

# ARTICLE

## IS KIM KARDASHIAN WHITE (AND WHY DOES IT MATTER ANYWAY)? RACIAL FLUIDITY, IDENTITY MUTABILITY & THE FUTURE OF CIVIL RIGHTS JURISPRUDENCE

*John Tehranian\**

### ABSTRACT

With the world's most ubiquitous celebutante firmly cast in the starring role, this Article conducts an exegesis on the semiotics of Kim Kardashian's racial identity. In the process, the Article explores the social construction of race in action, weighs the individual agency possible in the racialization process, and further probes the reality of identity fluidity at a time when society and the law are only just beginning to grapple with more malleable conceptions of race. After presenting an analysis of the social, legal, and historical formulation of the concept of whiteness and tracing the dramatic transformation of both juridical and popular notions of racial belonging over the course of American history, this Article draws upon Kardashian's racial fluidity and recent controversies involving Rachel Dolezal and Elizabeth Warren to question some of our most fundamental perceptions about race and provide a unique spin on issues of diversity, identity, and colorblindness. All told, the Article highlights (for better or worse) the continuing relevance of race in American life and underscores the underappreciated significance of racial fluidity (in a time when society is growing increasingly "woke" about gender fluidity) and

---

\* A.B., Harvard University; J.D., Yale Law School. Paul W. Wildman Chair and Professor of Law, Southwestern Law School.

its potentially seismic impact on long-held, but rarely questioned, assumptions in antidiscrimination and equal protection jurisprudence.

#### TABLE OF CONTENTS

I. INTRODUCTION .....	152
II. KIM KARDASHIAN AND THE WAGES OF WHITENESS .....	154
A. <i>What Does History Tell Us About         Kardashian’s Whiteness?</i> .....	154
B. <i>What Does the Law Tell Us About         Kardashian’s Whiteness?</i> .....	157
C. <i>What Does the Society Tell Us About         Kardashian’s Whiteness?</i> .....	160
III. WHY DOES KARDASHIAN’S WHITENESS (OR LACK THEREOF) MATTER AT ALL? POST-RACIALISM AND ITS DISCONTENTS .....	162
IV. BUT IS KIM WHITE (AND WHAT DO RACHEL DOLEZAL AND CAITLYN JENNER HAVE TO DO WITH IT)? IDENTITY FLUIDITY AND THE PLEASURES AND PERILS OF ELECTING RACE.....	166
V. KEEPING (THE LAW) UP WITH THE KARDASHIANS: MODELING MALLEABILITY AND GRAPPLING WITH THE JURISPRUDENTIAL CONSEQUENCES OF IDENTITY FLUIDITY.....	177

#### I. INTRODUCTION

As journalist Erin Keane once quipped, “Like a round, shiny mirror, [Kim] Kardashian’s butt reflects back to us our myriad cultural panics and anxieties, inviting us to oil them up and present them to the world . . . .”<sup>1</sup> Because no issue has defined American history more than race, it should come as no surprise that, even on this point, the most omnipresent celebrity of our generation, Kim Kardashian, and her backside have relevance.

---

1. Erin Keane, *All the Things We Project onto Kim Kardashian’s Butt: How One Woman’s Rear End Came to Mean Everything*, SALON (Nov. 12, 2014, 9:15 PM), [https://www.salon.com/test/2014/11/12/all\\_the\\_things\\_we\\_project\\_onto\\_kim\\_kardashians\\_butt\\_how\\_one\\_womans\\_rear\\_end\\_came\\_to\\_mean\\_everything](https://www.salon.com/test/2014/11/12/all_the_things_we_project_onto_kim_kardashians_butt_how_one_womans_rear_end_came_to_mean_everything) [<https://perma.cc/5U7L-WC5S>].

For years, people have wondered whether Kardashian is white.<sup>2</sup> By examining the radically different answers that law, history, and society give us, we may learn, at long last, the only remaining private detail of Kardashian's life. Perhaps even more importantly, we can also shed light on the politics of identity, the vexing problem of race, and the socio-legal dynamics of the racialization process.

With the world's most ubiquitous celebutante firmly cast in the starring role, this Article therefore conducts an exegesis on the semiotics of Kim Kardashian's racial identity. In the process, the Article explores the social construction of race in action, weighs the individual agency possible in the racialization process, and further probes the reality of identity fluidity at a time when society and the law are only just beginning to grapple with more malleable conceptions of race. In presenting an analysis of the social, legal, and historical formulation of the concept of whiteness and tracing the dramatic transformation of both juridical and popular notions of racial belonging over the course of American history, this Article questions some of our most fundamental perceptions about race and provides a unique spin on issues of diversity, identity, and colorblindness. All told, the Article not only highlights (for better or worse) the continuing relevance of race in American life but also underscores the underappreciated significance of racial fluidity (in a time when society is growing increasingly "woke" about gender fluidity) and its potentially seismic impact on long-held, but rarely questioned, assumptions in antidiscrimination and equal protection jurisprudence.

Part II begins by assessing the meaning of whiteness, and Kardashian's particular lineage, in a historical, legal, and sociological light. As we determine, while Kardashian is not white by historical standards, neither are most of you. That said, the law would characterize Kardashian as formally white. But the

---

2. See, e.g., Rachel E. Dubrofsky & Megan M. Wood, *Gender, Race, and Authenticity: Celebrity Women Tweeting for the Gaze*, in *FEMINIST SURVEILLANCE STUDIES* 93, 101–02 (Rachel E. Dubrofsky & Shoshana Amielle Magnet eds., 2015) ("Kim Kardashian is, as far as conventional notions of race go, Caucasian. However, if one googles 'Kim Kardashian' and 'race,' it is apparent that there are ongoing conversations about Kardashian's racialization. Scholars note that Kardashian's relationship to race is complicated at best. Kardashian has markers that can signify her as a woman of color, making her not quite white: her dark complexion and curvy body are used to racialize her in the popular press, as are her relationships with black men." (citations omitted)); Carrie Leilam Love, *Is Kim Kardashian and Kanye's Baby a Harbinger of the Apocalypse?*, *KQED* (Mar. 1, 2013), <https://www.kqed.org/pop/1942/kim-kardashian-and-kanyes-baby-a-harbinger-of-the-apocalypse> [<https://perma.cc/WW5T-2X4F>] (noting the wildly differing perspectives on the popular reading of Kim Kardashian's race).

seeming ability to give an answer certain to this question betrays the law's inherent instability on matters of racialization, a fact highlighted by the likelihood that Kardashian may not be white by law for much longer. Finally, sociologically speaking, we trace how recent geopolitical events have shaped social perceptions of race and perhaps impacted the way society reads Kardashian's racial heritage.

Part III takes a step back and asks why the enterprise of determining Kardashian's race, and scrutinizing the meaning of whiteness, has any value at all, particularly in a world that some have characterized as post-racial. In the process, we rebut the myth of colorblindness and demonstrate how race, overtly and subconsciously, continues to matter in American society both in small ways and large.

We then turn, in Part IV, to examining Kardashian's own volitional role in the construction of her racial identity. As we argue, Kardashian's chosen fluidity marks a broader movement towards "elective" notions of race. We contextualize social and judicial recognition of this phenomenon and the exertion of individual agency in identity (re)formation by comparing the relatively supportive public reaction to gender fluidity (as in the case of Kardashian's former stepparent, Caitlyn Jenner) with the widespread social opprobrium cast on racial fluidity (as evidenced by the controversies surrounding Rachel Dolezal and Elizabeth Warren).

In Part V, we conclude by examining the challenges that face the law in confronting the reality of identity fluidity. In the process, we model two different iterations of racial mutability and consider, and critique, the ways in which the law has only begun to grapple with the consequences of such ambiguity and malleability. All told, therefore, the Article and the Kardashian trope it adopts serve as a mechanism to highlight extant cultural and legal anxieties over identity fluidity and to initiate a broader conversation about the resulting impact on civil rights laws.

## II. KIM KARDASHIAN AND THE WAGES OF WHITENESS

### A. *What Does History Tell Us About Kardashian's Whiteness?*

In the popular and judicial imagination, race is an immutable trait and biologically fixed at birth. In 2004, for example, Supreme Court Justice Stevens referred to "[t]he *fact* that race is an

immutable characteristic.”<sup>3</sup> Indeed, our modern constitutional jurisprudence rests on the ubiquitous assumption that laws targeting race, because of (among other things) its immutability, must receive the most exacting scrutiny under an equal protection analysis.<sup>4</sup> But reality betrays this immutability narrative. Indeed, history has shown that race is very much a mutable thing.

Consider the very idea of a “white” race. It is a malleable concept whose meaning has changed dramatically since just the founding of the Republic. For those bent on originalism, one need look no further than the Framers for surprising proof of the supple definition of whiteness. To Benjamin Franklin, white racial identity belonged chiefly to individuals of English descent. As he once wrote, the Angles and Saxons alone made “the principal Body of White People on the Face of the Earth.”<sup>5</sup> He therefore had no compunction about challenging the whiteness of even the Swedes, whom he viewed—along with the Germans, French, Italians, Spaniards, and Russians—as “generally of what we call a swarthy Complexion.”<sup>6</sup>

Franklin’s unusual musings about the swarthy Swedes are not as anomalous as they may first appear. American history is rife with examples of the shifting meaning of whiteness. In the 1800s, the Irish faced a century-long battle against persistent discrimination before finally achieving “acceptance” as white.<sup>7</sup> In

---

3. *Vieth v. Jubelirer*, 541 U.S. 267, 338 n.32 (2004) (Stevens, J., dissenting) (emphasis added).

4. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring) (“Racial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision.”); *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting) (referring to race as “a highly visible and immutable characteristic”).

5. BENJAMIN FRANKLIN, OBSERVATIONS CONCERNING THE INCREASE OF MANKIND (1751), *reprinted in* 4 THE PAPERS OF BENJAMIN FRANKLIN 225, 234 (Leonard W. Labaree et al. eds., 1961).

6. *Id.*

7. *See, e.g., Noel Ignatiev, How the Irish Became White* 2–3, 40, 111 (1995) (documenting the century-long struggle of Irish-Americans to obtain recognition of their “whiteness” in the United States).

the early part of the twentieth century, Italians,<sup>8</sup> Greeks,<sup>9</sup> Slavs,<sup>10</sup> and other groups were viewed as nonwhite. Race riots at the turn of the century in Nebraska pitted whites against Greeks.<sup>11</sup> In parts of the segregated South, Italian children were often banned from whites-only schools.<sup>12</sup> And seemingly tolerant outposts such as Southern California were far from immune. For example, segregation of public facilities in San Bernardino extended as recently as the 1940s to individuals of Italian, Portuguese, and

---

8. See, e.g., *Rollins v. State*, 92 So. 35, 36–37 (Ala. Ct. App. 1922) (reversing the conviction of a black man for the crime of miscegenation on the grounds that the state had failed to produce competent evidence that the woman he had married, a Sicilian immigrant, was white by law); LEONARD DINNERSTEIN & DAVID M. REIMERS, *ETHNIC AMERICANS: A HISTORY OF IMMIGRATION AND ASSIMILATION* 36 (2d ed. 1982) (“Italians . . . were one of the most despised groups. Old-stock Americans called them wops, dagos, and guineas and referred to them as the ‘Chinese of Europe’ and ‘just as bad as the Negroes.’”). In the South, “some Italians were forced to attend all-black schools.” *Id.* Some even endured lynchings. See Thomas A. Guglielmo, “No Color Barrier”: *Italians, Race, and Power in the United States*, in *ARE ITALIANS WHITE?: HOW RACE IS MADE IN AMERICA* 29, 35 (Jennifer Guglielmo & Salvatore Salerno eds., 2003). In a 1907 immigration-reform debate, Congressman John Burnett of Alabama epitomized the rampant hostility towards these new immigrants: “I regard the Syrian and peoples from other parts of Asia Minor as the most undesirable, and the South Italians, Poles and Russians next.” Nancy Faires Conklin & Nora Faires, “Colored” and Catholic: *The Lebanese in Birmingham, Alabama*, in *CROSSING THE WATERS: ARABIC-SPEAKING IMMIGRANTS TO THE UNITED STATES BEFORE 1940*, at 69, 75–76 (Eric J. Hooglund ed., 1987). According to Congressman Burnett, these new groups were, unequivocally, not white. *Id.* at 76.

9. See, e.g., *Macomber v. State*, 291 N.W. 674, 676–78 (Neb. 1940) (describing a criminal trial involving the brutal robbery, beating, and kidnapping of a Greek man with the perpetrator goading the attack by declaring, “You \* \* \* Greeks aint going to run this town, the white people are going to run this town.”); LAWRENCE H. LARSEN & BARBARA J. COTTRELL, *THE GATE CITY: A HISTORY OF OMAHA* 165–66 (1997) (describing a 1909 race riot pitting “whites” against Greeks, when a thousand-man mob gathered in South Omaha and raided “Greek Town,” destroying businesses, burning buildings, and assaulting individuals of Greek descent whilst authorities refused to intervene).

10. See, e.g., MARY C. WATERS, *ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA* 1–2 (1990) (observing that, at the turn of the century, individuals of Slavic and Mediterranean descent were viewed as a lower species of humanity, and certainly not as members of the “white” race). As one candidate for political office wrote in 1920: “They have disqualified the negro, an American citizen, from voting in the white primary. The Greek and Syrian should also be disqualified. I DON’T WANT THEIR VOTE. If I can’t be elected by white men, I don’t want the office.” PHILIP K. HITTI, *THE SYRIANS IN AMERICA* 89 (1924). His views were not alone. For example, Senator Furnifold McLendel Simmons of North Carolina deemed these immigrant groups “nothing more than the degenerate progeny of the Asiatic hoards [*sic*] which, long centuries ago, overran the shores of the Mediterranean . . . the spawn of the Phoenician curse . . .” JOHN HINGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925*, at 164–65 (1983).

11. See LARSEN & COTTRELL, *supra* note 9, at 165–66.

12. See DINNERSTEIN & REIMERS, *supra* note 8, at 36.

Spanish descent—a fact recounted in *Westminster v. Mendez*,<sup>13</sup> the famous lawsuit that ended segregation in California just a few short years before *Brown v. Board of Education*.<sup>14</sup>

Thus, by the historical standards that prized Anglo-Saxon stock, as an individual of Armenian descent,<sup>15</sup> Kardashian was decidedly not white. But, then again, consider this: ***neither are most of you.***

### B. What Does the Law Tell Us About Kardashian's Whiteness?

The legal definition of white might also be surprising. Our modern classification system contains four broad racial groupings (American Indian/Alaska Native; Asian or Pacific Islander; Black; and White),<sup>16</sup> with the white category capturing persons “having origins in any of the original peoples of Europe, North Africa, or the Middle East.”<sup>17</sup> This scheme, formally adopted by the Census Bureau in 1980,<sup>18</sup> has quickly spread in use, both legally and socially, making an impact “well beyond the arena of demographics into the civic, political, and economic life of the country.”<sup>19</sup>

A curious series of legal decisions from a century ago gave us this legacy. Until 1952, federal law dictated that only white or black individuals could qualify for naturalization.<sup>20</sup> As a result, a

13. *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 782 (1947) (noting that, in the case of *Lopez v. Secombe*, 71 F. Supp. 769 (S.D. Cal. 1944), San Bernardino county maintained a public pool that barred entry to “all persons of *Latin* descent” and that this included “not merely of Mexicans but of all Latins, that is of people from the score or more Latin American Republics and from Italy, Spain and Portugal”).

14. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

15. For the purposes of this analysis, we are considering just Kardashian’s Armenian heritage.

16. See 28 C.F.R. § 42.402(e) (2019). The classification stems from OMB’s 1977 Directive No. 15. See OFF. MGMT. & BUDGET, DIRECTIVE NO. 15: RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING 37 (May 12, 1977). Per Directive No. 15, “Hispanic” is considered a culture/ethnicity, rather than a racial category. See *id.*

17. See OFF. MGMT. & BUDGET, *supra* note 16.

18. See Helen Hatab Samhan, *Not Quite White: Racial Classification and the Arab-American Experience*, in ARABS IN AMERICA: BUILDING A NEW FUTURE 209, 214 (Michael W. Suleiman ed., 1999).

19. *Id.* at 215.

20. Until 1952, one had to be either black or white—but nothing “in-between”—to be eligible for naturalization. See Naturalization Act of 1790, Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (limiting naturalization to “any alien, being a free white person”) (repealed 1795); Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256 (amending the naturalization statute to also include “aliens of African nativity and . . . persons of African descent”). This

wave of immigrants with racially “ambiguous” backgrounds—from Japanese<sup>21</sup> and Indian<sup>22</sup> to Arab<sup>23</sup> and Armenian<sup>24</sup>—needed to earn judicial recognition of their whiteness before they could obtain citizenship. Whiteness not only gave them the right to vote, but also it entitled them to a series of economic rights, including the ability to own land and to practice law, that were restricted at the time to citizens.<sup>25</sup> In Minnesota, for example, even Finnish immigrants<sup>26</sup> had to litigate their whiteness in court when the United States District Attorney denied them naturalization on the grounds that they were “Mongolian.”<sup>27</sup> While the Japanese and

---

racial limitation on naturalization provoked a series of race trials, from the late nineteenth century until 1952, where individuals would litigate their whiteness in order to obtain citizenship. See John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 818–20, 841 (2000).

21. *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (rejecting Takao Ozawa’s petition to be declared white by law and therefore eligible for naturalization on the grounds that individuals of Japanese ancestry were not Caucasian).

22. *United States v. Thind*, 261 U.S. 204, 206–13 (1923) (overturning a lower court holding and deeming Bhagat Singh Thind, a “high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India,” not white, arguing that, while Indians might be technically “Caucasian,” and “[i]t may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, . . . the average man knows perfectly well that there are unmistakable and profound differences between them today”).

23. Compare *Ex parte Mohriez*, 54 F. Supp. 941, 941–42 (D. Mass. 1944) (deeming an Arab male, Mohamed Mohriez, eligible for naturalization since he qualified as a white person), with *In re Hassan*, 48 F. Supp. 843, 844–45 (E.D. Mich. 1942) (deeming an Arab male, Ahmed Hassan, ineligible for naturalization since he did not qualify as a white person).

24. *United States v. Cartozian*, 6 F.2d 919, 919–22 (D. Or. 1925) (deeming Tatos O. Cartozian, an Armenian, white by law and therefore eligible for naturalization).

25. See, e.g., *Porterfield v. Webb*, 263 U.S. 225, 232–33 (1923) (upholding the constitutionality of California’s Alien Property Initiative Act (Alien Land Law) of 1920, 1 Cal. Gen. Laws, Act 261 (Deering 1944 & Supp. 1949), which prohibited noncitizens from owning real property in California); *United States v. Pandit*, 15 F.2d 285, 285 (9th Cir. 1926) (noting the law preventing noncitizens from practicing law in California); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 411–12 (1948) (scrutinizing California law denying commercial fishing licenses to noncitizens).

26. Ironically, such Scandinavian immigrants are now hailed by white supremacists as precisely the “type” of immigrants we should welcome to our country. See, e.g., Julie Hirschfeld Davis et al., *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html> [<https://perma.cc/MLB8-ZMCV>] (quoting Donald Trump as questioning why the United States should accept immigrants from “shithole countries” and expressing a desire for more immigrants from Norway).

27. In 1908, United States District Attorney John C. Sweet rejected the naturalization applications of John Svan and fifteen other Finns. Their cases ultimately ended up in federal court and, on January 17, 1908, Sweet’s decision was reversed by Judge William Cant, who held that Finns, despite claims of their “Mongol origins,” were white persons eligible for naturalization. See Aleksi Huhta, *Debating Visibility: Race and Visibility in the Finnish-American Press in 1908*, 4 NORDIC J. MIGRATION RSCH. 168, 170–

Indians lost these absurd cases (before the Supreme Court, no less), Arabs, Armenians, and other individuals from the Middle/Near East were narrowly (but not always) deemed white.<sup>28</sup> Armenians, after all, literally hailed from the lands adjacent to the Caucasus Mountains which, through some “hocus-pocus” by a German ethnologist, Johann Friedrich Blumenbach, gave birth to the term “Caucasian.”<sup>29</sup>

Thus, from a modern legal point of view, and in contrast to the historical view, Kardashian is undoubtedly white. Her descendants literally trace their origins to the Caucasus mountains, the site of Blumenbach’s most prized member of his skull collection.<sup>30</sup> Indeed, the government defines anyone of European, Middle Eastern, or North African descent as white.<sup>31</sup> Of

---

71 (2014). For a reproduction of the Svan decision, see *Are Finnish People White? What?*, BRUCE MINE INCIDENT, <https://bruce mine incident.wordpress.com/historical-back-drop-for-novel/are-finnish-people-white-what/> [<https://perma.cc/76NA-FZ6Z>] (last visited Sept. 4, 2020).

28. See cases cited *supra* notes 23–24. It is worth noting that the largely Christian immigration from the region played a strong role in the process, as society often conflates racial and religious identity. After all, until the 1960s, the vast majority of individuals of Middle Eastern descent who came to the country were Christian. In 1924, there were approximately 200,000 Arabs living in the United States and more than 80% of them were Christian. See ARAB CMTY. CTR. FOR ECON. & SOC. SERVS., ARAB AMERICAN ENCYCLOPEDIA 36–37, 47 (Anan Ameri & Dawn Ramey eds., 2000). Since 1965, 60% have been Muslim. See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 74 (2004). This dramatic change in the religious composition of Middle Eastern immigrants has, perhaps, not coincidentally led to renewed questioning as to whether individuals of Middle Eastern and North African (MENA) descent are white. For more on the conflation of race and religion in general, and Christianity and whiteness in specific, see JOHN TEHRANIAN, WHITEWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY 28–29, 69–70 (2009); John Tehranian, *Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship*, 82 IND. L.J. 1, 12–14 (2007).

29. See JOHANN FRIEDRICH BLUMENBACH, ON THE NATURAL VARIETY OF MANKIND 65, 138–39 (Thomas Bendyshe ed. & trans., Bergman 1969) (1775); THOMAS HENRY HUXLEY, ON THE METHODS AND RESULTS OF ETHNOLOGY (1865), reprinted in CRITIQUES AND ADDRESSES 134, 160–61 (1873) (“Of all the odd myths that have arisen in the scientific world, the ‘Caucasian mystery,’ invented quite innocently by Blumenbach, is the oddest. A Georgian woman’s skull was the handsomest in his collection. Hence it became his model exemplar of human skulls, from which all others might be regarded as deviations; and out of this, by some strange intellectual hocus-pocus, grew up the notion that the Caucasian man is the prototypic ‘Adamic’ man.”); *Dow v. United States*, 226 F. 145, 146 (4th Cir. 1915) (noting how Blumenbach’s work, and his “Caucasian” terminology, “became known” and “generally accepted” in the United States upon translation into English in 1807).

30. HUXLEY, *supra* note 29; see also Anya Zoledziowski, *Kim Kardashian Helped Me with My Own Racial Identity, Until She Didn’t*, VICE (May 27, 2020, 7:55 AM), [https://www.vice.com/en\\_us/article/ep4nxw/kim-kardashian-helped-me-with-my-own-racial-identity-until-she-didnt](https://www.vice.com/en_us/article/ep4nxw/kim-kardashian-helped-me-with-my-own-racial-identity-until-she-didnt) [<https://perma.cc/Z9CY-MQPK>].

31. See 28 C.F.R. § 42.402(e)(5) (2019) (defining, as white (not of Hispanic origin), all “person[s] having origins in any of the original people of Europe, North Africa, or the Middle

course, under this precedent, Winston Churchill, Adolf Hitler, Paris Hilton, Saddam Hussein, Muammar Gaddafi, and, yes, Kim Kardashian are all white by law.

*C. What Does the Society Tell Us About Kardashian's Whiteness?*

All the while, in some ways, Armenian-Americans have been growing decidedly less white in the past two decades. Specifically, the law's (purported) precision belies the inherent instability of social constructions of race. To put it bluntly, in the post-9/11 world, when individuals of Middle Eastern descent are at the airport, they are not white. When individuals of Middle Eastern descent are accused of a crime, they are not white. And while Steve Jobs (Syrian-American) might be just another white male CEO, Ralph Nader (Lebanese-American) another white politician, and Andre Agassi (Iranian-American) another white tennis player, no one calls Osama bin Laden, Saddam Hussein, Nidal Hassan, or Syed Farook white.<sup>32</sup>

Moreover, individuals of Armenian descent may be finding themselves officially changing race. Indeed, to better reflect popular perceptions, monitor discrimination, and gain relevant socioeconomic data, the Census Bureau has been considering a proposal to create a new and separate (nonwhite) racial category for individuals of Middle Eastern and North African descent: "MENA." The Bureau's preliminary definition of MENA included nine illustrative examples that captured the three largest Middle Eastern Arab nationalities (Lebanese, Syrian, and Iraqi), the three largest North African Arab nationalities (Egyptian, Moroccan, and Algerian), the two largest non-Arab Middle Eastern nationalities (Iranian and Israeli), and a transnational, non-Arab group (Kurdish).<sup>33</sup>

Unsurprisingly, the MENA proposal comes with controversy. Some have hailed the new category as an important recognition of

---

East"). This classification stems from the categories announced by the Office of Management and Budget in 1977 in its Directive No. 15. See OFF. MGMT. & BUDGET, *supra* note 16 (defining racial and ethnic categories for federal statistics and program administrative reporting).

32. See John Tehranian, *Selective Racialization: Middle-Eastern American Identity and the Faustian Pact with Whiteness*, 40 CONN. L. REV. 1201, 1219–20 (2008) ("When individuals lie at the cusp of the white/non-white divide, we unconsciously categorize them as the Other when they engage in wrongdoing but blend them into the white when they behave within social norms. Andre Agassi is a (white) tennis player and Ralph Nader is a (white) politician. But Osama bin Laden is an Arab terrorist and the Ayatollah Khomeini was a Middle-Eastern Islamic fundamentalist.").

33. See 82 Fed. Reg. 12242, 12245 n.1 (proposed Mar. 1, 2017).

the distinct identity of individuals who trace their heritage to the Middle East and North Africa.<sup>34</sup> In addition, adoption and use of the designation may help better align our bureaucratic classifications with popular perceptions, monitor discrimination (and remediation thereof) and produce valuable socioeconomic data. There are, however, reasons to be less sanguine about MENA. There are lingering questions to address about the preliminary exclusion of certain peoples (such as individuals of Turkish, Armenian, Afghani, and Azeri descent) from the classification. Perhaps most significantly, some observers have questioned the government's sudden, post-9/11 interest—after decades of categorizing such individuals as white—in getting a precise and disaggregated count of our Middle Eastern population.<sup>35</sup> The timing is indeed suspicious, coming at a moment when the war on terrorism continues to dominate the public imagination and when our reigning presidential administration has implemented an immigration ban on individuals hailing from numerous Middle Eastern countries—a ban that was blessed (albeit by the thinnest of margins) as constitutional by the Supreme Court.<sup>36</sup>

All told, there are many serious questions surrounding MENA. But, putting aside inquiries about the motivations behind the policy and the issues it raises, the potential creation of the new MENA category highlights a salient point about the inherently volatile nature of the race-identification enterprise. In particular, MENA provides the latest instantiation of a trend that we have long ignored: racial fluidity.

Whether Armenians count in the MENA category is still unresolved. But the country of Armenia abuts the region often referred to as the Middle East, which many Armenians have historically populated. In the wake of the last century's genocide,

---

34. See, e.g., *Call on Congress to Support Adding a MENA Category to the U.S. Census*, ARAB AM. INST., [https://aai.good.do/calloncongresstosupportaddingamenacategorytotheuscensus/Congress\\_Support\\_MENA/](https://aai.good.do/calloncongresstosupportaddingamenacategorytotheuscensus/Congress_Support_MENA/) [<https://perma.cc/UD6Y-JJ8K>] (last visited Sept. 4, 2020) (“[C]reating a separate aggregate response category for Middle Eastern or North African origin will better equip the U.S. to understand a growing constituency, allocate federal aid that addresses community-based needs and enforce civil rights laws.”).

35. See Khaled A. Beydoun, *Boxed In: Reclassification of Arab Americans on the U.S. Census as Progress or Peril?*, 47 LOY. U. CHI. L.J. 693, 743–51 (2016) (noting the “concerning ramifications that the proposed [MENA designation] poses to Arab Americans,” including facilitation of “War on Terror policing”).

36. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2403, 2423 (2018) (overturning lower courts’ striking of the ban as unconstitutional).

the Armenian diaspora has grown particularly large in such countries as Iran, Lebanon, and Syria.<sup>37</sup>

So while Kim Kardashian may be legally white for now, that may not be the case for much longer. As MENA illustrates, racial definitions continue to be fluid, even to this day—and not just by operation of law (i.e., what the federal government ultimately decides to do with the proposed MENA category) but also in social perception.

Thus, Kim Kardashian may soon accomplish something remarkable: change race. But fear not for Kardashian, as she will not have to make this fantastical journey by herself. Several million of Kardashian's fellow Americans may also soon find themselves going to bed one night as white people and waking up the next morning as something quite different. With this in mind, our courts' insistence on the immutability of race appears quixotic, at best.

### III. WHY DOES KARDASHIAN'S WHITENESS (OR LACK THEREOF) MATTER AT ALL? POST-RACIALISM AND ITS DISCONTENTS

Taking a step back, it is entirely fair to wonder why we are even entertaining such a discussion. After all, at a time when many wish that we would do away with the entire concept of race, such a project may appear hopelessly retrograde. Shouldn't we be spending our energy breaking down racial barriers rather than creating new ones? Aren't we, as the late Justice Antonin Scalia once posited, but one race—American?<sup>38</sup>

That would be nice, but one need look no further than the daily news to recognize the continued vexing relevance of race in modern American life. In our ostensibly post-racial environment, recent years have witnessed the lethal asphyxiation of George Floyd by a Minneapolis police officer,<sup>39</sup> the slaying of Breonna

37. Hovhannes Atabekyan, *The Armenian Diaspora: Exploring Its Legacy for the Future*, EVN REP. (Mar. 23, 2017), <https://www.evnreport.com/economy/the-armenian-diaspora> [<https://perma.cc/77H5-Q65X>] (discussing the Armenian diasporic communities in Iran, Lebanon, and Syria).

38. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“[U]nder our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual . . . . In the eyes of government, we are just one race here. It is American.”).

39. See, e.g., Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/ML68-W9UQ>].

Taylor in a no-knock Louisville police raid,<sup>40</sup> the cold-blooded killing of Ahmaud Arbery in a Georgia neighborhood,<sup>41</sup> the controversial acquittal of George Zimmerman on murder charges for the death of Trayvon Martin,<sup>42</sup> numerous shootings of unarmed African-American youths by law enforcement and subsequent rioting in Ferguson and Baltimore, a terrorist attack by a white supremacist against black parishioners at a church in Charleston,<sup>43</sup> and widespread furor over the semiotics of the Confederate Flag and recognition of historical figures with unsavory pasts on race-related issues. These events have made all but the most Panglossian prognosticators ask whether, in the post-Obama era, rumors of racism's demise may have been a tad premature.

Evidence of persistent and deep racial fault lines go well beyond anecdotal headlines, however. Subconscious discrimination and the iterative impact of decades of explicit discrimination continue to fuel these divides. For example, while overt acts of racism may have grown less acceptable in society over the past few decades, unconscious racism remains a powerful, determinative force. The Implicit Association Test (the IAT),<sup>44</sup> a widely used and accepted gauge of unconscious racism,<sup>45</sup> has demonstrated that “most of us have implicit biases in the form of negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities.”<sup>46</sup> Indeed, research drawing on the IAT and

40. See, e.g., Richard A. Oppel Jr. & Derrick Bryson Taylor, *Here's What You Need to Know About Breonna Taylor's Death*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/FUY7-LPKY>].

41. See, e.g., Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/7PEF-5XQ6>].

42. See, e.g., Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), <https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html> [<https://perma.cc/3WW2-UDZQ>].

43. See, e.g., Alan Blinder & Kevin Sack, *Dylann Roof Found Guilty in Charleston Church Massacre*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/us/dylann-roof-trial.html> [<https://perma.cc/7TMM-MND9>].

44. The IAT was developed in 1998 by social psychologists Anthony Greenwald, Debbie McGhee, and Jordan Schwartz. Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464, 1464 (1998).

45. See L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 298 (2012) (“[T]he IAT is the most widely used mechanism for revealing the existence of implicit biases.”); Justin D. Levinson, *SuperBias: The Collision of Behavioral Economics and Implicit Social Cognition*, 45 AKRON L. REV. 591, 613 (2011) (“The development of the Implicit Association Test (IAT) revolutionized the way the world looked at and understood implicit bias.”).

46. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493–94 (2005).

other similar models has repeatedly highlighted how race-based judgments that take place in our subconscious minds can inadvertently impact our choices and actions.<sup>47</sup> For example, a 2007 study revealed a surprising application of implicit bias by analyzing a vast data pool of split-second decisions—thirteen years' worth of foul calls in the National Basketball Association.<sup>48</sup> This analysis of whistle blowing found that white referees called fouls at a greater rate against black players than against white players.<sup>49</sup> The unconscious factoring of race by referees was significant enough for the authors of the study to conclude that its impact “is large enough that the probability of a team winning is noticeably affected by the racial composition of the refereeing crew.”<sup>50</sup>

Of course, implicit bias rears its ugly head at more than just sporting events. Recent empirical work demonstrates that, despite excessively optimistic assertions about its unimportance, color continues to play a critical role in the ability of individuals to succeed in the United States. While our nation has enjoyed great progress in civil rights and race relations over the past half-century, our trajectory is not entirely positive. Studies have captured the resilience of unconscious discrimination<sup>51</sup> against minority groups in all manners of economic, social, and legal life—from home purchasing and leasing<sup>52</sup> and employment<sup>53</sup> to

47. *Id.* at 1512–14.

48. Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees* 1, 6–7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13206, 2007), <https://www.nber.org/papers/w13206.pdf> [<https://perma.cc/8RD5-Y83N>]; see also Alan Schwarz, *Study of N.B.A. Sees Racial Bias in Calling Fouls*, N.Y. TIMES (May 2, 2007), <http://www.nytimes.com/2007/05/02/sports/basketball/02refs.html?pagewanted=1&r=2&ex=117876960> [<https://perma.cc/CJ4E-D4L6>]; Lester Munson, *Even NBA Study Might Confirm Racial Bias in Officiating*, ESPN (May 14, 2007), <https://www.espn.com/nba/news/story?id=2870260> [<https://perma.cc/UG9X-N6HY>].

49. The study also found that, while black officials called fouls more frequently against white than black players, the overall effect of this bias was less pronounced. Price & Wolfers, *supra* note 48, at 28.

50. *Id.* at 1.

51. Of course, some of this discrimination might be conscious.

52. See, e.g., MARGERY AUSTIN TURNER ET AL., URB. INST. METRO. HOUS. & CMTYS. POL'Y CTR., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000, at iii, 3-7 to -8 (2002) (noting persistent (albeit improved over time) discrimination against African-Americans in both renting and sales of homes and worsening treatment of Hispanics; *inter alia*, Hispanics were more likely in 2000 than in 1989 to receive a higher quotations on rent rates for a given property than their white counterparts).

53. In a groundbreaking study of the relationship between pigmentation and socioeconomic achievement among legal immigrants to the United States, Joni Hersch, a

retailing<sup>54</sup> and criminal sentencing.<sup>55</sup> At the end of the day, this empirical evidence should alone dull any irrational exuberance hailing the achievement of colorblindness in our society.<sup>56</sup>

Perhaps no data point makes the tragic divisions that continue to plague our country more daunting than the racial wealth gap. The 2010 Census revealed that the average white family possesses a household wealth of \$110,729.<sup>57</sup> By stunning contrast, the average African-American family possesses a household income of just \$4,995 and the average Hispanic

---

law and economics professor at Vanderbilt University, found that the average “light” skinned immigrant out-earned her “dark” skinned equivalent by approximately ten percent, even when controlling for race, country of origin, English ability, education, and occupation. Joni Hersch, *Profiling the New Immigrant Worker: The Effects of Skin Color and Height*, 26 J. LAB. ECON. 345, 348, 356, 365–66, 370–75 (2008). Perhaps most disturbingly of all, Hersch found that the detriment of a dark complexion was so significant that it sometimes wiped out any benefits accrued from educational attainment. As Hersch noted, “I thought that once we controlled for race and nationality, I expected the difference to go away, . . . but even with people from the same country, the same race, skin color really matters.” The Associated Press, *Study of Immigrants Links Lighter Skin and Higher Income*, N.Y. TIMES (Jan. 28, 2007), <https://www.nytimes.com/2007/01/28/us/28immig.html#:~:text=NASHVILLE%2C%20Jan.,be%20discrimination%2C%20a%20researcher%20says> [<https://perma.cc/L68B-CL8P>]. Similarly, a 2006 study published in the *American Economic Review* found that, even among blacks, skin color had a substantial impact on wages. *Ceteris paribus*, lighter skinned black men significantly out-earned their darker-skinned counterparts. See Arthur H. Goldsmith et al., *Shades of Discrimination: Skin Tone and Wages*, AM. ECON. REV., May 2006, at 242, 244–45.

54. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991) (finding that black males pay almost double the mark-up enjoyed by white males when adopting identical negotiating techniques in the purchase of cars).

55. A 2012 study by M. Marit Rehavi and Sonja B. Starr examined 36,000 federal criminal cases and found that black men were on average almost twice as likely to face a mandatory minimum charge as white men were, holding arrest offense, age, and location constant. Prosecutors are about twice as likely to impose mandatory minimums on black defendants as on white defendants. Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences* 5–8, 11–12, 24 (U. Mich. L. & Econ., Empirical Legal Stud. Ctr., Working Paper No. 12-002, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1985377](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1985377) [<https://perma.cc/TH8X-AT9G>]. Notably, the study surveyed only sentencing data from after the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), which granted federal judges greater leeway in sentencing decisions. As such, one cannot elide the results of the study by suggesting they may reflect the vestiges of sentencing discrimination from prior generations. *Id.* at 5–6.

56. Keith E. Sealing, *The Myth of a Color-Blind Constitution*, 54 WASH. U. J. URB. & CONTEMP. L. 157, 190 n.203 (1998) (“It seems beyond the need for debate that our society is not yet color-blind. However, Justice Scalia claims, at the very least, that we have a color-blind government . . . . Society clearly is not color-blind, despite Justice Scalia’s assertions to the contrary.”).

57. Tami Luhby, *Worsening Wealth Inequality by Race*, CNN: MONEY (June 21, 2012, 1:09 PM), <http://money.cnn.com/2012/06/21/news/economy/wealth-gap-race/index.htm> [<https://perma.cc/7PG6-M4VX>].

household just \$7,242.<sup>58</sup> In other words, there is a stunning 22:1 wealth ratio dividing whites and blacks. And, contrary to the dominant narrative of progress (which certainly has some merit), the racial wealth gap is now at its *largest* point since the government began recording such statistics a quarter-century ago.<sup>59</sup> Whiteness still matters. A lot.

IV. BUT IS KIM WHITE (AND WHAT DO RACHEL DOLEZAL AND CAITLYN JENNER HAVE TO DO WITH IT)? IDENTITY FLUIDITY AND THE PLEASURES AND PERILS OF ELECTING RACE

If you have made it to this point, you—dear reader—have every right to expect an answer to the question at hand. But, regrettably, the issue may not be as simple as we think. And that’s precisely the point. Race has always been a malleable social construct. And it is not solely imposed from without. Whether consciously or not, even Kardashian herself plays a role in how she is racialized by wielding a level of control in the process.

In some contexts—when she talks about her experience raising a biracial child and witnessing, for the first time, racism and discrimination<sup>60</sup>—Kardashian very much plays white. She grew up wealthy and privileged and her mother, Kris, is popularly perceived as white.<sup>61</sup> In other contexts—for example, when she “break[s] the internet”<sup>62</sup> and monetizes her assets by presenting herself a bold and “exotic” vision of beauty that stands in stark

58. *Id.*

59. See Rakesh Kochhar & Richard Fry, *Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics*, PEW RSCH. CTR. (July 26, 2011), <http://pewresearch.org/pubs/2069/housing-bubble-subprime-mortgages-hispanics-blacks-household-wealth-disparity> [<https://perma.cc/AMN5-3AF2>].

60. See, e.g., *Kim Kardashian Talks Racism and Discrimination*, CELEBUZZ (May 7, 2014, 9:45 PM), <https://www.celebuzz.com/2014-05-07/kim-kardashian-talks-racism-and-discrimination/> [<https://perma.cc/345Y-PDKU>] (“To be honest, before I had North [her daughter with Kanye West], I never really gave racism or discrimination a lot of thought. It is obviously a topic that Kanye is passionate about, but I guess it was easier for me to believe that it was someone else’s battle. But recently, I’ve read and personally experienced some incidents that have sickened me and made me take notice. I realize that racism and discrimination are still alive, and just as hateful and deadly as they ever have been.”).

61. Née Kristen Mary Houghton, Kris is the daughter of Mary Jo Shannon (née Campbell) and Robert True Houghton. See KRIS JENNER, KRIS JENNER . . . AND ALL THINGS KARDASHIAN 1–2 (2011). And she is of English, Dutch, and Scottish ancestry. See Dubrofsky & Wood, *supra* note 2, at 101.

62. See, e.g., David Hershkovits, *How Kim Kardashian Broke the Internet with Her Butt*, GUARDIAN (Dec. 17, 2014, 11:51 AM), <https://www.theguardian.com/lifeandstyle/2014/dec/17/kim-kardashian-butt-break-the-internet-paper-magazine> [<https://perma.cc/3YXT-LQKE>] (“Paper magazine’s winter issue, with the cover shot of Kim Kardashian by Jean-Paul Goude, set out to #BreakTheInternet.”).

contrast to the waifish Anglo-Saxon blonde traditionally embraced by the fashion industry<sup>63</sup>—she plays “ethnic.” To some, she even enjoys “honorary black” status in the African-American community.<sup>64</sup> With the (half) Armenian heritage that shapes her phenotype and aspects of how she presents herself (an underappreciated factor that impacts people’s perceptions of race), she might be viewed as nonwhite.

The phenomenon of Kardashian *qua* racial chimera epitomizes what Camille Gear Rich has dubbed our “era of ‘elective race’—a time when antidiscrimination law is being asked to attend to the dignity concerns of individuals as they attempt to control the terms on which their bodies are assigned racial meaning.”<sup>65</sup> With this reality in mind, Rich argues that our racial discrimination laws (particularly Title VII, the subject of her work) should protect not just “social race” (what Rich defines as the race assigned to individuals by society based on “perceived appearance or social practices”<sup>66</sup>) but rather voluntary racial-affiliation decisions that reflect individual agency in the construction of race, just as we are moving to do so with respect to gender.<sup>67</sup> To preserve our constitutional right to be free of race-based distinctions made by government and to truly eliminate discrimination on the basis of race, the law needs to adapt its concept of what might give rise to racial hostility. As Rich presciently notes, “[r]acial hostility can be triggered when a person ‘elects’ her race, demanding social or institutional recognition of membership in a given racial category for which her employer or coworkers believe she has no valid claim

---

63. See, e.g., Savannah Muñoz, *Kim Kardashian and the Politics (and Privilege) of Being Racially Ambiguous*, SUBSTANCE (Feb. 22, 2018), <https://substance.media/kim-kardashian-and-the-politics-and-privilege-of-being-racially-ambiguous-bfa9cf1a2636> [https://perma.cc/K3MK-XSEM] (“[Kardashian’s] body’s racial ambiguity allows her to move between her own whiteness and shallowly associate herself with people of color when she needs to be cool, relevant and ‘ethnic.’ Rather than genuinely engage with communities of color, Kim K morphs her body into any race and/or ethnicity she pleases. She’s Black when she needs publicity and relevance, Armenian when she needs to be ‘ethnic,’ and white when shit starts getting real.”).

64. See, e.g., Shamika Sanders, *Kim Kardashian Channels Diana Ross for Hype Williams Shoot*, RICKEY SMILEY MORNING SHOW (Aug. 26, 2012), <https://rickeymileymorningshow.com/773245/kim-kardashian-channels-diana-ross-for-hype-williams-shoot-photo/> [https://perma.cc/FA9P-XXX9] (referring to Kardashian’s use of her “honorary black card”).

65. Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1505 (2014).

66. *Id.* at 1508.

67. See, e.g., Audrey Mullender, *Conclusion: Where Does This Leave Us?*, in GENDER AND GROUPWORK 192, 192–93 (Marcia B. Cohen & Audrey Mullender eds., 2003) (discussing the need to “recognize individual agency” and achieve “an understanding of graduated and multiple subjectivities across a wide continuum of gender identity”).

of belonging.”<sup>68</sup> Rich published her article in 2014. The very next year, the curious story of Rachel Dolezal made headlines around the world.

Dolezal’s story broke when the City of Spokane, Washington announced an investigation into whether Dolezal, the president of the NAACP’s local chapter and instructor in the Africana Studies program at Eastern Washington State University, had violated the city’s code of ethics by deeming herself “African-American” on her application to serve on a local police ombudsman commission.<sup>69</sup> Dolezal’s mother publicly demurred, announcing that both her and Dolezal’s father were white, and, to punctuate her point, she released images showing Dolezal with blonde hair, blue eyes and fair skin as a child.<sup>70</sup> Dolezal’s antics became international news and she paid a price for the unwanted attention and the revelations that came with it. She lost both her NAACP and teaching positions and faced widespread public ridicule.<sup>71</sup> But Dolezal remained undeterred, even doubling down on her African-American identity. She is no longer known as Rachel Dolezal and has changed her name to Nkechi Amare Diallo.<sup>72</sup>

As critics have rightfully noted,

By turning herself into a very, very, very, very light-skinned black woman, Dolezal opens herself up to be treated as black by white society only to the extent that they can visually identify her as such, and no amount of visual change would provide Dolezal with the inherited trauma and

68. See Rich, *supra* note 65, at 1508.

69. See Brendan O’Connor, *Spokane NAACP President’s Mom Says Daughter Pretending to Be Black*, GAWKER (June 11, 2015, 10:35 PM), <http://gawker.com/spokane-naacp-presidents-mom-says-daughter-pretending-t-1710788405> [<https://perma.cc/2CEU-QAPG>].

70. See *id.*

71. See Nicholas K. Geranios, *Rachel Dolezal Struggling After Racial-Identity Scandal in Spokane*, SEATTLE TIMES (Mar. 24, 2017, 8:29 AM), <https://www.seattletimes.com/seattle-news/strongrachel-dolezal-struggling-after-racial-identity-scandal-in-spokane-strong/> [<https://perma.cc/NG4E-SZE3>] (recounting that Dolezal was “[a]ttacked by both blacks and whites, . . . was fired as head of the Spokane chapter of the NAACP and kicked off a police-ombudsman commission, and . . . lost her job teaching African studies at Eastern Washington University”).

72. See Adeel Hassan, *Activist Who Identified Herself as Black Takes an African Name*, N.Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/us/dolezal-activist-identifies-as-black-african-name.html> [<https://perma.cc/5WNR-B9Q7>].

socioeconomic disadvantage of racial oppression in this country.<sup>73</sup>

In the coda to her surreal interview with Dolezal after the release of Dolezal's book *In Full Color*,<sup>74</sup> Ijeoma Oluo poignantly recognizes the inherent privilege undergirding Dolezal's racial transformation, noting that

[I]t is white supremacy that told an unhappy and outcast white woman that black identity was hers for the taking. It is white supremacy that told her that any black people who questioned her were obviously uneducated and unmotivated to rise to her level of wokeness. It is white supremacy that then elevated this display of privilege into the dominating conversation on black female identity in America. It is white supremacy that decided that it was worth a book deal, national news coverage, and yes—even this interview.<sup>75</sup>

To many, Dolezal's gambit unfortunately appears to perpetuate the worst form of race imperialism where even black identity itself is appropriated for white ends. Though expressing his openness to the possibility of considering Dolezal black, Jamelle Bouie remarked that he was troubled by the fact that “it feels like Dolezal is adopting the culture without carrying the burdens.”<sup>76</sup> Indeed, it did not help that, amidst the uproar, public records revealed that she had actually filed a lawsuit in 2002

73. Ijeoma Oluo, *The Heart of Whiteness: Ijeoma Oluo Interviews Rachel Dolezal, the White Woman Who Identifies as Black*, STRANGER (Apr. 19, 2017), <https://www.thestranger.com/features/2017/04/19/25082450/the-heart-of-whiteness-ijeoma-oluo-interviews-rachel-dolezal-the-white-woman-who-identifies-as-black> [https://perma.cc/DPW8-ZTG8].

74. For failing to report royalties from sale of her book while collecting assistance from the state, Dolezal was later charged with welfare fraud. See Matthew Haag, *Rachel Dolezal, Who Pretended to Be Black, Is Charged with Welfare Fraud*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/us/rachel-dolezal-welfare-fraud.html> [https://perma.cc/8AHQ-WAEM].

75. See Oluo, *supra* note 73. Civil rights activist Rosa Clemente added that “[a]s people of color, no matter how hard we try, we cannot achieve whiteness, but the fact that a White woman can achieve Blackness and lie and take space and take resources and on top of it be belligerent when confronted is the epitome of White privilege.” See Taylor Lewis, *Is ‘Transracial’ Identity Real? 11 Opinions That Will Leave You Thinking*, ESSENCE (June 15, 2015), <https://www.essence.com/news/rachel-dolezal-transracial-identity-opinions/> [https://perma.cc/NK56-BC24] (quoting Clemente).

76. Jamelle Bouie, *Is Rachel Dolezal Black Just Because She Says She Is?*, SLATE (June 12, 2015, 7:22 PM), <https://slate.com/news-and-politics/2015/06/rachel-dolezal-claim-s-to-be-black-the-naacp-official-was-part-of-the-african-american-community-but-did-she-accept-the-racial-hardships-too.html> [https://perma.cc/T3EU-EG8B].

against Howard University for discriminating against her—as a white woman.<sup>77</sup>

Yet for all the furor involving Dolezal, it is curious just how starkly society's response to her actions contrasted with reactions, at roughly the same time, to another event: Kim Kardashian's former stepparent, Bruce Jenner, becoming Caitlyn. Caitlyn made her public debut in a June 2015 cover story for *Vanity Fair* and, in the process, garnered accolades for her bravery and enjoyed widespread recognition as a civil rights icon.<sup>78</sup> *Glamour* named her its Woman of the Year<sup>79</sup> and ESPN even bestowed her with its Arthur Ashe Award for Courage.<sup>80</sup> Yet, while liberal society (largely) celebrated Caitlin Jenner's right to select her gender, the feeling was not nearly as sanguine about Dolezal's ability to select her race. As Caitlin received awards, Dolezal was roundly mocked and condemned.<sup>81</sup> Headlines from the *New York Times* epitomize the sharp contrast in society's responses to Dolezal and Jenner. When authorities charged Rachel Dolezal with improper collection of public assistance, the headline from the normally restrained paper declared: *Rachel Dolezal, Who Pretended to Be Black, Is Charged with Welfare Fraud*.<sup>82</sup> By sharp contrast, when prosecutors considered charging Caitlyn Jenner with manslaughter for her role in a fatal car wreck, the paper matter-of-factly published an article entitled *Caitlyn Jenner May Face Manslaughter Charge in Fatal Crash*.<sup>83</sup> One can only imagine the offense that would have resulted if the *Times* had ran the story under the headline *Bruce Jenner, Who Pretended to Be a Woman, Is Investigated for Manslaughter*. But there was no public condemnation for the paper's judgment of Dolezal.

77. See *NAACP Imposter Sued School Over Race Claims*, SMOKING GUN (June 15, 2015), <http://www.thesmokinggun.com/documents/bizarre/rachel-dolezal-discrimination-lawsuit-786451> [<https://perma.cc/HDZ7-7ASX>].

78. See Alan Greenblatt, *Transgender Movement Hails Jenner as Pivotal*, in *ISSUES FOR DEBATE IN AMERICAN PUBLIC POLICY* 186, 186–87 (17th ed. 2017).

79. *Id.* at 186.

80. *Id.*; *Caitlyn Jenner Vows to 'Reshape the Landscape' in ESPYS Speech*, ESPN (July 15, 2015), [https://www.espn.com/espys/2015/story/\\_id/13264599/caitlynjenner-accepts-arthur-ashe-courage-award-espys-ashe2015](https://www.espn.com/espys/2015/story/_id/13264599/caitlynjenner-accepts-arthur-ashe-courage-award-espys-ashe2015) [<https://perma.cc/8TZ5-5P3K>].

81. Mark P. Orbe, *The Rhetoric of Race, Culture, and Identity: Rachel Dolezal as Co-Cultural Group Member*, 6 *J. CONTEMP. RHETORIC* 23, 35 (2016) (noting that, in popular opinion, Dolezal's attempt to identify as African-American was "largely rejected").

82. See Haag, *supra* note 74.

83. The Associated Press, *Caitlyn Jenner May Face Manslaughter Charge in Fatal Crash*, N.Y. TIMES (Aug. 20, 2015), <https://www.nytimes.com/2015/08/21/us/caitlyn-jenner-may-face-manslaughter-charge-in-fatal-crash.html> [<https://perma.cc/NGF5-7ZPH>].

As far as current social norms go, gender fluidity (at least of the male-to-female variety) appears to enjoy far greater tolerance, and even celebration, than racial fluidity (at least of the white-to-minority variety).<sup>84</sup> But it is fair to question this dramatic dichotomy. After all, if one objects to Dolezal's usurpation of black identity as an act of white privilege, one might also object to

---

84. See, e.g., ROGERS BRUBAKER, TRANS: GENDER AND RACE IN AN AGE OF UNSETTLED IDENTITIES 135 (2016) (“[I]t is more socially legitimate to choose and change one’s sex (and gender) than to choose and change one’s race.”). With respect to white-to-minority fluidity, history certainly provides a basis for the skepticism. The history of racial malleability in Hollywood provides a cautionary tale on this point, precisely because it has worked one-way for so long. As Hollywood’s lack of diversity in casting has gained more attention in recent years, the practice of casting white actors to play nonwhite roles—particularly when the nonwhite race of the character is a key trait of a particular role—has faced increased scrutiny. See Lisa Mullins & Allison Hagan, *White Actors Playing Other Races Diminishes Opportunities, #OscarsSoWhite Creator Says*, WBUR (July 2, 2020), <https://www.wbur.org/hereandnow/2020/07/02/april-reign-white-actors-animation> [<https://perma.cc/4YTE-2JPX>]. The practice is time-honored (perhaps hitting its lowest point in Mickey Rooney’s portrait of Mr. Yunioshi in *Breakfast at Tiffany’s* (Paramount Pictures 1961)) and, to the dismay of many, on-going. See *Some Thoughts on the Mickey Rooney Role It’s Best Not to Mention*, GIRLS DO FILM (Sept. 21, 2014), <https://girlsdofilm.wordpress.com/2014/09/21/some-thoughts-on-the-mickey-rooney-role-its-best-not-to-mention/> [<https://perma.cc/L82J-K9Y6>]. In just the past few years, Emma Stone raised eyebrows when she played Allison Ng (a character with Hawaiian and Asian heritage) in Cameron Crowe’s *Aloha* (Sony Pictures Entertainment, 2015), Scarlett Johansson faced criticism for taking the Asian lead in the live-action remake of the classic Japanese anime film *Ghost in the Shell* (Paramount Pictures, 2017), and a (mostly) white cast told the real story of the shenanigans of a group of (mostly) Asian-American MIT students in the world of high-stakes poker in the movie *21* (Columbia Pictures, 2008). See Maanvi Singh, *Here’s What People Are Saying About Racial Weirdness in ‘Aloha,’* NPR (June 2, 2015, 2:45 PM), <https://www.npr.org/sections/codeswithh/2015/06/02/411264817/heres-what-people-are-saying-about-racial-wierdness-in-aloha> [<https://perma.cc/4RW3-X9VQ>]; Allegra Frank, *Scarlett Johansson Defends Her Desire to Play Any Person, Any Race, or “Any Tree” She Wants*, VOX (July 16, 2019, 5:15 PM), <https://www.vox.com/culture/2019/7/16/20695075/scarlett-johansson-casting-controversy-response-political-correctness> [<https://perma.cc/EG79-ZCAS>]; Alvin Lin, *‘21’ Discriminatory Casting Unjustified*, TECH (Apr. 1, 2008), <https://thetech.com/2008/04/01/21casting-v128-n15> [<https://perma.cc/3WDS-XYNW>]. Those in Hollywood foolhardy enough to defend the practice have only revealed the problematic motivations and assumptions underlying it. For example, after casting an all-white set of actors to play ancient Egyptians in his film *Exodus: Gods and Kings*, Ridley Scott rationalized the move by claiming, “I can’t mount a film of this budget, where I have to rely on tax rebates in Spain, and say that my lead actor is Mohammad so-and-so from such-and-such . . . I’m just not going to get it financed. So the question doesn’t even come up.” See Scott Foundas, *‘Exodus: Gods and Kings’ Director Ridley Scott on Creating His Vision of Moses*, VARIETY (Nov. 25, 2014, 10:00 AM), <https://variety.com/2014/film/news/ridley-scott-exodus-gods-and-kings-christian-bale-1201363668/> [<https://perma.cc/5FKV-SC5G>]. Scott’s comments likely revealed more about his own worldview than that of his purported financiers. But the real problem with such casting practices lies not in the fluidity of race but its one-way direction. For a century, whites have systematically enjoyed the privilege of playing people of other races in motion pictures while nonwhites have rarely, if ever, enjoyed the luxury of playing “white” roles. Combined with the fact that nonwhite roles have been proportionately scarce on the silver screen, the whitewashing of cinematic stories becomes a tool for further white monopolization of, and the exertion of white supremacy over, the production of cultural content.

Jenner's usurpation of female identity as an act of male privilege. Similarly, if we accept Jenner adopting, externally, the gender identity she had always felt she possessed internally, why not accept Dolezal adopting, externally, the racial identity she had always felt she possessed internally? Indeed, as sociologist Rogers Brubaker has argued, the acceptance of gender fluidity compared to the resistance to racial fluidity is even more difficult to explain when one notes that there is an "evident biological basis of sex differences—a biological basis that is utterly lacking for racial differences."<sup>85</sup>

One might attempt to explain the contrary responses based on the different nature of gender transitions as compared to racial transitions. While gender fluidity might go both ways, the same may not be true of race. For example, sociologist Troy Duster has noted that, while white individuals can "try on different identities, even switching back and forth, ' . . . a dark-skinned black can't claim to be white.'"<sup>86</sup> Duster's claim may be true, but only to a certain extent. After all, a fair-skinned, blonde-haired, blue-eyed individual can no more claim to be black than a dark-skinned individual can claim to be white (see, for example, Dolezal herself). On the other hand, our norms of racialization, including the infamous one-drop rule,<sup>87</sup> have certainly made it easier to move from white to black than the other way around. Meanwhile, Brubaker speculates that the availability of certain cultural and linguistic tropes has made it easier for our society to accept gender, rather than racial, fluidity. Specifically, he points to the availability of the distinction between sex and gender (sex is, while gender does), made common by the 1970s, as paving the path for understanding that biological fact and social perception can differ when it comes to matters of male and female identity.<sup>88</sup> There is no such accompanying language or trope to help unravel the differences between one's ancestral DNA and one's race on the

---

85. See BRUBAKER, *supra* note 84, at 135–36. That said, it might actually be the biological basis of gender that enables people to believe that what Caitlyn Jenner felt inside warrants recognition in a way that they are not willing to believe with Rachel Dolezal. Such a view would suggest that, on some level, society may believe that race may be more constructed than gender.

86. Cristine Willmsen, *Lynnwood Man Tried to Use a Home DNA Test to Qualify as a Minority Business Owner. He Was Denied – Now He's Suing.*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/lynnwood-man-tried-to-use-a-home-dna-test-to-qualify-as-a-minority-business-owner-he-was-denied-now-hes-suing/> [https://perma.cc/5RPE-Z23Y] (Sept. 17, 2018, 10:13 AM) (quoting Troy Duster).

87. See generally Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997).

88. See BRUBAKER, *supra* note 84, at 135–36.

street. Brubaker further notes that sex/gender identity is ahistorical, while race/ethnic identity is very much grounded in transgenerational history and, therefore, subject to the weight of ancestral understanding, both as individually and socially understood.<sup>89</sup>

The Dolezal experience was no outlier. In the last few years, in a controversy that continues to dog her (in no small part due to her own fanning of the flames), Elizabeth Warren has faced similar backlash from both sides of the political aisle for her efforts to identify as a Native American. The controversy first erupted in 2012, when, during the heat of a Massachusetts senatorial campaign, reports broke that Warren had regularly listed herself as Native American in the American Association of Law School's annual law professor directory.<sup>90</sup> Warren's explanation was simple enough: as an individual from Oklahoma with some Native American ancestry, she wanted to connect with other professors with Native heritage.<sup>91</sup> Warren stated that she had never applied for a job as a Native American or otherwise benefitted in any way from the status.<sup>92</sup> Presumably, this indicates that there was no affirmative action involved in her hiring in prior posts—a position supported by the known facts.<sup>93</sup>

Nevertheless, Warren's position drew outcry, particularly from her political opponents.<sup>94</sup> And, in 2018, after years of taunting from Donald Trump, she made matters worse when she publicly shared results of a DNA test that revealed she possessed Native American ancestry in the range of six to ten generations

89. *Id.* at 138–39.

90. Garance Franke-Ruta, *Is Elizabeth Warren Native American or What?*, ATLANTIC (May 20, 2012), <https://www.theatlantic.com/politics/archive/2012/05/is-elizabeth-warren-native-american-or-what/257415/> [<https://perma.cc/DDY5-HSJV>].

91. Stephanie Ebbert, *Warren Says She Called Herself a Minority to Connect*, BOS. GLOBE (May 2, 2012, 5:13 PM), <https://www.bostonglobe.com/metro/2012/05/02/elizabeth-warren-said-she-called-herself-minority-professor-find-other-people-like/QwbGsi49koIvsKcd83lr4M/story.html> [<https://perma.cc/BCX3-V2V7>].

92. See Franke-Ruta, *supra* note 90; Annie Linskey & Amy Gardner, *Elizabeth Warren Apologizes for Calling Herself Native American*, WASH. POST (Feb. 5, 2019, 5:59 PM), [https://www.washingtonpost.com/politics/elizabeth-warren-apologizes-for-calling-herself-native-american/2019/02/05/1627df76-2962-11e9-984d-9b8fba003e81\\_story.html](https://www.washingtonpost.com/politics/elizabeth-warren-apologizes-for-calling-herself-native-american/2019/02/05/1627df76-2962-11e9-984d-9b8fba003e81_story.html) [<https://perma.cc/Z7GQ-KNWD>].

93. See Franke-Ruta, *supra* note 90 (noting, among other things, that numerous Harvard faculty members involved in Warren's lateral move to the school denied that her Native American heritage was ever mentioned as part of the hiring process).

94. *Id.*; Linskey & Gardner, *supra* note 92.

ago.<sup>95</sup> Apparently timed to end the debate about her ancestry once and for all so that she could announce her presidential candidacy with the issue in the rear-view mirror, the action backfired spectacularly. It was not that the DNA findings were inconsistent with the scope of her prior contentions: that she was, according to family lore, approximately 1/32 Native American (Cherokee). Rather, her unexpected release of the DNA information, for which absolutely no one had asked,<sup>96</sup> satisfied absolutely no one and led to renewed questions about her prior identification as a Native American.<sup>97</sup>

The political right pilloried her, screaming race fraud. Showing no shortage of racial insensitivity, Donald Trump repeated his infamous nickname for her (Pocahontas) and told her he looked forward to seeing her on the campaign “TRAIL.”<sup>98</sup> Meanwhile, the head of the Republican National Committee, Ronna McDaniel, even filed a formal complaint to the State Bar of Texas seeking disciplinary sanctions against Warren after the *Washington Post* found out Warren had designated herself as “American Indian” on her attorney registration card in 1986.<sup>99</sup> McDaniel’s letter charged Warren with lacking “Good Moral Character” as a result of her “three (3) decades of untruthfulness” in making the “misrepresentation that she was ‘American Indian.’”<sup>100</sup>

95. Rebecca Berg & Eric Bradner, *Elizabeth Warren Releases DNA Test with ‘Strong Evidence’ of Native American Ancestry*, CNN (Oct. 15, 2018, 7:26 PM), <https://www.cnn.com/2018/10/15/politics/elizabeth-warren-dna-test-native-american/index.html> [<https://perma.cc/WP9R-7TJE>].

96. Save, perhaps, Donald Trump, who had taunted her to take the test and offered her \$1 million—which he apparently has no intention of paying. See Allie Malloy, *Trump Says ‘Who Cares’ After Warren Takes DNA Test, Denies \$1 Million Offer*, CNN (Oct. 15, 2018, 11:18 AM), <https://www.cnn.com/2018/10/15/politics/donald-trump-elizabeth-warren-dna-1-million/index.html> [<https://perma.cc/QYG8-P9VY>].

97. See Linskey & Gardner, *supra* note 92.

98. Allan Smith, *Warren Pushes Back on Native American Jab, Says Trump He [sic] May Not Be ‘Free Person’ by 2020*, NBC NEWS (Feb. 10, 2019, 10:38 AM), <http://nbcnews.com/politics/donald-trump/gop-rep-brushes-aside-trump-s-jab-elizabeth-warren-s-n969811> [<https://perma.cc/K957-KE58>]. This latter comment was either an offensive pun based on Native American heritage or an abhorrent reference to the Trail of Tears.

99. Brett Samuels, *RNC Requests Disciplinary Action Against Warren over Native American Heritage Claims*, HILL (Feb. 6, 2019, 2:44 PM), <https://thehill.com/homenews/campaign/428784-rnc-chairwoman-requests-disciplinary-action-against-warren-over-decades-old> [<https://perma.cc/6ZX4-5MLP>]; see also Linskey & Gardner, *supra* note 92.

100. Letter from Ronna McDaniel, Chairwoman, Republican Nat’l Comm., to Off. of Chief Disciplinary Couns., State Bar of Texas (Feb. 6, 2019), [https://prod-cdn-static.gop.com/media/documents/Chairwoman\\_McDaniel\\_Letter\\_to\\_State\\_Bar\\_of\\_Texas\\_1549478702.pdf](https://prod-cdn-static.gop.com/media/documents/Chairwoman_McDaniel_Letter_to_State_Bar_of_Texas_1549478702.pdf) [<https://perma.cc/SET8-YS6Z>].

The response from the political left was no warmer. Commentators savaged her for appropriating Native American identity without having shared in its historical and cultural hallmarks and for possessing no more Native American ancestry than many other Americans of European descent (who usually identify as “white”).<sup>101</sup> The Cherokee Nation condemned her actions and emphasized that Warren absolutely had no basis to claim tribal membership.<sup>102</sup> In the end, Warren apologized.<sup>103</sup> But the DNA-test results (and the accompanying video promoting them, where a working-class Warren swilled beer in faux proletarianism<sup>104</sup>) marked a disastrous prelude to her announcement that she was seeking the Democratic Party’s 2020 nomination for President.<sup>105</sup>

While Warren’s suffered serious scrutiny over her actions, those of another player in the scandal—Harvard Law School (HLS)—received comparatively little attention, despite the potentially broader significance of the institution’s actions and the superior claim against them for fraud. HLS, it seems, had no compunction about touting Warren as a woman of color during her years on the faculty.<sup>106</sup> And it did so repeatedly (and, according to Warren, without her knowledge)—counting her as a Native-American woman in its senior ranks for six straight years in federally mandated diversity filings and citing her purported status as a Native American in its publicity efforts.<sup>107</sup>

101. See Linskey & Gardner, *supra* note 92 (noting that Warren’s identification as Native American after she took a DNA test “to demonstrate her purported heritage” was “a move that prompted a ferocious backlash even from many allies”); James Freeman, *Elizabeth Warren’s ‘American Indian’ Claim*, WALL ST. J. (Feb. 7, 2019, 4:52 PM), <https://www.wsj.com/articles/elizabeth-warrens-american-indian-claim-11549576347> [https://perma.cc/GWL4-CK3D].

102. Rozina Sabur, *Cherokee Nation Condemns Elizabeth Warren’s ‘Inappropriate and Wrong’ DNA Test to Prove Her Heritage*, TELEGRAPH (Oct. 16, 2018, 6:19 PM), <https://www.telegraph.co.uk/news/2018/10/16/choke-tee-nation-condemns-elizabeth-warrens-inappropriate-wrong/> [https://perma.cc/4JE7-5GTR].

103. See Linskey & Gardner, *supra* note 92.

104. See Ben Zimmer, *Elizabeth Warren and the Down-to-Earth Trap*, ATLANTIC (Jan. 5, 2019), <https://www.theatlantic.com/entertainment/archive/2019/01/why-elizabeth-warrens-beer-moment-fell-flat/579544/> [https://perma.cc/YH93-5EZT].

105. See *id.*; Linskey & Gardner, *supra* note 92.

106. Mary Carmichael, *Filings Add to Questions on Warren’s Ethnic Claims*, BOS. GLOBE (May 25, 2012, 12:46 AM), <https://www.bostonglobe.com/metro/2012/05/24/federal-documents-indicate-harvard-repeatedly-reported-elizabeth-warren-native-american/OZdiCFhjx5CCH3Es0sREHM/story.html> [https://perma.cc/3VA7-D473].

107. For example, Mike Chmura, the news director at HLS in the late 1990s, identified Warren as a Native-American in his outreach efforts to the *Harvard Crimson* and in a *New York Times* letter he penned in his official capacity. See *id.*

Independent of context, perhaps HLS's action would not appear so egregious, particularly if one believes that Warren actually did drive such efforts. However, when considered in full context, HLS's cynical gambit becomes deeply problematic. After all, HLS did not actually hire a *cis* or racialized woman of color<sup>108</sup> on its tenured faculty until 1998—almost two full centuries after its founding.<sup>109</sup> In the midst of HLS's uninterrupted, remarkable streak of avoiding<sup>110</sup> retention of a single woman of color, HLS's active promotion of its “minority” professor Elizabeth Warren—an individual whose phenotype guarantees her ability to elect white status whenever she so chooses—appears thoroughly craven, if not offensive. And the unsettling incident demonstrates how institutions that pay lip service to, but do not themselves meet, liberal ideals of diversity might be obscuring their shortcomings and protecting themselves from criticism by manipulating their hiring data.

HLS, of course, is not alone in lacking a ruling class (i.e., faculty and senior administration) that reflects the racial diversity of our country. Such a failure is still systemic throughout American institutions that wield economic and political power, let alone in the legal academy. But HLS's actions constitute an affirmative and exploitative attempt to mask its failures. One can only wonder how many other institutions bolster their faculty diversity numbers (which don't even come close to race parity) by claiming “minority” individuals with fair skin, blue eyes, light hair, and nothing more than an ancestor of color in the dim reaches of antiquity. In the process, such institutions achieve paper diversity without dealing with the “inconvenience” of actually recruiting and retaining racial minorities.

All told, the dichotomous treatment between racial fluidity, on one hand, and gender fluidity, on the other hand, is not only witnessed in society's relative acceptance of individually driven changes in gender rather than race. Consider social consensus on

---

108. That is, HLS did not hire someone society considered to be a woman of color.

109. See *Lani Guinier: Biography*, HARV. L. SCH., <https://hls.harvard.edu/faculty/directory/10344/Guinier> [<https://perma.cc/22QE-VNWQ>] (last visited July 12, 2020) (noting that Guinier was “the first woman of color appointed to a tenured professorship at Harvard Law School”); *Professor Lani Guinier*, HARV. L. SCH., <http://www.law.harvard.edu/faculty/guinier/> [<https://perma.cc/8699-CZLW>] (Jan. 3, 2013, 11:58 AM); *History of Harvard Law School*, HARV. L. SCH., <https://hls.harvard.edu/about/history/> [<https://perma.cc/L9HH-9GQL>] (last visited July 16, 2020).

110. If an institution goes almost two hundred years without hiring a single woman of color, such a dubious accomplishment, achieved against all odds, can only be fairly characterized as volitional.

costuming and burlesque performances. Though widely practiced in the past, “blackface” is no longer acceptable and society has finally deemed the act of white people blackening their faces so as to mimic African-Americans deeply offensive.<sup>111</sup> All the while, however, cis men still can and regularly do dress up as women “for fun” without fear of reproach.

Whatever moral and legal limits one might want to impose on identity fluidity, the idea of individuals taking control over the semiotics of gender and race, which are frequently imposed upon their identity and bodies from without, appeals to norms of freedom and provides an important measure of resistance to hegemonic forces that have shaped and limited ontological expressions since time immemorial. After all, isn’t there something particularly American about the right to shape one’s identity? If so, in a country dedicated to self-determination, Algeresque ascensions and Gatsby-esque reinventions, what matters most when asking about whether Kim Kardashian is, can be, or should be white is this: what Kardashian herself thinks.

As for the issue at hand, perhaps the single best word to capture the reality of Kardashian’s racial identity is *fluid*. Over time and in different contexts, she has occupied numerous spots along the American racial spectrum. And in enjoying, deploying, and being subject to this fluidity, she is not alone.

#### V. KEEPING (THE LAW) UP WITH THE KARDASHIANS: MODELING MALLEABILITY AND GRAPPLING WITH THE JURISPRUDENTIAL CONSEQUENCES OF IDENTITY FLUIDITY

Although she is still in the process of obtaining her law license,<sup>112</sup> Kim Kardashian has already made her seismic impact on the legal world felt far and wide. Besides her high-profile work

---

111. See, for example, the numerous recent “blackface” controversies that have led to losses of jobs and taken a substantial toll on political careers. See Lisette Voytko, *From Gucci, Justin Trudeau and Now Bed Bath & Beyond: The Year’s Blackface Controversies Continue*, FORBES (Oct. 24, 2019, 1:02 PM), <https://www.forbes.com/sites/lisettevoytko/2019/10/24/from-gucci-justin-trudeau-and-now-bed-bath--beyond-the-years-blackface-controversies-continue/#43731d624f6c> [https://perma.cc/WE3N-W9YU] (noting a series of high-profile “blackface” controversies in both business and politics in 2019, including incidents involving Canadian Prime Minister Justin Trudeau and Virginia Governor Ralph Northam).

112. See Staci Zaretsky, *Kim Kardashian Plans to Become Lawyer, Will Take Bar Exam in 2022*, ABOVE L. (Apr. 10, 2019, 1:46 PM), <https://abovethelaw.com/2019/04/kim-kardashian-plans-to-become-lawyer-will-take-bar-exam-in-2022/> [https://perma.cc/M9VQ-L4NH].

on criminal pardons,<sup>113</sup> she has unmasked the significant tension between the de jure (and constitutional) assumption of racial immutability and the de facto reality of racial fluidity. To wit, as the racialization of Kardashian demonstrates, racial identities can morph in at least two different senses: through changing racial schemata and through changing positioning of an individual within a given racial scheme.

First, race is malleable in that racial schemata themselves change, varying depending on time and place. Fluidity in this circumstance stems from without. Society, whether through a formal legal regime (MENA or the precedent-setting naturalization cases) or informal norms (post-9/11 racial understandings), determines racial classification. Under this version of mutability, although race is not formally an “accident of birth” since categories vary both temporally and spatially, it is almost entirely imposed upon the individual. Schemata may morph and an individual’s racial designation might shift as a result, but the individual—even one harnessing the power of social media like Kim Kardashian—is largely powerless to impact that classification.

Courts have acknowledged the existence of this first iteration of mutability—but not openly or consistently. Donald Braman, for example, argues that the Supreme Court’s jurisprudence, even dating back to the supremacist triumph of *Plessy v. Ferguson*,<sup>114</sup> has recognized (albeit tacitly) that race can be a socio-legal construct.<sup>115</sup> After all, it would be impossible for the Court to avoid such an acknowledgement when it was a given fact that Plaintiff Homer Plessy, a Creole of one-eighth black descent,<sup>116</sup> was black in some states but white in other states.<sup>117</sup> Thus, Plessy’s placement in a segregated train car would depend upon the laws of the particular jurisdiction in which the car was located. As the *Plessy* majority noted,

---

113. Peter Baker, *Alice Marie Johnson Is Granted Clemency by Trump After Push by Kim Kardashian West*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/trump-alice-johnson-sentence-commuted-kim-kardashian-west.html> [https://perma.cc/75UA-DK9A].

114. *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896).

115. Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1399–1400 (1999). As the Supreme Court had to concede in its majority opinion, the very definition of “black” varied within the various states at the time, thereby casting doubt of any essentialist notion of blackness. See *infra* text accompanying note 118.

116. *Plessy*, 163 U.S. at 541.

117. *Id.* at 552.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race [North Carolina]; others that it depends upon the preponderance of blood [Ohio]; and still others that the predominance of white blood must only be in the proportion of three fourths. [Michigan and Virginia]. But these are questions to be determined under the laws of each State and are not properly put in issue in this case.<sup>118</sup>

Whether the *Plessy* court eschewed interference with conflicting racial schemes in different states out of obeisance to the tenets of federalism, a commitment to appellate procedure or some other factor, its judgment effectively left it to each state to determine where it would draw the line between “colored” and white. Thus, in accepting a level of racial relativism, the Court implicitly blessed a system where some people could literally change their race by crossing a state border.

In more recent years, the Supreme Court has come closer to acknowledging this first iteration of mutability more explicitly. In *Saint Francis Coll. v. Al-Khazraji*,<sup>119</sup> the Supreme Court held that individuals legally designated as white but perceived of as something else could make out cognizable claims under § 1981.<sup>120</sup> In the process, the Court rejected arguments made by an employer who claimed that its employee, an individual of Arab ancestry, could not sue for discrimination under § 1981 (whose relevant standard denial of rights enjoyed by “white citizens”) because, as a Caucasian himself, the employee was a white person and could not have possibly been discriminated against on the basis of race by other individuals of his own race.<sup>121</sup> Interestingly, the Court did not dispose of the issue by holding Arabs nonwhite. It thereby eschewed making any formulaic, pseudo-scientific determinations about racial classification and recognized the relativism of race and its contextual grounding, overtly noting that “some, but not all, scientists . . . conclude that racial classifications are for the

118. *Id.* (citations omitted).

119. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

120. 42 U.S.C. § 1981 (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .”).

121. *Al-Khazraji*, 481 U.S. at 609–10 (noting that “petitioner submits that . . . section [1981] does not encompass claims of discrimination by one Caucasian against another”).

most part sociopolitical, rather than biological, in nature”<sup>122</sup> and acknowledging that “it may be that a variety of ethnic groups, including Arabs, are now considered to be within the Caucasian race” but may have not been before.<sup>123</sup>

At the same time, however, the *Al-Khazraji* Court did not wholeheartedly embrace relativism or mutability. First, it simply read § 1981’s proscriptions as encompassing discrimination based on “ancestry or ethnic characteristics.”<sup>124</sup> Second, it still referred to a “modern scientific theory” of race.<sup>125</sup> Third, it never grounded its holding in the idea that *Al-Khazraji* could bring his claim under § 1981 because what matters is how one’s race is viewed, rather than what it actually might be (to the extent such a thing exists). As such, the Court declined to ground relief in perception, i.e., whether a deprivation of rights stemmed from someone’s perceived nonwhite status.

In this sense, the holding in *Al-Khazraji* is, not surprisingly, consistent with *Shaare Tefila Congregation v. Cobb*,<sup>126</sup> *Al-Khazraji*’s companion case (and a case which Braman’s analysis almost entirely ignores). In *Shaare Tefila*, the Court reversed the Fourth Circuit’s holding that § 1982 claims<sup>127</sup> could not be brought against a group of defendants who had desecrated a synagogue with anti-Semitic epithets and symbols because such claims did not apply to “situations in which a plaintiff is not a member of a racially distinct group but is merely *perceived* to be so by defendants.”<sup>128</sup> While the Court could have held that race is, in fact, a social construct and, therefore, nothing more than perception, it did not go that far. Instead, it simply reiterated its language from *Al-Khazraji* and said that § 1982, like § 1981, included claims based on “ancestry or ethnic characteristics.”<sup>129</sup>

The Supreme Court has therefore carefully danced around the existence of first-iteration mutability. But, the judiciary’s failure

122. *Id.* at 610 n.4.

123. *Id.* at 610 (“Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law.”).

124. *Id.* at 613.

125. *Id.*

126. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987).

127. 42 U.S.C. § 1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”).

128. *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523, 526 (4th Cir. 1986); *Shaare Tefila Congregation*, 481 U.S. at 618.

129. *Shaare Tefila Congregation*, 481 U.S. at 617–18 (quoting *Al-Khazraji*, 481 U.S. at 613).

to acknowledge the mutability of race is rather common in many respects. Despite the important interdisciplinary work done in recent decades to demonstrate the socio-legal construction of race, even in elite academic circles, this research has surprisingly evaded acceptance, with large majorities of intellectuals still viewing race in essentialist, biological terms.<sup>130</sup> Curiously, it appears that notions about the immutability of race are far more immutable than race itself.

At the same time, race is also fluid in a distinct, second sense, in that an individual's place within a given racial scheme might change. In this second iteration of mutability, race is also not immutable, but there is greater personal agency in the process of racialization. Thus, racialization represents an intricate negotiation amongst at least three players: society, racialized groups, and individuals themselves. There is agency (and, of course, a strong degree of white privilege) when Rachel Dolezal goes from white to black,<sup>131</sup> when Elizabeth Warren deems herself, in whatever capacity, an "American Indian,"<sup>132</sup> or when Kim Kardashian simultaneously plays white and ethnic. But such agency is not limited to those who enjoy white privilege. To be sure, not everyone possesses ethnic or racial options; but, to differing degrees, many individuals (both those racialized as "white" and "of color") exert at least some level of control over their racialization. And, based on the growing body of empirical data from recent sociological research, there is good reason to believe that the number of such individuals is increasing.<sup>133</sup>

130. Maya Sen & Omar Wasow, *Race as a Bundle of Sticks: Designs That Estimate Effects of Seemingly Immutable Characteristics*, 19 ANN. REV. POL. SCI. 499, 502 (2016) (noting that, while "[m]any social scientists assume constructivism has become the standard academic approach, but research suggests otherwise" as a supermajority of college students and faculty in fields as diverse as biology, anthropology and political science continue to view in essentialist, biological terms).

131. See Orbe, *supra* note 81, at 23 (arguing that Dolezal's "insistence that she was not African American, but culturally Black triggered critical dialogue around the social construction of race in the United States, the one-drop rule, and agency issues surrounding assertions of authentic identity").

132. See Linskey & Gardner, *supra* note 92.

133. See, e.g., Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM. BUS. L.J. 789, 790 (2015) (noting the "growing numbers of Americans identify[ing] as multiracial, multiethnic, postracial, transgender, gender nonconforming, and bi (or multi) religious" and, consequently, that "the number of individuals who refuse to identify in a single category is increasing exponentially"); Aliya Saperstein & Andrew M. Penner, *Racial Fluidity and Inequality in the United States*, 118 AM. J. SOC. 676, 688, 691, 706–08 (2012) (documenting the unwitting results produced from a decades-long U.S. Bureau of Labor Statistics longitudinal study that began in 1979 that found that, over the course of two

As the public reactions to the Rachel Dolezal and Elizabeth Warren controversies suggest, whether racial fluidity stems from changes in racial schemata or the repositioning of individuals within a given racial scheme, it can be a deeply divisive concept. But it is also a fact. And our law has not fully caught up with, let alone acknowledged, this reality. Immutability continues to be a fundamental factor in determinations of what traits receive suspect-classification status under the Equal Protection Clause.<sup>134</sup> Yet the quintessential “immutable” trait which receives the highest level of scrutiny—race—is, in fact, malleable. Even gender’s heightened scrutiny is premised on its purported immutability.<sup>135</sup> In addition, the unfounded fetishization of immutability has impeded the ability of our equal protection jurisprudence to fully address issues of discrimination related to core identity traits that may be, at some level, chosen—traits such as language, hairstyle, or even sexual orientation.<sup>136</sup> Meanwhile, as we continue to publicly debate the extent to which antidiscrimination law can or should vindicate individual agency in gender expression (such as bathroom decisions), it makes sense to ask what level of protection, if any, we can or should grant to elective racial decisions as well. For example, it is worth considering whether Rachel Dolezal suffered impermissible discrimination when, on the grounds that she had allegedly misrepresented her race, she lost her academic and NAACP positions. At the same time, the Dolezal situation raises questions about the specter of race fraud and whether and how

---

decades, the reported race of a whopping 20% of surveyed individuals changed at least once (and, in many instances, more than once), with a strong (and troubling) correlations in changes to social status, as measured by income, incarceration, and marital and employment status).

134. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring) (“Racial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision.”); *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (“[T]he [ordinary] presumption of statutory validity may also be undermined [on equal protection grounds] when a State has enacted legislation creating classes based upon certain . . . immutable human attributes.”).

135. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (holding that governmental distinctions between men and women face heightened scrutiny “since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth”).

136. See John Tehranian, *Changing Race: Fluidity, Immutability, and the Evolution of Equal-Protection Jurisprudence*, 22 U. PA. J. CONST. L. 1, 60 (2019) (“[T]he continuing fetishization of immutability in the equal-protection calculus has impeded the realization of a jurisprudence of acceptance (rather than one of just mere tolerance)—not only with respect to race and race-related traits, but more broadly to other classifications that also have little to no link to merit and have a long history of being targeted on the basis of animus and bias.”).

misrepresentations of race (if there is, indeed, such an enforceable thing) should be patrolled or punished. As the case of Elizabeth Warren illustrates, the social construction of race also calls into question how affirmative action policies might work in a fluid world and the way in which we would measure their efficacy. In the coming decades, civil rights jurisprudence will finally have to grapple with our growing understanding of the racialization process and its inherent fluidity. In other words, the law will ultimately need to keep up with the Kardashians.