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Stories About Discrimination

Zachary A. Kramer

*Arizona State University at the Tempe Campus, zachary.a.kramer@asu.edu*

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INTRODUCTION

The sign of a good story is that it needs to be shared. When you have a good story to tell, you have to tell people about it. They need the information, and you need to talk about it. A good story demands attention. A good story is a force of nature.

There is a good story at the heart of Angela Onwuachi-Willig’s According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family. The story is about a love affair that fell apart in court. It is a story about racism, classism, and assimilation. And it is a story about a very public scandal that parked itself on the front page of newspapers; the O.J. Simpson trial of the roaring twenties. The story of Leonard Kip Rhinelander and Alice Rhinelander is, perhaps, the best story about law that I have heard in some time.

The short of it is that, in the span of a few years, Leonard and Alice met, fell in love, married, litigated, and divorced. The litigation is, of course, the key part of the story. Leonard sued Alice in search of an annulment, on the grounds that she was not who she said she was. Leonard, the son of a wealthy family, was white, and Alice, the daughter of working-class immigrants, was biracial, born to a white mother and a black father. Alice defended against the suit by arguing that Leonard went into the relationship with his eyes wide open—not only did he know Alice was black, but he also married her despite her race.

It did not have to go that way. Alice could have argued that she was, in fact, white. Had she convinced the court of this, the couple might have been able to remain a couple, as her whiteness would have removed the stain from their relationship.
But she did not argue that she was white. She argued, surprisingly, that she was black, though not with her words. Alice did not testify during the trial, presumably because her lawyer feared that she would proclaim herself to be white. Instead, her lawyer had her disrobe, in the judge’s chambers, so the court could see her skin as Leonard saw it so many times before. Imagine the scene. A young woman, silenced, standing practically naked before a group of strangers, participating in a legal action that will not only determine her identity, but will certainly mean the end of her marriage, and with it, the end of her life as she then knew it. Like I said, it is a good story.

But there is more to Onwuachi-Willig’s book. After recounting the Rhinelander case in incredible and admirable detail, According to Our Hearts fast-forwards to today to consider the state of multiracial families in American law and society. Onwuachi-Willig argues that multiracial families, specifically black-white families, occupy a kind of “placelessness” in American society. As a word, “placelessness” is not very helpful, but the point Onwuachi-Willig makes about it is. She argues persuasively that multiracial families occupy a strange space in both our culture and law. They are marginalized yet invisible, as likely to face discrimination as they are to be without a legal remedy. This is a critical point, and it is one that is worth taking seriously when thinking about the state of antidiscrimination law today. Onwuachi-Willig positions her contribution with the realities of modern discrimination in mind: she wants to dispel the idea that Loving v. Virginia, the Supreme Court’s 1967 decision striking down miscegenation statutes, marked the end of discrimination against multiracial families.

This is where I start to struggle a bit with the book. Let me be clear up front: According to Our Hearts is a good book, and I learned a lot from it. I did, however, get tripped up by its discussion of the ways in which multiracial families face discrimination today, as well as Onwuachi-Willig’s proposal for dealing with it. The goal of this Book Review is to outline my hesitation about her argument. Specifically, I want to make two points, both of which hover around a common theme: You have to have a good story to be effective in the realm of civil rights. After all, the stories we tell about discrimination matter considerably when it comes to creating change. The first point is that some of the stories that Onwuachi-Willig uses to document the discrimination aimed at multiracial families just do not feel all that discriminatory to me. This is not a scientific claim, to be sure, but rather more of a gut reaction that comes from comparing these stories against the story of Alice and Leonard Rhinelander. The second point is that Onwuachi-Willig’s proposal to

2. Id. at 18.
4. The Loving Court struck down Virginia’s anti-miscegenation statute as a violation of both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Id. at 2.
add “interraciality” as a protected trait under antidiscrimination law\(^5\) will not really create the kind of change both she and I would hope for with respect to multiracial families.

I. THE DAY-TO-DAY OF DISCRIMINATION

There are a lot of stories in *According to Our Hearts*. Not only does the book spend a lot of time with the Rhinelanders, but Onwuachi-Willig also peppers the book with stories from her own experience as someone in a multiracial relationship, as well with the stories of other multiracial families, which she collected through survey research. The purpose of these stories, including her own, is to shore up her claim that multiracial families live in a kind of placelessness in law and society—that bias against these families exists and that antidiscrimination law, as currently formulated, is not equipped to deal with it.

The problem is that not all of these stories help prove her central point. In fact, I think some of them undercut the book’s project. Consider a few examples. Onwuachi-Willig recounts a situation when she and her husband—she is black, he is white—went out for ice cream with a black, heterosexual couple.\(^6\) The black couple each ordered separate cups of ice cream and the server, without asking, rang them up together, as one purchase. When it was their turn, Onwuachi-Willig and her husband discussed what to get in front of the server, then ordered a single cup of ice cream to share. When it came time to ring up their order, the server asked, “Is this together?” Onwuachi-Willig and her husband, understandably, were taken aback. They ordered together. It was only one cup of ice cream. She was holding the cup while he was preparing to pay. It was ridiculous of the server to question them in that way, and it certainly supports Onwuachi-Willig’s point that “with black-white, heterosexual couples, other people often assume that the individuals in these couples are not intimate partners when they go out together.”\(^7\)

In another example of “relationship erasing,”\(^8\) Onwuachi-Willig recounts the story of Janice, a white woman who is civilly united to a black woman.\(^9\) The couple took a vacation with a different-race, heterosexual couple. At dinner, when it came time to deliver the bill, the waitress was hopelessly confused by the configuration of people. It took her four times to get it right, even though they tried on multiple occasions to explain who went with whom. Reflecting on the experience, Janice said the following: “It hurt. With her actions, she refused to see our family.”\(^10\) She went on, “But do you know how that feels? . . . Nearly forty years of

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6. Id. at 175.
7. Id.
8. Id. at 177.
9. Id. at 177–78.
10. Id. at 178.
love between the two couples, scratched out just like that."\(^{11}\)

What do stories like these tell us about discrimination against multiracial families today? Three points stand out. The first is that even when they exist openly in the world, multiracial families can nevertheless be invisible to the naked eye. This was the case for Onwuachi-Willig’s and Janice’s families, as the people with whom they interacted could not make sense of what was right in front of them. The second point to draw from these stories is that invisibility hurts. Janice said exactly that of her encounter with the hapless waitress, noting that the waitress effectively “scratched out” the forty years of marriage between the two couples.\(^{12}\) And Onwuachi-Willig had a similar reaction to her encounter with the confused ice cream server. She writes:

> Jacob and I just paused for a moment, staring at her in disbelief. As a couple that has been together for twenty years, we have figured out both subtle and obvious ways to communicate to servers that we are together in such public settings (even though some people never actually pick up on those cues).\(^{13}\)

Their “disbelief” speaks volumes about how uncomfortable the situation made them.

The third point to take away is that discrimination arises in the most mundane of situations. Here, it is over ice cream and dinner. In other examples from the book, similar slights—some more egregious than others—occur in a video rental store,\(^{14}\) at a YMCA,\(^{15}\) and during a funeral.\(^{16}\) For outsiders, discrimination is a part of everyday life, the price for being different. For multiracial families in particular, there is no hiding their difference; to exist together is to highlight their difference.

Now consider just one more story, one that Onwuachi-Willig mentions only in passing. In the spring of 2011, four men set a trailer on fire with Molotov cocktails.\(^{17}\) The four men were white. The trailer belonged to a multiracial couple—a black man and a white woman. The trailer was destroyed. Luckily, the couple was not home, so they escaped injury. Ultimately, all four men were convicted for their actions that night.\(^{18}\)

\(^{11}\) Id. (alteration in original) (footnote omitted).

\(^{12}\) See supra text accompanying note 11.

\(^{13}\) onwuAcHi-wiLLig, supra note 1, at 175.

\(^{14}\) See id. at 182–83 (quoting ANGELA NISSEL, MIXED: MY LIFE IN BLACK AND WHITE 19–21 (2006)).

\(^{15}\) See id. at 180.

\(^{16}\) See id. at 177.

\(^{17}\) Id. at 184 (footnote omitted). For further details about the case, see Press Release, Dep’t of Justice, Ark., Man Sentenced for His Role in Firebombing Residence of Interracial Couple (Apr. 6, 2012), http://www.justice.gov/opa/pr/2012/April/12-crt-440.html.

\(^{18}\) Press Release, supra note 17.
There is discrimination, and there is *discrimination*. The firebombing story is about as serious a case of discrimination as one could imagine. The four men targeted the couple because of their race, ultimately destroying their home and almost killing them because of it. Likewise, the story of Alice and Leonard Rhinelander, though not violent in nature, is pretty disturbing. Indeed, the image of Alice Rhinelander standing in the judge’s chambers, practically naked, forced to participate in such a dreadful legal proceeding, is one that will remain in my mind for a long time to come. By contrast, the other stories mentioned above are harder to pin down. They just do not feel that bad when compared to what Alice Rhinelander had to go through, let alone what the couple in Arkansas endured.

Nor do I think Onwuachi-Willig thinks of them this way. Responding to this vein of critique, she stresses the “great, emotional toll that these slights or microaggressions can have on people.”

I have no doubt that she is right about this. Outsiders bear the burden of being different, and often this means that outsiders themselves have to endure prejudice and overcome stereotypes in order to change the way society deals with difference. It should not be this way, yet it is. To that end, Onwuachi-Willig does a great service by forcing the issue: We need to talk about the daily struggles—the painful slights in mundane places, the accumulating microaggressions—if we are ever going to create real equality.

With respect to the second half of her book, the part that looks at multiracial discrimination as it exists today, Onwuachi-Willig describes her goal in this way: “In all . . . this book work[s] to remind us about the *Rhinelander* case; its significance, both historically and presently; and the reality of its lessons in the lives of today’s multiracial families.” Despite Onwuachi-Willig’s thoughtful analysis, when I think about the significance of the *Rhinelander* case for today’s multiracial families, I still get stuck on the idea that that story is a progress narrative. After learning about the story of Alice and Leonard Rhinelander, it is hard to get worked up about who gets—or does not get—the check in a restaurant.

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II. The Bigger Picture

Toward the end of the book, Onwuachi-Willig meditates on an important question: What role should the law play in stamping out discrimination against multiracial families? She proposes adding “interraciality” as a protected trait in antidiscrimination law. She gives three reasons for making this change. The first

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19. **ONWUAChI-WILLIG, supra** note 1, at 183.

20. **See, e.g.,** Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNEll L. Rev. 1259 (2000) (arguing that outsiders have to do the work of managing their identities in order to overcome stereotypes about their group).

21. **ONWUAChI-WILLIG, supra** note 1, at 22.

22. **Id.** at 264.
is the expressive effect of such a change. "Adopting this change “would send a message that we, as a society, want all the harms of racism to be delved into when examining claims of racial discrimination.” A second reason for her proposal is to “make it clear to courts that they will be following the clear intent of Congress when they incorporate considerations and arguments based on interracial status and being part of an interracial collective into their opinions and orders.” She suggests that “adding the word *interraciality* to these statutes may be the best and clearest response to the trend of strict textualism among a growing number of courts.” Onwuachi-Willig is right about the problem. In the discrimination context, courts have taken a fairly hard line in cases where victims of discrimination allege that they face discrimination, at least in part, because of their multiracial family.

Lastly, Onwuachi-Willig argues that introducing *interraciality* into anti-discrimination law will “destabilize our notions of clear-cut, fixed categories of race.” Elaborating on this point, Onwuachi-Willig says that adding *interraciality* to antidiscrimination statutes “would help to expose all the differences in the lives and lived experiences of families, even when they appear to be the ‘same.’” This is such an important point, as it captures what is perhaps the biggest obstacle to achieving equality via antidiscrimination law. Discrimination is both a legal concept and a social phenomenon. In theory, the two should map onto one another, with the legal concept of discrimination tracking the lived experience of discrimination. Unfortunately, there is a pretty large gap between how courts define discrimination and what discrimination looks like on the ground. Because antidiscrimination law is slow to change—because the law has not kept pace with the lived experience of discrimination—much of what people experience as discriminatory does not legally count as discrimination. Thus, Onwuachi-Willig’s impulse is correct: the goal should be to reorient the law to be more responsive to the needs of actual victims of discrimination.

Moreover, Onwuachi-Willig’s goal of destabilizing the legal concept of race, at least within antidiscrimination law, also makes a great deal of sense. Anti-discrimination law tends to get stuck on fixed notions of identity, treating traits as if they come in a one-size-fits-all form. The truth is that we are all different. Yes, we belong to identifiable groups, but identity groups are not monolithic. Identity is as

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23. *Id.*
24. *Id.*
25. *Id.* at 265.
26. *Id.*
27. A portion of Chapter 6 and all of Chapter 7 of *According to Our Hearts* document, in wonderful detail, the gaps in antidiscrimination analysis that prevent multiracial families from enjoying the full protections of the American equality project. See *id.* at 184–232.
28. *Id.* at 265.
29. *Id.* at 266.
much about how you act as it is about how you look.\textsuperscript{31} In the end, the universe of difference is vast. Trying to pin down identity is like trying to grab water.

While I celebrate Onwuachi-Willig’s overall impulse, I think her proposal to add interraciality to antidiscrimination law treats the symptom, but not the disease. Antidiscrimination protection is just not what it is cracked up to be. Think of it this way: Did the Civil Rights Act of 1964 do away with race discrimination? Of course it did not. Race discrimination persists as a social problem, and it has only gotten more nuanced and complex over time. Do not get me wrong—adding interraciality to antidiscrimination will improve the situation of some, maybe even many, families. It will not, however, lead to real structural change that antidiscrimination law was designed to create. Ultimately, if that kind of change is going to come, we are going to have to reconsider the entire way we engage the antidiscrimination enterprise.

I suspect the likely response to this critique would be something along the lines of this: Onwuachi-Willig is intentionally making a more modest suggestion, that in this case strategic choices outweigh idealistic choices. I understand this position. My suggestion for wholesale, as opposed to intermediate, change is not likely to gain traction in courts or legislatures, and my reading of \textit{According to Our Hearts} tells me that Onwuachi-Willig is seeking a more immediate impact. If I am right about this, then I offer my thoughts not so much as to critique her proposal, but as a reminder that there is still much work to be done.

\textbf{Conclusion}

In closing, I want to reiterate—so as to make sure it does not get lost in the muck—that \textit{According to Our Hearts} is a good book and a welcome contribution to antidiscrimination law literature. More than anything, it reminds us that love is worth fighting for. I cannot help but get lost in the multiple dynamics at work in the Rhinelander saga. In the end, I believe that Leonard really did love Alice and that his annulment suit was not of his own doing. Had he been strong enough to stand up to his father and the pressures of the time, he would have been able to create a family without regard to race, class, or geography. And I am confident that, were they alive today, Alice and Leonard could make a good life together. It would not be a life without hardship, but it would be a significantly better life than they shared together, however briefly, so many years ago.

\textsuperscript{31} On the distinction between being (status) and doing (conduct) in antidiscrimination law, see Kenji Yoshino, \textit{Covering: The Hidden Assault on Our Civil Rights} 24 (2006).