

2001

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Ohio State Law Journal, vol. 62, no. 3 (2001), 1145-1193.

<http://hdl.handle.net/1811/70462>

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# Racial Passing

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## I. PASSING: A DEFINITION

Passing is a deception that enables a person to adopt certain roles or identities from which he would be barred by prevailing social standards in the absence of his misleading conduct. The classic racial passer in the United States has been the “white Negro”: the individual whose physical appearance allows him to present himself as “white” but whose “black” lineage (typically only a very partial black lineage) makes him a Negro according to dominant racial rules. A passer is distinguishable from the person who is merely mistaken—the person who, having been told that he is white, thinks of himself as white, and holds himself out to be white (though he and everyone else in the locale would deem him to be “black” were the facts of his ancestry known).<sup>1</sup> Gregory Howard Williams was, for a period, such a person.<sup>2</sup> The child of a white mother and a light-skinned Negro man who pretended to be white, Williams assumed that he, too, was white.<sup>3</sup> Not until he was ten years old, when his parents

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<sup>1</sup> Some blacks have unknowingly been perceived as white. St. Clair Drake and Horace R. Cayton relate the experiences of a fair-skinned Negro woman who was initially treated with respect by a storeowner. Unbeknownst to her, the white proprietor took her to be a white person. The woman only learned of the mistake weeks later when she returned with her darker-skinned daughter. Seeing the woman in a new light, the proprietor immediately declined any further contact. ST. CLAIR DRAKE & HORACE R. CAYTON, *BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY* 160 (Harper & Row 1962) (1945). For similar but more recent episodes of racial “mistake,” see TOI DERRICOTTE, *THE BLACK NOTEBOOKS: AN INTERIOR JOURNEY* (1997), and JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY* (1995).

<sup>2</sup> GREGORY HOWARD WILLIAMS, *LIFE ON THE COLOR LINE* (1995). Gregory Howard Williams became a distinguished legal academic, serving as the Dean of The Ohio State University College of Law and the President of the American Association of Law Schools.

<sup>3</sup> What made Williams’s father a “Negro” was simply the ascendant convention that defined as a Negro anyone with a certain degree of Negro ancestry.

Williams’s father was the son of a Negro woman who served as a maid in the household of a rich white family in Bowling Green, Kentucky. His father was a young white man in that household. When his mother’s pregnancy became evident, her employer fired her. After the baby was born, whites and blacks none too gently suggested that Sallie Williams leave town with her “white nigger” baby. She resisted those demands until her older brother was murdered by unknown assailants; his mutilated body was found lashed to a railroad track. Fearing for her son’s safety, Sallie Williams fled to Muncie, Indiana, which became home to Gregory Williams’s father. WILLIAMS, *supra* note 2, at 62 (1995).

divorced, did Williams and his brother learn that they were “black” according to the custom by which any known Negro ancestry makes a person a Negro. Williams recalls vividly the moment at which he was told of his “new” racial identity:

I never had heard anything crazier in my life! How could Dad tell us such a mean lie? I glanced across the aisle to where he sat grim-faced and erect, staring straight ahead. I saw my father as I had never seen him before. The veil dropped from his face and features. Before my eyes he was transformed from a swarthy Italian to his true self—a high-yellow mulatto. My father was a Negro! We were colored! After ten years in Virginia on the white side of the color line, I knew what that meant.<sup>4</sup>

When he held himself out as white *before* learning of his father’s secret, Williams was simply mistaken. When he occasionally held himself out as white *after* learning the “true” racial identity of his father, Williams was passing. In other words, as I define the term, passing requires that a person be self-consciously engaged in concealment.<sup>5</sup> Such a person knows about his African American lineage—his black “blood”—and either stays quiet about it, hoping that silence along with his appearance will lead observers to perceive him as white, or expressly asserts that he is white (knowing all the while that he is “black” according to ascendant social understandings).<sup>6</sup>

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<sup>4</sup> *Id.* at 34. Preparing his sons for their new lives as blacks, Anthony Williams stated, “Life is going to be different from now on. In Virginia you were white boys. In Indiana you’re going to be colored boys. I want you to remember that you’re the same today that you were yesterday. But people in Indiana will treat you differently.” *Id.* at 33.

<sup>5</sup> The line can be thin indeed between concealment and declining to correct anticipatorily possible misconceptions. In the 1950s, Raven Wilkinson, a light-skinned African American dancer with the Ballet Russe de Monte Carlo, toured the American South, staying with her white colleagues in whites-only hotels. It could be argued that, under the circumstances, her silence meant she was concealing her racial identity and thus passing. It could also be argued that more than mere silence should be required before someone is deemed a passer lest the definition impose upon people in Raven Wilkinson’s circumstances an affirmative duty to disabuse observers of their possible misperception. As it turns out, when pushed to clarify her position, Ms. Wilkinson chose not to pass. When the manager of a Jim Crow hotel asked her directly if she was black, Ms. Wilkinson declared in the affirmative and was ordered to leave. See I’LL MAKE ME A WORLD (Blackside, Inc., 1998); Caryn James, *Black Artists Grappling With Profound Questions of Art and Race*, N.Y. TIMES, Feb. 1, 1999, at E8.

<sup>6</sup> For work that I have consulted in grappling with definitional and other problems associated with the concept of passing, see MARJORIE GARBER, SYMPTOMS OF CULTURE 141–52 (1998); SUSAN GUBAR, RACE CHALLENGES: WHITE SKIN, BLACK FACE IN AMERICAN CULTURE (1997); ADAM LIVELY, MASKS: BLACKNESS, RACE, AND THE IMAGINATION (2000); PASSING AND THE FICCTIONS OF IDENTITY (Elaine K. Ginsberg ed., 1996); WERNER SOLLORS, NEITHER BLACK NOR WHITE YET BOTH: THEMATIC EXPLORATIONS OF INTERRACIAL LITERATURE 246–84 (1997); GAYLE WALD, CROSSING THE LINE: RACIAL PASSING IN TWENTIETH-CENTURY U.S. LITERATURE AND

Estimates regarding the incidence of passing have varied greatly. Walter White claimed that annually “approximately 12,000 white-skinned Negroes disappear” into white society.<sup>7</sup> Roi Ottley asserted that there were five million “white Negroes” in the United States and that forty to fifty thousand passed annually.<sup>8</sup> Professor John H. Burma’s estimates were considerably lower. He posited that some 110,000 blacks lived on the white side of the color line and that between 2,500 and 2,750 passed annually.<sup>9</sup> Given its secretive nature, no one knows for sure the incidence of passing. It is clear, however, that at the middle of the twentieth century, large numbers of African Americans claimed to know people engaged in passing.<sup>10</sup>

## II. PASSING STORIES

“Blacks” have passed for “white” in a wide variety of circumstances.<sup>11</sup> One extraordinary instance occurred in 1848 when Ellen Craft—the daughter of a master and his slave mistress—escaped from bondage by train, boat, and carriage on a four-

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CULTURE (2000); G. Reginald Daniel, *Passers and Pluralists: Subverting the Racial Divide*, in *RACIALLY MIXED PEOPLE IN AMERICA* (Maria P.P. Root ed., 1992); Robert Westley, *First-Time Encounters: “Passing” Revisited and Demystification as a Critical Practice*, 18 *YALE L. & POL’Y REV.* 297 (2000); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Perception and the Case of Don’t Ask, Don’t Tell*, 108 *YALE L.J.* 485, 528 (1998).

<sup>7</sup> Walter White, *Why I Remain a Negro*, *SATURDAY EVENING POST*, Oct. 11, 1947.

<sup>8</sup> Roi Ottley, *5 Million U.S. White Negroes*, *EBONY*, Mar. 1948. Ottley became the adoptive father of the little girl at the center of a lawsuit to determine the girl’s race. See *Green v. City of New Orleans*, 88 So. 2d 76, 77 (La. Ct. App. 1956).

<sup>9</sup> John H. Burma, *The Measurement of Negro “Passing,”* 52 *AM. J. SOC.* 18, 20–21 (1946). See also William M. Kephart, *The “Passing” Question*, 9 *PHYLON* 336 (1948).

<sup>10</sup> See ST. CLAIR DRAKE & HORACE R. CAYTON, *supra* note 1, at 159 (“‘Passing’ is one of the most prevalent practices that has arisen out of the American pattern of race relations.”); LAWRENCE OTIS GRAHAM, *OUR KIND OF PEOPLE: INSIDE AMERICA’S BLACK UPPER CLASS* 376–93 (1999); GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 687 (1962).

<sup>11</sup> Racial passing has not been all one way. Whites have passed for black as well. Howard Griffin and Grace Halsell did so on a temporary basis to gather information about what it was “really” like to be black. Their journalistic exposes, *BLACK LIKE ME* (1961) and *SOUL SISTER* (1969), display that research.

White spouses of Negroes have also on occasion claimed that they were black in order to avoid the disapproval of individuals and authorities opposed to inter-racial marriages. See KATHRYN TALALAY, *COMPOSITION IN BACK AND WHITE: THE LIFE OF PHILPPA SCHUYLER* (1995); Joseph Golden, *Patterns of Negro-White Intermarriage*, 19 *AM. SOC. REV.* 144, 147 (1954); Renee C. Romano, *Crossing the Color Line: Black-White Interracial Marriage in the United States, 1945–1990* (1996) (unpublished Ph.D. dissertation, Stanford University).

day journey from Macon, Georgia, to Philadelphia, Pennsylvania.<sup>12</sup> Ellen Craft pretended to be white. Her slave husband was part of her disguise; he pretended to be her servant. And there was one more twist: Ellen Craft traveled not as a white woman but as a white man. To obtain freedom for herself and her husband, she temporarily traversed gender as well as racial lines.<sup>13</sup>

In contrast to the Crafts, who passed for whites to journey north to escape slavery, Walter White passed for white to journey south to investigate lynchings.<sup>14</sup> White was fair-skinned, blue-eyed, and blond-haired, the son of light-complexioned Negroes who were stalwarts of the black middle class in Atlanta, Georgia. His mother worked at home while his father was a mail carrier. Because of their coloring, the Whites sometimes found themselves in the middle of racial misunderstandings. When Walter White's mother and sisters boarded segregated streetcars, for example, Caucasian men who believed the women to be white often jeered them when they sat in the Negro section. A much more serious racial misunderstanding occurred in 1931 when Walter White's father was struck by an automobile driven by a white physician who practiced at Atlanta's Grady Hospital. At that time, the hospital was divided into two sections. The white section was clean and renovated; the black section, dirty and dilapidated. The physician took White's father to the white section of the hospital. Before long, though, a visit by a son-in-law apprized the hospital staff of their "error." Recounting the episode in his autobiography, Walter White wrote that his father "was snatched from the examination table lest he contaminate the 'white' air, and taken hurriedly across the street in a driving downpour . . . to the 'Negro' ward" where he died sixteen days later.<sup>15</sup>

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<sup>12</sup> WILLIAM CRAFT, *RUNNING A THOUSAND MILES FOR FREEDOM: THE ESCAPE OF WILLIAM AND ELLEN CRAFT FROM SLAVERY* (1860).

<sup>13</sup> The Crafts' planning was extraordinary. Because Mrs. Craft could not write, her right arm was placed in a sling to avoid any requests that she sign documents certifying her ownership of her slave. To dissuade strangers from seeking to strike up a conversation with Ellen Craft, William Craft put a poultice on his wife's face. Though the Crafts escaped from slavery, they remained vulnerable to recapture. Indeed, slave catchers from Georgia attempted to arrest them in Boston in 1850. They fled to England and returned to the United States only the Civil War when slavery had been abolished. See also R.J.M. Blackett, *The Odyssey of William and Ellen Craft, in RUNNING A THOUSAND MILES FOR FREEDOM* (1999); Ellen M. Weinauer, "A Most Respectable Looking Gentleman": *Passing, Possession, and Transgression in Running a Thousand Miles for Freedom, in PASSING AND THE FICTIONS OF IDENTITY*, *supra* note 6, at 37.

Slave owners who posted rewards for the return of runaways sometimes warned that their human property—often their own children—were evading capture by passing for white. See SOLLORS, *supra* note 6, at 255.

<sup>14</sup> See WALTER WHITE, *A MAN CALLED WHITE: THE AUTOBIOGRAPHY OF WALTER WHITE* (1948).

<sup>15</sup> *Id.* at 136.

Although Walter White could have passed, he recalls deciding at an early age to associate himself with the African American community. The formative event that molded his sense of communal attachment stemmed from the Atlanta riot of 1906.<sup>16</sup> Goaded by false stories of Negro men raping white women, a white mob terrorized blacks in Georgia's capital in an awful explosion of racial hatred. Caught in town amidst marauding whites, young Walter and his father escaped serious injury only because of the camouflage given them by their light complexions. They witnessed, however, terrible crimes committed against other Negroes:

We saw a lame Negro bootblack . . . pathetically try to outrun a mob of whites. Less than a hundred yards from us the chase ended. We saw clubs and fists descending to the accompaniment of savage shouting and cursing. Suddenly a voice cried, "There goes another nigger!" Its work done, the mob went after new prey. The body with the withered foot lay dead in a pool of blood in the street.<sup>17</sup>

At one point, a mob menacingly approached White's home, a participant in it yelling: "That's where the nigger mail carrier lives! Let's burn it down! It's too nice for a nigger to live in!" White's father determined that he and his son would defend the family homestead with firearms if necessary. White recalls that his father said to him "[i]n a voice as quiet as though he were asking me to pass him sugar at the breakfast table . . . 'Son, don't shoot until the first man puts his foot on the lawn and then—don't you miss.'" "In that instant," White relates:

there opened up within me a great awareness; I knew who I was. I was a Negro, a human being with an invisible pigmentation which marked me as a person to be hunted, hanged, abused, discriminated against, kept in poverty, and ignorance, in order that those whose skin was white would have readily at hand a proof of their superiority [so that] [n]o matter how low a white man fell, he could always hold fast to the smug conviction that he was superior to two-thirds of the world's population.<sup>18</sup>

It so happened that the mob never attacked the Whites' house. It quickly retreated when fired upon by White's black neighbors.

Years later, White devoted much of his attention to defending African Americans against racially-motivated violence. His principal means of struggle was exposure. Working on behalf of the NAACP, he gathered facts about lynchings and other atrocities and carefully publicized them in an effort to arouse American public

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<sup>16</sup> See Charles Crowe, *Racial Violence and Social Reform—Origins of the Atlanta Riot of 1906; Racial Massacre in Atlanta*, in 9 RACE LAW AND AMERICAN HISTORY: LYNCHING, RACIAL VIOLENCE, AND LAW (Paul Finkelman ed., 1992).

<sup>17</sup> WHITE, *supra* note 14, at 9.

<sup>18</sup> *Id.* at 11.

opinion. However, the daring way in which he pursued this task brought him close to danger. In 1919, he traveled to Phillips County, Arkansas, to investigate the deaths of some 250 blacks killed in an effort to discourage collective organization by African American cotton farmers. When whites in Phillips County became aware of White's purpose, he was forced to escape hurriedly. "You're leaving mister, just when the fun is going to start," White recalls being told by the conductor of the train on which he made his getaway. "A damned yellow nigger is down here passing for white and the boys are going to get him." "No matter what the distance," White later observed, "I shall never take as long a train ride as that one seemed to be."<sup>19</sup>

Blacks have engaged in temporary passing in many other, less dramatic, settings. To advance occupational ambition, some passed as white during the workday, while presenting themselves as African American outside of the workplace.<sup>20</sup> Chronicling this phenomenon in *White By Day . . . Negro by Night*, a 1952 article in *Ebony* magazine relates the following story:

One girl who passed to get work as a clerk in a Chicago loop department store thought she had lost her job when an oldtime, well-meaning friend of her mother came in and said in happy surprise, "Well, Baby, it sure is good to see this store is finally hiring colored girls." Fortunately she was overheard only by one other clerk who was a liberal and a good friend of the girl who was passing and the secret did not get out.<sup>21</sup>

Other blacks have passed as white in order to shop, sleep, or eat meals at racially exclusive establishments.<sup>22</sup> St. Clair Drake and Horace R. Cayton report that some light-skinned Negroes in Chicago whom they interviewed in the forties spoke of going to white establishments "just to see what they are like and to get a thrill."<sup>23</sup>

Rachel Kennedy—yes, my mother—passed as white not visually but aurally. When pressed to talk on the telephone with some authority on an important matter—a

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<sup>19</sup> *Id.* at 51. See also JESSIE REDMAN FAUST, *THERE IS CONFUSION* (1924) (telling the story of a black man who passes as white to investigate racism in the South).

<sup>20</sup> See DRAKE & CAYTON, *supra* note 1, at 162–63. Some observers believe that a few black professional baseball players disguised as whites (or as Indians, Cubans or Mexicans) played in racially exclusive white major leagues prior to Jackie Robinson's breaking of the color barrier in 1948. The manager of the Baltimore Orioles attempted to disguise second baseman Charlie Grant as an American Indian. Among other things that the manager tried was renaming Grant Chief Tokohama. That effort, however, failed; Grant never played in a regular season game. See JULES TYGIEL, *BASEBALL'S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY* 25 (1984).

<sup>21</sup> *White By Day . . . Negro by Night*, *EBONY*, Apr. 1952.

<sup>22</sup> DRAKE & CAYTON, *supra* note 1, at 162.

<sup>23</sup> *Id.* at 162. See also ADELE LOGAN ALEXANDER, *HOMELAND AND WATERWAYS: THE AMERICAN JOURNEY OF THE BOND FAMILY, 1846–1926*, at 454–55 (1999); CONSTANCE McLAUGHLIN GREEN, *THE SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION'S CAPITOL* 207 (1967).

consumer complaint, dealing with police, seeking employment or educational opportunities—she would adopt an accent that most listeners would associate with the speech of a white person. She put on countless stellar performances before an appreciative household audience that viewed these affairs as comical episodes in the American racial tragedy.<sup>24</sup>

Some “blacks” have passed for “white” on a long-term or permanent basis. Several of the children that Thomas Jefferson sired by Sally Hemmings eventually passed for white. Beverly and Harriet Hemmings transformed themselves into whites in the early 1820s, shedding their African American racial identities at the same time that they fled slavery at Monticello. Their sibling Eston Hemmings also passed for white. He was emancipated in 1827 by Thomas Jefferson’s will along with his older brother Madison Hemmings. These brothers remained in Virginia with their Mother until her death in 1835, at which point they moved to southern Ohio. By then both had started new families of their own with mixed race women who, like them, were descendants of relationships between masters and slaves. The status, color, and racial background of the Hemmings brothers’ mates were unlikely to have been accidental. As Lucia Stanton and Dianne Swann-Wright observe, both men probably sought marriages that would ensure that their children would inherit, in addition to freedom, “a passport to upper-class status within the black community and the probable option to enter the white race.”<sup>25</sup>

In Ohio, Madison and Eston Hemmings provided modest livings for their families. While the older of the brothers distinguished himself as a carpenter, the younger made a name for himself as a professional musician. While the older was content to stay within the small black community of the rural area in which they lived, the younger seems to have wanted to cross the race line. There was, however, a problem. “Notwithstanding all his accomplishments,” one journalist remarked, there existed “an impassable gulf” between Eston Hemmings and whites, “even the lowest of them.”<sup>26</sup> As another journalist later commented, “a nigger was a nigger in those days and that settled it.”<sup>27</sup> Actually the Hemmings brothers were definitely white

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<sup>24</sup> A young black woman recently informed me that she and her black friends often bargain for expensive items such as automobiles over the telephone or on the internet so that they can pass and thus hopefully avoid paying the inflated prices often requested of black female consumers. Cf. Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304 (1995). See also DEBRA J. DICKERSON, AN AMERICAN STORY xi (describing racial passing on the telephone); Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130 (describing passing on the internet).

<sup>25</sup> Lucia Stanton & Dianne Sawyer-White, *Bonds of Memory: Identity and the Hemmings Family*, in SALLY HEMMINGS AND THOMAS JEFFERSON: HISTORY, MEMORY, AND CIVIC CULTURE 163 (1999).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*



under Virginia law and arguably white under Ohio law.<sup>28</sup> As a matter of social practice, whites, however, deemed anyone with a “visible admixture” of colored blood to be a Negro. Eston Hemmings was described as being only “very slightly colored.”<sup>29</sup> But for most whites that was sufficient to stigmatize him.

Madison Hemmings stayed in Ohio and became a much-respected member of his local black community. Eston Hemmings left. Frustrated by racial exclusion from the jury, the witness stand, the voting booth, and public schools, he moved his family to Madison, Wisconsin, where he adopted a new name and racial identity.<sup>30</sup> He became Eston H. Jefferson, a white man.

The children of Madison and Eston Hemmings identified themselves as whites. Madison’s son, William Beverly Hemmings, served in an all-white regiment in the Civil War. Another son, James Madison Hemmings, disappeared and is thought by some in the family to have silently become white. Neither of these sons married, perhaps fearing that doing so would entail revealing their closeted racial background.<sup>31</sup> Eston Hemmings’s daughter, Anna, lived as a white woman and married a white man. Both of her brothers served as officers in white regiments in the Union Army. Beverly F. Jefferson married a white woman and lived a comfortable life as the owner of a prosperous hotel. John Wayles Jefferson remained single and became a wealthy cotton broker.

Some in the Hemmings family identified themselves as African Americans. During World War II, one of Madison Hemmings’s descendants was assigned to a white military unit but refused to join it, demanding instead that he be assigned to a black unit. In the 1970s, when Madison Hemmings’s great-great-grandson was but a youngster he called himself black even when a white neighborhood tough pummeled him repeatedly, screaming: “You’re white, I know you’re white.”<sup>32</sup> To a very large extent, though, members of the Hemmings family chose to become white.

The children of Michael Morris Healy—a white, Irish born, Georgia planter—and Eliza Clark, one of his slaves, offer another remarkable example of permanent

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<sup>28</sup> For a long time Virginia considered as “white” any free person who was more than three-quarters white. The situation for people of mixed race in Ohio was more ambiguous. By 1859, however, Ohio decreed that anyone with discernible colored ancestry was to be deemed colored. *See id.* at 182 n.5.

<sup>29</sup> *Id.* at 164.

<sup>30</sup> In 1845, a Cleveland newspaper wrote, perhaps with Eston Hemmings in mind, that “[n]otwithstanding all the services and sacrifices of Jefferson in the establishment of the freedom of this country, his own son, now living in Ohio, is not allowed a vote, or an oath in a court of justice!” *Quoted in Stanton & Swann-Wright, supra* note 25, at 165.

<sup>31</sup> On the other hand, perhaps they were gay or simply disliked the bonds of marriage.

<sup>32</sup> *Id.* at 172.

passing.<sup>33</sup> Prevented by state law from freeing his slaves, Michael Healy sent his children to the North where they could be educated and also be free of bondage in the event of their father's demise.<sup>34</sup> Several of these children had notable careers. James Augustine Healy (1830–1900) was a member of the first graduating class of the College of the Holy Cross in Worcester, Massachusetts. He pursued clerical studies in Canada and France, became a priest in Boston, and served for twenty-five years as the Catholic bishop of Portland, Maine. Alexander Sherwood Healy (1836–1875) studied music and canon law in Rome and served as rector of the catholic cathedral in Boston. Michael Augustine Healy (1839–1904) became a captain in the Revenue Cutter Service, the precursor to the Coast Guard, and commanded an ice ship off the coast of Alaska. Patrick Francis Healy (1834–1910) graduated from Holy Cross, joined the Society of Jesus, studied at several of Europe's most elite universities, and eventually became the President of Georgetown University.<sup>35</sup>

Helped by luck and talent, the Healys were also assisted in pursuing their ambitions by financial wherewithal, the absence of a discernible "taint" of color (except for Alexander Sherwood Healy), and an emotional stance toward their ambiguous racial status that allowed them, with apparent ease, to separate themselves from African Americans. Slavery provided the capital investment that generated the income that fueled the Healys' upward mobility. After their father died, his slaves were hired out and then sold for a substantial sum that provided the Healy children with trust funds.<sup>36</sup>

For the most part, the Healy children were perceived to be "white." As mentioned above, Alexander Sherwood Healy was darker than his siblings. According to one observer, his African blood "shew[ed] distinctly in his exterior."<sup>37</sup> Apparently, though, the Catholic bureaucracy averted its eyes from this "taint." So, too, did it avert its eyes from the fact that the parents of the Healy children had never properly married. This might have posed an insuperable barrier to those of the Healys who sought advancement within Catholicism since, under canon law, special dispensation would have been required to ordain an illegitimate candidate for the priesthood. In the case of the Healys, though, the catholic hierarchy simply looked the other way.

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<sup>33</sup> See James M. O'Toole, *Passing: Race, Religion, and the Healy Family, 1820–1920*, in 108(1996) PROC. MASS. HIST. SOC'Y 1, 2 (1998).

<sup>34</sup> *Id.* at 11.

<sup>35</sup> *Id.*

<sup>36</sup> When a slave woman named Margaret sued for her freedom in 1856, agents for the Healy estate contested her claim and prevailed in court, whereupon she was immediately sold, together with three of her children, each of them to a different purchaser. *Id.* at 14.

<sup>37</sup> *Id.* at 19.

The Healy brothers made that easy to do. They kept as quiet as possible the facts of their origins, distanced themselves from blacks, and declined to take any notable actions that would advance African Americans. When a black seminarian from Ohio wrote to James Healy requesting an assignment for parish work in the Portland diocese, Healy rebuffed the request, explaining that there were so few black Catholics in Maine “that it would be idle for me to think of adopting you as a subject.”<sup>38</sup> The Healys’ non-involvement in racial matters, however, reflected more than a mere tactical decision. It reflected their belief that they were white and no more related to blacks than any other white Americans. When James Healy attended Holy Cross he noted in his diary, without objection, the comments of classmates regarding “the niggers.” On graduation night he attended, without any apparent sense of irony, a black-face minstrelsy show. He dismissed as “a fool” William Lloyd Garrison and delighted that at a rally local abolitionists managed to raise only \$1.47 for the purchase of a slave whom they intended to free. A Unionist in the Civil War, James Healy opposed the racial egalitarianism of Radical Republicans, concerned that they would wrongly subordinate the restoration of sectional harmony to “the protection, the equalization & the super-elevation of the negro.”<sup>39</sup> He and his siblings were conservative, religiously devout individualists who thought of themselves as white even if, with a full understanding of their lineage, most Americans would have classified them otherwise. An ironic aspect of the Healys’ saga is that they have been made into blacks posthumously by those who claim them as African American pioneers. In *The Negro Almanac*, for instance, James Augustine Healy is described proudly as “the first Negro Catholic Bishop in the United States,” a distinction that Healy himself would have vehemently disavowed.<sup>40</sup>

Another person who has been claimed as a black pioneer though she passed for white during much of her lifetime is Anita Hemmings, whom Vassar College touts as its first black graduate.<sup>41</sup> Born in Boston to a family that identified itself as “black,” Hemmings matriculated at Vassar in 1897. Soon before she graduated, a roommate who suspected that something might be awry, asked her father to investigate the Hemmings family. In the course of doing so he learned of their negritude and revealed Anita Hemmings’s secret. Although students and teachers felt betrayed by what they perceived as Anita’s deceit, college officials permitted her to graduate.<sup>42</sup>

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<sup>38</sup> *Id.* at 15–16.

<sup>39</sup> *Id.* at 15.

<sup>40</sup> HARRY A. PLOSKI & ROSCOE C. BROWN, JR., *THE NEGRO ALMANAC* 804 (1967); *see also* *THE BLACK AMERICAN REFERENCE BOOK* 454 (Mabel M. Smythe ed., 1976).

<sup>41</sup> *See* Jillian A. Sim, *Fading to White*, *AM. HERITAGE*, Feb.–Mar. 1999, at 68, 72. There appears, as yet, no suggestion that Anita Hemmings is related to the Hemmings family of Virginia.

<sup>42</sup> *Id.* at 73.

Her attempt at passing, however, did become fodder for newspapers. According to a story in the *New York World*:

Society and educational circles...are profoundly shocked by the announcement...that one of the graduating class of Vassar College this year was a Negro girl, who concealing her race, entered the college, took the four year's course, and finally confessed the truth to a professor....

....

She has been known as one of the most [b]eautiful young women who ever attended the great institution of learning, and even now women who receive her in their homes as their equal do not deny her beauty.... Her manners were those of a person of gentle birth, and her intelligence and ability were recognized alike by her classmates and professors.<sup>43</sup>

Hemmings's choice of a marital partner further enmeshed her in passing. She married a "white Negro" physician, Andrew Love, who himself passed in order to build a prosperous medical practice that catered to the rich on Madison Avenue in New York City. Their daughter, Ellen Love, a 1927 graduate of Vassar, also passed. A professional actress, she tried out for the role of Scarlett O'Hara in *Gone With the Wind*, maintaining subsequently that she had been told that the reason she did not get the part was that her waist was too large.

The most sensational case arising from an alleged effort to pass was the lawsuit that pitted Alice Jones against Leonard Kip Rhinelander.<sup>44</sup> Jones was the daughter of a white mother and a black father, a couple of modest means. The Rhinelanders, by contrast, traveled in the highest circles of white, wealthy New York Society; Kip stood to inherit millions from his parents' estate. When they learned that their son had married a colored waitress, they insisted that he put an end to the relationship. Buckling to their demands six weeks into his marriage, he sought an annulment on November 27, 1924, claiming that Alice had deceived him about her race. Initially he alleged that she had tricked him by stating falsely that she was white. Later he alleged that she had tricked him not by outright falsehood but, more subtly, by silently but knowingly taking advantage of his mistaken belief that she was white.

Alice Jones's defense put the legal proceedings on the front pages of the New York dailies for weeks. Her defense was that he could not have been ignorant about her racial identity because, in terms of her physiognomy, he knew *everything* there

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<sup>43</sup> N.Y. WORLD, *quoted in* Sim, *supra* note 41, at 73.

<sup>44</sup> *In re* Rhinelander's Will, 36 N.Y.S. 2d 105 (1942). The best discussion of this case is the excellent college senior thesis by Jamie L. Wacks, *Reading Race, Rhetoric, and the Female Body: The Rhinelander Case and 1920s American Culture* (1995) (unpublished thesis, Harvard University). An abbreviated version of this thesis is available in *INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW* 162 (Werner Sollors ed., 2000) [hereinafter Wacks].

was to know about her. She argued that he could not rightly claim to have been hoodwinked because he had, so to speak, been under the hood. To support this argument, Alice's attorneys put into evidence two dramatic items. The first was correspondence that clearly indicated that she and Kip had had extensive sexual relations prior to their marriage. The other was Alice herself: her attorney obtained permission for Alice to disrobe and show herself behind closed doors to the all-male, all-white jury. The purpose in doing so was to show the jurors that there were aspects of her physiognomy, including her nipples, that would have put Rhinelander on notice about her race. In his summation to the jury, Jones's attorney stressed that Rhinelander had had "unlimited opportunities to look [at her body]."<sup>45</sup> The lawyer went on to say:

I let you gentlemen look at a portion of what he saw. You saw Alice's back above the bust. You saw her breast. You saw a portion of her upper leg. He saw all of her body. And you are going to tell me that he never suspected that she had colored blood! . . . You saw that with your own eyes . . . that colored blood was coursing through her veins.<sup>46</sup>

The attorney for Rhinelander made an all-out plea for the jury simply to register its disgust with inter-racial marriage. "There isn't a father among you," he declared, "who would not rather see his son in his casket than to see him wedded to a mulatto woman."<sup>47</sup> The jury found in Jones's favor.<sup>48</sup>

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<sup>45</sup> Wacks, *supra* note 44, at 174.

<sup>46</sup> Alice Jones was never called to testify. One close student of the case suggests that her attorney never called her to the stand because she sincerely believed that she was white and would have said so if asked—thereby wrecking her legal defense. *Id.* at 175–76.

<sup>47</sup> *Id.* at 171.

<sup>48</sup> For another saga of passing in the context of divorce litigation, see the excellent article by Willard B. Gatewood, Jr., *The Perils of Passing: The McCary's of Omaha*, 71 NEB. HIST. 64 (1990).

## III. JUDGING PASSERS

Passing has generated a wide range of responses. Many have been negative. Aggrieved slave-owners viewed as treacherous thieves runaway slaves who passed in order to gain freedom.<sup>49</sup> Segregationists condemned white Negro passers as an insidious danger that threatened the very foundations of the nation. Such people, it was feared, might contaminate white bloodlines by marrying unsuspecting Caucasians. According to Professor Joel Williamson, "Southern whites in the early twentieth century became paranoid about invisible blackness."<sup>50</sup>

The most thoroughgoing effort in American history to prevent and punish passing emerged in Virginia in the 1920s with the birth of the Anglo Saxon Clubs of America.<sup>51</sup> Fear of inter-racial intimacy and passing prompted Club activists to lobby in favor of extending Jim Crow segregation and ferreting out passers, especially those with children who attended white public schools.<sup>52</sup> It also prompted them to lobby in favor of narrowing the state's definition of who counted as a white person and the state's regulations governing matrimony. Until 1910, Virginia law considered a person to be white unless he was more than one-fourth black. After 1910, a person was considered to be white so long as he was no more than one-sixteenth black. In 1924, the Virginia legislature decreed that "the term 'white person' shall apply only to the person who has no trace whatsoever of any blood other than Caucasian."<sup>53</sup> In deference to descendants of Pocahontas and John Rolfe, however, the legislature did allow whites to marry persons "who have one-sixteenth or less of the blood of the American Indian"<sup>54</sup>—a concession which members of the Anglo Saxon Clubs

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<sup>49</sup> See 2 RUNAWAY SLAVE ADVERTISEMENTS: A DOCUMENTARY HISTORY FROM THE 1730S TO 1790, at 366 (Lathan A. Windley ed., 1983); SOLLORS, *supra* note 6, at 225; JOHN HOPE FRANKLIN & LOREN SCHWENINGER, RUNAWAY SLAVES: REBELS ON THE PLANTATION (1999).

<sup>50</sup> JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES 103 (1995).

<sup>51</sup> See Barbara Bair, *Remapping the Black/White Body: Sexuality, Nationalism, and Biracial Antimiscegenation Activism in 1920s Virginia*, in SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY 399 (Martha Hodes ed., 1999); Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, 428 (1988); Richard B. Sherman, "The Last Stand": *The Fight for Racial Integrity in Virginia in the 1920s*, 54 J. S. HIST. 69 (1988).

<sup>52</sup> The Anglo Saxon Clubs also targeted other areas where they perceived white racial purity to be imperilled. In 1926 they persuaded the legislature to mandate the racial segregation of all audiences for all public performances. This law was specifically aimed at the predominantly black Hampton Institute which had hosted racially mixed audiences and groups of performers, including an all-white glee club directed by a black conductor. See Bair, *supra* note 51, at 401.

<sup>53</sup> Walter Wadlington, *The Loving Case: Virginia's Anti-miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1202 (1966) (quoting the Virginia code).

<sup>54</sup> *Id.*

bitterly denounced as a loophole through which Negro Indians would be permitted to insinuate themselves into the bosom of white society. The Anglo Saxon Clubs wanted Virginia to take additional steps to purify its white population but were thwarted finally by opponents who maintained that, unless restrained, the Club's exacting racialism would lead to a situation in which some of the leading white families of the state would have to be re-classified as colored—indeed, a situation in which few “real” white people would be left.<sup>55</sup>

Although the Anglo Saxon Clubs barred women from membership, one of their most fervent and interesting champions was Louise Burleigh, a well-educated (Radcliffe College), literary-minded person who keenly supported the aim of shipping blacks back to Africa. Burleigh wrote (but did not publish) a short story, *Dark Cloud*, that vividly captures the sense of dread with which she and her colleagues viewed the possibility of miscegenation between unsuspecting whites and villainous passing Negroes.<sup>56</sup> In Burleigh's tale, a white New England woman named Alicia Fairchild travels south with her daughter where she attends her mother-in-law's funeral. During the ceremony she realizes that her husband's mother was black and that, therefore, he is black. Feeling defiled, the victim of a deception she perceives as akin to rape, Fairchild destroys her family. She kills her husband. But more significantly, she also kills her daughter by permitting the toddler to be consumed by fire inside of a locked church.<sup>57</sup>

White supremacists are not the only ones who have condemned black passers. Opponents of white supremacy have also objected. They have done so on two main grounds. The first is that passing constitutes a betrayal of African Americans. The second is that the costs of passing outweigh its benefits.

The relationship of passing to racial loyalty was central to Frances Ellen Watkins Harper (1825–1911), an extraordinary black woman who distinguished herself as a journalist, political activist, poet, and novelist.<sup>58</sup> Her best known exploration of passing is found in her novel *Iola Leroy*,<sup>59</sup> which chronicles the life of a light-skinned

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<sup>55</sup> See Bair, *supra* note 51, at 401–02. For an hilarious parody of racial witch-hunting, a farce based largely on the demands of the Anglo Saxon clubs, see GEORGE S. SCHUYLER, *BLACK NO MORE* (1931).

<sup>56</sup> Louise Burleigh, *Dark Cloud* (unpublished typescript, box 32, John Powell Papers, Alderman Library, Special Collections, University of Virginia), *discussed in* Bair, *supra* note 51, at 412–13.

<sup>57</sup> *Id.*

<sup>58</sup> See MELBA JOYCE BOYD, *DISCARDED LEGACY: POLITICS AND POETICS IN THE LIFE OF FRANCES E.W. HARPER 1825–1911* (1994); *A BRIGHTER COMING DAY: A FRANCES ELLEN WATKINS HARPER READER* (Frances Smith Foster ed., 1990).

<sup>59</sup> Frances E.W. Harper, *Iola Leroy*, in *THE AFRICAN-AMERICAN NOVEL IN THE AGE OF REACTION: THREE CLASSICS* (William L. Andrews ed., 1992). There are several excellent editions

Negro woman who refuses to pass. The daughter of a master and a slave whom he freed and married, Iola Leroy looks like a white woman, as did her mother. Indeed, throughout her childhood, Iola Leroy believed herself to be white because her parents shielded her from knowledge about her black ancestry. During the Civil War, Dr. Gresham, a white physician in the Union Army, proposes to her. He tells Iola Leroy that he knows of her racial background but wants to marry her anyway. "Love, like faith," he observes, "laughs at impossibilities. I can conceive of no barrier too high for my love to surmount."<sup>60</sup>

Attracted to Dr. Gresham, Iola Leroy nonetheless rejects his offer because of her determination "to cast [her] lot with the freed people as a helper, teacher, and friend."<sup>61</sup> In her view, Gresham's proposal creates a stark choice. She could marry him which would ultimately entail, she believes, becoming white. Or she could reject him and stand with her people, a course that entails remaining black. She chooses the latter.

To make sure that readers get the message that Iola Leroy made the correct choice, Harper reiterates the necessity of choosing racial sides throughout her novel. Years after Iola Leroy refuses Gresham the first time, Harper creates a scene in which her heroine refuses him again: "I don't think that I could best serve my race by forsaking them and marrying you. . . . I must serve the race which needs me most."<sup>62</sup>

Harper also creates scenes in which other white Negroes heroically eschew passing. At the outset of the Civil War, Iola Leroy's brother, Harry Leroy, tells the headmaster at his New England preparatory school that he would like to volunteer for service in the Union Army. When the headmaster points out that, given his appearance, Harry Leroy could join either a black or a white regiment, the narrator informs the reader that "[i]t was as if two paths had suddenly opened before him, and he was forced to choose between them. On one side were strength, courage, enterprise, power of achievement, and memories of a wonderful past. On the other side were weakness, ignorance, poverty, and the proud world's social scorn."<sup>63</sup>

Harry Leroy chooses the black side. When he volunteers, he expressly asks to be assigned to a colored regiment, a request that puzzled the recruiting officer:

It was a new experience. He had seen colored men with fair complexions anxious to lose their identity with the colored race and pose as white men, but here was a man in the flush of his early manhood, to whom could come dreams of promotion from a simple private

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of the novel *Iola Leroy*. The one I used and to which I shall refer here is found in the above collection.

<sup>60</sup> *Id.* at 86.

<sup>61</sup> *Id.* at 88.

<sup>62</sup> *Id.* at 176–77.

<sup>63</sup> *Id.* at 96.



to a successful general, deliberately turning his back upon every gilded hope and dazzling opportunity, to cast his lot with the despised and hated negro.<sup>64</sup>

Scorned by the recruiting officer (“you are the d—d’st fool I ever saw—a man as white as you are turning his back upon his chances of promotion!”),<sup>65</sup> Harry Leroy insists upon being identified as a colored man. “[U]nless I can be assigned to a colored regiment,” he declares, “I am not willing to enter the army.”<sup>66</sup>

A third hero who refuses to pass is Dr. Frank Latimer. Though his white ancestry “had effaced all trace of his negro lineage,” Dr. Latimer, like the Leroy, insists upon identifying himself as colored.<sup>67</sup> At one point, he finds himself (and Dr. Gresham) in the company of an outspokenly racist white physician, Dr. Latrobe, who says all manner of insulting things about blacks unaware that Latimer considers himself to be a Negro. After hearing Latrobe denigrate blacks and assert that he has a special talent for recognizing even “white niggers,” Latimer informs his colleague that, despite appearances, he too is black:

“ . . . I am one of them,” replied Dr. Latimer, proudly raising his head.

“You!” exclaimed Dr. Latrobe, with an air of profound astonishment and crimsoning face.

“Yes,” interposed Dr. Gresham, laughing merrily at Dr. Latrobe’s discomfiture. “He belongs to that negro race both by blood and choice.”<sup>68</sup>

At the end of her novel, Harper arranges for Iola Leroy to marry Dr. Latimer. Pressing once again her theme of racial duty, Harper writes that “[k]indred hopes and tastes had knit their hearts; grand and noble purposes were lighting up their lives; and

<sup>64</sup> *Id.* at 97.

<sup>65</sup> *Id.* (alteration in original).

<sup>66</sup> *Id.* Another of Harper’s heroes—the light skinned Negro Robert Johnson—also declines to pass:

“Johnson,” said a young officer . . . “what is the use of your saying you’re a colored man, when you are as white as I am, and as brave a man as there is among us. Why not quit this [colored] company, and take your place in the army just the same as a white man? I know your chances for promotion would be better.”

“Captain, you may doubt my word, but to-day I would rather be a lieutenant in my company than a captain in yours.”

“I don’t understand you.”

“Well, Captain, when a man’s been colored all his life it comes a little hard for him to get white all at once. Were I to try it, I would feel like a cat in a strange garret. Captain, I think my place is where I am most needed. You do not need me in your ranks, and my company does.”

*Id.* at 34.

<sup>67</sup> *Id.* at 179.

<sup>68</sup> *Id.*

they esteemed it a blessed privilege to stand on the threshold of a new era and labor for those who had passed from the old oligarchy of slavery into the new commonwealth of freedom."<sup>69</sup>

Old fashioned in form—the language is stilted and the plot melodramatic—*Iola Leroy* is alive with racial ideas that remain influential. It cautions against individualistic ambition and lionizes those who sacrifice self-promotion for (what Harper sees as) the long-term good of blacks as a whole. Harper celebrates black solidarity, champions black racial pride, affirms blacks who recognize racial duties, and lauds those who, though they look white, choose to stand with “their people.”

A second anti-passing theme is that benefits derived from passing are not worth its costs. In the 1990s, Ronald E. Hall maintained that “[p]assing for white inflicts psychological trauma on those who try it, because it requires them to erect a wall between who they are or could be as persons and who they are or try to be amid white society.”<sup>70</sup> In 1950 the Negro actress Janice Kingslow reached the same conclusion despite the offer of a lucrative contract from a Hollywood studio in return for her agreement to change her name and racial identity. In *I Refuse to Pass*, Kingslow explained why she rejected this deal: “What good was fame or money if I lost myself? This wasn’t just a question of choosing a pleasant-sounding false name to fit on a theatre marquee. [Passing] meant stripping my life clear of everything I was. Everything that had ever happened to me.”<sup>71</sup>

Frank J. Webb evoked this theme even earlier in the second novel written by an African American, *The Garies and Their Friends*.<sup>72</sup> This is the story of “a family of peculiar construction,”<sup>73</sup> a family much like Iola Leroy’s. Mr. Garie is a white slave-owner who purchases a woman with whom he falls in love. He frees and marries her. They produce two children who, according to the novel’s narrator, “showed no trace whatever of African origin.”<sup>74</sup> The Garies move to Philadelphia, Pennsylvania, to flee isolation and stultification in the slave South. They find, however, that racism is pervasive up North. Catastrophe overtakes them when an evil white man, Mr. Thomas Stevens, discovers that Mrs. Garie is of African American lineage. He directs a white mob to the Garies’ home where Mr. Garie is murdered and Mrs. Garie and a newborn die of exposure while seeking to escape. Family friends provide for the

<sup>69</sup> *Id.* at 204.

<sup>70</sup> Ronald E. Hall, *Blacks Who Pass, in* BROTHERMAN: THE ODYSSEY OF BLACK MEN IN AMERICA—AN ANTHOLOGY 474 (Herb Boyd & Robert L. Allen eds., 1995).

<sup>71</sup> Janice Kingslow, *I Refuse to Pass*, 8 NEGRO DIG., May 1950, at 30.

<sup>72</sup> FRANK J. WEBB, *THE GARIES AND THEIR FRIENDS* (Robert Reid-Pharr ed., Johns Hopkins 1997) (1857).

<sup>73</sup> *Id.* at 1.

<sup>74</sup> *Id.* at 2.

raising of the surviving children. Black people raise Emily Garie who identifies with blacks. White people raise Clarence Garie who, from an early age, passes for white.

Buffeted by the insecurities that menace all black people in ante-bellum Philadelphia, Emily nonetheless finds great satisfaction among her Negro friends and neighbors. When a young black man whom she has known for many years proposes marriage she happily accepts. This sets the stage for one of the few occasions on which Emily displays anger. She does so in response to her brother's request that she break off her engagement because he believes that she can do better than to marry a colored man and fears that such a marriage will make the secret of his own colored lineage less secure. Emily embraces the choices she has made. "You walk on the side of the oppressor," she tells her brother. "I, thank God, am with the oppressed."<sup>75</sup> She rejects her brother's request. She sees it as an example of his selfishness and his fundamental miscalculation regarding the ingredients of human happiness:

[Y]ou ask me to sever, at once and for ever, my connection with a people who, you say, can only degrade me. Yet how much happier am I, sharing their degradation, than you appear to be! . . . I am happy—more happy, I am sure, than you could make me, even by surrounding me with the glittering lights that shine upon your path.<sup>76</sup>

Events substantiate Emily's assertion. Her wedding is a large, beautiful, loving affair, the beginning of what promises to be a wonderful marriage. Clarence, by contrast, reaps only disappointment.<sup>77</sup> He proposes marriage to a white woman—Miss Bates whom he calls "Little Birdie"—without informing her of his racial lineage. He knows that there is a good chance that revealing his racial background would prompt Little Birdie to decline to go forward with the marriage. Previously she had expressed disapproval about an inter-racial marriage upon reading about it in a newspaper. When Clarence noted that the couple must have loved one another, and

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<sup>75</sup> *Id.* at 336.

<sup>76</sup> *Id.* at 335–36.

<sup>77</sup> After the murder of the Garies, when friends are trying to decide how best to raise the orphaned children, a debate erupts over the wisdom of retaining Clarence's identity as a white boy when, according to the dominant racial rules of that day and place, he was black. One of the black heroes of the novel declares:

I admit . . . that in our land of liberty it is of incalculable advantage to be white . . . . When I look around me, and see what I have made myself in spite of circumstances, and think what I might have been with the same heart and brain beneath a fairer skin, I am almost tempted to curse the destiny that made me what I am. . . . Yet, with all I have endured, and yet endure from day to day, I esteem myself happy in comparison with the man, who, mingling in the society of whites, is at the same time aware that he has African blood in his veins, and is liable at any moment to be ignominiously hurled from his position by the discovery of his origin. He is never safe.

*Id.* at 275–76.

that furthermore, the colored woman in question was “almost white,” Little Birdie responds with words that bring home to him the importance of race in her assessment of things: “‘How could he love her?’ asked she, wonderingly. ‘Love a coloured woman! I cannot conceive it possible,’ said she, with a look of disgust; ‘there is something strange and unnatural about it.’”<sup>78</sup>

In addition to this hint of his fiancée’s racial feelings, Clarence also has the benefit of a warning from the white woman who had largely raised him after his parents’ murder. Arguing that he has a duty to speak, this woman (Miss Bell) tells Clarence:

Throw away concealment, make a clean breast of it! . . . If you marry her with this secret hanging over you, it will embitter your life, make you reserved, suspicious, and consequently ill-tempered, and destroy all your domestic happiness. . . . [Tell the girl and her parents] ere it be too late. Suppose it reached them through some other source, what would they then think of you?<sup>79</sup>

Clarence once comes close to telling Birdie his secret. But according to the narrator, when he “looked full in her lovely face[ ] he could not tell her,—the words slunk back into his coward heart unspoken.”<sup>80</sup>

The secret torments Clarence. The narrator describes it as “a vampire, sucking away, drop by drop, happiness and peace.”<sup>81</sup> Yet Clarence refuses to attempt to defang the secret by revealing it to his fiancée. In the end, of course, the worst that could happen does happen. In a terrible scene, the son of the man who murdered Clarence Gairie’s parents recognizes Clarence from their experience as childhood friends and reveals his “tainted” background to Mr. Bates—Birdie’s father. Mr. Bates then curses Clarence as a “contemptible, black-hearted nigger”:

You have acted basely, palming yourself upon us—counterfeit as you were! . . . Had you been unaware of your origin . . . you would have deserved sympathy; but you have been acting a lie, claiming a position in society to which you knew you had no right. . . . Did I treat you as my feelings dictated, you would understand what is meant by the weight of

<sup>78</sup> *Id.* at 331.

<sup>79</sup> *Id.* at 326.

<sup>80</sup> *Id.* at 331.

<sup>81</sup> *Id.* at 345. Determined to keep the mixture of his race a secret until after his wedding, Clarence confides to his Aunt Ada:

I must shut this secret in my bosom, where it gnaws, gnaws, gnaws, until it has almost eaten my heart away. . . . [N]o escaped galley-slave ever felt more than I do, or lived in more constant fear of detection: and yet I must nourish this tormenting secret, and keep it growing in my breast until it has crowded out every honourable and manly feeling. . . .

*Id.* at 324–25.

a father's anger; but I do not wish the world to know that my daughter has been wasting her affections upon a worthless nigger; that is all that protects you!<sup>82</sup>

Revealed as a passer, Clarence loses Little Birdie; she breaks off their engagement, blighting "his greatest hope in life."<sup>83</sup> Furthermore, he finds himself to be almost completely isolated. "[H]e was avoided by his former friends and sneered at as a 'nigger.'"<sup>84</sup> At the same time, "he felt ashamed to seek the society of coloured men now that the whites despised and rejected him."<sup>85</sup> "[O]h! Em[ily,]" he writes to his sister, soon before he dies of a broken heart, "if my lot had only been cast with yours—had we never been separated—I might have been today as happy as you are."<sup>86</sup>

In non-fiction, Reba Lee's *I Passed for White* is a memorable illustration of the idea that passing can be a spurious remedy even worse than the predicament that the passer attempts to flee.<sup>87</sup> This fascinating memoir tells the story of a woman whose biological father was white and whose biological mother was a light-skinned Negro. Lee grew up in Chicago with her maternal relatives. She never knew her father. He was a student at the University of Chicago who quickly dropped Lee's mother, a waitress, when she became pregnant. Before Reba was born, her Mother married a Negro man who conscientiously raised her as his own child.

From an early age, Lee sought to escape being identified as black. She preferred friendships with whites, even when they expressed dislike for Negroes, and even though her relationships with them were contingent on her ability to hide her racial

<sup>82</sup> *Id.* at 353–54.

<sup>83</sup> *Id.* at 380. In an interesting twist, Webb makes Little Birdie a much more attractive figure after than before she learns about Clarence's ancestry. According to the novel's narrator, she truly loved Clarence, continued to do so after she learned that he was "really" colored, and broke off her engagement with him only out of a sense of filial devotion to her father. When she found out that Clarence was deathly ill, she insisted upon seeing him. Alas, she arrived too late; he died moments before she reached his room. Soon thereafter she, too died of a broken heart, joining her lover "where distinctions in race or colour are unknown, and where the prejudices of earth cannot mar their happiness." *Id.* at 391.

<sup>84</sup> *Id.* at 380.

<sup>85</sup> *Id.* at 380–81.

<sup>86</sup> *Id.* at 381. Another novel that vividly captures the horror of exposure is NELLA LARSEN's *PASSING* (Penguin Books 1997) (1929). The protagonist, Clare Kendry, is a Negro woman who not only passes for white but marries a white man who despises blacks (or, more precisely, people he recognizes as black). When Clare's husband catches her at a black party a terrible scene ensues in which she jumps (though perhaps she was pushed) out a window to her death.

<sup>87</sup> REBA LEE, *I PASSED FOR WHITE* (1955); see also Mary Church Terrell, *Why, How, When and Where Black Becomes White*, in *HARLEM'S GLORY: BLACK WOMEN WRITING, 1900–1959*, at 56 (Lorraine Elena Roses & Ruth Elizabeth Randolph eds., 1996); *Why I Never Want to Pass*, *EBONY*, June 1959; *I'm Through With Passing*, *EBONY*, Mar. 1951.

background. Her conduct was shaped in part by the influence of a grandmother who constantly praised the extent to which her relatives had been whitened by slave-masters in the antebellum period. "Our family," the grandmother proudly proclaimed, "has some of the best blood of the old South in it."<sup>88</sup> Lee's conduct was also shaped by deep ambivalence about both blacks and whites. She resented whites who felt themselves to be superior to Negroes but simultaneously felt herself to be superior to Negroes—or at least the "niggery" ones.

I felt bitter when I saw a cheap, flashy white girl walking along as if she owned the earth, but I felt worse when I saw a fat, sloppy Negro girl or a smart-alecky dressed-up one. I was on edge about the Negroes coming up from the South, the ignorant, dirty ones. . . . I didn't like them and it gave me a sick, distasteful feeling to have them called "my" race.<sup>89</sup>

Finally, Lee was prompted to pass because she yearned to be free of the limitations imposed by the race line. She wanted "to work without any colored label"<sup>90</sup> prejudicing whites against her from the outset without regard to her individual talents.

So Reba Lee passed. Without telling any of her relatives where she was going, she fled her home in Chicago, left behind a brief good-bye letter, took an airplane to New York City, renamed herself, and became a white woman. Racially privileged now, she obtained a clerical job and social connections that would probably have been denied to her in her old incarnation as a Negro. Through her new friends, she met a rich, young, white man who married her.

At first, she was happy with her new station—"as thrilled as an actress who sees her name in lights for the first time."<sup>91</sup> Passing, however, became increasingly burdensome. She repeatedly found herself in situations in which whites, thinking that she was one of "them," freely damned "the niggers"—verbal aggressions that bothered her despite her own alienation from Negroes. Hearing a man proudly assert at a dinner party that he would not amorously touch a nigger with a ten foot pole, Reba said to herself: "I'd have to get used to it. It shouldn't be any worse than for my white blood to hear talk against the whites. But it was worse. I had been brought up colored."<sup>92</sup> Still more trying was the strain of hiding her past. At the same time that Reba deceptively told her in-laws that her parents were dead, she sent herself letters and gifts that she showed to her in-laws from fictitious friends and relatives. Being on guard all of the time against a slip that might unravel her tale of lies imposed a terrible burden that she eventually decided was too heavy to bear. "I had entered the Promised land," she mused, "[b]ut now that I was there . . . I did not want to go on

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<sup>88</sup> LEE, *supra* note 87, at 2

<sup>89</sup> *Id.* at 76.

<sup>90</sup> *Id.* at 77.

<sup>91</sup> *Id.* at 157.

<sup>92</sup> *Id.* at 180.

with it. I was sick to the bone of lying and pretending. I was sick of the fear of being found out."<sup>93</sup>

The fear was realistic. For all of Reba's adeptness at constructing a new identity, the stickiness of her past confounds her. One evening she goes with her husband and some friends to a jazz club in Greenwich Village. There she is noticed by a black musician who knew her from Chicago. When he approaches her familiarly, she succeeds in preventing him from blowing her cover altogether. But the obvious connection that they share bothers her husband. She tells him that in Chicago she briefly attended a multi-racial public school. But he is reluctant to believe her—a reluctance that grows because of a second incident. Reba becomes pregnant, a development that terrifies her because of the prospect that she may give birth to a baby whose colored skin or kinky hair will reveal her racial secret. As it turns out, she encounters real difficulties with her pregnancy. She goes into labor prematurely and produces a still-born child. In her terror, exhaustion, and agony she asks a nurse: "Is it black?"—a question that irredeemably poisons her relationship with her husband who now suspects that she had an affair with the black musician at the jazz club.

Even more important to Reba than the shadow of exposure, however, is her discovery that, in the end, she did not really like living with whites—at least the ones she was around. Far from being a better class of individuals:

These people were no better, no, not as good, as the colored people I had known. More mannerly, yes, more knowledgeable and cultivated, acquainted with all the good things of life, but for all their background and opportunities they were less genuine, less understanding, less tolerant in their relations to each other. And less happy. The joy of living was not in them. . . . Oh, I liked the charming homes . . . the feeling of privilege. The rich white feeling. I liked what the whites *did* but not what they *were*. . . . I realized now that I had never been truly happy among them.<sup>94</sup>

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<sup>93</sup> *Id.* at 259. The literature on passing makes clear that fear of exposure constitute a major burden in the passer's life. Ray Stannard Baker quotes a black man who succeeded in passing but then decided to cross back and resume his life as a Negro. "No decent man could stand it," the former passer avers. "I preferred to be a Negro and hold up my head rather than to be a sneak." FOLLOWING THE COLOR LINE: AMERICAN NEGRO CITIZENSHIP IN THE PROGRESSIVE ERA 161 (Harper Torchbook 1964) (1908). Four decades later, *Ebony* magazine described as pitiable Negroes who pass for white at work but live as blacks at home. They are caught, the magazine observed, in "a strange Dr. Jekyll and Mr. Hyde existence—living constantly in fear that their day world will conflict with their night world." *White By Day . . . Negro By Night*, EBONY, Apr. 1952. See also HENRY LOUIS GATES, THIRTEEN WAYS OF LOOKING AT A BLACK MAN (1990) (profiling the passing of *New York Times* journalist Anatole Broyard).

<sup>94</sup> *Id.* at 260–61.

So Reba Lee crosses the race line once again. She divorces her husband and returns to her black relatives and friends in Chicago who, as she portrays it, accept her back without recrimination.<sup>95</sup>

The risk of being unmasked—outed—is only one of many costs to be considered by individuals contemplating passing. Another, ironically, is loss of status; a well-educated black man who might be outstanding in Negro circles, might only be moderately successful or even mediocre in the white world. Relating the testimony of a black man who rejoined the Negro fold, Gunnar Myrdal reports that among the reasons the man gave for rejecting passing was that while “he [was] ‘tops’ in the Negro community” for doing a certain job, among whites he would be among many and “far from the social ceiling.” Moreover, “[b]ecause his profession was one in which there [were] few qualified Negro workers, he got his position more easily as a Negro than he would have as a white man.”<sup>96</sup>

A similarly ironic problem is that passing almost always prompts those who do it to give up active participation in struggles on behalf of blacks—activities that are difficult but also gratifying. An example of this loss is found in James Weldon Johnson’s justly lauded *The Autobiography of An Ex-Colored Man*.<sup>97</sup> This novel chronicles the life of the illegitimate son of a white man and his light-skinned Negro mistress. Although passing long hovers as a possibility for this un-named man, he declines to do so until he witnesses the lynching of a Negro man in the South accused of “some terrible crime”—probably the rape of white woman.<sup>98</sup> The lynching generates two reactions—a closer identification with blacks alongside a yearning to flee blackness. Describing the former, Johnson’s protagonist declares that he “could understand why Negroes are led to sympathize with even their worst criminals and to protect them when possible.”<sup>99</sup> On the other hand, describing the impulse to flee

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<sup>95</sup> The reliability of this memoir is even more questionable than usual given two of its features. First, Reba Lee is a pseudonym. Second, the book was actually written by Mary Hastings Bradley, a person to whom Lee told her story. Notwithstanding these wrinkles, I found *I Passed for White* to be believable and persuasive.

<sup>96</sup> MYRDAL, *supra* note 10, at 686.

<sup>97</sup> JAMES WELDON JOHNSON, *THE AUTOBIOGRAPHY OF AN EX-COLOURED MAN* (William L. Andrews ed., Penguin Books 1990) (1912). James Weldon Johnson (1871–1938) was a lawyer, diplomat, and civil rights leader (the first black Secretary of the NAACP). He was also a writer who excelled in a variety of genres. He wrote an autobiography, *ALONG THIS WAY* (1933), poetry, *GOD’S TROMBONES*, *SEVEN NEGRO SERMONS IN VERSE* (1927), cultural history, *BLACK MANHATTAN* (1930), and was also the co-author (with his brother John Rosamond Johnson) of *LIFT EVERY VOICE AND SING*, often described as the Negro National Anthem. Johnson initially published *THE AUTOBIOGRAPHY OF AN EX-COLOURED MAN* anonymously in 1912. In 1926 it was republished with his authorship acknowledged. See generally EUGENE LEVY, *JAMES WELDON JOHNSON* (1973).

<sup>98</sup> JOHNSON, *THE AUTOBIOGRAPHY OF AN EX-COLOURED MAN*, *supra* note 97, at 135.

<sup>99</sup> *Id.* at 137.



any association with the American Negro, he recalls that "it was not discouragement or fear or [a] search for . . . opportunity that was driving me out of the Negro race. . . . [I]t was shame, unbearable shame. Shame at being identified with a people that could with impunity be treated worse than animals."<sup>100</sup>

The latter impulse predominates; the colored man becomes an *ex-colored* man. He becomes a white man who marries a white woman and makes lots of money. He attains "a white man's success."<sup>101</sup> Yet, in the end, he finds himself to be profoundly dissatisfied with the choice he made. At a fund-raising affair at Carnegie Hall on behalf of the Hampton Institute, he contrasts himself unfavorably with "that small but gallant band of colored men who are publicly fighting the cause of their race," men like Booker T. Washington who "will be victors even though they should go down in defeat." "Beside them," he muses, "I feel small and selfish. I am an ordinarily successful white man who has made a little money. They are men who are making history." "I too," he notes with a pang of regret "might have taken part in a work so glorious." He concludes that he has chosen the lesser part, "sold [his] birthright for a mess of pottage."<sup>102</sup>

Another cost of passing is the price of distancing oneself from those who might, even inadvertently, blow one's cover. Reba Lee told her white husband and in-laws that her parents were dead and said nothing to her parents about her marriage or pregnancy (until she decided to stop passing).<sup>103</sup> In New England in the 1940s, a Negro physician would periodically meet with black colleagues but only at a distance safely removed from the town where he was assumed to be white.<sup>104</sup> In the 1950s Buster Williams permitted his mother (Gregory Howard Williams's grandmother) to stay in his "white" household in Virginia, but only on condition that she pretend to be an employee.<sup>105</sup> Unsurprisingly, writers of fiction have been prompted to dramaticize this grim reality of passing. In Jessie Redmond Fauset's *Plum Bun: A Novel Without a Moral*, a sister denies recognition to her own sibling.<sup>106</sup> In Fauset's novel *Comedy, American Style*, a mother pretends that her son is her butler.<sup>107</sup> In Langston Hughes's short story *Passing*, a son denies his Mother.<sup>108</sup> In Sutton Grigg's

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<sup>100</sup> *Id.* at 139.

<sup>101</sup> *Id.* at 141.

<sup>102</sup> *Id.* at 154.

<sup>103</sup> LEE, *supra* note 87.

<sup>104</sup> W.L. WHITE, *LOST BOUNDARIES* (1947).

<sup>105</sup> WILLIAMS, *supra* note 2.

<sup>106</sup> JESSIE REDMOND FAUSET, *PLUM BUN: A NOVEL WITHOUT A MORAL* (Beacon Press 1990) (1928) [hereinafter FAUSET, *PLUM BUN*].

<sup>107</sup> JESSIE REDMOND FAUSET, *COMEDY, AMERICAN STYLE* (1953).

<sup>108</sup> LANGSTON HUGHES, *Passing*, in *THE WAYS OF WHITE FOLKS 51-55* (Vintage Classics 1990) (1933):

*The Hindered Hand* and Walter White's *Flight*,<sup>109</sup> parents exile children whose dark-skins will reveal the parents' racial masquerade. In Johnson's *Autobiography of an Ex-Coloured Man*, the protagonist pretends that an old friend is a stranger.<sup>110</sup> In Fannie Hurst's *Imitation of Life*, a passing Negro woman sterilizes herself to guarantee that no dark baby will reveal her hidden ancestry to a white husband who believes that she is white.<sup>111</sup> In the telling of these episodes, writers often (but by no means always) point an accusatory finger towards the passers. The substance of the charge typically is that only a person with a deformed sense of values would subordinate his or her associations with relatives and friends to ambitions of upward mobility—ambitions realizable only by pretending to be white.

Though condemnation of passing is the dominant motif in the fictional and non-fictional literature of racial subterfuge, other responses are also discernible. As one of Nella Larsen's passers observes regarding the ambivalence with which many blacks react to passing: "We disapprove of it and at the same time condone it. It excites our contempt and yet we rather admire it. We shy away from it with an odd kind of revulsion, but we protect it."<sup>112</sup> For some observers, condonation of passing stems from a perception that racial masquerade can constitute an unpleasant but acceptable adaptation to racist mistreatment. In *Plum Bun*, Jessie Redmon Fauset describes a Negro woman who passes occasionally in order to enjoy restaurants and orchestra seats that are customarily reserved for whites. Fauset comments tenderly that the woman "employed her colour very much as she practiced certain winning usages of smile and voice to obtain indulgences which meant much to her and which

Dear Ma,

I felt like a dog, passing you downtown last night and not speaking to you. You were great, though. Didn't give a sign that you even knew me, let alone I was your son. If I hadn't had the girl with me, Ma, we might have talked. . . . Isn't she sweet to look at, all blonde and blue-eyed? We're making plans [to get married] . . . I will take a box at the Post Office for your mail . . . I'm glad there's nothing to stop letters from crossing the color-line. Even if we can't meet often, we can write, can't we, Ma?

With love from your son,

Jack

*Id.*

<sup>109</sup> SUTTON GRIGG, *THE HINDRED HAND* (1895); WALTER WHITE, *FLIGHT* (1926).

<sup>110</sup> JOHNSON, *AN AUTOBIOGRAPHY OF AN EX-COLOURED MAN*, *supra* note 97.

<sup>111</sup> FANNIE HURST, *IMITATION OF LIFE* (1933).

<sup>112</sup> LARSEN, *supra* note 86, at 56. In at least one instance in the 1940s a white Negro recalls being urged to pass at work by other Negroes so as to forego occupying one of the scarce positions allocated to black workers. This person says that she decided to quit passing a decade later when she was assigned the task of typing a business letter that voiced her boss's support for Ku Klux Klan activities. She never sent it. See *I'm Through with Passing*, *EBONY*, Mar. 1951

took nothing from anyone else.”<sup>113</sup> “It was with no idea of disclaiming her own that [this woman] sat in orchestra seats . . . denied to coloured patrons,” Fauset continued. Rather, the woman’s passing stemmed from “a mischievous determination to flout a silly and unjust law.”<sup>114</sup>

The non-fiction literature by and about passers is also full of references to passing as a mode of resistance or subversion. Ray Stannard Baker noted that passing awakened glee among many Negroes because they viewed it as a way of “getting even with the dominant white man.”<sup>115</sup> Langston Hughes repeatedly defended passing as a joke on racism.<sup>116</sup> Gregory Howard Williams relates that his father derived great psychic satisfaction by defying the rules of segregation when he lived in Virginia as the husband of a white woman and the President of a (supposedly) lily-white chapter of the American Legion.<sup>117</sup> Williams also relates that his brother got a thrill from romancing white girls who would surely have spurned him had they perceived him to be a Negro. Boasting of one such conquest, Mike Williams declared that after finishing sex he told a girl gleefully: “You just been fucked by a nigger.”<sup>118</sup>

Shirlee Taylor Haizlip notes that in Washington, D.C., a “whites only” restaurant in the 1930s hired black people as lookouts to identify white Negroes who were

<sup>113</sup> FAUSET, PLUM BUN, *supra* note 106, at 15. Of course some contend that racial passing, like remaining in the homosexual closet, does take something from others by solidifying the oppressive social conditions that prompt people to deny identities marked for ostracism.

<sup>114</sup> FAUSET, PLUM BUN, *supra* note 106, at 15.

<sup>115</sup> RAY STANNARD BAKER, FOLLOWING THE COLOR LINE: AMERICAN NEGRO CITIZENSHIP IN THE PROGRESSIVE ERA 163 (Harper Torchbook 1964) (1908).

<sup>116</sup> See, e.g., *Jokes on Our White Folks*, in LANGSTON HUGHES AND THE CHICAGO DEFENDER: ESSAYS ON RACE, POLITICS, AND CULTURE, 1942–62 (Christopher C. DeSantis ed., 1995); *Fooling Our White Folks*, NEGRO DIG., Apr. 1950; *Why Not Fool Our White Folks*, CHI. DEFENDERS, Jan. 5, 1958.

<sup>117</sup> According to Williams:

The nightly crowds huddled as Grandma relished Dad’s stories about how he tricked the white man. Every time the white man was exposed as a fool, laughter ran out through the shack. The victories were small and inconsequential, but I realized the telling and retelling served the valuable purpose of soothing wounded souls . . .

Dad grew somber when he narrated the story of how, as a teenager, he masqueraded as white and sneaked into Marion, Indiana, thirty miles from Muncie, site of the last hanging in the north, August 7, 1930. He infiltrated the festive white crowd milling around the courthouse lawn where two black teenagers hung long after being beaten, kicked and drug from jail. Four thousand white citizens had stormed the jail and applauded as the youths were killed. Dad shared the horror of Indiana’s lynching with Muncie’s black community. It was as if he had walked into hell and come out with a report on it.

WILLIAMS, *supra* note 2, at 63–64.

<sup>118</sup> *Id.* at 174.

attempting to pass.<sup>119</sup> In retaliation, a Negro-owned newspaper published the names of the lookouts.<sup>120</sup> Perhaps the paper did this only to punish Negroes who aided Jim Crow exclusion and meant not at all to help or even express sympathy for passers. On the other hand, the paper's action might have reflected its managers' vicarious pleasure at seeing at least a few Negroes enjoying facilities that racists had hoped to keep exclusively white. An alternative or supplementary sentiment might have been a sense that, regardless of their own motives, passers necessarily disrupt policies that are intended to bar from positions of authority and privilege *all* persons of African ancestry. Breaches of the race line accomplished by passing may now appear to be quite minimal. When possibilities for resistance are narrow, however, even the most limited efforts to fool or escape or cheat a repressive social order can be inspiring. This is a point vividly captured by tributes to passers voiced by descendants who appreciate the hard-won benefits that their forbears carved from difficult circumstances through skillful, albeit deceptive, manipulation. Hence, Professor Cheryl I. Harris recalls admiringly her grandmother, a Negro woman who passed for white to get a job in a Chicago department store in the 1930s.<sup>121</sup> "Day in and day out," Harris writes, her grandmother "made herself invisible, then visible again, for a price too inconsequential to do more than barely sustain her family."<sup>122</sup> Recalling the memory of a white Negro who joined the Washington, D.C., police department during the first decade of the 1900s, Haizlip notes that "the Negro community knew, celebrated, and kept [the passer's] secret."<sup>123</sup> Others have responded similarly.

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<sup>119</sup> SHIRELEE TAYLOR HAZLIP, *THE SWEETER THE JUICE* (1994). As this story of the restaurant lookouts indicates, passing opened up large possibilities for betrayal, extortion, and revenge. The interesting thing about this facet of the passing phenomenon is not that outing occasionally occurred, but that it appears to have occurred infrequently.

The most horrendous example of outing I have come across stems not from lookouts who fingered Negroes attempting to pass or gays or lesbians attempting to remain closeted, but Jews who betrayed other Jews who were seeking to hide in Hitler's Germany. See PETER WYDEN, *STELLA* (1992). For a vivid novel about Jews passing in the white shadow of the Holocaust, see LOUIS BEGLEY, *WARTIME LIES* (1991).

<sup>120</sup> HAZLIP, *supra* note 119.

<sup>121</sup> Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707(1993).

<sup>122</sup> *Id.* at 1711. Similarly, Professor Gabriel Chin memorializes his grandfather who pretended to be the son of a Chinese emigrant already resident within the United States in order to avoid exclusion under the Chinese Exclusion Act. Professor Chin salutes the "defiance" that made it possible for him to be born in the United States. Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998). See also Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 LAW & SOC. INQUIRY 1 (2000).

<sup>123</sup> HAZLIP, *supra* note 119, at 63. Ray Stannard Baker wrote of blacks creating a "conspiracy of silence" to protect those among them who crossed the line to become white. BAKER, *supra* note 115, at 162. A play that dramatizes this point is Regina M. Andrews's *The Man*

Describing his reaction to the realization that some Negroes actually succeeded in pretending to be white, Professor Glen Loury writes that he was immediately intrigued by this phenomenon.<sup>124</sup> "I enjoyed," he recalls, "imagining my racial brethren surreptitiously infiltrating the citadels of white exclusivity. It allowed me to believe that, despite appearances and the white man's best efforts to the contrary, we blacks were nevertheless present, if unannounced, *everywhere* in American society."<sup>125</sup>

In *Lost Boundaries*, W.L. White tells the (true) story of the Johnston family, light skinned Negroes who passed for white in New Hampshire in the 1930s and 1940s.<sup>126</sup>

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*Who Passed: A Play in One Act.* At one point in the play, a Negro barber says to a passer who is returning to Harlem momentarily under cover of darkness:

You know your own people have been pretty good to you, Fred! Ain' none of them spotted you out and hunted you down to tell your Boss Fitzgerald that one of the "Niggers" he hates is working for him, and living right in his own home. It ain't every yellow faced Negro who can pass for white for fifteen years, hold a white man's job, marry a white woman, and not get caught.

Regina M. Andrews, *The Man Who Passed: A Play in One Act, in HARLEM'S GLORY: BLACK WOMEN WRITING, 1900-1950*, at 48 (Lorraine Elena Roses & Ruth Elizabeth Randolph eds., 1996).

<sup>124</sup> GLENN C. LOURY, *ONE BY ONE FROM THE INSIDE OUT: ESSAYS AND REVIEWS ON RACE AND RESPONSIBILITY IN AMERICA* (1995).

<sup>125</sup> *Id.* at 2. Professor Judy Scales-Trent voices a similar view:

[D]on't forget, white folks: we see you, we hear you, and we tell our stories. Was that you at a party joking about living in "Coon City"? Little did you know that one of those "coons" was at the party and is writing about you even now. . . . [W]e are everywhere, white folks. Beware.

JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY* 44 (1995).

<sup>126</sup> WHITE, *supra* note 104. This book served as the foundation for a film with the same title. *LOST BOUNDARIES* (an RD-DR Production 1949). One of the interesting things about the film *Lost Boundaries* is that white actors played the roles of the passing blacks. Part of the reason for this is that the producers of the film believed that white audiences would more easily accept criticism of white racism if it came from the mouths of other whites—even if these whites were portraying characters who were "really" black. For a trenchant analysis of *Lost Boundaries* and other films on passing, see GAYLE WALD, *CROSSING THE LINE: RACIAL PASSING IN TWENTIETH-CENTURY U.S. LITERATURE AND CULTURE*. (2000).

The paradox of white actors pretending to be Negroes who are pretending to be whites replicates a similar paradox in the film *Gentleman's Agreement*. The hero of that celebrated film is a Christian reporter who exposes and condemns bigotry by posing as a Jew. *GENTLEMAN'S AGREEMENT* (Twentieth-Century Fox Film Corp. 1947). *Gentleman's Agreement* has been lauded as one of Hollywood's boldest films. Ironically, though, several of the actors who starred in the film were passers who changed their names in order to evade Hollywood's own discriminations against Jewish entertainers. For instance, John Garfield, the actor who plays a Jewish veteran in the film, had the name Julius Garfinkle before changing it. See the incisive essay by MARJORIE GARBNER, *Gentility*, in *SYMPTOMS OF CULTURE* 75, 84 (1998).

The head of the family, Albert Johnston, Jr., was a physician. Although Negro acquaintances were aware of his passing, and some resented it, none ever did anything to reveal his secret. One of Johnston's brothers also passed for white. In his case, the process of passing included divorcing his Negro wife and marrying a white woman. Yet even the divorced woman declined to reveal her passing ex-husband's secret. As an observer declared, "so strong is the tie between all Negroes, that although they bitterly resent a Negro who has 'gone over,' they will nonetheless guard his secret as though it were their own, and not expose him to a white man."<sup>127</sup> In other words, paradoxically, Negro solidarity sometimes shielded Negroes who disclaimed blackness.

Two of the most important challenges to racial oppression in twentieth century American constitutional law involve episodes of passing. On May 30, 1942, police in San Leandro, California, questioned a young man who was walking down the street with a young woman, his date, because of suspicion that he was violating Military Exclusion Order N. 34, which directed all persons of Japanese ancestry in California to report to United States military authorities in order to prepare for evacuation and internment.<sup>128</sup> When confronted by the police, the man claimed to be "Clyde Sarah," a person of Spanish-Hawaiian ancestry. In fact, the man's name was Fred Toyosaburo Korematsu, a son of Japanese parents. In addition to producing a fake name, and altering his draft card, Korematsu had subjected himself to plastic surgery.<sup>129</sup> In 1944, the United States Supreme Court upheld the constitutionality of the provisions under which Korematsu was punished in a ruling that has been widely condemned.<sup>130</sup>

A second case involved a black man, James Hurd, who challenged the constitutionality of a court order evicting him from his home.<sup>131</sup> He was evicted at the behest of white neighbors who complained that he had breached a restrictive

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<sup>127</sup> WHITE, *supra* note 104, at 60. When I saw the Johnston family in a photograph that appeared in a 1949 issue of the *Afro-American Newspaper*, I was surprised by their success in passing because they seemed so obviously "black" to me. They were light-skinned to be sure but no more so than many other light-skinned Negroes with whom I am familiar. The author of the story in the *Afro-American* confirms my impression, noting that "the Johnson family appeared 'colored' to the newsmen of Harlem and many wondered how they could have passed for whites in the first place." Might it be that Negroes have a keener eye for detecting other Negroes even those trying hard to pass? According to Ralph Ellison, "most Negroes can spot a paper thin 'White Negro' every time." RALPH ELLISON, *SHADOW AND ACT* 124 (1953). See also Amy Robinson, *It Takes One to Know One: Passing and Communities of Common Interest*, 20 *CRITICAL INQUIRY* 715 (1994).

<sup>128</sup> See PETER IRONS, *JUSTICE AT WAR* 93-94 (1983).

<sup>129</sup> *Id.*

<sup>130</sup> *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944).

<sup>131</sup> *Hurd v. Hodge* 334 U.S. 24, 28 (1948).

covenant under which promises had been made that his home would never be sold to or occupied by a Negro.<sup>132</sup> At trial, Hurd raised broad legal issues but also a narrow factual objection. He asserted that the eviction would be improper because he was a Mohawk Indian and not a Negro.<sup>133</sup> Voicing this defense was none other than Charles Hamilton Houston, the great mentor of the African American civil rights bar in the years prior to *Brown v. Board of Education*<sup>134</sup> and a lawyer keenly attentive to the ramifications of tactical choices he made as a litigator.<sup>135</sup> Houston lost on the issue of racial classification (though he ultimately won on the federal constitutional issue).<sup>136</sup> The important point here, though, is that Houston attempted to use passing—this time passing for Indian—as a vehicle for advancing not only his client's cause but the broader cause of racial justice.<sup>137</sup>

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<sup>132</sup> See CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 79 (1959).

<sup>133</sup> *Hurd*, 334 U.S. at 27 n.2; VOSE, *supra* note 132, at 85–86.

<sup>134</sup> 347 U.S. 483 (1954).

<sup>135</sup> VOSE, *supra* note 132, at 84–92.

<sup>136</sup> *Hurd*, 334 U.S. 24.

<sup>137</sup> Professor Christine B. Hickman relates two stories about black relatives who bought houses covered by anti-Negro restrictive covenants. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997). Her uncle, Clarence Jones, was a successful attorney whose white neighbors initially left him and his family alone. Professor Hickman suggests that, ironically, the neighbors' racist stereotype may have prevented them from perceiving Jones as colored. After all, he was a hardworking lawyer whose three daughters attended the University of California at Los Angeles. It was not until the wedding of one of the daughters at the family home that the white neighbors became agitated. "As the various guests arrived," Hickman writes, "the neighbors were forced to see what their social training had not let them see before—the Jones family was undeniably black." *Id.* at 1167. Soon afterwards, white neighbors sued to evict Jones pursuant to the terms of the restrictive covenant. Jones declined to assert that he was anything but a Negro. *Id.* Raising arguments on which James Hurd prevailed four years later, Clarence Jones lost his challenge to the constitutionality of the state-backed eviction and was forced to move. *Stone v. Jones*, 152 P.2d 19, 22–23 (Cal. Ct. App. 1944).

A second uncle of Professor Hickman's, Uncle Jack, passing for white, moved into an all-white neighborhood in Detroit, Michigan, in 1956. Hickman, *supra*, at 1168. White neighbors discovered that he was a Negro, perhaps because of the appearance of one of his grandchildren, and demanded that he move. *Id.* Unlike Clarence Jones, Uncle Jack attempted to pass. He told reporters that he was half Cherokee and half French Canadian, omitting any mention of his African American ancestry. *Id.* at 1169. The white neighbors, however, rejected his story and increased their pressure, offering to buy the house for \$2,000 more than he had paid for it and threatening him with mob action in the event that he declined to sell "voluntarily." He soon moved. See *Buyer Beware*, TIME, Apr. 16, 1956, at 24.

Although Professor Hickman states that "it would not be fair to find fault with Uncle Jack's denial," she admits that she reads about it "with a touch of sadness and a twinge of disappointment

True, in some—maybe all—instances, passing entrenches racial lines of exclusion by reinforcing the norm that certain sectors of society are open only to those who are white or are at least perceived as white. Passing, moreover, has been seen as constituting such a trivial challenge to racial restrictions that some arbiters of the color bar permit masquerades to go forward so long as passers outwardly obey the rules of white supremacy—i.e., pretend actually to be white in return for receiving the privileges that white skin obtains.<sup>138</sup> With these concerns in mind, Leo Spitzer writes that passing was:

by and large a personal solution to discrimination and exclusion. It was an action that, when accomplished successfully, generally divorced its individual practitioners from others in the subordinated group, and in no way challenged the ideology of racism or the system in which it was rooted. Indeed, because individuals responding to marginality through . . . passing could be viewed as either conscious or unwitting accomplices in their own victimization—as persons consenting to the continuing maintenance of existing inequalities and exclusionary ideologies—it is certainly understandable why they often elicited such scathing criticism from their contemporaries.<sup>139</sup>

Passing, however, does pose at least some challenge to racist regimes. That is why they typically try to prevent it. Fleeing bondage by passing may have been an individualistic response to the tyranny of slavery but it did free human beings and helped to belie the canard that slaves were actually content with their lot. The successful performance of “white man’s work” by a passing Negro upset racist claims that blacks are categorically incapable of doing such work. The extent of the disturbance is severely limited by the practical necessity of keeping the passing secret. But under some circumstances a limited disturbance is about all that can be accomplished.

Some critics accuse passers of being complicit in the regimes that they attempt to escape. Sometimes they are. They may even become loud and fervent bigots.<sup>140</sup>

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because Uncle Jack denied who he was and the milling mob did not even listen.” Hickman, *supra*, at 1169.

<sup>138</sup> St. Clair Drake and Horace Cayton found that in the 1940s in Chicago some white people were “willing to overlook a small infusion of Negro blood provided [that] the person who is passing has no social ties with Negroes.” DRAKE & CAYTON, *supra* note 1, at 159 n.\*.

<sup>139</sup> LEO SPITZER, *LIVES IN BETWEEN: THE EXPERIENCE OF MARGINALITY IN A CENTURY OF EMANCIPATION* 180 (1999).

<sup>140</sup> See, e.g., HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL WRITTEN BY HERSELF* (Jean Fagan Yellin ed., Harvard University Press, 1987) (L. Maria Child ed., 1861). Harriet Jacobs notes, for example, that one of the most insidious enemies slaves found in her hometown was

a free colored man, who tried to pass himself off for white . . . who was always ready to do any mean work for the sake of currying favor with white people. . . . Every body knew he had the blood



But doing so has not typically been a necessary entailment of passing. And it is at least plausible that some passers have attempted to challenge racist practices from their newly acquired positions of racial privilege. It is true that, when accomplished successfully, passing divorces its practitioners from others in the subordinated group. But the same can be said about other strategies that escape the contempt that is routinely heaped upon passing. The millions of blacks who fled segregationist oppression in the Jim Crow Era could be said to have adopted an “escapist” solution to their plight, which distanced them from those they left behind. But few commentators malign participants in the Great Migrations on this account. Immigrants who leave the land of their birth are often lionized in American popular culture. Passers, though, are similar to immigrants in important respects. That is why one novelist sympathetically described one of his passing characters as “a naturalized foreigner in the world of wide opportunity.”<sup>141</sup> Just as immigrants leave their homelands for what they perceive as better opportunities abroad, sometimes casting away names and languages in the process, so, too, do passers leave their racial homeland for what they perceive as better opportunities elsewhere. While the immigrant is widely hailed for his initiative, however, the passer is widely cursed as a self-seeking opportunist.<sup>142</sup>

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of a slave father in his veins; but for the sake of passing himself off for white, he was ready to kiss the slaveholders' feet. How I despised him!

*Id.* at 119.

<sup>141</sup> CHARLES W. CHESNUTT, *THE HOUSE BEHIND THE CEDARS* 45 (1900).

<sup>142</sup> Suicide, like immigration, is another weapon of the weak that can usefully be compared with passing. Suicide involves the purposeful elimination of one's own life. Passing involves the purposeful elimination of one's outward affiliation with a given race. Indeed, St. Clair Drake and Horace Cayton describe passing as a form of self-induced “sociological death.” DRAKE & CAYTON, *supra* note 1, at 163. Like passers, people who have responded to oppressive conditions by killing themselves have often been castigated as cowardly and self-indulgent. When Jews committed suicide in response to Hitler's ascendancy in the 1930s, various commentators criticized them harshly. One of the most severe critics was Hannah Arendt. When she learned that the Jewish writer Stefan Zweig had committed suicide in Brazil in 1942 alongside his wife, Elizabeth Charlotte Altmann Zweig, Arendt averred that their act evinced a “kind of selfishness” and that it suggested the handiwork of beings who were “abnormally asocial and unconcerned about general events.” LEO SPITZER, *LIVES IN BETWEEN: THE EXPERIENCE OF MARGINALITY IN A CENTURY OF EMANCIPATION* 175 (Hill & Wang Paperback ed. 1999). Leo Spitzer wisely questions, however, whether it is valid “to judge such an intensely personal act entirely on the basis of its political consequences for group solidarity.” *Id.* Even more wisely he suggests an alternative interpretation of Zweig's suicide, one that is attentive to the paradoxical possibility that self-destruction can also be a form of self-assertion. Recognizing that Zweig harbored “a view of himself . . . that was antithetical to group or national identification . . . [a world-view] that dissuaded him from engaging in political resistance . . . through collective action,” Spitzer also holds open the possibility that Zweig's suicide was “a *positive* solution . . . [that] affirmed his ultimate control over his own

When confronted with oppressive circumstances, people sometimes stand and fight where they are to transform the situation. This is often an admirable reaction. Another reaction, though, is exit: leaving behind a bad situation in search of a better one. Exit, Albert O. Hirschman writes, “has been accorded an extraordinarily privileged position in the American tradition.”<sup>143</sup> The phrase, “Go West!” is but one of many resonant indications of the centrality of exit in American practice, psychology, and mythology. “The United States owes its very existence and growth to millions of decisions favoring exit” over staying and fighting.<sup>144</sup> Nothing is more classically American than the “successful individual who starts out at a low rung of the social ladder, necessarily leaves his own group behind as he rises.”<sup>145</sup> This person “‘passes’ into, or is ‘accepted’ by, the next higher group.”<sup>146</sup>

Charles W. Chesnutt is the writer who most sympathetically portrays passing.<sup>147</sup> A notable example of his solicitude is found in *The House Behind the Cedars*.<sup>148</sup> Set in the post-reconstruction era, this novel tells the story of John and Rena Walden, the children of a white man and his mulatto mistress. John leaves his mother’s home in North Carolina with the express purpose of fleeing the constraints imposed upon him by the local knowledge of his racially mixed lineage. He moves to South Carolina, changes his name to John Warwick, passes for white, marries the widow of a Confederate officer, and creates a large, prosperous law practice. Rena stays home with her mother and initially retains her association with their colored neighbors. At John’s urging, however, she too moves to South Carolina and passes for white. She falls in love with one of John’s rich, white clients and draws close to wedding him

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death,” and thus “asserted his freedom of choice.” *Id.* at 176. A similar claim be made on behalf of at least some passers.

<sup>143</sup> ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* 106 (1970)

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 108.

<sup>146</sup> *Id.* at 108–09. Hirschman goes on to write that the successful individual engaged in exit “takes his immediate family along.” *Id.* at 109. One of the things about passers that horrifies and angers commentators most is that many cut off even their immediate families. The person who severs even close familial ties in pursuit of ambition, however, does show commitment to that very American obsession—getting ahead.

<sup>147</sup> Chesnutt (1858–1932) was an extraordinary figure who was himself a “voluntary Negro.” He could have passed but chose to identify as a Negro. He was the first African American writer to be taken seriously on account of his craftsmanship by the white literary establishment. Chesnutt dealt with passing repeatedly in his work. In addition to *THE HOUSE BEHIND THE CEDARS*, he wrote *PAUL MARCHAND, F.M.C.* (written in 1921 but published in 1998) and *MANDY OXENDINE* (written in 1897 but published in 1997). For more on Chesnutt see WILLIAM L. ANDREWS, *THE LITERARY CAREER OF CHARLES W. CHESNUTT* (1980); HELEN M. CHESNUTT, *CHARLES WADDELL CHESNUTT: PIONEER OF THE COLOR LINE* (1952).

<sup>148</sup> CHESNUTT, *supra* note 141.

when, by coincidence, he discovers her racial background and withdraws his proposal of marriage. John counsels her to move to another city and try passing for white once again. Rena refuses and instead rejoins the colored community in which she was raised. Soon thereafter she tragically dies as a result of efforts to evade a villainous, sexually threatening black man.

*The House Behind the Cedars* is a nice counterpoint to *The Garies and Their Friends*.<sup>149</sup> In the latter, the sibling who stays black attains happiness, while the sibling who passes reaps misery. In *The House Behind the Cedars*, it is Rena, the sibling who returns to the African American fold, who suffers. Her brother, by contrast, appears to be happy with his racial identity as a white man. Unlike many of the passers portrayed in American fiction, John Warwick evinces no agonized self-doubts about his decision to become white. "I've taken a man's chance in life," he tells his mother, "and have tried to make the most of it; and I haven't felt under any obligation to spoil it by raking up old stories that are best forgotten."<sup>150</sup> Passing is not costless for John. He suffers pain at having to visit his mother's house under cover of darkness. He also suffers from the insecurity that menaces all passers. One of the reasons that he wants his sister to pass and to live with or near him is that he desires the company of at least one person with whom he can be completely open about his racial secret. But in terms of benefits versus costs, there is no question in John's view that passing constituted the right choice for him. "One who had gained so much," he muses, "ought not to complain if he must give a little."<sup>151</sup>

John Warwick's last comment will probably strike some readers as insulting to blacks inasmuch as it suggests that he minimizes the value of his association with African Americans—the "little" thing he believes he must give up to "gain so much," i.e., public recognition as a white man. Some readers will likely condemn his attitude as a form of self-hatred and racial betrayal. But what makes John "black" are merely racist laws and customs undeserving of deference. He should have the authority to determine for himself with what racial group, if any, he wants to be affiliated. If he chooses to white, so be it. He looks white. That is what enables him to pass in the first place. Moreover, it is with whites that he obviously feels most at ease. That is what enables him to say that he gives up "little" by leaving the black community of his childhood and joining the white community of his adulthood. If he were giving up what he considered to be "too much" he would presumably decline to pass.

This question of authority over racial affiliation and classification reaches back in American history and remains a vexing issue at present. An important episode in the past gave rise to *Plessy v. Ferguson*.<sup>152</sup> That infamous case involved the

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<sup>149</sup> WEBB, *supra* note 72.

<sup>150</sup> CHESNUTT, *supra* note 141, at 12.

<sup>151</sup> *Id.* at 20.

<sup>152</sup> 163 U.S. 537 (1896).

constitutionality of a state law that required that blacks and whites be seated apart in equal but separate railway cars. The challenge to the law was brought by a shoemaker, Homer Plessy, who was only one-eighth black and so light that he could have passed for white had he so desired.<sup>153</sup> The decision is notorious because the United States Supreme Court rejected Plessy's claim that this law branded blacks as inferior.<sup>154</sup> Because the segregation law formally applied to whites as well as blacks, the Court ruled that the state was meeting its obligation under the Fourteenth Amendment to provide to all persons the equal protection of the laws.<sup>155</sup> Less well known, though very important, is another aspect of Plessy's argument. He maintained that the federal constitution deprived states of the authority to label individuals racially.<sup>156</sup> In other words, he did not simply object to being limited to a railroad car that the community considered to be inferior because it had been set aside by law for use by a stigmatized segment of the population. He objected more fundamentally to the state's presumption that it could legitimately operate a system of racial matching under which, regardless of personal wishes, all individuals could be assigned to races to which they "belonged."<sup>157</sup>

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<sup>153</sup> Some commentators maintain, erroneously, that Homer Plessy was trying to pass and that what he objected to was not so much racial segregation per se but restrictions that ensnared him and others like him who were "almost white." It is true that Plessy's attorney, Albion Tourgee, complained that the segregation statute unfairly deprived his client of a valuable right—the reputation of belonging to the white race—and that one could reasonably infer from this complaint a desire on Plessy's part to be recognized as white. But this argument was inconsistent with the overall thrust of Tourgee's brief, which comprehensively attacked racial segregation per se and not merely as applied in any given case. It should be noted, moreover, that *Plessy v. Ferguson* represented an instance of carefully choreographed test litigation. The suit was initiated and supported by a group of light-skinned men of color who eschewed and abhorred all racial distinctions. Far from seeking to pass, Plessy made it known that he was a man of color sitting in a railroad car reserved only for whites. One reason for using Plessy, a man seven-eighths white, to challenge the law, was to highlight the statute's arbitrariness. See Diana Irene Williams, *New Orleans in the Age of Plessy v. Ferguson: Interracial Unions and the Politics of Caste* (1995) (unpublished senior thesis, Harvard University) (on file with the Harvard University Library); CHARLES A. LOFGREN, *THE "PLESSY" CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987); *THE THIN DISGUISE: PLESSY V. FERGUSON* (Otto H. Olsen ed., 1978). See also Amy Robinson, *Forms of Appearance of Value: Homer Plessy and the Politics of Privacy*, in *PERFORMANCE AND CULTURAL POLITICS* (Elin Diamond ed., 1996).

<sup>154</sup> *Plessy*, 163 U.S. at 551.

<sup>155</sup> *Id.* at 550–51.

<sup>156</sup> *Id.* at 548–49.

<sup>157</sup> See 13 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES* 27, 55–56 (Philip B. Kurland & Gerhard Casper eds., 1975) (brief of Homer Plessy):

The act in question . . . proceeds upon the hypothesis that the State has the right to authorize and require the officers of a railway to assort the citizens who engage in passage on its lines. . . . The gist of our case is the unconstitutionality of the assortment. . . . We insist that that the State has no

Homer Plessy lost that argument then. He would lose it again now. Although courts have considerably limited the power of states and the federal government to draw racial lines, they have also permitted them to do so for purposes deemed to be sufficiently compelling.<sup>158</sup> Courts, moreover, have upheld governmental authority to label individuals racially. Judges have invalidated racial labeling when they have perceived that its aim was to stigmatize. In 1964, at the urging of black candidates for electoral office, the Supreme Court of the United States invalidated a Louisiana statute which required the state to place a racial designation over the name of each candidate because, in the Court's words, the statute placed "the power of the State behind a racial classification that induces racial prejudice at the polls."<sup>159</sup> Around the same time, however, the Supreme Court upheld the constitutionality of a Virginia statute that required that divorce decrees recite the race of the divorcing parties.<sup>160</sup> Although the Court offered no explanation for its action, the likely response is that sort of racial designation poses little or no danger of racial stigmatization and is useful for purposes of charting important social developments. It is widely assumed, for the same reason, that there exist no constitutional impediments to requesting racial identification for purposes of tabulating the census or for administering affirmative action programs.

In the litany of charges arrayed against passing, none is more prevalent than the complaint that passers are "living a lie." This indictment warrants attention that can usefully be divided into two parts: one that considers complexities regarding forms of deception and a second that considers the conditions under which deceptiveness may be deemed morally and legally permissible.

There are many ways to be deceived. At one end of the spectrum, a person can attempt to mislead by telling a clear falsehood—stating that a light was green when one knows, in fact, that the light was red. At the other end, one can attempt to mislead by declining to disclose information that would prompt observers to think or act in ways that one wants to avoid. This latter scenario has often framed the modus operandi of the passer.<sup>161</sup> For purposes of obtaining medical training, Albert

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right to compel us to ride in a car "set apart" for a particular race, whether it is as good as another or not. . . . The question is not as to the *equality* of the privileges enjoyed, but *the right of the State to label one citizen as white and another as colored* in the common enjoyment of a common highway.

<sup>158</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>159</sup> *Anderson v. Martin*, 375 U.S. 399, 402 (1964), *rev'g* 206 F. Supp. 700 (D. La. 1962). For useful commentary on *Anderson*, see ANDREW J. KULL, *THE COLOR BLIND CONSTITUTION* 164–67 (1992).

<sup>160</sup> *Hamm v. Virginia*, 230 F. Supp. 156 (E.D. Va.), *aff'd mem.* 379 U.S. 19 (1964).

<sup>161</sup> WHITE, *supra* note 104, at 19.

Johnston, Jr., did not tell his white superiors at a hospital that he was a Negro; he simply allowed them to believe what they wanted to believe:

Later they told him, "You know when you first came, some of us thought you were a Filipino, or maybe a Hawaiian or a Jew—we didn't know what you were." And Dr. Johnston smiled along with them. So long as they didn't care enough to ask directly, why should he tell?<sup>162</sup>

When Adam Clayton Powell, Jr., passed for white during his first years at Colgate College he did not tell his classmates that he was white. He simply declined to correct their mistaken impression that was based on his appearance.<sup>163</sup>

James Weldon Johnson's "Ex-Coloured Man" thought carefully about this matter:

I finally made up my mind that I would neither disclaim the black race, nor claim the white race; but that I would change my name, raise a mustache, and let the world take me for what it would; that it was not necessary for me to go about with a label of inferiority pasted across my forehead.<sup>164</sup>

Is this deception? Yes, it is. True, the "Ex-Coloured Man" does not deceive by deploying a positive falsehood. Rather he deceives by purposefully leaving unstated certain facts about his situation which, given the circumstances, will lead most

<sup>162</sup> *Id.* at 19. The United States Navy did ask directly. During World War II, Dr. Johnston enlisted in the Navy. When a background check suggested that Johnston might not be as white as the Navy desired in its officers, a Naval intelligence agent briefly interrogated him:

"We understand that, even though you are registered as white, you have colored blood in your veins."

"Who knows what blood any of us has in his veins?" said the doctor.

The neat young man, who had been asked to sit down, now got up.

"Thank you very much, Doctor," he said. "That is all we want to know."

Soon thereafter the Navy sent Johnston a rejection notice saying that it was "unable to approve [his] application of [his] inability to meet physical requirements." *Id.* at 32.

<sup>163</sup> See WILL HAYGOOD, *KING OF THE CATS: THE LIFE AND TIMES OF ADAM CLAYTON POWELL, JR.* (1993); CHARLES V. HAMILTON, *ADAM CLAYTON POWELL, JR.* 48–50 (1991). After Powell's Negro ancestry was revealed to the student body he apologized to the few other black students at the college. According to one biographer, Powell's Negro lineage became known when white classmates paid a visit to his father's church in Harlem, the famous Abyssinia Baptist Church. HAYGOOD, *supra*, at 10–11. According to another biographer, Powell's Negro lineage was uncovered by investigators working on behalf of an exclusively white fraternity that Powell attempted to join. HAMILTON, *supra*, at 48–50. Both biographers agree that when Powell's negritude became generally known, his white room-mate demanded *that he move, a demand backed up by the college.*

<sup>164</sup> JOHNSON, *AN AUTOBIOGRAPHY OF AN EX-COLOURED MAN*, *supra* note 98, at 139.

observers to label him racially one thing (white), when, if they knew the facts withheld, they would racially label him something else (black).

The real issue, though, is not whether a passer deceives; as I have defined passing, deception is an essential part of the enterprise. The issue is how to assess the deception. Deceptions are by no means equal. Some are morally allowable, while others are not. It is one thing to lie to a murderer to protect a prospective victim. It is another to lie to a judge simply to injure a more accomplished rival. Many observers who would generally condemn passing would nonetheless excuse it in the case of a person seeking to escape death or enslavement—the case, for instance, of the Crafts. These observers would do so out of a sense that, while fraud is presumptively bad, there are exceptional situations in which even the most overt deceptiveness is justified or at least excusable and that fleeing the prospect of being killed or enslaved fits within that exception. If one accepts this proposition, however, what counts as exceptional? If deception to flee slavery is morally permissible, what about deception to flee the other caste-like limitations that have burdened most blacks? In my own view, passing to escape these stultifications was and remains morally permissible so long as it can be accomplished by means that do not impose morally prohibitive costs on innocent parties. Honesty and candor are surely presumptive virtues. But only that. For purposes of escaping immoral oppression, the presumption against dishonesty is overcome.<sup>165</sup>

An observer, however, who is willing to excuse a passer's deception of racist enemies might nonetheless feel differently about the deception of others, particularly those to whom the passer owes special obligations of trust. In the literature of passing, the question whether to reveal racial secrets to a loved one of a different race arises repeatedly. In *The Garies and Their Friends*, Clarence agonizes over his decision to withhold his secret from Little Birdie and later rues his silence.<sup>166</sup> In *The House Behind the Cedars*, Rena Warwick wrestles with whether she should tell her white fiancé about her colored background.<sup>167</sup> She is inclined to do so but is talked out of it by her brother. "Why should he know?" John asks. "We haven't asked him for his pedigree; we don't care to know it. If he cares for ours, he should ask for it, and it would then be time enough to raise the question." "I'm afraid he'd be unhappy if he knew," Rena responds, "and it would make me miserable to think him unhappy." Building upon this comment, John asks soothingly: "Do you imagine [George] would be any happier than he is now, or than if he should never know?" The argument implicit in this question—that telling George her secret would impose upon him an unwanted burden—helps to convince Rena to stay quiet. "It had never before

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<sup>165</sup> For an important analysis of deception that is generally more intolerant of it than I am, see SISSELA BOOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978).

<sup>166</sup> WEBB, *supra* note 72.

<sup>167</sup> CHESNUTT, *supra* note 141.

occurred to her," says the narrator, "to regard silence in the light of self-sacrifice. It had seemed a sort of sin; her brother's argument made of it a virtue. It was not the first time, nor the last, that right and wrong had been a matter of viewpoint."<sup>168</sup>

If Chesnutt raises questions about imprudent truth-telling, William Dean Howells attacks it frontally in his novel, *An Imperative Duty*.<sup>169</sup> At the center of this drama is a young woman, Miss Aldgate, who is unaware of her racially mixed parentage—white father, colored mother. Orphaned at an early age, Miss Aldgate is led to believe by her aunt and guardian, Miss Meredith, that she is white.

Howells repeatedly forces characters to consider the morality of truth-telling in circumstances in which the truth will foreseeably wound the person being informed. Prompted by what she views as an imperative duty, Miss Meredith tells Miss Aldgate the truth about her origins, at which point the following colloquy unfolds:

"[Y]ou mean to say—to tell me—that—that—I am—black?"

"Oh, no, poor child! You are as white as I am—as any one. No one would ever think—"

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... "Why, I must be dreaming. It's as if—as if—you were to come to a perfectly well person, and tell them that they were going to die in half an hour."<sup>170</sup>

Miss Meredith insists, moreover, that Miss Aldgate tell the truth to her suitors. Believing that, under the circumstances, silence is preferable, Howells excoriates Miss Meredith, calling her a "duty-ridden" creature "capable of an atrocious cruelty in speaking or acting the truth," a woman who "would consider herself an exemplary person for having done her duty at any cost of suffering to herself and others," a truth-telling absolutist who declares at one point: "It is better to die—to kill—than to lie."<sup>171</sup> Accentuating her fanatical "dutiolatry," Howells has Miss Meredith inform the reader that she "would rather see her [niece] perish before [her] eyes than married to any man who did not know the secret of her."<sup>172</sup>

Race matters greatly to many of the characters who enliven the fictional literature of passing. George Tryon breaks off his engagement to Rena Warwick when he learns that she is a Negro.<sup>173</sup> Clarence Garie's plans to marry Little Birdie Bates dissolve instantly when her family learns of his racial background.<sup>174</sup> Dr. Olney, the

<sup>168</sup> *Id.* at 56.

<sup>169</sup> WILLIAM DEAN HOWELLS, *AN IMPERATIVE DUTY* (1893).

<sup>170</sup> *Id.* at 74–75

<sup>171</sup> *Id.* at 34.

<sup>172</sup> *Id.* at 54.

<sup>173</sup> CHESNUTT, *supra* note 141.

<sup>174</sup> WEBB, *supra* note 72.



hero of *An Imperative Duty*, marries Miss Aldgate.<sup>175</sup> But he does so *in spite of* his knowledge of her racial lineage. Eventually, he proposes marriage—his love for her overwhelming all other considerations. But his initial response upon learning of her racial “taint” was:

a turmoil of emotion for which there is no term but disgust. . . . He found himself personally disliking the notion of her having negro blood in her veins; before he felt pity he felt repulsion. . . . a merciless rejection of her beauty, her innocence, her helplessness because of her race.<sup>176</sup>

James Weldon Johnson has his “Ex-Coloured Man” confide his racial secret to the white woman he desires to marry.<sup>177</sup> Her reaction is very much like Dr. Olney’s. Eventually, she comes to appreciate the individual virtues of her white Negro suitor and indeed ultimately marries him. Initially, though, when told by Johnson’s protagonist that he is colored, she, too, is distressed. According to the “Ex-Coloured Man”:

I felt her hand grow cold, and when I looked up, she was gazing at me with a wild, fixed stare as though I was some object she had never seen. . . . Her lips trembled and she attempted to say something to me, but the words stuck in her throat. Then, dropping her head on the piano, she began to weep with great sobs that shook her frail body.<sup>178</sup>

Just suppose the “Ex-Coloured Man” had withheld the racial facts of his ancestry? Would that and should that have constituted a legal or moral wrong? Consider the case of Anna D. Van Houten. In Massachusetts, in the early 1890s, Asa P. Morse proposed marriage to Van Houten. She accepted. But he subsequently withdrew his offer upon learning that she had Negro antecedents. She sued him for breach of promise to marry. His defense was that she had obtained his promise by fraudulently concealing her racial lineage.<sup>179</sup>

At trial, the presiding judge instructed the jury that, as a matter of law, Van Houten had a duty to answer truthfully any inquiries Morse made of her but had no duty to communicate all of the previous circumstances of her life. Clearly Morse

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<sup>175</sup> HOWELLS, *supra* note 169.

<sup>176</sup> *Id.* at 44.

<sup>177</sup> JOHNSON, AN AUTOBIOGRAPHY OF AN EX-COLOURED MAN, *supra* note 98.

<sup>178</sup> *Id.* at 149. Revealing his racial secret was traumatic for the “Ex-Coloured Man.” He thought about staying silent about his passing but rejected that alternative as an “indirect deception” that affronted his sense of honor. Still, he dreaded telling his beloved the truth about his racial past. “I am sure,” he mused, “I should have found it easier to take the place of a gladiator, no matter how fierce the Numidian lion, than to tell that slender girl that I had Negro blood in my veins.” *Id.* at 146.

<sup>179</sup> See *Van Houten v. Morse*, 162 Mass. 414 (1894).

never questioned Van Houten about her racial lineage. Van Houten won a jury verdict. On appeal, however, her victory was overturned on the grounds that the trial judge's instructions to the jury were faulty. According to the Supreme Judicial Court of Massachusetts, the trial judge erred by failing to instruct the jury that fraud could be perpetrated through omission—the assertion of a half-truth—what James Weldon Johnson called “indirect deception.” According to the court, “A partial and fragmentary disclosure, accompanied by the wilful concealment of material and qualifying facts, would be as much of a fraud as actual misrepresentation.”<sup>180</sup> Therefore, the court declared, if the plaintiff made favorable statements about her family, she was obligated to reveal everything material about it. She did not have to say anything about her family. But if she did talk about it, “she was bound not only to state truly the facts which she narrated, but [to refrain from suppressing or concealing] any facts which were necessary to a correct understanding on the part of the defendant of the facts which she stated.”<sup>181</sup>

What the Justices seem to have suspected is that Van Houten had painted a portrait of her Charleston, South Carolina, family that led her fiancé to have a certain impression of it without telling him certain other facts that would probably have led him to a very different impression. Likely to be established as facts, for instance, were suggestions at trial that the second husband of Anna Van Houten's mother was a colored barber who was also reputed to be Anna's father and that her mother, too, was about one-eighth black. Such omissions, the Court concluded, would amount to fraud and permit any promises based upon them to be withdrawn without liability. The court therefore voided Van Houten's jury verdict and ordered a retrial.

The Supreme Judicial Court of Massachusetts did not indicate in *Morse* that it cared much about the character of the relationship between the parties. The case did not involve a breach of contract action between two strangers buying and selling a carriage. It involved a breach of promise to *marry* between people who were already engaged to be married and thus on the cusp of committing themselves to one another for the balance of their lives. Given this degree of intimacy, it seems appropriate to expect of both parties more trust and candor than would ordinarily exist between contracting partners. It was arguable, in other words, that given her engagement to Morse, Van Houten had a special duty—a fiduciary duty—to share information about herself that she knew or should have known would be important to him, even if doing so was detrimental to what she perceived as her own best interest. From this perspective she erred if (as it appears), she kept silent about aspects of her family that she knew (or should have known) would materially affect whether Morse would propose. Her conduct could be said to reflect poorly upon her because it evinced a willingness to be evasive with her marriage partner about a matter that she knew or

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<sup>180</sup> *Id.* at 418.

<sup>181</sup> *Id.* at 417.

should have known he would consider significant. The argument would run that in the self-denying estate of marriage all opportunism should be strongly discouraged.

On the other hand, in courtship as in business, it is rightly expected that people will try to put their best foot forward which often entails minimizing if not altogether obscuring blemishes that, if seen, would alienate an otherwise potential partner. Here it bears recalling Judge Ruffin's observation that "it is not to be expected that [courting] parties will declare their own defects." Moreover, while marriage does and should impose added duties of candor between spouses, it should not wholly strip from spouses the privacy individuals enjoy against the world—including a zone of privacy even beyond the grasp of a marital partner. It is at least arguable that certain facts about one's background are within this zone and that in a racist society, racial ancestry is among these facts.<sup>182</sup>

Finally, it might be asked why people in Van Houten's position should be prompted by law or moral sentiments to propitiate the racial biases that Morse harbored or to which he was reacting. For law or public morality to require Van Houten to tell Morse of her colored lineage because she knows that it would matter to him is perhaps to give undue deference to destructive prejudice. The case is close; the competing arguments strong. Ultimately I believe that Van Houten committed no legal or moral wrong but confess to feeling troubled and equivocal about this conclusion.

#### IV. PASSING TODAY

Passing of various sorts remains controversial. Heated debate surrounded Secretary of State Madeleine Albright when journalists reported that some of her ancestors were Jews who had perished in the Holocaust and some charged that she, a practicing Episcopalian, had misleadingly denied knowledge of those facts to maintain distance from her Jewish roots.<sup>183</sup> And, of course, passing with respect to sexual orientation has sparked several debates central to recent struggles for gay and lesbian liberation. Examples include disputes over the morality of outing<sup>184</sup> and the

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<sup>182</sup> Cf. Anita Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161 (1999).

<sup>183</sup> See MICHAEL DOBBS, MADELEINE ALBRIGHT: A TWENTIETH-CENTURY ODYSSEY 377-95 (1999); ANN BLACKMAN, SEASONS OF HER LIFE: A BIOGRAPHY OF MADELEINE KORBEL ALBRIGHT 272-93 (1998); see also Peter Margulies, *The Identity Question, Madeleine Albright's Past and Me: Insights From Jewish and African American Law and Literature*, 17 LOY. L.A. ENT. L. REV. 595 (1997).

<sup>184</sup> See, e.g., LARRY GROSS, CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING (1993).

federal government's "don't ask, don't tell" policy, which effectively demands passing as a requirement for military service by lesbians and gays.<sup>185</sup>

Racial passing also remains a volatile subject. This is evidenced in part by the vehemence with which some continue to denounce it. "Trying to forgive Blacks who pass is difficult," Ronald Hall writes. "I feel that by passing, they have cursed the memory of every dark skinned person on their family tree."<sup>186</sup> The emotional combustibility of passing and conduct viewed as kindred to passing is also evidenced by the deep resonance of certain phrases—"stay black" and "don't forget where you come from"—that voice, among other things, a fear of racial desertion.<sup>187</sup>

One might have thought that racial passing and anxieties about it would have been rendered marginal by now given substantial declines in the intensity and power of anti-black feelings and practices. Simply being perceived as black no longer bars one absolutely from most of society's attractive opportunities. But for some observers, the specter of racial disunity, racial disloyalty, and even racial dissolution looms larger now because African Americans have more choice now than ever before regarding whom to date, where to live, or what school to attend. With more choices, larger numbers of blacks have more opportunity to distance themselves physically, socially, and psychologically from other blacks.<sup>188</sup> The prospect of new modes of passing in which, regardless of hue, Negroes become so-called "oreos"—black on the outside but white on the inside—has played a role in prompting some African Americans to pursue a renewed commitment to group solidarity.<sup>189</sup> Some who are inspired by black

<sup>185</sup> See, e.g., JANET HALLEY, *DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY* (1999).

<sup>186</sup> Hall, *supra* note 70, at 475; see also GRAHAM, *supra* note 10.

<sup>187</sup> See Alvin Poussaint, *The Price of Success: Remembering their Roots Burdens Many Blacks to Mainstream With Feelings of Either Guilt or Denial*, EBONY, Aug. 1987, at 78; BeBe Moore Campbell, *Staying in the Community*, ESSENCE, Dec. 1989, at 96; Bill E. Lawson, *Uplifting the Race: Middle-Class Blacks and the Truly Disadvantaged*, in *THE UNDERCLASS QUESTION* 90–113 (Bill E. Lawson ed., 1992). Two recent, wonderful novels demonstrate that the writers of fiction continue to find that the phenomenon of passing is a powerful vehicle for exploring American culture. See PHILIP ROTH, *THE HUMAN STAIN* (2000); DANZY SENNA, *CAUCASIA* (1998).

<sup>188</sup> Substantial numbers of people in many, maybe all, minority groups feel divided between enjoying fully the opportunities offered by white anglo-christian America—the "mainstream"—and maintaining a distinctive community immune from complete assimilation. For recent expressions of and reflections upon Jewish anxieties regarding passing, assimilation, and related phenomenon, see generally ELLIOTT ABRAMS, *FAITH OR FEAR: HOW JEWS CAN SURVIVE IN A CHRISTIAN AMERICA* (1997); ALAN M. DERSHOWITZ, *THE VANISHING AMERICAN JEW* (1997); MARJORIE GARBER, *SYMPTOMS OF CULTURE* 75–107 (1998).

<sup>189</sup> See John O. Calmore, *Random Notes of an Integration Warrior*, 81 MINN. L. REV. 1441, 1450 (1997) ("Even dark-skinned, nappy-headed African Americans like me can pass sociologically and culturally if we have the right history of socialization, the right credentials, a respectable job, an affluent income, and a proper street address or zip code.").

nationalist aspirations would like to impose a black communitarianism that would instill a heightened sense of racial obligation into African Americans. People with this view—the ideological descendants of Frances Harper—consider it urgent that blacks eschew assimilation into “mainstream” (i.e., “white”) society. Many of them also assert unapologetically that blacks ought to prefer one another over non-blacks. A broad array of African Americans—including many who pursue their schooling and professional activities in racially integrated settings—have adopted these ideological premises. They disparage blacks marrying whites, oppose inter-racial adoptions involving black children, and resist changes in verbal formulations or census classifications that would enable those now deemed to be “black” to identify themselves differently (e.g., as a “multi-racial” person). They see these activities as kindred to passing and condemn them as “escapist,” “inauthentic,” even “fraudulent” efforts that will lead to a debilitating “whitening” of what should be an authentically “black” African American community.

Who is right in the debate over racial passing? Is it a self-defeating betrayal of one’s race? Or is it a defensible assertion of individual autonomy? Satisfactory answers cannot be determined in the abstract. They depend on the surrounding circumstances. What are the consequences for declining to pass? What are the alternatives for seeking one’s goals? To whom must one lie in order to pass? To which groups, if any, does one feel a sense of affiliation? To what extent does passing entrench or subvert a given social order? Answers depend, moreover, on the judge’s baseline values.

As should be clear by now, I am skeptical of, if not hostile to, claims of racial kinship, valorization of racial roots, and politics organized around racial identity.<sup>190</sup> I am a liberal individualist who yearns for a society in which race has withered away as an important social marker. Yet I cheered (and still cheer) the mobilization of racial patriotism that constituted a central part of the mass movement that buried the pervasive, caste-like, Jim Crow oppression that dominated the racial landscape until rather recently. I applaud, for instance, the Montgomery Bus Boycott of 1954–55 when Martin Luther King, Jr., exhorted blacks to stand together as one in one pursuit of their demands. Noble in many respects, civil rights demonstrations—like all movements of collective action—also called into being a certain amount of coercion to cement the solidarity relied upon to defeat foes of African American advancement. During the Montgomery Bus Boycott, black people heeded King’s call to stay off the buses for all of the reasons universally lauded today. But implicit and explicit coercion—letting it be known that any strike-breaking would incur the strikers’ wrath—also played a role in solidifying the boycott. Blacks in Montgomery

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<sup>190</sup> See Randall Kennedy, *My Race Problem—And Ours*, ATLANTIC MONTHLY, May 1997, at 55–56.

effectively banned individualistic responses to the crisis at hand. Negroes who may have wanted to ride the bus were prevented by shame or fear from doing so.<sup>191</sup>

The exceptional nature of a strike (or a state of war) highlights, however, the rightful dominance of the presumption that should rule in the absence of emergency. Except for exceptional circumstances, we ought to permit individuals free entry into and exit from racial categories even if the choices they make clash with widespread conventional understandings of who is a “black” or who is a “white” and even if, despite making these choices in good faith, individuals mislead observers who rely on conventional racial signaling. Rather than seeking to chain people forever to the racial statuses into which they are born, we should try both to eradicate the deprivations that impel people to want to pass *and* to protect individuals’ racial self-determination, including their ability to revise racial identities.

A great irony is that the most bitter recent disputes over passing involve “whites” who are charged with posing as “blacks.” Consider, for example the, case of Mark L. Stebbins.<sup>192</sup> In 1985, Stebbins faced a recall election that threatened to oust him from his seat on the Stockton, California, City Council. A rival claimed that Stebbins had lied to voters in a predominantly Latino and black district because he was white though he held himself out as black. According to news reports, Stebbins was light-skinned and blue-eyed. Moreover, his birth certificate listed both of his parents as white. His first wife was white. But in subsequent marriages he twice wed black women, the second of whom he met at an NAACP meeting. Stebbins recalled that, because of his broad nose and curly hair, he faced taunts as a teenager in rural Washington state from classmates who sometimes referred to him as “nigger hair.”<sup>193</sup> He conceded that for the first twenty years of his life he thought of himself as white. But he insisted that after he moved to Stockton in 1966 in the wake of an engagement with civil rights activism in San Francisco he came to the “gradual realization” that, actually, he was black.<sup>194</sup> Asked in the midst of the recall campaign how he could identify himself as black when his parents were officially classified as white, Stebbins replied that he must be black because he felt black. Questioned about Stebbins’s racial identity, a black friend remarked that Stebbins is “whatever he says his is.”<sup>195</sup> Elaborating, one declared: “If you say you’re black, there is such a curse to it, nobody will argue with you. If you want that loaf of bread, anybody will give it to you.”<sup>196</sup>

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<sup>191</sup> See Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 *YALE L.J.* 999 (1989).

<sup>192</sup> See Jay Mathews, *Hue and Cry: Blue-Eyed Official Ran As Black, Faces Recall*, *WASH. POST*, May 6, 1984, at A1.

<sup>193</sup> *Id.* at A13.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

The friend, however, was clearly incorrect because Stebbins's rival, a black politician, did argue with him over his purported blackness and succeeded in having Stebbins recalled.<sup>197</sup>

Another hotly contested passing dispute involved Paul and Phillip Malone who applied for jobs as firefighters in Boston in 1975.<sup>198</sup> On their applications, they identified themselves as white. They were rejected. Two years later they re-applied. This time they indicated that they were black—a “fact” that undoubtedly enhanced their applications since the fire department was under a court-ordered affirmative action plan imposed to remedy a long history of anti-black racial exclusion. The Fire Department selected them. A decade later, when one of the Malones sought a promotion, someone told fire department officials that the brothers were racial imposters. In their defense, the Malone brothers insisted that they were black—that after their initial rejection by the fire department, they had discovered that their maternal great-grandmother was a Negro woman.

The personnel administrator for the Commonwealth of Massachusetts declared that the Malones could support their claim that they were black:

(1) by visual observation of their features; (2) by appropriate documentary evidence, such as birth certificates, establishing black ancestry; or (3) by evidence that they or their families hold themselves out to be Black and are considered to be Black in the community.<sup>199</sup>

The personnel administrator also determined that the Malones would be entitled to a favorable ruling “even in the absence of meeting the standard [for racial classification], if [it were found] that Phil and Paul Malone acted in good faith.”<sup>200</sup>

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<sup>197</sup> *Id.* In the absence of more information than I have at my disposal it is difficult to make an assessment of this outcome. If the voters were convinced on sensible grounds that Stebbins ought to be recalled, there is no reason for concern; representative democracy will have worked as it should. One sensible reason might have been the belief that Stebbins demonstrated unjustified evasiveness, if not dishonesty, in his racial self-presentation. For reasons already mentioned, I would disagree with this judgment. But the case is closed. Another possible reason for the recall was the belief that, optimally, colored people should be represented by colored agents, regardless of the agents' substantive thinking. This impulse to rally around people solely on the merits ascribed to their skin color, lip size, and hair texture is venerable but stupid.

<sup>198</sup> *Malone v. Haley*, No. 88-339 (Mass. Sup. Jud. Ct. July 25, 1989) (on file at the Harvard Law School Library). For commentary on this case see Christopher A. Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994); Luther Wright, Jr., Note, *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States' Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513 (1995).

<sup>199</sup> *Malone*, No. 88-339, at 16.

<sup>200</sup> *Id.* at 16 n.7.

The administrator concluded that the Malone Brother's were not black and that they made their claim of blackness in bad faith. The officer who presided over the Malone brothers' hearing found that they did not appear to be black. She also found that there existed no convincing documentary evidence linking them to even remote black ancestry. White is the racial designation stamped on the birth certificates of the men, their parents, and their parents' parents. As for the maternal great-grandmother whom the Malone brothers described as a black women, the hearing officer deemed their alleged photograph of her to be inconclusive. In addition, the hearing officer found no evidence that the Malones had ever identified themselves as black except for purposes of seeking to benefit from the affirmative action program.<sup>201</sup> Against this backdrop, the personnel administrator concluded that the Malone brothers failed to meet an "objective" standard of blackness and, further, that they did not believe in good faith that they were black when they applied for their positions as African Americans. Justice Herbert P. Wilkins of the Massachusetts Supreme Judicial Court affirmed the administrator's reasoning and ruling.

It would have been useful for the court to have expressly discussed the relationship between methods for determining race and the purposes of the affirmative action program.<sup>202</sup> If, for example, the goal of the affirmative action program was to make available special opportunities for those whose apparent blackness had previously been used to exclude them from eligibility for firefighter positions, it would have made sense (in the absence of costs I detail below) to limit the class of beneficiaries to those who were apparently black. The same is true if the aim of the affirmative action program was to elevate the fire department in the eyes of blacks by showing them in a highly public way that African Americans are now welcomed as firefighters. In either of these situations, one might well wonder why a person who is generally perceived to be white should be able to participate in the program simply because he has an idiosyncratic, albeit honest, desire to be black.<sup>203</sup>

The strength of the *Malone* decision is its implicit, albeit inarticulate, perception that no plausible aim of the affirmative action plan would have been worth the cost of excluding individuals from racial identifications that they honestly embraced. Justice Wilkins insisted that people who might conventionally be described as white could nonetheless be classified as black so long as they honestly considered themselves to be black. He paid appropriate deference to the healthy intuition that a free society ought to permit people to exit and enter racial categories, even for purposes of gaining access to public entitlement programs, fettered only by the

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<sup>201</sup> *Id.* In the 1986 census of Milton, Massachusetts the Malones identified themselves as white. See Bella English, *Color Coordinated*, BOSTON GLOBE, Oct. 12, 1988, at 21.

<sup>202</sup> See Ford, *supra* note 198, at 1281.

<sup>203</sup> Cf. Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 27 STAN. L. REV. 855 (1995).



bounds of good faith. Justice Wilkins rightly rejected the baleful notion that state power should be used to confine every person to a given racial place regardless of individual preferences.<sup>204</sup>

The merit of this insistence that society provide ample space for racial self-determination is highlighted by comparing it to the demand that people be made to accept whatever racial category is impressed upon them at birth. An example is an article written in response to the *Malone* case that suggests that, in order to avoid future instances of racial fraud, governments should revive the practice of putting race on birth certificates and classify individuals according to the race of their parents. "Those who falsely allege their race," the author argues, "should be . . . subject to criminal penalties."<sup>205</sup> The motivation behind this calls for a racial registration system different than that which motivated the racial registries codified by Virginia and other jurisdictions in the Jim Crow era. Instead, it is motivated by a desire to protect against corruption and sabotage of programs that have helped many people affiliated with historically oppressed racial groups. Still, whatever the motivation, the prospect of a new wave of racial identification laws is frightening to contemplate. It would be better to tolerate some or even considerable racial fraud under a regime of racial self-identification than to police affirmative action programs by subjecting individuals to racial identity tests. Indeed, abolishing such programs would be preferable to maintaining them if intrusive racial policing became part of their price.<sup>206</sup>

It bears noting, though, that there are remarkably few instances on record in which authorities have challenged the participation of individuals in affirmative action programs on the grounds that they did not belong within a given racial category of designated beneficiaries. There has been criticism of affirmative action programs that assist black-owned businesses on the grounds that, too often, they are merely passing as black when, in fact, they are white-run operations.<sup>207</sup> But thus far there are few counterparts to the *Malone* litigation in which the racial bona fides of individuals have been challenged.<sup>208</sup> There is no definitive account of why this is so. My

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<sup>204</sup> *Id.*

<sup>205</sup> Wright, *supra* note 198, at 567.

<sup>206</sup> Cf. BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS 127* (1973) (suggesting that dangers attending need to police claimants for reparations might outweigh value of offering reparations to victims of anti-black racial oppression in the United States).

<sup>207</sup> See Michael Oreskes, *The Set-Aside Scam: Corruption and Quotas in the Construction Industry*, NEW REPUBLIC, Dec. 24, 1984, at 17; Vernon C. Thompson, *Minority Firms vs. Minority Fronts*, WASH. POST, June 12, 1979, at C1.

<sup>208</sup> An interesting twist on the *Malone* episode is the case in which a passing White Negro passes back, re-establishes a black identity, and obtains desirable employment as an African American—sometimes to the consternation of blacks who never passed and who resent the privileged mobility of those who have. See Doris Black, *How Passing Passed Out*, SEPIA, Dec.

impression is that authorities are rightly loathe to investigate or repudiate individual's racial self-identification. It is also my impression, however, that relatively few whites have done what the Malone brothers did. One likely reason why whites tempted to pass for black for purposes of obtaining affirmative action benefits have declined to do so is that the perceived risks outweighed the perceived benefits. One risk is the reputational harm associated with being revealed as a passer. Another is the risk that the masquerade may be all too successful and cause the white passer to suffer the racial penalties that "real" blacks continue to face.<sup>209</sup>

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1972, at 66 ("Now the only passing that is prevalent is from white to black. . . . [B]eing black has become a job asset.").

<sup>209</sup> In 1986 the creators of the film *Soul Man* portray a spoiled, affluent white student who passes for black in order to obtain a scholarship earmarked for an African American. Initially the student is ecstatic. "This is the Cosby decade!" he exclaims. "America loves black people." After his skin darkens in reaction to a deliberate overdose of tanning pills, the student encounters a reality very different than the one he had envisioned. He gets the scholarship money. But he also gets racially harassed by prejudiced police officers, classmates, and a landlord. Reacting to the cue of his darkened skin, strangers see him as a potential rapist, pimp, or mugger instead of what he actually is—a student. By becoming black the *Soul Man* gets much more than he bargained for. Clarence Page, *I'm Sold, Man, On the Movie 'Soul Man,'* CHI. TRIB., Oct. 29, 1986, at 15.

When Mel Ferrer played the part of a passing white Negro in *Lost Boundaries*, he and member of his family became the targets of anti-black prejudice by people who identified him with the character he portrayed. See Al Weisman, *He Passed as a Negro*, NEGRO DIG., Oct. 1951, at 16.

