

Review Essay

Interrogating Identity

NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY By Judy Scales-Trent. University Park, Pennsylvania: The Pennsylvania State University Press, 1995. Pp. 194. \$19.50.

Mary Coombs†

I. INTRODUCTION

A few years ago, I would have described myself as a white Jewish heterosexual female.¹ Today, I'm considerably less sure, because both my self-understanding and my sense of the meaning and significance of those very categories has changed. Judy Scales-Trent's book, *Notes of a White Black Woman*,² provides a marvelous vehicle for exploring the process of understanding and defining individual and collective identities. As the title indicates, Professor Scales-Trent herself embodies the complex, sometimes painful, and often revealing identity of a "white black woman."³ Through

Copyright © 1996, BERKELEY WOMEN'S LAW JOURNAL and the AFRICAN-AMERICAN LAW & POLICY REPORT. For permission to reprint for classroom or anthology use, contact the AFRICAN-AMERICAN LAW & POLICY REPORT. For all other permission, including electronic use, contact the BERKELEY WOMEN'S LAW JOURNAL.

† Professor, University of Miami School of Law. Many thanks to Clark Freshman, Sharon Keller, and Marnie Mahoney for their comments and support, and to my research assistant, Anna Selden, and our reference librarian, Anne Klinefelter, for their superb skills at finding sources in a timely fashion and with minimal cues.

¹ If I had considered it, I also would have described myself as not disabled. However, the unmarked nature of the category "able-bodied" is so powerful that I probably would not have included that fact, even when thinking about categories of identity. Cf. Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969 (1993) ("There is a profound cognitive dimension to the material and social privilege that attaches to whiteness in this society, in that the white person has an everyday option not to think of herself in racial terms at all.").

² JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY* (1995).

³ Consistently with Professor Scales-Trent, I capitalize the word "black" only when used as a noun. I sometimes use "African-American" interchangeably with "black." I do not capitalize "white" because I do not believe that white people as such have a cultural or ethnic identity analogous to that of African Americans.

the thoughtful use of narrative, poetry, and other non-traditional formats,⁴ she conveys the insights she has gained from searching reflections inspired by her subject position. Her book provides us with a deeper understanding of the process of defining identity and of the role of the law in constructing and reinforcing identity categories.

In this essay, I use Scales-Trent's book as a springboard for examining some aspects of the construction of identity. By identity construction, I refer both to the creation of socially-defined identity categories such as race, sexual orientation, and religion, and to the process of classifying individuals within and among these categories. In analyzing these processes, it is helpful to recognize four structural aspects of identity construction, which operate concurrently: category construction, intersectionality, classificatory authority, and context. First, each identity category is properly constructed not as a dichotomy, but at least as a continuum. Indeed, some categories, such as race, are perhaps more accurately seen as a three-dimensional field.⁵ Second, all individuals exist at the intersection of multiple identity categories, such as that of "black woman," though for most of us some of these are the less-visible categories of privilege. Third, the authority to classify a particular person as either black or white, for example, is often contested. Such attribution may be done by the person herself, or by others, and the others may classify a person inclusively (she is "one of us") or exclusively (she is "other"). Finally, one's identity is always contingent and contextual. Identity is not fixed or absolute; rather, it is determined by particular persons for particular purposes at particular times in a process in which the person identified participates with varying degrees of freedom.

Scales-Trent draws on all these aspects of the fluidity of identity, though she focuses most specifically on the first two.⁶ In this essay, I examine each of these aspects of identity in turn, using examples from Scales-Trent's book and elsewhere to further a consideration of how we come to understand identity and how we might change those understandings.⁷ I then touch upon the political problems raised by the fragmentation and complexity of identity, looking briefly at the potential costs and bene-

⁴ Scales-Trent's book is part of a new and developing tradition of outsider narratives. Such narratives about particular people whose lives challenge identity categories are invaluable in helping us understand how these categories are constructed and how they might be reconstructed. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (discussing the use of narratives in legal scholarship); Mary Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 692 (1992). One of the most compelling narratives of the clash between lived identity and the law's Procrustean bed appears in Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law and A Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329 (1991).

⁵ As suggested below, for many categories the concept of a continuum or grid misleadingly obscures the ways in which the different identities within the category interrelate. Femininity, for example, is only comprehensible in the context of masculinity and vice versa.

⁶ Indeed, both are evident in her title, where she refers to herself as a "white black" "woman."

⁷ In a larger work in progress, I develop more fully these identity characteristics and the legal implications of how we conceptualize them in the context of attribution of racial or sexual orientation identity in family law contexts.

fits of the recently named categories, "people of color," "mixed-race" or "biracial," "bisexual," and "queer." I conclude by suggesting that, both for understanding the meanings of identity and for political strategizing around that knowledge, we benefit from a special focus on those identities which most thoroughly complicate the categories, such as that of a "white black woman."

II. FOUR ASPECTS OF IDENTITY CONSTRUCTION

A. Category Construction

Perhaps the most powerful lesson of Scales-Trent's book is its utter destruction of the notion that people can be neatly divided into two categories, white or black, by the traditional clues of skin, hair, and facial features.⁸ Her book analyzes "the dilemma of being black and looking white in a society that does not handle anomalies very well."⁹ She also reveals the ways in which we have dealt with such "anomalies"—by denying their existence or by proliferating categories with which to label people.

American law and cultural attitudes about mixed-race people can only be understood in their historical context. Conceptions of race developed in tandem with, indeed in large part as a justification for, slavery.¹⁰ Race was dichotomized, but the dividing line was between the allegedly pure white and anyone with even "one drop" of black blood, that is, a rule of hypodescent.¹¹ Thus, a child of a black female slave and a white slave owner was still black, no matter how fair-skinned she might be, and, because slave status passed through the mother, that child was legally her father's "black" slave. Though such children were common, the racial clas-

⁸ As both Scales-Trent and this essay indicate, the terms "white" and "black" (indeed the concept of race itself) are highly problematic. Nonetheless, I cannot avoid using the terms, even as I seek to expose their indeterminate and fictive nature.

⁹ SCALES-TRENT, *supra* note 2, at 11.

¹⁰ "African prisoners and their descendants were enslaved and kept in slavery for the simple reason that they or their ancestors were first enslaved. This was accomplished through the mediating concept of race, specifically the concept of 'negro race.'" Naomi Zack, *Mixed Black and White Race and Public Policy*, 10 HYPATIA 120, 123 (1995). See generally D. Marvin Jones, *Darkness Made Visible: Law, Metaphor and the Racial Self*, 82 GEO. L.J. 437 (1993) (discussing historical roots of concept of blackness).

¹¹ See SCALES-TRENT, *supra* note 2, at 4. As a sociological matter, the "one drop rule" was accepted throughout the nation by the early twentieth century. See Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2110 n.240 (1993). Most Southern states used legal rules of classification that were somewhat more "generous," allowing white status with those with almost as much as one-fourth black ancestry. *Id.* at 2110 & n.240. On hypodescent and American race law, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 24-25 (1991); but see Finkelman at 2110 n.240. Louisiana was unique in recognizing gradations such as mulatto, quadroon, and octoroon, based on percentages of black ancestry. See VIRGINIA R. DOMINGUEZ, *WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA* 2, 49-50 (1994). Of course, the apparent precision of such arithmetic ultimately rested on the fiction that one could unerringly classify the relevant ancestors as white or black. *Id.* at 49-50.

sification system made them invisible and obscured the interracial sex that brought them into being.¹²

Even though the conception of race was biological and essential, the criteria for determining a person's race were diverse and conflicting. The notions of "color" and "blood"¹³ were assumed to be compatible markers of the same ultimate categories, but stubborn facts made this assumption problematic. In the landmark case of *Hudgins v. Wright*,¹⁴ three generations of women claimed that they were descendants of a free Indian ancestor and thus, rightly, free. If black, the plaintiffs were presumptively slaves unless they could prove their free status; if Indian, the slaveholder bore the burden of proving their slave status. In the absence of adequate genealogical records, the court relied on physical appearance to determine the plaintiffs' race, and the resulting presumption decided the case in their favor. Thus, although the ultimate legal question turned on ancestry, the outcome of the case in fact turned on appearance: the plaintiffs' long, straight hair and copper color freed them.¹⁵

Both ancestry and color assume that race is a biological quality. Neil Gotanda, among others, has suggested that race is something more akin to culture or to a shared experience of racial oppression.¹⁶ Scales-Trent advo-

¹² The very term "mulatto" embodies the refusal to recognize the existence of the progeny of interracial sex, for it comes from the word mule, the sterile offspring of a horse and a donkey. SCALES-TRENT, *supra* note 2, at 99-100. The person of mixed-race is thus denied human existence rather than seen as the embodiment of the links and commonalities between the races. Gregory Williams, the child of a mixed marriage, describes how this affected him personally: while watching a Klan leader on television rail against "mongrel mulattos," he realized, "He was talking about me. I was the Klan's worst nightmare. I was what the violence directed against integration was all about." GREGORY WILLIAMS, *LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK* 91 (1995).

¹³ Gotanda notes the continuing power of the metaphor of blood, pointing to Justice Scalia's comments during oral argument in *Metro Broadcasting v. Federal Communications Comm'n*, 110 S.Ct. 2997 (1990). Scalia criticized the F.C.C.'s racial preference policy for being based on "blood, not background and environment." Gotanda, *supra* note 11, at 33 and n.126.

¹⁴ 11 Va. (1 Hen. & M.) 134 (1806).

¹⁵ *Id.* at 140. Ironically, Judge St. George Tucker, the most prominent legal scholar of the antebellum South, would have agreed with Scales-Trent that she "wears Africa in [her] hair." SCALES-TRENT, *supra* note 2, at 53. See Finkelman, *supra* note 11, at 2107-08 (describing St. George Tucker and his decision in *Hudgins*). Color could make one black, but it could not make one white if this threatened the boundaries of whiteness. See *Ozawa v. United States*, 260 U.S. 178, 197 (1922) (rejecting claim of a Japanese-born plaintiff that he was white, and thus entitled to be naturalized, and noting the imperfect correlation between color and race, since many whites are "darker than many of the lighter-hued persons of the brown or yellow races"). The imperfect fit between race and color is also apparent in the language of Title VII of the 1964 Civil Rights Act, which forbids discrimination on both of these bases. 42 U.S.C. § 2000e-2 (prohibiting discrimination because of race, color, religion, sex, or national origin).

¹⁶ Gotanda, *supra* note 11, at 3-5. Gotanda's article examines the Supreme Court understanding of race, identifying four separate approaches in the cases: formal race, status race, historical race, and cultural race. While not directly analogous to a discussion of the social construction of race, these categories nevertheless help us distinguish differing criteria. The relationship between Gotanda's categories of historical-race, referring to past and continuing racial subordination, and culture-race, referring to African-American culture, community, and consciousness, is complex. Culture-race is, by definition, the culture developed by a people subject to particular form of historical and contemporary oppression. Yet the concept of culture-race focuses on the agency of African Americans within and in response to those racial constraints. There is a similar tension within feminism over the extent to which we can recognize and celebrate women's agency with-

cates a similar transformation of our conceptions of racial identity into a form of ethnicity: black Americans are a people who, through temporal and geographical connections, have formed a common culture.¹⁷

Insofar as race is conceived of as a cultural phenomenon or an ethnicity, ancestry and appearance become less significant in classifying a person as black or white. Instead, a person would more likely be deemed black in proportion to his experiences of racial subordination,¹⁸ his knowledge of and participation in African-American culture, or his commitment to that community. A person's black identity might be called into question by his socio-cultural association with whiteness. He could in theory be so "assimilated" as to no longer be truly black.¹⁹ Indeed, Scales-Trent describes her own concern that her love of "white" chamber music might call into question her blackness.²⁰

The black community also might identify someone as not really black for being disloyal to essential credos.²¹ The epithet of oreo²² has nothing to

out losing sight of the oppressive conditions under which that agency is exercised. See Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J. L. & FEMINISM 217, 233, 233 n. 82 (1993). See also KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE 45 (1992) (arguing that the concept "race" biologizes what are differences in culture). But cf. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (criticizing the ethnicity vision of race and asserting that race is best understood "as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics"). See also PAUL GILROY, THERE AIN'T NO BLACK IN THE UNION JACK: THE CULTURAL POLITICS OF RACE AND NATION 38 (1991) (noting that "race formation . . . refers both to the transformation of phenotypical variation into concrete systems of differentiation . . . [and] the manner in which 'races' become organized in politics").

¹⁷ SCALES-TRENT, *supra* note 2, at 133-40.

¹⁸ Compare the comments of another fair-skinned black woman who adopts a form of historical race to classify herself as black. "What joins me to other blacks, then, and other blacks to another, is not a set of shared physical characteristics, for there is none that all blacks share. Rather, it is the shared experience of being visually or cognitively *identified* as black by a white racist society, and the punitive and damaging effects of that identification." Adrian Piper, *Passing for White, Passing for Black*, 58 TRANSITION 30, 31 (1992).

¹⁹ The fear that a child will be lost to blackness by such assimilation, I believe, drives much of the concern about transracial adoption. A black (or mixed-race) child raised by white parents without an adequate grounding in black culture is not, by such criteria, black at all. He will be unprepared to deal with racism he may encounter if he is seen as black. See Twila Perry, *Race and Child Placement: The Best Interest Test and the Cost of Discretion*, 29 J. FAM. L. 51 (1990/91) (critiquing interracial adoptions). For an argument favoring prompt placement for adoptable children regardless of racial matching, see ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 112 (1993). Cf. Gotanda, *supra* note 11, at 57-58 (criticizing the Supreme Court's analysis in *Palmore v. Sidoti*, 466 U.S. 429 (1984), for not perceiving the value to a white child of being raised in the bicultural home of her white mother and black stepfather).

²⁰ SCALES-TRENT, *supra* note 2, at 15. This, of course, raises the related question of how cultural phenomena become defined as black or white. It might seem apparent that chamber music is white and that jazz is black, based on the race of those who developed the form and of the majority of those who have contributed to it. Is there any more essential notion of black or white music? If, as Patricia Williams suggests, Beethoven may have been black, would we experience his music differently knowing that? See PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 110-15 (1991).

²¹ Disloyalty to one group, of course, is often equivalent to loyalty to another. A white might say to an assimilated Black, "I don't even think of you as black," believing this to be a compliment. The effort to cross boundaries should not be confused with an attempt to erase them or to melt everyone into a straight, white, middle-class male who has, perhaps, some exotic food preferences. Cf.

do with color.²³ For example, many would say Clarence Thomas is barely black under the criteria of culture and politics.²⁴ Scales-Trent points out that brown is underinclusive as a definition of being black,²⁵ for it would exclude her. It may also be overinclusive, insofar as it includes Thomas and others with his views.²⁶

When we conceive of race as a continuum or even as a set of parallel continua, we still are imagining race in terms of black and white. When I was a child, I learned (and had later to unlearn) that there were five races: black, white, red, brown, and yellow.²⁷ While the scientific underpinnings of this racial scheme are absurd, they still affect current conceptions of race. The problems of conflating ancestry, physical features, and culture noted

ELIZABETH SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 12 (1988) (noting that one author who believed in "the basic irrelevance of race" stated, "I have assumed that . . . Negroes *are*, after all, only white men with black skins, nothing more, nothing less." (quoting KENNETH STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH VII-VIII* (1956))).

²² The epithets "apple" and "banana" similarly denounce political or cultural heresy among Native Americans or Asian Americans and do not comment on color. See SCALES-TRENT, *supra* note 2, at 77.

²³ The continuing power of color as the trope for race is evident in our different responses to the notions that a fair-skinned, blue-eyed person is not black and that an "oreo" is not black. We understand the latter claim to be metaphorical, but the former to be an assertion that one is truly not black if one is not brown.

²⁴ Such an ethno-cultural conception of race is clearly socially constructed, rather than biological. It is correlated with the more biological conceptions of color and ancestry, however, since people classified black on those latter criteria are more likely to grow up within a black culture or experience racial subordination at the hands of strangers. Thomas, for example, may be less able than Professor Scales-Trent to get a cab to stop for him. Points of cultural tension arise when the categories are unmatched. A biracial child raised by a white parent, or a black child adopted by white parents, for example, will not be culturally black without special effort on the part of the parents. Cf. RUTH FRANKENBERG, *THE SOCIAL CONSTRUCTION OF WHITENESS: WHITE WOMEN, RACE MATTERS* 130 (1993) (describing the concerns of the parents of a light-skinned Mexican-Anglo child being raised in an Anglo community and noting, "Identity is not guaranteed by heredity, but must also be *socially* produced"). Conversely, while outsiders can never wholly experience a different culture and community, we can, in effect, develop fluency in a second cultural language with sufficient effort and humility. See SCALES-TRENT, *supra* note 2, at 111-15 (comparing parental approval of French fluency with a possible world where white parents would desire that their children be fluent in African-American culture); Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN'S RTS. L. REP.* 7 (1989) (urging lawyers and legal scholars to develop "multiple consciousness" as a jurisprudential method). However, as long as color continues to have subordinating effects, it would be presumptuous to think that even the most complete cultural fluency could make one black.

²⁵ SCALES-TRENT, *supra* note 2, at 87-91.

²⁶ As one commentator notes, "To the extent that racial identity is defined biologically and essentially, Justice Thomas is obviously 'black.' However, when racial identity is defined politically, as a firm commitment to anticacist struggles, Justice Thomas's claim to racial authenticity founders." Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 *STAN. L. REV.* 747, 769 (1994) (reviewing KWAME ANTHONY APPIAH, *IN MY FATHER'S HOUSE: AFRICAN PHILOSOPHY OF CULTURE* (1992)).

²⁷ Cf. *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), and *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (related cases holding that protection under §§ 1981 and 1982 must be determined by examining Congressional intent, and using dictionary understandings of race at the time of the passage of the Fourteenth Amendment to do so). Jews and Arabs qualified as distinct races, since they were "genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens." *St. Francis*, 481 U.S. at 613. The broader notion of a "white" race is a later formation. See López, *supra* note 16, at 36-37.

above for blacks also apply to Hispanics and Asian Americans.²⁸ Added to these factors are the complexities of language and of distinctive sub-identities such as Cuban or Korean.²⁹ Intermarriage occurs as well, and a given individual may be, on any or all of the continua, white *and* black *and* Native American *and* Latina. The mapping, even if it could be done, would require a multi-dimensional grid.

Other categories of identity are similarly complex. Even sex is not quite dichotomous, for there are hermaphrodites and transsexuals who cannot easily be pigeonholed by sex or gender.³⁰ Standard American religious categories—Jewish, Catholic, Protestant—similarly obscure intricacies within³¹ and across³² those categories. Judaism implicates race, ethnicity, nationality, and religion.³³ Similar complexity surrounds sexual identity.³⁴

B. Intersectionality

Because intersectionality is the subject of such a rich literature, I touch on it only briefly here,³⁵ focusing on two aspects highlighted by Scales-

²⁸ Because tribal membership is explicitly recognized as an issue of membership in a quasi-sovereign political body, I bracket the issue of the construction of the “red” race. See generally FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1941).

²⁹ While most public debate in the United States may not embody such specific ethnic terms in discussing African-American identity, it is impossible not to do so if you live, as I do, in South Florida. Some of our “African-American” neighbors and students are descendants of slaves brought to the territory of the United States. Others, however, are Haitian or Jamaican or Bahamian immigrants or their children. The community reflects both the cultural richness and the political tensions of such a potpourri.

³⁰ Furthermore, the sexes do not exist along a continuum but are intertwined. The category “woman” is defined and understood as the Other to “man.” Some claim that woman is that which is sexually desired by man. See CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 6 (1989). Certainly, under conditions of dominant (if not compulsory) heterosexuality, the identity categories woman and man will be relational, not distinct. In more subtle ways, other pairs, such as straight and gay or black and white, derive their meaning from each other. López suggests that whiteness is understood not as a category itself, but as the absence of non-whiteness. IAN HANEY LÓPEZ, *WHITE BY LAW* 27-28 (1995).

The oppressed term of each pairing is the “dangerous supplement” that is essential to understanding the dominant and apparently unmarked term. On the concept of dangerous supplements, see Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 *HARV. L. REV.* 1277, 1288-89 & n.38 (1984) (relying on JACQUES DERRIDA, *ON GRAMMATOLOGY* (G. Spivak, trans. 1976)).

³¹ Jews, for example, may be Orthodox, Conservative, Reform, or Reconstructionist, and those categories do not determine other characteristics often associated with one’s Jewish identity, such as one’s attitude toward Zionism.

³² In some ways, those who are deeply religious or fundamentalist in their beliefs—whether those beliefs are Jewish, Muslim, or Christian—are more similar to each other than they are to their more secular co-religionists.

³³ In the Israeli census, the identity categories are Jewish, Moslem, Greek Orthodox, Latin (Catholic), and other religious categories. By so structuring choices, authorities both divide Israeli Arabs by religion and assimilate all self-identified Jews, no matter how secular, into the Jewish religion. See DOMINGUEZ, *supra* note 11, at xiii. Note the importance of context. The category ‘Jew’ is inherently different in Israel, where Jews are the dominant group, than in the United States.

³⁴ See *infra* text accompanying notes 118-25 for a discussion of the complexities of sexual identities.

³⁵ The insistence by women of color and lesbians that the feminist movement recognize intersectionality has been invaluable. These authors have significantly sensitized other legal scholars, if not

Trent's work. First, Scales-Trent herself points out the connection between her scholarly work on the intersection of race and sex and her experience of living at the intersection of black and white within race.³⁶ Second, Scales-Trent helps us recognize that we are all intersectionally situated, sometimes in ways that make us uncomfortable. As an African-American woman, Scales-Trent would seem to be classically at the intersection of oppressions. Yet she acknowledges and reflects on her privilege vis-à-vis a disabled woman. The woman, unable to enter a restaurant after a progressive women's conference except by wheeling through the kitchen, insisted that her colleagues join her in leaving. Scales-Trent tells us that her first response was that she was hungry and did not want to have to deal with the issue—and that she then recognized the parallels to a white feminist's earlier complaint that she was "tired of dealing with the anger of black women."³⁷

Scales-Trent's story reminds us that intersectionality is not just a characteristic of those suffering multiple forms of oppression; we are all intersectional. Much of political struggle within various identity-based movements has reflected the insistence of some that others recognize their intersectionality.³⁸ Black women, for example, have challenged us to see that their "femaleness" is perceived differently by themselves and others because of their blackness.³⁹ What is logically entailed by that insight, yet psychologically obscured, is that we are defined as much by our privileged (unmarked) identity categories as we are by our unprivileged (marked) categories. A white woman's whiteness inflects her sex and an African-American man's maleness inflects his racial identity. My place in the world is as much a product of my whiteness and my economic privilege as it is of my female queerness.⁴⁰

the law itself, to its significance. See, e.g., SPELMAN, *supra* note 21; Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16 (1995); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). See also, SCALES-TRENT, *supra* note 2, at 11-12. I thus slight the question of intersectionality here, not because it is unimportant, but because I do not think I have much to add.

³⁶ SCALES-TRENT, *supra* note 2, at 11.

³⁷ *Id.* at 30-31.

³⁸ Identity politics can create a dilemma for those who find themselves at the intersection of different and sometimes conflicting categories. Black gay playwright Michael Winn says that "black Gays often feel like their loyalty is tested—as if they have to be primarily black or primarily Gay." Katherine Harris, *God Just Isn't a Practical Joker*, WASH. BLADE, Sept. 15, 1995, at 45.

³⁹ See Deborah King, *Multiple Jeopardy, Multiple Consciousness*, 14 SIGNS 42 (1988) (discussing the need for an interactive model of oppressions). Analogously, a black woman's blackness is different than that of a black man. In a sense, then, Sojourner Truth is one of the earliest deconstructors of gender essentialism. See Sojourner Truth, *Ain't I a Woman*, in MARY BECKER ET AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 9 (1994).

⁴⁰ "Privilege and oppression can and do exist simultaneously. . . . As a well-educated, currently able-bodied individual from a working-class family, who is also Black, a woman and a lesbian, I am constantly aware of how complex and contradictory those intersections are." Barbara Smith,

C. Classificatory Authority

Scales-Trent's book is particularly revealing in its exploration of the question of classificatory authority. She describes herself as a "black woman who is often *mistaken* for white."⁴¹ In this statement she asserts the right to classify herself (as black) and challenges the right of others to classify her (wrongly, as white). Note that a person may be classified in three ways: other-ascribed identity that excludes the person, other-ascribed identity that includes her, and self-reported identity.⁴²

1. White Authority to Classify

Not surprisingly, white people assume the authority to classify. Scales-Trent describes telling a white acquaintance at a party that she was black, to which he responded, "no, you're not."⁴³ His presumptuousness is revealing, though ultimately of little significance. Other whites, however, truly have some of the authority they assume. Scales-Trent describes a police officer who relied on facial characteristics to mark her as white on his forms and then appeared irritated when she dared correct him.⁴⁴ In many cases, however, we are not in a position to correct authority figures, because we are not even aware that we are being classified.

Classification of people by race is necessary in a variety of legal contexts, and legal rules vary both in which criteria they use and to whom they assign the authority to apply those criteria. The differences, and the potential tensions created by these differences, are apparent in even a cursory review of such domains as census data, Equal Employment Opportunity Commission (EEOC) reporting and litigation, crime statistics, and vital statistics like birth certificates.

The census, which is the source of racial demographics for electoral districting, relies on self-reporting, filtered through a set of bureaucrati-

Between a Rock and a Hard Place: Relationships Between Black and Jewish Women, in ELLY BULKIN, ET AL., *YOURS IN STRUGGLE: THREE FEMINIST PERSPECTIVES ON ANTI-SEMITISM AND RACISM* 67, 76 (1984). See also Grillo, *supra* note 35, at 17; Mahoney, *supra* note 16.

⁴¹ SCALES-TRENT, *supra* note 2, at 2 (emphasis added).

⁴² The struggle over authority to categorize a particular individual has a parallel in struggles over the authority to name and to proclaim the criteria for the category itself. For example, consider the debates and struggles over the naming of "racial" categories. Do we call the people in the category Blacks or African Americans? Latinos or Hispanics? While many of us believe this is quintessentially a decision to be made by those in the community, this does not, unfortunately, resolve the problem. There is no designated spokesperson, or structure for a referendum, within the relevant communities (and indeed disputes over the boundaries of the relevant communities are often embedded in the struggle over naming). I became intensely aware of this issue when I spent a year visiting at Boston University. Among the largely Cuban population of Miami, the generally preferred category name is Hispanic. When I used that term in Boston, I was told in no uncertain terms by my Latina students that I was wrong. Such geographic specificity can work reasonably well for my lectures; it is obviously problematic for the EEOC or the Census Bureau or even for a book about Hispanic or Latino culture or politics.

⁴³ SCALES-TRENT, *supra* note 2, at 73-74.

⁴⁴ *Id.* at 74.

cally-specified categories.⁴⁵ EEOC regulations pursuant to Title VII require employers to report on the racial make-up of their workforce and encourage them to do so by means of "visual surveys."⁴⁶ Thus, employers are authorized to classify their workforce collectively and sometimes individually by race.⁴⁷ Such authority has a certain logic since, when an individual employee claims she was the subject of race discrimination, the outcome should turn in part on the defendant's perception of the plaintiff's race.⁴⁸ Uniform crime statistics depend on racial classifications made by police, usually through visual assessment, though in ambiguous cases the assessment may be colored by cultural stereotypes or locational cues.⁴⁹

As Scales-Trent notes, we are first racially classified on our birth certificates.⁵⁰ The original data for classification is provided by the mother, who indicates the race of each parent. The child's race is then determined according to coding guidelines provided by the National Center for Health Statistics to state bureaus of vital statistics.⁵¹ Demonstrating the continuing power of the rules of hypodescent, these guidelines long provided that in cases where one parent was white and the other of a different race, the child was to be assigned to the non-white parent's race.⁵²

⁴⁵ The self-reporting system is modified when the respondent checks "other." Census procedures (which assume racial homogeneity within families and neighborhoods) ordinarily assign the person the same race as his nearest family member, housing bloc resident, or similar reference group. Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1243 (1994).

⁴⁶ *Id.* at 1250.

⁴⁷ In making these assessments, employers face conflicting strategic pressures. On the one hand, if they resolve doubtful cases as minority, the employers may benefit from the EEOC's perceiving them as having an adequate number of minority employees. On the other hand, if one of those workers is later fired, the worker may more readily be able to establish a prima facie case of discrimination.

⁴⁸ See *Perkins v. Lake County Dep't. of Utils.*, 860 F. Supp. 1262, 1277 (N.D. Ohio 1994) (holding that a plaintiff would be entitled to Title VII protection if the employer reasonably believed plaintiff was a member of a protected class, regardless of his ancestry). Thus, a white person discriminated against because of an erroneous assumption that she is black would have a claim. One of my students, who has a Southern accent and an unusual first name, encountered such discrimination when she called seeking an apartment. Landlords who seemed reluctant to show her anything exhibited obvious relief when she arrived and they discovered she was white.

⁴⁹ Ford, *supra* note 45, at 1256. Government bureaucrats are authorized to make identity classifications in a variety of contexts. For example, the military, in pursuit of its policy regarding the exclusion of those with a propensity to commit homosexual acts, asserts the right to assign people to heterosexual and homosexual identities. By doing so they seek to "manag[e] a privileged but unstable discursive and social position," Janet Halley, *Straight Procedure: The Conduct/Status Distinction in the 1993 Revisions to Military Anti-Gay Policy*, GLQ: J. LESBIAN & GAY STUD. (forthcoming 1996) (manuscript at 22, on file with author).

⁵⁰ SCALES-TRENT, *supra* note 2, at 75.

⁵¹ Ford, *supra* note 45, at 1257.

⁵² *Id.* After 1989, the system changed to classify mixed-race children on the basis of the mother's race, which is reminiscent of the rules in the antebellum South whereby slave status passed through the mother. *Id.* at 1259. As late as the 1960s in Louisiana, however, parental reports were not determinative. The deputy registrar of vital statistics was charged with flagging birth certificates that indicated a child was white but carried other indicia, such as a racially identifiable name, that suggested the child might have traceable African ancestry, and refusing to register such a child as white. DOMINGUEZ, *supra* note 11, at 36-37.

For both legal and social classification, then, the criteria for identity categories are distinct from but associated with authority. Because different authorities have access to different information, because appearance and ancestry (and, in the case of self-identification any other criteria the person chooses to use) play different roles, and because the categories from which racial identification is assigned or chosen vary, a person may be differently classified by different authorities.⁵³ Racial classification itself is arbitrary. The differences among these systems seem to add another layer of arbitrariness, for there is no indication that the different classificatory procedures of the census, the EEOC, and the Center for Health Statistics reflect any reasoned judgments about criteria or authority to classify.

2. Black Authority to Classify

Blacks, too, can make classificatory judgments that may not match a person's self-identity. In perhaps the most poignant moment in the book, Scales-Trent describes her pain at being perceived as white and thus dangerous by a little girl in a "pink organdy dress,/ pink socks,/ pink ribbons,/ patent leather shoes./ She had rich brown skin/ Hair pulled back in braids so tight . . . She was me when I was six/ getting ready for church on Sunday morning . . . So I smiled at her,/ seeing myself./ And she hid behind her mother's legs/ looked up at me/ and said/ 'I'm skeered of white people.'⁵⁴ Indeed, even Scales-Trent finds herself using color as her classificatory mechanism. She describes looking around a room to see if there are other Blacks present and then realizing that "[t]hough I can count all the brown faces in a room, there is no way that I can count the 'black' faces."⁵⁵

Blacks, however, are less likely than white people to see a white black woman as white. They may be better at picking up subtle characteristics of nose shape or hair texture.⁵⁶ They are used to living in a community in which the range of physical characteristics is much wider, because of the rules of hypodescent, and they may also have a greater felt need to identify the other Blacks in a crowd of strangers.⁵⁷

While for outsiders color is the most accessible criterion, and thus is often treated as determinative, insiders may base racial classifications on

⁵³ Because Hispanic is treated as both race and not-race, it creates conflict even within a single system. The coding system for birth certificates under the National Center for Health Statistics treats the answer "white" as "non-Hispanic" if given in response to the question regarding Hispanic origin. However, the answer "Hispanic" is treated as "white" if given in response to the question regarding race. Ford, *supra* note 45, at 1261. The EEOC treats "Hispanic" as a racial classification, along with white, black and Asian/Pacific Islander. See Employer Information Report EEO-1, 1 Empl. Prac. Guide (CCH) § 1881, at 2060-61, 65-66 (Oct. 1992).

⁵⁴ SCALES-TRENT, *supra* note 2, at 21-22.

⁵⁵ *Id.* at 88.

⁵⁶ *Id.* at 88-89. Scales-Trent describes how she delighted in her Afro: "I wear Europe on my face, [but] I wear Africa in my hair." *Id.* at 53.

⁵⁷ Similar special needs may explain lesbians, and gays, apparent ability to recognize each other by cues too subtle for heterosexuals—an ability sometimes referred to as "gaydar."

the person's family ties or geographic location or cultural knowledge. Sometimes, this facilitates the suppressed ironic humor of the oppressed. Scales-Trent tells the story of her fair-skinned North Carolinian Aunt Midge. A white woman huffily left her seat when a dark-skinned woman sat next to her on a recently-integrated bus and moved into a seat next to Midge. Aunt Midge and the other Blacks on the bus recognized, but chose not to correct, the bigot's error.⁵⁸

3. Passing

The phenomenon of passing⁵⁹ demonstrates vividly the impact of racial classification. A person who passes can obtain many of the benefits whiteness provides in this society. People who understand themselves as black may seek those benefits by passing either permanently and totally, or intermittently and strategically.⁶⁰ Scales-Trent uses the analogy of immigration for the first sort of passing.⁶¹ One might draw a similar analogy between temporary, strategic passing, such as some blacks' passing as white in the workforce while returning regularly to their African-American home communities, and the actions of Mexican or Palestinian laborers who cross the border every day to work in a wealthier neighboring land.⁶²

An individual need not choose to pass to be seen and treated as if she were white. Scales-Trent notes that she obtains the benefits of passing unwillingly; she is treated better because of white strangers' assumptions about her.⁶³ "There is no way around it. I am passing all the time as I walk

⁵⁸ SCALES-TRENT, *supra* note 2, at 41-42. The mix of amusement and bitterness recounted here is reminiscent of lesbians' responses to men's hopeful comments, such as, "Are you girls alone here?"

⁵⁹ Passing, in the racial context, usually involves a person of mixed ancestry, who would be deemed black under the rules of hypodescent, passing as white. More precisely, the white community has chosen to treat the person as white, that is, the masquerade of passing has succeeded in hiding the facts which would have led whites to identify the person as black.

⁶⁰ The extent of passing is unmeasurable since passing is, by its nature, invisible. "[P]assing can only name the very failure of passing." Carole-Anne Tyler, *Passing: Narcissism, Identity, and Difference*, 6 (2+3) DIFFERENCES: J. Feminist Cultural Stud. 212, 212 (1994).

⁶¹ SCALES-TRENT, *supra* note 2, at 96-97. As with immigration, the choice may be made by adults for entire families. A child may experience immigration not as a choice to pass but as a forced deportation from his native land. Gregory Williams tells the extraordinary story of his boyhood emigration from white to black America. He was raised in Virginia as the child of a white woman and a light-skinned black man passing as white. When the marriage broke up, his father took him and his brother back to Indiana, explaining to them on the bus that they were and would be seen as black when they arrived. WILLIAMS, *supra* note 12, at 32-33.

⁶² This perhaps indicates the limitations of the immigration analogy: the passing black person presents herself as if she has always been white; the immigrant often wears her border-crossing status openly. Sometimes passing is even more limited and strategic, for example, when a light-skinned Black passed as white to enjoy a cultural event closed to Blacks during segregation.

⁶³ While Scales-Trent could, as she notes, try to avoid or to decline these privileges of perceived whiteness by announcing her race to every passing stranger, this would involve a hypervigilant racial sensitivity akin to passing. Because of her liminal position, someone like Scales-Trent is particularly aware of the multiple, invisible privileges of whiteness, from catching a cab, to using a checkbook without challenge, to not having to worry that one's children will be the object of racial violence by the police. For a revealing explication of these privileges, see PEGGY McINTOSH, *WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE COR-*

through the world. . . . And I feel like a fraud. And I hate it.”⁶⁴ Scales-Trent’s reaction is parallel to that of Queer Nation activists, and suggests she might want a button that says: “How dare you assume that I’m white?”⁶⁵

Passing also has costs.⁶⁶ As a black woman, Scales-Trent wishes to date black men and finds herself preferring men who are not similarly fair-skinned.⁶⁷ Yet, when she does so, she puts the man in danger from whites who disapprove of black men dating white women.⁶⁸ There are other costs as well—white strangers may assume it is safe to be racist in front of her.⁶⁹ After describing a casually racist comment made by a cabdriver who did not hesitate to pick her up, she concludes, “I’m always waiting, waiting for them to say it. Please don’t say it. . . . Jesus God, cabbie, can’t I even go across town in a cab without having my whole identity called into question?”⁷⁰ The more permanent passing that Scales-Trent analogizes to immigration has its own enormous costs. A person who seeks to live her life passing must give up much of what she is, be ever alert not to say or do anything that would expose her immigrant status. She is cut off from the family she left behind. There are no cards or letters or visits back home as immigrants might share. The passing person and the Blacks who once

RESPONDENCES THROUGH WORK IN WOMEN’S STUDIES (Wellesley College Center for Research on Women Working Paper No. 189, 1988), described in Mahoney, *supra* note 16, at 233-36.

⁶⁴ SCALES-TRENT, *supra* note 2, at 17.

⁶⁵ As a white woman uncomfortable with white privilege, I sometimes want a button that says, “How dare you assume I value my white privilege?” – or a mark on my wrist to remind myself, “you are white and will be given white privilege.”

⁶⁶ Being too light can be a disadvantage where it is important to be seen as black. Scales-Trent describes Washington, D.C. Mayor Marion Barry’s encouraging his light-skinned wife to tan herself to a darker shade. SCALES-TRENT, *supra* note 2, at 79-80. Similarly, Gregory Williams describes the opposition to his appointment as the first black deputy sheriff, based on complaints that it would allow the sheriff to placate the black community while preserving the appearance of an all-white department. WILLIAMS, *supra* note 12, at 272.

⁶⁷ SCALES-TRENT, *supra* note 2, at 48-49.

⁶⁸ *Id.* at 83-86. Gregory Williams describes the parallel reaction for a light-skinned black man. When he dated dark-skinned black women, he was excoriated by a passing teenager as a “Nigger lover!” but his guidance counselor told him that socializing with white girls was “unacceptable.” WILLIAMS, *supra* note 12, at 166, 183.

⁶⁹ Adrian Piper has constructed a painful bit of performance art out of such experiences. She passes out calling cards that read:

Dear Friend:

I am black.

I am sure that you did not realize this when you made/laughed at/agreed with that racist remark. In the past I have attempted to alert white people to my racial identity in advance. Unfortunately, this invariably causes them to react to me as pushy, manipulative, or socially inappropriate. Therefore, my policy is to assume that white people do not make these remarks, even when they believe there are no black people present, and to distribute this card when they do.

I regret any discomfort my presence is causing you, just as I am sure you regret the discomfort your racism is causing me.

Sincerely Yours,

Adrian Margaret Smith Piper

Quoted in PEGGY PHELAN, UNMARKED: THE POLITICS OF PERFORMANCE 97-98 (1995). See also SCALES-TRENT, *supra* note 2, at 44.

⁷⁰ SCALES-TRENT, *supra* note 2, at 13.

claimed her as family all live with the emotional turmoil of what might occur if the pretense is revealed.⁷¹

The problem of passing or avoiding passing is one that has been particularly salient for gays and lesbians. The analogies between racial passing and sexual orientation passing, noted by Scales-Trent and others,⁷² are revealing though imperfect. Passing is an intergenerational phenomenon for African Americans. The children of one who passes will be seen as white and the connection with the African-American community erodes through the generations. At some point, the progeny "are" white, subject only to the possible risks of someone else tracing the buried connection⁷³ or a toss of the genetic dice that produces a child whose appearance recapitulates that of a black ancestor. For gays and lesbians, the familial issues of passing are distinct.⁷⁴ One's sexual orientation does not seem to depend on one's parents' sexual orientations⁷⁵ and certainly not on their public presentation as gay or straight. Nonetheless, with that caveat, I believe we can learn something about the impetus for and effects of passing by examining it within both the racial and sexual orientation categories.

As gays and lesbians, many of us pass, willingly or unwillingly, every day.⁷⁶ Coming out, the flip side of passing, is a never-ending process for the individual and the community. The gay and lesbian community faces a

⁷¹ See generally SHIRLEY TAYLOR HAZLIP, *THE SWEETER THE JUICE: A FAMILY MEMOIR IN BLACK AND WHITE* 267 (1994) (describing her search for the part of her family that had passed for white and abandoned her mother: "The family divested all its blackness into her. She was their Other . . ."). Cf. FRANKENBERG, *supra* note 24, at 104 (describing the disowning by white families of children who married interracially).

⁷² SCALES-TRENT, *supra* note 2, at 28-29. See also Frankenberg, *supra* note 24, at 109.

⁷³ Hazlip describes her quest to locate her mother's long-lost family, relatives who had grown up believing themselves to be white. HAZLIP, *supra* note 71, at 256-60. Written from Hazlip's perspective, the book does not permit us to see fully the effect on her new relatives of discovering that they have black family and are thus by some definitions no longer "white."

⁷⁴ Passing gays and lesbians, unlike passing black people, need not abandon their family of origin. Rather, they are often forced into the choice of living a lie by passing or being abandoned by their families when they refuse to pass. See Sharon Rush, *Sexual Orientation: A Plea for Inclusion*, 10 BERKELEY WOMEN'S L.J. 69, 72 (1995).

⁷⁵ But see Richard Horton, *Is Homosexuality Inherited?*, N.Y. REV. BOOKS 36 (July 13, 1995) (reviewing SIMON LEVAY, *THE SEXUAL BRAIN* (1995) and DEAN HAMER & PETER COPELAND, *THE SCIENCE OF DESIRE: THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR* (1995)) (discussing studies suggesting genetic bases for sexual orientation).

⁷⁶ As Janet Halley notes about the sometimes invisible quality of sexual orientation, almost no one is out to the grocery clerk. Janet Halley, *The Politics of the Closet: Toward Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915 (1989). Conversely, people may perceive gays and lesbians as "out" though we believe (or pretend to believe) we are still in our (glass) closet. Just as a fair-skinned black woman is more likely to be recognized as black by those who know her background, gay men and lesbians may be less closeted than they suppose among their friends and colleagues. One junior colleague of mine, in raising a domestic partnership question with an older, straight colleague, met the response, "Don't worry what the faculty will think. We all knew you were gay and we like you just the way you are." Personal communication from Clark Freshman.

Passing in the sexual orientation context is also complicated by issues of category definition and context. For those of us whose sexual orientations, on a variety of dimensions, are complex and shifting, the presumption of straightness is clearly inaccurate, but so are the alternative ready-made identities. Yet discussion, especially personalized discussion, of issues of sexuality make people uncomfortable.

particular problem in its invisibility. A large proportion of those who identify themselves as black and are considered as such by the African-American community carry visible markers of their racial identity in skin and hair sufficient for whites to see them as black. Even if those who are visibly black are not a random sample, because of the continuing linkages of color and status, most whites will know or at least know of Blacks in positions across the socio-economic spectrum.⁷⁷ Those people whom the heterosexual community is most certain to know as gay or lesbian, however, are a highly atypical group by demeanor and by presumed socio-economic markers. For too many straight people, the only gays they think they know or know of are the drag queens and dykes on bikes who comprise the sensationalized pictures of gay pride parades.⁷⁸ The response of many people to claims of gay rights might well be different if they knew that their dentists, the construction worker on the corner, the accountant across the street, and, yes, even their sister, were gay or lesbian.⁷⁹ Passing has severe community costs. Collective efforts to define and publicize the extent of our community may protect us by countering the efforts of the right to define the meaning and scope of queerness.⁸⁰

Both the costs and benefits of passing are rooted in the significance of these identity categories. Gays and lesbians pass because of the hegemonic assumptions of compulsory heterosexuality. Racial passing is a phenomenon of blacks' passing as white and not the reverse,⁸¹ because of the rules of hypodescent and because in our society whites claim and receive a property value in their whiteness.⁸² Scales-Trent rejects this unjustified privi-

⁷⁷ This knowledge is partly a result of the media's finding newsworthy successful African Americans and the Benneton phenomenon of advertising in which at least one token Black is included.

⁷⁸ Cf. Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 613-14 (1992) (arguing that, given the costs of coming out, those who can pass—that is, those whose personal styles do not make their homosexuality evident—are likely to do so).

⁷⁹ See generally MARSHALL KIRK AND HUNTER MADSEN, *AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE 90s* (1989). Cf. SCALES-TRENT, *supra* note 2, at 89-91 (noting the many occupations of fair-skinned black persons, with whom whites may interact not knowing that they are black). While such widespread coming out is thus likely to be politically beneficial, it is risky. Many straight people recharacterize coming out as "flaunting," even when the behavior is similar to their own, for example, having a lover's picture on one's desk.

⁸⁰ The question of the power of the lesbian and gay community to define itself raises two distinct issues. First, who has the authority to include individuals within the category? Is it morally or legally permissible to out people against their will? Second, who has the authority to define the boundaries of the community? Are bisexuals part of the gay and lesbian community, are they a distinct category, or are they, as some gay and lesbian activists insist, simply gays and lesbians without the courage of their convictions? See generally Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. 98 (1995) (discussing critical responses of both the gay and straight communities to the category disruptiveness of bisexuality).

⁸¹ The only cases of reverse passing of which I am aware are, first, a white author in the 1950s who colored himself to explore Southern racism, see JOHN GRIFFIN, *BLACK LIKE ME* (1961), and, second, the transparent strategy of claiming affirmative action benefits without taking on any aspect of blackness, see *infra* text accompanying note 87.

⁸² See, e.g., Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1994). Gregory Williams' book vividly demonstrates that whiteness is a valuable property, and that the loss of white

lege of whiteness when she claims her black identity. She rejects the option of crossing the racial divide in favor of working to bridge it.⁸³

4. Authority to Determine One's Own Identity

The concept of passing embodies a notion of multiple possible identities, and privileges the *self-experienced* identity as true, while the beliefs of others are the result of the person's successful deception. Can someone whose self-identity is consistent with the perceptions of others, then, ever be said to be passing? Scales-Trent writes that "I also know black people who did not know they were black until they found out by accident in their later years. And I know of black people whose parents have decided to never tell them they are black."⁸⁴ Is this last person "black" on any criteria but the racist concept of hypodescent?⁸⁵

Scales-Trent seems sometimes to suggest that there is a true racial identity, so that classifications by others—or even perhaps by the person classified—could be wrong. She asserts that she *is* a black woman who is often mistaken for white. In rejecting bureaucrats' categorizing her as white, she says, "[T]hat decision was made some fifty years ago when I was born, when the state required that my parents indicate my race for the birth certificate."⁸⁶ Her racial identity is determined in the first instance historically, although, as her discussion of passing demonstrates, subject to contemporary concurrence both by herself and by others.

One cannot create an effective self-identity in a vacuum. Indeed, one's sense of self-identity will reflect the assessments of others. Furthermore, it would be normatively inappropriate to give people unreviewable authority to determine their own identity, at least absent a good faith limitation. For example, the Boston Fire Department was surely right to decide that the Malone brothers, fair-skinned sons of a white family who had lived their lives as whites, were not entitled to be treated as Blacks for purposes of affirmative action simply by checking off the box "black" on their applications for promotions.⁸⁷ A somewhat more complex situation of self-naming

identity entails real costs. His white maternal grandparents, who had welcomed him as a visitor from Virginia when he was still "white," studiously ignored him when he returned to their home town as black. WILLIAMS, *supra* note 12, at 111-13.

⁸³ Compare Scales-Trent's response to that of Horace Plessy, who challenged enforced racial segregation by claiming that as a man with predominantly white ancestry and fair skin he was misclassified as black. *Plessy v. Ferguson*, 163 U.S. 537, 541 (1896). López discusses the ways in which choices can be made across the racial divide, but always inflected by the context of racism. López, *supra* note 16, at 49-50.

⁸⁴ SCALES-TRENT, *supra* note 2, at 89.

⁸⁵ See *supra* text accompanying notes 82-83. Perhaps an impish lawyer might describe such persons property interest in their whiteness as defeasible.

⁸⁶ SCALES-TRENT, *supra* note 2, at 75.

⁸⁷ See Ford, *supra* note 45, at 1232-34. The Malones' choice is easy since it appears that no one in their white community believed their claim was serious and thus no unintended consequences flowed from the claim. In other contexts, self-claimed identity may not so easily be cabined by the purpose for which it was made. For instance, in *Show Boat*, when Steve sips a drop of Julie's

contrary to at least some standard markers was that of Stockton City Councilman Mark Stebbins, who was accused of lying about his race to get votes. Stebbins, who had successfully run in a majority-minority district, proclaimed himself to be black, though his parents and siblings identified themselves as white. Stebbins based his racial identification on his ambiguous appearance and his "belief that he had a black ancestor who had passed as white."⁸⁸ These cases are disturbing because the claimed identities do not coincide with society's view of these individuals. Social consequences flow from the categorization as white or black; to claim the identity without accepting the consequences is absurd.

It is more productive to insist on the multiplicity and fictionality of race and other identity categories. When either whites or Blacks classify Scales-Trent in racial categories, those classifications have material effects and are, in that sense, real. But each classification is only provisional: each label conflicts with how others classify her and often with her own sense of herself. As she says elsewhere, "I often think and speak as if the categories 'black' and 'white' are real. . . . But living on the margin forces me to live with, and therefore to see, the complications."⁸⁹

D. Context

Issues of authority to classify are inevitably entangled with issues of context: one's identity and especially the salience of that identity shift with time and place.⁹⁰ As Scales-Trent herself notes, this contextuality is true of race. Like Zora Neale Hurston in Eatonville,⁹¹ Scales-Trent is only incidentally black in Washington, D.C. where blackness is assumed; in largely white Buffalo, her race becomes more central to her identity.⁹² Similarly, James Baldwin described himself as a Negro in America and an American

blood to save them from the Mississippi sheriff's impending arrest for miscegenation, would he be free thereafter to return entirely to his white status? See *SHOW BOAT* (Universal 1936).

⁸⁸ Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States' Definition of Race and Racial Classifications*, 48 *VAND. L. REV.* 513, 517 (1995).

⁸⁹ SCALES-TRENT, *supra* note 2, at 64.

⁹⁰ Predictably, however, salience of identity is strongest for those on the less powerful end of the continuum. For example, blackness is more salient than whiteness, homosexuality than heterosexuality. See Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 *BERKELEY WOMEN'S L.J.* 191, 208 (1989-90) (describing how we tend not to use unmarked categories like white or heterosexual in response to a request to "write down three self-descriptive nouns or adjectives"); Sue Wilkinson & Celia Kitzinger, *The Social Construction of Heterosexuality*, 3(3) *J. GENDER STUD.* 307, 313 (1994) (while "heterosexuality is not a political identity for heterosexual feminists," for "many lesbian feminists, accepting the label 'lesbian' is a defiant act of self-naming").

⁹¹ ZORA NEAL HURSTON, *How It Feels to be Colored Me, in I LOVE MYSELF WHEN I AM LAUGHING . . . AND THEN AGAIN WHEN I AM LOOKING MEAN AND IMPRESSIVE* 152, 152-53 (Alice Walker ed., 1979).

⁹² SCALES-TRENT, *supra* note 2, at 128. Similarly, Scales-Trent's "race" is not the same as that of a dark-skinned Black. "[I]f you have to say that you are black, if your skin doesn't say it for you . . . [h]ow can you be family?" *Id.* at 29.

in France; by contrast, an Algerian would be “raced” in France, but ethnic here.⁹³

Because race is so overwhelmingly and pervasively important in American law and culture, however, it is often hard to see its contextual nature. The contextuality of identity may be more easily examined in the first instance through other, less politically charged, identity categories, such as disability or religion. Here, as elsewhere, I acknowledge that analogies among identity categories are always imperfect.⁹⁴ Nonetheless, there are commonalities at a conceptual level (for example, issues of authority to categorize arise for all identities), and so long as we bear in mind the risk of false analogies and of burying others’ concerns under an appropriative claim that we are all similarly oppressed, such analogies can help us gain a deeper understanding of the process of identity construction.

Consider both the meaning and the salience of the category of disability. As Martha Minow has noted, disability is inherently contextual: one is disabled only insofar as the situation makes certain physical attributes problems. In a world in which ramps and other accommodations were universal, using a wheelchair rather than legs would be a difference rather than a handicap.⁹⁵

Religion provides an even clearer example of contextuality. The meaning and importance of being Jewish, for example, vary wildly.⁹⁶ I do not think about it at all when I go to a movie on Friday night, but that fact might mean to an Orthodox Jew that I am, though formally Jewish, the religious equivalent of a race-traitor. My brief marriage to a gentile, performed by a willing Reform rabbi, would not be recognized by an Orthodox Jew: in fact, it would be grounds for treating me as if I were dead. My sense of myself as Jewish makes me shiver when I read about the Aryan Nation. My identity as a progressive Jew forces me into complicated self-

⁹³ *Id.* at 68, 127-28.

⁹⁴ See Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-Isms)*, 1991 DUKE L.J. 397 (1991). In acknowledging that analogies between different forms of oppression are always imperfect, I do not suggest that the identity of being black and racially oppressed, for example, is biologically essentialist and thus conceptually unavailable to one without the indicia of blackness. Rather, I suggest that in our currently existing world, racism and other forms of oppression are both rooted in falsely essentialist notions of the meaning and boundaries of a category like race and have material effects on those who are subject to them. As someone subject to other forms of oppression, I may more readily be able to make the empathetic leap; but that leap will never be fully equivalent to the experience of racism. See also Minnie Bruce Pratt, *Identity: Skin Blood Heart*, in BULKIN, ET AL., *supra* note 40, at 11, 41 (explaining the need for each of us to do our own work rather than relying on the work of others).

⁹⁵ MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 319-20 (1990). As someone with 20-200 vision, I would have been significantly disabled for many tasks in a world without eyeglasses.

⁹⁶ See also FRANKENBERG, *supra* note 24, at 217 (explaining that she discovers from her Jewish informants “a sense of cultural belonging as flexible—but flexible within a determinate range of options or meaningful expressions of Jewish identity”). See also Avi Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 WASH. & LEE L. REV. 381 (1991).

analysis when I react to anti-Semitism by African Americans, or to the Intifada and the response of the Israeli government. I feel a connection with, even a responsibility for, the state of Israel very different from my reaction to the activities of China or France. Yet I also feel uncomfortable with the notion that I have a right to immigrate under Israeli law because of my great-grandmother's wholly-lived Jewish identity in a Russian shtetl. Furthermore, though intellectually I reject the very notion of biological race, I find myself thinking that someone "looks Jewish," when they have my dark coloring and my father's hooked nose.⁹⁷ Indeed, I understand why Jews can be seen as imperfectly white, particularly in those times and places where they have been racially excluded.⁹⁸ I am inspired, moreover, to reflect on my complex reactions to claims of Jewish group identity in part by my reading of Scales-Trent's musings on issues of racial solidarity and individualism in the African-American community.⁹⁹

Scales-Trent's book illustrates the fluidity, contextuality and complexity of identity.¹⁰⁰ She uses the metaphor of Navajo skinwalkers to explore "how we all 'skinwalk'—change shapes, identities, from time to time, during the course of a day, during the course of our lives."¹⁰¹ By reminding us of the importance of context, Scales-Trent encourages us to resist the seemingly natural impulse to categorize people into those rigid, oversimplified classifications¹⁰² that the law tends to impose and then reify.

⁹⁷ Meanwhile, I find myself in the position to hear anti-Semitic remarks and jokes more easily because my name allows me to pass unless and until I consciously and explicitly "come out."

⁹⁸ Cherríe Moraga has reflected on the imperfect whiteness of Jews:

They were like us in this.
Ethnic people with long last names
with vowels at the end or the wrong
type of consonants
combined a colored kind of white people.

Cherríe Moraga, *Winter of Oppression, 1982*, in *LOVING IN THE WAR YEARS: LO QUE NUNCA PASÓ POR SUS LABIOS* 73-74 (1983). Yet many Jews feel deeply uncomfortable about anything that sounds like quotas as a response to racial subordination, given the historical use of quotas to exclude Jews from elite institutions. See NATHAN C. BELTH, *A PROMISE TO KEEP: A NARRATIVE OF THE AMERICAN ENCOUNTER WITH ANTI-SEMITISM* 96-110, 185-97 (1979). Note also the assumption here that Jews are white. In Miami, I have learned that there are many Latino and Latina Jews who share many if not most of the ethnic, linguistic, and other characteristics of non-Jewish Latinos and Latinas.

⁹⁹ See, e.g., SCALES-TRENT, *supra* note 2, at 68-71.

¹⁰⁰ Critical race theory, feminism, and queer theory have been invaluable in demonstrating the importance of context and particularity. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 42-43 (1995); Harris, *supra* note 35; Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender,' and 'Sexual Orientation' in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995).

¹⁰¹ SCALES-TRENT, *supra* note 2, at 127.

¹⁰² The felt need to categorize is so strong in our culture that it feels natural. Some have suggested, however, that it is a culturally conditioned artifact of Western Cartesian thought. See, e.g., Ann C. Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95 (1990); Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 453 (David Kairys ed., 1990).

III. POLITICAL IMPLICATIONS OF IDENTITY CONSTRUCTION

What are the implications of recognizing the multiplicity, complexity, and fictitious nature of identity? It means, first, that identity can be deployed strategically and politically.¹⁰³ I do not mean that one can simply choose one's identity.¹⁰⁴ One's sense of identity is highly constrained. As Scales-Trent says, she wears the label black both "to show solidarity" and because it is "really mine and no one may take it from me."¹⁰⁵ Nor can we simply wish away such identity-based phenomena as race or racism. Racial identity is both real and unreal, both "all smoke and mirrors" and "profoundly serious, because so many fall for the trick."¹⁰⁶ Nonetheless, identities are not essential and unchangeable; they are subject to collective and perhaps individual reconceptualization. As we claim identities, we reshape the meanings of the categories we use. Consider four newer categories¹⁰⁷ that are still under construction: "people of color," "mixed-race" or "biracial," "bisexual," and "queer."

A. People of Color

The notion of an identity as a person of color (or its feminist counterpart, "woman of color") is, I believe, a relatively recent phenomenon.¹⁰⁸ It is a means of conscious coalition building and an intellectual commitment to examining the commonalities and differences among people who share

¹⁰³ The politics of identity and identity consciousness operate on many levels. For those among us who are academics, we ought to (and sometimes do) consider the role of identity in scholarship and in the construction of our academic community. See, e.g., Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705; Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758. We must also take into account our own identity as it may affect our scholarship. See Peter Halewood, *White Men Can't Jump: Critical Epistemologies, Embodiment, and the Praxis of Legal Scholarship*, 7 YALE J.L. & FEMINISM 1 (1995) (discussing role white men can play in race-conscious scholarship). Cf. Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991) (scholarship by African Americans can, but need not be, written in an identity-inflected voice).

¹⁰⁴ See *supra* text accompanying notes 87-88.

¹⁰⁵ SCALES-TRENT, *supra* note 2, at 75.

¹⁰⁶ *Id.* Kendall Thomas makes a similar observation in his analysis of *Bowers v. Hardwick*, 478 U.S. 186 (1986) (refusing to extend Constitutional protection for the fundamental right of privacy to consensual homosexual sodomy). Thomas warns us to beware drawing the "inference that because the 'homosexual' and 'heterosexual' identities the Supreme Court constructed in [*Bowers*] are false, they are therefore not real. Stated bluntly, we ought not forget that conviction under the statute Michael Hardwick was charged with violating could be punished by imprisonment for up to twenty years." Kendall Thomas, *Corpus Juris (Hetero)sexualis: Doctrine, Discourse and Desire in Bowers v. Hardwick*, 1 GLQ: J. LESBIAN & GAY STUD. 33, 47 (1993).

¹⁰⁷ Obviously, I do not mean that biracial or bisexual people, for example, are new. What is new is the conscious construction of these as categories of identity.

¹⁰⁸ Some of the classical writings by and about women of color can be found in *Women of Color at the Center: Selections From the Third National Conference on Women of Color and the Law*, 43 STAN. L. REV. 1175 (1991) and *Symposium: In Your Midst: Contributions of Women of Color in the Law*, 28 HARV. C.R.-C.L. L. REV. 259 (1988). See also *Women of Color in Legal Academia: A Biographical and Bibliographical Guide*, 16 HARV. WOMEN'S L.J. 1 (1993). As indicated in the Stanford symposium proceedings, the Women of Color conferences began in approximately 1988, which was also the year of the first people of color conference of legal academics. See Coombs, *supra* note 4, at 692.

this umbrella identity. Scales-Trent, for example, uses the literature of a variety of women of color—Latina, Asian, and Native American—to explore the complexities of identity. In their common reliance on tradition and family and language as sources of strength, they help her understand how “we are the same in our differences.”¹⁰⁹

The academic movements that draw together scholars of color reflect a broad commitment to considering such commonalities and differences. African Americans, Latinos and Latinas, Asians, and Native Americans share common experiences, but also differ significantly in how they define themselves and how they are treated by Euro-Americans. Understanding and politics are thus shown to be local, contingent and contextual. Because the category is consciously and explicitly coalitional,¹¹⁰ it makes obvious a truth about every identity category: its overinclusiveness. No matter how narrowly the category is defined, it treats as similar people who are always more than their common identity as, say, black female North American middle-class middle-aged heterosexual law professors.

B. Mixed-Race or Biracial

The politics of a biracial or mixed-race category are quite different from those of a people of color category. If a mixed-race category were to be generally recognized, it would require us to focus on the different criteria by which we make racial categorizations. By appearance, Scales-Trent is a genetic admixture of black and white ancestry. Yet she experiences herself as black, and grew up as black within a community and family who felt themselves to be black and shared black culture. Her experiences only partially overlap with those of a person whose parents grew up in different racial or cultural milieus. Mixed-race people’s sense of their own identity as black, white, or biracial will presumably reflect their color and their upbringing. A biracial child brought up by her single black mother in a black community would have a different sense of her racial identity than a similarly-hued child brought up by two parents who exposed her to both racial cultures or one adopted by a white couple and raised as if she were wholly white.

The recognition of the category mixed-race might seem a way of recognizing complexity and multiplicity, of allowing individuals to insist on social and legal recognition of their own self-experienced complex racial identity.¹¹¹ Yet there are wider political implications. As the politics of

¹⁰⁹ SCALES-TRENT, *supra* note 2, at 23.

¹¹⁰ “[T]he expression ‘people of color’ [creates a homogenous collectivity] as the term which designates all those who are not white . . .” Tyler, *supra* note 60, at 220.

¹¹¹ In one of his poems, Langston Hughes described the ambiguity of biraciality:

My old man’s a white old man
 And my old mother’s black . . .
 My old man died in a big fine house

biraciality make clear, identity is constructed simultaneously as a category and as an assignment of individuals within that category.¹¹² The rules of hypodescent dictate that biracial people will otherwise be considered black, not white.¹¹³ Because of the extent of interracial sex in America, particularly in the antebellum South, the vast majority of African Americans, regardless of color, are descendants of whites as well as Blacks.¹¹⁴ Statistical estimates of the number of Blacks have for the last thirty years affected voting district boundaries and legally significant demographics of employment and academic enrollments, as well as public assessments of the reality and significance of the black experience. What cost might there be to those who identify as black (the vast majority of whom are genetically mixed-race) if the census added a mixed-race category?¹¹⁵ Does the mixed-race category make sense as a new racial or ethnic¹¹⁶ category, or is it simply a way of avoiding the implications of being (seen as) black? Will the recognition of a mixed-race category erode or entrench the white racism embedded in the existing categories and the means by which people are assigned to them?

In effect, to extend Scales-Trent's analogy of race and geography, people seeking recognition as mixed-race are seeking to secede, as individuals, from blackness.¹¹⁷ Simultaneously, they call into question the boundaries

My ma died in a shack
I wonder where I'm gonna die,
Being neither white nor black.

Langston Hughes, *Cross*, in *COLLECTED POEMS OF LANGSTON HUGHES* 58 (Arnold Rampersad ed., 1995).

¹¹² The law participates in as well as reflects this construction. Thus, for example, the laws against miscegenation were passed because the legislature perceived and abhorred interracial sexuality. But such laws also required a definition of race that responded to the historic facts of such unions. In *State v. Treadway*, 126 La. 500 (1910), the court held that a sexual relationship between a white man and an octoroon was not prohibited by a statute that forbade concubinage between persons of the "white race" and "the negro or black race," since she was not black. The Louisiana legislature quickly responded by passing a bill that substituted "person of the colored or black race" for "person of the negro or black race." DOMINGUEZ, *supra* note 11, at 30-32.

¹¹³ "In common parlance, a person whose parents come from two different ethnic or racial groups will be identified by reference to the nonwhite, subordinate, named, or marked group rather than the dominant and therefore normative white heritage . . ." FRANKENBERG, *supra* note 24, at 98. As Scales-Trent notes when discussing her family roots, for white America " 'family' stops where 'black' begins." SCALES-TRENT, *supra* note 2, at 63. See Zack, *supra* note 10, at 122. The only possible exception would be people who "passed" as white or their descendants who would acknowledge themselves as mixed-race if they could.

¹¹⁴ Some estimates are that 75-90 percent of all African Americans have some white ancestry. Zack, *supra* note 10, at 125 (citing JOEL WILLIAMSON, *NEW PEOPLE* 9-16, 125 (1980)). Patricia Williams, a black woman who is unmistakably black in appearance, has written extensively about her slave great-great-grandmother, Sophie, and her white slave-owning great-great-grandfather, Austin Miller. WILLIAMS, *supra* note 20, at 216-17.

¹¹⁵ See Lawrence Wright, *One Drop of Blood*, *THE NEW YORKER*, 47, July 25, 1994.

¹¹⁶ Insofar as we accept Scales-Trent's invitation to reconceptualize race as ethnicity, mixed-race becomes especially peculiar. It categorizes someone not as having a particular "mixed-race" culture, but as being part of two different cultures. Many African Americans and members of other subordinated groups are already bicultural, for they need to learn the dominant culture in order to thrive on the terms it sets.

¹¹⁷ One may draw a parallel here to the complex relationship between the gay and lesbian community and self-identified bisexuals. See *supra* note 74. Again, those who identify themselves or are

that have been drawn around the country of whiteness, by questioning the credentials of many of its citizens. When and how and to what extent such secession should be recognized is a political and strategic question, not merely one of discovering and proclaiming the truth of an identity.

C. Bisexuality and Queerness

The categories bisexual and queer have emerged in reaction to oversimplified dichotomies of sex, gender and sexual orientation. Just as essentialist racial identities do not capture many individuals' sense of themselves, the dichotomies male/female, masculine/feminine, and straight/gay do not accurately reflect many persons' self-identity.¹¹⁸ While, with rare exceptions, one is anatomically male or female, people are more or less masculine or feminine. There is not one continuum here, but at least two: a male exhibiting a particular congeries of gender traits (clothing, hair style, walk, recreational interests, degree of aggression, occupation) would be seen as very different from a female exhibiting identical traits. The categorical complexity within sexual orientation is even greater. Leave aside for the moment the ways in which one's sexuality may be differently oriented, not by the sex or gender of one's partners, but by such criteria as intensity of sexual desires or attitude towards complex emotional relationships versus raw, uninvolved physical encounters.¹¹⁹ Even the apparently simple dichotomy of heterosexuality and homosexuality is false. Kinsey's studies indicate that most people are not wholly one or the other. Whether our criteria are sexual experiences, desires, or fantasies, most people exhibit a mix of heterosexual and homosexual characteristics.¹²⁰

Finally, the continua of sex, gender and sexual orientation are complexly interrelated. People attribute sexual orientation based on assessments of sex and gender. A masculine man is seen as straight, whether he understands himself to be gay or not; an effeminate man is perceived as

identified as ambiguously situated vis-à-vis an allegedly dichotomous category may respond in two ways. Some may seek to define a new category, with its own boundaries and membership criteria, such as bisexual or mixed race. Others may seize on the existence of such boundary-blurring persons to rethink the very meaning and possibility of categorization. Or the same people may engage in both strategies, shifting strategically between the political claim of identity and the deconstructive, theoretical argument against identity. Cf. MARJORIE GARBER, *VICE-VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE* (1995) (exploring such alternatives for understanding bisexuality and using bisexuality to understand sexualities).

¹¹⁸ See Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1 (1995); Valdes, *supra* note 100.

¹¹⁹ See EVE KOSOFKSY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 25-26 (1990) (noting the range of axes of variation, in addition to sex of partner, in sexual desire and activity). Cf. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267, 280-82 (Carol S. Vance ed., 1984) (exploring many varieties of sexual desires and experiences).

¹²⁰ See ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 636-47 (1948); ALFRED C. KINSEY, ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 468-74 (1953).

gay, regardless of whom he sleeps with.¹²¹ Cross-dressers are assumed to be gay, though most of them self-identify as heterosexual. Conversely, conforming to gender rules makes one appear straight. Thus, many of us, deliberately or inadvertently, spend much of our lives “passing.” Someone who wishes to make his or her gay identity visible can do so most readily by taking on the gender characteristics (falsely) associated with that sexual orientation. And, of course, straight people learn to take on the “right” gender¹²² and thus to signal their straightness.¹²³

While one could in theory reserve the terms homosexual and heterosexual for those few people who are unambiguously at one or the other pole and call the rest of us bisexual, such a construction of sexual orientation would be revolutionary. Bisexuality, even in a less hegemonic guise, threatens the boundaries of both the heterosexual and the homosexual communities.¹²⁴ Again, the less favored group, who see recognition of their identity as more fragile, may be particularly hostile. The lesbian and gay community often sees the claim to be a “bi” as embodying selfishness or false consciousness in denying one’s “true” gay identity. As with biracial identity claims, it is an open question what the political impact of category reconceptualization might be. Multi-racial people might join under an umbrella of people of color; bisexuals, along with gays, lesbians and transgendered persons might define themselves collectively as queer.¹²⁵

Both race and sexual orientation are rooted in part in biological facts like skin color or genitalia, but these are of no more inherent significance than the color of one’s eyes or the shape of one’s ears.¹²⁶ The identity categories that have such pervasive political and cultural significance are socially constructed, not biological, facts. “One must *learn* to be ‘black’ in this society, precisely because ‘blackness’ is a socially produced category.”¹²⁷ The active nature of this identity construction is especially evident in the context of sexual orientation. The acts of “outing” and “flaunting” and “closeting”—concepts developed to describe the processes of gay identity formation—have resonances for the meaning of one’s racial

¹²¹ See, e.g., Case, *supra* note 118; Valdes, *supra* note 100. This conflation is most clear from the perspective of the dominant, straight community. Within the gay community, issues of masculinity and femininity are far more contingent and complex. At certain times and places, for example, the culturally desirable gay man was a hyper-masculine clone. Cf. Fajer, *supra* note 78, at 615-16 (discussing the differentially gendered nature of relationships among gay couples).

¹²² SIMONE DE BEAUVOIR, *THE SECOND SEX* 301 (1952) (“One is not born, but rather becomes, a woman.”).

¹²³ Consider how complicated such signaling issues become for bisexuals, who may feel the need to correct misperceptions by both gay and straight people.

¹²⁴ See generally Mezey, *supra* note 80.

¹²⁵ See Mary Coombs, *Between Women/Between Men: The Significance for Lesbianism of Historical Understandings of Same-(Male)sex Sexual Activities*, YALE J.L. & HUMAN. (forthcoming 1996) (manuscript at 38, on file with author) (advocating such a coalition under the umbrella of queerness).

¹²⁶ Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977).

¹²⁷ HENRY LOUIS GATES, *LOOSE CANONS: NOTES ON THE CULTURE WARS* 101 (1992).

or ethnic or religious identity. The burgeoning literature of queer theory provides a new understanding of identity that can be applied in other contexts.¹²⁸ In particular, queer theory has engaged with the tension of simultaneously using and deconstructing identity categories.¹²⁹

Queer theory helps us understand how all identity categories are *created* rather than simply revealed. For many people, unlike Scales-Trent, race seems obvious and fixed, even if the significance attributed to it is socially constructed. But, at least in any culture where we do not walk around naked, gender and sexual orientation are always recognized as performative. We are all always demonstrating who we are by what we do.¹³⁰ Sexual identity is a practice, not a thing. Some scholars recognize that racial identity is also a practice.¹³¹ As Scales-Trent says, “‘race’ . . . is a continuing act of imagination. It is a very demanding verb.”¹³² Our identity, both as we understand it¹³³ and as it is perceived by others, is¹³⁴ the result of a series of actions we take in particular contexts, with varying (often very narrow) degrees of freedom.¹³⁵

¹²⁸ “[Q]ueerness . . . serves to highlight an irresolvable tension between, on the one hand, the deconstruction of the categories of identity; and, on the other, the political necessity of invoking (often in a fairly totalizing way) those same categories.” Carl F. Stychin, *To Take Him ‘At His Word’: Theorising Law, Sexuality and the U.S. Military Exclusion Policy 5* (paper presented at Law and Society, June 1995) (copy on file with author).

¹²⁹ “As much as it is necessary to assert political demands through recourse to identity categories, and to lay claim to the power to name oneself . . . it is also impossible to sustain that kind of mastery over the trajectory of those categories within discourse . . . the term ‘queer’ is to be a site of collective contestation.” Judith Butler, *Critically Queer*, 1 *GLQ: J. LESBIAN & GAY STUD.* 17, 19 (1993). See also DONNA J. HARAWAY, *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE*, 156, 157 (1991) (“What kind of politics could embrace partial, contradictory, permanently unclosed constructions of personal and collective selves and still be faithful, effective . . . ?”); Tyler, *supra* note 60, at 222 (“[t]otalizations of identity seem to be a necessary political strategem in the ongoing war of hegemony and resistance to it. Deploying identity fictions we recognize as such we wish to practice . . . ‘strategic essentialism.’”).

¹³⁰ The “are” in that sentence should not be misconstrued. It is not a fixed thing that is revealed, but a contingent and shifting quality. See generally JUDITH BUTLER, *GENDER TROUBLE* (1990); Valdes, *supra* note 100.

¹³¹ See, e.g., López, *supra* note 16, at 7 (“[r]ace is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing *process* subject to the macro forces of social and political struggle and the micro effects of daily decisions” (emphasis added)). A parallel and extended analysis of the performative, constructed nature of sexual orientation identity can be found in BUTLER, *supra* note 129.

¹³² SCALES-TRENT, *supra* note 2, at 3.

¹³³ Our self-understanding of identity might better be described not as a practice but as a narrative we tell ourselves. It always entails the possibility of change as the facts and the interpretation of our autobiographies shift. Cf. GARBER, *supra* note 117 (arguing that sexual identities exist only through such narratives and thus are dependent on a language that our culture makes available to us). As Foucault demonstrates, one could not understand oneself to be a homosexual before that concept was culturally available. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOL. I: AN INTRODUCTION* 42-43, 101 (1980).

¹³⁴ If I were writing this essay in Spanish, I would say “estoy” white or Jewish rather than “soy,” the form of the verb “to be” ordinarily used for identity categories, since “estar,” usually used for location, embodies the notion of change.

¹³⁵ We do not freely choose an identity in the morning as we choose a set of clothes. Although some transgendered people, who shift between male and female identities, may appear to do so, their guise as “male” and as “female” is only successful in this culture insofar as their transgendered identity is hidden.

IV. CONCLUSION

I have suggested here the value, epistemologically and politically, of recognizing the complexities and ambiguities of identity. We will understand the categories and their intersections better if we recognize that everyone exists at the intersection of categories, but everyone is also more than the intersection of categories. Identity politics is, by its nature, coalitional, for every identity category is an incomplete definition of the persons included therein.¹³⁶ After noting the effect of intersectionality in undermining the asserted essentialism in a term like “women,” Donna Haraway says:

[T]here was also no “she,” no singularity, but a sea of differences among US women who have affirmed their historical identity as US women of colour. This identity marks out a self-consciously constructed space that cannot affirm the capacity to act on the basis of natural identification, but only on the basis of conscious coalition, of affinity, of political kinship.¹³⁷

One advantage of recognizing this is that it facilitates coalitions across lines that might seem to divide us.¹³⁸ It also brings to the surface the strategic and political aspects of identity categorization.¹³⁹

¹³⁶ “The community of signifying clones whose identities are clear, communications transparent, and desires identical is therefore a fantasy based on the repression of differences within both the self and the community.” Tyler, *supra* note 60, at 233. The differences within identity categories are potentially a source of strength as well as tension. Cf. Audre Lorde, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER* 110, 111-12 (1984) (“Difference [among women] must be not merely tolerated, but seen as a fund of necessary polarities between which our creativity can spark like a dialectic”).

¹³⁷ HARAWAY, *supra* note 129, at 156 (footnote omitted).

¹³⁸ See, e.g., BULKIN, ET AL., *supra* note 40 (including perspectives on these potentially divisive issues of a Jewish woman, an African-American woman, and a white Southern woman.) To recognize the coalitional nature of politics, including identity politics, is, in effect, to reverse the false unity of umbrella identity categories, like “woman” as articulated by and about middle-class white women. It recognizes that common oppressions are only a part of the story. Cf. BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 44 (1984) (“The idea of ‘common oppression’ was a false and corrupt platform disguising and mystifying the true nature of women’s varied and complex social reality”). But it also recognizes that *all* identity categories, for example black lesbian, will partake of this contingent, coalitional quality. Cf. GLORIA I. JOSEPH & JILL LEWIS, *COMMON DIFFERENCES: CONFLICTS IN BLACK & WHITE FEMINIST PERSPECTIVES* 3 (1981) (“We can no more speak of White women as one amalgamated body than we can refer to Black and White women in such a manner”).

While identity is important to the development of an adequately informed politics, I reject the argument that it is either necessary or sufficient, though I understand the feelings of exclusion that may underlie such claims. Cf. *Combahee River Collective Statement*, in *HOME GIRLS: A BLACK FEMINIST ANTHOLOGY* 272, 275 (Barbara Smith ed., 1983) (“We believe that the most profound and potentially the most radical politics comes directly out of our own identity, as opposed to working to end somebody else’s oppression”). At its best, queer politics explicitly adopts such a politically engaged, contextual, coalitional view of identity and the politics of identity assertion. See Mezey, *supra* note 80, at 139 (“Duggan . . . envisions a ‘queer community’ that explodes the constricting categories of gender and sexual identity in favor of a community ‘unified only by a shared dissent from the dominant organization of sex and gender’” (quoting Lisa Duggan, *Making It Perfectly Queer*, *SOCIALIST REV.* Jan.-Mar. 1992, 11, 20)).

¹³⁹ For example, in seeking diversity in law faculties, we must examine the purposes served by diversity and then, insofar as practical, define our categories of diversity in a way that furthers those purposes. We want a representation of African Americans, for example, as role models and mentors for the students of color, as bridges to the larger African-American community, and potentially as authors of scholarship in the voice of color. These goals suggest that the ideal candidate—in addition to having the qualifications we expect of all faculty candidates—would be

People who live at the margins of categories provide an especially valuable starting point for exploring all the ways that identity can be deconstructed or reconstructed. As Scales-Trent's book demonstrates, a white black woman lives such a life.¹⁴⁰ As suggested earlier, many Jews do as well. Our identity turns both on who we are (or are perceived to be) and how the category itself is defined by different people in different contexts.

Of course, disrupting our simpler notions of identity categories entails costs, both on an individual and a structural level. Structurally, there is a temptation to essentialize and biologize identities like woman or African American in order to bolster claims of group harm and group right to protection. Such claims may be useful, but we must always remember their dangers as well. On an individual level, regardless of our theoretical sophistication, we are often disturbed by boundary-crossers. Scales-Trent describes how people who mistake her for white and then discover she is black become anxious, disoriented, even angry, as if she had somehow defrauded them, because she has disrupted the categories through which their world is organized.¹⁴¹

Nonetheless, we must engage in the work of disturbing and disrupting and disorienting. We must recognize and demonstrate the ways that identity categorization is a process that is always already occurring, that identity is never simply a mirror of some pre-social reality. "[W]e must help [others] blur the categories, turn concrete walls to powder."¹⁴² It is only as we do so that we can simultaneously build up identity as a search for commonalities and coalitions, a contextual, provisional political strategy for mutual understanding and assistance across boundaries that can, but need not, divide us. As someone who may be, depending on who decides and for what reason, Jewish or not, presently able-bodied, white in a city where whites are not a majority, female, and always queer, though the meaning of that term is contestable, I want and need to participate in the process.

Scales-Trent's book is invaluable to that process at two levels. It is a rich and eloquent narrative of a particular woman's experiences "at the intersection of race and color" a position that forces her to "transgress boundaries" by her very existence. This narrative illustrates the inevitability and desirability of category confusion. The book also offers us the insights

black in culture, appearance, and in experiential understanding of racial subordination. Being deemed black in some other context, for some other decisionmaker's particular purposes, is indicative but not determinative. When a candidate is "black" on only some of those criteria, and being considered in contention with other, differently qualified candidates, we must struggle over the relative significance of these markers of identity. There is no politically neutral, universal right answer. We do not avoid the political fights that face us over diversity and affirmative action by obscuring the complexity and multiplicity of race. See, e.g., Halewood, *supra* note 103, at 15-19; Kennedy, *supra* note 103. Cf. Sharon Rush, *Understanding Diversity*, 42 FLA. L. REV. 1 (1990) (suggesting that we should focus on facial diversity as the best means of achieving diversity in its broadest sense).

¹⁴⁰ SCALES-TRENT, *supra* note 2, at 2.

¹⁴¹ *Id.* at 57-59.

¹⁴² *Id.* at 154.

of a brilliant law professor on the significance of that narrative. All of us can learn—as I have learned—from Professor Scales-Trent.