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Antidiscrimination Law and the Multiracial Experience: A Reply to Nancy Leong

TINA FERNANDES

Introduction

The engagement between multiracial people and the law in America represents an example of the clash between the complexity of what it means to be a human being and the highly structural character of the law understood as a mechanism for social control. While being a human being means to have a variety of physical, mental, emotional, and social characteristics, many of which change...
over time through interaction with other human beings and the environment, the law is set up to be highly formalistic to provide an ostensibly clear basis for judges to make decisions about disputes between parties over social goods. As a result, when real human beings come in contact with the law, otherwise legitimate legal claims often fall through the cracks simply because the law has no way to process them. Adding to this confusion, the decision-making process in which judges participate in order to resolve disputes involves numerous judgment calls about what the relevant facts are, what the applicable law is, and how to best map law on to facts. For this reason, court decisions can be understood as always and necessarily interpretive in character. This is particularly the case when multiracial people come in contact with the law because the American legal system has a long history of thinking about human beings in terms of biologically distinct, clearly distinguishable races, and of attempting to keep these races both theoretically and physically separate.

3. This take on how judges decide cases is rooted in the critical legal studies movement that originated in the late 1970s and early 1980s. Conceptually based in critical Marxism and the critical theory of the Frankfurt School, critical legal studies holds that legal doctrine is an empty shell. See Guyora Binder, Critical Legal Studies, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 280-290 (Dennis Patterson ed., 1999) (stating that there is no such thing as “the law,” understood as an entity that exists out of context). Instead, law is produced by power differentials having their origins in differences in levels of property ownership. The idea that the act of judging is always and necessarily an act of interpretation, however, is most heavily influenced by an approach to legal theory known as legal hermeneutics. Legal hermeneutics is an approach to the law that calls us to consciously recognize the role of socio-historical context in any assessment of what the law means or should mean. See Gregory Leyh, Toward a Constitutional Hermeneutics, 32 AM. J. OF POLITICAL SCI. 369 (1988) (arguing, for example, that there is a historicity to all legal inquiry). In other words, legal reasoning does not occur in a vacuum and interpretation is always practical, i.e., it always occurs in a particular set of circumstances, at a particular time and place, and applies itself to a particular set of facts. Another way to say this is that any assessment of how a law should be interpreted is necessarily based in a dialogue between theory and practice.

4. The long history of anti-miscegenation laws and prevalence of so-called “Jim Crow” laws (laws enforcing racial segregation) in the U.S. between the end of the civil war through the mid-1950s both provide evidence for this claim. For more on anti-miscegenation laws in U.S. history, see, e.g., Eva Saks, Representing Miscegenation Law, RARITAN, Sept. 1988; Barbara K. Kopytoff & Al Leon Higginbotham, Jr., Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia, 77 GEO. L.J. 1967 (1989); Peter Wallenstein, Race, Marriage, and the Law of Freedom, 70 CHI.-KENT L. REV. 371 (1994); Wadlington, The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective, 52 VA. L. REV. 1189 (1966). For more on Jim Crow laws, see, e.g., JERROLD M. PACKARD,
Kevin R. Johnson has argued that the very idea of racial mixture "violates [American law's] monumental efforts to enforce racial separation during much of U.S. history." The long history of antimiscegenation laws, the "one-drop" rule, laws designed to prevent "passing" for other races, the inability of multiracial people to identify their mixed race status on the U.S. Census until recently, and the legal denial of inheritance rights of mixed race offspring are all examples of these efforts, according to Johnson.

In her paper, "Judicial Erasure of Mixed-Race Discrimination," Nancy Leong grapples with one instance of engagement between multiracial people and the law, providing an opportunity to explore the highly interpretative character of judicial decision-making. Specifically, she calls us to reflect on the concept of race at work in antidiscrimination law and argues that the way courts in discrimination cases presently understand the concept of race prevents multiracial plaintiffs from filing successful discrimination claims. The fact that judges in discrimination cases think about race "categorically," Professor Leong argues, renders antidiscrimination law inhospitable to claims of multiracial discrimination. By

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6. The "one drop rule," prevalent in the United States since the colonial period, is a form of "hypodescent" (the practice in societies in which there is a dominant race and a subordinate race of automatically assigning the children of mixed race unions the subordinate race) according to which anyone with a known "black" ancestor is considered black. Christine B. Hickman, The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census, 95 MICH. L. REV. 1161, 1163 (1997). "Passing" refers to the efforts by African Americans to be regarded as members of the so-called "white" race for access to jobs and other economic opportunities, particularly during the so-called "Jim Crow" era, or the period in American history of legalized racial discrimination—roughly between the end of the civil war and the mid-1950s. For more on "passing," see Randall Kennedy, Racial Passing, 62 OHIO ST. L.J. 1145 (2001).
8. Thinking about race "categorically," for Professor Leong, means relying heavily on the view that race consists of five fixed racial categories (Asian, Latino/a, White, Black, and Native American) termed by David Hollinger the "ethno-racial pentagon," DAVID HOLLINGER, POST-ETHNIC AMERICA: BEYOND MULTICULTURALISM 8 (1995); Leong, supra note 7, at 470, and thinking of races as pure, clearly distinguishable from one another, and defined by self rather than by others.
insisting on thinking about race "categorically," continues Professor Leong, courts unfairly exclude multiracial plaintiffs from the group of people who are permitted to bring cognizable discrimination claims resulting in the "erasure" of multiracial discrimination from the legal landscape. In order to render antidiscrimination law more hospitable to claims of multiracial discrimination, says Professor Leong, courts and judges should stop defining race "categorically" and start defining race in terms of the perceptions of the would-be discriminator (i.e., in terms of what Professor Leong calls "perceived race").

Professor Leong's reasoning seems to be that since race has no basis in genetics or biology, whenever racial discrimination happens it happens because someone is perceived as being of a specific race rather than because he or she actually is of a specific race. Additionally problematic for Professor Leong is that generally only "pure" or monoracial races are presently recognized as races by courts. So, this reliance on monoracial categories "obscures racial animus specifically directed at those perceived as multiracial." For Professor Leong, not only is this state of affairs unfair because it is an assault on the dignity of multiracial people and alienates them from the legal system, it also amounts to the "erasure" of the reality that discrimination against multiracial persons (or those perceived as multiracial) exists, to the detriment of the cause of eliminating racism from society.

It seems clear that Professor Leong's motivations for offering this alternative approach to racial identification in antidiscrimination law are two admirable goals. The first is the goal of providing a way for multiracial plaintiffs to bring discrimination claims based on the specific kind of discrimination they experience. The second is the goal of doing so without advocating any change in the law that

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9. This "erasure" of the multiracial experience from antidiscrimination jurisprudence, according to Professor Leong, blunts the use of antidiscrimination law as tool for promoting a more contemporary understanding of race, i.e., that race is neither biologically real nor describable in terms of neatly defined, rigid boundaries. This erasure simultaneously operates, Professor Leong says, to reinforce racial stereotypes that are, in her view, at the root of American racism.

10. See Leong, supra note 7, at 543.

11. See id. at 551 ("[T]he reliance of antidiscrimination jurisprudence on categories has generally excluded plaintiffs identified as multiracial . . . .").

12. Id. at 472.

13. Id. at 530-533.
would reinforce existing and outdated notions about the reality of biological race. Specifically, according to Professor Leong, simply doing the obvious and adding a new category of persons known as "multiracial" to the "categories" of persons already existing in antidiscrimination law, for example, would "itself reify prevailing racial classifications by implying that a multiracial person is the offspring of two members of 'pure' races"\textsuperscript{14} and for this reason should be avoided.

But, while I share and wholeheartedly support Professor Leong’s apparent goals, and I particularly support Professor Leong’s trailblazing attempt to bring the experience of being discriminated against as a multiracial person to the forefront of legal scholarship, I respectfully submit that her suggested path is both impracticable and fails to achieve what seems to be her primary objective; that is, to "dismantle the master’s house" on the topic of the historic legalization and codification of neat racial categories.\textsuperscript{15} And, the reason a switch to "perceived" race in discrimination cases will not dismantle the master’s house is that the problem in the master’s house is not, as Professor Leong suggests, usage of "categorical race" in the legal system. Instead, the problem is a failure on the part of the system to identify multiracial persons and discrimination against multiracial persons as real, i.e., as phenomena that exist in the world.

Moreover, Professor Leong’s claim that the addition of the category "multiracial" to the list of racial categories\textsuperscript{16} with which a given plaintiff is able to identify in discrimination claims would operate to undermine what she believes are the goals of antidiscrimination law—i.e., the promotion of a more contemporary understanding of race and the elimination of racism—is problematic because she provides no evidence that antidiscrimination law has ever had these lofty goals. Instead, when Professor Leong writes that "Title VII was... intended... to eliminate racial discrimination," she supports that claim by

\textsuperscript{14} Leong, supra note 7, at 543.
\textsuperscript{16} Leong, supra note 7, at 543. See id. at 470 ("Race discrimination jurisprudence relies heavily on a familiar set of racial categories that David Hollinger has termed the 'ethno-racial pentagon' of Asian, Latino/a, White, Black, and Native American.").
\textsuperscript{17} Id. at 471.
analogizing it to the sexual harassment law context. However, she does not provide proof that the purpose of sexual harassment law is to eliminate gender discrimination. Instead, she quotes law professor Vicki Schultz who merely opines that "the larger project" of sexual harassment law (apparently larger than providing the plaintiff in such cases with legal redress) is to "achieve gender equality." Professor Leong quotes Schultz as opining that the emphasis on sexuality in sexual harassment cases displaces attention away from "genuine" problems of sex discrimination, such as more "structural" problems like low job status and a lack of respect. Like Professor Schultz's take on how sexual harassment law diverts attention away from "genuine" (implicitly defined as "more important") problems of gender discrimination, Professor Leong argues, a focus on "racial categories" in Title VII law diverts attention away from what Professor Leong sees as the "genuine" problem of antidiscrimination law, i.e., the elimination of racial discrimination. But if the goal of antidiscrimination law is to provide a way for plaintiffs to obtain redress for employment practices that discriminate against them for illegal reasons, rather than to eliminate racism, then a switch to "perceived race" will not work to achieve that goal.

In this paper, I will offer a reply to Professor Leong in which I challenge her conclusion that courts in multiracial discrimination cases should focus on the "perceived" race of the plaintiff rather than on what Professor Leong calls "categorical" race. I make this challenge primarily by providing historical context to the two main areas of antidiscrimination law (equal protection law and employment discrimination law) and by making the case that usage of Professor Leong's "perceived" race in antidiscrimination law is out of step with that context. Emphasizing that the history of antidiscrimination law shows that its goal was (and still is) to provide redress for plaintiffs who have been the targets of illegal racial discrimination, I ultimately conclude that the reasoning Professor Leong uses to arrive at her recommendation of a switch to "perceived race" in discrimination cases is flawed.

18. Leong, supra note 7, at 538.
19. Id.
20. Id. at 534 (citing Vicki Schultz, The Sanitized Workplace, 112 YALE L.J. 2061, 2064-2067).
A switch to a focus on "perceived race," I argue, will likely have the reverse effect of what Professor Leong anticipates. That is, multiracial plaintiffs would very likely find themselves less likely to obtain redress for illegal discrimination directed against them rather than more likely. I will recommend that if antidiscrimination law is to be made more hospitable to claims of multiracial discrimination, a better alternative is as follows: In equal protection cases, courts should shift their focus away from individual rights and back to group rights and identify multiracial persons as a suspect class; and in employment discrimination cases, the category of "Multiracial" should be added to the list of options for racial self-identification when filing an employment discrimination complaint.21

I. Antidiscrimination Law and its Goals

Professor Leong’s recommendation that antidiscrimination courts should define race in terms of perception rather than "categorically" is rooted in what Professor Leong understands as the goals of antidiscrimination law, i.e., the promotion of racial understanding and the elimination of racism and racial discrimination. But, if history shows that these are not the goals of antidiscrimination law, if the goal instead is the much more practical goal of simply providing a remedy for specific acts of illegal discrimination, then a switch to "perceived" race on the part of courts and judges becomes nonsensical. I will explain how I arrive at this conclusion by treating each of two areas of antidiscrimination law identified by Professor Leong separately: equal protection law, as governed by the Equal Protection Clause of the 14th Amendment, and employment discrimination law, as governed by Title VII of the Civil Rights Act of 1964.

A. History of Equal Protection Law

Equal protection law originated with the ratification of the 14th

Amendment to the U.S. Constitution in 1868. The 14th Amendment included what is known as the Equal Protection Clause, which says, "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." A look at the historical context in which the Equal Protection Clause was created provides insight as to its meaning, purpose, and goals. The 14th Amendment is one of a set of constitutional amendments enacted around the time of the American Civil War. The Civil War ended in April of 1865. In December of that year, the Thirteenth Amendment, which banned slavery everywhere in the United States, was ratified. Two and a half years later, in July 1868, the 14th Amendment (containing the Equal Protection Clause) was ratified and then about two years after that, in March of 1870, the Fifteenth Amendment, prohibiting discrimination in voting "on account of race, color, or previous condition of servitude," was ratified. Taken together, these Civil War Amendments suggest that the Equal Protection Clause was included in the 14th Amendment to make clear that equal protection under the law for black Americans could and would be federally enforced. And so, Justice Miller's famous statement in The Slaughterhouse Cases to the effect that the 14th Amendment had "one pervading purpose," i.e., "the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him," seems very well justified.

23. The 13th, 14th and 15th Amendments to the U.S. Constitution are known collectively as the Civil War Amendments.
25. Citing The Slaughterhouse Cases, historian Howard Jay Graham has stated that the Civil War Amendments were all framed on behalf of black people ("the slave race.") HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM (1st ed. 1968). "This, of course, is especially true of the 14th Amendment." Id. at 157. In fact, for Graham, it is "patently absurd" to deny the antislavery origins of the 14th Amendment. Id. at 161.
26. [O]n the most casual examination of the language of [the 13th, 14th, and 15th Amendments], no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him. It is true that only the Fifteenth Amendment, in terms, mentions the Negro by speaking of his color and slavery. But it is just as true that each of the other articles was addressed to the grievances of
The legislative history of the 14th Amendment, much of which is found in the debates that took place in 1866 during the 39th Congress, supports this interpretation. That history shows that the Equal Protection Clause was meant to operate as a remedial measure to correct the widespread subjugation of black people as a group in America. When Congressman Stevens introduced the Amendment in the House, he characterized its purpose as "the amelioration of the condition of the freedmen." Additionally, proponents of the 14th Amendment repeatedly emphasized in the congressional debates of the time that one of the Amendment's primary purposes was to place in the Constitution itself the principles of section 1 of the Civil Rights Act of 1866, an Act whose entire purpose was to give citizens "without regard to race and color, without regard to any previous condition of slavery or involuntary servitude ... full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." In other words,
proponents of the 14th Amendment in the early Congressional debates repeatedly stated that the 14th Amendment’s primary purpose was to address the manifest unequal status of black people as a group. Therefore, the historical evidence shows that rather than being designed to address racial discrimination at large, “the [Congressional] debates reveal overriding concern with the status of one racial group [i.e., blacks].”

Professor Leong’s suggestion, therefore, that the purpose of equal protection law was to promote racial understanding, eliminate racism, and eliminate racial discrimination is revealed as having no basis in the historical evidence. Instead, the historical evidence reveals that the Equal Protection Clause had a related but much more realistic and practical purpose, i.e., to provide a legal mechanism through which black people, as a group, could challenge the Jim Crow laws that were enacted by (primarily the southern) states after the Civil War. This is important because the actual purpose of equal protection law, i.e., the protection of black people as an oppressed group, is out of step with Professor Leong’s argument that the use of prevailing monoracial categories to remedy multiracial discrimination unjustifiably reifies the rigid monoracial categories as “true” when it is possible for any racial group to exist as a social group even if they do not exist as a biological or physical group. In philosophical terms, it is possible that although race has no physical ontology, it does indeed have a social ontology, and this experience-based social ontology is not captured by defining race in terms of the perception of others. Instead, the social ontology

 Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

30. Leong, supra note 7, at 477.
31. The idea that race has no physical or biological ontology but does indeed have a social ontology rooted in the social experiences of those who are assigned a race by society is accepted by most contemporary philosophers of race. An idea that can trace its roots at least as far back as W.E.B. DuBois, in The Conservation of Races, some contemporary philosophers of race who adopt a similar view are Paul Taylor, Linda Martin Alcoff, Naomi Zack, and Robert Bernasconi.
of race is defined in terms of the experiences (usually of oppression) of those who are ascribed a particular by society.

Although Professor Leong is correct that the concept of race presently at work in equal protection law seems to involve thinking of race in ahistorical and acontextual terms—even adopting the concept of "immutability" from gender discrimination cases to describe a feature of race—this was not the original concept of race at work in equal protection cases. In the seminal case in equal protection law, United States v. Carolene Products Co., Professor Leong correctly points to the case’s famous footnote 4 as the origin of language that would be later used by the Court to define groups of people entitled to special protection under the Equal Protection Clause. But, Professor Leong’s characterization of the Court’s intended meaning in that footnote is inaccurate. It is true, as Professor Leong states, that the Court uses the word “discrete” to describe groups that may be entitled to special protection, but a quick look at the context reveals that the Court means by this term something quite different from what Professor Leong suggests.

For Professor Leong, when the Court describes groups that might be entitled to special protection from discrimination as "discrete," the Court means "straightforward" and having "distinct boundaries." What the Court actually says, however, is "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and may call for a more searching judicial scrutiny." The Supreme Court specifically explains, in other words, that by "discrete and insular minority" group, it means a group whose access to the ordinary political processes for vindicating minority rights has been

33. "Race, like gender . . . is an immutable characteristic [such that] divisions [based on race] are contrary to our deep belief that legal burdens should bear some relationship to individual responsibility or wrongdoing." Id. at 360.
34. Professor Leong writes, "The famous Carolene Products footnote generated an entire jurisprudence in which protection of an individual against discrimination depended on whether that individual fell into a 'discrete' category—one for which the very terminology implies that the category is straightforward and has distinct boundaries." Leong, supra note 7, at 505.
historically inhibited. It is important that the very socially and contextually defined concept of a discrete and insular minority or suspect class was never defined as being anything on the order of "straightforward" or as having "distinct boundaries."

The historically defined goal of equal protection law, then, is to protect historically marginalized and oppressed minority groups from laws that unfairly differentiate between them and other people to their detriment, particularly in terms of access to social goods, such as access to the political process. A switch to identifying targets of multiracial discrimination in terms of the perceptions of discriminators instead of in terms of their status as members of a group that has historically been marginalized and oppressed would therefore fail to accomplish that goal. Using the perceptions of others to identify targets of multiracial discrimination would instead result in protecting many people who merely seem to be multiracial instead of protecting actual multiracial people.

B. History of Employment Discrimination Law

Michael Evan Gold explains the historical backdrop of employment discrimination law as follows:

America is called the land of opportunity, but for the first 350 years of our history we denied equality of opportunity to most of our citizens. From the landing on Plymouth Rock to the middle of the twentieth century, the best of everything was reserved for men with white skin.

Employment discrimination law was enacted to overturn this state of affairs. It was enacted to increase the likelihood that persons

36. As I have explained elsewhere, the concept of a "discrete and insular minority" group later developed into the concept of a "suspect class," the cornerstone idea of equal protection law for most of its history. See TINA FERNANDES BOTTS, THE HERMENEUTICS OF EQUAL PROTECTION ANALYSIS (2011). In equal protection law, a "suspect class" is a group of people whose history of having been discriminated against in America has been so severe that if a law mentions that group by name, the law will be severely scrutinized by the Supreme Court and very likely struck down as illegal. Black people, or African Americans, were the original suspect class. Id.

37. MICHAEL EVAN GOLD, AN INTRODUCTION TO THE LAW OF EMPLOYMENT DISCRIMINATION xi (2d ed. 2001).
other than white males would benefit from meritorious hiring decisions. Employment discrimination law is rooted in the Unemployment Relief Act of 1933, which stated, "[I]n employing citizens for the purpose of this Act no discrimination shall be made on account of race, color, or creed." 38 Title VII of the Civil Rights Act of 1964 ("Title VII") evolved out of the Unemployment Relief Act and serves as the basis for employment discrimination cases today. Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin and was passed primarily to protect women and people of color from discrimination. 39 Title VII was designed as a guide to the litigation of employment discrimination cases and therefore goes into great detail about the kinds of behaviors that constitute illegal discrimination (e.g., harassment), the kinds of behaviors that are protected (e.g., opposition or reporting discrimination to the employer), the kinds of employers covered, and the kinds of bases for discrimination covered by the Act (e.g., race and sex). There is no evidence in the Act itself or in the legislative history surrounding the Act that its purpose was to promote racial understanding, eliminate racism, or eliminate racial discrimination, nor is there evidence that by "race" or "protected class" the Act meant "categorical" or "biological" race. Instead, history reveals that Title VII was enacted during the height of the civil rights movement and was designed to allow plaintiffs facing employment discrimination on the basis of being members of historically oppressed groups a legal remedy for that discrimination.

Professor Leong cites the Supreme Court's usage of the term "racial minority" in an employment discrimination case as evidence of a widespread judicial presumption of a "categorical" approach to race in employment discrimination law. The Court's usage of the term "racial minority," writes Professor Leong, "[implies] that minority membership is both obvious and self-defining." 40 Professor Leong says that in the same case, the Court wrote that to qualify for protection from discrimination, the plaintiff must show membership in a "protected class," and from this she concludes that

38. MARGARET C. JASPER, EMPLOYMENT DISCRIMINATION LAW UNDER TITLE VII (OCEANA'S LEGAL ALMANACS: LAW FOR THE LAYPERSON) 1 (2d ed. 2008).
40. Leong, supra note 7, at 507 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
the Court is operating under the impression that membership in a protected class is "stable and defined by conventional racial categories." However, contrary to Professor Leong's claim, the Court in this case never uses the term "protected class" and instead simply indicates that in order to bring a charge of racial employment discrimination, the complainant has the burden of first establishing a prima facie case, which can be accomplished by showing, among other things, that the complainant belongs to a "racial minority." Professor Leong's claim seems to be that simply by using the phrase "racial minority group," the Court has invoked what she calls a "categorical" concept of race. But, in employment discrimination cases, as in equal protection cases, although the Court does indeed refer to race, this reference alone does not in and of itself indicate a "categorical" understanding of race. Instead, race is understood in employment discrimination law to have a social currency that Professor Leong does not seem to appreciate.

As was shown to be the case with equal protection analysis, then, Professor Leong's suggested shift in focus in employment discrimination cases from the way it currently understands race—i.e., as a socially informed and historically defined marker of group oppression—to a mere matter of perception on the part of a would-be discriminator, is out of step with the purpose of employment discrimination law and will not achieve the goal of specially protecting multiracial plaintiffs. Thus, as was the case with equal protection analysis, the use of the perception of others to identify targets of multiracial discrimination would more likely result in protecting those who merely appear to be multiracial instead of protecting those who actually are. Since employment discrimination law is in the business of protecting those who actually are targets of illegal discrimination in virtue of their membership in a social group that has historically been the target of systematic, historical oppression or subordination, a switch to "perceived" race would be counter-productive.

41. Id.
II. Multiracial Animus and Discrimination: A New, “Other-identified” Definition of Race?

A. America’s Long History of Multiracial Animus

Professor Leong does well in establishing that there is a long history of racially motivated “animus” against multiracial people in America that continues until the present day. This animus, Professor Leong argues, originated in the taboo against interracial relationships and interracial mixing between whites and blacks that developed in the United States as part of the system of the chattel slavery of persons of African descent that existed in American society from the country’s origins in the colonial period until the end of the Civil War in 1865. The American distaste for interracial mixing in general and interracial persons in specific, according to Professor Leong, is rooted in what she calls a “heightened animosity toward Black/White mixed individuals” that was generated during this period in our history.\textsuperscript{42} Professor Leong shows that this heightened animus toward “Black/White mixed individuals” was supported by prevailing science well into the beginning of the twentieth century, a science that characterized such individuals as biologically defective and unhealthy, even diseased. The “mulatto” was understood to be physically, intellectually, and psychologically inferior to both blacks and whites, Professor Leong shows.\textsuperscript{43}

This understanding of the mixed-race individual as defective, and the hostility that was directed toward black and white mixed-race individuals as a result, according to Professor Leong, soon “spilled over” into other mixed-race combinations besides black and white. The hostility was soon applied to relationships between whites and Native Americans, for example, and then expanded to apply to other combinations.\textsuperscript{44} Mexican Americans, for example, particularly Mexican mestizos, were at one time considered a “mongrel race” who had inherited the worst qualities of Spaniards.

\textsuperscript{42} Leong, supra note 7, at 484.
\textsuperscript{43} Id. at 485.
\textsuperscript{44} Id.
and Indians to produce a race "still more despicable than that of either parent." 45 Statutes were enacted to revoke the citizenship of women once the women married Asian or Indian men. 46 Professor Leong cites the long history of pervasive anti-miscegenation statutes—from the 17th century until 1967 and at one time present in 38 states—as proof of how entrenched the proscription against race-mixing has been in America and how multiracial animus has manifested itself in laws that would very likely be interpreted today as discriminatory (against multiraciality and multiracial people) if multiracial discrimination were recognized as legitimate. 47

As further proof, and to establish that mixed race animus continues today, Professor Leong then lists some incidents of multiracial "animus" described in recent court cases. In one incident, described by the U.S. District Court for the Eastern District of Tennessee in passing, Oreo cookies were thrown onto a high school basketball court when a "biracial" student entered the game. 48 In another federal court case, a white supervisor of an African American employee who had multiracial children is reported as having made a series of derisive remarks about the children directed at their status as multiracial. 49 In yet another incident of multiracial animus described in a federal court case, not only were an employee's multiracial children subjected to multiracial slurs (e.g., "half-breed"), the employee herself was subjected to disparaging comments about her interracial relationship from her coworkers who at one point left a magazine article condemning interracial relationships in her desk drawer. 50 In another incident still, an employee in an interracial marriage was subjected to "pervasive harassment"—a coworker even remarking at one point that the employee had "ruined herself by marrying a black

45. Id. at 486.
47. Leong, supra note 7, at 484.
49. Green v. Franklin National Bank, 459 F.3d 903 (8th Cir. 2006).
man and having biracial children"—including having her children referred to as "monkeys" and "zebras." Professor Leong lists a similar incident of multiracial "animus," this time directed toward multiracial students by a teacher.

The facts of these court cases, Professor Leong suggests, contain evidence of the existence of a history of "animus" directed at multiracial persons, as well as a history of judicial "erasure" of multiracial discrimination. While in each example, the facts indicate hostility directed toward at least one multiracial person in virtue of being multiracial, according to Professor Leong, in each case no judicial action was taken to provide redress for this hostility. The result, for Professor Leong, was the exclusion of multiracial plaintiffs from participation in discrimination lawsuits and the simultaneous reification of the concept of "categorical" race.

B. Professor Leong's "Other-Identified" Concept of Race

The appropriate remedy for this state of affairs, according to Professor Leong, is for courts to stop defining race "categorically" and start defining the race of plaintiffs in multiracial discrimination cases in terms of the perceptions of would-be discriminators. Her thinking in this regard appears to be intimately linked to her stated view that race itself is "other-identified" or imposed from without. Professor Leong arrives at this view rather strangely, however. She begins by citing anthropologists, biologists, and other scholars for the proposition that race is a "social construction rather than a biological reality" and then states that morphology (physical traits) is an unreliable way of assigning racial identity for multiracial people. Factors such as "style of speech," language, name,

51. Madison v. IBP, Inc., 330 F.3d 1051 (8th Cir. 2003).
52. Id.
54. Leong, supra note 7, at 474.
55. Id. at 478.
56. Professor Leong writes, "Although most people believe they can identify others' race or ethnicity based on morphology ... morphology fails to provide a clear basis for identifying another person's race or ethnicity." Id. at 479.
associates, and/or "behaviors,"\textsuperscript{57} Professor Leong writes, are far more often used to identify people as multiracial. "I can't overemphasize," writes Leong, "the role of the perceiver in multiracial identification."\textsuperscript{58} The logic of Professor Leong's appears to go like this: Since race is a social construction, it is not objective. Since race is not objective, it is subjective. Because the scientific evidence shows that racial identity has no basis in biology, the only way racial identity can exist is in the eye of the beholder. "Thus, we must focus on the perceiver's perspective in examining how [multiracial identity] may lead to discrimination,"\textsuperscript{59} she concludes.

But, the leap from the statement that race is a social construction (which almost no one in race theory disputes) to the conclusion that race therefore only exists in the eye of the beholder is a large one and indicates only a surface engagement with current thinking on racial identity. For some time, there has been widespread acceptance within the scientific community of the proposition that race has no genetic basis.\textsuperscript{60} Long before the scientific community came up to speed on this topic, however, race theorists were debating the question of the metaphysics of race (both objective and subjective) and discussing the implications of the answer to this question for the welfare of those assigned a nonwhite race in America, specifically blacks/African Americans.\textsuperscript{61} More specifically for the purposes of this paper, as early as W.E.B. DuBois's "The Conservation of Races," the question of the difference or relationship between biological race and socially constructed race has been addressed significantly at

\textsuperscript{57} Id. at 479–480.

\textsuperscript{58} Leong, supra note 7, at 482.

\textsuperscript{59} Id.


\textsuperscript{61} I correlate a group's having been assigned a nonwhite racial status in America with the group's having been oppressed in America, i.e., with having been conceptualized (legally, socially, ethnically, etc.) as other than (and usually less than) normal or regular (i.e., white) persons.
least in the literature of the social sciences and the humanities. DuBois's understanding of race in the late nineteenth century seems to have been that while race likely has no biological basis, its social reality is nevertheless necessary to raise black people up from oppression. This is a conception of race—sometimes called racial pragmatism and sometimes called racial realism—held by many contemporary race theorists and is based on the practically informed premise that despite there being no biological or genetic basis for the concept of race, there is no way to reach out and help black people rise up from the continued unequal status in society that is generally a part of the black American experience without first being able to identify who is black.

What Professor Leong seems to miss, but many contemporary race theorists appreciate, in other words, is that the fact that race is socially constructed does not necessarily mean that race does not have objectively measurable currency in our social lives. The way we can identify someone who has been the target of racially motivated discrimination, on this view, without buying into the concept that race has a biological reality, is to check and see if the person is a member of a group that has historically been racially oppressed in America.

III. An Alternative Path for Protecting Multiracial Plaintiffs

If antidiscrimination law has the goal of providing a remedy for members of historically oppressed groups who have experienced discrimination, and if, as Professor Leong shows, multiracial people qualify as such a group, then the logical way to provide multiracial plaintiffs with redress in antidiscrimination cases would seem to be to simply add multiracial people to the list of specially protected groups already in existence in antidiscrimination law. This would both achieve Professor Leong's goal of protecting multiracial plaintiffs from the unique kind of discrimination they face and allow the plaintiffs themselves to racially self-identify, which would seem

to be preferable to having a race imposed upon them from without, i.e., through the perception of the discriminator. Additionally, adding a new category to the existing categories of official legal races has precedent in the history of how racial categories have evolved and changed over time, for example in the U.S. Census.

However, Professor Leong explicitly rejects this approach, arguing that official recognition of multiracial people as a legally cognizable group would operate to further reify the idea that race is biologically real. The basic idea is that there can only be multiracial people if there are monoracial people, so admitting the existence of multiracial people implies the existence of monoracial people. But the flaw in this argument is a failure to distinguish between the biological (or genetic) reality of race and its social reality. That monoracial identity is socially constructed does not preclude the possibility that monoracial identity is nevertheless socially real. The same is true of multiracial identity. Many things that are socially constructed are nevertheless real, if by "real" we mean that these things operate meaningfully in our lives. The classic example of this is money, but we can think of others.

The grander philosophical point is that in some sense, everything is socially constructed. We agree as a group that something is real and so it becomes real. We use it as if it were real and live with it as if it were real, so that at a certain point, the argument can be made that there is nothing with which we interact on a daily basis that is any more or less real than the concept of race. At the point at which everything is equally socially real (or nonreal), biological reality is quite irrelevant. The fact is that our society operates as if race were real. This includes monoracial identity, biracial identity, and multiracial identity. It is also the case that some racial identities are associated with a history of oppression. Antidiscrimination law is based on this understanding of race and the only way it can work is if it addresses specific acts of racial discrimination that happen to real people in the real world. To expect the law to operate in furtherance of intangible goals such as Professor Leong's "promotion of racial understanding" is to expect it to expend its efforts chasing windmills.

Additionally, Professor Leong's goal of changing antidiscrimination law so as to promote racial understanding and the elimination of racism is out of step with the purpose of
antidiscrimination law. The particular method Professor Leong suggests for achieving that goal is unlikely to better protect those who are the targets of multiracial discrimination. Specifically, antidiscrimination law was not designed to achieve lofty, idealistic goals like promoting racial understanding and eliminating racism, but to provide a remedy for specific acts of discrimination in the world; and a change in focus from “categorical” race to “perceived race” on the part of judges in antidiscrimination cases would not protect multiracial plaintiffs. Instead, such a switch would operate to provide multiracial plaintiffs with even less protection under the law than they have now. Specifically, a switch to “perceived race” instead of actual race (what Professor Leong calls “categorical” race) would more likely result in the inclusion in the class of specially protected persons those who should not be specially protected (namely, persons who only seem to be multiracial but are not actually multiracial), and the exclusion from protection of persons who should be specially protected (namely, persons who actually are multiracial).

Another problem with Professor Leong’s recommendation of a switch to “perceived race” is that she does not make clear whether she is advocating this switch for cases of multiracial discrimination only or whether she is advocating this switch for all cases of racial discrimination. It seems that to the extent that her argument makes sense, it only makes sense for multiracial discrimination. Is Professor Leong recommending that the “perceived” race standard should only be used in cases of multiracial discrimination, keeping “categorical” race in usage for all other cases of discrimination? If so, it seems that would likely present somewhat of a doctrinal nightmare. For example, on what jurisprudential basis could using

64. Note that Professor Leong herself implicitly concedes that multiracial plaintiffs can at present achieve at least some measure of relief if they simply allow themselves to be lumped into one of the existing monoracial categories currently recognized by the legal system (Asian, Latino/a, White, Black, and Native American). While allowing this lumping to occur is unacceptable to Professor Leong for the reason that doing so “erases” the reality of multiracial discrimination, and while this is a good reason to object to such a process, at least multiracial persons can be provided a remedy under the current system. By contrast, if courts were to focus on perceived race in discrimination cases, only those perceived as multiracial would be protected, not actual multiracial persons themselves, leaving multiracial persons no remedy at all for the discrimination they encounter unless they can ultimately prove in court that they were “perceived” as multiracial by a would-be discriminator.
one standard for multiracial discrimination and another for other kinds of discrimination be justified? In the alternative, is Professor Leong recommending that all racial identity should be defined in terms of the perception of the would-be discriminator? If so, people who currently understand themselves as black, for example, but who are not perceived as black (owing perhaps to extraordinarily light skin) would be unable to avail themselves of protection under the law. There is also the obvious logistical problem of using perception as the basis for racial identity across the board: How would one prove the perception of the alleged discriminator? What would be the standard of proof? Whether advocated for multiracial discrimination only or for discrimination cases across the board, then, it seems that Professor Leong’s recommended switch would present a number of doctrinal and practical challenges.

Additionally, it seems that Professor Leong’s entire argument has overlooked the idea that reality can be based on something other than biology (on something other than so-called “hard” science), i.e., that objectivity can be based in something other than physicality. As mentioned above, it can be both true that race is not biologically real and that race is socially real. Professor Leong herself seems to implicitly understand that actual multiracial persons can and do exist, particularly when she carefully goes through the history of multiracial animus in American society. Professor Leong is implicitly showing, through this process, the very real effect that such animus has had and continues to have in the lives of actual multiracial people. If Professor Leong were to acknowledge the social reality of race more consciously, she might come, to understand that recognition of multiracial people as a unique set of persons (or even black people, white people, or any of the other so-called races) does not necessitate the acceptance of the concept of biological race. If Professor Leong comes to understand that addition of the category “multiracial” to the existing categories available in antidiscrimination law would not reify the outdated view that race is biologically real, she might not so readily recommend the path she recommends.

If instead of switching to “perceived” race, antidiscrimination

65. "Would the ‘reasonable racist’ have identified this plaintiff as black under these circumstances?” is a possible standard of proof in this scenario, for example.
law simply allowed plaintiffs to identify as multiracial instead, and allowed multiracial plaintiffs to bring claims of illegal discrimination on the grounds that they were discriminated against as multiracial people, then two important things would be accomplished. First, the unique history of multiracial animus directed at multiracial people (some of the details of which have been identified by Professor Leong) would finally be brought to light, providing long-overdue validation to the experiences of many multiracial people. And second, when multiracial animus is observed or is alleged to have occurred in a court of law, this animus will no longer be ignored, overlooked, or swept under the rug of one or another of the monoracial identities available in antidiscrimination law. Instead, there would be a venue through which the unique animus faced by multiracial people could be examined and assessed to determine if it amounted to illegal discrimination.

So, while I commend Professor Leong for pointing out in legal scholarship the existence and unique nature of discrimination against multiracial people, I respectfully submit that the solution of simply adding “multiracial” to the existing racial groups with which targets of racial discrimination are able to formally identify is a better route to providing multiracial persons with the special protection to which they are entitled in equal protection law and employment discrimination law. This may be the way of the future. The idea that multiracial persons as such should be included in antidiscrimination jurisprudence is finding growing support in the legal literature.66

Conclusion

Professor Leong’s list of acts of multiracial animus has a familiar ring to any multiracial person living in America. Multiracial persons are constantly subjected to the question that Professor Leong cites in her paper: “What are you?”67 or, “No, but what are you really?” Multiracial persons constantly live in what Ruth Colker has called “the gap” between racial categories.68 But, the question I have for

67. Leong, supra note 7, at 477.
68. RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER
Professor Leong is whether, in her view, being constantly asked the question, “What are you?” contains any more “animus” when it is directed at an actual multiracial person than when it is directed at an “individual perceived as multiracial”? Professor Leong’s argument seems to necessitate that she answer “no” to this question. Such a response, however, focuses the attention of discrimination law more on punishing the discriminator than on providing redress for a multiracial plaintiff in a discrimination case and ignores the reality that the purpose of antidiscrimination law is to protect actual targets of discrimination, not to police the minds of would-be discriminators.

Many multiracial people can sympathize with Professor Leong’s desire that society transcend racial categories, but as Ruth Colker also points out, “[c]ategories can serve at least two constructive purposes. First, categories have value as a form of self-identity. Second, categories are crucial for political, instrumental purposes.” Colker explains further,

It is not enough for society to become nondiscriminatory, because not all groups in society currently operate on a level playing field. Because law and society have imposed subordination on people due to their membership in group-based categories, we need to make reference to categories in order to develop fair and effective ameliorative programs.

The fact is that for the time being racial categories are necessary in order to right the social wrongs done in the name of those categories. Professor Leong has taken a great step toward righting the wrongs done to multiracial people by pointing out the gap in antidiscrimination law through which multiracial people often fall. She has also added significantly to supporting the case for having multiracial people understood as a suspect class/protected class in antidiscrimination law by meticulously cataloguing the type of unique animus to which multiracial people are routinely subjected. Professor Leong is wrong, however, to recommend a switch from


69. Colker, supra note 68, at 7.
70. Id.
using the current understanding of race to an understanding of race based on the perception of the would-be discriminator. Doing so would specially protect many people who were not meant to be protected by antidiscrimination law and, more importantly, leave many of the very people Professor Leong (ostensibly) hopes to protect on the sidelines of equal protection under the law unless they happened to be perceived as multiracial on a particular occasion, and unless this could be proven as a first order of business.

A better option, then, for modifying antidiscrimination law to make it more receptive to the claims of the unique kind of discrimination experienced by multiracial people is to ask courts to (1) acknowledge the reality that equal protection law was designed to protect members of historically oppressed groups rather than "individuals" from illegal discrimination, to (2) add multiracial persons to the list of suspect classes in equal protection law, and to (3) add "Multiracial" to the list of available racial identities with which targets of employment discrimination can choose to identify in Title VII cases. To modify antidiscrimination law in this way would be to tweak it so as to align it in accordance with the increasing population of multiracial persons in America and with the unique type of discrimination multiracial people face. It would also be in keeping with the historically defined purpose of antidiscrimination law, which is to provide historically marginalized and oppressed groups with a legal remedy for the illegal discrimination that they experience in virtue of being a member of such a group.

As a legal hermeneutical approach to the law suggests, the way the law is interpreted should be a function of a dialogue between theory and practice, between the black letter law on the books and the social reality the law is designed to negotiate. The black letter law on the books today may be that the Equal Protection Clause should be interpreted in such a way as to find racial discrimination legally actionable regardless of the race of the person in question—that is, that racial discrimination is problematic in the abstract regardless of the race of the victim.71 But, a central claim of this paper is that this way of thinking about unconstitutional racial discrimination is not only out of step with the history of

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antidiscrimination law and its intended purpose, but is reflective of a false and misleading understanding of what "race" is and how "race" operates (and has historically operated) in American society and American law. That false and misleading understanding of "race" is that it is rooted in biological reality, and that the core problem in cases of unconstitutional racial discrimination is that differentiating between persons on the basis of race is somehow inherently problematic or unconstitutional. The stated rationale for this conception of what is problematic about racial discrimination is usually some version of the observation that there can be no legally meaningful connection between a person's "race" and his or right to social goods, such as employment or the right to attend a decent public school. But, while this observation is certainly true enough, it bears little relationship to the historical purpose of antidiscrimination law, which the record shows was remedial.

As Justice Thurgood Marshall noted in his dissent in *City of Cleburne v. Cleburne Living Center, Inc.*, "In separating those groups that [qualify for special protection under the Equal Protection Clause] from those that [do] not, . . . a page of history is worth a volume of logic." In other words, what is problematic or unconstitutional about racial discrimination in the American landscape is that it has historically marked off a given group as undeserving and inferior. Racial discrimination, on this view, is not problematic or unconstitutional per se but owing to the history of denying certain groups access to social goods.

It is within the context of the current false and misleading concept of race and the role it plays in antidiscrimination law that Professor Leong has written her article. If racial discrimination per se, or in the abstract, is the problem, then, yes, using the law to prevent it from occurring wherever and whenever it occurs is justified. This would include punishing alleged discriminators whenever and wherever they use "race" to make an adverse employment decision or deny someone admission to medical school, for example, regardless of the "race" of the targeted person in question. But, if the problem to be addressed by antidiscrimination law is instead, as the historical record shows, righting the wrongs done 72.

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by discrimination against members of historically oppressed groups, then adjudication of discrimination cases should include accurate identification of those to be provided redress. In other words, Professor Leong's focus on punishing alleged discriminators rather than providing redress for victims of discrimination is consistent with the current state of the law. But, the current state of the law is out of step with the intent behind antidiscrimination law.

In summary, Professor Leong has effectively shown that multiracial people, as a group, have experienced the kind of "animus" that should qualify them as deserving of special protection in antidiscrimination cases. The solution to this problem that involves an accurate understanding of how the concepts of race and racial discrimination operate in American society, however, is to simply add multiracial persons to the groups of persons already deserving of special protection rather than, as Professor Leong suggests, a switch to what she calls "perceived race."