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## BOOK REVIEWS

### MAKING THE MODERN FAMILY: INTERRACIAL INTIMACY AND THE SOCIAL PRODUCTION OF WHITENESS

ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY. By Angela Onwuachi-Willig. New Haven, Conn.: Yale University Press. 2013. Pp. 325. \$38.00.

*Reviewed by Camille Gear Rich\**

Angela Onwuachi-Willig's provocative book *According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family* seems tailor-made for the current cultural moment. The book arrives on the heels of the reelection of our first mixed-race President.<sup>1</sup> It arrives in the midst of a media blitz that favorably presents mixed-race couples on a routine basis, making the multiracial family seem a normal, even pedestrian occurrence.<sup>2</sup> Indeed, in 2012 the cultural embrace of the interracial family seemed complete when *Modern Family* was chosen as the top sitcom in the United States.<sup>3</sup> The program centers on the Dunphy-Pritchetts, an interracial, gay-tolerant family, seemingly progressive in all dimensions. Onwuachi-Willig's new book, however, boldly challenges the contemporary claim that interracial families are now an accepted and celebrated part of the American polity.<sup>4</sup> The author instead painstakingly reveals that the world still sub-

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<sup>1</sup> See Dana J. Stone, Parent and Child Influences on the Development of a Black-White Biracial Identity 149–50 (Oct. 7, 2009) (unpublished Ph.D. dissertation, Virginia Polytechnic Institute and State University) (on file with the Harvard Law School library).

<sup>2</sup> See KIMBERLY MCCLAIN DACOSTA, MAKING MULTIRACIALS 173 (2007). However, even as mixed-race couples are presented as being a common occurrence, Professors Jennifer Lee and Frank Bean find, in their study *America's Changing Color Lines*, that only about thirteen percent of American marriages involve persons of different races. Jennifer Lee & Frank D. Bean, *America's Changing Color Lines: Immigration, Race/Ethnicity, and Multiracial Identification*, 30 ANN. REV. SOC. 221, 228 (2004). Within this group, married Asians and Latinos were almost three times more likely to have interracial marriages than married blacks, and more than five times more likely than married whites. *Id.* at 228–29.

<sup>3</sup> *Modern Family* won the Emmy for Best Comedy for the years 2010, 2011, and 2012, and the Golden Globe for Best Comedy or Musical Series in 2012. See *Modern Family — Awards*, IMDB, <http://www.imdb.com/title/tt1442437/awards> (last visited Feb. 2, 2014).

<sup>4</sup> For a discussion of the increasing prevalence of conversations about multiraciality and interracial unions, see David L. Brunsma, *Interracial Families and the Racial Identification of*

jects the interracial family to insult and inferior treatment that the law fails to address and, further, that the acceptance of interracial couples in contemporary popular culture is far more partial, conditional, and ambivalent than it might initially seem.

One need look no further than the program *Modern Family* itself to find evidence of America's continuing anxiety about interracial unions. While fans of the program know the cast of characters well, the program's viewers most likely have not fully apprehended the program's cultural commitments and underlying political ambitions. The core characters of *Modern Family* are members of a white nuclear family, Claire and Phil Dunphy and their three children.<sup>5</sup> This couple's 1950s-style Dick and Jane union<sup>6</sup> stands alongside the May-December romance of Claire's white father, Jay Pritchett, who, having separated from Claire's white mother, has married Gloria, a fiery Latina from Colombia. Jay has also functionally adopted Manny, Gloria's Latino son. The family clan is complete when we are introduced to Claire's brother, Mitchell Pritchett, a white gay man who has coupled with another white gay man, Cameron, and adopted Lily, a Vietnamese child.<sup>7</sup> The not-so-silent political subtext that informs this current cultural favorite is that the era of interraciality has ended and the post-racial future has arrived. Indeed, in the world of *Modern Family*, "interraciality," the term Onwuachi-Willig uses to describe the discrimination aimed at mixed-race couples in American society,<sup>8</sup> is a relic of the past. The program further reassures its viewers that the white nuclear family will not be threatened by this new post-racial future, a time when whites casually form intimate family relationships with people of color. For *Modern Family* is treacle-coated reassurance that in these new "modern families," interracial parenting and interra-

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*Mixed-Race Children: Evidence from the Early Childhood Longitudinal Study*, 84 SOC. FORCES 1131, 1131 (2005) (noting that discussion of these issues reached a "feverish pitch" by early 2000 and continues to be of special cultural salience).

<sup>5</sup> For a description of the characters, see *Modern Family*, ABC, <http://abc.go.com/shows/modern-family/bios> (last visited Feb. 2, 2014).

<sup>6</sup> Dick and Jane was a popular scholastic reader series used in public schools in the 1950s that presented an idyllic representation of life as seen through the eyes of children raised in traditional nuclear families. Questions of race, class, and sexuality were never part of the stories featured. See Adma D'Heurle, Joel N. Feimer & Mary C. Kraetzer, *The Sugar-Coated World of the Third-Grade Reader*, 72 ELEMENTARY SCH. J. 362, 363 (1972).

<sup>7</sup> *Modern Family*, *supra* note 5.

<sup>8</sup> Interraciality refers to the anxiety interracial families provoke in others (p. 22). Onwuachi-Willig also sometimes uses the term to refer to the discrimination or negative treatment directed at interracial families (pp. 169, 284). For purposes of clarity I refer to this discrimination as "interraciality-based" discrimination. For further discussion of interraciality-based discrimination, see *infra* section I.B, pp. 1353-68.

cial marriage will simply mimic the dynamics of the white nuclear family in its original form.<sup>9</sup>

Close analysis of *Modern Family* further demonstrates that, despite the seeming cultural celebration of interracial families, the racial acceptance offered in the program is surprisingly partial. One major racial group is left out of the Dunphy-Pritchett clan's seemingly capacious diversity circle — blacks. Indeed, in the Dunphy-Pritchett family, white parents eagerly reach out to care for Latino, Asian, and mixed-race children,<sup>10</sup> but there are no black children in the family. Over the course of each season we occasionally see black friends, or black neighbors, but there is no sign that any black person has ever been invited into the Dunphy-Pritchett marital bed. One wonders, why did the producers' willingness to represent interracial intimacy stop with blacks? *According to Our Hearts* provides an answer. Onwuachi-Willig explains that black-white romantic dyads and the mixed-race families they produce are particularly anxiety provoking in the United States and, as a consequence, are typically erased and rendered culturally invisible (p. 18). She further argues that this invisibility hides the fact that black-white families suffer under a unique form of hostility and disadvantage (p. 9). By charting these black-white couples' experiences and using them in a "miner's canary" analysis to assess race relations,<sup>11</sup> she argues, we learn just how long racism and fear of interracial intimacy have endured (p. 122).

Onwuachi-Willig draws on multiple sources in *According to Our Hearts* to describe the persistence of bias against the interracial family, including legal history, anthropology, sociology, and psychology. The first half of the book, which is not the focus of this review, explores the background facts of *Rhineland v. Rhineland*,<sup>12</sup> a tragic annulment case that turned on whether the mixed-race wife, Alice Rhineland, had engaged in "racial fraud" when she married her white husband, Leonard "Kip" Rhineland (pp. 31–35). The author uses the facts surrounding the case to explore the kind of discrimination commonly experienced by black-white interracial couples prior to *Loving v. Virgin-*

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<sup>9</sup> For example, Claire's homemaker status is replicated in both the interracial and the gay family units. Each unit features a stay-at-home "mother" figure devoted primarily to the care of her/his children (Gloria/Cameron). Also, both the mixed-race couple and the gay couple feature a white male father figure with economic power who good-naturedly endures the Lucy-like escapades of his spouse (Jay/Mitchell).

<sup>10</sup> Jay and Gloria Pritchett have recently had a biracial Latino and white son, Fulgencio Joseph Pritchett.

<sup>11</sup> Onwuachi-Willig borrows this approach from Professor Erica Chito Childs (p. 122). See generally LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* 11–12 (2002) (describing miner's canary analysis as one that uses minority groups' problems and experiences to provide advance notice of larger structural and material problems that will ultimately threaten all Americans).

<sup>12</sup> 219 N.Y.S. 548 (App. Div.), *aff'd*, 157 N.E. 838 (N.Y. 1927).

*ia*<sup>13</sup> (pp. 25–116), the case in which the Supreme Court declared state antimiscegenation laws unconstitutional (p. 7). The second half of the book, which is more closely examined here, draws connections between *Rhineland*-era bias and the bias interracial couples have experienced post-*Loving* (pp. 121–22). The book then offers a series of law reform proposals to address the current negative animus mixed-race families face (pp. 264–67).<sup>14</sup>

*According to Our Hearts* is an ambitious project, as Onwuachi-Willig uses the book to flesh out a new area in antidiscrimination studies, namely, the study of relational discrimination.<sup>15</sup> The author's central claim is that in many cases it is not an individual's racial status alone that triggers discrimination, but rather her willingness to enter into interracial relationships (pp. 17–19).<sup>16</sup> This insight has broad implications for discrimination studies, for although courts have developed a rich doctrine that addresses discrimination triggered by interracial family relationships,<sup>17</sup> antidiscrimination scholars have not fully considered the implications that relational discrimination protections will have when extended to other protected groups. Onwuachi-Willig, therefore, creates an opportunity for us to consider the depth of our commitment to the concept of relational discrimination as this issue also arises with relatives of disabled, gay, or transgender persons.

Importantly, there is some risk that the more sophisticated elements of the author's theoretical contribution may be missed by less careful readers, as the book's hydra-headed account of relational discrimination is presented in a series of woven narratives, rather than in a more linear expository form. Also, Onwuachi-Willig solely focuses on race discrimination, despite the obvious broader implications of her relational approach. To ensure that her contribution to the antidiscrimination literature is properly recognized, this Review provides the framework and structure necessary to fully appreciate Onwuachi-Willig's insights about relational discrimination, as well as the context required to understand why her relational account charts a new direction for antidiscrimination theory.

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<sup>13</sup> 388 U.S. 1 (1967).

<sup>14</sup> Onwuachi-Willig argues that adding interraciality-based protections to antidiscrimination statutes would send a symbolic message affirming America's antidiscrimination commitments and better justify legal protections for multiracial people and families (pp. 266–67).

<sup>15</sup> I use the term relational discrimination to describe her project more broadly, as the term "interraciality" might distract some readers from the larger implications her arguments have for our understanding of collective-based discrimination.

<sup>16</sup> The author describes how her interviews with interracial couples demonstrate how discrimination in public spaces causes them to feel a sense of "placelessness" in American society (pp. 172–73).

<sup>17</sup> These cases are covered under interracial association doctrine. For examples, see *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972), which created the interracial association doctrine, and *Littlefield v. McGuffey*, 954 F.2d 1337 (7th Cir. 1992).

Properly framed, Onwuachi-Willig's book makes a second contribution to the antidiscrimination literature, as it provides us with a finely nuanced account of the dialectical, mutually constitutive relationship between family formation and "racial formation."<sup>18</sup> The study of "racial formation," a methodological approach introduced by Professors Michael Omi and Howard Winant,<sup>19</sup> requires that scholars examine the ways in which race is constantly redefined, reworked, and rearticulated by social and political institutions in different political and historical periods. Onwuachi-Willig does not use racial formation terminology to describe her work, instead explaining that she is interested in "how both law and society work together to define families and their rights and opportunities by race — especially when those families are multiracial" (p. 8). However, her analysis maps the microaggressions and microassaults against the interracial family that are intended to discipline the family by sanctioning those who have defied America's monoracial family norm (pp. 173–83, 203–11). She explores the ways in which race is recognized, reworked, and reproduced in small scale, seemingly inconsequential workplace discussions, housing market inquiries, and random exchanges between strangers in streets and restaurants. *According to Our Hearts* carefully charts how these microexchanges hew together to actualize and enforce an oppressive default monoracial standard for American families.

Even great books, however, can be improved upon, and *According to Our Hearts* suffers from two significant analytic problems. First, Onwuachi-Willig's theory of relational discrimination relies far too heavily on a single concept: interraciality. As a consequence the term is overdetermined. Therefore, in Part I, this Book Review parses out the concept of "interraciality" by exploring the various discrimination modalities covered by her discussion of interraciality-based discrimination. This section reveals that Onwuachi-Willig explores six different types of discrimination, some of which require engagement with cutting-edge disputes in antidiscrimination theory and law.<sup>20</sup> This Review teases out these various discrimination constructs and asks in a more deliberate fashion how they are related to one another and whether the injuries they cause merit redress by antidiscrimination

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<sup>18</sup> See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994).

<sup>19</sup> HOWARD WINANT, *RACIAL CONDITIONS* 23–36 (1994). My work in this area has more explicitly relied on the racial formation paradigm. See, e.g., Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1507, 1516 n.55 (2010) [hereinafter Rich, *Marginal Whiteness*] (describing microlevel contests that are part of a larger racial formation process); Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. (forthcoming 2014) [hereinafter Rich, *Recognizing Race*] (describing the need for more race scholarship that explores the microdynamics of racial formation projects).

<sup>20</sup> See discussion *infra* section I.B, pp. 1353–68.

law. Importantly, Onwuachi-Willig's use of narrative, a well established methodology for Critical Race Theory scholars,<sup>21</sup> has costs for her project as the narrative format does not allow her to fully engage with some of the interconnections between the discrimination concepts she describes. Therefore, Part I of the Review offers readers a more precise roadmap of these discrimination concepts in the hope that their potential for analyzing other forms of discrimination might be fully appreciated.

The second analytic problem, explored in Part II, is a product of cognitive bias, as the interracial family construct Onwuachi-Willig uses simultaneously positively informs and distorts the racial formation analysis at the heart of her book. Specifically, Onwuachi-Willig's account of the black-white interracial family invites readers to see these families as heroic, symbolic unions that by their mere existence challenge the ugly face of racism and traditional racial status hierarchy (pp. 123–25). Certainly, there is no doubt that many black-white interracial families play this heroic, symbolic role and are socially sanctioned as a result. However, Onwuachi-Willig never engages with the fact that the interracial family is not solely a symbol or target of racial messaging; rather, it also produces racial meaning. As Omi and Winant explain, the family itself is a powerful social institution (or site) that produces, inculcates, and disseminates racial understandings.<sup>22</sup> Relatedly, Onwuachi-Willig does not acknowledge the diverse ways in which the interracial family participates in racial messaging or value formation. For only *some* interracial families inculcate family members with the racial equality values she assumes are associated with this family form.<sup>23</sup> Other interracial families, arguably, have a more racially regressive role, because they seem to reconstitute existing racial status hierarchy and are devoted to assimilating family members to whiteness. Indeed, in these so-called “racially regressive” families, minorities pursue interracial intimacy as part of an assimilationist effort to expand the category of whiteness. This assimilationist pattern is more common with mixed-race white-Latino families and white-

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<sup>21</sup> See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY* 43–52 (2d ed. 2012) (discussing the role of narrative in Critical Race Theory); cf. Katharine T. Bartlett, *Perspectives in Feminist Jurisprudence*, in BETTY TAYLOR ET AL., *FEMINIST JURISPRUDENCE, WOMEN AND THE LAW* 3, 20 (1999) (discussing the role of narrative in feminist legal theory).

<sup>22</sup> See OMI & WINANT, *supra* note 18, at 96. This area of racial formation theory is not well theorized at present.

<sup>23</sup> Onwuachi-Willig of course likely realizes that some interracial families do not have progressive attitudes about race and are not interested in disrupting existing racial status hierarchy. However, her analysis never explicitly acknowledges these families' existence, nor does she attempt to include these families in her account regarding the need for interraciality-based anti-discrimination protections.

Asian families<sup>24</sup> because the amount of social distancing between these groups has decreased over time, making these racial categories function like ethnic categories for some whites.<sup>25</sup> As social distancing between these three “racial” groups decreases, intermarriage between them becomes more common.<sup>26</sup>

Onwuachi-Willig’s account therefore requires some supplementation to provide a full account of the role of the interracial family in racial formation projects, one that acknowledges the interracial family’s role in disrupting racial status hierarchy as well as its potential role in reinstating existing patterns of racial subordination. Her omission of the potentially racially regressive role interracial families play prevents her from offering a complete, contemporary, normative vision that would also justify protecting from discrimination interracial families that arguably entrench the racial status quo. Indeed, traditional Civil Rights Era antidiscrimination norms would only justify offering protection to those families who would disrupt the operation of white privilege, but we require a broader answer if we are to protect families that also seem somehow invested in and committed to maintaining potentially subordinating racial distinctions. Borrowing from my own work on elective race<sup>27</sup> and marginal whiteness,<sup>28</sup> I offer some contemporary post-Civil Rights Era arguments to protect interracial families, ones that would obtain in spite of these families’ potentially assimilationist aspirations.

In summary, this Review is entitled *Making the Modern Family* for two reasons. First, the title draws attention to the fact that Onwuachi-Willig is actively “making” the modern family that she purports to merely describe, for the *construct* of the modern family she offers is open to challenge, just as much as is the pop-culture, Dunphy-Pritchett construction most Americans use to understand the interracial family’s

<sup>24</sup> See Lee & Bean, *supra* note 2, at 231–34.

<sup>25</sup> *Id.* at 225–26 (“Contemporary evidence suggests that the boundaries [of whiteness] are again being stretched as Latinos and Asians pursue whiteness much as the Irish, Italians, and Poles did before them.” *Id.* at 226 (quoting Gary Gerstle, *Liberty, Coercion, and the Making of Americans*, in THE HANDBOOK OF INTERNATIONAL MIGRATION 275, 289 (Charles Hirschman et al. eds., 1999)) (internal quotation mark omitted)). For a discussion of ethnic whites’ assimilation, see NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE 132–50 (2010), which discusses Irish whites. Painter explains that there were at least two successive waves in which white Europeans were accepted into the category of white Americans. The first wave from the mid-1800s through the early 1900s was made up of Northern Europeans and included Irish and German Catholics. *Id.* The second wave covered Southern Europeans who were characterized as “beaten men from beaten races,” *id.* at 210 (quoting Francis A. Walker, *Restriction of Immigration*, ATLANTIC MONTHLY, June 1896, at 822, 829) (internal quotation mark omitted), and included Italians. *Id.* at 201–11.

<sup>26</sup> Lee & Bean, *supra* note 2, at 229.

<sup>27</sup> Rich, *Recognizing Race*, *supra* note 19.

<sup>28</sup> Rich, *Marginal Whiteness*, *supra* note 19, at 1497.



place in American life. This Review shows that Onwuachi-Willig's construct of the interracial family productively informs her work in some ways, and yet in other ways fundamentally distorts her account of the interracial family's role. Additionally, the title *Making the Modern Family* is intended to remind us that the modern family is the interracial family, and that the racial identity lessons that are disseminated in these family structures will have huge consequences for the maintenance of whiteness as a social category and the persistence of racial status hierarchy in the United States. Indeed, the choices family members make about how to raise interracial children will determine whether interracial families function as a racially progressive force or remain in their more historically established role of charting a path to whiteness.

## PART I

Part I of this Review provides the context and structuring framework necessary to fully appreciate how Onwuachi-Willig's account of relational discrimination advances antidiscrimination theory. Section A revisits the *Rhineland* story to flesh out the central concept that informs the book: interraciality, the negative reactions that black-white mixed-race unions trigger. Section B unpacks the account of interraciality-based discrimination Onwuachi-Willig describes in the narratives included in the book. This section reveals that Onwuachi-Willig identifies six different discrimination modalities and associated forms of injury: (1) injuries from negative animus; (2) racial-stereotyping-based injuries; (3) racial injuries stemming from the experience of phenomenological blackness; (4) racial injuries triggered by functional blackness; (5) racial-commodification injuries; and (6) injuries inflicted by the violence of the monoracial gaze. Section C explores Onwuachi-Willig's proposed solution to address interraciality-based discrimination, namely, making a family's interracial status a basis for protection under current antidiscrimination statutes. This section argues that Onwuachi-Willig's legal proposals may find less purchase than she imagines; however, her discussion of interraciality-based discrimination will greatly advance our understanding of the necessary scope, substance, and politics of relation-based antidiscrimination protections.

### A. *Interraciality in Historical Context: Rhineland v. Rhineland*

Onwuachi-Willig begins her project with an account of *Rhineland v. Rhineland*, the tragic love story of Alice Jones, a black chambermaid, and Leonard "Kip" Rhineland, the white son of a socially

prominent, wealthy family.<sup>29</sup> The story is offered to introduce us to the unique social problem produced by interraciality, and the special role black-white unions play in America's cultural anxieties about race. Onwuachi-Willig explains that Alice and Leonard met, fell in love, and dared to marry in the early 1920s, a period of intense race discrimination (pp. 26–29). The romance ended in an annulment action brought by Leonard on the ground of racial fraud (pp. 31–35). Specifically, Leonard claimed that his marriage to Alice should be dissolved because Alice had misrepresented her race, both by hiding the fact of her colored blood and affirmatively representing to him that she was white (p. 33). Many believed that Leonard truly was in love with Alice, but the scandal of his marriage to a black woman was too great (pp. 38–39), and he agreed to file for annulment because his family risked losing their standing in respectable New York society if he did not attempt to dissolve the union (pp. 35–36, 38–39). Alice's action, in contrast, was styled as a request for divorce (pp. 4–5). In substance, however, she was merely seeking legal acknowledgment that her husband knowingly and voluntarily consented to the marriage despite her race. She further sought access to the concomitant alimony and property settlement that would follow from legal recognition of the marriage and its dissolution (pp. 37–38).

By introducing us to the Rhinelanders, Onwuachi-Willig gives a face to the victims of interraciality-based discrimination and a historical context for understanding the contemporary anxiety that still surrounds black-white interracial unions. She also makes clear that the central concept that informs her understanding of relational discrimination, "interraciality" (p. 159), is based on the special problem posed by black-white interracial couples, in particular couples composed of a black female and white male. As she explains, interracial marriages were ranked on a racial hierarchy, one that treated permanent unions with blacks as one of the worst forms of race mixing (p. 124). Additionally, although she recognizes that history has primarily devoted attention to the cultural threat posed by black male and white female marriages, black female and white male marriages were thought to be so unthinkable that people would assume these unions were formed purely for sexual reasons (pp. 126–27). The author argues that the public opprobrium Leonard and Alice faced was spurred by this hierarchy, situating black women as the least desirable marriage partners (p. 127). This hierarchy, she argues, continues to influence dating patterns in the present day (pp. 128–31).

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<sup>29</sup> Onwuachi-Willig offers a full account of the relationship between Alice Jones and Leonard Rhinlander, as well as the legal proceedings, at pages 25 to 117.

Onwuachi-Willig next uses the *Rhineland* controversy to illustrate how interraciality-based bias is often communicated: through color-blind laws coupled with race-based social understandings (pp. 122, 145). For the *Rhineland* case is not an antimiscegenation case in the traditional sense, as New York law in the 1920s did not explicitly prohibit whites and blacks from marrying (p. 4). Instead, Onwuachi-Willig shows that seemingly colorblind matrimonial law (or contract law) rested on a background series of social understandings that made race an essential or key term of the marriage (pp. 35–39). Put simply, social understandings made voluntarily and knowingly marrying a black person so socially unthinkable that Leonard’s annulment suit based on racial fraud seemed entirely reasonable (p. 36). The law recognized that if Alice made misrepresentations about her race, her falsehoods were serious enough to render the marriage voidable. Onwuachi-Willig then charges the reader to examine contemporary legal disputes for evidence that racially inflected social norms both structure a controversy and make certain claims or remedies seem reasonable or unthinkable (pp. 149–54).<sup>30</sup> Indeed, lest we think that we have moved beyond an era in which race could be considered a key contract term, we need only look to the fertility industry. If a fertility clinic makes an error and impregnates a white woman with a black child, it can be sued for damages (pp. 151–52). Race remains a key contract term, and the monoracial family norm establishes that malfeasance or neglect destroying that possibility inflicts a legally cognizable injury.

Last, Onwuachi-Willig uses the *Rhineland* controversy to discuss the consequences of interraciality-based discrimination: it generates a sense of “placelessness” for mixed-race couples (p. 156). Onwuachi-Willig explains that there were very few places that Leonard and Alice could live once they were married, in spite of Leonard’s ample financial means, because the monoracial family norm made their marriage suspect (pp. 184–85). The only refuge they found was in the private sphere, in Alice’s parents’ home (p. 185). Indeed, it appears that it was Leonard and Alice’s decision to enter the housing market by signing a lease that publicly acknowledged their status as husband and wife that sounded the death knell for their relationship. The act of appearing in public space was quickly followed by newspaper articles that triggered social opprobrium and ultimately the annulment action (pp. 30–31). Onwuachi-Willig notes that this sense of placelessness still plagues interracial families today, as there are very few neighborhoods

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<sup>30</sup> Onwuachi-Willig argues that even under contemporary norms, race could be an acceptable basis for seeking an annulment (pp. 149–50). The ability to discriminate on the basis of race for intimacy decisions is still strongly protected because these decisions are treated as “personal” and “private.”

where such families feel comfortable (p. 186). Indeed, both interracial families and couples feel constrained to contain their affections to the private sphere or to carefully select sites for public acknowledgment of their connection, lest they become a source of curiosity or a target of sanction (pp. 169–72).<sup>31</sup>

While Onwuachi-Willig deftly teases out several important themes from the *Rhineland* materials, she misses out on another critically important opportunity: the chance to engage with the social challenges caused by fluid approaches to racial identification. For Onwuachi-Willig shows that in some contexts Alice would identify herself as colored and in others she identified or appeared to “pass” as white (pp. 3, 11–12). Moreover, Alice’s right to “elect” or choose her race as a racially ambiguous person was a central issue in the *Rhineland* annulment case, as Leonard’s lawyers hoped that this evidence of inconsistent racial identification would be recognized by the jury as proof of racial fraud (pp. 65, 69–71). In my work I refer to the contemporary cultural interest in exploring racial fluidity as the phenomenon of “elective race.”<sup>32</sup> As I explain, the rise of the era of “elective race” is revealed by the growing number of persons who assert that one has a “right” to choose one’s racial identity, as well as a dignity interest in having one’s racial identity choice recognized and accepted in public contexts.<sup>33</sup> The *Rhineland* case shows that, rather than merely being a contemporary phenomenon, elective race issues were central to the politics of race and racial identity long before the multiracial movement propelled these issues center stage in 2000. Onwuachi-Willig declines to address this issue because the core construct at the heart of her theory, interraciality, requires that she make a black-white couple the center of her analysis (pp. 18–19). Alice consequently gets reduced to being black, even as Onwuachi-Willig acknowledges that Alice had a far more complicated approach to her own process of racial identification (pp. 104–06).<sup>34</sup> However, when recast as a case about elective race, *Rhineland* presents us with the opportunity to consider several key contemporary discrimination theory questions. Should mixed-race persons be required to adopt a stable racial identity? What discrimination protection should be offered to persons who inconsistently identify by race? What do we do in a discrimination case when a subject

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<sup>31</sup> Onwuachi-Willig contrasts several of the privileges that white, heterosexual couples have access to no matter where they are with the privileges that black-white heterosexual couples can access — of the fifteen privileges listed for white, monoracial couples, only two are readily available to black-white couples (p. 169).

<sup>32</sup> Rich, *Recognizing Race*, *supra* note 19 (manuscript at 3).

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

<sup>34</sup> Onwuachi-Willig suggests here that Alice had claims to whiteness as well as blackness, and might herself have preferred to be recognized as white.

fails to racially self-identify in a manner that comports with the prevailing cultural interpretation of his phenotype? Has this individual still suffered discrimination when he experiences bias triggered by his racialized physical characteristics?

*Rhineland* also could be described as an opportunity to explore the politics of “marginal whiteness,” a term I have coined to describe the shifting, conditional, and contingent experience of white privilege “near whites” enjoy in various contexts.<sup>35</sup> “Near whites” or “marginal whites” are typically white-biracial persons, white-skinned Latinos or white-skinned Asians, although poor whites equally can find themselves cast outside of the circle of privilege in a given context.<sup>36</sup> I have argued that the experience of marginal whiteness creates perverse incentives for “near whites,” as in many circumstances they seem committed to structures that grant access to white privilege, even as they recognize that they will be denied the benefits that accrue to whiteness because higher-status whites will deny their claim to whiteness in some contexts.<sup>37</sup> Indeed, Alice’s experience helps illustrate this proposition, as her trial strategy was marked by ambivalence. When she began the case, Alice suggested that she might litigate her claim in a way that would establish that she was white and therefore no racial fraud had occurred (p. 35). This trial strategy presented no challenge to white privilege, racial status hierarchy, or the norm of the monoracial family. By the time of trial, however, Alice instead litigated her claim as a black or colored woman alleging that her white husband married her in full knowledge of her race (pp. 52–61). This trial strategy, in contrast, was deeply challenging of racial status hierarchy and the monoracial family norm. One wonders, why was there such an abrupt change in Alice’s trial strategy?

Onwuachi-Willig suggests that Alice’s trial strategy decision marked a form of social defeat, as she was forced to recognize that her racially marked phenotype made her quest for public recognition of her whiteness futile (p. 108). Stated alternatively, Alice was confronted with the reality of marginal whiteness — the understanding that, in the context of the trial, whites were unlikely to honor her claim to whiteness. Indeed, Alice’s case ultimately turned on jurors viewing her partially nude body with the goal of proving that her blackness was obvious and apparent based on her features (pp. 78–79). However, Alice’s participation in and enjoyment of the benefits of white privilege in other contexts establishes that whiteness was a far more fluid construct than her trial strategy suggests. Alice’s desire for whiteness

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<sup>35</sup> Rich, *Marginal Whiteness*, *supra* note 19, at 1516.

<sup>36</sup> EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* 179 (2d ed. 2006).

<sup>37</sup> Rich, *Marginal Whiteness*, *supra* note 19, at 1526, 1528–29.

and her ultimate exclusion from the category are a key part of the *Rhineland* tale. When viewed through the lens of marginal whiteness, her life story prompts us to ask how antidiscrimination law should regard the race discrimination claims of individuals who appear to have previously embraced and enjoyed the benefits of white privilege in some contexts. This issue reemerges as an item of critical importance in Part II of this discussion, as this Review considers the experiences of interracial families focused on assimilating to whiteness and the need for a normative justification to explain why the state should grant antidiscrimination protections to these families.

*B. The Many Faces of Interraciality: Contemporary  
Interraciality-Based Discrimination*

After concluding the *Rhineland* story, Onwuachi-Willig begins the second half of her analysis by demonstrating that interraciality is alive and well, and the monoracial family is still the default norm in the United States.<sup>38</sup> This monoracial norm, she argues, imposes special burdens on black-white families as they negotiate various social spaces, in particular the housing market and the workplace, because of enduring anxiety about black-white intimacy. The author finds this continuing discomfort particularly striking given that *Loving v. Virginia*, the case in which the Supreme Court declared antiscegenation laws unconstitutional, involved an African American woman and a white man. The author's solution is that the law must begin to address interraciality-based discrimination, which the author describes as the unique forms of discrimination stemming from one's membership in an interracial family. Onwuachi-Willig calls on lawmakers to straightforwardly address how interracial connections trigger discrimination. Onwuachi-Willig then does the painstaking work to investigate the interstices of antidiscrimination law and reveal how current legal protections inadequately address the discrimination directed at interracial families.<sup>39</sup>

Specifically, Onwuachi-Willig argues that because most people have internalized the idea of the monoracial family as a social norm, interraciality-based discrimination works discrete harms in the workplace (p. 199) and the housing market (p. 157). She explains that these

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<sup>38</sup> For discussion of the monoracial norm in the adoption context, see generally R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998).

<sup>39</sup> In one section, Onwuachi-Willig defines interraciality as the anxiety that interracial couples and families *trigger in others* as a consequence of their intimate connection. In another section of her book she describes interraciality as the discrimination experiences that the *interracial couple or family has* as a consequence of interacting with others who have been socialized based on the monoracial family norm. For our purposes here, I will refer to the discrimination couples face from third parties as interraciality-based discrimination.

two areas are arenas where the consequences of one's partnering relationships are rendered visible and can have financial consequences. She notes that although the courts protect against workplace discrimination based on race, they do an inadequate job addressing "the unique harms that can flow to persons in interracial couples who are in jobs or applying for jobs where there is an expectation of spousal presence and assistance" (p. 257). Similarly, although Title VIII<sup>40</sup> protects against race discrimination in the housing market, it too operates based on the default norm of the monoracial family, and therefore inadequately protects interracial couples when their interracial status triggers discrimination (pp. 195–96). By adding interraciality-based protections to both Title VII<sup>41</sup> and Title VIII, we would be better equipped to address these problems.

The remainder of Onwuachi-Willig's discussion documents and describes the harms that interraciality-based discrimination inflicts on couples and families. She carefully selects a series of narratives to illustrate these points, covering discrimination against both heterosexual and gay interracial couples (pp. 172–86, 241–42). However, careful readers will note that Onwuachi-Willig covers at least six distinct kinds of harm in her account of interraciality-based discrimination, but without proper roadmarkers it can be difficult to fully appreciate her analysis. First, Onwuachi-Willig explains, the interracial couple can experience traditional negative racial animus (pp. 201–07).<sup>42</sup> Second, the couple may be subject to interraciality-based racial stereotyping (pp. 2, 132–34, 179). Third, a white partner in a black-white union may live in a special state of racial sensitivity, which I will refer to as "phenomenological blackness," in which the person has so many experiences with discrimination that he becomes profoundly sensitive to and aware of microaggressions on blacks (pp. 125, 257).<sup>43</sup> Fourth, parties in an interracial relationship can be injured as a result of racial commodification (pp. 175–80).<sup>44</sup> Fifth, whites in interracial relation-

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<sup>40</sup> This refers to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3606 (2006).

<sup>41</sup> This refers to Title VII of the Civil Rights Act of 1968, 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. V 2011).

<sup>42</sup> Onwuachi-Willig describes general punishments and negative attitudes that are explicitly communicated to mixed-race couples.

<sup>43</sup> See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1106–13 (2008) (discussing seemingly neutral or ambiguous social interactions that are interpreted by minorities as involving discriminatory animus but are read as neutral by white viewers); Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCHOLOGIST 271, 273–75 (2007) (discussing microaggressions, microinsults, and microinvalidations).

<sup>44</sup> Racial commodification takes place when an employer or an employee attempts to harness an interracial couple's interracial status for economic purposes or to facilitate some instrumental workplace goal (pp. 219–20) (discussing ways in which interracial status proves to be an advantage for some interracial couples in the workplace). Employers and workers may be tempted to view a person's interracial connections as an important social marker, as some whites are more

ships may experience injuries as a consequence of functional blackness, because they actually share the same material deprivations inflicted on their minority partners (p. 256).<sup>45</sup> And sixth, families can be injured by the monoracial normalizing gaze in public settings (pp. 175–84).<sup>46</sup> Wielders of the gaze view the world through the monoracial family norm and tend to socially erase or deny obvious relationships between members of multiracial families when the members are of different races. Alternatively, they may refuse to consistently honor or respect these family connections, even when the family's bonds are socially acknowledged (pp. 183–84).

Onwuachi-Willig recognizes that much of the interraciality-based discrimination she describes is considered by lay people to be beyond the reach of antidiscrimination law, as it is effected through social behavior that is based on social “common sense” informed by race-based norms (pp. 213–19). She therefore attempts to distinguish between those factors that should be the subject of legal sanction and those that comprise an unfortunate but ultimately unregulable social backdrop (pp. 257–67).<sup>47</sup> In this way Onwuachi-Willig attempts to craft a reasonable, properly conservative approach to expanding the scope of antidiscrimination law. However, some readers may conclude that she gives away too much, as much of the discrimination she concedes to be social is actually the subject of debate in contemporary antidiscrimination theory circles. Indeed, as the next section of the discussion shows, some of the interraciality-based discrimination that she places in the category of extralegal “social” factors can be covered by contemporary antidiscrimination law if we closely examine the analytic structure, logic, and normative commitments of current antidiscrimination protections.<sup>48</sup>

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comfortable with a black coworker when they learn the individual has a white spouse. For further discussion of the politics of racial commodification and personal agency, see Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2169–70 & nn.99–100 (2013) (discussing future work on instrumental usage of personal identity). Cf. Camille Gear Rich, Essay, *Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of the New Functionalism*, 102 GEO. L.J. 179 (2013) (discussing ways employers can minimize commodification risks and injuries incident to instrumental uses of race).

<sup>45</sup> The author describes a white partner's disclosure that because her husband is black she has been seated at the back of restaurants, denied loans, pulled over for no reason, and steered out of white neighborhoods.

<sup>46</sup> Onwuachi-Willig discusses numerous anecdotes in which a third party in a public context misconstrued the nature of an interracial romantic or familial relationship. Examples include asking interracial married couples if they would like separate checks, even though there are clear signs pointing to a marital relationship, and a black mother being assumed to be a biracial child's nanny.

<sup>47</sup> Onwuachi-Willig discusses where the law can intervene to provide relief for relational discrimination by recognizing interraciality as a basis for antidiscrimination protections.

<sup>48</sup> While Onwuachi-Willig's reform proposal is broad, most of her suggestions for addressing interraciality-based discrimination focus on workplace disputes and changes to Title VII. Conse-



1. *Classic Negative Animus.* — Onwuachi-Willig begins her analysis with the most familiar type of bias addressed by Title VII, classic negative animus. In negative animus cases, discriminators clearly and directly indicate that they are hostile to or “uncomfortable” with interracial couples. For example, Onwuachi-Willig describes the experiences of one black-white mixed-race couple, in which “men . . . called [the couple] zebras, glared at [them] or asked [them] inappropriate questions about [their] sex lives” (p. 178).<sup>49</sup> Those who believe that such bare prejudice or outright bias is a thing of the past need only spend some time reading Title VII workplace discrimination cases from the last decade. Individuals who date interracially often still find that they are subject to adverse action at work sufficient to support a disparate treatment claim (including promotion denials, loss of assignments, and other denials of workplace benefits), as well as hostile environment discrimination — severe or pervasive negative comments sufficient to alter the terms and conditions of the workplace.<sup>50</sup> Onwuachi-Willig celebrates the fact that courts currently address interracially-based discrimination using these two existing Title VII claims, but she worries that the primary basis for these claims — a doctrinal concept called the right of “interracial association” — is merely a judicial construct created by judges interpreting Title VII. Given that Title VII’s plain terms only prohibit discrimination on the basis of an individual’s race,<sup>51</sup> plain language readings do not support the view that one is protected in the right of interracial association.<sup>52</sup> However, Onwuachi-Willig recognizes that interracial association doc-

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quently, this discussion of interracially-based discrimination will primarily concentrate on Title VII workplace disputes. The discussion only shifts to include Title VIII housing discrimination questions when that context is particularly germane — in particular, to address her discussion of interracially as “placelessness,” or what I call the violence of the “monoracial gaze.” Additionally, Onwuachi-Willig offers some global critiques of antidiscrimination statutes for their failure to include interracially as well as policy reasons for expanding the scope of antidiscrimination law. These global critiques and suggestions are dealt with at the end of this discussion of interracially-based discrimination, so that the precise doctrinal questions she raises can be addressed with regard to each discrimination modality she identifies.

<sup>49</sup> An internal quotation mark has been omitted.

<sup>50</sup> See, e.g., *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) (allowing white male to bring Title VII race discrimination claim based on discrimination triggered by marriage to black woman); *Bergerson v. N.Y. State Office of Mental Health, Cent. N.Y. Psychiatric Ctr.*, 611 F. Supp. 2d 224, 230–31 (N.D.N.Y. 2009) (white female employee alleging discrimination based on dating black male employee).

<sup>51</sup> The text of Title VII reads, in pertinent part: “It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .” 42 U.S.C. § 2000e-2(a) (2006).

<sup>52</sup> *But see Holcomb*, 521 F.3d at 139 (rejecting case law holding that plain language of Title VII does not support claims of interracial discrimination, and instead holding that plain language does, by definition, cover such discrimination).

trine, at least in its modern iteration,<sup>53</sup> is rich and well developed, providing protections during a couple's courtship and dating as well as marriage, and providing protection after the birth of a biracial child.<sup>54</sup> Onwuachi-Willig's proposal to add interraciality to Title VII therefore is addressed to higher-level concerns, including expressing our symbolic commitment to ending discrimination, ensuring consistent interraciality-based protections across jurisdictions, and ensuring that judges who provide these protections have confidence that they are giving effect to the will of Congress rather than engaging in judicial activism.

2. *Racial Stereotyping.* — The next form of discrimination Onwuachi-Willig describes that causes interracial couples to feel socially marginalized is racial stereotyping. The stereotyping she describes comes in two forms: negative stereotyping and benign stereotyping. In negative stereotyping cases, members of the couple are assumed to have offensive or demeaning qualities (p. 134).<sup>55</sup> The most common negative stereotyping scenario is one in which interracial couples are assumed to be hypersexual or attracted to one another for purely sexual reasons (pp. 132–33). For example, Onwuachi-Willig tells one story about a black-white couple composed of two professionals who were approached in a hotel lobby bar and asked if they were porn stars (p. 133). Nothing about their self-presentation, she argues, suggested any association with the sex industry, and the assumption was made because the couple was interracial. Negative stereotyping cases are closely related to the classic negative animus cases discussed above, for one of the most common ways in which people communicate negative animus is by making negative-stereotype-based comments to an interracial couple. However, one will also find cases in which individuals may have negative stereotypes about interracial couples in the absence of any specific negative animus toward the specific couple.<sup>56</sup> Intention, however, matters little given the obvious so-

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<sup>53</sup> There are two versions of interracial association doctrine. The first is based on a right to the benefits of an interracial association. See Rich, *Marginal Whiteness*, *supra* note 19, at 1499 n.12 (discussing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972), and other cases as part of the initial iteration of interracial association doctrine). A second, newer strand of interracial association doctrine protects family relationships and some friendships. See, e.g., *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (collecting cases on interracial relationships); *Holcomb*, 521 F.3d at 139 (recognizing claim for first time based on mixed marriage); see also *Rosenblatt v. Bivona & Cohen, P.C.*, 946 F. Supp. 298, 300 (S.D.N.Y. 1996) (recognizing claim based on family).

<sup>54</sup> *Rosenblatt*, 946 F. Supp. at 298.

<sup>55</sup> Onwuachi-Willig explains that this discrimination is tied to white supremacy, because those who display attitudes based upon negative stereotyping believe that it is only in an "unnatural world" that black-white intimacy prevails.

<sup>56</sup> For example, one can imagine a scenario in which a white coworker assumes that the interracial couple is hypersexual and approaches the couple for sexual advice. The white coworker

cially subordinating effect negative stereotypes have on persons exposed to them. Consequently, Onwuachi-Willig has little difficulty establishing that when negative stereotypes are communicated in a manner that alters the conditions of the workplace, existing Title VII doctrine would support a claim based on such behavior.

Positive or benign stereotyping, in contrast, is a far more complicated matter. In cases of benign stereotyping, the offending party tends to attribute positive or socially neutral attributes to an interracial couple.<sup>57</sup> For example, the offending party may assume that members of an interracial couple have specific skill sets (see p. 179). Indeed, Onwuachi-Willig describes how interracial couples are assumed to be particularly adept at parsing through and analyzing discrimination disputes (p. 179). Alternatively, third parties may resort to stereotype-based behavior out of a “politically correct” version of paternalism or a desire to demonstrate support. For example, Onwuachi-Willig describes how her supportive and racially progressive colleagues have assumed in a stereotypical fashion that she will be interested in hearing about movies or books discussing interracial couples (pp. 2–3). They also will suggest interracial couples that she might befriend (p. 2). Again, these actions may be intended to be supportive (or to demonstrate the offeror’s racially progressive stance), but this solicitous behavior can easily become a workplace distraction and a burden to an employee. Indeed, Onwuachi-Willig explains that for the interracial couple it sometimes seems as though every other aspect of their relationship is cancelled out except the interracial nature of their union (see p. 2).

The narratives Onwuachi-Willig offers describing this behavior make it appear that benign stereotyping is an inconsequential annoyance, but established Title VII doctrine recognizes that benign stereotyping can cause material harm.<sup>58</sup> Indeed, several scholars are currently considering which kinds of benign stereotyping should be prohibited under Title VII and how best to address harms associated with this phenomenon. Additionally, they are considering whether the doctrinal logic used to address benign stereotyping raises questions that threaten the administration of affirmative action programs.<sup>59</sup>

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is not motivated by negative animus; she has mobilized demeaning racial stereotypes and in this way offended the interracial couple.

<sup>57</sup> See BARBARA TREPAGNIER, *SILENT RACISM* 36–42 (2006) (describing benign stereotyping and paternalistic assumptions as a form of discrimination).

<sup>58</sup> *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199–200 (1991) (holding that an employer’s benign motives did not undermine the conclusion of sex discrimination); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251–52 (1989) (finding that Title VII provides a remedy for women placed in a “bind” by an employer’s stereotyping of women’s level of aggressiveness).

<sup>59</sup> See generally Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1 (2011) [hereinafter Rich, *Against Prejudice*] (discussing the effects of psychological research on benign stereo-

However, some scholars working on benign stereotyping stress that there is nothing in Title VII doctrine that requires negative stereotyping or even negative animus in order to make stereotyping actionable. As Professor Stephen Rich explains, all we need to consider is whether the assumptions made about the individual subject to the alleged “discrimination” serve to restrict the opportunities available to the target or cause him or her to bear special burdens.<sup>60</sup> Viewed through this lens, the benign behavior Onwuachi-Willig describes could still support a workplace race harassment claim if benign stereotyping compromises the terms and conditions of employment in a given workplace.

Additionally, if an employer assumes that a party in an interracial relationship should be given special responsibilities for minority recruiting or serve on a diversity committee, benign stereotyping can quickly become uncomfortable and exploitative. If the employee does not feel competent to or interested in providing this kind of service, he may conclude that he is being commodified in a manner that does not respect his autonomy and his right to make choices about how to use his experiences.<sup>61</sup> Indeed, this problem is closely related to other commodification risks discussed further below. However, the key insight here is that we should not be overly quick to treat benign stereotyping as a mere social problem beyond the reach of the law. Readers reasonably could conclude that this behavior could give rise to a disparate treatment or hostile environment claim.

3. *Interraciality and Phenomenological Blackness.* — Onwuachi-Willig also uses narrative to provide insight into the injuries caused by “phenomenological blackness”: a condition that causes whites who are interracially partnered with blacks to develop a greater sensitivity to racism. This increased sensitivity operates at two levels. First, whites in interracial relationships are *more aware* of the seemingly invisible microaggressions that other whites engage in that cause blacks to feel marginalized (p. 125).<sup>62</sup> Second, phenomenological blackness causes interracially partnered whites to feel all acts of antiblack racism far

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typing on the Supreme Court’s antidiscrimination jurisprudence). See also Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1148 (2004) [hereinafter Rich, *Performing Racial and Ethnic Identity*] (arguing that episodic exposure to benign racial stereotyping is unlikely to inflict harm unless it restricts the employees’ opportunities or discourages future cross-racial interaction).

<sup>60</sup> Rich, *Against Prejudice*, *supra* note 59.

<sup>61</sup> Racial commodification takes place when an employer attempts to explicitly harness an employee’s race for economic purposes. For further discussion of the politics of racial commodification and the question of agency, see generally Rich, *supra* note 44.

<sup>62</sup> Onwuachi-Willig quotes Professor Randall Kennedy: “Few situations are more likely to mobilize the racially privileged individual to move against racial wrongs than witnessing such wrongs inflicted upon one’s mother-in-law, father-in-law, spouse, or child” (p. 125) (quoting Randall Kennedy, *How Are We Doing with Loving?: Race, Law, and Intermarriage*, 77 B.U. L. REV. 815, 819 (1997)).

more deeply than the average white person who is not interracially partnered.<sup>63</sup> As Onwuachi-Willig explains, one's "racial identity [is] changed by virtue of her lived experiences as part of an interracial collective" (p. 257). Researchers have indicated that there is some basis for the view that whites who have partnered with blacks do develop an increased sophistication about and sensitivity to racism.<sup>64</sup>

To illustrate this phenomenon, Onwuachi-Willig offers a series of compelling narratives (pp. 254–57), but arguably the most compelling example is a personal account describing the experiences of her husband Jacob when he was employed at a construction site with racist coworkers (pp. 260–62). Onwuachi-Willig and her husband were strapped for cash and needed the money from the construction job, but her husband was having difficulty at work because he was forced to listen to racist jokes about African Americans. Importantly, his coworkers did not know that he had a black wife. The couple debated whether he should "come out" as part of an interracial couple, recognizing that he might be marginalized at work or even fired. Jacob ultimately did "come out" in a fit of anger, and the jokes in his presence stopped (p. 261). The story provides a riveting example of how a white partner can so internalize the minority partner's perspective that he is actually personally injured when he is exposed to racist conduct.

Onwuachi-Willig is explicit and clear that the law should extend protection to persons injured by racism rendered visible by phenomenological blackness (pp. 262–67).<sup>65</sup> She explains that her goal is to allow Title VII plaintiffs alleging workplace discrimination to allege "direct, discriminatory harm . . . whe[n] the racial group targeted by the offensive and discriminatory comments is not the racial group to which the plaintiff-employee belongs, but rather the racial group to which the employee's spouse or partner belongs" (p. 257). Courts for

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<sup>63</sup> Cf. Margaret O'Donoghue, *Racial and Ethnic Identity Development in White Mothers of Biracial, Black-White Children*, 19 *AFFILIA* 68, 80–81 (2004) (describing process of white mothers seeing themselves as raced persons and the United States as a racially constructed society as a consequence of being a member of a black-white interracial family).

<sup>64</sup> See, e.g., *id.* at 76–78. Specifically, Professor Margaret O'Donoghue's study of white mothers raising black-biracial children indicated that many of her white interviewees claimed to have felt "raceless" until they partnered with a black person and had children. *Id.* at 75. These women reported that their experiences with racism directed at their family members in the context of these intimate relationships caused them to take on a raced identity, both recognizing the privileges of whiteness, and internalizing experiences of racism against a black partner or a black child. This claim cannot be simply accepted at face value, as specific contexts may have caused them to be more aware of race prior to the relationship, including group status conflicts in which race was raised as a salient issue. Cf. Eric D. Knowles & Kaiping Peng, *White Selves: Conceptualizing and Measuring a Dominant-Group Identity*, 89 *J. PERSONALITY & SOC. PSYCHOL.* 223, 226 (2005).

<sup>65</sup> Onwuachi-Willig discusses how adding the concept of interraciality to the text of antidiscrimination statutes would extend needed protections for plaintiffs such as her husband (pp. 264–66).

the most part have been hostile to such claims, demanding instead that one demonstrate that one is actually a member of a particular racial category before one can claim hostile environment discrimination based on racially discriminatory comments (pp. 257–63). Also, legislatures and courts are likely to be skeptical about claims that are based on a partner's increased sensitivity to racial microaggression, as courts often find it hard to apprehend these microaggressions when they are raised by minority plaintiffs.<sup>66</sup>

Antidiscrimination scholars, in contrast, would likely applaud Onwuachi-Willig's proposal to protect phenomenological blackness, as they have long expressed concern that whites are insufficiently attuned to subtle racism. Indeed, Professor Barbara Flagg in her seminal article, *Was Blind But Now I See*, discusses as a major hurdle to racial equality the "transparency" phenomenon, the social dynamic in which whites remain oblivious to the way the racial microaggressions they engage in subordinate minorities.<sup>67</sup> Additionally, Professor Russell Robinson might describe the experience of phenomenological blackness as a hopeful sign that whites can overcome "perceptual segregation" — a conceptual barrier that typically prevents whites and blacks from coming to agreement about whether a subtle conflict or exchange constitutes race discrimination.<sup>68</sup> Given the importance of whites developing this kind of sensitivity, these authors would find it logical that Title VII should protect and reward those who have developed this more nuanced racial sophistication and understanding.

While the phenomenological blackness concept is extremely helpful, the construction site discrimination scenario Onwuachi-Willig describes could also be characterized as a case involving "racial labor" demands.<sup>69</sup> This term describes the burdens placed on white employees to support activities that facilitate and support white racism. The term "racial labor" proves helpful in understanding this scenario because it emphasizes the work whites must do to participate in racist conduct, as well as the labor required if they try to stand by passively and ignore racist conduct.<sup>70</sup> Professor Noah Zatz describes other "racial labor" cases in his work on interracial solidarity, noting that when white workers fail to comply with demands to tolerate racist conduct

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<sup>66</sup> See Robinson, *supra* note 43, at 1153–56; see also *id.* at 1127–35 (discussing how whites fail to perceive microaggression as "racism").

<sup>67</sup> See Barbara J. Flagg, "Was Blind But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

<sup>68</sup> See Robinson, *supra* note 43, at 1127–31.

<sup>69</sup> Rich, *Marginal Whiteness*, *supra* note 19, at 1531.

<sup>70</sup> See, e.g., *Spillman v. Carter*, 918 F. Supp. 336, 339 (D. Kan. 1996) (white employee sanctioned for refusing to participate in racially discriminatory hiring).

they are often subject to serious sanction.<sup>71</sup> In some cases, employees sue under Title VII when their attempts to rebuff racial labor demands are ignored. Thus far, interracial association doctrine has offered an inconsistent level of relief to plaintiffs in racial labor cases.<sup>72</sup> Protections fluctuate depending on the jurisdiction in question.

The racial labor construct is also helpful because some courts have interpreted Title VII interracial association doctrine in a way that turns on the level and intensity of the interracial relationship at issue, dismissing hostile environment claims when the employee complaining about racist conduct is a mere acquaintance or friend of the minority employee.<sup>73</sup> However, rather than focus on the intensity or significance of the relationship, antidiscrimination law should be focused on the racist conduct being required of a worker as this is the core normative concern of Title VII and is critical to the success of antidiscrimination law more generally. The psychological literature indicates that bystanders to racism have a vested interest in disrupting racist dynamics in the workplace. Research suggests that they are traumatized by the racism they witness whether or not they respond.<sup>74</sup> The literature also indicates that when whites consistently remain silent when subject to racial labor demands, they may unconsciously over time become more tolerant of racism.<sup>75</sup> In short, doing nothing in the face of racial labor demands actually undermines the work well-meaning whites may do to cultivate a progressive perspective.

4. *Functional Blackness*. — Onwuachi-Willig also gestures toward another category of injury that comes from interracial partnership, which could be described as “functional” blackness. This injury is rendered visible in her summary of Professor Heather Dalmage’s story, as Dalmage provides a detailed and painful account of the discrimination a white woman faces because she is partnered with a black man (p. 256). Dalmage explains that being a partner in a black-white interracial relationship subjects the white partner to concrete instances

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<sup>71</sup> Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 70–71 & nn.22–23 (2002).

<sup>72</sup> See *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512–13 (6th Cir. 2009) (discussing relationships protected under interracial association doctrine and discussing with disapproval the level of connection required by some courts).

<sup>73</sup> See, e.g., *id.*

<sup>74</sup> See K.S. Douglas Low et al., *The Experiences of Bystanders of Workplace Ethnic Harassment*, 37 J. APPLIED SOC. PSYCHOL. 2261 (2007) (outlining the harmful psychological costs and other health-related costs suffered by bystanders to ethnic discrimination); Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 579 (2009).

<sup>75</sup> See Rich, *supra* note 74, at 579; Fletcher A. Blanchard et al., *Condemning and Condoning Racism: A Social Context Approach to Interracial Settings*, 79 J. APPLIED PSYCHOL. 993, 995–96 (1994) (noting effect was strongest when individuals were surrounded by prejudiced persons but did not have regular contact with minorities).

of race-based humiliation and risk simply because he or she experiences the same treatment as the minority partner. These indignities include “being seated in the back of restaurants, being denied loans, being steered out of white neighborhoods [while] search[ing] for housing, being pulled over for no reason, and facing hostility from racist whites” (p. 256). In short, rather than merely being sensitive to the microaggressions and insults suffered by African Americans, the white partner who experiences functional blackness is socially subordinated and materially disadvantaged because she actually shares in the discrimination experiences of her black partner. As Onwuachi-Willig explains, these discrimination experiences fundamentally shape the perspectives of whites partnered in such relationships and effectively ensure their social marginalization. Onwuachi-Willig’s account is unclear about whether such harms can be grouped under phenomenological blackness or a different justificatory paradigm. However, it is clear that at present antidiscrimination law and scholarship do not address this form of discrimination.

5. *Commodification-Based Inquiries.* — Another peril Onwuachi-Willig identifies under the banner of interraciality-based harm is racial commodification-based injury. Two kinds of commodification risks are threatened. First, institutions, individuals, or entities interested in portraying themselves as progressive may find the interracial family a useful symbolic tool that effectively communicates a strong pro-diversity message. Members of an interracial couple may find themselves invited to special workplace events more often than monoracial couples or asked to appear in photos in workplace brochures. Professors Patrick Shin and Mitu Gulati describe this phenomenon as employer “showcasing,” using minorities (or here mixed-race couples) as part of an effort at racially progressive messaging.<sup>76</sup> Alternatively, institutions, individuals, or entities may regard the interracial couple as a special source of insight about race relations and constantly seek out members of the couple for insight about racial matters. This commodification strategy effectively gives interracial couples special status in an attempt to develop a “thicker” concept of diversity that will improve racial dynamics in the workplace.<sup>77</sup>

The question of whether antidiscrimination law should discourage racial commodification or provide remedies for commodified individuals has been a subject of a fair amount of discussion in recent years.

<sup>76</sup> Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1033 (2011).

<sup>77</sup> See Leong, *supra* note 44, at 2169 (“[T]he ‘thick’ version of the diversity objective . . . is not focused on the appearance of diversity, but rather views diversity as a prerequisite to cross-racial interaction, which fosters inclusivity and improves cross-racial relationships . . .”); Rich, *supra* note 44, at 205–10 (discussing how race might be used in pursuit of a new version of diversity focused on racialization experiences).



Professor Nancy Leong warns that one of the risks associated with “thin” or superficial approaches to diversity is that the thin approach allows us to treat an essential component of an individual’s identity (race) as a commodity without trying to serve higher-order goals.<sup>78</sup> In her view, using race in this manner causes an individual to have a fractured racial identity because part of the individual’s essential being has been surrendered to market pressures.<sup>79</sup> As a separate matter, the individual may find himself being racially commodified by a third party without the individual’s consent or knowledge (particularly in symbolic diversity efforts).<sup>80</sup> Certainly, when a third party uses an interracial couple for symbolic reasons without consent, our equality norms should be offended. In these circumstances, but for the fact of the couple’s interracial union, the couple would not be subject to this kind of treatment.

However, the larger question, of whether racial status can be commodified without traumatizing or degrading a racialized subject, is more complicated. I have argued that using race as a way of gaining insight into workplace patterns of racialization is permissible and should even be encouraged.<sup>81</sup> However, interracial couples may have little insight about these questions, particularly if they have tried to distance themselves from discrimination disputes. Leong’s work suggests commodification *per se* is deeply problematic<sup>82</sup> and that this problem is rightly part of antidiscrimination law’s concern. She proposes a damages remedy for racial commodification, to punish uses of race that are premised on thin approaches to diversity.<sup>83</sup> Extending her work to the concept of interraciality-based discrimination, one would find justification for protection against commodification of interracial relationships as well. Moreover, this proposal may be less controversial than it seems. Even in the absence of special protections, persons subject to this kind of treatment might be able to bring a claim under Title VII if the intimacy demands of an employer rose to the level of a hostile environment, in which case either member of the couple could bring a claim. Regardless of the individual employee’s race, if the employer is demanding that the employee produce her dif-

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<sup>78</sup> See generally Leong, *supra* note 44, at 2199–204 (situating the question of racial commodification within broader literature about commodification and its social desirability).

<sup>79</sup> *Id.* at 2204–06.

<sup>80</sup> See Rich, *supra* note 44, at 181–82 (discussing a law school’s use of a law professor’s claim of Native American ancestry to assist with its diversity goals without her express consent); Leong, *supra* note 77, at 2192–93 (discussing incident in which African American student’s image was Photoshopped into a picture without his knowledge to assist with school’s diversity messaging efforts).

<sup>81</sup> See Rich, *supra* note 44, at 201–05.

<sup>82</sup> Leong, *supra* note 44, at 2201–02.

<sup>83</sup> *Id.* at 2222–24.

ferent race partner for social events, the employee can argue that the employer's action is based on race.<sup>84</sup>

6. *Injuries Caused by the Monoracial Gaze.* — The last discrimination construct Onwuachi-Willig presents as part of the category of interraciality-based discrimination is something I call the violence of the monoracial gaze. Onwuachi-Willig explains that interracial families are constantly subject to a racial gaze that treats the monoracial family as a norm and therefore causes people to erase and deny obvious family connections between interracial family members when they appear in public space (pp. 175–76, 179–81). To illustrate the prevalence of this phenomenon, she recounts multiple stories in which third parties look at members of an interracial couple or family and refuse to believe that the members of the intimate collective are partnered with or related to one another (pp. 173–81). For example, Onwuachi-Willig tells numerous stories attesting that when a black mother is out with a black-white biracial child, she very often must suffer the indignity of being assumed to be the child's nanny or babysitter (p. 180).<sup>85</sup> Onwuachi-Willig describes another scenario in which a white father was staged with a black-white biracial child in a public place. The coupling elicited such strong disbelief from onlookers that it even spurred two bystanders to call law enforcement on the assumption that the child was being abducted (pp. 181–82).<sup>86</sup>

Couples face similar indignities as a result of the monoracial gaze. For example, Onwuachi-Willig describes a woman's experiences at a dinner during which she and her husband (an interracial couple) were seated with another interracial black-white couple, composed of two women. Onwuachi-Willig describes how the group's waitress repeatedly prepared the bill for the table improperly because interraciality made the idea of two black-white couples cognitively infeasible for the waitress (pp. 177–78). Some of the mistakes the waitress made could be attributed to her difficulty comprehending that there was a lesbian couple at the table, Onwuachi-Willig explains; however, the waitress's

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<sup>84</sup> See generally *id.* at 2207–10 (discussing racial performance demands). Onwuachi-Willig also comments on the danger of self-commodification, using one's membership in an interracial couple as a form of currency or social capital. See *id.* at 2153 n.7 (discussing future piece on identity usage). Self-commodification occurs, for example, when a black partner in a black-white interracial relationship uses the fact of her relationship to establish in white social circles that she is a safe social interlocutor. Onwuachi-Willig acknowledges she has enjoyed some benefits as a consequence of being involved in an interracial relationship, including an increased level of intimacy with whites who might otherwise feel threatened by her. The danger is that the members of the couple may be tempted to instrumentally use their relationship to access social benefits.

<sup>85</sup> Onwuachi-Willig notes that mothers and fathers of biracial children are routinely asked, "Is that your child?" (p. 170).

<sup>86</sup> Onwuachi-Willig specifically describes how one woman from a nearby table called 911, claiming on the phone that a family combination of a white father and a black-white interracial child just did not "seem right" (p. 181).

repeated mistakes made it clear that the waitress's automatic, default response indicated that she thought it was appropriate to divide the parties at the table into monoracial collectives and allocate costs consistent with that understanding (pp. 178-79). At present, antidiscrimination law does not provide any relief for this kind of conduct.

Onwuachi-Willig's discussion of the monoracial gaze suggests that she is somewhat torn about her decision to characterize the gaze as part of the domain of social problems beyond the reach of antidiscrimination law.<sup>87</sup> While she recognizes that most people regard this phenomenon as something the law is ill equipped to address, she presents compelling evidence that the instances of denial and erasure caused by the monoracial gaze have significant cumulative effects, as they communicate the sense that interracial connection is deviant. As she explains, each time a store clerk, fellow customer, or passerby gazes at the interracial family and fails to acknowledge the family connections, the viewer is reaffirming a racial ideology that posits that mixed-race families are socially abnormal (p. 184).<sup>88</sup> Over time these moments that erase and deny the validity of interracial connection erode interracial family members' very sense of citizenship and belonging in society (p. 183). Additionally, the monoracial gaze is one of the key ways in which society actualizes the sense of placelessness that plagues interracial couples and families, as it teaches them that there are few places where they can expect that their family connections will be presumptively honored or acknowledged (p. 184).

In addition to demonstrating the serious nature of the injury inflicted by the monoracial gaze, Onwuachi-Willig presents ample evidence that the arguments against policing this behavior through law are surprisingly weak. One of the common arguments made against sanctioning the exercise of the monoracial gaze is that "the law cannot change [social] attitudes" (p. 183), a claim that if taken seriously would undermine much of the basis for antidiscrimination law.<sup>89</sup> Indeed, the same claim was made to demonstrate the futility of sexual harassment protections, but there is no question that legal liability for sexual harassment has fundamentally changed workers' attitudes about what constitutes appropriate behavior in the workplace.<sup>90</sup> A more nuanced version of this argument is that the law is not responsible for natural cognitive errors that are not products of its own making. However,

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<sup>87</sup> Onwuachi-Willig notes that people mistakenly dismiss these injuries as purely social (p. 184).

<sup>88</sup> Onwuachi-Willig describes how this treatment communicates to interracial families that they operate at the "margins" (p. 184).

<sup>89</sup> See generally Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 749-50 (1995).

<sup>90</sup> See Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 518-19 (1993).

Onwuachi-Willig argues that the commonsense nature of the monoracial gaze has effectively been subsidized by state action (or inaction). Specifically, she argues that the state's failure to seriously enforce housing antisegregation laws has led to fewer residential spaces in which people of different races might meet and form family connections (pp. 183–84).

In order to determine whether the law should sanction an individual for exercise of the monoracial gaze, one must engage with some of the key contemporary debates in antidiscrimination theory. For many readers the question will turn on whether the exercise of the monoracial gaze is a mere accident or mistake, or a decision within the conscious control of the decisionmaker. Numerous scholars have argued against sanctioning individuals under Title VII or other antidiscrimination statutes for accidental or implicit bias.<sup>91</sup> They argue that the law creates perverse incentives when it penalizes individuals or institutions for actions that are beyond an individual's control. Others have contended that actions currently represented as accidental are actually within the control of a decisionmaker, and the law's role is to incentivize a decisionmaker to bring this accidental behavior within the realm of conscious thought so that he may prevent himself from engaging in discriminatory action.<sup>92</sup> In my view, the balance of scholarship in this area suggests that we should press in a more critical fashion against claims that discrimination is mere accident and instead ask what can be done to make individuals more aware of the racially insensitive nature of this kind of action. Moreover, Onwuachi-Willig warns that the monoracial gaze is often not the result of mere accidental judgment, but rather is an act of aggression and is intended to communicate negative animus or hostility toward the couple (p. 178). Thus, in these circumstances where the gaze is consciously exercised or used in a malicious manner, it falls into the category of classic negative animus, and in certain settings could be addressed as one of several hostile acts in a hostile environment case.<sup>93</sup>

The other major challenge to sanctioning the exercise of the monoracial gaze is that the injury it inflicts is typically the product of a one-time interaction in circumstances where parties are not familiar

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<sup>91</sup> See, e.g., Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999) (arguing there should be no liability for accidental discrimination). *But see* Melissa Hart, *Subjective Decision-making and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005) (arguing existing doctrine can and should cover implicit or unconscious discrimination).

<sup>92</sup> See generally Armour, *supra* note 89, at 749–50; Wax, *supra* note 91.

<sup>93</sup> For example, Onwuachi-Willig explains that this hostility becomes clear when the mistaken party continues with numerous intrusive and sometimes insulting inquiries to express his discomfort with interracial unions. Alternatively, a question may be coupled with a sarcastic response that indicates that the couple or family would not be expected to be intimately connected. See, e.g., p. 178 (discussing questioner's sarcastic retort, "I wouldn't know [that's the case automatically].").

with one another. When the monoracial gaze inflicts injury during a single apartment tour, workplace interaction, or exchange with a store clerk, the injury seems too diffuse and inconsequential for the law to address. Indeed, regardless of the statute used or the cause of action, these one-time, small-scale acts of alleged bias would be difficult to prosecute. However, Onwuachi-Willig points out that these erasures are deeply painful, amounting to a proverbial death of a thousand cuts as they are systematically inflicted on the interracial family one interaction at a time. In this way, the monoracial gaze is much like the sexually harassing conduct that shapes women's experiences as they walk down public streets.<sup>94</sup> While street sexual harassment has not entirely been eliminated as a social problem, social norms have changed sufficiently to make it less of a default cultural phenomenon. These changes arguably have come in large part because the threat of legal liability for sexual harassment has incentivized school officials and employers to ensure that people under their control are trained about how to identify such behavior and why it is prohibited.<sup>95</sup> If the monoracial gaze were to become part of our understanding about what constitutes discrimination, one might see a similar transformation in social attitudes and a willingness to think more critically before one assumes that a group of mixed-race persons are not connected or related.

*C. Onwuachi-Willig's Proposal: Adding Interraciality-Based Protections to Federal Antidiscrimination Statutes*

When viewed in toto, Onwuachi-Willig's complaints are primarily triggered by the inadequacy of interracial association doctrine, as this doctrine is the primary vehicle under Title VII and Title VIII used to protect interracial romantic and familial connections. Specifically, she worries that interracial association claims are creatures of doctrine,<sup>96</sup> and therefore families cannot know *ex ante* what protections are actually offered in a given jurisdiction. She additionally argues that pro-

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<sup>94</sup> See Bowman, *supra* note 90, at 522–34, 548–69 (describing harassment and potential remedies under tort and criminal law).

<sup>95</sup> For a discussion of the increased reach and influence of sexual harassment law in unexpected domains, see Camille Gear Rich, *What Dignity Demands: The Challenge of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1 (2009).

<sup>96</sup> There are two sources of interracial association doctrine. The first is explored in cases like *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972), and is based on securing the benefits of interracial association through Title VIII housing discrimination law. The second makes the interracial association claim derivative of classic claims triggered by the target's race and is represented by claims of bias based on interracial marriage or having biracial children. For a discussion of this strand of doctrine, see *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009), discussing relationships protected under interracial association doctrine.

tections for interraciality should be statutory in order to enjoy full legitimacy instead of being characterized as judicial activism (pp. 197–98, 264–65). Also, she explains that explicitly adding interraciality to anti-discrimination statutes would have communicative value, as interracial families and persons in monoracial families need to understand that the multiracial family is a protected family form (pp. 196–98). Onwuachi-Willig argues that such changes are required in order to cover the full range of ways in which interracial couples experience discrimination, as certain conceptual losses occur when one tries to fit interraciality-based discrimination under the individual-based approach used by Title VIII (pp. 198, 264–65). Relatedly, she regrets the kind of word-play games Title VIII plaintiffs must play in order to represent their experiences, as they must find a way to reduce collective-based discrimination claims into claims about individual discrimination (p. 197).

Onwuachi-Willig's claims about the symbolic importance of her proposed statutory additions are bound to be controversial. Many scholars have questioned whether persons protected by antidiscrimination law have any accurate understanding of the actual scope of anti-discrimination protections, and whether their behavior is actually influenced by these understandings.<sup>97</sup> Her stronger claim is that interraciality provisions would provide a more consistent level of protection and clearer notice to members of vulnerable families. However, this argument proves difficult to maintain as well. Given the sheer number of concepts covered by the term "interraciality-based discrimination," Onwuachi-Willig's proposal to add interraciality to Title VII and Title VIII will be interpreted quite differently by different legislators. Unless Congress more specifically defines what interraciality means, courts interpreting the term will simply recreate the discontinuities she worries about under existing interracial association doctrine. Alternatively, the term will be interpreted differently by different courts, resulting in different levels of protection. Importantly, the analysis offered in Part I could provide assistance to legislators and courts interested in thinking through the proper bounds of interraciality-based protections. Onwuachi-Willig perhaps does not anticipate that it will be difficult to define the boundaries of interraciality-based provisions because she assumes that some of the interraciality-based discrimination she discusses is simply in the domain of social problems that the law cannot reach. However, as the analysis above shows, many of

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<sup>97</sup> See, e.g., Rich, *Performing Racial and Ethnic Identity*, *supra* note 59, at 1242 (rejecting claim of clear causal links between legal protection and laypersons' actions); cf. Austin Sarat & Thomas R. Kearns, *Editorial Introduction*, in *LAW IN EVERYDAY LIFE* 1, 10–11 (Austin Sarat & Thomas R. Kearns eds., 1995) (discussing and critiquing the constitutive view that law shapes everyday interactions).

these issues are already being considered by antidiscrimination scholars as discrimination within the reach of legal regulation and sanction.

Finally, critics will argue that, although there is little question that most antidiscrimination statutes are individualist in focus, interracial association doctrine should not be discounted as an effective form of protection. Courts have moved away from the commodified version of interraciality initially identified with this doctrinal cause of action<sup>98</sup> in favor of a more analytically sound version. The newest version of the doctrine has become more vigorous in recent years. For example, Title VII now allows individuals to bring suit when they are discriminated against because they have a spouse, paramour, or child of another race.<sup>99</sup> Additionally, in some jurisdictions, interracial association doctrine protects individuals when they have friendships or work relations with persons of other races.<sup>100</sup>

In my view, Onwuachi-Willig's proposal to add interraciality as a protected feature under antidiscrimination statutes seems better understood as a thought experiment that pushes us to think more deeply about collective-based discrimination, rather than as a practical proposal to add another discrete form of bias to existing antidiscrimination protections. Understood this way, her claims about collective discrimination would not be subject to the same pressure to precisely define the scope of these proposed protections. Instead, her claims would cede to legislatures or courts the necessary discretion to determine in an incremental fashion how much protection is required for each relational characteristic in a given context.

Indeed, if some portion of interraciality-based discrimination were covered by antidiscrimination law, this coverage would portend a more extended discussion about whether we should permit relational discrimination claims based on other kinds of bias, including sexual orientation, transgender status, or disability. These questions are deeply important because, as Professor Kimberly DaCosta explains, intimate relations are politicized relations representing politically charged decisions about whom to love and how to love.<sup>101</sup> When the law pro-

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<sup>98</sup> See Rich, *Marginal Whiteness*, *supra* note 19, at 1538–39.

<sup>99</sup> See, e.g., *Madison v. IBP, Inc.*, 330 F.3d 1051, 1053–54, 1061 (8th Cir. 2003) (recognizing claim of white wife alleging discrimination triggered by having black husband and biracial children); *Mackey v. Children's Med. Ctr.*, No. 3:05-CV-043-L, 2006 WL 2713788, at \*21 (N.D. Tex. Sept. 22, 2006) (same); *Rosenblatt v. Bivona & Cohen, P.C.*, 946 F. Supp. 298, 299–300 (S.D.N.Y. 1996) (recognizing claim of white husband alleging discrimination triggered by having black wife).

<sup>100</sup> See *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (allowing a claim based on interracial friendships in the workplace); *Reiter v. Ctr. Consol. Sch. Dist. No. 26-JT*, 618 F. Supp. 1458, 1459 (D. Colo. 1985) (allowing a claim based on association with Hispanic community); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (allowing a claim based on a social relationship with an African American nonemployee).

<sup>101</sup> See DACOSTA, *supra* note 2, at 188–90.

fects people because of these political decisions, it is expressing a deep normative commitment to protect those who look past socially recognized bases for stigma to appreciate the human potential of a prospective partner. But even if we accept that this project is an important part of antidiscrimination law, we will still need to consider how far our commitment to collective-based discrimination protections extends.

For example, as an initial matter we must determine if relational discrimination protections should always cover classic negative animus. If we take Onwuachi-Willig's claims about relational discrimination seriously, then the mother of a disabled child should have the right to antidiscrimination protections under state antidiscrimination law when disability is a protected characteristic. In cases of relational discrimination, the mother is not being discriminated against for her "able-bodied" status. Rather, she is being discriminated against because society has low regard for people who are perceived to have given birth to imperfect, defective, or less able-bodied children. Alternatively, if the discrimination charge is brought by an able-bodied wife, one can see more clearly that it is her voluntary act of loving her disabled husband that causes her to suffer social sanction. The case for protecting family members from classic negative animus appears to fall squarely within the traditional scope of concern of antidiscrimination law.

Other forms of relational discrimination might give some courts and scholars pause as they consider the potentially broad reach of these proposed relation-based protections. Would negative stereotyping based on interconnectedness be sufficient to support a claim? For example, would the spouse of a wheelchair-bound person have a claim if people engage in stereotyping about her commitment to work or her capabilities on the assumption that she is or should be primarily engaged in tending to her disabled partner?<sup>102</sup> Again, in this circumstance, the plaintiff's intimate connection to her disabled husband is what triggers discrimination, as opposed to her individual status. Similarly, we must ask, does a person who experiences phenomenological disabled status have a claim if she is more sensitive to demeaning or insulting behavior concerning the disabled in her workplace? Would we permit the wife of a disabled husband to bring gaze-based claims if people routinely fail to honor and acknowledge her connection to her husband? Would we require evidence that this gaze is exercised in a

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<sup>102</sup> See, e.g., *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199–200 (1991) (declaring illegal under Title VII an employer's policy of excluding fertile women of childbearing age from certain jobs because benign motivation was insufficient justification for facially discriminatory sex-based classification); see also Rich, *Against Prejudice*, *supra* note 59, at 40–43 (discussing case scenarios in which benign or paternalistic intent motivates race-based disparate treatment with adverse employment consequences).



hostile manner or is motivated by discriminatory animus? Once the concepts under interraciality-based discrimination are parsed out and examined in detail, it becomes clear that the discrimination concepts Onwuachi-Willig describes are not about race at all, but rather are about more fundamental issues such as daring to love an individual despite the fact that the individual has some socially stigmatized characteristic. We discover that our decisions about whether and when to provide relational discrimination protections express more fundamental issues about when and where we are prepared to acknowledge and protect individuals from the costs associated with family connections.

Onwuachi-Willig does not specifically take on these questions, but they are clearly suggested by her work. Careful readers cannot avoid considering the broader implications of her account of discrimination as extended to include other vulnerable groups. Moreover, even if one speculates that many people will believe that race is special and that the case for relation-based protections is clearer and more persuasive when we focus on interracial families, there are still many unanswered questions about how interraciality-based protections are expected to function. Part II therefore examines the interracial family's role in racial formation projects as well as the ways in which it participates as a maker and disseminator of racial meaning, in order to better understand why this family form deserves antidiscrimination law's protection.

## PART II

Sad as it may seem, legal scholars working on racial formation seem to have all but forgotten about the family. More than twenty-five years ago, when Professors Michael Omi and Howard Winant first introduced racial formation theory, they described the patriarchal family as the racial formation institution par excellence, a key site for macro- and microlevel contests over racial norms.<sup>103</sup> Yet, in the ensuing decades, legal scholars have failed to use racial formation theory to explore the connection between family formation and racial formation issues. The absence of family law scholarship using this theoretical framework perhaps explains why this approach is not privileged in Onwuachi-Willig's analysis. However, close review of *According to Our Hearts* reveals that racial formation theory proves key in understanding why her construct of the interracial family distorts her analysis and prevents her from fully engaging with the complex ways in which the interracial family shapes racial consciousness.

This Part begins by recontextualizing Onwuachi-Willig's book as an example of racial formation scholarship. It begins with the proposi-

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<sup>103</sup> See OMI & WINANT, *supra* note 18, at 67.

tion that a racial formation–based analysis of the family recognizes the family as a target of racial messaging, as a symbol used in racial messaging, and *as a site that is invested in the production of racial meaning*. Because Onwuachi-Willig does not utilize racial formation theory to frame her analysis, she ends up representing the interracial family primarily as a target of discrimination and a symbol of racial advancement. Additionally, because she does not use racial formation theory, she does not systematically examine the interracial family’s role in racial messaging. Rather, Onwuachi-Willig’s analysis invites the reader to assume that the interracial family always messages the equality norms that she believes it symbolizes.<sup>104</sup> Instead the messages such families transmit are far more varied. Some interracial families inculcate their family members in ways that disrupt racial status hierarchy; other interracial families are assimilationist in nature and acculturate “near whites” and mixed-race persons to see themselves as white persons. This Part therefore supplements Onwuachi-Willig’s account of the interracial family by addressing the interracial family’s role in the social production of whiteness and considers whether antidiscrimination norms also justify extending protection to interracial families invested in the cultivation and maintenance of white identity.

Section A provides a comprehensive account of the interracial family’s role in contemporary racial formation, covering both its progressive and potentially regressive role. Section B explores the racially regressive role some interracial families play when they socialize mixed-race children to identify as white or accept existing racial status hierarchy norms that devalue blacks or other minorities. Section C explores normative justifications for protecting interracial families invested in assimilating to whiteness.<sup>105</sup> For Onwuachi-Willig’s justification for offering legal protections to the interracial family hinges on her view that these families disrupt racial status hierarchy and therefore should be protected consistent with Civil Rights Era norms (pp. 264–67). Borrowing from my own work on “marginal whites” and

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<sup>104</sup> Again, Onwuachi-Willig would likely acknowledge the racially regressive norms that predominate in some interracial families, but she never explicitly recognizes the existence of these families in her analysis and therefore does not present her readers with an account of their role in America’s effort to achieve racial equality.

<sup>105</sup> This normative account for protecting interracial families is an extension of propositions explored in some of my other work. See Rich, *Marginal Whiteness*, *supra* note 19, at 1502–03 (uncovering the relatively conservative normative commitments of existing Title VII doctrine and questioning whether they are expansive enough to serve Title VII’s broad antidiscrimination goals); Rich, *Recognizing Race*, *supra* note 19 (manuscript at 44–45) (discussing normative questions multiracial individuals’ complex racial-identity claims raise for courts and scholars interpreting Title VII). Onwuachi-Willig offers statements from many individuals who have physical features that allow them some “choice” in how to racially identify. She discusses modern-day Alice Rhinelanders, who passively “pass[ ]” for white (p. 8). For example, she describes a biracial student named Cara who sometimes passively passed for white (p. 10).

“elective race,” I supplement her account by offering justifications for protecting interracial families that are committed to assimilating to whiteness. In this way, the arguments offered in Part II *complement* the arguments Onwuachi-Willig offers in her book for family-based antidiscrimination protections, to help her achieve her stated goal of writing “the law of the multiracial family” (p. 19).<sup>106</sup>

*A. Racial Formation and the Interracial Family’s Institutional Role*

Family law scholarship on race has not explicitly privileged racial formation theory. However, most of the recent work in this area focuses on what would be described as macro-level racial formation issues: explicit legal rules that involve the machinery of the state in the production of the interracial family. These issues include antimiscegenation laws, interracial and transnational adoption, and racial identification issues raised by the census. Onwuachi-Willig as well explores some of the macro-level, legally compulsory ways in which the family becomes a target for the enforcement of the monoracial family norm.<sup>107</sup> While these discussions of macro-level issues provide substantial insight into the challenges faced by interracial families, Onwuachi-Willig’s work shines the most when she focuses on more pedestrian but more fundamental “social” matters. These micro-level social exchanges should command more attention in studies of race and the family.

Onwuachi-Willig’s analysis can be criticized, however, because she invites us to see the interracial family primarily as a target of race discrimination, rather than as a site of racial messaging, and therefore her analysis fails to take full account of the interracial family’s role in contemporary racial formation. Indeed, Onwuachi-Willig’s goal is to take her readers on an uncomfortable journey, showing how members of interracial families are repeatedly sanctioned for engaging in interracial intimacy. The law, she argues, should be invested in eliminating many of these moments of sanction. Certainly, Onwuachi-Willig is correct that the interracial family functions as a powerful symbol for many social actors, one that challenges the existing racial status hierarchy, and is therefore subject to sanction. However, the fact that it plays this symbolic role for others should not distract us from the fact that the *family itself* is producing its own racial meanings behind closed doors. The interracial family provides guidance to family members about

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<sup>106</sup> Internal quotation marks have been omitted.

<sup>107</sup> For example, Onwuachi-Willig discusses the role of housing law in reinforcing ideas of the monoracial family (pp. 184–98). For a discussion of some of these macro-level forms of targeting, specifically antimiscegenation law and adoption law, see RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 214–43, 367–401 (2003). See generally RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* (2001) (focusing on marriage law and adoption law).

what race is, how to understand one's own racial identity, and, equally important, the social position or relative status of different racial groups. These messages are critically important to understanding the racial formation projects in play during any given period.

Some will argue that Onwuachi-Willig's account implicitly recognizes this tutelary or instructional role families play; she merely assumes that attitude shapers in the interracial family will communicate racially progressive messages about social equality and interracial intimacy. However, this kind of progressive messaging does not always occur. Many interracial families form precisely because lower-status racial or ethnic groups gain status under the existing racial status hierarchy and become recognized by whites as acceptable marriage partners. Consequently, these families form without the family members being committed to significantly changing the existing racial status hierarchy. To be clear, when two persons of different races marry, one should not assume that this necessarily means that they have wholly rejected or abandoned the idea of "white" privilege or the monoracial norm. Rather, a minority person may simply believe that she is "near white" and that therefore the mixed coupling is not true race mixing. Alternatively, she may simply be attempting to ensure that her mixed-race progeny will reap status gains by being born into a superior racial status position, rather than merely inheriting the racial status of the minority parent.

Indeed, history shows that the interracial family historically has been an institution that assimilated ethnic or racial differences to whiteness and therefore did not disturb the existing racial status hierarchy. Ethnic whites that immigrated to the United States in the early 1900s, including Germans and Northern Europeans, intermarried with "American" or British whites as a way of being absorbed into the larger category of privileged white persons.<sup>108</sup> A second wave of immigrant intermarriage expanded the category of whiteness again in the 1950s and 1960s, when Italians and other Southern Europeans were added to the category of whiteness. Today we are experiencing a third wave in this expansion as sections of the Asian and Latino communities have gained sufficient social status that they are being accepted as suitable marriage partners by privileged whites today. In many cases, whites appear willing to treat Asian or Latino background, particularly for mixed-race persons, as a kind of "ethnic" rather than racial difference. Professor Charles Gallagher refers to this dynamic, in which

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<sup>108</sup> See generally LAUREN S. CARDON, *THE "WHITE OTHER" IN AMERICAN INTERMARRIAGE STORIES, 1945-2008* (2012).

racialized or subordinated ethnic groups are granted status equal to whiteness, as “racial redistricting.”<sup>109</sup>

Given the subtle and sophisticated nature of Onwuachi-Willig’s account of the interracial family, it is surprising that she does not cover the potentially racially regressive role the interracial family can play in contemporary race relations. However, this oversight may be a consequence of methodological choices she makes in her study. First, Onwuachi-Willig opts to make the black-white multiracial family the paradigmatic case that guides her understanding of interraciality (p. 122), and an assimilation focus is not as common in black-white families. Sociologists have suggested that assimilation messages are not as common because phenotypic differences prevent many children in black-white mixed-race families from assimilating to whiteness easily. However, there is some evidence that even black-white interracial families use these unions as a path for their children into whiteness when possible.<sup>110</sup> Second, sampling bias may account for the problem. Onwuachi-Willig uses an approach called convenience sampling in her account. Specifically, she collects stories from former volunteers and acquaintances made through friends (pp. 8–10); understandably these like-minded individuals were more likely to share her progressive vision. Those who were not like-minded, for obvious reasons, would

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<sup>109</sup> Charles A. Gallagher, *Racial Redistricting: Expanding the Boundaries of Whiteness, in THE POLITICS OF MULTIRACIALISM* 59, 60 (Heather M. Dalmage ed., 2004) (internal quotation marks omitted).

<sup>110</sup> Also, focusing exclusively on black-white couples and then generalizing to the experiences of multiracial families more broadly, Onwuachi-Willig opens herself up to the complaint that she is engaged in “black exceptionalism.” Scholars in Critical Race Theory and LatCrit have raised concern about studies of discrimination that assume a black-white binary, analyze discrimination problems based on animus against blacks, and then assume that other minorities will be covered by the same analysis because they suffer from similar discrimination dynamics in a milder form. Still, Onwuachi-Willig contends that black-white couples suffer from a “distinctly isolated status” (p. 122) and sociologists’ work tends to confirm that black-white couples and families generate hostility that does not carry over to other interracial families. However, Onwuachi-Willig provides the reader with no guidance to determine how to bracket this special hostility toward black-white couples so that their experiences may stand in for those of other multiracial couples and families. For a discussion of black exceptionalism and its implications for interracial coalition, see generally Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby — LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585 (1997), reprinted in 10 LA RAZA L.J. 499 (1998).

Certainly, critics might argue that the discrimination concepts in Part I emphasize certain kinds of discrimination that simply do not obtain with families other than black-white interracial families. For example, phenomenological blackness — where the white partner has sufficient discrimination experiences with the minority partner that the white partner takes on a special perspective — may not be available to other kinds of couples. Professor George Yancey, a sociologist, suggests that the harsh treatment black-white couples face may have unique socialization properties, properties that are more likely to lead to a racially progressive perspective for the white partner than the socialization pressures faced by other multiracial partner units. George Yancey, *Experiencing Racism: Differences in the Experiences of Whites Married to Blacks and Non-Black Racial Minorities*, 38 J. COMP. FAM. STUD. 197 (2007).

likely opt not to participate in a study of interraciality-based discrimination. Members of interracial couples who could see their children easily transitioning to a white identity or a transcendent raceless identity would be less interested in exploring the unique forms of discrimination faced by interracial couples.

Despite these problems, in my view, Onwuachi-Willig's account of the interracial family provides a much-needed starting point for persons interested in theorizing about the relationship between family formation and racial formation. However, some supplementation of her account is required in order to fully address the interracial family's tutelary role or its role as a site of racial messaging. Part B further explores these roles, concentrating on families that appear to be committed to assimilating their members to whiteness and therefore are treated as reinforcing existing racial status hierarchy in the United States.

### *B. Assimilationist Interracial Families: Bringing Up Baby*

How does the family function as a social institution that creates racial meaning? Some would argue that the *primary* function of the family in racial formation projects is to serve in a tutelary role. Specifically, the family's main purpose is to socialize family members regarding the existence of racial categories, the relative status position of different racial groups, and the rules for racial identification. The process of producing these different racial understandings, however, is often conflicted,<sup>111</sup> as "[t]he family . . . is not a monolithic unit."<sup>112</sup> That is, although all families attend to certain racial messaging issues, this does not mean that the racial understandings communicated to family members are consistent or even choreographed *ex ante*. Rather, many mixed-race families (and even monoracial families) are internally rife spaces in which children receive mixed messages about the rules of racial identification and racial hierarchy. Different family members come to this site of racial production with different agendas. Consequently, when studying the interracial family's role in racial formation projects, sociologists should treat the family as a site for race relations. The racial conflicts and resultant understandings that develop as these conflicting messages compete in the home have public-sphere consequences. Professors Yu Xie and Kimberly Goyette argue that researchers should devote more attention to these conflicts, through a course of inquiry that they call the "family dynamics perspective."<sup>113</sup>

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<sup>111</sup> See, e.g., O'Donoghue, *supra* note 63, at 76–77 (discussing the shifting racial awareness of white mothers in interracial families).

<sup>112</sup> DACOSTA, *supra* note 2, at 186.

<sup>113</sup> Yu Xie & Kimberly Goyette, *The Racial Identification of Biracial Children with One Asian Parent: Evidence from the 1990 Census*, 76 SOC. FORCES 547, 553–54 (1997).

More concretely, what do members of the interracial family do to discharge their tutelary obligations? First, parents are responsible for teaching children about the existence of racial categories and racial group status positioning. Instruction about existing racial categories seems as though it would be a relatively uncontroversial process. However, there is currently some fluidity in how Americans define racial groups. Some scholars have noted that Asians and Latinos, whether multiracial or monoracial, are being treated and described as ethnic groups within the category of whites, rather than as separate races.<sup>114</sup> Families develop their own understandings about such issues and inculcate family members with these norms.

Second, messages about racial status hierarchy are communicated. These messages may be explicit or they may be communicated more subtly by patterns of avoidance, or by parental discomfort with certain racial groups. Certainly most American families at this historical juncture teach family members about the importance of racial equality or racial fairness, whether these commitments are articulated as a commitment to colorblindness, race neutrality, or diversity. Even if a given family rejects some portion of the Civil Rights Era equality-norm message, the caveats family members offer will acknowledge prevailing views regarding the importance of eradicating racial status hierarchy. However communicated, these messages about racial status hierarchy can shape all of the child's future racial interactions.<sup>115</sup> That is, this family socialization process provides children with tools to challenge or *support* contemporary racial ideologies. Even if a child rejects the understandings provided by more senior family members, he or she is still reacting to certain basic principles introduced by parents or other family members.

Third, parents are responsible for transmitting their understandings regarding the rules of racial identification. As Professor Wendy Roth, a sociologist, explains, "Parents and close relatives provide the child with [his or her] first, and often most influential, . . . sense of [racial] self."<sup>116</sup> Some of this instruction is provided through declarations of race that are public. For example, parents are responsible for creating a child's public race by choosing a racial identity for the child on administrative documents.<sup>117</sup> Other instructions pertain to how the child

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<sup>114</sup> Gallagher, *supra* note 109, at 60.

<sup>115</sup> Cf. Xie & Goyette, *supra* note 113, at 548 ("Since parents play a crucial role in socializing children to be aware of racial and ethnic differences . . . parents' current racial designations for biracial children will greatly influence, if not definitively constrain, these children's own racial identifications in adulthood.")

<sup>116</sup> Wendy D. Roth, *The End of the One-Drop Rule? Labeling of Multiracial Children in Black Intermarriages*, 20 SOC. F. 35, 37 (2005).

<sup>117</sup> *Id.* at 37, 41.

is expected to identify socially. A child may be permitted to identify as interracial at school, but instructed to identify as black around older family members. Lessons about racial identification can be among the most fraught issues for parents in such families, as they may not agree about how children should be racially identified.<sup>118</sup> As DaCosta explains, parents are often particularly sensitive to how a child should be racially identified, and will seek to have their child racially labeled in ways that ensure that they see themselves reflected in their child.<sup>119</sup> Indeed, some have noted that the multiracial movement was initiated by white mothers seeking to create a racial identification option in administrative documents that allowed them to better maintain a racial connection to their children.<sup>120</sup>

Moreover, as children age, they may have conflicts with their parents regarding the racial identification rules a parent has chosen for them.<sup>121</sup> Family influence over children, however, typically is quite strong. For example, Professors David R. Harris and Jeremiah Joseph Sim report that multiracial teenagers remain influenced by the identification rules communicated in childhood, even if tempted to rebel against them.<sup>122</sup> Their research shows that teenagers will answer racial identification forms differently if they are at school versus at home — if they believe a parent is present at home when the form or questionnaire is administered.<sup>123</sup> However, in interracial families that adopt the rule that “one drop” of minority blood renders a child minority, interracial children often find space to rebel against this standard, and are making choices of their own. Additionally, interracial families are producing multiracial children who make inconsistent racial identity choices, ones that often turn on the context in which the identification decision is made. These factors suggest changes in family influence that should be analyzed further by racial formation scholars.

Additionally, aside from explicit instruction provided by parents, there are numerous more subtle parental decisions that shape a child’s racial identification decisions, such that a subsequent “voluntary” decision to identify as a member of a particular racial group appears natural or predetermined. For example, parents control the child’s social habitus, the neighborhood and friends to which the child is exposed.<sup>124</sup>

<sup>118</sup> See Xie & Goyette, *supra* note 113, at 554.

<sup>119</sup> DACOSTA, *supra* note 2, at 175.

<sup>120</sup> See, e.g., Tanya Katerí Hernández, “Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97, 109–11 (1998).

<sup>121</sup> Xie & Goyette, *supra* note 113, at 554.

<sup>122</sup> David R. Harris & Jeremiah Joseph Sim, *Who Is Multiracial? Assessing the Complexity of Lived Race*, 67 AM. SOC. REV. 614, 619–20 (2002).

<sup>123</sup> *Id.*

<sup>124</sup> See Brunσμα, *supra* note 4, at 1133 (“[W]hiter’ social networks appear to alter social spaces for multiracial individuals to choose to identify as multiracial, biracial or White.”).



Studies show that when a multiracial family chooses to locate itself in an entirely white social habitus, biracial children in the family are much more likely to identify as white persons.<sup>125</sup> Also, a parent's decision to expose a child to minority family members or to the minority parent's cultural background plays a large role in whether or not the biracial child chooses a white, biracial, or minority identity.<sup>126</sup> Teaching the child the minority parent's language if the parent speaks something other than English plays an important socialization role as well.<sup>127</sup> The region of the country the parents select for a residence also has effects.<sup>128</sup> While none of these decisions on their face are about race, they end up shaping a child's racial preferences in important ways.

Finally, family structure plays a role in racial identification patterns. For example, some evidence suggests that when a single white woman raises a biracial child alone, that child is more likely to identify as a white person.<sup>129</sup> Importantly, there may be large numbers of interracial families that are composed solely of white women raising biracial children, as the discrimination pressures on the mixed-race nuclear family that Onwuachi-Willig describes may cause these couples to divorce and separate, and women still by default are expected to be primary caretakers of their children. Also, race matters when studying the interracial family. Different kinds of multiracial families produce different racial identification patterns.<sup>130</sup> White-Latino and white-Asian families produce far more children who identify as white or bi-

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<sup>125</sup> *Id.* See generally Eduardo Bonilla-Silva, Carla Goar & David G. Embrick, *When Whites Flock Together: The Social Psychology of White Habitus*, 32 CRITICAL SOC. 229 (2006) (describing white social habitus); France Winddance Twine, *Brown Skinned White Girls: Class, Culture and the Construction of White Identity in Suburban Communities*, 3 GENDER, PLACE & CULTURE 205 (1996) (discussing effects on biracial child psychology).

<sup>126</sup> See Melissa Herman, *Forced to Choose: Some Determinants of Racial Identification in Multiracial Adolescents*, 75 CHILD DEV. 730, 732, 744 (2004).

<sup>127</sup> See *id.* at 731-32.

<sup>128</sup> See David L. Brunnsma, *Public Categories, Private Identities: Exploring Regional Differences in the Biracial Experience*, 35 SOC. SCI. RES. 555, 573 (2006) (explaining the role geographic region plays in an individual's choice to claim a multiracial identity).

<sup>129</sup> See Herman, *supra* note 126, at 742-44 (recognizing that race and gender of resident parent shape racial identity development); Jenifer Bratter & Holly E. Heard, *Mother's, Father's, or Both? Parental Gender and Parent-Child Interactions in the Racial Classification of Adolescents*, 24 SOC. F. 658, 679-83 (2009) (arguing that scholarship has overemphasized the importance of structural factors and family relationships, in particular level of father involvement, play a strong role in biracial children's racial identity choices); accord DACOSTA, *supra* note 2, at 114-15 (discussing family relationship as having key role in racial-identification decisions); Brunnsma, *supra* note 4, at 1133 (discussing research showing that multiracial girls tended to take on the race of the mother); *id.* at 1145-48 (discussing effect of father's race on racial identification patterns of black-white children and Hispanic-white children).

<sup>130</sup> Brunnsma, *supra* note 4, at 1145-48; see also Xie & Goyette, *supra* note 113 (discussing racial identification of multiracial children with one Asian parent).

racial than do black-white families.<sup>131</sup> Whether this pattern is a product of phenotypic barriers for black-white children or cultural issues is an open question. Armed with these insights about the way explicit instruction and family lifestyle choices inculcate members, race formation scholars can develop a richer account of the family's role in racial formation projects. Section C turns to one version of racial messaging currently operating in the interracial family — messaging assimilating members to whiteness — and explores the implications of this acculturation pattern for the project of racial equality.

### C. *Racial Identity Production in the Assimilating Multiracial Family*

At present interracial families have at least four potential identity options to offer to a biracial child: a monoracial white identity; a monoracial minority identity; a biracial or “border” identity; or a transcendent or raceless identity, which posits that race has no meaning at all.<sup>132</sup> While many parents still instruct their children to adopt a monoracial minority identity, assimilating mixed-race families tend to choose one of the three other racial identification options. This section shows that each of these three approaches to racial identification, including the biracial and raceless identity options, are part of what I call the “technologies of whiteness,” as they reinforce the cultural primacy of whiteness and the existing racial status hierarchy.

1. *Whiteness as White Self Identification.* — The simplest way in which multiracial families produce whiteness is when a parent of mixed-race children instructs them to identify as white. This is part of a phenomenon Gallagher describes as “racial redistricting” — a dynamic that allows the boundaries of whiteness to expand to include groups that until recently would have been considered outside of the dominant group.<sup>133</sup> In the only current national study of parents' choices when racially identifying their children, sociologist Professor David Brunσμα reports that the majority of children with white and minority parents still appear to be identified as minority, based on the minority parent's background.<sup>134</sup> However, he also notes that a significant number are currently involved in “reverse hypodescent” — which is leading to more children being identified as multiracial or white as

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<sup>131</sup> See Aaron Gullickson & Ann Morning, *Choosing Race: Multiracial Ancestry and Identification*, 40 SOC. SCI. RES. 498 (2011) (explaining that multiracials with Asian ancestry are more likely to claim a multiracial identity than mixed-race people of combined black and white or white and Native American ancestry).

<sup>132</sup> See Brunσμα, *supra* note 4, at 1133 (borrowing framework from discussion of biracial blacks but recognizing its general applicability to all multiracials). Brunσμα also identifies a fifth potential identity option: minority, white, and biracial, depending on interpersonal context. *Id.*

<sup>133</sup> Gallagher, *supra* note 109, at 60.

<sup>134</sup> See Brunσμα, *supra* note 4, at 1142.

opposed to a minority identity.<sup>135</sup> Brunnsma observes that “[t]he amount of variation in the racial classification of these very young mixed-race children, given historical treatments of racial identification in the United States, is truly astonishing.”<sup>136</sup>

Gallagher’s work on subgroups of multiracial families bears out his claims and further shows that families headed by white fathers tend to be assimilating interracial families. Specifically, he reports that in families in which the father was white and the mother was Asian-Indian, 93% defined their children as white.<sup>137</sup> The trend held in other contexts: when the mother was Native American, 51% of families identified their children as white, as did 67% of families with a Japanese mother and 61% of families with a Chinese mother.<sup>138</sup> Even 22% of white father–black mother unions defined their children as white,<sup>139</sup> despite phenotypic challenges associated with this combination. Comparatively, households headed by minority fathers tended to be less assimilationist in nature, but still trending in this direction. White women who married nonwhite husbands tended to identify their children as white far less frequently, but still a large portion of this group endorsed a white identity for their progeny.<sup>140</sup> For example, 50% of families with a Native American father and white mother defined their children as white. When the father was Japanese, Chinese, or Korean and the mother was white, 43%, 35%, and 58% of families respectively identified their children as white.<sup>141</sup> “Given these trends,” Gallagher explains, “it is possible that the progeny of some of these relationships will have the option to self-identify as white and live their lives in white social networks, occupy white neighborhoods, and marry white partners.”<sup>142</sup>

Of course, the reasons for identifying biracial children as white are clear. As Brunnsma explains, parents may be engaged in a kind of “risk assessment” — making racial identification decisions that are designed to minimize the risks and barriers their children will face growing up.<sup>143</sup> Parents may perceive that resources are distributed along racial lines; therefore, parents make moves early in their children’s lives to give them more “neutral” or “unmarked” categories that will allow

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<sup>135</sup> *Id.* at 1148–50.

<sup>136</sup> *Id.* at 1148 (citation omitted).

<sup>137</sup> Gallagher, *supra* note 109, at 62.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* Families that identify their children as white to others in public contexts could also be expected to socialize their children to claim white identities.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Brunnsma, *supra* note 4, at 1151.

them to access more privileges.<sup>144</sup> Gallagher predicts that in the next twenty years we will see “the children of Asian/white and Latino/white unions identifying themselves as many of their parents have already — as whites with multiple heritages where expressions of ancestry are ‘options’ that do not limit or circumscribe life chances.”<sup>145</sup> This dynamic appears to be particularly strong for biracial Asians with one white parent, as there is clear evidence that for this group Asian identity is treated as an “ethnic option,” similar to other ethnicities in the category of whiteness.<sup>146</sup>

The racial identification decisions of mixed Latino-white and Asian-white families are critically important, as the rates of white intermarriage with Asians and Latinos are far higher than the rate of white intermarriage with blacks. Indeed, intermarriage rates between Asians and whites, as well as Latinos and whites, are comparable to the rate of intermarriage between higher-status whites and Southern and Eastern European immigrants in the early twentieth century.<sup>147</sup> Statistics show that with each generation of Latino or Asian persons born in the United States, these minority groups rise in income and education level and become more likely to marry someone white.<sup>148</sup> The data is even clearer for particular minority groups. According to the 1990 Census, American-born Asian women who married were almost equally likely to have a white or an Asian husband (45% white husband).<sup>149</sup> Similarly, Native American women who married were almost equally likely to marry someone white as someone Native American (54% white husband).<sup>150</sup> Also, nearly one-third of American-born Latinas that married ended up married to a white husband (31.4% white husband).<sup>151</sup> Nonblack minority men are also racially outmarrying at high rates.<sup>152</sup> Approximately a third of American-born Asian men married white women (36% white wife), and a third of American-born Latino men racially outmarried to a white person (32% white wife).<sup>153</sup> Also, more than half of Native American men who married partnered with a white woman (53% white wife).<sup>154</sup> In con-

<sup>144</sup> *Id.* at 1150.

<sup>145</sup> Gallagher, *supra* note 109, at 61.

<sup>146</sup> Xie & Goyette, *supra* note 113, at 548. The authors offer numerous reasons for why biracial Asian whites are allowed to exercise this option, including because Asians have achieved social parity with whites. *See id.* at 550. This claim is perhaps an overstatement, as only certain ethnic groups grouped under the category Asian have achieved professional and financial success.

<sup>147</sup> DACOSTA, *supra* note 2, at 176.

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

<sup>149</sup> Gallagher, *supra* note 109, at 61.

<sup>150</sup> *Id.*

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

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

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

trast, only 5.6% of black men who married chose to partner with a white woman, and the percentage of black women who married white men was even lower.<sup>155</sup> These trends suggest that the majority of children from mixed-race marriages will be Asian or Latino and white, and whiteness will be the identity option of choice for large sections of the mixed-race population.

2. *Whiteness and Multiracial Self-Identification.* — The second way that mixed-race families may assimilate their children to whiteness is by encouraging them to adopt multiracial identities. This trend in racial identification<sup>156</sup> defies the traditional racial identification standard based on hypodescent, or the “one drop” rule, which would cause a child with one minority parent to be identified as a member of the parent’s minority group. Mixed-race parents who socialize their children in this manner claim that the multiracial identification label is an affirmation of the child’s connection to both parents. They complain that by adopting a monoracial minority label, the child would effectively erase the existence of the white parent and his or her role in the child’s life.<sup>157</sup> Professor Tanya Hernandez and other scholars have suggested that the multiracial label has been produced by a different set of concerns. They argue that the multiracial label is the product of white parents’ desire to maintain their children’s connection to white privilege.<sup>158</sup>

Concerns about the multiracial label are not entirely unfounded. It appears that persons who choose to identify as multiracial do not consistently identify as mixed race. When pressed to choose a single-race category, many multiracials, in defiance of the rules of hypodescent now choose white. This dynamic was illustrated in a 2000 study by the National Health Service.<sup>159</sup> The Service provided a questionnaire to respondents that permitted them to select more than one race, but respondents were asked in follow-up interviews to identify their primary or *main* race.<sup>160</sup> In these follow up interviews, more than 46% that identified as white-Asian subsequently identified as white, 81% that identified as Native American-white later identified as white, and even 25% of black-white biracials subsequently identified as white.<sup>161</sup> The second-generation effects of the multiracial label are likely to

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<sup>155</sup> *Id.*

<sup>156</sup> Roth, *supra* note 116, at 49–53.

<sup>157</sup> See DACOSTA, *supra* note 2, at 175 (noting that a parent will select racial identification rules for a mixed-race child often with the goal of reaffirming a racial connection to the mixed-race child).

<sup>158</sup> See, e.g., Hernández, *supra* note 120, at 110–11 (discussing the multiracial label’s role in connecting biracial children to white privilege).

<sup>159</sup> Gallagher, *supra* note 109, at 61.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 61–62.

make its whitening power even more clear. For when white multiracials marry a white or biracial-white person, they will again face the same incentives and flexible racial identification rules that allow them to identify their children as white. In short, the trend toward reverse hypodescent will likely be even stronger in these second-order multiracial families, and this observation gives additional weight to the concern that part of the motivation for claiming a multiracial identity is to maintain a connection to white privilege. White parents may socialize their mixed children to identify as multiracial with the ultimate desire of ensuring that they can pass along privilege associated with whiteness in whole or in part to their mixed-race children.<sup>162</sup>

3. *Whiteness and Racially Transcendent Children.* — Assimilating multiracial families may also encourage their children to have a raceless, post-racial, or racially transcendent identity. Close examination of this identity choice reveals its relationship to whiteness as well. As Professor Serin Houston observes:

The notion of racial absence manifests through whiteness when, for instance, people claim to be colorblind or when people who identify as white describe themselves as raceless. The choice and privilege of not experiencing oneself as racialized is a luxury that many people of color in the US cannot claim.<sup>163</sup>

Indeed, many white parents express an interest or a desire to pass a raceless perspective to their children,<sup>164</sup> to avoid having their children become overly racially sensitive. However, the experience of living in a body that is phenotypically raced as nonwhite ordinarily requires some sensitivity to racial matters in determining how one is being socially perceived.<sup>165</sup>

Houston further notes that whiteness works in ways that may actually be contrary to mixed-race persons' interests. She explains that "whiteness is discursively active regardless of its (in)visibility within societies."<sup>166</sup> It becomes the unspoken norm from which allegedly universal positions are articulated. In this way the raceless identity both requires us to "perpetuate colorblind attitudes and to minimize space afforded to complex and shifting experiences with racial identities."<sup>167</sup> Again, this effect is contrary to the interest of most multiracials, as context tends to affect when and how they articulate their connection

<sup>162</sup> See Hernández, *supra* note 120, at 110–11.

<sup>163</sup> Serin D. Houston, *Scales of Whiteness and Racial Mixing: Challenging and Confirming Racial Categories*, 50 GEOGRAPHICAL BULL. 93, 97 (2008).

<sup>164</sup> See Twine, *supra* note 125, at 211 (discussing experiences of biracial black children raised in white homes with a raceless perspective).

<sup>165</sup> See DACOSTA, *supra* note 2, at 178.

<sup>166</sup> See Houston, *supra* note 163, at 97 (quoting Wendy S. Shaw, *Decolonizing Geographies of Whiteness*, 38 ANTIPODE 851, 866 (2006)) (internal quotation marks omitted).

<sup>167</sup> *Id.* at 104.

to race. Indeed, the raceless model takes whiteness and transforms it into a universal perspective, leaving the only valid perspective as one that treats everyone as “just an individual” or rests on the notion that one “do[es] not see color.”<sup>168</sup>

4. *Conclusions.* — This more nuanced understanding of the socialization of family members in assimilating interracial families presents a challenge for advocates of interraciality-based protections. Onwuachi-Willig’s arguments for protections, in particular, lose their persuasive sway. The Civil Rights Era vision that informs her account justifies antidiscrimination protections based on the understanding that these protections are important tools in disrupting racial status hierarchy. Interracial families that treat existing racial status hierarchy as unremarkable and unproblematic seem not to want, need, or — more importantly — deserve antidiscrimination protections. It seems likely that assimilating families would be reluctant to publicly represent themselves and their children as “minority,” and therefore would be loath to make claims under antidiscrimination law. Instead, these families would be tempted to minimize or deny their discrimination experiences as a way of socializing their children to reject minority status and instead claim white public identities. Because assimilating families fail to hold discriminating persons to account for their actions, some would argue that these families create more problems for minority-identified families as assimilating families leave the basic dynamics of racial subordination in place in important social spaces.

Moreover, one of the unspoken assumptions that informs the Civil Rights Era vision of antidiscrimination law is the understanding that the experience of racialization is involuntary and inescapable for minorities born into a racial category; consequently, they should be protected from discrimination. In contrast, interracial families that present racialization as a choice, as something that can be avoided, raise questions about whether protections are even required if the experience of subordination is really a matter of personal discretion. Onwuachi-Willig does not address these questions because assimilating families are invisible in her analysis. However, allowing these families to play a more central role in our account of the mixed-race family actually produces important and productive opportunities. Section D turns to this project and the ways in which the normative vision of antidiscrimination law might be updated to address the function of assimilating families in the project of racial justice.

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<sup>168</sup> *Id.* (internal quotation mark omitted).

*D. A New Normative Vision: Post-Civil Rights Justifications for Protecting the Interracial Family*

In order to provide an account of assimilating interracial families, several key propositions must be recognized, as these propositions allow us to better distinguish assimilating families from nonassimilating ones, as well as better understand the unique perspective held by assimilating families. For one, the formation of an interracial family under an assimilationist framework is not an act in defiance of white privilege and understandings of white superiority. These families are typically formed because the parties embrace white privilege and are willing to extend that privilege to a larger number of “near white” persons. Relatedly, an increase in the number of interracial families is not necessarily a sign of racial progress. Rather, the patterns of racial group-mixing must be analyzed, as the rising number of mixed-race unions may merely signal that certain racial/ethnic groups have reached a high enough level of social status to be absorbed into whiteness.

Additionally, certain premises about racial identity must be accepted. First, one must acknowledge that multiracials and near whites migrate in and out of the category of whiteness, in a perpetual state of what I call “marginal whiteness.”<sup>169</sup> Second, discrimination experiences (experiences of racial subordination) play a key role in the identity-formation process for many multiracials.<sup>170</sup> Often a key trigger for a mixed-race or raceless person to choose a minority identity is discovering that he or she can and will be racially subordinated or excluded by higher-status white persons. Taken together, these propositions allow us to develop a better understanding of the challenges we must address in crafting an account of assimilationist families and justifications for protecting this family form.

The normative vision I offer for protecting assimilating interracial families is based on three arguments about the operation of contemporary discrimination. First, regardless of their assimilationist intentions, the marginal whites produced by assimilating families destabilize the category of whiteness and therefore destabilize the operation of white privilege.<sup>171</sup> Second, marginal whites produced by these families often transition to a minority identity after experiencing discrimination, and this transition is smoother when antidiscrimination law cushions and incentivizes that transition by providing damages for mistreatment. This factor is particularly important if antidiscrimination scholars believe that the basis for antidiscrimination law rests on the continuing

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<sup>169</sup> See Rich, *Marginal Whiteness*, *supra* note 19.

<sup>170</sup> *Id.*

<sup>171</sup> See *id.* at 1574 (explaining that whites who only contingently experience white privilege have unique opportunities to challenge white privilege).



presence of clearly visible and sizeable minority communities. Third, marginal whites promise to address certain informational deficits in our account of contemporary race discrimination, as they are sometimes made privy to the operation of facially neutral but racially discriminatory practices that are currently prosecutable under antidiscrimination law.<sup>172</sup> Each of these propositions suggests that marginal whites produced by assimilating interracial families have an important role to play in the pursuit of racial equality. Each proposition is discussed in more detail in the section that follows.

1. *Destabilizing Whiteness.* — In my article, *Marginal Whiteness*, I provide an account of the experiences and the incentive structure of marginal whites as they attempt to exercise white privilege.<sup>173</sup> As I explain, some marginal whites cannot predict with certainty the spaces in which their claims of whiteness will be honored and those in which they will be denied. Consequently, they sometimes have an ambivalent relationship to “white” privilege. For example, a biracial white-Asian child may be recognized as white by her teachers at prep school, but be subject to anti-Asian slurs when she rides the bus home to her apartment. These discontinuities in the experience of whiteness create a partially alienated perspective. Also, higher-status whites cannot always ex ante anticipate whether a person that they recognize as white consistently claims whiteness as his or her social identity. These conditions of uncertainty make attempts to engage in discriminatory behavior fraught with uncertainty, and therefore destabilize the operation of whiteness. For example, a German-Italian white person might complain to a biracial white-Asian person that Asians are bad drivers, assuming that she is speaking to a white person. The retort from the biracial Asian that her mother is an excellent driver is a conversation stopper that makes the German-Italian white more uncertain in future interactions. These dynamics on the whole make near whites who claim white privilege more conflicted when they engage in such behavior and makes whites who would try to distribute resources along racialized lines more wary about their conduct. Each of these dynamics is a productive development for the project of racial equality. Therefore, families that tend to assimilate their children in ways that encourage identification with whiteness are not the strong threat to racial progress that they might initially seem. Ensuring that mixed-race families are protected from discrimination provides a socializing backdrop that ensures that potentially white-identified family members remain aware and supportive of antidiscrimination law, recognizing the need for legal protections.

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<sup>172</sup> See *id.* at 1503.

<sup>173</sup> See generally *id.*

2. *Racial Transitions.* — Much of the conversation in the law review literature problematizing the growth of a multiracial population seems premised on the notion that racial identity choices are stable over time. However, recent research suggests that this assumption is largely incorrect. Multiracials shift back and forth between minority, white, and multiracial identities depending on the context in which a question is asked, the form used, their age, and their relevant life experiences. Recent research also suggests that discrimination experiences or other experiences of social subordination may trigger individuals who claim mixed-race or white identities to transition back to a minority identity. Again, if this research is accurate, extending antidiscrimination protections to families that socialize children to be multiracial or white will give the family (and its members) an opportunity to reflect on whether the choices they have made with regard to racial identity make sense in light of their likely life experiences. Stated more simply, litigating a case as a multiracial family subject to discrimination may be the transition experience that causes assimilating families to reconsider their approach to racial identification. What we must avoid is creating scenarios in which near whites are denied the protections of antidiscrimination law merely because they have engaged in racial identification patterns that seem to contradict the racialized nature of their physical characteristics. If near whites discover that antidiscrimination law proves a powerful deterrent and remedy against social discrimination, they may opt to acknowledge or even embrace the mixed-race nature of their union, given that it will continue to be a source of discrimination.

Moreover, even if the experience of discrimination does not change family members' identity commitments, Title VII has an interest in prosecuting discrimination triggered by a person's racialized physical characteristics. This discrimination obtains regardless of the personal identity claims of the individual involved. In short, eliminating discrimination against mixed-race assimilating families serves the autonomy interests of nonassimilating families as well, as discriminators often care little about the identity commitments of the family at issue. They are responding with hostility to the nature of the interracial union and should be sanctioned on that basis.<sup>174</sup>

3. *Information Deficits.* — The growing body of scholarship on implicit bias and aversive racism suggests that contemporary discrimi-

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<sup>174</sup> There is evidence that multiracials have unique insights about discrimination because of their mixed heritage. See, e.g., Margaret Shih et al., *The Social Construction of Race: Biracial Identity and Vulnerability to Stereotypes*, 13 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 125, 125 (2007) (noting black-white and white-Asian multiracials in her study were less likely to fall prey to stereotypical assumptions about other races than persons with a single race background).

nation operates at the level of the subconscious, or that, at the very least, discrimination has gone underground.<sup>175</sup> However, Professors Richard Thompson Ford and Ralph Richard Banks have suggested that much of the contemporary fascination with implicit and unconscious bias is based on a desire to avoid talking about the fact that explicit racism still exists, but simply goes on behind closed doors.<sup>176</sup> Near whites or marginal whites socialized in assimilating families have an important role to play in securing information about all three kinds of discrimination: hidden but explicit racism, implicit bias, and aversive bias. They gain insight into explicit but hidden racism because discriminating whites are more relaxed about their discriminatory attitudes in perceived all-white environments. Also, whites may be more forthcoming with near whites or marginal whites about aversive and implicit bias issues — revealing how facially neutral practices effectively sort out undesired minority candidates. In short, the information provided by near whites could be a valuable resource to many antidiscrimination plaintiffs who otherwise would not have access to information about discriminatory practices in the workplace.<sup>177</sup> Again, by providing strong and clear protection to the assimilating families that socialize near whites or marginal whites, antidiscrimination advocates ensure that this group has a positive relationship with antidis-

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<sup>175</sup> Aversive racism refers to a form of contemporary racism in which individuals still harbor underlying or unconscious negative feelings or beliefs about minority groups but at a conscious level will only endorse egalitarian values. Persons influenced by aversive racism will not discriminate directly and openly in ways that can be attributed to racism. However, because of their negative feelings, they will discriminate, often unintentionally, when their behavior can be justified on the basis of some factor other than race. For further discussion of aversive racism, see Rich, *Performing Racial and Ethnic Identity*, *supra* note 59, at 1190–91. The model of implicit bias similarly assumes that individuals may harbor bias at an unconscious or subconscious level and may use facially neutral means to express their disgust or discomfort with persons from minority groups. *Id.* at 1197 (noting “‘implicit attitudes’ that are more difficult to monitor and control because people do not view them as representative of their true attitude or outlook and, therefore, have no investment in trying to control them”).

<sup>176</sup> Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter? Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1054 (2009).

<sup>177</sup> Finally, although it is not a major part of the normative arguments for protecting mixed-race families, resource-allocation patterns are positively affected by assimilating families as well. Importantly, assimilating families, despite their aspiration to socialize their families to whiteness, often acculture family members to maintain ties to minority relatives or retain some aspect of minority identity. They may episodically join minority alumni organizations or community groups intended to benefit minority communities in ways that are entirely consistent with Civil Rights Era norms and goals. These connections and relationships are an important part of marginal whites’ identity-formation process and may also play a role in racial-identity transitioning discussed above. Again, by extending antidiscrimination protections to assimilating interracial families, antidiscrimination law encourages marginal whites to maintain these connections without controversy.

crimination law and is willing to provide assistance to others, even if these families are not likely to rely on these protections.<sup>178</sup>

In short, the normative vision I offer for protecting assimilating families is based on the understanding that antidiscrimination law is committed to disrupting racial subordination in any way possible, and assimilating families have an important role to play in this process. My view is based on the understanding that assimilating families do not simply reentrench racial status hierarchy. Rather, they destabilize the category of whiteness in ways that are to be encouraged. By forcing expansion of the category of whiteness, they trigger discrimination by those who would police whiteness's boundaries. This is a proper concern of antidiscrimination law. Also, we want Title VII to engage with the various ways in which socially privileged whites use strategies and resources to subtly pursue discrimination strategies that leave the most racially marked persons on the margins.<sup>179</sup> We need marginal whites to provide informational resources in order to ensure Title VII remains attentive to new strategies and patterns of bias. Finally, we want to facilitate marginal whites in an identity-formation process that allows them to recognize their connection to minority identity and minority community. Providing protections for their minority family members and the family collective is key to that experience.

Because my account makes the assimilating family more central, it also requires us to consider a different set of questions as we think about the discrimination cases we are likely to see over the next twenty to thirty years. The characters of *Modern Family* give us a sense of how assimilating families will complicate antidiscrimination law, as the progeny of these unions will present complex questions about the connection between antidiscrimination law and expression of racial identity. For example, one wonders how antidiscrimination law should respond when Fulgencio, Gloria and Jay's son (a biracial Latino-white child) experiences discrimination. What kind of protection is Fulgencio entitled to if he is white skinned, does not speak Spanish, and has self-identified as white for most of his life?<sup>180</sup> Onwuachi-Willig's prior re-

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<sup>178</sup> See *Longmire v. Wyser-Pratte*, No. 05 Civ. 6725 (SHS), 2007 WL 2584662, at \*1-2 (S.D.N.Y. Sept. 6, 2007) (discussing a biracial black man who passed as white on Wall Street but simultaneously tried to provide opportunities to African Americans through the Stanford Business School Black Students Association). For further discussion of the *Longmire* case and white multiracials' complex relationships with minority communities, see generally Rich, *Recognizing Race*, *supra* note 19, at 1-2.

<sup>179</sup> See Rich, *Marginal Whiteness*, *supra* note 19, at 1503.

<sup>180</sup> Fulgencio is what I call in my other work a "biracial white person." For further discussion of biracial whites' unique discrimination experiences and the challenges their identity choices create for the enforcement of antidiscrimination law, see *id.* at 1573-74 (describing rising number of white-identified multiracials); *id.* at 1521-32, (describing unique discrimination experiences); Rich, *Recognizing Race*, *supra* note 19, (further exploring the implications for antidiscrimination law of multiracials' current racial identification patterns).

search suggests that his name alone will trigger discrimination, even if he identifies as a white person. Should Fulgencio's prior decision to embrace "white privilege" in his workplace affect our view about his right to protections? What are the long-term consequences of allowing him to invoke discrimination protections in a workplace dispute?

Additionally, how should antidiscrimination law respond if Manny, Gloria's brown-skinned monoracial Colombian son, decides that he is white after being socialized in an assimilating interracial family? Many of the jokes in *Modern Family* center on the fact that a clearly racially marked Latino boy has rapidly assimilated to white middle-class life: he reads poetry, covets spots in prep schools, wears crisp-ironed shirts, and guzzles espresso.<sup>181</sup> Similar questions could be posed if Lily (a clearly racially marked Asian child in the family) decides to adopt a raceless or racially transcendent identity and refuses all racial labels as a consequence of her assimilationist upbringing. Should Lily still be entitled to the protections of antidiscrimination law and the benefits of racial diversity programs? Protections for individuals in these scenarios must be contemplated if antidiscrimination law is to stay abreast of current trends in family racial identification patterns. Moreover, it is equally important that the families in which these children are acculturated are protected under antidiscrimination law. Indeed, these families may encounter the same discrimination as nonassimilating families that historically have been antidiscrimination law's core concern. Moreover, assimilating families may find that these discrimination experiences function as moments that trigger reflection and reevaluation of whether they truly should turn away from the minority identification patterns they seem eager to leave behind.

## CONCLUSION

Onwuachi-Willig's book gives us numerous tools to better understand the challenges faced by nonassimilating interracial families, and a basis for asking more penetrating questions about how they are represented in American life. Her account of relational discrimination based on their experiences is truly illuminating. This Book Review supplements her analysis and provides additional resources for a complementary account of the role assimilating interracial families play, showing how assimilating families induct new groups of near-white ethnic minorities into the category of whiteness. I submit that her account is compelling, but our justification for protecting the mixed-race family must include an account of *both* assimilating and nonassimilat-

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<sup>181</sup> Cf. *List of Modern Family Characters*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_Modern\\_Family\\_characters#Manny\\_Delgado](http://en.wikipedia.org/wiki/List_of_Modern_Family_characters#Manny_Delgado) (last visited Feb. 2, 2014) (discussing Manny's interest in fencing, his affinity for coffee, and his burgundy dinner jacket).

ing families in order to truly cover the needs of families that face inter-raciality in the public sphere.

With some regret, I recognize that the insights I have provided about the assimilating interracial family may have made some readers feel more ambivalent about their favorite American comedy, *Modern Family*. For with more understanding, *Modern Family* is far less of a progressive program than it initially seems. Instead, the program serves as an advertisement for “racial redistricting,” namely, the assimilation of Asians and Latinos into the category of whiteness. Indeed, the program’s writers perhaps unconsciously revealed this aspect of the program’s agenda in a recent episode entitled “The Future Dunphys.”<sup>182</sup> In this episode, Gloria is concerned that her new biracial white-Latino son will never learn to speak Spanish (and is therefore becoming white) and that her son Manny, who is Latino, is forgetting almost everything about Colombian culture (and is therefore whitening as well). She attempts to address her anxieties by projecting concern about Lily, arguing that Cameron and Mitchell are doing Lily a profound disservice by not educating her about Vietnamese culture. When Lily is taken to a Vietnamese restaurant, she hates the food and announces that she hates Vietnam. In their fumbling attempts to reassure her, Lily’s white parents tell her that everyone should “go back to where they came from.”<sup>183</sup> This comment is read by the restaurant customers (who are predominately minority) as a clear sign of racism. The program’s message is tongue in cheek — but the point is still made. The writers suggest that the interracial family’s attempts to resist whitening and hold on to cultural difference are really not worth the effort. The program serves as a warning to interracial family units that maintaining Latino and Asian ethnic cultural connections presents the risk of being accused of racism, and furthermore that biracial and minority children do not really require (much less desire) the cultural experiences parents attempt to provide to maintain the child’s connection to his or her minority background.

By highlighting the potentially regressive role that multiracial families may play, including their potential role in bolstering existing racial status hierarchies or making amendments that merely serve to broaden the category of honorary whites, this Review adds to the already important work Onwuachi-Willig has done. For Onwuachi-Willig’s project is to make clear the psychological cost black-white multiracial families pay for violating the monoracial family norm and the benefits we all enjoy as a result of their sacrifices. However, in order to pursue

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<sup>182</sup> See *Modern Family: The Future Dunphys*, LOCATE TV, <http://www.locatetv.com/tv/modern-family/season-4/8025817> (last visited Feb. 2, 2014), archived at <http://perma.cc/JGM2-DJJ2>.

<sup>183</sup> *Modern Family: The Future Dunphys* (ABC television broadcast Apr. 3, 2013).

her goal of providing “the first comprehensive study of . . . ‘the law of the multiracial family’” (p. 19),<sup>184</sup> we must bear in mind that the multiracial family is not by its very nature necessarily racially progressive. Rather, there are “possibilities for different racial identities to emerge through mixed-race households [as well as] the stubborn presence of static racialization in these settings.”<sup>185</sup> Understanding the range of racial socialization roles the interracial family can play is “critical as [these families] simultaneously highlight[] the changes evident in society and emphasize[] the need to continually address contemporary inequities.”<sup>186</sup> As Houston further explains:

[M]ixed-race couples are often positioned as the resolution to racism or as exemplars of post-racial partnerships, yet . . . broad scale assumptions about an established hierarchy of race manifest within mixed-race households as well. Indeed, demographic and household diversity are not necessarily the most telling barometers of transformed racial norms.<sup>187</sup>

The makers of *Modern Family* would do well to heed these lessons as they do nothing to challenge the notion that the white middle-class suburbia and the white nuclear family are ideal paradigms or templates for achieving the American dream. The program does nothing to challenge the centuries-old idea that blackness is to be distanced as the boundaries of whiteness are renegotiated. In this way, *Modern Family* is not so modern after all. However, our response to the problems the modern family poses can take modern forms with substantial benefits for the project of racial equality.

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<sup>184</sup> Internal quotation marks have been omitted.

<sup>185</sup> Houston, *supra* note 163, at 94.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 106.