

Michigan Journal of Race and Law

Volume 2

1997

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Recommended Citation

Leonard M. Baynes, *Who is Black Enough For You? An Analysis of Northwestern University Law School's Struggle Over Minority Faculty Hiring*, 2 MICH. J. RACE & L. 205 (1997).

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WHO IS BLACK ENOUGH FOR YOU? AN ANALYSIS OF NORTHWESTERN UNIVERSITY LAW SCHOOL'S STRUGGLE OVER MINORITY FACULTY HIRING[†]

Leonard M. Baynes*

Prevalent constructions of race and identity have oversimplified complex issues about how people of color identify themselves and are identified by others. Identifying people of color in absolute and essential terms only compounds this problem. In 1994, Northwestern Law School decided not to hire Maria O'Brien Hylton, a female professor of color who did not fit easily into a single racial category. This Article argues that Northwestern's decision exemplifies the problems caused by oversimplistic racial categorizations.

INTRODUCTION

This Article considers the factors that should be used in hiring a person of color to a faculty position and raises the following questions:¹ Apart from potential teaching ability and scholarly

[†] This Article was delivered on a panel dealing with diversity at the First Annual Northeastern People of Color Legal Scholarship Conference in March 1996 and as a work-in-progress at the Southwest/Southeast People of Color Legal Scholarship Conference in May 1996. I would like to thank all who have heard, read, and commented upon this Article. I would like to thank my friends: Larry Cata Backer, Carlos Cuevas, Chris Iijima, Berta Hernández Truyol, Scott Howe, Catherine Jones, Hope Lewis, Joan Mahoney, Deborah McCoy, and Gina Monique Smith for their comments on earlier drafts of this Article. Keith Hylton, Maria O'Brien Hylton, and Joyce Hughes commented, often highly critically, on this Article, and I gratefully acknowledge their help. This acknowledgment should not be construed as indicating their endorsement of the views expressed. For those views the author accepts full and sole responsibility. I would also like to acknowledge the help of my research assistants, Cassandra Gagnon and Steven Lewis.

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1. Many critical race scholars have discussed how identity issues stand at the intersection of race, ethnicity, gender, and sexual orientation. See generally GLORIA ANZALDUA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* (1987); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women Of Color*, 43 STAN. L. REV. 1241 (1991) (examining violence against women of color in terms of both race and gender); Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 8 HARV. HUM. RTS. J. 1 (1995); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16 (1995); Trina Grillo & Stephanie Wildman, *Obscuring The Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (Or Other -isms)*, 1991 DUKE L.J. 397; Berta Esperanza Hernández Truyol, *Building Bridges—Latinas and*

productivity, should faculty appointments committees look to other criteria for candidates of color? Provided that we can still consider the race and ethnicity of prospective candidates of color at private institutions,² should faculty appointments committees be concerned about how closely identified a candidate is to an essentialized conception, for instance, of Black persons? Should a faculty hiring committee focus its efforts to hire African Americans on a Black person who has ancestral roots in the American South, whose family has endured Jim Crow racism, who is very dark-skinned, whose family background is impoverished, and who grew up in an all-Black segregated environment? Stated conversely, should a faculty appointments committee hire a Black person who does not meet any of these essentialized characteristics? In confronting these issues, this Article calls into question conceptions of race within mainstream U.S. society and among African Americans and other communities of color.

In this Article I will explore and analyze hiring events that took place at the Northwestern University Law School and try to use that situation as a means to discuss the larger issues of what we as faculty of color should look for in hiring additional faculty of color. The thesis of this Article is that there is no essential Black person because we all differ in fundamental ways; an essential Black candidate cannot be ascertained solely from physical appearance, place of origin, or socioeconomic data. Blacks in the Western Hemisphere are a mixed-race people and vary in socioeconomic status. Whether a person is an essential Black representative and as such can serve as an appropriate role model will vary depending on who is doing the judging. A person who fails to meet the essential Black criteria—which I maintain are based on stereotypes—should nevertheless be considered Black for purposes of affirmative action if he/she has a strong commitment to the Black community, is willing to mentor

Latinos at the Crossroads: Realities, Rhetoric and Replacement, 25 COLUM. HUM. RTS. L. REV. 369 (1994); Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995); Margaret Montoya, *Máscaras, Trenzas, y Greñas: Un/Masking the Self While Unbraiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994); Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305 (1990); Judy Scales-Trent, *Women in the Lawyering Process: The Complications Of Categories*, 35 N.Y.L. SCH. L. REV. 337 (1990) (commenting on the intersection of the categories of race and sex in America).

2. See, e.g., *Hopwood v. University of Texas*, 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996) (invalidating the University of Texas School of Law's race-based admissions program).

Black students, and is willing to advocate for the benefit³ of all people of color.⁴

I. THE O'BRIEN HYLTON HIRING CONTROVERSY AT NORTHWESTERN

Several major newspapers reported the controversy over hiring Professor Maria O'Brien Hylton at Northwestern University Law School mostly as a determination of whether O'Brien Hylton was "Black Enough."⁵ The prospective appointment raised the issue of who should be the essential Black representative. Professor O'Brien Hylton was a tenured member of the DePaul University Law Faculty.⁶ Her husband, Dr. Keith Hylton, was an untenured member of the Northwestern University Law faculty.⁷ In the summer and fall of 1994 Boston University Law School heavily recruited and offered immediate tenure to both O'Brien Hylton and Keith Hylton.⁸

3. See Robert S. Chang, *The End of Innocence or Politics After the Fall of the Essential Subject*, 45 AM. U. L. REV. 687 (1996).

4. I use the term "people of color" throughout this Article to define all people who are of African, Asian, Latino/Latina, or Native American ancestry.

5. Melanie Kirkpatrick, *Rule of Law: Not Black Enough for This Law School*, WALL ST. J., Jan. 11, 1995, at A15; see also Leonard Greene, *Racial Identity No Longer a Black-and-White Issue*, BOSTON HERALD, Feb. 13, 1995, at 8; Irene Sege, *Not Black Enough? Law Professor Heads to BU After Furor at Northwestern over Her Racial Identity*, BOSTON GLOBE, Feb. 9, 1995, Living Section at 63; Jan Crawford Greenburg et al., *Race Issue Sparks Hiring Controversy at NU Law School*, CHI. TRIB., Dec. 13, 1994, § 3, at 3; Rohan Preston, *Battle to Keep a Black Professor Leaves Bruised Egos and Reputations*, N.Y. TIMES, Mar. 8, 1995, at B8.

6. Preston, *supra* note 5. Maria O'Brien Hylton is a magna cum laude graduate of Harvard University and a graduate of Yale Law School. *Id.* O'Brien Hylton, who was born in the United States, is the child of an interracial marriage between a White Australian man and a Black Cuban woman. *Id.*

7. *Id.* Dr. Hylton holds a doctorate in Economics from the Massachusetts Institute of Technology and a magna cum laude bachelor of science degree and a juris doctorate, both from Harvard University. *Id.* Hylton is African American. *Id.*

8. *Id.* In late August, 1994, the Hyltons received a phone call from Dean Ronald Cass of Boston University Law School offering them both tenured professorships. Letter and Summary of Facts Surrounding the Appointments Controversy at Northwestern from Professor Keith Hylton, Boston University Law School, to Leonard M. Baynes, Western New England College School of Law (Jan. 8, 1997) [hereinafter Keith Hylton Summary] (on file with the *Michigan Journal of Race & Law*). The extension of the tenured Boston University offers to the Hyltons and the decision of Northwestern to interview Maria O'Brien Hylton were known by some members of the Northwestern faculty in August 1994. Letter from Professor Joyce Hughes, Northwestern University Law School, to Professor Leonard M. Baynes, Western New England College School of Law (May 17, 1996) [hereinafter May 17th Letter from Professor Hughes] (on file with the *Michigan Journal of Race & Law*). A formal announcement of the fact that Maria Hylton was going to interview for a faculty position was not made to the faculty as a whole until October 1994. *Id.*

In an effort to retain Keith Hylton, Northwestern considered O'Brien Hylton for a teaching position.⁹ According to its then-Dean Robert L. Bennett, Northwestern considered O'Brien Hylton for a teaching position because "we wanted to retain her husband, who is a valued member of the faculty."¹⁰ Dean Bennett further stated that "[w]e would have wanted to retain him regardless of his color."¹¹ Despite a hiring freeze at Northwestern, Professor O'Brien Hylton was interviewed.¹² Dean Bennett reported that the faculty appointments committee reviewed Professor Maria O'Brien Hylton's "scholarly writings, looked at her teaching experience and weighed such things as academic interest, collegiality and quality and style of scholarship."¹³

Professor Keith Hylton is of the opinion that his wife's candidacy lost support because of a concerted campaign¹⁴ against O'Brien Hylton's candidacy by students.¹⁵ Student groups in the

9. According to Keith Hylton, at this time the Hyltons weighed the benefits of the Boston University offer. Keith Hylton Summary, *supra* note 8. The Hyltons felt that Boston University had more to offer O'Brien Hylton than DePaul in terms of salary and benefits. *Id.* For Keith Hylton, there was some loss of prestige in going to Boston University, but, on balance, the only way to keep both Hyltons in the Chicago area was for Northwestern to consider O'Brien Hylton for a faculty position. *Id.*

10. Preston, *supra* note 5. According to Keith Hylton, in preliminary discussions the Hyltons considered the options of a visiting or nontenured offer, both of which could be made with minimal delay. Keith Hylton Summary, *supra* note 8. The Hyltons rejected those options because they were inferior to the Boston University tenured offers. *Id.*

11. Preston, *supra* note 5.

12. *Id.*

13. *Id.* The faculty appointments committee initially told Professor Keith Hylton that the committee found O'Brien Hylton well qualified and that the committee was "unanimous on the merits." Keith Hylton Summary, *supra* note 8. The committee thought that, although there was some faculty opposition, "the offer should easily win approval by the full faculty." *Id.* Paul Robinson of the committee did note to Keith Hylton that the opposition seemed to be "ideologically driven." *Id.* The report that the appointments committee distributed to the faculty indicated that the committee planned to recommend a tenured offer to O'Brien Hylton. *Id.*; see also Greenburg et al., *supra* note 5.

14. Greenburg et al., *supra* note 5. Hylton reports that:

In late October, I received a phone call from Theresa Cropper, director of minority affairs. She asked whether my wife and I were 'willing to put up with a fight over the appointment.' She informed me that the 'progressive front,'—made up by two feminist student organization[s], the black law student's associations, and the hispanic law student's association—planned to oppose my wife's appointment. I asked why, and although her answer was vague, she suggested that the students in this group were concerned that my wife's views were too conservative, given her status as a minority female law professor

Keith Hylton Summary, *supra* note 8.

15. The university newspaper, the *Daily Northwestern*, published an article charging that hiring O'Brien Hylton would be nepotism and that O'Brien Hylton would be an

Northwestern community were not sanguine to O'Brien Hylton's candidacy.¹⁶ The chair of the Black student group believed that O'Brien Hylton should not be counted as Black.¹⁷ Meanwhile, the co-chair of the Latino student group said that O'Brien Hylton should not be counted as Hispanic either, because she "seems to identify more as a Black."¹⁸ Some female students objected to O'Brien Hylton's candidacy because they believed that she was being considered solely because of her husband.¹⁹ As a result, both Hyltons lost interest in going to Northwestern and were contemplating going to Boston University.²⁰

inappropriate role model for students of color and female students because of her allegedly conservative views. Keith Hylton Summary, *supra* note 8. The Hyltons were unaware of the magnitude of the controversy over O'Brien Hylton's appointment until they received a call from the student newspaper requesting an interview with O'Brien Hylton. *Id.*

16. Keith Hylton alleges that Hughes and another unnamed Northwestern faculty member promoted much of the opposition by student groups to O'Brien Hylton's candidacy. Telephone Interview with Professor Keith Hylton, Boston University Law School (Nov. 26, 1996). Professor Hughes vigorously disputes Professor Keith Hylton's assertion. Letter from Professor Joyce Hughes, Northwestern University Law School, to Professor Leonard M. Baynes, Western New England College School of Law, (Jan. 10, 1997) [hereinafter Jan. 10th Letter from Professor Hughes] (on file with the *Michigan Journal of Race & Law*).

17. The group's decision reportedly extended beyond racial identification. Preston, *supra* note 5. The group wanted someone who specialized in areas other than the areas of specialty of current faculty members. *Id.* In addition, the press also reported that O'Brien Hylton came up short in an "informal evaluation [the Black Law Student Association conducted] of her 'abilities and approachabilities' based on interviews with about 15 of her current and former African American students." *Id.* Keith Hylton challenges the legitimacy and methodology of these alleged informal surveys, saying that there were students of color at Northwestern that supported O'Brien Hylton's candidacy. Telephone Interview with Professor Keith Hylton, *supra* note 16. Moreover, he maintains that she quietly mentored students of color at DePaul. *Id.*

18. Preston, *supra* note 5. Monica Santiago, co-chair of the 25-member Hispanic Law Students Association stated that Northwestern had "no Latino professors, so we would be glad to have one here." *Id.* "At first, we thought she was coming up as a black person. Then I spoke to the dean, and he said she was being presented as a Hispanic candidate." *Id.*

19. Heather Gold, a third-year law student who was a member of a Northwestern campus group called Feminists for Social Change, stated that "Maria Hylton wasn't being talked about as a star, as a walk-on-water figure." *Id.* She further stated, "Northwestern only considered her when her husband said, 'Hire her or I'll leave.' Do we want the appearance that she was hired as a perk for her husband?" *Id.*

20. Keith Hylton Summary, *supra* note 8. According to Professor Keith Hylton:

It was quite painful to both of us to see that our efforts to take our jobs seriously . . . had led to the assertion of defamatory and somewhat racist charges in the university newspaper It did not help that the campus newspaper was distributed widely in the Evanston community, where we live. Most painful was the absence, from all we could see, of a clear and forceful response, either publicly or privately communicated, by the university or law school administration.

Id.

The racial and ethnic identity²¹ of Professor O'Brien Hylton also became an issue when, according to O'Brien Hylton,²² Professor Joyce Hughes²³ personally called O'Brien Hylton.²⁴ Hughes was not a member of the faculty appointments committee. According to O'Brien Hylton, Hughes asked O'Brien Hylton whether she should be considered "a minority candidate."²⁵ O'Brien Hylton said that the "gist of Professor Hughes's questioning was, 'How black are you?'"²⁶

In late October, an informal faculty meeting was held to discuss O'Brien Hylton's candidacy.²⁷ At the meeting, Professor Joyce Hughes allegedly argued that O'Brien Hylton should not be considered "a minority candidate."²⁸

Subsequently two members of the faculty appointments committee met with O'Brien Hylton alone²⁹ and stated that they were not going to recommend a tenured offer to the faculty, but that they were willing to go forward with offering her a visiting position or untenured position.³⁰ When asked why, O'Brien Hylton was told

21. Professor O'Brien Hylton's political and ideological perspectives were also factors in Northwestern's decision not to offer her a tenured position. Preston, *supra* note 5; Sege, *supra* note 5. Some thought that she was not liberal enough since she was a law-and-economics type. Preston, *supra* note 5; Sege, *supra* note 5. Political ideology is, however, beyond the scope of this Article.

22. Preston, *supra* note 5; Sege, *supra* note 5.

23. Joyce Hughes was the first African American female tenure-track law professor in the country when she joined the faculty at the University of Minnesota Law School in 1971. See A 'Together' Prof, EBONY, May 1972, at 39; Joyce A. Hughes, *Neither Whisper nor a Shout*, in REBELS IN LAW (J. Clay Smith ed., forthcoming 1997).

24. Preston, *supra* note 5. Professor Hughes was the only other Black law professor besides O'Brien Hylton's husband, Keith, on the Northwestern law faculty. Sege, *supra* note 5.

25. Preston, *supra* note 5.

26. *Id.* Hughes described her conversation with O'Brien Hylton in the following manner: "Frankly, I thought it was courteous to call Maria directly and let her know my position about who is African American or Black in the U.S. context." Memorandum from Professor Joyce Hughes, Northwestern University Law School, to Faculty, Northwestern University Law School (Dec. 13, 1994) [hereinafter Dec. 13th Memorandum from Professor Hughes]. Hughes denied having spoken the words "Not Black Enough"—attributed to her by O'Brien Hylton in the newspaper article. *Id.* Hughes also denied saying anything to O'Brien Hylton concerning which faculty candidates she would or would not support in the future. Moreover, Hughes stated that Keith Hylton called Hughes, not the other way around, and that "what is referred to in the article" as a "later call" to him was a response to his voice mail message." *Id.*

27. Keith Hylton Summary, *supra* note 8.

28. *Id.* Keith Hylton acknowledges that he did not attend this meeting but the meeting was described to him by various other faculty members. *Id.* Other faculty members stated that the students' concerns also should be taken seriously. *Id.* In addition, another faculty member claimed to be appalled by the views O'Brien Hylton expressed in an article criticizing mandatory family leave. *Id.*

29. Keith Hylton was asked to leave the room. *Id.*

30. *Id.*; see also Preston, *supra* note 5.

that, although the appointments committee was “unanimous on the merits,” among the faculty there were “enough votes in opposition to kill the offer, and that in light of this and the controversy, it would be ‘too divisive’ to put the recommendation before the faculty.”³¹ O’Brien Hylton rejected the offer.³² After O’Brien Hylton rejected the offer, the appointments committee decided not to go forward with a recommendation of any sort.³³ As a result of the controversy, both Hyltons accepted the tenured positions at Boston University.³⁴

O’Brien Hylton did not help clarify these concerns about her racial and/or ethnic identification when she told the *New York Times* that she did not define herself in “racial terms” and that “I really don’t spend a lot of time defining myself; other people do.”³⁵ However, in a *Boston Globe* interview, O’Brien Hylton reported that she identified herself as “Black” on a form she completed as a clerk for a federal judge.³⁶ She also stated that she had been a member of Black organizations in college, in law school, and while practicing.³⁷ She told the *Boston Globe* that “I have always thought of myself as black. In spite of Joyce’s memo, I think that I’m still black. I try to take other people as they come and if possible to be taken the same way. Other people obsess about it a lot. This incident is proof of that.”³⁸ Despite this apparent ambiguity in newspaper accounts, persons close to O’Brien Hylton confirm that she identifies herself as a Black woman.³⁹

31. Keith Hylton Summary, *supra* note 8. Under the substantial opposition rule accepted by the law school administration, opposition as low as 25% was sufficient to block an offer. In a faculty meeting with at least 20 professors in attendance (which is not unusual), four votes in opposition would be sufficient to block. *Id.* O’Brien Hylton was told that the opposition ranged from four to eight, or more. *Id.*

32. Professor Keith Hylton reports: “[O’Brien Hylton] would have [rejected the offer] immediately after the meeting, but I urged her to delay the decision, so that I could talk the matter over with [certain professors,] both of whom were quite supportive during these events.” *Id.*

33. There was minor dissent on the committee from two members who wanted to go forward with the vote to the entire faculty. *Id.*

34. Professor O’Brien Hylton stated: “I was not interested in a visiting position. And I absolutely would not consider giving up my tenure at DePaul.” Preston, *supra* note 5. She stated that Northwestern must think that “they work in Shangri-La or something.” *Id.*

35. *Id.*

36. *Sege, supra* note 5.

37. *Id.*

38. *Id.*

39. Telephone Interview with Professor Keith Hylton, *supra* note 16; Telephone Interview with Professor L. Hope Lewis, Northeastern University Law School (January 20, 1997). Professor Lewis is a Harvard classmate of Professor O’Brien Hylton.

A common thread of the student complaints was the fear that Northwestern would consider Maria O'Brien Hylton a "minority" appointment—according to the *Chicago Tribune* she had no history of activism related to minority or women's issues⁴⁰—and then feel less pressure to hire minorities and women in the future.⁴¹ Dean Bennett disagreed with the students' conclusion. Dean Bennett said: "[W]e have affirmative action emphasis, and there's no doubt that we seek qualified candidates, but there are no reserved or limited slots. The students seem to think that if Professor O'Brien Hylton was hired, then that would foreclose another black or latino person being hired any time soon."⁴² This series of events illustrates that the process of selecting faculty, either explicitly or implicitly, calls into question the racial identity of a candidate. Consequently, the method of defining race and identity becomes important.

II. BLACK AS DEFINED BY SOCIAL CONSTRUCT

A. *Black Defined by White Society*

Christopher Ford, in his article, *Administering Identity: The Determination of "Race" in Race Conscious Law*, notes that race is no longer legally defined but is a "socially constructed" characteristic.⁴³

40. Bob Sexter, *Black Prof Fails Political Test: NU Refuses Tenured Position; 'Progressive' Stance Lacking*, CHI. SUN-TIMES, Dec. 11, 1994, at 3. O'Brien Hylton was active in minority issues at DePaul Law School. Telephone Interview with Keith Hylton, *supra* note 16. According to Hylton, "she was always involved if another person of color was coming through the appointments process and quietly mentored students of color one-on-one in her office." *Id.* He said that "she may not have done a lot of the more social activities with students of color, but she was active in minority issues." *Id.*

41. Sexter, *supra* note 40.

42. Preston, *supra* note 5.

43. Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race Conscious Law*, 82 CAL. L. REV. 1231 (1994). Historically, many American states used laws to define people as Black if they had any Black ancestry. It was believed that having any Black ancestors contaminated a descendent regardless of how White that person appeared. The subpersonal status of people of African ancestry was apparent in the institution of slavery. Chief Justice Taney, in the *Dred Scott* decision of 1857, highlights the prevalent attitude towards people of African ancestry when he stated:

[Negroes] were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them. . . . They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This

For a long time, race was used to imply inherent, biological differences between groups of human beings, signified by, but far more significant than, phenotype. In fact, many ethnic groups (e.g., Jews, Italians, Greeks, Poles) that are now considered "White" in the United States context were not historically considered "White."⁴⁴ In the 1960s, a consensus emerged that a biological notion of race was scientifically invalid.⁴⁵ In fact, recent studies demonstrate that two random people—one of African ancestry and the other of European ancestry—may have more DNA in common with each other than they do with members of their own racial group.⁴⁶

The continued salience of race after decades of consensus that race has no biological validity evidences the social construction of race. Many people are still wedded to racial stereotypes. Especially since many African Americans are so clearly identifiable as such, it is very easy for some in society to ascribe the behaviors of a few to the whole group. Since being Black does not have as many de jure restrictions as it had in the past, one's race does not have to be as closely defined. Today racial discrimination is more often limited to

opinion was at that time fixed and universal in the civilized portion of the white race . . . intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes.

Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 404–05, 407, 409 (1857). Although the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments purported to accord people of African ancestry benefits of U.S. citizenship, subjugation of Black citizens continued.

In 1896, the Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896), sanctioned separate and unequal conditions for people of African ancestry. The Supreme Court validated racial segregation although the plaintiff, Homer Plessy, who was seven-eighths White, argued that he should be considered White. Segregation extended beyond persons of African ancestry, however. For a discussion of treatment of Latinos as non-Whites, see Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975).

Thanks to many courageous African American leaders, *Plessy v. Ferguson* was overturned by *Brown v. Board of Education*, 347 U.S. 483 (1954). Again in the 1950s and 1960s, many African Americans and White Americans joined together to overturn most of the American system of apartheid, which was prevalent in the South. They did this through the Civil Rights Movement and the passage of the Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241, and the Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973 (1988)). This concerted action yielded people of color opportunities that are available to them today and allowed the African American community, for the first time, to define itself.

44. ANDREW HACKER, *TWO NATIONS* 5–12 (1992).

45. This consensus, however, has never been uniform. See generally RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* (1994) (examining the intellectual differences among people and social groups); Arthur R. Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 HARV. EDUC. REV. 1 (1969) (asserting that low income and lower status are due to genetic inferiority and are therefore largely irremediable).

46. See Sharon Begley, *Three Is Not Enough: Surprising New Lessons from the Controversial Science of Race*, NEWSWEEK, Feb. 13, 1995, at 67 (examining the scientific attack on the validity of race as a biologically meaningful distinguisher of people).

private actors, and there is not the blatant direct and arbitrary enforcement of racial hierarchy that existed under Jim Crow racism. As such, those private actors and individuals who want to discriminate do so by two means: (1) visual determination of one's race and/or self-identification; or (2) the creation of standards or criteria that demographically are likely to have a deleterious effect on people of color and inure to the benefit of White people.

The decline of race as a legal construction also makes it more difficult to administer affirmative action programs.⁴⁷ Christopher Ford cites the case of *Malone v. Haley*⁴⁸ in which two White men (who were twins) passed themselves off as Black⁴⁹ for the purpose of qualifying for employment as fire fighters under Boston's court-ordered affirmative action program.⁵⁰ The twins were discovered when they sought to be promoted to lieutenant and it was noticed that they were not "Black."⁵¹ They were fired on the grounds that they falsified their application and examination materials.⁵² The twins appealed, claiming that they should still be considered "Black" by the Department. Judge Herbert Wilkins followed the hearing officer's three-part test for adjudicating claims to racial identity.⁵³ He wrote:

[T]he Malones might have supported their claim to be Black[:] (1) by visual observation of their features; (2) by appropriate documentary evidence, such as birth certificates, establishing Black ancestry; or (3) by evidence that they or their families hold themselves out to be Black and are considered to be Black in the community.⁵⁴

The court found that neither of the twins met any of these three criteria.⁵⁵ The judge's analysis is simple but is likely underinclusive.

47. Ford, *supra* note 43, at 1240–62. Ford explains how important race is from a legal standpoint in (1) finding discrimination based on statistical data, (2) fashioning a remedy to a class of people who were discriminated against, (3) electoral redistricting, and (4) census data. *Id.* Ford goes on to discuss the various ways that racial identity has been administered historically and in other cultures. *Id.*

48. No. 88–339 (Mass. July 25, 1989).

49. Ford, *supra* note 43, at 1232–34. In 1975, the twins identified themselves as White and took the 1975 civil service exam, on which they scored poorly. In 1977, the twins took the test again but identified themselves as Black. *Id.* at 1232.

50. *Id.*

51. *Id.* at 1233.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* The court found that the twins had "fair skin, fair hair coloring, and Caucasian facial features." *Id.* The personnel administrator stated that "they do not appear to be Black." *Id.* The birth certificates also showed the Malone brothers and their parents were "reported consistently to be White" for three generations. *Id.* Judge

One might say that to identify by visual appearance may be satisfactory, but because of miscegenation many African Americans are not discernible solely by physical appearance.⁵⁶ For most of us, successful "passing" as "White" or "Black" may be an individual's decision to be something he or she is not, but more often it revolves around larger society's inability to "racialize" the individual. African Americans vary dramatically in color. The problem with documentation such as birth certificates is that White doctors or nurses often complete those forms and make those determinations. Allowing someone to be Black merely by self-identification does permit some instances of racial fraud as took place in the *Malone* cases, but it is probably the best method and least offensive mechanism for racial identification. Given that there still are so many negative Black stereotypes, the risks of Whites falsely identifying themselves as Black is probably small. A self-identification standard recognizes that the definition of Black is arbitrary and can be porous around the edges.

The issue of administering race often goes deeper than skin color, hair texture, and other indicia of appearance. In the African American community being "Black" is often associated, not only with issues of appearance, documentation, and self-identification, but also with ideological and political considerations⁵⁷ and with national identity issues.

appear to be Black." *Id.* The birth certificates also showed the Malone brothers and their parents were "reported consistently to be White" for three generations. *Id.* Judge Wilkins also found substantial evidence that they "did not claim Black status honestly or in good faith," but did so only to take advantage of the department's affirmative action program. *Id.* Eliot Marshall, a senior editor of the *New Republic*, was concerned with this type of abuse and advocated a litmus test of ancestor checks to determine ethnic and racial status. Eliot Marshall, *The Logical Next Step: Race Certification*, NEW REPUBLIC, Oct. 15, 1977, at 18.

56. See generally GREGORY HOWARD WILLIAMS, *LIFE ON THE COLOR LINE* (1995) (chronicling the life experiences of the author, a man with mixed racial heritage); JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN* (1995) (chronicling, through a series of essays written at different times, the author's thoughts and experiences with racial identity from her perspective as a person with European and African heritage).

57. See generally Chris K. Iijima, *Deconstruction, Reconstruction, We-Construction: Reclaiming the Politics of Racial Identity and Reflections on the Critique of the Black/White*, 29 COLUM. HUM. RTS. L. REV. (forthcoming 1997) (discussing modern day political construction of race).

I do not intend to address the issue of political diversity in the African American community. However, a quick example of how one's political perspective can shape one's racial identity is as follows. U.S. Supreme Court Justice Clarence Thomas undoubtedly evidences a "Black" appearance and is of a long line of African American ancestry, but because of ideological and political perspectives, many African Americans do not consider him to be part of the African American Community. See, e.g., JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE, THE SELLING OF CLARENCE THOMAS* 175 (1994) (indicating that 30% of African Americans "branded" Clarence Thomas an "Uncle Tom"); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 370 (1992) ("[T]he choice of a black like Clarence Thomas replicates the

B. Black Society's Definition of Black

So many times in the African American community⁵⁸ a person is ostracized for not being "Black" enough. Much of this self-definition may be an effort by the African American community to control the definition of who is Black. People cannot be "Black" if they are too light skinned, if they are too middle class, if they are too ambitious, if they are too refined, if they work too hard, if they are married to (or otherwise affiliated with) a White person, if they never lived in the ghetto or now do not live in the ghetto, if they have too many White friends, if they speak and write in standard English, if they are too well educated, or if they are not born in the

presence provide a perverse legitimacy to the oppression they aided and approved."); A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1427 (1994) (noting conclusions made that Justice Thomas so "consistently votes against the best interest of African-Americans reveals a great deal about his sense of racial identity and his lack of racial self-esteem . . . [and] suggests that there are many aspects of racial self-hatred that sometimes trigger the perverse conclusions he reaches"); A. Leon Higginbotham, Jr., *An Open Letter To Clarence Thomas*, 140 U. PA. L. REV. 1005, 1014 (1992) (worrying that Justice Thomas's criticisms of civil rights organizations "convey a stunted knowledge of history and an unformed judicial philosophy"); Catherine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L. REV. 117, 147 (1993) (viewing Thomas as a "man who has suffered many forms of racial abuse and who has tried to avoid the pain of this abuse by 'living in his head' "); Jack E. White, *Uncle Tom Justice*, TIME, Jun. 26, 1995, at 36 (labeling Clarence Thomas "Uncle Tom Justice").

58. Unfortunately, this need to exclude extends not just to African Americans. Caribbean Blacks sometimes exclude each other (and feel that they have little in common with others) based on their island of origin. After learning that my parents were from the Caribbean, a Jamaican American student asked me where my people were from. I told him St. Vincent, and his facial expression indicated that he was surprised—as if to say, "I am surprised that anyone could in one generation leave St. Vincent and become a law professor." After all, St. Vincent is a very small, undeveloped island by American standards.

This type of distinction is similar to the geographical stereotypes operating in the United States. For example, if someone says that she is from New York City—leaving crime and violence aside—many people have a stereotypical idea of what a New Yorker is; some may expect the stereotypical New Yorker to be socially more sophisticated, economically better off, and better educated because there is more available in a big city than in a small town. In contrast, if someone says that she is from Pin Point, Georgia, many people will engage in similar stereotyping to define the characteristics of a rural Georgian. Many might stereotype that person as being more poor, less educated, and less socially sophisticated because, on average, rural Georgia may have less financial and cultural resources to offer its residents than urban New York.

United States.⁵⁹ The list of characteristics excludes so many people that I sometimes wonder how many people are really “Black.”⁶⁰

This type of comment happens often in the African American community. The recipients of these comments are not even necessarily of any particular economic class or complexion. It sometimes happens when students are succeeding academically in school and someone says that “they are acting White.” This situation is exemplified by the Spike Lee film “School Daze,” which takes place at an all-Black college.⁶¹ In the film there are two groups of students: (1) the wannabees (more often light-skinned and middle class) who are members of the fraternities and sororities; and (2) the jiggaboos (more often dark-skinned and from a lower economic background) who are members of Black militant groups. In the film, Lee demonstrates the irony of these designations when several members of the Black militant student group eat at a fast food restaurant located in a Black neighborhood. At the restaurant, the students encounter some local residents who accuse the students of acting White. This film shows that the porosity of the designation of “who is Black enough” as well as that the designations may change based on who is doing the judging.

This process of definition by exclusion seems to be a contest as to who is the most victimized—and probably disguises a fear by those doing the excluding that they are being left behind and rejected. In doing so, it fails to appreciate that anyone of African ancestry in the United States, regardless of skin color, economic status, affiliation with White people, educational level, or national origin, is subject to some form of racial discrimination by some White Americans.

59. There may be other examples that I am excluding. Of course, some African Americans may see this exclusion as “payback” against those who, in the past, may have shunned those people of African ancestry who were darker skinned, less educated, poorer, or American-born.

Some of these definitions and historical discriminations that existed in the African American community sound very similar to the predominant stereotypes that many White Americans have against African Americans, because these criteria emanated from the dominant culture. They were imposed on, and perhaps internalized by, African Americans. It is common for a subjugated group to begin to identify with the dominant group and possibly act out its stereotypes.

60. There is no uniformity in the terms used by persons of African American heritage for self-classification; individual African Americans variously describe themselves as African American, Afro, Black, Negro, colored, or Creole.

61. *SCHOOL DAZE* (Forty Acres and a Mule Filmworks 1988).

C. Fitting into Narrowly Constructed Definitions

Maria O'Brien Hylton is a classic New York ethnic combination. Her mother is an African Cuban and her father is a White Australian of Irish ancestry. In her response to the *New York Times* interviewer, Maria O'Brien Hylton said that she did not think of herself in racial terms. Yet in an interview with the *Boston Globe*, Maria O'Brien Hylton seemed to give an inconsistent response when she told the interviewer that she always considered herself Black. Of course, these two statements may not necessarily be inconsistent. First, many people who feel comfortable with their Blackness do not feel it is necessary to define themselves in racial terms. Given that the African American community defines "Black" by means of exclusion, this desire not to define oneself by using racial constructions will pose problems with some members of that community. Second, Maria O'Brien Hylton is of a multiracial background; she is both Black and White. Her responses to these questions are congruent with her mixed-race ethnic background.⁶² Some multiracial persons may have their own unique issues. In his article *Multiracial Minorities: Erasing the Color Line*, Bijan Gilanshah states:

Multiracial individuals are often asked, "What are you?" or "Where are you from?" The ambiguous gap resulting from the multiracial individual's inability to belong to one monoracial group creates a lack of identity. . . . Multiracial individuals constantly confront sociological and psychological identity questions, either through confrontation with inquiring third parties, or through personal missions to resolve the psychological tensions within.⁶³

This analysis of the mental and psychological state of multiracial persons may be too facile, but in some circumstances, depending on

62. There has been a movement to have a separate census category for mixed-race individuals. The 1990 decennial census used five racial categories. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING: SUMMARY POPULATION AND HOUSING CHARACTERISTICS B-11 & B-12 (1992). The five categories were: "White"; "Black"; "American Indian, Eskimo or Aleut"; "Asian or Pacific Islander"; and "Other Race." *Id.* The "Other Race" category includes people "providing write-in entries such as multiracial, multiethnic, mixed, interracial . . . or a Spanish/Hispanic origin group (such as Mexican, Cuban, or Puerto Rican) . . ." *Id.* at B-12. There also has been an increase in the number of interracial marriages. ARLENE F. SALUTER, U.S. DEP'T OF COMMERCE, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1991, at 7 (1992). In 1991, there were approximately 994,000 interracial couples compared to 310,000 figure derived from the 1970 decennial census. *Id.*

63. Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 LAW & INEQ. J. 183, 189 (1993).

how and where the multiracial children are raised, these may be real issues. On the other hand, some multiracial people "adopt an either/or approach to identity definition by accepting one racial heritage in virtual denial of their other racial self."⁶⁴ This approach has its own unique risks because the multiracial individual then is in a position of denying a part of her/himself.⁶⁵ Maria O'Brien Hylton's resolution of her racial identity—i.e., whether she sees herself as mixed-race, Black, Latina, and/or White—will probably create some dissonance with a popular culture that sees itself as monoracial and, at least historically, wants to remain monoracial.

Maria O'Brien Hylton is also a child of immigrants who happen to be both Black and White. To say that she is one rather than the other is to deny her mixed-race heritage. Given her parents' foreign birth, O'Brien Hylton very well may not have the same U.S. historical basis of race—e.g., the one-drop rule in which any Black ancestry, no matter how remote, makes a person Black.⁶⁶ Finally, Maria O'Brien Hylton may have offered seemingly inconsistent answers to the two newspaper interviews because her Black ancestry is not American-born—her mother is African Cuban.

For Latinos/Latinas, the basis for their treatments as outsiders is not limited to their color or race. Differential treatment against them can be based on their "surname, language (including accent), national origin, sex, alienage, race and color."⁶⁷ Latinos/Latinas are a diverse group varying widely in complexion⁶⁸ and originating from different cultures.⁶⁹ The Latino/Latina's conception of who is White therefore differs from U.S. historical and cultural notions, as reflected in the one-drop rule.⁷⁰

64. *Id.* at 189–90.

65. *Id.*

66. See Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 257* (Kimberlé Crenshaw et al. eds., 1995) (asserting that the U.S. Supreme Court's color-blind constitutionalism fosters White racial domination and addressing racial classification as a part of this inquiry).

67. Hernández Truyol, *supra* note 1, at 376.

68. The census does not compile information on the racial breakdown of the Latino/Latina population. *Id.* at 379 n.19. Experts agree that most Latinos/Latinas are of mixed racial heritage. *Id.* (citing Greenfield & Kates, *supra* note 43, at 683, 700 n.197).

69. Latinos/Latinas in the United States currently comprise 22 million people constituting nine percent of the total United States population, emanating primarily from Mexico, Puerto Rico, Central America, South America, and Cuba. *Id.* at 383–85. The balance of the U.S. Latino/Latina population either have their origins in Spain or do not identify their origin. *Id.* at 383–87. They total 7.8% of the Latino/Latina population. *Id.* at 387.

70. *Id.* at 384 n.54.

It is estimated that only three percent of Latinos/Latinas designate themselves as Black; ninety-five percent designate themselves as White.⁷¹ This racial self-identification as “White” corresponds with the disappearance of Blacks and people of mixed-race ancestry in the Puerto Rican census between 1899⁷² and 1950.⁷³ Professor Hernández Truyol finds these figures interesting, since most Latinos/Latinas are racially mixed, including combinations of European White, African Black, and American Indian.⁷⁴ It is thus very unlikely that the Latino/Latina community is ninety-five or ninety-seven percent “White” by conventional U.S. standards.⁷⁵ White Americans historically have recognized the mixed-race ancestry of Latinos/Latinas. In his essay, *Los Olvidados: On The Making of Invisible People*, Professor Juan Perea notes that early historians and commentators noted the darkness of Mexican Americans’ skin and their mixed-race background.⁷⁶ The situation in

71. *Id.* (citing GERARDO MARIN & BARBARA VAN OSS MARIN, RESEARCH WITH HISPANIC POPULATIONS (1991)).

72. Puerto Rico became a U.S. possession after the U.S. victory in the Spanish American War. Hernández Truyol, *supra* note 1, at 383 n.48. The Treaty of Paris ratified Puerto Rico’s annexation, provided that Congress would define the political and civil rights of the people of the island. *Id.* Congress made the Puerto Rican people U.S. citizens through the Second Organic Act of 1917, known as the Jones Act. *Id.* (citing Second Organic (Jones) Act of 1917, ch. 145, § 5, 39 Stat. 951, 953 (1917)). In 1952, Puerto Rico achieved commonwealth status.

73. See JOSÉ CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE 98 n.475 (1979). This process of racial self-identification (as “White”) is called “blanqueamiento,” or whitening. EDUARDO SEDA BONILLA, REQUIEM POR UNA CULTURA 52 (1970).

74. Hernández Truyol, *supra* note 1, at 384 n.54; see also Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995) (discussing the creation of Latino/Latina invisibility and the non-recognition of Latinos/Latinas as a separate legitimate group with an impact on America).

75. Hernández Truyol, *supra* note 1, at 384 n.54.

76. Perea, *supra* note 74, at 975–76. Professor Perea notes that David Weber wrote that “American visitors to the Mexican frontier were nearly unanimous in commenting on the dark skin of Mexican mestizos who, it was generally agreed, had inherited the worst of Spaniards and Indians to produce a ‘race’ still more despicable than that of either parent.” *Id.* (quoting FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS 59–60 (David J. Weber ed., 1973)). Professor Perea also quotes Rufus B. Sage, a newspaperman and Rocky Mountain trapper who described residents of New Mexico in 1846 in the following way: “There are no people on the continent of America, whether civilized or uncivilized, with one or two exceptions, more miserable in condition or despicable in morals than the *mongrel* race inhabiting New Mexico . . .” *Id.* (quoting RUFUS B. SAGE: HIS LETTERS AND PAPERS, 1836–1847, at 82–87 (LeRoy B. Hayden & Ann W. Hafen eds., 1956)) (emphasis added). Finally, Professor Perea cites the views of historian Walter Prescott Webb who wrote in 1935:

The Mexican nation arises from the *heterogeneous mixture* of races that compose it. The Indian blood—but not Plains Indian blood—predominates, but in it is a mixture of European, largely Latin. The result is a conglomerate with all gradations from pure Spanish to pure Indian. There are corresponding social gradations with grandees at the top and peons at the bottom. The language is

Puerto Rico coincided with Mexican protests that ensued over the 1930 U.S. census, which presumed Mexicans to be non-White unless definitely "White."⁷⁷

It is unclear whether any or all of these issues were responsible for O'Brien Hylton's apparently inconsistent answers to the two newspapers. But it is clear that, rightly or wrongly, this ambiguity did not help her case in the African American community.⁷⁸

III. ANALYSIS

A. Race in Faculty Hiring

Faculty hiring is difficult enough under the best of circumstances. Procedurally, faculty hiring can be a fairly orderly process. Each law school usually has a faculty appointments committee comprised of several faculty members (with the dean sometimes sitting *ex officio*). The committee attempts to discern the needs of the law school by determining which faculty members may be on leave or plan to leave the law school.⁷⁹ The appointments committee pre-screens resumes of candidates who apply through the American Association of Law Schools' job fair.⁸⁰ The committee goes off to a city, usually Washington, D.C., or Chicago, for two days of interviews. The committee then rescreens the candidates, deciding who to invite back to the law school for an interview with the full faculty. To make these determinations, the committees often consider how the law school's expected hiring needs match up with each candidate's academic background, employment history, and

Spanish, or Mexican, the religion Catholic, the temperament volatile and mercurial.

Id. at 976-77 (quoting WALTER F. WEBB, *THE TEXAS RANGERS: A CENTURY OF FRONTIER DEFENSE* 13-14 (2d ed. 1965)).

77. Greenfield & Kates, *supra* note 43, at 699-700 n.197.

78. In O'Brien Hylton's defense, her experience with the Northwestern hiring process obviously was a very stressful event that had to have gone to the core of her self-identity. It is hard to fathom how any of us would cope under similar pressure and nationwide public scrutiny.

79. This determination is very difficult because faculty members have until March 15 of each year to notify their home institutions of their plans for the following year. As you can imagine, there is sometimes a very tight window to get a replacement for a departing faculty member, especially if the replacement is from another school and has to give his/her institution the same notice. Many faculty members do try, of course, to give their home institutions notice that they are seeking another position.

80. The committee will also receive a fair number of resumes from write-in candidates, those applicants who do not go through the job fair. These applicants may be interested in just a few schools in a particular geographical region or may have some connection with a particular law school. These applicants are also more likely to be people interested in lateral moves, as opposed to those who partake in the job fair who are more likely to be seeking their first full-time, tenure-track teaching position.

teaching interests. The candidate who is chosen to interview at the law school usually spends a whole day interviewing with the dean, other faculty members, the central college administration. The candidate also gives a presentation on a scholarly topic to the whole faculty.

After the day-long interviews, the appointments committee⁸¹ may then present the candidate to the faculty for a vote.⁸² If the faculty votes to extend an offer, the dean will often negotiate a course and compensation package with the candidate.

Because most of the resumes are often of very high quality, the interviewing process is tedious, and I find that law professors will sometimes focus on the most minute details to disqualify candidates. It seems to me that law professors also use this strategy as a camouflage to exclude those candidates with whom they ideologically disagree.⁸³

In the case of Northwestern's consideration of Maria O'Brien Hylton, this difficulty was exacerbated by highly controversial issues of race, class, gender and politics. Many of the parties involved agree that O'Brien Hylton was not denied a tenured teaching position at Northwestern University Law school because of her race,⁸⁴ but I believe that race did play a role. Professor O'Brien Hylton was initially considered for the teaching position at Northwestern because her husband was considering taking the tenured position at Boston University. Dean Bennett acknowledged that Northwestern was an affirmative action employer but denied that Professor Keith Hylton's race had anything to do with the steps they would take to retain him or to try to hire his wife. The Northwestern law faculty could not have been ignorant of the fact that if Northwestern granted Keith Hylton tenure and awarded Maria O'Brien Hylton a tenured position, the school would have increased its faculty of

81. The appointments committee will have reviewed in advance (and may make available to the faculty) the candidate's writing samples, law school transcripts, and job references.

82. The vote at many faculties may require a super-majority of 60–65% of the faculty present. A super-majority is required to ensure that there is substantial support on the faculty for the candidate, so that initial negative feelings concerning the hiring are minimized.

83. After a heated discussion about prospective faculty candidates, I jokingly told my colleagues that we should invent a new game show entitled "What's Wrong With That Resume?"

84. Letter from Professor Maria O'Brien Hylton, Boston University Law School, to Professor Leonard M. Baynes, Western New England College of Law (n.d.); Memorandum from Dean Robert W. Bennett, Northwestern University School of Law, to Northwestern Law Alumni (Jan. 26, 1995); *cf.* May 17th Letter from Professor Hughes, *supra* note 8 (stating that Professor Hughes did not circulate a memorandum to the faculty about the candidate's background and political orientation until after the matter had ended).

color from three to four, whereas if Northwestern failed to offer O'Brien Hylton a tenured position and as a result also lost Keith to Boston University, Northwestern's faculty of color would decline to two. Also, O'Brien Hylton was considered for the Northwestern position despite a moratorium on faculty hiring.

In Maria O'Brien Hylton's case, Northwestern had a rare opportunity to meet several potential affirmative action needs in one faculty hire, i.e., employ a woman who happened to be Black and a Latina. However, Professor Maria O'Brien Hylton's candidacy was opposed by the student groups one would expect to be her natural constituents—women, African Americans and Latinos/Latinas. Enthusiastic support by these groups for Maria O'Brien Hylton's candidacy may have moved the school to offer her a tenured position.⁸⁵ Maria O'Brien Hylton's race and gender may not have been the pivotal factor in Northwestern's decision, but given the discussion about race and gender concerning her candidacy, these had to be major factors in her being considered for the position in the first place.

B. Scrutiny of Faculty Candidates of Color by Faculty of Color in the Hiring Process

Many observers were outraged by the Northwestern hiring debate. Many Whites use the Northwestern hiring debate as an example of the intraracial prejudice that exists in the African American community.⁸⁶ They did not understand "what not being Black enough was." The news media worsened the situation by failing to clarify the issues and instead sensationalizing them.⁸⁷ Many people of color were also outraged by the Northwestern hiring debate. The newspaper accounts trivialized an important discussion of a complex issue. In the process, several members of our community—Joyce Hughes, Maria O'Brien Hylton, and Keith Hylton—were scapegoated. Furthermore, the issue was raised at the wrong time and in the wrong way—in the midst of a hiring decision. The hiring

85. The implications of O'Brien Hylton's racial identity in Northwestern's decisionmaking process become more pronounced when considered in light of the assurances that Professor Keith Hylton received from the faculty appointments committee that initially found O'Brien Hylton qualified and believed that there was adequate support for her candidacy. Telephone Interview with Professor Keith Hylton, *supra* note 16; Keith Hylton Summary, *supra* note 8.

86. See generally Editorial: *Academic Blacklisting*, BOSTON GLOBE, Feb. 10, 1995, at 20; Arnold R. Weber & Robert E. Bennett, *NU Faculty Appointments Based Only on Merit*, CHI. SUN-TIMES, Dec. 29, 1994, at 24.

87. See sources cited *supra* note 5.

struggle also had the potential to drive a rift between and among African Americans and Latinos/Latinas.

The faculty appointments committee has the difficult task of scrutinizing a candidate's academic and employment credentials in an effort to determine the candidate's potential for scholarship and teaching.⁸⁸ When it comes to candidates of color, this scrutiny often gets distorted as faculty appointments committees apply different criteria than to White candidates. I have heard of situations where employers have asked candidates of color for thirteen references from every employer—law and non-law—that the candidate has ever had. I have heard of situations where the law school has requested law school transcripts for candidates of color but not for White candidates. I have heard of situations where a candidate of color was asked to produce transcripts and several references before being interviewed. Even after meeting these requests, the candidate was denied an interview because, although the references were satisfactory, none were from a law professor from the candidate's alma mater. When I have questioned these obvious examples of discriminatory treatment, I have been told that the White faculty members making such requests have said that they want to give the candidates of color "a fair chance" and that they need this additional information to "feel comfortable" in making the hiring decision.

Given this context, it is not surprising that faculty of color would also subject candidates of color to intense scrutiny. Faculty members of color want to make sure that they can work with other faculty of color and that faculty of color will meet the needs of the communities of color on campus. The best way to make these evaluations is to question candidates of color about their racial identity, credentials, and commitment to the community of color. However, this inquiry may backfire by turning off the candidate.

Unfortunately, in the context of the hiring process, such an evaluation is sometimes a necessary evil. Contrary to Dean Bennett's assertion, there is often an informal upper limit on the number of faculty of color a school is willing to hire. The upper limit is not necessarily fixed, but the need or desire to hire an additional faculty member of color declines in proportion to the number of faculty of color that the law school employs. Therefore, each additional hiring of a person of color becomes more important since, with each additional hire, the opportunities for such hiring becomes much more limited.

88. This scrutiny sometimes seems like Judgment Day, when God (the faculty appointments committee) sends the good (candidates who receive an offer) to Heaven (the law school faculty) and the bad (those who do not) to Hell.

Faculty of color often have "unofficial" additional burdens⁸⁹ placed on them, such as mentoring students of color and junior faculty of color,⁹⁰ serving as the representative voice of people of color on various faculty committees, and interacting with the larger community of color.⁹¹ Therefore, in the hiring decision, it is not uncommon for senior faculty members of color to reach out to the candidates of color in an effort to answer, on the one hand, any questions the candidates may have that they cannot ask a White faculty member and to get, on the other hand, a sense of whether the candidate of color will fit in and meet the needs of the community of color on the campus.

When Professor Hughes called the Hyltons at home to discuss Maria O'Brien Hylton's candidacy, she might have been doing what many senior faculty members of color do. That is, Hughes may have been trying to ensure that she was serving her constituency by evaluating whether Maria O'Brien Hylton would be an appropriate role model and mentor for African American students. She may also have been concerned whether, with the potential addition of Maria O'Brien Hylton to the faculty, the faculty of color would have a diverse enough political perspective.⁹² Professor Hughes probably was also trying to clarify Professor Maria O'Brien Hylton's racial identity to make sure that Northwestern did not get away with claiming that it met affirmative action needs by hiring Maria O'Brien Hylton, who might not identify with all of the racial and ethnic groups potentially attributed to her by the school. In calling O'Brien Hylton, Professor Hughes may also have had her own agenda and her own preconceived notions as to who the essential

89. See generally Roy L. Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. REV. 419 (1986).

90. Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 148 n.21 (1994) (essentially calling mentoring a "bitter labor").

91. These requirements are in addition to the general requirements of teaching and publication for all faculty members. Unfortunately, many law schools do not give them due consideration when the faculty member comes up for tenure. In contrast, White faculty members for the most part have only to meet the minimal requirements.

These additional burdens are unfair and unfortunate. Conversations that my colleagues of color and I have had with some of the students of color at Western New England College School of Law have convinced me that similar additional requirements are placed on law students of color. The students are often a very small percentage in our classes, and they feel a very heavy burden when issues of race arise in the classroom discussions. They resent the fact that they sometimes feel compelled to speak; yet if they do not speak, their perspective will not be part of the classroom discussion. My colleagues and I explain that this is an unfortunate part of their minority status that is likely to continue the rest of their lives.

92. With the addition of Maria O'Brien Hylton to the Northwestern faculty, three of the four faculty members of color would have taught from the law-and-economics perspective.

Black candidate should be in terms of place of origin and racial and socioeconomic background.⁹³

In this process, I believe that Professor Hughes may also have been marginalized by the Northwestern Law School faculty. She was the most senior of the faculty of color at Northwestern and the first African American woman tenured at a predominantly White law school. She was not a member of the faculty appointments committee and was not consulted about the possible appointment of Maria O'Brien Hylton to the faculty until the rest of the faculty knew, even though certain other faculty members knew in advance.⁹⁴ It appears that she was not consulted, in advance, on an issue—the hiring of a faculty person of color—that would obviously be important to Professor Hughes. Given this situation, it is not totally surprising that Joyce Hughes would attempt to talk to Maria O'Brien Hylton privately to do her own fact-finding.

This line of questioning about a person's racial credentials is always difficult. From Maria O'Brien Hylton's standpoint, Joyce Hughes's line of questioning probably did sound like Joyce Hughes asking Maria O'Brien Hylton "whether Maria Hylton was Black enough." In my experience, the American Black community often defines itself by means of exclusion. In conversations with other African Americans, it is very common to hear that someone does not think that another African American is "Black enough" because the person is too light-skinned, too middle class, too refined, too conservative politically, or too well-educated.⁹⁵ People can also be excluded if they are foreign born or have too many White affiliations, such as a spouse or friends.⁹⁶ Given Maria O'Brien Hylton's racial and economic background,⁹⁷ in the African American community there are some people who might very well say that

93. Professor Hughes' concern over O'Brien Hylton's racial identity might have stemmed from a desire to get O'Brien Hylton to choose her ethnicity. But how can, and why should, someone choose a single ethnicity when she is both Black and Latina at the same time?

94. May 17th Letter from Professor Hughes, *supra* note 8.

95. In contrast, the larger American society these days may want to claim to be individuals as "White" or something other than "Black." Some Blacks fit into these categories because of their light skin color, middle class status, ambition, and refinement. See Jan. 10th Letter from Professor Hughes, *supra* note 16.

96. See Leonard M. Baynes, *Who is Black Enough for You? The Stories Of One Black Man and His Family's Pursuit of the American Dream*, 11 GEO. IMMIGR. L.J. (forthcoming 1997) (manuscript at 15, on file with the *Michigan Journal of Race & Law*) (asserting that given the history of Caribbean Blacks and the author's personal experiences, Caribbean Blacks and African Americans are all Black in the American context).

97. As mentioned earlier, Maria Hylton is of biracial background and her parents are middle class. Her father is a college professor and her mother is a teacher. She grew up on Long Island.

Maria O'Brien Hylton was not "Black enough."⁹⁸ Maria O'Brien Hylton meets many of the stereotypical criteria that some members of the African American community use to exclude each other. Even though Professor Hughes might not have used this terminology, i.e., not being "Black enough," a reasonable person could interpret the line of questioning about one's racial identity as questioning whether one was indeed "Black enough." Given Maria O'Brien Hylton's background, it is also not surprising that she might interpret the line of questioning as such.⁹⁹

C. Hughesian Racial Identification Theory

The Northwestern hiring debate highlights the tension in defining who is Black. In the course of the debate, Professor Joyce Hughes advocated a narrow definition of who is African American.¹⁰⁰ In a memo written to the Northwestern faculty, Hughes attempted to explain her position with respect to "minority hiring." It was reported that Professor Hughes stated that "[i]t is misleading to label as Black any person whose skin color is dark [A] person like Maria whose parents are (white) Australian and (black) Cuban should not be considered a Black candidate."¹⁰¹ She contextualized that statement by explaining that "while there are said to be 100 million people of African descent in Latin America and the Caribbean, they are not African American and are not Black in the U.S. context."¹⁰² "[There is a] 'distinction between African Americans and those who may be called Blacks or people of color African American students benefit from that which majority students have—persons on the faculty who validate them. For most African Americans, descent is from 12 generations of enslaved Africans."¹⁰³

98. I must acknowledge that I have also been accused from time-to-time of not being Black enough, more often in my youth than now. See Baynes, *supra* note 96, at 17–18. In the course of writing this Article I discussed these issues with family, colleagues and friends, and it seems that many people of color have had similar experiences.

99. Telephone Interview with Keith Hylton, *supra* note 16. Hylton explained that he and O'Brien Hylton interpreted the questions as this kind of inquiry.

100. Professor Hughes' rather narrow definition has implications concerning who should qualify as an African American candidate for purposes of affirmative action policies.

101. Sege, *supra* note 5 (quoting Memorandum from Professor Joyce Hughes, Northwestern University Law School, to the faculty, Northwestern University Law School (Dec. 4, 1994) [hereinafter Dec. 4th Memorandum] (on file with the author)).

102. Greenburg et al., *supra* note 5 (quoting Dec. 4th Memorandum, *supra* note 101).

103. Sege, *supra* note 5 (quoting Dec. 4th Memorandum, *supra* note 101).

Professor Hughes told the faculty that the newspaper accounts of her memorandum missed a subtle difference. She stated:

They changed my spelling of the word black and thus changed the meaning. When the word Black is used as a noun, I try to capitalize it; when it is used as an adjective, it is not capitalized. A person can be black in skin color but not be Black in the U.S. context.¹⁰⁴

In an effort to further clarify her position, Professor Hughes later wrote to the Northwestern faculty to reiterate that her earlier memoranda were written after Professor Maria O'Brien Hylton withdrew herself from consideration. Professor Hughes stated:

1. Color does not determine who is African American or a Black, to use the term polls say most African Americans prefer. (Note that I use a capital B.)
2. Faculty (of any race, any color, any ethnicity, any gender) who will validate African American students are necessary in institutions of higher education.
3. "Minority" faculty should not be concentrated in one particular orientation.¹⁰⁵

In each of these memoranda, Professor Hughes carves out a distinction between people of African ancestry who have their roots in the U.S. and those who have their roots elsewhere. Although Professor Hughes does explain why she may feel that this distinction is important, there are several concerns that may have given rise to Hughes' position.¹⁰⁶

First, she may believe that affirmative action policies should be remedial. That is, policies should be aimed solely at compensating African Americans for slavery and Jim Crow subjugation. According to this position, only those African Americans who could prove that they have a long ancestral history in the United States would qualify for the benefits of affirmative action programs; others who cannot prove this ancestral heritage would not qualify. That standard may have some merits. This standard is similar to that employed in assessing compensatory damages, where individuals are compensated based on the loss suffered by the individual. To apply this concept

104. Dec. 13th Memorandum from Professor Hughes, *supra* note 26.

105. Memorandum from Professor Joyce Hughes, Northwestern University Law School, to the Faculty, Northwestern University Law School (Jan. 8, 1995) (on file with the *Michigan Journal of Race & Law*).

106. The following points are not necessarily the views of Professor Hughes, but they are mostly compilations of discussions that I have had with African Americans about affirmative action and the question of who should be the essential Black candidate for law school admissions, faculty hires, and other positions.

by analogy, those African Americans who have a long ancestral history in the United States and can show that they have suffered from slavery and Jim Crow subjugation should receive more of the benefits of affirmative action than those who cannot make the same showing. This standard is not the rationale, however, for the affirmative action doctrine which has been adopted by the Supreme Court. Writing for the Court in *Regents of the University of California v. Bakke*, Justice Powell justified affirmative action on the grounds of pedagogical diversity—not to remedy past discrimination.¹⁰⁷ Furthermore, a requirement of Black racial pedigree raises many issues of proof. How many persons can trace their genealogy back to slavery? How can a person be certain that she is truly of American Black ancestry? In addition, in light of increasing immigration of Caribbean Blacks and Africans to the United States,¹⁰⁸ where are we to draw the line to exclude these people and their descendants from affirmative action programs? That is, when do a person's descendants stop being "foreigners" and become African Americans who happen to have their roots outside the United States? Implementation of such a standard would thus be very difficult to employ. Moreover, an entirely historical standard ignores contemporary discrimination suffered by all Blacks in the United States, including African Americans, Caribbean Blacks and Africans. A strict historical standard would also make it much easier for White administrators to avoid hiring candidates of color who cannot document their racial pedigree, in addition to meeting standard requirements concerning documentation of academic and employment history.

Second, Professor Hughes may be concerned that those people of color who do not identify themselves as African American may choose to become "White" if given the opportunity.¹⁰⁹ Many European immigrants of Jewish, Italian, Irish, and Greek ancestry who were not considered "White" in the 19th century attempted to "pass" as White to avoid discrimination by adopting the English language and White American culture and thereby assimilating into the White race.¹¹⁰ Some social commentators believe that the

107. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 265–320 (1978); see also Gabriel J. Chin, *Bakke to the Wall, Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881 (1996) (discussing the problems associated with diversity as a basis for affirmative action).

108. See Baynes, *supra* note 96.

109. Professor Derrick Bell also articulated this view in an address in which he noted that "there is every reason to believe that Spanish-speaking . . . immigrants, like their European predecessors will move beyond the bottom of society and leave blacks in the role society has designated for them" Derrick Bell, *The Permanence of Racism*, 22 SW. U. L. REV. 1103, 1103 (1993).

110. See generally HACKER, *supra* note 44, at 8.

expansion of the White race is continuing and that groups like Asian Americans are increasingly being considered "White."¹¹¹ The expansion of the "White" race, coupled with historical examples of Latinos/Latinas designating themselves as "White,"¹¹² lead some African Americans to question how long a coalition with other people of color will endure.¹¹³ There are many Latinos/Latinas, based on their racial genealogy, who would be classified as African American under the one-drop test if they were born in the United States to African American parents. When Professor Hughes says that many people in the Caribbean may be dark in color but are not Black, she is in essence saying that there are people in the Caribbean who do not define themselves by their African ancestry but rather by their Latino/Latina ethnicity. In such circumstances, some African Americans would probably assert that such an individual should not be entitled to claim status as a Black for purposes of affirmative action.

Latinos/Latinas do not fit easily within the conventional U.S. Black-White racial paradigm. Given this racial paradigm, some African Americans may view the fact that some Latinos/Latinas may not openly acknowledge their African ancestry as the equivalent of "passing."¹¹⁴ Moreover, I have heard stories of some light African Americans who have "passed" for Puerto Rican because they felt that they would be treated better by Whites.

The Black-White racial paradigm is at times too limiting. It does not consider that Latinos/Latinas may be discriminated based on their surname, culture, language, gender, as well as race.¹¹⁵ It also does not take into account the fact that race was defined differently

111. *Id.* at 9–10.

112. The number of multiracial and Black Puerto Ricans declined between the 1899 and 1950 census because people were designating themselves "White" as opposed to "Black." Hernández Truyol, *supra* note 1, at 384 n.54. In addition, the Mexican government protested when the 1930 census listed Mexican Americans as non-White. *Id.* at 376 n.19 (citing Gary A. Greenfield & Don B. Kates Jr., *supra* note 43, at 683, 700 n.197 (1975)).

113. I do not subscribe to this view. Many of the Latino/Latina students, faculty members, and friends that I encounter are proud of, and openly acknowledge, their multiracial roots.

114. In U.S. racial history, some very light-skinned African Americans denied their African ancestry and went through life pretending to be White. See generally SCALES-TRENT, *supra* note 56 (debating the construction of race as an African American woman who is often mistaken for White); WILLIAMS, *supra* note 56 (portraying the experiences of a man with mixed heritage who is not dark-skinned); Cheryl I. Harris, *Whiteness as a Property*, in CRITICAL RACE THEORY, *supra* note 66, at 276, 278 (discussing how "the law has accorded 'holders' of whiteness the same privileges and benefits accorded holders of other types of property" by recounting her grandmother's experience of "passing").

115. See Hernández Truyol, *supra* note 1, at 376–77.

in Latin countries than in the United States.¹¹⁶ Taking into account this different heritage, and the fact that discrimination is prevalent against them in the United States, Latinos/Latinas are moving in the direction of creating a race in and of themselves—separate from Blacks and Whites.¹¹⁷

Third, assuming that Professor Hughes believes in coalitions between African Americans and other people of color, she may still want to ensure that African Americans are not lost in the process. For instance, White administrators may very well discriminate within and between people of color in making a faculty hire or admitting students. Professor Hughes points out that the undergraduate student body at Northwestern is over twenty percent “minority,” but when that number was disaggregated, Asian Americans comprised seventeen percent whereas African Americans comprised only six percent.¹¹⁸

Fourth, some African Americans may want to use affirmative action programs to target specific groups of African Americans who have been particularly disadvantaged. Although many African Americans have benefited from the Civil Rights Movement and affirmative action, they have been mostly middle class.¹¹⁹ African American families who have lived at or near poverty for many generations may deserve targeted programs aimed at raising them from lives of despair. Similarly, descendants of slaves may envision affirmative action as a form of reparations.

CONCLUSION

Professor Hughes stated that people from the Caribbean and Latin America may be dark in color, but not Black in the American context. She is correct in that these Black people do not have a long American genealogy. However, this analysis reinscribes essentialist theory. It overlooks the fact that a person who is Black, but is not the

116. See *id.* at 384 n.54.

117. See Angel Oquendo, *Comments by Angel Oquendo*, 9 LA RAZA L.J. 43 (1996). See generally Celina Romany, *Gender, Race/Ethnicity and Language*, 9 LA RAZA L.J. 49 (1996) (conceptualizing race in a way that includes ethnicity and gender).

118. Professor Joyce A. Hughes, Remarks to Visiting Committee Meeting at Northwestern University School of Law (Apr. 21, 1995).

119. A small number of Blacks made progress in income by moving from the middle class into the more than \$50,000 per year category, while unprecedented numbers of Blacks fell from the middle class to poverty. DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW 807 (3d ed. 1992) (citing DAVID H. SWINTON, THE ECONOMIC STATUS OF AFRICAN AMERICANS: “PERMANENT” POVERTY AND INEQUALITY IN THE STATE OF BLACK AMERICA 1991, at 25 (Dewart ed. 1991)).

essential African American,¹²⁰ cannot be distinguished from other African Americans.¹²¹ The nonessentialized African American is still subject to the same discrimination by Whites as the essentialized African American.¹²² Unless articulated with precision, Hughes' theory has the potential to impair coalition building between and among groups of people of color. For instance, Maria O'Brien Hylton is a woman and a person of African, European, and Latino ancestry, all at the same time. She should not have to choose between or among those aspects of her identity or to compartmentalize herself into discrete categories.¹²³

Professor Hughes is correct to be concerned that African Americans do not get lost in the coalition. But African Americans need to reach out to other people of color to maximize their power. I am not suggesting that African Americans should have primacy among the various people of color. African Americans, Latinos/Latinas, Asian Americans, and Native Americans must each make sure that their own individual issues are not lost in any coalition. In making hiring and tenure decisions, faculties need to make every effort to ensure that the diversity in the people of color who are hired as faculty members is balanced to reflect the racial, gender, ethnic background of the student body and the community at large.

As African Americans, we have to realize that we do not have ownership of discrimination in United States; there are many other people of color who have experienced similar discrimination or discrimination in different quality and character. Moreover, we have to take notice of the variety in conceptions of race to which people adhere. It is only through dialogue on these issues that we can have productive discussions and form a true partnership between and among all people of color. It is more important to accept a faculty candidate of color for her intrinsic qualities in building a community

120. That is, the person's genealogy is not from twelve generations of enslaved Africans in the United States.

121. This failure to distinguish is particularly true of those second-generation Caribbean Blacks who were born in the United States. See generally Baynes, *supra* note 96 (stating that Caribbean Blacks, upon immigrating to the United States, experience de facto discrimination similar to African Americans).

122. In addition, people may be defined by and discriminated against based on characteristics besides their race—such as their gender, national origin, sexual orientation, class, culture, language, and color.

123. Professor Hughes acknowledges that she is an African American and a woman so she knows what it is like to be compartmentalized. See January 10th letter from Professor Hughes, *supra* note 16. Though it is true that Professor Hughes did not explicitly ask O'Brien Hylton to classify herself, asking the question, "Do you consider yourself a minority candidate or an African American?" to a woman in O'Brien Hylton's position necessarily requires an answer that forces her to compartmentalize herself.

of color at an institution than for her exact racial or ethnic makeup. Maria O'Brien Hylton should not have been evaluated by her racial, ethnic, or gender identity, but by her awareness of, and commitment and potential contributions to, the Northwestern community of color. At the same time, Northwestern should have acted with the explicit goal of obtaining a faculty of color that is truly reflective of the community and student population.

