

SIGNIFYING ON PASSING: (POST) POST-RACIALISM, (POST) POST- MODERNISM, AND (POST) POST-MARXISM

*Christian B. Sundquist**

The social and legal relevance of racial passing¹ appears to be fading as we ostensibly enter a color-blind, post-race era. During the “Age of Obama,” the notion of passing in our multi-racial society seems to many to be antiquated and unnecessary. As the nation has moved beyond state-sanctioned racial discrimination, many believe that the country also has moved beyond the need for a legal dialogue on racial passing and ambiguity. This “retreat from race,”² exemplified in part by the apparent declining significance of racial passing, proclaims that the state no longer should consider race when interpreting the law or incorporating democratic values of equality and opportunity. This Essay, however, argues that the continued phenomenon of racial passing can be utilized as a conceptual vehicle to destabilize and de-legitimize the post-racial agenda.

The continuing relevance of racial passing also underscores the significance of the lessons of Marxism. After all, the concept of “race,” and therefore the existence of racial passing, traces its lineage

* Associate Professor of Law, Albany Law School. J.D., Georgetown University Law Center. I thank Donna Young, Maria Grahn-Farley, Lenese Herbert, Peter Halewood, Nancy Ota and Areto Imoukhuede for their invaluable advice during the preparation of this Essay. I also am especially grateful to my colleague Anthony Paul Farley for organizing the post-racialism panel at the Third National People of Color conference that led to this publication opportunity, as well as for his continued guidance and support. An earlier draft of this Essay was presented at the Third National People of Color conference, held in September 2010 at Seton Hall Law School.

¹ Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1145 (2001) (defining passing as “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”).

² Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1589 (2009).

to the capitalist condition of racialized class distinctions and cultural hegemony (e.g., the white cultural norm). The post-racial agenda seeks to mask the commodification of persons, obscuring the salience of race and discrimination.³ Thus, the cry for a post-racial America is the latest attempt to lure society into a false sense of class and racial transformation. The continued presence of racial passing may lift the veil from our eyes to the conditions of racial and class exploitation that govern everyday life.

This Essay will proceed in three parts. The first section argues that the particular *weltanschauung*⁴ of post-racialism has obfuscated the continuing relevance of racial difference and conflict. The post-racial model seeks to skew the proletariat perception of social reality by imposing a false-consciousness that conceals existing relations of racial subordination and exploitation. In so doing, post-racialism strives to reject its theoretical Other: Marxism. However, the failings of post-racialism as a worldview are traced directly to its inability to refute the continuing salience of class and racial conflict. The second part of the Essay explores the similarities and differences between the post-racial model and the classic liberal colorblind model. The third part of the Essay concludes that the continuing relevance of racial passing should be utilized to reveal and disrupt the post-racial agenda.

I. POST-RACIALISM AND (POST) POST-MARXISM

The strident cry of post-racialism is a call to a post-Marxist and post-postmodern dialectic. Applying a post-racial perspective, the fundamental notions of classical Marxism—historical materialism, the dialectical process, antinomianism, class conflict, false consciousness and hegemonic control—are outmoded and unworkable in a world beyond race.⁵ Similarly, the themes of post-modernism—post-structuralism, deconstruction and relative meaning and contextual morality—are antithetical to the post-racial

³ See, e.g., Anthony P. Farley, *The Colorline as Capitalist Accumulation*, 56 BUFF. L. REV. 953, 956 (2008).

⁴ *Weltanschauung* can be defined as a comprehensive world view, or the fundamental cognitive orientation of an individual or society encompassing all of that individual's or society's knowledge and point-of-view, including, but not limited to, cultural, philosophical, and ethical views. GARY B. PALMER, TOWARD A THEORY OF CULTURAL LINGUISTICS 114 (1996).

⁵ See generally Eric Engle, *A Primer on Left Legal Theory: Realism, Marxism, CLS and PoMo*, 3 THE CRIT: A CRITICAL LEGAL STUD. J. 64, 70-73 (2010) (review of basic Marxist history and theory).

view.⁶ Post-racialism, thus, represents a shift from theories of modernity phrased in terms of class conflict (such as Marxism), as well as a distancing from post-modernity theories that purport to transcend universalism and objective morality (such as post-modernism).

Yet, far from setting forth a novel and transformational perspective, post-racialism attempts to coyly resurrect the past model of classical liberalism. The post-racial model argues that the world has moved beyond racial and class conflict at the meta-level, and as such, society and law should strive to respect individual liberty by adopting a colorblind/post-race and classblind/post-class orientation.⁷ The gaze returns to the liberal rights of the individual citizen—freedom to contract, control of property, competition uninhibited by “affirmative” measures, and equal opportunity—while failing to interrogate past discrimination and past accumulations of wealth.

Nonetheless, the core lessons of Marxism that speak to the salience of class conflict and the concepts of hegemony and false consciousness remain instructive to any discussion of class and racial inequality. The divisions between rich (bourgeoisie) and poor (proletariat) and white and non-white remain significant.⁸ Despite the comforting appeal of post-racial rhetoric, America has not moved “beyond race” or the need for race-based legal decision-making and remedies. Even with the eradication of state-sanctioned racial discrimination, American society has not outlived the value of racial passing as a vehicle for understanding racial borders and inequality. Race continues to control outcomes, social position, and access to legal rights.⁹ Race and identity performance continue to regulate our interpretation of social space and cultural meaning. The call to a post-racial understanding of the nature of law and society is premature at best, and a disingenuous scheme to normalize racial subordination and class exploitation at worst.

II. POST-RACIALISM AND THE COLOR-BLIND MODEL

The current charge of post-racialism is subtly distinct from the conventional liberal notion of colorblindness. The colorblind

⁶ See generally *id.* at 75-78 for a brief review of postmodernist theory.

⁷ Cho, *supra* note 2, at 1598-99.

⁸ BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 13 (2003).

⁹ *Id.* at 13-15.

ideal envisions a world where race and color must be disregarded in the application of social and legal rules, given the establishment of civil rights and equal opportunities for all individuals.¹⁰ The model holds that race is irrelevant to social policy and constitutional interpretation due to the eradication of formal *de jure* racial barriers to political participation. The distribution of social and economic resources, therefore, should be governed not by remedial racial considerations, but rather by liberal notions of meritocracy, equality and individualism.¹¹

The consequences of post-racialism are strikingly similar to those of the colorblind model of adjudication. Under both worldviews, the law is not justified in adopting race-regarding remedial measures, upholding affirmative-action plans, or otherwise considering race as a part of efforts to eliminate racial inequality. To do otherwise would violate core constitutional values of equality and individualism, either because as a jurisprudential matter the law must be rigidly colorblind or because society has simply progressed beyond the idea of race.

However, post-racialism is distinct from the colorblind model in the path it chooses to rationalize the departure from race-based considerations. Whereas the colorblind model justifies its rejection of race on strictly normative grounds, the post-racial movement emphasizes the descriptive social “reality” of racial transcendence and universalism.¹² Post-racialism is also signified by an undercurrent of intellectual exhaustion and impatience regarding dialogues on race and racism. Any discourse on continuing racism and inequality in society is seen as the “old school” civil rights community trumpeting of an eclipsed racial and cultural era.¹³ The discussions are considered passé and obsolete. The post-racial call to silence such racial dialogues assumes that race is devoid of social and legal meaning as a political construct.

¹⁰ Cho, *supra* note 2, at 1620-21 (discussion of post-racialism in the Roberts Court). “In the post-racial courts, the complex machinations of the courts’ evidentiary burden sleight-of-hand achieves the racial hegemony sought on matters of racial jurisprudence with far greater effectiveness. Chief Justice Roberts practiced his moral-equivalence soundbyte to perfection in his *Parents Involved* opinion comparing Jim Crow racialism with civil-rights racialism, writing “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Id.* at 1620 (quoting *Parents Involved v. Seattle Sch. Dist.*, 551 U.S. 701, 748 (2007)).

¹¹ *Id.* at 1601-02.

¹² *Id.* at 1597-98.

¹³ *Id.* at 1593.

III. RACIAL PASSING AND POST-RACIALISM

Following the post-racial theory, the contemporary relevance of racial passing is assumed to be nil. In a world that is beyond race and racial borders, there clearly would be no material or psychological need for transgression. However, scores of anecdotal, literary, and historical evidence demonstrate the enduring relevance of racial passing. Racial passing, even in its traditional iteration as the conscious and voluntary transgression of social boundaries in order to escape racial discrimination, remains prevalent in our society. Speaking from my own personal experiences, a former colleague of mine from private practice, “Rogelio,” regularly and consciously passes as white in order to avoid perceived and real workplace racial discrimination. “Rogelio” takes pains to actively conceal his Latino heritage from his employer and the legal community at-large by employing a variety of covering measures.¹⁴ He accomplishes his goal of passing by using a more “white” sounding first name than his given South American name (e.g., “Roger”), by intentionally mispronouncing his last name of South American origin to sound more “American,” by sanitizing his resume to remove any telling references to his non-white background, by refusing to teach his daughter the Spanish language, and by not interacting with other lawyers of Latino heritage. When I asked him why he felt it was necessary to engage in this practice, he explained that he was afraid that the racial baggage of being non-white—and concomitant risk of racial discrimination—would negatively impact his chances of becoming a partner in a large law firm. As angry as I was with “Rogelio’s” passing, his evaluation of the likelihood of racial discrimination was rational.

The frustration that I experienced over “Rogelio’s” passing conforms with the historical understanding of passing as a negative and dishonest betrayal of one’s “true” and singular racial position in society. The voluntary concealment of one’s racialized, non-white background in order to become “race-less” and free from the burden of race—to become “white”—often arouses hostility and outrage by both white and non-white observers. By destabilizing the legitimacy of racial categories and hegemony, the phenomenon of passing is appropriately seen as a threat to racial privilege and separation. Paranoia about racial passing and the “white negro,” for

¹⁴ See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (“Covering means the underlying identity is neither altered nor hidden, but is downplayed.”).

instance, fueled segregationist and anti-miscegenist legal policy during the *de jure* period of racial discrimination.¹⁵

The classic passer is vilified not only by formal racists but also by the larger society. Passing is viewed as a costly betrayal of shared history, ancestry, family, and identity ties.¹⁶ The passer is seen as turning his back to his own family and racial community, and the psychic costs of such subterfuge are seen as far outweighing any temporary gains.¹⁷ This theme of passing is thoroughly explored throughout literature and the media.¹⁸

However, the notion of racial passing need not be restrictively defined in terms of its traditional iteration. A performative and interpretive construction of passing is invaluable for demonstrating the continuing relevance and contestation of race and identity. Such a construction recognizes that passing demands an “appreciation . . . that all identities are processual, intersubjective, and contested/contestable.”¹⁹ The medium of racial passing “highlights the performative scaffolding fundamental”²⁰ to the

¹⁵ Kennedy, *supra* note 1, at 1157-58.

¹⁶ *Id.* at 1158-59.

¹⁷ *Id.*

¹⁸ See, e.g., NELLA LARSEN, *PASSING* (1929); NELLA LARSEN, *QUICKSAND* (1928); DANZY SENNA, *CAUCASIA* (1998); PHILIP ROTH, *THE HUMAN STAIN* (2001); *IMITATION OF LIFE* (Universal Pictures 1934). I have personally experienced such traditional forms of passing in my life. As the child of a lighter-skinned African-American mother and a white Swedish-American father, I am capable of being labeled with various racial constructions. My family and the predominantly African-American community that I was raised in as a young child taught me many lessons regarding the dangers of passing. One of my earliest memories involved enrolling in a new school during the second-grade and being asked by a school administrator whether I wanted to check “white” or “black” as my race. My mother said it was up to me to choose and so I chose “white.” My reasoning was, since I had always been black in the past, I wanted to see what being white was like for a change! While my mother was shocked by my decision, I mostly remember the emotional reaction of my usually stoic grandfather once I returned home from school. When told that I decided to try being white for a school year, my grandfather was brought to tears by my naïve response to the school form. While I do not recall specific statements from that meeting, I will forever carry with me the sense (wrongly or rightly) that passing is a vicious betrayal of your family and roots.

¹⁹ Michele Elam, *Passing in the Post-Race Era: Danzy Senna, Philip Roth, and Colson Whitehead*, 41 *AFR. AM. REV.* 749, 750 (2007) (quoting John L. Jackson & Martha S. Jones, *Passed Performances: An Introduction*, 15 *WOMEN & PERFORMANCE: J. FEMINIST THEORY* 9, 14 (2005)).

²⁰ *Id.*

perpetual negotiation and structuring of race, and the manner in which race remains contextually and politically relevant. Rather than providing a path to a post-racial nirvana, the phenomenon of passing demonstrates the continued viability of notions of race and racism. In this way, passing subverts the current system of racial categorization and hierarchy.²¹ The perceived need to transgress social mores in order to become race-less demonstrates that the world is not beyond race.

Passing is not accessible only to the racially ambiguous. Moving away from the perception of passing that is tied strictly to phenotypical racial confusion introduces the possibility to recognize passing as a “social heuristic” through which to understand the performative nature of race and identity.²² The determination of who can pass, for what, when, and where depends as much on “acculturated perception”²³ and racial context as interpreted phenotype. As Professor Elam observes:

What constitutes a supposedly ambiguous body in one time and place may not in another; ambiguity cannot, in other words, be treated as a transhistorical or positivist given; it is an attribution resulting from an acquired and variable interpretative competency.²⁴

By restricting our understanding of passing to a few visual exemplars of the “ambiguous body,” we adopt the inaccurate assumption that race “is always optically available and decipherable.”²⁵ The meaning we attribute to race is continually negotiated. We all—white and non-white—perform race. We all also regularly interpret race and evaluate the racial performances of others. The concept of performative passing illustrates the possibility of a person to disrupt the racial schemas of others by knowingly or unknowingly manipulating racial cognitive cues. The question of passing, and its decommodification of the raced body, is thus always tied to the larger social discussion of racial borders and meaning.

²¹ *Id.* at 762 (“Those who can pass not only inherit the legacies of mixed-race heritage; they put that heritage in practice in a way that marks the transgression of, and thus lays bare, the paradox of unequal entitlements in the land of equality.”).

²² *Id.* at 750.

²³ *Id.* at 751.

²⁴ *Id.*

²⁵ *Id.*

IV. CONCLUSION

The social reality of race—of racial discrimination, hegemony, and passing—is blurred by post-racialism. We—the proletariat—nonetheless retain the power to influence the terms of our consciousness²⁶ by re-incorporating the lessons of Marxism into the discussion on race. The existence of racial passing is one vehicle through which we can destabilize the false representation of a post-racial nirvana. The perceived need to pass into imaginary racelessness (e.g., whiteness) demonstrates the continued existence of racial subordination as well as the relative and subjective meaning of race itself. An application of Marxist principles can lift the veil from the false reality—of being beyond race, beyond racism, and beyond domination—imposed by post-racialism.

²⁶ See, e.g., Antonio Gramsci, Letter 128, in *GRAMSCI'S PRISON LETTERS* 217-18 (Hamish Henderson trans., 1998); Gramsci, Letter 129, in *id.* at 214-17 (discussing hegemony by consent of the proletariat and alluding to the possibility of the oppressed influencing their reality).