

A House Divided: The Invisibility of the Multiracial Family

Angela Onwuachi-Willig*

Jacob Willig-Onwuachi**

I. INTRODUCTION

Twenty years ago, Peggy McIntosh expounded upon the theoretical concept of white privilege in her paper, *White Privilege: Unpacking the Invisible Knapsack*.¹ White privilege, she said, “is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks”² that includes individual advantages such as the following:

1. I can, if I wish, arrange to be in the company of people of my race most of the time.
2. I can avoid spending time with people whom I was trained to mistrust and who have learned to mistrust my kind or me.
3. If I should need to move, I can be pretty sure of renting or purchasing housing in an area which I can afford and in which I would want to live.
4. I can be pretty sure that my neighbors in such a location will be neutral or pleasant to me.
5. I can go shopping alone most of the time, pretty well assured that I will not be followed or harassed.³

* Professor of Law, Charles M. and Marion J. Kierscht Scholar, University of Iowa. B.A., Grinnell College; J.D., University of Michigan Law School. Author can be reached at angela-onwuachi@uiowa.edu.

** Assistant Professor of Physics, Grinnell College. B.A., Grinnell College; M.S., University of Iowa; Ph.D., Case Western Reserve University; Post-Doctoral Fellowship, Harvard Medical School/Beth Israel Deaconess Hospital. Author can be reached at willig@grinnell.edu.

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¹ Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, INDEP. SCHOOL, Winter 1990, *excerpt available at* <http://www.case.edu/president/aaction/UnpackingTheKnapsack.pdf>.

² *Id.*

³ *Id.*

Twenty years later, in 2008, McIntosh's words ring equally true and have become a staple in the anti-racist literary canon. We, a black⁴ woman and a white man who are married and living together in Iowa with our three biracial children, have given McIntosh's work serious thought over the years, both voluntarily and involuntarily. We use it in our lives as a basis for examining our own invisible knapsacks of privilege, such as our unearned privileges as heterosexuals. For example, in our actions and efforts to support the legal recognition of same-sex marriage, we often remind ourselves of the benefits that we have received as a result of the Supreme Court's decision in *Loving v. Virginia*⁵ in 1967. *Loving* held that anti-miscegenation statutes were unconstitutional, thus ensuring at least the legality of our multiracial marriage in every state.⁶ We also use McIntosh's work as a basis for understanding our own individual social advantages and disadvantages as a result of our two different races. For instance, I, Jacob, a white man, am often reminded of my own white privilege when I shop alone in malls and am neither followed around in stores nor asked to produce various forms of identification when purchasing items.⁷ Whereas I, Angela, a black woman, am often exposed to my racial disadvantage when I read the newspaper, watch television, or listen to the news, all of which are filled with negative and stereotypical images of black people.⁸ Finally, we use McIntosh's work

⁴ We prefer to use the term "blacks" to the term "African Americans" because the term "blacks" is more inclusive. See *Why "Black" and Not "African-American,"* Adan Gonzalez, 3 J. BLACKS HIGHER EDUC. 18, 18-19 (1994) (explaining why the term "black" is a more inclusive term than "African-American"). Additionally, we find that "[i]t is more convenient to invoke the terminological differentiation between black and white than say, between African-American and Northern European-American, which would be necessary to maintain semantic symmetry between the two typologies." Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1044 n.4 (1992).

⁵ 388 U.S. 1 (1967).

⁶ *Id.*; see also *infra* Part II.B. Almost twenty years before *Loving*, the California Supreme Court struck down California's anti-miscegenation statute in *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948). See R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839, 847 (2008) (using *Perez* to argue that "identity-based restrictions that prohibit someone from marrying the 'person of [her] choice' inflict significant citizenship harm").

⁷ See Mary Jo Wiggins, *Race, Class, and Suburbia: The Modern Black Suburb as a "Race-Making Situation,"* 35 U. MICH. J.L. REFORM 749, 797-98 (2001-2002) (detailing how professionally dressed black people are routinely followed in stores); James Ragland, *Black Shoppers Feel They're Unwelcome: Oprah Isn't the Only One Complaining about Stores*, *Study Said*, DALLAS MORNING NEWS, Aug. 7, 2005, at 7E. ("The Oprah incident [in which billionaire Oprah Winfrey was prevented from entering an Hermes store in Paris, allegedly because the store had been having problems with North African women] renewed talk about racial profiling in stores. The study found that 56 percent of black respondents sensed that store clerks or security guards were watching them more closely than other customers. By comparison, 40 percent of Hispanic and 17 percent of white respondents say the same thing.")

⁸ See CAMILLE O. COSBY, TELEVISION'S IMAGEABLE INFLUENCES 36-37 (Wellington & Chiu, eds. 1994) (describing images of black people in the media as the "Savage African, Happy slave, Devoted servant, Corrupt politician, Irresponsible citizen, Petty thief, Social delinquent, Vicious criminal, Sexual superman, Unhappy non-white, Natural-born cook, Perfect entertainer, Superstitious churchgoer, Chicken and watermelon eater, Razor and knife 'toter',

as a means for understanding and evaluating the ways in which our racial advantages and disadvantages are complicated by our marital union. Primarily, we use it as an avenue for understanding the ways in which our privileges—mainly Jacob’s—disappear as a result of our marriage.

More than forty years after *Loving*, we continue the legacy of the case’s named plaintiffs, Mildred and Richard Loving. We endure the legacy of the Lovings’ social lives, which, even after the historic decision, were affected by both conscious discriminatory attitudes and unconscious biases. We also, however, benefit from their courage through a range of legal privileges and protections that stem from the Supreme Court’s recognition of their fundamental right to marry regardless of race.

While *Loving* has forever changed the lives of interracial, heterosexual couples by allowing them to legally marry, it has not led society to embrace all multiracial couples and families. Instead, society and law continue to assume that all intimate couples and families are monoracial. This Article examines how society and law work together to frame the normative ideal of intimate couples and families as both heterosexual and monoracial.⁹ In so doing, this Article focuses solely on the issue of race and the privilege of monoraciality among intimate couples and does not address the privilege of heterosexuality among couples, which is readily evident within our society.¹⁰

Uninhibited expressionist, Mentally inferior [and] Natural-born musician”) (quoting Nagueyalti Warren, *From Uncle Tom to Cliff Huxtable, Aunt Jemima to Aunt Nell: Images of Blacks in Film and the Television Industry*, in *IMAGES OF BLACKS IN AMERICAN CULTURE: A REFERENCE GUIDE TO INFORMATION SOURCES*, 51, 51-52, (Jessie Carney Smith ed., 1988)); Patricia M. Worthy, *Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue*, 18 *HASTINGS COMM. & ENT. L.J.* 509, 536 (1995-1996) (“Research confirms that the news coverage relating to African-Americans is consistently negative, focusing solely on crime or other unpleasant characteristics.”); see also Leonard M. Baynes, *Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule*, 37 *U. RICH. L. REV.* 819, 893-96 (2003) (discussing the negative effects of racial stereotypes in the media, especially on children); Sherri Burr, *Television and Societal Effects: An Analysis of Media Images of African-Americans in Historical Context*, 4 *J. GENDER RACE & JUST.* 159 (2001) (discussing effects of images of black people in the media since the 1950s).

⁹ See Lenhardt, *supra* note 6, at 882 (“Just as important as this setting of social norms, however, is the extent to which state regulations have also served over time to reproduce and police identity norms in the marriage context.”); Melissa Murray, *The Space Between: The Intersection of Criminal Law and Family Law* 94 *IOWA L. REV.* (forthcoming 2009) (manuscript at 31-48, on file with the authors) (analyzing how criminal law and family law work together to reinforce normative ideals of family).

¹⁰ This Article addresses statutes that are assumed to adequately protect interracial, heterosexual couples in a post-*Loving* era, but that do not do so because they create no space for such couples in their language. It is true that many of the privileges that attach to monoracial, heterosexual couples also do not attach to monoracial, same-sex couples; however, because anti-discrimination law generally excludes homosexual individuals from protection from discrimination based on sexual orientation and because there is prevalent, open prejudice against same-sex couples in our society, the statutory language and law discussed herein is generally not seen as protective of same-sex couples. In other words, the hole in anti-discrimination law for same-sex couples is widely exposed for all who are willing to acknowledge it, while it is not so easily exposed for interracial, heterosexual couples. Our hope is to expose this hole. See Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 *MICH. J. RACE & L.* 285, 303 (2001) (“[B]ecause sexual orientation remains an unprotected category in federal statutory

The Article does, however, repeatedly use the term “heterosexual” in describing its focus in order to acknowledge that the privilege of monoraciality in families does not extend fully to same-sex couples and families.

This Article sets out to accomplish three goals. First, it examines the daily social privileges of monoracial, heterosexual couples as a means of revealing the invisibility of interracial marriages and families within our society. Specifically, Part II of this Article follows the path of McIntosh by thinking through unacknowledged monoracial, heterosexual-couple privileges and listing unearned privileges, both social and legal, for such couples. It also uses Kimberlé Crenshaw’s theory of intersectionality to explicate how couples in general may experience societal benefits and disadvantages differently based upon various intersections of identity categories.

Second, this Article examines housing discrimination law to demonstrate the connection between the daily social disadvantages of interracial, heterosexual couples and families and the lack of legal recognition for interracial couples and families. Specifically, Part III of this Article uses housing discrimination law to show how law can ignore the existence of interracial, heterosexual couples thereby reinforcing an ideal of marriage and family as monoracial. In so doing, this Part explains how housing discrimination statutes assume that plaintiffs will be monoracial, heterosexual couples, and fail to fully address the harms to interracial, heterosexual couples who are subjected to discrimination in housing and rental searches because of their interraciality (e.g., because they have engaged in race-mixing). Part III.A describes the legal framework for evaluating housing discrimination cases, including the means for analyzing discrimination by association cases in court. Part III.B details the categories of plaintiffs who can allege discriminatory action “because of” race, familial status, or marital status under housing discrimination statutes. It then explicates how interracial couples who are victims of discrimination in housing because of their status *as an interracial couple alone* do not neatly fit within any of these categories.

Third, this Article calls for housing discrimination statutes to explicitly recognize interracial couples and families, thereby filling this hole in anti-discrimination law. Specifically, Part IV proposes that legislators add a new protected class category for “interraciality” to housing discrimination statutes. The Article argues that such an addition is the only means by which the law can address the “expressive harms”¹¹ or lack of dignity¹² that result

and constitutional civil rights law, discriminators may willingly concede sexual orientation discrimination when some evidence of discriminatory action exists, but deny racial or gender discrimination.”). Still, as this Article seeks to reveal about heterosexual couples, the disadvantages that attach to same-sex couples in our society can become further complicated by other identity categories, such as interraciality.

¹¹ See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993) (defining expressive harms as harms that “result[] from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or mate-

from the current framing of family in housing discrimination statutes as monoracial.

This Article concludes with a call for statutes and rights to be legally framed in a manner that is inclusive, rather than exclusive.

II. EXPOSING ONE MORE INVISIBLE KNAPSACK OF PRIVILEGES

All individuals in our society possess one or more invisible knapsacks of unearned privileges, whether they be based on race, color, class, sex, religion, sexual orientation, nationality, able-bodied-ness, marital status, or other identity categories. At the same time, however, individuals also may suffer or endure societal disadvantages that attach to one or more of their identity categories.¹³ This Part discusses these advantages and disadvantages as they relate to people who are involved in committed, intimate relationships. Part II.A focuses on the unearned privileges that individuals involved in intimate, heterosexual relationships generally enjoy. Part II.B addresses those privileges as they relate to interracial, heterosexual couples.

A. *Filling the Heterosexual Knapsack of Privileges*

Just as McIntosh has been taught throughout her life not to recognize her white privilege, many heterosexuals have been conditioned to remain oblivious about their own unearned privileges based on sexual orientation.¹⁴ In general, heterosexual individuals and couples enjoy many social and legal benefits in our society. A few examples of heterosexual privilege include the following:¹⁵

rial consequences the action brings about"); see also Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretative Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1107 n.19 (2002) (asserting that "the expressive harms approach asks the Court to interpret the social meaning of state action and to incorporate social meaning into constitutional interpretation").

¹² Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 676 (2005) (arguing "that dignity is (and always has been) a central area of concern in the struggle for racial justice, and that current Supreme Court jurisprudence indulges in delusional and counterfeit thinking when it chooses to undervalue, distort, or evade entirely core dignity concerns in the context of racial disputes").

¹³ See *infra* Part II.B for a discussion on intersectionality.

¹⁴ See McIntosh, *supra* note 1 ("I began to count the ways in which I enjoy unearned skin privilege and have been conditioned into oblivion about its existence. My schooling gave me no training in seeing myself as an oppressor, as an unfairly advantaged person, or as a participant in a damaged culture."); see also Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 890 (1995) ("First, the characteristics of the privileged group define the societal norm, often benefiting those in the privileged group. Second, privileged group members can rely on their privilege and avoid objecting to oppression. Both conflicting privilege with the societal norm and the implicit choice to ignore oppression mean that privilege is rarely seen by the holder of the privilege.").

¹⁵ This list closely tracks portions of McIntosh's list in her paper *White Privilege: Unpacking the Invisible Knapsack*, *supra* note 1 and text accompanying note 3.

1. In all fifty states, intimate heterosexual partners can marry each other as long as they do not violate other marital restrictions, such as age or number restrictions, and can have their marriage recognized by every other state in the union.
2. Heterosexual couples can turn on the television or read the newspaper and see reflections of their cross-sex, intimate relationships widely represented.
3. So long as they are otherwise qualified, heterosexual couples can adopt children in all fifty states.
4. When out in public, the children of heterosexuals are presumed to “belong” to them as parents.
5. The children of heterosexual couples are given texts and classes that implicitly support their family unit.

This particular list of heterosexual privileges is not exhaustive, yet it illustrates McIntosh’s point about how privilege can make insiders “feel welcomed and ‘normal’ in the usual walks of public life, institutional and social,” and make outsiders feel unwelcome and without a home in those same areas.¹⁶

Indeed, while this list of heterosexual advantages could be endless, the list of heterosexual couples that may enjoy all of these benefits is more restricted. Because of the interlocking nature of hierarchies in our society, not all heterosexual couples are treated equally. Every couple’s experiences in the world can be complicated by other identity categories, such as inter-raciality or socioeconomic class. The next section of this Article discusses restrictions that specifically affect interracial, heterosexual couples.

B. Unpacking the Heterosexual Knapsack of Privileges

In 1964, Mildred (Jeter), a black woman, and Richard Loving, a white man, filed a class action lawsuit that challenged the constitutionality of Virginia’s ban on interracial marriage.¹⁷ Just six years earlier in 1958, Mildred and Richard had left their home state of Virginia, which enforced anti-miscegenation statutes, to marry each other in Washington, D.C., which did not prohibit interracial marriages.¹⁸ Following their marriage, the Lovings had returned to reside in their home state.¹⁹ In Virginia, however, they were arrested, charged with violating Virginia’s ban on interracial marriages, and threatened with the enforcement of a one-year prison sentence unless they

¹⁶ See McIntosh, *supra* note 1; see also Camille A. Nelson, *Lovin’ the Man: Examining the Legal Nexus of Irony, Hypocrisy, and Curiosity*, 2007 Wis. L. REV. 543, 549 (“Like other racialized couples, my partner and I do not have the luxury of simply venturing where we might—we often reflect upon whether certain venues will be welcoming, comfortable, or safe.”).

¹⁷ *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

¹⁸ *Id.* at 2-3.

¹⁹ *Id.* at 2.

left the state without returning for twenty-five years.²⁰ Upon hearing the Lovings' claims on appeal, the Supreme Court of the United States struck down Virginia's anti-miscegenation statutes and ruled in favor of the Lovings.²¹ In so doing, the Court rejected Virginia's argument that its anti-miscegenation statutes did not violate the Equal Protection Clause because they applied equally to whites and non-whites.²² The Court reasoned that such a defense could not legitimate statutes that had no purpose other than to discriminate against racial minorities and promote white supremacy.²³ The Court further held that the statutes violated the Due Process Clause because marriage was a fundamental right that rested with the individual, a right that the State could not restrict by invidious racial discrimination.²⁴

Since that historic day in 1967, the *Loving* decision has consistently been highlighted as a transformative case on race relations and a symbol of the steady breakdown of racial barriers in intimate and personal relationships.²⁵ Same-sex marriage advocates applaud *Loving* as an important case that protects citizens' private decisions about whom they choose to love and with whom they choose to join together in family.²⁶ Legal scholars such as Randall Kennedy encourage the public to view *Loving* as a tool for actively advancing and facilitating interracial relationships in the fight against racism.²⁷

Although forty years have passed since the groundbreaking decision was issued, our society does not necessarily recognize and acknowledge in-

²⁰ *Id.* at 2-3.

²¹ *Id.* at 2, 12.

²² *Id.* at 9-12.

²³ *Id.* at 11-12.

²⁴ *Id.* at 12.

²⁵ See, e.g., Robert A. Destro, *Introduction to Symposium, Law and the Politics of Marriage: Loving After 30 Years*, 47 CATH. U. L. REV. 1207, 1219-21 (1998) (describing *Loving* as an important case on race and eugenics); Reginald Oh, *Interracial Marriage in the Shadow of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. DAVIS L. REV. 1321, 1323, 1333 (2006) (arguing that "*Loving* is as much a case about racial segregation in public schools as *Brown [v. Board of Education]* is a case about prohibiting interracial marriages" in that "[r]acial segregation and antimiscegenation practices were ultimately designed to further the same goal: to preserve white racial purity and maintain a social system of white supremacy"); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1032 (1979) (discussing how both *Brown* and *Loving* reflect the principle that "no person is by virtue of race morally inferior to another").

²⁶ See William N. Eskridge, Jr. & Sheila Rose Foster, Remark, *Discussion of Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 329, 333 (1998) ("People say, 'you can't have same-sex marriage,' and you remind them to think about thirty or forty years ago. Forty years ago in West Virginia, where I grew up, it was UNTHINKABLE for a different-race couple to marry. . . . The point to be made from that is the 'constructedness' of marriage, and lines for cordoning people off within marriage."); see also Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 905-06 (2006) (arguing in favor of analogies of the ban on interracial marriages prior to *Loving* to the ban on same-sex unions, as the former was rooted in white supremacy and the latter is rooted in heterosupremacy and male supremacy).

²⁷ Randall Kennedy, *How Are We Doing with Loving?: Race, Law, and Intermarriage*, 77 B.U. L. REV. 815, 819 (1997) ("In my view, black-white intermarriage is not simply something that should be tolerated—it is a mode of partnership that should be applauded and encouraged.").

terracial and multiracial couples and families in all aspects of life. Specifically, interracial, heterosexual couples cannot and do not experience every privilege that we identified above in Part II.A. Instead, their interraciality as a couple tends to complicate their ability to “enjoy” the full range of heterosexual advantages.

As Kimberlé Crenshaw illustrated in her seminal work on intersectionality, different groups of people may encounter varied forms of discriminatory behavior based upon the intersection of two or more identity categories.²⁸ Intersectionality recognizes that power, privilege, disadvantage, and discrimination are influenced by interlocking spectrums of identity. For example, because the identities of black men and black women differ along the intersection of race and sex, black women may have distinct vulnerabilities to violence and discrimination from black men.²⁹ Although Crenshaw’s theory of intersectionality focused on black women and the ways in which they are uniquely oppressed based on the convergence of racism and sexism in their lives, her theory can be applied to other groups. Scholars in many fields use Crenshaw’s theory to discuss the complex nature of oppression and discrimination along multiple axes.³⁰

While interracial, heterosexual couples may face discrimination based upon a single identity category such as their marital status or socioeconomic class, they also may encounter discrimination at the intersection of race and family. As we, Jacob and Angela, have seen in our own lives, our inter-

²⁸ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-43 (1991) (explaining that women of color are at the intersection of race and gender oppression). See also Kimberlé Williams Crenshaw, Transcript, *Panel Presentation on Cultural Battery, Speaker: Kimberlé Williams Crenshaw*, 25 U. TOL. L. REV. 891, 892 (1995) (“Intersectionality generally functions as a metaphor for capturing the different dimensions of race and gender as they converge in the lives of women of color.”); see also Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1775 (2003) (asserting that intersectionality is a “concept that conveys at least the following two ideas: (1) that our identities are intersectional—that is, raced, gendered, sexually oriented, etc.—and (2) that our vulnerability to discrimination is a function of our specific intersectional identities”).

²⁹ Crenshaw, *Mapping the Margins* at 1242-43; see also U.S. EEOC, EEOC COMPLIANCE MANUAL, § 15, at 15-8 to -9 (2006), available at <http://eEOC.gov/policy/docs/race-color.pdf> (discussing intersectional discrimination and noting that “Title VII [of the Civil Rights Act of 1964] prohibits discrimination not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex)”).

³⁰ See, e.g., Hutchinson, *supra* note 10, at 302-16; see also Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 860-74 (2006) (applying intersectionality theory to heterosexual black men); Emily M.S. Houh, *Toward Praxis*, 39 U.C. DAVIS L. REV. 905, 924-38 (2006) (operationalizing anti-essentialism and intersectionality in a sexual harassment hypothetical); Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379, 381 n.4 (“The experiences for black heterosexual women in interracial relationships are also different than those of black lesbians and black men in interracial relationships.”); Gowri Ramachandran, *Intersectionality as “Catch-22”: Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 301 (2005) (discussing the double bind of “intersectionals,” whom she defines as “persons who are members of more than one ‘low-status’ category, such as women of color, queer persons of color, or indigent women”).

raciality tends to make our very existence as a couple invisible and places many of the privileges that generally attach to heterosexual couples and families outside of our reach. For example, although we enjoy the individual right to legally marry and have our marriage recognized in every state throughout the nation, no other privilege on the list of heterosexual advantages in Part II.A falls within our realm of benefits as a couple.³¹ Were we now to reconstruct that list to comport with our own reality as a black female-white male couple, it would read as follows:

1. In all fifty states, we had the ability to legally marry each other, and every state in the nation has had to give full faith and credit to our marriage because of the *Loving v. Virginia* decision in 1967.
2. Heterosexual couples can turn on the television or read the newspaper and see reflections of their cross-sex, intimate relationships widely represented. But we do not see reflections of ourselves as a married, interracial, heterosexual couple, widely represented in the media. Even when we do, the plot line nearly always ends in tragedy, spurred by the mixing of races.³²
3. So long as they are qualified, heterosexual couples can adopt children in all fifty states. But even after the Multi-Ethnic Placement Act,³³ we as an interracial couple would encounter difficulty in adopting children, especially children who were not of African descent.³⁴
4. When out in public, the children of heterosexuals are presumed to “belong” to them as parents. But when we are out in public, together or separately, our children often are not presumed to be ours. For example, people frequently ask us “Is that your child?” or, “Are you playing big brother today?” Little children tell us that we do not “match” our children.³⁵
5. The children of heterosexual couples are given texts and classes that implicitly support their family unit. But our children are not

³¹ See *supra* notes 14-15 and accompanying text. See generally Adele M. Morrison, *Same-Sex Loving: Supporting White Supremacy Through Same-Sex Marriage*, 13 MICH. J. RACE & L. 177 (2007) (noting that “mixed-sex interracial couples” are “normative by being mixed-sex but non-normative by being mixed race”).

³² See generally Angela Onwuachi-Willig, *There’s Just One Hitch, Will Smith: Examining Title VII, Race, and Casting Discrimination on the Fortieth Anniversary of Loving v. Virginia*, 2007 WIS. L. REV. 319 (analyzing the dearth of black-white interracial couples in film and television as a result of casting discrimination based on perceived audience preferences).

³³ Howard M. Metzbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended at 42 U.S.C. § 622 (2000)).

³⁴ For a general discussion of the difficulties interracial couples face in the adoption process, see *Interracial Couple Say They Were Denied Adoption Because They Had Not Suffered Enough Racism*, JET, Aug. 16, 1999, at 23, available at http://findarticles.com/p/articles/mi_m1355/is_11/96/ai_55588159.

³⁵ See Angela Onwuachi-Willig, *A Beautiful Lie: Exploring Rhinelander v. Rhinelander as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CAL. L. REV. 2393, 2458 (2007); see also RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 155 (2001).

given texts and classes that implicitly support our family unit. Their texts almost never reflect or support the interethnic, interracial diversity of our family.

As our list above demonstrates, different types of couples may have different experiences based upon various intersections of identity categories. For example, unlike monoracial, heterosexual couples, we often suffer the daily microaggression of having our status as a family assumed away, even when we are out with our children. Other people rarely assume that we are intimate partners when we go shopping together in the grocery store. At best, store cashiers and other customers assume that we are friends, even with our rings on our hands and our children with us. At worst, clerks speak to Angela as though she were a random stranger throwing items into Jacob's basket. Jacob is always asked, "Is this together?" Similarly, other customers perceive us together as store clerk and shopper, almost always approaching Angela to ask if she will assist them as well.³⁶ Additionally, unlike white, heterosexual couples, fear of mistreatment plays a role for us when choosing public accommodations. We try to plan where we will eat, play, or stay overnight as a means of avoiding discrimination.³⁷ At times, we even "game" the system, sending Jacob in first to scope out the premises, or to check us in at a hotel. We also have encountered difficulty in finding neighborhoods where people approve of our household. Where possible, we have steered ourselves directly to integrated neighborhoods.³⁸

Other interracial, heterosexual couples face the same obstacles that we do, regardless of any differences in the intersection of our identity categories. For instance, the children of an Asian Pacific American male-white female couple also are unlikely to be given texts or classes that implicitly

³⁶ Other interracial couples have documented similar experiences. *See, e.g.*, ERICA CHITO CHILDS, NAVIGATING INTERRACIAL BORDERS: BLACK-WHITE COUPLES AND THEIR SOCIAL WORLDS 40 (2005); PAUL C. ROSENBLATT ET AL., MULTIRACIAL COUPLES: BLACK AND WHITE VOICES (1995). *See generally* Rashmi Goel, *From Tainted to Sainted: The View of Interracial Relations as Cultural Evangelism*, 2007 WIS. L. REV. 489, 516-17 ("When faced with a mixed-race couple, people seem to ignore or disbelieve activity that—for a same-race couple—would be indicative of a relationship. People often express surprise at the existence of an interracial couple, asking in dumbfounded tones, 'Are you two . . . together?'").

³⁷ *See* Nelson, *supra* note 16, at 549 ("Navigation of the public space, versus the private sanctuary, is an issue requiring some deliberation on the part of many interracial couples." (footnote omitted)).

³⁸ Other interracial families have made similar choices. *See, e.g.*, HEATHER M. DALMAGE, TRIPPING ON THE COLOR LINE: BLACK-WHITE MULTIRACIAL FAMILIES IN A RACIALLY DIVIDED WORLD 95 (2000) (asserting that black-white mixed-race families "desire racially mixed neighborhoods because there they can have a sense of safety and comfort and not face repeated acts of border patrolling and racism"); Steven R. Holloway et al., *Partnering 'Out' and Fitting In: Residential Segregation and the Neighbourhood Contexts of Mixed-Race Households*, 11 POPULATION, SPACE & PLACE 299, 319-20 (2005) ("All mixed-race household types are more likely to live in diverse neighbourhood settings than same-race households. . . . [M]ixed-race households tend to experience higher levels of neighbourhood racial diversity than white same-race households, but lower levels than non-white same-race households. *Black-white pairings are an exception—they live in more diverse neighbourhoods than the black population in general.*" (emphasis added)).

support their family unit. Likewise, an Asian Pacific American male-white female couple will see few media representations of similar couples.

While our experiences as an interracial, heterosexual couple are very real for us (and many couples like us), they cannot be generalized to all interracial, heterosexual couples.³⁹ For instance, as detailed above, an Asian Pacific American male-white female couple may suffer the same discrimination as we do, but they also may experience a particular event differently than we would based upon their own combination of race, gender, class, and sexuality. When out shopping together in a grocery store, an Asian Pacific American male, unlike Angela, is unlikely to be perceived as a store worker who is servicing a white female customer. Neither race nor gender stereotypes regarding Asian Pacific American men lend themselves to that type of imagery.⁴⁰ Just changing the type of store, however, may alter the experience of both couples. For example, in an electronics store, racialized and gendered stereotypes may lead customers to believe that the Asian Pacific American male is a worker who is servicing a white female customer. Indeed, as one couple—a white woman and an Indian American man—has related to us, he is often approached by customers who believe that he is a store worker when they are out together in an electronics or computer store.

Even other black female-white male couples may experience certain events differently than we do along the intersection of race, family, and color. For example, a very light-skinned black woman with a white husband may instead face the microaggression of having people constantly assume that her family is white, despite her own personal identification and that of her children. In sum, just as the disadvantages that people and families may encounter in life can be similar across identity categories, they also can vary based upon differing intersections of identity categories.

³⁹ See Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 *BUFF. L. REV.* 1, 10 (1999) (discussing multidimensionality, which highlights the “interlocking sources of advantage and disadvantage” that constitute discrimination).

⁴⁰ Compare Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 *AM. U. L. REV.* 851, 915-16 (1999) (noting how service work increasingly became synonymous with black women), and Pamela J. Smith, *Part II—Romantic Paternalism—The Ties That Bind: Hierarchies of Economic Oppression That Reveal Judicial Disaffinity for Black Women and Men*, 3 *J. GENDER RACE & JUST.* 181, 196-205 (1999) (describing the linkage between the images of black women and service workers), with Richard Delgado, *Rodrigo’s Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 *VAND. L. REV.* 1691, 1720 (2007) (“[T]he dominant stereotype of the Asian male is sexless: Nerdy. No body hair. Thick glasses. Good at math and science. Bad at sports.”). See also Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 *HASTINGS WOMEN’S L.J.* 165, 190 n.120 (1995) (noting that “one common set of racial images portrays the typical Asian American as someone with a heavy accent, who works in a laundry or as a gardener, practices karate, and studies fastidiously”).

III. UNCOVERING THE LEGAL INVISIBILITY OF THE INTERRACIAL FAMILY

The disadvantages of interracial couples are not limited to the social context alone. The law, too, plays its own role in reifying and reinforcing the normative ideal of coupling, marriage, and family as monoracial. This role is evident in the language and application of Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act.⁴¹ This Part uses housing discrimination law as a tool for emphasizing the continuities between social discrimination against interracial, heterosexual couples, and the failure to recognize interracial, heterosexual family units within the law. Part III.A describes the law of disparate treatment in the housing context and the law of discrimination by association generally. Part III.B details the categories of plaintiffs considered fit to allege discriminatory action “because of” race, familial status, or marital status under housing discrimination statutes. It then explicates how interracial couples that are victims of discrimination in housing because of their status *as an interracial couple alone* remain unacknowledged as a family unit (at least in terms of expressive value), because they do not fit within any of these categories.

A. *Pleading Discrimination in Housing*

Under Title VIII, only certain classes of citizens are protected from discrimination in housing. As enacted, Title VIII provided that “it shall be unlawful”:

- (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.
- (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin. . . .
- (d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. . . .⁴²

⁴¹ Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. § 3604 (2000)); *see infra* Part III.A and accompanying footnotes.

⁴² Civil Rights Act of 1968, tit. 8, Pub. L. No. 90-284 § 804, 82 Stat. 73, 83 (codified as amended at 42 U.S.C. § 3604 (2000)). Subsequent amendments have expanded the list of protected characteristics to include sex, familial status, and handicap, but the statute’s protection is still limited to the characteristics specifically enumerated in its text. 42 U.S.C. § 3604 (2000).

Under Title VIII, plaintiffs can prove discrimination with direct evidence,⁴³ or through circumstantial evidence⁴⁴ by using the burden-shifting model that the Supreme Court specifically developed for evaluating employment discrimination in *McDonnell Douglas Corp. v. Green*.⁴⁵ Applying this burden-shifting model to housing discrimination cases, courts have held that a plaintiff has to prove housing discrimination through three different steps. First, the plaintiff must establish a prima facie case of discrimination by proving the following four factors: (1) that she is a member of a racial minority; (2) that she applied for and was qualified to rent or purchase certain property or housing; (3) that she was rejected; and (4) that the housing or rental property remained available thereafter.⁴⁶ Once the plaintiff proves each of these factors, the court draws an inference of discrimination and moves to the second step, where the owner or landlord must articulate a legitimate explanation for rejecting the plaintiff's application.⁴⁷ If the defendant satisfies this burden, then, in the third step, the plaintiff must prove that the defendant's stated reason was a pretext for discrimination.⁴⁸ The plaintiff can show pretext by demonstrating that the proffered reason had no basis in fact, did not actually motivate the challenged conduct, or was insufficient to warrant the challenged conduct.⁴⁹ However, even upon proof of pretext, a jury may still rule in favor of the defendant if it believes that a non-discrimi-

⁴³ Direct evidence "is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Amini v. Oberlin Coll.*, 440 F.3d 350, 359 (6th Cir. 2006) (quoting *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 470 (6th Cir. 2005)). *But see* Martin J. Katz, *Unifying Disparate Treatment*, 59 HASTINGS L.J. 643, 651 (2008) (arguing that there is currently "a four-way circuit split" over the definition of "direct evidence").

⁴⁴ Circumstantial evidence is, by definition, not direct evidence. It is evidence that requires an inference to be drawn to reach a certain conclusion. *Minhgnoc P. Tran v. The Boeing Co.*, 190 F. App'x 929, 932 (11th Cir. 2006). As with employment discrimination cases, direct evidence of discriminatory intent is difficult to come by in housing discrimination cases, and plaintiffs in housing discrimination lawsuits generally try to prove their claims through circumstantial evidence. *See* Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 182 (2007); *see also* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1285 (asserting that employment discrimination has generally become more subtle).

⁴⁵ 411 U.S. 792 (1973).

⁴⁶ *Mencer v. Princeton Square Apartments*, 228 F.3d 631, 634 (6th Cir. 2000) (adapting the *McDonnell Douglas* employment discrimination framework to the housing context); *Lexington-Fayette Urban County Human Rights Comm'n v. Metro Mgmt. Inc.*, No. 2002-CA-001234-MR, 2003 WL 22271567, at *4 (Ky. Ct. App. Oct. 3, 2003) (same).

⁴⁷ *McDonnell Douglas*, 411 U.S. at 802; *see also* *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981) (noting that the defendant's burden is only one of production, not persuasion).

⁴⁸ *McDonnell Douglas*, 411 U.S. at 804; *see also* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000).

⁴⁹ *See* *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (holding that a plaintiff who proves pretext in the third stage does not necessarily win because the factfinder may still find that there was no discrimination); *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir. 2003) (same).

natory factor was at play. The ultimate burden of persuasion rests with the plaintiff at all times.⁵⁰

Additionally, a person discriminated against because of her association with an individual in a protected class can use the *McDonnell Douglas* framework to prove discrimination against herself. For example, a white individual who believes that she was denied a rental because of her black friends may file a discrimination claim “because of” race under Title VIII.⁵¹ The first court to analyze a claim of discrimination based on interracial association did so through an employment discrimination case and rejected the lawsuit based on lack of standing.⁵² However, the vast majority of courts to address this issue since then have rejected such a restrictive reading of anti-discrimination statutes. Recent court decisions have interpreted “because of race” broadly, reasoning that an exclusion of discrimination by association lawsuits would run contrary to the purposes of general discrimination law.⁵³ According to these courts, plaintiffs in discrimination by association cases suffer discrimination because of their *own* race or protected class, not just because of their relationship to someone of another race or protected class.⁵⁴

⁵⁰ *Burdine*, 450 U.S. at 253.

⁵¹ *See, e.g.*, *W. Va. Human Rights Comm'n v. Wilson Estates, Inc.*, 503 S.E.2d 6, 8-13 (W. Va. Ct. App. 1998) (relying on a state statute identical to the federal Fair Housing Act in all relevant aspects to recognize a housing discrimination claim brought by a white woman who alleged discrimination based on her association with black friends).

⁵² *See Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205, 208-09 (N.D. Ala. 1973). The court held that the challenged action did not constitute discrimination “because of” the plaintiff’s own race, but rather involved practices that affected only members of a different race. *Id.* at 208-09 (“The employment practices which plaintiff attacks in his complaint are practices which result in disparate treatment of black employees. Plaintiff avers that he is a white citizen. The employment practices, subject to challenge in this action, have no impact upon [the] plaintiff.”). Relying on *Ripp*, another district court provided the following explanation for its rejection of a similar claim of discrimination: “Neither the language of the statute [Title VII of the Civil Rights Act of 1964] nor its legislative history supports a cause of action for discrimination against a person because of his relationship to persons of another race.” *Adams v. Governor’s Comm. on Postsecondary Educ.*, No. C80-624A, 1981 WL 27101 (N.D. Ga. Sept. 3, 1981).

⁵³ These cases, for the most part, are employment discrimination cases. *See, e.g.*, *Bryant v. Automatic Data Processing, Inc.*, 390 N.W.2d 732, 735 (Mich. Ct. App. 1986) (“Indeed, if we were to hold otherwise, then employees subject to such invidious discrimination would have no recourse under state law and an employer could legally engage in such discrimination. We do not believe that the Legislature intended such a result.”); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (“Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute in a *battle with semantics*.”).

⁵⁴ *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) (deciding the question for the first time); *see also Parr*, 791 F.2d at 889-92; *Rosenblatt v. Bivona & Cohen, P.C.*, 946 F. Supp. 298, 300 (S.D.N.Y. 1996); *Chacon v. Ochs*, 780 F. Supp. 680, 682 (C.D. Cal. 1991); *Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442, 1445 (N.D. Ga. 1984). These cases are distinguishable from cases based on a denial of the right of association. In these cases, the plaintiffs argue that they have been denied the benefits of associating with those “who would have been included in the relevant context had they not been excluded because of a racially discriminatory selection process.” *Palmer v. Occidental Chem. Corp.*, 356 F.3d 235, 236 (2d

For example, in *Rosenblatt v. Bivona & Cohen, P.C.*, a white attorney at a law firm filed a lawsuit against his former employer, alleging that he had been terminated because he was married to a black woman.⁵⁵ In evaluating the plaintiff's claim, the district court noted other decisions that rejected discrimination by association claims for lack of standing, but then refused to adopt the same position.⁵⁶ The court explained: "Plaintiff has alleged discrimination as a result of his marriage to a black woman. Had he been black, his marriage would not have been interracial. Therefore, inherent in his complaint is the assertion that he has suffered racial discrimination based on his own race."⁵⁷

B. *Pleading for Understanding at the Intersection of Race and Family*

These statutory tools for filing housing discrimination lawsuits are arguably ineffective for truly combating the type of discrimination that interracial, heterosexual couples may face as a familial unit. The members of a monoracial, heterosexual couple who can assert the same factual allegations of race discrimination in their complaint can thus plead their claims together as a couple. However, the members of an interracial, heterosexual couple who are discriminated against because of their interraciality (i.e., because they have engaged in race-mixing) have to make their individual races and family unit exclusive of each other in order to explain the factual basis of their discrimination claims. In essence, although housing discrimination law is designed to recognize citizens' lives as part of a collective unit, it fails in these instances to fully encompass the harms done to interracial, heterosexual couples.

Indeed, we encountered this very problem with housing discrimination law when we filed a joint housing discrimination claim. While our lawsuit

Cir. 2004); see also *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972) (recognizing, for the first time, the viability of a claim for denial of interracial association).

⁵⁵ 946 F. Supp. at 299.

⁵⁶ *Id.* at 299-300 (holding that the plaintiff had standing because the weight of cases that acknowledged discrimination by association claims "is persuasive and their logic is convincing").

⁵⁷ *Id.* at 300; see also *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) ("Manifestly, if Whitney was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend. Specifying as she does that she was discharged because she, a white woman, associated with a black [person], her complaint falls within the statutory language that she was 'discharge[d] . . . because of [her] race.'"). The Sixth Circuit reached the same conclusion by highlighting that Title VII of the Civil Rights Act of 1964 does not require that allegations address discrimination based "directly" on an individual's race. It reasoned, "Title VII as actually worded simply prohibits discrimination 'because of such individual's race.' There is no mention of the words 'directly' or 'indirectly' in the statute. Under these ambiguous circumstances, we look to the purpose of the statute for its proper interpretation." *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc.*, 173 F.3d 988, 995 (6th Cir. 1999). Recently, in a case of first impression, the Second Circuit adopted this rationale. *Holcomb v. Iona College*, 521 F.3d 130, 138-39 (2d Cir. 2008).

did not involve a claim of discrimination based on interraciality, we did confront the question of how interraciality would fit into our factual allegations, ultimately deciding to move forward with a more traditional and “recognizable” claim based on race. In this Article, we use a hypothetical in order to highlight the question of discrimination and interraciality and emphasize the difficulties that interracial, heterosexual couples can face in having their claims fully embraced and acknowledged by the law.

Hypothetical

Consider, for example, the hypothetical case of a married couple—Andrew Williams, a black man, and Jackie Owens, a white woman.⁵⁸ Andrew and Jackie live in a large city on the East Coast, where Andrew works as a doctor at a prominent hospital and Jackie works as a high school teacher. Two years earlier, they had relocated from a large Midwestern city, where they lived in a suburban house they owned jointly. Upon moving, they sold their house and rented an apartment in the bustling city-center, close to Andrew’s new hospital. They enjoyed the experience of living in the city, but wanted to move to a quieter, more residential area. Because they planned to wait a few more years before purchasing their own house, they looked for another apartment or house to rent in a nearby suburb.

Andrew and Jackie found an advertisement for a two-bedroom apartment on a website with local rental listings. They called the landlord/owner to set up an appointment to view the apartment. Although the landlord could not meet them personally, he arranged a time for a rental agent to show Andrew and Jackie the apartment.

When Andrew and Jackie arrived for their appointment, they found the house attractive and well-maintained, and they appreciated its location on a quiet tree-lined street. While Andrew checked out the lawn, Jackie rang the doorbell and was greeted warmly with a handshake by the rental agent, Betty, who was white. When Andrew walked up behind Jackie and introduced himself as Jackie’s husband, Betty’s demeanor seemed to change. Betty greeted Andrew only verbally and quickly turned her back to begin the tour of the apartment. Both Andrew and Jackie noted Betty’s odd behavior but quickly put it out of their minds as they toured the apartment.

As they viewed the apartment, Andrew and Jackie fell in love with it. Immediately after finishing the tour, Andrew called the landlord from the car to express their desire to rent the property. The landlord seemed very happy that they were interested, and he explained that he already had other applications for the apartment, but had not yet made a decision. He instructed them to leave their application with the rental agent with whom he would be

⁵⁸ This hypothetical is loosely based on a lawsuit of ours, which was resolved to our satisfaction. We are unable, however, to discuss the specifics of that case and have altered the facts to protect the anonymity of the parties involved.

speaking later that afternoon. The owner went on to say that, if they liked that apartment, he had another apartment just coming available for rent in a nearby house that they would surely like as well. The owner gave Andrew the address of the other house over the phone so that he and Jackie could drive by it. He concluded by asking Andrew and Jackie to call him later to schedule a time to see the other location. Once Andrew got off the phone, he and Jackie filled out an application and gave it to the rental agent. That evening, Andrew called the landlord to follow up about the apartments. He and Jackie were confident that the landlord would select them once he saw the strength of their application.⁵⁹ During the phone conversation, the landlord told Andrew that he had their application and was speaking to the rental agent at the very moment, but that he would call Andrew back later. When Andrew spoke to the landlord again, the landlord told him that the first apartment was no longer available. Then, before Andrew could even ask about the second apartment, the landlord informed him that the second apartment, which Andrew understood as not even being on the market yet, was also no longer available.

The next week, Andrew and Jackie began to look on the Internet for rental listings again. They noticed that the same landlord had a new listing for an apartment for rent in that same area. They wondered if either a third apartment had become available, if the renting of the second apartment had fallen through, or if (remembering Betty's odd behavior) the landlord did not want to rent to them for impermissible reasons. Andrew then e-mailed the landlord, re-introducing himself and inquiring about the apartment listing. Andrew wrote:

Hello. I am writing to see if I can reschedule an appointment to view the apartment that you advertised on the housing.com website. You and I have actually spoken before on the telephone. My wife and I recently viewed the apartment that you had for rent at 34 Carson Road. I'm Andrew Williams, the person who called to tell you how much we liked the Carson apartment. At the time, you indicated that you had another apartment that we were sure to like (if we liked the Carson apartment) at 35 Eager Street. When we spoke last, you indicated that this apartment was not available.

I was looking through ads on housing.com and saw your ad for another apartment in the area. Is this the apartment on Eager or a different apartment? Is it available? Can my wife and I set up an appointment to view the advertised apartment tonight or any other time? Thanks in advance for your quick response.

Andrew Williams

⁵⁹ The application requested information about jobs and finances, included contact information for past landlords (all of whom strongly recommended Andrew and Jackie), and allowed for a credit check.

In his reply, the owner indicated that the listing was in fact for the second apartment but asserted that it was still not available. He wrote:

Dear Dr. Williams,

This apartment, I thought was available, but for now it isn't. (We spoke about its non-availability earlier. The web ad shows a time-lag). Sorry for the confusion. I wish you good luck in your search.

Best Wishes.

Two days later, at Jackie's request, a friend e-mailed the owner to inquire about the second apartment, which was still listed on the website. The landlord, who was not aware of any connection between the friend and Jackie, indicated in his response that the house was still available for rent and, in fact, suggested a meeting time with the friend to view the apartment. (The friend later cancelled the appointment.) Thereafter, Andrew contacted his brother, who is an employment discrimination attorney and is somewhat familiar with housing discrimination law. The brother told Andrew and Jackie that they had reasonable evidence to support a claim of discrimination.

Andrew and Jackie filed a complaint with the state discrimination commission asserting discrimination because of Andrew's race. After all, they could easily prove the four factors of the *prima facie* case of discrimination under this construction: (1) that Andrew belonged to a minority group; (2) that Andrew, along with Jackie, had applied for and was qualified to rent or purchase the property at issue; (3) that Andrew, along with Jackie, was refused the housing despite being qualified; and (4) that the housing remained open thereafter, and the owner or landlord continued to seek or review applications from persons of lesser or similar qualifications outside of the protected (race) class.

During the preliminary investigation of the complaint, the owner provided his legitimate, non-discriminatory reason for not renting the second apartment to Andrew and Jackie: that he had to go out of town a couple of days after speaking to Andrew on the phone, and did not think that he could rent the apartment before he left. In fact, the landlord conceded that he did not enter into an agreement to rent the second apartment until two months after he first told Andrew and Jackie that it was not available. He also revealed that he had rented the second apartment to three unrelated women in their twenties. These women, apparently friends or roommates, had significantly worse credit scores than Andrew and Jackie, and a combined income that was less than one third of Andrew and Jackie's. Finally, the owner produced evidence that he had rented to white, black, and Asian *monoracial* families and couples in the past (though the black couple had begun their lease after the filing of Andrew and Jackie's complaint), which would make it harder, though not impossible, to prove a claim of discrimination based

solely on Andrew's race.⁶⁰ Still, the landlord provided no explanation for lying to Andrew on two separate occasions by telling him that the apartment was no longer available when, in fact, it was. Nor did the landlord explain why he did not believe that he could rent the apartment before he left when Andrew and Jackie indicated a desire to rent either the first or second apartment immediately.⁶¹

Based on the facts in this hypothetical, although Andrew and Jackie have persuasive (in fact, almost perfect) evidence of wrongdoing by the landlord under the *McDonnell Douglas* framework, they will encounter difficulty in explaining and detailing discrimination because of the identification of their protected class category. Although Andrew and Jackie arguably have a strong claim based solely upon discrimination against Andrew, their strongest claim for discrimination lies at the intersection of race and family, not just upon race or family alone. After all, the owner of the apartment in this hypothetical appears not to be discriminating against either Andrew or Jackie based upon animus toward their particular racial group, but rather against them together as an interracial couple. Yet, the law—here, housing discrimination law—fails to fully address their experience in the face of their “complex” familial identity.⁶² No protected category under the law

⁶⁰ Cf. *Cygnar v. City of Chicago*, 865 F.2d 827, 842 (7th Cir. 1989) (declaring that “the replacement of minority employees by individuals of the same race does not preclude a finding of discriminatory intent”); *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1272 (10th Cir. 1988) (holding that hiring or promoting a member of a protected class in place of a Title VII plaintiff is insufficient to insulate the employer from liability).

⁶¹ Cf. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (“A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.”).

⁶² See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140-50 (coining and explaining the term “intersectionality”); see also Minna Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. (forthcoming 2009) (manuscript at 11-36, 41, available at <http://ssrn.com/abstract=1099327>) (discussing the empirical difficulties of proving intersectional claims because even “as multiple claims have proliferated, few courts engage in any systematic or rigorous analysis of the possibility of complex discrimination”). *But see Worcester Hous. Auth. v. Mass. Comm'n Against Discrimination*, 547 N.E.2d 43, 45 (Mass. 1989) (“The use of the plural [in the term “persons”] signifies a legislative determination that two persons cannot be denied housing accommodations or benefits solely because the owner or administering authority prefers not to deal with certain kinds of people based on, inter alia, their race, sex, age, or marital status. The statute thus reaches, and prevents, discrimination in housing against, among others, unmarried couples, interracial couples, younger couples, older couples, and couples who hold different religious beliefs.”). Of course, the owner's evidence regarding rentals to monoracial couples is not inconsistent with Andrew and Jackie's traditional race discrimination claim because the lease of the monoracial, black couple began only *after* Andrew and Jackie filed their complaint.

appears to include Andrew and Jackie's family as one interracial unit, a fact that not only complicates Andrew and Jackie's claim but also redoubles their injury—at least with respect to dignity—by implicitly erasing the existence of their family.

Under current housing discrimination statutes, Andrew and Jackie cannot pursue an interraciality discrimination claim based upon their "familial status" because housing discrimination statutes define "familial status" in relation to one's dependents. For example, Title VIII defines "familial status" to mean:

One or more individuals (who have not attained the age of 18 years) being domiciled with—

- (1) a parent or another person having legal custody of such individual or individuals; or
- (2) the designee of such parent or other person having custody, with the written permission of such parent or person.⁶³

Because the discrimination experienced by Andrew and Jackie did not result from having children in the family, they do not fit within the category of persons or families included in the term "familial status."

Additionally, assuming that Andrew and Jackie are in a state that provides protection for discrimination based upon "marital status,"⁶⁴ Andrew and Jackie also cannot prove their claim based on "marital status" because that term generally refers only to individuals' status as either married or single.⁶⁵ For example, in *County of Dane v. Norman*, the Wisconsin Supreme Court made clear that, under Wisconsin's housing discrimination statute, "marital status" was defined as "being married, divorced, widowed, separated, single or a cohabitant."⁶⁶

Most of all, as we noted above, Andrew and Jackie will encounter difficulty in factually asserting a joint claim of discrimination "because of" their interraciality as a family. Had the owner's actions against them simply been targeted at Andrew alone, Andrew and Jackie could just seek to plead and

⁶³ 42 U.S.C. § 3602(k) (2000).

⁶⁴ Although Title VIII does not include protections against discrimination due to "marital status," many state housing discrimination statutes do. *See, e.g.*, CAL. GOV. CODE § 12955 (West 2008) (containing a fair housing provision that prohibits discrimination on the basis of sexual orientation, marital status, race, sex, ancestry, source of income, disability and other factors).

⁶⁵ *See Miller v. C.A. Muer Corp.*, 362 N.W.2d 650, 654 (Mich. 1984) (reasoning that "[b]y including marital status as a protected class, the Legislature manifested its intent to prohibit discrimination based on *whether* a person is married" under the anti-discrimination statute in Michigan); *see also Hadfield's Seafood v. Rouser*, No. CIV.A.00A-07-008-JRJ, 2001 WL 1456795, at *3 (Del. Super. Ct. Aug. 17, 2001) (noting that "marital status," as defined in the anti-discrimination statute in Delaware, was "solely concerned with whether one is married or single and whether the complainant was discriminated against based on that single fact").

⁶⁶ 497 N.W.2d 714, 715 (Wis. 1993); *see also N.D. Fair Hous. Council, Inc. v. Petersen*, 625 N.W.2d 551, 560 (N.D. 2001) (asserting "status with respect to marriage" means "whether a person is divorced, widowed or separated").

prove disparate treatment under the *McDonnell Douglas* burden-shifting framework by pleading racial animus against Andrew individually (as they did in this hypothetical). Because, however, the facts suggest that the landlord may have discriminated against Andrew and Jackie because of their interraciality as a couple, and not just because of animus towards Andrew's racial group, the couple will have to engage in wordplay to explain and prove the factual basis for their claim of discrimination against them as an interracial couple. Specifically, Andrew and Jackie will each have to assert discrimination based on the law of discrimination by association, claiming separately and individually that, but for the race of their spouse, they each individually would have been treated differently. In so doing, they will have to divide their family unit.

IV. CREATING A SPACE OF THEIR OWN: CLASS PROTECTION BASED ON INTERRACIAL STATUS

Although courts arguably can find (and certainly would find) discrimination "because of race" for couples like Andrew and Jackie under the analysis used in interracial association cases,⁶⁷ this method does not fully address the problem of housing discrimination against interracial couples based on their race-mixing as such. Rather, it perversely maintains and reinforces discrimination. Specifically, while the interracial association analysis can technically offer such interracial, heterosexual couples redress through damages and other forms of relief under Title VIII, it fails to address the "expressive harms" or lack of dignity in the continued assumption of monoraciality among families in housing discrimination statutes.

Unlike in the employment context, where the law of discrimination by association has been applied to individuals, housing discrimination law is intended to recognize the family unit, as demonstrated by its protection of people based on familial status and marital status. Housing discrimination law is intended to protect the principle that not all couples or families are the same. Yet, in this particular context, the law implicitly presents all families and couples as monolithic—specifically, as monoracial (and heterosexual). It mandates that claimants in an interracial family split their individual races and family unit in order to factually assert a claim. In other words, it requires that the family unit be broken up, at least legally, in order to receive protection, and, in so doing, fails to fully recognize the unit's very existence.⁶⁸

⁶⁷ The court may also recognize the claim without any analysis at all, as the Kentucky Court of Appeals once did. See *Lexington-Fayette Urban County Human Rights Comm'n v. Metro Mgmt., Inc.*, No. 2002-CA001234-MR, 2003 WL 22271567, at *5 (Ky. Ct. App. Oct. 3, 2003) ("As an interracial couple, the Wilkersons are clearly members of a protected class.").

⁶⁸ Cf. Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1292 (2006) ("Exclusion [of same-sex couples in public accommodations] suggests that the business refuses to recognize the couple's legiti-

Importantly, the analysis in interracial association cases fails to acknowledge the true nature of discrimination against the mixed-race, heterosexual couple due to their interracial status. Such discrimination concerns more than pure race discrimination as it is based on the collective, not the individual. Specifically, it is based on interraciality and the particular stereotypes targeted at people who *together* intimately cross racial boundaries. As the hypothetical in Part III.B demonstrates, it is possible for an alleged discriminator not to treat individuals differently based on race, but to treat couples differently based upon racial mixing. In other words, a landlord can choose to treat individuals and even monoracial families equally across many races, but may, if she finds interracial couples and multiracial families repugnant, treat them unequally. As the Michigan Court of Appeals once noted:

Discrimination against interracial couples is certainly based on racial stereotypes and is derived from notions that the blood of the races should not mix. We believe that both the broad language of the civil rights act and the policies behind the act should be read to provide protection from discrimination for interracial couples.⁶⁹

The need for changes in statutory housing discrimination law is growing every year. As the EEOC recently recognized in its initiative known as E-RACE, an acronym for Eradicating Racism and Colorism from Employment, “[n]ew forms of discrimination are emerging. With a growing number of interracial marriages and families . . . racial demographics . . . have changed and the issue of race discrimination in America is multi-dimensional.”⁷⁰ If multidimensional discrimination against interracial, heterosexual couples is to be fully addressed in the housing context, legislators must offer the possibility of a more nuanced interpretation of such couples’ experiences by specifically adding “interraciality” as an additional protected category in housing discrimination statutes. Such an addition is the only means by which the law may address the “expressive harms” or lack of dignity that can result from the current framing of family in housing discrimination statutes as monoracial. As Crenshaw’s theory of intersectionality highlights, broad interpretations of the words “because of race” cannot resolve this hole in anti-discrimination housing law, as such words fail to fully encapsulate the ways in which interracial, heterosexual couples are uniquely affected by the multiple intersections of race and family. As a consequence, broad readings still fail to address the problem of how an assumption of monoraciality

macy, striking a blow at the couple’s collective dignity and self-respect. Those dignitary harms burden the couple’s development.”).

⁶⁹ *Bryant v. Automatic Data Processing, Inc.*, 390 N.W.2d 732, 735 (Mich. Ct. App. 1986).

⁷⁰ U.S. EEOC, *WHY DO WE NEED E-RACE?* (2008), http://www.eeoc.gov/initiatives/e-race/why_e-race.html; see also Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Relationships*, 84 TEX. L. REV. 739, 739 (2006) (“Interracial relationships have increased dramatically over the last fifty years.”).

in housing discrimination statutes pits the individual against the collective for interracial couples.

V. CONCLUSION

This Article analyzed how avenues for factually detailing discrimination in complaints by interracial, heterosexual couples can be limited within the housing context. In so doing, it focused solely on the issue of race and the privilege of monoraciality among intimate couples.

This Article began to reveal this problem in housing discrimination law by first providing an understanding of the unearned privileges, both social and legal, for monoracial, heterosexual couples. It then used the theory of intersectionality to explicate how different types of couples may experience societal benefits and disadvantages differently based upon various intersections of identity categories. Thereafter, the Article illustrated how interracial, heterosexual couples can face difficulty in explaining their harms through discrimination under courts' current "because of" discrimination analysis where the defendant landlord has rented or sold housing to monoracial couples of all races, but has refused to do so for mixed race couples. Specifically, it explained how current protected categories under housing discrimination statutes essentially require individuals in interracial couples to make their individual races and family unit separable categories in order to pursue discrimination claims based on interraciality.

Most importantly, this Article exposed how this implicit requirement in housing discrimination statutes rests on an assumption of the monoracial family that works to reinforce the normative ideal of family as monoracial. In so doing, it reminds us of the need for legislators and courts to reframe rights and protections in a manner that is inclusive rather than exclusive.

