(RE)DEFINING RACE: ADDRESSING THE CONSEQUENCES OF THE LAW'S FAILURE TO DEFINE RACE

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Modern lawmakers and courts have consistently avoided discussing how to define race for legal purposes even in areas of law tasked regularly with making decisions that require them. This failure to define what race is in legal contexts specifically requiring such determinations, and in the law more broadly, creates problems for multiple actors in the legal system, from plaintiffs deciding whether to pursue claims of discrimination, lawyers deciding how to argue cases, and legal decision-makers deciding cases where race is not only relevant but often central to the legal question at hand. This Article considers the hesitance to engage with questions of racial definition in law. Drawing on findings from social psychology to demonstrate how race can be defined in multiple ways that may produce different categorizations, this Article argues that the lack of racial definition is problematic because it leaves a space for multiple definitions to operate below the surface, creating not only problematic parallels to a bad legal past but also producing inconsistency. The consequences of this continued ambiguity is illustrated through an ongoing dilemma in Title VII anti-discrimination law, where the courts struggle to interpret race, illustrating the general problems created by the law's refusal to define race, demonstrating the negative impact on individuals seeking relief and the confusion created as different definitions of race are applied to similar cases, producing different outcomes in similar cases. This Article concludes that definitions of race should be intentionally, rationally selected by lawmakers and/or the courts, creating racial definitions that make sense in the context of the law or policy requiring the use of race, that are tied to the reasons for implicating race in the law, and that are informed by evidence about how racial perception and categorization processes operate.

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INTRODUCTION

Imagine a person for whom the following things are true. This person is often asked, "What are you?" and is faced with many guesses as to the answer: mixed race, Indian, Puerto Rican, Dominican, Black, White with a tan. It is not uncommon for others to approach this person with questions in multiple languages. This person would say that she has a White mother and a Black father. This person has a diverse social network, and at different times can be seen associating with groups that are predominantly White, predominantly Black, or racially mixed. This person self-identifies as multiracial, as Black, and as White, depending on the situation, the context, or perhaps the layout of the particular form asking the question. Now imagine that you were asked to identify the race of this person. Which of the available pieces of information, assuming you had access to all described above, would you rely on? One could make a case for the dominance or superiority of any one piece of information, but it would also be difficult to argue that reliance on any of the others was objectively wrong. While this hypothetical person could be considered the most extreme version of racial ambiguity,[1] this person's ambiguity highlights the variety of ways we think about racial identity and cues to racial group membership. Depending on which piece of information someone has access to or prefers to base racial categorizations on, as well as the particular manifestation of the cue in the moment, different perceivers/categorizers may come to different conclusions about the racial identity of the above-described person.

Like people in everyday life, the law also pervasively categorizes people by race and has done so for centuries, yet if we asked Chief Justice Roberts, for example, about how to identify the above hypothetical person, he would be just as confused.[2] The pervasive need to categorize[3] creates discomfort among many, including jurists like Chief Justice Roberts, particularly when they subscribe to a colorblind

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1 Although this is not unrealistic or uncommon now (it happens to resemble the experience of the Author), it will likely become increasingly common with demographic shifts leading to increasing numbers of people who identify as multiracial and/or have identities, and particularly appearances, that are relatively ambiguous. *See* PEW RESEARCH CTR., MULTIRACIAL IN AMERICA: PROUD, DIVERSE AND GROWING IN NUMBERS 1 (2015), http://www.pewsocialtrends.org/files/2015/06/2015-06-11_multiracial-in-america_final-updated.pdf.

2 Oral Argument, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 4812586, at *32 ("Should someone who is one-quarter Hispanic check the Hispanic box or some different box? . . . What about one-eighth?"). Justices Scalia and Alito also chimed in on this line of questioning about how to define race. *See id.*

3 *See generally* C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93 (2000); C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Categorical Person Perception*, 92 BRIT. J. PSYCHOL. 239 (2001).

ideal.[4] Thus, Roberts, who invokes a colorblind society in arguing that we must stop discrimination on the basis of race by refusing to see racial categories or identities, still muses about what it means to be Hispanic in *Fisher v. University of Texas*, even though the rumination on the meaning of race unsurprisingly found no place in the final decision of that case.

Despite the Court's relative silence on the meaning and construction of race, the law relies on conceptions of race to sort out a wide range of conflicts. For example, imagine the above hypothetical person is a plaintiff in a discrimination case. How do (or should) courts go about making a determination about which aspects of this person's identity are relevant to making a determination about whether something has occurred because of this person's race?[5] In this example, in the absence of guidance from discrimination laws themselves about what is meant by race, the answer is unclear. And the answer is not only unclear now, since legal history is filled with numerous stories about individuals living at the boundaries of racial categories and the law's clumsy attempts to reconcile their complex identities,[6] particularly in light of legal definitions of race that were hard to apply in practice, inconsistent, and/or non-existent. In this particular type of discrimination case, racial identities most often pass without dispute or reflection. But for a growing number of individuals, those that exist at the margins of existing racial categories, their protection against racial discrimination may not be guaranteed in light of the law's internal discomfort with confronting the complex and ambiguous nature of the legal construction of race. Therefore, this Article discusses both the cognitive and legal origins of race and the implications of race as a concept that is multiply-determined (by multiple racial cues and

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4 The legal origin: *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." Social science definition: an "ideology in which all people [are] to be judged as individual human beings—without regard to race or ethnicity." Carey S. Ryan et al., *Multicultural and Colorblind Ideology, Stereotypes, and Ethnocentrism Among Black and White Americans*, 10 GROUP PROCESSES & INTERGROUP REL. 617, 618 (2007).

5 Camille Gear Rich, *Racial Commodification in the Era of Elective Race: Affirmative Action and the Lesson of Elizabeth Warren* (USC Gould Sch. of Law, Legal Studies Research Paper Series No. 12-19, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132685 (arguing that a key contemporary legal issue is how the law can negotiate complex racial identities and the challenges these complex identities create for antidiscrimination law).

6 *See, e.g.*, ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS (2013) (telling the story of the Rhinelander case, a 1924 divorce case that hinged on the legal determination of Alice Rhinelander's race). Consider also the racial identity aspect of *Plessy v. Ferguson*, 163 U.S. 537, namely that the dispute arose out of Plessy's refusal to leave the White car because he claimed a White identity and passed as White (i.e., appeared White), and this conflicted with legal definitions of race that said his 1/8 Black ancestry made him Black.

definitions) at a time when the law is generally hesitant to engage in definitional discussions of race even in areas of race-conscious law.

"[L]aw provides the raw materials through which the mechanisms of social categorization act."[7] In other words, the law has helped shape race, and it has also made race matter.[8] Not only does the law play the role of creator and maintainer of social understandings about race, among other things, it also reflects existing psychological and social realities back to society.[9] The law influences and reflects how we experience and define social categories like race, and it is also being shaped by the psychological underpinnings of social categorization processes. Understanding the reality of this bidirectional relationship is the necessary starting point for any discussion about the relationship between legal and psychological conceptions of race. Drawing on social psychological research into how race as a concept is psychologically constructed, this Article attempts to provide a framework for better defining race as a legal construct. This highlights both the role of law in defining race and the implications of the law's current approach to racial definition for legal outcomes and society's psychological experiences of race.

Race[10] is a loaded and ubiquitous word, social category, and concept in American culture. Everyday interactions, academic and scientific research, law and politics, and popular media are regular domains for its discussion, yet the discussion in any domain rarely

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7 R. Richard Banks & Jennifer L. Eberhardt, *Social Psychological Processes and the Legal Bases of Racial Categorization*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 54, 56 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

8 *See, e.g.*, IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE, 111, 111–53 (1996); Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487 (2010).

9 "Law has shaped race and changing notions of race have shaped law." Banks & Eberhardt, *supra* note 7, at 56; *see also* Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 409 (2012) ("[E]xamining the manner in which judges recognize race elucidates how courts (and the broader legal culture of which they are part) both assess and simultaneously create racial significance.").

10 I use the word "race" throughout to describe groups of individuals differentiated on the basis of socially-constructed concepts of racial kinds amongst humans, most often on the basis of believed relevance of shared physical characteristics or ancestries. I do not intend to make any claims about these groups being identifiable at any level other than a social one, as research has consistently shown that American racial groups are not distinguishable at the biological or genetic level, *e.g.*, David A. Hinds et al., *Whole-Genome Patterns of Common DNA Variation in Three Human Populations*, 307 SCIENCE 1072 (2005); R. C. Lewontin, *The Apportionment of Human Diversity*, 6 EVOLUTIONARY BIOLOGY 381 (1972), despite widespread beliefs to the contrary and the reification of this idea with the advent of race-based medicine, *e.g.*, Dorothy E. Roberts, *Legal Constraints on the Use of Race in Biomedical Research: Toward a Social Justice Framework*, 34 J.L. MED. & ETHICS 526 (2006). When talking about biologically-related cues of race, I refer only to the fact that these characteristics are rooted in biology to the extent that, for example, genes determine one's physical appearance. The meaning given to particular constellations of these traits is socially-determined.

begins with an understanding of what "race" is perceived to be or what it represents in any precise terms. A dictionary definition of race says it is "[e]ach of the major divisions of humankind, having distinct physical characteristics."[11] This definition suggests that race is defined by physical characteristics, but other definitions suggest that race is evident from ancestry or descent (e.g., race is a "group of people descended from a common ancestor"[12]). Taken together, these definitions allude to the biological roots of race, evident either through biologically-determined physical attributes or ancestry. As a social category and concept, though, there must be elements of social construction. Robin D. G. Kelley said: "Race [i]s never just a matter of how you look, it's about how people assign meaning to how you look."[13] This quote succinctly suggests that race is about biology to the extent that people assign meaning to certain biologically-determined attributes. This perspective highlights a nuanced understanding often lost in discussions about whether race is biologically-determined or socially-constructed.

The lack of discussion about what race is (rather than just what race leads to) leaves everyone to operate on the basis of their own perspectives and assumptions about race, whether that is a biological, social construction, or other view. Most people seem to come to discussions of race assuming that everyone else has a similar understanding of how to define race and how to apply it to individuals and groups.[14] For example, even in an assumed simple racial categorization situation, the presumption is that everyone knows who is Black and who is White, for example, even with no prior discussion of what it means to *be Black* or *be White*. More specifically, most people assume that everyone will agree on who belongs in which category and which characteristics make individuals members of the category. As hinted at above, even a simple disagreement over whether race is biologically-determined or socially-constructed may lead people to differ in making seemingly simple racial categorizations because they are using different information. In addition, all of the discussion thus far assumes that there are, in fact, distinct lines to be drawn even if they are drawn on the basis of different information. This assumption is further

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11 *Race*, OXFORD DICTIONARIES, https://en.oxforddictionaries.com/definition/race#race_Noun_300 (last visited Mar. 24, 2017).

12 *Id.*

13 DVD: Race—The Power of an Illusion, Episode Two: The Story We Tell (California Newsreel 2003); *see also* Osagie K. Obasogie, *Do Blind People See Race? Social, Legal, and Theoretical Considerations*, 44 L. & SOC'Y REV. 585, 587, 602, 609 (2010).

14 *See, e.g.*, Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1127–29 (2008) (explaining that when talking about racism or discrimination, "black and white speakers think they are talking about the same thing, but they may not be").

tested by the ever-increasing population of multiracial people,[15] which blurs the lines between racial groups, however they are constructed, rather than simply moving them around.

From lived experience, we know that perceptions of racial distinctions are associated not only with appearance and ancestry, but also social behaviors like clothing and hairstyle selection and manner of speaking,[16] as well as class markers like education and income.[17] We also know that in lay discussions of race, the more someone conforms to the prototype of a particular race on multiple dimensions, the more likely they are to be perceived as representative of the racial group in question. For example, someone with more Afrocentric facial features, Black ancestry, stereotypically Black clothing and manner of speaking, little education, and low income is likely to be considered "more" Black than someone with fewer of these characteristics. The seemingly additive nature of these cues suggests that race is not based only on "obvious" biologically-based cues such as appearance and ancestry, but that other cues also affect perceptions of race. Considering the ways lay people talk about race raises questions about what types of information about a person serve as cues to race, how these different types of information might be prioritized relative to each other, and how they may interact to affect racial categorization.

These examples indicate that race is not simply made up of one piece of information or based on one theory of origin. Instead, race can be defined in accordance with multiple theories about its origins (biological and/or social) as well as on the basis of multiple cues (ancestry, appearance, self-identification, etc.). Not surprisingly, these distinctions between theories of race and the multiple cues to race that we observe in everyday life also show up in the law.[18] The same debates about biological determinism versus social construction and the appropriate cues for racial categorization play out in legal discourse and individual cases. Unlike day-to-day conversation, which does not

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15 *E.g.*, U.S. CENSUS BUREAU, C2010BR-02, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 (2010).

16 *See, e.g.*, DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN "POST-RACIAL" AMERICA (2013); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

17 *See, e.g.*, Jonathan B. Freeman et al., *Looking the Part: Social Status Cues Shape Race Perception*, 6 PLOS ONE e25107 (2011); Destiny Peery, Race at the Boundaries: Toward a Better Understanding of the Construction of Race Through the Study of Racial Categorization of Ambiguous Targets (Aug. 2012) [hereinafter Peery, Race at the Boundaries] (unpublished Ph.D. dissertation, Northwestern University) (on file with Author); Andrew M. Penner & Aliya Saperstein, *How Social Status Shapes Race*, 105 PNAS 19628 (2008).

18 *See, e.g.*, Gómez, *supra* note 8, at 490–91 (discussing multiple theories of race in law); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1 (1991) (discussing the shifting definitions used by just the U.S. Supreme Court, let alone lower courts, in Fourteenth Amendment and Title VII jurisprudence).

purport to offer clear and efficient rules for dealing with social issues, the law aims to provide clear and efficient means for interpreting concepts relevant to law and policy and guiding people's behavior in ways that conform to the ideals set out in law. For this reason, it is important that the law take seriously the statements it makes, explicitly and implicitly, with regard to these debates about racial definitions, for the law is a powerful influencer of our understandings of social concepts, including race.

The law's failure to define race more clearly, perhaps due to the discomfort these efforts can engender, results in omitted cases and remedial gaps. And Chief Justice Roberts's struggle with the definition of race in *Fisher I* mirrors a larger discomfort in the law. This Article, then, examines how the law's racial definitions (or lack thereof) shape understandings of race as a psychologically and socially important category through discussion of relevant psychological research on the colorblind ideal and racial categorization processes, as well as an illustration of the issues caused by contemporary failures of law to define race even in race-conscious domains. It calls attention to the need for definitions of race in law and proposes that these definitions be tailored to the domain of the relevant law or policy, tied to the goals of the law (and its reasons for implicating race), and cognizant of relevant evidence about how racial perception and categorization processes operate.[19] Part I briefly discusses the historical and contemporary approaches to the colorblind ideal, including a short survey of the psychological research demonstrating the effects of colorblindness on racial attitudes and intergroup relations. Part I also discusses how the colorblind ideal has possibly led to the law's hesitance to define race by encouraging a view that talking about or acknowledging race is problematic in and of itself. Part II traces the shift from explicit legal definitions of the past to the implicit definitions that fill the void left by the law's contemporary refusals to define race, demonstrating that even though explicit legal definitions have disappeared from the word of law, the legacy of these definitions operates in contemporary legal approaches to questions around race. Part III examines the implications of failing to define race through examination of an ongoing struggle in

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19 A similar discussion (and call to action) is happening in science and medicine with regard to the use of race as a relevant category in research, with some calling for discussions about "when and how best to use race as a variable rather than arguing about the categorical exclusion or inclusion of race [as a relevant category] in science." Pilar Ossorio & Troy Duster, *Race and Genetics: Controversies in Biomedical, Behavioral, and Forensic Sciences*, 60 AM. PSYCHOLOGIST, 115, 116 (2005). Dorothy Roberts would consider this part of a social justice approach to the use of race wherein there is a distinction made between race as a biological category (myth) and a social category (reality) and engagement with race as a social category includes discussion of not only when but also how to use race. Roberts, *supra* note 10, at 531–33.

Title VII anti-discrimination law as highlighted by plaintiffs at the boundaries of racial categories who find themselves without protection against discrimination due to judicial disputes about how to interpret Title VII's use and meaning of race as a category. Part IV discusses the social cognitive origins of race as illustrated through psychological and social science research, offering this evidence as a foundation for new legal definitions of race. Part V concludes with the normative implications of refusals to define race and calls for more goal-driven, intentional uses and definitions of race throughout the law.

I. THE COLORBLIND IDEAL AND RACIAL DEFINITIONS

There is a lot of discussion around the ideal way to confront issues around diversity, including addressing inequality and preventing prejudice and discrimination. Different strategies produce different outcomes in terms of their effects on social groups, the efficacy of ameliorating intergroup contact situations, and attitudes toward diversity efforts.[20] One such approach, colorblindness, is a strategy that is considered explicitly within the law, as well as outside the law.[21] It is also a strategy that some would argue works against the very goals it purports to accomplish by implicitly or explicitly discouraging engagement with race as a relevant social topic.[22]

Colorblindness is the pervasive default approach to issues of diversity in the United States.[23] Amongst lay people and within social institutions, including the law, it is held up as the ideal strategy for overcoming conflict in racial/ethnic relationships and inequalities based on these social group memberships.[24] This seems to be in part due to its intuitive appeal as an "easy" strategy that should make the uncomfortable topic of race disappear by trying to forget its relevance.[25] The colorblind ideal has a long history in law, dating back over one hundred years,[26] and the preference for colorblindness in law has been relatively steady since then.[27] However, what colorblindness means for

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20 *See generally* Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J.L. & SOC. POL'Y 473 (2011) [hereinafter Peery, *The Colorblind Ideal*].

21 Gómez, *supra* note 8, at 501 (discussing how it would be useful to consider colorblindness's deep roots in law, which has led to increasingly wide acceptance in society at large).

22 *See, e.g.*, Michael I. Norton et al., *Color Blindness and Interracial Interaction: Playing the Political Correctness Game*, 17 PSYCHOL. SCI. 949 (2006).

23 *See, e.g.*, *id.*

24 *See generally* Peery, *The Colorblind Ideal*, *supra* note 20.

25 Norton et al., *supra* note 22, at 949.

26 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

27 *See generally* ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

the law has shifted over time, beginning with *an every distinction is a bad distinction* approach, shifting to a more race-conscious approach to ensure colorblindness in outcomes, and returning recently to the *no distinctions* approach.[28] Alongside these shifts in the umbrella approach to diversity in law, the law's take on racial definitions has also had an interesting history. In the early days of the colorblind ideal, during the inception of it as a "no distinctions" approach, the law had very explicit racial definitions and race determination procedures.[29] With the shift toward race-consciousness during the civil rights movement, these explicit racial definitions were slowly removed from the word of law. Now, we find ourselves back to a "no distinctions" version of colorblindness that implicitly discourages discussion of race[30] for fear of drawing lines that will only be used divisively, meaning even discussion for the sake of definition and clarification in order to administer race-conscious law deemed suspicious and problematic.

In this Part, the historical and contemporary approaches to the colorblind ideal in law are discussed briefly, followed by a brief discussion of the efficacy of the colorblind ideal in ameliorating race relations. Finally, the relationship between legal colorblindness and racial definitions is discussed.

A. *Historical Colorblindness*

Justice Harlan's dissent in *Plessy v. Ferguson*[31] is considered the introduction of the colorblind ideal into the legal discourse around race,[32] and the American judicial system has not looked back since, at least in terms of articulating the ideal approach to intergroup relations.[33] It has been argued that the colorblind ideal was born out of the anti-discrimination principle enshrined in the Fourteenth Amendment's Equal Protection Clause[34] and that the anti-discrimination principle requires a colorblind approach.[35] In the earlier interpretations of this relationship between the anti-discrimination principle and the

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28 *Id.*

29 *See infra* Part II.

30 *See, e.g.*, Evan P Apfelbaum, Samuel R. Sommers & Michael I. Norton, *Seeing Race and Seeming Racist? Evaluating Strategic Colorblindness in Social Interaction*, 95 J. PERSONALITY & SOC. PSYCHOL. 918 (2008).

31 163 U.S. 537.

32 *Id.* at 559 (Harlan, J., dissenting) ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.").

33 *See generally* Peery, *The Colorblind Ideal*, *supra* note 20.

34 U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to *any person* . . . equal protection of the laws." (emphasis added)).

35 163 U.S. at 559 (Harlan, J., dissenting).

colorblind ideal, the anti-discrimination principle called for colorblindness because it was simply interpreted to mean that there should be no distinctions recognized between groups in order to prevent discrimination on the basis of those distinctions.[36] In other words, in order to achieve equality, we should stop making distinctions all together. With the advent of the civil rights movement, the relationship between the anti-discrimination principle and the colorblind ideal began to shift, as it seemed necessary to be race-conscious, not colorblind, in order to monitor and enforce the anti-discrimination principle.[37] This race-conscious perspective persisted during the civil rights movement and the decades following, leading to race-conscious law and policy such as anti-discrimination law and affirmative action. In the last decade or so, the law has made a strong shift back toward the original conception of colorblindness articulated by Justice Harlan, one that links the anti-discrimination principle and the colorblind ideal through a shared belief in a "no distinctions" approach to issues of race.[38]

B. *Contemporary Colorblindness*

The claim by Chief Justice Roberts that, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[39] explicitly announced the beginning of the newest era of the colorblind ideal in law.[40] Written in the plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*,[41] one of the most important race-related cases in modern history, it explicitly adopted the colorblind ideal on behalf of the Roberts Court and framed the next generation of legal discourse around issues of race. It also shifted the relationship between the anti-discrimination principle and

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36 *See generally* KULL, *supra* note 27.

37 *Id.* There was an understanding that using race as a social category, as opposed to a biological category, is critical to finding and eliminating inequities based on race. *See, e.g.*, Roberts, *supra* note 10, at 527.

38 For more discussion of this re-linking of the colorblind ideal and the anti-discrimination principle or anti-classification, see, for instance, Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); see also Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

39 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Seattle Schools*), 551 U.S. 701, 748 (2007).

40 Some would argue that the re-commitment to the "no distinction" colorblind ideal occurred in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which upheld affirmative action, but prohibited racial quotas, or in *Grutter v. Bollinger*, 539 U.S. 306 (2003), wherein Justice O'Connor expressed hope that twenty-five years or less would be needed before we could rely on colorblind policies.

41 *Seattle Schools*, 551 U.S. 701.

colorblindness back toward the original iteration of colorblindness,[42] one that assumes that as long as distinctions are not made explicitly, discrimination is less likely to occur.

In the decade since *Grutter v Bollinger*,[43] the landmark case dealing with race-conscious admission plans in higher education that signaled the end of a race-conscious colorblind ideal,[44] the original no distinctions version of the colorblind ideal has been reiterated again and again in cases involving race-related issues, including not only modern school desegregation plans,[45] but also race-based admissions[46] and employment discrimination.[47] The opinions in all of these cases set out the colorblind ideal as the only acceptable means to achieving racial equality,[48] often while still acknowledging the reality of continued racial inequalities.[49] In *Fisher I*, the Court goes to great lengths to make the historical relationship between the anti-discrimination principle and the colorblind ideal salient,[50] using quotes from equal protection jurisprudence to reinforce the historical and contemporary link made between solving discrimination by not distinguishing between groups.[51] In *Schuette v. Coalition to Defend Affirmative Action*,[52] Justice Kennedy, on behalf of the plurality, goes to great lengths to reaffirm that the colorblind ideal, best articulated for the current Court in *Seattle Schools*, requires that entities, including schools, the government, and the courts,

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42 KULL, *supra* note 27, at 113–30.

43 539 U.S. 306.

44 Colorblindness and race-consciousness are now seen, again, as competing frameworks for approaches to diversity. Roberts, *supra* note 10, at 526. But some argue that there needs to once again be a decoupling of the colorblind ideal and anti-classification. *See, e.g.*, Driver, *supra* note 9, at 411, 450–51 (arguing that the anti-classification principle and the colorblind ideal are conceptually distinct despite conventional wisdom to the contrary because under the anti-classification principle, the government is forbidden from racially categorizing individuals, whereas under the colorblind ideal, the government cannot take race into account for individuals and within society as a whole).

45 *Seattle Schools*, 551 U.S. at 748.

46 Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).

47 Ricci v. DeStefano, 557 U.S. 557 (2009). For full discussion of the implications of *Ricci* in terms of its effect on the discourse around post-racialism/colorblindness versus racial classification and race-conscious ness, see, Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197 (2010).

48 Peery, *The Colorblind Ideal*, *supra* note 20, at 477.

49 *E.g.*, Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved [here ensuring representation of racial minorities in higher education].").

50 133 S. Ct. at 2417–19.

51 *E.g.*, *id.* at 2418–19 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people" and "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect" (first quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000); then quoting Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting))).

52 134 S. Ct. 1623 (2014).

be suspicious of engaging in any form of racial definition or categorization.[53]

C. *Colorblindness in a Race-Conscious World*

Colorblindness seems like a commonsense approach to issues of diversity, and it is that intuitive appeal that makes it such a pervasive ideal.[54] Unfortunately, colorblindness fails in the face of the reality that people are simply not color (or category) blind.[55] It is cognitively adaptive to notice and process salient cues to social group memberships, which lead to activation of a wealth of information associated with those groups. These basic social categories, including race, gender, and age, serve as quick sources of information in a complex social world.[56] Social psychologists would argue that this adaptive cognitive processing of social groups is not as inherently problematic as courts have suggested.[57] In addition, even if we accept the courts' assertions that the existence of groups and the recognition of distinctions between them are inherently problematic, it is nearly impossible to avoid noticing basic social categories like race, making the orders to avoid this naively optimistic at best.[58]

In addition to the cognitive and psychological difficulties of achieving true colorblindness, a colorblind approach often works against the very goals it is supposed to serve.[59] While colorblindness is supposed to be inclusive and prevent stereotyping, prejudice, and discrimination, empirical evidence shows that it may instead lead to less successful intergroup interactions that make individuals seem more biased,[60] and increased explicit[61] and implicit prejudice toward minority

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53 *Id.* at 1633–34.

54 Peery, *The Colorblind Ideal*, *supra* note 20, at 484.

55 *Id.* at 481; *see also* Obasogie, *supra* note 13, at 611–13 (discussing how blind people also "see" race, pointing out that it is assumed that race and racism are "problems of visual recognition and not social or political practices").

56 Peery, *The Colorblind Ideal*, *supra* note 20, at 481.

57 *Id.*

58 *Id.* at 482.

59 *Id.* at 484–90.

60 *See, e.g.*, Evan P. Apfelbaum et al., *Learning (Not) to Talk About Race: When Older Children Underperform in Social Categorization*, 44 DEVELOPMENTAL PSYCHOL. 1513 (2008); Sophie Trawalter, Jennifer A. Richeson & J. Nicole Shelton, *Predicting Behavior During Interracial Interactions: A Stress and Coping Approach*, 13 PERSONALITY & SOC. PSYCHOL. REV. 243 (2009); Jacquie D. Vorauer, Annette Gagnon & Stacey J. Sasaki, *Salient Intergroup Ideology and Intergroup Interaction*, 20 PSYCHOL. SCI. 838 (2009).

61 *See, e.g.*, C. Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808 (1994).

outgroups.[62] These are precisely the outcomes colorblindness is supposed to remedy (and at the very least not exacerbate). In addition to animating negative outcomes, studies show that it is majority or high-status individuals, but not minority or low-status individuals, who prefer a colorblind approach to diversity.[63] This difference is explained by the idea that a colorblind approach favors the status quo, which favors majority, high-status groups,[64] particularly when applied in a system with existing inequalities. If an approach to diversity fails to gain the acceptance of the very people it is supposed to draw in, it raises serious questions about whether a new approach should be considered.

Colorblindness also fails in fulfilling goals of racial harmony and improving racial equality because it often leads to a shutdown of discussions of race generally.[65] Unfortunately, this means that discussions of what race is, what it means, and how race is or should be determined are lost in the shuffle of efforts to quiet discussions about continued inequalities based on race. In a world where talking about race may be considered racist,[66] it is increasingly difficult to have social or legal discussions about race even when it is agreed that race is relevant and carries the weight of the law. Race-conscious law, including anti-discrimination law and the jurisprudence around race-based admissions, fails to include discussion of racial definitions, instead

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62 *See, e.g.*, J. Nicole Shelton et al., *Ironic Effects of Racial Bias During Interracial Interactions*, 16 PSYCHOL. SCI. 397 (2005).

63 *See, e.g.*, Ryan et al., *supra* note 4 (showing that Whites prefer colorblindness, while Blacks prefer multiculturalism).

64 *Id.* at 619, 632.

65 Norton et al., *supra* note 22. I do distinguish here between the legal colorblind ideal, which is not necessarily aimed, in the ideal, at shutting down discussions of race so much as making them unnecessary, and an anti-discrimination colorblind perspective, which sees discussions of race inherently problematic because they "discriminate" or distinguish based on race. I would argue that the current version of colorblindness is motivated more by the anti-discrimination principle than an anti-subordination principle, which characterized the version of colorblindness popular around the time of the civil rights movement and amongst critical race scholars. In addition, the psychological realities of colorblindness as a strategy for diversity suggest that discussions of race are discouraged under a colorblind approach, as colorblindness seems to carry a default of anti-discrimination rather than anti-subordination. With the decision in *Ricci v. DeStefano*, 557 U.S. 557 (2009), the Supreme Court created a situation in which any consideration of race, even if to avoid illegal discrimination, could be considered inherently suspicious and thus potentially unconstitutional, thereby reinforcing a strict version of the colorblind ideal that aligns more with the anti-discrimination approach than the anti-subordination approach to colorblindness. *See* Norton, *supra* note 47, at 203–04.

66 Apfelbaum et al., *supra* note 30. A Google search for "talking about race is racist" turns up headlines like "MLK Jr. would want racist Obama to stop talking about race" and "Racism is over, stop talking about it." *See* Kaili Joy Gray, *Kathleen Parker: MLK Jr. Would Want Racist Obama to Stop Talking About Race Already, Sheesh*, WONKETTE (Aug. 26, 2013, 4:40 PM), http://wonkette.com/526778/kathleen-parker-mlk-jr-would-want-racist-obama-to-stop-talking-about-race-already-sheesh; Paige Lavender, *White Conservative Male Pundits to Nation: Racism Is over, Stop Talking About It*, HUFFINGTON POST (July 19, 2013), http://www.huffingtonpost.com/2013/07/19/white-men-racism-over_n_3624866.html.

focusing all attention on how to best limit or do away with racial distinctions that are written into the law in an effort to increase adherence to the colorblind ideal.

II. LEGAL DEFINITIONS OF RACE

Given the renewed commitment to a colorblind ideal that has been relinked to an anti-discrimination principle that asks that no distinctions be made between groups,[67] it might seem as though the law had never been in the business of explicitly defining race. Even after the early link was made between the anti-discrimination principle and colorblindness that called for no distinctions in *Plessy*,[68] the law had a long history of defining race not only explicitly but also in overly rigid terms on the basis of quite precise rules about relevant racialized information.[69] In a recent reiteration of the colorblind ideal in *Fisher I*, the Court cited *Bolling v. Sharpe*[70] to suggest that defining race was and is "contrary to our traditions,"[71] and yet, again, there is a long, now negatively-viewed history of racial definitions and court-conducted race determination proceedings. This Part discusses this history of explicit definitions and their effects on contemporary implicit definitions, demonstrating that, despite the move from explicit to implicit definitions, many of the same legal race definitions and race determination procedures are operating today.

"Law has shaped race and changing notions of race have shaped law," said Banks and Eberhardt,[72] highlighting the ways in which the law is closely tied to how we experience and define social categories like race and the ways in which those social categories affect the law. Banks and Eberhardt argue that legal norms and decision-making processes are implicated in racial categorization processes theorized about and measured by psychological studies (discussed in Part IV).[73] They point out that the link between basic psychological principles and the racial categorization processes promoted by legal rules and judicial decisions is rarely noticed or investigated by scholars in either psychology or law. U.S. history is full of examples of race's importance in terms of basic

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67 *Seattle Schools*, 551 U.S. 701, 748 (2007).

68 Plessy v. Ferguson, 163 U.S. 537 (1896).

69 *See generally* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA (2009) (discussing in-depth the history of racial categorization with an emphasis on the rigid and precise legal rules that determined legally cognizable racial identity).

70 347 U.S. 497 (1954).

71 *Id.* at 499.

72 Banks & Eberhardt, *supra* note 7, at 56.

73 *Id.* at 55–56.

rights and privileges afforded and protected by the law. Because rights and privileges have historically been so closely tied to social categories like race, racial determination processes (i.e., racial categorization rules and processes) within the legal system have historically played an important role in making decisions in individual cases. In other words, the legal system developed the means and rules to define racial categories and sort individuals into them because these processes were required in order for the institution of law to function in particular race-relevant domains.

Virginia was one of the first American colonies to create a formal legal definition of race when its House of Burgesses passed a law in 1662 that addressed the inheritance of slave status in order to deal with multiracial children resulting from pairings of White men and Black slave women.[74] This Act was written to address the problem of multiracial children who, by their very existence, challenged the racial hierarchy of the existing race-based system of slavery that enslaved Blacks and protected the high status of Whites.[75] The superficial simplicity of this Act and many similar acts that followed in Virginia and elsewhere failed to head off the need for additional race determination rules and procedures. Despite the explicit legal construction and attempted enforcement of over-simplified and rigid racial categories meant to avoid the blurring of lines between Whites and non-Whites, decisions still had to be made in the individual cases of persons who did not clearly belong to one race or another based on the existing standards.[76] These racial determinations made it into the courtroom and the legislatures as multiracial individuals challenged their racial classifications, forcing the law to attempt to lay out clear standards for category membership.

In the early days of race determination trials, the courts relied primarily on two evidentiary procedures to determine the legal race of multiracial persons who challenged their status: observation of appearance and investigation of ancestry.[77] Both approaches were rooted in a biologically-deterministic approach to race, as they both purported to speak to the biological distinctions between races that were manifested in attributes of the body or inherited from parents. Courts

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74 A. Leon Higginbotham Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, *in* MIXED RACE AMERICA AND THE LAW: A READER 13, 13 (Kevin R. Johnson ed., 2003).

75 *E.g.*, Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890–1934*, 20 LAW & HIST. REV. 225 (2002) (discussing the regulation of multiracial folks through the law and why such regulation was seen as necessary).

76 *See infra* Part III.

77 Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, *republished in* MIXED RACE AMERICA AND THE LAW: A READER, *supra* note 74, at 111.

also, as part of their consideration of a plaintiff's appearance, examined the demeanor of these individuals, indicating some belief in the power of racial essence to extend to style of dress or manner of speaking even if the physical traits of the person were inconclusive.[78] Further, when all else failed, courts looked at the races of the people a person associated with.[79] These once official methods, now argued to be archaic, are still observed today,[80] as people still rely on multiple racial cues (including appearance, ancestry, and social association) to disambiguate visually ambiguous or multiracial persons in particular.[81]

While race determination trials set a precedent for how to go about identifying the race of others, statutes defining race were even more explicit in the creation of racial definitions and their subsequent influence on how people think about race has been relatively more direct. Courts were, in part, relying on the standards set by these statutes to make their race determinations. The standard forms of legal racial definitions essentially said that quite minimal amounts of non-White blood made someone non-White in the eyes of the law.[82]

In racial determination proceedings, judges and juries decided the official legal race of plaintiffs challenging their racial classification. In passing laws that explicitly defined race (and laws prohibiting crossing these legally-defined boundaries), the legal system established itself as one of the most influential shapers of race as a concept and category. The legal system provided lay people with the means for making their own racial determinations. They learned that "biological" cues to race matter, especially physical characteristics that were determined by having "blood" of a particular group, as well as information about the race(s) of an individual's ancestors. When this biologically-related information was unavailable, people were told to look to more social-contextual information such as social association to determine a person's race, asking with whom the person socializes, lives around, and attends church.[83] If at least one of the law's purposes is to influence people,[84] then we should expect that the legal treatment of race will trickle into everyday understanding and usage of race. In addition, as a major social institution, the effects of the law's treatment of race are also

78 Novkov, *supra* note 75, at 261–63 (discussing the use of social presentation and association in *Weaver v. State*, 116 So. 893 (Ala. Ct. App. 1928)).

79 *See id.*

80 *See infra* Part IV.

81 Peery, Race at the Boundaries, *supra* note 17.

82 *See, e.g.*, Christine B. Hickman, *The Devil and the "One Drop" Rule*, *republished in* MIXED AMERICA AND THE LAW: A READER, *supra* note 74, at 104.

83 *See, e.g.*, PASCOE, *supra* note 69, at 114.

84 *See, e.g.*, Tom R. Tyler & John T. Jost, *Psychology and the Law: Reconciling Normative and Descriptive Accounts of Social Justice and System Legitimacy*, *in* SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 807 (Arie W. Kruglanski & E. Tory Higgins eds., 2d ed. 2007).

likely to leave a long-lasting impression on a society's view of race across time.

The historical standards laid out by the law for determining race, despite their removal from the present body of law, are often still relied on unofficially in law and colloquially to make racial determinations.[85] These strict historical legal rules seem to have given rise to lay rules of racial categorization that are discussed in the social scientific study of race.[86] Specifically, the principle of hypodescent (saying that the race of a multiracial child is assigned to that of the socially-subordinate parent[87]) and the one-drop rule (saying that one drop of non-White, particularly Black, blood is sufficient to make a multiracial person non-White[88]), resemble the old legal rules that made racial determinations dependent on relatively small traces of non-White blood and tied them to the status of an individual's parents. Recent research in social psychology finds empirical evidence of the continued relevance of these types of racial categorization rules.[89] This evidence raises questions about the relationship between the lay and legal definitions of race given the similarities between historical legal rules and lay rules of racial categorization. It seems logical that the law may have left a legacy of its historical treatment of race that is still apparent in how people racially categorize others today. It is equally plausible that the law could have simply reflected a social reality in the past that continues today despite the fact that the law has since moved away from such explicit statements about racial classification. In either case, considering the social institutional origins of racial categorization processes is important because social concepts are born not only out of our brains but also out of societal influences, especially significant social institutions like law.

This introduction to the legal origins of race has only hinted at the specificity with which the law has, at times, addressed questions of race. The social importance of race combined with this specificity signaled the importance of legal conceptions of race for everyday understanding of race. In addition, it is these legal origins of race that laid the foundation for contemporary social and legal conceptions of race. The remainder of this Part explores the role of law in defining race even more specifically, including treatment of race in current court decisions.

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85 *See* Julie C. Lythcott-Haims, Note, *Where Do Mixed Babies Belong? Racial Classification in America and Its Implications for Transracial Adoption*, 29 HARV. C.R.-C.L. L. REV. 531 (1994).

86 *See, e.g.*, Arnold K. Ho et al., *Evidence for Hypodescent and Racial Hierarchy in the Categorization and Perception of Biracial Individuals*, 100 J. PERSONALITY & SOC. PSYCHOL. 492 (2011); Destiny Peery & Galen V. Bodenhausen, *Black + White = Black: Hypodescent in Reflexive Categorization of Racially Ambiguous Faces*, 19 PSYCHOL. SCI. 973 (2008).

87 *See* MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 56 (1964).

88 *See, e.g.*, F. JAMES DAVIS, WHO IS BLACK? ONE NATION'S DEFINITION 4–6 (1991).

89 *See* Ho et al., *supra* note 86; *see also* Peery & Bodenhausen, *supra* note 86.

A. *Historical Definitions*

The history of legal definitions of race can best be traced through three related but distinct aspects of legal rules and procedures around race. This Section briefly explores the role of race determination proceedings, anti-miscegenation law, and generalized definitional statutes in creating legal conceptions of race in the past. Throughout this review of relevant historical case and statutes, it should be obvious that from the earliest stages of legal race determination, the psychological aspects of race categorization discussed in Part II are obviously at play in terms of influencing how the law conceived of both how to define race as well as how best to make determinations in line with those definitions.

1. Race Determination Cases

Once a system of slavery that enslaved Blacks existed in the United States, it was considered necessary to police the boundaries of Blackness and Whiteness because these determinations made the difference between free and slave status.[90] In other words, the construction of racial categories was necessitated by the development of legal rights and privileges, such as those afforded to free persons but not slaves, that roughly corresponded to racial group status. While the correspondence between race and status was not perfect, as there were free Blacks,[91] recognition of a correspondence gave weight to the determination of race and status. Because the correspondence between race and status was imperfect, resolving the gray areas formed the basis of many of the early race determination cases which gave shape to informal standards for determining racial group membership that were eventually formalized in later race-related law, such as miscegenation law.

In race determination proceedings, the courts relied primarily on two evidentiary procedures to determine the race of mixed race persons challenging a contested legal status: observation of appearance (especially physical characteristics or phenotype) and investigation of heritage.[92] Both types of evidence implicated a biologically deterministic approach to race. That is, both purported to identify the biological distinctions between races by focusing on something related to the biology of the person, either the genes that produced particular

90 *See, e.g.*, ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2010).

91 *See, e.g.*, KULL, *supra* note 27, at 10–11.

92 *See* Gross, *supra* note 77.

phenotypic traits such as skin color or hair texture or biological relationships to ancestors that shared racial group membership(s) with the person in question.

Two cases from the early 1800s demonstrate the use of appearance in making racial determinations. In *Gobu v. Gobu*,[93] the plaintiff was observed to have "olive [skin], between black and yellow, had long hair and a prominent nose."[94] Therefore, presumably because her physical features did not suggest a Black ancestry sufficient to produce prototypically Black features, the court presumed that she was not biologically Black enough (if she was Black at all) to require that she be kept as a slave. In *Hudgins v. Wrights*,[95] a similar analysis was done to determine again whether the plaintiff should be free. In this case, the racial classification as non-Black was made based on physical features since the plaintiff appeared White due to her complexion, hair, and eyes. In addition, the physical appearance of the plaintiff's mother was used to further support the correctness of the racial determination made in the case since the mother "had long black hair, was of a copper complexion, and generally called an Indian."[96] This reliance on physical characteristics was justified on the basis of commonsense since "[t]he distinguishing characteristics of the different species of the human race are so visibly marked, that those species may be readily discriminated from each other by mere inspection only."[97] In addition, Judge Tucker also explains in *Hudgins* that, particularly when it comes to Blacks, observation of appearance should be sufficient for making racial determinations because "[n]ature has stampt upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour either disappears or becomes doubtful; a flat nose and woolly head of hair."[98]

Despite Judge Tucker's belief in the stamp of race, appearance was not always sufficient to determine racial group membership, as ambiguity in appearance meant that courts needed to look beyond phenotype. In these cases, the court deviated from its reliance on physical features and instead focused on ancestry or biological theories of race. It was felt that a response to the problem with racial ambiguity was needed, and this concern led to the passing of statutes that defined race on the basis of heritage, which often took the form of racial

93 Gobu v. Gobu, 1 N.C. (Tay.) 188 (1802).
94 *Id.* at 188.
95 Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134 (1806).
96 *Id.* at 137.
97 *Id.* at 141 (Roane, J., concurring).
98 *Id.* at 139 (majority opinion).

fractions.[99] Hickman[100] describes the *Peavey v. Robbins*[101] case where a plaintiff testified as to the race of his parents and grandparents, and the court did the "ancestral mathematics"[102] to determine that the plaintiff's grandfather was a mulatto (as testified to by the plaintiff himself), thus the plaintiff met the standard for classification as Black.[103] Other cases found the courts looking to the science of race that existed at the time to determine which racial or ethnic groups could be traced to the same origins as Whites or Caucasians. For example, in *Gong Lum v. Rice*,[104] a Chinese American was denied classification as White despite greater physical resemblances between the Chinese and Whites on the basis of skin color because the Chinese are not part of the Caucasian race and instead originate from a different biological race (i.e., "Mongolian or yellow race"[105]).

Finally, the courts also considered the demeanor of the plaintiffs to determine race, suggesting that if it was unclear from physical appearance or analysis of one's racial ancestry, demeanor was suggestive of a particular group membership. This approach hinges on the notion that particular races had an essence that could be expressed through the subtleties of dress, manner of speaking, or association with others of a particular race. Novkov[106] discusses the case of *Weaver v. State*,[107] which, among other things, considered whether the plaintiff interacted with Blacks and attended a Black church. Novkov notes that the reasoning behind why association was determinative as evidence of proper racial classification was asymmetrical, since association with Whites did not make one White, but association with Blacks made one Black in the eyes of the court.[108]

The use of appearance and information about social association was considered by later courts making racial determinations in miscegenation cases as evidence that was related to more informal, older understandings of race.[109] These understandings of race relied on the notion that race is commonsensical such that it is something "we know when we see it,"[110] and demonstrated the incorporation of common understandings of race into the law, affecting formal definitions of race

99 *See infra* Section II.A.3.
100 Hickman, *supra* note 82, at 108–09.
101 48 N.C. (3 Jones) 339 (1856).
102 Hickman, *supra* note 82, at 109.
103 *See id.* at 108–09.
104 275 U.S. 78 (1927).
105 *Id.* at 81.
106 *See generally* Novkov, *supra* note 75.
107 Weaver v. State, 116 So. 893 (Ala. Ct. App. 1928).
108 *See* Novkov, *supra* note 75, at 263.
109 *See id.* at 264.
110 Gross, *supra* note 77, at 112; *see also* PASCOE, *supra* note 69, at 111.

as well as the adjudication of rights on the basis of race. Unfortunately, it became apparent across many race determination trials relying on these standards that there was not actually a single commonsense definition that everyone agreed on. That is not to say that these methods of race determination died out with this realization or the advent of miscegenation law and its enforcement which emphasized supposedly more precise definitions of race. While the law moved toward more "scientific" and "objective" legal definitions of race on the basis of blood quantum or racial fractions, when these failed, the old race determination standards (i.e., the informal but commonsense definitions of race) were allowed back in, reinforcing their place in understanding the boundaries between racial categories.

2. Miscegenation Law

Novkov describes the time after the Civil War as one of "racial crisis."[111] She argues that because the rigid lines between Black and Whites that were once enforced by the institution of slavery itself were called into question with the abolition of slavery, the South was left in disarray as it considered ways to prevent the breakdown of the longstanding racial hierarchy. Because the system of slavery and the laws determining free versus slave status that had previously accomplished the goal of creating and enforcing a racial hierarchy were gone, miscegenation law became the new means for accomplishing these same goals. In other words, miscegenation law took the place of slavery in defining racial difference and enforcing a racial hierarchy between Blacks and Whites in particular.[112] With the increased importance of policing the racial boundaries via prohibition of interracial sex and marriage, race classification maintained its importance as well. In order to determine who was and was not a slave, it had previously been necessary to determine the race and status of the person in question. Now in order to determine who could and could not marry, it was necessary to make the same determination, thereby continuing the legacy of race determination by the judicial branch.

"Miscegenation law made race classification seem to be imperative," argues Pascoe,[113] precisely because race determination was the first step in determining whether people were adhering to the law or not and because race was no longer wrapped up in status. Because of the imperative that seemed to be wrapped up in the belief that

111 Novkov, *supra* note 75, at 228.

112 *See* Rachel F. Moran, *Love with a Proper Stranger: What Anti-Miscegenation Laws Can Tell Us About the Meaning of Race, Sex, and Marriage*, 32 HOFSTRA L. REV. 1663 (2004).

113 PASCOE, *supra* note 69, at 111.

miscegenation law was one of the only remaining ways to police the racial boundaries in the absence of slavery, precisely defining race in order to quickly and correctly make legal determinations of race seemed all the more important. Pascoe argues that the harder legislators tried to do this, the more arbitrary and less logical the categories became.[114] Further, these definitions rested on an illusion of certainty about race that was reflected in the legal definitions that were incorporated into these statutes.[115] This illusion of certainty and the reality of arbitrariness did not translate into reduced importance of racial classification. Rather, it seemed to only reinforce the importance of racial categories and the strict definition of these categories.

3. Race Definition Statutes

Statutes defining race often took one of two forms.[116] The first type measured race by "the yardstick of ancestry."[117] For example, this type of statute prohibited intermarriage between Whites and those who had a Black ancestor three or four generations removed. Before the end of the Civil War, Alabama enacted a code in 1852 prohibiting intermarriage between members of different races that defined "Negroes" as "person[s] of mixed blood, descended . . . from Negro ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person."[118] This type of statute said that any Black blood within three generations was sufficient to make a determination that one was legally "Negro."

The second and more common type of statutorily defined racial measurement was a blood-quantum standard or a standard that measured race by a mathematical fraction of racial blood.[119] The specific racial fractions used in the statutes varied among states and, in some jurisdictions, by racial or ethnic group. For example, Indiana law deemed a person "having one-eighth part or more of negro blood" ineligible for marriage to a White person.[120] The most common standard was a one-eighth standard[121] that meant, for example, that

114 *Id.* This point also marks a point of caution in racial definitions since definitions that aim to be too precise, given the inherently malleable and fuzzy nature of race as a concept, and/or definitions that are not properly linked to the goals for the use of race, are bound to create as many problems as a lack of definition.

115 *See id.*

116 *Id.* at 116

117 *Id.*

118 Novkov, *supra* note 75, at 231–32 (citing ALA. CODE (1852): Art. I, § 4).

119 PASCOE, *supra* note 69, at 116.

120 *Id.*

121 *Id.*

anyone who had one-eighth or more of Black blood was to be considered Black. There were other varieties of this standard, including a one-half standard for Indians in certain jurisdictions and a one-fourth standard applied to a number of different groups. Importantly, these standards were designed to erase multiracial identifications by mixed race individuals by ensuring their legal racial identities were monoracial, minority ones. Thus, once it was determined that a person had one-eighth Black blood, the person was legally Black.

Virginia, one of the first colonies to enact laws containing definitions of race of the type described above, also enacted one of the strictest standards for race classification in its anti-miscegenation law. Enacted in 1924, this statute, unlike the statutes of many other jurisdictions, defined both who was White and who was not. Specifically, the Virginia statute defined a White person as a person "with no other admixture of blood than white and American Indian."[122] A White person under this standard was eventually redefined as someone with "no trace . . . of any blood other than Caucasian."[123] In addition, the statute applied an even stricter standard to Negro determination, since it considered a colored person one with "one-sixteenth or more Negro blood," with this strict definition of Blackness being held over from an earlier law.[124] In 1930, Virginia simplified its definition of a colored person to include persons with "any ascertainable Negro blood."[125]

By defining race in objective-sounding ways such as this, the illusion of certainty was maintained.[126] In addition, the courts, backed by race scientists,[127] could perpetuate the biological "fact" of race, which provided much needed justification for maintaining the existence of racial differences that necessitated a racial hierarchy that left Whites undisturbed at the top. When the information was available to make determinations in accordance with these standards, the laws were construed and applied strictly,[128] maintaining the belief in the legitimacy of such definitions.

These precise, objective standards for racial categorization did not resolve the problems that previous law aimed at maintaining racial boundaries had encountered. For example, what was the court supposed

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122 Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, *republished in* MIXED RACE AMERICA AND THE LAW: A READER, *supra* note 74, at 54 (citing ch. 371, § 6, 1924 Va. Acts 535).

123 *Id.* at 53.

124 *Id.*

125 *Id.* at 54.

126 PASCOE, *supra* note 69, at 111, 115–18.

127 *See, e.g.*, Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 30 (2013).

128 Hickman, *supra* note 82, at 108.

to do when the physical appearance of the individual in question was too racially ambiguous and an ancestral investigation was too difficult? While a reliance on the more objective and scientific ancestral determinations seemed to lend some legitimacy to the idea of race that was something more than the simple, social understandings of race grounded in differences in skin color or association with others of particular races, it was sometimes necessary to return to these more informal standards based on appearance and social association. As discussed previously, in *Weaver*,[129] this reintroduction of the old understandings of race was explicitly allowed when the new, scientific understandings of race failed, setting up a tradition of race determination that allowed both types of evidence, reinforcing both the "objective" and subjective aspects of racial classification and making clear that the courts could in practice use the evidence that best allowed them to find what they wanted to find in a particular case.[130] This new mixed application of standards reflected "scientific" and social understandings of race, lending legitimacy to the use of both to gain the desired outcome of exclusion from Whiteness while maintaining legal racial distinctiveness and a strict racial hierarchy.

B. *Contemporary (Lack of) Definitions*

Perhaps due to a desire to distance itself from the problematic history the law has with regard to race and to fully embrace the version of the colorblind ideal that calls for no distinctions for any reason, lawmakers and the courts alike approach racial definition with suspicion, even in situations in which the law utilizes racial classification.[131] In a nod to progressive attitudes of egalitarianism and colorblindness and modern theorizing around race, there seems to be little disagreement that race is at minimum more than a biologically-based concept.[132] The Supreme Court and lower courts have explicitly discussed the social and political components of race, concluding that even if some biological basis is assumed, it is not the full story of what race is.[133] Despite this embrace, or at least acceptance, of the social

129 Weaver v. State, 116 So. 893 (Ala. Ct. App. 1928).

130 Novkov, *supra* note 75, at 264.

131 *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2418–19 (2013) (citing equal protection jurisprudence to support the notion that racial classification is inherently suspicious).

132 *See* Perkins v. Lake Cty. Dep't of Utils., 860 F. Supp. 1262, 1272–74 (N.D. Ohio 1994) (highlighting the Supreme Court's discussion of the biological versus sociopolitical nature, with the Court seemingly coming down on the side of social construction).

133 *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) ("[R]acial classifications are for the most part sociopolitical, rather than biological, in nature.").

constructionist aspects of race and the movement away from explicit definitions of race in the law, these refusals to define race simply obscure the continuing operation of business as usual with regard to racial definition and the prioritizing of biologically-based racial cues, particularly ancestry.

1. Refusals to Define

Even in the age of anti-miscegenation law, which did explicitly identify racial groups for the purposes of preventing the crossing of racial boundaries,[134] questions sometimes arose about the absence of definitions of the particular groups implicated in these types of laws. For example, in *Perez v. Sharp*,[135] a 1948 case that threw out an anti-miscegenation statute for being too vague and uncertain, the court took issue with the lack of definition for the terms used to describe racial groups, including mulatto, as well as the uncertainty about how to prove membership in a racial group.[136] The *Perez* court argued that failures to define the descriptive term mulatto led to a "problem of how the statute is to be applied."[137] Despite their focus on the term mulatto given the plaintiff in this particular case, they argue that definitions were lacking for Whites and other groups, too.[138] The problem *Perez* identifies in 1948 still applies to the legal use of race generally and racial groups specifically, given that descriptive terms for racial groups or the general concept of race are rarely, if ever, defined explicitly, creating problems for the consistent and clear interpretation and application of race-conscious law. Unlike in 1948, when the courts could look at other existing statutes or legal definitions to inform their conception of race,[139] contemporary courts lack similar modern reference points and face a colorblind ideal that discourages discussion of race where possible, even for purposes of defining and clarifying a racial classification that is already written into the law.

The *Perkins v. Lake County Department of Utilities*[140] court spends time discussing the difficulties of defining race,[141] particularly given the acceptance by contemporary law that race is socially-constructed[142] and,

134 *See generally* PASCOE, *supra* note 69.

135 198 P.2d 17 (Cal. 1948).

136 *Id.* at 28–29.

137 *Id.* at 28.

138 *Id.*

139 *Id.*

140 Perkins v. Lake Cty. Dep't of Utils., 860 F. Supp. 1262 (N.D. Ohio 1994).

141 *Id.* at 1271–73.

142 *E.g.*, *id.* at 1272 (citing the Supreme Court's acknowledgement of the social construction of race in *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987)).

in any overly general way, is difficult to define.[143] The court points out that in confronting the difficulties of creating general definitions of race, the Supreme Court[144] and lower courts have tended to punt on questions of definition, even as they apply the concept of race in specific domains of law.[145]

The *Fisher I* decision from 2013 presents reasons that some might argue racial classifications should be suspect in the first place, highlighting the ways in which definitions of race could be problematic if not done properly.[146] For example, the *Fisher I* Court makes very salient the fact that legal precedent requires that racial classifications be considered suspect[147] and highlights repeatedly that racial classifications, if used, should be "clearly identified and unquestionably legitimate."[148] If the use of racial classifications should be clearly identified and legitimate, why should the classifications themselves, when used, not be clearly identified and legitimate as well?[149] This question remains absent from a discourse that only reluctantly takes up issues of racial classification generally.

2. Legacies of Definitions Past

What fills the space left by the removal of explicit racial definitions from law? The hope has clearly been that race would be pushed into irrelevance, making racial definitions unnecessary. Unfortunately, when the law still recognizes and uses race, the lack of definition leaves a wide open space for the legacy of past definitions, implicit definitions, and biases to operate. Part IV discusses the operation of racial definitions and race determination proceedings that look much like those long thought left in the past in the context of a contemporary issue of legal interpretation and application of racial definitions. The remainder of

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143 *Id.* at 1271 ("[T]his Court has discovered that the issue of membership in a given racial classification is deceptively complex.").

144 *See, e.g.*, Morrison v. California, 291 U.S. 82, 86 (1934) ("[T]he governing [definition] always being that of common understanding." (citation omitted)); *see also Saint Francis College*, 481 U.S. 604 (reinforcing the use of common understanding as the standard for defining race).

145 *See, e.g.*, *Perkins*, 860 F. Supp. at 1272 ("The thread running through such cases is that 'race' is not a static concept. It lives and changes according to popular beliefs.").

146 Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419–20 (2013).

147 *E.g.*, *id.* at 2419 ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect." (quoting Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting))).

148 *Id.*

149 The language of the Equal Protection Clause and the standard of strict scrutiny applied to race seems to call for racial definition when asking that the use of race be narrowly tailored, although that narrow tailoring standard does not currently apply to questions of how race will be used (in definitional terms), just when it can be used.

this Part will show evidence of this legacy through examination of the psychological research demonstrating the relevance and salience of old legal race determination rules and the racial cues prioritized by traditional definitions of race.

The standards for determining race laid out in anti-miscegenation law, despite their removal from the present body of law, are often still relied on unofficially today to make racial determinations.[150] The common standards of a "yardstick of ancestry"[151] and blood quantum,[152] as well as the much stricter standards used by states like Virginia, all represent legal rules that gave rise to social rules of racial categorization that are discussed in the context of social science approaches to understanding racial classification. There are two primary rules that have historically been applied to racial determination in the United States, particularly to determining Black racial group membership, that are derived from the legal standards of group membership outlined above: the principle of hypodescent and the one-drop rule.

The principle of hypodescent is the racial determination rule that says that the race of a person with mixed race parentage is assigned to that of the "socially subordinate" parent.[153] This rule most closely resembles the old racial classification standards such as the "yardstick of ancestry" and some of the less strict blood quantum standards. It also reflects the early determination that the children of slave women and White men would have their free status determined by the status of their mother (the socially subordinate parent) as opposed to their father. This principle does not rely on precise racial fractions, and thus, is not subject to as strict enforcement as other, more precise, categorization rules. Despite the possibility of this being a less strict rule in theory, discovery of Black or non-White ancestry, even if one's appearance is racially ambiguous, would lead to a classification as Black in practice under this rule, much as it would have in a court applying the legal rules that the principle was derived from.

The one-drop rule, which says that one drop of Black blood makes one Black,[154] is derived from standards such as Virginia's definition of Whiteness that determined that any non-White blood made one non-White or the stricter versions of the blood quantum laws such as those requiring only one-eighth or one-sixteenth Black blood to be Black. Even this stricter rule for racial determination has been adopted outside

150 Lythcott-Haims, *supra* note 85, at 538.

151 PASCOE, *supra* note 69, at 116.

152 *Id.*

153 HARRIS, *supra* note 87, at 56.

154 *See* Hickman, *supra* note 82, at 104; Kerry Ann Rockquemore & Patricia Arend, *Opting for White: Choice, Fluidity and Racial Identity Construction in Post Civil-Rights America*, 5 RACE & SOC'Y 49 (2002).

the domain of law. Lythcott-Haims argues, for example, that this rule has even been adopted as a means of empowerment within the Black community and among multiracial people claiming Black heritage while at the same time being used by Whites to exclude individuals from their racial group.[155]

Recent research in social psychology supports the idea that the legacy of these legal and social rules governing racial categorization are present at some level today, even given an increased awareness and acceptance of more flexible definitions of race. In my work with Galen Bodenhausen,[156] we found that when study participants were shown racially ambiguous persons and these people were revealed to be Black-White biracials (i.e., shown to have one Black and one White parent), study participants were more likely to automatically categorize these multiracial people as Black and not White, thus applying the standards set by law and later incorporated into social definitions of racial categories in the form of the principle of hypodescent. This occurred even though the same study participants, when given more time to consider their categorizations, classified the Black-White biracials as multiracial.

After finding evidence of the continued use, at least implicitly, of categorization rules like the principle of hypodescent in this initial paper,[157] we conducted a follow-up study to further examine the role of ancestry information in racial categorization of multiracial or racially ambiguous persons.[158] In this study, non-Black participants saw family trees of targets who were Black, White, or racially ambiguous in appearance. These family trees contained images of the target at the bottom of a family tree that also included photos of the target's grandparents. By extending the ancestry information to include grandparents, it was possible to examine more gradations of Black vs. White ancestry, and it allowed for a test of the one-drop rule, a stricter racial categorization rule than the principle of hypodescent. We found that having at least two Black grandparents significantly increased the frequency of speeded monoracial Black categorizations. There was no significant difference between the racially ambiguous targets presented with two versus three Black grandparents, suggesting a possible threshold of ancestry required for a monoracial categorization around fifty percent. These results suggest the contemporary relevance of racial categorization rules like the principle of hypodescent that assign multiracial persons to monoracial minority groups on the basis of some

155 Lythcott-Haims, *supra* note 85, at 539.

156 Peery & Bodenhausen, *supra* note 86.

157 *Id.*

158 This work was presented at the annual meeting of the Association for Psychological Science but remains an unpublished study. Data and results on file with the Author.

non-White heritage, but they also suggest that contemporary race categorization rules may be less clear about where to draw the line between racial groups than they once were.

The categories that people apply to others, including racial categories, matter,[159] as they have implications for subsequent experiences of stereotyping and prejudice in line with the applied category. Thus, the historical legal rules that were translated into social rules for making racial determinations have the power, despite their removal from the law, to continue to affect the lives of individuals subjected to them, while also affecting basic understandings about racial group membership.

III. THE PROBLEM OF AMBIGUITY

Does all of the preceding discussion about the lack of racial definitions resulting from a "no distinctions" form of the colorblind ideal actually matter? As the decisions in multiple race-relevant cases in the summer of 2013 have made clear yet again,[160] the Supreme Court and significant portions of the American population are still hoping that they can stop talking about race and that doing so will solve any problems the United States faces around race. Unfortunately, the questions about racial definition will not simply go away if we ignore them,[161] and they may actually get worse in the face of changing demographics that make negotiation of our still rather rigid racial classification system increasingly difficult. One example of an area of law in which these questions about racial definitions (or lack thereof) are presenting themselves *right now* is in Title VII race discrimination cases involving multiracial and racially ambiguous plaintiffs. This Part discusses the obstacles faced by these individuals when bringing discrimination claims, as well as the difficulty that courts are having in attempting to define race on a case-by-case basis based on interpretations of Title VII and the little bit of contemporary jurisprudence available on the issue. This Part concludes with a

159 Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Racial Categorization*, 15 PSYCHOL. SCI. 342 (2004).

160 Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (discussing race-based admissions policies, including the general suspicion about the need for racial classification and the goals served by race-conscious admissions programs); Shelby County v. Holder, 133 S. Ct. 2612 (2013) (striking down one of the major sections of the Voting Rights Act, in part due to a seeming belief in the amelioration of race discrimination in voting that renders the provisions requiring review by the federal government no longer necessary).

161 Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) ("The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race . . . .").

discussion of where the courts might look for information to inform their conceptions of race in this domain.

A. *Actual Versus Perceived Race, Ambiguous Plaintiffs, and Title VII*

Courts are now being faced with claims, the numbers of which are only likely to increase, brought by individuals claiming discrimination on the basis of a group membership (i.e., race, religion, national origin) that fails to correspond to their self-claimed group membership. These cases seem to most often result from individuals having ambiguous appearances that leave their identities open to interpretation by observers, as is often the case for individuals who might identify as multiracial[162] or who have appearances that are perceived to be prototypical of particular racial/ethnic, religious or national origin groups even if the person does not claim such an identity.[163] The courts are struggling with how to handle situations in which a person is clearly being harassed or discriminated against based on the discriminators' misperceptions because these plaintiffs are being targeted for discrimination on the basis of membership in groups to which they do not belong (based on lack of ancestry or claims of group membership). Their resolution at this point, although there is not a consensus, has been the creation of what other scholars have termed "the actuality requirement,"[164] meaning a requirement that a person be an "actual" member of the group for which they are being targeted in order to seek any remedy for their experiences of discrimination.[165] Unfortunately, the courts have not been explicit about how exactly one establishes that one is an "actual" member of a racial group.[166] The descriptions of the cases that follow will help illuminate some of their assumptions about

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162 *See* Burrage v. FedEx Freight, Inc., No. 4:10CV2755, 2012 WL 1068794 (N.D. Ohio Mar. 29, 2012).

163 *See* Lopez-Galvan v. Mens Wearhouse, No. 3:06cv537, 2008 WL 2705604 (W.D.N.C. July 10, 2008) (featuring a Dominican plaintiff who was perceived by others to be Black but who denied such a classification); Butler v. Potter, 345 F. Supp. 2d 844 (E.D. Tenn. 2004) (featuring a Caucasian with a "prominent nose" who was perceived by others as Middle Eastern as a result of this feature).

164 *See* D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87 (2013).

165 See RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 91–97 (2005) and Cristina M. Rodriguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1406 (2008) for discussion of the dangers of government-driven inquiries about racial authenticity.

166 There may be good reason the courts have avoided doing this since it has the potential to create a "nearly insurmountable issue[] of proof in court regarding the actual racial heritage of a plaintiff and/or a person replacing a plaintiff." Moore v. Dolgencorp, Inc., No. 1:05-CV-107, 2006 WL 2701058, at *4 (W.D. Mich. Sept. 19, 2006).

fulfilling this actuality requirement, which hinge on the definition(s) of race preferred by the court in each case. The cases illustrate how the lack of racial definition[167] leaves the courts to use different racial definitions and identity determination standards across different jurisdictions, courts, and cases. This is problematic not only for the individual plaintiffs seeking relief in their particular cases, but it also fails to provide clear notice to future plaintiffs (and their future alleged discriminators) about what is and is not protected behavior.[168]

1. Types of Misperceived Plaintiffs

While this Article focuses on perceived race claims to illustrate problems caused by a lack of racial definitions, perceived group membership issues have arisen for other protected classes as well. For the sake of highlighting the potential problems the courts are hesitant to address in dealing with misperceptions across a variety of identities, a short discussion of the types of misperception claims the courts are contending with follows.[169] These other categories also suffer from failures to define, but discussion of the specifics is beyond the scope of this Article.

While Title VII covers race, color, religion, sex, or national origin,[170] the record shows thus far that the courts have determined in cases of race, national origin, and religion that perceived group membership is not sufficient to warrant protection under Title VII.[171] *Butler v. Potter*[172] set the stage for subsequent cases dealing with misperceived plaintiffs under Title VII. It was the first case that explicitly addressed the question of whether perceived group

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167 Title VII does not provide a definition of race and neither does the U.S. Equal Employment Opportunity Commission (EEOC), although the EEOC does explain the prohibition on race discrimination encompasses many things, including perception. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, NO. 915.003, EEOC COMPLIANCE MANUAL SECTION 15: RACE AND COLOR DISCRIMINATION (2006), https://www.eeoc.gov/policy/docs/race-color.pdf.

168 Rich, *supra* note 5, at 14–15, discusses the many race definition issues confronted in the *Malone v. Haley* case, including that the case (and others like it) should raise due process concerns since "the brothers were held accountable under a racial definition standard that had not been established, much less circulated, prior to the dispute about their racial identities."

169 Each of these identities, and the courts' decisions in favor of denying protection on the basis of a broad range of perceived identities, raise their own questions about the implications of this denial, although many of the issues raised here will apply to these other identities as well.

170 42 U.S.C. § 2000e-2(a)(1) (2012).

171 This leaves open the question of whether color or sex could be misperceived (or has been) and what would happen with these claims. In *Uddin v. Universal Avionics Systems Corp.*, No. 1:05-CV-1115-TWT, 2006 WL 1835291 (N.D. Ga. June 30, 2006), the court dismissed the plaintiff's perceived race and national origin claims but denied summary judgment on the plaintiff's color discrimination claim (based on his dark complexion). *Id.* at *6.

172 345 F. Supp. 2d 844 (E.D. Tenn. 2004).

membership was protected by Title VII, finding that discrimination claims under Title VII could not be based on perceived national origin or perceived race (as opposed to actual race) and later cases have adopted this reasoning.[173] Butler was a Caucasian postal worker who was harassed because his co-workers perceived him to be Indian or Middle Eastern.[174] The case is often cited alongside *Uddin v. Universal Avionics Systems Corp.*,[175] which featured a plaintiff who was a Muslim Indian who was perceived by his co-workers as Middle Eastern.[176] The court in *Uddin* dismissed the plaintiff's Title VII claim based on race, ethnicity, and/or national origin because they were persuaded that Title VII affords no protection for perceived race or national origin by their reading of both Title VII and *Butler*.[177] *Lewis v. North General Hospital*[178] raised the question of whether perceived religion might find protection, but its plaintiff, perceived to be Muslim,[179] also found his case dismissed under the same precedent established in *Butler* and *Uddin* for race and national origin,[180] that is, finding that Title VII does not offer protection in the instance of perceived group membership. *El v. Max Daetwyler Corp.*[181] affirmed the holding in *Lewis*, finding that the plaintiff, misperceived as Muslim,[182] did not have standing to bring a claim of discrimination under Title VII.[183]

Again, while this Article focuses on perceived race claims and their implications, it is important to note here that the courts have recognized

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173 *See id.* at 850 ("As noted in the Amended Complaint, plaintiff asserts discrimination, including the creation of a hostile work environment, on the basis of his perceived race and/or national origin. However, it is undisputed that plaintiff is not of Arab, Indian, or Middle Eastern descent and that he so informed his supervisors in response to their questions about his prominent nose. As defendant points out, Title VII protects those persons that belong to a protected class and says nothing about protection of persons who are *perceived* to belong to a protected class. . . . Neither party has cited any controlling authority which would permit a claim for perceived race or national origin discrimination and this Court is unaware of any such precedent. For these reasons, the Court finds that plaintiff cannot state a claim for discrimination based on his perceived race and/or national origin and summary judgment will be granted on these claims." (footnote omitted) (citations omitted)).

174 *Id.* at 846.

175 2006 WL 1835291.

176 *Id.* at *1.

177 *Id.* at *6.

178 502 F. Supp. 2d 390 (S.D.N.Y. 2007). This case was immediately preceded by another case, *Berrios v. Hampton Bays Union Free School District*, No. CV 02-3124, 2007 WL 778165 (E.D.N.Y. Mar. 12, 2007), which noted that that the Supreme Court and the circuit courts had not made precedent for perceived religion claims under Title VII, but in that case, the court allowed the issue to go to the jury in order to allow for appellate review.

179 *Lewis*, 502 F. Supp. 2d at 401.

180 *Id.*

181 No. 3:09cv415, 2011 WL 1769805 (W.D.N.C. May 9, 2011).

182 *Id.* at *1.

183 *Id.* at *6. This case also featured a perceived race claim that was also denied based on *Butler*. *Id.* at *5.

the often substantial overlap between race and national origin claims,[184] highlighting another aspect of the definitional issues raised by this Article. Further, given the additional conflation of race or ethnicity, national origin, and religion that is often present in many misperceptions cases, particularly those involving plaintiffs misperceived to be Muslim,[185] it is less than ideal to ignore the overlap between race and these other classes when discussing Title VII issues around (mis)perceived plaintiffs and the broader issues of categorical definitions. For the sake of space and clarity, a narrow focus is required here.

2. "Actual" vs. Perceived Race

Butler is credited with creating the precedent for denying Title VII claims on the basis of perceived group membership, and it is the language from this case that has made its way into each subsequent case involving discrimination on the basis of a perceived group membership. While not using the term "actual" specifically in the opinion, Judge Varlan in *Butler* explicitly accepts the employer's argument in this case[186] that Title VII says nothing about protecting people who are perceived to be members of a protected class but are not members of that class.[187] The defendant further makes the case, which Judge Varlan finds convincing, that the court should not read perceived group membership into Title VII because Congress could amend Title VII to include protection for those perceived to be members of a protected class, adding that they provided the same type of protection in the Rehabilitation Act and the Americans with Disabilities Act, which were passed after the Civil Rights Act of 1964.[188] In other words, as Judge Chin says in *Lewis*, "[i]f Congress had wanted to permit a similar cause of action under Title VII for [perceived group membership] discrimination, it could have so provided. It did not."[189]

The explicit language of actuality remains implicit throughout cases between *Butler* and *Burrage v. FedEx Freight, Inc.*,[190] where the court finally says, "[i]t is true that Title VII protects only those who are

184 *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 606, 614 (1987); Ortiz v. Bank of Am., 547 F. Supp. 550, 553, 556–57 (E.D. Cal. 1982).

185 *See Max Daetwyler Corp.*, 2011 WL 1769805, at *1; *Lewis*, 502 F. Supp. 2d at 401.

186 It is interesting to note that the defendant in *Butler* was the U.S. Government acting on behalf of the Postmaster General, so the U.S. Government inadvertently helped create the misperception defense in these types of cases. 345 F. Supp. 2d 844 (E.D. Tenn. 2004)

187 *Butler*, 345 F. Supp. 2d at 850.

188 *Id.*

189 *Lewis*, 502 F. Supp. 2d at 401.

190 No. 4:10CV2755, 2012 WL 1068794 (N.D. Ohio Mar. 29, 2012).

actually in a protected class, and not those who are perceived to be in a protected class."[191] The *Burrage* court continues to make explicit the language of actual versus perceived group membership when discussing the plaintiff's argument that he was harassed based on physical characteristics that made him appear to be a member of a group of which "he was not an actual member."[192] Unfortunately, neither the *Burrage* court, despite explicitly identifying a distinction between "actual" and perceived group membership, nor any of the courts before it discuss how exactly one can prove actual membership in the group that is being targeted for discrimination.

In other words, the courts require racial classifications to be made but provide no definition of race and identify no means for making determinations of race. The courts may have considered this discussion unnecessary in light of the fact that they have dealt thus far with plaintiffs who have expressly disclaimed membership in the group they were targeted as a member of, but the creation of this explicit distinction begs the question of what exactly distinguishes "actual" membership from perceived membership in a particular social category. Unfortunately, as discussed below, the answer to this question may be a return to the type of race determination proceedings of the past discussed in Part III, except without the guidance of explicit rules, for better or worse, for determining group membership.

Given that this Part focuses on the distinction between "actual" and perceived race specifically, it is necessary to discuss the specific language applied to this particular distinction. Again, *Butler* is the first case to deal with questions of perceived group membership under Title VII, but it is also the first case that explicitly deals with perceived race under Title VII. Here, the court does not explicitly use the language of "actual race" in opposition to perceived race, but it does point out explicitly that the plaintiff is alleging discrimination on the basis of being perceived as Indian or Middle Eastern but that he is "neither of Indian nor Middle Eastern origin; he is a white Caucasian."[193] It is informative here that the *Butler* court says that the plaintiff lacks the correct "origin" to be considered a member of the group targeted for discrimination and that

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191 *Id.* at *5 (emphasis added). This court also then injects the actuality language into their summary of the holding in *El v. Max Daetwyler Corp.*, No. 3:09cv415, 2011 WL 1769805 (W.D.N.C. May 9, 2011), by describing the holding as a case "granting defendant's motion to dismiss discrimination claim where the plaintiff was only perceived as, *but actually was not*, Muslim." *Burrage*, 2012 WL 1068794, at *5 (emphasis added). They further discuss "actuality" with regard to *Lopez-Galvan v. Mens Wearhouse*, No. 3:06cv537, 2008 WL 2705604 (W.D.N.C. July 10, 2008), as well by talking about the plaintiff's "actual" versus perceived group membership. *Burrage*, 2012 WL 1068794, at *7.

192 *Id.* at *8.

193 Butler v. Potter, 345 F. Supp. 2d 844, 846 (E.D. Tenn. 2004).

it identifies the plaintiff as both "white" and "Caucasian."[194] Both of these choices reflect an implied preference for ancestral origins as a means for establishing actual membership in a racial group. The *Butler* court does not explicitly mention how the plaintiff self-identifies, although this is also implied by the court having knowledge of the plaintiff's background in the absence of any reference to the plaintiff's origins being part of the record in this case. Therefore, it is unclear what weight the *Butler* court gives self-identification in determining actual race, since their determination of the plaintiff's lack of membership is based on a lack of proper ancestry.

In *Uddin*, the court dismisses the plaintiff's racial/ethnic and national origins claims based on the fact that the alleged discrimination is based on a misperception that the plaintiff is Middle Eastern.[195] The court here establishes that the plaintiff is not of Middle Eastern ethnicity based on the fact that he was born in India.[196] The court does not explicitly establish whether Indian is a race, ethnicity, and/or a national origin before dismissing the claims, so it is unclear from the opinion if the dismissal results from the plaintiff incorrectly identifying the relevant class, or because being born in India is not considered appropriate qualification as an actual member of the racial, ethnic, or national origin group in question. The focus on his birthplace could suggest an implicit preference for ancestry as the proper means to qualify for a race/ethnicity claim, or it may simply highlight the conflation between race, ethnicity, and national origin as previously mentioned. On the other hand, because the court allows a color discrimination claim on the basis that the plaintiff has a "dark complexion" and was replaced by a "white" person,[197] it seems the court tries to distinguish between physical markers, such as skin color, and race/ethnicity claims that could implicate the same physical markers. Thus, the court again seems to come down on the side of ancestry as a means for establishing "actual race."

In *Lopez-Galvan*, the plaintiff self-identifies as "Latin" and "Dominican" and expressly rejects identification as Black[198] despite the fact that he believes he is being targeted because people perceive him as

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194 Caucasian has long been considered to be one of the major racial groups along with Mongolians, Malayans, Ethiopians (Blacks), and American (Indians). *E.g.*, Johann Friedrich Blumenbach, *On the Natural Variety of Mankind*, *republished in* 8 SLAVERY, ABOLITION AND EMANCIPATION: THEORIES OF RACE 141, 200 (Peter J. Kitson ed., 1999).

195 Uddin v. Universal Avionics Sys. Corp., No. 1:05-CV-1115-TWT, 2006 WL 1835291, at *1 (N.D. Ga. June 30, 2006).

196 *Id.*

197 *Id.* at *6.

198 No. 3:06cv537, 2008 WL 2705604, at *2–3 (W.D.N.C. July 10, 2008).

Black.[199] Here the court seems to accept, with little analysis otherwise, that the plaintiff is not an actual member of the protected class at issue (Black) because the plaintiff says he is not a member of that group.[200] The court corrects the plaintiff's assertion that Latin or Dominican are races, noting that they are "ethnicity" and "national origin," respectively.[201] Here, then, the court is satisfied with self-identification as the means for determining the plaintiff's membership (or not) in the protected class in question. This is unlike the two previously discussed cases in that in *Lopez-Galvan* ancestry is not discussed, whereas in those other cases, self-identification was never explicitly mentioned.

Finally, in *Burrage*, the court, in addition to introducing the explicit language for "actual" versus perceived race, utilizes both the plaintiff's ancestry and his self-identification as a means for determining "actual" group membership for the purposes of his Title VII claims.[202] Here, the court acknowledges on the record that the plaintiff identifies as "half-African American and half Caucasian"[203] and later refers to the plaintiff as being "in fact of mixed descent."[204] Later, the court mentions again the plaintiff's self-identification and his ancestry, noting that the plaintiff "is not Mexican. . . . Burrage considers himself to be black, as he has an African-American father and a Caucasian mother."[205] *Burrage* reinforces the preference of prior courts (and history[206]) for ancestry as a means of (dis)qualifying individuals as members of racial groups, as well as a preference for self-identification as a means of determining group membership.

Taken together, these cases conclude, often implicitly, what has been held as true in the law and beyond for some time: race is to be determined primarily by ancestry and sometimes by self-identification, particularly if that self-identification corresponds to ancestry.[207] By

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199 Many Dominicans would be considered racially Black and ethnically Hispanic, making them Afro-Latinos according to U.S. definitions of race and ethnicity. *See Race*, CENSUS.GOV, https://www.census.gov/quickfacts/meta/long_RHI225215.htm (last visited Mar. 24, 2017); *see also* SILVIO TORRES-SAILLANT, CUNY DOMINICAN STUDIES INST., INTRODUCTION TO DOMINICAN BLACKNESS 53–54 (2010), https://www.ccny.cuny.edu/sites/default/files/dsi/upload/Introduction_to_Dominican_Blackness_Web.pdf.

200 *Lopez-Galvan*, 2008 WL 2705604, at *2–3

201 *Id.* at *2, 7.

202 Burrage v. FedEx Freight, Inc., No. 4:10CV2755, 2012 WL 1068794 (N.D. Ohio Mar. 29, 2012).

203 *Id.* at *1.

204 *Id.*

205 *Id.* at *5.

206 *See, e.g.*, PASCOE, *supra* note 69.

207 Historically, it was disputes about self-identification that often formed the basis for courtroom battles of rights and privileges, necessitating race determination trials before moving onto substantive legal issues. *E.g.*, Gross, *supra* note 77, at 111–13. It was also the case that self-identification was often rebutted on the basis of ancestry information that purported to go against the claimed identity. *Id.*

explicitly rejecting perception's role in racial categorization, these cases deny not only previous cases acknowledging the relevance of perception over other factors in determining identity for the purposes of being considered a member of a protected class,[208] but also the psychological and cognitive fact that all race is perceived, and thus perception is central to the question of both racial classification and the discrimination that may result from it. This may have been made possible in the past by the fact that most often the courts were dealing with cases where the perceptions in question aligned with other cues to group membership, but given ongoing and future demographic shifts in the United States,[209] the issue of discrimination based on misperceived identity is not going away. The next two Sections present the case for a perception theory as advanced by some courts dealing with perception cases under Title VII as well as psychological research on race perception and categorization that demonstrates the importance of perception (particularly based on phenotype or appearance) relative to the law's preferred racial cues of ancestry and self-identification in race categorization processes.

B. *Inconsistency and Confusion for the Courts*

Butler and its progeny do not fully capture how courts have approached racial categorization in Title VII discrimination cases. Before turning to the research showing the central role that perception plays in all racial categorization, it is worth examining two contrasting cases that preceded *Butler*.[210] First, these cases oppose the conclusion of *Butler* that perception is not relevant to Title VII claims, revealing the

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208 *See* Bennun v. Rutgers State Univ., 941 F.2d 154, 173 (3d Cir. 1991) (stating that objective appearance to others matters more than subjective feelings about one's own identity); Perkins v. Lake Cty. Dep't of Utils., 860 F. Supp. 1262, 1272–73 (N.D. Ohio 1994) (stating that people only need to appear to be a member of a protected class to be deemed a member of a protected class, for example).

209 As counted by the 2000 U.S. Census, the census that allowed people to mark more than one race for the first time, there were 6.8 million multiracial individuals. And the share of people with ancestry of two or more races has doubled between 1980 and 2010–2012. NICHOLAS A. JONES & AMY SYMENS SMITH, U.S. CENSUS BUREAU, C2KB3/01-6, THE TWO OR MORE RACES POPULATION: 2000 (2001). It is estimated that no later than 2050, non-Whites, including large numbers of Hispanic/Latino and multiracial people who are particularly likely to be misperceived, will be the numerical majority in the U.S. population. William H. Frey, *America's Changing Racial Diversity: What the 2010 Census Shows*, CTR. FOR AM. PROGRESS, https://cdn.americanprogress.org/wp-content/uploads/issues/2011/10/pdf/frey_presentation.pdf (last visited Apr. 22, 2017).

210 Neither of which is mentioned by *Butler* or subsequent cases, despite addressing how to determine racial group membership in a Title VII discrimination case (where identity is challenged by the defendant) and explicitly acknowledging the role of perception in racial categorization and discrimination.

inconsistency across the courts in considering issues of racial definition discussed in this Part. Second, they acknowledge the importance and centrality of perception in racial classification, particularly when considering how racial classification plays out in a situation involving discrimination. These cases recognize that race is always perceived (perception matters even when categorization is "correct"), and that perception is of utmost importance from a legal perspective in the context of discrimination law.

In 1991, the Third Circuit decided *Bennun v. Rutgers State University*, a case involving a Title VII claim by an Argentinian man denied promotion to full professor.[211] The defendant challenged the identification of the plaintiff in order to escape liability for discrimination.[212] Unlike the misperception cases discussed above, the plaintiff in this case did not claim he was discriminated against based on a misperceived identity; he identified as Hispanic and claimed to be discriminated against on that basis.[213] Here, it was the defendant that brought the plaintiff's identity into dispute, presenting evidence that the plaintiff's ancestors were not Hispanic, thus, neither was the plaintiff, even though he was born in Argentina and all other cues considered by the court pointed to his Hispanic identity.[214] While only trying to escape its own liability, the defendant in this case laid the groundwork for the distinction between "actual" and perceived race that would appear later in *Butler* and subsequent cases, particularly if actual race was to be determined by ancestry (as opposed to other cues) as had historically been done in the United States.

To some extent, the Third Circuit punted on the question of whether the plaintiff was Hispanic, preferring to give deference to the district court's determinations on this question because they had superior access to information about the plaintiff,[215] and finding that at minimum the district court was "not clearly erroneous" in its conclusion.[216] Of particular relevance to the discussion here, the *Bennun* court says,

> [w]e think unlawful discrimination must be based on Bennun's objective appearance to others, not his subjective feeling about his own ethnicity. Discrimination stems from a reliance on immaterial outward appearances that stereotype an individual with imagined,

211 941 F.2d 154 (3d Cir. 1991).
212 *Id.* at 158.
213 *Id.*
214 *Id.* at 171–73.
215 *Id.* at 173.
216 *Id.*

> usually undesirable, characteristics thought to be common to members of the group that shares these superficial traits.[217]

In other words, the court highlights that what matters most is how a person is perceived when it comes to determining whether discrimination has occurred and should be protected against.

Bennun was followed by *Perkins v. Lake County Department of Utilities*,[218] a case involving a plaintiff identified as American Indian who filed a Title VII discrimination case based on his American Indian identity. Again, this was not a case involving claims of discrimination based on a misperceived identity, but as in *Bennun*, the defendant presented a defense to alleged discrimination by challenging the racial identity of the plaintiff, arguing that his ancestry did not support his self-identification as American Indian.[219] Again, the defendant's argument in this case laid the groundwork for the "actual" versus perceived race distinction that some courts have recently adopted, but as in *Bennun*, the *Perkins* court rejected it.[220] Specifically, the court says, "subjective perception of an individual's race clearly plays an important role in racial classification where discrimination is involved. This Court has never encountered an instance in which an employer admittedly first checked the pedigree of an employee before engaging in discriminatory conduct."[221] The *Perkins* court adds, "[individuals] only have to appear to be [a member of a protected class] to be deemed members of that protected class" under Title VII given that Title VII is meant to be broadly applicable to provide equal opportunity to everyone.[222] Finally, the court says, "[t]his Court believes that, consistent with the intent of Title VII, when racial discrimination is involved perception and appearance are everything."[223] While *Butler* and other courts ignored the decisions of *Bennun* and *Perkins*,[224] recent psychological research supports exactly what these two courts suggested about the role of perception in race categorization and discrimination. While psychologists might not agree that appearance is everything when it comes to racial categorization, they are much more likely to agree that perception is crucial.

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217 *Id.*

218 860 F. Supp. 1262 (N.D. Ohio 1994).

219 *Id.* at 1265.

220 *Id.* at 1277.

221 *Id.* at 1273.

222 *Id.* at 1276.

223 *Id.* at 1277.

224 *Bennun* and *Perkins* clearly represent cases that could have been persuasive on the question of whether perceived race is protected under Title VII, although they were not considered by *Butler* or subsequent courts.

C. *Determining Relevant Racial Definitions for Title VII*

This Article aims to offer a solution to the problem being discussed throughout that race is multiply determined (by a variety of cues), there are multiple definitions that exist, and in the absence of an explicit definition, this variety in definition is allowed to operate implicitly to influence interpretations of law. In considering how to best develop a definition of race in the context of Title VII, it is also possible to extract out general principles for creating definitions of race in other legal contexts. The Title VII cases discussed above highlight two aspects of creating racial definitions: (1) consideration of the legal domain in which race is being implicated, and (2) the goals of the law in question. The third aspect is discussed here, wherein definitions are intentionally and rationally selected based on awareness of existing evidence about racial perception and categorization processes

It is not uncommon for the courts to turn to evidence outside of the law to inform their conceptions and definitions of race.[225] Attempts by the law to define race have often relied upon discussions of what historical and modern science have to say about cognizable racial groups,[226] particularly in the absence of the now historical rules that explicitly defined racial groups on the basis of, for example, blood quantums[227] and fractions of ancestors.[228] Modern psychological science has specifically addressed questions about the role of perception in racial categorization, but has also examined the interaction and influence of different racial cues, including those talked about by the courts: phenotype (appearance), ancestry, and self-identification.

Relevant to the perspective espoused by *Bennun* and *Perkins* and in opposition to the conclusions of *Butler*,[229] recent social psychological research has specifically addressed questions about the interaction and influence of multiple racial cues, including those at issue in the cases discussed in this Part. Specifically, a series of studies examining the relationship between ancestry, appearance, and self-identification as cues to racial categorization were conducted.[230] Across three studies, participants were presented with information about individuals and had participants categorize them based on race. These studies demonstrate the dominance of biologically-related information (ancestry and appearance) in racial categorization, a perspective reflected in the legal and social rules for race categorization for hundreds of years. They also

225 *E.g.*, PASCOE, *supra* note 69.
226 *See Perkins*, 860 F. Supp. at 1271–72.
227 PASCOE, *supra* note 69.
228 *Id.*
229 Butler v. Potter, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004).
230 Peery, Race at the Boundaries, *supra* note 17.

specifically tested the assumption inherent in legal and social race categorization rules that ancestry takes priority over other racial cues, including the salient visual (and most easily perceived) cue of appearance.

In the first study, ancestry and appearance were presented for a series of individuals. The target individuals appeared Black, White, and racially ambiguous.[231] In addition, participants were given information about the races of the targets' presumed parents. It was possible for the target individuals to have Black, White, or racially mixed (Black and White) ancestry. After learning about the target individuals, participants completed a speeded categorization task which is designed to capture relatively spontaneous and/or automatic categorizations.

Historical categorization rules would suggest that ancestry should always be the dominant influence on categorization patterns regardless of appearance. On the other hand, appearance is a salient, visual cue, and it is just as reasonable to expect that this would mean that appearance would influence categorization patterns more consistently. This study showed that both appearance and ancestry affected categorizations. Of particular relevance to the Title VII issue discussed in this Part, individuals with mixed ancestry and/or ambiguous appearances were categorized based on whichever provided racial cue was the least ambiguous. In other words, when an individual had an ambiguous appearance, racial categorizations corresponded to the available ancestry information (e.g., Black ancestry meant Black categorizations). When the target had mixed ancestry, racial categorizations corresponded to the appearance of the target (e.g., appearing Black meant Black categorizations). It is important to note here that for individuals with unambiguous appearances (i.e., those who appeared Black or White), perceived race based on appearance more strongly influenced categorization patterns than perceived race based on ancestry.

This study demonstrates a number of things relevant to the discussion of Title VII discrimination in this Part. First, because it explicitly considers the relationship between ancestry, the courts' long-preferred qualifier for racial group membership, and appearance, it allows for evaluation of the courts' presumptions of ancestral dominance in racial perception and categorization. The simple answer seems to be that ancestry matters, but appearance matters more in terms

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231 Note that the ambiguous targets are not ambiguous in the sense that no one person can categorize them confidently, but rather they are ambiguous because there is no consensus about how to categorize the target. In other words, it is possible, and likely, that any one person would have no problem coming to some conclusion about the race of one of these targets; it is just more likely for these individuals that the conclusions at which observers arrive will diverge from the individual's self-identified identity or other identity cues, such as ancestry.

of its influence on basic racial categorization. This supports the contention by a minority of courts (e.g., *Bennun*[232] and *Perkins*[233]) that race perceived from appearance is primary, and it highlights that ancestry matters most in situations where the salient perceptual cue of an unambiguous appearance is not available.[234] In other words, ancestry is most important in situations in which appearance does not already tell someone what group a person belongs to.

Two additional studies examined the relationship between ancestry, appearance, and self-identification. In these studies, participants were presented with information about target individuals that included either information about their ancestry or their appearance and (for all targets) their racial self-identification. In the study examining the influence of ancestry and self-identification, ancestry consistently influenced categorization responses above and beyond self-identification. For example, for individuals who self-identified as Black, those with Black ancestry were more likely to be categorized as Black (compared to those with mixed ancestry). This same effect appeared for other combinations of ancestry and self-identification cues. It is important to note here that for individuals with mixed ancestry, self-identification was more influential. Basically, as in the first study, when ancestry was mixed/ambiguous, participants turned to other cues to help them disambiguate the target. This was not true for individuals who had monoracial ancestry, for whom ancestry determined how they were categorized. This study supports the historical and contemporary presumption that ancestry matters more than self-identification in determining race by showing the relative dominance of ancestry information.

In the study examining the influence of appearance and self-identification, appearance consistently drove categorization responses. For example, for targets who self-identified as Black, those who also appeared Black (compared to appearing ambiguous) were most likely to be categorized as Black. In other words, targets with Black and White phenotypes were categorized based on their appearance, regardless of their self-identifications. Again, for the racially ambiguous individuals, the other cue provided (self-identification) was used to disambiguate the target such that racial categorizations were more likely to correspond to self-identification for these targets. This study speaks to the courts' assumptions that plaintiffs could simply stop discrimination or harassment based on a misperceived identity by correcting the

232 Bennun v. Rutgers State Univ., 941 F.2d 154 (3d Cir. 1991).

233 Perkins v. Lake Cty. Dep't of Utils., 860 F. Supp. 1262 (N.D. Ohio 1994).

234 Much like in the race determination cases discussed in Part III where the courts were likely to interrogate ancestry when the person before them defied categorization based on appearance alone.

discriminator's misperception through active self-identification. Not only do the cases discussed in this Part feature plaintiffs who attempted this, they also show the resilience of perceptions based on appearance in the face of conflicting information demonstrated empirically above.

Taken together, these three studies highlight the dominance of biologically-related information, suggesting that the courts are not wrong to assume that ancestry plays an important role in people's racial categorizations. On the other hand, the courts are largely missing the role of race perception based on appearance as central to race categorization generally[235] and, particularly, race categorization as a precursor to discrimination. These studies show that appearance consistently influences racial categorization, and this is particularly the case for targets perceived by observers to be obvious members of a particular racial group. In addition, *Butler* and allied courts assume that perceptions based on appearance, when "incorrect," can simply be corrected by the presentation of ancestry evidence or a self-identification that does not claim the (mis)perceived identity. The research presented here shows the remarkable resilience of racial perceptions in the face of conflicting information, including information that rationally we might consider more "objective" than one's claimed identity. This research also highlights the power of initial perceptions, drawing attention to the ways in which initial perceptions, even if they fail to correspond to other available racial cues, are remarkably resistant to change. Part IV digs deeper into the psychological evidence about racial categorization and perception that would be useful to conceptualizing race in the law going forward.

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235 In a recent case brought by the EEOC, *EEOC v. Kaplan Higher Learning Education Corp.*, No. 1:10 CV 2882, 2013 WL 322116 (N.D. Ohio Jan. 28, 2013), the court threw out evidence from an expert who attempted to determine the race of rejected job applicants by having "race raters" categorize the individuals based on photographs. The court believed that this was an unreliable way to go about determining the race of the individuals because the race raters were not experts trained in racial perception, missing the point that we are all experienced "race raters" in the sense that we are all constantly perceiving and categorizing people we encounter on the basis of race and other basic social categories. Numerous studies corroborate the fact that for most people, although not necessarily those focused on in the cases discussed in this Article, there is high correspondence between race as perceived by observers and racial self-identification and other racial cues. *See, e.g.*, TOM W. SMITH, UNIV. OF CHI., NAT'L OP. RESEARCH CTR., ASPECTS OF MEASURING RACE: RACE BY OBSERVATION VS. SELF-REPORTING AND MULTIPLE MENTIONS OF RACE AND ETHNICITY 3 (2001) (reporting that there was 97–98.5% agreement between observed race and self-identified race for Black and White General Social Survey respondents). The high degree of correspondence between observed and self-identified race obscures the role of perception in racial categorization, whereas the individuals discussed throughout this Article, that have appearances and/or self-identifications that are ambiguous in some way, highlight the role of perception in categorization processes.

IV. THE PSYCHOLOGY OF RACIAL CATEGORIES

This Part turns to a discussion of the psychological and socio-legal origins of racial categories, which provide the foundation on which legal definitions of race could be based. While the colorblind ideal leads the courts and lawmakers to avoid discussions of race and racial categories when at all possible, this Part demonstrates the nearly unavoidable psychological development of social categories, including race, as well as the role of law in helping shape and maintain racial categories. By discussing the psychological origins of race as a category, it becomes easier to see what aspects of race are and have been considered the core elements of the category.

The review that follows focuses on two different, yet prominent, approaches to questions about the origins of race as a concept and basic social category. This Part examines the cognitive developmental origins of social categories, particularly race. This Part considers how social categories come to be used as humans develop from birth and across the lifespan. This approach highlights the possible universal underpinnings of racial categorization processes by considering the role of basic cognitive structures and processes as they develop, particularly early in the lifespan. By considering the overlap, regardless of other influences, in the acquisition and use of social categories like race, it becomes possible to see which aspects of race may be socially constructed and what aspects may be relatively inherent. Understanding these cognitive foundations of race is important to understanding how our psychology of race affects our social and legal approaches to race.

A. *Social-Cognitive Origins of Race*

The social sciences have long been interested in questions of racial categorization. The social psychological work on racial categorization has focused on how pervasive it is, how quickly it occurs, and what characteristics (largely of the perceiver) moderate racial categorization patterns. In general, research has focused on racial categorization because it is one of the relatively immediate and basic categorizations. Social psychologists have demonstrated that, particularly in the absence of prior knowledge, perceivers tend to focus on a social target's race, gender, and age first.[236] Social categories like race carry with them a wealth of generalized information about the members of the category,[237]

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236 Charles Stangor et al., *Categorization of Individuals on the Basis of Multiple Social Features*, 62 J. PERSONALITY & SOC. PSYCHOL. 207 (1992).

237 *See, e.g.*, Macrae & Bodenhausen, *supra* note 3.

making social categories particularly informative in situations where other information about a social target is scarce. In addition, research has shown that people can easily (i.e., without relying on conscious processing or cognitive resources) and quickly categorize social targets on the basis of these basic social categories.[238] It is not surprising that categorical thinking is a fundamental cognitive ability given basic cognitive limitations and the overabundance of social stimuli that perceivers encounter on a daily basis.[239] For race specifically, research has shown that the brain shows differential responses in brainwave activity to targets of different races as early as 122 milliseconds after presentation of a picture.[240] In other words, it takes a fraction of a second for people to begin to process a basic social category like race.[241]

What follows is a compressed review of the large body of work in the psychological literature about racial categorization. This review puts emphasis on identifying the developmental and social cognitive origins of racial categorization. The studies discussed here focus on responses to racially ambiguous targets who challenge simplistic racial categorization rules and procedures and best illustrate racial categorization processes in action by revealing how people negotiate the boundaries of racial categories. Further, studies that focus on responses to these individuals are especially relevant to the discussion in Part IV about the law's treatment of multiracial and racially ambiguous persons in a discrimination context.

1. Cognitive Development and Use of Race

A discussion of origins must consider how individuals develop a concept of race and begin using racial categories. Understanding the cognitive developmental process helps to highlight both what elements of racial categorization might be relatively universal while also suggesting how early social influences dictating relevant race

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238 *See, e.g.*, Haydn D. Ellis, *Processes Underlying Face Recognition*, *in* THE NEUROPSYCHOLOGY OF FACE PERCEPTION AND FACIAL EXPRESSION 1 (Raymond Bruyer ed., 1986).

239 *See, e.g.*, GORDON W. ALLPORT, THE NATURE OF PREJUDICE 56 (1954); Galen V. Bodenhausen & C. Neil Macrae, *Stereotype Activation and Inhibition*, *in* 11 STEREOTYPE ACTIVATION AND INHIBITION: ADVANCES IN SOCIAL COGNITION 1 (Robert S. Wyer, Jr. ed., 1998); Marilynn B. Brewer, *A Dual Process Model of Impression Formation*, *in* 1 ADVANCES IN SOCIAL COGNITION: A DUAL PROCESS MODEL OF IMPRESSION FORMATION 1 (Thomas K. Srull & Robert S. Wyer, Jr. eds., 1988); Macrae & Bodenhausen, *supra* note 3.

240 Tiffany A. Ito & Geoffrey R. Urland, *Race and Gender on the Brain: Electrocortical Measures of Attention to the Race and Gender of Multiply Categorizable Individuals*, 85 J. PERSONALITY & SOC. PSYCHOL. 616, 618–22 (2003).

241 For comparison, sex/gender is attended to very quickly, still within a fraction of a second, but it takes longer than attention to race by about fifty milliseconds on average. *Id.* at 616.

construction and categorization rules may influence a person's perception and use of race as a social category later in life.

A framework for examining the developmental origins of racial categories comes from Lawrence Hirschfeld. He is interested in how social categories are formed from a developmental perspective, seeing the study of children as a gateway to understanding why certain social categories develop universally (in the sense that the broader category itself exists, such as race, rather than the specifics of the subgroups that make up the category) and come to have essentialist properties (i.e., they seem to be "natural kind" categories).[242] Hirschfeld is interested not in children's evaluations or stereotypes of groups, but in how children reason about race, how they come to understand racial categories and boundaries, and what children's understanding and use of race tells us about understandings and use of race by adults.

Classic theories that attempt to explain how children use and understand race argue that younger children first see and use race when they can observe perceptual characteristics of race (i.e., differences in appearance), and they move to seeing race as permanent and heritable around ages six to eight.[243] Hirschfeld argues that essentialist thinking (e.g., seeing race as immutable and heritable) appears much earlier than proposed previously, as early as age three or four.[244] He has shown that young children believe nature, not nurture, determines the race of adopted children. In addition, young children report that race is more immutable and heritable than characteristics like occupation and body build.[245] Hirschfeld also argues that children may not move from relying on perceptual characteristics to essentialist thinking as suggested by other researchers. Instead, he argues that essentialist thinking may come before a true grasp of the perceptual characteristics that make groups distinct. For example, he finds that children have trouble identifying dolls or pictures that resemble themselves even though they can identify their own race verbally at a young age.[246] The conclusion from this is that children may learn about race by understanding category labels rather than groupings of perceptual characteristics.[247] In other words,

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242 LAWRENCE A. HIRSCHFELD, RACE IN THE MAKING: COGNITION, CULTURE, AND THE CHILD'S CONSTRUCTION OF HUMAN KINDS (1996) [hereinafter HIRSCHFELD, RACE IN THE MAKING].

243 *See, e.g.*, Diane Hughes, *Racist Thinking and Thinking About Race: What Children Know but Don't Say*, 25 ETHOS 117, 119 (1997); Kristin Pauker, Nalini Ambady & Evan P. Apfelbaum, *Race Salience and Essentialist Thinking in Racial Stereotype Development*, 81 CHILD DEV. 1799, 1806 (2010).

244 Lawrence Hirschfeld, *The Conceptual Politics of Race: Lessons from Our Children*, 25 ETHOS 63, 83 (1997).

245 *Id.* at 83–84.

246 HIRSCHFELD, RACE IN THE MAKING, *supra* note 242, at 138–39.

247 Jennifer L. Eberhardt & Jennifer L. Randall, *The Essential Notion of Race*, 8 PSYCHOL. SCI. 198, 200 (1997).

children learn race more through top-down (i.e., conceptually-driven) rather than bottom-up (i.e., perceptually-driven) processes.

Hirschfeld also addresses questions about whether children reason differently about human and non-human kinds.[248] He finds that while children around the age of seven do not differ in how they reason about animals and people with different skin colors, children around the age of ten do. Ten-year-olds use different strategies depending on whether the target is a person or an animal, as well as whether the target characteristic is race-relevant or not. For example, children think Black-White biracial children will look Black even if they do not think the child will be categorically Black. Adults, on the other hand, understand the same child to be categorically Black even if she does not only have Black features, although they often expect the child to look Black as well.[249] On the other hand, children do not think that the child of a blonde person and a brunette person will necessarily be brown-haired, nor do they think that dark skin will be predominant in animals that have different-skinned parents. This provides evidence that older children and adults use a one-drop rule for humans (coloring their expectations about the display of racially-relevant features) but not non-human kinds (e.g., animals). However, Hirschfeld argues that this is not evidence that older children and adults reason in the same way because he believes that adults are operating on the basis of category membership while children are relying on appearance.[250]

The role of culture and environment in racial category development and the use of race by children is also addressed by Hirschfeld's work.[251] He finds that the experience of children with interracial contact moderates what children expect children of one White and one Black parent to look like such that the children with greater interracial contact expected mixed children to have mixed features rather than Black features, whereas the children with less interracial contact expect the mixed children to have Black features.[252] These children, Hirschfeld argues, due to their greater experience with children of other races, see race as more malleable and less dichotomous compared to children who grow up in homogenous, same-race environments. Hirschfeld also addresses, although not empirically, the

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248 *See, e.g.*, HIRSCHFELD, RACE IN THE MAKING, *supra* note 242, at 70.

249 Lawrence A. Hirschfeld, *The Inheritability of Identity: Children's Understanding of the Cultural Biology of Race*, 66 CHILD DEV. 1418 (1995) [hereinafter Hirschfeld, *The Inheritability of Identity*].

250 *Id.* at 1425.

251 HIRSCHFELD, RACE IN THE MAKING, *supra* note 242; Lawrence A. Hirschfeld, *On Acquiring Social Categories: Cognitive Development and Anthropological Wisdom*, 23 MAN 611 (1988) [hereinafter Hirschfeld, *On Acquiring Social Categories*]; Hirschfeld, *The Inheritability of Identity*, *supra* note 249.

252 Hirschfeld, *The Inheritability of Identity*, *supra* note 249, at 1432.

role of culture in the development of racial categories.[253] He acknowledges that while social categorization varies significantly across cultures, the means of acquiring the categories themselves do not. He argues that this suggests a less significant role of culture than has been previously assumed. Specifically, he argues that children do not learn about race by learning about how the culture around them defines race. Rather, children learn about race because of universal cognitive processes that guide acquisition of particular types and limited numbers of "natural kinds," of which race is a common and spontaneously available "natural kind" for humans.

2. Social Cognition: Perceptual and Conceptual Processes

Hirschfeld emphasizes the distinction between perceptually-driven and conceptually-driven processes in racial categorization, suggesting that the reliance on the two processes changes over the lifespan. This distinction also raises interesting questions about the degree to which people rely on characteristics of the category compared to perceptual characteristics of a given person when making racial categorizations. A brief review of the relevant literature that speaks to this distinction between perception and conception follows, with an emphasis on research that has examined how people disambiguate racially ambiguous targets since responses to these individuals provide unique insight into the categorization process in action.

The interaction of perceptual and conceptual processes in categorization among adults is relatively indisputable at this point.[254] Perceptual processes in racial categorizations are processes driven by the characteristics of the stimulus itself (i.e., the concrete, perceivable characteristics of a target); physical features are an example.[255] Conceptual processes in racial categorization are processes driven by the salience of racial groups or categories and corresponding stereotypes available to the perceiver (i.e., the relevant concepts related to the person or the groups they represent).[256] Research on racial

253 HIRSCHFELD, RACE IN THE MAKING, *supra* note 242; Hirschfeld, *On Acquiring Social Categories*, *supra* note 251.

254 *See, e.g.*, Brewer, *supra* note 239; Gregory L. Murphy & Audrey S. Kaplan, *Feature Distribution and Background Knowledge in Category Learning*, 53 Q.J. EXPERIMENTAL PSYCHOL. SEC. A 962 (2000).

255 *See, e.g.*, Irene V. Blair et al., *The Role of Afrocentric Features in Person Perception: Judging by Features and Categories*, 83 J. PERSONALITY & SOC. PSYCHOL. 5 (2002); Leslie A. Zebrowitz & Joann M. Montepare, *Social Psychological Face Perception: Why Appearance Matters*, 2 SOC. & PERSONALITY PSYCHOL. COMPASS 1497 (2008).

256 *See, e.g.*, Bodenhausen & Macrae, *supra* note 239; Brewer, *supra* note 239; Susan T. Fiske & Steven L. Neuberg, *A Continuum of Impression Formation, from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and*

categorization has examined both of these processes, and a sample of that research is reviewed below with an emphasis on the racial categorization literature that has most directly looked at racial categorization of racially ambiguous targets.

a. Perceptual Process: Responses to Stimulus Characteristics

Research on how the characteristics of a person affect racial categorization, particularly when the most obvious physical characteristics of race (e.g., skin color and afrocentricity of features) are made ambiguous, has been limited to this point. In addition, particularly when researchers cannot point to dark skin or prototypical racial features, it becomes more difficult to identify what particular characteristics are influencing categorization at this level. Willadsen-Jensen and Ito showed at the level of basic brain responses that racially ambiguous faces created from morphing Black and White source faces were differentiated from both unambiguously Black and White filler faces about 500 milliseconds (half a second) after exposure to the face, as indicated by brain wave activity.[257] Similar effects were demonstrated with Asian-White morphed faces and Asian and White filler faces. This is a relatively slow response compared to the differentiation that occurs between Black and White faces.[258] Willadsen-Jensen and Ito infer that the ambiguous faces are more difficult to process because of their ambiguity and the overlap between the features of these faces and the faces of the unambiguous groups, which slows responses to these faces relative to unambiguous faces.

In another attempt to get at the most basic level of categorization and the categorization process itself, Freeman, Pauker, Apfelbaum, and Ambady used mouse tracking to examine the temporal dynamics of categorization for racially ambiguous faces.[259] They presented racially ambiguous (Black-White morphs) and non-ambiguous (Black and White) faces and tracked participants' mouse movements when making categorization decisions. Participants had to decide whether to categorize the faces as Black or White, and these response options were presented in opposite corners of the screen. They found evidence that participants were attracted to the category opposite the one they ultimately chose such that if they chose "Black," their trajectories

Interpretation, *in* 23 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1 (Mark P. Zanna ed., 1990).

257 Eve C. Willadsen-Jensen & Tiffany A. Ito, *Ambiguity and the Timecourse of Racial Perception*, 24 SOC. COGNITION 580 (2006).

258 Ito & Urland, *supra* note 240 (showing that unambiguous Black and White faces are differentiated as early as 122 milliseconds).

259 Jonathan B. Freeman et al., *Continuous Dynamics in the Real-Time Perception of Race*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 179 (2010).

showed a slight curve toward choosing "White" before ultimately selecting "Black." Further, these curves in the trajectory were greater when the faces being categorized were racially ambiguous compared to unambiguous Black or White faces.

MacLin and Malpass investigated how characteristics of a person, such as hairstyle, may be used to disambiguate racially ambiguous people.[260] In these studies, they found that racial markers, such as hairstyles considered prototypical of particular racial groups, led to different racial categorizations for the same racially ambiguous target faces depending on the race suggested by the racial marker. In addition, these differences in categorization then affected subsequent perception and memory of the faces. In this case, the researchers made the skin color and physical characteristics of the face racially ambiguous but disambiguated the faces for participants using hair as the physical characteristic of interest.

This body of research demonstrates the importance of the salient visual cues of appearance contained both in the fixed physical characteristics of the face and body (e.g., skin color and facial features) and in malleable characteristics of appearance, including hairstyle and manner of dress, for racial perception and categorization. It also highlights that people intuitively pay attention to these cues when perceiving race and making racial categorizations, and the effect of subtle variations in these cues can have noticeable effects on the resulting categorizations.

b. Perceptual Process: Contextual Effects

Context (i.e., the characteristics of the environment that a person is encountered or presented in) may also serve as a type of perceptual cue in racial categorization. The existing research in this area thus far has largely considered how the people around an ambiguous person can serve as disambiguating, contextual cues to the person's racial group membership. For example, Shutts and Kinzler found that when racially ambiguous faces were paired with Black or White faces, the pairing affected categorization of the ambiguous faces such that the ambiguous faces were assimilated to the racial group of the face they were paired with.[261] In addition, Ito, Willadsen-Jensen, Kaye, and Park examined variation in implicit bias toward racially ambiguous faces in different

260 Otto H. MacLin & Roy S. Malpass, *Racial Categorization of Faces: The Ambiguous Race Face Effect*, 7 PSYCHOL. PUB. POL'Y & L. 98 (2001).

261 Kristin Shutts & Katherine D. Kinzler, *An Ambiguous-Race Illusion in Children's Face Memory*, 18 PSYCHOL. SCI. 763 (2007). See also the Author's studies on social associational effects on racial categorization (data on file with the Author).

contexts.[262] In two studies, Ito et al. demonstrated that the context provided by situating a racially ambiguous face among all Black, all White, or racially mixed sets of faces affected evaluations of the racially ambiguous faces.[263] Significant bias against racially ambiguous people was found when their faces were presented among White faces but not Black faces due to increased salience of their minority features. Further, ambiguous faces were seen as more prototypically White among Black faces and more prototypically Black among White faces. These studies suggest that people use characteristics of the environment the social target is presented in (including the people they are around) to disambiguate otherwise ambiguous persons via processes of assimilation and contrast that rely on the characteristics of those around the target rather than characteristics of the target per se.

This work highlights yet another subtle influence on racial perception and categorization and points to the importance of cues external to the person being perceived. Everyday interactions, including those that take on legal significance, are always situated in a relevant context, and the importance of acknowledging the influence of context for racial categorization is underappreciated.

c. Conceptual Process: Use of Racial Labels

Racial labels serve as an explicit indicator of racial category, and racial labels have been shown to affect subsequent perception of racially ambiguous faces in particular. For example, Eberhardt, Dasgupta, and Banaszynski found that when participants saw racially ambiguous faces that were labeled either "Black" or "White," the provided racial label influenced subsequent perceptions and memory for the features of the face of the previously ambiguous faces in the direction of the racial label.[264] This effect was moderated by implicit beliefs about the malleability of human traits such that entity theorists (those that believe traits are immutable)[265] were more likely to remember racially ambiguous faces as consistent with the provided label, whereas incremental theorists (those that believe that traits are malleable)[266] were more likely to remember the ambiguous faces as inconsistent with the provided label. In another study, Levin and Banaji found that racial

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262 Tiffany A. Ito et al., *Contextual Variation in Automatic Evaluative Bias to Racially-Ambiguous Faces*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 818 (2011).

263 *Id.*

264 Jennifer L. Eberhardt, Nilanjana Dasgupta & Tracy L. Banaszynski, *Believing Is Seeing: The Effects of Racial Labels and Implicit Beliefs on Face Perception*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 360 (2003).

265 Carol S. Dweck, Ying-yi Hong & Chi-yue Chiu, *Implicit Theories: Individual Differences in the Likelihood and Meaning of Dispositional Inference*, 19 PERSONALITY & SOC. PSYCHOL. BULL. 644 (1993).

266 *Id.*

labels applied to racially ambiguous faces affected subsequent perceptions of the targets' skin colors such that those faces labeled "White" were later judged to have significantly lighter (Whiter) complexions compared to when the same faces were labeled "Black."[267]

These studies highlight the way in which a conceptual category label can drive perception of the perceptual characteristics of a person. In other words, once someone is given a racial label or provides one through self-identification,[268] this label is bound to affect subsequent racial perception and categorization for that person. The importance of racial labeling cannot be understated, particularly in the context of historical legal rules that assigned racial labels to individuals, leading not only to likely changes in the perception and categorization of those individuals by others, but also to consequences tied to legal rights and privileges that were associated with the race determination made by the law.

d. Conceptual Process: Use of Stereotypes and Prejudice

Racial stereotypes may also direct racial categorization, particularly of racially ambiguous targets and for people who are high in prejudice (and thus more likely to endorse the stereotypes). Hugenberg and Bodenhausen found that hostile racially ambiguous faces were more likely than happy racially ambiguous faces to be categorized as Black (compared to White) by participants high in implicit prejudice compared to those low in implicit prejudice.[269] These results suggest that racial associations, such as the association between Blacks and hostility, may drive categorization processes for racially ambiguous individuals showing some evidence of Black group membership. Hutchings and Haddock[270] followed up this study, replicating Hugenberg and Bodenhausen,[271] and adding that those high in implicit prejudice also rated the intensity of the anger displayed by angry racially ambiguous faces as greater when they categorized the face as Black than when they categorized the same face as White.

In another study of stereotypes, Bartholow and Dickter found that racial stereotypes consistent with the race of target faces facilitated (i.e., sped) racial categorization of those faces, whereas information inconsistent with racial stereotypes slowed racial categorization of

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267 Daniel T. Levin & Mahzarin R. Banaji, *Distortions in the Perceived Lightness of Faces: The Role of Racial Categories*, 135 J. EXPERIMENTAL PSYCHOL.: GENERAL 501 (2006).

268 See Peery, Race at the Boundaries, *supra* note 17, for studies on the influence of self-categorization on racial perception and categorization processes.

269 Hugenberg & Bodenhausen, *supra* note 159.

270 Paul B. Hutchings & Geoffrey Haddock, *Look Black in Anger: The Role of Implicit Prejudice in the Categorization and Perceived Emotional Intensity of Racially Ambiguous Faces*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1418 (2008).

271 *Id.*

faces.[272] This was attributed to response competition, as in competition between the information activated by the race suggested by the facial features and associated with the activated stereotypes. Further, it was the stereotype information which drew attention first, so stereotype-incongruent information elicited activation of incorrect racial categorizations that corresponded to the race implied by the stereotypes.

Much research has focused on the role of individual difference moderators of racial categorization patterns, including racial prejudice and endorsement of different theories of race (e.g., race is biologically-determined or socially-constructed). Blascovich, Wyer, Swart, and Kibler found that racially-prejudiced individuals who were highly-identified with their racial ingroup were more motivated to police the boundaries between racial groups than non-prejudiced individuals.[273] Prejudiced individuals took longer to categorize racially ambiguous people and hesitated more vocally when making categorizations of these individuals, presumably because they were more concerned about accurately identifying ingroup versus outgroup members than were non-prejudiced individuals. Castano, Yzerbyt, Bourguignon, and Seron found a similar effect, demonstrating that those highly-identified with their ethnic group categorized ethnically ambiguous people as ingroup members more slowly and less often than they categorized these individuals as outgroup members.[274] Further, these highly-identified participants took more time to accept a person as an ingroup member than to reject people as outgroup members (termed "ingroup over-exclusion"[275]), which was theorized to be a method of protecting the integrity of the ingroup.

Finally, Sanchez, Young, and Pauker investigated individual differences in theories of race, demonstrating that those exposed to more racially ambiguous faces were less likely to endorse biological conceptions of race,[276] which has consequences for racial perception and categorization.[277]

All of these findings suggest that underlying theories of race or racial groups derived from stereotypes or broad beliefs about the basis of

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272 Bruce D. Bartholow & Cheryl L. Dickter, *A Response Conflict Account of the Effects of Stereotypes on Racial Categorization*, 26 SOC. COGNITION 314 (2008).

273 Jim Blascovich et al., *Racism and Racial Categorization*, 72 J. PERSONALITY & SOC. PSYCHOL. 1364 (1997).

274 Emanuele Castano et al., *Who May Enter? The Impact of In-Group Identification on In-Group/Out-Group Categorization*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 315 (2002).

275 Jacques-Philippe Leyens & Vincent Y. Yzerbyt, *The Ingroup Overexclusion Effect: Impact of Valence and Confirmation on Stereotypical Information Search*, 22 EUR. J. SOC. PSYCHOL. 549 (1992).

276 Diana T. Sanchez, Danielle M. Young & Kristin Pauker, *Exposure to Racial Ambiguity Influences Lay Theories of Race*, 6 SOC. PSYCHOL. & PERSONALITY SCI. 382 (2015).

277 *See, e.g.*, Melody Manchi Chao, Ying-yi Hong & Chi-yue Chiu, *Essentializing Race: Its Implications on Racial Categorization*, 104 J. PERSONALITY & SOC. PSYCHOL. 619 (2013).

race as a category influence treatment of perceptual characteristics, ultimately affecting the resulting categorizations in ways that are consistent with the racial group suggested by these conceptual starting points. In addition, acknowledgement of the role of biases linked to stereotypes and personal prejudices is important in the discussion of racial definition, particularly when considering the types of rules that people are bound to default to and their reasons (explicit or implicit) for doing so.

e. Interaction of Perceptual and Conceptual Processes

Despite this distinction between perceptual and conceptual processes in racial categorization, it is probable in many, if not most, social interactions that both processes are at play. Perceivers are always carrying racial stereotypes and racial attitudes with them that are likely to influence, on some level, how they interact with people of different racial groups. It is also the case that, particularly in the case of ambiguous individuals (e.g., those who are ambiguous in appearance or have mixed racial ancestry that may not suggest an obvious racial categorization), perceptual processes are likely to become more influential as people respond to perceptual characteristics of the target that attract more visual attention and require interpretation. Particularly for multiracial or racially ambiguous individuals, there are fewer concrete conceptual influences (e.g., stereotypes) to direct categorization of them, which may require perceivers to take a more perceptual approach to categorization in these cases.

Taken together, all of these findings illustrate some of the cognitive nuances of racial perception and categorization. When considering the origins of racial categories from a psychological perspective, it is important to consider the role that subtle influences on cognitive processing of race play in the race determinations people ultimately make about others. In addition, the variety of influences highlighted in this Section should also make clear that there are not only multiple cues to race, but also multiple variables that influence interpretation or prioritization of particular cues for race determination purposes. If we are to take seriously this Article's call for more intentional, evidence-based approaches to defining race, particularly in the law, this foundation suggests contexts and situations where various cues to race are likely to be influential and/or the best way to capture what is meant by race when used in particular legal contexts.

V. REDEFINING RACE: A NEW DEFINITIONAL FRAMEWORK

The law remains conflicted in its dealings with race, as it is still undecided whether the law should be wholly colorblind or remain race-conscious. In fact, the law is race-conscious, at least some of the time. As such, the law still plays an important expressive role in defining race. Lawmakers and the courts should be mindful of this. In many ways, the debate about the role that law should play in defining race has remained unchanged, as it still centers around the definitions that the legislature and courts use (or more recently the definitions they fail to provide), how they are interpreted and applied to individuals, and how to deal with individuals who find themselves somewhere between the superficially simple lines that are drawn.

As the changes to the U.S. Census in 2000[278] and the continued discussion of how to handle the changes in the data collected about race reveal, United States law continues to struggle with how to define race and its categories. Paul Finkelman said, "[t]he word 'race' defies precise definition in American law."[279] This statement remains as true today as it was when the concept of race was first introduced to the American legal system hundreds of years ago. Courts continue to struggle with the idea that any lines that are drawn between particular racial categories are bound to be technically arbitrary, even if they are socially and politically real, as it has been well-accepted that race is more of a social construction than a biological fact. The U.S. Census Bureau, in promulgating the definitions of racial categories relied on most often by governmental agencies enforcing civil rights law, specifically disclaims that there is any real scientific or anthropological basis for the classifications it has settled on.[280] They argue that the classifications are simply a standardized way to maintain records.[281] In some ways, those involved in the business of defining race seem to have thrown up their hands and simply acknowledged that whichever classifications they choose to rely on are by their very nature arbitrary. They would not be wrong, but that does not mean that they should stop explaining what they mean when they use race and refer to racial groups.

The answer to the obvious question of why the government and the law should rely on admittedly arbitrary categories lies in the continued need to monitor racial equality and progress. Even if it is acknowledged

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278 JONES & SMITH, U.S. CENSUS BUREAU, *supra* note 209.

279 Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937, 937 n.3 (1993) (reviewing KULL, *supra* note 27).

280 *E.g.*, Kenneth E. Payson, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed Race People*, *reprinted in* MIXED RACE AMERICA AND THE LAW: A READER, *supra* note 74, at 191–93.

281 *Id.*

that the racial categories that the United States relies on to sort its populations into groups are flawed, they maintain social significance, and most people are still willing to place themselves within these categories with little objection. It is still a relatively small percentage of people who refuse to identify with only one major racial category.[282] In addition, the race-conscious law that exists is meant to address the past and continued harms that exist for particular, historically salient minority groups, including non-White racial groups, and requires statistical showings of underrepresentation as evidence of disparate treatment.[283] These statistical showings require the collection of data, a process that requires racial groups to be identified in some way.

The issue of how to deal with possible claims of multiracial people,[284] or others who otherwise do not fit neatly within the existing system of racial classification, is compounded by the fact that there has been a shift toward allowing racial self-identification to take precedence in collecting information about race even though one's self-identification may not reflect the most common perception of one's racial identity.[285] How the law decides to resolve these situations has implications for how race-conscious law is interpreted and applied. If all that matters is self-identification, then the law cannot interpret race to be tied to physical features, as there will never be perfect correspondence between the self-identification of individuals and the identity that others perceive based on their appearances or ancestries. If anything, this correspondence is likely to decrease as the populations of multiracial and racially ambiguous people continue to increase. On the other hand, there is an increased possibility for abuse if race is completely decoupled from appearance or ancestry, as there would be virtually no way to challenge a person's self-identification.[286]

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282 MIXED RACE AMERICA AND THE LAW: A READER, *supra* note 74, at 189 ("Less than 3 percent of the total population reported more than one race.").

283 *See* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, *reprinted in* MIXED RACE AMERICA AND THE LAW: A READER, *supra* note 74, 319.

284 For a more complete discussion of the treatment of multiracial persons in discrimination law, see Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469 (2010).

285 *See, e.g.*, Ford, *supra* note 283, at 322; Rich, *supra* note 5.

286 One of the major concerns with an overreliance on self-reported racial identity in the absence of other cues, including appearance and/or ancestry, is the potential for "racial fraud" or a strategic misreporting of one's race to gain access to privileges or resources. *See, e.g.*, Malone v. Civil Serv. Comm'n, 646 N.E.2d 150 (Mass. App. Ct. 1995) (a case involving two brothers claiming Black identities to gain employment despite appearances and other cues that led them to be perceived and categorized as White). For a discussion of the *Malone* case and similar situations, see Rich, *supra* note 5. Nancy Leong adds to the discussion about third party (e.g., employers) strategic use of racial identity in *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

The same issues that have been dealt with since the early days of race determination trials, that relied on observations of appearance to determine racial group membership, appear again when the only standard left by which to judge group membership under the law is based on reasonable perceptions of group membership as a function of appearance. No physical attributes perfectly correspond with racial group membership, and with an increasing number of people who may be considered racially ambiguous in appearance, subjective opinions regarding the racial identities of these individuals could vary wildly. Justice Traynor in *Perez v. Sharp* highlighted these difficulties more than fifty years ago when he argued that if group membership is to be determined by appearance, it is possible that persons having the same hereditary background could be protected differently under the law because of differences in appearance.[287] This is obviously troublesome.

Under a system of law that considers race, as American law continues to do, there must be lines drawn and what is meant by "race" must be defined. Despite the acknowledgement across all levels of society and throughout many social institutions that use racial information, including the judicial and legislative branches, race remains a fuzzy concept, and the continued use of this concept requires some form of clarity. As long as resources are meted out on the basis of race and backed up by the law, the examination of what race means must continue. There is no obligation for the government to establish a unitary definition of race across all of its branches or in all the laws that it promulgates, interprets, and enforces. This would be undesirable in any case given the difficulties society and the courts have long faced when defining race and racial groups. If society is moving toward reflecting a more nuanced, more flexible conception of race, the law should not be trying to either maintain or develop a new rigid conception of race. Rather, the law should accept that in this instance, it is necessary to deviate from its adherence to bright lines and accept the fuzzy ones as best as it can at the general level, while focusing on drawing clearer lines in specific areas of law where understandings of race are relevant and explicitly drawn upon to inform the law at issue.

This Article has highlighted the need to carefully consider what legal uses of race mean in terms of how to define racial groups relevant to the law in question, as well as the means for determining racial group membership. Anecdotal evidence and psychological research cited above demonstrate the complex interaction of at least three common cues to race (appearance, ancestry, and self-identification) that are often easily made available in everyday social interactions, including those interactions addressed by race-conscious law such as discrimination

287 Perez v. Sharp, 198 P.2d 17, 28 (Cal. 1948) (Traynor, J.) (majority opinion).

law. The law has traditionally focused on ancestry when making racial determinations, although it has also considered other racial cues, including appearance, self-identification, and social association, when ancestry information has been unavailable or difficult to interpret. While a preference for ancestry as the most relevant racial cue is not inherently problematic, it is problematic to assume that ancestry is the best definition of race in every context. Ancestry in particular raises questions about the means for determining group membership on that basis in ways that are deemed legitimate, clear, and respectful of the personhood of the individuals that are subject to the legal race determination.

As hinted at above, this Article also demonstrates the need to consider more carefully when race is best represented by the various racial cues.[288] Lawmakers and the courts should evaluate when race is best represented by ancestry, appearance, self-identification, and/or other cues. Further, their considerations should also acknowledge the relationship that should exist between the goals of race-conscious law and policy, and what those goals suggest about the racial definitions most likely to capture the population(s) targeted by the law. Ideally, lawmakers in particular, but the courts when necessary,[289] would articulate domain-specific definitions of race based on the goals of the law and theoretical (and empirically supported) evidence about which cue(s) would best capture the desired population.

In the context of Title VII discrimination law, for example, race may be best defined in terms of how a plaintiff is perceived based on their appearance and other racial cues, as perception determines whether someone is likely to be subjected to discrimination or not.[290] The cases and social psychological research discussed throughout this Article demonstrate that appearance is one of the most salient factors in

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288 In other words, "scholars should not take conceptualizations of race for granted." Gómez, *supra* note 8, at 499.

289 Although some scholars have cautioned against involving courts in disputes about the definition of racial categories, see, for example, FORD, *supra* note 165, at 91–97; Cristina M. Rodriguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1406 (2008); and Driver, *supra* note 9, at 408–09, the courts will have to engage in this type of discussion, particularly in areas of law where the statutes lacking definitions are unlikely to be amended.

290 The perception theory advanced in this Article for Title VII cases, *see also* Greene, *supra* note 164, admittedly cannot be applied as cleanly to disparate impact claims or class action discrimination claims under Title VII, given that they both rely on statistical showings of disparities between groups. Perception is not irrelevant in these contexts, as making determinations about who is going to be counted in which group still implicates the role of employer perception, as some of those determinations may be made by the employer, although many of the classifications in these cases would result from other methods, especially self-identification. This does raise questions about whether there may be a need for definitional differences within the same domain, given the proposed guidelines for selecting definitions advocated for in this Article. Future work could discuss the nuances of this.

racial perception and categorization, often dominating other cues typically preferred by the courts, including ancestry and self-identification. Therefore, it is the perceptions[291] of the alleged discriminators that determine the likelihood of experiencing discrimination, since those who do not appear to be a member of the group targeted for discrimination are less likely to experience discrimination on the basis of that group membership. The cases and research previously discussed demonstrate that perceptions are remarkably resilient even in the face of ancestry or self-identification information that conflicts with the perception. The Title VII cases discussed above featured plaintiffs who had attempted to correct their alleged discriminators' misperceptions to no avail—discrimination continued on the basis of the discriminators' perceptions.

While this represents a subject for more in-depth analysis in future work, race-based admissions or affirmative action policy, on the other hand, represents an area where a different racial definition may be best based on the purported goals of the policy in question. If the goal of race-based admissions is to correct for a past of exclusion, then race in this context might be best conceived of as referring to ancestry,[292] with an emphasis on those who have ancestry of groups that have been historically discriminated against. If race is defined in this manner, then it should not matter whether the person looks a particular way or even whether they self-identify in a particular way. On the other hand, legal discussion about race-based admissions has shifted away from a goal of remedy to one of proactive opportunity for all. The diversity rationale, reiterated most recently in *Fisher*,[293] says that the goal of race-based admissions is to contribute to a critical mass of diversity so that everyone in the relevant community learns and benefits from exposures to that diversity. If the diversity rationale is the goal of race-based admissions, then race in this context may better be captured by self-identification or appearance. If we assume that those who self-identify

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291 The mindset of the alleged discriminator is of great importance in discrimination jurisprudence, as demonstrated by the Supreme Court in cases like *McCleskey v. Kemp*, 481 U.S. 279 (1987) that put an emphasis on determining discriminatory intent; thus focusing on the alleged discriminator has been commonplace.

292 The work of Kevin Brown addresses questions about the use of ancestry in affirmative action and race-based admissions, making the argument for a more sophisticated understanding of the interaction of ancestry, ethnicity, and class in order to ensure that the admissions policies are capturing the populations meant to be targeted by the remedial focus of such policies (i.e., "ascendants" of historically disadvantaged groups). *See, e.g.*, Kevin Brown, *Change in Racial and Ethnic Classifications Is Here: Proposal to Address Race and Ethnic Ancestry of Blacks for Affirmative Action Admissions Purposes*, 31 HAMLINE J. PUB. L & POL'Y 143 (2009); Kevin Brown, *Now Is the Appropriate Time for Selective Higher Education Programs to Collect Racial and Ethnic Data on Its Black Applicants and Students*, 34 T. MARSHALL L. REV. 287 (2009).

293 Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).

as members of particular groups or those with appearances that suggest membership in particular groups are more likely to have experiences that represent that group, then it may be of little concern whether someone can make ancestral claims to that group.

The areas of discrimination law and race-based admissions are not the only areas ripe for these definitional discussions. In yet another example, in the context of jury selection and Batson challenges alleging racial discrimination in that process, there are numerous questions that arise about the evidence needed to prove that a removal occurred because of race in that context. In that process, there are potentially many relevant sources of information about the race of the juror(s) in question, including the perception of the attorneys(s), the perception of the judge, the perception of the defendant, as well as any information provided during voir dire or on juror questionnaires that could signal race, including self-identification. In practice, any of these pieces of racial identity information could be relevant to making a Batson challenge, and yet there is little guidance as to which of these cues, if any, should be (or are in practice) prioritized for evidentiary purposes or whether they are relevant at all. This creates the possibility that challenges potentially look very different in terms of evidentiary standards used and outcomes on the basis of idiosyncratic preferences for proving inappropriate attention to race in a variety of ways.

CONCLUSION

While many anxiously await the day when racial classifications are finally irrelevant, that day is not yet upon us. Even as lawmakers, the courts, and the American public push back against race-conscious law and policy and the use of racial classifications, the reality of race-consciousness must be faced. Race still matters, even if the concept is a socially-constructed one, and the law still plays a role in making that so. Despite a renewed faith in legal colorblindness that emphasizes a "no distinctions" approach to issues of diversity, the law cannot continue to hide behind colorblindness or a fear of the past to avoid being clear about what it means when it uses race and racial categories. In addition, as long as there is race-conscious law, there must also be racial classification and a willingness on the part of lawmakers and/or the courts to define those racial classifications in clear terms, preferably terms that are tailored to the goals of the race-conscious law in question, as well as the existing evidence about how racial categorizations may operate in situations targeted by the law.