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Antidiscrimination Law and the Multiracial Experience:

A Reply to Nancy Leong

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Introduction

The engagement between multiracial people¹ and the law in America represents an example of the clash between the complexity of what it means to be a human being and the highly structural nature of the law understood as a mechanism for social control.² While being a human being means to have a variety of physical, mental, emotional, and social characteristics, many of which change and transmute over time as we interact with other human beings and the environment in which we find ourselves, the law is set up to be highly structural and formalistic so as to provide an ostensibly clear basis for judges to make decisions about disputes between parties over social goods. As a result, when real human beings come in contact with the law, what could be construed as otherwise legitimate legal claims often fall through the cracks simply because the law has no way to process them. Adding to this confusion, the decision-making process in which judges participate in order to resolve disputes involves numerous judgment calls about what the relevant facts are, what the applicable law is, and how to best map law on to facts. For this reason, court decisions can be understood as always and necessarily an exercise in interpretation.³ This is particularly the case when multiracial people come in contact with the law since the American legal system has a long history of thinking about human beings in terms of biologically distinct, clearly distinguishable races, and of attempting to keep these races both theoretically and physically separate. Kevin R. Johnson has argued that the very idea of racial mixture “violates [American law’s] monumental efforts to enforce racial separation during much of U.S. History.”⁴ The long history of anti-miscegenation laws, the “one-drop” rule, laws

¹ I will use the terms “multiracial people,” “multiracial individuals,” and “multiracial persons” to refer to the set of persons with which Leong is concerned in her paper. Although Leong often refers to this set of persons as “individuals perceived as multiracial,” I find this terminology cumbersome, and in my view usage of this terminology on her part is meant more to convey that race in general is biologically unreal than to deny that multiracial people have a very real social ontology. However, where it is important for the exposition of Leong’s argument to refer to this set of persons as “individuals perceived as multiracial,” I will do so.

² For an account of law as social control, see Vago, *Law and Society*, 203-270.

³ This take on how judges decide cases is rooted in the critical legal studies movement that originated in the late 1970s and early 1980s. Conceptually based in critical Marxism and the critical theory of the Frankfurt School, critical legal studies holds that legal doctrine is an empty shell. There is no such thing as “the law,” on this view, understood as an entity that exists out of context (Binder, 1996, 1999). Instead, law is produced by power differentials having their origins in differences in levels of property ownership. The idea that the act of judging is always and necessarily an act of interpretation, however, is most heavily influenced by an approach to legal theory known as legal hermeneutics. Legal hermeneutics is an approach to the law that calls us to consciously recognize the role of socio-historical context in any assessment of what the law means or should mean. Gregory Leyh has argued, for example, that there is a historicity to all legal inquiry (Leyh, 1988). In other words, legal reasoning does not occur in a vacuum and interpretation is always practical, i.e., it always occurs in a particular set of circumstances, at a particular time and place, and applies itself to a particular set of facts. Another way to say this is that any assessment of how a law should be interpreted is necessarily based in a dialogue between theory and practice.

⁴ Johnson, *Mixed Race America and the Law*, 3.

designed to prevent “passing,” the lack of a way until recently for multiracial people to identify their mixed race status on the U.S. Census, and the legal denial of inheritance rights of mixed race offspring are all examples of these efforts.⁵

In her paper, “Judicial Erasure of Mixed-Race Discrimination,” Nancy Leong grapples with one instance of engagement between multiracial people and the law, providing an opportunity to explore the highly interpretative nature of judicial decision-making. Specifically, she calls us to reflect on the concept of race at work in antidiscrimination law and argues that the way courts in discrimination cases presently understand the concept of race prevents multiracial persons from being able to file successful discrimination claims. The fact that judges in discrimination cases think about race “categorically,” Leong argues, renders antidiscrimination law inhospitable to claims of multiracial discrimination.⁶ By insisting on thinking about race “categorically,” argues Leong, courts unfairly exclude multiracial plaintiffs from the group of people who are permitted to bring cognizable discrimination claims resulting in the “erasure” of multiracial discrimination from the legal landscape.⁷ In order to render antidiscrimination law more hospitable to claims of multiracial discrimination, says Leong, courts and judges should stop thinking about race “categorically” and start defining racial identity in terms of the perceptions of the would-be discriminator (i.e., in terms of what Leong calls “perceived race”). Leong’s reasoning seems to be that since race has no basis in genetics or biology, whenever racial discrimination happens it happens because someone is *perceived as* being of a specific race rather than because he or she actually *is* of a specific race. Additionally problematic for Leong is that only “pure” or monoracial races are presently recognized as races by courts. So, while monoracial people (or those perceived as monoracial to use Leong’s terms) can presently bring a case of discrimination, multiracial people (or those perceived as multiracial) cannot, which, for Leong, is unfair, is an assault on the dignity of multiracial people, and alienates multiracial people from the legal system.⁸

It seems clear that Leong’s motivations for offering this alternative approach to racial identification in antidiscrimination law are two very admirable goals, namely the goal of providing a way for multiracial plaintiffs to bring discrimination claims based on the specific kind of discrimination they experience, and the goal of doing so without advocating any change in the law that would reinforce existing and outdated notions about the reality of biological race. Specifically, according to Leong, simply doing the obvious and adding a new category of persons known as “multiracial” to the “categories” of persons already existing in

⁵ *Ibid.*, 2-3.

⁶ Thinking about race “categorically,” for Leong, means relying heavily on the view that race consists of five fixed racial categories (Asian, Latino/a, White, Black, and Native American) termed by David Hollinger the “ethno-racial pentagon” (Hollinger, 1995; Leong, 470) and thinking of races as pure, clearly distinguishable from one another, and defined by self rather than by others.

⁷ This “erasure” of the multiracial experience from antidiscrimination jurisprudence, Leong argues, blunts the use of antidiscrimination law as tool for promoting a more contemporary understanding of race, i.e., that race is neither biologically real nor describable in terms of neatly defined, rigid boundaries. This erasure simultaneously operates, Leong says, to reinforce racial stereotypes that are at the root of American racism.

⁸ Leong, 530-533.

antidiscrimination law, for example, would, according to Leong, “itself reify prevailing racial classifications by implying that a multiracial person is the offspring of two members of ‘pure’ races.”⁹

But, while I share and wholeheartedly support Leong’s apparent goals, and I particularly support Leong’s trailblazing attempt to bring the experience of being discriminated against as a multiracial person to the forefront of legal scholarship, I respectfully submit that her suggested path is both impracticable and fails to achieve what seems to be her primary and underlying objective, that is, to “dismantle the master’s house,” so to speak, on the topic of the historic legalization and codification of neat racial categories.¹⁰

Leong’s claim that the addition of the category “multiracial” or “other race” to the list of protected classes in employment discrimination claims would operate to undermine what she believes are the goals of antidiscrimination law – i.e., the promotion of a more contemporary understanding of race and the elimination of racism – is problematic because antidiscrimination law has never had these very lofty goals. Instead, the goal of antidiscrimination law is to provide a way for plaintiffs to challenge laws or employment practices that discriminate against them. In other words, the legal system arguably is simply not designed to police the minds of would-be perpetrators of discrimination. Rather, the legal system is set-up to identify legal rights and to uphold those rights when violated.

In the following paper, I will offer a reply to Leong in which I examine how she arrives at her conclusion that courts in multiracial discrimination cases should focus on the perceived race of the plaintiff rather than on “categorical” race and conclude that the reasoning Leong uses to arrive at this conclusion is flawed. A focus on perceived race, I will also argue, will likely have the reverse effect of what Leong anticipates. I will then argue that if antidiscrimination law is to be made more hospitable to claims of multiracial discrimination, a better alternative is as follows: In equal protection cases, courts should shift their focus away from individual rights and back to group rights and identify multiracial persons as a suspect class; and in employment discrimination cases, multiracial persons should simply be added to the list of protected classes.

Antidiscrimination Law and its Goals

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

Equal Protection Law

⁹ Leong, 543.

¹⁰ See, Lorde, “The Master's Tools Will Never Dismantle the Master's House”

Equal protection law originated with the ratification of the 14th Amendment to the U.S. Constitution in 1868, which included what is known as the Equal Protection Clause, i.e., “No state shall... deny to any person within its jurisdiction the equal protection of the laws.” A look at the historical context in which the Equal Protection Clause was created provides insight as to its meaning, purpose, and goals. The 14th Amendment is one of a set of constitutional amendments enacted around the time of the American Civil War.¹¹ The Civil War ended in April of 1865.¹² In December of that year, the Thirteenth Amendment, which banned slavery everywhere in the United States, was ratified. Two and a half years later, in July 1868, the 14th Amendment (containing the Equal Protection Clause) was ratified and then about two years, in March of 1870, later the Fifteenth Amendment, prohibiting discrimination in voting “on account of race, color, or previous condition of servitude,” was ratified. Taken together, these Civil War Amendments suggest that the Equal Protection Clause was included in the 14th Amendment to make clear that equal protection under the law *for black Americans* could and would be federally enforced.¹³ And so, Justice Miller’s famous statement in *The Slaughterhouse Cases* to the effect that the 14th Amendment had “one pervading purpose,” i.e., “the protection of the newly made freeman and citizen from...oppression,” seems very well justified.

The legislative history of the 14th Amendment, much of which is found in the Congressional debates that took place in 1866 during the 39th Congress, supports this interpretation. That history shows that the Equal Protection Clause was meant to operate as a remedial measure to correct the widespread subjugation of black people as a group in America. When Congressman Stevens introduced the Amendment in the House, he characterized its purpose as “the amelioration of the condition of the freedmen”.¹⁴ Additionally, proponents of the 14th Amendment repeatedly emphasized in the Congressional debates of the time that one of the Amendment’s primary purposes was to place in the Constitution itself the principles of section 1 of the Civil Rights Act of 1866, an Act whose entire purpose was to give citizens “without regard to race and color, without regard to any previous condition of slavery or involuntary servitude....” “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens....”¹⁵ In other words, proponents of the 14th

¹¹ These amendments are known collectively as the Civil War Amendments (i.e., the 13th, 14th, and 15th Amendments).

¹² Rawley, *Turning Points of the Civil War*

¹³ Citing *The Slaughterhouse Cases*, historian Howard Jay Graham has stated that the Civil War Amendments were all framed on behalf of black people (“the slave race”). “This, of course, is especially true of the 14th Amendment” (Graham 1968: 157). In fact, for Graham, it is “patently absurd” to deny the antislavery origins of the [14th Amendment]....” (*Ibid.*, 161).

¹⁴ Congressional Globe, 39th Congress, 1st Session

¹⁵ Section 1 of the Civil Rights Act of 1866 reads, “Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full

Amendment in the early Congressional debates repeatedly stated that the 14th Amendment's primary purpose was to address the manifest unequal status of black people as a group. Therefore, the historical evidence shows that rather than being designed to address racial discrimination at large, "the [Congressional] debates reveal overriding concern with the status of *one* racial group [i.e., blacks]."¹⁶

Nancy Leong's suggestion, therefore, that the purpose of equal protection law was to promote racial understanding, eliminate racism and eliminate racial discrimination is revealed as having no basis in the historical evidence. Instead, the historical evidence reveals that the Equal Protection Clause had a related but much more realistic and practical purpose, i.e., to provide a legal mechanism through which black people, as a group, could challenge the Jim Crow laws that were enacted by (primarily the southern) states after the Civil War. This is important for several reasons. First, the actual purpose of equal protection jurisprudence, i.e., the protection of black people in virtue of the fact that they constituted an oppressed group, is out of step with Leong's apparent belief that black people, as a group, do not exist. What Leong misses in her account is that it is possible for black people (or any racial group) to exist as a social group even if they do not exist as a biological or physical group. In philosophical terms, although race has no physical ontology, it does indeed have a social ontology, and this social ontology is not captured by defining race in terms of the perception of others. Instead, the social ontology of race is defined in terms of the *experiences* (usually of oppression) of those who are ascribed a particular race by society.

Although Leong is correct that the concept of race presently at work in equal protection law seems to involve thinking of race in ahistorical and acontextual terms¹⁷ -- even adopting the concept of "immutability" from gender discrimination cases to describe a feature of race¹⁸ -- this was not the original concept of race at work in equal protection cases. In the seminal case in equal protection law, *U.S. v. Carolene Products Co.*, Leong correctly points to the case's famous footnote 4 as the origin of language that will be later used by the Court to define groups of people entitled to special protection under the Equal Protection Clause. But, Leong's characterization of the Court's intended meaning in that footnote is inaccurate. It is true, as Leong states, that the Court uses the word "discrete" to describe groups that may be entitled to special protection, but a quick look at the context reveals that the Court means by this term something quite different from what Leong suggests.

For Leong, when the Court describes groups that might be entitled to special protection from discrimination as "discrete," the Court means "straightforward" and having "distinct

and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

¹⁶Baer, *Equality Under the Constitution: Reclaiming the Fourteenth Amendment*, 138.

¹⁷ See, e.g., *Regents of the University of California v. Bakke*, and progeny.

¹⁸ "Race, like gender... is an immutable characteristic...[such that] divisions [based on race] are contrary to our deep belief that legal burdens should bear some relationship to individual responsibility or wrongdoing," *Ibid.*, 360.

boundaries.”¹⁹ What the Court actually says, however, is “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and may call for a more searching judicial scrutiny.” The Supreme Court specifically explains, in other words, that by “discrete and insular minority” group, it means a group whose access to the ordinary political processes for vindicating minority rights has been historically inhibited.²⁰ It is important that the very socially and contextually defined concept of a discrete and insular minority or suspect class was never defined as being anything on the order of “straightforward” or as having “distinct boundaries.”

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

Employment Discrimination Law

Leong cites the Supreme Court’s usage of the term “racial minority” in an employment discrimination case as evidence of a widespread judicial presumption of a “categorical” approach to race in employment discrimination law. The Court’s usage of the term “racial minority,” writes Leong, “[implies] that minority membership is both obvious and self-defining.”²¹ Leong points out that in the same case, the Court wrote that to qualify for protection from discrimination, the plaintiff must show membership in a “protected class,” and from this Leong concludes that the Court is operating under the impression that membership in a protected class is “stable and defined by conventional racial categories.”²²

But, Leong’s understanding of how race is understood in employment discrimination law is just as confused as is her understanding of how race operates in equal protection law.

¹⁹ Leong writes, “The famous *Carolene Products* footnote generated an entire jurisprudence in which protection of an individual against discrimination depended on whether that individual fell into a ‘discrete’ category – one for which the very terminology implies that the category is straightforward and has distinct boundaries.” (Leong, 2011,505)

²⁰ The concept of a “discrete and insular minority” group later developed into the concept of a “suspect class,” the cornerstone of equal protection law for most of its history. In equal protection law, a “suspect class” is a group of people whose history of having been discriminated against in America has been so severe that if a law mentions that group by name, the law will severely scrutinized by the Supreme Court and very likely struck down as illegal. Black people, or African Americans, were the original suspect class.

²¹ Leong, 507, citing language from *McDonnell Douglas Corp. v. Green*.

²² *Ibid.*

Employment discrimination law is rooted in the Unemployment Relief Act of 1933, which stated, “[I]n employing citizens for the purpose of this Act no discrimination shall be made on account of race, color, or creed.”²³ Title VII of the Civil Rights Act of 1964 evolved out of the Unemployment Relief Act and serves as the basis for employment discrimination cases today. Michael Evan Gold explains the importance of employment discrimination law as follows:

America is called the land of opportunity, but for the first 350 years of our history we denied equality of opportunity to most of our citizens. From the landing on Plymouth Rock to the middle of the twentieth century, the best of everything was reserved for men with white skin.....²⁴

In the second half of the twentieth century, however, and “despite the longest debate in history in the Senate,”²⁵ Congress passed a law prohibiting discrimination on the basis of race, color, religion, sex, or national origin, i.e., Title VII of Title VII was passed primarily to protect women and people of color from discrimination.²⁶ Title VII was designed as a guide to the litigation of employment discrimination cases and therefore goes into great detail about the kinds of behaviors that constitute illegal discrimination (e.g., harassment), the kinds of behaviors that are protected (e.g., opposition or reporting discrimination to the employer), the kinds of employers covered, and the kinds of bases for discrimination covered by the Act (e.g., race and sex). There is no evidence in the Act itself or in the legislative history surrounding the Act that its purpose was to promote racial understanding, eliminate racism, or eliminate racial discrimination, nor is there evidence that by “race” or “protected class” the Act meant “categorical” (i.e., biological) race as defined by Leong. Instead, Title VII was enacted during the height of the civil rights movement and was designed to allow plaintiffs facing employment discrimination on the basis of being members of historically oppressed groups a legal remedy for that discrimination. Usage of the word “race” (or the phrases “racial minority” or “protected class”) in employment discrimination law invokes a socially-defined concept of race rather than a biologically-defined one.

As was shown to be the case with equal protection analysis, then, Leong’s suggested shift in focus in employment discrimination cases from the way it currently understands race -- i.e., as a socially informed and historically defined marker of group oppression -- to a mere matter of perception on the part of a would-be discriminator, is out of step with the purpose of employment discrimination law and will not achieve the goal of specially protecting multiracial plaintiffs. As was the case with equal protection analysis, the use of the perception of others to identify victims of multiracial discrimination would more likely result in protecting those who merely appear to be multiracial instead of protecting those who actually are; and employment discrimination law is in the business of protecting those who actually are victims of discrimination.

Leong’s “Other-Identified” Concept of Race

²³ Jasper, *Employment Discrimination Law under Title VII*, 1.

²⁴ Gold, *An Introduction to the Law of Employment Discrimination*, xi.

²⁵ *Ibid.*, xii.

²⁶ *Ibid.*, 2.

Leong's view that racial identity should be defined in multiracial discrimination cases in terms of how the victim of discrimination is perceived by the discriminator is intimately linked to her stated view that race itself is "other-identified"²⁷ or imposed from without. Recall that for Leong, multiracial discrimination occurs because a person is *perceived as* multiracial, not because a person *actually is* multiracial. Leong arrives at this conclusion rather strangely. She begins by citing anthropologists, biologists, and other scholars for the proposition that race is a "social construction rather than a biological reality"²⁸ and then states that morphology (physical traits) is an unreliable way of assigning racial identity for multiracial people.²⁹ Factors such as "style of speech," language, name, associates, and/or "behaviors,"³⁰ Leong argues, are far more often used to identify people as multiracial. "I can't overemphasize enough," writes Leong suddenly, "the role of the perceiver in multiracial identification".³¹ The logic of Leong's reasoning on this topic is somewhat muddled, but it appears to go something like this: Since race is a social construction, it is not objective. Since race is not objective, it is subjective. In other words, what Leong seems to be saying is that since the scientific evidence shows that racial identity has no basis in biology, the only possible way racial identity can exist is in the eye of the beholder. "Thus, we must focus on the perceiver's perspective in examining how [multiracial identity] may lead to discrimination,"³² she concludes.

But, the leap from the statement that race is a social construction (which almost no one in race theory disputes) to the conclusion that race therefore only exists in the eye of the beholder is a large one and indicates only a surface engagement with current thinking on racial identity.. For some time, there has been a widespread acceptance in the scientific community of the proposition that race has no genetic basis.³³ Long before the scientific community came up to speed on this topic, however, race theorists were debating the question of the metaphysics of race (both objective and subjective) and discussing the implications of the answer to this question for the welfare of racialized people in America, specifically blacks/African Americans. More specifically for the purposes of this paper, as early as W.E.B. DuBois's, "The Conservation of Races," the question of the difference between or relationship between biological race and socially constructed race has been addressed significantly at least in the literature of the social sciences and the humanities.³⁴ DuBois's understanding of race in the late nineteenth century seems to have been that while race likely has no biological basis, its social reality is nevertheless necessary to raise black people up from oppression. This is a conception of race -- sometimes called racial pragmatism and sometimes called racial realism -- held by many contemporary race

²⁷ Leong, 474.

²⁸ Leong, 478.

²⁹ She writes, "Although most people believe they can identify others' race or ethnicity based on morphology... morphology fails to provide a clear basis for identifying another person's race or ethnicity." *Ibid.*, 479

³⁰ *Ibid.*, 479-480.

³¹ *Ibid.*, 482.

³² *Ibid.*

³³ See, e.g., Montagu, *Man's Most Dangerous Myth*; UNESCO, *Race and Science: The Race Question in Modern Science*; Livingstone, "On the Nonexistence of Human Races;" Lewontin, "The Apportionment of Human Diversity;" and Hubbard, *Exploding the Gene Myth*, and Graves, *The Emperor's New Clothes: Biological Theories of Race at the Millennium*.

³⁴ DuBois, "The Conservation of Races."

theorists³⁵ and is based on the rather rational premise that despite there being no biological or genetic basis for the concept of race, there is no way to reach and out help black people rise up from the continued unequal status in society that is a generally a part of the black American experience without first being able to identify who is black.

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

America's Long History of Multiracial Animus

What Leong does well in her paper is establish that there is a long history of racially motivated "animus" against multiracial people in America that continues until the present day. This animus, Leong argues, originated in the taboo against interracial relationships and interracial mixing between whites and blacks that developed in the United States as part of the system of the chattel slavery of persons of African descent that existed in American society from the country's origins in the colonial period until the end of the Civil War in 1865. The American distaste for interracial mixing in general and interracial persons in specific, according to Leong, is rooted in what she calls a "heightened animosity toward Black/White mixed individuals" that was generated during this period in our history.³⁶ Leong shows that this heightened animus toward "Black/White mixed individuals" was supported by prevailing science well into the beginning of the twentieth century, a science that characterized such individuals as biologically defective and unhealthy, even diseased. The "mulatto" was understood to be physically, intellectually, and psychologically inferior to both blacks and whites, Leong shows.³⁷

This understanding of the mixed race individual as defective, and the hostility that was directed toward black and white mixed race individuals as a result, according to Leong, soon "spilled over" into other mixed race combinations besides black and white. The hostility was soon applied to relationships between whites and Native Americans, for example, then expanded to apply to other combinations.³⁸ Mexican Americans, for example, particularly Mexican mestizos, were at one time considered a "mongrel race" who had inherited the worst qualities of Spaniards and Indians to produce a race "still more despicable than that of either parent".³⁹ There were also cases where the citizenship of white women was revoked once the women married Asian or Indian men. Leong cites the long history of pervasive anti-miscegenation statutes – from the 17th century until 1967 and at one time present in 38 states – as proof of how entrenched the proscription against race-mixing has been in America and how multiracial animus has manifested itself in laws that would very likely be interpreted today as discriminatory (against multiraciality and multiracial people) if multiracial discrimination were recognized as legitimate.⁴⁰

³⁵ See, e.g., Taylor, *Race: A Philosophical Introduction*

³⁶ *Leong*, 484.

³⁷ *Ibid.*, 485.

³⁸ *Ibid.*

³⁹ *Ibid.*, 486.

⁴⁰ *Ibid.*

As further proof, and to establish that mixed race animus continues today, Leong then lists some incidents of multiracial “animus” described in recent federal court cases. In one incident, described by the U.S. District Court for the Eastern District of Tennessee in passing, Oreos were thrown onto a high school basketball court when a “biracial” student entered the game.⁴¹ In another federal court case, a white supervisor of an African American employee who had multiracial children is reported as having made a series of derisive remarks about the children directed at their status as multiracial.⁴² In yet another incident of multiracial animus described in a federal court case, not only were an employee’s multiracial children subjected to multiracial slurs (e.g., “half-breed”), the employee herself was subjected to disparaging comments about her interracial relationship from her coworkers who at one point left a magazine article condemning interracial relationships in her desk drawer.⁴³ In another incident still, an employee in an interracial marriage was subjected to “pervasive harassment” -- a coworker even remarking at one that she had “ruined herself by marrying a black man and having biracial children”⁴⁴ – including having her children referred to as “monkeys” and “zebras.”⁴⁵ Leong also lists a similar incident of multiracial “animus” described in a recent *state* court case.⁴⁶

An Alternative Path for Protecting Multiracial Plaintiffs

If antidiscrimination law has the goal of providing a remedy for members of historically oppressed groups, and if, as Leong shows, multiracial people qualify as such a group, then the logical way to provide multiracial plaintiffs with redress in antidiscrimination cases would seem to be to simply add multiracial people to the list of specially protected groups already in existence in antidiscrimination law. This would both achieve Leong’s goal of protecting multiracial plaintiffs from the unique kind of discrimination they face and allow the plaintiffs themselves to racially self-identify, which would seem to be preferable to having a race imposed from without, i.e., through the perception of the discriminator. Additionally, adding a new category to the existing categories of official legal races has precedent in the history of how racial categories have evolved and changed over time, for example in the U.S. Census.

Notably, however, Leong explicitly rejects this approach, arguing that official recognition of multiracial people as a legally cognizable group would operate to further reify the idea that race is biologically real. This is a well known argument for anyone familiar with the debates inside the multiracial movement. The basic idea is that there can only be multiracial people if there are monoracial people, so admitting the existence of multiracial people implies the existence of monoracial people. But the flaw in this argument is, once again, a failure to distinguish between the biological (or genetic) reality of race and its social reality. That monoracial identity is socially constructed does not preclude the possibility that monoracial identity is nevertheless socially *real*. The same is true of multiracial identity. Many things that

⁴¹ *Defoe v. Spiva*, 8.

⁴² *Green v. Franklin National Bank*, 13.

⁴³ *Wheaton v. North Oakland Medical Center*, 777.

⁴⁴ *Madison v. IBP, Inc.*, 128.

⁴⁵ *Ibid.*

⁴⁶ *Loeffelman v. Board of Education* (A terminated teacher took issue with having been terminated for describing mixed children as “racially confused” and “dirty” in front of biracial students during school hours.)

are socially constructed are nevertheless *real*, if by “real” we mean that these things operate meaningfully in our lives. The classic example of this is money, but we can think of others.

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

In summary, while I commend Leong for pointing out in legal scholarship the existence and unique nature of discrimination against multiracial people, I respectfully submit that the solution of simply adding “multiracial” to the existing categories of “suspect classes” in equal protection law and “protected classes” in employment discrimination cases is a better route to providing multiracial persons with the special protection to which they are entitled. The idea that multiracial persons should be designated as a suspect/protected class in antidiscrimination law is finding growing support in the legal literature.⁴⁷

Concluding Remarks

In summary, Nancy Leong’s goal of changing antidiscrimination law so as to promote racial understanding and the elimination of racism is out of step with the purpose of antidiscrimination law. Moreover, the particular method Leong suggests for achieving that goal is unlikely to better protect those who are the victims of multiracial discrimination. Specifically, antidiscrimination law was not designed to achieve lofty, idealistic goals like promoting racial understanding and eliminating racism, but to provide a remedy for specific acts of discrimination in the world; and a change in focus from “categorical” race to “perceived race” on the part of judges in antidiscrimination cases, would not protect multiracial plaintiffs. Instead, such a switch would operate to provide multiracial plaintiffs with even less protection under the law than they have now.⁴⁸ Specifically, a switch to “perceived race” instead of actual race (what

⁴⁷ See, e.g., Rives, *Comment: Multiracial Work: Handing Over the Discretionary Judicial Tool of Multiculturalism*

⁴⁸ Note that Leong herself implicitly concedes that multiracial plaintiffs can at present achieve at least some measure of relief if they simply allow themselves to be lumped into one of the existing monoracial categories currently recognized by the legal system (Asian, Latino/a, White, Black, and Native American). While allowing this lumping to occur is unacceptable to Leong for the reason that doing so “erases” the reality of multiracial discrimination, and while this is a good reason to object to such a process, at least multiracial persons can be provided a *remedy* under the current system. By contrast, if courts were to focus on perceived race in discrimination cases, only those *perceived as* multiracial would be protected, not actual multiracial persons themselves, leaving multiracial persons no remedy at all for the discrimination they encounter

Leong calls “categorical” race) would more likely result in the inclusion in the class of specially protected persons those who *should not be* specially protected (namely, persons who only seem to be multiracial but are not actually be multiracial), and the exclusion from protection of persons who *should be* specially protected (namely, persons who *actually are* multiracial).

Also, it seems that Leong’s desire to change the focus of antidiscrimination law to “perceived race” rather than “categorical” race is just generally muddled and somewhat naïve. The opposite of “perceived” race is not “categorical” race but objective race; and the opposite of “categorical” race is not “perceived” race but non-categorical race (i.e., an understanding of race that recognizes the fluidity of the concept of human racial categorization). By recommending a switch from “categorical” race to “perceived” race, then, Leong seems to want to establish *both* that objective race does not exist *and* that categorical race is an illusion in one fell swoop. She seems to think that if these two things are established, somehow magically the ideal of racial understanding that she seeks will be achieved, and racism and racial discrimination will somehow suddenly disappear. But, recent research in critical race theory underscores the naiveté of this kind of thinking. For many critical race theorists, primarily those identifying themselves as “racial realists,” racism in American society is here to stay; and the sooner persons of color accept this fact, the sooner they can get on to the productive business of bettering the lives and conditions of people of color rather than wasting time trying to alter the “racial consciousness” of American society, an enterprise understood as an exercise in futility.⁴⁹

Another problem with Leong’s recommendation is that she does not make clear whether she is advocating using “perceived” race instead of “categorical” race for cases of multiracial discrimination *only* or whether she is advocating this switch for all cases of racial discrimination. It seems that to the extent that her argument makes sense, it only makes sense for multiracial discrimination. Is Leong recommending that the “perceived” race standard should only be used in cases of multiracial discrimination, keeping “categorical” race in usage for all other cases of discrimination? If so, it seems that would likely present somewhat of a doctrinal nightmare. For example, on what jurisprudential basis could using one standard for multiracial discrimination and another for other kinds of discrimination be justified? In the alternative, is Leong recommending that all racial identity should be defined in terms of the perception of the would-be discriminator? If so, people who currently understand themselves as black, for example, but who are not perceived as black (owing perhaps to extraordinarily light skin) would be unable to avail themselves of protection under the law. There is also the obvious logistical problem of using perception as the basis for racial identity across the board: How would one prove the perception of the alleged discriminator? What would be the standard of proof?⁵⁰ Whether advocated for multiracial discrimination only or for discrimination cases across the board, then, it seems that Leong’s recommended switch would present a number of doctrinal and practical challenges.

Additionally, it seems that Leong’s entire argument has been generated by her unfamiliarity with the idea that reality can be based on something other than biology (on something other than so-called “hard” science), i.e., that objectivity can be based in something

unless they can ultimately prove in court that they were “perceived” as multiracial by a would-be discriminator.

⁴⁹ See, generally, Banton, *Racial Consciousness*; and Bell, “Racial Realism.”

⁵⁰ “Would the ‘reasonable racist’ have identified this plaintiff as black under these circumstances?” is a possible standard of proof in this scenario, for example.

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

Leong’s list of acts of multiracial animus have a familiar ring to any multiracial person living in America. Multiracial persons are constantly subjected to the question that Leong herself cites in her paper: “What are you?”⁵¹ or, “No, but what are you *really*?” Multiracial persons constantly live in what Ruth Colker has called “the gap” between racial categories.⁵² But, the question I have for Leong is whether, in her view, being constantly asked the question, “What are you?” contains any more “animus” when it is directed at an actual multiracial person than when it is directed at an “individual perceived as multiracial”? Leong’s argument seems to necessitate that she answer “no” to this question. Such a response, however, focuses the attention of discrimination law more on punishing the discriminator than on providing redress for a plaintiff in a discrimination case and ignores the reality that the purpose of antidiscrimination law is to protect actual victims of discrimination, not to police the minds of would-be discriminators.

Every multiracial person can sympathize with Leong’s desire that society transcend racial categories, but as Ruth Colker also points out, “[c]ategories can serve at least two constructive purposes. First, categories have value as a form of self-identity.... Second, categories are crucial for political, instrumental purposes.”⁵³ Colker explains further, “It is not enough for society to become nondiscriminatory, because not all groups in society currently operate on a level playing field.... Because law and society have imposed subordination on people due to their membership in group-based categories, we need to make reference to categories in order to develop fair and effective ameliorative programs.”⁵⁴

The fact is that for the time being racial categories are necessary in order to right the social wrongs done in the name of those categories. Leong has taken a great step toward righting the wrongs done to multiracial people by pointing out the gap in antidiscrimination law through which multiracial people often fall. She has also added significantly to supporting the case for having multiracial people understood as a suspect class/protected class in antidiscrimination law by meticulously cataloguing the type of unique animus to which multiracial people are routinely subjected. Leong is wrong, however, to recommend a switch from using the current understanding of race to an understanding of race based on the perception of the would-be discriminator. Doing so would specially protect many people who were not meant to be

⁵¹ Leong, 477.

⁵² Colker, *Hybrid: Bisexuals, Multiracials, and Other Misfits under American Law*

⁵³ Colker, 7.

⁵⁴ *Ibid.*

protected by antidiscrimination law and, more importantly, leave many of the very people Leong (ostensibly) hopes to protect on the sidelines of equal protection under the law

A better option, then, for modifying antidiscrimination law to make it more receptive to the claims of the unique kind of discrimination experienced by multiracial people is to ask courts to (1) acknowledge the reality that equal protection law was designed to protect members of historically oppressed groups rather “individuals” from illegal discrimination, to (2) add multiracial persons to the list of suspect classes in equal protection law, and to (3) add multiracial persons to the list of protected classes in employment discrimination law. To modify antidiscrimination law in this way would be to tweak it so as to align it in accordance with the increasing population of multiracial persons in America and with the unique type of discrimination multiracial people face. It would also be in keeping with the historically-defined purpose of antidiscrimination law, which is to provide historically marginalized and oppressed groups with a legal remedy for the illegal discrimination that they experience in virtue of being a member of such a group. As a legal hermeneutical approach to the law suggests, the way the law is interpreted should be a function of a dialogue between theory and practice, between the black letter law on the books and the social reality the law is designed to negotiate. In other words, judges should interpret antidiscrimination law so as to include in those protected everyone who is a member of a historically oppressed group. Since multiracial persons, as Leong has done a good job of showing, qualify for this status, the law should be interpreted so as to address the unique form of discrimination they face.

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