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Authors
Richardson, LS
Goff, PA

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From Interraciality to Racial Realism


Reviewed by L. Song Richardson* & Phillip Atiba Goff**

Introduction

As a result of our nation’s progress in breaking down de jure and de facto discrimination, there is significant debate about how to advocate for racial justice. Since explicit prejudice is in such stark decline,1 some argue that the fight for racial equality is almost complete. All that remains is for the achievements of stigmatized racial groups to catch up to our nation’s enlightened hearts and minds.

However, as Professor Angela Onwuachi-Willig demonstrates in her important and groundbreaking new book, According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family, it is a mistake to believe that the fight for racial justice is over. Through her close

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* Professor, University of Iowa College of Law. J.D., Yale Law School; B.A., Harvard University. I wish to thank Lauren Sudeall Lucas for her insightful comments on an earlier draft and to extend my gratitude to Elizabeth A. Etchells and Francesca Kazerooni for their invaluable research assistance. Finally, I appreciate the valuable work performed by Kelsie Krueger, Michael Deane, Spencer Patton, and the Texas Law Review staff.

** Assistant Professor, UCLA, Department of Psychology. Ph.D., Stanford University; B.A. Harvard University.

examination of relationships between black and white individuals, she exposes how the remnants of our nation’s sordid history of racial bias continue to affect both law and culture today. More importantly, what Onwuachi-Willig conveys is the need to challenge dominant assumptions regarding how racism operates in order to improve the laws and customs that enable equitable outcomes. Specifically, she demonstrates that although de jure prohibitions on interracial marriages are unconstitutional after the Supreme Court’s decision in Loving v. Virginia and societal approval towards these couplings is higher than ever, the dearth of mixed-race relationships and families, especially black–white couples, belies the claim that our society has overcome the deeply engrained taboo.

Despite progress, outright racism against mixed-race couples is troublingly evident, as the violent discourse in response to a recent Cheerios commercial and the violent assaults and murders perpetrated against such couples attest. However, Onwuachi-Willig’s chief accomplishment in this book is not simply pointing out where racism still exists but rather in revealing why our thinking about race must evolve in order to address it. As Onwuachi-Willig masterfully demonstrates, unconscious and invisible biases are equally, if not more, pernicious than outright bigotry because their invisibility in both law and society makes them difficult to recognize, confront, and address. In fact, the law often provides no remedy for even the most obvious instances of discrimination against mixed-race couples.

According to Our Hearts is on the pulse of the central paradox facing the fight for civil rights today, namely, how to reconcile the broad gentling of racial animus with the continued persistence of racial inequalities of all types. Onwuachi-Willig gives us some insight into this puzzle as it relates to multiracial families. Through her exploration of how law and society together create and maintain the normative ideal of family as monoracial and heterosexual she “challenge[s] the commonly accepted notion that legal
discouragement of and punishment for intimate, cross-racial heterosexual intimacy no longer exists.” After persuasively demonstrating that these sanctions survive today, she introduces the concept of “interraciality.” This term refers to the discrimination biracial, heterosexual couples face “because of their interraciality as a couple, as opposed to the race of just one member of the couple.” In order to facilitate recognition of and recompense for the harm multiracial families continue to endure, Onwuachi-Willig argues that discrimination based on interraciality should be included as a protected category in current antidiscrimination law.

In this Review, we argue that her concept of interraciality is not only an important intervention for a group currently left unprotected by antidiscrimination law but that it is also important within the broader context of civil rights. Her insights not only explain why adding protected categories to antidiscrimination law is necessary, but—when combined with lessons from the social psychology of contemporary bias—they show why the law should also account for the additional mechanisms through which racial bias manifests itself, whether conscious or unconscious, visible or invisible.

In Part I, we briefly summarize the book, emphasizing Professor Onwuachi-Willig’s discussion of how societal attitudes influence the law’s construction of the family as monoracial and heterosexual and the resulting harms to multiracial families. In Part II, we situate her book within the broader cause of civil rights and explain how her concept of interraciality pushes the boundaries of the law’s traditional framing of bias as primarily motivated by intentional racism. We briefly introduce the social science of contemporary bias to demonstrate that not only is the law constructed around an outdated notion of family but also that the law’s current conception of racial bias is similarly constructed to make invisible all but the most obvious and purposeful forms of discrimination. We conclude by arguing that only by enlarging our discussion of the nature and causes of bias, as Onwuachi-Willig does so powerfully in her book, can law and society address “the full range of [discrimination] harms that can occur.”

I. Interraciality: Protecting an Invisible Class

While today no laws prohibiting interracial marriages exist and attitudes towards these relationships are generally positive, our society is still dealing with the effects of centuries of legal and de facto discrimination against these couples. This is reflected not only in the relative rarity of

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9. Id. at 201.
10. Id. at 21 (footnote omitted).
11. Id. at 264–66.
12. Id. at 212.
black–white intimacy13 but also in the invisible, but harmful, ways that law and society continue to treat these relationships as nonnormative. Professor Onwuachi-Willig’s theory of interraci ality accounts for this legacy of history by suggesting that antidiscrimination laws should explicitly recognize multiracial families as a new protected class. Only by doing so, she argues, can the law, and society in general, begin to ameliorate the often invisible punishments these couples and families confront. This Part traces Onwuachi-Willig’s illuminating discussion of the historical and contemporary punishments of heterosexual, mixed-race couples and unpacks her theory of interraci ality.

A. The Rhinelanders’ Doomed Relationship

Onwuachi-Willig uses the ill-fated relationship of Alice and Leonard Rhinelander in 1920s New York to expose how the legal and social taboo against interracial relationships is not simply a relic of the past but continues to affect multiracial relationships today. In part I of the book, she examines their relationship from their initial meeting in 1921, through their two-month marriage, to the end of the annulment trial in which Leonard lost his claim of marital fraud.14 His allegation was that Alice had deceived him about her racial identity, and had he known she was not white, he would not have married her.15 Through her analysis, Onwuachi-Willig reveals “how law and society have often functioned together to frame the normative ideal of family as monoracial, both in our history and in our present.”16

The Rhinelander story reflects the symbiotic relationship between societal norms and the law. Despite the absence of de jure prohibitions on interracial marriages in 1920s New York,17 racism made the crossing of racial boundaries in intimate relationships unacceptable. The depth of the then-existing racial intolerance is made starkly apparent by the fact that neither Alice’s lawyers nor the judge questioned whether racial misrepresentation was a cognizable claim under the marriage fraud statute.18 It was so obvious that unknowingly marrying a black person was harmful and degrading to the white spouse that neither the judge nor Alice’s lawyer challenged the underlying racist assumption embedded in the very nature of the lawsuit itself. The language of the statute did not require this interpretation, but prevailing attitudes about black inferiority did.

Furthermore, existing beliefs about “racial purity” also foreclosed Alice’s ability to defend against the lawsuit by claiming a white racial
identity. Although Alice’s mother was white and the rule of hypodescent did not officially apply in New York, it was also apparent that just one drop of “black” blood was sufficient to exclude her from being classified as white.19 Finally, Alice’s lawyer took advantage of and reinforced the predominant view of race as biological. He argued that no fraud occurred because Leonard had seen Alice naked prior to their marriage and thus had to know that she was black.20 To prove his point, in a shocking and degrading move that would have been unthinkable had Alice been considered white, her lawyer had Alice bare her upper and lower body in front of the all-male jury.21 This display was necessary, in his view, to demonstrate that she was “‘dark’ all over.”22

Although racial attitudes have become more outwardly tolerant since the Rhinelander trial in 1924, in the remainder of the book, Professor Onwuachi-Willig reminds the reader that it is not so easy to escape the legacy of the racist history reflected in the Rhinelander case. She masterfully weaves the story throughout, persuasively demonstrating that its lessons still have relevance today. Next, subpart I(B) shows that despite the gentling of racial animus, multiracial families are still punished, both explicitly and implicitly, for crossing the color line.

B. Current Manifestations

In part II of the book, Onwuachi-Willig challenges the belief that “legal discouragement of and punishment for . . . [interracial] intimacy no longer exists.”23 She demonstrates that while the law does not explicitly discriminate against these relationships, its implicit assumptions about the monoraciality of families are equally pernicious. That is because, by framing family as monoracial, antidiscrimination law fails to recognize multiracial families and the unique harms they suffer as a result of their interraciality.24

One example she uses to illustrate her point comes from how the Fair Housing Act defines familial status.25 This statute provides a compelling illustration because, unlike the other civil rights statutes, its goal is to safeguard families, instead of just individuals, from unlawful discrimi-

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20. ONWUACHI-WILLIG, supra note 3, at 77.
21. Id. at 77–79.
22. Id. at 79 (quoting RENEE C. ROMANO, RACE MIXING: BLACK-WHITE MARRIAGE IN POSTWAR AMERICA 167 (2003)).
23. Id. at 201.
24. See id. at 20.
However, since Congress assumed monoraciality when drafting the statute, its text inadvertently excludes multiracial families from protection. Thus, if a landlord unlawfully refuses to rent to a monoracial black family, the family unit can file a suit together, alleging discrimination against them as a family. However, the statute does not explicitly cover situations where “the couple is being discriminated against, not because of the race of a specific member or specific members of the family—that is, the black person in the family—but rather because of the family’s status as a multiracial family, as a unit that was formed through race mixing.” Multiracial families are not a protected category under the statute, and the fact that these families were overlooked in the statute’s drafting demonstrates just how deeply embedded the norm of the monoracial family is.

A few courts have attempted to work around the invisibility of multiracial families in the law by using a “discrimination by association” analysis. When seeking relief under the Fair Housing Act, for instance, this analysis requires each member of a multiracial family to claim “separately and individually that, but for the race of their spouse, they each would have been treated differently.” Unlike monoracial couples, who can file their claims together, the discrimination by association analysis requires multiracial families to “engage in wordplay” and “divide up their family unit” in order to bring their suit.

This construction of family as monoracial does not just exist in antidiscrimination law; it exists in society as well. For instance, Onwuachi-Willig gives numerous examples of multiracial relationships being rendered invisible in public “even when all the social cues point to marriage or commitment.” The monoracial ideal is so strong that people simply do not see the relationship. Worse yet, even the children of these couples are often perceived as not being part of the family unit. The number of multiracial children in the United States has grown exponentially since the 1970s. (reporting that the number of people who reported multiracial status on the census grew from forty-six thousand in 1970 to almost one million in 1980 and that by 2000 that number had reached 6.8 million, although this was also the first year that people were instructed to check two racial categories on the census form if applicable).
improved when the family becomes visible because then these couples or families are interrogated about their relationship or their children, as their interracial coupling is perceived as the most salient aspect of their relationship. Thus, society’s normative conception of family as monoracial and heterosexual renders multiracial families at once both invisible and remarkable. These contrasting treatments coexist because these families exist outside the norm.

Some may dismiss “all the slights, mistreatments, and intrusions toward multiracial families [as] purely social,” reminiscent of the Supreme Court’s sharp distinction between social and legal discrimination in the now infamous Plessy v. Ferguson decision. The Court’s analysis in Plessy reflected the belief of many sociologists that “stateways cannot change folkways,” and Justice Powell’s later opinion in Wygant v. Jackson Board of Education expressed the view that de facto social discrimination was “too amorphous” to be addressed by antidiscrimination law. However, as Onwuachi-Willig explains, “These responses ignore the way that law can work and has worked to perpetuate and reify norms and practices that continue to place interracial families on the margins of our society.” Thus, the law and social norms together establish and maintain the monoracial ideal, exposing multiracial families not only to social stigma but also to legal erasure.

The problem, as Onwuachi-Willig demonstrates, is that while the discrimination by association analysis gives these families a vehicle to recover damages and other forms of recompense, it does not capture the “true nature of discrimination against the mixed-race, heterosexual couple . . . . Specifically, [the discrimination] is based on interraciality and the particular stereotypes targeted at people who together intimately cross

36. See ONWUACHI-WILLIG, supra note 3, at 169 (describing how interracial couples are often asked questions such as “How did you ever meet?”); see also id. at 175–79 (providing other examples of questions multiracial couples have received about their relationship).
37. Id. at 170, 179–83.
38. And when it becomes apparent that the group is actually a unit, then, she writes, “In that moment, the questioner gets to exercise her privilege in discerning and naming who is family and who is not.” Id. at 176.
39. Id. at 184.
40. 163 U.S. 537 (1896).
41. See id. at 544 (“The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality . . . .”).
44. Id. at 276 (plurality opinion).
45. ONWUACHI-WILLIG, supra note 3, at 184.
racial boundaries.”46 Thus, the law “fails to address the ‘expressive harms’ or lack of dignity in the continued assumption of monoraciality among families in housing discrimination statutes.”47

Throughout the book, Onwuachi-Willig carefully examines how all the civil rights statutes suffer from similar shortcomings. By rendering the multiracial family invisible, antidiscrimination law not only constructs and reinforces the normative ideal of the monoracial family but also fails to recognize the unique discrimination faced by multiracial families unless they force themselves into the monoracial ideal. Thus, antidiscrimination law reifies existing racial categories.

C. The Remedy

Onwuachi-Willig suggests that to solve the problem of “law’s invisible role in reifying race and racial hierarchies among individuals and families,”48 Congress should add the term “interraciality” as a protected category to antidiscrimination statutes.49 She argues that this “modest”50 change could have a number of important effects. First, it would provide much-needed redress for the unique harms multiracial families face and signal to advocates that they should recognize and raise these claims.51 Furthermore, it would help to weaken society’s conception of fixed racial categories, thereby creating a place for these families within society.52 Finally, she concludes that:

[A]dding the term \textit{interraciality} to antidiscrimination statutes would make visible the ways in which narrowly framing the ideal for families has stifled us in our growth as individuals and communities, and it would help to expose all the differences in the lives and lived experiences of families . . . .

In the end, as the assumptions that have undergirded our social norms and laws slowly begin to catch up to our nation’s aspirations for equality, the text within our antidiscrimination laws should also begin to reflect those very goals.53

46. \textit{Id.} at 197.
47. \textit{Id.} at 198.
48. \textit{Id.} at 233.
49. \textit{Id.} at 234.
50. \textit{Id.} at 233.
51. \textit{Id.} at 264.
52. \textit{Id.} at 265–66.
53. \textit{Id.} at 266. There are, of course, many reasons to be skeptical that Congress or the courts would be sympathetic to such a change in antidiscrimination law. \textit{See} Jeb Rubenfeld, \textit{Essay, The Anti-Antidiscrimination Agenda}, 111 \textit{Yale L.J.} 1141, 1143 (2002) (“[A] good deal of the present Supreme Court’s groundbreaking constitutional case law makes better sense when viewed not in the doctrinal terms in which it presents itself, but in terms of an anti-antidiscrimination agenda . . . .”); Kenji Yoshino, \textit{The New Equal Protection}, 124 \textit{Harv. L. Rev.} 747, 748 (2011)
In the next Part, we situate Onwuachi-Willig’s book within the larger struggle for civil rights and racial equity in the United States. We argue that her insights pave the way for recognition of all the ways in which the law fails to remedy discrimination, even beyond the domain of family.

II. From Interraciality to Racial Realism

Onwuachi-Willig’s close examination of multiracial families demonstrates the symbiotic relationship between the law and prevailing norms. On the one hand, the law embeds societal norms, such as the norm of the monoracial family. However, societal norms do not remain static. As societal norms change, the law also changes to incorporate new understandings. On the other hand, the law does not simply reflect societal norms, it also can play a role in legitimizing them. Thus, once the problematic assumptions embedded in the law are brought to light, the law must change to reflect new understandings. Otherwise, the law will continue to play a role in legitimizing the problematic norm.

Onwuachi-Willig demonstrates this relationship in the context of the interracial family, showing that current antidiscrimination law reflects societal expectations of monoraciality among families. Yet, as these multiracial families have become more numerous, the assumption of monoraciality has slowly begun to change, bringing the embedded assumption to light and making it clear that the law is no longer adequate to reach all the harms it was meant to redress. Some judges are beginning to recognize that antidiscrimination law is inadequate to safeguard multiracial families and have devised innovative interpretations of the law to bring these families under its protection.54

However, while these broader interpretations are commendable, working within existing laws rather than changing the law also has problematic consequences. As Onwuachi-Willig points out, leaving the framework in place legitimizes and reinforces the monoracial norm by requiring multiracial families to erase their multiracial status in order to fit themselves within the monoracial ideal.55 Only by changing the law to provide explicit recognition of and protection to multiracial families will the law begin to facilitate changes in the way that society views family. Thus, the law influences norms, and norms influence the law. Furthermore, while some judges have recognized the discrimination that multiracial families endure, others have not. Now that the problematic norm has been

54. See supra notes 30–32 and accompanying text.
55. See ONWUACHI-WILLIG, supra note 3, at 198. See generally, Lucas, supra note 19 (highlighting this problem in her discussion of multiracial individuals and antisubordination).
exposed, the protection these families receive should not be dependent upon the judge who happens to hear the case.

In this Part, we argue that Onwuachi-Willig’s insights about the symbiotic relationship between law and society are not only important in the domain of interracial families but also in the broader cause of civil rights. This is because the antidiscrimination statutes upon which she relies also embed societal assumptions about how discrimination operates. As a result, they not only fail to remedy discrimination against interracial families, but they also fail to remedy all but the most invidious and intentional forms of discrimination.

In the short term, then, the addition of multiracial families as a protected class is important because currently they are unprotected against even intentional discrimination. Adding them to the statutes will give them the same recognition and protection that other protected classes already receive. However, these already existing protected classes only receive a remedy when they can provide evidence of malicious motives. Thus, as we argue next, in addition to adding protected categories, antidiscrimination law must expand to cover less obvious, but more ubiquitous, contemporary mechanisms of bias as well. Otherwise, multiracial families, just like the protected classes that already exist, will not obtain a remedy for the more prevalent forms of bias that exist today. In subpart II(A), we discuss how antidiscrimination law currently frames discrimination. In subpart II(B), we introduce the social science of contemporary bias to highlight the disconnect between the law’s construction of discrimination and how discrimination actually operates.

A. The Law’s Construction of Discrimination

Currently, antidiscrimination law foregrounds intent and malicious motivations. This construction of discrimination is understandable when we consider the societal context in which the civil rights statutes were enacted. These statutes were passed in the 1960s to provide remedies for the malign effects of centuries of intentional bigotry, including slavery and Jim Crow laws and policies. Unsurprisingly, then, they reflect the

56. By malicious motives we mean that plaintiffs must show a discriminatory intent, even when the claim is based upon disparate impact. See Washington v. Davis, 426 U.S. 229, 239–41 (1976) (holding that laws that have a racially discriminatory effect, but that were not adopted to advance discriminatory motives, are constitutional); see also Bernie D. Jones, Critical Race Theory: New Strategies for Civil Rights in the New Millennium?, 18 HARV. BLACKLETTER L.J. 1, 14–15 (2002) ("With respect to disparate impact determinations, plaintiffs gained relief only if they could show that an allegedly discriminatory policy had discrimination as its intent.").


understanding of bias as primarily intentional and motivational. Hence, just as antidiscrimination law reflects society’s framing of family as monoracial, so too does it reflect society’s understanding of how discrimination manifests itself.

For instance, the employment discrimination statute, Title VII of the Civil Rights Act of 1964, prohibits discrimination based upon disparate treatment. Courts typically “approach every disparate treatment case as a search for discriminatory motive or intent.” While this interpretation of the statute is not inevitable, it reflects the common understanding of bias as arising primarily from consciously held negative attitudes and beliefs. As Professor Angela Harris has noted, this focus on intent grows out of the “essentially moralistic discourse of discrimination [that] condemns the racialist ideologies that pervaded most of twentieth century law and public policy, . . . [and] place[s] a premium on proving individual intent to harm and distinguishing innocent victims from evil victimizers.”

However, while the foregrounding of intent and motive made sense at a time when most forms of discrimination were overt and obvious, today discrimination no longer primarily functions this way. Consequently, the

the end of World War II through the 1960s and the statutes passed to remedy the effects of those laws).


61. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (“Title VII tolerates no racial discrimination, subtle or otherwise.”); Sheila Foster, Intent and Incoherence, 72 TUL. L. REV. 1065, 1084–85 (1998) (“The term discriminatory intent is hardly self-defining, as its meaning can range anywhere from unconscious bias to conscious bias to conscious desire to harm.” (internal quotation marks omitted)); Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 GEO. L.J. 279, 288 (1997) (“[I]t is not the Court’s doctrine that has limited its vision, but the Court’s vision has limited its doctrine.”); Rebecca Hanner White & Linda Hamilton Krieger, Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making, 61 LA. L. REV. 495, 499 (2001) (“[T]he disparate treatment inquiry should focus on causation, not conscious discrimination.”).


63. See Dovidio, supra note 1, at 845 (“[A]lthough overt expressions of prejudice have declined steadily and significantly over time, subtle—often unconscious and unintentional—forms continue to exist.”); see also Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489, 1493–94 (2005) (“[M]ost of us have implicit biases in the form of negative beliefs (stereotypes) and
traditional civil rights model does not describe either the experiences of those often targeted for disparate treatment or our best scientific understanding of the mechanisms that undergird discrimination. As a result, the law’s blind spot has harmful and unintended effects similar to those identified by Onwuachi-Willig in her book. Next, we briefly discuss what social psychology reveals about the operation of bias.


In stark contrast to the traditional civil rights model of discrimination, which relies on lay assumptions of discrimination’s origins, the mind–science–justice (MSJ) model of discrimination adopts a behavioral–realist approach to questions of race and fairness in the law. This behavioral–realist approach uses scientific consensus in the social sciences to develop accurate models of human behavior from which legal doctrine may then be derived. It calls upon legislators, jurists, and legal scholars to identify empirically verifiable mechanisms for the causes of objectionable inequalities and to account for them in law and policy.

When behavioral realism is applied specifically to domains of race and antidiscrimination legislation, the science reveals a radically different theory of how discrimination occurs and what remedies it. Specifically, while bigotry can play a role in intergroup injuries (e.g., employment discrimination, police abuses, educational inequalities), the science reveals that attitudes are a notoriously capricious predictor of behaviors—accounting for 10% of behaviors at best. This suggests that the traditional
civil rights model, which presupposes that racial prejudice is nearly the sole source of discriminatory outcomes, builds from a faulty conception of discrimination. Further, the traditional model is not able to account for research innovations, particularly in the mind sciences, over the past quarter century such as the ways that implicit bias, color blindness, stereotype threat, and masculinity threat can conspire to produce racially disparate outcomes even in the absence of old-fashioned racial bigotry.

For instance, research demonstrates that as a result of a psychological process known as stereotype threat, even egalitarian individuals can engage in behaviors that create problematic racial disparities and sometimes produce deadly consequences. Stereotype threat refers to the fear and anxiety that is produced when one fears being evaluated in relationship to a negative stereotype about one’s group. The influence of stereotype threat on interracial interactions has been well documented.

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69. See John F. Dovidio et al., Implicit and Explicit Prejudice and Interracial Interaction, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 66 (2002) (finding that the implicit attitudes of white individuals toward black individuals predicted the white individuals’ spontaneous behavior).

70. See Victoria C. Plaut et al., Is Multiculturalism or Color Blindness Better for Minorities?, 20 PSYCHOL. SCI. 444, 444–45 (2009) (concluding that color blindness, “an assimilationist ideology . . . [that] stresses ignoring or minimizing group differences,” can “reinforce[] majority dominance and minority marginalization” and “may promote interpersonal and institutional discrimination through social distancing”).

71. See Phillip Atiba Goff et al., The Space Between Us: Stereotype Threat and Distance in Interracial Contexts, 94 J. PERSONALITY & SOC. PSYCHOL. 91, 91, 104 (2008) (demonstrating that for white individuals, stereotype threat, “the fear of being stereotyped as racially prejudiced,” can lead to racial distancing); Claude M. Steele & Joshua Aronson, Stereotype Threat and the Intellectual Test Performance of African Americans, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 808 (1995) (defining stereotype threat and finding that stereotype threat with regard to intelligence affects the behavior of African-Americans in intellectual situations).

72. See Phillip Atiba Goff et al., Racism Leads to Pushups: How Racial Discrimination Threatens Subordinate Men’s Masculinity, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1111, 1115 (2012) (finding that “[f]or Black participants [in a study], the experience of discrimination threatened their masculinity, which led them to engage in compensatory masculine behaviors”).

73. PHILLIP ATIBA GOFF ET AL., CONSORTIUM FOR POLICE LEADERSHIP IN EQUITY, PROTECTING EQUITY: THE CONSORTIUM FOR POLICE LEADERSHIP IN EQUITY REPORT ON THE SAN JOSE POLICE DEPARTMENT 11 (2013); Goff et al., supra note 71, at 91.

74. Steele & Aronson, supra note 71, at 797.

75. See Goff et al., supra note 71, at 104 (positing that stereotype threat affects the interaction between white and black individuals by causing racial distancing); Jennifer A. Richeson & J. Nicole Shelton, Negotiating Interracial Interaction: Costs, Consequences, and Possibilities, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316, 317–19 (2007) (arguing that members of dominant groups engage in self-regulation—careful monitoring of thoughts and behaviors—in order to avoid appearing prejudiced, which can lead to negative intrapersonal outcomes).
In interactions between black and white strangers, for example, egalitarian-minded whites might fear that their words and actions will be assessed as racist. Meanwhile, black individuals might fear that they will be evaluated as criminal or unintelligent. Researchers have found that this anxiety can affect the verbal and nonverbal behaviors of both individuals, leading them to physically distance themselves from each other, make less eye contact, and use unfriendly tones of voice. It is not difficult to imagine that the resulting interaction is negative for both individuals, confirming the negative stereotypes, either conscious or unconscious, that they had for each other.

We can see the relevance of stereotype threat in the context of a job interview. Imagine a white employer who interviews two equally qualified candidates who differ only in race. The effects of stereotype threat on both the employer and the black candidate can adversely affect the dynamics of the interview. As a result, the black applicant may be judged more negatively and therefore fail to obtain the job, not because of any explicit racist beliefs on the part of the decision maker but because stereotype threat adversely affected the interaction. In this situation, the black candidate has been disadvantaged by bias, but not the intentional bias that current antidiscrimination law recognizes. Furthermore, if it becomes apparent that this particular employer has historically hired equally qualified whites over blacks, others may ascribe his or her behavior to conscious racism even when this label is inaccurate.

We can even imagine how stereotype threat might affect the interactions of individuals with multiracial couples. An individual might want to ask an interracial couple about how they met simply because she is always curious about what brought two people together and not because she wants to interrogate the couple’s interraciality. However, she may fear that this question, or some other question, might lead the couple to perceive her as having a problem with their relationship. Thus, she becomes

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76. Goff et al., supra note 71, at 92.
78. E.g., Dovidio et al., supra note 69, at 62.
79. See Goff et al., supra note 71, at 91; see also NAT’L RESEARCH COUNCIL, MEASURING RACIAL DISCRIMINATION 95 (Rebecca M. Blank et al. eds., 2004) (discussing tone of voice); Dovidio et al., supra note 69, at 63 (discussing eye contact).
uncomfortable, anxious, and self-conscious about everything she says, leading her to act in ways that might lead the couple to assume incorrectly that she is disturbed by the fact that they are an interracial couple. Again, stereotype threat has led to attributions of racism when, in fact, no such bigotry existed.

Similarly, stereotype threat may also be an additional reason why interracial relationships, especially black–white interracial relationships, are rare. A white man who is attracted to a black woman may be apprehensive about approaching her because of the fear that he will be evaluated negatively because of predominant racial stereotypes of white racism. He may be concerned that the anxiety he feels about approaching someone to whom he is attracted will be mistakenly interpreted as arising out of racism. If he does engage her in conversation, she may attribute his anxious behaviors to bias rather than to jitters. Thus, the resulting unpleasant interaction may prevent a relationship from occurring.

In addition to stereotype threat, another psychological process that can cause racial disparities is implicit racial bias. Implicit racial bias is a pernicious result of the way that our brains process information. In order to make sense of all the information that bombards us, our brains automatically and unconsciously categorize people and objects with lightning speed. Once these people or objects are placed into categories, anything that is associated with that category also comes to mind. Again, this occurs unconsciously and automatically. Then, these unconscious associations can predispose us to evaluate the person or object in a manner consistent with the unconsciously activated associations.

82. See generally John F. Dovidio et al., supra note 69 (studying the effects of implicit bias on behavior during interactions between black and white individuals and finding that the implicit bias of white individuals predicted their nonverbal friendliness toward black individuals); Anthony G. Greenwald et al., Measuring Individual Differences in Implicit Cognition: The Implicit Association Test, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998) (“Implicit attitudes are manifest as actions or judgments that are under the control of automatically activated evaluation, without the performer’s awareness of that causation.”).

83. See sources cited supra note 82.

84. See Susan T. Fiske & Shelley E. Taylor, Social Cognition 71 (2d ed. 1991) (discussing the “categorization” stage of information management and suggesting that the categorization of a particular action occurs spontaneously and rapidly).

85. See id. at 69 (discussing how fundamental attribution error occurs when one attributes behavior of another person to his or her own dispositional qualities, rather than to situational forces).

86. See id. at 67–69 (suggesting that fundamental attribution error is automatic and unconscious).

87. See Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989) (discussing a model whereby “stereotypes are automatically (or heuristically) applied to members of the stereotyped group” even without a conscious element).
For instance, research over the past four decades demonstrates that, regardless of our race and our consciously held beliefs, most of us unconsciously associate young black men with criminality. We are socialized to have this association because of what we read in the newspapers, hear on the radio, or see on television. As a result, in contexts where this association is relevant, we will interpret ambiguous behaviors of black men more negatively, and as more consistent with criminality, than ambiguous behaviors of young white men in identical situations. Unconscious racial bias, then, refers to how our unconscious stereotypes and attitudes can affect our behaviors and judgments in ways that we are unaware of and thus cannot control.

In her book, Onwuachi-Willig reveals how unconscious racial bias can influence our dating preferences. She references a study by Professor Goff, one of this Review’s authors, in which black women were rated as more masculine than their white counterparts. As a result, black women were literally miscategorized as black men between 9% and 13% of the time (depending on stimulus modality, e.g., videos versus pictures). Additionally, and unsurprisingly, the more masculine a woman was rated, the less attractive she was rated, regardless of race, leading to racial differences in ratings of attractiveness. Importantly, when black women were not perceived as black, these effects virtually disappeared, suggesting that it is the coding of “blackness” that masculinizes black women.

Furthermore, unconscious biases can also explain the association between family and monoraciality that Onwuachi-Willig uncovers in her book. As she writes, “Strangers often try to fit such couples into comfortable tropes of blackness and whiteness.” This observation is consistent with lessons from social psychology. We have been socialized

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90. See Richardson & Goff, supra note 88, at 303–07, 310–14 (referring to numerous studies that reveal an implicit association between young black men and criminality and discussing that association’s effect on the way people perceive seemingly benign behaviors); see also L. Song Richardson, Arrest Efficiency and the Fourth Amendment, 95 MINN. L. REV. 2035, 2045–48 (2011) (recounting a study that demonstrated that the race of the actors dramatically influenced how observers interpreted the actors’ actions).
91. ONWUACHI-WILLIG, supra note 3, at 128–29.
92. Id. at 146 (citing Phillip Atiba Goff et al., “Ain’t I a Woman?”: Towards an Intersectional Approach to Person Perception and Group-Based Harms, 59 SEX ROLES 392, 392 (2008)).
93. Goff et al., supra note 92, at 397–98.
94. Id. at 397 fig.2, 400 fig.4, 401.
95. See id. at 401.
96. ONWUACHI-WILLIG, supra note 3, at 175.
through television shows and other sources to view families as monoracial. When multiracial families are depicted, their non-normativity is highlighted, thereby reinforcing the monoracial norm.97 Thus, our unconscious association of family with monoraciality prevents us from categorizing multiracial individuals as families in our minds.

The effects of unconscious racial bias and stereotype threat can cause problematic racial disparities in employment, housing, and a host of other legally relevant domains. Yet, antidiscrimination law fails to provide a remedy.98 The Fourteenth Amendment’s Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”99 While the language of the Amendment is broad enough to cover both conscious bigotry and unconscious racial bias, the Supreme Court’s equal protection jurisprudence requires plaintiffs to prove that “a discriminatory purpose [was] a motivating factor” in the challenged conduct.100 And discriminatory purpose means that “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”101 While scholars have argued that the intent standard is broad enough to cover unconscious biases,102 thus far, the Supreme Court has not adopted this interpretation.103

Acknowledgment of racially disparate impacts might provide a remedy for the effects of unconscious biases and stereotype threat because these psychological processes result in racially disparate impacts. The Court has held that claims based upon disparate impacts must be brought under the civil rights statutes rather than under the Equal Protection Clause.104 However, while antidiscrimination statutes purport to recognize claims of

97. Consider the recent reaction to a Cheerios commercial that depicted an interracial family—a black father, white mother, and biracial child. The reaction to the ad was so negative that Cheerios asked that the comments section on YouTube be turned off. Leanne Italie, Cheerios Exec on Ad Featuring Mixed Race Couple: ‘We Were Reflecting an American Family,’ HUFFINGTON POST (June 5, 2013, 5:14 PM), http://www.huffingtonpost.com/2013/06/05/cheerios-ad-mixed-race-couple_n_3390520.html. A Cheerios executive defended the commercial, stating that they “were reflecting an American family.” Id.
98. See supra notes 26–32 and accompanying text.
102. See, e.g., Krieger, supra note 59, at 1243 (describing the need for coherence in distinguishing between intentional and unintentional forms of discrimination and arguing in favor of a tiered system of liability predicated on this distinction); White & Krieger, supra note 61, at 506–11 (arguing that some Supreme Court opinions support the idea that intent can be unconscious).
103. Harris, supra note 58, at 2011 (“Perhaps more disturbingly, the criminal intent rule insulates from judicial scrutiny forms of bias that are unconscious or cognitive in origin.”).
discrimination based upon disparate racial impacts, courts still require plaintiffs to demonstrate some malicious intent.

As the previous discussion demonstrates, while the Equal Protection Clause and the civil rights statutes were meant to provide remedies for discrimination, they fail because each is based upon a model of discrimination that, as shown by the science, is no longer prevalent. Thus, just as the law embeds normative conceptions of family, the law also embeds norms of how discrimination operates. This construction not only reflects societal beliefs about what discrimination looks like but also legitimates them. This means that, barring significant challenges to the present conceptualization of race, racism, and how they function, both the law and society will fail to interrogate how universally human mental processes can provoke racial injustice even in the absence of conscious bias. This is why a new model of racism, broader conceptualizations of how it functions, and more inclusive understandings of protected classes are critical to making continued progress on racial equity—something that the MSJ model advances and Onwuachi-Willig’s book pushes us to do.

Conclusion

Professor Onwuachi-Willig’s compelling analysis reveals the importance of considering how the law’s embedded assumptions can stymie progress towards racial equality. In the domain of interracial relationships, her proposal to add multiracial families as a protected category to antidiscrimination statutes is both well-supported and necessary in order to protect these families from discrimination and to broaden societal conceptions of family. Furthermore, her insights also open up space to consider more broadly how the law’s and society’s conceptions of discrimination also create harm. Consequently, not only should the law expand to provide protection to categories of individuals previously excluded, as Onwuachi-Willig rightly suggests, but the law should also


106. Harris, supra note 58, at 2010 (“Even where evidence of ‘disparate impact’ can establish a prima facie case, the courts have emphasized the plaintiff’s ultimate burden of proving invidious intent.”). Furthermore, claims based upon disparate impact are rare because “very few Title VII cases are actually amenable to disparate impact treatment.” Krieger, supra note 59, at 1162 n.3 (noting that it is a “common misperception . . . that a plaintiff can prevail in virtually any type of case by making an unrebutted showing of disparate impact on a group protected by Title VII”); see also Linda Hamilton Krieger, Civil Rights Perestroika: Intergroup Relations After Affirmative Action, 86 CALIF. L. REV. 1251, 1302–03 (1998) (“Claims of disparate impact[] . . . constituted less than two percent of the courts’ Title VII caseload . . . .”). In fact, since 1971, the Supreme Court “has yet to find disparate impact discrimination, and lower federal courts have not had much better success.” Foster, supra note 59.

107. See, e.g., Krieger, supra note 106, at 1304 (arguing that “from a social and cognitive psychological perspective, . . . reliance on the individual disparate treatment adjudications will result in the significant underidentification of discrimination, not only by decision makers, . . . but by victims and fact finders as well”).
safeguard these protected categories from the harms that arise from unintentional biases. Put another way, her insights require an expansion of antidiscrimination law to include protections against these seemingly “nonbiased” sources of pervasive intergroup discrimination as well.

Finally, Onwuachi-Willig’s proposal has an additional benefit. As previously discussed, unconscious stereotypes and attitudes can affect the behaviors and judgments of even the most egalitarian individuals. However, despite their ubiquity, these unconscious biases are also malleable. In other words, it is possible to overcome their effects. Lessons from the mind sciences demonstrate that one effective way to overcome the effects of unconscious biases is to make people aware of their existence and the possibility for overcoming them. As Onwuachi-Willig notes throughout her book, people likely harbor unconscious biases against multiracial families. Thus, the addition of interraciality as a protected category to antidiscrimination statutes will help highlight to individuals the ways in which their unconscious biases may disadvantage multiracial families. Such awareness can help people overcome their automatic and unconscious association of family with monoracial individuals and thereby serve to mitigate some of the harms currently affecting multiracial families that Onwuachi-Willig emphasizes in her pioneering book.