occupy in the public discourse, and the binary non-white/white racial realities that they actually experience. By demonstrating the key difference between the reality of the cases and the theorized notions about the cases,\textit{Multiracials and Civil Rights} seeks to further racial justice efforts by setting forth an overt “socio-political race” lens for analyzing matters of discrimination, rather than the personal racial identity perspective utilized by multiracial-identity scholars and legal actors. The socio-political race perspective meaningfully preserves an individual’s ability to


assert a varied personal identity, while providing a more effective tool for publicly addressing racism and pursuing equality.

Moreover, the book will illustrate that the claim for multiracial exceptionalism is deeply flawed, misses the continuing power of white dominance, and poses a real danger to equality. This will be done by tracing the legal challenges to race-based affirmative action over the last ten years and noting the ways in which Supreme Court affirmative action litigation has positioned mixed-race persons as disrupting the societal need for racial remediation. The empirical documentation of the book’s cases disrupts this notion and shows that multiracials are not an exception to the white/non-white dynamic of racism and instead are being invoked as a tool to dismantle the protections of civil rights law.

In sum, the book will explore the following questions: 1) Does the increase in the number of individuals who identify as mixed-race present unique challenges to the pursuit of political equality? 2) How should law respond to multiracial racial identity in a manner that enables such persons to protect themselves from domination? And, 3) Does the advent of multiracial racial identity necessitate a new vision of what racial equality means?

The exploration of these questions are grounded in an examination of all electronically available anti-discrimination law cases with mixed-race identified claimants, within the discrimination contexts of employment, education, housing, public accommodations and criminal justice. These contexts were specifically chosen because they form the bedrock of civil rights equality law. (The voting rights context was omitted because under the Voting Rights Act a group cannot raise a claim unless the group is sufficiently numerous and geographically compact to constitute a politically cohesive insular minority group in any given electoral unit. Thus far, multiracials are too geographically dispersed to satisfy this criterion.) The cases were collected from the electronic case law databases of

Westlaw and Lexis by seeking out each instance in which a claimant alleged racial discrimination and identified as “multiracial,” “biracial,” “mixed-race,” “racially-mixed” and “mixed-heritage.” Excluded from the analysis were cases where a claimant happened to have mixed-race ancestry but did not personally identify as mixed-race, as the purpose of the inquiry is to explore the adequacy of the law’s response to multiracial identity. Thus a case where a claimant raised a concern with discrimination from having the “racial secret” of his black ancestry conflict with his presentation as “white” person, was excluded for not presenting a specific multiracial identity.28

It should be noted that the compilation of cases includes the very same cases discussed by the multiracial-identity literature but greatly expands both their number and scope. While the multiracial-identity literature is primarily restricted to the discussion of eight employment discrimination cases, my empirical study includes twenty-five employment court cases along with twelve additional administrative claims dealt with directly by the Equal Employment Opportunity Commission government agency. More importantly, this book extends beyond the multiracial-identity literature sphere of the workplace, with an interrogation of claims regarding discrimination in education, housing, public accommodations, and the administration of criminal justice. Each of the aforementioned chapters directly engages the details of every relevant case in order to concretely demonstrate how they counter the multiracial-identity scholar thesis of the inadequacy of anti-discrimination law. Given the deep seated attachment to the notion that multiracial discrimination is a unique phenomenon that current anti-discrimination law is too narrow to properly address, it is especially important to be methodical and exacting in the exposition of the overwhelming number of cases which demonstrate the contrary. The stories that

multiracial claimants themselves tell of their experiences of discrimination are at the heart of this book and its concern with eradicating racism for all.

Each of the chapter reviews of cases will discuss the relevant civil rights statutes and any parallel constitutional inequality claims that were raised by the claimants. The discussion of the cases begins with Chapter Two’s examination of the workplace context, the arena in which the greatest number of multiracial discrimination cases are filed. Chapter Three will then assess educational discrimination claims. Chapter Four will examine housing and public accommodations discrimination. Chapter Five will consider the treatment of multiracials in the criminal justice system.

Chapter Six will then unpack how despite the fact that the empirical record does not by and large show anti-mixture animus, what fundamentally concerns multiracial-identity scholars is the pursuit of “Personal Identity Equality.” The chapter will also examine the ill effects on anti-discrimination law of the multiracial “Personal Identity Equality” approach to civil rights as evidenced by the rhetorical positioning of multiracials as the justification for dismantling affirmative action programs. Chapter Seven concludes by offering a socio-political perspective on race to supplant the multiracial personal identity approach for assessing multiracial discrimination claims.

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An Introduction to Anti-Discrimination Law and Its Perceived Multiracial Failings

The chapters that follow will each describe discrimination allegations filed by multiracial claimants in a variety of legal contexts that include employment, education, housing, public accommodations, and criminal justice. While each of those areas has its own developed body of law, the equality principles that ground how to prove a claim of
discrimination are based in several common precepts that it will be useful to introduce from the start for readers unfamiliar with this legal terrain.

Above all, the law understands discrimination as an unjustified difference in treatment informed by specifically prohibited considerations (such as race or gender) that causes harm. Not all human differences are protected by law from discrimination. For instance, some people may have more favorable views of tall as opposed to short persons, but anti-discrimination law does not cover height-bias. Courts refer to those traits that are protected by law as “protected classes” or “protected groups.”

Race is a protected category and a person of any race can bring a claim of discrimination. In examining whether a claimant has proven that discrimination occurred, a court conducts a inquiry into what was done and how the claimant was adversely treated because of their racial difference. To articulate a coherent claim, it is thus mandatory to overtly assert that race was the prohibited category that influenced the differential treatment. For that reason, it is necessary for the claimant to identify their race as the racial difference that motivated the ill treatment. However, this is not a litmus test of racial identity. It is a review of actions and their results. Racial identity is relevant only inasmuch as it illuminates how it motivated the adverse treatment. Hence, specific racial categories are not listed in the text of any anti-discrimination law nor do courts limit the law to particular racial groups. Moreover, the same standard of proof applies to all race discrimination claims regardless of what the claimant’s racial identity is.

Infused into the articulation and interpretation of anti-discrimination law statutes such as the Civil Rights Act of 1964, is the foundational equality perspective of the Fourteenth Amendment of the U.S. Constitution. Its literal mandate that state governments not deny any person the equal protection of the laws has been judicially interpreted to require the same treatment for persons who are deemed similarly situated.\textsuperscript{31} To illustrate, this means that a state employer cannot intentionally treat employees with similar credentials and work experience differently when they apply for the same promotion simply because they are of a different race.

The prohibition against states using racial differences to harm individuals is so considerable that race is treated as a “suspect category” for which the court must apply a strict scrutiny standard of review. Under the strict scrutiny standard, a state policy challenged as a violation of equal protection requires the demonstration of a compelling government interest to justify the policy’s invocation of race. Absent a compelling government interest, to consider racial differences the policy is void and thus unconstitutional. The foundational case illustrating the constitutional principle against discrimination is that of Brown v. Board of Education.\textsuperscript{32} In striking down a government educational policy of racially segregated schooling that violated the equal protection of the laws, Brown ushered in a flurry of legislation attempting to dismantle all forms of Jim Crow segregation.

It is important to note that the civil rights legislation that followed Brown was and continues to be broader than the constitutional equal protection standard. While the Constitution only applies to discrimination by government entities, federal and state statutes

\textsuperscript{31} U.S. Const. amend. XIV, § 1 (“nor Shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”). The Fifth Amendment similarly prohibits racial discrimination by federal government entities as well with its edict that “no person shall be deprived of life, liberty or property, without due process of law.” U.S. Const. amend. V.  
\textsuperscript{32} 347 U.S. 483 (1954).
encompass private individuals and organizations as well. Moreover, case law decisions have limited the Constitution to the prohibition of only “intentional” discrimination, while statutory law is free to encompass restrictions on racially neutral policies that have racially disproportionate statistical discriminatory effects to better address concerns with systemic and structural racism.

Thus, statutory anti-discrimination law goes beyond the doctrinal limitations on constitutional law, while sharing the same fundamental goal of seeking racial equality. While it is true that both the constitutional anti-discrimination cases and statutory laws were developed in response to our nation’s entrenched history of Jim Crow racial segregation, the contours of the doctrine are broad and extend beyond the Jim Crow context. The text of our statutes and case law are in no way limited to a black-white understanding of race. Instead they allow for capacious ways of considering how harmful treatment was “on the ground of or because of race or color.” For this reason, groups other than African Americans such as Asian Americans, Latinos/as and Native Americans are able to use the very same legal protections against discrimination as African Americans. The abstract and open-ended nature of the language of the laws means that judges have a central role in interpreting what discrimination means.

Judges find that often the most persuasive articulation of racial discrimination is made when the claimant can specifically identity how persons of another race in similar circumstances were not exposed to the same adverse treatment as the claimant. Such a

34 McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 278 (1976) (noting that civil rights statutes “are not limited to discrimination against members of any particular race”).
comparison to a similarly situated “comparator” not of the claimant’s racial background is not required by law but is useful to courts in identifying the differential treatment. A similar analysis applies when women are compared to men in gender discrimination claims, or disabled persons are compared to able-bodied persons in disability discrimination claims. In short, anti-discrimination law inquires about race and racial categories because its concern is the prohibition against using race as a basis for harming people.

However, multiracial-identity scholars take issue with anti-discrimination law’s traditional focus on racial categories. For instance, Nancy Leong asserts that the judicial referencing of multiracial claimants with monoracial terms is a “judicial erasure of multiracial discrimination” which trivializes the uniqueness of the discrimination and “entrenches the crude [single race] racial categories in our social consciousness, along with the stereotypes associated with those categories.” For this reason, Leong proposes that “we should aspire to a more fluid understanding of race, one that acknowledges animus directed against a person’s perceived race without an attendant need to define that person’s ‘objective’ racial identity or to place that person in a category.” For Leong, the law’s consideration of racial categories in assessing discrimination claims is ultimately what is problematic. Her proposal for “judicial recognition of those who are discriminated against because they are perceived as multiracial” is based on the conclusion that a unique mixed-race animus is propelling the cases, and that our current anti-discrimination laws are ill-equipped to navigate the terrain of perceived race. Leora Eisenstadt adopts Leong’s anti-category analysis to propose that anti-discrimination statutes like Title VII be amended “to explicitly recognize

37 Ibid., 528.
38 Ibid., 543.
39 Ibid., 549.
the fluid nature of identity” by adding protection based on “an individual’s actual or perceived racial identity.\textsuperscript{40}

Yet the shift to a “perceived race” regime will not be very helpful to multiracial discrimination victims like Cleon whose story introduced this chapter. Cleon looked white and thus his perceived race was white. The discriminatory treatment he received was not based on his perceived race but was instead motivated by the mixed-race results of his Ancestry.com test. Pointedly, the racial harassment all centered on the blackness revealed by his genetic test. Once Cleon was read by his workplace as tainted by blackness his white appearance was immaterial. In other words, the racial category drove discrimination, not Cleon’s appearance. Thus for Cleon and many others whose appearance does not announce their racial ancestry, the anti-category approach to discrimination law will leave them without legal protection when others react with adverse treatment to the disclosure of non-white ancestry.\textsuperscript{41} Legal scholar Angela Onwuachi-Willig describes a similar shortcoming for white-appearing individuals who begin to experience racial discrimination when it is revealed that they have a non-white partner and/or non-white children.\textsuperscript{42}

Rather than denounce the anti-discrimination law concept of racial categories outright, other multiracial-identity scholars instead advocate for the insertion of a multiracial category into the legal doctrine. For example, Scot Rives and Tina Fernandes agree with Nancy Leong’s assessment about the inadequacy of the racial category approach, but both prefer that

\textsuperscript{40} Eisenstadt, “Fluid Identity Discrimination,” 841.

\textsuperscript{41} Adrian Piper, “Passing for White, Passing for Black,” \textit{Transition} 58 (1992): 4-32, 30 (“[M]y public avowal of my racial identity [as Black although appearing White] almost invariably elicits all the stereotypically racist behavior that visibly black people always confront...”).

\textsuperscript{42} Angela Onwuachi-Willig, \textit{According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family} (New Haven: Yale University Press, 2013), 207-264 (proposing that “interraciality” be added to the protected areas of coverage in anti-discrimination law statutes).
an explicit “multiracial” category be inserted into the legal doctrine.\textsuperscript{43} However, as previously noted anti-discrimination law is not structured with any specific categories. As the chapters that follow will delineate, the laws are formulated based on whether an individual of any race has been treated differently than someone of a different race. The laws do not specify particular races for inclusion and enforcement. Nevertheless, Scot Rives asserts that a “separate category for mixed race is necessary to redress the unique harms targeting mixed-race persons,”\textsuperscript{44} and Tina Fernandes proposes that constitutional Equal Protection doctrine specify that multiracial persons be treated as a suspect class distinctive from the existing suspect class of “race” and that statutory civil rights law “add Multiracial to the list of available racial identities.”\textsuperscript{45}

Furthermore, Fernandes also recommends that government agencies receiving discrimination complaints add a multiracial category to their intake questionnaires, in lieu of the current format of inviting respondents to designate multiple races as they like.\textsuperscript{46} Such questionnaires are not mandated by civil rights law, and exist simply to streamline the process of filing a claim for a government agency to investigate.\textsuperscript{47} The current questionnaires like the decennial census permit a respondent to indicate their multiple racial ancestries, and to attach additional pages to describe the discrimination allegations.

\textsuperscript{44} Scot Rives, “Multiracial Work,” 1334.
\textsuperscript{45} Fernandes, “Antidiscrimination Law and the Multiracial Experience,” 215.
\textsuperscript{46} Ibid., 197.
\textsuperscript{47} U.S. Equal Employment Opportunity Commission, Intake Questionnaire, https://egov.eeoc.gov/eas/uniformintakequestionnaire09.pdf (question of race invites respondent to choose all categories that apply); U.S. Department of Education Office for Civil Rights, Discrimination Complaint Form, http://www.ed.gov/about/offices/list/ocr/complaintintro.html (open-ended question as to how discrimination was “based on race”); U.S. Department of Housing and Urban Development, Form 903 Online Complaint, https://portal.hud.gov/FHEO903/Form903/Form903Start.action (open-ended question as to how housing was denied “because of your race”).
Since anti-discrimination law already permits a claimant to describe their racial identity however they choose as long as they are alleging that some act of discrimination was “because of race,” it is unclear why Rives and Fernandes insist that statutes be amended to specifically include a multiracial category. No other racial identity is expressly written into the statutory texts. There is no Asian-specific anti-discrimination law or Latino-specific anti-discrimination law. Nor have Asian and Latino civil rights organizations using the existing laws to protect their constituents from discrimination (such as the Asian American Legal Defense Fund, Latino Justice, or the Mexican American Legal Defense Fund) argued that there should be.

Given the incoherence of demanding the insertion of a multiracial category where no other racial categories are statutorily specified, it is particularly troubling that the rhetoric of multiracial exceptionality that is used for the demand is being drawn upon by the Supreme Court to question the need for polices of racial inclusion. Simply stated, theorizing that multiracials require exceptional treatment from anti-discrimination law bolsters harmful attempts to dismantle the civil rights laws that currently exist. Thus, despite the differences in specific law reform proposals made by the multiracial-identity scholars, they are united in their presumption that mixed-race personal identity necessitates a change to civil rights law in ways that actually endanger the ability to protect multiracials and others from discrimination. This book seeks to provide a corrective to such a course.

Chapter 7: The Way Forward: the Socio-political Racial Approach

“Personal identity and personal choice are relevant issues, but they are subsidiary to questions of race, racism, and the structures of racial oppression.\textsuperscript{48}"

What this book’s review of multiracial discrimination cases has revealed is first that multiracial claimants are not legally disadvantaged in raising claims of discrimination with our present civil rights laws. Secondly, the cases demonstrate the enduring power of white privilege and the continued societal problem with non-whiteness in any form. Specifically, the cases illustrate the perspective that non-whiteness taints rather than the notion that racial mixture itself is problematic. In the rare cases where racial mixture is directly targeted, traditional civil rights law has been properly applied. Yet this insight is lost in the midst of the multiracial-identity scholars’ singular focus on promoting mixed-race identity.

Multiracial victims of discrimination will be better served by legal analyses that seek to elucidate the continued operation of white supremacy that harms multiracials as non-whites. Such a focus will also better support all anti-discrimination law and public policies that as was shown in the previous Chapter, are now being in part challenged based upon the premise of multiracial exceptionality. The key antidote to such an erosion of civil rights is a theoretical grounding that shifts away from a focus on personal individual identity recognition to a focus on group based racial realities.49

While multiracial-identity scholars assert that anti-discrimination principles necessitate the protection of the expression of personal fluid racial identity, this position loses sight of anti-discrimination law’s foundational distinction between the personal and the private. Tarunabh Khaitan explains that globally discrimination law maintains a divide between the public and private in which the legal duty not to discriminate is only imposed upon persons and institutions that interact with the public and are in a position to grant or

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deny access to goods or services.\textsuperscript{50} Such public duty bearers include the state, employers, landlords, hotels, restaurants and other service providers. While private individuals may certainly harbor prejudices and even make decisions based upon those prejudices, the legal duty not to discriminate does not include them. Anti-discrimination law focuses upon public duty bearers because of their power as gatekeepers of opportunities, basic goods and social mobility. Private individuals acting outside of public spheres do not have the same potential for influencing societal opportunity. Khaitan provides the following example:

[A] consumer who refuses to shop at a store simply because its proprietor is Muslim has probably not violated any law, even though most people would condemn such refusal as discriminatory. The law does not require us to refrain from discriminating on the ground of race in the choice of our friends either.\textsuperscript{51} This is why anti-discrimination law is unidirectional in nature. Employees are not prohibited against holding racial bias against their employers. Nor are tenants and consumers regulated in expressing racial bias however odious those expressions may be. The liberty right to hold bias along with a plethora of other perspectives and opinions is sustained until it materially encroaches on another’s access to public goods. In other words, anti-discrimination law’s primary concern is with public effects and not personal expressions of bias. For this reason, legal scholar Lauren Sudeall Lucas, also concludes that conflating the personal need for identity formation with the role of law in addressing group-based discrimination risks harming U.S. constitutional Equal Protection equality enforcement.\textsuperscript{52}

Hence multiracial-identity scholar Camille Gear Rich’s expansive concern with privileging a “right to self-definition” may be well-intentioned in its desire to maximize the

\begin{flushleft}
\textsuperscript{51} Khaitan, \textit{A Theory of Discrimination Law}, 2.
\end{flushleft}
liberty interests of those with fluid racial identities, but it misapprehends the ultimate purpose of anti-discrimination law. Extending Khaitan’s analysis of the function of anti-discrimination law to the multiracial context illuminates how personal racial identity may be important to an individual but not salient to the public concerns of anti-discrimination law, unless a public duty bearer has denied or altered access to a public good based upon that racial identity.

This does not mean that all expressions of personal identity are irrelevant to anti-discrimination law. The key is the effect of biased action on the access to public goods. Thus, when the expression of personal racial identity is penalized with an interference in the access to a public good, anti-discrimination law is justified in regulating the discriminatory behavior. This is why Devon Carbado’s and Mitu Gulati’s work about how distinct “racial performances” in the workplace elicit varied responses, is directly tied to an employee who suffers disparate treatment. The concept of racial performance focuses on how non-biological factors such as the manner in which one speaks, styles one’s hair, makes wardrobe choices and aligns with particular cultural expressions in music, dance and otherwise, all influence how others perceive one’s racial appearance and react to it. The idea of racial performance is thus based upon the volitional choices an individual can make to express their racial identity.

While multiracial-identity scholars often cite to Carbado & Gulati’s work on racial performance to support their emphasis on personal racial identity expression, they frequently lose sight of Carbado & Gulati’s theoretical grounding in anti-discrimination law’s foundational concern with public differential treatment. For Carbado & Gulati, racial performance matters to law only insofar as it is used to deny a racialized group member

access to opportunity and services. They underscore this with their example of Mary, a black woman who has been denied a work promotion despite her excellent work record and educational background.\textsuperscript{55} While other black women in the office are promoted, Mary is not. It also happens that Mary is the one black woman who wears her hair in dreadlocks and wears West African influenced attire on Casual Fridays in ways that the supervisors may unconsciously find nonconforming and threatening. Racial performance theory is not concerned with the specifics of any particular personal identity racial performance, but rather with having anti-discrimination law sanctioning employers and others who deny a public good like a work promotion because of racialized concerns with that performance. The material inequality that results from the denial of public goods is at the center of Carbado & Gulati’s discussion of racial performance.

The multiracial-identity scholar preference is to isolate a claimant’s personal identity concern with perceived harm to dignity, from the question of material inequality. For instance, Camille Gear Rich urges that U.S. anti-discrimination law “attend to the dignity concerns of individuals as they attempt to control the terms on which their bodies are assigned racial meaning.”\textsuperscript{56} What the demand for a dignity-approach to anti-discrimination law overlooks, is how inequality includes indignity but is not reducible to it.\textsuperscript{57} \textquote{It is just not all there is to it, or even its irreducible core, sine qua non, or floor.}\textsuperscript{58} For this reason a dignity approach cannot substitute for the harm of inequality on its own terms. As legal scholar Catharine MacKinnon explains:

\begin{quote}
Inequality is always undignified. But reducing its injury to the feeling of indignity in the subordinated person makes it all mental and within the
\end{quote}

\textsuperscript{55} Ibid., 717.
\textsuperscript{56} Gear Rich, \textquote{Elective Race,} 1505.
\textsuperscript{58} Ibid.
unequally treated person, which tends to cover up, even trivialize, the coercive
and injurious external conditions and systemic acts usually involved, the
material deprivations and physical harms inflicted by dominant groups, along
with the resources and status they benefit from. . . . [Inequality’s] demeaning
meanings cannot be ended without also ending its material deprivations. For
instance, the harm of unequal pay is not only that it deprives one of dignity,
although it can, but that it deprives one of money. Reducing inequality to its
dignitary dimension misses too much to be able upon remediation to produce
equality.59

In short, a dignity approach to discrimination sidelines the concern with material inequality
which is the only effective mechanism for addressing racial subordination inasmuch as
inequality is always about material hierarchy. Most importantly,
the inequality exists whether the person subjected to it experiences a loss of
dignity or not. Put another way, dignity is a value or feeling. Equality is only
secondarily a value or feeling. Primarily it is a fact. Inequality is also a fact. .
. . The injury of inequality is not reducible to feeling bad at its indignity,
although we often do. The injury is the harm of the fact of one’s equal
humanity being denied realization in the world. Fixing the world will fix the
way we fell about it.60

Applying Catharine MacKinnon’s substantive equality theory insights about the
weaknesses of the dignity approach to the context of multiracial discrimination, illuminates
the mistake of equating the feeling of being disgruntled by any resistance to multiracial
identity, with anti-discrimination law’s fundamental concern with material inequality.

464.
60 Ibid., 472-73.
Indeed, even *Brown v. Board of Education*’s stated concern with “generating inferiority in the hearts and minds” of school children was rooted in the material inequality of racially segregated public education rather than its harm to dignity.\(^{61}\) This is underscored by *Brown*’s focus on material harm to black children rather than any speculation that the “hearts and minds” of white children would perceive any racial inferiority from being separated from black children.\(^ {62}\)

The premium placed by multiracial-identity scholars on the pursuit of a dignity claim for recognition of a personal racial identity overlooks the intrinsic concern with material inequality that is fundamental to anti-discrimination law. As the Supreme Court case law in the higher education affirmative context indicates, judicial preoccupation with protecting individual dignity in fact endangers the enforcement of anti-discrimination law. The erosion of anti-discrimination law is also evident in the Supreme Court’s decision to forbid public K-12 schools from pursuing racial diversity by directly employing a racial balancing policy when selecting students.\(^ {63}\) In 2007, the Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, held that voluntary integration programs which are not seeking to address historic intentional discrimination cannot use race in a mechanistic way to determine where pupils are assigned to public schools.

The decision rejected what it called racial balancing for its own sake, along with the notion that K-12 schools should have the prerogative to institute plans to maintain racial diversity. The Court focused on how “one of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person.”\(^ {64}\) Immaterial to the Court in *Parents Involved* are the demonstrated harms that come from allowing a school

\(^{64}\) Ibid., 2767.
to become racially exclusive in a society that continues to accord hierarchical meaning across racial groups. Hence, in practice the judicial consideration of personal dignity harms in the racial context has not always been conducive to the pursuit of greater racial equality that multiracial-identified scholars and others actually seek.

Moreover, the personal racial identity dignity focus has also propelled significant legislative threats to the continued enforcement of anti-discrimination. Opponents of policies of racial inclusion have also been at the forefront of lobbying for the abolition of any state collection of racial and ethnic statistics under the purview of so-called “racial privacy” initiatives.65 The premise of “racial privacy” initiatives, is that racial and ethnic identity is exclusively a personal matter that should be of no concern to the state even to fulfill its goal of eradicating racism. However, racial and ethnic statistics enable the government and social justice activists to better enforce our nation’s anti-discrimination laws by being able to identify group-wide patterns of racial exclusion. In contrast, social justice activists from countries that do not collect racial ethnic statistics (such as France and several Latin American countries), consistently report how it hinders their ability to monitor and address racial discrimination.66

Notwithstanding the important role of governmental racial data in monitoring racial inequality, a large number of multiracial advocacy organizations publicly endorsed the “racial privacy” initiatives.67 Thus far the legislative “racial privacy” initiatives have not been successful in interfering with the important civil rights tool of gathering racial data, but its

67 Jared Sexton, Amalgamation Schemes: antiblackness and the critique of multiracialism (Minneapolis: University of Minnesota, 2008), 64.
proponents have vowed to continue with their efforts. Should the “racial privacy” lobby
garner any inroads in their effort to make racial identity treated as exclusively a personal
matter, the injury to civil rights law will be significant. As Chris Chambers Goodman
astutely observes:

When Harry Potter covers himself with the invisibility cloak, he still acts, reacts, and
causes results, while those around him simply cannot see what he is doing. If racial
privacy legislation succeeds in covering racial and ethnic statistics with a similar
cloak, people still will act (discriminate), react (retaliate), and cause results (racial
harm), but litigants will not be able to prove those actions, nor link their results to the
actors, thus subverting the enforcement of civil rights laws.68

Therefore, this book seeks to propose an intervention to counter the multiracial-
identity scholar overemphasis on a personal racial identity perspective that misapprehends the
social-political significance of race in the assessment of equality problems. The proposal is
for an explicit “socio-political race” lens for analyzing matters of discrimination.69 Its virtue
is that the socio-political race perspective meaningfully preserves an individual’s ability to
assert a varied personal identity, while providing a more effective tool for addressing racism
and pursuing equality.

The socio-political concept of race views racial categories as neither a biological nor
cultural constructions but rather as a group-based social status informed by historical and
current hierarchies and privileges. This understanding of race diverges from some aspects of
the literature on the social construction of race. Specifically, it jettisons the emphasis on
personal identity for a focus instead on the societal and political factors that structure
opportunity by privileging and penalizing particular phenotypes and familial connections

68 Ibid., 299.
69 Tanya Katerí Hernández, “’Multiracial’ Discourse: Racial Classifications in an Era of
viewed as raced across groups. A socio-political race inquiry into the existence of discrimination does not examine a claimant’s individual racial identity in a vacuum but rather the context of how the claimant was treated within any existing racial hierarchies.

For some, much about the socio-political race approach may just seem like a common sense consideration of structural racism. Yet within the contemporary climate in which the social construction of race is misconstrued to mean the irrelevance of race, there is a newfound need for specificity and transparency in the articulation of how continuing racialization of individuals is salient to how systemic discrimination occurs. Without that specificity and transparency the public impulse is to treat discrimination as a dynamic caused by the deviance of individuals unconnected to group-based hierarchies and structures of exclusion. Operating without the socio-political race approach has led multiracial-identity scholars to reduce inequality to a concern with the judicial and public recognition of personal racial identity that overlooks the issues of material inequality that are being raised in legal cases of discrimination.

While no single scholar has specifically lobbied for a socio-political racial analytical lens per se, many have used other terms to address similar concerns that are relevant to the socio-political racial analytical lens. For instance, the socio-political race concept combines Neil Gotanda’s insights about the salience of remaining cognizant of past and continuing forms of racial subordination while appreciating how race can act as an indicator of social status. The socio-political race perspective thus eschews both biological and cultural notions of race. W.E.B. Du Bois could be characterized as deploying a socio-political perspective on race regarding blacks in the United States when he famously stated “But what

is this group; and how do you differentiate it; and how can you call it ‘black’ when you admit it is not black? . . . I recognize it quite easily and with full legal sanction; the black man is a person who must ride ‘Jim Crow’ in Georgia.\textsuperscript{72} For Du Bois societal racial classifications were not based on innate self-identity but instead rooted in the forces of socio-political subordination of his time.\textsuperscript{73}

The abolition of formal Jim Crow state mandated segregation has not lessened the significance of the socio-political race perspective for blacks, nor mitigated its application to persons without African ancestry. In her examination of Latino census politics, contemporary sociologist Nancy Lopez uses the term “street race” in ways that resonate with the socio-political perspective.\textsuperscript{74} Lopez uses the term to describe the need for data collection forms to encourage respondents to consider how race data is used for monitoring social inequalities in ways that call for a response based on how others perceive one’s race rather than how one personally identifies. Legal scholars Lani Guinier and Gerald Torres also implicitly deploy a socio-political view of race in their call for mobilizing people across racial categories to confront structural injustice as a matter of what they call “political race.”\textsuperscript{75} Guinier and Torres’s “political race” encourages all races and ethnicities to draw upon the African American racial identity rooted in solidarity and focus on systemic problems.

What this book’s socio-political perspective particularly directs attention to are the ways in which even in the contemporary setting racial differences are created and maintained

\textsuperscript{75} Lani Guinier and Gerald Torres, \textit{The Miner’s Canary} (Cambridge: Harvard University Press, 2002).
for the social imposition of inferiority. The socio-political race perspective incorporates the sociological understanding that individuals are not born with a race. It is society that racializes an individual. Racialization then is a “systemic accentuation of certain physical attributes to allocate persons to races that are projected as real and thereby become the basis for analyzing all social relations.” Or as legal scholar Ian Haney López states “race is not hereditary; our parents do not impart to us our race. Instead society attaches specific significance to our ancestry.” Sociologists Omi and Winant’s elaborate further on racialization as a racial formation that is a “sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed.” Eduardo Bonilla-Silva helpfully refines the concept further with his idea of racialized social systems whereby societies structure economic, political, social and ideological levels by the placement of actors in racial categories or races. Each of these sociological explications of race as a racialization process informed by structural systems itself undergirds this book’s socio-political approach to analysis of discrimination issues.

Applied to the context of multiracial discrimination claims, the socio-political lens on race assesses whether a public duty bearer has racialized an individual as part of a mechanism for adverse treatment. A claimant’s desire for public recognition of a personal multiracial identity standing alone will not suffice to make a legal claim of discrimination if not subject to being penalized. While a multiracial-identified person may feel slighted by any resistance or questioning of his or her personal racial identity, such a slight is not tantamount to being

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denied access to employment, housing, public accommodation, or educational advancement based upon race.

Interestingly enough, none of the multiracial discrimination case claimants discussed in this book personally raised the concern with having their mixed-race identity recognized. In contrast, it has been the multiracial-identity scholars assessing the cases that have set forth this concern from the top down. Ethnic Studies scholar Caroline Streeter has similarly noted that “[c]ompared with the academic writing by scholars of multiraciality, writing and video work by racially mixed women are far less invested in ‘the right to choose identity’” and instead align themselves with people of color in their critique of inequality and discrimination of all kinds.\(^{80}\)

The voices of the multiracial claimants themselves suggest that the multiracial-identity scholars have misconstrued the nature of multiracial discrimination on the ground. Rather than presenting a unique form of discrimination, multiracial claimants are articulating a concern with being less favorably treated than those perceived as white. Even the small subset of cases in which African Americans are identified as the instigators of multiracial discrimination, fail to impart a novel form of discrimination. Instead, the factual allegations follow the historical pattern of dark-skinned African-Americans acting in a retaliatory fashion towards light-skinned persons they fear bear attitudes of superiority for how closely their skin or phenotype approximates whiteness (regardless of how far removed in ancestry the racial mixture is as in the case of many persons of African ancestry who racially identify solely as black).

Perhaps it is not multiracial claimants themselves that are in need of the insights from the socio-political lens for assessing discrimination claims, but rather the multiracial-identity

scholars who contemplate their cases. In addition to assisting multiracial-identity scholars appreciate the reality of multiracial discrimination, the socio-political lens may also assist them in more accurately assessing the salience of contemporary civil rights law. This book’s survey of the cases themselves illustrates that contrary to the presumption of multiracial-identity scholars, judges do properly apply anti-discrimination law to multiracial claims even when they do not refer to claimants by their preferred mixed-race identity. Yet should future judges begin to exhibit confusion with how to analyze multiracial claims of discrimination, the socio-political racial lens can be a useful analytical aid. Revisiting a case from a previous chapter will help to illustrate a useful application of the socio-political lens.

For instance, in the 2010 employment case of Nash v. Palm Beach County School District,81 (as discussed in Chapter 2) recall that Che Nash, a multiracial black and white teacher brought an employment discrimination claim against his employer school district in Boca Raton, Florida.82 In the court’s search for mixed-race specific animus (as promoted by multiracial-identity scholars) the court lost sight of the larger pattern of non-white workplace discrimination that may have affected the claimant. The court noted that the employer school did not dispute that Nash, “as an individual of mixed race, belongs to a protected class” and thus administered the claim based on that status.83 As a result, Nash’s failure to provide credible evidence that similarly situated employees who were not mixed-race were treated more favorably resulted in the dismissal of his case.84 In the absence of evidence of specific mixed-race discrimination, there is a strong possibility that the court’s strict adherence to Nash’s request for a search for “multiracial” discrimination, may have inadvertently undermined a fuller inquiry that could have detected a larger pattern of discrimination in the workplace that adversely affected Nash.

82 Id. at *1, *5, *7.
83 Id. at *8.
84 Id. at *10.
If Nash’s lawyer had instead litigated Nash’s experience within the socio-political understanding of racism, his claim of discrimination would have been viewed as more persuasive. The most important litigation difference would have been for Nash’s workplace displacement to have been directly situated as part and parcel of what other non-white teachers like himself were experiencing within the school district. Notably, the socio-political perspective approach enables claimants to preserve their personal racial identity in describing themselves as multiracial while at the same time locating their experience as a racialized non-white person when that is applicable to their incident of discrimination. (The rare instances of allegations of discrimination at the hands of other non-whites will also be aided by the socio-political lens inquiry into how the particular context may esteem whiteness in how the multiracial claimant was targeted. Chapter 2’s discussion of dark skinned black color discrimination against light skin multiracial claimants in the workplace illustrates this).

As applied to Nash, the socio-political perspective would have highlighted the several instances in which Nash and the few African American teachers at the school were treated poorly in contrast to the white teachers. Explicitly harnessing the experiences of other non-whites in the workplace as part of the non-white discrimination that he was also exposed to, would have strengthened Nash’s legal claim as a multiracial identified claimant. This is because when the context of Nash’s workplace is examined from the perspective of non-white versus white differentiation, rather than specific multiracial animus, a court is not limited to searching solely for evidence of how non-multiracial persons were treated in comparison. Expanding the judicial inquiry into whether a broader pattern of non-white versus white differential treatment existed would have permitted the court to recognize how Nash was harmed by a workplace seemingly entrenched in a white over non-white hierarchy.

What this book’s review of the emerging multiracial discrimination cases like Nash’s reveals is the enduring operation of white privilege and the continuing societal problem with
non-whiteness in any form. Specifically, the cases illustrate the perspective that non-whiteness taints rather than the concern that racial mixture itself is worrisome. Yet this insight is lost in the midst of the multiracial-identity scholar’s singular focus on promoting mixed-race identity. Thus the socio-political race analytical lens is also meant to act as a corrective against the influence of such Personal Identity Equality platforms that have inclined the judiciary to discount the legitimacy of policies of inclusion like affirmative action based on the presumed distinct racial position of multiracials.

Furthermore, the socio-political analytical lens could be also a salutary intervention in the related dynamic of discounting the extent of discrimination that multiracials experience. For example, in the context of juror selection some judges have allowed a prosecutor’s alleged confusion about mixed-race prospective juror identity to justify rejecting that mixed-race person from jury service. While prosecutors can use their “peremptory strikes” to reject a prospective juror without any stated reason, federal and state constitutions prohibit prosecutors from rejecting prospective jurors from serving as jurors on a specific trial based upon their race. When prosecutors appear to be rejecting prospective jurors based upon their race, defendants can raise a Batson challenge and thereby inquire if there is a non-discriminatory reason for striking the juror.\textsuperscript{85} The judge then must assess whether the prosecutor’s proffered reason is merely pre-textual and whether the defendant has shown purposeful discrimination.

When Batson challenges have been raised about rejecting mixed-race prospective jurors from jury service, some prosecutors have claimed that they were incapable of harboring discriminatory purpose in excusing the prospective juror because they were not even certain of the juror’s race (while at the same time rejecting many other jurors of color).\textsuperscript{86}

The attempt to evade an inquiry into discriminatory action by claiming confusion about a juror’s racial identity is as a threshold matter problematic given the pervasive use of juror questionnaires that contain race and ethnic juror information, in addition to the ability to raise the question of racial identity during the voir dire questioning of prospective jurors. More disturbing though is the reaction of some judges who assert “the demonstrated uncertainty as to her race makes it less likely that [a juror] was challenged because the prosecutor believed she was black.”

This is disturbing in view of the fact that mixed-race jurors are often excused along with other jurors of color in a seeming pattern of blanket exclusion. Such prosecutors are thus permitted to racially lump together presumably “racially ambiguous” jurors with other jurors of color they view as undesirable for jury service, while at the same time deflecting judicial inquiry with a claim of ignorance about the specificity of a mixed-juror’s ancestry. In effect, the mixed-race juror can be racialized and excluded from jury service while with a sleight of hand the racialized intent is veiled behind a claim of racial ignorance. Personal Identity Equality with its emphasis on the distinctiveness of racial ambiguity is incapable of articulating how the strategic recognition of ambiguity harms mixed-race prospective jurors let alone a monoracial identified juror whose appearance is also considered racially ambiguous. In fact, prosecutors have made claims of non-recognition of race with monoracial identified jurors as well as with multiracial-identified jurors.

Unlike the Personal Identity Equality approach, the socio-political race analytical lens pierces through the duplicity of the simultaneous recognition and non-recognition of race. Rather than permitting a prosecutor’s claim of non-recognition of race to be examined in

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89 People v. Barber, 200 Cal. App. 3d 378, 245 Cal Rptr 895 (5th Dist. 1988); U.S. v. Watford, 468 F.3d 891, 913 (6th Cir. 2006).
isolation and thereby characterized as a “race neutral” justification for excluding a juror, the socio-political race lens would examine the context of the exclusion. For instance, the socio-political racial lens would find it relevant and significant when a mixed-race prospective juror is excluded in a larger pattern of excluding non-white jurors.

Support for the socio-political analytical shift to examining Batson challenges in terms of over-arching non-white juror exclusion (rather than examining individual racial group exclusion in isolation), can be found in New York’s legal recognition of Batson challenges based upon skin-color exclusion. New York’s Court of Appeals specifically stated that “Persons with similar skin tones are often perceived to be of a certain race and discriminated against as a result, even if they are of a different race and ethnicity. That is why color must be distinguished from race. . . . dark skin color is a cognizable class and, indeed must be one unless the established protections of Batson are to be eviscerated.”

Similarly, the United States Second Circuit has clarified that distinct racial and ethnic groups may be combined for Batson purposes. What the New York State Court of Appeals, and the United States Second Circuit Court have recognized is that racial bias is often manifested in overarching non-white versus white terms rather than in the specifics of personal racial identity.

However, even in the absence of an entire pattern of non-white exclusion, the socio-political analytical lens would not treat a prosecutor’s claim that he or she did not recognize a juror’s race, as race-neutral given the wealth of data demonstrating that human beings implicitly perceive racial and ethnic differences even when they do not acknowledge such

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91 Ibid., 614-616.
recognition for themselves. Moreover, a prosecutor’s consciously subjective assessment of racial and ethnic identity is not salient to whether racial considerations are in play. For as one judge who has dissented from the treatment of prosecutor claims of non-recognition of race as race-neutral has stated:

There is no sensible method for reviewing, on a cold record, a prosecutor’s subjective statement that he did not notice a prospective juror’s race. . . . The whole point of *Batson* is that minority status can’t be taken into account in jury selection when exercising peremptory challenges. A person with a minority heritage may bring valuable perspective to the factfinding process, and that is so whether or not the prospective juror “looks like” a minority to the prosecutor or trial judge.

In other words, it is immaterial what a prosecutor’s statements about perceived racial identity are when racial exclusion is the result. A more sound judicial approach to claims of non-recognition of race is to acknowledge the existence of group-based social hierarchies and demand further justification for the juror rejection.

In short, multiracial victims of discrimination will be better served by legal analyses that seek to elucidate the continued operation of white supremacy when whites mistreat them because of their non-white status and when non-whites mistreat them out of fear that light skinned multiracial individuals will exercise racial hierarchy. But this can only be done by shifting away from a focus on individual identity recognition to a focus on group based racial realities. The socio-political analytical lens is one path for doing so. For while “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.

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94 U.S. v. Guerrero, 595 F.3d 1059, 1066 (9th Cir. 2010) (Circuit Judge Gould dissenting).