

# MULTIRACIAL WORK: HANDING OVER THE DISCRETIONARY JUDICIAL TOOL OF MULTIRACIALISM

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*The rise of the mixed-race population and its implications for our society has received attention in current discourse and media coverage. Some see it as a portent of the post-racial world to come; others see it as just another challenge to which antidiscrimination law must adjust. Despite this new attention, racial mixing is not a new phenomenon by any measure. What have changed are the methods of categorization. By realizing this fact, we can repudiate the claim that increased declarations of mixed-race identity signal a major shift and instead focus on readjusting outdated legal schemes that were predicated on old methods of monoracial categorization. This Comment addresses the conflict between new categorization methods for mixed race in data gathering as well as the noncognizable mixed-race-based claims in current Title VII doctrine. Mixed-race individuals face unique harms themselves, and Title VII's refusal to acknowledge mixed race results in dismissal of claims. After addressing two similar proposals that do not go far enough to remedy harms, this Comment proposes taking the discretion of framing race from judges and placing it in the hands of plaintiffs. Under this Comment's proposal, plaintiffs can frame race as they experience the discriminatory use of race—including the mixed-race classification—against them, while allowing employers to rebut the plaintiffs' claimed race by showing that they perceived the plaintiffs' race differently.*

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## INTRODUCTION

Recently, I was confronted with an example of the ongoing cultural debate over the proper categorization of multiracial persons. While filling out an equal employment opportunity form for job interviews, I found myself at a loss with what to mark. The form employed a two-tier system. The first tier required a Yes-or-No answer to whether the respondent belonged in the ethnic category of Hispanic or Latino. If the respondent marked No, he or she could move to the second tier and mark: White; Black or African American; Asian, Native Hawaiian or Other Pacific Islander; Native American; or Two or More. Each racial category in the second tier included the parenthetical admonition, “Not Hispanic or Latino.” As someone who identifies as a mixed-race person and has seen many of these forms, I was accustomed to formulations that allowed either selection of only a single monoracial category, selection of all monoracial categories that apply, or, more recently, a separate choice for Two or More. Here was something that I had never seen. As one of partial Latino background, I was locked out from a choice to pick multiple races even though I also identify as being of Asian and white (non-Latino) descent.

In this example, the limited racial structure only affected my personal feelings and may have had a minor distorting impact on statistics that could be used to show or refute concerns about equal employment opportunity. But similarly fluctuating rules and discourse surrounding racial categorization also play out in settings with more tangible and immediate repercussions involving equally strange and varied rules. As this Comment shows, Title VII jurisprudence has operated in confusion regarding the definition and purpose of multiraciality, how multiraciality relates to and is differentiated from a biracial paradigm, and what various conceptions of identity mean for Title VII’s operation moving forward.

The majority of multiracial discourse in the United States has arisen in response to a perceived increase in interracial reproduction following the U.S. Supreme Court's invalidation of antimiscegenation laws in *Loving v. Virginia*<sup>1</sup> as well as the increasing demand for a multiracial or mixed-race category,<sup>2</sup> exemplified by the debate surrounding the 2000 Census.<sup>3</sup> This discourse has generally been limited to addressing the benefits or detriments of creating a separate category in the census and other frameworks.<sup>4</sup> However, while battling over the creation of a multiracial category, the debaters have generally overlooked the ramifications of such a category in areas of law where it has potential to further racial justice or hinder it.

Contrary to the assertions made in recent media coverage,<sup>5</sup> racial mixing is not a new phenomenon, nor is the explicit categorization of mixed race as

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1. 388 U.S. 1, 2 (1967) (holding that antimiscegenation laws violated the Equal Protection Clause and were thus unconstitutional).

2. I use the terms biracial, multiracial, and mixed race at different points throughout this Comment. I find mixed race to be a more accurate term than biracial, as it does not as greatly presuppose the existence of discrete pure biological races. As for multiracial, it is often used when describing an entire population or region to indicate that it itself is composed of several racial groups, regardless of whether any individuals in that population identify as more than one racial category or as multiracial. Much of the current discourse, however, uses the terms multiracial or biracial. I will therefore use those terms, especially when discussing the overall phenomenon and previous scholarship that uses them. I use these terms despite my embrace of the social construction model of race and the terms' obvious propensity to reify biological race. Under a true biological race theory, nearly everyone must be considered mixed race, for "[b]iologically, we are all of us multiracial." BARBARA TIZARD & ANN PHOENIX, *BLACK, WHITE OR MIXED RACE? RACE AND RACISM IN THE LIVES OF YOUNG PEOPLE OF MIXED PARENTAGE 2* (rev. ed. 2002). Thus, by accepting the social construction of discrete racial categories, we can acknowledge a separate constructed mixed-race category. See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27-28 (1994); Rainier Spencer, *New Racial Identities, Old Arguments: Continuing Biological Reification*, in MIXED MESSAGES 83 (David L. Brunsma ed., 2006).

3. The 2000 Census was the first census to allow respondents to mark more than one racial category. Thus, while it did not create a separate multiracial category, the census's approach made it possible to count this group separately. See U.S. COMM'N ON CIVIL RTS., *RACIAL CATEGORIZATION IN THE 2010 CENSUS, BRIEFING REPORT 23* (Mar. 2009). However, it was not the first census to embrace some recognition of mixed-race status. Between 1850-70 and 1910-20, mulatto was an explicit category. Additionally, in 1890, octoroon and quadroon were included. Claudette Bennett, *Racial Categories Used in the Decennial Censuses, 1790 to the Present*, 17 GOV'T INFO. Q. 161, 164 tbl.1 (2000).

4. See, e.g., Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned From Trademark Law*, 84 CALIF. L. REV. 887, 891 (1996) (arguing that embracing mixed-race categories as transitory measures will reduce race to a meaningless category). But see, e.g., Tanya Katerí Hernández, "Multiracial" Discourse: *Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998) [hereinafter Hernández, *Discourse*] (contending that the creation of a multiracial category is not a race-conscious solution but actually a disassembling of race consciousness that further obscures ongoing discrimination).

5. See, e.g., Hope Yen, *Multiracial Americans the Fastest Growing Group*, HOUS. CHRON., May 28, 2009, <http://www.chron.com/dispatch/story.mpl/nation/6445979.html>.

something separate.<sup>6</sup> However, the periods of explicit categorization occurred briefly during times of de jure racial stigmatization; mixed-race categories were later absorbed into monoracial categories through the rise of the hypodescent rule, prompting elimination of mixed-race categorization.<sup>7</sup> Over the past twenty years mixed-race identity has reemerged in general discourse and on the census in part because of the Multiracial Category Movement (MCM).<sup>8</sup> Mixed-race identity has also received legal acceptance in some areas, even as Title VII jurisprudence has rejected it.<sup>9</sup>

Despite the historical existence of racial mixing, most laws dealing with race are structured in a monoracial scheme. However, the ability to mark more than one category on the 2000 and 2010 Censuses and the subsequent effect on other federal programs via Directive 15,<sup>10</sup> which seeks to unify categorization across the federal government, make it apparent that the monoracial conception of race is no longer consistent in law. Courts are increasingly confronted with the conundrum of applying laws predicated on a monoracial conception<sup>11</sup> to a growing mixed-race population's claims to multiracial identity, which are emboldened by federal, state, and private data-gathering techniques that explicitly use a multiracial category or allow selection of multiple categories. Courts attempting to apply legal rules created for a monoracial scheme

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6. See Bennett, *supra* note 3; Spencer, *supra* note 2, at 89 ("It seems that Americans have forgotten, if in fact they ever really knew, the long history of population mixture on this continent.").

7. Hypodescent is the more accurate articulation of the "one drop of blood rule" in which an individual of multiracial background is racialized according to whichever racial component is lowest on the racial hierarchy. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (holding that a one-eighth black plaintiff was black for purposes of assigning seats in segregated railcars). While this was seen primarily to operate against blacks, the rule is based on contextual hierarchies and can operate to remove black racial designation when that would confer benefits. See *In re Cruz*, 23 F. Supp. 774, 775 (E.D.N.Y. 1938) (holding that a three-fourths American Indian, one-fourth black individual was not black for purposes of naturalization and thus was ineligible).

8. The Multiracial Category Movement began in the 1990s as an overall movement initiated by organizations such as Project Race to secure a multiracial category in government and other racial data tracking. See *History and Results*, PROJECT RACE, <http://www.projectrace.com/historyandresults> (last visited May 13, 2011).

9. See *infra* Part I.B.2.

10. The federal government's Directive 15 promulgates the categories to be used in gathering racial and ethnic information. It affects not only the census but also many other federal programs gathering this information. OFFICE OF MGMT. & BUDGET, STATISTICAL POLICY DIRECTIVE 15 (1997), available at [http://www.census.gov/population/www/socdemo/race/Directive\\_15.html](http://www.census.gov/population/www/socdemo/race/Directive_15.html).

11. Indeed, the landmark case for equal protection law that set the scene for increased scrutiny of laws affecting racial minorities, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), coined the term "discrete and insular minorities," which has shaped the common law surrounding the Equal Protection Clause, the Voting Rights Act, the Fair Housing Act, and Title VII. See Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 505-07 (2010).

to mixed-race individuals<sup>12</sup> have been inconsistent and often appear to use the mixed-race identity of an individual or a population as a legal tool to adjust or bolster arguments.<sup>13</sup> One area in which mixed-race identity has been rejected is Title VII employment discrimination.<sup>14</sup> This rejection involves not only refusal to acknowledge mixed race as a separate protected class, but also hindrance of mixed-race individuals claiming disparate treatment on the basis of a monoracial category.<sup>15</sup> Instead, they are conscripted into other monoracial protected classes, defeating their own monoracial disparate treatment claims as well as claims by others who are replaced by someone of mixed race.<sup>16</sup>

Title VII rejection is problematic because mixed-race individuals face unique harms, and courts seem unwilling to apply consistency and resolve the tension between this identity and current doctrine. The harms at issue are not only harms of categorization that much of the literature focuses on but harms attached to the category. Harms of categorization are those that arise from simply being classified by a system of rules, separate from any benefit or injury based on that categorization, such as being perceived as belonging to or forced to identify with an ill-fitting category.<sup>17</sup> Harms attached to the category are the negative actions such as refusal to hire someone of that category or

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12. As a reminder, this is not to say mixed-race identity is a new phenomenon, but only that mixed-race individuals are no longer automatically being placed into monoracial categories for the sake of convenience under the existing legal framework.

13. See, e.g., *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1080 (9th Cir. 1999) (Beezer, J., dissenting) (arguing that the inclusion of multiracial children in a race-conscious laboratory school admissions policy defeated the narrow tailoring prong of strict scrutiny when relying on diversity as the compelling government interest).

14. 42 U.S.C. § 2000e-2(a)(1) (2006).

15. Title VII does not specify whether claims for racial discrimination in employment must be based on a particular scheme of identity (for example, multiple monoracial categories, biracial categories, or another type of scheme). Instead, the statute only prohibits discrimination “because of such individual’s race.” See *id.* The same is true for the Equal Employment Opportunity Commission’s regulations. See 29 C.F.R. § 1601 (2010). Instead, courts have built doctrine based on “discrete and insular” categories, creating the tension examined in this Comment. See *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981) (further refining employment discrimination claims but still maintaining a presumption of a single protected class); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (holding that in order to make a prima facie case, one must establish “that he belongs to a racial minority” (emphasis added)); *Carolene Prods.*, 304 U.S. at 152 n.4. Title VII claims have been expanded to include all races, whether majority or minority. See *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 659 (9th Cir. 2002). They have also been held to include claims for discrimination based on interracial associations. See *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008).

16. See *McCauley v. Stanford Univ. Med. Ctr.*, No. C 07-1784 JF (RS), 2009 WL 650359, at \*9 n.6 (N.D. Cal. Mar. 11, 2009) (holding that a biracial (white and black) replacement employee was of the same class as the terminated black employee because both were of African descent); *Jackson v. Katy Indep. Sch. Dist.*, 951 F. Supp. 1293, 1302 n.12 (S.D. Tex. 1996) (holding that a biracial child’s placement was based on membership in the black protected class).

17. See *supra* note 4 for a debate on harms and benefits of categorization.

violence against those in the category. Individuals who are socially racialized as mixed race or embrace that identity face discrimination from a unique animus independent from the harms based on monoracial identities.<sup>18</sup> Under current law, these unique harms in the employment context cannot be remedied even when attempting to bootstrap a claim onto a color claim or a traditional race claim.<sup>19</sup> Additionally, there are instances in which a mixed-race identity functions to obscure discrimination similar to certain aspects of intersectionality.<sup>20</sup> Despite membership in multiple racial categories, a mixed-race complainant must plead a specific protected class to allege discrimination on the basis of race. Courts will often restructure the claims of those seeking a multiracial class into traditional monoracial terms.<sup>21</sup> Further, some courts have held that a mixed-race individual can be replaced by a member of any racial group to which the mixed-race person owes some of his or her heritage.<sup>22</sup> A mixed-race individual can even be used as a foil to another individual's traditional monoracial claim because they can be conscripted into the same protected class as that of the traditional claimant—if they share any racial heritage despite possible vast disparities in phenotypical indications of race, self-identification, and social perception. This can be especially problematic where colorism claims' cognizability is limited.<sup>23</sup>

Even when framing a complaint under a monoracial category, mixed-race individuals face problems of standing. First, they are especially susceptible to being perceived as belonging to a racial group completely unrelated to their personal identification or ancestry, or as identifying with a particular racial

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18. See *infra* Part II.

19. See discussion *infra* Part I.B.3.

20. Intersectionality is a framework that articulates how various power structures (such as race and gender) act in concert to create unique harms and prevent populations at the intersection (for example, black women) from seeking redress for or representing a single category. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 141–50 (describing several cases in which black women were not allowed to represent a class of women for gender discrimination, were not allowed to have their race discrimination remedy extended to black males, or were forced to pick either gender or race discrimination to present a cognizable claim).

21. See, e.g., *Jackson*, 951 F. Supp. 1293.

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

23. Colorism is discrimination based on differences in skin tone and phenotype, regardless of membership in the same overall racial group. Those self-identified or perceived as monoracial who are replaced by mixed-race individuals may have claims for colorism. See Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1711 (2000). Colorism's cognizability in employment discrimination claims has varied, with courts more willing to recognize this standing for Latino/a and white populations and less willing to recognize it for black populations. *Id.* at 1726–28.

group because of the assumed mutability of their identity.<sup>24</sup> Thus, when courts require proof of membership in a class, mixed-race people are often barred from bringing claims when they are discriminated against for belonging to a race with which they do not identify.<sup>25</sup> Second, those of mixed backgrounds are more susceptible to mutability attacks. For example, a defendant in an employment discrimination suit may point to a mutable characteristic as the reason for the plaintiff's dismissal when that characteristic may be what triggered an individual's racialization in the first place.<sup>26</sup> This defense works because the majority of courts still accept race as an immutable characteristic even as mixed-race persons challenge that conception.<sup>27</sup>

Thus far, multiracial discourse has focused on the concept of separate categorization in data gathering, while ignoring ongoing experiences, problems, and harms created by social perception as mixed race.<sup>28</sup> Two scholars, however, have examined these harms and have proposed to combat them through extensions of current law.<sup>29</sup> While these proposals are helpful, they focus narrowly on disparate treatment claims using employer intent and perception.<sup>30</sup> Focusing on employer intent and perception may remove the barrier of establishing membership in a specific class to which a mixed-race individual may or may not belong, but it also reinforces the perpetrator model of discrimination, eschews disparate impact claims, maintains a significant burden on a claimant to establish a prima facie case by showing employer perception, and does not fully solve intersectional harms.<sup>31</sup>

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24. Maria P.P. Root, *The Multiracial Experience: Racial Borders as a Significant Frontier in Race Relations*, in *THE MULTIRACIAL EXPERIENCE: RACIAL BORDERS AS THE NEW FRONTIER*, at xxi, (Maria P.P. Root ed., 1996) (articulating this concept as "situational race").

25. Cf. *Perkins v. Lake Cnty. Dep't of Utils.*, 860 F. Supp. 1262, 1278 (N.D. Ohio 1994) (holding that employer perception of the plaintiff as Native American was enough to state a claim, partially because of the difficulty establishing the plaintiff's membership in this protected class).

26. Mutable characteristics are those that are considered flexible and changeable, such as hairstyle, manner of dress, affiliations, speech, and other mannerisms.

27. See Ken Naksu Davison, Comment, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 *ASIAN L.J.* 161, 176 (2005).

28. This split can be conceptualized as the harm of categorization and the harm of meaning attached to a categorization. For examples of multiracial discourse's focus on categorization, see Shalini R. Deo, *Where Have All the Lovings Gone?: The Continuing Relevance of the Movement for a Multiracial Category and Racial Classification After Parents Involved in Community Schools v. Seattle School District No. 1*, 11 *J. GENDER RACE & JUST.* 409 (2008); Maurice R. Dyson, *Multiracial Identity, Monoracial Authenticity & Racial Privacy: Towards an Adequate Theory of Multiracial Resistance*, 9 *MICH. J. RACE & L.* 387 (2004); Julissa Reynoso, Note, *Race, Censuses, and Attempts at Racial Democracy*, 39 *COLUM. J. TRANSNAT'L L.* 533 (2001).

29. See Leong, *supra* note 11; Davison, *supra* note 27.

30. See Leong, *supra* note 11; Davison, *supra* note 27.

31. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161 (1995), for a critique of intent-based racial antidiscrimination law, comparing it to impact-based age discrimination law.

While these proposals allude to use of a separate mixed-race category if one is perceived as such, this Comment argues explicitly that a mixed-race category is required in order to remedy ongoing discrimination.<sup>32</sup> At the same time, in order to effectively address all discriminatory harms, mixed-race persons should not be locked into such a category. In this way, this Comment's proposal echoes the perception-based proposals, but instead of focusing on employer perception, it allows a plaintiff to frame race as he or she desires for the initial complaint. A showing of an inconsistent perception can then be used by a defending party to refute that framing. Allowing plaintiffs to frame perception will make disparate impact claims accessible<sup>33</sup> and assuage concerns over creating a separate category and further fractioning minority groups.<sup>34</sup> Additionally, this proposal places the burden of establishing employer perception on the party best able to access the necessary evidence, instead of on a complainant who in most cases does not reach the discovery phase.<sup>35</sup>

Several objections are likely to arise from this approach, many of which have been articulated in the debate over the creation of an independent mixed-race category for data gathering.<sup>36</sup> These include concerns about reification of biological race, creation of a new in-between class to further subordinate groups on the bottom, fractioning of minority groups that can lead to losses of political power, and concerns that such a category does not reflect accurate perceptions or experiences.<sup>37</sup> Beyond those articulated about the category generally, there is also a risk of granting greater protection to mixed-race individuals when other subordinated classes may be more or at least equally in need of it.<sup>38</sup> Further, given the inherently diverse nature of mixed-race individuals, the

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32. See Leong, *supra* note 11, at 543; Davison, *supra* note 27, at 185.

33. For an analysis of the disappearing disparate impact claim, see Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597 (2004).

34. For an example of some fractionalization concerns, see Hayward Derrick Horton, *Racism, Whitespace, and the Rise of the Neo-Mulattoes*, in MIXED MESSAGES, *supra* note 2, at 117 (describing how the mixed-race population functions as a new group with greater access to white space than blacks, thereby placing the mixed-race and black groups in opposition).

35. Because protected class membership is an important element of a prima facie employment discrimination case, inability to establish this perception at the pleading stage often leads to claim dismissal under Federal Rule of Civil Procedure 12(b)(6).

36. See, e.g., Hernández, *Discourse*, *supra* note 4.

37. *Id.*

38. This heightened protection at the expense of other subordinated classes can be especially problematic if, as predicted by some scholars, the United States racial scheme shifts its focus from who can be allowed into whiteness to who is not allowed to escape blackness. See Eduardo Bonilla-Silva & David G. Embrick, *Black, Honorary White, White: The Future of Race in the United States?*, in MIXED MESSAGES, *supra* note 2, at 33.



proposal stands to be at greater risk of essentialization objections.<sup>39</sup> However, keeping exclusive control of the categorization out of the hands of any one party and focusing on unique animus towards mixed-race individuals for any claims based on the mixed-race class can eliminate or mitigate many of these concerns.

Part I of this Comment begins by examining the historical existence of racial mixing and the myth of racial purity in an effort to disarm claims that racial mixing signals a coming racial utopia. It then looks at the meandering progression of separate mixed-race categorization from its initial use, to its absorption into monoracial categories, and its current limited reemergence in legal doctrine. From this point, Part II examines the specific harms that mixed-race individuals face, focusing on those at play in employment discrimination. Part III examines two previously proposed interventions for these harms and finds them to be an incomplete remedy. Finally, Part IV proposes a flexible but separate categorization as an alternative that best addresses the failure of current antidiscrimination jurisprudence to remedy the harms faced by mixed-race people.

## I. CATEGORIZATION PAST AND PRESENT

### A. Historical Perspective

Despite the contemporary extolling of the biracial baby boom after *Loving v. Virginia*,<sup>40</sup> “what is taken today to be interracial sex has in fact been going on for centuries in North America and has produced millions upon millions of children during that time.”<sup>41</sup> What has changed over time are the rules of racial categorization and formal recognition of the interracial relationships.<sup>42</sup> The quandary of what to do with these offspring in a society that privileges

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39. Essentialism involves assumptions that a true monolithic essence or meaning can be attached to a category, assumptions that are often in conflict with the heterogeneity of most essentialized groups. See DIANA FUSS, *ESSENTIALLY SPEAKING* 2 (1989). That a mixed-race category is likely to face more essentialism objections is not to say that it is more heterogeneous than traditional monoracial groups. Rather, the risk of essentialism with mixed-race individuals is mistakenly intuitive to many because of their ingrained views that traditional racial categories are monolithic and contemporary views that mixed-race individuals are inherently more diverse. For an in-depth look at the benefits and pitfalls of essentialism, see *id.* at 1–22.

40. 388 U.S. 1 (1967).

41. KATHLEEN ODELL KORGAN, *FROM BLACK TO BIRACIAL: TRANSFORMING RACIAL IDENTITY AMONG AMERICANS* 20 (1999); Spencer, *supra* note 2, at 84.

42. Spencer, *supra* note 2, at 95.

one race and promotes its purity can be addressed under several systems.<sup>43</sup> Initially, some areas within the United States experimented briefly with in-between status and mulatto as a classification for mixed-race individuals. Gradually, however, the country settled upon hypodescent as certain distinctions became untenable without such a system.<sup>44</sup> This progression demonstrates why certain methods were discarded and what the options in the current debate truly are.

The history of racial intermixture of the growing North American population did not even start in North America. The “mixture was ongoing even prior to African slaves arriving on American shores.”<sup>45</sup> The West African coast had its own burgeoning mulatto population who were likely among those captured for the slave trade.<sup>46</sup> Later on, further miscegenation occurred in the Chesapeake colonies in the 1600s, primarily among the indentured servants from Europe and Africa, but also between indentured servants of both origins and slaves from Africa.<sup>47</sup> Initially, in the Upper South of the United States, this mixed-race population was assigned the status of slave, which along with new laws tying slave status to blackness served to create a system of hypodescent.<sup>48</sup> At the same time, South Carolina and Louisiana developed a competing rule that granted this population mulatto and in-between status.<sup>49</sup> The growing mulatto population spawned several depictions in fiction and film showing this identity to be a very distinctive part of culture.<sup>50</sup> A classic film character emerged known as the “tragic mulatto.”<sup>51</sup>

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43. These systems include: Hypodescent, in-between status (those of mixed race are afforded higher status than the “pure” members of the subordinated race but lower status than the subordinating race), bottom-of-the-ladder (products of mixture are considered especially inferior), top-of-the-ladder, highly variable status (race is more co-dependent on wealth and other social status, such as in Latin America where “money whitens”), and egalitarian pluralism (similar to highly variable status, but here race and mixture of race have little weight on status, which is instead driven mainly by class and ethnicity). See F. James Davis, *Defining Race: Comparative Perspectives*, in MIXED MESSAGES, *supra* note 2, at 17–25.

44. Some state systems within the United States have allowed an in-between status for mulattoes, and some commentators have argued unsuccessfully that mixed-race individuals be considered the bottom-of-the-ladder. *Id.* at 17–18. The majority of law has been framed around hypodescent. *Id.* The bottom-of-the-ladder view, however, marshaled support for antimiscegenation laws as methods of preventing the creation of an even more inferior “mongrel” race. *Id.* at 21–23.

45. Spencer, *supra* note 2, at 89.

46. *Id.*

47. *Id.* at 90.

48. Davis, *supra* note 43, at 17.

49. *Id.*

50. Bridget K. Smith, *Race as Fiction: How Film and Literary Fictions of “Mulatto” Identity Have Both Fostered and Challenged Social and Legal Fictions Regarding Race in America*, 16 SETON HALL J. SPORTS & ENT. L. 44, 80–82 (2006).

51. *Id.* at 64.

As the international slave trade ended and the cotton trade demanded more labor, the Upper South rule gained popularity and the hypodescent became the rule across all slave states by 1850.<sup>52</sup> By enacting rules predicated on hypodescent status, lawmakers forced distinct mulatto populations to collapse into the overall black population through miscegenation.<sup>53</sup> For example, initially starting in the 1600s Louisiana's miscegenation laws forbade free persons of color (mulattoes were the only people of African descent allowed freedom) from marrying whites or blacks but dropped the distinction by 1808.<sup>54</sup> According to one scholar, the distinction became untenable by 1918.<sup>55</sup> The tenability of the distinction disappeared as social patterns led to heavy intermixing between mulattos and blacks but very little intermixing between mulattoes and whites.<sup>56</sup> The census's tracking of a mulatto category follows this timeline by ending shortly after 1918 in 1920.<sup>57</sup> The common portrayals of mulattoes in film also disappeared eventually.<sup>58</sup> Thus, any brief moves towards a separate in-between status were quickly replaced by hypodescent.<sup>59</sup> The historical existence of racial mixing, the laws addressing it, and popular culture depictions all show that monoracial categorization was based on a construction of race that was only tenable through the use of hypodescent. Despite some commentators' claims that the "browning" of America is a sign of a coming postracial society in which any antidiscrimination scheme will become hopelessly untenable or unnecessary,<sup>60</sup> it is thus clear that historically society has been able to effectively discriminate regardless of racial mixing and narrowed racial categorization.<sup>61</sup>

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52. Davis, *supra* note 43, at 17.

53. *Id.*

54. *Id.*

55. JOEL WILLIAMSON, *NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES* 113 (1980).

56. *Id.*

57. Specifically, the census tracked mulatto beginning in 1850, continuing through 1870, and then recurring in 1910 and 1920, while octoroon and quadroon were included once in 1890. This pattern shows not only the sporadic nature of the census's categories but also that the category was found to be untenable after 1920. Bennett, *supra* note 3, at 164 tbl.1.

58. Smith, *supra* note 50, at 95. Portrayals of mixed race have recently reemerged; however, they continue to be portrayed as slightly tragic. See *id.* at 124.

59. See Davis, *supra* note 43, at 17.

60. See, e.g., Suzy Hansen, *The Browning of America*, SALON.COM, Apr. 27, 2002 (reviewing Rich Rodriguez, *BROWN: THE LAST DISCOVERY OF AMERICA* (2002)).

61. GREGORY THOMAS CARTER, *AMERICA'S NEW RACIAL HEROES: MIXED-RACE AMERICANS AND IDEAS OF NOVELTY, PROGRESS, AND UTOPIA* 164 (2007).

## B. Reemergence and Boom

### 1. *Loving*, the Multiracial Category Movement, and the 2000 Census

After *Loving v. Virginia*<sup>62</sup> invalidated antimiscegenation laws as violations of equal protection,<sup>63</sup> one might expect an increase in interracial marriage to follow. Indeed, there are some data to support this.<sup>64</sup> Long before *Loving*, however, many states had repealed or invalidated their antimiscegenation statutes, reducing the exceptionalism of the post-*Loving* years.<sup>65</sup>

*Loving* did, however, signal a greater acceptance of interracial marriages and relationships, thus enabling the embrace of a mixed-race identity. This acceptance did not immediately translate into an understanding of multiracial children as anything other than monoracial. In fact, despite this signaling of greater acceptance,

[t]he position of multiracials within racial/ethnic and white hegemonic society has generally been arbitrary and inconsistent. 'Until a change in policy in 1989, biracial babies with a white parent were assigned the racial status of the nonwhite parent. Otherwise, multiracial babies of two parents of color, whether the same or different races, were assigned the race of the father.' This monoracially based assignment of multiracial children enforced a single race identity that erased mixed race existence and promoted cultural denial of miscegenation.<sup>66</sup>

Over time as the population grew, those affected began to campaign together for changes to these policies. This growing population helped fuel the MCM, a movement comprised of organizations such as Project RACE (Reclassify All Children Equally)<sup>67</sup> that campaigned in the 1990s at the local

62. 388 U.S. 1 (1967).

63. *Id.* at 12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.")

64. U.S. BUREAU OF THE CENSUS, TABLE 1: RACE OF WIFE BY RACE OF HUSBAND: 1960, 1970, 1980, 1991, AND 1992 (1994), available at <http://www.census.gov/population/socdemo/race/interractabl.txt>. See also Haya El Nasser, *Multiracial No Longer Boxed in by the Census*, USA TODAY, Mar. 2, 2010, [http://www.usatoday.com/news/nation/census/2010-03-02-census-multi-race\\_N.htm](http://www.usatoday.com/news/nation/census/2010-03-02-census-multi-race_N.htm).

65. At the time of *Loving*, only sixteen states still had antimiscegenation statutes on the books. *Loving*, 388 U.S. at 6. Such statutes in other states had been previously repealed by legislative action or by state court action. California, for example, had invalidated its antimiscegenation statute in *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948), nineteen years before *Loving*.

66. BEVERLY YUEN THOMPSON, *THE POLITICS OF BISEXUAL/BIRACIAL IDENTITY: A STUDY OF BISEXUAL AND MIXED-RACE WOMEN OF ASIAN/PACIFIC ISLANDER DESCENT* 20 (2006) (citing Root, *supra* note 24, at xviii), available at <http://snakegrl.files.wordpress.com/2010/02/microsoft-word-final-book-bisexual-biracial-identity.pdf>.

67. Project RACE (Reclassify All Children Equally) is an organization that "advocates for multiracial children and adults through education, community awareness and legislation [and] for a multiracial classification on all school, employment, state, federal, local, census and medical forms

and federal level for changes to racial data gathering methods.<sup>68</sup> This campaign culminated in the compromise embodied in the 2000 Census, which allowed respondents to mark more than one racial category but did not offer a separate multiracial category.<sup>69</sup> Response to this compromise has been varied. It has been criticized for going too far and not going far enough; it has also been criticized as an example of the untenable nature of categorizing and tracking race at all.<sup>70</sup> The debate remained unresolved at the time of the 2010 Census, which included the same categorization.<sup>71</sup>

After at least ten years of tacit acknowledgement reflected in the census, discussion of a multiracial category has increased in response to data that show an increasing mixed-race population.<sup>72</sup> Additionally, the election of Barack Obama of black African and white American ancestry to the U.S. presidency in 2008 suggests that the salience of the mixed-race population is also increasing.<sup>73</sup> Many have written to exhort the rising population and its power to “brown” the country, moving it into a postracial era. This coverage can act as positive feedback on the growth of multiracial populations not by increasing the amount of interracial reproduction, but by encouraging those who in the past would have embraced a monoracial category to identify as multiracial.<sup>74</sup> As the multiracial category is covered positively in mainstream media and public discourse, people who may have passed as monoracial or considered themselves as such may reconsider their self-identification.<sup>75</sup> In media

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requiring racial data.” *Mission Statement*, PROJECT RACE, <http://www.projectrace.com/aboutprojectrace> (last visited May 13, 2011). It has campaigned since 1991 for various legislative reforms. See *History and Results*, *supra* note 8; see also Spencer, *supra* note 2, at 88.

68. G. Reginald Daniel & Josef Manuel Castañeda-Liles, *Race, Multiraciality, and the Neoconservative Agenda*, in *MIXED MESSAGES*, *supra* note 2, at 128–36.

69. See *COMM’N ON CIVIL RTS.*, *supra* note 3.

70. *Id.* at 15–36.

71. Barbara Kiviat, *Should the Census Be Asking People if They Are Negro?*, *TIME*, Jan. 23, 2010, <http://www.time.com/time/nation/article/0,8599,1955923,00.html?iid=tsmodule#ixzz0dcAzZMGW>.

72. U.S. Census Bureau projections show that those identifying as belonging to two or more racial categories will increase by 311 percent by the year 2050, higher than any other racial or ethnic category (Hispanic and non-Hispanic being the only ethnic categories tracked by the census). See U.S. CENSUS BUREAU, NATIONAL POPULATION PROJECTIONS RELEASED 2008 (BASED ON CENSUS 2000) SUMMARY TABLE 7: PROJECTED CHANGE IN POPULATION SIZE BY RACE AND HISPANIC ORIGIN FOR THE UNITED STATES: 2000 TO 2050 (2008), available at <http://www.census.gov/population/www/projections/summarytables.html>.

73. See El Nasser, *supra* note 64; Dianna Marder, *Obama Reflects Growth of Biracial America*, *PHILA. INQUIRER*, Jan. 16, 2009, at A1.

74. See El Nasser, *supra* note 64. But see Jesse Washington, *Black or Biracial? Census Forces a Choice for Some*, *HANFORD SENTINEL*, Apr. 19, 2010, [http://docs.newsbank.com/openurl?ctx\\_ver=z39.88-2004&srft\\_id=info:sid/tw.newsbank.com:AWNB:LPRB&srft\\_val\\_format=info:ofi/fmt:kev:mtx:ctx&srft\\_dat=12F3291C6F849CA0&svc\\_dat=InfoWeb:aggregated5&req\\_dat=0D6884C8DA6CD5B5](http://docs.newsbank.com/openurl?ctx_ver=z39.88-2004&srft_id=info:sid/tw.newsbank.com:AWNB:LPRB&srft_val_format=info:ofi/fmt:kev:mtx:ctx&srft_dat=12F3291C6F849CA0&svc_dat=InfoWeb:aggregated5&req_dat=0D6884C8DA6CD5B5).

75. See, e.g., Alice LaPlante, *Self-Identified Multiracial Individuals Realize Real Benefits*, *STAN. GRADUATE SCH. BUS. NEWS*, Apr. 2009 (finding in a study of high school students that “[t]hose who

coverage of the multiracial phenomenon, this feedback concept is generally ignored and the increasing mixed-race population is discussed as solely a result of increased interracial procreation rather than new ideas about self-identity.

The emergence of a mixed-race category in data gathering methods and in the media is balanced at least partially with a pushback against the category in scholarship. The pushback comes in the form of solidarity sentiments from affected groups of color. The general sentiment, as put by one scholar, is that:

many monoracials do view a multiracial identity as a choice that denies loyalty to the oppressed racial group. We can see this issue enacted currently over the debate of the U.S. census to include a multiracial category—some oppressed monoracial groups believe this category would decrease their numbers and “benefits” within the system.<sup>76</sup>

Fear of population losses in the census and other data gathering tools stands in tension against a policing of eligibility for race-based remedies. When it is time to stand up and be counted, these populations seek strength in numbers regardless of appearance or upbringing. Those taking advantage of race-conscious remedial measures or programs are pressured to identify as authentic or full blooded.

In a further evolution of the multiracial emergence theme, some scholars have postulated that racial hierarchy in the United States is shifting. They claim that racial stratification in general and the rules of racial recognition in the United States are slowly coming to resemble the tri-racial stratification in Latin America.<sup>77</sup> According to these scholars, the United States is developing into a loose tri-racial stratification of whites, honorary whites, and nonwhites. The white category—defined as traditional whites, new white immigrants, assimilated Latinos, and light-skinned multiracials—is at the top, followed by an intermediary group of honorary whites—Asian Indians, Chinese Americans, darker-skinned multiracials, Japanese Americans, Korean Americans, light-skinned Latinos, and Middle Easterners. At the bottom is a nonwhite group, or the collective black—defined as African Americans, Cambodians, dark-skinned Latinos, Filipinos, Laotians, and Vietnamese.<sup>78</sup>

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identified with multiple groups reported either equal or higher psychological well-being and social engagement than those who identified primarily with a single group”).

76. THOMPSON, *supra* note 66, at 21.

77. Bonilla-Silva & Embrick, *supra* note 38, at 33–48; cf. Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States–Latin America Comparison*, 87 CORNELL L. REV. 1093, 1112–18 (2002) [hereinafter Hernández, *Matrix*].

78. Bonilla-Silva & Embrick, *supra* note 38, at 33–34.

Many have pointed to the increased recognition of mixed-race individuals as a signal that we are approaching a postracial utopia.<sup>79</sup> Understanding the true source of the population “increase” is instrumental in evaluating how the law deals with the population and what significance we give to the increase itself.

## 2. Legal Acceptance

Taking their cue from the federal government, many courts have grappled with the Two or More category in a variety of legal doctrines. In several areas, they have embraced it. In other areas, they have acknowledged a distinct category without basing decisions upon it. In still other areas, courts have rejected it completely. I examine areas of law in which courts have adopted a course of action other than full-scale rejection. These cases in turn allow us to examine the rejection of mixed-race identity in Title VII in the broader context of the evolving law.

Recent examples involving remedial consent decrees and voting rights revolve around the question of how a separately categorized population should be used for purposes of determining the overall racial minority population or for determining the size of a specific monoracial population. Other examples involve transportation services and the Fair Housing Act. First, in *DeLeo v. City of Boston*<sup>80</sup> the district court examined a judicial decree mandating preferences in hiring and promoting black officers until the percentage of entry-level minorities equaled the percentage of the city’s minority population.<sup>81</sup> White police officer candidates sued to overturn this decree, alleging that the decree’s goal had been met.<sup>82</sup> Specifically, they claimed that the percentage of entry-level minority police force members now equaled that of the minorities in Boston’s population.<sup>83</sup> The percentage of entry-level minorities was 38.82 percent, a figure not in contention.<sup>84</sup> What was in contention was the percentage of the city’s minority population.<sup>85</sup> The plaintiffs contended that the minority population was 38.26 percent based on the black and Hispanic populations from the 2000 Census.<sup>86</sup> Thus, according to the plaintiffs, the

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79. CARTER, *supra* note 61 (analyzing past uses of mixed race as the solution or signal of racial utopia).

80. No. 03-12538-PBS, 2004 WL 5740819, at \*1 (D. Mass. Nov. 23, 2004).

81. *Id.*

82. *Id.*

83. *Id.* at \*10.

84. *Id.*

85. *Id.*

86. *Id.*

percentage of minorities in the entry-level police force exceeded the city's, shoring up their position that the decree no longer applied. The defendants contended that the plaintiffs' asserted percentage did not include those identified as multiracial or biracial and that including those individuals would raise Boston's minority population to 40.12 percent, making the police force underrepresented and hiring preferences necessary.<sup>87</sup> Invalidating the decree, the court sidestepped the question of which number reflected the correct minority population and held that both estimates of the city's minority population were sufficiently on par with the percentage of minority officers on the force.<sup>88</sup> The important point for purposes of this Comment is that the court accepted that the mixed-race population was a separate group, primarily because the data were presented as such in the census.<sup>89</sup> The court did not try to funnel the population into monoracial categories.

Second, in *Black Political Task Force v. Galvin*<sup>90</sup> the same federal judicial district confronted the question of how, for purposes of redistricting and creating more majority-minority districts, to count those who marked more than one race. The court considered whether to count those individuals in each category they marked when calculating the totals for monoracial categories or to count a separate mixed-race category and include this category in an overall total of minorities.<sup>91</sup> Tallying each monoracial group every time it was marked would total greater than 100 percent of the population, as those who marked multiple categories would be tallied multiple times. The court avoided the question of whether to include the mixed-race population as part of the overall minority category, finding their small numbers indeterminate. In dicta, the court leaned against counting all categories marked because of its double-counting consequence.<sup>92</sup> Besides addressing the obvious need for accuracy, it effectively creates a separate group for mixed-race individuals because those who marked more than one box are tallied separately to avoid double counting.

In *Darensburg v. Metropolitan Transportation Commission*,<sup>93</sup> a California district court addressed whether to include those who had marked two or more races on the 2000 Census as minorities for purposes of determining "communities of concern" in the Transportation Commission's equity analysis

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87. *Id.*

88. *Id.* at \*11.

89. *Id.*

90. 300 F. Supp. 2d 291 (D. Mass. 2004).

91. *Id.* at 301.

92. *Id.*

93. 611 F. Supp. 2d 994 (N.D. Cal. 2009).



of the public transportation funding plan.<sup>94</sup> The plaintiffs, patrons of a municipal transit district, brought a class action against the Commission, alleging that its funding decisions disproportionately harmed their district's predominantly minority ridership in violation of a California state statute.<sup>95</sup> The court accepted the Commission's calculation of the minority population that included the multiracial population separately in its reasoning on what subset of ridership was deprived of service.<sup>96</sup>

Finally, in the most explicit example of acceptance, the district court in Kansas held biracial to be a protected class under the Fair Housing Act in *Smith v. Mission Associates Limited Partnership*.<sup>97</sup> In this case, a white couple with biracial children (from the mother's previous relationship) filed a housing discrimination claim on the basis of racial discrimination against the children. The couple succeeded in establishing membership for the children in a protected class as biracial.<sup>98</sup> The court stated, "[p]laintiffs have all established that they are members of a protected class. Larry and Duane McFadden are both bi-racial, being half black and half caucasian."<sup>99</sup> *Smith* provides a clear endorsement of proceeding with a housing discrimination claim as a member of a biracial class and is most closely analogous to the protected class membership requirements of employment discrimination law.

These cases show that in doctrines requiring both statistical and individualized racial categorization, courts have often embraced the concept of a separate identity for multiracials. Although some courts have avoided resting the ultimate decision upon this classification, this level of acceptance nonetheless contrasts with the wholesale rejection in Title VII employment discrimination claims.<sup>100</sup>

### 3. Legal Rejection in Title VII

As discussed above, in several areas of law, courts have either implicitly or explicitly accepted the existence of a separate category of mixed race. This acceptance, however, has not carried over into employment discrimination, an area with substantial impact on mixed-race individuals. Generally, courts have resisted recognizing a separate class for mixed racial status, instead

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94. *Id.* at 1013.

95. *Id.* at 997.

96. *Id.* at 1013.

97. 225 F. Supp. 2d 1293 (D. Kan. 2002).

98. *Id.* at 1296, 1299.

99. *Id.* at 1299.

100. It is ironic, however, that, as just discussed above, a mixed-race identity is not rejected in determining when a remedial consent decree for a past successful employment discrimination claim is met.

construing the identities of mixed-race plaintiffs or employees as belonging to monoracial categories and then allowing the action to proceed as a typical race discrimination claim. In disparate treatment claims, for example, if a portion of a plaintiff's racial background is the same as a replacement employee, courts have often rejected the claim, effectively racializing the plaintiff as belonging to a monoracial category and dismissing the claim. Courts have been inconsistent as to which direction to racialize, whether to allow the claim to move forward or to nullify it. In this way, the ability to racialize mixed-race employees has become an additional tool in a court's arsenal to dispense with employment discrimination cases early at the prima facie stage of proceedings.

a. Title VII Doctrinal Background

Title VII of the Civil Rights Act authorizes two primary types of employment discrimination claims: disparate treatment and disparate impact.<sup>101</sup> The Supreme Court laid out the current framework used to establish disparate treatment in *McDonnell Douglas Corp. v. Green*.<sup>102</sup> Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of racial discrimination by showing that he or she is: (1) a member of a protected group; (2) subjected to adverse employment action; (3) replaced by someone outside the protected group; and (4) qualified to do the job.<sup>103</sup> The burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."<sup>104</sup> Upon the defendant employer meeting this burden, the plaintiff must then show that the articulated reason is pretext in order to prevail.<sup>105</sup> The plaintiff can show pretext by demonstrating the reason to be false and need not show that the reason was offered as pretext for racial discrimination specifically.<sup>106</sup>

Thus, when establishing a prima facie case for a disparate treatment claim, it is important to ascertain whether the plaintiff and replacement employee are members of a specific protected group. Problems arise when determining if a mixed-race plaintiff belongs to the pleaded protected group or whether a mixed-race employee replacing a plaintiff is considered someone outside the protected group. Uncertainty in this determination can prevent a case from moving past the prima facie stage. Therefore, challenging protected status

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101. 42 U.S.C. § 2000e-2(a)(1) (2006).

102. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

103. *Id.* at 802.

104. *Id.*

105. *Id.* at 804.

106. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147–48 (2000).

becomes an attractive option for employers trying to disarm cases in this arena. Rejecting mixed-race identity enables new attacks on traditional disparate treatment claims.<sup>107</sup>

*Griggs v. Duke Power Co.*<sup>108</sup> laid out the test for establishing disparate impact under Title VII. Disparate impact claims place the initial burden on a plaintiff to establish that a specific employee selection device has an exclusionary effect on members of the protected group to which the plaintiff belongs.<sup>109</sup> This effect can be established using different methods, but it requires more than showing that the employer's workforce does not mirror the racial composition of the surrounding population.<sup>110</sup> Similarly, an employer cannot rely on parity in racial composition in order to defend disparate impact.<sup>111</sup> While the Supreme Court has stated that there is no single standard of disparate impact in Title VII racial discrimination cases, all claims require the racial determination of relevant comparator populations such as the applicant pool.<sup>112</sup> For example, in *Griggs*, the Court looked to census data on the educational achievement of different racial groups in order to establish that a high school diploma requirement created an adverse impact.<sup>113</sup> A more common and specific method—applicant flow analysis—uses data on those who have applied for a position.<sup>114</sup> This analysis compares, for example, the relative test pass rates of applicants on the basis of race.<sup>115</sup>

Reliance on racial classifications again creates a possible conflict with the emerging mixed-race category. Under the traditional disparate impact analysis of relative population groups, the classification of those who mark more than one classification on the census can create conflicts similar to those that courts have addressed in voting rights and consent decree cases. The Court's case-by-case approach in disparate impact claims and its general disapproval of any fixed percentage to show impact seem to allow courts to sidestep the question as long as the mixed-race population remains relatively small. This will not always be the case, however, as discussed in Part I, with claims to mixed-race identity continually increasing. Even with applicant flow analysis, as part of the *prima facie* case, the categorization of mixed-race applicants

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107. See *infra* Parts II.A and II.B (discussing mixed-race harms and intersectional obscurement affecting traditional claimants).

108. 401 U.S. 424 (1971).

109. *Id.* at 431.

110. Shoben, *supra* note 34, at 603.

111. *Id.*

112. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988).

113. *Griggs*, 401 U.S. at 430 n.6.

114. Shoben, *supra* note 34, at 604.

115. *Id.*

is unavoidable and can affect the overall data relied upon for showing relative pass rates among racial groups.

The recent Supreme Court decision in *Ricci v. DeStefano*<sup>116</sup> suggests that the concern over categorization is only about an effect upon a dying or extinct actionable theory of discrimination. This decision restricted the ability to act preemptively to avoid disparate impact litigation and called into question the claim's constitutionality more generally. The analysis in *Ricci*, however, shows the increased importance and function of racial categorization in establishing the impact upon the plaintiffs' group.<sup>117</sup> The Court discussed "white and Hispanic firefighters who likely would have been promoted based on their good test performance," clearly relying on some type of classification of the applicants involved.<sup>118</sup> *Ricci*, also increases the importance of gathering racial data for voluntary municipal actions taken to rectify measures with an anticipated disparate impact. The Court stated that any such action could only be taken with a "strong basis in evidence" that the municipality would be subject to disparate impact liability.<sup>119</sup> This showing requires strong indication from traditional methods of establishing disparate impact—applicant flow or relative population. Thus, municipalities will likely require even higher percentage disparities or relative pass rate differences before making a voluntary prophylactic change, if they attempt to do so at all. When trying to demonstrate this strong basis, it will matter how the increasing mixed-race population is categorized.

b. Rejecting Mixed-Race-Based Claims Under Title VII

In *McCauley v. Stanford University Medical Center*,<sup>120</sup> an African American plaintiff employee, Vanda McCauley, alleged that she received different treatment in training and promotion opportunities from a similarly situated employee of a different protected class and that this treatment led to her resignation.<sup>121</sup> On the defendant's motion for summary judgment, the court found that McCauley had failed to make a prima facie case of racial discrimination based on two parallel grounds.<sup>122</sup> The court found that another African American employee, Shara Johnson, was offered the same

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116. 129 S. Ct. 2658 (2009).

117. *Id.* at 2664.

118. *Id.*

119. *Id.*

120. No. C 07-1784 JF (RS), 2009 WL 650359 (N.D. Cal. Mar. 11, 2009).

121. *Id.* at \*1.

122. *Id.* at \*8-9.

training opportunities as the comparator employee.<sup>123</sup> McCauley alleged that Johnson, who had a white mother, self-identified as “‘mixed race’ [and did] not have African American facial features.”<sup>124</sup> The court refused to acknowledge that Johnson should be considered anything other than African American without a showing to the contrary by McCauley.<sup>125</sup> Thus, the court placed Johnson in a racial category that she potentially did not embrace, and it placed upon the plaintiff as part of the prima facie case the burden to prove that Johnson was not African American.<sup>126</sup> The McCauley court’s reasoning echoes hypodescent in finding Johnson to be African American based on her having one parent of African American descent. While this choice is often the default racialization when a parent’s race is known, regardless of appearance, it demonstrates how the court’s particular racialization of mixed-race persons can serve to bolster a judicial decision.<sup>127</sup>

*Moore v. Dolgencorp, Inc.*<sup>128</sup> provides another example of rejection. In *Dolgencorp*, the plaintiff Danetta Moore, an African American woman, was fired from her position as a store manager and filed a two-part complaint alleging racial discrimination under state law and Title VII.<sup>129</sup> Moore was replaced by Randy Young, a self-identified individual of mixed race with an African American parent.<sup>130</sup> The plaintiff asked the court to take judicial notice of a distinction between the protected class of black and mixed race.<sup>131</sup> The court declined and stated, “[t]here is no basis on this record to find either as a matter of fact or as a matter of law, that there presently exist two separate racial classes whose parameters are either well known or capable of accurate and ready determination by reference to unimpeachable sources.”<sup>132</sup> The court further rejected Moore’s claim that a light-skinned African American of mixed-race heritage is not entitled to protection in the same class.<sup>133</sup>

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123. *Id.* at \*9.

124. *Id.* at \*9 n.6.

125. *Id.*

126. *Id.*

127. Northwestern Univ., *Does It Matter if Black Plus White Equals Black or Multiracial?*, BIOTECH WK., Oct. 29, 2008 (reporting on a Northwestern study that suggests “the immediate response of nonblack study participants is to categorize a racially ambiguous person as black when it was known that one of the person’s parents was black and one was white,” but absent that knowledge categorization was more indeterminate).

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

129. *Id.* at \*1 (cited for the same proposition by another district court in *Collins v. TIAA-CREF*, No. 3:06cv304-RJC, 2009 WL 3077555 (W.D.N.C. Sept. 23, 2009)).

130. *Id.*, at \*2.

131. *Id.* at \*4 n.5.

132. *Id.*

133. *Id.* at \*4.

Again, the court racialized a comparator employee of mixed race in order to dispense with a claim.

In *Kendall v. Urban League of Flint*,<sup>134</sup> the plaintiff Jaime Kendall claimed a biracial identity and alleged discrimination on the basis of that identity.<sup>135</sup> Kendall relied not only on self-identification but also on the testimony of several other persons stating that she “has a light complexion and ‘looks bi-racial.’”<sup>136</sup> The plaintiff was an employee of defendant Urban League of Flint and received generally complimentary reviews of her performance. When Kendall applied for the CEO position, the board chair probed her biracial identity even though the plaintiff generally identified as black.<sup>137</sup> The board member questioned her ability to identify with African Americans and campaigned against her candidacy for the CEO position. The plaintiff alleged that this caused her to lose the position to a monoracially identified African American.<sup>138</sup> The district court granted summary judgment for the defendant after concluding that the plaintiff had failed to present a prima facie case that race was a factor in Kendall not getting the position.<sup>139</sup> The court was presented with several options in racializing the plaintiff, including findings that she was white and was discriminated against on the basis of that race, that she was African American and thus someone of the same class was hired, and that she was a member of a separate biracial or mixed-race class and was discriminated against on the basis of that race. Only the first and last options would allow the claim to move forward. However, under the first option, the plaintiff would have had a better chance of moving past the prima facie case. The plaintiff would have been required, however, to claim an identity with which she did not identify, leading to harms of categorization. Additionally, as the board members at issue perceived that she was at least partially African American, her claim of being white would have been met with confusion and incredulity by those who apparently held a monoracial view of the white identity. The indeterminate and flexible nature of Kendall’s identity led the court to determine that race was not a factor, despite facts showing it to be an explicit subject of consideration to at least one board member.<sup>140</sup>

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134. 612 F. Supp. 2d 871 (E.D. Mich. 2009).

135. *Id.*

136. Brief of Appellant at 5, *Kendall*, 612 F. Supp. 2d 871, *appeal docketed*, No. 09-1461, 2009 WL 2443878 (6th Cir. July 30, 2009).

137. *Id.* at 9.

138. *Id.* at 11–20.

139. *Id.* at 23.

140. *Id.*

## II. MIXED-RACE HARMS

### A. Unique Animus

Mixed-race individuals are subject to discrimination not only on the basis of the component racial groups to which they belong, but also because they identify as racially mixed. This unique animus towards those racially mixed is related to the general historical animus directed toward miscegenation. Racial groups or classes to which the mixed individual may belong are often the source of this animus. In Ohio, a man sent threats and hate mail to a city employee specifically calling out the employee's mixed-race status as the reason.<sup>141</sup> Recently, a Louisiana justice of the peace refused to marry an interracial couple not because he felt that interracial marriage was wrong in and of itself, but because he believed that the child would have no place in society.<sup>142</sup>

In examining the methods used by white supremacist groups for constructing race, Abby Ferber found that one of the highest antipathies was directed toward products of racial mixing.<sup>143</sup> Ferber studied recruitment and instructional materials from several white supremacist groups.<sup>144</sup> Additionally, she reviewed interviews and personal accounts of white supremacists.<sup>145</sup> From these materials, she found that maintaining racial purity was one of the main concerns for the white supremacist cause.<sup>146</sup> The literature focused on protecting white bloodstreams from mixing with blacks. Leaders claimed that this focus was more sympathetic to their targeted white audiences than using examples of mixing between other racial groups and whites.<sup>147</sup> This desire for racial purity is motivated at least partly by animus toward the products of racial mixing involving whites in addition to general segregationist attitudes.<sup>148</sup> The fear of racial mixing is based on stereotypes that were marshaled more openly in the past to support miscegenation statutes: Mixing of the races leads to degraded forms of humans.<sup>149</sup> This fear is also based on

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141. Associated Press, *Ohio: Man Accused of Threat to Justice*, N.Y. TIMES, Apr. 10, 2008, <http://query.nytimes.com/gst/fullpage.html?res=9806E1DA173DF933A25757C0A96E9C8B63&sec=&spn=&emc=eta1>.

142. Associated Press, *Louisiana: Calls for Resignation*, N.Y. TIMES, Oct. 17, 2009, at A9.

143. Abby L. Ferber, *White Supremacists in the Color-Blind Era: Redefining Multiracial and White Identities*, in MIXED MESSAGES, *supra* note 2, at 147–55.

144. *Id.* at 148.

145. *Id.* at 149.

146. *Id.*

147. *Id.*

148. *Id.* at 153–55.

149. This fear echoes the bottom-of-the-ladder schema for categorizing products of racial mixing.

the concern that racial mixing will create familial bonds between whites and nonwhites that will threaten the white racial bond.<sup>150</sup>

Nancy Leong has consolidated many instances when this animus has prompted litigation or media coverage.<sup>151</sup> And there are likely more instances than those reflected in litigation, given judicial erasure of discrimination.<sup>152</sup> Judicial erasure has the effect of erasing evidence of mixed-race discrimination and prevents creation of legal precedent on the subject.<sup>153</sup> In her examination of exemplar cases, Leong has found that many courts, like those in the cases discussed above, shift the identity of a plaintiff or comparator employee in order to structure the claim in terms that fit neatly into existing jurisprudence.<sup>154</sup> Based on the facts of these cases, it is likely that several instances of mixed-race discrimination occur that cannot be tracked or counted.<sup>155</sup> This not only falsely minimizes the magnitude of this discrimination but also reduces the likelihood that claims of mixed-race discrimination will be brought in the first place.<sup>156</sup> Because lawyers take lack of precedent as a signal, they instead plead according to a monoracial category.<sup>157</sup> Courts are also reluctant to recognize a new claim in a time when racial discrimination is supposedly decreasing.<sup>158</sup>

## B. Intersectional Obscurement

In the seminal work by Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, the legal repercussions of intersectional identity are examined in three cases.<sup>159</sup> In *DeGraffenreid v. General Motors*<sup>160</sup> a group of black women alleged employment discrimination on the basis of being black women. The court granted summary judgment for the defendants, holding that the plaintiffs could bring suit on behalf of either blacks or women but not as a special class of black women, as this would “create a new

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150. *Id.* at 154.

151. Leong, *supra* note 11, at 483.

152. *Id.* Judicial erasure is the process by which courts take multiracial discrimination claims and structure them in monoracial terms. *Id.* at 523–24.

153. *Id.* at 528.

154. *Id.* See *supra* Part I.B.3.

155. Leong, *supra* note 11, at 528.

156. *Id.*

157. *Id.* at 527.

158. *Id.* at 528.

159. Crenshaw, *supra* note 20.

160. 413 F. Supp. 142 (E.D. Mo. 1976).



'super remedy.'"<sup>161</sup> In *Payne v. Travenol*,<sup>162</sup> a group of black female plaintiffs sought class certification for a racial discrimination claim on behalf of all blacks.<sup>163</sup> The court refused to allow black women to represent black males.<sup>164</sup> Based on the racial data, the plaintiffs were able to demonstrate racial discrimination against black females alone as well as a general finding of racial discrimination against all blacks. But the court refused to extend the remedy to black males.<sup>165</sup> In the third case, *Moore v. Hughes Helicopter, Inc.*,<sup>166</sup> the black female plaintiffs alleged that the defendant engaged in sex and race discrimination.<sup>167</sup> The appellate court affirmed the district court's refusal to certify the plaintiff to represent all females because they had serious doubts about her ability to represent white females adequately.<sup>168</sup> In this way, black females at the intersection of two marginalizing power structures are on the one hand prevented from representing those outside of that intersection but also denied the ability to seek a remedy based on this intersectional identity.

The experience of mixed-race individuals in employment discrimination claims is similar to the experience of intersectional plaintiffs, but treatment of mixed-race claims can also act as a reverse intersectional harm against others.<sup>169</sup> Consider *McCauley v. Stanford University Medical Center*<sup>170</sup> and *Moore v. Dolgencorp, Inc.*<sup>171</sup> In these cases, mixed-race comparator employees were used to defeat racial discrimination claims because they were perceived as belonging to two identities. They were presumed to represent either identity as if they belonged solely to each category. This presumption is the reverse of how the intersectionality of black female identity prevents black women from representing either constituent identity.

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161. *Id.* at 143.

162. 416 F. Supp. 248 (N.D. Miss. 1976).

163. *Id.* at 250.

164. Crenshaw, *supra* note 20, at 147.

165. *Id.*

166. 708 F.2d 475 (9th Cir. 1983).

167. Crenshaw, *supra* note 20, at 143.

168. *Id.* at 144.

169. Intersectionality has generally been conceived as a method to examine the interaction of multiple power structures. The examination of multiple racial categories operates within the same power scheme: Race subordination. Mixed race is not a prototypical example of intersectionality. Instead, I use the concept merely as a tool to show that in certain limited aspects the harms mimic those viewed as intersectional harms in other instances. *But see, e.g.,* Bruno Diaz, *Black Hispanics Struggle for Their Racial Identity*, HISPANIC TRENDING, Feb. 13, 2005, [http://juantornoe.blogspot.com/hispanicrending/2005/03/black\\_hispanics.html](http://juantornoe.blogspot.com/hispanicrending/2005/03/black_hispanics.html) (discussing how the struggle for identity among black Hispanics is often thought of as an ethnic/racial intersection, but some consider Hispanic to be a race in itself).

170. No. C 07-1784 JF (RS), 2009 WL 650359 (N.D. Cal. Mar. 11, 2009).

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

When plaintiffs are of mixed race themselves, they are similarly presumed to experience nothing distinct from each monoracial group. In fact, at least one court has gone further. In *Walker v. University of Colorado Board of Regents*,<sup>172</sup> the court stated in effect that a mixed-race plaintiff cannot allege discrimination based on a monoracial category if a comparator employee is identified as any other racial group with which the plaintiff significantly identifies.<sup>173</sup> Specifically, the plaintiff Walker self-identified as “a multiracial person of Black, Native American, Jewish and Anglo descent.”<sup>174</sup> The court rejected the contention that he could only be replaced by a member of a “protected class [that] is limited to multiracial persons” “because it would be impracticable to apply and could be so self limiting that a particular person is the only identifiable member of the group.”<sup>175</sup> Instead, the court held that “multiracial persons may be considered members of each of the protected groups with which they have any significant identification.”<sup>176</sup> Because of the permissive “may be” language, this scheme can be construed in two ways. In one construction, a mixed Latino, Asian, and white person who is fired and replaced with someone of any of those three groups would be prevented from establishing a prima facie case of employment discrimination.<sup>177</sup> In another construction, which the *Walker* court alludes to, the mixed Latino, Asian, and white employee may be considered whatever category to which the replacement employee does not belong. If a Latino replacement was hired, then the original mixed employee could try to assert discrimination based on Asian or White identity. Thus, a replacement employee of any of those three classes would not necessarily defeat the plaintiff’s prima facie case. While this second conception may seem to operate like a mixed-race categorization, it does not address mixed-race discrimination. The *Walker* court stated that “the fact that a Black man was selected for the position . . . and an Anglo woman was selected as [the other position] do not, in themselves, defeat [Walker’s] claims.”<sup>178</sup> Yet the court does not suggest how the plaintiff’s membership in a protected class should be determined other than to include that such a protected class cannot be a general multiracial class.<sup>179</sup> Combining the

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172. Civ. A. Nos. 90-M-932, 92-M-372, 1994 WL 752651 (D. Colo. Mar. 30, 1994), *aff’d*, 45 F.3d 440 (10th Cir. 1994).

173. *Id.* at \*1.

174. *Id.*

175. *Id.*

176. *Id.*

177. In this situation, one way to allege a case of race discrimination would be if a Native American or African American replacement employee were hired.

178. *Walker*, 1994 WL 752651, at \*1.

179. *Id.*

first view of the “may be” doctrine from this case<sup>180</sup> and the view about race from *Dolgenercorp* and *McCauley*, it would seem that the ultimate employee to hire should be one of as many racial backgrounds as possible to restrict the possible claims of fired employees.

While it is not a fully formed method of invalidation, at least one dissenting opinion has sought to use mixed-race individuals as a refutation to the compelling interest of diversity. In *Hunter v. Regents of the University of California*,<sup>181</sup> the dissent took issue with inclusion of multiracial children for a race-conscious program, arguing that it was overinclusive.<sup>182</sup> The articulated compelling government interest of the race-conscious admission program was to increase the racial diversity of underrepresented groups in an experimental school that sought new teaching methods for diverse classrooms.<sup>183</sup> In rejecting the inclusion of mixed-race individuals in the race-conscious program, the dissenting judge suggested that mixed-race individuals could not contribute to the benefits granted by diversity.<sup>184</sup> He sought to bar mixed-race individuals from membership in underrepresented minority groups without any actual information regarding their background and their representation in the program.<sup>185</sup> Here, the judge chose not to dissect mixed-race identity when it served to distinguish individuals from prototypical justifications of diversity that may not have considered mixed-race individuals when originally conceived. This dissent illustrates how the failure to acknowledge mixed-race identity can threaten to harm racial justice concerns predicated on diversity. It seems especially perverse that a program attempting to increase diversity was barred from including those of mixed race in its target group.

These cases demonstrate the full array of options that mixed-race persons present to judges; they can at once belong to a mixed-race or monoracial category, or simultaneously to each separate racial category with which they identify. To be sure, in some cases, the plaintiff must belong to a fixed racial category, even a mixed-race category, to move the case forward. However, no standard has yet been created to address claims brought by mixed-race individuals. Instead, it has been left to the discretion of judges who have done little to establish a framework, but have seized upon this malleable tool

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180. Indeed, at least one commentator has construed *Walker* according to this first conception. See Leong, *supra* note 11, at 509–10.

181. 190 F.3d 1061 (9th Cir. 1999).

182. *Id.* at 1080 (Beezer, J., dissenting).

183. *Id.*

184. *Id.*

185. *Id.*

of mixed race racialization to easily dispense with claims. As articulated below, several frameworks may be utilized to hand some of the control to the parties.

### C. Situational Race and Performing White

Situational race is another harm that affects mixed-race individuals. Situational race can affect any individual in particular circumstances; however, mixed-race individuals are especially vulnerable to this harm for several reasons. Situational race is racial categorization that occurs when individuals' mutable characteristics lead others to perceive them as belonging to a particular race, although the individuals do not self-identify with that race or have any ancestral connection to that race.<sup>186</sup> Under Title VII, no legal remedies are available for harms caused by situational race because the law provides remedies only when discrimination arising from a particular perception of race matches the actual racial classification of the individual. No remedy exists for discrimination triggered only by an mutable characteristic.<sup>187</sup> In many cases, a discriminator who relies on phenotype markers perceives mixed-race individuals as belonging to a particular racial group, and these individuals are discriminated against on the basis of this perception regardless of its accuracy.<sup>188</sup> However, these mixed-race individuals may not be able to establish membership in the perceived racial class because of the continuing judicial conception of race as an immutable characteristic dependent on ancestry.<sup>189</sup> One commentator argues that this situational race especially impacts those of mixed race because their phenotypically indeterminate appearance or varied behavior creates perceptions that can often be inconsistent with the immutable hereditary view of their race.<sup>190</sup> Even when characteristics trigger accurate racializations of mixed-race persons, a court is likely to consider the discriminatory actions to be based not on race but on mutable characteristics because mixed-race people generally are misperceived more easily.<sup>191</sup> Courts may conclude that if identity can shift away from

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186. Root, *supra* note 24, at xxi.

187. *Id.*

188. *Id.*

189. Davison, *supra* note 27, at 182–83. Examples of mutable racial characteristics include dress, hairstyle, method of speech, and organizational affiliations.

190. *Id.* at 180. For example, when a mixed-race individual whose phenotypic traits make it difficult for others to determine her race adopts the hair or dress associated with a certain social conception of race, others will start to view her as belonging to that race. If she is then discriminated against on the basis of the perceived race, it would be accurate—advantageous under current law—for a discriminatory perpetrator to point to the mutable characteristic as what triggered the animus, though it is still a race-based animus.

191. *Id.* at 180–82.

the discriminators' perceptions of race, it is by definition mutable and any signaling characteristic that a discriminator relied upon must be mutable as well.<sup>192</sup> Thus, judgments based on what are thought to be mutable characteristics can serve as acceptable grounds for discrimination.<sup>193</sup>

The experiences of mixed-race persons show race as a social construction and indeed a mutable characteristic dependent on more than just physical features.<sup>194</sup> In fact, the mutable identity of mixed-race persons can create pressures to mutate according to social expectations. Two scholars have observed this dynamic in racial minorities generally and describe it as a problem of racial performance in which employers increasingly focus on these performance measures in assessing the salience of one's race.<sup>195</sup> According to the authors:

[T]he problem of race in the post-*Brown* workplace derives not only from phenotypic manifestations of difference (or skin-deep racism); it derives as well from performative manifestations of difference. Employers want to know not only whether the prospective employee is black in an identity status sense but whether he is black in an identity conduct sense. For at least some corporations, the ideal black employee for the post-*Brown* firm, a firm that professes a commitment to both racial equality and racial diversity, is one who is identifiably black with respect to phenotype but unconventionally black with respect to conduct or social behavior. From the employer's perspective, this employee "looks" black but "acts" white (or at least does not act "too black"). It is precisely this in-between racial identity . . . that makes a person both recognizable and unrecognizable as a black person. . . .<sup>196</sup>

This dynamic functions more often for mixed-race employees because not only is their physical identity perceived as mutable, but they are more likely to be viewed as having a choice in embracing a specific identity. Pressure exists to act in a manner consistent with one identity or another, likely the majority identity. Additionally, what matters is not necessarily whether they are phenotypically identifiable as a minority race but whether that race can be counted for purposes of limited opportunities available, such as diversity initiatives. Employers are thus motivated to hire or retain those who can be counted toward diversity numbers but who can also be

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192. *Id.* at 183.

193. *Id.* With the rise in bleaching creams and cosmetic procedures, these features are not conclusively immutable either.

194. *Id.* at 185.

195. DEVON W. CARBADO & MITU GULATI, *ACTING WHITE* 8 (forthcoming from Oxford University Press), available at [http://www.law.berkeley.edu/institutes/cs/sl/lawemotion\\_conference/ActingWhiteintro.pdf](http://www.law.berkeley.edu/institutes/cs/sl/lawemotion_conference/ActingWhiteintro.pdf).

196. *Id.* at 4.

pressured to mutate racial characteristics without being able to file a discrimination claim in response.

### III. PERCEPTION-BASED SOLUTIONS

Ken Naksu Davison and Nancy Leong have attempted to grapple with some of these failures in employment antidiscrimination law that affect mixed-race employees especially. Davison has made a more general assault on the immutability requirement of Title VII jurisprudence, and Leong has examined the harms experienced by mixed-race groups. Both rely on an examination of the discriminator's perception,<sup>197</sup> but this reliance only leads to a partial solution.

#### A. Employer-Perception-Based Disparate Treatment Claims

Davison, who has argued that mixed-race persons experience a high incidence of situational race and mutable race problems, looks to the jurisprudence in *Perkins v. Lake County Department of Utilities*<sup>198</sup> for a solution. In *Perkins*, an individual perceived as Native American was discriminated against, but at trial, the parties disputed whether he was actually Native American.<sup>199</sup> The court resolved this dispute by holding perception as definitive,<sup>200</sup> despite Title VII's failure to include a "regarded as" prong like the American Disabilities Act.<sup>201</sup> The court stated that "[a]s with the joy of beauty, the ugliness of bias can be in the eye of the beholder."<sup>202</sup> Davison proposes that when a mixed-race employee is perceived as belonging to a particular race because of either performance or situational reasons, the employee "would be able to bring a racial discrimination [claim] under the *Perkins* test"<sup>203</sup> based on that perception. Under this proposal, it would not matter whether the plaintiff actually belonged to that protected class or was able to change the mutable characteristics that prompted the treatment.<sup>204</sup>

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197. Leong, *supra* note 11, at 543; Davison, *supra* note 27, at 184.

198. 860 F. Supp. 1262 (N.D. Ohio 1994).

199. *Id.* at 1269.

200. *Id.* at 1277–78.

201. 42 U.S.C. § 12102(2) (2006) ("The term 'disability' means . . . being regarded as having such an impairment.").

202. *Perkins*, 860 F. Supp. at 1277–78.

203. Davison, *supra* note 27, at 185.

204. *Id.*

Nancy Leong proposes a very similar method of determining the race of mixed-race plaintiffs by focusing on the perception of the employer.<sup>205</sup> As she puts it:

Despite the longstanding reliance on categories within antidiscrimination jurisprudence, the categorical model need not and should not remain the paradigm for recognizing racial discrimination to the exclusion of all other paradigms. Rather, we should aspire to a more fluid understanding of race, one that acknowledges animus directed against a person's perceived race without an attendant need to define that person's "objective" racial identity or to place that person in a category. A jurisprudence constructed around that understanding would focus entirely on whether the perception of someone's race—whatever that perceived race might be—motivated discriminatory treatment. Analyzing the relationship between racial perception and discriminatory treatment could, but would not have to, proceed by reference to defined racial identity categories.<sup>206</sup>

This proposal would thus model after the process used by the court in *Perkins*,<sup>207</sup> in which the employer's perception mattered despite the plaintiff's indeterminate membership in the perceived racial group. But Leong's proposal would not require the employer to perceive the plaintiff as belonging to a monoracial category; it would only require the employer to perceive the plaintiff as an outsider.<sup>208</sup> In this scenario, the plaintiff's race is a factual issue to be debated by the parties. Thus the proposal is very similar to Davison's but the plaintiff has a lower burden than that proposed by Davison since the focus is more on general outsider status than a perception of a specific monoracial categorization.

#### B. Unfulfilled Aims

Both of these proposals are incomplete because they focus exclusively on perception. Employer perception reifies the law's obsession with the perpetrator model of discrimination. By looking exclusively to the perpetrator to determine the race of mixed-race plaintiffs or comparator employees, the power shifts to the defendant and the plaintiff has the burden to prove

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205. Leong, *supra* note 11, at 543.

206. *Id.* at 543–44.

207. 860 F. Supp. 1262.

208. *See id.*

perception.<sup>209</sup> Further, both proposals fail to address disparate impact analysis in the context of mixed-race employees.<sup>210</sup>

The perpetrator models fail to address what I have described as intersectional obscurement, in which multiracial individuals can become the ultimate replacement employees. Employers can hire them to fulfill more than one protected class so as to defeat multiple discrimination claims. In the same way, employers can replace them with a member of any class with which they identify.<sup>211</sup> The employer-perception model would thus put the burden of establishing an employer's perception on the plaintiff in order to meet the requirements of a prima facie case whether under disparate treatment or disparate impact analysis. Especially in cases involving the defendant's mixed-race comparator employees, it would be difficult for the plaintiffs to make their claims cognizable by showing, in part, that the comparator employees are self-identifying in particular, pretextual ways to defeat the claim and that the defendant employer actually perceives them as something else. The one in the best position is the employer, especially at early stages before discovery. Thus, the perception focus actually bolsters the perpetrator model of discrimination, which presents a large barrier to successful discrimination claims. Any scheme predicated on this viewpoint would likely reduce the redressability of discriminatory harms.

#### IV. A FLEXIBLE BUT SEPARATE CATEGORIZATION IN TITLE VII ACTIONS

A separate category for mixed race is necessary to redress the unique harms targeting mixed-race persons. In order to be most effective any scheme proposing such a category must address many pitfalls and complexities in Title VII doctrine. Any categorization must be flexible, just as race can be fluid and contextual. The general argument against a separate category for mixed race ignores the fact that courts are in the midst of selectively choosing where to embrace it and that society already constructs such a category

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209. See generally Barbara J. Flagg, "Was Blind, but Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, (1993); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

210. Despite recent setbacks, see, e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), disparate impact claims are still viable. According to two scholars, however, they primarily benefit whites. See Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 121 (2010) (arguing that "Ricci lessens an employer's burden of justification when test results are racially skewed in favor of whites").

211. See *supra* Part II.B.



for some individuals. Instead, we must examine the treatment of individuals based on belonging to this category, not the harm of merely being categorized. Many participants of the contemporary discourse argue for why the category is beneficial as a general matter, and these arguments demonstrate possible benefits to adopting such a category in Title VII.<sup>212</sup>

Proponents of an explicit multiracial category have argued that it can serve as an antiracism measure for destabilizing current discrete insular racial categories.<sup>213</sup> They view the creation of this category as a necessary step to reach an era in which race has as little meaning as eye color.<sup>214</sup> Further, they contend that continued dependence on monoracial categories embodies the rule of hypodescent and reinscribes these categories upon the population, contributing to the existence of race.<sup>215</sup> Additionally, activists take issue with the undue restraint on those who consider themselves multiracial.<sup>216</sup> Forcing them to choose a monoracial construct of themselves removes a right to self-determination. For these scholars, the affront is not the inaccuracy of data tracking or the reinforcement of current categories; it is the forced act of choosing.<sup>217</sup>

In Title VII doctrine, the lack of a separate categorization perpetrates these general harms. Those who choose to structure their claims based on a mixed-race identity lose in court and are instead racialized into a monoracial category with which they do not identify, curbing the ability to self-determine. Explicitly acknowledging a mixed-race category would more effectively recognize the existence of unique harms. It would lead plaintiffs and their attorneys to more likely plead such a category rather than a monoracial one. It would encourage judges to do the same, creating precedent further allowing such harms to be considered and addressed.

Beyond embracing a separate categorization, I propose that the focus on perception as the primary method of establishing racial categorization is flawed. Instead, plaintiffs should be free to frame their racial identity as well as the racial identity of comparator mixed-race employees. This framing could

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212. See, e.g., Dyson, *supra* note 28; Johnson, *supra* note 4; Naomi Zack, *American Mixed Race: The U.S. 2000 Census and Related Issues*, 17 HARV. BLACKLETTER L.J. 33 (2001).

213. Johnson, *supra* note 4, at 925.

214. *Id.* at 929. Arguably, eye color does have salience, at least to race. See, e.g., TONI MORRISON, *THE BLUEST EYE* (1970).

215. Johnson, *supra* note 4, at 901.

216. Zack, *supra* note 212.

217. See Carrie Lynn H. Okizaki, Comment, "What Are You?": *Hapa-Girl and Multiracial Identity*, 71 U. COLO. L. REV. 463, 472 (2000) ("[T]he legal institutionalization of racial identity in terms of separate and distinct racial categories forces mixed-race people to 'choose a race,' not allowing them to identify with all parts of themselves.").

be in the form of a traditional monoracial category or a mixed-race category. The defendant could then rebut the framing of the racial class by showing that they actually perceived race of the parties involved differently than plead. This showing would be modeled after the same standard proposed for plaintiffs by Davison and seen in *Perkins*, but the burden to make such a showing is instead on the defendant. Enabling plaintiffs to frame racial identity would eliminate the initial burden upon plaintiffs to establish a prima facie case prior to being able to probe the employer for information and could maintain their ability to structure the claims. Further, this proposal would more properly address intersectional obscurement and would maintain the benefit of a perception-based analysis. Two specific benefits that differentiate this proposal from those examined are discussed next.

#### A. Disparate Impact/Intersection Resolution

This plaintiff-chosen framing proposal addresses disparate impact claims involving mixed-race individuals and resolves the intersectional obscurement. The Davison and Leong proposals focus exclusively on employer perception in disparate treatment claims and the framework of establishing a prima facie case.<sup>218</sup> This employer-perception-based plan would be difficult to apply to disparate impact analysis because the latter would require a statistical showing of the employer's perception of every employee.<sup>219</sup> Instead, a flexible plaintiff-chosen framing would allow a plaintiff to plead their case without proving employer perception of every employee or applicant and place any burden of establishing the perception upon those in the best position to do so: the employer defendant.

The proposed system would also resolve part of the intersectional obscurement harms of representation in which a mixed-race employee is assumed to be able to represent monoracially identified persons in their experiences. Instead of a court holding that a person of mixed race experiences the same treatment as any of their component races and thus can be categorized as any of them for purposes of defeating a claim, the plaintiff would plead mixed race and only after the employer's showing of a different perception to rebut the pleaded race could this pleading be overturned. Thus, the obscurement in *Dolgenercorp*<sup>220</sup> or *McCauley*<sup>221</sup> would not dispense a claim

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218. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

219. See *supra* Part I.B.3.a.

220. *Moore v. Dolgenercorp, Inc.*, No. 1:05-CV-107, 2006 WL 270158 (W.D. Mich. Sept. 19, 2006).

221. *McCauley v. Stanford Univ. Med. Ctr.*, No. C 07-1784 JF (RS), 2009 WL 650359 (N.D. Cal. Mar. 11, 2009).

without a showing that the person alleging discrimination was not perceived as possessing that identity.

Further, while addressing the specific animus articulated towards mixed race, the proposal's flexibility can disrupt the intersectional disenfranchisement on the disparate treatment level. Additionally, the proposal addresses the reverse intersectional harms perpetrated on monoracial claimants by courts when replaced by mixed-race employees. While this proposal is related to claims of colorism, it is a more workable proposal to address mixed-race harms.<sup>222</sup> Robust colorism jurisprudence could reduce the need for a mixed-race jurisprudence but would not eliminate the need.<sup>223</sup> Moreover, as Taunya Banks discusses, colorism claims are hit or miss, with courts generally allowing it for lighter or more stereotypically varied skin color groups but denying it for the black population.<sup>224</sup> Thus, the ability to plead a multiracial identity can rectify underenforced colorism harms.

## B. Objections

In employment discrimination, there are many pitfalls in implementing a scheme to cover mixed-race animus. And there are more general objections that arise from recognizing the concept in the first place. However, the proposed intervention minimizes the potential drawbacks and can defeat the objections. These objections can be sorted into three primary categories: concerns about separate categorization in any scheme, concerns about an excessive power grant or misappropriation of scarce resources, and essentialization concerns.

### 1. General Concerns About Separate Categorization

Development of a multiracial category has been critiqued in general for several reasons. Some claim that it fractionalizes minority populations,<sup>225</sup> reifies biological race,<sup>226</sup> and further subordinates black populations as the bottom of the hierarchy.<sup>227</sup>

The literature addresses the possible harms of this separate category in a multitude of areas. Pushing for this category could have ramifications for the

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222. See *supra* note 23 for colorism defined.

223. Mixed race and differences in color do not necessarily track, thus colorism would not catch all the harms, especially when attempting to capture different conscious or unconscious motives.

224. Banks, *supra* note 23.

225. Reynoso, *supra* note 28, at 552.

226. JARED SEXTON, AMALGAMATION SCHEMES: ANTIBLACKNESS AND THE CRITIQUE OF MULTIRACIALISM (2008).

227. Hernández, *Discourse*, *supra* note 4; Hernández, *Matrix*, *supra* note 77.

solidarity of minority groups in the face of discrimination as the population is further fragmented.<sup>228</sup> The generally accepted method of determining mixed-race identity is through self-identification. This creates a concern that those self-identifying as mixed race but experiencing discrimination under the perception of a single race will not be “counted” as part of the population experiencing that discrimination or that the discrimination experienced by the individual will not be tracked as discrimination against that monoracial population, leading to inaccurate data about current discrimination. Many fear that the census and other programs that gather racial data will lose a measure of reality. Researchers in several disciplines, such as public health who rely on the census and other forms of racial data share this concern. They worry that because so many different racial pairings can be included in a single category, a separate mixed-race category will remove numbers from other populations, thereby reducing the quality of statistical analyses and making historical tracking difficult. An additional fractionalization concern centers on the use of this category as a stepping stone to justify a colorblind or postracial conception of current social relations. The fear is that this population would be held up as an unreasonable exemplar of racial harmony. Additionally, as the acknowledged multiracial population increases, the problems for an antidiscrimination scheme that is predicated on monoracial categories will continue to increase and disbanding the system may become more enticing than confronting these problems.

These concerns fail to realize that in employment discrimination, a separate category already functions intermittently,<sup>229</sup> and in other areas of jurisprudence, a separate category has gained increasing acceptance.<sup>230</sup> Thus, we should look to the harms that can be attached to this categorization and possible interventions based upon it. A flexible categorization allows minority populations to maintain their numbers for purposes of employment data since that categorization is only triggered when needed. Thus, this Comment’s proposed framework can address the current problems with the monoracial scheme, while eliminating concerns by providing a pragmatic scheme that can be used to bolster antidiscrimination. By vesting the power of use of the categorization not exclusively with mixed-race individuals and focusing on use of the separate category only for mixed-race animus, fractionalization concerns are minimized as well because this proposal illustrates the contextual nature of race. Just because a

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228. See Reynoso, *supra* note 28, at 553.

229. See *supra* notes 81–139 and accompanying text.

230. See *supra* notes 81–99 and accompanying text.

person may be of mixed race in one context, it does not mean they are permanently fractioned off the overall population.

## 2. Excessive Power Grant to Multiracials

A recent study shows that embracing mixed-race identity is correlated with greater well-being among mixed-race individuals compared with those who instead identify as belonging to a single racial group.<sup>231</sup> This comparative well-being held regardless of whether the monoracial group was considered “high status” or “low status.”<sup>232</sup> These findings suggest that this Comment’s proposal rewards more advantaged groups with greater access to opportunity to redress harms. The call for resource devotion toward the underserved mixed-race population thus draws resources away from populations less well off who may be in greater need of redress opportunities.

Granting a right of action—in effect a grant of power—to those embracing mixed-race identity can be attacked based not just on the current position of mixed-race individuals in the racial hierarchy but also on their possible future position. For example, the argument that assimilated Latinos may be absorbed into whiteness to maintain the white majority in the United States is a potential concern with multiracials.<sup>233</sup> As we have seen in other doctrines, a system designed to promote racial equality could end up granting the bulk of its power to the oppressing class.<sup>234</sup> Finally, one scholar has pointed to how the concept of mixed race requires a reifying of blackness, essentially creating the rise of a neo-mulatto class with greater access to aspects of white privilege.<sup>235</sup> It would seem counterintuitive to grant those with access to such privileges an additional remedy beyond that accessible to other racial minorities.

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231. See, e.g., LaPlante, *supra* note 75. LaPlante’s article is based primarily on the study and findings published in Kevin R. Binning et al., *The Interpretation of Multiracial Status and Its Relation to Social Engagement and Psychological Well-Being*, 65 J. SOC. ISSUES 35 (2009). This study used a population of mixed-race high school students in the Los Angeles area, allowed them to elect the racial identification of their choice, and used a questionnaire to determine psychological well-being and social engagement. *Id.* at 38–42.

232. Binning, *supra* note 231, at 44.

233. Gustavo Chacon Mendoza, *Gateway to Whiteness: Using the Census to Redefine and Reconfigure Hispanic/Latino Identity*, in *Efforts to Preserve a White American National Identity*, 30 U. LA VERNE L. REV. 160 (2008).

234. This includes vote dilution claims after *Shaw v. Reno* and *Miller v. Johnson*, and disparate impact claims after *Ricci v. DeStefano*. See Harris & West-Faulcon, *supra* note 210, at 118; Jamin B. Raskin, *The Supreme Court’s Racial Double Standard in Redistricting: Unequal Protection in Politics and the Scholarship That Defends It*, 14 J.L. & POL. 591, 592 (1998).

235. Horton, *supra* note 34; see also SEXTON, *supra* note 226.

However, these objections echo the concerns in *DeGraffenreid v. General Motors*<sup>236</sup> over the creation of a super remedy that were disarmed by intersectionality theory.<sup>237</sup> As scholars have rejected it in the context of intersectionality, it should also be rejected here. Additionally, the fear of an exclusive super remedy is balanced by the ability for traditional claimants to frame their own claims around mixed-race identities, if applicable in a given case. Thus, the new approach is flexible enough to be used as a solution to the confrontation of traditional conceptualized discrimination any time the question presents itself, not just at the behest of mixed-race individuals.

### 3. Essentialization

A mixed-race category would include a heterogeneous population with varied backgrounds putting it at an arguably high risk of essentialism harms.<sup>238</sup> This objection reflects a concern about the vastly different combinations that would be lumped into a single category and the varied statuses in a racial hierarchy that mixed-race individuals might occupy.<sup>239</sup> However, using this argument as a reason to defeat use of a mixed-race category creates the assumption that it would be more essentializing than a monoracial category, which is already allowed. If instead we recognize that all racial categories face dangers of essentialization and a mixed-race category can provide a means for addressing a certain class of harms, then use of a mixed-race category should be no more feared than use of racial classification generally.

Specifically, in this system a separate mixed-race category is only used for specific mixed-race harms. The elective nature allows for a freedom to structure one's claim that combats an essentialist view of framing a claim.

## CONCLUSION

New areas of conflict continue to emerge within Title VII as the increasing population of self-identifying mixed-race individuals faces ongoing racial discrimination in the workplace. As the courts grapple with this issue, it is important to remember the historical context of racial categorization, the prevalence of racial mixing in the past, and its unexceptionalism today. This

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236. 413 F. Supp. 142 (E.D. Mo. 1976).

237. *Id.* at 143.

238. This argument is not meant to suggest that a traditional racial category is necessarily more homogeneous than a multiracial category; instead, it articulates a concern that differentiated persons on a racial hierarchy, such as a biracial Asian-white or a biracial Latino-black, would be included in one protected class. See FUSSELL, *supra* note 39, at 21.

239. Bonilla-Silva & Embrick, *supra* note 38, at 33.

context demonstrates that the proper response of an antidiscrimination scheme to the increased complication of racial construction is not wholesale elimination of the doctrine or complete rejection of innovation, but instead nuanced and examined innovations that allow the necessary flexibility.

We have seen the “rise” of mixed-race identity to the forefront of racial categorization debate. Much debate has been centered on the harm of categorization. The harms attached to that categorization must be addressed. As demonstrated, courts are being confronted with these harms and will likely continue to be confronted with them. So far, they have failed to satisfactorily or even consistently deal with them. Additionally, even the commentators who have sought to address such concerns have done so in only a limited sense. By moving control of the definition and use of mixed race into the hands of plaintiffs who are most in need of an antidiscrimination tool, while maintaining a system that enables redress for actual harms, we can provide a workable scheme that is consistent, comprehensive, and adaptable to changing conceptions of race.