

## *Black Pluralism in Post Loving America*

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“There is something called *black* in America and there is something called *white* in America and I know them when I see them, but I will forever be unable to explain the meaning of them . . . .”[\[1\]](#)

### **Introduction**

Since 1967, the number of multi-racial individuals with some African ancestry living in the United States has increased dramatically as a result of increased out-marriage by black Americans and the immigration of large numbers of multiracial individuals from Mexico, the Caribbean, as well as Central and Latin America. With the removal of national origin quotas in the 1965 immigration reform law,[\[2\]](#) more people with some African ancestry have entered this country over the past forty years than at any other time in our history.[\[3\]](#) Consequently, the face of late twentieth and early twenty-first century America has changed, as have attitudes about race, especially about persons with some African ancestry.

Much of the conventional public, political and judicial rhetoric, however, does not reflect the heterogeneity of African Americans. The ongoing rhetoric of mono-racialism may be the byproduct of at least two factors. Legally, the law played a dominant role in constructing and reifying a “single” black race. Throughout the twentieth century, blackness in America was “seen as so self-evident” that one was considered black if one’s African ancestry was visible or known.[\[4\]](#) Politically, scholars have long contended that diversity within the black community was suppressed for strategic purposes, so that mono-racialism became a unifying and primary organizing principle in the fight against race discrimination.[\[5\]](#) These legal and political accounts of blackness continue to this day.

Contemporary rhetoric still assumes that black Americans are a homogenous group with a shared common identity and history.[\[6\]](#) Nevertheless, “[i]mportant shifts in the composition of the U.S. population and contemporary constructions and representations of biological and cultural mixture, problematize the very nature of [b]lack identity and the [b]lack experience in [twenty-first century] America.”[\[7\]](#) As legal scholar Kenneth Karst predicted more than a decade ago, the static and monolithic racial legal category “black” has changed “[a]s perceptions of race meld further into perceptions of culture.”[\[8\]](#)

Recently the Pew Research Center found that “nearly four-in-ten African Americans (37%) say that blacks can no longer be thought of as a single race” because of increasing diversity within that community.<sup>[9]</sup> Unsurprisingly, perceptions about the disaggregation of blackness are stronger among younger black Americans, particularly those who were born after *Loving v. Virginia*, the post-*Loving* generation, who are more likely than their older counterparts to report that blacks are no longer a single race. More importantly, the Pew study merely quantifies what many black Americans already know; class- and generational-based differences in values and experiences transcend racial differences, even for black Americans. Some even argue that we are living in a post-black era.<sup>[10]</sup>

Many members of the post-*Loving* generation, came of age in the 1990s with no memories of *de jure* racial segregation laws or the need for the 1960s civil rights legislation to combat overt racial discrimination. Accordingly, they see race, racism and identity through different lens. In other words, we are witnessing a significant generational shift in thinking that is beginning to be reflected in popular culture and scholarly literature about race and identity, but not in the courts. American judges and policy-makers, composed primarily of the children of *Brown v. Board of Education*,<sup>[11]</sup> remain stuck in a racial jurisprudence and rhetoric of the late twentieth century that focuses on intentional and overt mono-racial discrimination. There is little recognition by courts of the multiple levels of race-related discrimination or that persons with some African ancestry may experience discrimination differently.

To illustrate the changing perceptions of identity for individuals with partial African ancestry – those born shortly before and post-*Loving* – and the implication of black pluralism on contemporary anti-discrimination law, this chapter analyzes the experiences of and public dialogues about children of interracial parentage and how their differential treatment by non-blacks, as well as blacks, raises legal issues courts are not prepared to address. The first *Loving* era child is President Barack Hussein Obama, born six years before the *Loving* decision to a black Kenyan father and a white Kansan mother, and raised in Hawaii. The Harvard Law School graduate’s skin tone and other physical features identify him as someone with African ancestry. He also self identifies culturally as a black American; nevertheless, because of his interracial parentage controversy arose during his successful runs for the U.S. Senate seat and presidency about whether he is “authentically” black.

The blackness of the second *Loving* era child, Maria O’Brien Hylton, born seven years before the Supreme Court case to an Afro-Cuban mother and white Australian father of Irish ancestry, also was publicly questioned. Unlike President Obama, Hylton’s physical appearance is more racially ambiguous, and her identity is further complicated by the Latin roots of her mother. She made headlines nationally when black members of the Northwestern University Law School community objected to her hiring as a minority faculty member, arguing that Hylton was not black enough because of her light skin tone and alleged lack of cultural identity.<sup>[12]</sup>

The public controversies surrounding the racial identities of President Obama and Professor Hylton reflect contemporary public discourses on race, and suggest the potential legal implications of being “black” in post-black America. These discussions signal how the generational shift in race discourse impacts Americans with interracial parentage and some African ancestry. This transition raises interesting questions about the continued viability of late twentieth century anti-discrimination race jurisprudence, especially as applied to people traditionally “raced” or identified as black or African American. Discussions about their racial identity provide an opportunity to examine the struggle occurring within the community of Afro-descendants, and larger American community, about the meaning and measurement of blackness and “racial authenticity” in 21<sup>st</sup> century America.

As the following discussion suggests, the notion of “racial authenticity” is illusive. It operates slightly differently for individuals whose physical appearance comports with conventional notions of blackness than for more racially ambiguous individuals. The focus of discussion for racially distinctive individuals like President Obama is whether their interracial parentage makes them less black socially, less representative of perceived black political interests and less likely to experience traditional forms of race-based discrimination. More specifically, one emerging question is whether mixed-race individuals are more likely to experience situational blackness<sup>[13]</sup> - whether one can be black for some but not for other purposes, and if so, when one is black for anti-discrimination purposes.

This question is even more sharply drawn when questions about racial authenticity arise for individuals whose African ancestry is less apparent. As this chapter explains, the overriding question in both cases is whether interracial parentage confers some type of benefit and disadvantage on Afro-descendant children not experienced by individuals whose formal racial classification is black, and if so whether anti-discrimination law should take these differences into account.

## **II. *Loving*’s Children in Post-Black America: Barack Obama and Racial Authenticity**

Historically, the law discouraged interracial parentage and penalized their offspring by consigning children to the “lower” of the two racial categories. But in post-black America, many of these children refuse to be defined primarily under one racial category.<sup>[14]</sup> Nevertheless, the public remains fixated on assigning a single racial group to mixed-race children rather than accepting how they characterize themselves. The public discussions about President Obama’s race illustrate this problem.

Although the media initially characterized Barak Obama as black or African American, others were not so sure. During his 2004 senatorial campaign, his Republican opponent, Alan Keyes, an African American, suggested that because Obama is not descended from enslaved West Africans he really is not an African American. Obama’s African ancestry, physical features—brown skin tone, hair texture, and broad nose—and self-identification as a black or African American is insufficient, in Keyes’s mind, to make him an

“authentic” African American. Thus, for Keyes, authentic blackness is based on a direct connection or link to the slave experiences of West Africans in the Americas and the segregation that followed into the mid-twentieth century, before *Loving* and the 1965 immigration reform. Thus, persons with any African ancestry who lack this background are racially suspect.

Indeed, some have intimated that a black individual’s lack of ancestral ties to slavery constituted a positive attribute. During the 2008 presidential race, political scientist Ron Walters, an African American, built on Keyes’ distinction suggesting that the absence of a direct ancestral link to enslaved West Africans benefitted Obama in his run for the presidency. According to Walters, Obama was a more acceptable presidential candidate to white Americans than earlier black candidates, like Jesse Jackson and Al Sharpton. Unlike Obama, Jackson and Sharpton, descendents of slaves, embodied “the traditional African-American identity [which] is more threatening [to whites], because it raises . . . the culpability of whites in slavery.”[\[15\]](#)

Linking authentic blackness to American slavery is problematic. The Keyes/Walters definition of African American over emphasizes the connection between slavery and anti-black bias rather than dominance of a white supremacy ideology in America. Neil Gotanda calls this approach “historical race”, a concept that “embodies past and continuing racial subordination, . . . [that represents] the meaning of race . . . the [Supreme] Court contemplates when it applies ‘strict scrutiny’ to racially disadvantaging government conduct.”[\[16\]](#) This definition framed in the American slave experience seems to exclude someone like President Obama even though he has the physical attributes of blackness, self-identifies as black and may experience race-based discrimination.

Questions about President Obama’s racial authenticity also tend to conflate self-identified race (cultural race) with historic race. When the readers of nationally syndicated columnist Clarence Page, an African American, wrote asking him to stop calling Obama “black” because of his interracial parentage, Page reminded his readers that Obama self-identifies as black. Page asserts Obama’s cultural race as proof of his blackness whereas his readers seem to reflect Ron Walters’s belief that Obama’s perceived identity status is different from conventionally black Americans because of his interracial parentage.

Historically, the offspring of “interracial reproduction” were classified as *mulatto*, or some fractional label. In most instances, this label had no legal significance in the United States; one was still black. This traditional ascription of race, however, was not applied to President Obama. Even though he looks like many black American products of slave era miscegenation, his racial authenticity is suspect. The public saw him as different from conventional earlier miscegenated black Americans because his mother is white and his father is a Kenyan not descended from enslaved West Africans. Further, his Kenyan father lived briefly in United States in the 1960s and never experienced the hardships and deprivations caused by Jim Crow laws of the late nineteenth and first half of the twentieth century. Thus, Walters and Keyes suggest that President Obama’s interracial parentage translates into a different identity status.

While the Supreme Court's anti-discrimination jurisprudence is grounded in the American experiences of West African slaves and their descendants, it has never limited relief for race-based discrimination to this group of black Americans. If a court was to consider President Obama's racial status, it would likely to conclude that his is black. In 1995, a Massachusetts court was called upon to determine the legal racial status of twin brothers, Philip and Paul Malone, who, after identifying themselves as black, obtained positions as firefighters with the Boston Fire Department as a result of an affirmative action program.<sup>[17]</sup> Subsequently, the Malone brothers, who looked and lived white, were fired for filing falsified applicants after a hearing officer determined that they were not black. The brothers appealed saying that there was no criteria for determining racial identification and that thus the Department only required self-identification.

In an unreported decision the Supreme Judicial Court of Suffolk County upheld the firing saying that the brothers failed to establish their claimed racial identity using any of three types of evidence: (1) phenotypical – a visual observation of their features, (2) genealogical – using documentary evidence to establish black ancestry, and (3) cultural – providing evidence that the family held itself out as black and were considered black by their community.<sup>[18]</sup> While the Malone brothers failed to satisfy any of these tests, President Obama easily meets all three tests including the genealogical test because legal blackness in America is defined as *any known African* ancestry. <sup>[19]</sup>

The questioning of President Obama's racial authenticity confuses "[t]ranscendent community interests . . . with a simplistic belief that the African-American community is a monolithic entity in which all people of color live identical lives in every respect[,], agree with one another, or even like one another."<sup>[20]</sup> But black Americans, like other individuals, are more than their chosen or assigned racial identity. They have multiple identities that intersect or overlap in ways not anticipated by law's conventional unitary approach to race-based discrimination. Increasingly these cultural and imposed identities influence both how we see ourselves and how others see us in America. The political and cultural division between black ethnics is an example of multiplicity *within* a racialized legal identity—black multiplicity.

Black multiplicity is a subset of racialized identity, not another category of identity like class, gender or sexuality. For example, ethnicity within a racialized group may influence how racial bias is experienced. Recently arrived Afro-Caribbean immigrants may be preferred over native-born black Americans because the former often are stereotyped as hard working individuals who hold multiple jobs as compared to the more negative stereotypes advanced about conventional black Americans as lazy. Similarly, Afro-Latinas/os might be treated or perceived as being different from black descendants of American slaves because of their Latin ethnicity. In other words, they may not be seen as black. Thus the racialized portion of one's identity does not operate in a unitary fashion.

The problem of different racialization among black Americans is not limited to children of interracial parentage. Skin tone privilege – colorism - is widely believed to confer privileges on visibly identified conventional light-skinned black Americans without

regard to parentage. But courts have difficulty recognizing and accepting that black Americans can experience discrimination differently based on parentage, phenotype and ethnicity.

The public discourse about President Obama's racial authenticity suggests the emergence of a different type of intra-racial privilege among black Americans. Having one white parent may confer an actual or perceived racial privilege even on a self-identified African American. For example, one writer asks: "What makes [Obama] 'black' rather than 'white'?...Socially, he is as white as he is black.... he had to learn how to be black in the social world...and even had to be mentored by a friend at school to learn how to 'act black'.... He seems to see himself as a human bridge . . . . His blackness is largely a figment of white imaginings." [21] Further, this different racial status attaches without regard to the individual's racial performance. In other words, whether one racially identifies as white, black or mixed-race, where interracial parentage is known, one is considered by the public, but not the courts, as less conventionally black.

There are a few employment cases where claimants alleged discrimination because of their mixed-race status.[22] The courts in these cases refuse to treat discrimination based on interracial parentage as a basis for a race discrimination claim. Instead they tend to adopt a mono-racial approach, looking for discrimination based on the race of one parent rather than on interracial parentage itself.

If interracial parentage confers a perceived different racialized identity on individuals who appear phenotypically black, then the perception of privilege may be even stronger for individuals whose physical appearance is more racially ambiguous. These individuals may be seen and treated as inauthentic black Americans because of their appearance *and* parentage. This perception commonly held both intra-racially and inter-racially is even more problematic when the result is discriminatory decision-making. Courts are even less prepared to handle these cases using conventional race anti-discrimination law. This point is examined briefly in the next section of this chapter.

### **III. *Loving's* Racially Ambiguous Children – – Maria O'Brien Hylton**

The controversy surrounding consideration of Maria O'Brien Hylton for a tenure-track position at Northwestern Law School illustrates another aspect of the issue about post-*Loving*, post-black blackness, at least for anti-discrimination law purposes. Unlike President Obama, whose physical appearance comports more with conventional notions about who "looks black" and who openly identifies as black, Professor Hylton, the sister of CNN commentator Soledad O'Brien and wife of a black law professor, looks more racially ambiguous. Her racial ambiguity might free her from everyday racism like racial profiling while shopping or driving a car. Nevertheless, she may experience race-based discrimination in situations where her remote African ancestry is known and used as a factor in making adverse employment decisions.

When Professor Hylton applied for a faculty position at Northwestern Law School, a senior black faculty member called her black identity into question in essence asking her

“How black are you?”<sup>[23]</sup> Applying the factors considered by the court in the Malone Brothers case Professor Hylton clearly satisfies the genealogical test. Her mother’s Afro-Cuban ancestry would satisfy the genealogical test establishing her partial black ancestry. So she would be considered black for anti-discrimination purposes even though her physical appearance does not clearly signal her black ancestry. The court in the Malone Brothers case suggested that any of the three tests, phenotypical, genealogical or cultural could be used to establish racial identity. But genealogy was not enough for some non-white members of the law school community. They complained that not only did Professor Hylton not look black, some doubted whether she culturally identified as a black American.

There were conflicting accounts about whether she self-identified as black, at least in conventional U.S. terms. To further complicate matters, a Latino law student group said Hylton was not Latino because they felt she identified more with being *black* than being Latino—suggesting that these are mutually exclusive categories. Professor Hylton initially refused to be drawn into what seemed like a discussion of identity politics telling “the *New York Times* that she did not define herself in ‘racial terms’ . . . . However, in a *Boston Globe* interview, [she] reported that she identified herself as ‘Black’ on a form she completed as a clerk for a federal judge. . . . had been a member of Black organizations in college, in law school, and while practicing. . . . [saying] ‘I have always thought of myself as black.’”<sup>[24]</sup> The controversy ended when she and her husband accepted a job at a northeastern law school. Professor Hylton has gone on to have a successful academic career.

Professor Hylton was targeted because of her physical appearance and perceived cultural identification. Without question, “phenotype goes a long way in facilitating racial identity because it is the foundation for the social interaction with others by which one largely comes to identify one’s self.”<sup>[25]</sup> Some social scientists speculate that “profit-maximizing firms and utility-maximizing individuals have a preference for blacks with light skin hues.”<sup>[26]</sup> Thus, individual members of the same race, even those like President Obama who appear visibly black, may be treated differently based on phenotypical characteristics, including skin tone. These preferences are most obvious in employment settings.

Indeed, racially ambiguous children of interracial parentage with some black ancestry may have even more difficulty navigating mixed-race ancestry. They are disproportionately the beneficiaries of various forms of skin tone and/or appearance privilege. Skin tone discrimination, or colorism, is related to, but different from, racial passing, a second form of skin tone privilege where self-identified or racially classified black Americans with light skin tones are either misclassified as white, or are seen as racially ambiguous, as opposed to black.

The preference for light skin tones may be a result of unconscious bias, what Jerry Kang calls “racial mechanics—the ways in which race alters intrapersonal, interpersonal, and inter-group interactions.”<sup>[27]</sup> There are explicit and implicit racial meanings assigned to the racial categories created by law and cultural practices; and the racial meanings

associated with these categories are triggered when we interact with others. As a result, implicit racial biases—negative stereotypes and prejudices—influence our interactions. These reactions are automatic in the sense that they are unintentional and outside the actor’s awareness.

A few empirical studies found that unconscious or automatic negative stereotype biases influence decision-making.<sup>[28]</sup> Further, there is evidence that skin tone affects wages, employment opportunities, access to healthcare, and even the accumulation of intergenerational wealth. Individuals with features most commonly attributed to black Africans are likely to be judged more harshly than members of the same formal racial with less “Afrocentric” features as a result of automatic or implicit racial attitudes.<sup>[29]</sup> It should be noted, however, that lighter skin African Americans also experience discrimination, albeit in a different manner from their “darker” counterparts. The perceived and actual benefits racially ambiguous individuals with some African ancestry gain in securing employment triggers resentment among more racially identifiable black Americans. As Professor Hylton’s case demonstrates, such “benefits” may even result in adverse employment decisions.

Several factors distinguish Professor Hylton’s case from a conventional colorism case. First, unlike most colorism claims, her light-skin did not confer an economic advantage, but rather resulted in a disadvantage. Second, both blacks and Latina/os at the law school questioned her racial “authenticity.” Unlike President Obama, her mixed-raced parentage had both a racial and ethnic component. Latina/os questioned her ethnic authenticity suggesting that she must choose between being black and being Latina/o leaving no room to embrace all aspects of her parentage, her mother’s *Afro-Cuban* background and her father’s Australian-Irish ancestry. Her choice was to identify as either black or a de-racialized Latina.

Racially ambiguous individuals of interracial parentage like Professor Hylton are more likely to experience situational race, “racially biased conduct [that] is situation sensitive”<sup>[30]</sup> because they cannot blend in with more visible black Americans. Thus their “racial authenticity” is constantly being questioned. In contrast, President Obama’s visible appearance minimizes or erases his white ancestry unless he or someone else invokes it.

Scholars use the term “situational race” to denote several different, but related phenomena. Situational race may refer to what happens to racially ambiguous mixed-race individuals who look non-white, but not identifiably black. Thus a person who self identifies as black and who has some African ancestry may be “misidentified” as belonging to some other racialized group and treated accordingly.

Maria O’Brien Hylton’s experience at Northwestern, however, does not neatly fit within the racial misclassification category. Her opponents knew about her remote African ancestry. But her racially ambiguous appearance and interracial parentage cause non-whites to conclude that the genealogical connection was insufficient for minority representational purposes. They demanded information about her cultural identity. In



the end their criteria for rejecting her as a minority faculty representation was based on subjective criteria that was “racially biased” and “situation sensitive”—situational blackness.

Situational blackness, unlike situational race, is not limited to racial misclassification (appearance) or cultural identity. Situational blackness also incorporates aspects of performative race, focusing on factors like parentage, education, socio-economic status and the circumstances triggering the racial identification of the individual. Thus media discussions of President Obama’s race are instances of situational blackness where they mention his white mother, his Harvard education, and relatively affluent adult lifestyle.

What is operating in these situations is a complex formula of racialization resulting in an unstable definition of blackness. Blackness in the twenty-first century no longer is determined solely by ancestry but is shaded by factors like parentage, education, appearance, cultural identification and socio-economic factors.

Courts are unprepared for the more complex race cases presented by children of interracial parentage. Anti-discrimination jurisprudence is based on notions of racial immutability – racial status as static, unchanging.<sup>[31]</sup> The Northwestern Law School Community used a mono-racial, mono-ethnic approach to define Professor Hylton’s racial identity. Similarly, courts traditionally resolve discrimination claims by mixed-raced individuals using a mono-racial approach that fails to capture the essence of the claims. This point is discussed briefly in the next section.

#### **IV. The Need for New Theories to Address Employment Discrimination**

As mentioned previously, race discrimination based on appearance is more likely to be automatic or unconscious, while discrimination based on known ancestry is more likely intentional, but less common. Falling somewhere between is racial decision-making based on stereotypic notions about differences between blacks based on ethnic group membership, or in the case of *Loving*’s children, interracial parentage. This latter form of race-related discrimination whether intentional or unintentional results in employment preferences based on multiple aspects of an individual’s identity that the law fails to recognize.

The unitary way law treats race-based discrimination as affecting all black Americans equally and remediable only if intentional is insufficient to handle the increasingly complex forms of *race-related* discrimination. To illustrate this point let’s reconsider what might have happened had Maria O’Brien Hylton filed an employment discrimination claim against Northwestern Law School for racial discrimination in hiring. Title VII of the 1964 Civil Rights Act prohibits discrimination in employment based on race, color, religion, sex or national origin. Under this provision Professor Hylton’s chances of success might depend on the law school’s subsequent actions.

If the law school subsequently hired a “black” law professor for the position for which Professor Hylton was considered, some courts might conclude there was no race-based

discrimination because they law school simply preferred one qualified black candidate over another. If the law school hired a “Latino” law professor for the position a few courts might inquire more closely to determine, where possible, whether Professor Hylton and the successful candidate, were of the same race. A very few courts seem willing to recognize intra- ethnic discrimination among Latina/os because of their mixed ancestry then intra-racial discrimination claims.<sup>[32]</sup> But these cases usually involve Latina/os plaintiffs with phenotypical characteristics closely associated with black Americans. Where the parties are racially ambiguous courts assume no racial bias. Courts literally tend to see race in black and white terms – racial absolutes.

When the claim is inter-ethnic, courts tend to treat all racially ambiguous Latina/os alike. These courts fail to appreciate the racial overtones and anti-black bias in inter-ethnic employment discrimination claims by Latina/os because of the myth that racism, particularly anti-black bias, does not exist in racially mixed Latin America.<sup>[33]</sup> So if the Latina/o candidate selected was not Cuban, then these courts would conclude there was no viable race discrimination claim.

Each of these approaches ignores a key aspect of Professor Hylton’s potential employment discrimination claim. It is not merely whether the employer hired a black or Latina/o applicant but whether the trigger for the discrimination she experienced was her interracial parentage. If so then the employment decision was based on the impermissible use of race and should be actionable. Yet courts, stuck in their mono-racial approach to race-based discrimination, are uncomfortable with claims brought by mixed-raced litigants wanting to assign the basis of discrimination to one race rather than to the interracial status of the claimant.

One possible solution would be to expand racial discrimination jurisprudence to include discrimination based on interracial parentage. On its face this approach seems like a simple solution, but it ignores more than fifty years of race discrimination jurisprudence grounds in mono-racialism. Judges, without specific guidelines, would look to this older body of race law for guidance, easily slipping back into a mono-racial approach.

An alternative approach would be to create an entirely new case of action that rejects the notion of racial immutability as a foundation for a discrimination claim recognizing intra- and inter-racial discrimination claims based on interracial parentage and colorism. Instead, the courts’ focus would be on whether phenotype, ancestry or cultural identity of a claimant was a factor in employment decision-making. If so, then the inquiry would focus on whether consideration of these factors was permissible under the law.

But one problem with this approach is whether to retain the intent requirement for actionable race discrimination claims. Even though the type of discrimination Hylton experienced was intentional, as mentioned previously, much race-based discrimination today is unconscious – unintentional. Given the unconsciousness of much race-based decision-making, in many cases it may be impossible to establish intent to discriminate based on interracial parentage. Abandoning racial immutability as applied in race

discrimination law would require a rethinking of anti-discrimination principles generally. This is a big agenda fraught with landmines.

## V. Conclusion

In many ways President Barack Obama's family reminds us of what the United States might have looked like had the politicians and courts of the late nineteenth and early twentieth century not worked so hard to enforce racial segregation, anti-miscegenation and exclusion of non-whites. His white mother, Ann Dunham, has a son who self identifies as black, and a daughter, Maya Soetoro-Ng, who self identifies as "hybrid"; "half white" and "half Asian." Obama's sister sees nothing unusual about the fact that her brother "named himself" black and she named herself hybrid, reasoning that "[e]ach of us has a right to name ourselves as we will." [34] Further, Soetoro-Ng is married to a Chinese-Canadian and has one child, so President Obama's two daughters have a first cousin with Chinese, Indonesian and white ancestry. Adding more spices to the mix, Soetoro-Ng's racially ambiguous appearance causes her to be misidentified as Latina so she learned Spanish. President Obama and his sister were raised in Hawaii, the most multiracial state in the Union and their families and perspectives reflect different attitudes about racial identity that twentieth century-made laws are ill-equipped to handle.

We face a bumpy road ahead in developing more precise and searching definitions of actionable "race" discrimination; the old formula labels are outmoded and no longer reflect the new direction the *Loving* era children are taking us. The challenge in twenty-first century America is to develop more flexible and realistic legal theories that allow people the freedom to choose their identities without being defined by them, while at the same time guarding against the pernicious and arbitrary use of ancestry to confer privilege or burdens on segments of Americans.

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[1] Carl Hancock Rux, *Eminem: The New White Negro, in Everything but the Burden: What White People Are Taking from Black Culture* 15, 36 (Greg Tate ed., 2003).

[2] Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

[3] Sam Roberts, *More Africans Enter U.S. than in Days of Slavery*, N.Y. Times, Feb. 21, 2005, at A1.

[4] Neil Gotanda, *A Critique of 'Our Constitution is Colorblind'*, 44 Stan. L. Rev. 1, 25 (1991). Yet as Neil Gotanda posits in a 1991 article, race, in particular the racial category "black," while a consistent and constant "social divider," is not a "stable, coherent legal and social concept." *Id.* at 23. He identified four racial categories - historical race, status race, formal race and cultural race - used by the United States Supreme Court that reflect distinct ideas about race. *Id.* at 4-5.

[5] Religious scholar Zipporah G. Glass argues that “mestizaje has always been a part of Blackness in the United States, but it was ... [suppressed] to make Blackness the primary organizing principle” to fight de jure segregation. Zipporah G. Glass, *The Language of Mestizaje in a Renewed Rhetoric of Black Theology*, in *Racial Thinking in the United States: Uncompleted Independence* (Paul Spickard & G. Reginal Daniels, ed) 3 (2004).

[6] Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 *UCLA L. Rev.* 263, 344 (1995).

[7] *Id.* at 341.

[8] *Id.* at 344.

[9] Pew Research Center, *Blacks See Growing Values Gap Between Poor and Middle Class: Optimism About Black Progress Declines* 4, 24 (2007), available at <http://pewsocialtrends.org/assets/pdf/Race.pdf> (this survey was conducted in association with National Public Radio). The survey included “a nationally representative sample of 3,086 adults . . . [and] included an oversample that brought the total number of non-Hispanic black respondents to 1,007.” *Id.* at i. Only 53% of non-Hispanic black Americans polled thought that “blacks can still be thought of as a single race.” *Id.* at 24.

[10] Linda Nicholson, *Identity After Identity Politics*, 33 *Wash. U. J.L. & Pol'y* 43, 43 fn.2 (2010) (noting suggestions by others that that we are currently living in a «post-black» world).

[11] 347 U.S. 483 (1954).

[12] Leonard Baynes, *Who Is Black Enough for You?: An Analysis of Northwestern University Law School's Struggle over Minority Faculty Hiring*, 2 *Mich. J. Race & L.* 205, 210 (1997).

[13] See Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 *DePaul L. Rev.* 1013, 1020 (2004). Professor Wang argues that “racially biased conduct is situation sensitive.” *Id.*

[14] Haya El Nasser, *Multiracial No Longer Boxed in By the Census*, *USA Today*, Mar. 2, 2010, available at [http://www.usatoday.com/news/nation/census/2010-03-02-census-multi-race\\_N.htm](http://www.usatoday.com/news/nation/census/2010-03-02-census-multi-race_N.htm) (providing examples of mixed-race children who chose to self-identify as multiracial in the 2010 Census).

[15] Jean Marbella, *Who's Right When Race Lies Below the Surface*, *Balt. Sun*, Feb. 6, 2007 at 1B, 9B.

[16] Gotanda, *supra* note 4, at 4.

[17] *Malone v. Haley*, No. 88-339 (Sup. Jud. Ct. Suffolk County, Mass. July 25, 1989).

[18] *Malone v. Haley*, No. 88-339 (Sup. Jud. Ct. Suffolk County, Mass. July 25, 1989) at 16. Two years earlier they applied for the same position, identifying themselves as white, but failed to get hired after scoring poorly on the competitive civil service examination. Their racial identity became a problem when they applied for a promotion to lieutenant ten years later and the Fire Commissioner noticed they were identified as black. The hearing officer “found that they have fair skin, fair hair coloring, and Caucasian facial features.” *Id.* at 17. The brother documentary evidence, their parents’ birth certificates, which identified the race of their grandparents, showed that both sides of the family had been identified as white for three generations. *Id.* at 18. “[T]he only indication of [b]lack ancestry offered by the Malone brothers was the questionable and inconclusive photograph of a woman they claimed to be Sarah Carroll, their maternal great-grandmother” whose existence the brothers “discovered” in 1976. *Id.* at 19. There also was no evidence that the brothers were considered black by their community. *Id.*

- [19] Angelique Davis, *Political Blackness: A Sociopolitical Construction of Blackness Post-Loving v. Virginia*, Chapter X (explaining that the Census defines any person with a trace of African ancestry as Black).
- [20] Lisa A. Kelly, *Race and Place: Geographic and Transcendent Community in the Post-Shaw Era*, 49 *Vand. L. Rev.* 227, 235 (1996).
- [21] Gabe Heilig, *Red, White and Blue*, *Balt.*, Sun, May 23, 2008, at 21A.
- [22] Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 *Am. U. L. Rev.* 469, 501-04 (2010) (discussing cases where courts reflected «animus» against claims of race discrimination by multi-racial plaintiffs).
- [23] Baynes, *supra* note 12, at 210.
- [24] *Id* at 211.
- [25] Maurice R. Dyson, *Multiracial Identity, Monoracial Authenticity & Racial Privacy: Towards an Adequate Theory of Multiracial Resistance*, 9 *Mich. J. Race & L.* 387, 408 (2004).
- [26] Kwabena Gyimah-Brempong & Gregory N. Price, *Crime and Punishment: And Skin Hue too?*, *Am. Econ. Rev.*, May, 2006, at 246, 246 (citing Arthur H. Goldsmith et al., *From Dark to Light: Skin Color and Wages Among African-Americans* (unpublished paper, 2005); *see also* Arthur H. Goldsmith et al., *From Dark to Light: Skin Color and Wages Among African-Americans*, 42 *J. Hum. Resources* 701 (2007).
- [27] Jerry Kang, *Trojan Horses of Race*, 118 *Harv. L. Rev.* 1489, 1493 (2005) (citing Jerry Kang, *Cyber-race*, 113 *Harv. L. Rev.* 1131, 1138-46 (2000)).
- [28] *See, e.g.*, Natsha Martin, *Pretext in Peril*, 75 *Mo. L. Rev.* 313, 317 fn.11 (2010) (citing studies of how unconscious racism has affected plaintiffs' claims in employment discrimination cases); Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 *Harv. C.R.-C.L. L. Rev.* 393, 448 fn. 417 (2009) (citing empirical data showing how unconscious bias influenced judges and juries in criminal trials).
- [29] Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 *Personality & Soc. Psych. Rev.* 242 (2002); Irene V. Blair, Charles M. Judd & Jennifer L. Fallman, *The Automaticity of Race and Afrocentric Facial Features in Social Judgments*, 87 *J. Personality & Soc. Psych.* 763 (2004); Keith B. Maddox & Stephanie A. Gray, *Cognitive Representations of Black Americans: Reexploring the Role of Skin Tone*, 28 *Personality & Soc. Psych. Bull.* 250, 254 (2002) (measuring how “perceivers can use skin tone as organizing principles in social perception, apart from the presence of other facial features”).
- [30] Wang, *supra* note 13, at 1020.
- [31] Ken Nakasu Davison, Note and Comment: *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 *Asian L. J.* 161 (2005).
- [32] *See*, Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 *UCLA L. Rev.* 1705, 1732-36 (2000).
- [33] For a discussion of inter-ethnic employment discrimination case law, *see* Tanya Katerí Hernández, *Latino Inter-Ethnic Employment Discrimination and the ‘Diversity’ Defense*, 42 *Harv. C.R.-C.L. L. Rev.* 259 (2007).

[34] Ellen Goodman, Op-ed, *Transcending Race and Identity*, Boston Globe, Jan. 25, 2008 at A19.